

## DIGITAL DEATH: THE INHERITANCE OF DIGITAL INFORMATION\*\*

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The subject of the research is the right to inherit digital information.

The purpose of the research is to substantiate the need to conduct legal regulation of the consequences of the death of a person in the context of inheritance of digital data.

The research is based on the analysis of sources of Russian and foreign law, as well as practical materials of Russian and foreign law in the sphere of rights and freedoms. The methodological basis of the research was formed by general scientific methods of cognition (analysis, synthesis, modelling) and private-scientific methods of cognition (comparative-legal, formal-logical).

Main results. There are some approaches to the correlation of rights and freedoms realized in real and virtual space. The first approach considers digital or virtual rights and freedoms as a new legal phenomenon that requires separate legal regulation. The second approach assesses digital or virtual rights and freedoms as a manifestation of the features of those rights and freedoms that already exist outside the digital world. Although the first approach is more popular, the second approach is more correct because digital rights and freedoms either add a new territory of rights and freedoms or affect the mechanism of realization, but do not create a fundamentally new legal phenomenon.

Because the death of a person does not automatically have consequences for the digital space, it is necessary to create a legal mechanism for recognising digital death, which will allow an individual who died in reality to become so for the virtual space. For the realisation of these powers it is not necessary to create completely new legal categories, it is enough to take into account the peculiarities of the realisation of offline rights and freedoms in virtual space.

Conclusions. It seems more correct to move away from the concept of separating offline and online rights and to focus on the point-by-point introduction of digital rights and freedoms into existing legislation. Such an approach will not only ensure faster regulation of digital rights and freedoms, but will also make it possible to base legal regulation on provisions that have already had experience of implementation, and therefore identify possible gaps, problems, etc.

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## 1. Introduction

Today, one of the development priorities of the Russian Federation is digitalization, however, despite the apparent penetration of digitalization into all aspects of an individual's life, it can be stated that all of them relate exclusively to the stage of a human's biological life. Despite the fact that the topic of digital death and subsequent inheritance has become of interest to researchers [1; 2; 3; 4; 5; 6], and by 2047, it is predicted that about 2.7 billion people will die<sup>1</sup>, a significant part of which will leave a digital footprint, at the moment, the sphere of regulation of the digital existence of a person after the occurrence of his physiological death is outside the area of interest of the legislator. Undoubtedly, the complexity and heterogeneity of the digital space creates problems for legal regulation, but the above circumstances make it necessary to consider the prospects for the existence of a kind of right to digital death, which should be understood as the right of a person who died in reality to become such for the virtual space.

Using the Internet, a person does not create a separate digital personality, but only forms his digital image, through which he performs the necessary actions in the virtual space. Despite the fact that the digital image is inextricably linked with a physically existing person, the fact of the occurrence of the death of this person does not automatically become known in the virtual space. Therefore, to recognize a person as dead for the virtual space, additional actions are required, the sequence of which in most cases either does not have an external form of expression and their consolidation, or is designed in general in the form.

Consequently, the central issue in the framework of this procedure is undoubtedly the question of whether the data left on the Internet is inherited property. The need to resolve this issue is due to the emergence of individual cases, on the

basis of which the practice of resolving such conflicts is formed.

The research is based on the analysis of sources of Russian and foreign law, as well as practical materials of Russian and foreign law in the field of rights and freedoms.

The methodological basis of the research was formed by general scientific methods of cognition (analysis, synthesis, modeling) and private scientific methods of cognition (comparative legal, formal logical), which contributed to a comprehensive and substantive study of the issues raised.

## 2. Inheritance of digital information

The first high-profile case, which became widespread and raised the issue of data remaining after the death of a person, concerned the military Justin M. Ellsworth, who died in Iraq in 2004. The father of the American military appealed to Yahoo with a request to provide him with access to the correspondence they conducted with their son via e-mail, but was refused due to company policy: accounts that had no activity for longer than 90 days were subject to automatic deletion without the right to transfer access to them to third parties (including close relatives). Taking advantage of the opportunity provided for in the user agreement to disclose the contents of the account by court order<sup>2</sup>, Mr. Ellsworth appealed to the court, eventually winning the case on April 20, 2005 and receiving a disk with 10,000 pages of text<sup>3</sup>. This case has become a powerful argument for justifying the ownership of emails and, consequently, the right to inherit them.

The decision had an impact on the American legislator: on June 24, 2005, the state of Connecticut passed an act on access to the e-mail accounts of the

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<sup>1</sup> United Nations, Department of Economic and Social Affairs, World Population Prospect: The 2017 Revision, custom data acquired via website. 2017. URL: <https://population.un.org/wpp/> (Date of access: 09/23/202)

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<sup>2</sup> Who owns your e-mails? 2005. URL: [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/4164669.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/4164669.stm) (Date of access: 09/23/202)

<sup>3</sup> Yahoo gives dead Marine's family e-mail info. 2005. URL: [http://www.nbcnews.com/id/7581686/ns/world\\_news-mideast\\_n\\_africa/t/yahoo-gives-dead-marines-family-e-mail-info/](http://www.nbcnews.com/id/7581686/ns/world_news-mideast_n_africa/t/yahoo-gives-dead-marines-family-e-mail-info/) (Date of access: 09/23/202)

deceased<sup>4</sup>, but comprehensive regulation of this area began only in 2014. Section 12 of the Delaware Code was amended regarding trust access to digital assets and digital accounts<sup>5</sup>, in which the electronic accounts of the deceased were equated with "other objects of property". This act caused a discussion among technology companies that considered it impossible to provide heirs with the same level of access that the testator had during his lifetime, which affected the content of the unified act of 2015 recommended for adoption in all states of the country – the act on trust access to digital assets<sup>6</sup>, where digital assets were divided into two categories (subject to availability the consent of the deceased and the court decision).

Another well-known case related to the inheritance of digital data occurred in 2012 in Germany, where a 15-year-old girl died under the wheels of a train. The girl's parents contacted Facebook with a request to provide access to her account, but were refused: the social network referred to the requirements of data privacy legislation. The court of first instance sided with the parents, justifying their right of access to the account through the fixed provision on inheritance of personal diaries and letters (paragraphs 2, § 2047 and § 2373 of the German Civil Code). The court of appeal disagreed with this decision, focusing on the prohibition of disclosure of personal information of the owner and the persons with whom she communicated. In 2018, the German Supreme Court decided on this case,

allowing the transfer of the account by inheritance, including with the opening of access to data related to user communication on a social network<sup>7</sup>.

While American legislation can be considered among the most advanced [7], and individual acts of European countries can be defined as the basis for the development of an appropriate comprehensive legal regulation<sup>8</sup>[8; 9], the Russian legal system cannot boast of significant practical experience and legislative transformations in this matter.

In order to carry out a qualitative normative legal regulation, the Russian legislator needs to answer a number of important questions.

The primary question is what exactly should be inherited. A huge layer of information is concentrated within the virtual space, but it should be understood that not all information can become an object of inheritance. In this case, it is necessary to distinguish the category of "virtual things", which will have a clear form (file, complex work, etc.), the property of transferability and be considered as material value. The clarity of the form allows you to separate one digital information from another, thereby dividing the spheres of influence of people into specific virtual objects. The transferability property of a thing allows you to grant control over a virtual object to another person. The need for the status of material value excludes from the list of virtual things that have a moral, aesthetic or other

<sup>4</sup> An act concerning access to decedents' electronic mail accounts. Substitute Senate Bill No. 262 Public Act No. 05-136 // Connecticut General Assembly. URL: <https://www.cga.ct.gov/2005/act/Pa/2005PA-00136-R00SB-00262-PA.htm> (Date of access: 09/23/202)

<sup>5</sup> Title 12. Decedents' Estates and Fiduciary Relations. Fiduciary Relations. Chapter 50. Fiduciary Access to Digital Assets and Digital Accounts // State of Delaware. The Official Website of the First State. URL: <https://delcode.delaware.gov/title12/c050/index.shtml> (Date of access: 09/23/202)

<sup>6</sup> Fiduciary Access to Digital Assets Act // The National Conference of Commissioners on Uniform State Laws. URL: <https://www.uniformlaws.org/viewdocument/final-act-with-comments-40?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22&tab=librarydocuments> (Date of access: 09/23/202)

<sup>7</sup> Parents can access dead daughter's Facebook, German court rules // The Local.de. URL: <https://www.thelocal.de/20180712/german-court-to-rule-on-parents-access-to-dead-daughters-facebook> (Date of access: 09/23/202)

<sup>8</sup> LOI no 2016-1321 du 7 octobre 2016 pour une République numérique : L'Assemblée nationale et le Sénat ont adopté // Journal officiel de la République Française. URL: <https://wipo.int/ru/text/420578> (Date of access: 09/23/202) ; LEY 10/2017, de 27 de junio, de las voluntades digitales y de modificación de los libros segundo y cuarto del Código civil de Cataluña // Noticias Jurídicas. URL: [http://noticias.juridicas.com/base\\_datos/CCAA/600511-I-10-2017-de-27-jun-ca-cataluna-voluntades-digitales-y-de-modificacion-de.html](http://noticias.juridicas.com/base_datos/CCAA/600511-I-10-2017-de-27-jun-ca-cataluna-voluntades-digitales-y-de-modificacion-de.html) (Date of access: 09/23/202) ; Spain tackles the problem of how to handle your digital legacy after you die // El País. URL: [https://elpais.com/elpais/2018/10/08/inenglish/1539010138\\_182928.html](https://elpais.com/elpais/2018/10/08/inenglish/1539010138_182928.html) (Date of access: 09/23/202)

similar value.

These theoretical conclusions should be correlated with the current Russian legislation, since we do not have special rules on the inheritance of virtual objects, but Article 1112 of the Civil Code of the Russian Federation clearly states that inheritance does not include non-property rights and other intangible benefits.

Based on this provision, it can be concluded, for example, that an email or social network account itself cannot be objects of inheritance: the heir is not interested in the fact of gaining access to the site (in this case, he can register on it under his own name), but in access to that part of the person's life activity which he carried out in the digital space. However, through e-mail or a social network account, a person realizes the freedom of thought and speech granted to him by the Constitution of the Russian Federation of 1993, the right to privacy and the secrecy of correspondence. Correspondence acts as a method of communication, which is similar in status to telephone conversations, but the issue of inheritance of recorded telephone conversations is not put on the agenda. Despite the fact that an email or social network account has specific forms and access to them can theoretically be transferred, the account itself does not have any material value, and therefore does not fit the criteria of virtual things.

Due to the lack of clear legislative provisions concerning inheritance issues related to the digital space, there is a multiplicity of options in the legal literature regarding the status of social networks and the possibility of their inheritance [10; 11; 12; 13]. Thus, M.M. Panarina [14] notes that the account is considered as a database, an entry on the server of the owner of the social network, rights and obligations from the agreement with the organizer of the social network. E.S. Grin classifies accounts in social networks as multimedia products (art. 1240 of the Civil Code of the Russian Federation), however, subject to their compliance with these objects [15; 16]. A.L. Romanova justifies the recognition of a profile in a social network as a result of intellectual activity [17].

M.I. Suleymanova concludes that social

media accounts should be considered as "other property" and included in the list of objects of inheritance [18]. The author's argument is quite curious that there is a possibility of alienating an account through purchase and sale, because it is only partially possible to agree with this statement (within the framework of the example given by the author of the purchase and sale of the site), because it is not uncommon for the rules of use of a certain site to prohibit the sale of an account. Of course, there is no responsibility in Russian legislation for the sale or purchase of accounts, but if such an action is detected, the site owners warn that the sold account will be blocked. As an example, the rules of the online service for digital distribution of computer games and programs Steam<sup>9</sup>.

Despite the abundance of approaches to understanding the status of an account (on a mail server, on a social network, etc.), trying to justify the need for its transition in the order of inheritance, it seems possible to raise an important question, but from a completely different angle: if the owner of a website overnight decides to cease its activity and deletes the corresponding site with all the accounts on it, will this action be regarded as the destruction of someone else's property? The paradoxical nature of this issue forces us to return to the very essence of the situation when a person registers on a certain portal: he does not conclude an account purchase and sale agreement, but gets access to someone else's property as part of the service provided to him. Therefore, in order to talk about the possibility of inheriting an account (even if it is empty and does not contain any important information), it is necessary to consolidate in legislation the provision on replacing the testator with the heir in all (without exception) his contractual relations. In this case, such a vision can be based on a fundamental principle of German law: the universality of the inheritance of death, which provides for the transfer to the heirs of all contractual positions held by the deceased, including those related to the use of digital services, since it is believed that such contracts are not strictly personal, but rather generic in nature [19].

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<sup>9</sup> A blocked Steam account. Steam Support service. Valve Corporation. URL: <https://help.steampowered.com/ru/faqs/view/4F62-35F9-F395-5C23> (Date of access: 09/23/202)

In the Russian Federation, the inheritance does not include rights and obligations inextricably linked to the identity of the testator, and the right to create an account was granted to a specific person who provided his data during registration. Therefore, the very fact of being able to access a site cannot be an inherited object.

However, heirs do not always need access to e-mail or a social network account, sometimes the central subject of dispute is files that are stored in digital space (videos from the family archive, musical or literary works of a deceased relative, etc.). In this case, these virtual objects have all the listed characteristics, since the files not only are there clear boundaries and the possibility of their transfer, but also a material (cost) component. Despite the logicity of including such files in the list of virtual things, a number of discussion issues remain open. For example, who will identify files located on e-mail that are subject to inheritance; whether all files will be transferred without exception or their contents will be checked; who will be entrusted with all the functions of ensuring and maintaining virtual inheritance. The above questions are primarily confronted with Article 23 of the Constitution of the Russian Federation, which guarantees the secrecy of correspondence.

One of the possible options for a partial solution to this problem may be to borrow experience in relation to YooMoney electronic wallets. The owner of the electronic wallet decides on the status of the created electronic wallet (anonymous, named or identified) by providing a list of data and documents, therefore, determines the degree of binding of his electronic wallet to his real offline identity. The funds held in an electronic wallet are subject to inheritance from an identified electronic wallet, after the heir provides all necessary documents<sup>10</sup>. Similarly, it is possible to differentiate the social pages available on the Internet, mail accounts, etc., that is, to include in the list of objects of inheritance only files from pages, than the status was determined by the owner during his lifetime as related to his offline personality.

It is important to note that WebMoney has also independently worked out the procedure for transferring ownership rights to the WM identifier (electronic wallets) by inheritance<sup>11</sup>. If the registration was made under an false name, then, according to M.G. Dieva, R.V. Kosova and S.A. Tarabrin, access to such an account and funds on it will need to be obtained in court [20]. In other issues of digital inheritance directly related to monetary expression, there is no such clear algorithm of action. Thus, the inheritance of crypto assets is casual in nature and depends on each specific situation [20; 21; 22].

At the same time, there are objects in the virtual space that were not created by a deceased person, but acquired by him (digital books, musical compositions, films, etc.). From classical legal positions, inheritance of these objects is not possible, because the user agreements of these sites provide for the provision of only a lifetime license to use the file.

Another important point is the posthumous regulation of social networks and accounts through which entrepreneurial or other non-prohibited economic activities were conducted (monetized channels on video hosting, "working" accounts on Vkontakte, where orders for the sale of goods and services are placed). With regard to such accounts, it is necessary to develop a separate approach, which is of a compromise nature, since these accounts also have a third feature of virtual things – material value. It is possible to consolidate the following options: 1) transfer of only part of the access possibilities (for example, closing access to correspondence for the new owner of the page, etc., transfer of access only to a group or community that creates material value for heirs, without providing access to the personal page of the person who administered the group or community during his lifetime; 2) transfer of access to the account only after deletion on it contains personal information of a person (correspondence, videos and photos hidden under privacy settings). The establishment of such

<sup>10</sup> Inheritance of money from a YooMoney wallet. URL: <https://yoomoney.ru/page?id=530519&ysclid=lr7821pjr655590267> (Date of access: 09/23/2022)

<sup>11</sup> The procedure for transferring ownership rights to the WM-identifier inherited by WebMoney. URL: [https://wiki.webmoney.ru/projects/webmoney/wiki/poryadok\\_peredachi\\_prav\\_na\\_vladienie\\_wm\\_identifikatorom\\_ponasledstvu](https://wiki.webmoney.ru/projects/webmoney/wiki/poryadok_peredachi_prav_na_vladienie_wm_identifikatorom_ponasledstvu) (Date of access: 09/23/2022)

rules will help to respect the right to inheritance and not violate the right to privacy.

Of particular interest is the analysis of the possibility of inheriting company bonuses (Aeroflot Bonus, Sberbank, Russian Railways), conducted by S.V. Lebedkov [21]. Despite the fact that there are several approaches to the legal nature of bonuses (discount, property right, advance payment or encouragement), the author concludes that these bonuses are the encouragement of a particular person, which excludes the possibility of their inclusion in the inheritance.

Consequently, the issue of inheritance of digital phenomena left after a person's death requires comprehensive legislative regulation and cannot be left to the discretion of site owners and courts. At the same time, the legislator cannot limit himself only to a general indication of inheritance or non-inheritance of the objects in question, a thorough analysis of virtual phenomena related to human activity is required, their legal assessment, granting them a certain legal status, on the basis of which a decision will be made on its transfer to heirs or leaving without a new owner.

Along with this, the important question is not only what to inherit, but also in what order. Within the framework of Russian legislation, two important procedural aspects can be noted. Firstly, the user agreements of the same social networks prohibit registration on behalf of or instead of another person ("fake account") (clause 6.3.1. Rules for using the VKontakte website<sup>12</sup>), which raises the issue of establishing rules and procedures for confirming the identity of the owner of the corresponding page. Secondly, the form of the document on the basis of which the transfer of virtual objects will take place requires clarification. Since 2019, the Civil Code of the Russian Federation contains a direct prohibition on making a will using electronic or other technical means. Consequently, the legislator leaves no other options for a will, except for its written form, certified by a notary or equated to notarized wills [23].

However, the written form of the will does not eliminate the question of how exactly in the

will it is necessary to formalize the desire to transfer a virtual thing to the heirs: is it enough to specify the appropriate webpage, group, community, or is it necessary to specify a username and password in the will, and what to do if the password was changed before death, but after writing the will.

Accordingly, the issue of inheritance of virtual space objects is completely new to the Russian legislator and requires detailed elaboration of basic approaches to both inheritance objects and procedure. Today, we have to state the fact that the Russian Federation is significantly lagging behind European and American legislation on this issue.

### 3. Conclusions

The main reason hindering the process of legal regulation of digital rights and freedoms is the lack of a clear understanding of what digital rights and freedoms are: whether they are a fundamentally new phenomenon or just a specific continuation of the legal provisions that already exist in our legal system. Today, the first position finds more support in the scientific community [24; 25], forcing the development of new concepts, searching for a legal basis for the emergence of a new branch of law, and, etc. However, for a long period of time the development of this direction has not brought significant results, and in some cases only further complicating the situation. It seems that the above problem is caused by the practical impossibility to create a new branch of law. It is possible to talk about a separate branch of law only in relation to phenomena that have no offline analogues.

The analysis of digital rights and freedoms potentially existing for our legal system demonstrates a higher degree of consistency of the position that gives digital rights and freedoms the role of legal phenomena that introduce specific components into the content of existing rights and freedoms: the complexity and hierarchy of their implementation, taking into account the new space of their action and, in some cases, recognition of a new way of applying existing legal opportunities. The "digital death" considered in this research is a set of already existing rights and freedoms that are implemented comprehensively and systematically. To implement these powers, it is not necessary to

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<sup>12</sup> Rules for using the VKontakte Website. URL: <https://vk.com/terms> (Date of access: 09/23/202)

create completely new legal categories, it is enough to take into account the specifics of the implementation of offline rights and freedoms in the virtual space.

Thus, it seems more correct to move away from the concept of separating offline and online rights and focus on the point-by-point implementation of digital rights and freedoms into existing legislation. Such an approach will not only ensure faster regulation of digital rights and freedoms, but will also allow legal regulation to be based on provisions that already have experience in implementation.

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