Emerging Technologies, Personality Laws and the Dead

Introduction

The digital era has reshaped the boundaries of debates on the protection of personality and privacy of the dead. Whether the dead have a right to privacy and how this might be managed are urgent and vital questions. In order to explore this emergent space, a team of researchers from Aston, Newcastle University and the University of Southampton organised a workshop on 19 April 2021, inviting academics, practitioners, policymakers and experts from the fields of psychology, philosophy, sociology, politics, education, death studies, media studies, feminist science, human-computer interaction, law and technology studies.

Throughout discussions, it became clear that despite coming from different fields of study, jurisdictions and experiences, this is a growing issue, with many of the challenges encountered providing common themes and difficulties which need to be addressed, and appropriate response would be the recognition of post-mortem privacy. We have synthesised the commentary emerging from this event to outline the current state of play in relation to post-mortem privacy and personality and to act as a call for future research, collaboration and action. The key themes from the event, along with further suggestions, are discussed in greater detail below.

Intersection and entanglement of legal regimes

Post-mortem privacy intersects with a plethora of legal regimes, in both civil and common law jurisdictions. In discussions around digital remains, privacy is often wrongly juxtaposed to property only and other relevant legal and social considerations are often neglected. Some jurisdictions, such as France, have taken a more proactive stance on post-mortem data protection, creating a system for the collection and storage of data after death, while other regimes overlook the issue entirely (e.g. England).

Further consideration should be whether current legal principles (not just privacy, but also property, intellectual property, contract, succession, data protection, human rights, criminal law, conflicts of laws and jurisdiction) are well suited to deal with issues of post-mortem privacy and personality rights, or digital legacy and digital remains more broadly. Law often looks at problems in binary – as a conflict between two parties – whereas, in reality, there usually are other stakeholders that need to be taken into consideration, for example, the wider societal interests of preservation and heritage. Here, other paradigms such as the law of organ donation provide a useful point of contemplation and comparison.

Interdisciplinarity

From the above, it is clear that the law alone cannot solve all of the issues at hand. Interdisciplinary treatment of post-mortem personality and privacy is critical to developing the conversation both philosophically and practically. In particular, there is a need to be mindful that the common vocabularies used regularly in reference to issues surrounding post-mortem privacy – such as death, grief, self, AI – are in constant flux, containing different contextual meanings. It is also important to evaluate how post-mortem privacy might sustain heteronormative and patriarchal inequalities and hierarchies that are implicit in legal systems.
Furthermore, we often focus solely on legal and technological challenges in post-mortem privacy, which can overlook the very real social, relational and even spiritual components of the digital afterlife. Perspectives from the Global South and approaches on the preservation of the dead and management of the digital afterlife are therefore essential to expand this conversation.

**Power of digital platforms**

Our lives now have a profound dependence on cloud storage and digital platforms. Yet, the misuse of data by these very platforms (for example with the Facebook-Cambridge Analytica scandal) has lessened public trust in them. With that comes the need to scrutinise the increasing corporate control over our posthumous data and the preservation of digital remains. What mechanisms (for example, the court system, legislation, new regulatory bodies) can we use to regulate how platforms deal with our data? And how might this regulation be scalable given the transnational reach of technology companies? Is there a need for a more democratic style of data governance that relies on the principle of solidarity and intergenerational equity, such as data cooperatives?

**The relationship between the dead, data bodies and wider society**

The dependence on cloud-based platforms creates tensions in the relationship between the data of the dead, data bodies and society. Currently, data is heavily centralised and under the control of a few commercial operators. In such situations there are several different (and often competing) interests at stake – from the government to the user and the tech company; each will have different priorities – but whose voice is heard? The contractual nature of the relationship between the parties on many occasions does not deal with post-mortem privacy matters or, where it does, the contractual provisions do not reflect the reality of social norms, or practical experiences of users, who may use informal workarounds to access the data of loved ones (e.g. through password sharing) – which may be forbidden under contract.

Wider questions emerge as to the creation of frameworks that will map across the different areas, particularly where debates about ethics, access and ownership of data arise – matters which do not align well in digital environments. The importance of public interest in either preserving or not preserving digital remains is acknowledged, but, as a concept, this requires greater clarity. A further thought is also needed as to the relationship with past, as well as future generations – and what the collective digital memory will be in the future.

**Addressing the challenges of harming the dead & dealing with grief**

Longstanding philosophical problems revolve around the idea of having any duties or harm to the dead. Whilst convincing philosophical arguments have seemingly been developed in this area, there is a disconnect here with how we encounter the dead. Some actions may feel instinctively intrusive or harmful to the dead, but whether this should be translated into law is another matter. The relational harm to surviving family members and others, along with the chilling effect that may occur to the dead themselves (pre-mortem), are also of relevance. There are further implications in terms of information and assets left behind, and further discussions to be had in this area.

Simultaneously, there needs to be an acknowledgement that there is not an ‘ideal’ way to grieve, nor can there be adherence to the notion that tech can help or hinder the process, with
a more nuanced understanding beneficial to all. Whilst several platforms have introduced memorialisation and legacy features, the appropriateness and effectiveness of these can be questioned. Should such functions lie within the responsibilities of service providers/platforms, which serve to provide constant reminders and potential tension between posthumous privacy and commemoration? During their lifetime, people tend to curate their digital presence, but to what extent can this be extended post-mortem? Should there be a role here for the right to be forgotten, and does de-linking go far enough? The applicability of temporal decay is also of relevance – does, or should this apply online, or is the nature of digitalisation such that digital remains can live on beyond physical means?

The dead living on

A recurrent theme, related to the idea of memory, was the potential for the dead to “live on” beyond death. Whilst the private (self-conscious) self arguably disappears on death, the public self (objective manifestation, ‘informational body’) remains. These complexities also mean that there are real implications for the living, in needing to have regard to the dead, who continue to “live on” alongside the living, with a digital embodiment a part of how we encounter each other in everyday life. At stake is not only memories, but the relationship with those still alive – what the dead leaves behind impacts upon the living, and the matter of access need to be separated from archiving, both being conceptually different things. A further consequence is that the data of the dead cannot be treated as independent of the living, and until the web reaches a greater level of decentralisation, more effective data portability or clearer ownership over data, this is unlikely to change. Digital re-uses which see the convergence of technology such as animations, deepfakes, chatbots and avatars raise difficult questions about their legal and other nature and how to build layers of engagement between the physical body and such re-uses. On the one hand, these can be seen as a form of ‘frozen self’ (as the person as they were until the time of death), albeit without human agency or autonomy which are otherwise integral to our legal or political understanding of personhood. On the other, they may be understood as a form of interactive photograph/video/robot and in that sense morally and legally less significant Ethical debates can become particularly complex when approached from a historical/archival perspective – e.g. holograms created of Holocaust survivors to tell ‘their’ story, as opposed to those created for commercial/entertainment purposes.

Suggestions/actions

1. Digital assets to be characterised in law as property, where appropriate

Whilst the nature of digital assets remains in a state of flux, if patrimonial assets, such as digital currency and copyright were to be viewed as property, this would be a “quick fix” to address some of the challenges faced, particularly in relation to accessing data after the death of a loved one – e.g. to access photographs stored on a cloud service. Current access to such platforms has proved to be a matter lacking clarity and difficult to obtain (for example to access Apple services requires a Court Order), so to consider such assets as property would enable executor access.

2. Conceptualising digital remains and digital legacy more clearly in theory and law

Related to the above point, a clearer understanding of the concepts of digital remains and digital legacy in both theory and law would help in this area – for example, an understanding that not
everything is digital assets or property, along with a greater comprehension of information that is highly personal, and how these areas should be treated.

3. **Greater clarity as to how personal representatives can access data after death**

From a practical perspective, greater clarity/simplicity in law for personal representatives to access (or potentially delete/transport) data from platforms after death would be helpful. The US Revised Uniform Fiduciary Access to Digital Assets Act (RUFADA) provides some potential solutions, but there are further discussions to be had revolving around the relevant rights of users and social concerns.

4. **Technological options available for users to plan for the disposition and protection of digital remains (not just digital assets)**

In recognition of the current options available to users to forward plan for their digital remains on death, more options are needed (presently they are few and binary - with the potential to delete/preserve). Individuals wish to filter assets for transmission, deletion, or preservation to a variety of different people, including non-traditional heirs such as friends, but death causes a radical context collapse. Thought needs to be given to ways in which a more selective way of passing on information and assets can be effected, including using technological mechanisms such as intelligent agents to interpret the wishes of the deceased.

5. **Eliminating the taboo**

In general, there seems to be a profound reluctance to discuss or make plans for the personal management of digital remains/digital legacy. Indeed, research suggests that the privacy paradox – the gap between users’ stated preferences to protect their privacy and their actual behaviour – extends to the consideration of post-mortem privacy. Furthermore, even in scenarios where users might be interested in sharing their personal data posthumously, they do often? not make adequate provisions to do so.

Practitioner experience has also demonstrated that it remains an onerous and costly process for heirs to get control of certain digital assets, such as access to iCloud storage. It is therefore necessary to break down the taboo surrounding death online and make this conversation both relatable and equitable, so people are able to engage and plan for how their data is managed post-mortem. Often whether these discussions happen will be dependent on the knowledge of the family lawyer, with triggering events such as marriage, having children or nearing death spawning such conversations. More accessible guidance and toolkits will be required for this and different societal institutions – such as libraries – might provide safe learning spaces to engage with these issues, along with developing guidance and awareness for the legal profession. A further question relates to whether platforms should have a duty to provide nudges in respect of starting such discussions.

6. **Education/awareness**

As discussed above, education and awareness of such matters is an important step forward, with the potential that within 50 years there could be more people dead than alive on social media platforms. Data after death is a difficult topic to broach, but an area where existing guidance is lacking and starting conversations now would help to resolve problems post-
mortem, particularly as in death, a radical context collapse happens. Here, there is also a role
for nudges, particularly on social media platforms, to serve as reminders to legacy
requests/access in the future. Greater awareness is also important from a wider societal/public
interest perspective, inter alia in terms of preventing cybercrime which can be facilitated
through using a deceased person’s data and accounts.

7. Greater transparency required

Some challenges had been encountered in accessing and sharing data from platforms, with an
urgent need for greater transparency of platforms in enabling this important research to take
place. These revolve around:

a. Access to transparency reports – to understand what platforms are doing in this
area, and the user engagement with various tools provided. Researchers should
be able to access information about the uptake of services such as Facebook
Legacy Contacts and Google Inactive Account Manager (e.g. akin to copyright
takedown notice reports).

b. Clarity as to what platforms do or enable with users’ accounts and data
after death – requiring more transparency in respect of Terms of Service and
how data is dealt with. Research carried out by the Queen Mary University
‘Beyond the Clouds: What Happens to Data Stored in the Cloud after you Die?’
had found that 75% of contracts did not address what happened when the user
dies.

8. Digital archives and public interest

Maintaining public interest in digital archives as a ‘global public good’ – The wealth of data
amassed on platforms should not be owned and effectively locked up by private companies
after death – with a strong public interest for future generations in these archives.

This position paper is a result of the “Emerging Technologies, Privacy Law and the Dead”
workshop, funded by the Modern Law Review. The workshop was facilitated by members of
the Leverhulme-funded research group “Modern Technologies, Privacy Law and the Dead”,
which include Dr Edina Harbinja and Dr Marisa McVey at Aston University, Dr Remigius N.
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This document is based on discussions and suggestions from a virtual workshop held on 19
April 2021.

The workshop included a range of contributors and other invited participants representing
academia, practitioners and policymakers.
Chairing the discussions:

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- Prof Maggie-Savin Baden, University of Worcester
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The four sessions of the workshop focused on:

1. Historical developments, the current state of the law and regulation

2. The impact of technology on digital privacy and individual and collective memories

3. The theoretical and social justifications for the protection of memory and privacy of a person after death; and

4. Conclusions and recommendations on emerging law and technology for the protection of post-mortem privacy and personality

This position paper was prepared by Dr Marisa McVey and Dr Holly Hancock.