Access to Digital Assets upon Death or Incapacity: Response to Consultation Paper 20

Dr Patrick A. Stokes
BA (Hons), PhD, FHEA
Senior Lecturer in Philosophy
School of Humanities and Social Sciences
Deakin University

As a researcher working on the ontological and ethical issues raised by the persistence of the dead in online media, I am grateful for the opportunity to respond to the questions raised in *NSW Law Reform Commission Consultation Paper 20: Access to Digital Assets upon Death or Incapacity*. My responses to some of the questions raised in the consultation paper are given below.

(1) When a person dies what should it be possible for third parties to do in relation to the person's digital assets? In particular:

(a) Who should be able to access those assets?

I endorse the idea of a 'digital executor' to manage and where necessary make decisions about the disposal of digital assets. Where someone has not appointed someone to act in this role (for instance, if they have not used a digital register or appointed a legacy contact for specific services) such a role would presumably fall to the next-of-kin. However, it is likely there will be occasions where it is not apparent who could or should fulfil such a role, or where that person's decisions may be properly contested by other parties. As an example: imagine the parents of a deceased adult person wish to delete that person's social media profiles, while the deceased's siblings wishe to preserve ('memorialise') those profiles. In those circumstances, courts would, I suggest, benefit from clear principles regarding the disposal of digital assets. I propose that such principles should include the following (adapted from Stokes (2019)):

i. A default presumption against deleting digital assets (such that where parties disagree over whether to delete or preserve an asset, preserving is to be preferred unless strongly countervailed by other factors).
ii. In deciding whether items should be deleted, the following (non-exhaustive) factors are to be considered:

    a. *Extent of Survival*: Whether the contents of the digital assets are available elsewhere in other forms or whether they are contained solely in the digital asset. For example, do the photos in this Facebook profile exist in other social media accounts, in hard drives etc. or will they be lost to the world if the profile is deleted? (Note that a given collection of digital content *itself* may have a value as a collection curated by the deceased, in addition to the value of its constituent parts, even if each individual item of content is available elsewhere).

    b. *Depth of Phenomenal Presentation*: How 'rich' is the range and type of content found in the digital asset? Is it the sort of 'constitutive' content that presents the deceased 'as they were' (e.g. photos, video, personal writing) or does it comprise what Floridi (2013), 2014) calls 'detachable' data such as one's randomly-assigned tax file number? In assessing depth of phenomenal presentation, a number of factors may be relevant:
        - Numerical extent of the items contained within the digital asset (are there many or just a few?)

- Temporal extent of those items (do they present the deceased as they were over a long period or short?)
- Modal variation (is all the content of one type or is there a mix of video, text, photo, audio etc?)
- Extent to which the asset gives a sense of the concrete personality of the deceased e.g. does it capture their way of talking, concerns, interests etc.?

c. *Accessibility*: How accessible was the digital asset before the user died, and how accessible will it be if preserved, memorialized or deleted? (Presumably not at all, in the latter case). Here the privacy rights of both the deceased social media user and of third parties, such as other individuals caught up in the deceased user's social media activity, becomes relevant. It may also be that the value of an asset *qua* collection will partly depend upon choices about accessibility the user themselves made while alive. (An amusing cat video found on YouTube may not matter much in and of itself, for example, but that the deceased chose to share that video on their Facebook profile may give it an additional kind of value). There may also be public interest reasons to make some assets public that previously were not.

d. *Vulnerability to Overwrite*: Will the form in which an asset is preserved, if it is preserved, make it vulnerable to being overwritten by other users? For example: if users are able to leave messages on the user's profile will this have the effect of pushing the user's own words and posts out of immediate visibility (Ebert 2014)?

As stated, this list is not imagined to be exhaustive, but indicative of the kinds of considerations that will need to be brought to bear in such cases.

(b) What assets should they be able to access?

Per 4(a) below, I suggest 'digital assets' be defined very broadly, and that digital executors should generally be responsible for all such assets. While it may be that privacy considerations should properly preclude executors accessing some such assets, there do not appear to be distinct classes of assets which should be prima facie off-limits, nor any way of determining ahead of time which assets are excessively personal and which are not. Executors may not know they have breached a deceased user's legitimate interest in privacy (see 4(b) below) until they stumble upon something sensitive. A useful distinction might however be made between public assets (e.g. Twitter accounts), restricted-public assets (e.g. Facebook profiles) and wholly private assets (e.g. email accounts) with different assumptions about privacy for each class.

(c) For what purposes should they be able to access them?

I noted in my initial submission that an emerging issue is the re-use of digital assets in the form of artificial-intelligence driven avatars. I suggest that digital assets should only be used for such purposes with the permission of the digital executor. I cannot say what sort of remedies might or should be available where a third party uses a deceased user's digital assets in this way without the digital executor's permission.

(e) What restrictions should there be on that access?

Per (c) above, any (re)use of digital assets in the form of avatars etc. would need to be authorized by the 'digital executor.' Such restrictions would apply to digital assets generated by the user's own social media activity (including SMS communications), but not to words and likenesses of the user published in other media, though these would presumably be separately governed by copyright law. The reason for this distinction is that, as argued in Stokes (2019, 2015, 2012), social media profiles involve a distinctive form of self-presentation that gives them a particular status. As an example, were I to take publicly available videos of Elvis Presley and use these and his lyrics and public interviews to create an avatar, this would not involve the reuse of digital assets in the sense in question, though it would no doubt infringe other copyright restrictions. Were I to use my deceased friend's Facebook videos and posts to generate an interactive avatar, however, this would be closer to a reanimation of his online profile, which raises different ethical problems to the Elvis case (see e.g. Stokes (2012); Buben (2015)).

(3) Should NSW enact a law that specifically provides for third party access to a person's digital assets upon death or incapacity? Why or why not?

I believe that it would be useful for NSW (and other Australian jurisdictions) to enact laws so as to:

- determine who gets to make decisions about the preservation, deletion, and re-mediation of 'digital remains' (Gibson 2014);
- regulate the re-use of digital remains; and
- determine what principles are to apply where disputes arise over these disposals.

(4) If NSW were to legislate to provide specifically for third party access to a person's digital assets upon death or incapacity:

(a). How should the law define "digital assets"?

I believe a relatively broad definition, more in line with the Canadian *Uniform Access to Digital Assets by Fiduciaries Act* than the American *Revised Uniform Fiduciary Access to Digital Assets Act*, would be appropriate. The American definition restricts 'asset' to electronic records in which the deceased holds a property right or interest. This potentially excludes assets where the deceased did not hold property rights (say, if they had signed that over to a platform provider via that platform's Terms of Service) but where the digital asset is nonetheless 'constitutive' of the user's identity in the sense discussed above.

(b) How can the law appropriately balance privacy considerations with access rights?

While there is a diversity of views in philosophy on the question of whether and how posthumous harms are possible, there are good reasons to believe that dead persons retain interests that are capable of being violated, and there is no obvious reason why an interest in privacy is not one of these. That then gives us defeasible reasons to respect the interest in privacy (whether explicitly stated pre-mortem or merely inferred) of the dead. Such a reason may be outweighed by other considerations in many cases. It is, however, important to acknowledge that such a reason does exist and and should be taken into account.

Where the deceased previously expressed a wish as to how their digital assets should be disposed of and by whom, those wishes should be followed to the extent possible unless a court or other relevant authority finds good grounds for that wish to be set aside. My concern is with how such remains should be treated rather than about their ownership, so this claim does not depend on digital assets being heritable.

References

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