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Digital Death: Can accounts on Facebook & Co. be inherited?

Dear Ladies and Gentlemen,

Around 80% of Swiss residents have access to the Internet and thus use one or more e-mail accounts, maintain social media profiles or shop with customer accounts at online retailers. 3.7 million Swiss own a Facebook-profile. The digitisation and the explosive development of social media raise the question of whether digital footprints such as Facebook & Co. are hereditary. From 2098, Facebook will count more dead than living users. The topic, however, is not widely considered in practice. On the one hand because the "digital natives", in contrast to the "non digital natives" are still relatively young, and on the other because there are insufficient "leading cases".

1. Intellectual property

When we die, the Internet keeps us alive. Published achievements on the web represent intellectual property, which belongs to the creator and is inherited. Already in the distant past, there were the first beginnings of a patent right. A first abstract patent law was created in Venice in 1474. With the first Industrial Revolution, the need arose for a modern patent law, which was realised in most states by the mid-18th century. Intellectual property worth protecting includes: inventions, musical works, literary works, images, photographs, names, company names, aliases (Lady Gaga), trademarks (trade names, logos, three-dimensional marks), design, shapes (especially cars), colours (Lamborghini-red), soles (Louboutin, though not in Switzerland), banknotes, coins, and much more (not an exhaustive list).

Accordingly, verbal, pictorial or graphic publications on the Internet also become intellectual property and are legally protected.

For thoroughness, it should be mentioned that there is no inheritance if the owner of the intellectual property is a legal entity. A legal entity lives forever.

2. www.itbelongstome.com

The easiest way to illustrate this is the ownership of a domain. This belongs to the "inventor" and after its death this passes on to the heirs, be it legal or specified heirs. Such domains can have a considerable value. Just imagine www.elvispresley.us or www.donaldtrump.com. The highest positioning in search engines is guaranteed.

In addition to inheritance by universal or singular succession, the provisions of the bestowers are authoritative. Which contractual provisions form the content? It may be that a provider wants to stay out of a heir quarrel.

Then the following questions arise: Can a provider influence the inheritance rights of Internet domains owners? If so, which formal requirements must be met? If not, why not? Contracts with regard to death (inheritance contracts and the like) require public certification in Switzerland.

The question becomes interesting if the regulations, for example on Facebook in the USA, are formal requirements, but do not meet the qualified formal requirements of European law. For conflict of laws, rules of international private law (IPR) provide information. This right also explains the application of the legal system. According to which standards is the legal relationship assessed, US law or CH law? Furthermore, if a national law was specified by contract, how far is this so-called *professio iuris* applicable? Another problem is that of jurisdiction - at the place of the testator or at the seat of the company? Needless to say, lawsuits in this area could prove to be full of pitfalls.

3. Does a Facebook account always belong to me or my heirs?

Somewhat more problematic are entries within a network. While a homepage clearly demonstrates a certain independence, an entry in a network is strongly influenced by its personality. In other words, the person is in the foreground and not an avatar.

In several "old" estates, there were letters that formed part of the inheritance. If the person had a certain reputation and was in contact with noble personalities, their correspondence was meaningful. For example, Mozart's letters to Salieri or Oppenheimer's to the US authorities. Such letters are inheritable goods. Again and again there are auctions of the personal possessions of renowned people by their heirs (for example, the 1962 address book of Marilyn Monroe was bought for \$ 30,000).

This should happen similarly with Facebook. The account is hereditary. It becomes problematic if the terms and conditions preclude perishability. An example of this would be iTunes: A buyer of music in the iTunes store who stores it in the cloud, receives only a right of use. According to the terms and conditions of Apple, this expires with death. Thus, the stored songs are non-transferable, because the user has accepted the terms and conditions.

Legislation states that digital data stored on a local storage medium, together with other assets, is included in the estate. The question of digital data, which is not stored locally but in the internet, is not clearly regulated from a legal point of view. In most cases, these are not assets in the sense of inheritance law, but rather personal concerns that are not transferred to the heirs.

Now ask the same questions as above (formality, contractual provisions, IPR, choice of law, jurisdiction etc.).

4. Actualities

For most estates these questions should not arise.

Individual providers deal with the problem differently, and offer different alternatives. With some providers, the account will lapse as a result of not being used (no updates, etc.). At the request of the heirs, many also offer the deletion of the account because it is outdated. Problematic scenarios could arise where financial interests make the further maintenance of the account worthwhile.

So that the right to informational self-determination can be asserted beyond death, it must be determined, during a lifetime and in a will, what should happen to the data after death. One possibility is to use an executor, who is identified in the will. In the meantime, there are even some service providers on the Internet who will take care of digital identities and manage the estate.

5. Regulatory requirements

The need for action in the field of digital estate is enormous. The federal government has taken up the issue in the context of the ongoing revisions to the Data Protection Act (DSG). The preliminary draft of the new DSG provides that individual heirs, family members or partners may request information from online services, or request the return or deletion of data belonging to deceased persons. However, many Facebook users are likely to die before digital legacy finds a clear legal basis.

Digital estate regulation is becoming an increasingly important issue, as today's users have a large number of online accounts and related contractual relationships. If we can in any way assist you in the area of inheritance law and estate planning, our artax team is at your disposal.

Kind regards
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