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How do we provide the digital footprint with eternal rest? Some criteria for legislation regulating digital wills

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ABSTRACT

This article analyses the implications of the death of digital service users on their digital footprint and assesses some of the solutions—contractual and legislative—that have been posited to date by digital service providers and by Parliaments of a few countries. In view of the different initiatives analysed, and the experience gained in their implementation, the paper presents legal certainty, effectiveness and transparency as criteria that should guide the regulation of the digital footprint in the case of death. These criteria must allow for the adoption or regulation of mechanisms for managing the digital footprint of digital service users to be clear and trustworthy for them and efficient and easily recognized and adopted by digital service providers.

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1. The digital footprint¹

A person's digital footprint is made up of all the records that are in the cloud. They are created when they communicate with others on the Internet via email, when they take part in social networks, when they store things, when they share photos or videos, or when they read books, listen to music, watch films, play games or make purchases from online stores through digital service providers. Also forming part of one's

digital footprint are the accounts on digital service providers used to manage all these records (Varnado, 2014).²

The content of the files making up the digital footprint differ in nature and value. Some of these records may contain data protected by different rights, some of them fundamental, such as freedom of expression, secrecy of correspondence, personal data protection, image rights and the right to personal and family honour. Others may contain original creations protected by intellectual property rights (i.e. documents or photos). Furthermore, both of these types of records

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¹ I have chosen to use the term “digital footprint” in this article. Nevertheless, it should be noted that a review of the literature reveals the use of other expressions, such as *digital property* (Watkins, 2014; Connor, 2010); *digital assets* (Connor, 2010; Edwards & Harbinja, 2013; Hopkins, 2013); *digital traces* (Wright, 2014); *digital estate* (Hopkins, 2013); *digital legacy* and *digital memory* (Bassett, 2015) or *digital remains* (McCallig, 2013).

² This very broad definition of the digital footprint has led one author to acknowledge that its application is “utterly mindboggling” (Ray, 2012). Nevertheless, we cannot ignore the fact that some authors regard this broadness as useful, to be able to include everything that actually has to be regarded as part of the digital footprint (Connor, 2010).

may have an economic value, to a greater or lesser degree (i.e. bitcoins or money earned on an online gaming site). Others, meanwhile, may be—only or additionally—of sentimental value to the user or their personal or family circle (i.e. correspondence carried out by email, photos shared on family albums uploaded onto the web or playlists or reading lists shared with him or her). Some, such as emails, may even be of value greater to that inherent in them, as master keys that allow users to manage their digital footprint in digital services, in saving the data necessary to access them (Carroll & Romano, 2010, 109).

The footprint created by users' Internet activities is stored on digital service providers' servers in the cloud, which are generally managed through password-protected accounts.

Whilst users are still alive, their digital footprint is, formally at least, under their exclusive control by means of the personal access provided by the digital service provider.

However, when they die, they lose this control. First of all, when a digital service user dies, their digital footprint remains on the Net if nothing is done about it (Carroll & Romano, 2010; Watkins, 2014).

It is not just that. When a user dies, their successors, relations and friends often find it impossible or difficult to manage the files making up the former's digital footprint, whether in terms of deleting it, accessing it or keeping it alive.

This situation has led to a range of lawsuits in recent years that have concluded with a number of court rulings in some countries that have had great media impact.

For example, one might recall the case of the parents of a soldier killed in Iraq who wished to access the emails sent by their son from the front, to create a memorial to him, which Yahoo refused until access was granted by a judge (Lastowka, 2010).³ There is also the tale of a Virginia family who sought, in vain, to access the Facebook profile of their son, who had committed suicide at the age of 15, to investigate the circumstances that had led to his death (Varnado, 2014; Watkins, 2014).

These and other issues that have arisen over recent years have led some digital service providers, although initially reluctant to do so, to make changes to their policies to provide a response to this new reality. The social pressure often accompanying these lawsuits has meant that different rulings have begun to adopt some legislation with mechanisms enabling management of a deceased user's digital footprint. It is easy to appreciate how, as McCallig points out, "a bereaved family in dispute with Facebook often makes a national or international news story" (McCallig, 2014).

Digital service providers have no incentive *a priori* to do anything with regard to managing the digital footprint of dead users, in that they generally base their business model, the free-of-charge nature of their services, on the use they make of the information generated by their living users' activities. This is why doing anything with regard to deceased users' digital footprints would normally entail spending time and money with, probably, little return (Varnado, 2014; Leaver, 2013).

Nevertheless, some digital service providers, aware of the need to provide a response to this situation, have begun to amend their policies to include specific rules on the matter or to offer options for users to electronically express their preferences in this regard. Additionally, recent years have seen the appearance of companies offering to manage the digital service accounts of deceased users. Furthermore, in this scenario, the doubt arises as to whether current legislation is enough to provide an answer to the challenges presented by digital footprints when users die (Edwards & Harbinja, 2013). Therefore, to provide a global and comprehensive response to the different situations that may arise with regard to digital footprint management subsequent to a user's death, some countries have begun to adopt legislation incorporating digital footprint management mechanisms.

Nevertheless, we cannot ignore the fact that digital footprint management is still not a generalized social concern, despite the stories appearing in the media.⁴ Indeed, a US survey shows how 63% of Americans make no plans for their digital footprint after their death.⁵ These figures are particularly significant when noting that, according to a YouGov survey in the UK, only 20% of the young people aged between 18 and 24 surveyed have ever considered the matter.⁶

Whatever the case, there is no doubt that this concern will grow as digital natives get closer to death and the presence on the Net expands and evolves with the appearance of new digital services or new social uses of information and communication technologies (McCarthy, 2015). Indeed, the problem has only just begun and digital footprint management will surely

⁴ For example, "Como preparar la muerte digital" (2015), *El Mundo* <http://www.elmundo.es/tecnologia/2015/10/31/5633c0c2ca4741bb188b461a.html>; "La muerte toca lo digital" (2015), *ABC* <http://www.abc.es/tecnologia/redes/20150221/abci-facebook-redes-cibermuerte-201502182107.html>; "Dret a la mort digital" (2016), *La Vanguardia* (29/02/2016) <http://www.lavanguardia.com/vida/20160229/4085404087/dret-a-la-mort-digital.html>. "Bequeathing the keys to your digital afterlife" (2013), *New York Times* <http://www.nytimes.com/2013/05/26/technology/estate-planning-is-important-for-your-online-assets-too.html>; "End of life tech companies grow with changes in death traditions" (2013), *Huffington Post*, http://www.huffingtonpost.com/2013/06/13/end-of-life-death-tech-funeral_n_3431174.html; "Death on Facebook now common as 'dead profiles' create vast virtual cemetery" (2012), *Huffington Post* http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles_n_2245397.html; *Cyberspace when you're dead* (2011), *New York Times* <http://www.nytimes.com/2011/01/09/magazine/09Immortality-t.html> (last consulted September 2017).

⁵ <http://www.nextavenue.org/5-steps-creating-your-digital-estate-plan/>; "Leaving Behind the Digital Keys to Financial Lives" (2013), *New York Times* http://www.nytimes.com/2013/05/25/your-money/forgotten-in-estate-planning-online-passwords.html?nl=todaysheadlines&emc=edit_th_20130525&r=2& (last consulted September 2017).

⁶ Nevertheless, there are almost no studies on societal concern on the digital estate and on how it should be administered after a person dies or is incapacitated. We are only aware of one: "La muerte toca lo digital" (2015), *ABC* <http://www.abc.es/tecnologia/redes/20150221/abci-facebook-redes-cibermuerte-201502182107.html>.

³ Who owns your e-mails? BBC News http://news.bbc.co.uk/2/hi/uk_news/magazine/4164669.stm (last consulted August 2017).

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