Digital Afterlife Under Dutch Law: The German Case on Inheriting a Facebook Account from a Dutch Perspective*

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1. Introduction

What happens to the Facebook accounts of the millions\(^1\) of Facebook users who die every year? Practically speaking, a person can either set their account to be deleted after they pass away or have it ‘memorialized’, in which case the account cannot be changed unless a ‘legacy contact’ was appointed.\(^2\) But what happens from a legal point of view? The German Bundesgerichtshof (BGH) dealt with this question in the case discussed here.\(^3\) The cause of the BGH’s ruling is a tragic one: the mother of a 15-year-old girl who passed away tried to log on to her daughter’s Facebook account using the girl’s username and password, but failed because the account had already been memorialized. Part of the reason the mother wished to access the account was to determine whether the girl had intended to commit suicide, or if her death was more likely an accident. Facebook, however, denied the mother access to the girl’s account, fending off the mother’s request by appealing, in short, to the right to privacy of the persons the daughter had communicated with. The BGH ruled in favour of the mother, and details of the case can be found in Seifert’s introductory note.\(^4\)

Here, the case before the BGH is explored within the context of Dutch national law. It should be emphasized that, in the Netherlands, neither case law\(^5\) nor a steady doctrine yet exists on the subject of this BGH case, rendering any suggestions on the outcome of such a case tentative. Furthermore, the ruling by the BGH touches upon many intriguing and difficult legal issues regarding the ‘inheritance’ of social media accounts. As a result, this case note does not deal with all dimensions of the case under discussion, but rather singles out some aspects.

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\(1\) According to an estimation made in 2012 by a company that provides services for access to the passwords of accounts for relatives after a death: nathanlustig.com/tag/facebook-death-rate.

\(2\) facebook.com/help/1506822589577997.


\(5\) No case law has been published on the subject, nor does any unpublished case law exist, to my knowledge.
2. The ‘Digital Inheritance’ and the ‘Digital Assets’ Comprising It

2.1. General

The case fits into the broader framework of how the so-called digital inheritance is legally dealt with. This term digital inheritance is not a legal one; it is a description of a social phenomenon, in which heirs are confronted not only with ‘old-fashioned’ assets such as tangible assets or traditional rights, but also with accounts on social media and the like. What is an heir to do with this online legacy? This question has received little attention in Dutch legal literature. Van der Geld pointed out the importance of managing one’s digital inheritance, describing the digital inheritance as a person’s collective digital assets.  

2.2. Digital Assets

Like digital inheritance, digital asset is not a legal term. It is 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. What are these things, legally speaking? Are they like tangible assets, giving rise to property rights (rights in rem), or not? Can anyone actually ‘own’ a social media account, or parts thereof? These are valid legal questions that need to be resolved and to which the answers remain largely unclear.  

In the Dutch legal literature, there is some debate as to the ways and extent to which the various digital assets can be fitted into the existing framework of patrimonial and property law. The discussion deals with the important question of how ‘open’ the system of Dutch property law is. Article 3:1 of the Dutch Civil Code (DCC) defines ‘goods’ (goederen) as either ‘things’, meaning corporeal objects (zaken, Art. 3:2 DCC), or as vermogensrechten (Art. 3:6 DCC). The term vermogensrechten is even harder to translate to English than other civil law concepts, but can be translated, though somewhat uncomfortably, as ‘patrimonial rights’. This category of rights is essentially open and includes property rights, such as limited property rights (beperkte rechten) and other absolute rights, such as intellectual property rights, as well as contractual rights. New types of (patrimonial) rights can be included under this category, which also applies to rights to digital assets.

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7 See also J.H.M. VAN ERF, ‘Ownership of digital assets?’, EuCML 2016, pp 73 ff.
This subsumption, however, does not provide us with an answer as to the nature of a right to a digital asset. Is it of a proprietary or absolute nature, and does it have third-party effect? Can the right be revendicated in bankruptcy of a third party holding the digital asset, or does it merely constitute a contractual claim? This may depend on the type of digital asset we are dealing with, but also on one’s view on the openness of Dutch property law. For example, Struycken, in his dissertation on the *numerus clausus*, shows himself to be fairly reserved in acknowledging new absolute rights.\(^9\) Other important scholars, however, are more lenient towards accepting more absolute, property-like rights.\(^10\) I myself reached the tentative conclusion that cryptocurrencies such as bitcoins are patrimonial rights of a proprietary nature.\(^11\)

As to digital content, Van Erp and Loof argue that a right of ownership is conceivable and that the DCC could provide for the application of the provisions on the ownership of things (*zaken*) to digital content; however, they also questioned whether this is the best solution, since the provisions on ownership are, naturally, not tailored to digital content.\(^12\) Tjong Tjin Tai proposes a notion of data (file) ownership, but stresses that further research into this approach is needed because, again, several rules of Dutch property law are not easily applicable to data files.\(^13\) Others, such as Verheul\(^14\) and Wibier,\(^15\) are more hesitant about the proprietary approach to data files.

As Verheul points out, the discussion on the place of digital assets within property law has shifted into the realm of possible future law.\(^16\) Under current law, the place of digital content or data within the Dutch legal system is not yet clear; therefore, digital content cannot currently be regarded as property under Dutch law. Consequently, the right to access digital content stored in a Facebook account is of a contractual, not a proprietary, nature.

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2.3. Digital Inheritance

Digital assets may either exist offline or online ‘in the cloud’, where they are stored by a third party. If the digital assets exist offline, for example on the hard disk of the deceased’s computer, they will not pose much of a problem to an heir. On the other hand, if they are stored online and can only be accessed through an account, getting access to these assets can be difficult, as the present BGH case shows. In this case, however, the mother did have the girl’s username and password, whereas the Dutch legal literature instead focusses on situations in which the heirs lack the deceased’s login credentials. This BGH case thus poses the somewhat new question of whether, in cases where the heirs do have the username and password, access may be contractually or otherwise excluded. The question is not altogether new, since it has been discussed by some in reference to accessing email accounts, to which I will return later.

Van der Geld describes the various options available to a user of social media to tackle the practical problem of heirs not having the deceased’s login credentials: 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. Ziggur, for instance, ironically provides an account in which one can record one’s wishes with regard to social media accounts. Those wishes will be carried out by either Ziggur or a person appointed by the user. Another example is provided by Digizeker, a digital ‘safe’ where credentials and documents can be stored, whether in collaboration with a notary or not. The Royal Dutch Association of Civil-law Notaries (KNB) has apparently taken Van der Geld’s warnings seriously, since their website advocates the use of such a ‘social media testament’ or a digital safe.

17 A. Berlee, EuCML 2017, pp 256 ff, para. IV also points out that the legality of giving access to heirs by providing them with login credentials is questionable when the contract that governs the social media account limits the heirs’ access. On this limitation of the heirs’ access, see below.
18 L.A.G.M. Van der Geld, 35. KWEP 2013. See also V.C. Hartkamp; 2304. NJB 2013, para. 8; A. Berlee, EuCML 2017, pp 256 ff, para. IV.
19 Dutch notaries are civil-law notaries.
20 ziggur.me/nl/about.aspx.
21 digizeker.nl.
22 notaris.nl/testament/digitale-nalatenschap.
3. Inheritance of the Contractual Right to Access

3.1. General

Under Dutch law, as a general rule, an heir becomes party to a contract into which the deceased entered. This follows from the *saisine* rule of Article 4:182 DCC and more specifically from Article 6:249 DCC, which states that the legal effects of a contract also bind successors under universal title (*onder algemene titel*), unless the contract provides otherwise. An heir is a successor under universal title (Art. 3:80 para. 2 DCC) and thus continues the legal position of the deceased by the operation of law, in this case as a party to the contract. The contract may, however, provide otherwise, as mentioned above. This can either be by an explicit clause in the contract to that effect, but it may also follow from the contract implicitly, for example because of the personal nature of the contract.23

In the case of a Facebook account, the user and Facebook enter into a contract governed by the Terms of Service.24 These Terms do not explicitly state that the user has access to the content in their account, such as pictures they add to their profile or messages they send; however, the contract should clearly be interpreted in this way, as the BGH has done in this case. This right to access normally passes on to the heir.25 The question is whether the nature or the provisions of the contract put a stop to this by ‘providing otherwise’, as mentioned in Article 6:249 DCC.

3.2. Nature of the Contract

As to the nature of the contract, little Dutch case law or literature exists on the subject in general. V.C. Hartkamp contends that an online account is a personal right that does not pass on to the heir. She argues that it is useless for an heir to continue the deceased’s account, and moreover, that the deceased protected his account with a password, making it unlikely he would want his heirs to be able to access it.26 Others see no obstacle in the nature of the contract.27

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23 Asser/Hartkamp & Sieburgh 6-III 2014/534; Asser/Perrick 4 2017/464; M.J.A. van Mourik & F.W. J.M. Schols, Erfrecht (Mon. Pr. nr. 1) 2018/10. For the particular issues that a bequest (*legaat*) raises in relation to licenses, see A. Berlee, EuCML 2017, pp 256 ff.
24 nl-nl.facebook.com/legal/terms. Like the BGH (see para. 19), I will leave the question of the nature (type) of this contract aside, because it is not relevant to the issues discussed in this case note.
26 V.C. Hartkamp, 2304. NJB 2013, para. 6.
The BGH hold\textsuperscript{28} that the contract is indeed of a personal nature with respect to future use of the account by the heir; such use is obviously not intended by the contract. This does not mean that the same holds true for access to the content already existing at the time of the user’s death, however. The BGH compares the online communication through Facebook with offline communication. Even though whomever communicates with the Facebook user may rely on Facebook to deliver their message or other content to the correct account, once a message is delivered, it is out of the sender’s hands, just as it is in the offline world. The sender must bear in mind that the message may be passed on to or viewed by third parties or heirs, as would be the case with a letter that is part of an estate.

Since there is no Dutch case law on this specific aspect and the literature seems divided, it is hard to predict what a Dutch court would rule in such a case. The BGH’s arguments seem convincing. On the other hand, the comparison to paper letters may become old-fashioned, and 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.

3.3. Contractual Exclusion of Inheritability

Another interesting question is whether the provisions for the memorialization of an account stand in the way of inheriting the contractual right to access. The BGH ruled that Facebook’s rules on memorializing the account do not render the right to access uninheritable because those provisions were not part of the contract, and even if they were, they would have been invalid.\textsuperscript{29} The court held that the provisions were not part of the contract because they could only be found in the ‘help area’ of Facebook. Nowadays, however, the Terms of Service determine that a person can designate a so-called ‘legacy contact’ to manage their memorialized account. Only this person or another person appointed in a valid will or similar document will be granted (limited) access to the account.\textsuperscript{30} In a sense, the contract thus limits the inheritability of the right to access, which is possible according to Article 6:249 DCC, as we have seen.

Given that these Terms of Service are standard terms and conditions, these specific provisions could be voidable under Article 6:233 DCC on the grounds of being unreasonably onerous. If that is the case, the heir can invoke the voidability because heirs continue the legal position of the deceased.\textsuperscript{31} Article 6:233 DCC is,

\textsuperscript{28} See paras 33 ff of the case.
\textsuperscript{29} See paras 26 ff of the case.
\textsuperscript{30} nl-nl.facebook.com/legal/terms, Art. 4, para. 5, s. 5.
\textsuperscript{31} Parl. Gesch. Boek 6 BW 1981, p 925. This could provide an argument for the idea that the nature of the contract excludes inheritability, because it is possible that the deceased knowingly agreed to the standard terms and conditions, trusting that his private communication would be safe from his heirs.
under certain circumstances, to be interpreted in accordance with Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (consistent interpretation) and to be applied ex officio by a court.\textsuperscript{32} Voidability might well be the result, as is demonstrated by the ruling of the BGH.\textsuperscript{33} Under Dutch law, the legal presumption of Article 6:237 section b DCC could come to the aid of the heir. It presumes a provision to be unreasonably onerous and therefore voidable if it substantially and unexpectedly limits the contractual obligation of the user of the standard terms and conditions. Such a rule does not exist under German law, but a comparable standard can be derived from the open norms of Paragraph 307 section 2 of the German Civil Code,\textsuperscript{34} the provision on the basis of which the BGH ruled the clauses on memorialization invalid, had they been part of the contract with Facebook.\textsuperscript{35} It must be granted that Article 6:237 section b DCC is seldomly applied in Dutch case law\textsuperscript{36} but, as in German law, a similar rule can be derived from (the consistent interpretation of) the open norm of Article 6:233 section a DCC, albeit without the procedural benefit offered by the presumption of Article 6:237 DCC.

Some Dutch case law from the lower courts on a different topic also points in the direction of voidability. In two cases, a court deemed a clause that released a bank from its obligation to inform the heirs of the transaction history of a bank account voidable under Article 6:233 DCC.\textsuperscript{37} Like the BGH, the courts attach much value to succession under universal title, due to which the heirs take the deceased’s legal position. Although a true line of case law has not yet been established and these cases dealt with a (solely) financial interest rather than the (also) personal or emotional interests of the heirs, a parallel to our Facebook case might be drawn.

3.4. Right to Privacy

All social networking companies must comply with a multitude of rules to guarantee the privacy of their clients, with Facebook being no exception. To what extent do these obligations interfere with Facebook’s contractual obligation to give an heir access to the account of the deceased? This is a very complex and difficult legal

\textsuperscript{32} Asser/Hartkamp 3-I 2015/175, 187 ff; R.H.C. Jongeneel, Algemene voorwaarden (R&P nr. CAI) 2017/1.6.1 ff.
\textsuperscript{33} A fortiori, this may also be the result if the Terms of Service were designed the other way around, stating that the account will be permanently deleted after a user’s death unless they opt for memorialization. Currently, memorialization is the default option, see facebook.com/help/1506822589577997.
\textsuperscript{34} R.H.C. Jongeneel, Algemene voorwaarden (R&P nr. CAI) 2017/12.3.
\textsuperscript{35} See paras 28 ff of the case.
\textsuperscript{36} R.H.C. Jongeneel, Algemene voorwaarden (R&P nr. CAI) 2017/12.3.
question for several reasons. First, the field of privacy and data protection law is in itself complex because of the many sources of the law that interact with each other. Secondly, public and private law are increasingly intertwined, raising many complicated questions, for example on the horizontal effect of fundamental rights. Thirdly, in a case such as the BGH case, Facebook is invoking rights and interests that are essentially not their own, but a third party’s (persons with whom the daughter communicated), which were created to protect others, not Facebook. These complexities will not be treated in-depth here, but will be touched upon while making a comparison of Dutch law to the BGH case.

It could be argued that the deceased’s right to privacy stands in the way of granting access to the heir. The BGH is quite short in dismissing this argument. The German post-mortem personality right is limited to protecting human dignity, not the deceased’s privacy. Likewise, in the Netherlands, it is generally held that the right to privacy ends at death. Zuiderveen Borgesius and Korteweg, however, defend that the general personality right can protect a user’s privacy post-mortem. As mentioned before, our views about (post-mortem) privacy could change, and it is indeed possible that the law will develop in this direction; however, it is too soon to tell.

The right to privacy of the persons with whom the deceased communicated is another privacy interest that must be taken into account. Does their right to privacy perhaps bar the heir’s action? The BGH considers this question from several angles: the secrecy of telecommunication (Fernmeldegeheimnis), data protection law, and the general personality right of the persons with whom the girl in question communicated with. These issues will be discussed below.

The secrecy of telecommunication is protected under Dutch law by Article 13 section 2 of the Constitution. The text of the Article is presently limited to the protection of communication by letters, telephone, or telegraph (brief-, telefoon- en telegraafgeheim); however, a procedure to amend this Article has been set in motion to make the secrecy of telecommunication technology-independent. In addition to this constitutional right, Chapter 11 of the Dutch Telecommunicatiewet contains provisions on the secrecy of communication similar to Paragraph 88 section 3 of the German Telekommunikationsgesetz. These provisions are an implementation of the ePrivacy Directive, and do not apply to parties such as Facebook or other providers of so-called over-the-top services. Those services will be included in the scope of the proposed ePrivacy Regulation, which will replace the Directive. In other words, the secrecy of telecommunication may, in due course, come to include the type of services that Facebook provides. Even so, it can be argued, like the BGH did, that provisions on the secrecy of communication are not aimed at shielding the communication from heirs, since they take the legal position of one of the parties to the communication itself. Again, a comparison to analogue communication can be made.

The BGH weighed the heir’s interests and rights against the interests and fundamental rights of the persons with whom the daughter communicated. This balancing of interests and rights is indicated by Article 6 para. 1 section f General Data Protection Regulation (GDPR), and is also called for when applying the
general personality right. Just as in Germany, the GDPR also applies in the Netherlands. Furthermore, Dutch law provides persons with a constitutional right (Art. 10) to privacy (eerbiediging persoonlijke levenssfeer).

The BGH does not explicitly state how the balancing of rights and interests fits within the framework of private law. This can be observed in Dutch case law as well, although it can be achieved in various ways. One must bear in mind that the persons whose privacy rights and interests are at stake are neither party to the suit at hand nor party to the contract; therefore, the exercising of the rights of the data subject as described in Chapter III GDPR is out of the question. Rather, Facebook uses the rights and interests of those third parties to justify a breach of contract, so to speak. This said, the processing of personal data could be rendered unlawful under Article 6 para. 1 section f GDPR as a result of the balancing of rights and interests. This balancing could also lead to the conclusion that the constitutional right to privacy of the third parties should prevail. These outcomes could be relevant to several (open) norms of private law: the right to specific performance could be barred, (part of) the contract could be rendered void, or the legal consequences of the contract could be altered by the operation of reasonableness and fairness (redelijkheid en billijkheid), thus giving an (indirect) horizontal effect to the third parties’ fundamental rights to privacy and data protection.

The BGH concluded that the mother’s interests prevailed. In Dutch literature, it is suggested by some that granting heirs access to a deceased person’s email account might be contrary to the third party’s right to privacy or data protection, while others point out the balancing of interests that needs to take place. Dutch courts indeed usually balance interests in cases like this. Again, no specific (published) case law on the topic exists, but parallels may still be drawn.

In the so-called second HIV case, a dental surgeon requested a patient to have his blood tested for HIV because the surgeon had made contact with the patient’s blood during surgery. The patient refused, invoking his fundamental rights. This case is an illustration of the functioning of open norms in a contractual setting, and shows that an (alleged) infringement of the fundamental right to privacy of Article 10 of the Constitution may be justified with (in) such an open norm. After a balancing of interests, it was held that the patient should

38 See paras 64 ff of the case.

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cooperate. The parallel to our BGH case is to be found in the balancing of a fundamental right on the one hand and the other interests and contractual rights on the other. One difference, however, is the fact that the patient was party to a contract, whereas in the present BGH case, the privacy of third parties is at stake.

The Dutch Supreme Court (Hoge Raad) was called upon to give judgment in two cases in which a third party’s privacy was involved: the Lycos case and the Valkenhorst case. A notable difference with our BHG case, however, is that the scene was not laid out in contract law. In both cases, the interests of the party seeking access to the information prevailed over the interests of the party invoking the (third party’s) privacy interest. In the Lycos case, the claimant requested the personal details of someone whose website was hosted by Lycos. On that website, allegations were made about the claimant being a fraud. Lycos refused to provide the requested information, referring to the rights to data protection and privacy. The Supreme Court held that the court of appeal had balanced the interests in a correct manner, and upheld the court of appeal’s ruling that Lycos acted unlawfully (Art. 6:162 DCC, tort) and needed to provide the requested information.

In Valkenhorst, a woman requested information on her biological father from a foundation that denied this information because of the mother’s right to privacy. The Supreme Court balanced this right to privacy with the woman’s personality right to know who her father is, and concluded that the latter right prevails. This personality right had previously not been recognized in Dutch law, and the Supreme Court was probably inspired by German law.

The three Dutch Supreme Court cases discussed here are examples of situations in which, like the BGH case, the right to privacy gets the short end of the stick. That is not to say that Dutch courts would arrive at the same conclusion if they were to decide on a case resembling the present BGH case. The outcome depends on a balancing of interests, and therefore on the specific circumstances of the case. Having said that, the Valkenhorst case shows that German law and the BGH’s case law likely provided inspiration for the development of Dutch law on fundamental rights in the past. The present BGH case might therefore provide the next source of inspiration for Dutch law.

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45 HR 15 April 1994, NJ 1004/608 (Valkenhorst). See also on this case R. Neimelien & C.W. Noordlander, Horizontale werking van grondrechten (Deventer: Kluwer 2013/11.4).
47 For example, how should the balance be struck if the mother was not also the heir of the girl? Or, viewed from a different angle, if the heir was not a close relative?