

DIGITAL REMAINS: ETHICAL PRESERVATION, DISPOSAL AND REUSE OF ONLINE ARTEFACTS OF THE DEAD

*Preliminary Submission to the New South Wales Law Reform
Commission review of access to digital assets upon death or
incapacity*

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1. Purpose of Submission

This submission draws on previously published and forthcoming research to identify emerging issues in the distribution, disposal, and reuse of the digital assets of deceased internet users for the Commission's consideration. The submission will not make comments upon the current operation of, or recommendations for specific amendments to, specific laws. Rather, it will provide suggestions for questions to be considered by NSWLRC in undertaking its review. It will also outline principles emerging in the literature that could usefully inform regulation of the use and disposal of digital assets.

2. Context

The management of 'digital remains' (Gibson 2014), the electronic artefacts left by internet users after they die, has been an emerging topic in sociology and cultural studies in the last decade. It has also presented an ongoing practical and legal problem for individuals, corporations, and governments around the world. However there has been relatively little attention paid to this topic by ethicists, while policy making has tended to be reactive and ad hoc, attempting to deal with challenges generated by new technologies after the fact.

To date, policy responses have often simply applied existing concepts of ownership or rights of disposal to digital assets, without recognizing and responding to the ways in which these differ from traditional (physical, financial, intellectual) assets. Such assets are typically straightforwardly heritable. However, the items that comprise our online lives increasingly do not fit within these traditional frameworks. For instance, many digital 'assets' are licensed rather than owned, in ways their pre-digital equivalents were not. Hence we can bequeath physical books, CDs and DVDs to our survivors, but not (typically) eBooks or music and video downloads from services like iTunes (Nansen et al. 2017). Many of our digital assets, unlike physical property, are also transferred without loss; hence 'data theft' doesn't actually deprive us of our data, for instance.

Moreover, as Luciano Floridi (2013), 2014) in particular has argued in the context of data privacy, analogies with physical assets miss the *constitutive* dimension of certain forms of information. Roughly, some forms of digital asset are not simply information *about* us but are partly constitutive of our identity. (Other types data, which Floridi calls 'detachable' data, are only contingently attached to our identities, such as our PIN or Tax File Number).

Perhaps surprisingly, a helpful analogy for understanding digital assets of the dead that have such a constitutive element is not with deceased estates, but with human remains. These are not understood as heritable property. Families do not inherit ownership of their loved one's body, but nonetheless have certain (highly regulated and circumscribed) rights of disposal. Reconceptualising certain classes of digital assets as *remains* instead of *property* changes our approach to how we should deal with these items.

3. Social Media Assets

I have argued previously (Stokes 2012, 2015, 2019) that social media profiles are one such form of 'constitutive' data. Increasingly, these profiles are a major part of how we are present in the world to other people. They provide for particular forms of 'telepresence' in the lives of others and extend our agency across space. The data that constitutes them is thus part of our personal identities in an important sense, albeit one that has not yet been fully articulated in the literature.

Findings in psychology and sociology (e.g. Kasket 2012; Brubaker et al. 2013; Kern et al. 2013; Ebert 2014) demonstrate that social media profiles increasingly play an important social role as sites of interaction and commemoration when social media users die. Profiles become places for communities to express their grief. Users continue to write on the 'walls' of the dead on Facebook, for instance, for months and even years after the person has died, usually addressing them in the second person ("We all missed you at Nanna's birthday today, wish you could see how big the kids are getting" etc.). Bereaved people sometimes report finding enormous comfort in the ongoing virtual 'presence' of the dead in social media. The poignant experience of the Ranaudo family is illustrative:

Amy Ranaudo confronted the digital afterlife of her brother Ben last year, when he became the 11th Australian to die in combat in Afghanistan. "He had a Facebook profile and that's where it started - that's where everyone went to express themselves."

Now, Ben Ranaudo's page has become a permanent memorial and meeting place, embraced by his family and friends as a place for him to live on. "Now I think it's therapeutic," his sister says. "It's brought him back to life a little bit, you can hear him laughing. It's something no one would have expected to happen. It's a way of immortalising him." (McMahon 2011)

These items have considerable importance as loci of remembrance and mourning for individuals and communities. I have further argued (Stokes 2015) that insofar as social media profiles are a virtual part of the person, there are pro tanto moral reasons not to delete them, even if these reasons can sometimes be outweighed by other moral considerations.

The legal ownership of these profiles is effectively determined by the Terms of Service of the relevant social network provider, but they are clearly not heritable goods. They do, however, present important challenges for the regulation of access and disposal of such assets. This is particularly the case in circumstances where surviving family members may disagree about whether and in what form these artefacts should be preserved, or when service providers may wish to delete a profile against the wishes of survivors. At present whether a deceased user's social media profile is deleted, left unaltered, or placed into a 'memorialised' state (where certain functions are no longer available and phrases are added to the user's name to make it clear they have died) is entirely a function of service provider policy and how bereaved families interact with these.

In forthcoming work (Stokes 2019) I identify (non-exhaustively) four types of question that can be asked to help inform decisions on whether a given social media artefact has a claim to preservation:

- i) *Extent of Survival*: To what extent does the digital asset preserve content that is not available elsewhere in the online environment? (A relevant consideration here is that social media profiles may have a value as a *collection* over and above the value – sentimental, cultural, aesthetic – of the individual items therein).
- ii) *Depth of Phenomenal Presentation*: To what extent does the digital asset preserve the phenomenal presence – the look, sound, and communicative style – of the deceased user?
- iii) *Accessibility*: How large is the existing audience for that asset? Are other individuals caught up in the deceased’s social media profile? What were the user’s own pre-mortem privacy settings and preferences, and what weight should be given to these preferences now?
- iv) *Vulnerability to Overwrite*: To what extent can the profile be preserved in a way that preserves it? Ebert (2014) notes that the way in which users interact with social media profiles can tend to overwrite those profiles themselves; for instance, condolence messages on a Facebook ‘wall’ push the posts made by the deceased themselves off the front page and out of immediate visibility. How will duties of preservation and the needs of communities of mourning be balanced?

Questions the Commission may therefore wish to address are:

- **Who should have authority to determine whether and how a social media profile is deleted or memorialised? What will happen in situations where relevant stakeholders disagree?**
- **What weight will be given to the wishes of the deceased themselves in this process, and how will this be determined?**
- **Should there be a default, but defeasible, presumption against deletion?**

4. Reuse of Digital Remains by Third Parties

Memorialisation, however, is not the only use of digital artefacts that requires ethical, legal, and policy consideration. Another, deeply concerning emerging issue is the development of what Buben (2015) calls “Interactive Personality Constructs” (IPCs): artificial-intelligence driven systems designed to continue to interact with the living in a way that is qualitatively identical from the way a deceased internet user did while they were alive. In a typical IPC scenario, a platform uses information supplied to it, such as the dead person’s social media traces to inform an Artificial Intelligence (AI) system which will be able to answer questions put to it in a way that mimics how the dead user spoke while alive.

While there has been some discussion of this technology over the last decade, for most of this period the technology has been largely theoretical. Various start-ups have attempted to 'animate' the dead in this way, such as 'Virtual Eternity,' 'Eternime' and the Twitter-based 'Lives_On' ("When Your Heart Stops Beating, You'll Keep Tweeting"), but with generally underwhelming results.

Recently, however, there have been reported advances in the uses of artificial intelligence to operate text-based 'chat bots' that replicate the conversation style of a deceased person, based on their online messaging while they lived (Newton 2016). As 'bot' technology both improves and becomes more familiar as part of the 'onlife' (Floridi 2015) environment in which the online/offline distinction is increasingly dissolved, it is not difficult to envisage such technology becoming more widespread and more effective in future.

Such technologies raise serious ethical questions, which in question pose challenges for policy makers. Are these technologies a form of exploitation of the dead, as Buben (2015) warns? Do they violate the rights of either the living or the dead (assuming the dead can have rights or interests, a topic of ongoing and active debate in the philosophy of death)? Are these simply techniques for memorialisation, or are they in fact an attempt to replace the dead?

Questions the Commission may therefore wish to address are:

- **Whether such remediation of online materials of the dead should be subject to regulation;**
- **Who has the right to determine whether digital remains can be used in these ways, under what conditions, and for how long?**
- **Whether survivors or other interested parties should have control or veto over the use of such materials, and under what conditions;**
- **Which materials should be available for such purposes and who retains ownership of such materials under these circumstances;**
- **Whether some uses of this technology (for instance in remediation of the dead in racist, sexist, pornographic or otherwise offensive contexts) should be permitted, regulated, or banned.**

5. Conclusion

The issues raised in this submission point towards a number of avenues of inquiry for policymakers working in this area. The submission is not meant to be exhaustive, but to indicate where some important emerging questions lie to facilitate further discussion. I am happy to provide any further information or context NSWLRC might find useful.

6. Acknowledgements

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