Exploring the multiplicity of digital remains

PhD thesis
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Title page

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Title and subtitle	Exploring the multiplicity of digital remains
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Date	02.12.2024

To Thorbjørn, Gunvor, Søs,

& Christian

Acknowledgements

I would like to express my gratitude to those who contributed to this project.

First and foremost, a heartfelt thank you to my partner, Christian, for his unfailing support and for taking care of our children during this time. I am also deeply grateful to my children for enduring my absence, especially towards the end of the project, and for always grounding me when I have been too much in my head. You truly are the best.

I thank the lawyers who participated in the interviews and the University of Copenhagen for this fantastic opportunity. A special thanks to my supervisors, Trine and Jens-Erik, for their continuous support and professional guidance in bringing this project to fruition, and to my academic colleagues for ongoing discussions that has refined my work – especially Katrine and Serena for keeping me on my toes in the final period leading up to the submission. Without your contributions, this PhD thesis would not exist.

I owe thanks to my family and friends for their support and encouragement as well. To my father, sister, sister-in-law, and JJ, for reading through the thesis, and to Sabrina for her beautiful illustrations and last-minute rescue.

Lastly, I want to remember those who have passed away as they have been an integral part of my long journey into the digital afterlife. My mother and grandmother who have been sources of inspiration, and a special thanks to Bene for our conversation on the digital afterlife before her untimely death. Their memories and influences have been deeply felt throughout this project.

Thank you all.

Astrid Waagstein, December 2024

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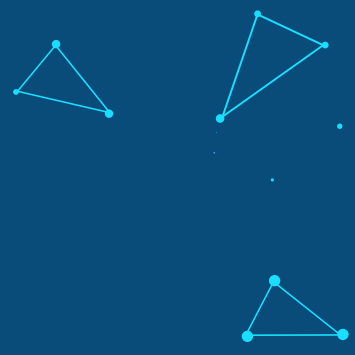
Part 1

Situating the research



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1 Introduction

1.1 Dying in the digital realm

When we die, we leave behind a material legacy consisting of physical possessions, property, and intangible intellectual and economic assets. Relatives and professionals handle the settlement in the period following the death. The deceased individual can exert an influence on these personal belongings through, for example, the formulation of wills antemortem, whether a legally binding notarial testament or a more provisional statement written on a piece of paper and placed on a bookshelf.

The individual can specify their wishes, including household items and economic assets, burial wishes, etc. and is a way to ensure that one's last will is being fulfilled. Even in the absence of a will, there are still clear principles of interpretation and distribution of these conventional properties and assets, which lawyers and courts apply to dispose of and transfer physical and intangible assets (e.g. securities, intellectual property). In other words, there are clear guidelines for the postmortem management of the physical, material legacy, which is both institutionalised and formalised, and which is almost automatically initiated through the occurrence of physical death. Besides this physical, material, and often tangible legacy, we leave behind something else that is far more fragmented and intangible in nature and where the process for managing it and the rules governing it are less clear and well-established. The phenomenon is often referred to in terms of 'digital remains' or 'digital legacy' and covers the digital footprints and data that are collected, stored, and processed over the course of our lifetime; and which upon our death continue to live on or cease to exist.

The 'digital remains' phenomenon is a consequence of our datafied lifestyle, in which digital technologies are incorporated into most aspects of people's lives, especially in developed countries, where technologies monitor our purchasing habits, economy, and movements; they mediate our online communication and are entangled in work- and social life, and in how we engage with family and friends. This digital life has rendered us 'data subjects', whether we like it or not, and the pervasiveness of the digital into our social spheres has almost become invisible to us (Lupton, 2015, pp. 1–3). When death occurs and we pass away, however, the traces and footprints almost come to the fore through a continued digital presence, such as posthumous

algorithmic behaviours, orphaned data, or the left-behind digital devices of the deceased, as aspects of our lives continue past our human finite and make *something* stand out. This something is difficult to grasp, and while scholars discuss whether the digital afterlife is to be understood as an 'absence of digital death' (Burden & Savin-Baden, 2019, p. 231), 'a continued digital presence' (Cupit et al. 2012), or some form of 'second death' (Stokes, 2015, 2021), the dead keep showing up in our social digital feeds; or at least some version of them does, and we continue to engage in conversations with them almost like a form of modern necromancy:[1]

> (…) today in our digital society – and in ever-growing numbers – we talk to the dead (…) through WhatsApp, Twitter, Facebook or other social networks as we carry the dead with us on our everyday digital devices. We can store the dead in the cloud and hold them in our pockets as they sit there in a state of suspension, until we conjure them back to life with the swipe of a finger or, importantly, when algorithms dictate. (Bassett, 2022, p. 2)

The entanglement of death and digital technology goes by many names, such as the broader 'digital immortality' and 'digital afterlife' or narrower terms such as 'digital legacy' or 'digital remains.' If we leave aside terminological and conceptual differences for now, however, a trait that digital remains share is how they can be either fragmented and fleeting, coherent and lasting – one could almost say 'eternal' – and interactive; seemingly 'alive', depending on the type of data, underlying technology, and use scenarios in question. Moreover, there is neither a clear cut-off for when the process for managing digital remains begins and ends, nor is the process similarly formalised and coherent (e.g. across authorities). This is in sharp contrast with the process for handling bodily and physical remains, which is initiated almost automatically in the moment of death.

One of the reasons why the digital remains phenomenon is so difficult to capture and handle postmortem connects to the difficulty in defining 'ownership' or 'custodianship' (i.e. who has the right to access and control the data of the deceased) within the digital sphere. Ownership is not

[1] Necromancy refers to an ancient practice of communicating with the dead to receive prophesy from them. Sherlock talks about a modern, digital form of necromancy, where dead celebrities appear as 'wise, all-knowing being' in commercials where they resurface after their deaths as digital resurrections (Sherlock, 2013, p. 171).

always bound to the object in the digital realm, but rather to a system of digital infrastructures, platforms, and multiple stakeholders in which questions related to access and control are influenced by a range of factors. This complex landscape makes the phenomenon difficult to grasp, as it becomes fragmented, multiple, and distributed, which again makes practices and rules of governing 'it' difficult to navigate for organisations and individuals alike.

The philosophical assumption underlying the project is that 'digital remains' is a vague and unsettled phenomenon – a something 'in the making' – that is continuously undergoing development and change rather than being settled and agreed upon. I will return to unfold the philosophical foundation and research purpose of the thesis in chapter 3, but here is a brief introduction. This 'partial existence' of objects (Jensen, 2010, p. 20), as Jensen labels the unsettled and negotiated existence of a phenomenon inspired by Latour's notion of relative existence (Latour, 1999), entails refraining from considering the object of study a stabile homogenous or even passive entity onto which humans (researchers included) can apply their ideas and perspectives; and nor is the belief that objects command humans (Bille & Sørensen, 2012, p. 61; Brinkmann et al. 2012, p. 520). Rather, the partially existing (i.e. changeable) and distributed phenomenon is shaped and transformed by different human and non-human actors through ongoing interpretations, categorisations, and negotiations in a mutually constitutive process (Brinkmann et al. 2022, p. 520), which is not fixed to start off with – which is the whole point. To investigate the phenomenon where there are controversies. By exploring controversies and disagreements, rather than consensus, it is possible to explore the process of negotiation in which the object of study becomes and in which different actors take part (Brinkmann et al. 2022, p. 529).

This philosophical foundation is reflected in the general focus of this research, which is on 'how digital remains come into existence, what discursive and empirical versions of the phenomenon emerge through situated doings and sayings, and with what consequences?' This general focus, which has guided this research, is reflected in the following specific research questions and will be addressed throughout the thesis.

1.2 Research questions

1. Which conceptualisations of the notion of digital remains are present in contemporary literature, referred to in terms of e.g. 'the digital afterlife'?
2. Which practices exist around the management of digital remains among lawyers and legal professionals, and what are their understandings and reported practices of digital remains?
3. How is postmortem data enacted in the first European case law on the subject matter, cf. the BGH Facebook case?
4. What are the shared issues, i.e. problem characteristics, regarding different actors' (human and non-human) doings and sayings around digital remains?
5. How can the multiplicity and complexity of the digital remains phenomenon be captured?

1.3 Legitimising the field of research

Why is research into the digital afterlife – a broader term that also encompasses digital remains – relevant or even necessary? For one, research on the digital afterlife is significantly underexplored in the Danish context, and this limited knowledge spans cultural, political-economic, social, legal, and technological aspects. For instance, we have limited knowledge on how organisations, businesses, public administrations, and individuals operate and deal with postmortem digital information, and what (norms) inform these practices. How do families and private individuals go about the management and curation of digital content and information in the event of death, and what motivates or discourages them in this process? The same applies within organisations: What processes are initiated when an employee dies, and how do organisations manage data and devices at the end of life – especially considering the fact that employees often also use their work devices for personal and private use? And furthermore, how does this process look across sectors – what overlaps or differences in processes are there? And on a more general level, what and how much data do we want to store for future purposes, and who should ultimately be responsible for doing so?

As an example of this knowledge gap: The family- and inheritance lawyers featured in this thesis seem to lack specialised knowledge in evaluating or valorising digital data and personal information (in contrast to their experience with conventional artifacts, such as cars and

manuscripts). While they attempt to handle postmortem data and digital content to the best of their ability and within their remit, in some respects it seems as though they have not really considered the issue at all (nor do they appear to be forced to do so).

In Denmark, we have public digital records of citizen data, including health data, which the individual can access throughout their lifetime. We have cultural institutions preserving cultural digital objects of celebrities, public figures, and historic events, but which have only first recently begun to explore how data and information belonging to ordinary citizens should be retrieved, preserved and safekept. Additionally, there are obviously all the (international) commercial enterprises who are also profiting from user data, collecting and storing information belonging to people who will eventually die. So to rephrase a question, which Stokes put forward: What are we [to do with these informational bodies, ed.] of the dead?" (Stokes, 2021, p. 94). Do we keep them, burn them, reuse them, or let them be?

This leads me to the second reason for why research investigating the digital afterlife is necessary: it concerns society as a whole. Individuals, authorities, institutions and businesses, all who engage with data and content somehow, will eventually be confronted with the question of what to do with the data of the deceased. Accordingly, society has yet to fully comprehend and grasp the phenomenon of digital remains – gain insight into the practices, experiences, and norms that apply – to be able to develop methods of management, best practices and general guidelines, applicable legislation, and sustainable, ethical guidelines and technological aids.

1.4 Area of investigation

In this thesis, we will examine how the notion of digital remains is understood and 'done' in different legal, postmortem settings, as part of understanding the phenomenon more closely. The thesis does not operate with a specific definition or understanding of the phenomenon of digital remains that requires empirical confirmation or rejection, just as conceptual refinement and specification are not the prime interest. We need to start somewhere, of course, and the thesis will begin by exploring some "first articulations" (Venturini, 2010) in terms of different scholarly interpretations of the phenomenon. As Marradi (1994, p. 157 as cited in Gobo & Marcheselli, 2023, p. 10) states, however, words and concepts are not 'the perfect reflection of the thing'; or at

least that's how concepts and words are approached in this thesis. They are merely 'directions along which to look' (Blumer, 1954, p. 7). Furthermore, the idea is to approach the phenomenon openly and without prejudice, which is done by assuming that it is *not* something specific from the outset and by being open to how it manifests itself (both discursively and materially). This entails refraining from viewing it merely as a distinct technology or type of data, although technology and data are involved in the process of mutual constitution and refraining from reducing the phenomenon to a question of definition, although words can also be helpful (and performative). Definitions change, different things are labelled the same way, and the same things can be labelled differently. Additionally, different meanings can be attached to a concept, and the idea is therefore to approach the subject with a sense of naivety to understand what it is and how it comes into being.

The philosophical foundation of this thesis, inspired by Science and Technology Studies (STS), views the phenomenon (i.e. digital remains) as a socio-technical configuration that is continuously shaped and negotiated by different human and non-human actors in a mutual process. I will turn to explain the philosophical foundation in chapter 3; for now, what is important to understand is that humans alone do not influence the phenomenon, as by 'naming' it or 'using' it in different ways. Nor does technology alone determine what the object is or becomes. The assumption is that the object of study it is born out of both material and social 'doings' in an interplay through continuous negotiation of the object's existence, which we will examine more closely in the chapters that follow. Accordingly, by placing oneself where the object is still subject to negotiation, it becomes possible to identify what the object is made into in different contexts; or rather, 'who and what is doing the doing'.

The context for the empirical investigation is the legal realm; more specifically, the empirical investigation focuses on how lawyers and parts of the legal community handle and conceptualise digital remains in selected postmortem settings.

The 'postmortem' settings that form the basis of the investigation include, on the one hand, 12 family- and inheritance lawyers from north Copenhagen and their handling of digital objects in the context of estate administration and will formulation (both areas where the postmortem is at the

forefront). It is not an ethnographic study, however, and more an investigation of practice through 'what the lawyers say they do' through qualitative interviewing (referred to as 'reported practices'). Nor is it carried out in a postmortem setting. Estate administration involves the process of inventorying a deceased person's belongings (the estate) and distributing them to their heirs. Accordingly, the investigation examines how digital remains are attended to in practice. How is a computer handled in decedent estate settlements, and how are digital objects value assessed? Are digital devices passed on to the heirs; and if so, how do the lawyers manage such a transfer? Are the devices wiped before transfer, can you browse through contents for preservation purposes, or is nothing done? Furthermore, are there considerations of whether locally stored, creative productions (images, text, videos) and drafted intellectual work (e.g. manuscripts) could be of interest to others, and are these objects accessible and discoverable? Are digital remains included in wills – and if so, how? These reported doings, or enactments, all tell us something about how they understand and perceive the phenomenon of digital remains together with more conceptual accounts of digital remains (e.g. in terms of the lawyer's answers to the question 'what covers the notion of digital remains in your view'?).

The empirical investigation also includes analysis of a German court case that deals with how a Facebook profile should be handled and conceptualised in a postmortem context. The legal proceedings specifically centre around the question of whether social media data should be treated as 'inheritance' that can be transferred upon death or as private data that should remain private postmortem and is analysed through various documents concerning how digital data should be conceptualised and thus handled (enacted) in a postmortem context.

The investigation reveals how the digital remains phenomenon is done and understood differently across contexts. For example, there are three different versions of digital remains emerging from the interviews in terms of 'frontstage', 'property-like', and 'information-like' version, just as controversy is resulting in two different enactments of digital remains present in the court case. Accordingly, the digital is enacted differently in different contexts, just as the phenomenon is framed in different ways in the scholarly literature and perceived differently (on a conceptual level) among lawyers in the interviews. It is this diversity of the situated doings and sayings that the concept of 'multiplicity' aims to illuminate.

However, there are also overlaps; less between 'versions' and more between the two postmortem situations. Accordingly, in addition to these separate analyses (of the court case and the interviews), a cross-sectional analysis has been carried out from which five 'problem characteristics' have subsequently been derived. These problem characteristics are to be understood as 'themes' or 'shared issues', which have been derived from the two empirical studies (i.e. two postmortem situations), parts of the literature and empirical examples. The problem characteristics constitute a set of 'entry points' from where it is possible to discuss the consequences and implications of the various doings and sayings of digital remains. Accordingly, it is not merely the difference in conceptualisations and practices that are of interest to this dissertation, but rather the 'effects' of the different (socio-technical) doings, which in a mutual process affect how the object of study comes into being. The problem characteristics are thus different thematic entries for discussing the interconnected human and non-human entities that exert an influence on each other and help to shape the phenomenon in an interplay – without being mutually exclusive. The entry points identified are, respectively: 1) Access, 2) Affected users, 3) Intermediaries, 4) Invisibility and material absence, and 5) Digital data and content, and they affect – individually and in combination – how the object of study comes into being.

Additionally, the various theoretical interpretations and constructs covered in chapter 4 are viewed as limited. They manage to capture 'aspects' of the phenomenon but not the phenomenon in all its complexity and diversity. The contribution of this thesis therefore consists of a reconceptualisation – a new theoretical interpretation of digital remains – which attempts to avoid reducing and translating the phenomenon into a single concept, a specific technology, or a certain practice; Rather, it seeks to capture the complexity and everchanging nature of digital remains and is sought provided in the five aforementioned problem characteristics.

1.5 Chapter preview

The following outlines the contents of the chapters of the thesis. **Chapter 1** addresses the general focus of the thesis and presents the five research questions, which are answered in the individual chapters. **Chapter 2** serves as a background chapter (along with Chapter 3, philosophical background, and Chapter 4, theoretical background, providing insight into the researcher's

personal and academic background dating back to 2012). In addition to describing the researcher's prerequisites and prior knowledge, the chapter provides insight into the development of the phenomenon in the Danish context, as seen 'through the eyes of the media'. These two narratives contribute to the story of the becoming of the phenomenon, viewed from both a personal perspective and through Danish media lenses (albeit on a small, qualitative scale). Additionally, the personal and the media narrative is to be understood as interconnected, as the researcher has contributed to disseminating knowledge in the field to the media. **Chapter 3** reviews the philosophical foundation of the thesis, which draws inspiration from both phenomenology and primarily from STS (i.e. Science and Technology Studies). Specifically, it presents the work of STS researcher Casper Bruun Jensen (2004a, 2004b, 2010, 2022), along with contributions from other STS researchers, such as Annemarie Mol and Bruno Latour, who inspired his work and this thesis. Collectively, their ideas form the cornerstones of the 'STS-inspired' approach, informing both philosophical, reflective, and, to some extent, analytical endeavours of the thesis. **Chapter 4** introduces selected theoretical interpretations or conceptualisations of digital remains from the academic literature. The chapter serves as the theoretical background for the dissertation, and the analytical insights gleaned from this literature are incorporated into the discussion in Chapter 8 to derive and illuminate the material and social constituents of the object of study. **Chapter 5** comprises the methodology section of the thesis and highlights the methods used for the two primary studies of the thesis. Respectively, eight interviews with family- and inheritance lawyers and their handling of digital objects in estate administration and will formulation (Study 1), as well as a German court case examining how social media data is handled in a postmortem context (Study 2). The chapter presents the data collection, empirical foundation, and analytical methods for both studies. **Chapter 6** contains the analysis of Study 1, also referred to as the 'Lawyer study', which examines the understandings and practices among family- and inheritance lawyers regarding digital remains. **Chapter 7** contains the analysis of Study 2, also referred to throughout the thesis as the 'BGH court case'. It analyses the legal reasoning (on the basis of a collection of documents) through which the study object is enacted. **Chapter 8** constitutes the discussion and basis for the core contribution of the thesis in terms of five problem characteristics. The problem characteristics represent common issues derived from the empirical studies (Study 1 and study 2), empirical examples and draws upon parts of the literature in addition. **Chapter 9** represents a

comprehensive presentation of the thesis' final contribution – a reconceptualisation of digital remains as a phenomenon – based on the five problem characteristics presented in Chapter 8. The chapter answers the research question: 'How can the multiplicity and complexity of the phenomenon of digital remains be captured?', and it expands on the socio-material nature of digital remains. **Chapter 10** presents the conclusions, summarising the results and suggesting questions and perspectives for future research.

2 Digital remains in retrospect

I have been engaged with the topic of 'digital remains' since 2012, when I wrote my thesis on the subject, and have continued to work on it with varying degrees of involvement over the years. Consequently, I am not a blank slate in this field. Instead, I am deeply entangled with the topic, having participated also in the public Danish discourse around digital remains, and is thus shaped and is being shaped by the phenomenon I am studying. The chapter aims at addressing this 'precondition', which has undoubtedly influenced the current research project, both in terms of how I have approached it, where I have looked, where I have started (basing on what I already know), where I have ended. As Flick states, "prior knowledge and what we bring with us to the interpretative event play an important role in the process of making sense of something" (Flick, 2013, p. 8), and I would add, affect other's stance towards me in the research process. This chapter will begin by providing insight into to my personal and professional background (i.e. an 'inwards perspective'), and secondly it will provide insight into the Danish media discourse around the topic though the past two decades (i.e. an 'outwards perspective'). This 'media narrative' has been part of my effort to distance myself from the topic anew – a form of disentanglement – and consequently both perspectives, i.e. the inwards- and outwards, form the epistemological basis of this research project alongside with the philosophical foundation in chapter 3. The media discourse analysis constitutes a small, qualitative review of a series of news articles from the period between 1998 to 2023, which is by no means systematic or comprehensive. Nevertheless, it provides some insight into the Danish media discourse around digital remains (i.e. how the phenomenon is portrayed in the media) and what events have help shaped the narrative of digital remains in the public.

2.1 The inwards perspective

In the early 2010s, the concept of digital remains had not yet been formulated in Danish context. In other words, it was yet a nameless phenomenon[2] – at least how it is understood in Danish context today – and only existed in the minds of the few. Accordingly, the public's awareness was limited, as was media attention and only a handful of brief cursory news articles on *digital arv* was published around this time. In 2011, my own attention was drawn to the issue of dying (or rather not dying) online due to my grandmother's passing.

In 2011, my attention was drawn to the issue of dying (or rather not dying) online due to my grandmother's passing. She was quite tech-savvy for her age. She provided the household's internet connection, had a laptop (which she used whenever possible), and communicated frequently via email and Facebook, which early adopters had only recently joined. In sum, she had a great interest in digital technology and its potential, which was quite unusual for a woman of her age – 75 years at the time. She left behind not only a physical estate but a digital one as well. Although her digital footprints were still quite limited compared to people's digital footprints present day, likely due to the level of digitisation level of society at the time, she nevertheless had a digital collection. My mother, on the other hand, did not.

In 2004– seven years earlier, before everyday communication moved online and before social media platforms like Facebook, Instagram, and Twitter gained momentum and were widely adopted – my mother passed away. The estate management following her death primarily involved collecting, distributing, or discarding physical objects such as clothing, jewellery, work-related documents, ring binders, photos, and artworks. Moreover, end-of-life events were triggered continually and automatically in relation to her physical departure: the hospital reported her death, other relevant authorities were automatically notified, and the funeral service was soon

[2] The notion of a phenomenon being undetected and unnamed is what Zuboff refers to as the "unprecedented" (Zuboff, 2019, p. 12).

carried out due to the issue of bodily decay, and the management of her physical estate followed established procedures and deadlines.

This contrasted the case of managing my grandmother's digital life, where norms and formalised practices seemed absent. Conventional end-of-life administers such as hospital, undertakers, probate court, church office, legal executors did not offer services in this regard and bereaved families were left to their own devices to come up with "netiquettes". That is, appropriate online behaviour in the context of death (Sofka, 1997), and ways for addressing posthumous digital issues. Thus, the posthumous management and curating of my grandmother's digital life was up to us as a family to figure out. Questions started to mount up that were both technical, ethical, practical and social in its character. We had questions concerning the posthumous management of her social media profile and whether her profile should be left as it were, shut down or made into a memorial (although not a technological feature yet). We had practical issues with shutting down digital accounts and other activities (memberships), as well as privacy considerations in relation to accessing correspondences (if possible) – although it manifested more as a sentiment of crossing an invisible line at the time. Our questions also concerned the hardware and its contents, which we as a family, collectively had to decide on. Were there any content of interest on the device, should we sift through the computer to see, where to find it and who should do it as my grandfather her closest relative – had no skills in operating a computer and no digital literacy. The task seemed staggering, and at some point, I remember, we gave up – even his grandchildren that after all possessed some degree of digital literacy. In the end my grandfather took over her computer and the digital stuff that we were able to manage, was managed, whereas other digital affairs were left in the dark. The professional executors stayed silent in this regard, but the experience stayed with me.

The two deaths in my family and the procedural heterogeneity of the descendent estate management became the starting point for my interest in the subject matter. In 2012 I initiated my research on digital legacy, and in 2013 I finished my master on the topic exploring the posthumous practices, understandings, and attitudes of hospice caregivers in relation to digital information and effects. Specifically, the thesis explored the awareness towards digital legacy through a qualitative and exploratory process, and inquired about attitudes and sentiments towards the digital stuff we leave behind (Waagstein, 2013). Assuming, that most people had not given thought to their digital

posthumous effects due to the topic's novelty, including prospect respondents, the recruitment criteria developed for the project became 'some degree of death awareness'. Death awareness in this context refers to the notion of a person being consciously aware of one's future death and the potential reflective and empirical outcomes of this mental attitude (e.g. preparatory activities). The idea was that a certain degree of death awareness would coincide with the probability of having considered or maybe even prepared for one's death. Accordingly, eleven semi-structured interviews with hospice employees - mostly nurses – were carried out at a hospice in Zealand which centred around three core themes. For one, the question of awareness and towards digital remains: were the interviewees aware of potentially leaving behind digital portfolio upon death? Second, how were their sentiments and attitudes towards digital legacy, and 3) the perceived value of the digital stuff. Answers indicated that respondents had not given thought to the existence of a posthumous digital portfolio. The group of interviewees had not reflected more deeply about the issue of leaving digital stuff behind or connected experiences with digital afterlife in other contexts to their own situation despite the fact 1) that the hospice workers were very 'death aware' – they had prepared for their future deaths in other realms – and 2) despite having personal experiences with inaccessible digital contents. However, respondents expressed a desire to secure their digital portfolios – or parts of it – for the sake of their families and themselves as they perceived digital data as valuable when made aware of their potential digital legacy that grew out of the research. In addition, when revisiting the hospice six months after, the workers had begun addressing issues around digital legacy with hospice patients and their relatives and had to some extent begun the process of managing their digital belongings in terms of e.g. securing spouse's access to photos, accounts etc. should they die unexpectedly.

In September 2013, three months after delivering my master's thesis, *Kristeligt Dagblad*[3] picks up on the research and wants to publish an article om the thesis' results. The research has novelty value and with the first article reporting on the thesis being entitled "The legacy of tomorrow is online"[4] and the sensational lead: "risk of losing future legacies for prosperity" (Lind, 2013), the story was quickly picked up by other national and local news media exposing the notion of digital

[3] *Kristeligt Dagblad* is a Danish nationwide Newspaper.

[4] Translated from "Fremtidens arv ligger gemt på nettet".

remains more broadly. From here on, digital legacy went from being on the radar of the few to being a universally known phenomenon. Journalists, various experts, and different associations have since 2012 taken part in the conversation around digital legacy in DK at regular intervals, which means that they have all contributed to its conceptual development, including myself.

In the following years, other formative activities and engagements take place which includes my membership of the international research network Death Online Research Network and participation in the first Death Online Research Symposium gathering some of the earliest death-tech scholars in the field. The research network was coined in 2013 and supports international (western) collaboration and conversation around the study of death and digital media. Besides participating and staying up to date in the academic conversations around the digital afterlife, I have been participating in the public Danish discourse around managing digital effects (rather than afterlife as online mourning and grief), periodically since 2013. This includes knowledge dissemination in national and local news (print, broadcast and digital media) as well as public speaking at seminars and conferences for associations such as Danish Lawyers of Succession ('Danske arveretsadvokater') and the National Association Life&Death ('Landforeningen Liv&Død'). The latter is a non-profit organisation/NGO whose *raison d'être* is working for dignified death, whom I worked for as research and UX consultant for six months where I did research on attitudes and awareness of digital legacy among the public, and later as representative. Over the years, I have also had conversations with start-ups/entrepreneurs and university students, who wanted to exchange ideas or know more about the niche field.

In sum, these previous engagements and activities – i.e. master thesis, dissemination and knowledge exchange via research network, associations and conferences, student guidance, public dissemination through the media etc – has shaped my understanding of the phenomenon just as the phenomenon has shaped me.

Consequently, I am undeniably intertwined with the phenomenon, which in itself represents an intriguing research challenge: how to study a phenomenon which you are so entangled yourself? While I do not have a definitive answer, the media analysis has at least been an attempt to disentangle myself *slightly* by investigating the phenomenon from an external perspective to begin with, i.e. through the lens of the media. I have focused on what stories are told in the media, if the

stories change, what events appear in the period and who else contribute to the narration and shaping of digital remains in the period (i.e. *digital arv*)? This external perspective is not an attempt to distance myself from my prior knowledge and prerequisites, which I actively utilise throughout the project, but rather an attempt to better distinguish 'gut feelings' from 'facts' at the project's outset and proceed from there.

In the next section we will turn to the small-sized, qualitatively performed 'media analysis'.

2.2 The outwards perspective – digital remains in the media

In this section, we will examine how digital remains has been portrayed in the Danish media, which involves reading and analysing a series of news articles in the period between 1998 to 2023. It investigates how the phenomenon has been depicted in the media and how it has evolved over the years, and the aim is, as mentioned, to distance myself somewhat from my own narrative (professional and personal), while at the same time giving the reader a first introduction to the topic. The analysis of the articles is by no means 'objective' or systematic – i.e. it does not involve quantitative measures such as word frequency or statistical calculations and nor is it supported by software analysis. Rather, it has been carried out qualitatively and 'manually' by me, and consequently, it is my reading and interpretation of the articles. The articles have all been retrieved from the InfoMedia database (*InfoMedia - Royal Danish Library*, n.d.), and the method of analysis has involved 1) a cursory orientation in the individual articles focusing on title, lead and initial body text and the identification of core articles[5], which are read more thorough. 2) a thematic coding of the core articles, and 3) the grouping of articles into main periods based on common themes of the articles and significant events for the period. This has resulted in the identification of three major periods, i.e. 'News Waves', stretching respectively from 2012–2014, 2015–2017 and 2018–

[5] Core articles refer to those that treat the topic in greater detail, either by being more extensive, based on original investigations or sources, or by being 'first-mover' articles. These are contrasted with shorter articles that primarily reference core articles or releases from news agencies like Reuters. As a result, newspaper articles from a certain period tend to treat the subject quite uniformly and homogeneously.

2023, including a period *before t*he issue becomes publicly known, which is from the 1990s to 2010 approximately.

To determine when the phenomenon began and became widespread, various search intervals were initially conducted, and it appears that the cut-off date for broader awareness of the phenomenon falls between 2011 and 2012. This is identified by doing different search intervals on the term 'digital arv'[6] in the period (see appendix A for a selection of searches).

The period from 1998–2011 yields only a handful of of search results related to the notion of digital remains, while the period from 2012–2014 yields 44 results for comparison (and 87 if headlines are not joint) (see appendix A for searches), while a search on 'digital arv' between 2012–2023 yields around 900 search results. Quantitatively, the added number of search hits indicates a greater prevalence of the issue *after* 2011, and qualitatively (upon greater scrutiny of the individual articles), indicates a refinement and development of the concept, which we will turn to investigate in the next sections.

2.2.1 Before public awareness (1990s–2011)

The notion of digital remains (*digital arv*) is already mentioned in news articles in the late 90s (in 1997 and 2000 specifically), but there are only a few articles, and they are for the most associated with digital cultural heritage and the preservation of 'the internet'. One of them is the article "This is how the rescue operation of important data went"[7] (Daarbak, 2011), which e.g. describes a project led by the Danish State Archive that is initiated to ensure long-term preservation of digitally born material, and report on strategies for collecting and preserving the internet via data logging and by making archival information of historically significant events accessible to the public. Like other few articles from this period, they report on strategies for collecting and preserving the

[6] The Danish word 'digital arv' covers a broad spectrum of terms such as digital legacy, digital remains, digital inheritance etc. The search did not include words as 'digitale fodspor' (digital footprints) or alternative search terms and strings, as the idea was to keep the analysis relatively small-sized and preliminary.

[7] All titles and quotes in this section have been translated by the author from Danish. In this case the original title is: "Sådan gik redningsaktion for vigtige data".

internet through data logging and making archival information of historically significant events accessible to the public, and addresses preservation formatting and incompatibility issues (Thomsen, 2012). However, a shift in the semantical meaning seem to takes place around 2011/2012, where digital remains goes from representing the aforementioned 'digital heritage' to be referring to an individual's personal legacy to a greater extent. At the same time, year 2012 seem to be the cut-off date for a growing media interest and coverage of the subject matter kickstarted by *Kristeligt Dagblad*. Kristeligt Dagblad conducts a sample inquiry in relation to a news article on digital legacy (Beck & Jørgensen, 2012): it constitutes the first non-representative exploration of digital remains in Denmark and shows that 72 out of 90 Danish people have not at all considered, or given few thoughts to, how their bereaved will get access to digital values upon their death. The journalistic angle of the article is "the role of the digital in grief therapy and grief work" and conceptualises digital remains as "digital memories" and focus on the role of these in grief work and thus the needs and interests of the bereaved as well as the importance of future access for commemoration and remembrance purposes. This is indicated through headlines such as "Bereaved must have access to digital legacy"[8] (Damgaard, 2012). In comparison to later articles, we are not yet deeply immersed into the subject matter and explanations and exemplifications that declare what is entailed in the notion of digital remains is for the most left out other than mentions of "text messages, pictures, and video" on "internet services (Beck & Jørgensen, 2012).

2.2.2 First news wave (2012–2014) – the phenomenon becomes known

What is generally characteristic of the first news wave (2012–2014) is that digital remains come onto the media's radar receiving greater media coverage and greater public attention. Additionally, the term *digital arv* is being adopted as the common term. In the wake of the above-mentioned article and survey sample by *Kristeligt Dagblad* (Beck & Jørgensen, 2012) together with the results of my master's thesis being published (Waagstein, 2013), the number of articles on the digital remains increases from five articles between 2011–2012 to have around 90 articles in dec 2013,

[8] Author's translation from the original title: "Efterladte skal have adgang til digital arv".

when identical headlines are joined. Besides being an indicator of a growing public interest in the topic, a qualitative analysis of the articles shows that the topic expands and refines. For instance digital remains goes from being referred in terms of 'the internet' or 'internet pages to being referred in more detailed and varied terms such as deceased's profiles on social media on Facebook, LinkedIn, Twitter, photos, websites, chat messages, accounts, personal documents on the computer diaries, mails (Vesterberg, 2014), songs, speeches, music.[9] In addition, new issues are added to the list of challenges such as the issue of preserving and accessing micro-historical perspectives (the lives of ordinary Danes), which refers to individual people's digital accounts for the sake of historiography. The issue is highlighted through headlines and quotes such as "The digital heritage is often lost" (Quass, 2013) and "The loss of people's digital heritage could become a problem for researchers and historians in the future" ('Historikere Vil Redde Digitale Dokumenter', 2013). The Danish author Peter Øvig Knudsen also comments on this issue in a statement to TV2, and states that

> Especially 'The Blekinge Street Gang' and my books about the occupation (…) are based on something that someone has hidden at one time or another. These are both public archives, but to a large extent also private individuals who themselves were involved or knew someone who was. It is gold you can find there. If that is lost, it will be impossible in the future to get really close to these people (…). ('Kendt forfatter', 2013)

In addition, the journalistic focus moves from issues of formatting and incompatibility to focusing on access-related issues of digital remains, which, unlike physical chattels and property, is often password-protected. The consequence of not being able to access material or accounts is presented as the dilemma between the risk of one "haunting the internet forever" or "losing parts of one's personal story" (Vesterberg, 2014). Moreover, it is primarily the interests and emotional stress of the bereaved that is in focus in the media's coverage, whether the wish for access concerns the preservation of stuff for remembrance (memorials) or concerns the management of "digital ghosts" ('Citathistorie Fra Kristeligt Dagbl: Mange Digitale Breve, Fotos Og Dagbøger Går Tabt, Når vi Dør - Mediearkiv - Infomedia', 2013; Vesterberg, 2014). Furthermore, journalists are

[9] From the original source: "Citathistorie: Mange digitale breve, fotos og dagbøger går tabt, når vi dør", 25 September 2013.

gradually starting to communicate different types of advice on how to handle digital remains, which includes writing down passwords for social media accounts, pointing towards system configuration options such as "Google Inactive Account Manager" ('GUIDE: Sådan Sikrer Du Din Digitale Arv', 2013; Schelde, 2013). Security and privacy concerns regarding the sharing of passwords are raised, and the focus is on how to transfer access information without compromising security (rather than e.g. on the privacy of the deceased when making information and material available) ('Sådan sikrer du dit digitale eftermæle - TV 2', 2013). This topic, is however covered minimally. Additionally, the first Danish death tech start-up, Aftercloud, is launched in December 2014. The service's core product is to facilitate the termination of deceased individuals' social media profiles and to store those digital remains that people wish to preserve – such as digital photos and videos (Damsgaard Bach, 2013; Johansen, 2014). The founder, Jonas Gundersen, shuts down the service after 1.5 years due to 'low demand', which according to Gundersen himself, is due to 'timing': he believes the demand of such services will increase in the future (Westersø, 2016).

2.2.3 Second news wave (2015–2017) – attention on the bereaved

What generally dominates the media landscape in the second news waves (2015–2017) is production of new knowledge and dissemination on the topic, and these initiatives are primarily carried out primarily by the National Association Life&Death[10]. They conduct a population survey, arrange a national conference and arranges evening classes through FOF (i.e. 'Folkeligt Oplysningsforbund') in how to manage one's digital afterlife (Oxholm, 2016). The increased knowledge in the field affects the news reporting, which become slightly more advanced and refined. Additionally, more detailed online guides on how to manage digital remains are produced in the media. The focus remains on the interests of the bereaved and thus digital remains as memorial objects, as in the first wave, but the media's awareness gradually turns towards the conflicts of interest between the bereaved, the deceased and the service providers.

[10] The National Association Liv&Død (Life&Death) is formerly known as Danish Cremation Society which was founded back in 1881 to prevent cremation. Today the fundamental values of the association is to work for starting the good conversation about death and a dignified farewell to life (Landsforeningen Liv&Død, 2024).

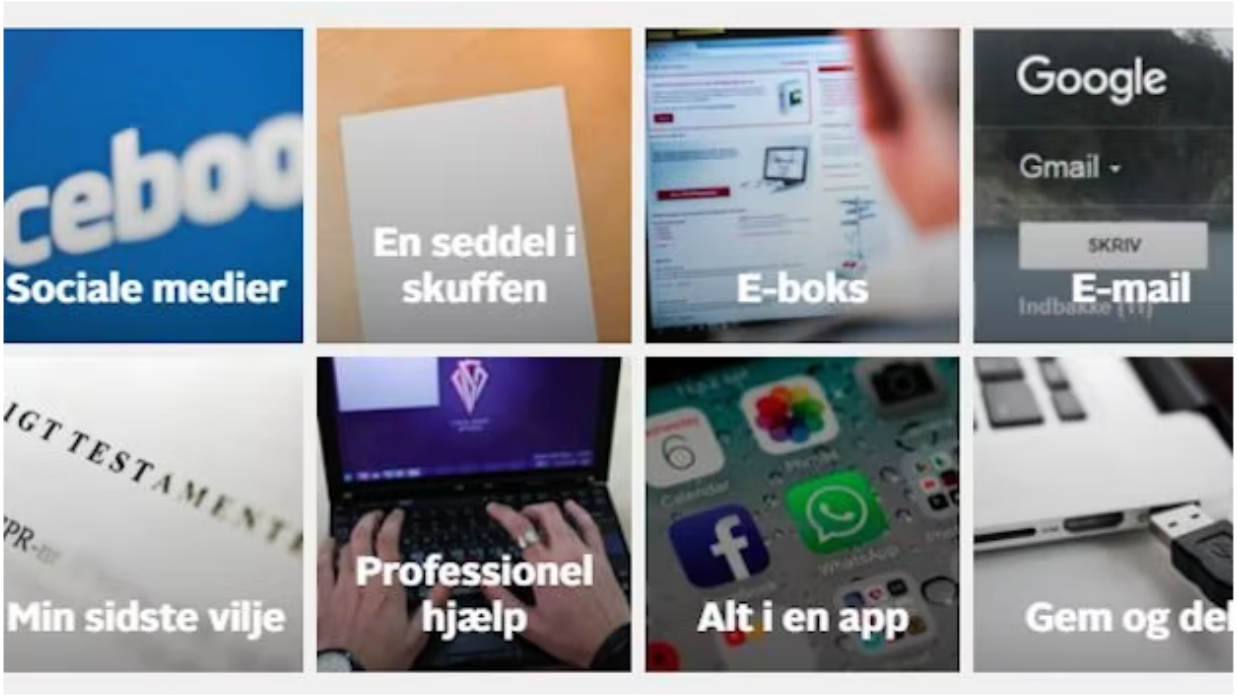
Events that occur during the period include the Danish Association Life&Death's three-part effort, which aims at increasing Danes' focus on the digital remains to encourage decision-making and preventive action. The initiative consists partly of a report prepared in collaboration with the research agency Epinion and Christian Alsted Kvalitativ Markedsindsigt Christiansborg (The National Association Liv & Død, 2015),[11] an humorous information campaign about 'the digital funeral director' disseminated through TV and digital media (Larsen, 2015; National Association Liv & Død, 2015) as well as a the arrangement of a conference at Christiansborg entitled "Let us die online" (National Association Liv & Død, 2016).[12] Among the speakers are: Director of e-Boks Susanne Søndahl Wolff, Director of the podcast Elektronista and futurist Christiane Vejlø, lawyer of succession from Bech-Bruun Johan Hartmann Stæger, Member of the European Parliament Christel Schaldemose (Social Democrat), Member of the Danish Parliament and IT spokesperson Karin Gårdsted (Social Democrat) as well as undersigned (Astrid Waagstein). The information campaign, the Digital Undertaker, is an intended as an educational campaign produced by the agency *Konstellation* in collaboration with production company *Made in Valby* on behalf of the Association Liv &Død (Larsen, 2015; National Association Liv & Død, 2015). With regards to the report, it sheds light on Danes' opinions and knowledge of digital legacy and the results of the will be presented in chapter 8.

In the period between 2015–2016, more in-depth guides on how to deal with digital remains are published, including now include the public sector platform 'e-Boks'[13], which is proposed as a safe for storing information and digital stuff to avoid compromising security (Westersø, 2016). However, the focus is still on solving the issue of 'access' postmortem (e.g. by sharing of passwords pre-death), so that family members can access the materials posthumously.

[11] In cooperation with Life&Death and Christian Alsted, I deliver a proposal for the survey, which Epinion finalizes and carries out.

[12] The Danish title of the conference is: "Vi vil dø på nettet."

[13] e-Boks is a communication platform that facilitate communication between private citizens and public sector authorities and private actors such as insurance company, banks etc. owned by Nets and PostNord.



Souce: GUIDE: How to secure your digital legacy"[14], TV 2 Nyhederne Online, 8 April 2016 (Westersø, 2016). Titles from the top left are: Social media, A note in the drawer, E-Boks, E-mail, My Last Will, Professional help, All-in-one-app, Save and share, and illustrates the notion that the online guides have become more comprehensive and are visualised.

Besides the dissemination of the abovementioned activities and initiatives (conference, campaign and report), an article "The digital legacy" is published in the magazine *Danske Advokater* (From, 2015). The publication indicates that the legal industry is now joining the chorus of actors. In this context, Rikke Frødstrup, a lawyer at Advodan Glostrup, states, "It is important to make people aware of the problem precisely because it is normal to be active on social media today"(From, 2015), and goes on to explain she has a not about social media at her wills meetings (From, 2015, p. 22). In the news article, "Sørg for dine arvinger i tide" ('Sørg for Dine Arvinger i Tide', 2017), attorney Janny Lundhus Mikkelsen states that "it may be a good idea to entrust one's codes to a trusted person along with instructions on what should happen". In other words, with increased focus on not dying digitally, attention is being placed on what one can do (agency). Additionally,

[14] The original title: "GUIDE: Sådan kan du sikre din digitale arv".

classes on managing digital remains are now offered through the Danish public libraries, and targets especially senior citizens (Kæhler, 2017). It

It is also in this period that news on the work of American Uniform Law Commission's (UCL) in terms of the (Revised) "Fiduciary Access to Digital Assets Act" (RUFADAA, 2015) is reported in Danish news. The Uniform Fiduciary[15] Access to Digital Assets Act (UFADAA, 2014), was developed by the Uniform Law Commission (ULC) to provide fiduciaries, such as executors, with a legal framework for managing the digital remains of deceased or incapacitated individuals. The Revised act (RUFADAA, 2015) ensures that the privacy and intent of the user are respected (nolo.com, 2024), while allowing fiduciaries to manage necessary digital assets for estate settlement. Accordingly, the RUFADAA extends the traditional powers of fiduciaries to include digital assets like computer files, web domains, and virtual currency, however, it restricts access to electronic communications, such as emails and social media accounts, unless the original user explicitly consented to fiduciary access in a will, trust, power of attorney, or other legal document (uniformlaws.org, 2024).

2.2.4 Third news wave (2018–2023) – introducing postmortem rights and interests

In addition to ongoing courses offered by Danish public libraries on managing digital remains, a notable characteristic of the third news wave (2018–2023) is the increased focus on the rights and interests of the deceased. This shift is reflected in news articles that highlight the revised RUFADAA act, which places greater emphasis on the privacy and intent of users compared to the earlier UFADAA act of 2014, but also national and international significant events and academic publications in the period. These include the passing of EU's General Data Protection Regulation (Regulation 2016/679) (GDPR, 2018), and the subsequent Danish Data Protection Act (Databeskyttelsesloven, 2018), which is a vehicle for the increased focus on deceased individual's rights. In 2018 it was up to the EU Member States to provide for specific measures regarding data protection as part of and in Denmark the DPA includes deceased people protecting their data for a

[15] 'Fiduciary' is a person appointed to manage the property of another person.

10-year period, which can be shortened or prolonged depending on the specific circumstances (Databeskyttelsesloven, 2018). In the period – maybe due to the GDPR and the Data Protection Act, we move from terminologies of digital memories and artefacts such as photos, texts and videos, to also talk about legacy as 'data'. In January 2018, the Danish master's thesis "Implementing Post-Mortem Privacy in a Digital Age – a thesis on the proposed 10-year post-mortem data protection in Denmark" (Thaarup, 2018), which identifies challenges to post-mortem data protection in Denmark, and suggest possible solutions to these challenges. See also (Fensbo, 2018; Thaarup, 2017). Other important events reflected thematically in news articles in the period, is the settlement of the German court case in Karlsruhe in July 2018 (Barkholt, 2018), which concerned the question whether a Facebook account – including its contents – was to be considered part of the estate passing to the heirs on the base of universal succession or if the contractual terms concluded upon the death of the account holder. We'll return to both the BGH Facebook case, and the Danish Data Protection Act in later chapters. Furthermore, DANSK IT's working group for data ethics publishes publishes a report with 18 specific recommendations for good data ethics in November 2018, which can be used as a line of direction for companies, authorities, decision-makers, and ordinary citizens when working with data ethics. One of the 18 recommendations concerns specifically the "Safeguarding and protecting our digital legacy" on the grounds of "the individual's right to decide over his or her own data must be protected, also after the death of the individual" (DANSK IT, 2018). In 2019, an academic paper by Luciano Floridi and Carl Öhman (Öhman & Floridi, 2017) gains national and international attention, which that there will be more dead users on Facebook than living ones in just 50 years. The article highlights the need for us to consider what happens to our data when we die, according to *Berlingske*, a Danish daily newspaper (Marquardt, 2019).

2.3 Summary

This chapter has aimed to introduce the reader to my personal and professional background and create transparency of my prerequisites and prior knowledge. Additionally, it has treated the phenomenon from an outwards perspective – i.e. through the lens of the media – which has been an attempt to distance myself from the topic anew as well as serving as a first introduction of the

topic to the reader. The analysis has consisted in a small-sized qualitative analysis of the Danish media narrative around the topic of digital remains from the period between 1998–2023 and have looked into how the phenomenon is portrayed in the media, and which events are significant to the public understanding and development of the concept. The analysis has identified three distinct 'waves' in the Danish media discourse on digital remains from 1998 to 2023, each with a different focus. Initially, the concept was non-existent (1990–2011), then to be conceptualized and integrated into public discourse as digital cultural heritage in the period's beginning, which hold historical significance (around 2011-2012). Then to gradually evolve into a 'personal digital legacy' with emotional value for family members (2012-2014). However, in 2017, the focus shifted to the rights and interests of the deceased, starting with the RUFADAA act in the US, and the implementation of the European GDPR and the supplementary Data Protection Act (2018-2020) in Europe, which provide protection for deceased data subjects in Denmark and other European countries. Collectively, this both 'inwards' and 'outwards' (Danish context) perspective forms the epistemological basis and the starting point of this research project together with the philosophical foundation, which we will turn to next.

Part 2

Theoretical framework and methodology

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3 Philosophical and methodological foundation

In this chapter, I will introduce the analytical approach and philosophical foundation that draws on STS researcher Casper Bruun Jensen's "non-humanist, ANT-inspired" (Jensen, 2022, p. 529) approach. After presenting Jensen's work (Jensen, 2004a, 2004b, 2010, 2022), I briefly discuss the contributions of other STS researchers, such as Annemarie Mol and Bruno Latour, who inspired his work. Collectively, their ideas form the cornerstones of my 'STS-inspired' approach while also informing philosophical, reflective and, to some extent, analytical endeavours of my methodological approach, without however claiming to represent STS as a whole.

3.1 Ontology for developing things

As stated in the introduction, the general focus of this thesis is on 'how digital remains come into existence and with what consequences', which represents a philosophical and analytical position drawn from Science and Technology Studies (STS).[16] Specifically, the approach aims at studying the 'becoming'[17] of a phenomenon (Jensen, 2022, p. 529), which is possible if one considers the object of study to be unsettled, vague and "not-yet-quite-existing" (Jensen, 2010, p. 20). The methodological framework for studying the 'partially existing', a concept originating from Bruno Latour (Latour, 1999),[18] is integrated into Jensen's non-humanist approach, which he specifically refers in terms of an "ontology for developing things" (Jensen, 2004a, p. 20). The approach aims at understanding the processes through which 'socio-technical reality'[19] is constructed (Jensen, 2022, p. 531), which occurs through the continuous efforts of humans and non-humans alike (Jensen,

[16] STS is an interdisciplinary or multidisciplinary field in which most practitioners have their foundational education in humanities or social sciences disciplines, or in health, natural, or engineering sciences. STS is about understanding how science, technology, and society interact and have effects, and, despite variations and disagreements across STS theories, the common agreement is that science and society are co-produced. Consequently, they are constructed in mutual processes, meaning that social factors cannot solely explain development (social determinism), and contrary technology alone (technology determinism) cannot solely explain it (Høyer, 2022, p. 326).

[17] Author's translation from original language.

[18] Latour (Latour, 1999, p. 310) uses the term 'relative existence'.

[19] Author's translation from original language.

2022, p. 529), and analytically one does so by trying to specify and articulate the object's existence (Jensen, 2022, p. 521).

Accordingly, such an STS analysis aims first of all at identifying the active constructs of the phenomenon (of which the researcher incidentally is considered to be an active part) and analyse the consequences hereof. This basically means investigating what the object is made into (i.e. different versions or constructs of the phenomenon), rather than assuming it is something specific from the outset or trying to achieve a fixed definition of it. Jensen describes the approach as one that "investigates the socio-technical processes whereby unstable, weak, almost non-existent things gradually become attached to diverse networks and practices and thereby attain a multiple and distributed, yet partial exitance" (Jensen, 2010, p. 21). While I will return to the different methodological strategies for "tracking down how situations are variously delimited and with what consequences" (Jensen, 2004c, p. 6), let us first take a brief look at the (onto)epistemological foundation for this theoretical direction.

Historically and philosophically, there has been a separation between ontology and epistemology and consequently a separation between how the world is (the nature of things) and how knowledge is created (Ratner, 2021, p. 142). This division assumes that we are trapped in our own perspectives on the world and therefore have no access to the world itself, which is precisely what STS challenges. The ontological turn creates a focus on concrete, scientific practices, through which it is claimed that we *do* have access to the world – and we are actually part of constructing it. Turning to STS, it thus bases on the (onto)epistemological belief that there is *no* separation between knowledge of the world (subject) and the world (object) – and the world is performed and becomes through socio-material networks, which can be studied empirically (Ratner, 2021, p. 141). Accordingly, this materialist, posthumanist perspective traverses modern dichotomies between object–subject and materiality–discourse in practice (Jensen, 2010, p. 25). Consequently, scientific practices – like other practices – are seen as socio-technical, performative and situated endeavours in which social scientists work to delimit and construct versions of the object through their analysis. Researchers participate in the shaping and transformation of the object of study, just like they themselves area shaped and transformed in the (knowledge) process of mutual creation.

3.1.1 Partial, distributed and multiple objects

The philosophical assumption inherent to this science theory is that that the object of study (i.e. digital remains) is a vague, unsettled and changeable phenomenon, which the notion of the partially existing encapsulates. It is based on the philosophical idea that the existence (ontology) of an object has yet to be determined, stabilised or blackboxed.[20] It is subject to ongoing negotiation and transformation, first coming into being if or when other actors, practices and institutions nurture their fragile existence and help to strengthen them (Jensen, 2022, p. 517). This also involves non-human actors, and factors such as technology also play a role in the processes whereby the non-existent gradually becomes attached to diverse networks, becoming stabilised and blackboxed (Jensen, 2022, p. 517).

Jensen uses an illustrative case for his approach, which is a quasi-ethnographic study of the Danish Electronic Patient Record (EPR) conducted in the early 2000s (Jensen, 2004b, p. 3). He explores the "visions, development, and implementation" (Jensen, 2010, p. 20) of the EPR. However, the object of study refuses to behave like a technological object is expected to do; that is, seemingly being neither coherent, static, homogenous nor consistent (Jensen, 2010, p. 21), despite being labelled a (health) technology. Rather, as Jensen observes, it appears to be both "there and elsewhere" (Jensen, 2004c, p. 4, 2010, p. 20), and in practice a multiplicity of things forming a "whole only sometimes, in some places, for some actors and for some purposes".

What follows from the notion of the multiple and distributed object is an 'anti-singular' view on scientific objects. When scientific objects are not to be perceived as singular (Bille & Sørensen, 2012, p. 60), it means that they are understood as homogenous, stable or even passive entities onto which humans (researchers included) can simply project their ideas and perspectives (Bille & Sørensen, 2012, p. 60; Jensen, 2022, p. 520). Conversely, objects do not command humans, either; rather, they are shaped and transformed by different human and non-human elements through

[20] Conceptually, in the natural sciences, blackboxes are units with an input and output. The blackbox itself contains things that are no longer necessary to consider, but which are well-known and taken for granted (Olesen & Knoustrup, 2007, p. 82). In Latour's sense of the word, this refers to the moment when actor-networks have become so stabilised that they are no longer questioned (Jensen, 2022, p. 517). In other words, they have become "solid facts about the phenomenon" (Olesen & Knoustrup, 2007, p. 87), which Latour describes in terms of scientific work being rendered invisible by its own success (Latour, 1999, p. 304).

ongoing interpretations, categorisations and negotiations in a mutually constitutive process (Jensen, 2022, p. 520). This implies that the object is variable; it comes in many different versions and materialises to different degrees. As Jensen articulates it:

> As one encounters "it" empirically, the EPR is sometimes a word, a text, addition, procedure, a prototype, and interface and a database. One cannot decide in advance whether the referent is linguistic and rhetorical to be used for political bargaining, or piece of software used by nurses for medication purposes, or quite possibly both at once as well as other things. Prior to empirical scrutiny, one simply cannot be sure whether the EPR is something "envisioned" or something "concrete". (Jensen, 2010, p. 25)

The general purpose of approaching a phenomenon in such a 'backwards' manner – to analytically dissolve the idea of scientific objects as singular and instead consider them multiple, distributed and partial – is to allow for the research to commit to more varied aspects of the objects of study and the contexts of which they are a part (Jensen, 2022, p. 530). As Jensen (2022, p. 530) reasons, an STS analysis will often add new dimensions to social theoretical approaches, which precisely radically separate human subjects and technological objects.

3.1.2 Posthumanism and the principle of generalised symmetry

To study sociotechnical reality – that is, to study the mutually constitutive processes involving human and non-human entities – involves letting go of "an ontology of separateness" (Suchmann, 2007, as cited in Orlikowski, 2010, p. 134) and leaving behind a dualist world-view. When analyses are carried out through the principle of generalised symmetry, neither humans nor things have priority. As this approach might seem radical – to assume that the things–humans relationship is symmetrical (i.e. non-hierarchical) – it is, however, an analytical means to emphasise what happens in the material encounter between the world and humans (Bille & Sørensen, 2019, p. 618).

Accordingly, this activation of objects as non-human actors (Jensen, 2004a, p. 231) offers a way to rethink the place of humanity in the world, which is central to 'posthumanist' or 'anthropocene' theories (Jensen, 2004a, p. 241; Orlikowski, 2007, p. 1435). Although there are nuances to the

different approaches and disagreements in terms of which foci is most important, posthumanist theories generally share the same goal: of decentralising the human subject to focus on things as active and material co-creators of social worlds (Rosendahl Thomsen, 2019, p. 642).

The principle of generalised symmetry is a way of questioning what is 'active' in the humans–things relationship, which takes us beyond an instrumental view of objects to analyse the world in a more complex and nuanced manner and which entails withholding from automatically ascribing the active, determining role to social actors in how events unfold (Bille & Sørensen, 2012, p. 63). As Barad explains, matter is an active participant in the world's becoming (Barad, 2003, p. 803), and things also play an active part in the creation of social worlds. Things are neither lifeless objects nor shallow accessories (Bille & Sørensen, 2019, p. 614); they have *agency*, as Alfred Gell (Gell, 1998, pp. 21–22) formulates it. However, the agency of things is not to be confused with the notion that humans and technology are alike, since, for one, things have no intentions (Bille & Sørensen, 2012, p. 63). Rather, material objects have 'effects' and interact in a dialectical relationship with human actors (Bille & Sørensen, 2019, pp. 613–614). In this thesis, agency is therefore to be understood in terms of material phenomena playing an active role in shaping the conditions under which events unfold (Bille & Sørensen, 2012, p. 63). Accordingly, in the posthumanist or nonhumanist regime, both human and non-human actors are seen as agents of change that help to shape the (scientific) object in an interplay; or, as Lupton phrases it: The 'more-than-human' approach provides "a relational perspective that views humans and non-humans as interconnected and trans-agential" (Lupton, 2020, pp. 23–24).

The non-humanist and posthumanist perspective is useful even if one cannot disregard the emphasis on the human perspective in the study, as it ensures an awareness of "what is being active and how it is being active"[21] (Bille & Sørensen, 2012, p. 64) rather than assuming that humans are the central actors in the given context. This provides the researcher with an awareness towards biases as, according to Rosendahl Thomsen, it "forces oneself beyond the view of the world shaped by humanity" (Rosendahl Thomsen, 2019, p. 642).[22] Accordingly, the posthumanist

[21] This quote has been translated by the author from the original language.

[22] Author's translation of original language.

can simply focus on how the world would look different when one does not privilege the human perspective, or when one is able to question the idea of the autonomous subject (Rosendahl Thomsen, 2019, p. 647).

3.1.3 The partial existence of digital remains

Translated into the research project, the philosophical assumption is that 'digital remains' are a changeable and distributed phenomenon – something unsettled, vague and in the making – and thus "not-yet-quite-existing" (Jensen, 2010, p. 20); rather the phenomenon is continuously undergoing development and change, stretching beyond geographical, ontological and spatio-temporal boundaries. Accordingly, as Jensen states, "one cannot determine once and for all whether [it] is discursive or material, local or national, beneficial or harmful, technical or political, or all of these to varying degrees and in various places" (Jensen, 2004c, p. 11). When you therefore go looking for digital remains, you end up finding many things, in many places, at different times, and to varying degrees. Conceptually, for instance, there are many different terms in use, and different meanings seem to be attached to the notion of digital remains (as well as to related terms). And materially, the phenomenon seems to be somewhere between existent and absent due both to its scattered and distributed nature and the many ways the phenomenon of digital remains materialises: sometimes as a Facebook memorial-account, which can be studied through affordances, user-interfaces etc.; at other times as treasured digital and locally stored artefacts (heirlooms) on the deceased's personal computer or in the cloud; and at yet other times, as 'not-quite-et-existing' legal practices. Accordingly, digital remains are subject to ongoing negotiation, are characteristic of the partially existing object, and are continuously shaped and transformed by human and technological efforts in a mutual process (Jensen, 2022, p. 529); in this case, how the object is negotiated[23] and treated through the reported practices of family- and inheritance lawyers in estate settlements and in legal wills and through German case law and, which we

[23] The word 'negotiation' is not used in its conventional sense, where it typically describes a process occurring solely between humans. In this context, 'negotiation' refers to a process in which both humans and non-humans engage in the negotiating the existence and settlement of an object (see also the section 3.2.2).

examine more closely in chapter 6 and 7. For now, let us turn to how to study and where to find the partially assumed, partially existing phenomenon of digital remains.

3.2 How to study and where to find digital remains

3.2.1 Deliberate simple-mindedness and interpretative flexibility

Besides taking on this aforementioned 'symmetrical perspective', where one does not prioritise human perspectives in the analysis, Jensen emphasises the importance of pursuing a "deliberate simple-mindedness" (Jensen, 2010, p. 20) together with an "interpretive flexibility" (Jensen, 2010, p. 20) when investigating a moving target.

Deliberate simple-mindedness refers to an analytical mode of being, where the researcher attempts to be "consciously naïve" (Jensen, 2010, p. 20, 2022, p. 518). Methodically, it involves alienating oneself from common assumptions (Jensen, 2022, p. 529) by letting go of "priories and finalities", as Jensen (Jensen, 2004c, p. 11) states; that is, refraining from thinking that we already know "what it is and what it does" (Jensen, 2010, p. 21) and disregard previous beliefs, ideas and assumptions, in addition to "letting go of deterministic understandings of what the object must turn into" (Jensen, 2010, p. 26). Instead of pursuing what STS researcher and empirical philosopher, Annemarie Mol, calls "epistemological normativity" (Mol, 2002, p. 6), which is prescriptive and tells you how to know an object properly, the researcher must be open and interrogative to societal issues (Høyer, 2022, p. 326).

This disposition entails an analytical strategy that allows the researcher to shift between the representational idiom, where concepts and meanings are the focus of the inquiry, to a more performative idiom, where practice and doings are foregrounded and where things can also 'act'. According to Mol, this is a step away from epistemology, which is concerned with 'reference'; asking whether representations of reality are accurate or not (Mol, 2002, Section preface VII). Accordingly, representationalism is our usual way of thinking about science, which focuses on language, words, representations, meanings and symbolism, whereas how the performative idiom thinks about science is more about the doing of things – practice, performance and agency – and the performative engagements of the human and non-human (Pickering, 2017, pp. 136, 144). In this thesis, a flexible approach involves shifting between Mol's performative "ontology-in-practice"

(Mol, 2002, p. 157) – or a modified version of the concept – and a nominalist approach viewing the object of study as a term with a variable and changing usage (Jensen, 2010, p. 25). Both will be introduced shortly, but let us first turn to the question of where to locate the partially existing object before introducing the data foundation.

3.2.2 Looking for controversies

According to STS, one way to track down partially existing objects is to place ourselves in places where knowledge and technology are still up for negotiation, as opposed to places where socio-technical[24] order has already been settled (i.e. the phenomenon has stabilised) (Jensen, 2022, p. 530). This is done by tracking down "unfinished processes or political or technological controversies",[25] as Jensen (Jensen, 2022, p. 517) and Venturini and Latour write; by turning to controversies rather than areas of consensus (Venturini & Latour, 2010).

But what is a controversy from a non-humanist perspective in the first place? And how is it captured? Firstly, controversies are related to "contemporary socio-technical debate" (Venturini, 2010, p. 258), meaning that they concern scientific and technical issues (Venturini, 2010, p. 265) and must be studied when they are still "unresolved" (Venturini, 2010, p. 264). Past conflicts are *not* controversies, unless, as Venturini states, it is possible to return to the moment the conflict was played out (Venturini, 2010, p. 264). Of other characteristics, controversies must be observable to some extent and open to the public rather than concerning underground issues due to the risk of otherwise "drifting towards conspiracy theories" in which "secretive attitudes" are in play (Venturini, 2010, p. 264). In its simplest form, controversies are "situations where actors disagree (or better, agree on the disagreement)" (Venturini, 2010, p. 261). But there is more to it; according to Venturini, controversies are "the most complex phenomena to be observed in collective life" (because collective life itself is complex), and it is impossible to reduce a controversy to a single question (Venturini, 2010, p. 262). Consequently, controversies are spaces of conflict in

[24] Author's translation from *sociotekniske*. However, Venturini (Venturini, 2010, p. 258) also uses the term "socio-technical".

[25] Author's translation from original language.

which the things and ideas that were taken for granted start to be questioned and discussed (Venturini, 2010, p. 262); and where 'some action is going on' (Venturini, 2010, p. 264); Accordingly, this space of conflict can entail 'open fights' – but does not do so in every case.

To be an authentic controversy, the controversy must not be "cold". Being cold means that there is no actual debate or disagreement among the actors, which results in "boring or partial cartographies",[26] (Venturini, 2010, p. 264). Moreover, controversies are not merely quarrels among humans, as they involve "all kinds of actors"(Venturini, 2010, p. 261). An actor in its broadest sense is "anything doing something" (Venturini, 2010, p. 266), and the identification of an actor merely requires an answer to the question as to whether, 'the given actor's presence or absence makes a difference and is perceived by others' (Venturini, 2010, p. 266). Consequently, these beings are all actors in the "battlefield" of contemporary socio-technical debate – although their power might be unevenly distributed. As Venturini explains "Arctic seals and political leaders were both concerned by the Bali climate conference, but the second were probably slightly more influential" (Venturini, 2010, p. 266),. These different human and nonhuman actors in a network are not to be considered isolated actors, but they engage in networks – or, rather, 'worknets' as Latour turns the phrase (Latour 2004, as cited in Venturini, 2010, p. 267) – and they are constantly working at tying and untying connections. The continuous renegotiations are either 'motivated' by the desire for change or the maintenance of the status quo; either way, the "actors are constantly striving to reduce the complexity of their interactions" (Venturini, 2010, p. 263) and "aspire to some kind of stability" (Venturini, 2010, p. 267). According to Venturini, this is since social order and social hierarchy is at stake (Venturini, 2010, p. 267). To summarise Venturini, controversies are "where collective life gets most complex: where the largest and most diverse assortment of actors is involved; where alliances and opposition transform recklessly; where nothing is as simple as it seems; where everyone is shouting and quarrelling; where conflicts grow harshest" (Venturini, 2010, p. 262).

In this dissertation, the techno-scientific controversy (or partially existing object) – which involves the negotiation in many different 'worknets' involving many different actors – concerns the settling of the existence of digital remains. The negotiation process is investigated through two different

[26] In Venturini's (2010, p. 258) work, 'cartography' refers to the mapping of controversies and entails techniques for exploring and visualising issues.

situations: German case law, that treats the question of how social media data is to be treated postmortem (cf. the BGH Facebook case) and eight interviews with lawyers regarding their work in relation to digital objects in decedent estate and will making (cf. Lawyer study).

The versions emerging from these legal doings (i.e. the lawyers' reported practices and court settlements) are connected to an 'overall' negotiation among social and material actors about the phenomenon's existence and, thus, its settlement. Whether it is property, privacy or merely social media profiles and accounts to be terminated? This also means that had we observed and described practices (as part of ethnographic fieldwork) within, for example, the tech industry or the private family involved in the mentioned court case, yet other versions and configurations of the digital remains would have appeared. It is worth noting that when I use the term 'enactment', it is to anchor the material and symmetrical (non-humanist) foundation into the analysis of the empirical material, which is mainly merely textual and language based. However, it is primarily through observed physical practice that we can speak of an 'object being enacted', according to Mol (see 3.2.4.1).

The two situations represent, respectively, an 'explicated' vs. a more 'subtle' conflict, both of which centre around postmortem conflicts (but do not treat the same case). Their overlap is that they generally investigate the treatment of data and devices in postmortem settings; apart from that, they are distinct. The German court case represents an open, public controversy with unconcealed differences of opinion**,** which treats the legal question whether social media data should be treated as personal information to be protected against third-party access or as family heirlooms to be inherited. The other study constitutes interviews with lawyers practicing family- and inheritance law, who are approached with questions regarding their conceptual and practice-anchored understanding of digital remains. The questions centre around their 'reported' treatment of data and digital devices in will-making and decedent estate settlements, and contrary to the case law, the conflict is dormant from the outset in this second study. Accordingly, it grows out of the conversation with the lawyers and starts to appear especially when the inquiry becomes materially focused; that is, when questions address their handling of digital data and devices in estate settlements.

We will turn to analyse the two 'explicated' and 'subtle' controversies in chapters 6 and 7; for now, let us turn to what being a nominalist entails.

3.2.3 Being nominalist

According to Jensen (Jensen, 2004c, p. 9), another strategy for exploring the partially existent object is being a nominalist, which means treating the scientific object as a word in the first instance (but not necessarily in the last). To the nominalist, a word is simply a pointer, much the same way Blumer's notion of "sensitizing concepts" merely suggests "directions along which to look" (Blumer, 1954, p. 7). Alberto Marradi also provides a good explanation for the necessity of what he refers to as a being a "conventionalist" (see Gobo & Marcheselli), which much in the same way treats words as labels rather than as "the perfect reflection of the thing". In other words, the referent (the thing or object), the meaning we attribute to it (the concept), and the word we use to name it (the term) are one and the same (Marradi, 1994, as cited in Gobo & Marcheselli, 2023, p. 9). The Marradi quote is cited here directly without further explanation, as it is rather self-explanatory:

1. There are different things which are designated by the same name (or word).

2. Sometimes the opposite is true: the same thing is designated with different

names (this is the case with languages).

3. The name of a thing can change and often.

4. There are multiple ways in which names are related to things (Marradi 1994, as cited in Gobo & Marcheselli, 2023, p. 10)

The nominalist approach serves as a methodological starting point to avoid the user having an excessively narrow perspective for exploring the phenomenon, instead providing "a general sense of reference and guidance in approaching empirical instances" (Blumer, 1954, p. 7). Because on the contrary, we need concepts to "know where to look, what to look for or how to recognize it when you find it", as Becker and Becker explains (Becker & Becker, 1998, p. 110). Jensen formulates the nominalist approach as follows:

> Methodologically, this entails that one takes serious the assumption that any entity is a word in the first instance (…) but not necessarily in the last instance, since the point of following the process whereby objects garner partial existence is precisely to learn how it is possible for actors to undergo ontological phase-shifting, from being mere words to becoming properly technological objects with well-known and reliable capacities and functions. (Jensen, 2010, p. 26)

The idea is partly to ensure that officially or institutionally sanctioned perspectives are not simply replicated in the analysis (Jensen, 2010, p. 24). Methodologically, it entails not confining oneself to a specific term or letting a definition be the endpoint for the theoretical-conceptual orientation and search. Instead, as Blumer suggests, it entails "directions along which to look," (Blumer, 1954, p. 7) and it is regarded as one concept or perspective among many with a more or less clear relation to the phenomenon. Conversely, I had to start somewhere, and words and concepts have provided inspiration for where to look for the phenomenon, thereby functioning as theoretical-conceptual 'clues'.

Turning to the project, I began my search for articulations and specifications of the phenomenon in the theoretical-conceptual realm (i.e. in words and concepts), as literature can function as the "first level of articulation" (Venturini, 2010, p. 266). At the same time, literature can be "as dynamic and disputed as controversy themselves" (Venturini, 2010, p. 266). The investigation of these 'first-level articulations' consisted in identifying scholarly terms and descriptions that seemed to relate to the object of study on a descriptive level, albeit not necessarily explicitly labelled 'digital remains' or 'digital legacy'. Moreover, online searches for *digital arv* were made, which functioned as theoretical-conceptual clues for where to look, which led me to the family- and inheritance lawyers I later interviewed (cf. the lawyer study).

3.2.4 Investigating the doings of digital remains

Annemarie Mol's "empirical philosophy" (Mol, 2002, p. 4) takes us past the dichotomy between "the knowing subject" and "the objects-that-are-known" (Mol, 2002, p. 50) to study how objects are being manipulated in practice. As stated, Mol introduces a performative aspect to studying phenomena with her 'praxiographic' approach which takes us from the "representational idiom"

(Jensen, 2004a, p. 232), beyond the level of language, and to the performative idiom focusing on practices (or manipulations) and doings. In the performative realm, the focus is no longer merely on different perspectives of the object, understood instead as how different practices enact a given object (Mol, 2002, p. 32; Ratner, 2021, p. 146). As Mol states:

> This one [book, ed.] does not speak of different perspectives on the body and its diseases. Instead, it tells how they are done. (Mol, 2002, preface, vii)

Accordingly, rather than applying or confirming the correctness of existing concepts (Ratner, 2021, p. 157), the focus is on the 'enactment' of different versions of the object through sociomaterial and situated practices, since it is the empirical situations that demonstrate the object's multiplicity (Jensen, 2022, p. 520). In fact, it is the different enactments that make them fundamentally multiple, ontologically speaking, and which make them become realities and not just perspectives (Bille & Sørensen, 2012, p. 61). As Mol writes:

> If practices are foregrounded there is no longer a single passive object in the middle, waiting to be seen from the point of view of seemingly endless series of perspectives. Instead, objects come into being – and disappear – with the practices in which they are manipulated. And since the object of manipulation tends to differ from one practice to another, reality multiplies. (Mol, 2002, p. 5)

To use an illustrative case, Mol carries out an ethnographic study of the disease atherosclerosis in a Dutch university hospital in 2002. Here, while following the day-to-day diagnosis and treatment of atherosclerosis, she discovers how the disease is being 'enacted' though the hospital's various practices, multiplying the object into different versions from site to site. The pathologist enacts the disease as "a thick intima of the vessel wall", whereas the physician in the outpatient clinic enacts atherosclerosis as "pain that follows from walking" (Mol, 2002, p. 48). According to Mol, both versions of atherosclerosis are real-enough versions of the disease as "complaints are not more real than size of vessel walls" (Mol, 2002, p. 48). However, while both versions have a 'single' disease as their referent (Mol, 2002, p. 36), the object is enacted differently from site to site, which causes it to be distributed and multiple (without being understood in plural, however):

> (…)a single disease that in practice appears to be more than one – without being fragmented into many. Thus, a body may be multiple without shifting into pluralism (Mol, 2002, p. 151)

The different versions can then either align Mol, 2002, p. 40) or clash (Mol, 2002, p. 46). If they clash, however, then in practice one version will be privileged over the other (Mol, 2002, p. 47). Incompatibility thus becomes a practical matter (Mol, 2002, p. 35), as Mol states; and conversely, an absence of clash in terms of "a full-blown fight" (Mol, 2002, p. 104) does not necessarily imply consensus. It simply signals a lack of overlap between practices (Mol, 2002, p. 112). The different versions of reality can thus exist and co-exist, without necessarily ending with open conflict.

According to STS researcher Anders Kristian Munk, they are rarely open conflicts with distinctive sets of advocates and opponents. In fact, controversies are often silent, maybe dormant, and invisible forms of inconsistencies and disagreements, which upon closer examination contain a complex of many different layers of being 'for' and 'against' (Munk, 2021, p. 106). As Munk states, "it is not necessarily (…) about clear disagreements and sharply defined frontlines, but about overlapping and mutually dependent realities that (…) flow into each other"[27] (Munk, 2021, p. 107). Accordingly, to understand and capture this complexity, the researcher must be "slowing down and looking at which realities are being practiced from situation to situation"[28] (Munk, 2021, p. 107).

The second study of this thesis investigates how digital remains are treated in (legal) practice through legal argumentation, provisions and laws. Specifically, it analyses how posthumous social media data is enacted across a series of German court cases, respectively, between Regional, Appeal and Federal settlements that treat the same event. The court case represents a negotiation process, an ongoing and significant controversy, involving negotiations about whether the phenomenon is property or privacy. The two versions of digital remains cannot coexist in the court case, and, as Mol phrases it, they are practically incompatible. Accordingly, one version must be chosen over the other. The German court determines that social media data (the account) are to be legally conceptualised as property to be inherited. It therefore rejects the notion of deceased having a postmortem right in the form of privacy or data protection, since this is not written in any German laws. It is thus the 'property-view' that counts as real, and the consequence of the ruling

[27] Author's translation from original language.

[28] Author's translation from original language.

is that the version of digital remains as property stands a little stronger for now, in Mol's sense of enactment.

3.2.4.1 The concept of enactment

Turning to the empirical foundation of this thesis, the term 'enactment' is used as an analytical term to emphasise that "anything is doing something", as Venturi (Venturini, 2010, p. 266) explains the connection between human and nonhuman actors in sociotechnical controversies, and that these doings are part of a collective, "shared uncertainty" (Macospol, 2007, in Venturini, 2010, p. 260) on on what digital remains is or isn't. Even though, in the context of this thesis, the term is applied in relation to a "textual universe" (Venturini, 2010, p. 266) – whereas the original application of enactment in Mol's work is employed in relation to ethnographic, situated research extending beyond different field sites (outpatient clinic vs. pathology) (Mol, 2002, p. 35) – the term is still useful.

What it does is that it anchors (from a textual offset, at least) parts of the philosophical foundation of STS into the analysis of empirical material of this thesis. This anchoring occurs by the concept directing attention to the 'doings' that take place in the (interview) situation (albeit verbalised and constructed), which extends beyond 'human's use of and perspective on things'. Additionally, the concept ensures that analytical attention is brought to non-human, material actors; or, as Mol suggest to focus on the active engagements of materials in the enactment of reality, including, for example, browsers and laptops, which also 'act' in the (postmortem) situation, and whose doings one could easily overlook as, by habit, one tends to favour/prioritise the human perspective.

Accordingly, the concept invites us to focus on the material and performative aspects of the situation in which practice is foregrounded and in which both human and nonhuman actors are at work in an attempt to settle the ongoing and socio-technical dispute over the object's existence (i.e. digital remains).

The term is applied as an analytical perspective in the investigation of two (empirical) postmortem studies in terms of, respectively, a lawyer study and a court case. The former refers to a series of interviews with family- and inheritance lawyers focusing on the handling of digital objects in estate

administration, while the other refers to a German lawsuit that treats the question of how accounts and data are to be treated postmortem. This negotiation process (manifested through legal arguments and provisions) is analysed using secondary and tertiary documents originating from the period 2015–2020 (when the rulings took place) and investigates how posthumous social media data is enacted through legal practice (see section 5.3).

In both situations, one could say that the object of study is 'enacted' differently – most obviously as either property or privacy – through different legal practices. In the lawyers study, the object of digital remains is negotiated through the material presence (and absence) of devices, heirs, probate, inheritance and family lawyers, laws (GDPR, DPA) etc. Consequently, digital remains come into being as, respectively, social media profiles of deceased, as property-like, and as information-like. Likewise, in the German court case, digital remains are negotiated across courts, all of which help to shape the object in an interplay and enacted as, respectively, property and privacy in the two different court practices.

3.2.4.2 The concept of multiplicity

Just as the concept of enactment in this paper is applied to textual universes – where actions are not understood as firsthand observations of material, concrete practices across physical locations, as in Mol's work, but solely as practices described in the interviews – the concept of multiplicity is also slightly modified here.

My application of the concept of multiplicity does not fully align with what Mol recommends in her empirical-philosophical approach. Mol emphasises that researchers should observe physical practices directly, rather than solely interviewing informants about them, although she acknowledges that interviews can also provide insights into how concrete practices are carried out (see 5.2.2 for further discussion of Mol's viewpoint). The key is to gain sufficient insight into the concrete practice so that the researcher can assess whether there are different (multiple) versions that are incompatible and therefore risk 'colliding'. Another caveat is that the empirical basis of this dissertation is somewhat limited in assessing potential incompatibility and multiplicity. Partly because the empirical foundation is solely textual and partly because the empirical data is limited

in scope both in terms of 'field sites' and 'actors' (2, lawyers mainly), 'methods applied' (interviews and documents) as well as area of investigation (legal only).

The common denominator between STS and my approach is, however, a material focus – where 'material' in this thesis should be understood as 'the subject's own descriptions of their interaction with the object'. In addition to bringing material aspects to the forefront through interviews, these described practices are viewed symmetrically, meaning that material actors (e.g. computers, browsers, legal wills) are emphasised in the analysis alongside social actors. Speaking of the social and material, it is important point to mention that Mol does not distinguish between the discursive and material elements in a practice. I fully agree with her on this and, in the following, this distinction is applied solely on an analytical level. The material and social are mutually shaping cornerstones of socio-material realities, which will be addressed in Chapter 9.

3.2.5 Summary

This chapter has outlined the philosophical and methodological foundations of the dissertation, which primarily draws on STS researcher Casper Bruun Jensen's non-humanist approach. The general focus of the dissertation is to understand how digital remains come into existence and with what consequences, which, put differently, means that the object is perceived as unsettled and partially existent. The goal of the thesis is to identify and articulate the active constructs of phenomena, which are to be understood as the result of continuous efforts of both humans and non-humans (Jensen, 2022, p. 529). We will examine what this means more concretely in chapters 8 and 9, but moving forward, we will take with us, the notion that digital remains is not yet a settled phenomenon and we will begin our exploration where there is still disagreement and 'some action' going on, as Venturini suggest. Specifically, we will analyse how the object of study is enacted in different two different, legal settings – in decedent estate settlement and in a German lawsuit (chapter 6 and 7) – and methodically, a symmetrical and open-minded attitude will be applied. First, however, we will review different conceptualisations of digital remains (chapter 4), and thereafter move on to review the methods and analytical apparatus applied in the thesis.

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4 Conceptualisations of digital remains

Introduction

The notion of digital remains is often referred under the wider term “digital afterlife” (Carroll & Romano, 2011; Savin-Baden & Mason-Robbie, 2020a), “digital immortality” (Bell & Gray, 2001; Kneese, 2016, 2023; Savin-Baden & Burden, 2019) or the older term “thanatechnology” (Bassett, 2022; Sofka, 1997); which, however, has gradually fallen out of use. Other concepts entail the notion of ‘digital heritage’, ‘digital inheritance’, digital legacy’, ‘posthumous data’, ‘digital remains’ or the older ‘technology heirlooms.’ However, the boundaries between these (i.e. the conceptual differences and overlaps) are not always clear.

In fact, both terminology and definitions of the digital afterlife are constantly evolving in this growing body of literature. New concepts are introduced, different concepts are sometimes labelled the same way, and occasionally, it seems that the same phenomena are being labelled differently. Legal, Dutch scholar Tweehuysen uses e.g. the term “digital inheritance” as an umbrella term to discuss the status “of all kinds of ‘digital things’ in the realm of patrimonial law: domain names, virtual goods in online gaming environments, cryptocurrencies, online shopping credit, data(files) such as pictures and e-mails, and so on” (Tweehuysen, 2019, p. 1150).

Consequently, the notion of the digital afterlife – and other adjacent terms – encompass many different understandings of the phenomenon spanning from philosophical ideas of digital immortality (addressing questions such as e.g. digital death as secular or religious), online memorial culture, ‘online’ grief and mourning practices, virtual cemeteries, digital funeral practices etc.

However, there seems to be a persistent lack of conceptual clarity which has been present for some time now. Debra Bassett called for conceptual clarity as early as 2015 (Bassett, 2015), and still in 2024, Harju continues to emphasise the lack of ‘conceptual robustness’, stating that;

> The concept thus suffers from being applied too broadly to refer to ‘all the digital material and data people leave behind in death’ on commercial platforms and personal hard drives, which takes away from the explanatory power of the concept. (Harju, 2024, p. 2)

Nagy and Kiszl e.g. considers ‘digital legacy’ “(…)all data that exists in a digital form, the creation of which can be linked to any given person”(Nagy & Kiszl, 2020, p. 386), just as Burden and Sabin-Baden defines the digital afterlife (citing Basset) as “any [static, ed.] information that exists in digital form after death and includes social media profiles, email, online shopping accounts, digital music and photos, as well as account information, digital assets, and digital property (…)”(Savin-Baden & Burden, 2019, p. 91). Conversely, other concepts suffer from being defined too narrow and limited such as being reduced to an instrumental role of the bereaved or restricted to concrete objects such as photo libraries, social media profiles, emails etc. But as Harju, who uses the term ‘digital afterlife’, states, the digital afterlife “(…)entails the use of digital material of the dead in other contexts and for other purposes, from public performances of solidarity and memorialisation (…) to mobilisation of grief (…)for social and political change, but also more sinister circulation of data of the dead (…) (Harju, 2024, p. 2).

The goal here is not to establish a definitive concept, as the theoretical foundation is too limited for that (and it is also not the purpose of the thesis as a whole either). Instead, this chapter aims to provide a glimpse into some of the theoretical understandings of digital remains, which are by no means exhaustive, and the chapter thus serves as a theoretical background for the thesis on the one hand. On the other the theory presented, or parts of its, will help illuminate the effects of the ‘socio-material doings’ of actors later on (in chapter 8).

The thesis applies the term ‘digital remains’, which on par with Harjus’ notion of ‘the digital afterlife’(Harju, 2024), is to be understood as a broad concept extending beyond specific technologies, application methods, use scenarios, symbolic meanings etc. as we shall see in chapter 9. In brief, the concept of digital remains is suggested to be conceptualised as a socio-technical reality which is shaped by the mutual ‘doings’ of social and material (or technological) actors, which extends beyond representational understanding. The idea is to offer a broader and more adaptable interpretative frame for understanding the phenomenon in question, which is more flexible and dynamic in capturing its multiplicity, complexity, and constantly evolving nature.

The theoretical background in terms of various ‘digital-remains concepts’ are presented in the following and provides insights into both older and newer ones concepts and interpretations of the digital afterlife. However, it is primarily the term 'digital remains, 'digital legacy, and the 'digital

afterlife' that have guided the search and selection of literature, along with descriptions of the phenomenon that seem to overlap with these concepts. Additionally, the concepts presented is rooted in Western cultures and traditions only, which share somewhat comparable views on death and dying.

4.1 Thanatechnology, technology heirlooms and thanato-sensitive designs

One of the first scholars to bridge together the notion of death and technology is Carla Sofka, who coined the term “thanatechnology” in 1997. The prefix 'thana' is derived from ‘thanatology’, referring to the study of death (McCord & Morse, 2020). ‘Technology’ encompasses in these early internet-days mostly different types of websites such as online forums and chat rooms. Websites, forums or blogs which either provides opportunities for social and functional support to individuals and their families who cope with life-threatening illness, the process of dying, or grief, as Sofka states (Sofka, 1997, p. 545) or e.g. provide spaces for terminally ill individuals that enables these individuals to take control of their finite time such as “thanablogs” (Cupit et al., 2012).

In the early days of research in this field, the phenomenon is primarily studied within the HCI (Human-Computer Interaction) domain. Accordingly, other early scholars to join the conversation around the digital afterlife are[29] HCI scholars Michael Massimi, William Odom, Richard Banks, David Kirk and Andrea Charise, who in the early 2010s takes an interest in the design of “thanato-sensitive technologies” (Massimi et al., 2010; Massimi and Charise, 2009) and “technology heirlooms” (Banks et al. 2012; Odom et al. 2012). Thanato-sensitive designs generally focus on actively integrating facts of mortality, dying, and death into the design and development of technology, whereas ‘technology heirlooms’ refer to design-led processes of investigating the potentials of digital remains (as design objects).

Yet other areas of Human-Computer Interaction research investigate the role of technology and digital artifacts in the process of bereavement, remembrance, preservation, bequeathment and

[29] “Human-Computer Interaction is according to HCI scholars Maciel & Pereira a multidisciplinary field and human-centred approach to the design and development of computer-based technologies (Maciel & Pereira, 2013, p. ii).

the ‘stewarding’ of digital artefacts to address death-related issues and generally support ‘death-centric practices’ in the development and design of systems (Brubaker et al. 2014; Massimi & Baecker, 2010, 2011; Odom et al. 2009, 2010).

In 2011, HCI researchers Evan Carroll and John Romano published one of the first books (not anthology) on the topic, titled “Your Digital Afterlife: When Facebook, Flickr and Twitter Are Your Estate, What's Your Legacy?”. The pioneering book provide a hand on guide on how to manage and secure one’s digital legacy and presents one of the first conceptualisations of the phenomenon in terms of ‘digital heirlooms’ belonging to the dead (e.g. photos, emails, videos), and which must be attended to by the individual:

> Email, photos, videos, Facebook accounts – they’re the elements of your new digital life. In fact, almost without realizing it, we have shifted toward an all-digital culture. Future heirlooms like family photos, videos, and personal letters, are now created and stored in digital form. And increasingly they’re stored online at popular sites that might not be accessible to your loved ones after you pass away. (Carroll & Romano, 2011, p. 2)

Accordingly, in these nascent research years the concept of the digital afterlife is primarily understood as ‘design objects’ (technology heirloom), design-led processes as visual and textual digital creations (digital heirlooms) such as photos, videos, Facebook profiles, and emails (digital artifacts) or as design principles for developing sensitive systems that considers and integrates aspects of dying, and death into technology.

4.2 Digital remains as ‘objects of the deceased’

What is implicated, but not always explicated, is a general understanding of digital remains as treasured (material) objects, which are valuable and instrumental to mourners and bereaved for different purposes such as morning, comfort, commemoration, memorialisation and remembrance. The bereaved interact with the objects, digital ones too, as these “objects of the deceased” (Walter et al., 2012, p. 293) essentially embodies, represents or otherwise connects the deceased. As Bassett states: “(…)the dead’s digital artefacts are experienced by the bereaved differently from physical artefacts(…) because, for many inheritors, these digital memories and messages embody the essence of the dead”(Bassett, 2022, p. 21).

While I disagree with the notion of 'essence' here, objects have the potential of representing or linking to the dead in different ways, and as Pitsillides et al. states, citing Flusser (1990), "[material] objects contain memories of how they were used and who used them in their material culture which is initiated by our interaction with them and the traces of our presence we leave on them" (Pitsillides et al., 2012, p. 82). There are many theories on these inherent or evoked qualities of the objects of the deceased (e.g. in terms of their capability to evoke memories and stories, continuing bond etc); however, scholars agree these include 'capabilities' pertains to digital objects as well. As Pitsillides states:

> In today's society we are increasingly living with blended collections of physical, digital, and hybrid artifacts (…) which hold a wide range of meanings and sentimentalities [which] (…) for a range of idiosyncratic reasons (…) cannot be fully defined. (Pitsillides, 2019, p. 429)

According to Pitsillides, the postmortem emotional value of memorials – concerning both digital, material and hybrid objects – are also constructed through the form and use (i.e. through the bereavement process) of the objects and not just via their semiotic values. The materiality and agency of the things matter too, and consequently, Pitsillides argues that how we respond to things emotionally is bound to 'material experiences' of things as well (i.e. sensorial, affective, interpretive and performative ways of experiencing), including 'digital, material experiencing' such as linguistic, sonic, pixel and temporal structures (Pitsillides, 2019, p. 429).

O'Connor emphasises another quality or value of what she terms "posthumous digital material" (O'Connor, 2020) and its capability of supporting 'bond continuation' between the living and deceased,[30] which, according to O'Connor, is crafted around the griever's ongoing use, relation and experience with posthumous digital materials (O'Connor, 2020, p. 40) and "(…) involve griever's open-ended, creative storying of their departed; drawing on the life of the dead, but told through the prism of the ongoing, changing experiences of the socio-culturally situated bereaved"

[30] Bond continuation refer to the theory of continuing bonds (Klass et al. 2014), which is a contemporary theory on grief opposing older ones such as Freud's which frames grief as time-limited process (Pitsillides, 2019, p. 433). It proposes an understanding of grief as something that enables people to maintain a continuing bond with the deceased – in this case through object's and materials relating the dead and the living. However, not as form of denial, but as way of survivors finding places for the dead in their ongoing lives (Klass et al. 2014).

(O'Connor, 2020, p. 40). They are not juts agreed upon stories and objective facts about lived lives true or uniform for all grievers, as O'Connor states. Additionally, these posthumous materials have the potential to live on, provided that they blend the history of the dead with the ongoing lives and experiences of the bereaved. As O'Connor states, "[t]hese creative, narrative, relational accounts of the dead, which interweave history and story, fact and construct, record and rendering, make for posthumous representations that live on because they are born off, and continuingly pertinent to, survivor's ongoing lives (O'Connor, 2020, p. 41).

Basset also supports the idea of an ongoing relationship with the dead through what she calls "digital memories and messages" which enrich ongoing digitally facilitated bonds and relationships between deceased and bereaved through thana-technologies (Bassett, 2022, pp. 140–142):

> We now carry precious digital memories and messages of the dead on our everyday devices, making it easier than ever to feel close to the dead and to continue a dynamic and ongoing relationship with them. (Bassett, 2022, p. 140)

4.3 Digital remains as 'online media memorials'

Another conceptualisation of digital remains is that of 'online media memorials'. The concept have been labelled and interpreted many different ways (Allison et al. 2023; Nansen et al. 2021; Öhman & Floridi, 2017; Walter et al. 2012, p. 292), and typically, but not always, refer to digital afterlives as connected to the postmortem application of social media sites or platforms.

Öhman and Floridi identify 'online memorial services' as one of the four main categories of digital afterlife services. They describe these as commercial digital spaces, with emphasis on commercial, for the deceased individuals or groups to be mourned and/or remembered and a place where the bereaved can interact with the digital remains of the deceased in terms of uploaded photos, videos and other forms of informational entities (Öhman & Floridi, 2017, p. 646).

> Due to its size and central position in society, the most relevant example of Online Memorial Services is Facebook. Facebook ''memorializes'' the profiles of their dead users, and uses them as a means to produce surplus attention and user activity from the bereaved, which in turn can be sold to a third party. (Öhman & Floridi, 2017, p. 652)

Brubaker and Callison-Burch use the term "Facebook memorial",[31] which, as they state, can take on many forms and serve many purposes:

> Post-mortem accounts and profiles serve a variety of purposes, from digital artifacts (…) to personal archives (…), as well as online memorials (…) and gathering places for online communities. (Brubaker & Callison-Burch, 2016, p. 2908)

In addition to being digital artefacts, personal archives and online communities, they describe the Facebook memorial as a design for the living, which is "reappropriated" for the purpose of memorialisation practices (Brubaker & Callison-Burch, 2016, p. 2909) – an aspect which is a key differentiator as the usage and purpose of the profile changes from the antemortem to the postmortem. In comparison, online memorials could also refer to designated online communities and spaces, which are intentionally created and authored by bereaved for the purpose of memorialisation, mourning and social support through communication with other mourners (Christensen & Sandvik, 2013). In other words, digital spaces which is not reappropriated postmortem, but are designed for the bereaved individuals from the outset such as the Danish afdoede.dk (afdøde.dk, 2024), which was previously labelled mindet.dk.

This distinction between memorials as spaces or objects that are either 'purposeful or accidental' is already put forward in 2014 by Moreman and Lewis, who state that:

> A Facebook profile can function as a space for mourning, which is broadly defined as any outward expression of grief. It can also become a memorial object created, whether purposefully or accidentally, as an act of memory preservation." (Moreman & Lewis, 2014, p. 24).

In Georges' typology of memorial sites attention is drawn to the shift in authorship, level of control and intentionality of the memorial sites. Georges distinguishes between first-, second-, and first-person memorial sites, where first-person memorials are sites that proposes users to create and manage the data while they are still alive in view of their future death (first person). Second-

[31] Jed Brubaker's research has informed postmortem data management solutions deployed at Facebook such as Legacy contact.

person memorial sites are sites created by users during their lifetime and then transformed after the user's death into a place for grieving and remembrance (reappropriated purpose, such as Facebook), whereas third-person memorials are created from the user's entourage *after* their death (Georges, 2017, p. 6). While some scholars emphasise the "intentionality" or "accidenticality" with which a posthumous site is created – such as Bassett (Bassett, 2022, p. 6), who distinguishes between "accidental posthumous sites" designed for the living (e.g. Facebook, Twitter) and "intentional posthumous sites" designed for the dead" (e.g. LifeNaut, Eternime) (Bassett, 2022, p. 6), Bollmer, however, points out how it ultimately makes no difference to the algorithm: "For the algorithms that undergird social networks, there is no clear functional difference between a living user and deceased one" (Bollmer, 2013, p. 146).

4.4 Digital remains as (cultural) digital heritage

Another conceptualisation of digital remains, which e.g. are perceived within the field of library and information science, is the understanding of digital remains as 'digital heritage'. The notion refers to repositories of digital material artefacts and memorabilia, which are valuable in that they represent or trigger memories of the past events and people, or as Pitsillides el al. phrase it: "narratives and artifacts (…) play[ing, ed.] a key role in keeping the memory of ancestors people alive" (Pitsillides et al., 2012, p. 86). Accordingly, (digital) cultural objects are valued and preserved for their connection to and representation of historical events, culture and society, and can be either 'digitally born' content or 'digitised content' (Digital Bevaring - Rigsarkivet, 2024). Similar to analogue 'historical artefacts', digital artefacts represent "historically or culturally significant memories" (Conklin, 2013, p. 11), which can become an important part of the historical record or even the basis for cultural communication and popular entertainment.

According to Nagy and Kiszl it is due to their sentimental value for successors or historians, which becomes apparent only after their death, they are considered valuable:

> There is a lot of digital data that is not considered valuable by the creator during their lifetime, the importance of which becomes apparent only after their death. A seemingly worthless photograph in a smartphone's memory may have incredible sentimental value for successors or historians. (Nagy & Kiszl, 2020, p. 387)

Pitsillides, Waller and Fairfax describe digital heritage as "[t]he accumulation and curation of digital data online, which could form the basis of an inexhaustible resource containing the exact documentation of our digital past "(Pitsillides et al., 2012, p. 90), and which has the "potential to provide a detailed account (…) of our present Digital Heritage: comprising of society, identity and culture" (Pitsillides et al. 2012, p. 77).

Issues pertaining to the digital, historical records, or as Pitsillides et al. state "digital information for historical sociological use(Pitsillides et al., 2012, p. 87), typically concerns the notion of long-term preservation, curation and maintenance of digital archives (Hawkins, 2013; Nagy & Kiszl, 2020), which cultural institutions (i.e. libraries, museums, and archive) attends to.

However, the question is if this collective, public memory is to be understood in traditional terms as "purposeful collections of digital surrogates" (Price in Harris, 2016, p. 47), or if the notion of heritage and archives encompassing electronic repositories holding "unorganized cluster of narratives", such as the Google search engine as Pitsillides et al. point out:

> Where should this information relating to ones 'digital lives' exist, including after death, and what should its context be? Should it be placed in a digital museum, at a funeral or in a historical archive? (…) Already it is possible to "Google or look up in Wikipedia hundreds of thousands of the dead" (…) However, one can question what results from this unorganized cluster of narratives of a person's life, and what can one learn about a person by simply Googling them. (Pitsillides et al., 2012, p. 84).

4.5 Digital remains as mundane informational trails

The concept of digital remains is also elaborated by Morse & Birnhack in 2019 who states digital remains as "digital informational trails of ordinary people" (Morse & Birnhack, 2020a, p. 110). While, Nagy and Kiszl also refer to the notion of digital remains as being "seemingly worthless" (Nagy & Kiszl, 2020, p. 387), it is only until the occurrence of death, as stated above. Likewise, the 'mundane trails' in the context of 'digital heritage', for instance, assume an intrinsic value of the digital object as it bears witness to 'the everyday' for futures. Morse and Birnhack seem to be using the characteristics of the mundane and trivial in another sense – in opposition to financial

values and sentimental values – but without, however, being very elaborative. According to them, data does not always convey a set of values and beliefs but can be trivial and dispensable (author's wording) too and they suggest refrain from using the term 'digital assets' and 'digital legacy'. This is since 'asset' assumes from the outset that personal digital content is property, whereas 'legacy' glorifies the data left behind, and instead they propose using the more inclusive term "digital remains" (Morse & Birnhack, 2020a, p. 110). While it is difficult to deduct if what Morse and Birnhack's mundane and trivial data connotates data that are indifferent, excess data or even "data waste"[32], a metaphor offered by Gregg (Gregg, 2015 in Lupton, 2020, p. 46), their point is simply that data and digital content is not necessarily treasured and valuable always. In addition, Morse and Birnhack (2019, 2020), Birnhack and Morse (2022) go on to suggest a classification of digital remains constituting, which we will explore next.

4.6 Different types of digital remains

Several 'death tech' scholars have attempted to refine and clarify terminology by suggesting typologies and subdivisions of the notion of digital remains (Bassett, 2015; Kasket, 2019; Morse & Birnhack, 2019, 2020a; Rycroft, 2020) and the digital afterlife industry (DAI) (Öhman & Floridi, 2017). They all offer different classifications based on data types, business models (of companies), applicable laws and other.

In early attempts to provide conceptual clarity, Bassett e.g. suggest the distinguishment between "digital legacy" and "digital memories", and proposes the term "digital legacy" to be used in reference to passwords, account information, digital assets and digital property, which in essence are "things that belong in a digital safe or vault that are static once the user has died" (Bassett, 2015, p. 1129). Conversely, "digital memories" are to be used in reference to "personal videos, messages, photographs and blogs, which are things that according to Bassett belong in a digital memory box and which enable storytelling, on-going narratives, memorialisation and "renegotiated" relationships with the dead in the digital afterlife (Bassett 2015, p. 1129).

[32] The metaphor connects to environmental effects generated by creating, storing and processing data and data centres.

Öhman and Floridi divide what they term the “digital afterlife industry” into four main types of death tech services, which covers both dedicated afterlife service and ‘reappropriations’ (e.g. the Facebook memorial). These are respectively 1) Information Management Services 2) Posthumous Messaging Services Online 3) Online Memorial Services and 4) Re-creation Services. Information Management Services are services that “help users deal with problems regarding digital asset management that may arise as a consequence of their own or someone else’s death” (Öhman & Floridi, 2017, p. 645). Posthumous Messaging Services refer to services that “upon the death of the user, deliver online messages or other digital communicative content to appointed recipients” (Öhman & Floridi, 2017, p. 645). Online Memorial Services refer to companies providing an online space for a deceased individual or group to be mourned and/or remembered” and Re-creation Services refer to services that “use personal data in order to generate new content replicating a dead person’s social behavior” (Öhman & Floridi, 2017, pp. 645–646).

Scholars Birnhack and Morse (2022) have identified four categories of digital remains, reflecting different social, economic or legal contexts. These are respectively 1) intangible items 2) information about property 3) intellectual property 4) and personal data. The category of intangible items are e.g. digital currencies, domain names, music files (e.g. iTunes), e-books or items purchased in online games and virtual worlds (Birnhack & Morse, 2022, p. 285), which entails a shift from ownership to contractual rights whose scope of use (also postmortem) is dictated by the specific license. Accordingly, the power to determine the fate of intangible items upon the user’s death lies with the party who drafted the contract, as the authors state (Birnhack & Morse, 2022, p. 285). Information about property is not property in itself but refer to information crucial to facilitating the management of the estate and the transfer to heirs upon the owner’s death. The third, intellectual property, is digital content that are to be considered copyright works/creative works protected by copyright law (in some case at least), whereas the category, personal data, constitute the deceased’s personal data and meta-data such as e.g. search history logs, instant messaging (Birnhack & Morse, 2022, pp. 285–288).

Kasket compares "digital footprints" to actual feet, describing them as “extraordinarily structurally complex, with many moving parts”. She provides detailed descriptions of the traits of digital remains formulated as five different concepts or “main bits of anatomy”, that are, respectively,

“digital assets”, “digital autobiographies”, “digital archives”, “unauthorized digital biographies” and “digital dossiers” (Kasket, 2019, p. 18).

Kasket’s most simple and straightforward category is that of ‘digital assets’, which are “digitally stored material that either has inherent financial value or constitute online portals to tangible assets” (Kasket, 2019, p. 18).

The notion of ‘digital assets’ is elaborated by legal media and privacy scholar Edina Harbinja (2020), who proposes the distinction between assets that *do mimic* physical property (e.g. bitcoins and game assets), and assets that *do not mimic* physical property (such as social networks, emails, or personal data):

> It is difficult to apply the most accepted western theories of property to digital asset generally, and in particular to those that do not mimic physical property (such as social networks, emails, or personal data). Other assets, such as virtual worlds and game assets or even bitcoin, *do* mimic physical property to an extent and their propertisation is more acceptable, with the caveat that many of these assets are created on another person’s property (infrastructure, servers, or intellectual property of service pro- viders and companies). (Harbinja, 2020, p. 94)

She states that a “propertisation narrative” of digital (remains) takes place within the legal regime, and she finds that legal classification of certain types of assets as e.g. ‘property’ is unfit. Because many of the ‘objects’ they refer to are intrinsically “personal and identity-related” (Savin-Baden & Mason-Robbie, 2020a, p. 94).

Returning to Kasket, a top-level distinction of her five concepts (which generally seems to be referring to different forms of digital communication) is between materials that “we know about” (i.e. digital assets, digital autobiographies, and digital archives) (p. 24) and materials whose existence “we are unaware off” (i.e. digital dossiers and unauthorised digital biographies) (Kasket, 2019, p. 29).

Consequently, ‘digital dossiers’, whose existence we are mostly unaware of, constitute “personally telling information compiled by cookies, fingerprinting, tracking, algorithms, locally stored objects” (Kasket, 2019, p. 18). In contrast dossiers, which is being collected via various tracking- and online

surveillance technologies (Kasket, 2019, p. 29) The other category of 'unknown' materials are "unauthorized digital biography", which are to be understood as a fragmented bricolage rather than a coherent narrative" (p. 26) and are described as the "personal material about you or portraying you, linked to you and viewable by others, authored before or after you die" (Kasket, 2019, p. 18). Unauthorised digital biographies are e.g. constitute links and search results with information about you or it constitute written material that other people have authored after one's (p. 24). Accordingly, these 'materials' refers to traces and information that we are unaware of being captured in the first place, and which, depending on what bits and pieces that are put together, with what purpose and in what the context – can be accurate, inaccurate or even "deceptive" (Kasket, 2019, p. 26).

Digital archives and autobiographies refer, as stated, to contents that is 'known to us', which we have deliberately created (Kasket, 2019, p. 24), but there is a difference in terms of its viewability and level of control between these: digital autobiographies refer to content that is deliberately published to an online to audience about ourselves and our lives and represents us as we want to appear in the world, as Kasket states (Kasket, 2019, p. 24) – e.g. social media content – and it is which the (living) individual have largely creative control over (Kasket, 2019, p. 24). "Digital archives", on the other hand, refers to content that is *not* publicly viewable and necessarily intended to be shared (as is unrelated to the notion of the archive as a public and purposeful repositories for cultural and historical artefacts). Accordingly, archives encompass all sorts of collections, such as "email and messenger history, stored documents and pictures"(Kasket, 2019, p.18), and are referred to as "behind-the-scenes material"(Kasket, 2019, 27). However, while spanning from being "pedestrian and administrative, sometimes impersonal and sometimes even exquisitely revealing" (Kasket, 2019, p. 27), they were unlike e.g. autobiographical material, "never intended for wider dissemination, and may even be a dramatic arts with an individuals preferred public persona" (Kasket, 2019, p. 27), as Kasket states.

If we disregard the labels, Kasket's categories and concepts provide insight into important key characteristics of the digital configurations, which we can use moving forward. This is e.g. the notion of content that we 'know about' vs. content we 'don't know about'. Additionally, there are aspects of her classification that captures the distinction between public vs. private content (the latter refers to Kasket's notion of "behind-the-scenes-material", which again connects to

intentionality/deliberateness with which content is made or shared. Moreover, Kasket's categories cover aspect of 'authorship' – e.g. pre/post-death and ourselves/others – as well as aspects such as coherence vs. fragmentation of content as well as the aspect of monetary vs. non-monetary value.

4.7 Active digital remains (digital immortals)

A newer, more 'active', variant of digital remains (if it even is to be conceptualised as such) has emerged with the advancements of digital technology. The phenomenon has been referred in terms of "digital resurrections" (Sherlock, 2013), "griefbots" (Fosch Villaronga, 2019), "deadbots" (Hollanek & Nowaczyk-Basińska, 2024), "ghostbots" (Harbinja et al. 2023), "digital immortals" (Savin-Baden & Burden 2019) or in Öhman and Floridi's industry terms, "re-creation services", which they use to describe services that "use personal data in order to generate new content replicating a dead person's social behavior" (Öhman & Floridi, 2017, pp. 645–646).

We will explore the notion of digital immortals in greater detail in Chapter 8, but here is an introduction to the phenomenon. Although the concept of the digital immortal may differ significantly from other interpretations, it is relevant here since digital remains – if we understand these as posthumous digital data – often serve as the building blocks for various forms of digital resurrections. These resurrections are composed of the communicational and informational fragments we leave behind, whether knowingly or unknowingly, and often include extensive and sometimes very personal digital material.

While the sophistication of the underlying technology and the form of these configurations vary great, they are generally understood as digital or computational simulations of real people that once lived. However, many newer conceptualisations of digital immortals seem refers to digital simulations of deceased people created from the use of generative AI resurrecting the deceased loved ones as conversational AI agents or 'chatbots'. Harbinja et al. describe ghostbots as "digital reincarnations of deceased persons, usually though not exclusively created using AI techniques, sometimes also known as post-mortem avatars, deepfakes, replicas, holographs, or chatbots" (Harbinja et al., 2023, p. 2).

Earlier examples of 'digital resurrections' are Sherlock's notion of the posthumous media representation (PMR), which refers to dead celebrities featured in commercials or in the

entertainment industry, and which – at the time – involving on less advanced technologies. An example of such early digital resurrection is the 2006-commercial "Give a Few Bob", which features the British comedian, Bob Monkhouse. Monkhouse is digitally resurrected through the compilation of components of archival footages, body doubles, and voice impersonators (Sherlock, 2013, p. 165), and Sherlock describes the phenomenon of the PMR as "digital manipulations through which the deceased personality appears to us in new contexts as though alive today and, in some cases, as though the person is consciously aware of his or her own death" (Sherlock, 2013, p. 165) – referring to Monkhouse who speaks of his own death in the commercial. As Hsu states, "[t]he idea of using dead celebrities in commercials was alive and well even before the arrival of modern computer-generated imagery (CGI) techniques; older commercials simply combined old footage of the celebrities with new footage through computer compositing techniques" (Hsu, 2015).

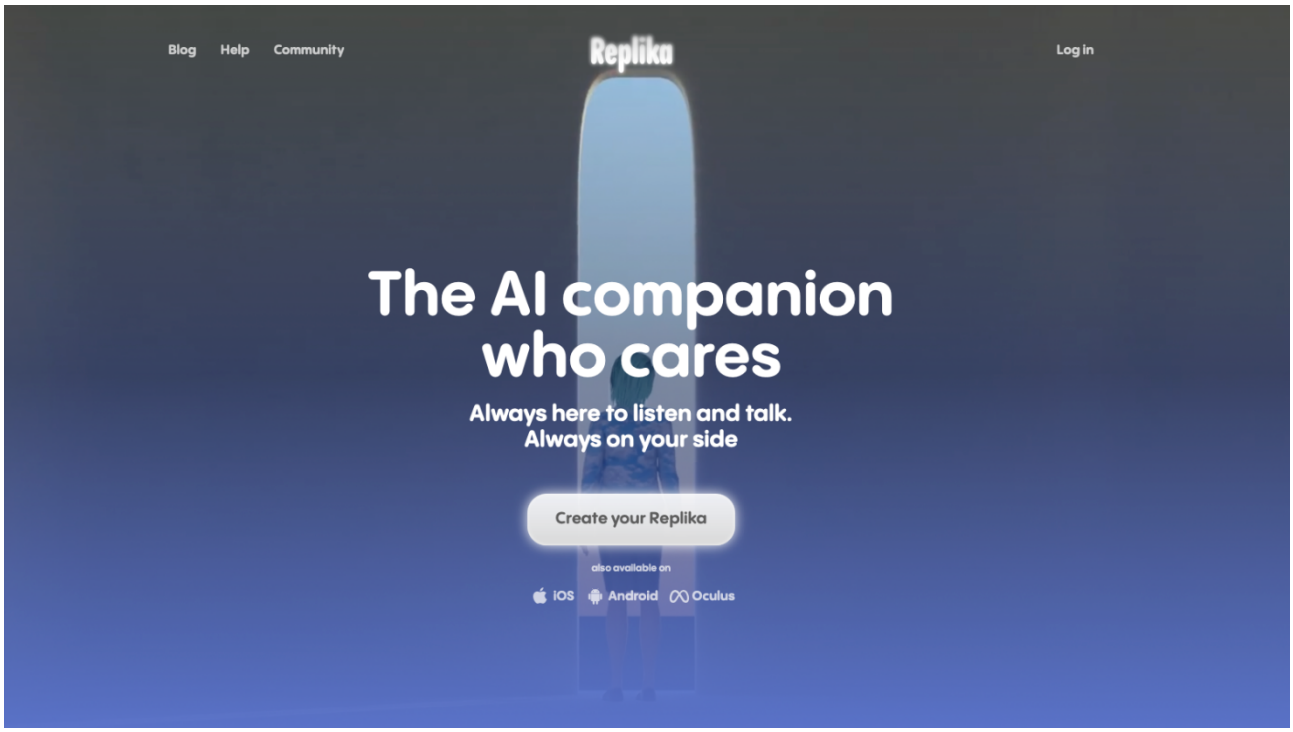
However, bringing back the dead celebrities have become "big business" (Famurewa, 2018), as part of the advertising and entertainment industry involving now more sophisticated technologies such as deepfake technology and bringing back celebrities such as Tupac Shakur, Michael Jackson and the famous TV chef Antony Bourdain (Harbinja et al., 2023, p. 3). Robert Kardashian, i.e. the father of famous American media personality Kim Kardashian, was digitally resurrected in terms of a holographic representation (a three-dimensional image) based on deep fake technology in 2020 (Gorman, 2020).

Burden, however, states that we are still at very early stages in his notion of an 'active' digital immortal, which is not merely a conversational agent but is to be understood as a 'high-level' digital immortal. A high-level DI would be able both to speak, sense, prioritise between actions, remember (e.g. semantic memory, episodic memory, procedural memory), as it would be able to conduct complicated tasks. As Burden states, to "string together a whole series of different actions in order to achieve a goal or sub-goal set by its motivation" (Burden, 2020, pp. 149–150).

However, bringing back ordinary deceased real-world people have also become part of 'recreation-business', trying to replicate personalities. Eugenia Kuyda, the founder of Luka, a company specialising in "neural network machine learning model and scripted dialogue content"(*Replika*, n.d.), built an Artificial Intelligent chatbot assistant to digitally resurrect her friend, who she lost in 2015 by age 34. She fed the system with personal digital correspondences of the two friends,

including correspondences of the family of the deceased, and the 'robot personality', which developed over time with use ('This App Is Trying to Replicate You', 2019).

The original purpose of what is today called Replika was to construct a conversational replica of the deceased – or at least to construct a program to take on the personality of real-world deceased person (Fosch Villaronga, 2019, p. 98) – for the living to conversate with. However, the system now been repurposed and rebranded to "The AI companion who cares – always here to listen and talk. Always on your side" (*Replika – Our Story*, n.d.)



Source: (*Replika – Our Story*, n.d.)

Accordingly, the systems now enable people to build a digital version of themselves, which can serve multiple purposes. E.g. as extra memory, as a tool for journaling, as a personal assistant, acting as you, carrying out time consuming and inane activities such as scheduling appointments, or as a conversation partner with whom you can share personal your thoughts, feelings, and beliefs in a safe space ('This App Is Trying to Replicate You', 2019).

However, little do we know if the ghostbots – also referred to as 'griefbots' – are capable of "(…) activat[ing] the grieving process more efficiently and accurately than people's memories and objects, and speed up the stages of such a process: denial, anger, bargaining, depression, and

acceptance" (Godfrey, 2018, as cited in Fosch Villaronga, 2019, p. 98); or, as Harbinja et al. states may cause emotional distress and addiction (Harbinja et al., 2023, p. 5).

Going forward, this thesis applies the term 'digital remains', which on par with Harjus' notion of 'the digital afterlife', is to be understood as a broad concept extending beyond specific technologies, concepts, application methods, use scenarios, technological objects etc. (as we shall see in chapter 9). In brief, the concept of digital remains will later be suggested to be conceptualised as a socio-technical reality which is shaped by the mutual 'doings' of social and material (or technological) actors, which extends beyond a representational understanding. The idea is to offer a broader and more adaptable conceptualisation of the phenomenon for capturing its multiplicity, complexity, and constantly evolving nature.

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5 Investigating two postmortem situations

5.1 Interviews and case study

The thesis' empirical foundation consists in interviews with 12 Danish family- and inheritance lawyers, who deals with decedent estate and wills, and in part in a German lawsuit that treats the question of how data and accounts of deceased people is to be treated in terms of the BGH Facebook case lasting from 2015–2020. I refer collectively to the empirical material as 'postmortem situations'. Not because interviews and documents are 'conducted' in a postmortem setting, but since they have a shared 'focus' on what happens to data in legal posthumous settings and both generally centres around the management of digital effects and contents postmortem. However, beyond this shared focus, the empirical collections are distinct. The court case in terms of the BGH Facebook case serves as a real-world example of a controversy within the German court and involves a public conflict that must be resolved through a settlement based primarily on applicable laws and regulations. In contrast, the Lawyer study in terms of the interviews consist of dialogues between the researcher and the interviewees, conducted individually or in group, and are considered 'produced data' or constructed data.

In the following sections, the empirical material will be described in further detail together with the methods applied in both postmortem situations, starting with the interviews.

5.2 Interviews

5.2.1 Interview type and data collection process

The interview data produced comprise of eight interviews, one of which is a group interview, with respectively inheritance lawyers and family lawyers and were conducted both individually and in groups in the period between August and November 2021. Family lawyers provides advice on aspects of family and inheritance law, and thus play a central role in tasks and conflicts related to wills and prenuptial agreements, inheritance and estates, unmarried cohabitation, marriage, separation and divorce and property division (Danske Familieadvokater, 2024b). Inheritance lawyers are also specialised in some of the same areas as family lawyers (e.g. family fortune,

separate estate and wills), but their expertise lies in the field of inheritance and estate administration (Danske Arveretsadvokater, 2024). Accordingly, both family- and inheritance lawyers handle objects that need to change hands, now or in the future, which may include data and digital effects. The assumption is that by following this process of transfer or change of ownership, it is possible to gain insight into how these professionals perceive and understand data in postmortem contexts.

The initial part of the recruitment of informants for the interviews consisted in identifying lawyers and law firms online, who seemed familiar with the notion of digital remains in one way or other and seemed to engage in the management of digital data and effects as part of their work portfolio. A variety of search engines were used to explore different results searching on 'digital arv + advokater' (digital remains + lawyers), just as 'private browsing' search mode was employed to prevent results based on previous search history pointing back to the researcher.

The different searches resulted in the identification of sixteen law firms with lawyers engaged in digital legacy management one way or another and who had varied knowledge level and engagement in the field of digital remains. There were some who had only written blogposts on the topic, and those whose posts in addition seemed quite generic, and those who outright claimed to be offering counselling on digital legacy management on their webpages. These individuals were contacted by email or via phone, and while some of these approaches resulted in either 'spontaneous' or 'scheduled' interviews (see below), other lawyers declined to participate due to self-proclaimed limited knowledge on the topic. Some of these, however, referred to other potential participants, which is a recruitment method referred in terms in terms of "snowball sampling" (Gobo, 2004). Snowball sampling means recruiting subjects through the recommendations of other subjects with the same characteristics (Gobo, 2004, p. 419), and accordingly, the spontaneous calls led in some cases to the reference of more knowledgeable participants, who then were contacted.

As stated, the recruitment process resulted in eight interviews in which seven were carried out as individual phone interviews, and one was carried out as an onsite group-interview with five family- and inheritance lawyers at their office north of Copenhagen (see figure below). In total, twelve lawyers were interviewed, and among them, one individual participated in both the group and s.

This person was responsible for referencing, choosing, and inviting the four other participants for the group interview. The spontaneous interviews lasted between twenty-thirty minutes, whereas the scheduleds lasted approximately one hour and the group interview which lasted one hour and twenty minutes. After each interview, the researcher's immediate impressions, reflections and further questions (debriefs) – that is, questions that had either prompted more questions or remained unanswered – were noted down and implemented in subsequent interviews. These debriefs or audit trails worked as a record of reflections and questions on the interview and provided a tool for keeping track of changed understandings of previous experiences (Brinkmann & Kvale, 2018, p. 48). Accordingly, the records were an attempt to create transparency (towards myself) in the knowledge production.

The table below summarises the length, date and type of interview conducted in addition to document type (field notes vs. recordings). The 'interview type' category distinguishes between 'spontaneous' and 'scheduled' interviews, as well as 'individual' and 'group' interviews. Interview number 8a and 8b involves the same person but is divided into two separate sessions because the first interview was interrupted before completion.

Nr.	**What**	**Date**	**Documentation**	**Type**	**Duration**
1	Spontaneous phone interview	30.08.2021	Field notes	Individual	20-30 min
2	Spontaneous phone interview	6.09.2021	Field notes	Individual	20-30 min
3	Spontaneous phone interview	13.09.2021	Field notes	Individual	20-30 min
4	Scheduled phone interview	20.09.2021	Field notes	Individual	20-30 min

5 (Group)	Onsite interview	23.09.2021	Recorded & transcribed + debrief	Group interview with 5 participants	1 hour, 20 min
6	Scheduled phone interview	29.09.2021	Recorded & transcribed + debrief	Individual	1 hour +
7	Scheduled phone interview	26.10.2021	Recorded & transcribed + debrief	Individual	1 hour +
8a	Scheduled phone interview	22.11.2021 &	Recorded & transcribed + debrief	Individual	30 min
8b	Scheduled phone interview	29.11.2021	Recorded & transcribed + debrief	Individual	30 min

The interviews referred to as 'spontaneous phone interviews' in the above table means that the interviewees were unprepared for them and not notified in advance. This format had in part the purpose of screening participants and increase the likelihood of recruiting lawyers with some knowledge on the topic rather than just 'any lawyer who might have an opinion and was willing to share it'. As Juul states, in relational to phenomenological research, is that the good informant must have extensive experience with the field the researchers are interested in (Juul, 2012, p. 101). In addition, the spontaneous format was an effort to gain more immediate and authentic responses from the participants and access to knowledge about practices. This approach is in accordance with Brinkmann and Kvale, who state that; "the more spontaneous the interview procedure, the more likely one is to obtain spontaneous, lively and unexpected answers from the interviewees" (Brinkmann & Kvale, 2018, p. 64).

The four spontaneous interviews were documented through field notes taken during the conversations, and the quotes that seemed important at the time were jotted down live and in full, using abbreviations. Immediately afterwards, the entire interview was written up from the field

notes to ensure readability and comprehension later. Except for one quote from interviewee Lisbeth (mentioned on p. 132), all quotes in the analysis chapter (chapter 6) stems from the recorded and transcribed in-depth interviews. This one quote is however 'live transcribed' by hand and reflects, I would argue, the original account of the interviewee.

The four scheduled interviews, where one was a group interview, refer to the notion that the lawyers were prepared for the interviews. These interviews were all recorded and transcribed in full. Some of the lawyers had been referenced through other lawyers via snowballing, as mentioned earlier, but was nevertheless all approached by the researcher and their (individual) interviews scheduled either over the phone or via email. Furthermore, written consent was also collected either before (for scheduled interviews) or after all interviews (for the spontaneous interviews) and stated the protection and safe keeping of personal data and the granting of permission to use the collected empirical material for research purposes.

5.2.2 Interview focus

With regards to the focus of the interviews, the interview inquiry generally centres around the lawyer's understanding of digital remains on two levels. Respectively, a conceptual level focusing on how the object of study is understood on the level of language and meaning, and a practice-oriented level focusing on how digital remains is understood through the exploitation of the lawyer's reported practices. The investigation of practice refers to the management of digital property in estate administration. The two-sided focus applies to both the individual interview and the group interview. Accordingly, the conceptual level emphasises the lawyer's 'literal' accounts in the data collection – what words and concepts do they use in relation to the phenomenon – while the 'practice-oriented' level focus on obtaining information about their practices. Reported practices is to be understood as accounts on 'what the lawyers say they do' as opposed to first-hand observations of actions. However, the verbal statements and anecdotes of the lawyers represent more "grids of meaning", as Mol states, as the stories they tell provide us with insights into "event that have lived through (Mol, 2002, p. 15). Mol phrases it as follows:

> The stories people tell (…) convey a lot about lakes, shopping trolleys, or staircases. What people say in an interview doesn't only reveal their perspective, but also tell about events they have lived through. (mol, 2002, p. 15)

Of course, these stories also reveal something about the storyteller and his/her sensemaking, feelings etc. as Mol states, but the stories additionally give insights into how something is done in practice, and, as Mol states, it is thus "still possible for us to get to know some of the things we would have seen if we had followed people on their daily routine" (Mol, 2002, p. 15). Consequently, while is not possible to talk about actual 'doings' on the base of interviews in terms of observed action (ethnographic research), it is possible to talk about verbal accounts of lived experiences – stories about how things are done in practice – which represent more than opinions, feelings or meanings. The stories, which are selected from across interviews, are about settlements of digital content and information in estates and written wills, which is lived through, and which is the closest we get to learn about the lawyers' daily routines. This is due to the managing digital effect and data constitutes such a relatively small part of estate administration and of the lawyers' workflow in general, and one would have to wait a very long time to be able to 'observe' digital estate administration – if at all. Therefore, the interview method, which focuses on 'reported' practices, has seemed the most appropriate approach in this context.

The practice-related inquiry specifically centred around reported practices on 'will making' (testimonials) as well management of digital data and effects in descendent estate – e.g. in terms of how a computer is handled? Are digital devices passed on in descendent estate, and if so, how do the lawyers go about such a transfer? In addition, are devices wiped before transfer, can you browse through contents with the purpose of preservation, or does one do nothing? With regards to locally stored creative productions (images, text, videos) and drafted intellectual work (e.g manuscripts), does one consider if it could be of interest to others, and how to make it accessible or discoverable?

Besides investigating the 'sort' of practices within the legal realm (i.e. what actions characterises legal, posthumous data practice?), a central aim of the practice-oriented level of inquiry was to explore the 'prevalence' of the problem among the lawyers – e.g. if their practice seemed well-established, still rather nascent or maybe even non-existing. The concept of 'prevalence' relates to

an initial uncertainty about whether the lawyers practice would essentially be noticeable and observable in any way, or if the practice seemed more 'non-existent' so to speak. This assumption is based on a reflection of a 'double absence' of the deceased and the technological object in postmortem situations: the digital object (of the deceased) does not provide 'access' to the deceased due to its material absence, and the deceased, conversely, does provide 'access' to the object as the subject cannot speak and therefore does not point towards the object (see more on this in Chapter 8). The question is then if this 'reinforcement of absence' makes practice difficult to observe – and more akin to 'inaction' – or not. This is the wonder and question encompassed in the wording 'prevalence' used here.

5.2.3 Interview guide

A semi-structured guide was used for both the spontaneous and scheduled individual phone interviews, and each interview began with a general introduction to the research project,[33] a purpose statement – provided either verbally or in writing (via email) – and questions for testing their knowledge level. The stated purpose of the research was expressed as an attempt 'to obtain knowledge of legal practices around the digital in postmortem contexts' and intentionally omitted the term 'digital remains' (translated from *digital arv*). The latter was done to avoid triggering too many associations and preconceptions prior to the interview, and the ideas was to allow for a freer association and conversation, as there are already many fixed notions about what digital remains is or is not.

General introduction to the research project and purpose statement (send out to participants via email for scheduled interviews)

> "Dear XXX,
>
> My name is Astrid, and I am PhD student in Information science at UCPH. I am contacting you as you have been mentioned as someone I should talk to. I do research on what happens to data and information in the context of death within different sectors, and one aspect of my project examens data practices within the legal field. Firstly, the aim of my research is to uncover contemporary legal

[33] The description aligns with the content of the written informed consent sent to the interviewees before the scheduled interviews (see appendix B).

practices and knowledges in relation to the topic and more specifically I am interested in learning how digital assets are handled in the legal realm, in a postmortem context, e.g. in relation to estate administration.

In addition, I would like to ask if you have the opportunity to have a chat over the phone one of days to come? The format will be open and exploratory as the research area is relatively underexposed. You can also see my researcher profile here:

https://komm.ku.dk/ansatte/?pure=da/persons/302927.

Best regards,

Astrid"

The general introduction was followed by questions exploring the lawyers' knowledge- and experience levels in relation to managing digital remains, and covered, as stated, the following themes 1) Terminology and conceptual understanding and 2) Practices around data and digital stuff – e.g. what type of counselling, ways of handling specific hardware and software (computers, emails, social media etc.) and ways of value assessing the digital etc (see appendix C for interview guide).[34] Practice, here understood as 'reported doings', included both a focus on the lawyer's individual 'lived through' experiences in managing the digital, but also encompass more general, intersubjective agreements on how the digital is to be managed posthumously in terms of procedures, rules, common knowledge etc. (i.e. what aspects seem to inform these emerging/established practice). Accordingly, the interview aims at describing the experience in general (i.e. as one shared by many), and on individual experience and reflection (Finlay, 2009, p. 9).

The group interview was different from the individual interviews in that it was not just a conversation between the interviewer and the interviewee, but it involved several participants. Additionally, it was arranged through an interviewee who had previously participated in an individual, spontaneous interview. Furthermore, it was conducted in a much less structured manner compared to the individual phone interviews, although covering the same overall questions, as the dynamic and interpersonal flow was prioritised over structure and order (Brinkmann & Kvale, 2018, p. 65). The participants of the group interview were colleagues,

[34] Legal practice involves value assessment and how they value and assess the digital is therefore telling.

which means that they knew each other and the atmosphere of the situation was light and jolly although questions however were answered with seriousness. More participants meant, firstly, that the interview was longer than individual interviews allowing enough time for participant to speak. Second, questions were answered both individually (i.e. 'by turns') whereas other answers turned into shared conversations, reflections and discussions between the interviewees. In fact, it was during the group interview that uncertainties and dilemmas about how the digital should be handled (and thus understood) in the postmortem arose.

5.2.4 Mode of inquiry

The mode of inquiry refers to the researcher's cognitive and emotional stance towards the people interviewed during the qualitative inquiry. In the interview situation, I have adopted "empathic neutrality" as inquiry mode (Patton, 2002). According to Patton, neutrality refers to the investigator's commitment is to "understand the world as it unfolds, be true to complexities and multiple perspective as they emerge and be balanced in reporting both confirmatory and disconfirming evidence with regard to any conclusions offered" (Patton, 2002, p. 51). Put simply, neutrality is concerned with strategies for becoming aware of selective perception, personal bias, and theoretical predispositions (Patton 2002, p. 51) and simply suggests attempting to be nonjudgemental (Patton, 2002, p. 53). He explains neutrality as follows:

> The investigator does not set out to prove a particular perspective or manipulate the data to arrive at predisposed truths. The neutral investigator enters the research arena with no axe to grind, no theory to prove (to test but not to prove), and no predetermined results to report. (Patton, 2002, p. 51)

Neutrality, however, is not to be confused with "absolute objectivity" in terms of value-free science. Objectivity is not possible to attain in practice since qualitative inquiry is intrinsically social in its nature, as Patton states, just as "subjectivity" is a misleading term with too many negative connotations (Patton, 2002, p. 51). Conversely, neutrality does not imply detachment (Patton, 2002, p. 51) and this is where empathy comes into the picture.

Empathy develops from personal contact with the interviewees (Patton, 2002, p. 52) and describes a stance towards the people one encounters, that communicates understanding, interest, and

caring (Patton, 2002, p. 53). It places emphasis on the human capacity to know and understand others, which Patton phrases as follows, citing Wispé:

> Empathy involves being able to take and understand the stance, position, feelings, experiences, and worldview of others (…) empathy combines cognitive understanding with effective connection, and in that sense differs from sympathy, which is primarily emotional (Wispé, 1986). (Patton, 2002, p. 52)

Turning to the project, I have strived to be 'empathic' by attempting to put myself in the shoes of the interviewees and attempt to understand their positions, feelings, experiences, thoughts and worldviews. This empathic disposition is also entailed in the phenomenologically oriented method of analysis, which is applied in analysing the interviews, and which I will touch upon shortly. Neutrality, I have aimed at by attempting to distance myself from common assumptions (Jensen, 2022, p. 529) – a strategy that aligns well with the general attitude of being "deliberate simple-minded" (Jensen, 2010, p. 20) and thus attempts to let go of priorities and finalities. Accordingly, the neutrality aspect of the inquiry have involved being open and nonjudgmental during interviews, adopting a nominalist stance to be become aware of theoretical predispositions and preconceived ideas.

In sum, these are different strategies for 'untangling myself from the entanglement with the subject', but I do not claim to be unconditional as investigator or being able to fully bracket myself as the phenomenological ideal prescribes. As stated in chapter 3, I have taken part in the shaping and transformation of the object of study just like I have been shaped and transformed in the (knowledge) process myself. Conversely, I consider my prerequisites and prior knowledge a fundamental condition – a research premise – which has also proved productive for the knowledge production (Juul, 2012, p. 73). The prerequisites have equipped me with an 'intuitive sense' of what cues to follow in the interview situation and what questions to explore further in situ. The knowledge and intuition I have outright exploited, however, while at the same time having been mindful and transparent (cf. chapter 2) about these.

As an example, I have as researcher sometimes brought other perspectives into the dialogue, thus bringing the conversations past 'surface-level' and subjective life-world experiences. This is the case in the next example, where the notion of the general data protection (cf. GDPR) is brought

into the conversation, which pushes gently the interviewees to reflect beyond their own immediate experience.

> **Interviewer:** "So the data on device, is it considered the same as diaries in an attic or how would you conceptualise it, legally?"
>
> **Abigail:** "Well, we do not consider it… we consider it, just like I said, [the same as, ed.] a diary. Something the heirs can just grab. An artefact with no [economic, ed.] value, but it's eh personal."
>
> **Interviewer:** "Okay [hesitant], so it [the contents of a computer] does not possess any economic value [and nor is considered subject to data-, ed.] protection…and what about GDPR? Do you consider this?"
>
> **Abigail:** "We don't do anything in that regard. Just like we don't do anything with the diary in GDPR terms." (Excerpt from group interview)

Conversely, my personal and professional background influences the participants' cognitive and emotional stance towards me, emerging as 'participant bias', which is reflected in the implied preconceptions and prejudges of the following written statement from an interviewee (Adam) prior to an interview: "I am somewhat in doubt about whether I can contribute with anything other than common knowledge, especially after I checked your website (*Digital Arv*, n.d.)" (see appendix D for full quote).

The interviewee positions me as a specialist due to my long-term engagement prior to our meet, which illustrates, despite attempts of being neutral and open as researcher, that the knowledge process is not an isolated, individual, endeavor in which I as researcher can simply bracket myself. Rather, it is an intersubjective and reciprocal process in which the interviewee participates as well, or as Juul phrases the basis for (phenomenological) epistemology; the subject experience and reflect in interaction with the world *and other subjects* (Juul, 2012, p. 69), and from this place, I am 'conditioned'.

5.2.5 Method of analysis

The method for analysing the interviews is phenomenological or "phenomenologically oriented" (Finlay, 2009, p. 9), as Finley suggests, as the research does not fully embrace the phenomenological project. For one, I do not claim to employ a distinct phenomenological ideology such as e.g. a "Husserlian" or "Heideggerian" (hermeneutic) phenomenological approach (Juul, 2012, p. 72). Second, there are aspects of this thesis' where the phenomenological ideal is not fully embraced. These aspects concern e.g. the philosophical assumption of 'objectivity', including the phenomenological attitude of reduction or epoché (Finlay, 2009, p. 19; Juul, 2012, p. 72). Phenomenology focus on how the object/phenomenon is shaped in human consciousness in an interaction between the object and subject and thus views the world, i.e. human experience. Within this ideology, at least traditionally, it has been possible to obtain true, objective knowledge through rich descriptions (Juul, 2012, p. 69) and through the phenomenological ideal of epoché or reduction. Epoché/reduction refers to the unconditioning (Juul, 2012, p. 73) and bracketing of the researcher, which allegedly makes it possible to derive uninterpreted, unbiased, first-person accounts of the interviewees (Juul, 2012, p. 72). As I generally employ a materially focused (not ethnographic, however) and performative philosophy of STS, which views the world as a sociotechnical entity that is shaped by human and non-human actors in a mutual process, the philosophical stance of (human) 'objectivity' is a point where I do not fully commit to the phenomenological project. Rather, the knowledge process too is perceived as a mutually constituted and performative endeavour in which the social scientist herself engages in delimitation and construction of versions of the object through her analysis.

This philosophical assumption is supported during recruitment of the interviewee – in terms of a participant bias – where I am positioned as 'conditioned' by one of the interviewees due to my long-term engagement in the field of research (see 5.2.4, Mode of inquiry). Additionally, the phenomenological ideal prescribes that the phenomenalist researcher should enter a less controlling role (Juul, 2012, p. 76). Although I do strive to retrieve these 'first-person, lifeworld accounts' and make the interviewees reflect on their experiences, I do not hold back in the interview situation. I take control and steer the interviewees in a different direction than they were heading at times – more than I believe that an acclaimed phenomenologist would. Consequently, the phenomenological contribution consists in a phenomenologically oriented analysis (i.e. as

means to an end, which is also reflected in the general mode of inquiry) rather than forming the whole philosophical basis.

However, the method employed have at its core describing the experiencing subject's accounts in terms of "lifeworld" or "lived experience" (Finlay, 2009, p. 8), and seek to "describe the perspective of others on an empirical basis" (Patton, 2002, p. 53). This latter commitment is in accordance with the phenomenological pursuit and is the aim of the interview analysis. Accordingly, the phenomenological (oriented) analysis focus on human experience in terms of the subject's knowledge and reflections of the world (Juul, 2012, p. 66) and aims to describe phenomena as it appears to the actors in their everyday life context. The concept of "lifeworld", a term coined by Husserl (Juul, 2012, p. 79), refers to the subject's experience and perception of the world in which they live and which is intersubjectively constituted and taken for granted. Accordingly, intersubjectivity, as Juul explains, unfolds in time and space in the lifeworld, which many subjects share, and is not something that only exists in face-to-face relations (Juul, 2012, p. 79). Rather, lifeworld is an intersubjectively constituted experience of the world with shared social, cultural, and historical context, which the subjects have bodily, sensory, and practical experiences with (Jørgensen, 2022).

The researcher essentially tries to capture and describe these multitudinous lifeworld experiences, which is depended on the subject's experience and knowledge the phenomenon, and happens though the identification of patterns and meaning structures in the stories told (Juul, 2012, p. 98). Consequently, detailed and rich descriptions are essential to the phenomenological investigation (Juul, 2012, p. 101), and as Juul states "the strength of the qualitative lifeworld interview is to bring forth rich experiences that the researcher can learn from" (Juul, 2012, p. 100). It is from this position phenomenology asserts that the interviewees, not the researcher, know best (Juul, 2012, p. 100).

Consequently, the knowledge interest of the phenomenological analysis is description and understanding and focus on 'what' or 'how', rather than 'why' (Juul, 2012, p. 99). However, description is not to be understood as a retelling and referencing of what the interviewees say and say they do (Juul, 2012, p. 98). Description entails interpretation. Accordingly, the phenomenological researcher transcends the descriptive level by developing a scientific language

(i.e. a “second-order perspective” (Juul, 2012, p. 88)) for the subject’s pre-theoretical, lifeworld experiences (i.e. the “first-order”, “first person perspective” (Juul, 2012, p. 87), and accordingly, there are two levels of reading in play in this phenomenologically oriented analysis. The reading is a continuum between the descriptive, “first-order” levels – which avoids abstract intellectual generalisations – and an interpretative, transcending “second-order” level. The second-order concepts identified (e.g. the ‘frontstage version’) is thus both anchored in the first-person perspective and simultaneously transcends this perspective, attempting to capture what is characteristic of the environment (Juul, 2012, p. 88). However, while one level is more descriptive and the other more interpretative, both levels are to be understood as “empathic” (Willig, 2017, p. 12) in that they both attempt to amplify meaning while staying true to the subject’s accounts rather than to explain what something “is really about”, which refers to a “suspicious reading” (Willig, 2017, p. 5).

Accordingly, the first-person perspective involves staying close to the accounts of the interviewees in trying to bring forth the common-sensical, pre-theoretical accounts of the phenomenon (Juul, 2012, p. 79), and the starting point of the analysis is the experience as it presents itself spontaneously and pre-theoretically. That is, in terms of the interviewee’s tacit, spontaneous, uninterpreted accounts (Juul, 2012, p. 98), which according to phenomenology is expressed via the subject’s categorisations or so-called “typifications” of the social world (Juul, 2012, p. 87). Typifications refer to how people in their everyday lives experience and gradually internalise the roles and behavioural expectations of their surroundings, which will eventually make unfamiliar objects seem familiar (Juul, 2012, p. 79). Put differently, the first-order perspectives are those understandings that actors in their lifeworlds apply to immediately categorise phenomena in their daily lives, and it is these typifications or “ideal types” that are subject to phenomenology’s interest (Juul, 2012, p. 87). Second-order perspectives are the researcher’s conceptual constructions, which are anchored in the first-person, immediate lifeworld accounts, but as stated, seeks to transcends them by elucidating general and empirical aspects of people’s everyday lives (Juul, 2012, p. 88). Accordingly, second-order concepts are the researcher’s analytical categories – their means for identifying and discovering patterns of meaning –are derived from the empirical, first-order perspectives of the interviewees (Juul, 2012 pp. 91, 98). Methodologically, the

phenomenological researcher attempts to activate the subject's experiences and reflections (Juul 2012, p. 97) and to meet them in their reflexive process during the interviews (Juul 2012, p. 97).

The mentioned analysis of the interviews employing first and second order perspectives takes place in sections 6.1 and 6.2.

5.3 The BGH Facebook case

5.3.1 The case in brief

This chapter will introduce the second empirical study in terms of the first European court case[35] on postmortem data treatment, including the applied method of analysis. The case study aims at bringing the legal reasoning (the legal argumentation) behind these judgements into light in terms of scrutinising the main arguments of the settlement. The case will be elaborated further in chapter seven, but here is a short introduction to the case.

The case was finally settled in 2020 in the German Federal Supreme Court in Karlsruhe (i.e. the 'Bundesgerichtshof') (*Digitaler Nachlass – Übergang des Nutzungsvertrags mit einem sozialen Netzwerk (Order of 27 August 2020)*, 2020) and will be referred to as the 'BGH Facebook case'. The case, which was a lengthy process of five years and consisted in several judgements, concerns the question of how social media data is to be treated postmortem, and involved judgements of respectively German Regional court, the Court of Appeal and the Supreme Federal court in the period between 2015–2020. Specifically, the courts treated the question whether a deceased Facebook user's account and its contents – in this case conceptualised as a 'contract'– was inheritable or not in the event of death and how access was to be interpreted (Facebook ruling: German court grants parents rights, 2018; Oltermann, 2018). Could a Facebook profile with all its communication content be considered part of the estate, passing to the heirs upon death just like "old-fashioned assets" (Tweehuysen, 2019, p. 1150), or was the statutory requirement to protect the secrecy of telecommunications in terms of the German Telecommunications Act

[35] It should also be noted here that the ruling concerned the death of a minor and that it is not clarified if the decision would apply to an account holder that has reached the age of majority (Fuchs, 2021, p. 6).

(Telekommunikationsgesetz – TKG) (i.e. protecting the communication of 'Facebook friends') or the privacy of the deceased party in terms of 'data protection regulation' a hindrance to universal succession? (Fuchs, 2021, pp. 1–2; Hardinghaus et al. 2018). Indirectly, the case also treated the question of whose rights and interest to protect of all the stakeholders involved – the deceased's, the businesses or the bereaved family's – is also treated in the BGH Facebook case.

Although the case concerns posthumous management of a 'social media' profile – which adds to the complexity of the issue as more actors and stakeholders in terms of platforms and infrastructure are involved – it treats a similar controversy as the one emerging in the Lawyer study. Namely, the question whether the digital is to be conceptualised and treated as private, personal information in a postmortem context versus as transferrable property – or as Fuchs formulates it; if "the digital and the 'analogue' assets of the deceased would be treated alike in the event of death" (Fuchs, 2021, p. 2).

The outcome of the case was that the Berlin Regional Court ruled in favour of inheritability (2015), whereas The Berlin Court of Appeal reversed this ruling (2017). In 2018, the Federal Supreme Court (BGH) restored the first instance judgement (2018) and reaffirmed that Facebook data should be regarded no different than analogue letters and diaries which heirs automatically inherit (Fuchs, 2021). Additionally, subsequent questions of how access was to be understood was treated (2018–2020). For instance, it was settled that 'access' means a transfer of rights and obligations of the account (and thus access to an interactive configuration of the account) rather than a USB stick with content in PDF format, which Facebook initially provided, was insufficient (Fuchs, 2021, p. 5).[36]

5.3.2 Case study or empirical example?

In this thesis, I have chosen to refer to the lawsuit as a 'case study,' but at the same time I am questioning if it is in fact a case study or merely an empirical example. As Creswell states, a case study involves "detailed, in-depth data collection" that draws upon "multiple sources of

[36] It should also be noted here that the ruling concerned the death of a minor and that it is not clarified if the decision would apply to an account holder that has reached the age of majority (Fuchs, 2021 p. 6).

information" such as interviews, documents, observations etc. (Creswell, 2007, p. 73). Additionally, the case explores the phenomenon "(…) within its real-world context" (Yin, 2014, p. 16), or as Creswell phrases it, "within a bounded system" (Creswell, 2007, p. 73) in which the boundaries between the phenomenon and the context are not always sharply distinguishable (Yin, 2014, p. 17). Of the more general traits, the case study can involve "one individual, several individuals, a group, an entire program, or an activity" (Creswell, 2007, p. 74) and can be studied through one or several cases, i.e. "single- and multiple case study") (Yin, 2014, p. 18) and can be both qualitatively and quantitatively carried out (Creswell, 2007, p. 73).

Except for the broad characteristics just mentioned, which would classify the lawsuit as a 'qualitative, single case study of a legal decision', many of the characteristics does not fit well with the study in question. Surely, the case involves an investigation of an 'occurrence in its real-world context,' but apart from this the empirical material base, the case is relatively limited and relatively homogeneous. The case is explored through documents only, in contrast to e.g. interviews or observation in addition, which make up a quite limited set of documents both in number and variety in addition. This limitation will result in lack of depth and context and thus in limited perspectives and angles represented. Furthermore, the analysis bases on tertiary and secondary sources of information only, and not primary documents such as e.g. original, German decisional material. Consequently, there is generally a lack of empirical breadth and diversity – the case material is not particularly varied and extensive – which does not fit well with the definition of a case study and argues against viewing the court case as such.

Conversely, the 'case study-characteristics', that elevate the case beyond a mere empirical example, include its reliance on a varied selection of documents (although not extensive), which explores a "real-world case" (Yin, 2014, p. 16) "over time" (Creswell, 2007, p. 73). Accordingly, the BGH Facebook case is an empirical inquiry of a real-world event (a lawsuit), which is studied within a bounded system (the German courts) and takes place over several years and across several courts (represents a development). Additionally, the case explores a "contemporary phenomenon" (Yin, 2014, p. 237) (i.e. digital remains), and seems to resemble what Creswell refers to as an "intrinsic case". The intrinsic case means that the case represents a unique or unusual situation in which the goal is to explore the "the case itself" (Creswell, 2007, p. 74). Accordingly, the BGH Facebook case is unique and unusual case in that it represents the first and only European case on

postmortem data treatment in which the 'case itself' is the trial. Consequently, these are all aspects that to some extent fit the descriptions of the case study.

5.3.3 Analysis

The analytical focus and interest of the study is on the legal argumentation (i.e. arguments and counter arguments). It is the different ways the courts argue for and against respectively a property and a privacy perspective, which is of interests, and thus the reasoning 'behind' the judgements. Not the specific legal frameworks applied and statuary power (i.e. decisions and action granted by a specific law). However, specific laws and provisions are considered to the degree necessary to understand the context of the negotiations and argumentation.

Besides representing a 'unique case', the BGH Facebook case is used instrumentally (Creswell, 2007, p. 74) to highlight and amplify perspectives not entirely clear in the Lawyer study (i.e. interview study). As the case contains issues of central importance to the purpose of the inquiry from which we can learn, as Patton states (Patton, 2002, pp. 46–47); that is, understand how the digital is enacted in a legal postmortem context – it has among others things helped elucidate different implications of considering digital remains as either 'property' or 'privacy'. Additionally, the court case has been instrumental in looking for common themes transcends the – without however being understood as an attempt to "formally" generalise from the court case itself (Flybjerg, 2022) – and that way get a more elaborate picture of the phenomenon and its constituents.

5.3.4 The basis (documents)

The analysis bases on secondary and tertiary documents, as outlined in Chapter 5, which analyses and reports on one or several of the legal settlements from the period between 2015–2020.

Documents can be divided into 'primary", "secondary" and "tertiary" documents (Lynggaard, 2022, p. 187) and the classification denotes in part a temporal distance to an event explored, meaning, whether the document is produced immediately after the event or sometime after. It also denotes the 'accessibility' of the document as well as the level of 'analytical processing'. The former refers

to whether the document is open or closed to the public, and the latter to whether the document has been subject to interpretation or not and to what degree. Accordingly, primary document are sources that are circulated among "a limited set of actors" in a closed forum (e.g. private letters or negotiation proposals) at a time in the "immediate vicinity of an event or situation to which the document refers".[37] Secondary documents are typically publicly available although the public may not necessarily be the target audience. Additionally, the documents are produced in a period immediately after or around the occurrence they concern. Tertiary texts, on the other hand, are produced some time after the event or situation (in contrast to primary sources which are produced in the immediate closeness to the event in question), are publicly available as well, and is, in addition, an analytical processing/reading of the event or situation it refers to (Lynggaard, 2022, pp. 187–188).

The analysis is based on documents only, and specifically secondary and tertiary documents. The selection criteria for the documents is their direct relation to the trial, and that they either describe or analyse, and the documents applied include: 1) international news articles on the case, 2) legal blog posts on the case 3) Legal summaries of the individual settlements provided by the legal, German database Beck-online (*Beck-Online*, n.d.) (see appendix F for overview of legal documents)[38] and 4) academic papers analysing one or several of the judgments. The international news articles make up secondary documents, legal blog posts and the legal summaries of the individual from Beck-online, as these are produced around the period of the trials. The tertiary sources consist of academic papers analysing the case, which are produced 'some time after' the trial took place and which are analytically processed.

The news articles have been applied to broadly orient the case, while academic papers from various European countries (e.g. the Netherlands, Italy, and Germany) form the basis of the analysis. These texts examine the case in the context of their respective national legislations (e.g. Italian and Dutch contexts). Consequently, a cross-analytical perspective of the documents has not been applicable or desirable due to the significantly different legal frameworks in each country.

[37] Author's translation from original language.

[38] The documents have been translated using ChatGPT[38]

Additionally, the interpretations of the academic texts are not further interpreted, but instead taken at face value. However, I have confirmed the consistency between the documents used in my analysis by comparing arguments of the academic texts with the court's press releases, and vice versa. The reversed process has been necessary as I am not fluent in German (legal) language and cannot verify the accuracy of the translations. Furthermore, I have not added another analytical layer, but I do apply these interpretations within a different conceptual framework, which we will explore further in Chapter 9.

Part 3

Analysis

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6 The Lawyer Study (study 1)

In this chapter, we will analyse the interviews exploring the family- and inheritance lawyers' reported practices concerning postmortem matters, and the focus is as follows: if the lawyers' actions and statements reflect their understanding and viewpoints towards digital remains, what can we what can we make of them?

This chapter will analyse eight interviews carried out as respectively an onsite group interview and as seven individual interviews, who deal with decedent estate and will making (i.e. the formulation of wills as a service). The analysis aims to explore the different life world accounts of the lawyers and focus on how they understand the notion of the phenomenon expressed in terms of both doings and sayings. The 'doings' are not observations from an ethnographic field study but refers to a practice-oriented focus in the interviews stemming from the lawyers 'reported actions' in relation to the managing digital remains in decedent estate. In other words, 'what the lawyers say they' in relation to concrete work-related events. The sayings, on the other hand, refer to conceptual level of the inquiry focusing on words and literal accounts of the phenomenon.

The analytical insights from the interview analysis are further elaborated in chapter 8 along with respectively the analytical insights from the German court case, other empirical examples and parts of the theoretical foundation.

6.1 Problem and practices

6.1.1 Work experience of the lawyers

As stated, one of the goals of the empirical investigation was to figure out how well-established the lawyers' practice around digital remains were, including the 'prevalence' of the problem of dealing with digital remains in their realm. The latter refers to an uncertainty concerning whether the lawyers have any work-related experience in dealing with digital effects and information postmortem, and consequently, if a practice would at all be noticeable and observable. These aspects have been important to cover since interviewees with real-world experience would base their reports on actual, lived-through events, rather than providing 'speculative' accounts or opinions on how to deal with digital remains as part of their jobs. The notion of 'practice' covers

doings derived from both anecdotes of real-world (work) experience in managing digital remains, and emerging general procedures, rules and regulatory basis, unspoken norms (on how to do manage the digital) etc. – basically all aspects that seems to inform their practices somehow. Accordingly, this section, and the two subsequent, explores these questions, and thus seeks to provide insight into the prevalence of problem and the lawyers concrete work experiences and professional roles and serves as background for the remaining chapter.

How to read the interviews: In the upcoming sections, the interviewees' quotes should be read with the understanding that the interviews were conducted by me, the undersigned, and the label 'interviewer' thus refers to me as the researcher. Additionally, I have replaced the interviewees' birth names with pseudonyms to both anonymise them, but also to distinguish between the interviewees in the various quotes. The interviewees from the individual interviews are: Adam, Grant, Lisbeth and Abigail, and the interviewees from the group interview are Diana, Gabrielle, Naomi, Shannon and Jacob (Jacob, however, is not quoted). It will be indicated a quote is from a group interview. All quotes, including those from supplementary sources such as articles and blog posts, have been translated by me, the author, with support from translation software, as the original interviews were conducted in Danish.

Turning to their work experiences, anecdotes of the lawyers indicate that some of them offer counselling on digital remains as part of their will drafting services. These services are part of what can be referred to as 'antemortem services', and are services provided before the client's death. Simultaneously, many of the lawyer's state that they have not dealt with issues related to managing digital effects and information in e.g. estate settlement – at least not according to their own immediate lifeworld reflections and ideas about what 'managing digital remains' entails (this latter experience adheres to the postmortem realm, vs. the antemortem realm, and concern tasks related to the post-death realm. We will return to difference between these shortly). The reason for this limited experience, according to one of the interviewee's immediate reflection, is that; "we simply don't get these requests" (Gabrielle). However, statements like the one above contrast many of the lawyer's later accounts of their practices, which indicate that data (or at least device) management *is* a part of estate settlement and that the concrete management of these things do occur. Accordingly, there is a discrepancy between many of the lawyers' immediate accounts of

what ‘managing digital remains’ entails and their ‘practice-anchored reports’ on the matter in the interviews.

Accordingly, early accounts on practices are but ‘surface-level’ (not so detailed and reflective) and in their idea of managing digital remains is primarily related to the termination of social media profiles (we’ll return to this). However, when the practice-anchored part of the inquiry is initiated – specifically, when the conversation centres on the posthumous management of ‘concrete, physical hardware’ – the interview changes from surface-level descriptions of the phenomenon to being more reflective and concrete. At this ‘material’ level of the inquiry, the lawyers provide details on their doings in terms of information of concrete experiences and real-world events and, which again bring the interviews beyond immediate conceptions and surface-level accounts to a more detailed account of their doings.

Consequently, it turns out that they do have more substantial, work-related experience in managing digital devices and information in decedent estates, although early and immediate accounts indicated a limited experience. The experience is, to start off with, associated with other areas of legal practice, such as family law, or mentioned as discussions within legal forums.

In the following example the interviewee suddenly comes to think of a marriage agreement involving cryptocurrencies, that she made for a client; Diana: “I just completed my first marriage settlement on cryptocurrencies!”, and another example, where an interviewee reports on the subject of digital remains (i.e. *digital arv*) being touched upon in ‘courses’:

> **Gabrielle:** It’s something that's *talked* about a lot [Diana: yes] among Danish inheritance lawyers in relation to specialist stuff. I was just at a course out there about 14 days ago, and it's a topic on the agenda (digital remains, that is) (excerpt from group interview)

Although the lawyer’s work-related experience in managing digital stuff, according to the lawyer’s own conviction, is limited and primarily involves pre-death planning (i.e. marriage settlements and will making services) to start off with, many of the interviewees nonetheless are convinced than the issue of dealing with data postmortem, will grow bigger. The following is an excerpt from the group interview, where the interviews are asked directly if they think dealing with the digital postmortem make up a problem.

Interviewer: "Do you even think this is a problem?"

Gabrielle: "Not yet [Jacob giggles], but it probably will be."

Diana: "It's not a practical problem yet, but it will be." (excerpt from group interview)

The same is the case in the below statement, where the interviewee – despite her own limited experience with these issues – are convinced that this problem (of managing digital remains) will grow bigger in the future.

Abigail: "It's very rare that the deceased leave behind anything of significant value on the internet. This is because, fortunately, a minority of the generation currently passing away, have large companies, major websites, or commercial sites. Platforms like Instagram are used by younger people who are not yet at the age where they are passing away, so there isn't much of value left behind. When I handle decedent estates, I ask the heirs if there is anything digital I need to consider. If they say 'no', we typically don't do anything further. We don't assist with shutting down Facebook or Instagram accounts or anything like that."

Interviewer: "I'm curious – are we inventing a problem that doesn't really exist, then?"

Abigail: "I think it will become a problem eventually, but we're not there yet."

Interviewer: "Okay, so you haven't dealt with any specific cases of digital asset management in decedent estates?"

Abigail: "*I* never have, at least."

6.1.2 The financial role of inheritance lawyers

Concerning the role of the lawyers, the sentence from the excerpt above "It is very rare that the deceased leave behind *anything of significant value* on the internet (authors emphasis)" and the subsequent reference to "large companies, major websites, or commercial site" point towards the notion that the lawyer's administrative focus is financial one as default and that the task of distribution and valorisation relates to primarily (economic) assets. This role is also explicated by one of the other interviewees, who directly concedes that:

Gabrielle: "Yes, it's primarily a financial role [the legal executor]. It mainly involves registering assets, assessing their value, and then distributing them among the heirs or selling them." (excerpt from group interview)

Even though the administrative role of lawyers also involves attending to the distribution of other 'less fiscal' effects as well (such as chattels), the primary purpose of managing a decedent's estate is to settle it, which means to value assess and sell property, i.e. real estate and personal belongings. A settlement which is necessary, according to one of the interviewees, as the deceased are not permitted to own anything.

> **Gabrielle:** "Managing a decedent's estate involves handling the estate in accordance with existing rules, which means dealing with the property and assets and passing them on. This means actualising the estate and transferring it. I can't own anything when I die because we live in an organised society, and it would be chaotic if I owned something after my death. There would be no one to sell it to, no one to sign the papers, and we can't have that. That's why we have these rules that state, 'when I die, these things need to be out of my hands.'" (excerpt from group interview)

6.1.3 Ante vs. postmortem practices

The role and tasks of the lawyers in decedent estate administration are, as alluded to, bound to notion of the 'antemortem' and the 'postmortem', or as one of the interviewees, to the division between actions as preventive measures" or "fire extinction" (see quote below). These terms refer to a distinction between pre-death and post-death events and actions – a distinction which and necessary as different situations call for different answers and is by the way very common in literature.[39]

Additionally, there are differences in the options for handling property and possessions between antemortem and postmortem events. Accordingly, 'antemortem practices' refer in the interviews to pre-death planning in terms of will making, while postmortem practice refer to post-death action in terms of decedent estate management. Although, as we shall see, conceptually there is not such a sharp division between ante and post because as an individual's interests can extend beyond death through 'limited posthumous control' recorded in the deceased's will (Keating, 2015,

[39] The scholars Savin-Baden and Mason-Robbie, for instance, differentiate between "pre-death" and "post-death" (Savin-Baden & Mason-Robbie, 2020b, p. 23).

p. 182). In their work contexts, however, such distinction is practicable, sensible and phrased as follows.

> **Grant:** "In talking about this you will need to distinguish between a before and an after death…the preventive [measure, ed.] on the one hand and the 'fire extinction on the other, if you would like (…) and on a more concrete level, we are talking about respectively 'wills' and the 'management of decedent estate'."

This temporal distinction is applied both in relation to conventional management of old-fashioned objects as well as to the digital realm. However, in the digital domain options for managing e.g. social media profiles differs from an ante to a post in particularly. Pre-death action, for instance, involves the possibility of configurating a Facebook profile for postmortem use in terms of a 'memorialisation stage', or by appointing a 'legacy contact'. Whereas postmortem options, at least without the predeath configuration, is very limited in the digital space. In comparison, it is still possible to walk into a physical house and locate physical objects postmortem – even when no pre-death planning has been made by the now deceased (unless of course they are in a safe). In the digital domain however, death implies the sudden onset of a lock or barrier of systems, which is a condition psychologist and digital death scholar Elaine Kasket (Kasket, 2019, p. 104) compares to a 'Portcullis'. According to Merriam-Webster, portcullis are "a grating of iron hung over the gateway of a fortified place and lowered between grooves to prevent passage"(*Definition of Portcullis*, 2024). In real life portcullis are metal barriers for preventing passage or trespassing, whereas the digital pendent of a portcullis is a sudden and unwarned system configurations to prevents access in the postmortem, and which little room for action.

6.1.3.1 On digital will making (antemortem action)

The antemortem (pre-death) practices of the lawyers' addresses the question how digital remains are dealt with on a preventive level and primarily refers to the practice of legal will making.

In the interviews, it is indicated that the lawyer's pre-death service package includes counselling on two levels. On one level, pre-death planning involves the lawyer inquiring about the client's wishes regarding the post-death management of their digital assets in relation to their

conventional will making service. Specifically, it involves making clients aware of the option to consider how to handle their digital assets posthumously and asking if they have any specific wishes in this regard. According to one of the interviewees clients rarely have any wishes or considerations in this regard, and consequently, a very general statement is added to the testament (see below). This statement, which is the testament standard formulation of one on digital remains of one of the interviewees, basically just indicates that topic has been addressed. It does provide any specifics in managing the digital.

Example of formulation on digital remains in a will

> **Adam** (dictating): "We're aware of digital remains, meaning we recognise that we leave various digital footprints when we die. These can be on a computer, PC, phone, or information stored on different devices. To the furthest extent possible, we will sort through this and express our wish to ensure the deletion of this information, and we have informed each other about any wishes regarding present or future social media pages, such as Facebook, LinkedIn, Twitter, etc. We are aware that a folder for storing this information, as well as photos, video documentation of household effects, etc. should be created to always document their existence."

On another level, pre-death planning involves the advice to clients about leaving clear instructions for relatives for how to manage and access digital assets posthumously. This advice, which is often related to the management of social media profiles, typically includes reminders to share access information (such as passcodes) so that relatives can handle the deceased's digital stuff postmortem, and is illustrated by following quote from an interviewee: "When I meet my clients, I tell them that they need to get a handle on their codes" (Diana). Additionally, this advice on sharing access information and leaving instructions for family and friends – typically on a physical piece of paper – is recommended in many online guides on 'how to manage digital remains' provided by NGOs, such as Ældresagen or law firms. Although many of these guides seems to have been updated and refined over time, they generally and consistently advise, that individuals should ensure to:

> Write down your decisions along with usernames and passwords for your various digital profiles. (Ældresagen, 2024)

6.1.3.2 Different postmortem practices (informal vs. formal probate)

Postmortem practices generally refer to estate administration, which is the legal task of assessing and distributing assets and belongings of a deceased person as the person 'cannot own anything upon death', as stated. However, in the exploration of the lawyers' practices, it quickly becomes evident that the lawyers follow different procedures and has different roles depending on the specific type of estate administration authorised (by the probate court). While several types of estate administration or management methods exist (e.g. undivided possession of an/the estate, appropriation to a beneficiary of all assets of [a deceased's] estate etc.), we will focus on respectively 'formal estate administration' and 'informal estate administration', which are those alluded to in the interviews. These two administration forms each have their own procedures, requirements, and legal implications, which is explained at the website of the National Courts Administration's (i.e. Domstolstyrelsen).

'Informal estate administration' or 'private settlement' (in Danish, *privatskifte*) refers to when estates are handled by the heirs themselves – with or without the help of a lawyer. There are certain requirements from probate court to this settlement form (e.g. means the estate must be solvent,[40] all heirs must agree through the process, and the settlement form must be in accordance with the formal will of the deceased etc.). However, when these requirements are met, the estate can be settled privately (Danmarks Domstole, 2024) and heirs can handle the estate themselves.

Formal estate settlement (in Danish 'Bobestyrerbehandling') refers to the administration of an estate by a legal executor (Danmarks Domstole, 2024), and comes into effect if, for example, if the heirs cannot agree or the estate is insolvent. The executor is typically a lawyer appointed by the probate court or a lawyer is designated by the deceased in their will and has the legal authority to manage the estate's affairs, including the tasks of distributing assets according to the will, paying debts, and fulfilling other obligations under the supervision of the probate court. Accordingly, the

[40] 'Solvent' means that it is estimated that all assets, including estate's income, are sufficient to cover the estate's debts. The current sale value of the assets is decisive for the assessment of solvency/insolvency (*Insolvente bobestyrerboer*, 2017).

legal executor makes all decisions regarding the administration of the estate, but all significant decisions must be presented to the heirs before a final decision is made (Danske Familieadvokater, 2024a).

In summary, if there are *no* controversies and the estate is solvable, the distribution of household effects and personal property (including hardware), is undertaken by the heirs, who settles the case internally with or without the support of a lawyer. Conversely, if the estate is being insolvent or if the heirs somehow disagree, a legal executor is appointed who then become formally responsible for (and has legal authority to) the distribution of the estate.

The investigation of the lawyers' postmortem (after death) practices centres around the question on how to handle computers and accounts in a decedent's estate. Specifically, it explores whether devices and computers are handled in the estate settlements. Are they wiped before transfer? Do the lawyers or heirs review the contents beforehand? Or do they do nothing at all when administering the estate? Are there any conflicts present in terms of distributing the digital? Consequently, this part of the inquiry focuses on the management of tangible digital objects and information in estate settlements, which each has different management methods and regulatory frameworks depending on the type of digital object – is it e.g. social media profiles, computers (and their contents), intellectual work, creative productions (text, photos, movies) etc. – as well as the administration form various forms of value and rights attributed. In the following, the inquiry, however, mostly centres around hardware and its content (and not social media e.g. – we'll touch upon this aspect in the court case).

According to report from the interviewees, the different legal management methods affect how the estate, among them how digital assets, is treated. This differences in procedures and roles, are expressed as follows:

> **Diana:** "If it's an informal administration, I would ask the other heirs, 'Do you agree? Okay, there you go, take it' [the computer, ed.]. As a legal executor, I'm not sure I would do this. I think that if I were to follow my duties, I would have to say 'no' [to handing over the computer]" (…)

> **Diana:** "it's because I don't know what I'm handing over [another person chimes in] – one thing is they take those [physical] folders I haven't reviewed – but if they ask 'may I take all the folders?'" (excerpt from group interview)

Accordingly, if it is an informal estate settlement, the situation does not call for any protective measures in relation to managing the computer – as the heirs has the authority to decide on the matter themselves – whereas in relation to formal probate, it would seem that the lawyers hve the legal authority and responsibility and consider the risk of making accessible sensitive information via hardware access, although not explicated.

Similar, if a decedent estate has no immediate heirs a 'cleaner' is hired to clear out the physical estate. The task of the cleaning a decedent estate involves the collection and destruction of physical stuff, which in some cases concerns a computer as well, and the differences in postmortem management method is again reflected in an interviewee statement: If it's a formal estate, the computer is physically destroyed, and if it's a informal estate, the interviewees have no opinion about the management of it.

> **Interviewer:** "Many of you leave the computer in the estate, which is then either managed by the 'cleaner' (…) or the heirs take care of it. Do you have a sense of what happens in those two cases, respectively?"
>
> **Gabrielle:** "If it's a professional cleaner, which is a person we use at this workplace, they typically destroy the computer. It gets hit with a hammer. It is not left at the recycling site (…) it is simply destroyed – unless we ask for it to be preserved. But if it is the heirs [that deal with it, ed.], I guess we have no opinion about how they handle it…?"
>
> **Naomi:** "No, then we have no idea what happens – then someone takes it." (excerpt from group interview)

Besides pointing towards differences in procedures and roles in estate administration, the differences between these postmortem practices (i.e. formal vs. informal) indicates that the object of study is being shaped through their (reported) practices. Accordingly, the different situations call for different posthumous action, and these differences in practice influences what the object of study becomes.

When the computer is hit by a hammer, it is no longer a material asset, which needs to be traded in the market, but is viewed as something else. The postmortem practice of destroying it – including emphasising that it is 'not left at the recycling site' – indicates an awareness and mindfulness towards the sensitive contents of the device which enacts the device as a computer as more than merely a physical-material asset.

In the upcoming chapters, we will take a closer look at the different understandings of the digital, which slowly grows out of the empirical material.

6.2 Versions of digital remains

6.2.1 Surface-level understandings of digital remains

How do lawyers enact digital remains through their reported doings and sayings? Ad stated, this question is in part answered through the analysis of the responses to the direct interview question "what covers in your view digital legacy" focusing on the lawyer's immediate conceptions of digital remains, and in part through an analysis of the lawyer's verbalised practices focusing on how the lawyers (say they) carry things out in dealing with digital artefacts and data in postmortem situations.

Starting with the former, the conceptual and literal accounts of the notion of digital remains seem to predominantly be associated with the posthumous persistence of 'social media' profiles and the management of these (typically in terms of the shutting-down of these) which is reflected in both interview statements and via online resources, such as the following.

> **Interviewer:** "What covers in your view the notion of digital legacy?"
>
> **Naomi:** "Everything that goes on on social media that isn't removed…photos, things on the internet." (Excerpt from individual, spontaneous interview[41])

Online guide from Forumadvokater.dk

[41] This interviewee participates in both individual interview and group interview (see chapter 5).

> ”Digital legacy: How to close accounts and profiles of the deceased and how to give access before you die.” (*Digital Arv*, n.d.-b)

Additionally, the immediate associations with digital remains are with (other) digital, objects with no financial value such as ‘family photos’ and ‘accounts’ in general and additionally, the phenomenon is associated with the ‘practicalities’ of managing these items postmortem, including the transfer of access information (passcodes) antemortem.

> **Grant:** “But for the vast majority what they mean when touching upon digital legacy [is] the family photos and social media accounts. It’s a matter of practicalities, passing on passcodes to the bereaved (…) accessing the account and writing a message to your followers that [let’s them know, ed.] that you have passed away. It can also just be the code for your iPhone (…) that’s what you're trying to solve when discussing digital legacy with will clients.”

The understanding of digital remains related to deceased’s social media profiles, including other ‘soft’ assets, and the posthumous management of these, is referred in terms of a ‘frontstage’ version of digital remains. It represents the lawyer’s immediate associations with the phenomenon and is inferred from the conceptual level of the inquiry, in particular.[42] This surface-level understanding is also found in online sources such as legal blogpost, web articles and digital guides on how to manage digital remains.

Excerpt from Danish Lawyer’s Magazine on digital legacy management

> Digital legacy: Social media is becoming an increasingly significant part of the everyday life of most Danes. However, many people haven’t considered what will happen to their profiles and accounts after they die. This is where the legal profession can be of help.[43] (From, 2015).

Kasket has also observed this this ‘frontstage version’ (not her wording) of digital remains predominating in British public perception, and states that “Many of us associate digital legacy or Digital Afterlives with the social media profiles that often outlive their users” (Kasket, 2020, p. 35).

---

[42] The term ‘frontstage’ is unrelated to Goffmann’s dramaturgical approach to social interaction (Goffman, 1974). It does however imply, in this thesis, that there are ‘backstage accounts’ too, which refers to more profound accounts of the phenomenon reflected in the lawyer’s reported doings.

[43] Author’s translation.

However, the absence of a social media profile does not preclude the existence of a digital legacy, as she states.

> If you lack a Facebook, Twitter, or Instagram account, however, do not imagine that you have no digital legacy. Nearly everyone has digitally stored assets, documents, and online accounts of financial and pragmatic significance to their heirs. (Kasket, 2020, p. 35)

Indeed, as the interview progresses and conversations unfold, the initial, surface-level understandings (i.e. frontstage version) develop into more reflective accounts of digital remains as additional terms and literal descriptions are introduced. For instance, the interviewees introduce the category of 'digital assets' into the conversation, and although the term is not fully elaborated, it appears to introduce another conception or category of digital remains. One that refers to digital items with monetary or 'fiscal'[44] value, as it is exemplified by a webpage 'generating revenue'.

> **Abigail:** "To me something, digital remains [digital arv][45] (…) are the things created on digital media that could have value to my heirs and be passed on. So, everything that is on Facebook and Instagram and all kinds of places would *not* be digital remains [inheritance, ed.] to me (…) Digital inheritance would cover something like a website I had made or some kind of game that had a [economic, ed.] value that my heirs could carry on and make money on which possess a financial value."
>
> **Interviewer:** "Okay, but do you then speak differently about it in your field of work?"
>
> **Abigail:** "No, not at all…we…you know it's still something that gets very, very little attention. You would know that if you worked with decedent estate."

Contrary to the more immediate accounts, the phenomenon of digital remains seems to be *not only* associated with social media accounts, such as Facebook and Instagram, but also to digital property and possessions with economic value in terms of a 'digital legal inheritance'. The word 'inheritance' is used in the translation of the next example to highlight the interviewees'

[44] That which is concerned with tax and tax payment

[45] The Danish term *arv* collectively encompasses the meanings of the English word inheritance, legacy and heritage.

understanding of digital remains as legal inheritance – a lawful transmission of property, real estate, and material possessions as executed by law (Riis, 2023).

Other interviewees distinguish terminologically between 'digital assets' and 'digital legacy', although without specifying any conceptual differences.

> **Interviewer:** "I want to hear, what covers in your view digital legacy?… which I presume is the word used in your line of business or what?"
>
> **Diana:** "I guess it is, digital legacy?" [others chime in]
>
> **Gabrielle:** "Digital legacy and digital assets." (excerpt from group interview)

'Assets' are likely associated with items that have economic value (as in the former example implies), whereas 'legacy' is associated with items of non-economic value, which however does not necessarily imply sentimental value, but this is not explicated. This point is states by Morse and Birnhacks, who states that digital remains are not always imbued with affective or economic value, but can entail the mundane and trivial as well (Morse & Birnhack, 2020b, p. 110).

Yet others go beyond viewing digital remains as 'assets' and 'dead social media accounts' to perceive the concept as a nascent and conceptually unsettled phenomenon. This is the case in the following two interview excerpts. One interviewee describes the phenomenon as 'a sort of umbrella term that can embody all kinds of nuances,' while another expresses it as 'there's so much in it [the concept, ed.].' While the expressions have subtle differences, they both indicate that a negotiation is taking place regarding what phenomenon actually encompasses.

Interview excerpt (individual interview)

> **Grant:** "The term [*digital arv*] is linguistically apt, but language is a lawyer's tool, and it isn't very precise…it covers all sorts of stuff. A will that is made online, I guess, could also fall under digital legacy, but it is not inheritance [legally speaking, ed.]. So, it's just a sort of umbrella term which can embody all kinds of nuances."

Interview excerpt (individual interview)

> **Adam:** "I think it's interesting because there's so much in it [the concept of digital remains, ed.] …and I find it difficult to figure out what the heck it actually is."

In this section we have treated the lawyer's immediate and common-sensical perception of digital remains in terms of a 'frontstage' version. This version encompasses an understanding of digital remains as deceased peoples' social media accounts, photos and other objects with soft value forms attributed to it and puts an emphasis the practical-administrative dimensions of having and managing digital remains. Additionally, other terms and understandings are introduced– such as digital assets with 'fiscal' value, which is however not further elaborated – and digital remains is also presented as a more unsettled phenomenon.

6.2.2 Managing hardware in decedent estate

In the following part of the analysis, the insights primarily stem from the practice-focused part of the inquiry, which centres on the posthumous management of concrete, physical hardware and software. This practice-anchored inquiry is based on questions addressing personally experienced, real-world interactions, events and ways of working with digital effects rather than conceptual questions such as 'what does the notion of digital legacy entail in your view' (conceptual focus). At this level of the inquiry, the lawyers provide more detailed information on their practices (or sometimes the practices of their colleagues), which moves the interviews beyond immediate conceptual, surface-level accounts.

As mentioned above, there are two types of postmortem practices present in the interviews, which is the formal and informal estate settlement. In the interviews, it quickly becomes clear that the management of (digital) objects is affected by the type of administration authorised, which then again affects how digital objects – in this case, a laptop – is being treated postmortem. To revisit, in the informal estate settlement – where heirs have the authority to decide on the matter themselves provided that they can agree – no protective measures in managing the computer is taken amongst the lawyers, and the heirs can have the computer. Whereas in the formal estate settlement, protective measures of legal executors in terms of withholding the computer are considered. – although not explicated in the above case presumably to prevent the risk of exposing sensitive information through the hardware.

The answer to this difference in postmortem practices might also lie in the 'nature' of the digital device (which also makes it for an interesting 'prompt' in the interviews) and the concept of the

"hybrid item" (Kirk & Sellen, 2010) might be helpful in this connection. Hybrid items refer to physical instantiations of media content, such as cassette tapes, video tapes, CDs, and vinyl records, which are valued for sentimental reasons, while the medium itself is merely a storage device (a container) with no sentimental value (Kirk & Sellen, 2010, pp. 10, 14). Expanding on this definition, the hybrid item encompasses both material, tangible properties and serves as a gateway to intangible data, information, and contents associated with various forms of value (e.g. sentimental, fiscal, trivial, etc.). The following example highlights the hybridity of the digital, where the computer is perceived as a material asset with a market value on one hand, and as a storage device for 'sentimental stuff' on the other (which, according to the interviewee, is incidentally comparable to physical letters).

> **Adam:** "A computer is an asset with some value. It can be worth 5, 50 or 500 USD and there's maybe something inside which we can call sentimental stuff which belong to the private sphere just like a physical letter. That isn't something you value assess (…) unless it's Karen Blixen's[46] writings, but normally we don't value assess these things. It is not something that needs to be assessed in relation to the decedent estate. You only assess those things that can be traded in the market."

This difference in practice, both arising from the types of estate settlements as well as from the hybridity of the digital device, enacts the objects different across situations. I refer to these different enactments, as respectively a property-like' and 'information-like' enactment of digital remains, which I will see expand on in this and the next sections (6.2.2. and 6.2.3).

The notion of the 'property-like', which we will treat first, entails that attributes of "old-fashioned objects" (Tweehuysen, 2019, p. 1150) being applied to digital objects. It implies a form of 'alleged physicality', which causes the digital to be paralleled with more analogue types of objects – both media and content – and performed accordingly: as delimited, tangible possessions that allows for ontological differences between the digital and the analogue to be ignored. Additionally, the property-like enactment is expressed through the lawyers' view on 'access' to both digital content and devices, which is that heirs, in most cases can have the computer and access it. In sum, these

[46] Famous Danish author.

ways of dealing with and understanding the digital enacts it as legal inheritance, involving a legal transfer of property and possessions to the heirs executed by law in the event of death.

In the following example, this 'property-like' enactment of digital remains is particularly evident.

> **Gabrielle:** "In most cases, we don't do anything" [the others chime in] and we also can't access it because it's password protected and things like that…so very often we can't access it."
>
> **Interviewer:** "And then what happens?"
>
> **Gabrielle:** "It stays with cups and cans and all sorts of stuff – and the images in the drawer [in the house](…) we don't give special treatment to a computer over a royal vase – we actually don't." (excerpt from group interview)

In this example, the interviewee perceives a laptop as no different from a "royal vase," receiving no special treatment in the estate settlement. It is considered a physical-material asset first of all subject to value assessment, sale, and distribution, which lies somewhere between and asset (a sellable good) and 'a chattel' (a tangible, movable piece of property not necessarily sellable) (*Definition of Chattel*, 2024). Consequently, it can be grouped with everyday items like cups, cans, and other belongings.

What is reflected in the former statement, is that the enactment of the digital as 'property' – or 'property-like' – allows for the lawyers to follow protocols, norms, and conventions of physical property and assets and apply it to the digital realm. The property-like enactment refers typically to the notion that digital objects (and possibly also to their contents) is paralleled with more analogue forms of objects, including traditional, written forms of communication such as diaries and physical letters. This view is reflected in the following statement.

> **Abigail:** "Unless we're talking about an author with pronounced rights, then we'll say the things on the computer is the same as if you went up onto the attic and found your dad's old letters – that is also not something we do anything about."

The transfer of regulatory basis and legal 'common sense' from the traditional realm to the digital – enacting the digital as property-like – is also evident from the following dialogue.

> **Interviewer:** "So you develop your own guidelines to the best of your ability, or how you put it?"
>
> **Abigail:** "Yes, that's one way of putting it. Consequently, we have many years of experience in decedent estate management and hence we try to use our common sense and our legal experience and I don't think IT – the things that are digitally stored, that is – is very much different than what's in the attic (…)."

In fact, as the next interviewee's explicitly claims, the existing legal frameworks (e.g. enacted through the statuary power of testament law) can accommodate this digital, postmortem problematic as the problematic is not much different from the analogue world – and thus not new.

> **Grant:** (…) digital legacy is a late appendix to the classical testament law (…) jurisprudence is on top of it, even if it hasn't considered it (…) you shouldn't believe that…that is, there are rules enough already…they can accommodate this concept [digital remains, ed.]…they just didn't consider it then. But rules are flexible…immaterial rights have always existed…eh, and that's the next then…is this in fact immaterial?…anyhow, let's approach this nice and easy."

Even though the small pause, the rhetorical question and change of topic in terms of the sentence "(…) eh, and that's the next then…is this in fact immaterial?…anyhow, let's approach this nice and easy", might suggest that he might not be entirely sure of his case after all.

This property-like enactment of the digital (i.e. applying attributes of analogue and physical items to digital items) is reinforced in relation to hardware and physical devices because they possess a market value that can be realised, unlike, for example, the digital communication content of ordinary people not authors). According to one of the interviewees, a legal executor cannot refuse to hand over a computer to the heirs, if it's worth money, as its value must be realised.

> **Gabrielle:** "If they [the heirs, ed.] ask, I can't refuse to hand over an asset that has a [financial, ed.] value. I can't destroy something that is worth money, so if it's a money-asset [oversat fra 'kroner-øre-aktiv'], I can't refuse to hand it over as it has a value of some sort. But most computers lose their value the moment they leave the store. Then they're zero kroner." (excerpt from group interview)

Accordingly, in private settlements at least it would seem, that the interest or obligation to protect whatever personal content is stored or is accessible via the device, is secondary to settling the estate financially in postmortem legal practices. Thus, if the device is worth money, the lawyers cannot refuse to hand it over (this is however different in formal probate, as we shall see later).

Considering the notion of the 'hybridity' of devices, a question is then if the interviewees seem to differentiate between the valorisation of the *device itself* and the *contents of the device*? The answer is not clear-cut, but content seems to be frequently paralleled with traditional forms of communication – 'analogised' – and treated accordingly. This is illustrated both in the previous example, and in the next, where an interviewee juxtaposes the contents of a traditional, physical diary 'in the attic' and the contents of a device, stating it essentially as similar but in a different packaging.

> **Interviewer**: "So the data on device is considered the same as diaries in an attic or how would you conceptualise it, legally?"
>
> **Abigail:** "Well, we do not consider it… we consider it, just like I said, [the same as, ed.] a diary. Something the heirs can just grab. An artefact with no [economic, ed.] value, but it is eh personal."
>
> **Interviewer:** "Okay [hesitant], so it [contents of a computer] does not possess any economic value [and nor is considered subject to data-, ed.] protection…and what about GDPR? Do you consider this?"
>
> **Abigail:** "We don't do anything in that regard. Just like we don't do anything with the diary in GDPR terms."

An adjacent question following this statement, is where the lawyers stand in relation to postmortem access to devices, since these, along with digital content, are often password protected? Are computers along with their contents paralleled with chattels and diaries, which heirs are permitted to access and read as default – what can be referred in terms of legally authorised access – or is such postmortem access to be considered as unauthorised?

One viewpoint, put forward by an interviewee (see below), suggests that a person familiar with the passcodes of the deceased is legally permitted to access the devices of the deceased and its contents posthumously – provided that consent has been given.

> **Interviewer:** "(…) what would indicate that you didn't have the intention of sharing."
>
> **Grant:** "Well, in those cases where you need help, where you can't open the diary." [speaking in analogy, ed.]

Interviewer: “And if you know the password?”

Grant: “Well, then it depends on why you know it. If you know it because the deceased shared it with you, then you’re permitted to use it. Then the deceased have said “my diary is in the attic you’re welcome to go and pick it up.”

As the previous and following examples together illustrate, consent is understood as the written or verbal communication of one’s passcodes before death, and additionally a good reason for the heirs knowing the password should be provided, as the interviewee states. Conversely, the notion of ‘denial of access’ or’ ‘lack of consent to access devices’ is to be understood as *not* sharing access information with relatives before death (however this may look in practice: make sure your browser does not log in per default, remember to remove post it’s from your desk – and what to do if death is sudden? Accordingly, both ‘acts’ (i.e. consent and denial) are perceived as intentional and deliberate by the lawyers, although this scenario seems unlikely as many people are first of all unaware of the existence of their digital remains, and additionally, do not plan for their death digitally speaking according to numerous of surveys on digital remains (see chapter 8).

In the same vein, another interviewee seems to share the expectation of individuals to be engaging in digital pre-death planning and supports the notion that ‘denial of access’ is an intentional and deliberate act of the individual testator. The following interviewee explicitly states that if no protective measures have been taken – e.g. if private stuff is left accessible in the physical or digital realm postmortem – it is considered an act of consent welcoming others to access and read content posthumously. Accordingly, the hindrance of access/protection of personal content is alone the responsibility of testator.

Gabrielle: “probate courts generally say, 'Well, there’s no difference between love letters in a drawer or email correspondence on a computer. If you’ve chosen to die and leave your things out in the open, then you have to accept that others will come and see them, whether they’re in a drawer, on a shelf, or on a PC, right’? At least that’s what Richardson [a retired judge from the Danish court] has said so far, right?” (excerpt from group interview)

However, it 'so far' marks the before and after the GDPR data law coming into effect, as the following statements indicates (the statements is unrelated to the above statement in the group interview):

> **Shannon:** "Well, Richardson said – a now-retired judge from X court –before this GDPR data law came into effect, that the deceased's information was not sensitive personal data, and we didn't have to protect it in the same way. But then this law came along…and suddenly it was also included in this whole ensemble of when something is considered sensitive personal data, right?" (excerpt from group interview)

In terms of consent, an interviewee extends the logic of consent (i.e. paralleling the sharing of access information with 'consent to postmortem access') to third-party services such as Facebook. This is even though such access would be in defiance with the policies of the service provider and thus considered 'unauthorised access' from the service provider's perspective.

> **Interviewer**: "So writing down your passcodes intentionally for others [to use them, ed.] – is that what you mean by giving consent?"
>
> **Grant:** "Yes (…) the passing is done deliberately (…) and to me as a counsellor that makes a great difference. Accordingly, should an ill-considered term of service be a hindrance to solving a great problem [dealing with digital remains] and when it's by the way a sanctionless regulation by and large. They'll [Facebook.] only discover it if you are so foolish contacting customer service at Facebook and tell them that you intent to do it."

Accordingly, access to digital content and information – however obtained – settles the 'right-to-read' and places digital remains on par with deceased's "non-digital personal belonging" (Morse & Birnhack, 2019, p. 117), and thus as property-like.

What also moves the digital towards a property-like nature, is the notion that concepts such as 'digital rights' and 'interest of the deceased' is believed to be "very academic", which is evident from the following statement.

> **Interviewer**: "(…) have you experienced anything in concrete where you thought; 'here's something I need to protect on behalf of the deceased?'"

> **Abigail:** "No, [answers promptly], there never has been. It is not something we spend our time on…this is very very academic (…) but I have had many decedent estates where I thought that the deceased certainly didn't wish for the legitimate heir to inherit."

The interviewee indicates that these rights and interests are irrelevant to her mundane everyday work life practices. Instead, the *real* issue concerns that fact that inheritance often falls into the wrong hands.

6.2.3 The information-like digital remains

In addition to treating digital remains as property-like (i.e. paralleling digital and old-fashioned assets and allowing for access), the interviews reveal a third type of enactment of the digital, namely as something personal and private. It is expressed through the lawyer's reported practices as subtle considerations for the management of the personal and private on one level, and as doubts in relation to their current practices and conceptualisations (the property-like enactment) at another level. Although this version is slow to emerge and is less manifest that the other two versions of digital remains, it slowly grows out of the group interview where it is present in reported doings and dialogues of the lawyers.

Additionally, the conceptual exploration of 'the digital' in relation to posthumous management of computers never moves much beyond the word 'content'. It therefore remains unclear how the lawyers interpret the notion of the digital, aside from viewing it as various forms of digital communication. In other words, the concept is treated on a very general level, whereas scholar Elaine Kasket in comparison subdivides digital remains into respectively digital assets, digital autobiographies, digital archives, digital unauthorised biographies, and digital dossiers (Kasket, 2019), which is treated in chapter 4. Bringing in Kasket is to say that posthumous digital communication is a concept far more granular than obvious from the interviews with the lawyers where 'content' stays a high-level-category. Consequently, it is difficult to determine whether the lawyers' mental models of content pertain to social media data, digital photos, instant messaging, email correspondences, metadata, trivial information, personal sensitive data, or a combination of all these data types. Nevertheless, as previously mentioned, it is reasonable to assume that 'content' refers to some form of digital communication – whether that content is text, audio, or

images – on the base of mentions of 'confidentiality' and 'protection'. This, I believe, reflects an understanding of the content as 'information' and 'communication'. Based on this interpretive leap, I argue that there is a third dimension of the notion of digital remains present in the empirical collection, which goes beyond the analogue-digital comparison constituting digital remains as 'informational'. Accordingly, this third enactment of the digital among the lawyers is referred in terms of an 'information-like' enactment of digital remains.

The attention towards the private and sensitive manifest as indecisive statements and dialogues about how the digital remains is and should be valorised and handled posthumously. This is elucidated especially in the group interview where two interviewees conversate in "crossing discourses" (Brinkmann & Kvale, 2018, p. 96).

What is reflected in this dialogue of crossing discourses is the doubt whether their administrative practice should comply with the wishes and needs of the heirs (e.g. breaking into a computer to access memories and information) or if they should comply with data protection regulation to safeguard personal information of, I assume, the deceased or third parties even if the potential harm is not explicitly stated.

> **Gabrielle:** "(…) that's at least what they say in courses, that you must protect yourself. (…) You must put a password on things, on your computer, if you don't want your children to read them, right? (…) And then there's probably nobody who can figure out how to access these things, no matter how much they try."
>
> **Shannon:** "But sometimes the discussion arises *precisely* because they want to access the computer, right? Consequently, do you as legal executor bring about the…"
>
> **Gabrielle:** "…destruction of" [Gabrielle tries to finish Shannon's sentence)
>
> **Shannon:** "…breaking into the computer so people can access it? where I would presume you'd typically say 'we can't do it', at least I have done this, because there could be some personally, sensitive information that we need to take into account."
>
> **Gabrielle:** "But we actually can [break into the computer, ed.]. We discussed it on a course recently and it's actually not that expensive to get some code people to access it. And then it's just a question about spending those money, right?"
>
> **Shannon:** "But then I guess, in principle, you have to look through the computer as a legal executor before you hand it over?"
>
> **Gabrielle**: "Yes, well I think that too."

Shannon: "…to make sure there's no GDPR-sensitive information."

Gabrielle: "I have to (yes)."

Shannon: "…in consideration for the deceased or, what do I know, third parties right." (excerpt from group interview)

Accordingly, the dialogue yields important information on their different perceptions of the subject matter in which one focus on the feasibility of breaking into a computer, and the other questions cautiously the ethics and legality of such an act. This dilemma and implied conflict of interest is more distinctly and confidently formulated in this second excerpt, indicating a slightly higher degree of reflection and knowledge level of the interviewee, 'Shannon'. Additionally, the dialogue suggests that they are collectively trying to determine their practice in relation to the handling of digital matters.

Interview excerpt (group interview)

Shannon: "But there *is* a consideration for protecting the deceased and his/her sensitive information"

Gabrielle: Yes, yes, but it's basically not greater just because it's on the computer than if it's in the drawer [Shannon: no, no]… that's just what I mean.

Shannon: But whether you put it here or there [refers to location], it doesn't really matter – and how thoroughly you do it – the consideration is [should be] there.

Gabrielle: Yes, yes… but I agree with that… I'm just saying it also exists in the physical form.

Shannon: Yes.

Other indications of the lawyer's being attentive towards and aware of the private and personal are reported as real-life stories and firsthand accounts on dilemmas in managing hybrid devices, such as the following, where the legal executor declines the hand-over of the device to the heirs for reasons of privacy considerations.

Interview excerpt (group interview)

Shannon: "I experienced once – it was one of my previous colleagues that made the decision – that she declined the transfer of it |the computer] because they didn't know what was on it and it was coded and all sorts of stuff, so first we had to figure out how to open it – which was doable – and then time had to be spent going through it because there was a risk of

handing over sensitive personal information that shouldn't be passed on to the heirs….it was refused with reference to GDPR, among other things."

These precautionary measures (e.g. withholding a computer from the heirs) indicate a consideration for protecting sensitive content on behalf of someone. However, it is not always clear from the statements whether these privacy concerns relate to living individuals (e.g. communication partners of the deceased), the deceased's (personal information), or both. In the following example, the consideration concerns the living parties in terms of 'the deceased's clients' who might feature in a clients record on the deceased computer – or at least it seems as though the concern relates to the living, but it's only at first sight.

> **Diana:** "I had one case with an old doctor. Self-employed. Someone wanted his computer, and I thought, I'm not handing that over. I have no idea what kind of client records and such he might have on it. So I chose to say no. She could technically have just taken it without asking me, but she asked and I said 'no'." (excerpt from group interview)

It turns out, however, that the interviewee has formulated the will of this same, self-employed doctor, and it turns out that the privacy concerns concern is also related to the deceased's posthumous reputation.

> **Diana**: "He was alone and had done all sorts of other things and I thought, there could be all sorts of things on that computer that the heirs shouldn't have."
>
> **Naomi**: "…You were thinking about the patients, right?"
>
> **Diana:** "Yes, (but) also considering that he had visited all sorts of sleazy websites… I mean, it's not impossible that he had been on all sorts of things."
>
> **Interviewer:** "Okay, yes… because you knew him or what?"
>
> **Diana**: "I had made the will and I… I asked among other things – well, it has nothing to do with it – but I asked, for example, 'why should that woman inherit'… 'well, I slept with her'… well, fine, then she inherited 2 million… he was just a single man with money and was around (in the sense 'promiscuous')."
>
> **Shannon:** "But in that situation, one can say, if he also had a patient record lying around, then you can't expect that you can just hand it over, because those are sensitive personal data." (excerpt from group interview)

Although the interviewees are aware of the formal rights of the deceased as for example outlined, for example, in the Data Protection Act (cf. previous dialogue from group interviews), and do sometimes consider the aspects of e.g. defamation aspects and posthumous reputation of their clients, as in the example above. the analysis nonetheless suggests that the lawyers often seem to prioritise the interests of living individuals over those of the deceased in many instances. The last sentence in the above statement "if he also had a patient record lying around, then you can't expect that you can just hand it over, because those are sensitive personal data" indicates this. It is not the deceased's reputation which essentially concerns Shannon as legal executor, but the sensitive data of the clients of the deceased.

This assertation is e.g. also based on the notion that accessing a deceased person's computer to retrieve files and photos is an act rarely questioned in estate management contexts (if there is no will made, that is) indicating that the consideration for the bereaved in practice seems to take precedent over wishes and privacy concerns of the deceased. This is illustrated in the following example, where the conflict centres on the living parties' interests in the contents of the computer – the two set of heirs – while the deceased's interests are largely absent from the dialogue.

> **Interviewer:** "Have you encountered any specific problems, or is it fairly straightforward dealing with digital assets in estates?"
>
> **Adam:** (pauses) "Yes, sometimes there's a dilemma where the children might disagree on who should have access to a computer, for example. If there's some discord in the family, it can lead to problems, right?"
>
> **Interviewer:** "In what way…"
>
> **Adam:** "It can be a bit difficult if one branch of the family says, 'We want access to that computer,' and the other branch also wants access, what do you do? Or if they say, 'That computer shouldn't go to the surviving stepchildren…it's actually our deceased father's computer, they shouldn't have it,' and things like that."
>
> **Interviewer:** "And I assume it's the content on the computer that's of interest, more than the computer itself?"
>
> **Adam:** "Yes, yes…it's the content [spoken with an obvious tone]."
>
> **Interviewer:** "What…do you have a sense of what interests them about it?"
>
> **Adam:** "No…I actually don't. It can be due to several things…it depends a bit on the nature of the conflict."

The same applies in the following example, where the computer is seized not out of consideration for the deceased, but due to the unresolved disagreement among the heirs about who should have access. Put differently, the controversy is not reported as a question of *access or not*, but a question of *which heir* is the legit heir and should thus be granted access.

Interview excerpt (group interview)

> **Shannon:** "I mean, where it really becomes an issue is when the heirs are not on good terms and if they can't agree on something as simple as making a USB copy and sharing it (the contents) with the other brother, sister, or whoever it might be…I mean, sometimes I've experienced – but only a few times – that they get very fixated on who has that damn computer, right…uh, and as the executor, you have to say, 'Well, then I'll just keep it.'"

Similarly, there appears to be a higher incidence of variants of the word 'sentimental' in the interviews compared to terms like 'data protection', confidentiality and 'sensitive'. These prevalent variants could be a verbal indicator of a greater concern for the interest of the living at large – although no frequency analysis has been conducted – in relation to postmortem legal practices since things can hardly be sentimental to the dead. In other words, these prevalence of these sentimental word variants implies an emotional connection that the deceased can no longer experience, thus rather pointing towards a living-object-relation.

Nevertheless, there is a consideration for the deceased in a more conventional sense, focusing on aspects of personality rights, such as avoiding defamation and cherishing the legacy (reputation) of the deceased, as the following example illustrates. The interviewee considers her moral obligation with regards to protecting against the defamation and exposure of the deceased on Danish national broadcast TV.

Interview excerpt (group interview)

> **Gabrielle:** "There has always been some kind of moral consideration [another lawyer verbally confirms]… I mean, we fundamentally try to look after the deceased's interests in the sense that they had a wish for how their things should be distributed, and we also think that they should not be unnecessarily defamed or exposed. For example, I had this request

from Danmarks Radio – who was in search for some heirs – if I would allow it to be featured on a TV show, right? It was the one where I had those cash amounts that I basically didn't know where they came from, and I said no to that on the grounds that I didn't know what story it would uncover. I didn't think it was in the man's interest to be exposed even though he was dead, so I said no to that. And it's a common moral consideration we have, to say, 'what is in the interest of the deceased?'"

6.2.3.1 Is jurisprudence on top of it?

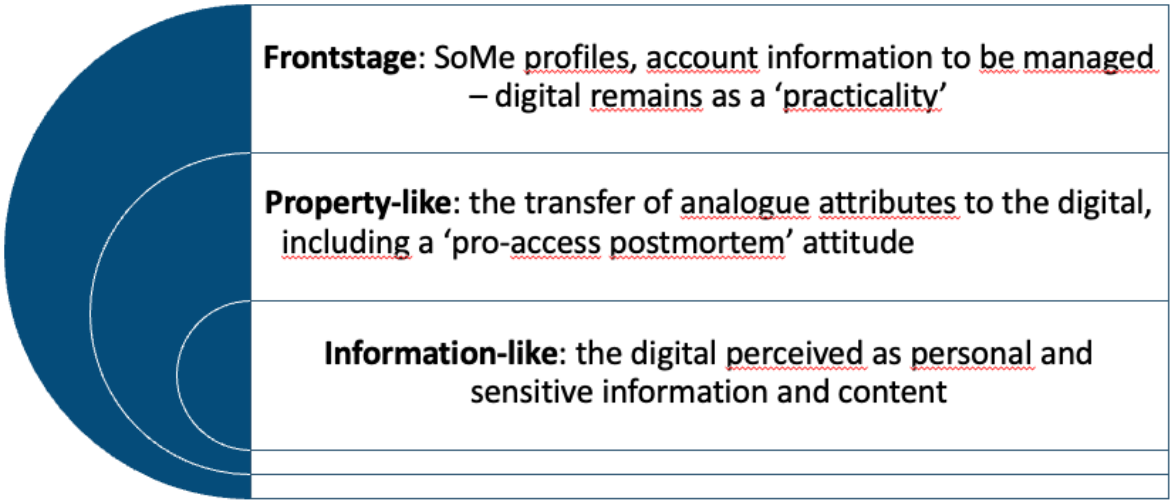
In summary, this section has investigated how lawyers in a singled out legal context understands and 'does' digital remains in addition to identifying the prevalence and establishment of legal practices in this regard. The phenomenon has been explored at a conceptual level focusing on words and conceptualisations of the phenomenon amongst the lawyers and at a practice-anchored level focusing on the doings of digital remains investigated through the reported practices of the lawyers in relation to e.g. estate settlement. Analytically, it means that different 'life world accounts' has been identified in the interviews, corresponding to a first-level interpretation, which have then been translated into 'second-order' perspectives. That is, the analytical categories or versions of digital remains.

Three different versions have been outlined in the qualitative investigation, which (in theory) are not mutually excluding, and which entails a 'frontstage' version, 'a property-like and an 'information-like' version of digital remains. The frontstage version reflects the lawyer's immediate, common-sensical accounts of the phenomenon, where notions of digital remains primarily concerns the administering of social media of deceased postmortem and the sharing access information pre-death (to get access to the profiles and their contents). In other words, a 'practicality' that can be dealt with on a preventive level by e.g. sharing access information with relatives pre-death. The property-like version parallels digital stuff with more old-fashioned objects, assuming digital effects and information as inheritable. In addition, it entails considering postmortem access to deceased objects as a 'matter of course', which is in accordance with current legal framework. As one of the interviewees expresses it "jurisprudence is on top of it [and] (…) there are rules enough already [that] can accommodate this concept" (Grant, individual interview,

mentioned p. 98). A third, less explicated enactment of digital remains emerging from the practice-oriented part of the inquiry, are digital remains as 'informational'. The lifeworld accounts position the digital stuff as personal and private in the postmortem, however, with an emphasis on a subtly expressed privacy concern for the 'living' parties as opposed to the deceased. Each of these versions has emerged on the grounds of varying degrees of interviewee reflection and reported actions, and each version gives different answers as to whether the management of digital remains poses a problem.

As Morse & Birnhack states, the legal framing has practical implications, which does not necessarily fit the current situation.

> (…) once we classify a new situation, as a mere extension of a familiar one, we quickly formulate practical solutions. If, however, the old classification does not fit, we need to sign a new legal solution. (Birnhack & Morse, 2022, p. 5)



If digital assets are to be understood as property-like and inheritable, as some parts of the empirical data suggests, the lawyer's reported administrative practices are regarded as relatively straightforward and uncomplicated. This is because this enactment allows them to follow protocols, norms and regulatory basis (e.g. property law, inheritance law) derived from the

conventional practice and thus from the management of traditional chattels and household properties and apply to both physical hardware and digital communication. Accordingly, the digital is enacted as traditional objects and communication content (i.e. tangible and physical) such as physical diaries and letters, which means that the lawyers need not to take precautionary measure when distributing personal computers (i.e. 'hybrid items') in private estate settlements. This 'analogising' behaviour settles the digital as something delimited and familiar, and consequently, it allows for the lawyers to treat the digital in accordance with the regulation of physical assets and heirlooms as indicated by the statement; "We don't give special treatment of a computer over a royal vase" (Gabrielle, group interview, mentioned p. 97). The digital becomes a practical and economic task in the distribution of the (physical) estate allowing for an 'business-as-usual-approach'. This tendency of extending familiar categories and rules to the online realm in legal regimes, has also been observed by scholars Birnhack & Morse &, who states that:

> it is tempting to extend familiar social categories and offline legal rules to new, online modes of human behavior (…)The convenience of the analogue-to-digital-extension spares us from reinventing the wheel and facilitates a quicker social response. (Birnhack & Morse, 2022, p. 4)

Contrary, if the digital is to be understood as an aspect that has to do with protecting personal or private information – as other parts of the empirical data subtly suggest – the postmortem practices of enacting computers as traditional economic assets and juxtaposing digital communication with more analogue forms of communication, becomes a problem. It means that the deceased suddenly have rights and interests they as professionals should attend to and whose interest then (of the bereaved and the deceased) to attend to, and how to?

Concurrently with the lawyer's more profound and detailed reports as conversation progresses, they ask themselves if they have an obligation to safeguard the sensitive and confidential stuff in descendent estate management. While detailed accounts of what 'confidential' and 'sensitive' encompasses, is left out, together with reasons of protection and in relation to 'whom', some of the lawyers interviewed *do* report on taking action in that regard. E.g they withhold the deceased's computer or 'hammer it' in some cases to protect living parties mostly, but in some cases also the deceased. Additionally, they express doubt in relation to the treatment of sensitive material –

which is a doubt that relates to questions of whose interest to attend to – which could indicate that the lawyers feel they have an obligation and a responsibility to safeguard digital 'effects' as well. However, it seems that the practice of enacting the digital as 'property-like' is the most prevalent and permeating practice.

Essentially, the controversy that emerges from the interview situation revolves around the question whether digital stuff should be considered something private and personal or simply 'a practicality' involving the distribution and inheritance of the physical estate. The (legal) implications of the different framings are summed nicely by Morse & Birnhack, who states that

> (…) a property framing implies succession and inheritance law, which means there is always and heir, even if by default, and heirs should have access to the deceased's online accounts, whereas privacy framings raise challenges about its posthumous condition. In the absence of legislation, and if we can conclude that privacy does not survive death, the result too would be that the service provider has the ultimate say. (Birnhack & Morse, 2022, p. 3)

This dilemma is represented in the BGH Facebook case as well, which we will examine next. The case is used instrumentally, which means that it is employed to highlight and amplify perspectives not entirely clear in the interviews (with good reasons as the purpose of the interviews was to avoid assumptions and preconceived ideas in the inquiry). Consequently, the lawsuit will help elucidate different implications of considering digital remains as either 'property' or 'privacy', and vice versa. The BGH case will be analysed first in Chapter 7. Subsequently, the consequences of these different enactments of digital remains, derived from both the layers study (study 1) and BGH case (study 2), will be analysed and discussed in Chapter 8.

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7 The BGH Facebook Case (study 2)

7.1 Introduction

The BGH Facebook case is interesting as it is the first European court case on how social network data and accounts should be treated postmortem and revolves around a similar controversy to the one alluded to in the Lawyer study, namely, whether the digital remains is to be understood as property or privacy.

Consequently, the case contains issues of central importance to the purpose of the inquiry from which we can learn, as Patton states (Patton, 2002, pp. 46–47)(i.e. from which we can understand how the digital is enacted in a legal postmortem context) and has helped elucidate different implications of considering digital remains as either 'property' or 'privacy'. Additionally, the court case has been instrumental in looking for common themes transcends the case – without however being understood as an attempt to "formally" generalise from the court case itself (Flyvbjerg, 2022) – and that way get a more elaborate picture of the phenomenon and its constituents.

The objective here is to unfold key issues and arguments of the case to discover how digital remains is enacted (in the court room), and these will be introduced in the following. Secondary documents in terms of translations of legal summaries and academic interpretations of the case (Fuchs, 2021; Patti & Bartolini, 2019a; Tweehuysen, 2019) have made the foundation of the analysis. However, as it is the different understandings/framings of the digital that is of central interest emerging from the main issues, the specific legal argumentation and frameworks is considered less relevant in this case.

Accordingly, the analytical focus is on the 'legal reasoning' behind the judgments, examining the arguments and counterarguments related to the various questions addressed between courts, and the arguments are analysed using secondary and tertiary documents, as outlined in Chapter 5. More specifically, it is the legal enactment of the digital emerging from the argumentation that is of central interest and not the specific legal frameworks employed.

News articles provided initial insights into the case, while academic papers from different European countries (the Netherlands, Italy, and Germany) form the foundation of the analysis. As

stated in chapter 5, arguments selected and applied in this cross-analytical reading are not further interpreted but taken at face value and compared to additional documents.

7.2 The case

The BGH Facebook case (‘Digitaler Nachlass Beinhaltet Zugang Zum Facebook-Konto’, 2020) is interesting as it is a European landmark ruling on how social network data and accounts should be treated postmortem (Oltermann, 2018) – as respectively property or privacy – and thus represents a unique case. The case began in 2015 and was settled finally in 2020 and involved the mother of a girl who tragically died in an underground accident in 2012. The mother sought access to her daughter's Facebook account through a court request and, besides seeking emotional closure, the parents hoped to avoid paying compensation to the train driver, who would not be entitled to it if suicide was ruled out (‘Facebook Ruling’, 2018). The mother was familiar with the daughter’s access information but was prevented from accessing the daughter’s account, as it had changed into a memorial stage upon death. This limits access and use (Fuchs, 2021, pp. 1–2). Facebook profiles are set into a memorial stage when the owner of the profile is reported dead, which can be done by any (Facebook) user. A memorial stage involves Facebook reappropriating the profile, allowing the bereaved to visit it for mourning, commemoration, and remembrance purposes – a type of deactivated and 'frozen' mode. However, if a 'legacy contact' was designated before death (an option which however did not exists at the time), the profile can be configured to a limited extent by the bereaved as well.

In legal terms, the case concerned the question whether a Facebook account was inheritable or not in the event of death and how access was to be interpreted. Could a Facebook profile, including all its communication and content, be considered a part of the estate passing to the heirs upon death just like “old-fashioned” assets (Tweehuysen, 2019, p. 1150) or was personality rights of the deceased and her Facebook contacts a hindrance to universal succession? (Fuchs, 2021, pp. 1–2)? The legal consequences of the different conceptualisations are summed up by Birnhack and Morse, who state that:

> A property framing implies succession and inheritance law, which means that there is always an heir, even if by default, and heirs should have access to the deceased’s online accounts,

whereas a privacy framing raises challenges about its posthumous condition. (Birnhack & Morse, 2022, p. 3)

The rulings in sum were that the Berlin Regional Court ruled in favor of inheritability (2015), whereas the Berlin Court of Appeal reversed the ruling two years after with reference to, among others, the “Secrecy of Telecommunication” (2017). The argument of the Appeal court stated that the contract was to be transferred to the parents upon death, but that Facebook was prevented from disclosing the contents of the profile due to “Secrecy of telecommunications” (Fuchs, 2021, p. 3). In 2018, the Federal Supreme Court (‘Bundesgerichtshof’) in Karlsruhe restored the first instance judgement and reaffirmed that the account was inheritable (2018), and subsequently questions of how access was to be understood was treated (2018–2020). This concluded with the Federal Supreme Court determining that access in this case meant 'access to a limited, but yet interactive, configuration of the account' rather than content in terms of PDF files.

Additionally, it should be noted that special circumstances influenced the ruling, such as the deceased being underage and children warrant special attention (McCallig, 2014, p. 139), and that her death was tragic. However, we can still learn from these judgements and the legal reasoning behind, I would argue, as the rulings also provide broader insights into views on digital postmortem issues which are separate from the circumstances surrounding the tragic death of a minor. Accordingly, as legal scholar Tweehuysen states, “parallels can still be drawn" (Tweehuysen, 2019, p. 1157).

7.3 The main arguments

7.3.1 Arguments of inheritability of the digital

The inheritability of a Facebook account was deemed practicable by Regional and Federal court because, under German law, an account on a social network is classified as a ‘contract’ under the law of obligations (Fuchs, 2021, p. 6). This contract for the use of Facebook, which the daughter had entered into, was transferred to heirs upon death. Consequently, the Berlin Regional Court concluded that online communication and offline communication should be treated alike in the event of death (Tweehuysen, 2019, p. 1154), and as Fuchs explains, “a personal diary for instance

would be inherited regardless of its content and the same should be the case for emails and private Facebook messages" (Fuchs, 2021, p. 2). Hardinghaus et al. explains this juxtaposing of online and offline communication as follows:

> The heirs of a Facebook user who is deceased ("User") shall have the right to access the User's Facebook account. This results from the general inheritance law provisions of the German Civil Code (*Bürgerliches Gesetzbuch* – "BGB"), pursuant to which the User's contract with Facebook is transferred by law to the User's heirs, in particular the fundamental German civil law principle of 'universal succession' under Section 1922 (1) BGB. In practice, this means that the situation is similar to the one regarding diaries or private letters, the rights to which pass to heirs under Section 1922 (1) BGB (Hardinghaus et al. 2018).

Accordingly, the same principles of (not) protecting postmortem communication should apply to both digital and analogue private communication. Consequently, Facebook could not rely on data protection law as confidential letters could be read by the heirs after the death of their recipient which applied to digital messages as well (Fuchs, 2021, p. 2).

Regarding the subsequent rulings concerning 'access', the Berlin Regional Court (and subsequently the Federal Supreme Court upon appeal) settled that 'access' in this case meant a transfer of rights and obligations of the Facebook account to the heirs, which involved the opportunity to read the content "the same way the daughter had been able to". Consequently, a USB stick with unstructured content of 14,000 PDF files, which Facebook initially provided, was insufficient (Fuchs, 2021, p. 5) and contradicted the first instance judgement, as Fuchs explains: "[d]elivering the contents of the account in a huge pdf file did not fulfil the obligation laid down in the earlier judgment" (Fuchs, 2021, p. 4).

In addition, the court stated that the memorial state directive, which the account was configured into by Facebook due to the death report by anyone (Facebook users), was invalid and to be cancelled. According to the Berlin Regional Court, the memorial directive caused '"an unreasonable disadvantage" to the heirs, who should be granted access to the full account for a reasonable period of time – however in a 'passive reading mode' rather than an 'active author

mode' (Fuchs, 2021, p. 5). This was particularly significant given the circumstances – the deceased's tragic death and the parents' right to find out what happened to their child.

7.3.2 Facebook as data custodian

Counterarguments of inheritability was put forward by the Berlin Court of Appeal and advocated for deceased's postmortem privacy rights in addition to the privacy rights of communication partners (Facebook friends). As Fuchs states: "According to the Berlin Court of Appeal, the parents had no right to access the Facebook account and the communication content stored in it after the death of the child" (Fuchs, 2021, p. 3). Accordingly, the Appeal Court reversed the ruling of the Reginal Court with reference to "Secrecy of telecommunications" (Fuchs, 2021, p. 5), which excluded inheritability of the account (Regional judgement, 2017). The court stated that Facebook was prevented from disclosing the contents of their daughter's communications to the parents due to the secrecy of telecommunications (Fuchs, 2021 p. 3).

According to Fuchs, this settlement was met with criticism, as Facebook, on the base of "stipulating secrecy obligations in its general terms and conditions" (Fuchs, 2021, p. 3), elevating themselves to data custodians or guardians '"invoking rights and interests that were essentially not their own", as Tweehuysen states (Tweehuysen, 2019, p. 1156). This is problematic because not even the post office is allowed to sift through, destroy, or memorialise contents, as Fuchs states (Fuchs, 2021, p. 3). Birnhack and Morse makes the same interpretation, stating that "In the absence of legislation, and if we conclude that privacy does not survive death, the result would be that the service provider has the ultimate say" (Birnhack & Morse, 2022, p. 3).

7.3.3 Rejection of any privacy rights

The Federal Court rejected the exclusion of inheritability based on both testator's postmortem personal rights and the personality rights of her Facebook friends. First of all, since the risk of information breach is to be expected regardless of the medium, as Fuchs explains:

> The user of a social network knew just as little as the writer of a letter who would ultimately take note of the content of the message. The sender might trust that his or her message

> would only be made available to the selected recipient account, but he or she had to expect that third parties could potentially gain knowledge of the content of the message – both during the lifetime of the account holder and in the event of death. (Fuchs, 2021, p. 3)

Additionally, the court states that 'heirs', and thus the mother, are not to be considered 'others' ('others' in this case refer to individuals and institutions who are not involved in the protected communication), and consequently the Secrecy of telecommunications did not conflict with the mother's claim to access.

In relation to the question of the (postmortem) rights of the deceased – in terms of data protection of the deceased's communication – the Federal Court is, as Tweehuysen states, "quite short on dismissing the argument" (Tweehuysen, 2019, p. 1156). It could be argued that privacy of the deceased stand in the way of granting access to the parents, however, the argument is dismissed with reference to privacy ending upon death – at least within German jurisdiction (Tweehuysen, 2019, p. 1156). Consequently, GDPR was not a hindrance to universal succession as data protection only protects the living (this is different to Danish legislation, as stated).

7.4 Versions of the court cases

The court cases represent an 'explicated' controversy (vs. a 'subtler' controversy in the lawyer study emerging during the process of interview), which treats the legal question whether social media data should be treated as personal information to be protected or as family heirlooms to be inherited on par with offline communication. The versions that emerge from the different settlements, I argue, are connected to an 'overall' socio-technical negotiation and settlement about the phenomenon's existence among social and material actors. Namely, the controversy about whether digital stuff should be treated as property vs. privacy in the postmortem.

Accordingly, two different versions of the object are played out in (legal) practice, and the versions cannot coexist; they are practically incompatible (Mol, 2002, p. 47), which is why one must be chosen over the other[47]. The German Federal Court determines that the account is to be

[47] Whereas in Mol's case with the disease atherosclerosis could coexist as practices do not overlap.

conceptualised as ‘property’ to be inherited – together with the contents of the accounts despite it being personal and containing communication of others – and consequently the heirs are granted access to the contents by the Federal Court. The notion of postmortem rights of the deceased (GDPR) as well as privacy rights of the living (secrecy of communication) is rejected, and consequently, it is the ‘property-view’ that counts as real (Mol, 2002, p. 48). The consequence of the ruling is that the version of digital remains as ‘property-like’ stands a little stronger for now – at least in German case law.

The court case serves as an example of the process of the shaping and negotiation across courts about what the phenomenon is, and illustrates how the object of study is enacted across courts (from regional to appeal to federal court) through statuary power provided by applicable laws, acts, legal precedent, social circumstances, and interpretations/practices of each court, which all shape and affect the becoming of the object. Just like the phenomenon’s existence (i.e. digital remains) is also negotiated in the Lawyer study, where the lawyers enact the phenomenon through their handling of devices and artefacts through estate settlements (if we could have observed one, but we can only relate to their actions as understandings). So, when some of them choose to hand over the computer to the heirs it is enacted as property, which the bereaved collectively must figure out how to handle, and when the lawyers choose to withhold the computer, based on suspicion and recognition of sensitive (postmortem) data, the computer and its content are enacted as private information and personally sensitive data. Consequently, the object of study is ‘enacted’ differently from site to site, and it is evident that digital remains is a phenomenon far from settled.

7.4.1 Is there a problem?

If we set aside the legal argumentation for now and take a closer look at what exactly the parents 'inherit' in the BGH Facebook case – beyond the notions of 'online communication' and 'accounts' – is there a problem? We will explore this question in more detail in Chapter 8, but for now, let us examine some of the differences and similarities between what is typically referred to as ‘analogue’ versus ‘digital’ communication in the papers on the court case.

One of the 'analogising' arguments, enacting social media as not so different from analogue material, is that personal analogue content (e.g. diaries and private letters) is also transferred to the heirs upon death; and in that sense, there is no difference between online and offline communication. The content of a Facebook account can (and must be expected to) be subject to information breach and thus being read by third parties on par with private letters and diaries. Additionally, heirs are in this case not considered third parties. However, as Tweehuysen states: "it is conceivable that our ideas about privacy develop in such a way that private communication is even private to our heirs, perhaps precisely because technology enables us to shield it from them" (Tweehuysen, 2019, p. 1154).

Additionally, it is arguable that communication genres have not changed radically with the emergence of networked communication and is to be understood as "discursive conventions of expressing and experiencing a particular subject matter (Bruhn Jensen, 2011, p. 15), just as we can agree that some digital formats and genres of digital stuff "mimics" traditional property, as Harbinja states. For instance, cryptocurrencies stored in electronic wallets 'behave' much like traditional assets (e.g. securities) stored in digital safe keeps. Further, it is easy to see the resemblance between old-fashioned artefacts such as video and photos and their digital counterparts, although still rendered as zeros and ones, stored on intermediary platforms, and could be subject to digital manipulation in terms of deepfake technology.

However, if we go beyond the legal sphere by taking a closer look at the qualities of the digital vs. non-digital materials – and essentially *what* the parents inherit and gains access to – is there then a problem? From a general and material perspective, I would argue that the answer is 'yes'. The digital differ from physical chattels and property in so many ways which makes it difficult to support the idea that social media profiles are similar to offline communication and is to be treated as it were a 'physical diary'.

Of course, there is the obvious 'similarity' between the content in that they are quite personal forms of communication. However, as Harbinja states in relation to the private letters, "it's less information, it's less data, it's less complicated (…)it's more simple offline" (as cited in Kasket, 2019, p. 91):

> But physical letters could be personal (…). They can be imbued with the personality and identity of the writer, and *they* can pass on to next of kin as physical property [question posed by the book's author]. There is this element of physicality in the letters, yes,' Edina said.' But also, it's less information, it's less data, it's less complicated. There is no account there that is owned by company. It's a piece of paper, a physical possession, a letter. The person owns it. So it's more simple offline (Kasket, 2019, p. 91).

Likewise, physical letters can be "imbued with the personality and identity of the writer" (Kasket, 2019, p. 91) – presenting an individual's private, inner world, however, as Harbinja states in Kasket's book:

> [O]nline information is highly *personal*. It's personal data, personality, *identity*… They are so different from the offline property that is not that personal: traditional property, land, wealth, financial assets (…) Online, do you have the intermediary service provider, multiple individuals involved, data, servers. The account comprises many different elements (as cited in Kasket, 2019, pp. 91–92).

Additionally, social media sites contain many different types of contents (not only text) such as images, video, text, sound, and 'reactions' in contrast to physical diaries and letters. Clippings, images, and drawings may feature in the personal diary as well, however, contrary to offline communication, the online account "(…) comprises many different elements" (Kasket, 2019 p. 91).

The diary is limited in scope and provides a 'what you see is what you get' experience due to its physical, one-layered, non-digital and static nature. In contrast to this, an eventual full access to a Facebook profile grants access to deep-layered, organised, searchable material, which includes numerous content elements.

Stylistically, the physical diary is monological and offline readers only have access to the "received letters" (Birnhack & Morse, 2022, p. 284), whereas in the online realm entire correspondences are made available (and searchable) upon access and involves typically multiple people.

Moreover, digital content is password-protected, which not only signifies the distinction between private and public content (much like the lock on a diary), but it also becomes a practical

distinction in the postmortem because the content is practically inaccessible (unlike the diary which despite the 'lock' is physically available and accessible).

Furthermore, networked communication entails those online social media accounts is not a closed circuit, like the diary, but connects you to others and others to you. Information is linked internally (within the platform) and externally (to digital environments outside the platform), whereas the physical diary is not tagged with metadata that connects information about you to a wider network and thus has limited reach. Indeed, the diary can be copied, brought about physically and digitised, but reach is still rather limited compared to the digital rendering of online data and content. Also, no 'behavioural information' is derived from the diary for commercial purposes – even though the diary can be published posthumous and sold.

Additionally, the physical letter does rarely constitute 'searchable collections' but are rather stand-alone objects (cf. 'it's simpler offline'). In comparison, the affordances of digital mediums in terms of e.g. "searchability" – the ability to find content – creates, according to Boyd "new opportunities and challenges" (Boyd, 2014, p. 11). The affordance of searchability makes it possible to search for specific elements within the digital environment such as phrases, people, old and new conversations, groups, and generally makes it possible to browse through an extensive and potentially quite personal digital portfolio.

In conclusion of this medium comparison, it is relevant to state the following question:

> Even if the conditions and affordances of the mediums containing either 'analogue' or 'digital' content are different, are they then different in any way that is problematic to the postmortem situation?

We will delve deeper into this question in Chapter 8.5, but in short, the answer is 'yes' – at least to some extent. While networked and traditional forms of communication might not appear vastly different when considered in isolation, the design and affordances of the digital environment significantly influence the conditions under which content is created and disseminated, including in postmortem contexts.

7.5 Summary

Although the BGH Facebook[48] case concerns posthumous treatment of 'social media accounts' – which adds to the complexity of the issue as more stakeholders, regulation, data infrastructure, etc. are involved – the case has been pivotal in unfolding key issues around managing data postmortem of the Lawyer study. 'Key issues' refer to dilemmas and issues which are present in both postmortem situations and which revolve around questions of e.g. postmortem access, consent, data as privacy, data as privacy, etc.

Accordingly, the court case has been instrumental in looking for common themes between the former study (Lawyer study, chapter 6) and the case in question (the BGH Facebook case), without however being understood as an attempt to generalise from the court case itself. Instead, the case has been selected as it contains issues of central importance to the purpose of the inquiry from which we can learn (Patton, 2002, pp. 46–47), which in this case concerns how the digital is enacted in a postmortem context. By examining these shared issues, or as Macospol states, a "shared uncertainty" (Macospol 2007, in Venturini 2010, p. 260), is it has been possible to get a more elaborate picture of the phenomenon and its constituents. The issue of 'access' and 'content' is for instance treated in both the Lawyer study and the court case, but treated more elaborately in the court case, just as the question of 'access' has to go through three courts (Regional, Appeal and Federal court) before it is concluded that it specifically entails access to an 'interactive profile configured in passive reading mode' rather than '14,000 PDF files' ('Digitaler Nachlass Beinhaltet Zugang Zum Facebook-Konto', 2020). Accordingly, the different responses of the courts on these issues – and the many ways of being for and against property and privacy essentially – have helped shed light on emergent practices and understandings of digital remains both in the court room and beyond.

If we are to do a little recap, the lawyer study (Chapter 6) has identified three versions of digital remains, which are respectively: social media to be phased out (frontstage version), 2) chattels and property to be inherited (property-like version) and 3) as information and sensitive data accessible via e.g. hybrid items to be protected against third party access (i.e. information-like remains). In

[48] BGH refers to 'Bundesrichtshof', which is the German Supreme court.

the lawsuit, digital remains (i.e. social media data) is treated as a question of property versus privacy – a case of doubt which is also present in the lawyer study, however less explicated – which in the end is settled as property by the German 'bundesgerichtshof '(Federal Court). As stated previously, the versions, are part of an ongoing socio-technical dispute on settling the existence of digital remains, which are yet vague and partially existent (Chapter 3), but in which, however, the 'property-like' version might stand a little stronger for now. We are not concerned with whatever version is more 'real' than others, although it would be possible to investigate ethnographically, according to Mol and Jensen. That is, explore what versions are merely just words, visions, and concepts, and stays so, and what versions materialises and becomes different versions of reality or different objects altogether (completely different phenomena). However, we *can* conclude that the object of study is far from settled – both discursively and materially.

In the next chapter, we will explore the joint (material and social) forces which in an interplay affects the phenomenon in question and whose work causes different effects. These 'constituents' are treated under different 'themes,' which we can understand as entry-points that open ups to different ways of understanding the phenomenon depending on the material and social actors in question. Consequently, the intent is to not be focusing too much on the themes themselves, but instead to be focusing on the issues, actors involved and effects embedded into these, which are overlapping and influence each other (across the themes).

Part 4

Discussion, contribution and future research

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8 Issues of the postmortem situations

This chapter analyses the implications of the different ways of understanding and enacting digital remains, thereby examining the effects of the versions of digital remains inferred from, respectively, the lawyer study and the BGH Facebook case (cf. chapters 6 and 7). Despite fundamental differences in these two postmortem situations, they both revolve around the same overall dilemma between enacting the digital as property and privacy, and both provide insights into how the digital is conceptualised and enacted in postmortem legal settings. Accordingly, although not similar, the two situations contain adjacent issues, dilemmas and controversies, which has prompted a cross-analytical investigation of the situations from which a set of common themes or 'problem characteristics' has been derived. In addition, these problem characteristics draw upon parts of the theoretical foundation as well as on stand-alone empirical examples. They are to be understood as 'entries' from where it is possible to discuss the consequences and implications of the various doings and sayings of digital remains; a position from where it is possible to discuss and unfold the interconnected human and non-human entities that exert influence on each other and help shape the phenomenon in an interplay – without being mutually exclusive. The problem characteristics are, respectively: 1) access, 2) affected users, 3) intermediaries, 4) invisibility and material absence, and 5) Digital data, content types and digital configurations. Individually and in combination, they affect how the object comes into being. We will return to the process of the mutual constitution of digital remains in terms of a 'sociotechnical reality' in chapter 9. Before doing so, we will analyse access.

8.1 Access (#1)

8.1.1 The illusion of pre-death planning

How the digital is conceptualised and treated relates closely to the notion of how access is interpreted in relation to digital remains. When understood as possessions and property, something we own, the ownership of digital remains passes to the next of kin upon death, and the classification authorises access to those who are part of the decedent estate. This includes, as illustrated, access to diaries, which is in accordance with current 'non-digital' procedures,

conventional succession and property frameworks, regardless of the volume and character of the content. Accordingly, when a property frame is applied, digital remains are considered possessions that pass to the next of kin upon death. This contrasts with the private property of the deceased, that is to remain private. Consequently, access is considered unproblematic, and it is granted almost by default through existing legal frameworks. However, this property-like enactment of digital remains builds on the premise that the act of sharing access to information (passcodes) is done deliberately and on a well-informed basis; that is, that the mortal individual is aware of the existence of the digital and is inclined to act on this knowledge antemortem: leave behind instructions to their heirs whether this act is framed as a positive act (deliberately disclose) or a negative one (deliberately *not* disclose).

But firstly, most Danish people are unaware of possessing and leaving behind digital remains upon death and cannot be expected to deliberately plan their digital estate, just as there is a general tendency not to plan ahead in relation to one's physical estate. This lack of knowledge and awareness of one's digital afterlife – whether it persists or automatically ends – is supported by a population survey (n = 2143) published by IDA, a Danish union, in October 2022. The survey was carried out by market research provider Norstat (Ingeniørforeningen, IDA, 2022), and states that less than 10% of the Danish population has considered what should happen to their digital footprints (i.e. their data, photos, files and profiles) upon their death. Respectively, 90%, 88% and 85% in the age group intervals: 18–34, 35–49 and 50–70 years, have made *no* plan for their digital possessions upon death.

Survey question: Have you made a plan for what will happen to your data, photos, files, and profiles when you die?

	Total	Man	Woman	Age 18-34	Age 35-49	Age 50-70
Yes	9%	10%	8%	8%	9%	10%
No	87%	86%	88%	90%	88%	85%
Don't know/irrelevant	4%	4%	3%	3%	3%	5%
Total	100%	100%	100%	100%	100%	100%

The table excerpt is from the IDA population survey from October 2022. The table reveals how fewer than one in ten Danes have considered what should happen to their digital remains when they die. A full 87% indicate that they have not made such a plan. The table has been translated from the original language by the author.

We find a similar tendency in a population survey from 2015 investigating Danish attitudes and knowledge about digital legacy (Landsforeningen Liv&Død, 2015). The study was led by National Association Liv&Død in collaboration with Christian Alsted Qualitative Market Insight Aps and undersigned, and it was carried out by market research provider Epinion. The study (n = 1122) states that roughly half of the survey respondents (47%) have no plans to avoid problems with their digital remains, even if most (69%) of them consider the issue important. In addition, 73% of the respondents feel that digital traces pose a problem for themselves and their loved ones, but the majority (71%) have no strategies to secure their digital remains. Even more interesting is that almost half (48%) do not wish to exist on the internet (i.e. have an online digital presence) after death.

Accordingly, if we take the survey results at face value, it would be naïve and unrealistic to expect individuals to express their postmortem preferences regarding digital matters. Efforts to close this 'knowledge-action gap' among the public are initiated by organisations and professionals involved in the digital afterlife, including legal professionals. Lawyers offer services related to digital estate planning, and their counselling typically includes recommendations for disclosing access information. In fact, sharing access information with next of kin before death is often considered due diligence in certain professions. This practice is often phrased similarly to the online guideline provided by Ældresagen, a members organisation for senior citizens, which represents a 'give access'-opinion.

Guide concerning digital remains on the Ældresagen[49] website

> Make a document with your wishes for your digital heritage. Write down your decisions, along with usernames and passwords for your different digital profiles. (Ældresagen, 2024)

[49] Ældresagen is a national member organisation and interest organisation for senior citizens in Denmark.

Another example of this seemingly common practice of advising on the disclosure of access information or vice versa (deliberately not giving access), which is considered 'responsible planning', is provided by lawyer Van der Geld.

> (…) the credentials can either be stored at home, on paper or on a computer, or they can be included in a will. If a user does not wish his heirs to have access to his social media accounts, the credentials are simply not provided to the heirs. Rather, the user could state in his will what needs to be done with his account, for example having it deleted by the executor of the will. These provisions can also be made online, as notaries and others have started providing services to manage digital inheritances. (Tweehuysen, 2019, p. 1152)

Although this counselling practice makes some sense, as it provides individuals with a degree of autonomy and self-determination in relation to data postmortem in a society influenced by powerful tech firms, it nonetheless jumps to conclusions; it assumes that individuals are willing to let others access their digital assets – even if these 'others' are relatives – which is not always the case.

As noted by Morse and Birnhack along with earlier scholars, there is often a disconnect between users' stated preferences and their actual behaviour. This incongruence is encapsulated in the notion of a "posthumous privacy paradox,"(Morse & Birnhack, 2020b) which highlights that while some individuals express a desire to preserve their privacy after death, their actions do not align with these intentions. Conversely, others may wish to share their personal content and information posthumously but fail to take the necessary preparatory actions, a phenomenon referred to as the 'inverted privacy paradox' (Morse & Birnhack, 2020b, pp. 13–14).

This postmortem privacy paradox is likely reflected in the results of a survey conducted by a Danish association, the National Association of Life&Death (Landsforeningen Liv&Død, 2015). While participants report that they 'do nothing to avoid problems with digital remains' and 'have no strategies to secure their digital inheritance', 49% express concerns about their lack of control over what happens to their private traces on social media. Accordingly, while some aspects of the postmortem issues manifest as a 'posthumous privacy paradox' (an incongruence between user's preferences and behaviour), which is linked to the lack of predeath planning and recordings of

individuals' wishes, other issues are related to the 'interpretation' of these wishes and wills, which heirs or legal professionals often carry out.

8.1.2 The art of interpretation

Whether or not wills and wishes are recorded – meaning that they are materialised and externalised to some extent – postmortem practices are ultimately related to the art of interpretation. For instance, even a written will can be unintentionally linguistically vague and unclear, leading to doubts regarding the deceased's 'actual' intentions. Even with an expressed and explicated will, uncertainties can arise. This is illustrated by an incident reported by an interviewee in which ambiguous language usage created confusion about who was named as the rightful heir.

> **Grant:** "A lady made a will where she wrote 'Bente shall manage my estate'. And from a narrow linguistic interpretation, 'manage' is *not* a synonym for 'inherit' or 'receive'. It means 'administering'. So, the deceased's relatives thought that Bente [a friend of the deceased] should not receive anything at all – at most just help with practical matters, such as clearing, administering, distributing. And Bente thought the opposite – that it meant that she should inherit everything."

One of the interpretative strategies for unravelling doubts and ambiguities in relation to wills and testaments is referred to as 'the armchair principle'[50]. The armchair principle involves putting oneself in the shoes of the deceased, as one interviewee explains it, to figure out what the person might have meant if not clearly stated.

> **Grant:** "You try to put yourself in testator's place, so to speak (…) and half of the inheritance lawsuits are about this particular topic (…) 'What might he have meant by the expression? What was his relationship to the children who are not mentioned?' There, one must try to the best of one's ability to figure it out(…)."

Interpretation, however, is not limited to the reading of a particular will. It also involves other types of evidence, which the interviewee does not elaborate on beyond mentioning 'testimonies,'

[50] Author's translation of interviewee's (Grant) mention on 'lænestolsprincippet'.

to settle lawsuits and conflicts. The legal armchair principle, also known as 'broad interpretation,' requires that the interpreter avoid being overly literal and linguistically narrow. Rather than leaving the matter unresolved, the interpreter should ensure that an inheritance is determined, which sometimes requires the application of certain 'filling-in' principles. In this case, the broad interpretation concerns interpreting the word 'manage' as 'inherit'.

> **Grant:** "Of course, there are limits to how far you can go; you can't insert people who aren't mentioned in the will at all, to name one boundary that can never be crossed. But you really do go quite far. The outcome was that Bente was actually to inherit, and this was of course based on testimonies about how close Bente and the deceased were, but also on certain 'filling-in principles', such as thinking 'why make a will without any heirs?' There are rules that state that in the event of two interpretations, where one leads to the will being effective and the other leads to it being ineffective, then you choose the one where the will is effective. The idea is that making the will shouldn't be a waste of time."

Why introduce interpretation principles from conventional estate settlements into the discussion of postmortem data? The point is that while broad interpretations are currently mostly applied to wills concerning physical estates and possessions (i.e. conventional estate settlements) digital items are becoming an increasingly significant part of an individual's estate. This makes conventional interpretation practices relevant to the digital realm as well, as it is crucial to consider what assumptions might be made in relation to digital assets and data. Accordingly, interpretation principles also concern 'digital' wishes and wills, which can also be recorded or unrecorded – and can be too ambiguous and vague. Here, 'digital wills' does not refer to a specific concept or method of 'digital will making', but rather to multiple ways of expressing or recording wishes, including options available through digital service providers and platforms to users. We will touch on this in the section to come.

The notion of "access by proximity" and "access by default (Birnhack & Morse, 2018; Morse & Birnhack, 2019) – terms the authors seem to use interchangeably – is illustrative of this interpretive hassle, which also seems to exist in the digital realm. The former, access by proximity, refers to situations in which members of the deceased's household may have access to the digital devices – through e.g. oral knowledge of access information – and hence to the digital remains.

Consequently, access and "leafing through" the deceased's data does not require any special legal permission, as Morse and Birnhack (Morse & Birnhack, 2019, p. 110) note, and "the physical proximity to the deceased belongings grant permission to access and control them, including discarding them all together", as they state. The other concept, "access by default", seems to also entail the notion of a semi-automated granting of access through information systems (browsers) and unlocked devices, which they describe as follows:

> Access by default: Third to half of the users keep their accounts logged in and their domestic devices unlocked; or have shared their passwords with other; or have a (physical) accessible list of passwords. In the case of the user's death, other people will thus have access by default to their digital remains. (Birnhack & Morse, 2018, p. 5)

Considering that relatives might have 'access per default' to the devices and content of the deceased (not an unlikely scenario), how might such automated access be interpreted in the event of family disputes? Is it rendered as 'unauthorised access' with refence to the non-human and possibly undeliberate granting of access via computers and browsers? Or is it rather to be interpreted as an extension of (human) consent granted antemortem; but yet applicable postmortem, assuming that the sharing is done deliberately? Because if not, would the deceased not have taken the necessary precautionary measures to prevent postmortem access?

Consider another aspect of this 'access-by-default' scenario in which relatives have knowledge of various passwords of the deceased and/or the devices might be unlocked. Does this situation or 'act' serve as an invitation for accessing all the person's hardware, files, accounts and social media profiles? Or should the involved parties strive to find a middle ground? And if so, how does such middle ground look in practice? Where and how should this line be drawn, and can the systems and machines handle such flexible options?

Taking the scenario slightly further, how would access be interpreted in the relation to a password manager that keeps an overview of all the deceased's access information? Does knowing the master password of the deceased's password manager count as 'consent to access'? To what extent? Is it to be interpreted as 'full access by default' and serve as an invitation to access all available apps and to sift through their contents?

Consequently, it is relevant to ask how the 'disclosure of access information' might look in practice and the extent to which this access to information can be applied in postmortem settings. Consider, for instance, that someone leaves a physical note with their passcodes in the home as an act of supporting their own memory, or people sharing their passcodes (verbally) with family members on occasions, which is very common 'predeath-behaviour' in families. How is such an act of verbal disclosure or the leaving of a physical note to be interpreted in a postmortem setting? Should it also count as 'consent to access' devices and their contents in the postmortem setting? Moreover, does this consent apply to other digital communication systems than the one originally addressed? And, conversely, when to know when access is denied, considering the automated access provided through technology? How does *not* providing access to information look in this case?

The notion of access by default/access by proximity is unproblematic if the heirs are in accordance and agree on the settlement; hence, a 'private, informal settlement'. In the event of a conflict, however – hardly a rarity in inheritance cases – these aspects (i.e. access by default and proximity) can become crucial, as the person who has access to the hardware potentially has access to important information. In the following example, a confiscation has been made on the basis of suspicions stemming from the discovery a large amount of cash found on the physical premise:

> **Gabrielle:** "(…) Sometimes, I've confiscated things, because we thought; 'Hey, there's something strange here'. We do it [confiscate] for specific reasons, because we think we might need it at some point. Once we found a lot of cash, and we thought; 'we need to be careful and find out where the money comes from and confiscate the computer in the first place to see if it becomes relevant [to look into it, ed.]… Now, it was the Treasury that was heir, so there was no need to go further into that…" (excerpt from group interview).

Consequently, access not only becomes a question of safeguarding the living or the deceased's posthumous private information/reputation or the practical matter of closing social media profiles posthumously. It becomes a question of who, among the living, gains access to crucial information, as the party with access to devices holds the upper hand in the (typically financial) dispute. Consequently, the digital is no longer merely 'remains' or 'memorial objects', having instead become 'digital intelligence'.

The next example concerns a lawyer's hypothetical example of a dispute between heirs over what type of information should form the legal basis for the settlement of an estate: a 'self-contradictory will' versus the 'digital communication' accessible from the deceased's hardware?

> **Lisbeth:** "Well, if we now have, for example, a will that is contradictory: One party wishes to have access to the computer to access the correspondence to obtain the wishes [of the deceased], whereas the other wants the will to form the basis of their wishes. It's a skewed issue in many contexts… And there's no provision in this area. The attitude is that a hammer should be put through [the computer]."
>
> Interviewer: "What do you do, then?"
>
> **Lisbeth:** "We call a meeting and try to find a solution; 'Are they looking for some specific information on the computer?'. There is no legal framework in this area."

Accordingly, as the next example also illustrates, digitally stored information can potentially serve as 'burden of proof' in certain cases; and if we backtrack even further, a settlement can become a question of 'who gets to the physical location first, which is where hardware is located together with "cups and cans"' (interviewee Gabrielle). The likelihood of this scenario arising is supported by one of the interviewees stating that the authorities are not initially controlling physical access to the house.

> **Diana:** "That's the challenge when we pass away (…) accessing those assets. It's one thing to specify your wishes in a will (…) but another thing is what [actually] happens. Many people think that when someone dies, the probate court immediately seals off the house with yellow tape and locks the door. But that's not the case. Everyone who had a key before still has access, and they can take what they want. So, when do we get a chance to see what's there, right? There's a significant (…) gap where we have no authority. We can't do anything. And then, when we finally can, are we doing the right thing?" (excerpt from group interview).

Taking the scenario a bit further, it is not unlikely that the party in possession of the device can choose to withhold information, delete or even manipulate that information in the event of a

dispute. This potentially concerns information about assets or the deceased's intentions based on the information. In such cases, access to the devices and information becomes crucial, as the heirs who enter the physical premise first have access to the devices.

To illustrate this, let us consider this next case with real-life connections, which involves a lawsuit between two heirs over digital remains. The one party accuses the other of having hacked into the deceased's computer and manipulated the information constituting the basis for the financial distribution of the estate. The party in possession of access information claims that access information was deliberately given by the deceased (antemortem), and that the intelligence was original/not manipulated. The other party claims that access was *not* approved by the deceased, obtained instead without legal permission (presumably guessing the passcode, and that the person subsequently manipulated the data/digital 'evidence' by altering a PDF. This party wants the settlement to be based on raw, uninterpreted data instead, but is having difficulty obtaining this information, as it dates back further than what can be retrieved from the platform on which it is stored.

The disagreement in this case makes it crucial who knows the codes and initially has access to the deceased's devices, as this person has access to key information regarding the distribution of the inheritance. Furthermore, as the case has proceeded to court, the judicial and legal foundations of the case become pivotal, as the court will ultimately settle the matter; specifically, it is the selection of applicable laws and types of 'digital evidence' deemed admissible (i.e. considered 'original' or unmanipulated) that are crucial. For instance, is a PDF document sufficiently acceptable as digital intel, or is 'raw data' extracted from the service provider's servers required? And what might be the outcome of the trial if such data no longer exists on the company servers?

While scholars such as Harbinja, Morse and Birnhack highlight the potential for new legislation to better adapt to the digital reality, including improvements in the will formulation skills of lawyers and clients (according to the interviewees), others place their trust in 'techno-solutionism' – a critical concept by Kneese (Kneese, 2023) – the (failed) idea that system design and configuration can address some of the digital issues translated into the postmortem realm. However, I want to draw attention to another important aspect here. What is of interest is that, despite the apparent simplicity of managing digital remains (e.g. just write down your passwords), there is a gap

between dealing with digital remains 'in theory' and the practical reality of actually handling them. In reality, it becomes a messy and random process, which is because it is not only influenced by the wills and actions of people; materiality and things also play a part.

Access to digital objects and information, for instance, is influenced by various social and material (f)actors, which exert an influence on the situation and 'act' on their own as well as collectively. These material and social actors are tantamount to software and hardware granting 'access by default', interpretation practices of lawyers and heirs, left behind post-it notes, the absence (or presence) of legal frameworks, actions or non-actions of the deceased and the physical home and its accessibility to the heirs. Accordingly, social and material actors play different parts in the postmortem situation and 'disrupt' the postmortem situation, each in their own way. For instance, how is a left-behind post-it note with login information to be interpreted? What information is considered relevant in a dispute between heirs: the deceased's temporary physical notes, or private correspondence on social media? And how does the testator signal to others that they may access their digital data? Or the opposite, that they may *not* access the data postmortem?

This chapter has provided insight into some of the challenges and issues associated with the notion of access, which are both social and materially affected. Next, we will turn to issues connected to the second problem characteristics, collectively referred to as 'affected individuals'.

8.2 Affected individuals (#2)

'Affected individuals' is a collective term for the bereaved and deceased individuals whose interests and rights do not necessarily align, and who the given postmortem situation affects differently. Accordingly, the potentially conflicting interests of the affected users are the centre of attention of this problem characteristic, and it concerns questions about how rights and interests might be understood, formulated, practiced and balanced against each other. Can the deceased be said to have a right or interest? If so, how are these rights to be exercised and balanced against the interests of the bereaved? Moreover, as a living actor, does the individual have influence over which information and objects they leave behind (e.g. by being aware of their options through the formulation of a will, technological settings or by inventing their own way of accommodating both the wishes of the heirs and their own privacy wishes)? Ultimately, the legal and normative

dispositions towards postmortem rights and interests impact the conceptualisation and doings of digital remains. It should be noted that intermediaries (e.g. service providers, legal executors) also exert influence on the postmortem situation, as they are parties of interest. Consequently, their interests can also conflict with those of affected users in e.g. lawsuits (as in the BGH Facebook case) in relation to postmortem data access. However, as the incentive of these superordinate and market-dominating stakeholders (see chapter on Intermediaries) are very different from those of the affected users, this problem characteristic will concentrate on the affected users.

The conflict of interest between the affected individuals (i.e. deceased and the bereaved) essentially comes down to the question of whether the deceased can have an interest, legally speaking. If the deceased has no interest and/or rights to be protected digitally, there is no issue with third parties and relatives accessing the deceased's devices and digital information; essentially, there is no conflict. Conversely, if the deceased *is* assigned rights and interests (e.g. in terms of privacy rights), then there is the risk of a full-blown controversy developing. As Birnhack and Morse point out, "the framing matters" (Birnhack & Morse, 2022, p. 281), and the postmortem dilemma essentially comes down to questions such as: Whose interests and rights to attend to? How should the interests of the affected users be balanced against each other? And how should rights and interests be conceptualised?

These questions involve two rival conceptualisations of digital remains (i.e. property vs. privacy). Morse & Birnhack (2022, pp. 281–282) sum up their legal implications, stating that "a property framing implies succession and inheritance law, which means there is always and heir, even if by default, and heirs should have access to the deceased's online accounts" (Birnhack & Morse, 2022, pp. 281–282). In contrast, a privacy framing challenges the posthumous condition of digital remains, as personal data upon death are not part of the estate, and the question is whether privacy rights should survive death (Birnhack & Morse, 2022, pp. 280–282).

In the German court case (the BGH Facebook case), privacy and data protection arguments are summarily dismissed with refence to fact that data protection only concerns the living. In Denmark, however, the Data Protection Act (Databeskyttelsesloven, 2018) states that the data of deceased are protected for a 10-year period. The Data Protection Act was passed in 2018. The EU Member States provided for specific measures regarding data protection as part of the GDPR –

among other things, they were to decide if protection should include the data of deceased people. Accordingly, no specific provisions were passed in this regard in Germany, whereas the Danish Data Protection Act states that the data of deceased are protected for a 10-year period (although this time can be shortened or prolonged, depending on the specific circumstances). The Danish Data Protection Act states, as follows:

The data protection act (protecting of deceased's data)

> "(5) (…) the General Data Protection Regulation shall apply to the data of the deceased persons for a period of 10 years following the death of the deceased."
>
> "(6) In consultation with the competent minister, the Minister of Justice may lay down rules to the effect that the provisions of this Act and the General Data Protection Regulation shall apply, in full or in part, to the data of the deceased persons for a period longer or shorter than that specified subsection (5)." (Databeskyttelsesloven, 2018).

Precisely *how* the above Danish article is to be interpreted remains uncertain. 'In theory', however, the data protection rights of the deceased could be exercised through fiduciaries (a trustee) or the mortal individual themself pre-death. Accordingly, postmortem data protection regulations could play a pivotal part in the Danish context (case law), as noted by Patti and Battolini: "contrary to German legislation where the principle of universal succession played a pivotal part in the BGH ruling, data protection rules at the forefront in other EU member countries, including Denmark and Italy" (Patti & Bartolini, 2019b, p. 1185).

In a recent decision of the Danish High Court, Østre Landsret, from 31 March 2023 (*Østre landsrets retsbog*, 2023), a surviving spouse requested that the probate court order Apple to grant access to the deceased's Apple ID. This was necessary to be able to continue to operate the deceased's business. The High Court rejected this request. According to the NJORD Law Firm website, this was because the deceased's Apple IDs, along with e.g. accounts, do not form part of their estate and cannot be assigned to heirs or others. Rather, they are considered personal and private, and they are covered by an agreement between the user and the service provider (NJORD Law Firm, 2023). However, the Record of the Court of the lawsuit includes no mention of the notion of 'data protection' or 'privacy'. The statutory power comes from the Administration of Estates of Deceased Persons Act (Dødsboskifteloven), and the court does not address the notion of data protection. It

simply states that; “since the request is not related to the administration of the estate, the High Court concurs that the request is not granted” [51] (*Østre landsrets retsbog*, 2023). The question remains then, if the decision, as Njord indicates, suggests that an Apple ID is not to be considered ‘property’, but is deemed private and personal, and consequently is stated as ‘unrelated to the estate settlement’? Or if the ruling is based on entirely different areas of the law? As we do not know the basis for this decision transcript from the court record), we can only speculate about the legal interpretations made and, consequently, the question remains if postmortem data protection and privacy considerations will play any role in Danish case law in the future. In the upcoming section, a small selection of concepts pertaining to postmortem data rights are touched upon to see how postmortem privacy rights and agency could look in theory.

8.2.1 The deceased

8.2.1.1 Postmortem rights and interests

The theoretical landscape points towards a greater complexity of postmortem rights and interests than is evident from the interviews with the lawyers and the court case, because, as Conway and Grattan note, digital assets are complex in that they “cross the boundaries between the tangible and the intangible, and between property law, succession law, intellectual property law, contract law and privacy law (…) and [t]here is a significant degree of uncertainty and confusion around digital assets, and, because of the legal and technical issues they raise, specific laws may have to be enacted in the future” (Conway & Grattan, 2017, p. VI Conclusion).

Different scholarships have attempted to develop nuanced, theoretical frameworks for providing the deceased with some level of data protection and data rights. However, not all concepts are applicable to this realm. For one, the protection of a deceased’s ‘personality’ can be tricky due to the “problem of the subject”, which basically entails that a dead person is incapable of having an interest (Buitelaar, 2017). More specifically, the problem of the subject refers to the notion that there is an absence of an active agent with interests and reasons (i.e. moral and practical), and

[51] Author’s translation of decision.

therefore no one to make reflexive judgements and no grounds on which claims can be made (Buitelaar, 2017, 132–133).

Pearce adds to our understanding of this postmortem, digital issue by outlining differences and key characteristics to the concept of personal information and their postmortem application (Pearce, 2018). He states that the legal framework of the GDPR lays out two different "rights perspectives" (Pearce, 2018). While both the property and personality-framing aims at protecting individuals from "unjust interferences in their lives" (Pearce, 2018, p. 194), the key differentiator between the two rights perspectives lies in the postmortem implication.

Accordingly, the former (property-rights perspective) frames personal information as a "property-right" and focus on the "control of external resources" (such as material objects, possessions, or land), whereas the latter (personality-rights perspective) frames it as a "personality-right" and focus on "the control of aspects of an individual's being and identity" (Pearce, 2018 p. 193). Pearce sums up the difference in these two rights-perspectives, as follows:

> The idea of privacy and data protection as personality (…) relies on the presumption that an individual's personal data intrinsically represents key constituent aspects of that individual's character, and that said individual should be able to control those data so to maintain the integrity of their identity. Conversely, the idea of privacy and data protection as property is based on the presumption that an individual's personal data (…) can essentially be thought of as an external resource to which an individual is entitled to control due to their ownership of their resource. (Pearce, 2018, p. 198)

As regards the postmortem implications of these rights perspectives, the *property*-framing – conceptualising personal data as an external resource, which the individual is entitled to exercise control over – states that these rights are "inalienable and transferable" , as they exist independently of an individual's personality (Pearce, 2018, p. 194). Conversely, the personality-framing – conceptualising personal information as 'key constituent aspects of that individual's character' and where integrity of a person's identity is related to controlling certain aspects of their personality – states that this right ceases to exist when the individual dies. The reason being is that such rights cannot exist independently of an individual's personality (Pearce, 2018, pp. 193–194), which Pearce explains as:

> (…) rights that come into being when an individual is born, cease to exist when the individual dies, cannot exist independently of an individual's personality, and are thus inalienable and non-transferable. (Pearce, 2018, p. 194)

Hans Buitelaar (Buitelaar, 2017) challenges the notion that the deceased do not qualify for privacy rights, arguing that this perspective is outdated in a networked society in which Internet users leave behind digital remains. According to Buitelaar the focus should be on the "privacy-related dignitary aspects of the Internet user's digital legacy" (Buitelaar, 2017, p. 130), and he proposes the legal principle of "informational self-determination"– the capacity to control which information about an individual is available and accessible (Buitelaar, 2017, p. 137) extended to the postmortem realm. He suggests that this principle, grounded in human dignity and autonomy, could serve as the basis for recognising claims to a deceased person's digital remains in the form of a subsisting digital persona (Buitelaar, 2017, p. 139).

Lillian Edwards and Edina Harbinja, and later Harbinja, have also contributed to the discussion about how rights and interests could look postmortem in the digital realm. Edwards and Harbinja propose the concept of "post-mortem privacy" (Edwards & Harbina, 2013a), which they define as "the right of a person to preserve and control what becomes of their reputation, dignity, integrity, secrets, or memory after death" (Edwards & Harbina, 2013a, p. 103). In her later research, Harbinja elaborates on the concept, which she explains is a legal concept for "allowing individuals to control their privacy/identity/personal data post-mortem, analogous to their post-mortem control of property through the concept of testamentary freedom" (Harbinja, 2017, p. 30, 2022, p. 62). Accordingly, she advocates for the concept being rooted in individual autonomy – that is, that postmortem privacy builds on the conception of privacy as an aspect of one's autonomy – since autonomy, in principle (provided it does not conflict with other purposes), could transcend death through the legal principle of testamentary freedom applied to the online environment. This would then allow for individuals to exercise control over personal data and digital assets.

Harbinja also introduces the broader framework of "postmortal privacy" (Harbinja, 2020, p. 95), which conceptually bridges the postmortem privacy concept with Floridian ethics, stating that the informational body should be treated with the same dignity and respect as the physical body post-mortem (Öhman & Floridi, 2017, p. 654) – but with the notable difference that the informational

body (in terms of data, biometrics, digital assets and memories etc) does not decay like the dead, physical body does (Harbinja, 2020, p. 97). Instead, it persists for as long as technology will allow, and consequently, as Harbinja asserts, "we should provide the same treatment for informational body [as the human body, e.] with respect (…)underpinned by dignity and autonomy (Harbinja, 2020, p. 95).

8.2.1.2 The agency of the deceased

The BGH court does not treat the question of whether the deceased 'would have wanted' heirs to have access to the account, as no wishes were stated in this regard. The issue relates back to the problem of wishes and wills of the deceased not being recorded (pre-death), which is a clear tendency in both the IDA and Liv&Død surveys (Ingeniørforeningen, IDA, 2022; Landsforeningen Liv&Død, 2015). The argument is that when no wills are recorded and wishes explicated, legal executors cannot claim that these were not met. However, the lack of recorded wishes and wills is not always equated with postmortem indifference – as evident from Morse and Birnhack's notion of "posthumous privacy paradox"(Morse & Birnhack, 2020b) which states an incongruence between wishes and actions in relation to the postmortem. Accordingly, the argument becomes untenable. The mortal individual might have wishes and interests in relation to managing the digital 'when aware', but they fail to plan for reasons that remain to be explored. One guess would be a lack of knowledge and awareness, such as a misconception of the digital being managed automatically by the service providers posthumously, a lack of awareness of having a digital estate to begin with, or the lack of ways to express and record one's digital wishes – both digitally and non-digitally. As Keating states, there is an "absence of a system of recording the intentions of the deceased", which again minimises the individual's option for exercising postmortem control (Keating, 2015, p. 177).

In comparison, there are many 'systems' for recording one's wishes and taking preventive action in relation to our bodily deaths. For example, it is possible to plan one's funeral, decide upon postmortem bodily treatment (cf. a 'life testament'), or state one's will in relation to organs. Furthermore, events are triggered automatically in relation to the physical, bodily death; death is reported by a doctor, central bodies are notified, the management of the physical estate is

initiated, and some kind of funeral service is usually performed. Some of these procedures, practices and rituals are formalised and institutionalised, whereas others – such as the seating in the Church at a funeral service – are more informal and norm-driven. Nevertheless, norms, practices and systems *do* exist, which is not always the case in relation to our 'informational bodies'.

According to Stokes, we have always been trying to figure out how to deal with the dead in our societies, and the question "What are we to do with the dead?" is but a new version of an ancient one (Stokes, 2021, p. 94). However, the disposal of a physical body is one thing, the disposal of "informational body of the dead" another (Öhman & Floridi, 2017, p. 652). How do we dispose of this informational body? Or do we maintain it? Whose responsibility, is it? Who receives per default the data? And who might want it – the family, the platform owner, the state, the deceased individual, the helping professionals? How can these both fragmented and coherent items of data and content best handled? What ethical guidelines should govern the disposal (or continuation) of the informational body – or parts it – and are we allowed to profit from the data of our deceased?

The existing options for recording one's wishes in relation to the digital cover both 'conventional' ways of recording wishes and wills (e.g. in terms of will formulation in which the digital is starting to be integrated, cf. the interviews), as well as technologically supported ways in terms of 'digital afterlife services' or "code solutions" (Harbinja, 2017, p. 35). As Edwards and Harbinja states, "A number of digital services have emerged in recent years to try, in the main absence of legal assistance, to solve the problems of transmission of digital assets. As digital assets. These include 'password lockers', online will drafters and post-mortem emailers, as well as various hybrids (e.g. Asset Lock, Entrustet, Life Ensured, Death Switch, My Digital Executor, Final Fling)" (Edwards & Harbinja, 2013b, p. 143). The code solutions refer both to pre-death configuration options of software, such as Facebook Legacy Contact, Apples Legacy manager or Google's Inactive Account Manager (i.e. 'integrated code solutions'), and to dedicated digital afterlife services such as online estate management services, online will services and the like.

Facebook's Legacy Contact is an example of an integrated 'code solution', which Brubaker and Callison-Burch describe as a "reappropriation for memorialization practices" (Brubaker et al. 2016 p. 2909) that attempts to strike a balance between the needs of the deceased and those

memorialising them through the means of a stewardship-based approach. This “post-mortem data management solution designed and deployed at Facebook” (Brubaker & Callison-Burch, 2016, p. 2908), which focuses on improving the design of memorialised accounts (Brubaker & Callison-Burch, 2016, p. 2911) involves ‘someone’ [anyone] informing Facebook about the death of a Facebook user [it must be a platform user] through a memorialisation request. This request is then reviewed by ‘Facebook’s Community Operations team’. Once death is confirmed, the account is set into a memorialised state and displays no advertising or birthday reminders (Brubaker & Callison-Burch, 2016, p. 2911).

Beside on this stewardship-based data management approach, which is described as an “acting for the deceased rather than as the deceased” (Brubaker & Callison-Burch, 2016, p. 2910), there is, according to Brubaker, also a “configuration approach” (p. 2909), where the account holder makes decisions pre-mortem, or an “inheritance-based” (p. 2910) approach, which involves the transfer of ownership and control [to some degree, ed.] over a digital artefact from a deceased individual to an heir.

Upon closer examination, however, digitised and conventional (i.e. non-digitised) options for recording one’s wishes to be able to exercise some level of postmortem control remain quite limited. For one, since postmortem configuration options of software are only available through the most well-established tech companies (e.g. Apple, Google, Facebook), whereas other digital business have typically not provided guidelines or code solutions for postmortem situations; despite the inevitability of such situations emerging. Second, the awareness of (code) solutions among users is limited, as reflected by a study conducted by Morse and Birnhack in June 2017, where 74% of the respondents were unaware of existing online tools for managing digital remains (Morse & Birnhack, 2020a, p. 118). Consequently, as Rycroft writes, when the tech companies have not thought about this issue, it can hardly be surprising that users have not considered it.

> (…) if the tech companies themselves have not thought about the digital afterlife, it is hardly surprising individual users have also not considered what legal rights the Tech Companies will have over their digital life online upon death (…). (Rycroft, 2020, p. 133)

Thirdly, besides being acquainted with the configuration options of integrated code solutions, users can only configure the medium for postmortem use to the extent allowed by the intermediary (can

you e.g. download and share content postmortem?). Additionally, opting for a dedicated digital afterlife service costs money, which the users should be willing to spend, and scholars like Nansen et al. have identified a trend of "premature deaths" within this market (Nansen et al., 2021). Furthermore, these (external) services often complicate data management unnecessarily, acting as intermediaries of intermediaries, and some of them grapple with ethical issues, particularly those offering 'hacking services' for data access. With regards to conventional ways of exercising postmortem data control, lawyers do provide services for recording a client's 'digital will' in some cases. However, as the interviews (cf. lawyers study) show, these formulations are rather generic in relation to the digital, mostly concerning the sharing of access information pre-death (i.e. 'write down your passwords'). Accordingly, they are not very instructive, concrete or very detailed, which risks making them subject to 'broad interpretation' and 'filling-in principles'.

Furthermore, the deceased agency is also limited by the rigidity and inflexibility of the platforms, which refers to the incapability of technology to accommodate to social reality. Consequently, affected users must figure out alternative strategies to attend to their *actual* wishes in relation to the digital to circumvent the limitations and changes made to the platform.

I knew a young woman, who became terminally ill. Because she knew she was going to die, she wanted to prepare for her death – bodily, physically as well as digitally. Before her death, she explicitly expressed that she did not want her Facebook profile to be 'memorialised' or in any other way continued after her death, as she did not want people to 'pour out sad feelings on her Facebook wall'. At the same time, she wanted her closest relatives to be able to access the private contents of her profile (and other digital data) for a period following her death for the purpose of downloading artefacts and communications of interest. But the infrastructural landscape of the respective platforms are unable to accommodate such a complex task. As Birnhack and Morse write:

> (…) people have different wishes regarding different online services: A person may be interested in enabling their children to access photos for purposes of memorialization and enabling their spouse to access online bills, but at the same time, wish that the family would not read private communication. Tailoring a will to fit multiple situations regarding each digital item is likely impossible. (Birnhack and Morse, 2022, p. 15)

The best solution was to 'circumvent the system' in terms of 1) *not* reporting her death to the system, as the profile would automatically memorialise and limit access. As stated in the BGH Facebook case, the memorial state directive means that *any person* can bring the user's profile to a state of remembrance, which the court in the specific case referred in terms of an "unreasonable disadvantage" (Fuchs, 2021, p. 2) – not only for the heirs, as Fuchs states, but for the deceased as well. 2) telling relatives to do the same, as anyone can report death, thereby freezing the system, and 3) providing the closest relatives with access to information (which violates terms of use policies). Consequently, affected users must figure out alternative strategies to attend to their *actual* wishes in relation to the digital to circumvent the limitations and changes made to the platform.

A final consequence of the absent, limited and rigid options in this regard is that individuals might settle into "digital resignation" in the postmortem. Digital resignation is a condition where people feel unable to control the information that digital entities have about them despite having an interest in doing so (Draper & Turow, 2019). So-called 'zombie-profiles' often result. Zombie profiles are profiles that are neither managed through means of postmortem death-validation, through predeath configuration in terms of either a 'legacy contact' or 'memorialisation' configuration, or through antemortem deletion (by the e.g. mortal individual herself).

8.2.1.3 Pre-death expectation vs. post-death permissions

We have touched upon different concrete pre-death options for the individuals to exercise data control in the postmortem, as well as different legal and philosophical conceptualisations of the rights and interests of the deceased. But what are the consequences when the interests of the deceased are practically absent and the next of kin want access to private data at the same time? How are these interests balanced against each other, and what are the potential pitfalls of not attending to, in this case, the interests of the deceased?

As stated, the courts grant priority to the interests of the bereaved parents over the (unstated) interests of the deceased with reference to various legal frameworks; basically, since the deceased girl has not stated any wishes or wills in this regard (as most of us have not). Consequently, the court overrules the terms of service and systems configurations of the service provider, granting

the parents of the deceased girl postmortem access to private correspondence between their deceased daughter and her Facebook friends. In this case, access entails full access to the deceased individual's account, which is problematic for several reasons; not least that the data we believed and expected to be private 'in life' is be made accessible to others post-death.

The configuration between private and public content on social media platforms promises and signals to users that private correspondences are information and communication that will not be available to others. Kasket refers to material that is 'known to us' and those involved in the correspondence, but closed to the public and which covers emails, SMS threads, messenger app conversations as "behind-the-scenes-material" (Kasket, 2019 p. s. 27). The full disclosure of the account to the parents (as in the BGH Facebook case), including private correspondences between the girl and her conversation partners (i.e. 'Facebook friends'), disregards the agreement between the service provider and the deceased (Facebook made a similar argument in court, though it has its own set of issues, which I address in Chapter 7). Private conversations and interactions, which the individual believed to be private in life but are made accessible to others post-death, and which might be rephrased as a discrepancy between pre-death expectations vs. post-death permissions and action. This potential clash between the in-life expectations of the account holder and post-death permissions and actions is also noted by Kasket:

> Sometimes they [the contents, ed.] are pedestrian and administrative, sometimes in personal and sometimes exquisitely revealing, but whatever their nature *they were likely never intended for wider dissemination* (author's emphasis) and may even be at dramatic arts with an individuals preferred public persona. Whether you are an open book, or whether you'd sooner caught off your finger then give your significant other access to your file of passwords and access coats, I suspect most of you would hesitate slightly if you thought that everything in your archive could be seen by your next of kin after death. But that couldn't happen. Could it? (Kasket, 2019, p. 27)

The issue relates back to the previously mentioned, limited options for pre-death user configurations of systems: If there is no (or limited) opportunity for the individual to record and explicate wishes in relation to digital remains (see agency of the deceased), these wishes are difficult to honour. The arrow, however, not only points to the deceased and their lack of actions,

but also to the service provider, who in their stated purposes and system configuration makes promises to the users to protect their contents from third parties in terms of the configuration of content regarding private vs. public content.

Turning to the BGH Facebook case, the courts' granting of 'full access' to the deceased individual's account and its content postmortem might be case-specific (the deceased girl was a minor). However, the individuals' fundamental rights and interests are nonetheless sought protected under the GDPR – in Denmark also post-death through the Data Protection Act – which, among other things, involves the principle of 'purpose limitation'. Purpose limitation means that new uses of personal data, which entail any purpose that is additional to or different from the originally specified purpose, must be fair, lawful and transparent (ico.org, 2023), and basically states that the purpose of data application cannot suddenly change. But the question then becomes whether it can change from an antemortem to a postmortem context, or if that is tantamount to breaking promises? The notion of purpose limitation was not addressed in the BGH Facebook case, as German law does not protect the data of the deceased, as previously stated. However, it is likely that purpose limitation, as part of the GDPR, would apply in the Danish context due to the passed Danish Data Protection Act (Databeskyttelsesloven, 2018), as it protects deceased data subjects for a 10-year period.

An important detail worth noting in this case is that it was not the service provider that granted access, but the court. Considering the growing interest in using data belonging to deceased individuals for producing digital afterlife products (e.g. 'digital immortals'), the concern of pre-death expectations vs. post-death permission becomes a pressing issue. It is relevant to consider which pre-death promises are made through system architecture and policies, and, if changed in the postmortem, on what grounds? Additionally, if there are there any predeath configuration options for deciding for oneself on postmortem access or application of deceased data, such as 'opting in' solutions.

This section has treated issues related to the conceptualisation of postmortem rights and the interests of the deceased together with agential issues of the postmortem situation affecting the deceased. We will now turn to review issues pertaining to the bereaved individuals.

8.2.2 The bereaved

8.2.2.1 The interests of the bereaved

While issues concerning the deceased are linked to the conceptualisation of their postmortem rights and interests, such as "post-mortem privacy" (Edwards & Harbina, 2013; Harbinja, 2017) and the pre-death options that provide the deceased with some level of autonomy and self-determination, the interests of the bereaved are another story.

In the BGH Facebook case, for instance, the bereaved parents want access to their deceased daughters' social media account, as they are searching for digital evidence of her cause of death in addition to wanting emotional closure. In other cases, the motivation stems from discomfort relating to the continued presence of social media profiles of the deceased, which the relatives (or at least some of them) want terminated. In other cases, digital information functions as 'digital intel' in the settlement of lawsuits, disputes or in private settlements. In most (ordinary) cases, however, the interests of the bereaved are connected to sentimental and affective values. Walther et al. (Walter et al., 2012) describe this relational and emotional aspect in terms of "objects of the deceased", which refers to an inherent quality of the (material) objects that embody the deceased one way or another. Consequently, the bereaved might want access to these for the purpose of commemoration, mourning, remembrance or emotional closure.

For whatever reason, the interest in access might clash with the interests of other stakeholders. Many cases involve clashes with an online intermediary (as the deceased is incapable of 'objecting'), who is working to prevent access from third parties (e.g. heirs) with reference to the contractual terms. But what happens if access to these 'memorial objects' is prevented, if the objects are deleted, or they are in other ways rendered inaccessible to the bereaved after death? How does this affect the bereaved individual? This section deals with how the interests of the bereaved might look – the 'other side' of the property–privacy controversy. To illustrate this affective value of the digital and the consequences of deletion or inaccessibility of data, let us turn to an empirical example: a written contribution in Politiken, a Danish daily newspaper, authored by Nanna Slotmann, who is the mother Wilfred, who passed away at age 14. The testimonial is the real-life example of Stokes' (Stokes, 2015, 2021) notion of "deletion as second death", which

Bassett (Bassett, 2021) further develops with her concept of “second loss”. While I will return to explain the concepts, let us first turn to the written contribution.

8.2.2.2 Deletion as second death and second loss

In her contribution from 3 April 2024, Slotmann (Slotmann, 2024) explains how, “I lost my son, and shortly after, he died digitally (…)” (see appendix E for full version). In this case, ‘dying digitally’ refers to an unwanted and unwarned deletion (it’s not actually ‘deletion’, as these are public records that are maintained, but they are no longer visible to her as mother), of her son’s personal data from public sector systems, which include, among other things, Danish citizen’s health data.

In this case, the deletion or inaccessibility concerns medical records of her son’s course of illness, which, according to Slotmann, is a testament to their “journey and (…) trauma” as family, which they as parents should have the right to decide what happens. She writes:

> For me and my husband, for example, it is about a very extensive journal from Rigshospitalet. A journal that documents everything we and our son have been through. It's our journey and our trauma in that journal. We have the right to save it for the future. We never asked for our child's information to be stored digitally. We have never had any problem with that. Until now. But now, apparently, it isn’t our information anymore. Someone has decided, without our consent, that everything should be deleted. Or at least that we can't access it[52]. (Slotmann, 2024, p. 2, see appendix)

Here, it is worth noting how, compared to other European countries, Denmark is a highly digitised country. All citizens can communicate with public authorities and serve themselves online via platforms and administrative self-service systems. Borger.dk, for instance, constitutes such a system in which Danish citizens can access personal information about their health, housing situation, childcare information, family relations etc. – a vast range of life-related tasks and information – that are also integrated with other public-sector systems and public databases, such as ‘Sundhed.dk’. Accordingly, the systems store and display personal information *about* the user *to*

[52] Author’s translation from original language.

the user, including children, and the data and information that are accessible during the citizen's lifetime.

Returning to Slotmann, the sudden deactivation also applies to systems like AULA – a public system where parents communicate online with schools and daycare about their children, which includes pictures of the children's daily life. This page shuts down a few days later, as Slotmann explains:

> I can't log in. My child does not exist in the system. Again, without warning. I can't contact his teachers through Aula. I can't access old messages, pictures, or anything else related to my child's schooling. As if the child has never been here. (Slotmann, 2024, p. 1, see appendix)

The notion of the 'digital death' also takes effect at the doctors, who mistakenly think that Slotmann's husband has only one child because only one child is now visible in his system, as well as in her mailbox in which "the digital machine offers condolences", as Slotmann writes:

> The digital death also brings more absurd experiences, such as when I receive a letter from Udbetaling Danmark with the message, "You are no longer entitled to Child and Youth Benefits. Udbetaling Danmark[53] offers condolences." The digital machine offers condolences. It was so absurd that they had tried to humanize the machine with one line, that they should have just left it out. (Slotmann, 2024, p. 1, see appendix)

The example reflects the emotional impact of losing a child and the additional pain caused by digital systems failing to recognize their existence. As Slotmann further details, a relationship does not simply end because a person dies, which in the death literature is referred in terms of "continuing bonds" (Klass et al. 1996, 2014). The continuing bonds theory critiques older grief theories emphasising how the bereaved should engage in time-limited grief and 'move on'. Instead, continuing bonds theory explains grief as something that enables us to maintain a continuing bond with the deceased; not as 'denial' but as survivors finding places for the dead in their ongoing lives (Klass et al. 2014).

[53] Udbetaling Danmark is a public authority responsible for a paying out public benefits – such as state pensions and housing support (*Udbetaling Danmark | ATP.dk*, 2020).

The medical record is a testament to the world that Slotmann is the mother of W., and the data thus a testament to their ties, which until recently manifested digitally. As she formulates her rights and interests:

> I am the mother of Wilfred. I will be for the rest of my life. It must be in my journal. It should not be deleted, because it is an essential part of who I am. I and other parents who lose their children should have the right to at least decide what happens to our children's information when they die, so that it is not simply erased without warning. It is our information about our children, so why do we lose the right to it because our children no longer breathe? (Slotmann, 2024, p. 2, appendix-version)

Consequently, the operational choice of 'public sector Denmark' to delete – or render inaccessible – her son's medical record in public sector systems, triggers in Slotmann a condition of what is referred to in the literature as "second loss"(Bassett, 2021). According to Bassett second loss involves the experienced loss (or fear of losing) of data created by the deceased or data that commemorates them by deleting these data (or through technological obsolesces). The deletion (or fear hereof) creates a new form of anxiety for the bereaved (Bassett, 2021, p. 819). Bassett's second loss concept builds on Stokes' "second death"(Stokes, 2015), which refers to the deletion of a person's online persona. Accordingly, deleting the data comprising a person's online presence means deleting that person from the world. 'Person' should be understood as a temporally and physically distributed and intersubjectively constituted person materialised in e.g. SNS (Social Network Services) profiles, rather than as an agent with rights and interest(Stokes, 2015, p. 246). Consequently, Bassett suggests that this second death is being experienced by some people as a form of second loss.

According to Stokes, second death is wrong simply because that person mattered and is inherently valuable:

> By deleting your online persona, with its rich encapsulation of what you look, sound, think, and act like, we delete *you* from the world. That would be wrong, not because you wanted to persist, but just because you are valuable. You. The world loses something, the specifics of which are known to those who love you, when you sleep out of it. (Stokes, 2021, p. 107)

He argues that social media traces left behind by the dead, together with photographs, letters and the like, comprise a material part of the process of remembrance, which he, on the grounds of Jeffrey Blustein's notion of "rescuing from insignificance", argues that we have a moral obligation to rescue, preserve and prevent the forgetting of (Stokes, 2015, p. 239). Blustein's approach is linked to the abovementioned inherent value of the dead, rather than the fulfilment or frustration of the interest of the deceased person (Stokes, 2015, p. 243), and it involves testifying to who the dead were, keeping them alive in a "moral space" and "make them persist" (Stokes, 2021, p. 105).

Accordingly, he argues for the preservation of digital remains, stating that it is "through remembrance we can, to some extent at least, lessen the completeness of that loss" (Stokes, 2015, p. 239). This approach places emphasis on the deceased person as someone with intrinsic value, which we have a moral obligation to keep alive. Not, however, in hope of reward and recognition, but simply as a way of keeping promises (Stokes, 2021, pp. 104–105).

> If forgetting the dead strikes as a moral failing and not merely a lapse in rationality, that is at least as much because in forgetting them we allow or even collaborate in time's erasing them from the world (…) We cannot stop people dying, but we can try to hold off second death quite a bit longer. Just in so far as persons have a certain kind of preciousness, and as such a certain claim on our protection, we have at least some sort of moral obligation to preserve the dead and keep them with us. (Stokes, 2021, pp. 105–106)

8.2.3 The conflict of interest exemplified

In the previous sections, we have discussed the various interests and rights of, respectively, deceased and bereaved individuals; but what happens when these interests 'clash'? Whose interest to attend to, then? In the lawsuit, this clash exists between the service provider's user agreements and the wishes of relatives to access the deceased individual's account. Additionally, I would argue that there is an implicit conflict between the account owner's pre-death expectations of use and post-death actions (in this case providing access) (see 8.2.1.3).

However, a third example of a dormant, unspoken and tacit conflict of interest exists in the form of the opposing interests surrounding the 'digital immortals' phenomenon. As stated in chapter 4, the

digital immortal is a digital simulation or manipulation generated from the data of the deceased. In some cases, this involves publicly available material, whereas in others it involves extensive and personal datasets. For the deceased, the interest concerns moral and legal rights to privacy; and the ability to some extent to control what happens to one's data postmortem, such as preventing one's data from being used postmortem for AI training purposes (unspecific application) or to avoid being digitally resurrected (specific application). Consequently, one might ask if these very personal and private data should be the business of others (companies and relatives). To the bereaved, the digital immortal provides comfort and consolation through the use and interaction with the product; hence, the word 'griefbot' (although they can also provoke 'uncanny feelings'). For the platform owner, the interest lies in selling subscriptions and keeping the living users interacting with this "robot personality"(Fosch Villaronga, 2019) based on the data of the deceased.

With these far-reaching implications of active digital configurations, it is no longer only a question of whose interests to accommodate, but, as Dijk and Waal (Dijck & Waal, 2018, p. 7), suggest, equally an a priori question of "*Who is or should be responsible for anchoring public values* [moral, ethical] *in societies that are increasingly organized through online systems?"*

8.3 Intermediaries (#3)

8.3.1 Different intermediaries

The digital remains phenomenon continues to be difficult to capture and handle postmortem, partly because it is connected to the issue of defining 'ownership' and, following from that, 'custodianship'; that is, who has the right to access and control the data of the deceased within the digital sphere. In the digital realm, ownership is not aways bound to the object, the 'thing' itself, as in conventional estate settlement, where the digital object, as we have seen, is considered property and possessions. Rather, the notion of ownership is bound to a system of digital infrastructures, platforms and multiple stakeholders in which the question of access and control is influenced by a range of factors (see e.g. the problem characteristic of 'access'). This complex landscape makes practices and rules of governing the digital, including digital spaces, difficult to navigate for both organisations and individuals. This section examines which actions are taken

(and, following from that, what authority is assigned/given to) administrative organs or 'custodians' of the digital in various contexts (collectively referred to as 'intermediaries'). In this section, I will investigate how these intermediates exert their influence and what level of influence they have, which is in turn connected to their 'level of access' to the data of the deceased.

'Intermediaries' are understood in this dissertation as administrative and managerial agents between parties in a postmortem situation or conflict, who have different levels of power and different levels of access to the digital. Generally, intermediaries have (or can provide) access to the data of the deceased, and they exert their influence both online and offline. Oftentimes, their roles as 'data custodians' is far from formalised, since the procedures around data in postmortem settings are sometimes messy and other times merely less well-established – and following from that, the interests of the affected users are not always balanced and thought-through.

The probate court or the BGH court is an example of a superordinate intermediary which in the BGH case overrules the contractual terms and agreements of the service provider, thereby granting postmortem access and control to the heirs. The heirs are also intermediaries – in addition to being affected individuals – whose 'power' lies in their social bond to the deceased. Accordingly, the deceased have the potential for 'direct access' to digital remains due to their knowledge of the passwords of the deceased and eventual physical proximity to the hardware. In addition to this, they do not need special permission to access and read (that is, if it is 'informal probate' and the hardware is accessible). As Morse and Birnhack (Morse & Birnhack, 2020a, p. 110) explain: "the person who has such access does not need any special legal or other permission to leave through the personal items, and as a social matter, we accept that the physical proximity to the deceased belonging grants permission to access and control them, including discarding them altogether".

If the heirs disagree, however, another intermediary takes over. These are the legal executors (e.g. family- and inheritance lawyers), who exert their influence in estate administration on the basis of their legal experience and conventional wisdom (see chapter 6). If we revisit the example from above, the computer was confiscated as part of the formal probate due to suspicions that it might contain sensitive information about assets. Here, the lawyers' power to act exceeds that of the heirs. Let us revisit the example in which the legal intermediary/executor assumes their role as

'data custodians', albeit without being formally appointed as such, and decide if the hardware is to be confiscated and 'hammered', wiped, or turned over to heirs without question.

> **Diana:** "If it's an informal administration, I would ask the other heirs, 'Do you agree? Okay, there you go, take it' [the computer, ed.]. As a legal executor [formal probate], I'm not sure I would do that. I think that if I were to follow my duties, I'd have to say 'no' [to handing over the computer]."

8.3.2 Online intermediaries and access levels

Intermediaries can also take on more material forms, such as a physical or online 'will',[54] which exerts influence in the postmortem situation on the basis of the explicated wishes of the deceased antemortem. Alternatively, it can manifest as 'digital afterlife services' and platforms, such as 'Exizent' (TechRound, 2023). Exizent is an online estate administration platform that serves as an administrative agent in the postmortem situation, guiding the heirs and/or legal executors concerning the wishes of the deceased in relation to digital assets. Through these online afterlife services, the deceased can record postmortem wishes regarding the digital, which closely resembles an 'online' or 'digital' will. However, the level of access of these services to the deceased's data afterlife (and consequently their 'levels of power') differs from that of e.g. social media platforms; that which Dijck and Waal refer to as "infrastructural platforms" (Dijck & Waal, 2018, p. 13).

Infrastructural platforms are powerful corporations (i.e. Aphabet Inc. (Google services), Facebook, Inc, Apple Inc, Microsoft cooperation and Amazon.com, Inc.) that own and operate the platforms and ecosystems through which data is collected and processed (Dijck & Waal, 2018, p. 14). Accordingly, they are not merely 'passive technologies' controlled by the users, but rather influential players through which data flows are managed, processed, stored and channelled (Dijck

[54] In the anthology *Future Law*, Burkhard Schafer (Schafer, 2020, pp. 234–235) discusses the notion of "dynamic digital wills", which are computational models of legal reasoning entailing that, according to their wording, "systems that are capable of reasoning with an interpreting legal norms and extend them to a situation where the norm in question is a person's will".

& Waal, 2018, p. 13). They essentially act as online gatekeepers and data custodians of user and content data.

Basset considers, what I refer to as respectively infrastructural platforms and dedicated digital afterlife services, as *types* of digital afterlife services, but distinguishes between them as afterlife services that are respectively "intentional" and "accidental" (Bassetts 2022, p. 44). Intentional afterlife services are platforms and technologies that *intentionally* offer the ability to e.g. create digital afterlives (e.g. as avatars that continue to be socially active after the biological death of their creators (Bassett, 2022, p. 40) or encourage their users to upload files, data etc. on their servers (Bassett, 2022, p. 32). On the other hand, the 'accidental' afterlife services are "social networking platforms created for the living [that] are now being rapidly inhabited by the dead in a digital grief space"(Bassett, 2022, p. 41). Accordingly, the accidental afterlife services are designed for the living (e.g. Facebook, Twitter) and reappropriated for postmortem use.

I want to highlight another key differentiator between these platforms or enterprises, as I believe the difference between them exceeds the notion of 'intent' vs. 'accident' – for can't we also say that the reappropriation of a Facebook profile for postmortem use implies some level of intentionality?

I will make a distinction between '(intentional) digital afterlife services' and 'infrastructural platforms', and call attention to another key differentiator between these platforms and services, which pertains to 'the level of postmortem access' (permission to access and/or use) to digital content and data, and which differs between these two platform types.

The (intentional) digital afterlife services constitute, for instance, the estate planning software Zenplans (TechRound, 2023). Such services typically store data and content extracted from another platform (or device), which is subsequently uploaded to the afterlife service. Accordingly, the afterlife service and its operations are not integrated with the ecosystem, platforms and dataflow of the infrastructural platforms. In contrast, social media platforms (e.g. Facebook, Instagram) own and operate the platforms and ecosystems through which data is collected and processed, meaning that the data and content (eventually digital remains) are operated 'from within' these. We can refer to these as 'internal data' or 'internal digital remains' – which additionally constitute

both ‘content data’ and ‘user data’ (Dijck & Waal, 2018, p. 9) – and to the former as external data, i.e. data/remains which are not generated through the platform.

Consequently, the infrastructural platforms have more ‘direct access’ to content and user data in comparison to the digital afterlife services, because digital afterlife services do typically not generate user and content data themselves, but merely stores ‘existing data’. Essentially, the infrastructural platforms have a greater power and control over the users’ digital remains than the digital afterlife services (or the offline intermediaries, such as lawyers and heirs, for that matter) as they operate directly through the algorithms and infrastructures – at least as long as the conflict is not taken to court (cf. the court overruled the Facebook policies in the BGH Facebook case).

The next section examines how the more direct access levels (permissions) of platform providers impact the postmortem situation.

8.3.3 The (postmortem) power of infrastructural platforms

As evident from the previous section, output data and content are not merely affected by consumer behaviour and ‘passive technologies’; instead, they are continuously configured by powerful online intermediaries who own the systems and infrastructures on which data are generated.

Their capacity to change and control data outputs is demonstrated in the BGH Facebook case, where the high court ordered the service provider to re-configure the digital account into a passive-reading mode rather than retaining the fully functional, interactive pre-death modus of the account. Accordingly, it demonstrates that these intermediaries are capable of continuously changing, limiting or entirely excluding user configuration options (frontend), but they can also change which data are being collected and processed through the design and settings of the digital environment (backend configuration). As Dijk and Waal describes, “social media platforms are never neutral ’tools’: they make certain things visible, while hiding others” (Dijck & Waal, 2018, p. 32). This power also impacts the postmortem: frontend configurations determine the type and level of post-death access and data control of users through system design and affordances (user permissions), just as backend configurations and operations can broaden or limit permissions of

the service provider's collection, processing and application of user and content data (company permissions).

As an example of the power of infrastructural platforms, Facebook has changed their policies, system architecture and configuration options regarding the data of deceased users numerous times since its launch, starting with the full removal of deceased accounts from the network upon death, which was changed to a configuration of 'memorialisation' in response to pressure from users (McCallig, 2014, p. 138), ultimately making a limited testamentary action available in terms of 'legacy contact' as their latest configuration. The Facebook legacy contact is "a post-mortem data management solution designed and deployed at Facebook" (Brubaker & Callison-Burch, 2016, p. 2908). According to Brubaker et al. this is an attempt at striking a balance between the needs of the deceased and the bereaved through a stewardship-based approach (Brubaker et al. 2016, p. 2909). It involves anyone (although they must be users of the platform) notifying Facebook about the death of a Facebook user through a memorialisation request. The 'Facebook Community Operations team' reviews the request, and once death is confirmed via a submitted death notice, for example, Facebook sets the account in a memorialised state and no longer displays advertising or birthday reminders (Brubaker & Callison-Burch, 2016, p. 2911).

The post-death superiority of the infrastructural platforms is also indicated discursively in the company guidelines, where the user can "[r]equest the removal of [one's] account" and where Facebook "may add more capabilities for legacy contacts in the future" (*About Legacy Contacts on Facebook | Facebook Help Center*, 2024).

Where the former, in terms of the word 'request', implies that it is ultimately up to Facebook to determine the destiny of the account, the latter implies that users are to expect future updates and changes. If users disagree with these updates, they must either accept them anyways or exert collective pressure, as we saw users object to the full removal of deceased accounts to begin with. As McCallig states, the "relationships (…) between users on the network are primarily controlled by the legal (contractual) and technical boundaries that Facebook set"(McCallig, 2014, p. 138).

Consequently, the social media service provider influences how digital remains come into existence through its technological conditioning and available affordances – and to whom this content is available postmortem. That is, if the social media accounts and data are to become 'no

thing' posthumously (the deceased account is fully removed), if it is to become an 'online memorial' in terms of a 'static digital archive', or if the users (bereaved and deceased) are able to download pre- or post-death raw data forms in terms of e.g. xml-files, images and video files. This feature was added a few years ago.

These modus operandi difference can be tracked back to the motives, logics and financial incentives of these commercial companies. While the infrastructural platforms and digital afterlife services both have a shared interest in settling the 'digital estate' (which in Facebook's case means hindering orphaned data of deceased from floating around on their platform) infrastructural platforms differ in terms of how they act in their own commercial interests. In contrast, lawyers primarily act in the interest of their clients (the affected users or, alternatively, the State in the case of debt), and the primary objective of their business is to settle the decedent estate. Online estate management services basically have this same business goal, however, with a prime focus on the postmortem, facilitation of 'digital' assets, content and information. While the infrastructural platforms, as stated, share an interest in managing deceased's accounts in the postmortem, it is not their primary goal and incentive. As most people are aware at this point, their commercial interest is in the user and user interactions, which together with the platform's infrastructural superiority pushes power balances in the postmortem.

As regards the configuration options available to users: What are the options for configurating an account for users, if any, in postmortem situations? Can the account be terminated, transferred, set to a limited reading mode, set to a limited author mode or can it be completely deleted? Can contents be deleted, downloaded – in a comprehensible form – or possibly even donated postmortem? What tasks, if any, can be outsourced to others (pre-death) and acted out (post-death), such as legacy managers (implemented at Facebook and Apple)? Or are no options available concerning the digital afterlife?

Accordingly, it also becomes pressing to ask what postmortem permissions commercial companies bestow themselves in relation to collecting, processing and applying data and what stated purposes they have in relation to these data. For instance, do we know if social media data are deleted postmortem or rather deactivated and stored for undeclared future purposes when a person has died? To what extent are regulations and configurations updated at the companies'

own convenience, and for and for what purpose does a company like Facebook retain deceased profiles? In other words, what are the purposes informing the algorithmic configurations of the platform, and how do they affect postmortem application?

The fact that Google issued a patent in 2015 entitled “Methods and Systems for Robot Personality Development” (U.S. Patent No. 8996429) (Quinn & Brachmann, 2015), which allows for the programming of a robot personality based on data from deceased users, underscores the importance of being aware of backend operations and permissions granted via software, especially for commercial use. The patent states that: “The robot may be programmed to take on the personality of real-world people (e.g. behave based on the user, *a deceased loved one* [author’s emphasis], a celebrity and so on) so as to take on character traits of people to be emulated by a robot” (Francis Jr. & Lewis, 2015). Microsoft followed in Google's footsteps and obtained a patent in 2020, which allows for, as Harbinja et al. states “creating chatbots that may correspond to a present entity, such as oneself, a friend, a relative, or even a historical or fictional character” and which can be “based on ‘images, voice data, social media posts and electronic messages with the option of rendering in 2D or 3D”; however, it is a technology that Microsoft has chosen to shelve for now (Harbinja et al., 2023, p. 4).

In summary, there are different ways in which intermediaries can exert influence on digital remains in the postmortem and they each have different level of authority and different level of access to the digital remains. In general, however, intermediaries are administrative agents in postmortem situations, which have the ability to either prevent or provide affected users with access to digital remains. Technology/infrastructural intermediaries specifically play a decisive role in this process, as they could limit or entirely exclude user agency through the design and settings of the digital environment (e.g. through architecture, scripts, user policies), as they own the systems and infrastructures. What kind of opportunities (or lack thereof) are available to the affected users in the postmortem?

Additionally, the conditions made available may be driven by commercial interests as opposed to lawyers as intermediaries, who solely serve the interests of the affected users or the state. In some cases, interests may coincide between the intermediary and affected users or affected users in between (e.g. when the Facebook interest in managing deceased profiles to prevent zombie

profiles from floating around overlaps with the deceased/bereaved interest in having a memorial profile). Conflicts may arise in other cases, however, as in the case of the BGH Facebook or the example of the Danish public sector deactivating a child's medical record, making data disappear from one moment to the next.

8.4 Invisibility and material absence (#4)

The problem characteristic 'invisibility' refers, but is not limited to, the notion of physical and sensory qualities of the digital (i.e. materiality, tangibility) – or rather the absence of this – in the digital effects. This lack of material and tangible qualities has consequences in the postmortem in terms of how easy it is to collect, curate, locate and close down objects, as the bereaved family can only act on what they can see, hear or experience. As Nagy and Kiszl (2020, p. 387) point out, "[i]t is practically impossible (…) to explore a personal digital legacy completely if the deceased person did not make any arrangements related thereto while they were alive".

> The digital life of a person does not end with their biological death. The user accounts and subscriptions they leave behind live on without an owner, and most of them cannot be transferred in the way that real property and personal property can (for example, a house, car or watch). During the probate procedure, the latter can easily be discovered and legally transferred. It is practically impossible, however, to explore a personal digital legacy completely if the deceased person did not make any arrangements related thereto while they were alive. Recently, legislators have realized that some kind of regulation or guidance is necessary. (Nagy & Kiszl, 2020, p. 387)

For one, physicality and tangibility ensure that artefacts (e.g. household property, chattels) are perceivable and visible in postmortem situations. Conversely, due to their material and spatial absence, digital assets are less discoverable, and risk being overlooked posthumously, since there is no obvious objects for the bereaved to claim.

One of the interviewees mentions the consequences of the lack of material presence:

> **Naomi:** "'Yes, because we don't see it…that's the problem. In reality, I could be quite nervous that if a young person dies and doesn't leave a will, because they think they are immortal –

> and maybe that's how it should be when you're young – but when it's not written anywhere, and they don't leave that information [what assets they have and where], then we don't see it…it's not included…and what happens to it, then?'"

This issue is very different from conventional estate settlement dealing with physical remains. In most cases, these things are encountered either in the ceiling, basement or drawers qua their physicality and spatial presence. The digital remains, however, are not necessarily detectible the same way by the heirs or the legal executor, the consequence of which being that they can be forgotten or exploited by those who potentially find it valuable or find new purposes for the material.

The is the case with cloud-based content (text, video, images), the presence and discoverability of which depends on someone knowing about them or having access to its 'material proxy' in terms of e.g. a piece of paper, a will or a physical device (through access by default). Contrary to cloud-based content, social media profiles are publicly viewable digital materials, the online presence of which leads people to discover them – although families do not always succeed in memorialising or terminating these profiles. Likewise, the computer is a physical, tangible piece of hardware, which is discovered and handled in the decedent estate.

Some cases almost seem to have some mutually reinforcing 'absence-effect' between death and technology. On the one hand, the absence of the material objects or systems means that the thing does not draw attention to itself and cannot be found; on the other, the deceased are silenced, materially absent subjects, incapable of telling where the remains are or how others should approach them. Accordingly, the object does not provide 'access' to the deceased (as e.g. digital memories), nor does the deceased provide 'access' to the object, which reinforces their omittance. This reinforcement also occurs with reversed polarity in the case of Nanna Slotmann. When Slotmann's son 'is deleted' (her own wording), her son's death is reinforced by technology and the bereaved mother experiences 'second loss' (see also affected users). Consequently, the 'invisibility' issue also concerns the transition of remains that at one point were accessible and visible to affected users, and which suddenly and without warning is transformed into nothing; in a split second, it is deactivated and made inaccessible.

Accordingly, both the absence of material qualities of data and the information architecture are factors that can limit postmortem action (for the individuals), as these are easily missed or suddenly 'gone' – the latter of which the bereaved might experience as a type of second loss.

Another aspect, in addition to the lack of material and spatial presence, which means that digital objects sometimes go unnoticed, is that decentralised systems and 'stand-alone' services also provide an explanation for why digital objects – in this case digital assets – risk being overlooked. Cryptocurrencies, for example, is a relatively new type of asset, which is both digitally rendered (and thus invisible and inaccessible to anyone other than the owner), but at the same not integrated with other records of financial and governmental institutions.

Instead, cryptocurrencies are generated from decentralised Fintech environments, that are not integrated with national, centralised, financial information systems. Asset information is typically extracted from these centralised financial systems, such as those belonging to banks or the Danish Tax Agency. When these assets are not automatically registered, however (e.g. like securities are), cryptos do not figure in the list of assets of the legal executor in estate settlements – despite the Danish tax system having registration procedures. They are like money in the mattress; they only figure somewhere if asset information is recorded in a material proxy such as a marriage settlement or registered in the tax system by the owner themself or if asset information is shared verbally or in writing with relatives.

Consequently, cryptocurrencies are digital objects that risk being overlooked in the event of death, the consequence being relatives missing out on the inheritance. DL News, an independent news organisation providing in-depth reporting on cryptocurrency issues, reports from a survey (n = 1000 US adults) conducted by digital security firm All About Cookies that 63% of crypto holders do not have a digital will and that what will happen in the event of the holder's death is uncertain (Carreras, 2024). The survey also finds that half of the population has online assets that their partner does not know about, and roughly 40% of American adults only store their passwords 'in their head'.

Excerpt from survey conducted by the digital security firm All About Cookies among 1000 US adults:

- Only 37% of US crypto holders have a plan to share wallet information in the event of their death.
- Almost 40% of US adults store their passwords 'in their head'.
- Half of the population has online assets that their partner does not know about

Source: (*DL News - Markets, DeFi, Regulation and Top Cryptocurrency News*, n.d.)

AssetVault, a so-called death-tech service, is a FinTech company offering technology on 'digital witnessing and blockchain wills' to prevent assets from being overlooked and lost. TechRound writes that "Five years ago, the founder's uncle passed away without a will and testament and Founder and CEO Vishnu saw the trouble that his family had to go through to figure out where all the assets were" (TechRound, 2023). Users can use TechRound to catalogue and store access information on all valuable assets – digital as well as physical.

In the following, we will take a closer look at the features and material qualities of the digital, which is also influenced by the platform architecture. Accordingly, where some features are 'embedded' in the data (e.g. communication style, genre of the content), other features are reinforced by technological underpinnings and affect how the digital is rendered. Is it dispersed or coherent, active/passive, and is the data to be understood on the basis of its parts or whole?

8.5 Data, content and digital configurations (#5)

The attraction of being able to divide the digital renderings into clear, meaningful and long-lasting categories, such as 'accounts', 'profiles', 'assets' or, as Rycroft proposes, "financial assets", "sentimental assets", "assets with social value" and "intellectual assets" (Rycroft, 2020, pp. 130–131) is understandable. It would make the legal treatment of data much easier.

However, the interpretation of the digital as homogenous and stable entities, which can be fitted into legal practices and classification systems, contradicts digital stuff's distributed, changing and compound nature. Accordingly, digital data and content is not always the same, as it changes with

the setting and use of the platforms, which is exactly what renders the digital difficult to pin down and manage (Lupton, 2020, p. 74).

According to Dijk and Waal, a platform is a programmable digital architecture that is "fueled by *data,* automated and organized through *algorithms* and *interfaces,* formalized through *ownership* relations driven by *business models,* and governed through *user agreements*" " (Dijck & Waal, 2018, p. 9). These platforms, including the ecosystem of which they are a part, channel "social, economic and interpersonal traffic" between end users, corporate entities and public bodies by means of the collection, processing, circulation and monetisation of user data (Dijck & Waal, 2018, p. 7). Accordingly, the platforms and their ecosystems affect how data is being rendered and outputted, which can be more or less coherent and comprehensible (to users), more or less 'active', and more or less readable to the affected individuals in the postmortem. Consequently, it is difficult to state whether contents and their technological underpinnings are to be understood as 'correspondence', 'systems', 'digital spaces (of mourning)', 'accounts' etc.

Moreover, these processes of collection, processing, circulation and monetisation of user data do not stop just because a user has passed way. The platform economies have effects that continue into the postmortem as well.

This problem characteristic treated in this section focuses on the 'inherent' and material qualities (e.g. how personal, trivial, administrative and accessible) of data and communicational entities, on one hand, and how the digital environments and their architecture shape, configure and remodel these data, on the other (e.g. how raw, dispersed or active the data output is). This also has consequences in the postmortem. The nature of data in terms of 'genre' and configuration (i.e. how the data is processed and applied) affects how personal, meaningful, comprehensible and discoverable data are for the affected individuals and, consequently, how manageable and controllable they are to the users.

Accordingly, as we shall see, digital remains can both be understood as 'input data' – e.g. personal data that are fed into intelligent software generating digital replicas of people who once lived (data as means) – or they are 'output data' in terms of 'content', possibly treasured, valuable, coherent and 'static' objects, such as correspondence, images and interactive configurations, such as digital immortals (end product). One can also distinguish data between the viewable, meaningful,

comprehensible and readable (to the user), versus the less invisible, comprehensible and meaningful (to the user), such as behavioural data collected through the platform for the purpose of profit.

These different qualities and shapes of data, to which we will now turn, all argue against excessively narrow and fixed definitions of what digital remains are (not); for now, at least.

8.5.1 Three examples of digital remains

Let us begin by considering three examples of different configurations of digital remains: the digital photo, the memorialised Facebook profile and a (deceased) conversational AI agent (i.e. digital immortal/ghostbot). The purpose here is to get a sense of the differences between them and their implications postmortem; at least from a user perspective.

In a legal sense, the digital photo and video is considered an 'artefact' that is distinct from 'data' and 'information', in that artefacts fall under intellectual property law. This essentially means that photos and videos can be transferred to the family upon death. As Hylleberg explains:

> Personal data in this context [postmortem] should be seen in relation to personal messages and comments, but when it comes to pictures and videos, it is no longer considered data but rather artifacts, which may fall under intellectual property (IP) laws, and such matters should be transferred to the family.[55] (Hylleberg, 2019)

Additional features of the digital photo include its digital rendering, ease of distribution (which is in fact beneficial for estate distribution), and the presence of metadata. Content-wise, however, if we disregard the application of deepfake technology, the digital photo resembles a traditional photo from the perspective of the affected users. Consequently, the photo does not cause administrative confusion in postmortem situations.

If we turn to social media profiles, they can be understood as accounts or digital spaces provided by an intermediary platform and from which content (i.e. images and messages, private and public)

[55] Translated by author from original language.

are generated. The profiles, whether on Facebook, Twitter, Instagram, TikTok, Snapchat etc, constitute coherent, collective and to some extent publicly available forms of textual-visual data, which are – in Facebook's case, for example – typically deactivated and preserved in the postmortem (at least in the memorial stage). It could, however, technically be configured differently by the service provider postmortem (as in the court case) or accessed unauthorised and 'continued' by third parties postmortem without consent (this does not typically occur). In summary, a Facebook profile is typically not 'authored' postmortem, and its content is unaltered, discontinued and static.

This is not the case with the "digital immortal" (Savin-Baden & Burden, 2019) or "ghostbots" (Harbinja et al. 2023); that is, the digital simulations of real-world deceased people, which we treated in chapter 4. There are, as stated, great variations in the configurations of the digital immortal, which concern the degree of sophistication of the technology applied to process data and the types and volumes of data from which they are built (Fosch Villaronga, 2019, p. 98).

One of the more sophisticated versions of a 'digital immortal' (compared to Sherlock's less advanced examples (Sherlock, 2013) is based on generative AI technology and constitutes intelligent conversational agents based on the deceased's data. An example of such a real-case "deadbot" (Hollanek & Nowaczyk-Basińska, 2024) was developed by Eugenia Kuyda, the founder of Luka, a company specialising in chatbot technology, and launched in March 2019 ('This App Is Trying to Replicate You', 2019). It was an artificial intelligent chatbot assistant, which digitally resurrected her late friend, Roman, who died in 2015 by age 34. She fed the system with "behind-the-scenes" material (Kasket, 2019, p. 27) comprising personal digital correspondences between the friends together with correspondence between the deceased individual and his family, which had been 'donated' to bring him back.

If we break this configuration down into smaller pieces, an intelligent ghostbot is partly authored by the deceased and partly by communication partners, and then 'fed into' the AI machinery. The machinery then processes these commutative bits and pieces once again using algorithmic processing and user engagement of the living users in combination, and the configuration turns into what? A 'correspondence', a 'representation', a manipulation, an 'account' or a 'contract' between living users and the company?

Consequently, it can be difficult to determine how in fact a digital immortal is to be conceptualised. Are we talking about 'digital remains'? Do the data belong to the deceased or to the living? Are we talking about the parts (inputted data) or the whole (the end-product)? And to whom does it belong when it is authored by a mix of humans and software? And on top of everything else – when it is created by a private enterprise? Is the digital replica, whose baseline data can be retrieved (antemortem) without the knowledge of the users, to be considered 'company assets'? The machine also learns from its inputs. New outputs are generated on this basis – and what else is this?

Accordingly, the digital immortal is therefore far from settled, both as a phenomenon and technological object, and it is more complex to grasp and conceptualise than the notion of the digital photo: Should the digital immortal be governed on the basis of its parts (the deceased's content and user data) or on the basis of its whole (the product, the account). The latter has different implications and provides different options than the former, but it essentially boils down to who is ultimately to be considered the 'data custodian' of this very personal configuration: the individual/account holder? the heirs? the intermediary?

Let us leave these questions for now and see what general features of data (which includes the underlying systems) we can subtract from the notion of digital remains and consider the effects these inherent and material qualities and data configurations might have for the affected users in the postmortem.

8.5.2 The incomprehensibility of data

While data are not always meaningful, comprehensible, preservable or viewable to the individual human being or 'consumer', this does not mean that they are not meaningful, useful or interesting to private, commercial actors.

Take, for instance, the notion of behavioural data and metadata, which are generated through means of surveillance and tracking technologies (e.g. commercial purposes when users interact online). These types of data are typically declared as operations necessary 'to give the best user experience'. They fuel recommender systems and personalised advertising (typically manifesting as

cookies warnings), and they are what that makes digital businesses profitable. As Lupton states, 'big data' are "valuable commodities the personal data about people contained within these massive data sets are represented open to profitable exploitation" (Lupton, 2020, p. 45). Indeed, they say a lot about people's preferences, tendencies and habits, which is exactly what makes them valuable to companies, who can sell this behavioural information to advertisers or use them for other commercial purposes. Zuboff phrases it differently, and describe behavioural data as 'knowledge that is accumulated from us but never made available to us despite the tech companies knowing everything about us' – an unprecedented phenomenon which Zuboff describes in terms of "extreme asymmetries of knowledge and power" (Zuboff, 2019, p. 12).

But what is the issue here? What can these data possibly be used for? After all, you would not sell ice cream to a dead person, right?

The problem is that these (user) data are also valuable to tech companies in the postmortem context; not for advertising, but as building blocks for new products in the market. As consumer commissioner, Meglena Kuneva, stated in 2009: "Personal data is the new oil of the Internet and the new currency of the digital world "(*World Economic Forum*, 2011) – and as with crude oil, data does not perish. Companies find new ways of exploiting data, such as when they use data for building blocks of digital immortals, as mentioned in the above section. On top of this, these building blocks go "beyond the more obvious, showy Facebook profiles, the blogs, the digitally stored photographs" (Kasket, 2019, p. 32). Accordingly, the "digital dossier"(Kasket, 2019, p. 18,32), as Kasket labels the more incomprehensible and invisible digital footprints, go under the radar – and even more so in the postmortem. They are not something the individuals 'stumble upon' in post-death settings, or which the bereaved have interest in per se. At the same time, these data, which tell a lot about people's preferences, tendencies and habits, are very valuable and meaningful to commercial enterprises.

Although the issue of untransparent data operations, which companies can profit from, is not so different from the 'in-life' issue, where behavioural data are likewise dispersed and beyond the control of users despite attempts to strengthen autonomy via legal frameworks such as GDPR, the consequences are rather different in the postmortem than in-life.

For one, since the deceased cannot waive the possibility of their data being used for profitable purposes, as they are dead and silenced (i.e. the absence of an active agent), and second, because systems and software do not provide the user with pre-death options for stating their post-death wishes in terms of e.g. a "do-not-bot-me"-option (Harbinja et al., 2023, p. 6); not yet, at least. Combined with the potential, broader application (i.e. use extended to the postmortem) and often 'hidden' (i.e. the lack of operational transparency) of individuals' behavioural data and content data for commercial purposes, this makes the power imbalance even more skewed in the postmortem – and the postmortem actions of the companies ethically questionable.

A company specialising in creating 'active afterlife products´ is Eternime, which presents their product on the company website as follows:

> (…) an Artificial Intelligence digital replica of you, built from your digital footprint (emails, social media posts, smartphone and wearables data etc.). This digital twin will learn from you, grow with you, help you and, eventually, live on after you die (…) We started this project in 2014 at the Massachusetts Institute of Technology, and have been working ever since on understanding human psychology and building the Artificial Intelligence that will help humans "live" forever as digital replicas are. (*Who Wants to Live Forever?*, n.d.)

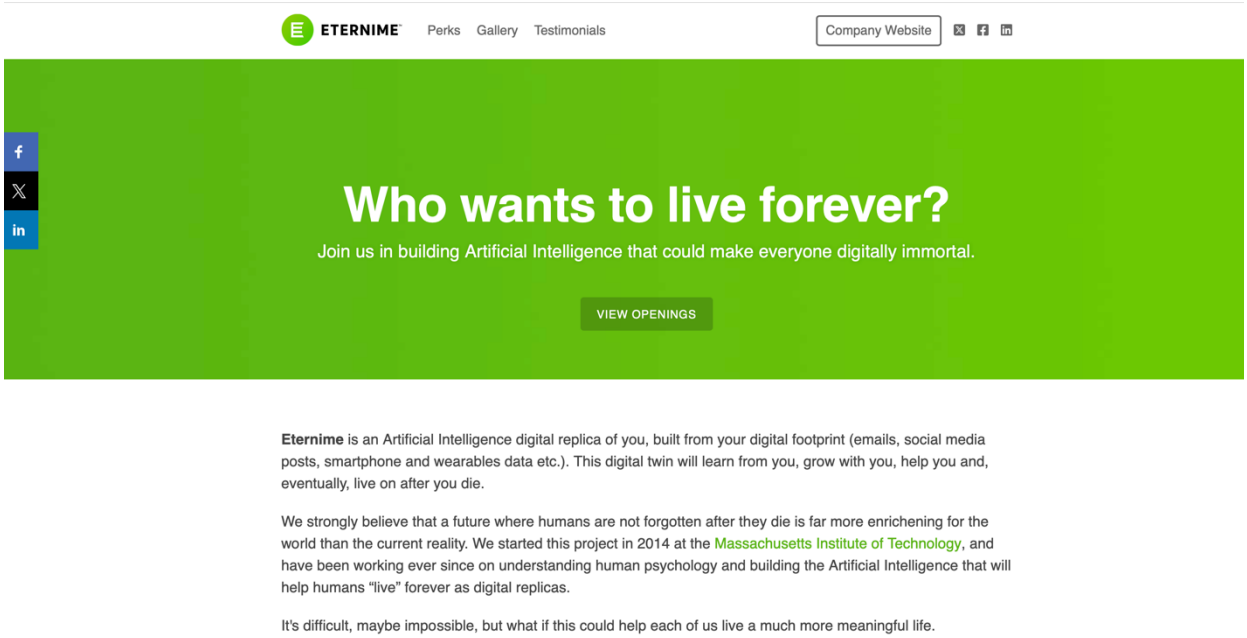

Image: Eternime webpage (Eternime. (n.d.).

While it is difficult to deduce from the website if the digital immortality being generated while the user is alive or after (and has thus 'donated' the data or not), it is evident that these bots are already products on the market and that they are based on both user and content data. As Harbinja et al. write: "Eternime are experimenting with AI technology to create posthumous avatars through the collection of 'geolocation, motion, activity, health app data, sleep data, photos, messages that users put in the app' from the deceased's smartphone" (Harbinja et al., 2023, p. 4).

8.5.3 Coherence vs. dispersion

What also influences the extent to which we are able to collect, curate, locate and close-down digital objects in the postmortem is the notion of what I refer to as the 'coherence and dispersion' of data. Do the data we leave behind always constitute purposeful, searchable collections of readable and meaningful formats? Or are they also scattered digital footprints spread all over the web? How meaningful, comprehensible and readable the digital is depends on how the information system renders it to the user, which is not always in the form of orderly collections of photos.

In the BGH Facebook case, the company initially provided the mother with a huge PDF file, which was difficult to navigate and read (e.g. as PDF readers lack the same sophistication in the affordance of searchability as social media profiles). Consequently, Facebook was ordered to provide access to the user account "in the same way as their daughter had previously been granted access", and by providing a USB stick of 14.000 PDF files, this obligation was not fulfilled (Fuchs, 2021, p. 5). Under normal circumstances, a Facebook profile (or online memorial) constitutes a relatively orderly and cohesive collection of materials. But this is not always the case, as Kasket explains:

> Have you Googled yourself lately? (…) you'll like this spot information about you stemming from all manner of sources. Unless you're a celebrity, with writers vying to publish the definitive story of your life, the unauthorized biography you see represented in the search results will be a fragmented bricolage rather than a coherent narrative. (Kasket, 2019, p. 26)

Accordingly, digital remains are not always 'coherent narratives', but can be fragmented bricolages, which are uncontrollable and possibly even inaccurate, unexpected or even deceptive:

> I'm guessing you that you will feel okay about some bits of it and may even be alarmed about other bits. You are likely to find information that is inaccurate, or deceptive through its being out of context, or entirely accurate but not something you want published, or just unexpected. You could be surprised because you've forgotten a few things, or because you were unaware that the information was captured in the first place. There might be information that appears to be about you but is actually about someone else. You might even discover that you are dead already, that you've been dead for four years (…). (Kasket, 2019, p. 26)

Additionally, the fact that we are unaware of these footprints and fragmented bricolages (or cannot do anything about them) does not mean that we do not care if they are there or not.

8.5.4 Access versus application

Another crucial element to consider in understanding the configuration of digital remains is the question of 'access' version 'application'. Is data accessed or is applied and repurposed?

In the BGH Facebook case, access was granted to the accounts (and their contents) of the deceased. This might imply a conflict between the girl's pre-death expectations vs. post-death action, as stated earlier, but there is another layer to it. In the BGH Facebook case, the issue concerns the question of intermediaries/courts providing 'access' to existing and unaltered (although private) contents. Conversely, the digital immortal concerns the 'application' of the data of the deceased, which, as stated above, constitute both content data (data of which we are aware) and user data (of which we are unaware), and which can be processed and reconfigured for new purposes and commercial ends.

Öhman and Floridi have collectively termed the notion of companies profiting from the data of the deceased as the "digital afterlife industry"(Öhman & Floridi, 2017). They propose digital remains to be understood as "a form of capital, an undead creature that demands human life activity – living labour – in order to remain productive. It follows, that use of digital remains for commercial purposes, creates an interest in increasing either the sales of the remains, or consumers' interaction with it." (Öhman & Floridi, 2017, p. 648).

The commercial goal of the digital immortal is essentially to engage bereaved (or 'yet-mortal', to start off with) consumers with the product, which in this case is the simulation of the deceased individual.

Considering the growing interest in these products and the wider application of deceased user- and content data for commercial purposes; questions pertaining to the interests and rights of the deceased are becoming increasingly pressing. Resurrecting the dead with intelligent software has already become a popular application of generative AI in China, which allegedly provides the bereaved with consolation and comfort. There are incidents where the technology has been used to cover up family members' deaths. In addition, training ChatGPT to mimic their deceased family members has become a global trend, which businesses then supplement with cloned voices and animated avatars if users provide recordings of the deceased speaking and their photos (Zhou, 2024). For whatever purpose they are used, the point is here, that while all these data in terms of

behavioural data, communicational and informational data might not all be visible or meaningful to the bereaved or the deceased, the value lies somewhere else. For the deceased, it may lie in rights and principles of autonomy and self-determination; being able to control what happens to the data post-mortem (e.g. preventing one's data from being used postmortem for AI training purposes (not human-specific) or to avoid being digitally resurrected) – and solution Harbinja et al. term as a 'do not bot me' clause (Harbinja et al., 2023, p. 11).

8.5.5 The trivial vs. the personal

According to Bollmer, the notion that network technology brings the deceased back to life is nothing new. As he states, it is rather "the belief that the amount of data recorded and externalized gives a nearly full representation of the authentic identity of the human being", which can cause anxiety (Bollmer, 2013, p. 145). While I agree with Bollmer on this, I would like to call attention to another issue of these supposed "near-totalized (…) digital presences" (Bollmer, 2013, p. 145); namely, the issue of access to or application of extensive and personally telling communicational and informational items in attempts to bring the dead back to life.

As indicated in section 7.4.1, there are aspects distinguishing the digital differs from more traditional forms of communication than others, such as concerning stylistic qualities: How is the language of the communication? Who does the communication concern? Is it sensitive or trivial information? And so forth. Accordingly, communication can be rather trivial and mundane, or it can be private, personally telling or even "revealing of the people behind the social masks that we all assume", as Kasket, which means that this was "never intended for presentation to others" (Kasket, 2019, p. 32).

In relation to treating data as property or chattels, these two features (i.e. being personal or extensive) are not necessarily problematic in isolation. For instance, if the data assemblage is either 1) a trivial (or at least not too personal) and extensive vs. data being 2) personal and limited. In combination, however, these two features privacy issues might arise, as third-party access implies access to an extensive *and* personally telling set of data and content, which the deceased maybe never have intended for wider dissemination in the first place. As Öhman and Floridi states,

> There is less of a risk to distort an (dead) informational body merely consisting of bank credentials than one that includes the complete social data of a lifetime. In other words, the larger the quantity and quality of information used in a service, the higher the risk of altering how it is being displayed, of violating the human dignity of the dead (Öhman & Floridi, 2017, p. 651).

Add to this the difference between merely 'accessing' such content – as we saw in the BGH Facebook case – versus 'applying' an extensive set of personal data of the deceased and using them for new purposes with commercial interests; ethical concerns start to appear. Let us explore a few examples.

There is the version of the earlier mentioned digital resurrection of Bob Monkhouse, a late British comedian, who featured in the commercial "Give a Few Bob" in 2006, and who was brought to live through the compilation of components such as archival footages, body doubles, and voice impersonators (Sherlock, 2013, p. 165). Of other digital resurrections made, Robert Kardashian (the father of famous American media personality Kim Kardashian), is to be mentioned, who was digitally resurrected in terms of a holographic representation (a three-dimensional image) using deep-fake technology (Gorman, 2020; Harbinja et al., 2023). Additionally, companies like Replika and Eternime offer digital simulations of deceased real-world (ordinary) people, built using Artificial Intelligence.

On the surface, these digital simulations, such as that of e.g. Monkhouse and Replika, might appear alike, just as both configurations are termed 'digital resurrections'. Materially, they also seem to be alike, as both appear as digital, interactive, embodied versions of the real-world person who once lived.

There is, however, a difference in terms of the sophistication of these products and the ways in which data are processed and rendered. The digital simulation of Monkhouse, constituting a combination of body-double data, voice impersonator and archival footage of the deceased, is generated from a limited amount of imagery of the deceased already known to the public and computationally manipulated. Just as the holographic manipulation of the late Robert Kardashian – a birthday present to Kim Kardashian from her husband Kanye West – is but an AI generated three-dimensional audiovisual representation of Robert Kardashian *authored* by West – or as Dunne-Mile

states, another “Kanye West production”(Dunne-Miles, 2021). In contrast, Replika bases their simulations on very personal correspondence and private data (Messenger correspondence and private text messages); messages that were never intended to be shared with others than communications partners, which are then more imbued with personality.

To return to Bollmer, the ‘representativeness’ is a factor to the bereaved; that is, it matters if the simulation or manipulation is human-like and seems to represent the personality of the deceased, or if it is more like an alienating robot personality provoking an uncanny feeling. To the deceased/mortal, however, it is the difference in volume and the level of personality of data applied in these configurations of the deceased (who were never asked in the first place), which needs attention. From the perspective of privacy and data protection, the digital intelligent simulation ‘Replika’ or ‘Eternime’-configuration is much more problematic due to the volume and type of data applied in the immortal than that of the less technologically advanced resurrections of Monkhouse and Kardashian.

However, the Kardashian and Monkhouse digital immortals raise other ethical concerns; namely, if others should be able to manufacture and ‘author’ the personality of the deceased, thereby controlling what the deceased says and does. As Professor Sarah Jones, Deputy Dean of Computing, Engineering and Media at De Montfort University, Leicester, states: “One of the main concerns is the right of the deceased. Would they want to be digitally brought back to life? Who controls the words that they say? Could this be manipulated to force conversations that they wouldn't have agreed to?” (Liberatore, 2020).

A third complication appears when the manipulation and application of data concerns deceased minors. In 2020, as part of a South Korean documentary, 7-year-old Nayeon was brought back to life in terms of an embodied, digital simulation, and the grieving mother was reunited with her daughter in a Virtual Reality space (Wray, 2020). Photos and videos of the deceased child were combined with a 3D scan of a living child’s movements together with voice audio tracks from child actors with similar voices. Although the simulation was not imbued with personality, the question remains: Who protects the rights and interests of these children? The grief-stricken parents, who would do anything for one last glimpse or one last conversation with their deceased child? Or the company with financial interests?

Add to this the original purpose of what is today called Replika (*Replika*, n.d.), which was to construct a conversational replica of the deceased – or at least to construct a program to take on the personality of real-world deceased persons (Fosch Villaronga, 2019, p. 98) – to converse with, has now been repurposed and rebranded to "The AI companion who cares – always here to listen and talk. Always on your side" (*Replika*, n.d.). It is a system outputted as a digital avatar, which enables people to build a digital version of themselves and which can serve multiple purposes. E.g. as extra memory, as a tool for journaling, as a personal assistant, acting as you, carrying out time-consuming and inane activities, such as scheduling appointments, or as a conversation partner with whom you can share personal thoughts, feelings, and beliefs in a safe space ('This App Is Trying to Replicate You', 2019).

Consequently, the concept of digital immortals cannot be treated the same way, although labelled the same way, but must be broken down into its components to understand what they are and what different rules should govern them.

Put differently, how are we to conceptualise and govern these data assemblages/configurations both in terms of the data inputted and data outputted. Is the data configuration to be understood as a conversational replica mimicking the deceased? Or should it instead be understood as the private perceptual world of the living user? A very fancy, interactive form of diary representing aspects of our personality – a framing that the company is trying to steer towards, according to their website.

> (…) a personal AI that would help you express and witness yourself by offering a helpful conversation. It's a space where you can safely share your thoughts, feelings, beliefs, experiences, memories, dreams – your private perceptual world.(*Replika – Our Story*, n.d.) (*Replika – Our Story*, n.d.)

In relation to the data inputted – the personal, communicational source data, that is – are these to be considered company goods that tech companies can freely be allowed to profit from? Or are they subject to data protection in terms of the individual's right to exercise control over data as an external resource? Or is it possible to imagine a 'donation-based' model involving informational self-determination at some level (I'll donate my personal data for x purposes), just like organ donation? Moreover, is it necessary and possible to distinguish between man-authored or

machine-authored contents (aka co-authored content data) in settings of post-death data management? And what can one learn from the interactions with systems in terms of user data/behavioural data?

8.6 Summary

This chapter has discussed a set of themes or commons issues in terms of problem characteristics. They are entry points from which I have discussed the interconnected human and non-human efforts at play in shaping the phenomenon, and which have been derived from the two postmortem situations, empirical examples and parts of literature. The problem characteristics are, respectively: 1) access, 2) affected, 3) intermediaries, 4) invisibility and material absence, and 5) Digital data, content and digital configurations. I will briefly summarise each of these before moving on to elaborate on the thesis contribution in the next chapter, of which these are a part.

Access: refers to a range of social and material factors that affect access to digital objects and content, which have different consequences in the postmortem. These factors include the knowledge and know-how of lawyers, system settings, storage and placement of digital effects – whether physically or digitally located – as well as the interpretation of, for instance, the deceased individual's wishes – or in the absence of such wishes, the interpretation of the deceased's pre- or postmortem actions. How, for example, should a left-behind post it-note with login information be interpreted? What information is considered relevant in a dispute between heirs: the deceased's temporary physical notes or private correspondence on social media? And if it is desired, how does the testator signal that others may access a person's digital data; or the opposite, that they may not access the data postmortem? These social and material 'acts' of the situation can be interpreted as more or less intentional and to a greater or lesser extent allow for postmortem access.

Affected users: This characteristic attends to the potential conflicts of interest that may arise between the affected users (deceased and the bereaved) in the postmortem situation. Can the deceased be said to have a right or interest? And if so, how can these interests be balanced against the interests of the bereaved – who typically would like to access digital remains? Moreover, how

can the rights and interests of the deceased be conceptualised and exercised (i.e. what pre-death options are available for exercising post-mortem control of data and digital content?) and what strategies must the individual and their relatives invent themselves to circumvent the rigidity and limitations of the digital technological systems to make data accessible postmortem, on the one hand, while attending to their own privacy wishes on the other? Additionally, what do the interests of the bereaved look like, and what are the consequences if these interests are not met? Ultimately, legal norms and technological conditions impact how rights and interests might be understood, formulated, practiced and balanced against each other.

Intermediaries: The intermediaries are administrative and agential links between parties in a postmortem settlement or conflicts, which have different levels of power and different levels of access to the digital. Lawyers and heirs are examples of human intermediaries who influence how digital remains are done and understood in an estate administration (enacting it either as a royal vase or something private). This is based on the knowledge and know-how that is brought into the situation, and court intermediaries can overrule contractual terms and agreements between the deceased and the service provider. Just like courts, online intermediaries are powerful in that they own the systems and infrastructures from which data are generated and thus have more direct access. This not only means that these intermediaries are able to limit or entirely exclude user configuration options (frontend configuration), but also that they can change which data are being collected and processed through the design and settings of the digital environment (backend configuration). These continuous frontend-/backend configurations have consequences in the postmortem, as we saw with Facebook's ongoing postmortem changes and afterlife configurations (access level, download options, deletion etc). Although the interests of the affected users may coincide with those of the intermediary (e.g. when the Facebook interest in managing deceased profiles to prevent zombie profiles from floating around overlaps with the deceased/bereaved interest in having a memorial profile), the infrastructural platform providers are nonetheless driven by commercial interests (as opposed to lawyers as intermediaries who serve the interests of the affected users). Consequently, it becomes necessary to ask what postmortem permissions these platforms bestow themselves (for what purpose does Facebook e.g. retain deceased profiles) and on what levels are policies and configurations updated at the companies' own convenience?

Invisibility and material absence: Invisibility points towards the lack of material qualities and physicality of digital remains, which have consequences in the postmortem. Put simply, the visible and tangible are items perceived as 'things' to be handled, whereas invisible and intangible stuff (e.g. the digital) are not necessarily found and handled in postmortem situations and therefore risk being overlooked. In comparison, visible digital objects (e.g. social media profiles) are publicly viewable profiles, just as physical devices are spotted in the decedent's estate. Although this point might seems obvious – the immateriality of the digital – I believe it is one of the key issues of the postmortem context, which might also explain the non-existence of postmortem practices: this 'absence' is reinforced by the absence of a living active agent, as there is 'no one' to point towards the object, and 'no thing' to point towards the deceased. Additionally, the issue of invisibility also concerns that which was once visible and accessible, but which suddenly and without warning is deactivated by the platform provider, or the lack of centralised and public record of financial assets.

Data, digital content and digital configurations: The problem characteristic 'Data, digital content and digital configurations' focuses on the inherent qualities of data and content along with the system configurations affecting these. This has consequences in relation to managing the output posthumously: Are the data valuable, meaningful and discoverable to surviving individuals? Or is the opposite the case? The features concerned are both 'inherent' features of the content (e.g. style and tone of voice of communication forms), but they are also connected to the everchanging and distributed nature of the digital environment/the technological underpinnings, which affects how data is outputted, and which in turn has consequences in the postmortem. This concerns, for example, features of the data being personal or trivial, and voluminous or limited, visible (comprehensible) or invisible, fragmented or coherent, passive vs. active data.

9 The socio-technical constitution of digital remains

This chapter addresses the final of the five research questions (i.e. 'how can the multiplicity and complexity of the phenomenon of digital remains be captured?), and it elaborates on the main contribution of the thesis: a reconceptualisation of digital remains as a socio-technical configuration of human and non-human elements shaped in an interplay. The reconceptualisation builds on the problem characteristics presented in the previous chapter.

On the base of an STS-inspired, non-humanist approach (which views the phenomenon as a techno-scientific controversy that takes both material and social actors seriously), I have attempted to develop a descriptive frame, which seeks to capture the complexity, multiplicity and dynamic nature of digital remains and which extends beyond particular technologies, perspectives and singular concepts.

The question above addresses the notion of how we are to 'articulate and specify' the existence of digital remains, as stated in the introduction, if we are to avoid priorities and finalities and capture the phenomenon on its own terms. That is, if we are to avoid our study being too narrow, preconceived and fixated – thinking that we already know what it is and what does – or, conversely, causing the object of study to be empty and devoid of meaning as it ends up capturing 'everything and nothing' (Køppe, 2008, p. 33).

Accordingly, the non-humanist approach has laid the groundwork for developing a descriptive frame that transcends human-centred, dichotomous and singular views on the phenomenon. 'Singular' refers to the perception that an object is always the same (including it being passive and stable), and 'changeability' is only a question pertaining to different human's understandings and interpretations (Bille & Sørensen, 2012, p. 60).

9.1 What's missing

Many theorists, particularly legal scholars, often refer to digital remains as relatively homogeneous and stable entities that can be classified and subdivided in enduring categories or reduced to instruments for humans to engage with and make sense of.

So too legal scholar Rycroft, when he depicts four main categories of 'digital assets': digital assets with financial value, digital assets with sentimental value, digital assets with social value and digital assets with intellectual value; albeit without elaborating on the notion of 'social value'. Morse and Birnhack classify digital remains as well, their classification being in terms of intangible items, information about property, intellectual property, and personal data, whereas Öhman and Floridi view the digital afterlife as 'types of businesses': the digital afterlife industry (Öhman & Floridi, 2017). Kasket provides one of the more comprehensive classifications of the phenomenon of digital remains, categorising digital footprints as, respectively: digital assets, digital autobiographies, digital archives, digital unauthorised biographies and digital dossiers (Kasket, 2019, p. 18).

While many of these digital remains concepts and classifications have proven useful for elucidating certain aspects of the phenomenon (when categories are dissolved), their ability to capture the phenomenon more holistically is limited. This concerns, for example, concepts capturing different characteristics of digital remains, including different human experiences and interactions with these.

Additionally, conceptualisations of digital remains are oftentimes either too narrow and definitive while at others too broad and lack 'conceptual robustness' (Harju, 2024, p. 2). As Harju states: "The concept [of the digital afterlife] thus suffers from being applied too broadly to refer to 'all the digital material and data people leave behind in death' on commercial platforms and personal hard drives, which takes away from the explanatory power of the concept". (Harju, 2024, p. 2) And conversely, digital afterlife is at other times "reduced to an instrumental role and viewed as something that the living do something with or something to: either digital afterlife is incorporated into social practices and rituals, or it is stored, archived, deleted, circulated online, etc." (Harju, 2024, p. 2).

This is an attempt at a new theoretical perspective, one different from the theoretical interpretations presented in Chapter 4.

I argue that digital remains is largely constructed through socio-technical processes in which both social and material actors take part, each exerting their own influence on the phenomenon. As Venturini states, a process in which "anything doing something" (Venturini, 2010, p. 266), and it is

these mutual 'doings' between the social and material that shape the object in interplay. The approach, rooted in STS, considers the object of study 'partially existing', meaning vague and unsettled, and it is by examining these 'mutual doings' of human and non-human actors that it becomes possible to see how the object is shaped and comes into being.

9.2 The strategy for exploring mutual doings

This non-humanist "disposition" (Bruun Jensen, 2010, p. 2) – not theory as it would constrain the approach – studying socio-technical controversies, employs a symmetrical, nominalist and consciously naïve approach. It attempts to avoid "epistemological normativity" (i.e. science that tells how to know properly (Mol, 2002, p. 6)) and resists dividing the world into orderly categories in terms of object and subject. Accordingly, the approach considers the phenomenon partially existing, meaning vague and unsettled, and it is by examining this unsettledness in terms of 'mutual doings' of human and non-human actors that it becomes possible to see how the object is shaped and comes into being.

The reconceptualisation of digital remains as a socio-technical configuration represents an anti-singular view of digital remains, which seeks to decentralise the human subject to the greatest extent possible. The idea is that by viewing digital remains as largely constructed through socio-technical processes – where material entities are additionally recognised as formative agents – it becomes possible to focus on how the world would look different when human perspective is not privileged (Rosendahl Thomsen, 2019, p. 647).

9.3 The contribution elaborated

The reconceptualisation is based on the different contours of digital remains in term of five problem characteristics (see below), which are derived from the empirical analyses, empirical examples and parts of the literature in combination. The problem characteristics are to be understood as a set of common themes and entry points in combination, which offers a position from which the consequences and effects of these socio-technical doings are elucidated.

The entries – and the human and non-human actors treated and discussed within each of them – are interconnected, albeit without being mutually exclusive or necessarily always having effect/exerting influence. As Venturini also states, these different human and nonhuman actors in a network are not to be considered isolated actors, as they engage in networks – or, rather, 'worknets' (Latour, 2004, as cited in Venturini, 2010, p. 267) – and they are constantly at work, tying and untying connections (Venturini, 2010, p. 267). This means that, individually and in combination, the actors exert influence and affect how the object of study comes into being, and this impact depends on whether this absence or presence makes a difference and if other actors perceive it (Venturini, 2010, p. 266).

The problem characteristics in which different social and material actors are at work depending on the situation, are respectively: 1) access, 2) affected users, 3) intermediaries, 4) invisibility and material absence, and 5) digital data, content and digital configurations (Chapter 8).

Problem characteristics and the human and nonhuman constituents of the digital remains	
Access	Concerns social and material factors affecting the notion of access to digital remains postmortem
Affected users	Concerns the interests of the bereaved and the deceased (affected users) and the potential clash of these in the postmortem.
Intermediaries	Administrative and managerial (human and nonhuman) agents of postmortem conflicts and settlements and the effects of their work
Invisibility and material absence	Concerns the lack of materiality and spatial presence of both objects and subjects reinforcing each other's invisibility and absence
Data, content and configurations	The features and qualities of digital remains, including their underlying technologies and configuration, which have effects in the postmortem • The incomprehensibility of data • Access versus application • Dispersion vs. cohesion • Trivial vs. personal data

In the following, I will illustrate this interconnectedness of the social and material actors; or, as Pickering calls it: "dances of agency" (Pickering, 2017, p. 136). Each puts their own respective effort into shaping the existence of digital remains. Whether these are computers, wills, heirs or legal executors or institutions, they 'have effects', as their absence or presence makes a difference and is perceived by other actors, as Venturini states (Venturini, 2010, p. 266). The social and material actors are embedded in the problem characteristics and drawn from 'across' postmortem situations, and thus they do not exemplify Mol's notion of an ontology-in-practice (situated and ethnographic). Additionally, the notion of the 'social' and 'material' will be separated for the purpose of illustration, although – philosophically and ontologically – they are to be understood as inseparable.

The mutual shaping of the phenomenon of digital remains, which is reflected in the problem characteristics, takes place when affected users act (i.e. 'hack' the system (typically by sharing passcodes), resign or in other ways circumvent the system), such as an effect of technology not accommodating certain social scenarios or the users' intentions. The doing of the social actors then shapes the outcome of digital remains in that they make the object become something other than intended (by e.g. technology or the online intermediary in the postmortem situation). This is the case when affected users refrain from memorialising or deleting a Facebook profile upon death (e.g. because of conflicts in the family or simply resignation), which inadvertently turns them into 'zombie profiles' rather than controllable and contained 'memorialised' profiles or 'deleted accounts' of the intermediary. The experience, personality and digital literacy of the affected users also matters, and the notion of 'access' depends on affected users having an interest in digital remains and on users being aware of the options for providing posthumous access – and essentially deciding to make use of them.

The intermediaries/online service providers also 'act' when they either limit or provide users with pre-death configuration options in terms of postmortem access, deletion- and download options (pre- or post-death) or by changing policies or platform architecture, which then – depending on whether the users act (i.e. make use of, ignore or hack) – affects the outcome and existence of digital remains. The deceased can also act, despite their absence, and exert influence through

wills, system configuration options (pre-death) and material proxies, but which again are under the influence of the practices and know-how of lawyers, executors and personal representatives, who might enact and interpret the notion of access and objects (property vs privacy) differently than as indicated by the deceased or their material proxies. If revisiting the lawyers' practice around estate management (i.e. their management methods), the shaping of the object (if it is enacted as property or privacy) is under the influence of e.g. the type of probate and the general knowledge of the lawyers (of e.g. the Data Protection Act), who sometimes wipe hardware, at other times confiscating and 'hammering' it and at other times simply turning it over to heirs without question; just like wishes reflected in system settings (of e.g. the platforms) and conventional wills can be contradictory meaning both exerting their influence.

Objects (e.g. devices) and technological systems also exert influence through their material presence or absence. Are the contents and digital devices found and accessed, or are they stored away or forgotten. Additionally, technology also 'acts' by allowing for automated access postmortem in terms of 'access by default', which can lead to private correspondence becoming accessible to the bereaved in the postmortem, enacting the digital as property rather than as private content., with more powerful actors (Venturini, 2010, p. 266),

The mutual constitution also occurs in the BGH Facebook case. superordinate probate court exerts influence in that it orders the design and configuration of the memorialised account (to which the parents can be granted access for the purpose of altering it), and the court determines the outcome of the configuration (account vs. incomprehensible data extraction). It is not difficult to imagine a countermove from the service providers involving changes to the terms of service, user agreements or configuration options in the future (as McCallig (McCallig, 2014) also emphasises), which was in fact the case in the BGH Facebook case. As Fuchs states: "[i]n the meantime, Facebook itself reacted and adapted its terms and conditions" (Fuchs, 2021, p. 6). Consequently, the object is in a continuous state of flux and influenced by many different actors.

As stated previously, the different doings of digital remains, are part of an ongoing socio-technical dispute on settling it existence, which are yet vague and partially existent (chapter 3). We are, however, not concerned with whatever version is more 'real' than others, although it would be possible to investigate ethnographically according to Mol and Jensen. However, we can conclude

that the object of study is far from settled. In fact, it seems to be rather multiple. The object being 'multiple' is not only about digital remains being defined differently (conceptually), but that it is 'done' differently too (practice, performativity).

Accordingly, 'multiplicity' in this thesis covers both the theoretical-conceptual versions of digital remains as identified e.g. in the media discourse, in academic articles, and interviews with lawyers, as well as enacted/'performed' realities occurring in legal practices such as in the lawyer study and in German courts.

The versions are not 'alike', but some aspects of them do seem to overlap both among the empirical versions themselves, and between the theoretical and empirical versions – especially when broken down into smaller parts (as in Chapter 8). This is e.g. the case, when the notion of "second death/second loss" is reflected in the written contribution by Slotmann in Politiken (Slotmann, 2024) or when the digital-remains category of "Information about assets"(Morse & Birnhack, 2020a) seem to reflect the practical reality and business of companies such as AssetVault (app for registering your digital assets and credentials). There is in other word an empirical reality behind the words.

Consequently, problem characteristics are a way to make room for the multiplicity by not settling or deciding upon a 'version' (discursive or enacted), but rather provides a way for specifying how 'it' constantly changes with the performances of various actors.

Scholar Anu Harju shares the same goal of developing a new and more "nuanced conceptualization of what the digital afterlife *is* (as opposed to what the digital afterlife does or affords)"(Harju, 2024, p. 2), as the current vocabulary and conceptual apparatus lacks robustness and cannot explain the complexity of it. As she states:

> (…) there is a need for new and more precise vocabulary and conceptual apparatus to address and explain the complexity of digital afterlife, an account that considers not only the social dimension but also the technological character of digital afterlife, paying attention to the implications this condition has on a personal as well as a societal level. A socio-technical understanding of data and digital artefacts not only views them as technological, but as deeply social, too, as they have been designed, produced, adopted, and used by people as a result of various social processes. (Harju, 2024, p. 4)

As in this thesis, Harju suggests a socio-technical understanding of the phenomenon, viewing the object of study (cf. the 'digital afterlife') as a "techno-affective assemblage" (Harju, 2024, p. 5) –;an assemblage of technological and social interdependents (Harju, 2024, p. 4):

> Assemblage thinking (…) offers a way to reconcile the nature of data with the social as it incorporates human/non-human relationality, materiality, distributed agency, and the social in a way that makes digital afterlife more than the sum of its individual parts. (Harju 2024, p. 5)

While Harju's article is primarily conceptual and grounded in various theoretical foundations (e.g. "assemblage-thinking" by Leonardi, 2012; originating from Deleuze and Guattari, 2003), the goal remains the same: to broaden our understanding of digital remains (or in Harju's terms, 'the digital afterlife') through a socio-technical lens, and to provide a more dynamic understanding of the phenomenon in question. It also involves leaving the representational realm and entering the domain of relative ontology (Harju, 2024, p. 6), as in the present dissertation.

9.4 Critical reflection

Is there a contradictory movement in claiming to study an unsettled, negotiated and unfinished phenomenon, while simultaneously contributing to its stabilisation by offering a descriptive framework – an act in itself that contributes to settling and black-boxing the object of study?

I believe the answer is both 'yes' and 'no'.

The reconceptualisation, which is based on the five problem characteristics, should not be understood as an objective descriptive framework for the phenomenon of digital remains (or the digital afterlife, for that matter) nor as a set of characteristics pertaining to the object (in a singular sense). Rather, it is a way to identify 'central issues' that influence how digital remains come into being, and which is derived from two empirical cases (Danish and German) in addition to selected theories and empirical examples. In this sense, it functions as a descriptive framework for the *becoming* of digital remains – one that helps to illuminate the central actors involved in negotiating what digital remains is and, in so doing so, actively shaping and influencing the phenomenon. But not in every case, and not always exerting their influence.

The reconceptualisation is also an empirically anchored contribution – unlike Harju's reconceptualisation, which is mainly theoretical. This means that, on one hand, the contribution attempts to rise above individual cases (it is a conceptualisation) without claiming to be universally applicable to all 'postmortem situations'. The problems and problem characteristics will vary depending on the situations considered, the underlying theory and the researchers conducting the study. Additionally, the empirical basis is relatively limited, as previously mentioned; however, it manages to serve as a unique exemplification of central issues, thereby providing a basis for both understanding the phenomenon and developing the reconceptualisation going forward.

Conversely, there are several common themes to be traced, both among the empirical cases and within digital afterlife-theories, which, I would argue, allows for the framework to transcend the individual cases. So, to the question of whether I contribute to a settlement: yes, I do. Firstly, simply by studying the phenomenon, I shape it as a researcher. But secondly, because the framework represents an attempt at capturing and thereby stabilising the phenomenon.

In relation to the former, as researcher, I am Interconnected with the phenomenon – and have been since 2012, when I began to take an interest in the topic and seek knowledge about it (see Chapter 2). Accordingly, from an onto-epistemological viewpoint, scientific practices are socio-technical, performative, and situated endeavours by nature, and there is no separation between knowledge of the world (subject) and the world (object).

Conversely – how I have attempted *not* to settle the phenomenon – the goal from start to 'finish' has been to describe the phenomenon as openly and broadly as possible. This is achieved by initially approaching the subject with an open and non-judgmental attitude and by ultimately viewing it as a framework of 'becoming' rather than a characteristic of the object itself. Conversely, this socio-technical framework is broad enough to avoid fixating or narrowing the concept too much, as it allows space for the socio-technical configuration to evolve, depending on the situation (and the actors involved in the negotiation). At the same time, it provides sufficient specificity and clear contours to avoid falling into the trap of becoming overly all-encompassing. As many previous conceptualisations of digital remains suffer from, as stated earlier:

> The concept (…) suffers from being applied too broadly to refer to 'all the digital material and data people leave behind in death' on commercial platforms and personal hard drives, which takes away from the explanatory power of the concept. (Harju 2024, p. 2)

Accordingly, the definitive and settling aspect lies in asserting that there are some 'typical actors/actants' present – or common postmortem issues, based on the empirical and theoretical foundations that underpin this investigation – but this does not exclude the possibility that other actors/issues may emerge, depending on other sociotechnical configurations. Consequently, if we investigated the practices of probate courts, families settling estates, and service providers/companies, we would have other 'doings' and perspectives with which to build our framework.

In other words, the descriptive framework serves as a starting point; an interim structure that extends beyond individual concepts, practices and technologies, balancing between being descriptive and prescriptive; albeit, with the caveat that the empirical foundation does not constitute ethnographic, on-the-ground data, as previously mentioned. Consequently, unless we, as Jensen states, "empirically track down" (Jensen, 2010, p. 21) the work of these actors, it is impossible to say which versions of the phenomenon will materialise (and align or clash), and what is or will become different objects altogether (completely different phenomena).

The framework has aimed to capture the multiple and distributed nature of the phenomenon of digital remains, providing a new and multifaceted perspective on what digital remains is or isn't by identifying the human and non-human actors that shape the sociotechnical reality, and which is to some extent shared across the two empirical, postmortem situations. This, I believe is not in opposition to the goal of articulating and specifying the unsettled and 'not-yet-existing'.

9.5 Summary

The chapter has presented a reconceptualisation of digital remains as a socio-technical configuration of human and non-human elements (aka as interconnected problem characteristics) that shape the phenomenon in an interplay. This framework, developed from an STS-inspired approach in terms of ontology for developing things mainly, avoids narrow and preconceived ideas

of the object of study and has laid the foundation for reconceptualising the phenomenon of digital remains: one which extends beyond specific technologies, (human) perspectives and practices and captures its diverse and ever-changing nature.

10 Conclusion and future research

10.1 The main outlines

In this dissertation, I have examined the phenomenon of digital remains, which is a relatively new concept that has emerged due to our increasingly digitalised lives. In broad, the notion of digital remains – or the digital afterlife – concerns the new challenges of our datafied lifestyle at the end of life. Simply put, digital remains are the data and digital content which is left behind in various forms and contexts when we, as individuals, pass away, and which different societal impacts. Challenges, which, I argue, we as society not yet fully comprehend but nonetheless affect individuals, authorities, institutions and businesses, who all engage with data and content somehow, and who will eventually be confronted with the question of what to do with the data in the postmortem. This thesis has investigated some of these challenges and attempted to get a broader perspective of the phenomenon and its constituents.

I have employed a non-humanistic approach to examine the phenomenon, which has involved resisting the believe I think I know what it is or does (Jensen, 2010, p. 21). It is a philosophical stance, or as Jensen calls it, a non-humanistic 'disposition' (Jensen, 2010, p. 2) where one attempts to free oneself from biases and assumptions at various levels of the research project.

Firstly, by not taking words and concepts too categorically. This is not because words are meaningless or because there is no reality behind them, but because if we become too fixated on concepts, we may end up merely replicating officially or institutionally sanctioned perspectives in our analysis (Jensen, 2010, p. 24), and because: definitions change, different things are labelled the same way, and the same things can be labelled differently, and different meanings can be attached to a concept. Conversely, we will have to start somewhere, and words and concepts have provided 'directions along which to look' – a concept Blumer refers to as 'sensitizing concepts'.

But even beyond the linguistic level, one should strive to avoid biases and assumptions – without, however, assuming unconditional objectivity. This is particularly true in my case, which has also posed a particular methodological challenge. How to investigate something which you are so entangled with yourself and has helped shape since 2012? This dissertation is both an attempt to utilise the knowledge I have accumulated on the one hand and strive to maintain a critical distance from it on the other. The non-humanistic approach, which Jensen refers to as ontology for developing things, has been particularly useful for this purpose: resisting "epistemological normativity" (Mol, 2002, p. 6). The philosophical assumption is that this phenomenon, digital remains, is still evolving and is 'partially existing', meaning unsettled and vague. Practices are emerging, the conceptual framework is underdeveloped, and the phenomenon itself is not entirely clear, as digital remains is not (only) a particular technological object – even though many theories would like to settle the phenomenon as such – and new challenges and understandings emerge with the advancements of the technology.

It is precisely this unsettledness, or as Jensen calls it, stage of being "no-yet-quite-yet existing" (Jensen, 2010, p. 20), which has been the centre of attention in this thesis. By studying the unsettledness or "socio-technical debate" (Venturini, 2010, p. 258), and place oneself where there is disagreement and debate, it has been possible to examine how digital remains comes into existence in different situations and who (and what) is involved in the negotiation of what it is and will become.

What has further central to this philosophical approach, and inherent in the 'non-humanistic' perspective based on the work of Jensen, Latour, and Mol, is that it does not assume humans are the central actors. Things also act – not in the sense that they can be ascribed a 'consciousness' and 'intentionality' – but in terms of material phenomena playing an active role in shaping the conditions under which events unfold (Bille & Sørensen, 2012, p. 63). The perspective is referred to as a 'generalised symmetry' and has been as means to see how the world might look if we do not prioritise the human perspective.

The dissertation has also presented a range of selected conceptualisations of the phenomenon of digital remains, which addresses the first research question: which conceptualisations of the notion of digital remains are present in contemporary literature, referred to in terms of 'the digital

afterlife'? The conceptualisations spans from digital remains as purposeful posthumous cultural collections with societal value (digital heritage), treasured memorial objects embodying the deceased (objects of the deceased) and online memorials (social media memorials), which the bereaved interact with, as mundane informational trails (trivial data), as classifiable data and digital content (typologies of digital remains) and as more active forms of remains generated from AI technology (digital immortals). The selection is based on the concepts 'digital remains', 'the digital afterlife', and 'digital legacy', which are by no means exhaustive, but represent various theoretical understandings of the phenomenon.

The controversy or negotiation regarding the nature of the phenomenon we are investigating has originated within the legal domain, where two empirical studies of the phenomenon and 'coming-into-being' have been conducted and addresses the second research question of this thesis. Namely, 'which practices exist around the management of digital remains among lawyers and legal professionals, and what are their understandings and reported practices of digital remains?, and 'How is postmortem data enacted in the first European case law on the subject matter, cf. the BGH Facebook case?'

The first study consists of interviews with 12 family- and inheritance lawyers, whose reported practices involving digital objects in estate settlements and will formulation practices were examined. The second study is a case study which has investigated a German lawsuit – the BGH Facebook case – consisting of a series of different judgements lasting from 2015–2020. The case treated the legal question whether social media data should be treated as personal information to be protected or as family heirlooms to be inherited on par with offline communication – accordingly as property or versus privacy.

The versions that emerge from the different settlements, I argue, are connected to an 'overall' socio-technical negotiation and settlement about the phenomenon's existence among social and material actors. The interviews have been analysed using a phenomenological approach, whereas the court cases have been analysed using secondary and tertiary documents.

The lawyer study has investigated how lawyers specialising in succession law and family law manages and interprets the nature of digital effects and posthumous data in their work, and three different versions of digital remains has emerged from these reported doings and sayings. Namely,

a ‘frontstage’ version’ of digital remains, a ‘property-like’ version of digital remains and an ‘information-like’ version of digital remains. These are derived on the base of the reported doings identified across the interviews, where a computer in decedent estate is handled differently depending on the social and material conditions of the postmortem situation (are heirs in agreement, what type of probate and do heirs know the passwords of the digital). Sometimes it’s handed over to the heirs, sometimes it’s wiped, and other times confiscates, and it is evident that digital remains is a phenomenon far from settled. The 'frontstage' version covers the lawyer’s immediate, surface-level understanding of digital remains. The ‘property-like’ version refers to an understanding where attributes of traditional artifacts are applied to digital effects and data, and finally, the 'information-like' version involves an understanding of digital remains as sensitive and personal information.

In the German lawsuit, we know how it ends up, and which ‘version’ of digital remains prevails. It is the property enactment, and digital remains is settled as inheritable. However, this is not the interesting part. What is of interest is what (legal) arguments have underpinned the decisions of the enactment of digital remains as respectively property and privacy. Accordingly, the focus of the lawsuit (i.e. the BGH Facebook case) has been to see how the phenomenon has been interpreted and has enacted through the lawsuits (from Regional, to Appeal to Federal court) through analysing secondary and tertiary documents of the case. Methodologically the ‘doings’ are investigated through legal argumentation of the judgments lasting from 2015–2020, whereas the applicable laws and their statutory power are of less interests. Consequently, the term ‘enactment’, does in this thesis not rely on ethnographic 'on-the-ground' research, as on Mol’s research. Enactment bases solely on the ‘doings’ observed through interviews and document analysis. However, the term has been useful for anchoring (from a textual offset at least) the philosophical foundation of STS into the analysis and foregrounding a symmetrical perspective in the analysis and thus on the active engagements of materials in the enactment of reality.

Despite the fundamental differences between the empirical material (the lawsuit and the interviews), the two situations give insights into the doings and sayings of dealing with digital effects and both revolve around the same overall dilemma between understanding and enacting the digital as property vs. privacy. This also means that the situations despite their differences have overlapping problems, dilemmas, and controversies. Consequently, in addition to providing insight

into two ‘socio-technical debates’ about what digital remains is, they have also served as the foundation, along with concepts and digital afterlife theories, for developing a set of problem characteristics which span across the postmortem situations, which answers the thesis fourth question: What are the shared issues, i.e. problem characteristics, regarding different actors’ (human and non-human) doings and sayings around digital remains?

These problem characteristics should be understood as a set of 'shared issues' of postmortem situations in which the social and material – wills, the deceased, legal executors, online intermediaries, computers, heirs etc. – are acting individually and in together the shape the phenomenon in question.

Returning to research question one (conceptualisations), overall, these interpretations present digital remains as relatively homogeneous, stable, and meaningful object and phenomena, which can be classified into long-lasting categories. While this is not necessarily wrong, they often lose sight of material and temporal aspects, such as the notion of how the ‘postmortem’ is incorporated into the systems and thus the data. What are, not just digital stuff, but ‘posthumous’ digital stuff? This singular and normative understanding of digital inheritance as something stable, homogeneous, and unchangeable is what this dissertation challenges. It argues that the phenomenon is distributed, changeable, and, most importantly, multiple and therefore, an alternative descriptive framework is needed to capture this.

And thus, we arrive at the dissertation's contribution, which answers the last and fifth research question of this thesis, namely: How can the multiplicity and complexity of the digital remains phenomenon be captured?

The thesis offers a reconceptualisation of the phenomenon of digital remains as a socio-technical phenomenon shaped by both social and material actors in a mutual and ongoing negotiation process. It is this socio-technical negotiation that the problem characteristics empirically demonstrate. However, these problem characteristics are not definitive, as they evolve with situated practices and socio-material configurations, meaning that additional aspects cannot be ruled out. Indeed, further issues are likely to emerge upon investigating other practices. Future research could therefore focus on developing, refining, and revising this thesis' description

framework to provide deeper insights into the constitutive features and dynamics of digital remains when examining other situated practices.

10.2 Future research

The digital afterlife as research field is generally quite underexplored, especially in Danish context, where there is a general lack of knowledge on how individuals, businesses and platforms, legal institutions and public institutions operate and deal with data and information postmortem.

For example, we still have quite limited empirical knowledge about how private individuals go about the management and curation of digital content and information – both pre-, peri- and post-death – and what motivations and inform their actions? Do people prepare, in what way, and what knowledge do they possess about options and tools for preparing and planning the digital death or afterlife (legally, technologically)? What are their practices and posthumous wishes around managing digital effects and what are the fallback behaviours of the individuals: do they resign, ignore or deal with the data left behind? Additionally, do families agree, and if not, what are the conflicts about, and what are the attitudes around posthumous privacy and data protection?

Additionally, postmortem 'backend operations' of both private and public sector companies dealing with data is still a black box. While the META corporation (i.e. Facebook, Instagram) often garners significant attention in both general and scientific discourse, there is a notable lack of insight into the postmortem data flows and operations of both such private sector companies as well as public sector companies. What has e.g. informed decisions on deactivating the health data of Danish citizen's children, and was the citizens ever asked?

Future research could for instance study the in-house operations and behind-the-scenes tasks (human and non-human) of public and private companies, including postmortem knowledge in start-ups, in terms of global and local decision-making, cross-sectorial processes and cross-platform designs to gain insight into the data flow of Danish citizens around the end of life. What policies and regulatory frameworks inform these postmortem decisions, system designs and policies – if any? Who and what aspects are considered in the process and where does the data go? Is it deactivated, for how long, and what parties have yet access (or can gain access) to these

digital remains? Can the data be re-activated and what is archived for future purposes and to what extent? And from the 'user's perspective, do they experience a lack of postmortem configuration options in public sector systems?

As for legal aspects, future studies could include 'on-the-ground' investigation of legal practices in terms of the investigation of Danish case law, court's attitudes towards digital remains and practices of legal executors in decedent estate settlement.

Additionally, with the advancements and new purposes of data extending into the postmortem realm, ethical considerations and investigations regarding the application and use of data postmortem are also necessary. On an individual level, for example, how do people feel about the idea of being digitally resurrected through generative AI? Conversely, what would it be like to talk to your deceased brother or sister in the form of an avatar? Joyful, uncanny, therapeutic? And should the rights and interest of the deceased be considered? On a societal level what technological downsides of these resurrection-technologies seem to exist – considering that they have already been used to cover up family members' deaths – and what values do we want to see reflected in future technologies? How should, for instance, the use of Artificial Intelligent systems be governed and regulated in relation to posthumous personal data considering the emergence of 'digital immortals?'

Accordingly, future research therefore calls for investigating both cultural, political-economic, social, legal, and technological aspects of both digital deaths and afterlives.

11 English summary

This project delves into some of the contemporary conceptualisations and practices surrounding digital remains primarily within the academic and legal realm. Digital remains as phenomenon is at its infancy and is often referred under the wider term 'digital afterlife' which embodies a multitude of concepts spanning from collections of cultural, digital artefacts (digital heritage), digital effects and data to be inherited (digital inheritance), personal posthumous information (personal data) financial assets (digital assets) and deceased social media accounts (online memorials). The philosophical assumption for the project is that digital remains is a distributed and multiple phenomenon – something yet unsettled and undefined – and the objective is to study its development- and transformation process while at the same time trying to specify and outline its 'nature'. In other words, the PhD explores the doings of digital remains, which allegedly is shaped and transformed by different human and non-human actors through ongoing interpretations, categorisations and negotiations.

The context for the empirical investigation is the legal realm and it focuses on how lawyers and parts of the legal community handle and conceptualise digital remains in selected postmortem situations. The 'postmortem' settings that form the basis of the investigation include, on the one hand, interviews with 12 family- and inheritance lawyers from north Copenhagen and their handling of digital objects in the context of estate administration and will formulation (both areas where the postmortem is at the forefront). One the other it includes the analysis of a German court case that deals with how a Facebook profile should be handled and conceptualised in a postmortem context.

The thesis offers a reconceptualisation of the phenomenon of digital remains as a socio-technical phenomenon shaped by both social and material actors in a mutual and ongoing negotiation process, which are formulated as a set of 'problem characteristics' or 'shared issues'. The shared issues are respectively: 1) Access, 2) Affected users, 3) Intermediaries, 4) Invisibility and material absence, and 5) Data, content and digital configurations as they affect – individually and in combination – how the object of study comes into being.

12 Dansk resumé

Dette projekt undersøger nogle af de samtidige måder, vi forstår og håndterer digitale fodspor på, på dansk kaldet 'Digital arv', i en primært juridisk kontekst. Digital arv er et relativt nyt fænomen og omtales ofte bredt som 'the digital afterlife'. Begrebet omfatter alt fra samlinger af kulturelle, digitale artefakter (digital heritage), data, der juridisk går i arv (digital inheritance), posthume personlige oplysninger (posthumous personal data), finansielle, digitale aktiver (digital assets) og afdødes sociale mediekonti (online memorials).

Projektets filosofiske udgangspunkt er, at digital arv er et distribueret og mangfoldigt fænomen, dvs. noget som endnu er uafklaret og udefineret, og målet er at studere dets udviklings- og transformationsproces samtidig med at målet er at forsøge at specificere og skitsere dets 'natur'. Ph.d.-afhandlingen udforsker med andre ord hvordan fænomenet digital arv formes og ændres af forskellige menneskelige og ikke-menneskelige aktører og 'bliver til' gennem løbende fortolkninger, forhandlinger og 'gørender'. Dvs. hvad er digital arv og hvordan kommer det til syne i forskellige situationer og gennem forskellige beskrevne praksisser?

Konteksten for den empiriske undersøgelse er juridisk, og fokuserer på hvordan advokater og dele af det juridiske samfund håndterer og konceptualiserer digital arv baseret på to udvalgte postmortem situationer. De 'postmortem' situationer omfatter dels interviews med 12 familie- og arveretsadvokater og deres håndtering af digitale 'ting' i forbindelse med håndtering af dødsboer og testamentformulering (begge områder, hvor det postmortem er i forgrunden), og dels en dokumentanalyse af en tysk retssag, der omhandler, hvordan en Facebook-profil skal håndteres og konceptualiseres i en postmortem-kontekst.

Afhandlingen tilbyder en rekonceptualisering af fænomenet digitale arv som et socio-teknisk fænomen, formet af både sociale og materielle aktører i en gensidig og løbende forhandlingsproces. Denne ramme er formuleret gennem et sæt af 'problemkarakteristika' eller 'fælles problemstillinger', og de er på engelsk henholdsvis: 1) Access, 2) Affected users, 3) Intermediaries, 4) Invisibility and material absence, and 5) Data, content and digital configurations, og som individuelt og i kombination indvirker på hvordan undersøgelsesobjektet bliver til og formes.

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Østre Landsrets Retsbog (31 March 2023).

14 Appendix

Appendix A: Search terms and intervals at InfoMedia.

Appendix B: Consent form, retrospective (in Danish).

Appendix C: Example of interview guide.

Appendix D: Participant bias reflected.

Appendix E: Written contribution by Nanna Slotmann, April 3, 2024.

Appendix F: Document list of secondary and tertiary sources.

Appendix

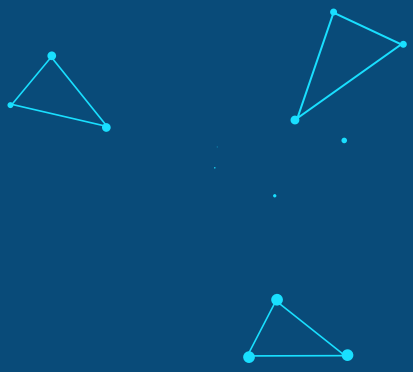
A

The increasing number of search results over the years indicates the growing prevalence of this topic. These search results encompass (in InfoMedia) all media types, including contributions from radio, TV, news media, and national newspapers. The results account for both the number of articles with aggregated headlines and those without, the latter reflecting the redistribution of the story or topic. The choice of search term was straightforward, as the term most commonly used in the Danish context is 'Digital arv.' This term covers a range of meanings, including digital inheritance, digital heritage, digital legacy, and digital remains. Although alternative search terms and strings (e.g., "digitale fodspor" [digital footprints]) were considered, they were not applied to keep the analysis small-sized.

Search interval	**Period**	**Number of results**	**Examples**
Search 1	Jan 1998– Jan 2011		Article 1: Debate: "Pas på digitale dokumenter", 7 April 2000. Article 2: "Danmarks digitale arv er en international opgave", 11 Januar 2008. Article "Sådan gik redningsaktion for vigtige data", 4 Februar 2011.
Search 2	Mar 2011– Aug 2012	14 of 22 articles	14 articles are about the topic of digital remains if similar headlines are joint. 22 if they are not. One of the first articles on the topic as it is understood today (personal digital remains), is the article: "DIGITALT ARVEGODS: MINDET OM MALENE KAN FÅ EVIGT LIV PÅ NETTET" (4 February 2012). Interval covers period before my master thesis is covered in the media.
Search 3	Sep 2012– Dec 2014	44 of 87 articles	44 articles are about the topic of digital remains if similar headlines are joint and 87 if they aren't combined. Period when thesis are covered in the media. The coverage starts on September 26, 2013, with the article "Fremtidens arv ligger gemt på nettet" (Lind 2013).
Search interval 4	2011-2024	Approximately 900	

Appendix

B



Samtykkeerklæring

Om projektet og formålet med indsamlingen

I forbindelse med din deltagelse i forskningsprojektet Understanding Postmortem Information & Data Practices på Københavns Universitet, har vi brug for dit samtykke til at måtte behandle de persondata, som interviewet med dig mandag d. 20. september 2021 indebar. Dette skriftlige samtykke gives således retrospektivt som dokumentation for dét tilsagn der blev afgivet mundtligt forud for ovennævnte interview efter orientering om hovedpunkterne i denne erklæring.

Projektet undersøger og afdækker informationshåndtering ved død, og fokus er primært på forskellige sektorers håndtering af fx borgeres information i en postmortem kontekst fremfor på de interviewede personers personlige sagsforhold. Indhentning og behandling vedrører primært almindelige oplysninger såsom den interviewedes navn, kontaktoplysninger, stillingsbetegnelse og andre fagligt relaterede personoplysninger, der er en nødvendig forudsætning for koordinering og udførsel af et interview. Ved anvendelse af resultater fra interviewet i enten undervisningssammenhæng, videnskabelige publikationer eller som led i forskningsformidling på forskningsinstitutioner indenfor DK/EU/EØS eller udenfor EU/EØS-lande, anonymiseres alle indhentede personlige oplysninger. I tilfælde af at personfølsomme holdningstilkendegivelser og overbevisninger måtte fremkomme under interviewet (fx religiøsitet, fagforeningsforhold), foretages ligeledes en anonymisering. Branche-oplysninger (fx advokat) anonymiseres ikke, da dette ikke er personoplysninger.

Opbevaring og regler for behandling

Dine oplysninger opbevares på et sikkert drev (S-drev) på Københavns Universitet i personhenførbar stand indtil september 2023. Efter denne dato vil dine persondata blive slettet.

Persondataforordningen, GDPR, Artikel 6, stk. 1, litra a), giver KU ret til at behandle ikke-følsomme persondata om dig på baggrund af dit samtykke. Du kan samtykke ved enten at underskrive feltet nedenfor, eller ved at bekræfte at du er indforstået med vilkårene for deltagelse i forskningsprojekt *Understanding Postmortem Information & Data Practices* beskrevet i denne samtykkeerklæring (som vedhæftes) til mailen awaa@hum.ku.dk.

Jeg er indforstået med at Københavns Universitet må registrere og behandle mine persondata i forbindelse med ovennævnte forskningsprojekt

Navn: _____ Dato og underskrift: _____

Databehandler og dataansvarlig

Samtykket til behandling af personoplysninger er frivilligt og du kan til enhver tid trække det tilbage. Du kan trække det tilbage ved at kontakte Astrid Waagstein (awaa@hum.ku.dk). Du er også velkommen til at rette henvendelse, hvis du har nogen spørgsmål. Københavns Universitet, CVR nummer 29979812, er dataansvarlig for behandlingen af persondata i forskningsprojektet. Du kan læse mere om Københavns Universitets privatlivspolitik her: https://informationssikkerhed.ku.dk/persondatabeskyttelse/privatlivspolitik/.

Appendix

C

Interview guide

Interview questions

- Is this an area you know something about? How to process/handle digital assets (both hardware and software) for legal purposes for example within:
    - Estate administration
    - Wills
    - Other (question for testing knowledge level)

- What covers in your view the notion of digital remains/digital legacy? How would you describe what it is? (question about their conceptual understanding)
- Are there any concrete cases that you know for yourself or through a colleague with regards to this subject? (questions providing insight into their lived experiences, general practice and the problem area's prevalence)
- If so, could you tell us a bit more about this? For example, what do you do, and what your impression of how families handle this? Do the families agree in the process? Do they have passwords? What happens in the event of a disagreement? Are you familiar with any (Danish) case law? I am interested in knowing what sort of practice that exists, both in case of conflicts and agreements – and if it is even possible to make such distinction in the empirical approach? (questions providing insight into their lived experiences, general practice and the problem area's prevalence)
- Concrete (work) experience/practices:
    - How do you 'inherit' a computer or other device?
    - What are the procedures for handling it?
    - What are the procedures for handling social media, e.g. Instagram?
    - Some suggest sharing disclosing password information, but are you allowed to do that according to law, terms of services etc.? (questions providing insight into their lived experiences, general practice and the problem area's prevalence)
- If no, are there other people you think I should talk to? Somebody who knows something about this subject field? (further recruitment through 'snowballing')
- Are there any provisions you can lean on in the management of digital effects and data? (Question providing insight into what informs practice? E.g. in terms of laws, experience, know-how and back catalogue in general)
- Can you say something about which legal framework that are relevant within this field and why? E.g. copyright, privacy law, intellectual property etc.? (Question providing insight into what informs practice? E.g. in terms of laws, experience, know-how and back catalogue in general)

Appendix

D

Participant bias reflected in email during interview recruitment (Full quote)[56]

> Dear Astrid,
>
> Thank you for your email. I have attached a declaration of consent.
>
> (…)
>
> I am somewhat in doubt if I can contribute with anything other than truisms, especially after I checked your website www.digitalarv.dk. I always bring up the topic at meetings about wills, but it is quite difficult to grasp. Most people tend to overlook it, and I believe there are many important aspects to the subject.
>
> I'm looking forward to talking to you.

[56] Author's translation from Danish.

Appendix

E

POLITIKEN

Debat: Jeg mistede min søn, og kort efter døde han digitalt

3. april 2024, Politiken, Sektion 2 (KULTUR), Side 7 (Debat), NANNA SLOTMANN, CAND.MAG...., 730 ord, Id: ea2a8789

Død Det er, som om det offentlige har slettet alle digitale spor på, at min søn har været her.

27. AUGUST 2023 DØDE min søn på Rigshospitalets intensivafdeling. Mindre end 24 timer senere begyndte det, jeg kalder hans digitale død.

Det startede med, at jeg fik en notifikation i Min Sundhedsplatform, som jeg havde fået tusindvis af gennem det sidste halve år af min søns sygdomsforløb, om, at jeg som person med fuldmagt havde nye prøvesvar. Selv om min søn på det tidspunkt er død, går jeg ind for at se svaret for at få det ud af verden. Men da jeg går ind i appen, kan jeg ikke finde ham derinde. Alle hans oplysninger er forsvundet.

Han er blevet slettet. Uden varsel.

Som om han aldrig havde eksisteret.

Nogle dage senere sker det samme med Aula.

Jeg kan ikke logge ind. Mit barn findes ikke i systemet. Igen uden varsel. Jeg kan ikke kontakte hans lærere gennem Aula. Jeg kan ikke få adgang til gamle beskeder, billeder eller alt andet, der har med mit barns skolegang at gøre. Som om mit barn aldrig har været her.

DEN DIGITALE død byder også på mere absurde oplevelser, som da jeg får brev fra Udbetaling Danmark med besked om, at »du er ikke længere berettiget til Børne- og Ungeydelse Udbetaling Danmark kondolerer«. Den digitale maskine kondolerer. Det var så absurd, at man med en linje havde forsøgt at menneskeliggøre maskinen, at man hellere skulle have ladet være.

Min mand var for nylig ved lægen. Han skulle egentlig have været af sted for længe

siden, men på grund af vores yngste søns sygdom og efterfølgende død havde han ikke været af sted. Lægen siger til ham, at det er længe siden, han har været der, men at hun kan se, at han har et barn, der har haft det svært. Ét barn. Det er vores ældste barn. Som har haft det svært, fordi lillebror er død. Igen er vores søn blevet slettet fra systemet uden tanke for, hvilke konsekvenser det måtte have i den virkelige verden.

MEN HVORFOR skal vi beskæftige os med den digitale død? Den digitale død illustrerer en række problemer i vores samfund. For det første tager man i digitaliseringen ikke højde for, at mennesker er mennesker. At mennesker har relationer, og at relationer ikke stopper, fordi et menneske holder op med at trække vejret. At digitale fodspor er oplysninger, der er vigtige for pårørende, og har vi egentlig ikke ret til disse? Når man sletter et barn uden at informere forældrene, fratager man os ikke bare muligheden for at tage stilling til, hvad der skal ske med alle de oplysninger, der ligger digitalt, men også muligheden for at gemme det, vi synes er vigtigt.

For mit og min mands vedkommende handler det eksempelvis om en meget omfattende journal fra Rigshospitalet. En journal, der dokumenterer alt det, vi og vores søn har været igennem. Det er vores rejse og vores traumer, der ligger i den journal. Den har vi ret til at gemme til fremtiden.

Vi har aldrig bedt om, at vores barns oplysninger skulle gemmes digitalt. Vi har heller aldrig haft noget problem med det. Før nu. Men nu er det åbenbart ikke vores oplysninger mere. Nogen har besluttet, uden at vi har givet samtykke til det, at alt slettes. Eller i hvert fald, at vi ikke kan tilgå det. Det er dybt problematisk.

DEN DIGITALE død illustrerer også, at vi har et forældet syn på sorg. Når de døde er væk, skal vi slette dem. Vi skal videre. Når de ikke trækker vejret mere, er det bedste, man kan gøre at sige farvel og ikke tænke mere på dem. Vi skal ikke "dyrke" sorgen eller de døde. Nyere sorgforskning viser imidlertid, at det er vigtigt, at vi bærer vores døde med os. At vi lever bedre med sorgen, hvis vi netop gør det: lever med den og ikke pakker den og vores døde væk i glemslen.

Jeg er mor til Wilfred. Det vil jeg være resten af mit liv. Det skal stå i min journal. Det skal ikke slettes, for det er en væsentlig del af, hvem jeg er. Jeg og andre forældre, der mister deres børn, bør have ret til i det mindste at tage stilling til, hvad der skal ske med vores børns oplysninger, når de dør, så de ikke bare slettes uden varsel. Det er vores oplysninger, om vores børn, så hvorfor mister vi retten til dem, fordi vores

børn ikke længere trækker vejret?

Appendix

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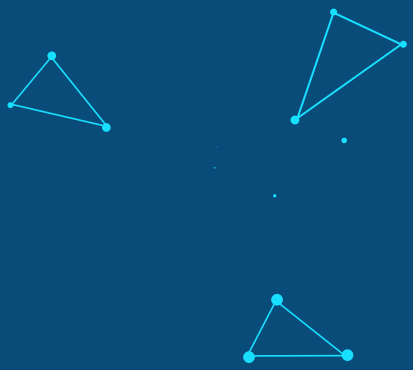

Document overview, BGH Facebook case[57]

SECONDARY SOURCES			
Document type	**Source**	**Title**	**Excerpt from document**
Judgement of Federal Court of Justice, judgment of 12.7.2018 – III ZR 183/17 NJW 2018, 3178	Beck-online, access to database retrieved via University of Copenhagen, Department of Law beck-online.beck.de/Home	BGH: * Digitaler Nachlass – Übergang des Nutzungsvertrags mit NJW 2018, 3178 einem sozialen Netzwerk	In the event of the death of the account holder of a social network, the user contract is generally transferred to his heirs in accordance with Section 1922 of the German Civil Code. Access to the user account and the communication content stored therein is not precluded by the testator's postmortem right of personality or the secrecy of telecommunications or data protection law.
Summary of judgement by 'beck-aktuell Redaktion' Meldung vom 07.01.2016	beck-online.beck.de/Home	LG Berlin: Eltern erben Facebook-Konto ihres verstorbenen Kindes" becklink 2002068	Parents are entitled to access the Facebook account of their deceased child. This is the result of a judgment of the Berlin Regional Court of 17.12.2015 (Az.: 20 O 172/15, BeckRS 2015, 20953), which became known on 06.01.2016. The contract with the social network is part of the inheritance, according to the decision. The judges did not want to see the digital estate treated differently than, for example, letters or diaries. The lawsuit was filed by a woman whose daughter had died in 2012 under circumstances that have not yet been clarified. The mother hopes to get any indications of motives for a possible suicide of her daughter via the Facebook account.
Summary of judgement by 'beck-aktuell Redaktion' Meldung vom 31.05.2017, Redaktion beck-aktuell	beck-online.beck.de/Home	KG: Eltern dürfen nicht auf Facebook-Account ihrer verstorbenen Tochter zugreifen becklink 2006807	Parents are not allowed to access the Facebook account of deceased children. This is the result of a ruling of the Court of Appeal of 31.05.2017, in which the judges in the second instance ruled in favor of Facebook. The protection of telecommunications secrecy precludes the heirs' claim to gain access to the daughter's communications with third parties, according to the court's reasoning. The judgment is not final, as the Senate has allowed the appeal to the Federal Court of Justice (Az.: 21 U 9/16).

[57] All German texts are translated with AI translation software.

Summary of judgement by 'beck-aktuell Redaktion' Meldung vom 13.11.2017, Redaktion beck-aktuell	beck-online.beck.de/ Home	Verbraucherzentrale Bayern: Auch digitales Erbe muss geregelt werden becklink 2008312	Bavarian Consumer Advice Centre: Digital heritage must also be regulated The Bavarian Consumer Advice Centre advises people to take care of their digital estate in good time. Otherwise, there is a great risk that valuable data, memories and content will be lost. According to the digital association Bitkom, 93% of consumers have not yet regulated their digital inheritance at all.
Summary of judgement by 'beck-aktuell Redaktion' Meldung vom 30.01.2018, Redaktion beck-aktuell	beck-online.beck.de/ Home	Justizminister und DAV fordern Regelung für Vererbung digitalen Nachlasses becklink 2008936	Minister of Justice and DAV call for regulation for inheritance of digital estate Several state ministers of justice are calling for legal regulations so that heirs can gain access to protected digital services of a deceased person - such as a Facebook profile or a mobile phone with a PIN code. Facebook had denied relatives of deceased users entitled to inherit access to such accounts, among other things with reference to telecommunications secrecy and the protection of communication with third parties - and won in court in this regard. The German Bar Association (DAV) also sees the legislator as having a duty.
Summary of judgement by 'beck-aktuell Redaktion' Meldung vom 22.06.2018, Redaktion beck-aktuell	beck-online.beck.de/ Home	Eltern kämpfen um Facebook-Nachlass toter Tochter - BGH vor Grundsatz-Urteil becklink 2010222	Parents fight for Facebook estate of dead daughter - BGH before landmark ruling In the dispute between a couple of parents and Facebook over access to the blocked Facebook account of their dead daughter, a landmark ruling on the inheritability of digital content is looming. The highest civil judges of the Federal Court of Justice in Karlsruhe signaled in the hearing on 21.06.2018 that for them the central question will be whether the digital inheritance is to be put on an equal footing with the analogue one - i.e. whether heirs are allowed to read chat messages and e-mails in the same way as letters. The verdict is to be announced on July 12, 2018 (Az.: III ZR 183/17).
Summary of judgement by 'beck-aktuell Redaktion' Meldung vom	beck-online.beck.de/ Home	becklink 2010423 BGH: Eltern erben Facebook-Konto der toten Tochter	BGH: Parents inherit Facebook account of dead daughter The contract for a user account with a social network is generally transferred to the heirs of the original account holder by way of universal succession. They thus have a claim against the network operator for access to the

12.07.2018, Redaktion beck-aktuell		becklink 2010222	account, including the communication content stored therein, as the Federal Court of Justice has ruled (judgment of 12.07.2018, Az.: III ZR 183/17).
Summary of judgement by 'beck-aktuell Redaktion' Meldung vom 25.02.2019, Redaktion beck-aktuell	beck-online.beck.de/Home	Digitale Erben erwirken Zwangsgeldbeschluss gegen Facebook becklink 2012338	Lawyer: Only USB Stick with Data Provided According to lawyer Pfaff, the parents had turned to the court again because they were only provided with a USB stick containing a 14,000-page PDF document. The parents, according to Pfaff, wanted to access their daughter's Facebook profile to find clues as to whether the 15-year-old might have committed suicide. Facebook explained that setting up a "passive mode," where one can access content but not communicate, is technically impossible. In the original, active mode, a Facebook profile, for example, also automatically sends reminders to friends.
Summary of judgement by 'beck-aktuell Redaktion' Meldung vom 09.09.2020, Redaktion beck-aktuell	beck-online.beck.de/Home	Digitaler Nachlass beinhaltet Zugang zum Facebook-Konto becklink 2017403 https://beck-online.beck.de	Digital heirs obtain penalty payment order against Facebook In the dispute over a girl's digital inheritance, her family has obtained a penalty payment order against Facebook, according to her lawyer Christian Pfaff. The parents of the 15-year-old from Berlin had won access to the Facebook account information of their daughter, who died in a subway station in 2012, before the Federal Court of Justice (WM 2018, 1606). The decision of the Berlin Regional Court, which is available to the German Press Agency, shows that Facebook has not released the girl's digital legacy in a sufficient form.
NEWS ARTICLES			
Online news article	BBC News. (2018, July 12). Facebook ruling: German court grants parents rights to dead daughter's account. In Europe. https://www.bbc.com/news/world-europe-44804599		Germany's highest court has ruled that the parents of a dead daughter have the rights to her Facebook account under inheritance law.
Online news article	Oltermann, Philip. (2018, July 12). Facebook told to grant grieving mother access to daughter's account. The Guardian. https://www.theguardian.com/world/2018/jul/12/facebook-told-grant-		German court rules parents can inherit contract between a child and a social media site

	grieving-mother-access-daughters-account	
Online news article	Alkousaa, Riham. 'Heirs Can Access Facebook Account of Deceased Relatives - German Court'. Reuters, 12 July 2018, sec. World. https://www.reuters.com/article/idUSKBN1K219T/. Online article by Riham Alkousaa, July 12, 2018 Heirs can access Facebook account of deceased relatives - German court	BERLIN (Reuters) - Heirs in Germany have the right to access the Facebook accounts of their deceased relatives, a court said in a landmark privacy ruling on Thursday, saying a social media account can be inherited in the same way as letters.
Blogpost	Hardinghaus, Dr. Alexander, Ramona Kimmich, and Philipp Süss. 'German Federal Supreme Court: Facebook Account Passes to Heirs'. ReedSmiths Technology Law Dispatch, 12 July 2018. https://www.technologylawdispatch.com/2018/07/in-the-courts/german-federal-supreme-court-facebook-account-passes-to-heirs/.	On 12 July 2018, the German Federal Supreme Court (Bundesgerichtshof – "BGH") ruled that a Facebook user account passes to the user's heirs (Case no. III ZR 183/17). This is the first time the BGH has had the opportunity to deal with the provisions of the new EU General Data Protection Regulation 2016/679 ("GDPR"). While the full judgment has not yet been published, the BGH's press release of the same date gives some insight into the BGH's considerations:
ACADEMIC PAPERS (TERTIARY SOURCES)		
Fuchs, Angelika. "What Happens to Your Social Media Account When You Die? The First German Judgments on Digital Legacy". ERA Forum 22, nr. 1 (April 2021): 1–7. https://doi.org/10.1007/s12027-021-00652-y.		
Patti, Francesco Paolo, og Francesca Bartolini. "Digital Inheritance and Post Mortem Data Protection: The Italian Reform". SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 13 January 2019. https://papers.ssrn.com/abstract=3397974.		
Tweehuysen, Valérie. "Digital Afterlife Under Dutch Law: The German Case on Inheriting a Facebook Account from a Dutch Perspective". European Review of Private Law 27(5) (1 October 2019): 1149–58. https://doi.org/10.54648/ERPL2019061.		