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POSTMORTEM EXERCISE
OF DATA PROTECTION RIGHTS: THE APPLE CASE

ABSTRACT. The paper aims at developing the debate on digital inheritance by analyzing its first judicial application in Italy. In this decision, the Court applied Article 2-terdecies, d.lgs 196/2003 and took a crucial step with regard to the legal regime of personal data – and, more broadly, of digital resources – after the data subject’s death. The Italian legislation, as this decision shows, seems to have adopted a ‘personalistic model’ through which not only heirs and relatives, but any person showing a legitimate interest could exercise the data subject’s rights on personal data. After a brief introduction of the main themes concerning the postmortal exercise of data (1.), this essay analyzes the reasons behind the judicial decision (2.) and seeks to further explore the dogmatic qualification of the rights on personal data recognized by the legislator with Article 2-terdecies (3.).

CONTENT. 1. Data perpetuity in the information society – 2. The ruling – 3. Postmortem exercise of data protection rights

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1. *Data perpetuity in the information society*

‘*We live on the internet, but what happens when we die there?*’¹ The debate surrounding the correct framing of the legal regime of digital resources is currently involving the time span following the death of an individual. The topic has been gaining momentum in the scholarly studies and it has recently found a concrete example in our legal system with the first judicial case decided by an Italian court concerning postmortem access to personal data, decided by the first civil section of the Court of Milan.

The extension of the scope of application of the debate inherent to the digital goods’ legal regime to the post-mortal phase arises as a logical corollary of the ‘commodification’ process that affects the goods of the information society. Indeed, a variety of socioeconomic rationales are traditionally identified for the relevance recognized to the issue of ‘digital death’² and are deeply connected with the centrality that digital resources such as data have reached within the digital economy.³ Within this framework, many economic actors are flourishing and developing the so-called ‘Digital Afterlife Industry’ (DAI):⁴ the trend of stratification and exploitation of data belonging to deceased individuals finds its origin in empirical evidence such as, on the one hand, the (over)accumulation⁵ of profiles (and, therefore, information) of deceased persons on social networks and, on the other hand, the spreading of for-profit enterprises that focus their commercial practices on data.

¹ N.M. BANTA, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, *Fordham L. Rev.*, 83, 2014, p. 799, at 800.

² G. RESTA, *La “morte” digitale*, *Dir. inf.*, 6, 2014, pp. 891-920.

³ Summarized by ID., *Personal Data and Digital Assets after Death: a Comparative Law Perspective on the BGH Facebook Ruling*, *EuCML*, 5, 2018, p. 201, at 201-202.

⁴ C.J. ÖHMAN, L. FLORIDI, *The Political Economy of Death in the Age of Information: A Critical Approach to the Digital Afterlife Industry*, *Minds and Machines*, 27, 2017, pp. 639-662. Specifically, regarding the policy choices made by Facebook, see D. MCCALLIG, *Facebook after death: an evolving policy in a social network*, *International Journal of Law and Information Technology*, 22/2, 2014, pp. 107-140.

⁵ It has been calculated that, if Facebook continues to attract new users and expand with the same rate, the number of deceased users will exceed 4.9 billion before 2100. The statistic is reported by C.J. ÖHMAN, D. WATSON, *Are the dead taking over Facebook? A Big Data approach to the future of death online*, *Big Data & Society*, January-June 2019, pp. 1-13.

This depicted tendency has provoked, in many areas, a rethinking⁶ of the relationship between the single individual and the end of life⁷ in light of the new information society's paradigms. Consequently, numerous questions of legal nature are arising as well; amongst them, particular attention has been addressed to the so-called 'digital inheritance.'

For obvious reasons, the studies inherent to data 'perpetuity'⁸ have mostly focused on governing data related to living individuals, in line with the enhancement of forms of protection such as the right to be forgotten.⁹ Since few years, however, the attention of scholars has turned to the theorization and identification of forms of protection aimed at pursuing an adequate data access model or governance model also related to deceased people.¹⁰

At least in part, the shift is due to the fact that the same problem of the 'dissociation'¹¹ between digital identity and personal identity affects the individual both in life and after death.¹² In fact, it could be argued that this dissociation reaches its acme at the moment of the separation between the digital identity of the deceased and his

⁶ T. WALTER, *The pervasive dead*, in *Mortality*, 24/4, 2019, pp. 389-404 points out that a 'pervasivity' model of death is spreading and that it is characterized by the continuation of bonds even after the event of dying, moving away from the paradigm of death as a place without return (that dates back to Catullus, 3, 11-12: "*Qui nunc it per iter tenebricosum/illuc, unde negant redire quemquam*").

⁷ D. SISTO, *Morte e immortalità digitale: la vita dei dati online e l'interazione postuma*, *Funes. Journal of narratives and social sciences*, 2, 2018, p. 111, at 111.

⁸ RESTA, *La "morte" digitale*, cit., at p. 892.

⁹ Among the many scholars who have been dealing with the topic, see G. FINOCCHIARO, *Il diritto all'oblio nel quadro dei diritti della personalità*, *Dir. inf.*, 4-5, 2014, pp. 591-604; M.R. MORELLI, *Oblio (diritto all')*, *Enc. dir.*, Agg. VI, Milano, 2002; J. ROSEN, *The Right To Be Forgotten*, in *Stan. L. Rev. Online* 64, 2012, pp. 88-92; also, naturally, on a case-law basis, see ECJ 13 May 2014, C-131/12, *Google Spain SL, Google Inc. contro Agencia Española de protección de datos (AEPD) e Mario Costeja González*.

¹⁰ In the Italian context, see M. CINQUE, *La successione nel "patrimonio digitale": prime considerazioni*, *Nuova giur. civ. comm.*, 2012, II; A. MAGNANI, *L'eredità digitale*, *Notariato*, 2014, pp. 519-532; V. BARBA, *Interessi post mortem tra testamento e altri atti di ultima volontà*, *Riv. dir. civ.*, 2017, pp. 319-349; C. CAMARDI, *L'eredità digitale. Tra reale e virtuale*, *Dir. inf.*, 1, 2018, pp. 65-93.

¹¹ RESTA, *La "morte" digitale*, cit., at p. 892, where the Author specifies that this dissociation disjoins in a synchronic dimension (data accumulated in a plurality of archives) and in a diachronic one (the reputation of the person remains inherently dependent on the events of the past).

¹² RESTA, *Identità personale e identità digitale*, *Dir. inf.*, 3, 2007, pp. 511-531.

physical body: for the living individual, the dissociation affects his identity, which is disjointed into a plurality of digital identities, distinct from each other by place of storage and respective temporal frame of reference; instead, with regard to the deceased, the disappearance of the physical body is not balanced by the disappearance of the ‘electronic’¹³ one, which, indeed, outlives it.

The fact that the physical body is survived by the digital alter ego should not be overlooked, since the latter keeps existing in countless formats and for an incalculable time.¹⁴ As a consequence, the expression digital ‘immortality’ is becoming increasingly popular among scholars.¹⁵

Therefore, the outlined scenario justifies the efforts to clarify the fate of digital assets relating to an individual after his/her death. Correspondingly, judges have to deal with challenges arising on two levels: firstly, the identification and legal qualification of tools and remedies that can be implemented with the purpose of providing effective post-mortal protection of the rights; secondly, judicial decisions should address the internet as a whole, in order to prevent the protection’s nullification due to the inherent ‘aterritorial’ nature of data.¹⁶

A first step in addressing these issues was taken by the decision of Court of Milan pertaining to the subject of this essay.

2. *The ruling*

In accordance with Articles 669-*bis* and 700 c.p.c., the parents of a man deceased in a car accident appealed to the Court of Milan to obtain assistance from Apple in the recovery of their son’s personal data. Data created with the physical device

¹³ S. RODOTÀ, *Il diritto di avere diritti*, Roma-Bari, Editori Laterza, 2012, p. 397.

¹⁴ SISTO, *Digital Death. Le trasformazioni digitali della morte e del lutto*, *Lessico di etica pubblica*, 1, 2018, p. 49, at 57.

¹⁵ SISTO, *Morte e immortalità digitale...*, cit., pp. 111-122.

¹⁶ J. DASKAL, *The Un-Territoriality of Data*, *The Yale Law Journal*, 125, 2015, pp. 326-398. In this context, data is understood as part of the ‘digital heritage’ to which the digital inheritance pertains (for this expression, see CINQUE, *La successione nel “patrimonio digitale”...*, cit., pp. 645-655).

– destroyed in the accident – was stored in the iCloud account thanks to the synchronization system, but the parents, despite their requests, were not allowed to access it, due to the restrictions Apple applied.

Once established the admissibility of the legal request, the reasoning of the Court departs from the innovative legal provision introduced by D.lgs. 10 agosto 2018, n. 101, i.e. Article 2-*terdecies* of the Italian Data Protection Code (D.lgs. 30 giugno 2003, n. 196).

The ground-breaking rule, that follows the guidance of the GDPR¹⁷ and whose function is explicitly to ensure regulatory coverage to postmortal data protection, states that the rights provided by Arts. 15 to 22 of the GDPR can be exercised by the ones who have an interest, or act in the protection of the deceased, or due to family reasons. In the specific case, the Court deals with the request of recognizing the right of access under Article 15 GDPR.

On the basis of Article 2-*terdecies*, by referring to the ‘family reasons worthy of protection’ identified in the provision, the Court stated that the plaintiffs were entitled to exercise the right to access to the deceased son’s personal data. The judge has pointed out, indeed, that the bond existing between parents and children, the content of the allegations and the desire of collecting a selection of recipes which their son – working as a chef – had saved in the device, were conditions that could justify the provision’s application.¹⁸

Given the admissibility of the appeal and the legitimacy to access the data of the deceased, the Court’s logical reasoning unfolds by taking into consideration the possible reasons that could have precluded the approval of the requested measure: on the one hand, the limits that the legislative framework places on the postmortem exercise of the rights on personal data and, on the other hand, the conditions that the procedural

¹⁷ Recital n. 27 specifies that the Regulation does not apply to this kind of data (‘This Regulation does not apply to the personal data of deceased persons. Member States may provide for rules regarding the processing of personal data of deceased persons’), due to a choice that has been defined coherent with the traditional principle that legislative policy decisions regarding family law or succession law exceed the legislative competence of the European Union (F. TROLLI, *La successione mortis causa nei dati personali del defunto e i limiti al loro trattamento*, *Jus Civile*, 4, 2019, p. 313, at 318).

¹⁸ Trib. Milano, ord. 10.02.2021, p. 5.

discipline requires for the preventive measure under Article 700 c.p.c.

With regard to the first set of limits, Article 2-*terdecies*, II, Data Protection Code enhances the autonomy of the data subject and allows him/her to ‘prohibit’ the exercise of the rights on personal data after the event of death. However, neither an explicit will nor its specific formal and substantive requirements can be found in the present case. Therefore, the judge could admit the legitimacy of the plaintiffs.

With regard to the second set of limits, the Court considered both the *fumus boni iuris* and the *periculum in mora* as existing. The first was recognized because of the legitimacy to exercise the right to access personal data.¹⁹ The second was claimed as actual due to the fact that the Apple systems related to the deceased person would have been definitively ‘destroyed’ following a period of inactivity of the user, with the consequence of the loss of the data stored and, hence, the irreparable damage to the exercise of the recognized rights.

For the reasons briefly summarized here, the Court sentenced Apple ‘to provide assistance [...] in the recovery of data from the accounts [...] in the procedure called «transfer», aimed at allowing the applicants to acquire the credentials of access to Apple ID’.²⁰

3. *Postmortem exercise of data protection rights*

The decision of the Court of Milan addresses, for the first time in our legal system, at a case law level, the issue of ‘digital inheritance.’ This expression identifies the problem inherent to the fate of data and, more generally, of digital goods, after the death of an individual.

The *quaestio iuris* lies on the thin line along succession law and personality rights and it is emphasized by a phenomenological element: the dissociation between

¹⁹ The judge follows this hermeneutic path by coordinating the national discipline with the principles expressed by the GDPR. In particular, the reasoning is shown by the reference to the ‘legitimate interest’ mentioned by Article 6, par. 1, lett. f) GDPR, that makes the processing of data ‘lawful’.

²⁰ Trib. Milano, ord. 10.02.2021, p. 7.

an individual's biological existence and his/her electronic double.²¹ In addition to this aspect, another, more recent phenomenological factor arises, the concrete implications of which are yet to be determined: the consequences of the atterritorial nature of data in terms of circulation of digital goods. The atterritoriality raises questions concerning the individuation and coordination of regulatory measures which should be implemented with respect to data. Indeed, it may occur that the effectiveness of legal protection could be frustrated due to the continuous crossing of territorial borders and, consequently, of jurisdictions, by data and by digital goods in general.

The mentioned decision offers some particularly interesting insights.

In order to define the rights on personal data of a deceased user, it is necessary to preliminarily address the concrete structure that the 'digital heritage' can assume. A patrimonial component should be distinguished from an affective one.²² Moreover, the interest may be directed both to data access and to their governance.²³

The interesting aspect emerging from the ruling of the Court of Milan concerns the practical application of the new Article 2-*terdecies*, D.lgs. 196/2003, introduced by D.lgs. 101/2018, through which the Italian legislator confirms the theoretical approach of the previous legal framework.²⁴ This approach, according to some scholars, aligned the systematic choice related to the exercise of personal data after death with a 'personalistic model',²⁵ which addresses both personality rights and personal data.²⁶

The above-mentioned consistency between the previous formulation and the

²¹ RESTA, *La "morte" digitale*, cit., at 894.

²² CINQUE, *La successione nel "patrimonio digitale"*..., cit., at p. 646.

²³ S. DELLE MONACHE, *Successione mortis causa e patrimonio digitale*, *Nuova giur. civ. comm.*, 2, 2020, p. 460, at 460.

²⁴ In particular, Article 9, III, d.lgs. 196/2003, on similar model to the previous Article 13, III, l. 675/1996. This aspect is brought out by S. STEFANELLI, *Destinazione post mortem dei diritti sui propri dati personali*, *MediaLaws*, 1, 2019, pp. 136-147.

²⁵ RESTA, *La successione nei rapporti digitali e la tutela post-mortale dei dati personali*, *Contratto e impresa*, 1, 2019, at 89 and 104, where it is emphasized the distinction between this approach and two other models, defined as 'succession model' (which is based on a proprietary approach to immaterial goods of the individual and seeks to adapt the traditional succession law to the reality of the digital economy) and as 'contractual autonomy model' (which underlines the trend to develop computer models that help the data subject in making a conscious choice over the fate of her digital 'traces' after death).

²⁶ RESTA, *La successione nei rapporti digitali*..., cit., at pp. 94-95.

current formulation – which does not lack of significant innovations – is confirmed by the explicit reference which the ruling makes to the thesis of the persistent exercise of the rights on personal data beyond the life of the individual.²⁷ According to this doctrine, some legal systems, including the Italian one, favor ‘an extension of protection, attributing to relatives, heirs or other subjects the power to exercise the rights of the data subject after his/her death,’²⁸ creating a sort of permanence of the individual rights amongst those mentioned by the legal provision.²⁹

By accepting this position, the Court shows to move away from the most relevant European judicial precedent addressing both digital death and digital inheritance: the 2018 ruling of the German *Bundesgerichtshof* on the case concerning the request for access to the Facebook account filed by the parents and heirs of an underage girl who died after an accident in the Berlin subway.³⁰ Following the prevailing theory amongst scholars, the German Federal Supreme Court had affirmed the full inheritability of personal data, adopting a ‘succession model’ for the data governance of a deceased individual.

Instead, the approach adopted by the Court of Milan reflects the aforementioned ‘personalistic model’.

The solutions offered by the two rulings come to the same conclusion, i.e. the recognition of the right to access to the personal data of the deceased by the plaintiffs, from a practical point of view. However, they diverge on a theoretical level. The first one embraces the thesis according to which legal relationships concerning intangible goods pertain to the asset of the deceased and can be inherited, consistently with the principle of universality of succession (§1922 BGB).³¹ Instead, the second one, through the application of Article 2-terdecies Data Protection Code, recognizes a sort of

²⁷ Trib. Milano, ord. 10.02.2021, p. 4.

²⁸ RESTA, *La successione nei rapporti digitali...*, cit., at p. 97.

²⁹ DELLE MONACHE, *Successione mortis causa...*, cit., at p. 465; in the same sense, F. ZAGARIA, *Patrimonio digitale e successione mortis causa*, *De iustitia*, 2020.

³⁰ BGH, 12-7-2018, III ZR 183/17. For a detailed analysis of the case, see R. MATTERA, *La successione nell'account digitale. Il caso tedesco*, *Nuova giur. civ. comm.*, 2019, I, pp. 703-708.

³¹ RESTA, *La successione nei rapporti digitali...*, cit., at p. 91.

persistence (*Fortwirkung*) of the rights in question beyond the life of the natural person, without the legislator having clarified whether it constitutes a legitimacy *iure hereditatis* or *iure proprio*.³²

Scholars seem to favor the second interpretation and justify this approach by stressing that the problem of vacancy of entitlement of the legal relationship, to which the succession phenomenon normally responds, would not occur when dealing with digital resources.³³

In other words, according to the Italian legislation, the postmortem exercise of the rights on personal data, recognized to certain categories of subjects, represents a possible answer to the legal questions raised by new technologies with regard to the fate of digital assets after the data subject's death.³⁴ In addition, the provision, compared to the hypothesis of the 'succession model', potentially expands the number of those entitled to exercise the rights and, at the same time, restricts it, as it provides for more stringent requirements for the permanence of rights to occur. Finally, it needs to be stressed that the legislator limits the general principle of the possible postmortal exercise of the rights on personal data. Indeed, the second paragraph of Article 2-*terdecies* does not admit the exercise of the referred rights in the cases provided for by law or when the data subject has expressly prohibited it, enhancing private autonomy and self-determination.

Ultimately, it is also worth mentioning the relationship between the judicial decision and the debated issue of digital sovereignty.³⁵

³² RESTA, *La successione nei rapporti digitali...*, cit., at p. 99.

³³ DELLE MONACHE, *Successione mortis causa...*, cit., at 468: "*sembra che, quando ci si collochi al di fuori del perimetro dei diritti patrimoniali del defunto, ciò che può residuare, in realtà, siano solo forme di tutela iure proprio, con legittimazione attribuita dalla legge o comunque da riconoscersi, secondo i principi, a determinati terzi in base, per lo più, al loro legame familiare con il de cuius*".

³⁴ As stated by Article 2-*terdecies* d. lgs. 96/2003, the categories are: the ones having a 'personal interest', the ones acting to protect the interested party, or the ones acting 'for family reasons worthy of protection'.

³⁵ For an early comment on this aspect, see M. BASSINI-G. DE GREGORIO-O. POLLICINO, *L'accesso ai dati post mortem su cloud: il commento all'ordinanza del Tribunale di Milano 2020/44578*, *federnotizie.it*, 5 March 2021, available at: <<https://www.federnotizie.it/laccesso-ai-dati-post-mortem-su-cloud-il-commento-allordinanza-del-tribunale-di-milano-2020-44578/>> (last access: 09.04.2021).

Most relevantly, in the Italian case the access request was related to data stored in the cloud computing platform iCloud. From this perspective, the Italian case differs from the well-known case of the San Bernardino attack, with which the issue of access to personal data of a deceased person – also for reasons of public interest – emerged on a global scale.³⁶ In the latter case, access to the cloud had been granted, but not to the physical device.

Digital inheritance evokes the operational difficulties typical of disputes concerning digital goods and data generated by digital platforms. Specifically, cloud computing allows to access the synchronized material from anywhere, regardless of the physical storage location and data retention.

In the decision of the Court of Milan, no circumstances from the evidence revealed the place of storage of the requested data. Furthermore, the decision of the Court denied Apple's claim to impose data access conditions typical of the US legal system, but extraneous to the Italian legal system. The judge concluded that the Court should rely on the rules of the legal system 'before which the right is enforced'.³⁷

This case explains well why the planetary dimension of the 'silicon giants'³⁸ also involves the jurisdiction and the law to be applied in the specific dispute.

To summarize, the ruling of the Court of Milan allows an initial definition of a few questions related to the issue of postmortem governance of digital resources, by embracing the theory of the persistent exercise of rights on personal data after the death of the data subject. At the same time, the above-mentioned decision leaves other issues unsolved, especially those concerning the concrete ways through which individuals may dispose of their rights on personal data after their death as well as the role which digital platforms will (or will not) play in relation to those powers of disposal.

³⁶ A full scrutiny of the case and of the questions raised can be found in M. OROFINO, *FBI v. Apple: il caso è (forse) chiuso, ma le questioni di fondo rimangono apertissime*, *DPCE online*, 26/2, 2016, pp. 277-295.

³⁷ Trib. Milano, ord. 10.02.2021, p. 6.

³⁸ As Stefano Rodotà used to describe "i grandi soggetti economici che si identificano con la rete" (RODOTÀ, *Il diritto di avere diritti*, cit., p. 414).
