

## Duplicate digital goods: technological challenges in distinguishing between patrimonial and existential legal situations\*

### *Bens digitais dúplices: desafios tecnológicos à distinção entre situações jurídicas patrimoniais e existenciais*

### *Bienes digitales dobles: retos tecnológicos a la distinción entre situaciones jurídicas patrimoniales y existenciales*

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#### Abstract

Based on Pietro Perlingieri's theoretical model of the constitutionalization of civil law, the article is dedicated to analyzing the normative treatment of new digital goods based on the functional profile of legal situations, which distinguishes patrimonial situations from existential ones, instrumentalizing the first to the second. However, based on the deductive method and theoretical review, the article aims to identify the problem arising from goods with a dual nature, in which elements of heritage and existentialism are combined, such as social media profiles and YouTube channels that promote products and brands in a way associated with the influencer's personal lifestyle; relationship sites with premium modalities, in which payment takes place to facilitate access to another person's data and, thus, promote the search and the intended meeting; and also social games, in which participants interact with each other, linked to social networks and based on data available there, to build an identity in cyberspace. It was found that such assets end up transferring to the interpreter the responsibility for recognizing in law both the role of ensuring their disposition under the existential autonomy of their holder, but also, creating barriers against the commodification of the human person.



**Keywords:** legal good; subjective legal situation; heritage; technology.



#### Resumo

A partir do modelo teórico da constitucionalização do direito civil de Pietro Perlingieri, o artigo dedica-se à análise do tratamento normativo dos novos bens digitais com base no perfil funcional das situações jurídicas, que distingue as situações patrimoniais das existenciais, instrumentalizando as primeiras às segundas. Entretanto, com base no método dedutivo e na revisão teórica, o artigo visa a identificar o problema decorrente dos bens com natureza dúplice, em que se combinam elementos de patrimonialidade e existencialidade, tais como perfis em redes sociais e canais no Youtube que veiculam a divulgação de produtos e marcas de forma associada ao estilo de vida pessoal do influencer; sites de relacionamento com modalidades premium, em que o pagamento acontece para facilitar o acesso a dados de outra pessoa e, assim, promover a busca e o encontro pretendido; e, ainda os social games, nos quais os participantes interagem entre si, atrelados a redes sociais e com base em dados nelas disponíveis, para construir uma identidade no ciberespaço. Constatou-se que tais bens acabam por transferir ao intérprete a responsabilidade por reconhecer, no Direito, tanto o papel de assegurar sua disposição em conformidade com a autonomia existencial do seu titular, como também criar barreiras contra a mercantilização da pessoa humana.

**Palavras chave:** bem jurídico; situação jurídica subjetiva; patrimonialidade; tecnologia.

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## **Resúmen**

*A partir del modelo teórico de la constitucionalización del derecho civil de Pietro Perlingieri, el artículo se dedica al análisis del tratamiento normativo de los nuevos bienes digitales con base en el perfil funcional de las situaciones jurídicas, que distingue las situaciones patrimoniales de las existenciales, instrumentalizando las primeras a las segundas. Sin embargo, con base en el método deductivo y en la revisión teórica, el artículo objetiva identificar el problema decurrente de los bienes con doble naturaleza, en que se combinan elementos de patrimonialidad y existenciales, tales como perfiles en redes sociales y canales en YouTube que vehiculan la divulgación de productos y marcas de forma asociada al estilo de vida personal del influenciador; páginas web de relacionamiento con modalidades premium, en el que el pago ocurre para facilitar el acceso a los datos de otra persona y, así, promover la búsqueda y el encuentro pretendido; y, aún los social games, en los cuales los participantes interactúan entre unos mismos, articulados a las redes sociales y con base en datos en ella disponibles, para construir una identidad en el ciberespacio. Se constató que tales bienes acaban por transferir al intérprete la responsabilidad por reconocer en el derecho tanto la función de asegurar su disposición en conformidad con la autonomía existencial de su titular, pero también crear barreras contra la mercantilización de la persona humana.*

**Palavras clave:** bien jurídico; situación jurídica subjetiva; patrimonialidad; tecnología.

## **1 Introduction**

The development of information technology has given rise to the emergence of digital legal assets, consisting of coded data that can represent, for example, images, sounds and even automated conducts that become the object of socially relevant interests and legal relationships. The normative treatment of these new goods, in the light of the traditional categories of private law, gives rise to several controversies, especially with regard to their transferability and communicability.

Here we start from the methodological perspective of the constitutionalization of civil law, which, taking as a landmark theoretical work of Pietro Perlingieri, prioritizes the approach of legal situations from a functional perspective, focusing especially on the distinction between patrimonial and existential situations. This approach is aimed at identifying patrimonial situations as instrumental to existential situations, functionalized to the realization of the free development of personality, which entails the distinction of normative treatment between them. However, this same perspective recognizes the existence of dual legal situations, in which the patrimonial and existential aspects intertwine.

This article, based on a deductive method and theoretical review, focuses on the analysis of how digital assets, i.e., the object of legal situations in which patrimonial and existential aspects are mixed, challenge this methodological system and place obstacles to the interpreter's performance from this perspective, illustrating the difficulties with some concrete examples.

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## **2 Emergence and diffusion of digital legal assets**

Digital technologies focus on the possibility of digitizing information, that is,

translating it into numbers. Information, sounds, images, everything can be digitized, reduced to binary codes. These "numbers encoded in binary can be the object of arithmetic and logical calculations performed by specialized electronic circuits" (Levy, 2012, p. 54). Thus, the real can become digital, to be transmitted, stored, modified and, eventually, translated back into real: texts, images, sounds, actions of a robot, etc. Digital technology has grown and gained great space because "digitization allows for an effective and complex type of information processing, impossible to be performed by other means" (*ibid.*). In a precise definition:

Digital goods are intangible goods represented by coded instructions and organized virtually using computer language, stored in digital form, either on the user's own device or on external servers as in the case of cloud storage, for example, whose interpretation and reproduction operates through computer devices (computers, tablets, smartphones, among others), which may or may not be stored on the owner's own device, or transmitted between users from one device to another, access via download from servers or digitally on the network, and may be presented to the user (Fachin; Pinheiro, 2018, p. 296).

The development of digital technology, as part of information and communication technologies, has reached activities of various kinds: personal and professional, social, economic, etc. This process took a leap thanks to the internet and how it has become a natural component of social life: "In the past, to access the Internet, you went somewhere: home, to work or to an *Internet café*. Today, the internet is everywhere" (Souza, 2018). Daily life today is based on this technology: use of online banking services, distance learning, bringing people together for personal purposes, among others. This greatly impacted social relations and, as a consequence, also legal ones. It is stated that these transformations allowed the emergence of new legal goods, that is, the object of subjective legal situations, the term of reference of all behaviors which are inserted in legal relations (Perlingieri, 2005, p. 74).

The virtual universe, especially from social networks, allows new forms of expression, a way of being in the world of networks, which enables the exercise of the most diverse projections of personality, in addition to being a new environment for legal business. Digital technology has brought new ways of establishing relationships and living, creating personal needs and market opportunities, which embody new goods of life, considering that "the significant character of goods penetrates the cultural reproduction of identity, participation, status and social ideology" (Slater, 2002, p. 15). With this, centers of interest are created that should be disciplined by the Law, based on new paradigms, interpreting these legal relations from the functional view:

[...] Technologies broaden the horizons of the private sector. There seem to be no more limits to human pretensions. Trades, professions, centers of interest, legal assets are radically altered. The old typewriter has given way to the computer, just as outdated versions of electronic devices or applications become obsolete every day. In this way, the new technological possibilities transform the theory of goods, based on the new centers of interest that raise the legal incidence in the spaces of private freedom. Such a finding requires that the interpreter does not stick to outdated paradigms, and that, despite the possible structural or material identity of old and new certain legal

situations, he must understand the function effectively performed by the legal good based on the interests protected (Tepedino, 2014).

The analysis of new assets must be umbilically linked to the legal relationship in which they are inserted, that is, to the specific function they perform in legal situations. After all, "the meaning of the legal good depends essentially on the interest that qualifies it and its classification must be apprehended in the wake of the function that the good plays in the legal relationship" (Tepedino; Oliva, 2020, p. 181). In addition, just as reality has shown that the diffusion of securities and equity interests, with the growth of business activities, has surpassed in economic value real estate, traditionally considered by law as more valuable, digital goods also seem to surpass the importance of material goods: virtual currencies, *e-commerce*, *websites*, *blogs*, are some examples of goods whose value has increased exponentially.

Digital goods have challenged a static view of property, demonstrating that, far beyond the idea of appropriation, access to such goods is a new modality of belonging (Guilhermino, 2020). Markets are replaced by the network economy, in which physical assets lose value to gain value from intangible assets, creativity and intellect. People's relationship with goods is also transforming:

Consumers are also starting to shift from ownership to access. While cheap durable goods continue to be bought and sold on the market, more expensive items such as appliances, automobiles, and homes will increasingly be owned by suppliers and accessed by consumers in the form of leasing, rents, associations, and other terms of service (Rifkin, 2001, p. 5).

It is within the scope of these new legal relationships that digital goods must be thought of, in order to define the appropriate legal treatment that should be given to them. Digital goods express the object of the relationships projected in this new environment, which generate legal effects and, therefore, it is necessary to understand them. The first studies stated that digital goods were imitations or reproductions of material goods (Emerenciano, 2003, p. 41). However, today it is noted that the analog standard is no longer imperative for the definition of digital goods, as we are facing new goods created for digital parameters, such as the miles awarded by airlines. It is necessary to verify to what extent the current order, tailored to an analog universe, can satisfy the needs of digital relations.

In the face of these intangible assets "progressively inserted into the internet by a user, consisting of information of a personal nature that brings him some utility, whether or not it has economic content" (Lacerda, 2021, p. 78), it is understood, then, that the verification of its nature is central to attributing the treatment appropriate to these assets, and should always be something contextualized. Just as "special will be the damage to the ear of a sportsman, even if not professional, who loves to swim or for whom he enjoys listening to music; just as the damage to the leg of those who live on one of the top floors of a building without an elevator will be special" (Perlingieri, 2008, p. 808), the value and normative treatment of an asset also

refers to the function it performs in a given subjective legal situation.

In fact, a digital asset can perform a patrimonial or existential function depending on the relationship in which it is inserted. For example, the visual configuration of a *website* usually performs the function of allowing friendly access and navigation, with the aim of expanding the number of customers and creating the brand's visual identity, however, recently it was reported that a mother got help on the network for someone to reproduce the old *streaming* platform layout because the autistic son had become accustomed to the previous configuration and now struggled to access his favorite cartoon (Dias, 2011). In view of the child's disability, the service provided to restore the previous visual configuration, offering him digital well-being, placed structurally patrimonial, performed an existential function. Therefore, once again, the importance of functional analysis is highlighted, the only one capable of enabling the most appropriate protection for these types of assets.

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### 3 Functional profile of subjective legal situations

The approach of these new assets in this article is based on the work of Pietro Perlingieri, from the methodological perspective of the constitutionalization of civil law. In this vein, the concept of subjective legal situation is used, understood as "the efficacy of the fact with reference to a center of interests, which finds its imputation in a recipient subject" (Perlingieri, 2002, p. 105). In this concept, the objective of giving conceptual form to behaviors and interests emerges, that is, to legalize social reality, which stems from two fundamental premises of the Italian jurist's thought.

In the first place, there is the inexistence of a legally irrelevant fact, because if the event exists in the world of law, it is the object of some kind of evaluation by the legal system: for example, the fact that a subject takes the car and goes for a walk characterizes the manifestation of a legal principle, of a fundamental right, consisting of freedom of movement (Perlingieri, 2006, p. 600-601). What the author admits is the existence of facts that, although relevant, are not predetermined to have some kind of effectiveness: if I walk through my land I am exercising my right to property, without, however, there being any kind of specific legal effect (*ibid.*). The legal fact in the broad sense is the touchstone of this theoretical framework, it is a fundamental concept, as it is the point of confluence between factual reality and Law, the link between eventuality and the normative declaration that governs it, "the way in which the legal system acts" (Perlingieri, 2006, p. 598). In Perlingierian thought, the norm does not exist in the abstract, since it is the product of the interpretation of the text (normative statement) in confrontation with the concrete case, and, thus, it is the factual moment that attributes to the norm the concreteness that is essential to it.

Secondly, the structure of the legal relationship is not a relationship between

subjects corresponding to a normative hypothesis, but rather a relationship between subjective legal situations of complex content, since, even if there is a lack of opposing subjects – as occurs in the promise of reward and in the offer to the public – there will already be centers of interests represented by subjective legal situations (Perlingieri, 2002, p. 115). Furthermore, the structure of the legal situation does not provide for active or passive poles, that is, parties holding rights and duties, because only inserted in a legal relationship, in which the positions of the subjects can be verified, can rights and duties be attributed to them.

The analysis of subjective situations is complex, because, according to Perlingieri, it can be carried out under different aspects – or *profiles*. In this sense, it is possible to adopt, as a perspective of examination: a) the *effect profile* – the situation is the effect of a fact, natural or human, legally relevant; b) the profile of interest – the situation is based on an interest, deserving of protection, which justifies its configuration; c) the *dynamic profile* – the situation lasts over time as a qualification of a plurality of behaviors; d) the profile of the *exercise* – the exercise of the situation requires the manifestation of a subject, not necessarily the holder of the interest (e.g., the parents, in parental authority); e) the *functional profile* – the synthesis of the essential effects produced by the situation; and f) the *normative or regulatory profile* – the attribution of normative relevance to confer legality to the situation, in order to guarantee the prerogative of its holder (Perlingieri, 2006, p. 631-633).

It has already been highlighted that, in relation to new legal assets, especially digital assets, the functional profile seems to be the most appropriate, as it allows us to evaluate the function performed by the good in spite of its structure distinct from existing goods. In fact, the recognition of the tax immunity of electronic books and the proper supports for their reading, by the Federal Supreme Court (STF) (Brasil, 2017; 2017b), which was considered in doctrine "an important step to show how legal interpretation, attentive to emerging technologies, should qualify legal goods by their functional aspect, detaching itself from conceptualizations based on merely structural aspects" (Tepedino; Frazão, 2017). In this sense, the functional profile is usually taken as the most important for the qualification of digital assets, as it involves addressing the role played by the situation in the context of socio-legal relations and reflects more clearly the qualifying bias regarding its patrimoniality.

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#### **4 Distinction between patrimonial and existential situations**

Another fundamental premise of Perlingierian thought consists in the instrumentality of patrimonial situations to existential ones: although the economic moment, as an aspect of organized social reality, cannot be eliminated, it must receive a qualitatively different treatment, so that, instead of threatening to commodify existential situations, it can serve as an instrument for the free development of the person (Perlingieri, 1989, p. 176). It is

relevant, therefore, to distinguish between patrimonial situations – subject to quantification in pecunia – and existential situations, due to the differentiated normative treatment.

This distinction seems clear in the contrast between property, credit, company versus personality rights and family rights, in which the mere analysis of the object satisfies the interpreter's objective, but in complex situations this distinction can be more difficult. At this point, the functional profile gains relevance, through which the factual cut is used to reflect on the specific function of that situation in the legal system, with all the circumstances that the case determines, through a fruitful dialogue between the norm and reality (Perlingieri, 1972, p. 338). The fundamental idea is that the function can keep up with changes in society, being, therefore, a contextual and socially constructed concept.

The distinction is necessary in view of the indirect instrumentality of patrimonial situations to the realization of dignity, since their main objective is the realization of a social function; primarily, they are at the service of the collectivity, making it inevitable to conform private autonomy to the imperative of solidarity. A different situation occurs in existential juridical situations, whose objective is the direct realization of dignity, according to one's own aspirations, values and *modus vivendi*; finally, they have as their immanent function the free realization of the personality, according to the person's own life project that he has built for himself. We can summarize that patrimonial situations have a social function, and existential situations only have a personal function – if we can attribute to them some kind of function (Teixeira, 2010, p. 146-147).

The doctrine that develops this reflection emphasizes, however, that it is not a matter of establishing a new dichotomy. These categories, although separate, bring an intrinsic complementarity, insofar as patrimonial situations have as their ultimate purpose the free development of the person:

It will not always be possible to say that a legal relationship is existential or patrimonial, as it is not uncommon for both interests to be involved in it. Legal situations can reflect existential and patrimonial interests at the same time. And this is not because the patrimonial relationship is functionalized to the promotion of existential values, as occurs in all legal institutes, but because it is composed of existential situations and patrimonial situations. (Meireles, 2009, p. 47-48)

It is also recognized the existence of hypotheses in which, although elements of the two are present, there is a clear predominance of one over the other, such as existential situations with patrimonial repercussions or patrimonial situations with existential repercussions. More than that, however, double legal situations are highlighted, that is, those that involve the two aspects with similar degrees of intensity, since "it can be patrimonial, existential or, sometimes, one and the other together, since some patrimonial situations are instruments for the realization of existential or personal interests" (Perlingieri, 2006, p. 131).

Especially in view of this finding, the investigation of the function of the legal

situation, understood as a synthesis of its essential effects, can only be operated in concrete, since there is no essentiality previously determined by the legislator, but only that verified in the face of the concrete fact. Thus, the application of this theoretical model to digital goods presupposes focusing on some concrete examples, as follows.

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## 5 The functionalization of digital goods

In order to reflect on the appropriate legal treatment for each legal situation and considering that it is a new type of goods, it is understood that the most coherent alternative involves a functional approach – as already outlined – in order to verify, concretely, what function that good plays in the specific legal situation.

Patrimonial legal situation is that which performs an economic function, subject to conversion into pecunia, having as its object financial interests, and as its scope profit. Therefore, its protection is directly linked to the realization of free enterprise and is based on article 170 of the Federal Constitution. With regard to digital assets, Bruno Zampier suggests that the situation will be patrimonial when the information inserted in the network generates immediate economic repercussions, being endowed with economy (Zampier, 2021, p. 79).

Examples of this category are virtual currencies (such as *bitcoins*), miles, *websites*, apps, electronic coupons, and goods used within virtual online gaming economies. In fact, this last category seems to have acted as an embryo of the others, as described in doctrine:

Electronic games, in order to become profitable for their developers, create in their imaginary universe, several items and virtual currencies that need to be acquired by the player for the system to allow him to play, that is, so that he can advance to the next stage of the game, passing phases or evolve and have respectability in that virtual world. The expression "virtual currency" has gained notoriety due to virtual reality games, being an item that exists in electronic format, that is, it is not physical and is also not represented by any traditional currency; It is currency that exists within a game and only has value within that virtual economy, that is, within that closed system. The acquisition of these virtual currencies and other negotiations, when a player sells this currency to another player, are transactions that are carried out and valued in real currencies, notably the US dollar; It cannot be ignored, therefore, that in some way, real money becomes part of the virtual world and is incorporated into it, leading to the questioning of the values involved in these transactions, in addition to the economic values that virtual currencies may have and their legal nature. (Ferrer; Martins, 2020, p. 1150).

In principle, digital heritage assets follow the market system, which involves, at the level of Law, the regime of appropriation and transfer of ownership proper to material assets. In this way, they can be the object of contracts between those involved to be transmitted, for example, from the seller to the buyer. Also, in the event of the death of its holder, they can be transmitted to their heirs, composing the so-called *digital inheritance* (LEAL, 2020, *passim*). They may also be the object of division between spouses or partners, in the event of dissolution of a conjugal partnership due to separation or divorce (Leal; Teixeira, 2020, *passim*).

It makes sense to consider that other digitally conveyed goods, which follow the logic of access, can also be characterized by assets of a patrimonial nature, such as those obtained through *streaming*, vacation rentals (such as *Airbnb*), for use (such as an *uber*), etc. Such goods, whose enjoyment occurs through onerous access (it is necessary to pay to have access to them), they have economic expression and patrimonial traits, but with the important difference that they do not lead to appropriation. It seems that assets that fulfill a patrimonial function and presuppose appropriation are, in principle, transferable and, therefore, it is presumed that they constitute the content of what is conventionally called digital inheritance, due to the identity, in essence, with the hereditary collection in the scope of succession.

In contrast to patrimonial assets, digital assets with an existential function are predominantly present in the scope of personality rights, due to their direct and immediate connection with the realization of human dignity. It is noted that, in the context of digital goods, personal information placed on the network causes the possibility of numerous developments that claim priority protection. The protection of sensitive data under the General Data Protection Law – LGPD has gained prominence in recent times in the Brazilian legal system – especially motivated by the pandemic that has put virtual life in undeniable evidence.

Article 1 of the LGPD states that it aims to protect the fundamental rights of freedom and privacy, as well as the free development of the personality of the natural person. As personal data end up revealing important signs that are expressions of personality, they are treated in the category of existential situations, as they are emanations of human dignity:

[...] A piece of data, linked to the sphere of a person, can be included among the rights of personality. To do so, it must be adjectivated as personal, characterizing, extension or dimension of its holder. And, in this sense, increasingly, data processing activities interfere in people's lives. Today we live in a society and an economy that are oriented and moved from these identifying signs of the citizen. It is a new type of identity and, for this reason, such digital dossiers must externalize correct information so that the identity of the holder of that information is reliably projected. This ends up dogmatically justifying the inclusion of personal data in the category of personality rights. (Bioni, 2019)

Personal data brings with it information related to the person (article 5, I, of the General Data Protection Law – LGPD), which justifies its direct link with the individual's identity. Therefore, "a piece of data that, in itself, does not appear to have any importance, can acquire a new value; therefore, in the current conditions of automatic data processing, there is no longer an 'unimportant' piece of data" (Doneda, 2020), as it can be directly linked to some aspect of personality.

The need for protection gains even more prominence when the data is sensitive. According to article 5, II, of the LGPD, it is "personal data on racial or ethnic origin, religious conviction, political opinion, membership in a union or organization of a religious, philosophical or political nature, data related to health or sex life, genetic or biometric data, when linked to a natural person". In this sense, sensitive data is personal data that is especially susceptible to

being used for discriminatory purposes, such as stigmatization, exclusion, or segregation, so that its processing affects the dignity of its holder, harming their personal identity or privacy (Konder, 2019, p. 455). In other words, privacy and equality are the justification for the more intense protection of some data than others (Branco, 2020, p. 33).

The data entered in the virtual environment can identify the person and, from there, he or she receives a certain treatment by the community that threatens the free development of his or her personality, such as preferences manifested in dating apps, medical information collected by blood banks, data on the use of electronic stimulators, the disclosure of which clearly affects the privacy of their holders (Mulholland, 2018, p. 160-161). Therefore, the LGPD protected sensitive and non-sensitive data differently. However, it is highlighted in doctrine that the qualification of data as sensitive is contextual, since even personal data that are not sensitive in themselves can become sensitive when combined with other data (Frazão, 2018).

Personal data in general, whether sensitive or not, are all expressions of personality and, therefore, protected by the protection of the right to the free development of personality and the principle of human dignity. In view of this, its treatment is only admitted as a result of the free and legitimate exercise of existential autonomy, which has its clearest manifestation in consent. In the case, however, of sensitive data, the manifestation of this consent will require greater formalities, in view of the greater susceptibility to cause damage to the existential sphere of its holder: "differentiated and special protection" is required and the treatment "should always be considered exceptional, due to the relevance of the values in question" (Tepedino; Teffé, 2019, p. 310).

The requirement of consent does not imply, however, attributing free and absolute availability to such data. Traditionally, personality rights are considered unavailable and non-waivable, a view enshrined by the Brazilian legislator in article 11 of the Brazilian Civil Code: "With the exception of the cases provided for by law, personality rights are non-transferable and non-waivable, and their exercise cannot be voluntarily limited".

This absolute intangibility of personality rights by act of will is daily unmasked by social reality, to the point of seeking in doctrine mitigations to the legal provision. It is alleged, in restriction to the text of the legal provision, that in fact only the definitive waiver, the permanent disposition, would be prohibited, allowing temporary or limited acts of assignment of attributes linked to personality<sup>1</sup>.

The doctrine that recognizes, as relative, the need to interpret the provision in the light of the constitutional guarantee of freedom, linked to human dignity itself, is the best path (Teixeira, 2010, p. 227). In this sense, it is stated that the prohibition should prevent a limitation

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<sup>1</sup> In this sense, statement no. 4 of the First Conference on Civil Law CEJ/CJF: "4 – Art. 11: the exercise of personality rights may be voluntarily limited, as long as it is not permanent or general".

that "arises not from the exercise of another aspect of human dignity – the freedom of personal self-determination – but from patrimonial purposes" (Schreiber, 2008, p. 262). Since the autonomy to choose how to most adequately realize one's personality is part of one's own protection of personality, any form of limitation or absolute restriction on the power of disposition would constitute an act of paternalism incompatible with the democratic pluralism that governs the constitutional order (Moraes, 2010, *passim*). Thus, when this personality that links the data to the individual's personality is at stake,

In principle, there is no way for it, by itself, to be transmitted to another by the right of succession or shared according to the rules of family law, nor to be definitively renounced. But it is necessary to highlight that the consent of the holder allows the creation of patrimonial effects from these existential legal situations, such as the blogger who uses her profile on social networks to obtain financial advantages or the onerous assignment of image by the model, hypotheses that can give rise to double situations.

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## 6 Digital goods with a dual function

Profiles on social networks and YouTube channels can be examples that fit into existential situations – when done for personal fulfillment, records of family memories, etc. –, or duplications, when the insertion of personal data on the internet lends itself to financial objectives, as is the case with bloggers, *influencers*, and *youtubers*. These are people whose profiles on social networks, websites and Youtube channels are intended to promote products in a paid way and, for this, the more followers, the more profitable it is to recommend a product, demonstrate its *life style*, etc. (Guilhermino, 2020). At first, they do not fit as people who perform public functions or notorious artists, but as ordinary individuals who gain followers by being admired to the point of wanting the same clothes, going to places they indicate, going to the same restaurants, etc. They become true celebrities considering the high potential of social networks. The image influences millions of followers and makes its financial value grow as its following increases. This is the new market measure (Pintão, 2019). Not to mention the situations in which the value is added not only to the image of the blogger, *youtuber* or influencer, but to the whole family: often, the posts generate greater engagement when family members – including younger children – are also inserted in the ad, which is sometimes even for children's products. The advertised products incorporate the family's daily life and that is what you want to convey on the networks, as it is what generates influence. Image, lifestyle (personal and family, as everything is a stage on the networks for followers), reputation, are the determining factors for consumer trust. Thus, although this legal situation has as its core the data and the privacy of those involved, has as its founding scope financial objectives.

In the context of digital goods, it is highlighted as a double situation hypotheses in

which access to the virtual environment presupposes payment for the knowledge of other people's data; it is not, therefore, a question of access to goods, music, movies, etc., but to the data of others, which is what is intended to be known. The person makes their own data available in the virtual environment (image, information about age, tastes and preferences) which are the factors that will bring together or distance those who browse these *sites* with the same purpose. This is what is seen on *dating sites*, whose registration is free with several premium modalities, that is, the payment can happen to facilitate another person's data and, thus, promote the search and the intended meeting. In these cases, "some resources that help find the ideal '*match*' are only available to subscribers" (Loubak, 2019), that is, to have access to certain categories of information, there must be a financial counterpart.

Another example of a double legal situation related to digital goods is *social games*. These are casual, simple electronic games, whose participants interact with each other, and which help in the construction of identity in cyberspace. They are linked to social networking sites and use information from their members, starting from a system that is activated by the user when accepting the game's terms of commitment; with this, the application collects information from their profile from their social networks (Rebs, 2012, p. 206). This is exactly what characterizes these applications, which effectively create a virtual identity used in the game, from real information consensually captured from social networks. The interaction between virtual identities is verified in the various digital scenarios, whose data is captured for the most diverse features of the *game*, whether for differentiation, reputation, satisfaction or for functionalities (*ibid.*). It is verified that the players manifest their revealing preferences of their personalities, in a dynamic of exposure of their own information that ends up building their own virtual personal identity, from real data and the connections that are established in the digital environment. As a result, it is almost impossible to think of anonymity in this virtual environment, referring to the contours of privacy established by Stefano Rodotà, as the right to informational self-determination, as freedom to manage one's own information that is closely linked to personal identity (Rodotà, 2008, p. 93).

What is aggravated in the context of *social games* is that, in the rules of the game, there are "items with functionalities strictly linked to the game, for which users are willing to pay with something (whether virtually, symbolically or even concretely) to enjoy and have as possession only in virtuality. These items or elements formed by *pixels* that link capital values for their acquisition will be characterized as *Virtual Goods*" (Rebs, 2012). Sometimes, it is necessary to spend (real) money for certain *social games*, which ends up generating an even greater risk of the patrimonialization of the virtual identity.

Recognizing the possibility *a priori* of acts of disposition of attributes of one's own personality as a form of personal fulfillment, the dilemma arises of how, *a posteriori*, to avoid any deviations that may result in commodification or instrumentalization of the human person.

These twofold legal situations constituted from the exercise of business autonomy over personality assets are illustrative of this difficulty. In fact, the functional analysis does not lend itself to evaluating transmissibility, communicability and waiverability in the abstract, but is intended to control the merit of protection, in concrete, of each act of exercise of subjective legal situations.

In this sense, the double legal situations seem to highlight that the distinction between patrimonial and existential situations is not an end in itself, but a means to enable the instrumentalization of patrimonial aspects to the realization of the dignity of the human person. From this perspective, the normative treatment of dual digital assets must involve a control of the acts at their disposal – and, consequently, of their communicability, transferability and renounceability sensitive to the combination of patrimonial and existential elements, pursuing the most appropriate reading for the realization of the personality of their owner.

This involves transferring to the interpreter the responsibility for recognizing in the Law, in such cases, both the role of ensuring its disposition in accordance with the existential autonomy of its holder, as well as creating barriers against the commodification of the human person. In the case of duplicate digital goods, the interpreter's attention seems especially important to prevent the price of dignity from being put on a price.

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## 7 Concluding notes

The development of digital technology has given rise to the proliferation of new goods, on which various interests fall and which, because of this, demand adequate normative treatment. From the Perlingerian perspective, the functional profile is the most appropriate for determining the norms applicable to subjective legal situations that have these goods as their object, given that they prioritize the effects they produce in the social context in which they are inserted. This perspective leads to the distinction between patrimonial and existential digital assets, in order to recognize the instrumentality of the former to the latter, with the objective of enabling the free development of the personality of their holders.

However, duplicate digital assets are identified in which patrimonial and existential aspects are intertwined. Examples were the profiles on social networks and YouTube channels that advertise products and brands in a way associated with the influencer's personal lifestyle; social networking sites with premium modalities, in which payment happens to facilitate access to another person's data and, thus, promote the search and the intended meeting; and also *social games*, in which participants interact with each other, linked to social networks and based on data available in them, to build an identity in cyberspace. It was found that such goods end up transferring to the interpreter the responsibility for recognizing, in the Law, both the role of ensuring their disposition in accordance with the existential autonomy of their holder, as well as creating barriers against the commodification of the human person

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