Oliver M. Habel: "Personal Data Online Following Death or Mental Incapacity"

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I. Introduction

1. Personal data of a data subject are always involved when a natural individual makes use of internet applications like shops, search engines, online banking, social communities, blogs, "internet service providers" in general, email service providers, Twitter and WhatsApp, smartphone services, etc.

2. Personal information means any information which has in any way a reference to a natural individual, e.g. on photos, videos, vocal messages, internet telephony, text messages like on Facebook, Twitter or in emails.

3. There are differences between the various internet applications when internet users make use of the offers:

   a) Online shops and banking services have a limited use for personal data: Under EU and German data protection laws the operator is only allowed to collect and to make use of personal data for purposes of fulfilling the contract and collecting the consideration,

therefore, mostly money. All further use of personal data needs to have the prior expressed consent of the data subject.

A contractual relationship exists between the operator of a shop or a banking service and the user.

b) In social communities the user decides which personal data in which form shall be delivered to or shall be accessible to whom. The provider has always access to this personal information.

The provider's internet service is based on a contract with the user who becomes a member of the community. Therefore, a contract between the social community operator and the user exists.

c) The posting of messages on a blog is also based on the free decision of the data subject to share her/his opinion with mostly unknown third parties.

Also here a certain legal relationship exists because at least the operator allows the user to post her/his opinion on the blog.

d) On WhatsApp the user decides with whom she/he wants to share messages, photos, etc. Each mailed personal information is addressed to a known third party. It is offered like a short message service (SMS) according to WhatsApp's "Terms of Service". The

difference to e-mail services, besides the technology, is that the operator of WhatsApp organizes certain social community-type additional applications. The user gets informed about other users of WhatsApp who she/he might know. This works because the operator collects all mobile phone numbers of all its users and can get access to the user's mobile phone numbers on her/his smartphone. In contrast to e-mail, any WhatsApp message such as a text, music, photo or video is directly delivered to the recipient only, and not stored on WhatsApp's servers, as WhatsApp explains in its Terms of Service.

WhatsApp and the users stay in a contractual relationship.

e) An e-mail service provider obliges itself to deliver e-mails and their attached documents to the recipients only. There are no further social communication applications. E-mails are stored on the provider's servers until they are collected by the recipients and may be stored by the operator for a further period of time thereafter.

The service is based on a contract between the e-mail service provider and the user.

II. Are legal assumptions with respect to the online personal data of a deceased person comparable with the situation of an incapable person?

A deceased person has died, whereas an incapable person still lives. An incapable person is still the holder of all her/his rights, as well as the owner of her/his economic assets and the holder of her/his human rights. The sad situation of an incapable person is the subject of a curatorship. In Germany, a family court needs to decide if and what type of curatorship is ordered for the well-being of a mentally incapable person. The curator acts on behalf of the incapable adult who continues to have ownership of property and is subject to all fundamental human rights.

The legal implications of the two situations are different.

III. What are the typical interests of an heir or of the close family of a decedent?

1. They might need to review e-mail accounts for any to-dos or concerning ongoing contractual relationships with, for example, shop operators or other internet service providers.

2. They might want to inform others, e.g. on social platforms, of the death of the decedent.

3. An heir might be interested in searching for what type of content the decedent has on social communities, cloud services, or internet games.

4. Curiosity about unknown information but also emotional reasons will also have a substantial weight.

5. This makes it necessary for an heir or a close family member to have access to the internet applications that were used by the deceased, thus, they need to know the registration name and password. An heir or a family member might obtain this information by reviewing the decedent's documents. Alternatively they may need to ask the respective operator of an application to be informed of the deceased's user name and password.

IV. What is the legal position of an heir and/or a close family member of a deceased?

1. To be an heir does not mean to be a family member. The heir is the person or the persons who are inserted by the decedent in a last will and testament or, if such document does not exist, it will be probably the nearest living family member in accordance with the respective law of the country in which the decedent lived.

2. According to German law, § 1922 BGB (German Civil Code), all rights to assets of any nature are transferred to the heir the moment the person dies. The heir automatically takes the decedent's place in all contractual relationships. And the heir also becomes

the debtor, if applicable, in the decedent's place (for this reason, the heir can decide within the first six weeks if she/he wants to reject the heritage). She/He is the universal successor to the deceased.

3. Only assets with economic value of any nature are transferred in case of succession. The very personal rights are only transferred if a specific law orders it, such as in §§ 28 subpara 2, 30, 64 Urheberrechtsgesetz (German Copyright Act). Any afterlife right to privacy may be guarded by the closest relatives only because these rights or obligations to protect the afterlife dignity of a deceased do not transfer to the heir but stay with the closest family members only.

V. Does an heir have a right to claim for surrender of the user name, password, access to content and e-mail communications of the deceased against an internet application provider?

1. Any claim for surrender might be due to contract or due to law. Any use of internet applications will be based on a contract or at least on an approval by a provider for making use of an application. In the terms and conditions of many applications, one cannot find any information that is helpful for answering this question. In some cases one may find that the right to use the internet application expires automatically if a person dies. Or providers like Facebook or Google offer various models of necessary to-dos by an heir

with more or less vague commitments of the operator even to answer. One method employed by providers to make it nearly impossible to enforce claims by an heir seems to be to build up high barriers by asking for court documents, for example from a US court even if the user is located for example in Europe.

2. Under German law the heir automatically takes the decedent's place in a contract with a provider due to the universal succession of the heir in § 1922 BGB. Based on the applicable national contract law it will be a case-by-case decision what a provider can regulate in its terms and conditions for services related to the death of a user of its application. The provider might regulate that a contract automatically expires in case of the user's death or a contract might be terminated by the provider with immediate effect in case of the user's death. But the right of an heir in her/his heirship is not only subject to § 1922 BGB but also part of the constitutional right in Art. 14 GG (German Constitution) that property is guaranteed. There must be a very strong reason for a provider to limit the contractual relationship in this way in its terms and conditions. This could be the case if an individual service is a subject of the contract. Under German law, clauses in T&Cs shall be reviewed in consideration of the law on general terms and conditions in §§ 305 ff. BGB, specifically § 307 subpara. 2 BGB which assumes disproportionate discrimination in cases of disagreement with the fundamental notions of the law.

Article 14 GG (guarantee of property in the Germany Constitution) and § 1922 BGB are such fundamental notions of the law.

VI. Does a provider have a right to refuse claims by an heir for surrender of access to the decedent's e-mail account?

The provider might argue that it needs to protect the right of privacy of the former user who might not want an heir to gain access to, for example, her/his e-mails. The right to privacy is a fundamental right as guaranteed under Article 2 subpara. 1 GG. But this constitutional right has no effect between private parties. This is why the provider cannot successfully refer to this argument if the decedent has not expressed her/his will that nobody, or specifically not the heir, shall get access to her/his e-mails.

VII. Or might a provider refuse a claim for access on the basis that this would be a breach of the secrecy of telecommunications, and therefore unlawful?

1. "Secrecy of telecommunications" is protected as a fundamental right under Article 10 subpara. 1 GG. It can only be limited by law. E-mail services are telecommunication services within the meaning of TKG (German Telecommunications Act). Although arguable, the strong opinion in German legal literature is that it is not only the process of an e-mail being delivered that is protected by the guarantee of secrecy

of telecommunications, but also the e-mails stored on the e-mail service provider's servers after a copy of the e-mail has been collected by the recipient.

2. In § 88 TKG the "secrecy of telecommunications" is repeated by the legislator. Exceptions in the case of the death of an e-mail account owner do not exist in the law. It is argued that the legislator needs to modify TKG to allow a telecommunications provider to grant to an heir access to the e-mail account and messages. This legal position is currently under ongoing discussion.

3. Another strong argument for the provider could be the applicability of data protection laws to the personal data of a descendant which do not allow access to personal data for a third party without the consent of the data subject.

   a) The decedent was probably the data subject when any e-mail communication took place.

   b) According to § 1 subpara. 3 BDSG (German Federal Data Protection Act) the applicability of the BDSG is superseded if there exists a more specific legal regulation for the respective facts of a case. In the case of § 88 TKG (see above) it is more specific to telecommunications like e-mail communications and, therefore, the only

applicable legal regulation with respect to the secrecy of telecommunications.

c) Also, it is disputed whether data protection laws may continue to apply after the death of a data subject. The legal basis for data protection law is seen in Germany as an obligation of the state to guarantee a person's privacy. But this constitutional guarantee is granted to living people because personal freedom is required only by a living person. The German Federal Supreme Court has established an afterlife right of personality in its jurisdiction. This shall protect the dignity of a deceased. The legal aim of data protection is to protect the data subject in how she/he communicates her/his personal data with third parties. The aim of afterlife protection of the dignity of a deceased is different from the aim to allow a person to decide to whom her/his personal data are given. The discussion is ongoing.

d) BDSG itself only refers to a "person concerned" who is a living person because only a living person needs to be protected concerning the use of her/his personal data.

e) Also, the draft EU Data Protection Act in its version of March 12, 2014 does not define in Article 4 (1) and (2) that also personal data of a

deceased are subject of the upcoming EU-European data protection law.

f) These are strong arguments against an applicability of EU or German data protection laws for the personal data of a decedent. Thus a right to claim for deletion of personal data or a right to be forgotten in Art. 17 of the draft EU Data Protection Act cannot be referenced by an heir. The heir needs to refer to the conditions of the contract between the respective provider and the decedent.

In case of misuse of a deceased's personal data, the closest family members might claim for cease and desist based on the decedent's afterlife right to privacy.

VIII. Conclusion

1. An heir takes the decedent's place in contracts between the decedent and internet application providers, in German law called "universal succession".

2. It will be subject to the applicable contract law if a provider can refer validly to an expiration clause or to a right to terminate with immediate effect in case of the user's death.

3. Under German law the aforementioned clauses might violate the basic principles of heirship in § 1922 BGB and in Art. 14 GG.

4. If the decedent has not decided about the access to her/his e-mails, any provision of access by the provider might violate the secrecy of telecommunications guarantee of Art. 10 GG because the applicable TKG does not make any exception from this case in § 88 TKG.

5. It is disputed whether EU or German data protection laws apply to the personal data of a dead person.

6. When it is necessary to decide if a strong afterlife right to privacy shall be established and if data protection laws shall apply to the personal data of decedents, one has to ensure a balance between the right to privacy and the freedom of information. I plead in favor of strong freedom of information, to avoid too many limitations on communications due to privacy issues of an individual who no longer exists physically.

7. The case of an incapable person cannot be compared with the case of a dead person because it is a matter of curatorship under various legislations which might apply. An incapable person is still the holder of all her/his rights, e.g. in relation to property, contracts or fundamental rights.

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