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The German *Bundesgerichtshof*'s Decision on Access to the Facebook Account of Your Deceased Child from a Belgian Law Point of View

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1. Introduction

1. The 'new gold'[1], the 'oil of the digital era'[2] and 'the raw material of the 21st century'.[3] These are just a few of the many nicknames that were given to (big) data in the past decade, mainly triggered by the jet-propelled growth of their economic and commercial value. That growth has faced the law, which finds itself in a constant struggle to keep up with rapid and seemingly never ending technological evolutions, with a plethora of issues and challenges. How can 'new' phenomena like e-commerce, online platforms and digital data as valuable business assets be fitted in legal rules and principles, the majority of which were developed with face-to-face contracts about physical services and real estate, movables and claims in mind? As far as private law is concerned, this issue is well up on the list of pressing issues lawyers and policy makers have agonized over and still agonize over today, as is evidenced by the German *Bundesgerichtshof*'s decision of 12 July 2018.

2. For two reasons this decision is a good example of the situation I have just described. Firstly, it brings to the fore the need to crystalize the (private law) position of members of social networks and online platforms. What (type of) rights and obligations do members derive from their contract with Facebook? Secondly, the decision illustrates how the aforementioned technological and digital evolutions have caused other branches of law, such as human rights law and privacy and data protection law, to put extra pressure on private law. Today personal data are spread in such an easy manner and at such a high speed that the demand for protection of the individual is very strong. Inevitably that protection comes with a

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1 See *Press Conference on Open Data Strategy*, given by then EU Commissioner for Digital Agenda Neelie Kroes on 12 Dec. 2011, available on https://europa.eu/rapid/press-release_SPEECH-11-872_en.htm (accessed 1 Dec.. 2018).

2 'The world's most valuable resource is no longer oil, but data', *The Economist* 2017, https://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource (accessed 1 Dec.. 2018).

3 German Bundeskanzlerin Angela Merkel in her speech at the 2018 World Economic Forum in Davos, available on https://www.bundeskanzlerin.de/Content/EN/Reden/2018/2018-01-24-bk-merkel-davos_en.html.(accessed 1 Dec.. 2018).

price, which also makes itself felt in the field of private law. One could for instance think of the obligations the General Data Protection Regulation (hereafter: GDPR) imposes on contracting parties.

3. In this article[4], the German Bundesgerichtshof's decision of 12 July 2018 is scrutinized from a Belgian law point of view. The discussion is largely structured along the line of thought that the *Bundesgerichtshof* has followed in its decision, which, roughly speaking, is composed of two parts. The first part consists of the approval of the rights that the belated daughter derived from her contract with Facebook as inheritable rights. In the second part, the *Bundesgerichtshof* checks, and dismisses, a number of legal grounds, mainly of a human rights and data protection law nature, that according to Facebook prevent the parents from being granted access to their daughter's Facebook account. These two parts are also the backbone of this article.

2. *Rights* v. *Digital Content*

4. Before embarking on the discussion of the German *Bundesgerichtshof*'s decision, it is important to shed some light on what the court has decided and, equally important, what it has not decided. Roughly speaking, the court has decided that the parents must be granted access to their daughter's Facebook account because they have inherited the rights their daughter derived from her contract with Facebook, including the right to access the account. The court has not decided that the parents must be granted access because they have inherited the (digital) content of their daughter's Facebook account or, as the Berlin Landesgericht has noted[5], the server on which that content is stored. As a result, the scope of the decision is limited.

5. The difference between both decisions is not to be disregarded, in particular from a private law point of view. As will be elaborated on below, under Belgian law, and with a few exceptions, rights are inheritable. Put differently, a deceased's rights, including his or her contractual rights, become the property of his heirs. That is because under Belgian law contractual rights are goods (*goederen/des biens*) and only goods are inherited by a deceased's heirs. Digital content is not a good under Belgian law, because only material objects and (patrimonial) rights are considered goods, and digital content, and digital data in general, does not come under either of these categories.[6]

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4 This article is up to date till 1 Dec. 2018.

5 Landesgericht Berlin 17 December 2015 (20 O 172/15), No. 23, http://www.gerichtsentscheidungen.berlin-brandenburg.de (accessed 1 Dec.. 2018).

6 See K.Swinnen, 'De inpassing van digitale producten in het Belgisch privaatrecht', in *Vereniging voor de vergelijkende studie van het recht van België en Nederland. Preadviezen 2017* (the Hague: Boom juridisch 2017), pp (247) at 250-252.

The rights one has in relation to digital data, on the other hand, are goods and in that capacity inheritable. The same goes for the server on which digital content is stored, which is a material object and hence comes under the first category of goods. That is, however, of no avail to the parents in the case at issue, both under Belgian and German law, because the server on which their daughter's digital content is stored did not belong to their daughter and as a result is not part of her estate.

3. The Inheritability of the Girl's Facebook Rights

3.1 Heirs Do not Inherit All of the Deceased's Rights

6. Article 724 of the Belgian Civil Code (hereafter: CC) provides that by law the deceased's heirs are put in possession of his or her goods, rights and claims. It must be noted that the word 'possession' in this article lacks accuracy, because the heirs do not become mere possessors of these assets: they acquire full ownership of them, by means of substitution to be precise.[7]

7. For the purpose of this article, the fact that the deceased's 'rights' are inherited by his or her heirs deserves particular attention. Although Article 724 CC keeps mum about any restriction, it is beyond doubt that not all of the deceased's rights are acquired by his or her heirs.

For instance, rights that were established for the deceased's lifetime only are not inherited; they cease to exist upon the deceased's death.[8] Whether a right was established for the deceased's lifetime only, depends (among others) on the contracting parties' intent and on the law. In the former case, the right ceases to exist upon death of the designated contracting party, simply because that is what the parties have agreed upon. In the latter case, the right ceases to exist because that is what the law dictates. A common example is the right of usufruct, which, according to Article 617 CC, is terminated by the usufructuary's death. In addition to the aforementioned rights,

also rights that the deceased derives from a so-called '*intuitu personae* contract' are not inherited by his

or her heirs. These rights are terminated by death and as a result are no part of his or her estate. The same is often said of a person's so-called 'extra-patrimonial' rights.

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7 W. Pintens, Ch. Declerck, J. Du Mongh & K. Vanwinckelen, *Familiaal vermogensrecht* (Antwerp: Intersentia 2010), p 718.

8 See e.g. W. Pintens, Ch. Declerck, J. Du Mongh & K. Vanwinckelen, *Familiaal vermogensrecht*, p 718; M. Puelinckx-Coene, *VI. Erfrecht – Deel 1*, in *Beginselen van Belgisch Privaatrecht* (Mechelen: Kluwer 2011), p 8.

8. Both rights derived from an *intuitu personae* contract and rights established for the deceased's lifetime only are elaborated on in the following paragraphs of this chapter. Extra-patrimonial rights are addressed in the third chapter of this article (infra 23-24). Rules and provisions of criminal law are not dealt with.

3.2 Rights Established for the Deceased's Lifetime Only

9. As the girl has joined Facebook in January 2011, Facebook's then Terms of Service, at the time called '*Statement of rights and responsibilities*', must be looked at. It cannot be inferred from the *Bundesgerichtshof*'s decision and the preceding decisions whether changes to these Terms of Service were made, and accepted by the girl, in the period between January 2011 and the time of her death. As the then Terms of Service are no longer available, we have to rely on what the aforementioned courts have said about them in their decisions. In paragraph 25 of the *Bundesgerichtshof* decision, it is stated that Facebook's then Terms of Service do not contain a provision on the inheritability (*Vererbbarkeit*) of the contract. Therefore I assume that the contract between the girl and Facebook did not contain a specific provision on the inheritability of the contract and the rights the parties derive from it.

10. Facebook has argued that its rules on so-called 'memorialized accounts' prevent the girl's rights from being inherited by her heirs. Upon notification of the death of a user, Facebook transforms his or her account into a memorialized account. According to Facebook's current help page, one of the features of a memorialized account is that no one can log into the account. The German *Bundesgerichtshof* has dismissed the impact of Facebook's rules on memorialized accounts on the inheritability of the girl's rights under the contract. It has held (among others) that Facebook's rules on memorialized accounts do not apply to the case as they were no part of its Terms of Service. Apparently these rules were not mentioned nor referred to in Facebook's then Terms of Service and only figured on the platform's help page.

11. What about Belgian law? Are the deceased girl's contractual rights considered rights established for her lifetime only because of Facebook's rules on memorialized accounts? Article 1108 CC provides that there can be no valid contract without the contracting parties' consent.[9] The meaning of that provision is twofold. Firstly, it makes clear that consent is a prerequisite for the validity of a contract. Secondly, it follows from Article 1108 CC Belgium that a contracting party is only bound by the

9 In principle, minors lack the capacity to perform legal acts (Art. 1124 CC), which includes the capacity to contract. It is, however, generally accepted that there are some exceptions to this rule, such as opening a savings account and performing day-to-day legal acts. See e.g., S. Stijns, *Verbintenissenrecht - I* (Bruges: die Keure 2005), p 94-95. Joining Facebook can be said to fall under that category.

contractual provisions he or she has consented to. As consent is a prerequisite for the existence and validity of a contract, there is simply no (valid) contract with regard to other provisions.[10]

Hence, the question to be answered under Belgian law is whether the deceased girl has consented, or can be said to have consented, to Facebook's rules on memorialized accounts. On the sign up page, there is a disclaimer stating that if someone clicks the sign up button, he or she is considered to agree to Facebook's Terms of Service, which in fact are the general terms and conditions Facebook wants to govern the contracts with its users. The disclaimer also contains a clickable link to the Terms of Service. These terms contain a (rather general) provision on memorialized accounts, which in its turn contains a clickable link to Facebook's help page, where more information about these accounts is provided. Judging from what the German *Bundesgerichtshof* has held, that is different from how things were done when the deceased girl signed up for Facebook. At that time, the only way to find out about Facebook's rules on memorialized accounts was to browse through Facebook's help page. I am not certain about Facebook's 2011 sign up page, but on its current sign up page a link (in small print) to the help page can be clicked at the very bottom of the page.

12. If one darts a glance at the case presented to the German *Bundesgerichtshof*, the question whether the rules on memorialized accounts are part of the contract seems to be an easy one. These rules did not figure and were not mentioned or referred to in Facebook's then Terms of Service, so they were not among the provisions Facebook had submitted to the girl for approval as the legal framework it wanted their contract to be governed by. Put differently, these rules were not 'introduced into the contractual field'.[11] The disclaimer displayed above the sign up button reads that by clicking that button the user agrees to Facebook's Terms of Service. At the time the deceased girl clicked the button, the rules on memorialized accounts were no part of these Terms of Service, so she cannot be bound by them just because she has clicked the button. In other words: there was no consent.

13. The same conclusion is reached when we take a closer look at the case and apply the rules on general terms and conditions to it. In Belgian contract law, two words are key in the field of general terms and conditions: notice and acceptance.[12]

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10 See also B. De Groote, 'Contracteren in een elektronische omgeving: algemene voorwaarden', in M. Dambre & P. Lecocq (eds), *Rechtskroniek voor de vrede- en politierechters* (Bruges: die Keure 2018), p (199) at 205.

11 This wording (*contractuele veld/le champ contractuel*) is used in for instance Court of Appeal (*Hof van beroep/Cours d'appel*) Liège 25 January 2016, *T. Verz. (Tijdschrift voor verzekeringen*) 2016, p (461) at 462; Court of Appeal Liège 29 June 2015, *T. Verz.* 2016, p 349; Court of Appeal Liège 29 January 2013, *T. Verz.* 2014, p (80) at 81.

12 See e.g. Court of Appeal Liège 19 December 2013, *TBBR (Tijdschrift voor Belgisch Burgerlijk Recht)* 2018, p (432) at 434; Court of Appeal Liège 29 January 2013, *T. Verz.* 2014, p (80) at

That is in particular true when the other party is a consumer. Under the first requirement, the general terms and conditions must have come to the notice of the consumer or the consumer must at least have had the opportunity to take note of them, the burden of proof of which rests with the party that wants its general terms and conditions to apply to the contract.[13] That requires the latter to take certain actions. For instance, it was held by a Belgian tribunal that if a contract is about to be concluded electronically and the consumer is invited to accept the general terms and conditions by ticking a box on the online form, the other party is obliged (1) to provide the consumer with a link that clearly and explicitly refers to a page with the complete general terms and conditions or to a file with that content and (2) to make sure that the contract cannot be concluded if the aforementioned box is not ticked.[14] In the present case, Facebook had not lived up to this rule, because the link it had provided the girl with (right above the sign up button) did not refer to the rules on memorialized accounts and because the link through which these rules could be accessed, entitled 'Help', did not explicitly refer to these rules.

14. As far as contracts concluded on the internet are concerned, regard must also be had at specific rules. These rules are primarily of a consumer protection law nature and are the result of the transposition in Belgian law of the EU Directive on electronic commerce.[15] As the deceased girl was a natural person who acted for purposes other than trade, business, craftsman's or professional activities (Art. I.1, 2° of the Belgian Code of Economic Law (hereafter: CEL)), she was a consumer and hence protected by the CEL's provisions, including Article VI.45 CEL on the information a company must provide a consumer with before concluding a so-called 'long distance contract'.

It looks like the consumer is not required to pay a price in money for the services delivered by the company in order to be protected by this provision (as well

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81; Justice of the Peace (*Vredegerecht/Juge de paix*) Fontaine-l'Evêque 15 February 2016, *JLMB* (*Jurisprudence de Liège, Mons et Bruxelles*) 2017, p (332) at 333. It looks like this will also be codified in the new Book 5 of the Belgian Civil Code, in Art. 5.27 to be precise. That provision explicitly states that in order for general terms to be included in a contract, the other party must have taken note of (or must have had the possibility to do so) and accepted them. The draft for the new Book 5 has not yet been adopted by the Belgian parliament and is available on https://justitie.belgium.be/sites/default/files/ontwerp_van_wet_tot_invoering_van_een_burgerlijk_wetboek_en_tot_invoeging_van_boek_5_verbintenissen_.pdf (accessed 1 Dec.. 2018).

13 About the burden of proof, see among others: Court of Appeal Liège 19 December 2013, *TBBR* 2018, p (432) at 434; Court of Appeal Liège 29 January 2013, *T. Verz.* 2014, p (80) at 81; Justice of the Peace Fontaine-l'Evêque 15 February 2016, *JLMB* 2017, p (332) at 333.

14 Justice of the Peace Fontaine-l'Evêque 15 February 2016, *JLMB* 2017, pp (332) at 333–334.

15 In full: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

as by Art. VI.46 CEL). That can be inferred from the opening words of Article VI.46, §2, which read that '*if* the long distance contract imposes on the consumer a duty to pay'[16], and the absence of the word 'service contract' in the aforementioned article, in the definition of which a duty to pay does figure (Art. I.8, 34° CEL). Some Belgian authors also refer to Article 2 of the EU Directive on electronic commerce, where the word 'information society services' is defined as '*any service normally provided for remuneration, at a distance, by electronic means [...]*'[17], in which definition the use of the word 'normally' is important. Finally, on a more general note, it must be remarked that Facebook does not get nothing in return for the services it provides. According to its Terms of Service, a user grants Facebook (among others) '*a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings).*'

15. Article VI.45 CEL stipulates that the consumer must be provided, among others, with information about the main characteristics of the services (Art. VI.45. §1, 1° CEL), which seems to be relevant to the case at issue. Granting them access to their account is among the services Facebook delivers to its users. As we have seen earlier, memorialized accounts cannot be accessed, which means that Facebook no longer delivers the aforementioned service. In my opinion, that is an important ('main') characteristic of the service.

Article VI.46 adds that the information shall be provided in a clear and comprehensible manner. It is accepted that a company complies with the latter provision if it makes the information available on its website.[18] The company is not required to publish the information on the same page as the one where the contract is concluded, in this case the page with the sign up button.[19] It is, on the other hand, required that the relevant page can be accessed by clicking a hyperlink.[20] So far, so good for Facebook.

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16 My italics.

17 Refer to this provision to answer the question whether it is required that the consumer pays a price in order to be protected by consumer law: E. Wauters, E. Lievens & P. Valcke, 'Ik ga akkoord. Maar waarmee? Sociale netwerksites en hun algemene voorwaarden', in E. Lievens, E. Wauters & P. Valcke (eds), *Sociale media anno 2015. Actuele juridische aspecten* (Antwerp: Intersentia 2015), pp (125) at 131-132.

18 See e.g. F. Debusseré & J. Dumortier, 'Distributie via nieuwe informatietechnologieën: de elektronische overeenkomst en de overeenkomst op afstand', in *Bestendig handboek distributierecht* (Antwerp: Kluwer 2010), p (1) at 37; R. Steennot, 'Artikel VI. WER', in *Artikelsgewijze commentaar handels- en economisch recht* (Mechelen: Wolters Kluwer 2014), p (161) at 165.

19 R. Steennot, in *Artikelsgewijze commentaar handels- en economisch recht*, p (161) at 165.

20 President Commercial Tribunal (*Voorzitter rechtbank van koophandel/Président du tribunal de commerce*) Brussels 18 May 2001, *Jaarboek Handelspraktijken 2001*, 375; R. Steennot, in *Artikelsgewijze commentaar handels- en economisch recht*, p (161) at 165.

However, it is learnt that a company is not compliant with Article VI.46 CEL if the information it must provide the consumer with is spread over multiple pages, demanding the consumer to check multiple pages in order to get all information.[21] That is exactly how things were done at the time the deceased girl signed up for Facebook: the general terms and services where displayed on one webpage, the rules on memorialized accounts on another (and remote) one. Article XV.83, 8° CEL (*iuncto* Art. XV.70 CEL) provides that violations of the Articles VI.45 and VI.46 CEL are punishable by fine ranging from 26 to 10.000 euro. Moreover, and here the relevance for the parents kicks in, rules of general contract law, in particular the rules on (the requirement of) full consent (Art. 1109 ff. CC), provide the consumer in such a case with the possibility to have the contract nullified.[22] For instance, one could try to argue that the girl has erred (*dwaling/l'erreur*) when entering into the agreement with Facebook, although in that case it is required that the girl would not have concluded the contract if she had known about the rules on memorialized accounts[23], which is rather unlikely. As the nullification of the contract is not what the deceased girl's parents aim for, provided they have inherited their daughter's right to have the contract nullified in the first place (infra 23 ff), and also goes beyond what is necessary to set things right, the court can limit the nullification of the contract to the rules about memorialized accounts.[24] It must be emphasized that there is only a remote chance that a Belgian court would get down to this, because, as I have demonstrated above (supra 12-13), it will most likely decide that the rules on memorialized accounts do not apply to the contract at all, which renders the partial nullification of the contract superfluous and even impossible.

3.3. Intuitu Personae Contracts

16. The German *Bundesgerichtshof* has dwelled on the issue of whether it follows from the highly personal character of the parties' obligations under the contract that the girl's rights cannot be inherited. That is very reminiscent of the Belgian law doctrine of *intuitu personae* contracts. These contracts are governed by

21 R. Steennot, in *Artikelsgewijze commentaar handels- en economisch recht*, p (161) at 165.

22 See B. Keirsbilck, 'Overeenkomsten op afstand en e-commerce', in J. Roessems (ed.) *Transacties en geschillenbeslechting in het Wetboek van Economisch Recht* (Antwerpen: Intersentia 2016), p (35) at 46; E. Terryn, 'Overeenkomsten op afstand', *TPR (Tijdschrift voor Privaatrecht)* 2015, p (1610) at 1632.

23 See among others Court of Cassation (*Hof van Cassatie/Cours de cassation)* 27 October 1995, *Arr. Cass. (Arresten Cassatie)* 1995, p 920; Court of Cassation 8 May 1905, *Pas. (Pasicrisie)* 1905, p 214; Court of Appeal Mons 3 June 2014, *JLMB* 2017, p 14; S. Stijns, *Verbintenissenrecht – I*, p 88.

24 About the possibility for the courts to limit the nullification of a contract, called 'partial nullification' ('*partiële nietigheid*'/'*la nullité partielle*'), see among others S. Stijns, *Verbintenissenrecht – I*, pp 131-133; W. van Gerven & A. Van Oevelen, *Verbintenissenrecht* (Leuven: Acco 2015), p 149.

particular rules of private law, one of which is that they are terminated by the death of the contracting party in consideration of which the contract was concluded.[25]

17. For quite a long time, the doctrine of *intuitu personae* contract has been pretty straightforward. If one of the contracting parties has entered into the contract because the other party masters a specific skill, and for that reason only or in the very first place, the contract is considered an *intuitu personae* contract. A common example of this type of *intuitu personae* contract is the contract a patron has concluded with a painter to have his portrait painted. Also contracts where the person of the other party was the main reason for a contracting party to enter into the contract, such as the contract of gift, have always been considered *intuitu personae* contracts.

Over time, the doctrine of *intuitu personae* contracts has developed. Today also contracts that were concluded because a contracting party meets certain requirements (e.g. he is creditworthy or has a clear financial and business plan) or has certain qualities that the other party values, can be *intuitu personae* contracts. Examples of these contracts, sometimes called '*intuitu personae* contracts *sensu lato*'[26] or 'objective *intuitu personae* contracts'[27], are credit agreements[28] and running account contracts. In principle, the rules that apply to these *intuitu personae* contracts are the same, but exceptions might apply and some of the effects of these rules might be mitigated. For instance, it is said that these contracts can survive the bank's or client's merger with another company[29].

18. It follows from the foregoing that the parents of the deceased girl do not or, in the case of an objective *sui generis* contract, are unlikely to inherit the rights their daughter derived from the contract with Facebook if the latter contract is an *intuitu personae* contract, provided that the *intuitu personae* aspect of the contract concerns the girl (or both parties). In other words, in order for the daughter's rights under the contract to cease to exist as a result of the *intuitu personae* character of the contract, it is required that Facebook has entered into the agreement because of

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25 See among others Court of Appeal Mons 14 January 1997, *RCJB (Revue critique de jurisprudence belge)* 2001, p 14; Justice of the Peace Verviers 8 October 2012, *T. Vred (Tijdschrift van de Vrederechters*) 2014, p 258; H. De Page & P. Van Ommeslaghe, *Traité de droit civil belge – III-2* (Brussels: Bruylant 2013), nos. 664–665; S. Stijns, *Verbintenissenrecht – I*, p 27; P. Wéry, *Droit des obligations – II* (Brussel: Larcier 2016), p 559.

26 See e.g. H. De Page & P. Van Ommeslaghe, *Traité de droit civil belge – II-1* (Brussels: Bruylant 2013), no. 70.

27 F. George & P. Bazier, 'Faillite et intuitus personae: un régime à définir?', *TBBR* 2017, p (3) at 10–11 (and the references in their footnotes).

28 See e.g. Court of Appeal Mons 17 January 1994, *JLMB* 1994, p 1032; K. Andries, 'Intuitu personae-clausules', in G-L. Ballon, H. De Decker, V. Sagaert, E. Terryn, B. Tilleman & A.-L. Verbeke (eds), *Contractuele clausules. Gemeenrechtelijke clausules – I* (Antwerp: Intersentia 2013), p (333) at 339; S. Stijns, *Verbintenissenrecht – I*, p 26.

29 H. De Page & P. Van Ommeslaghe, *Traité de droit civil belge – II-1*, no. 71.

the girl's person or special skills or because she meets certain requirements or has certain qualities.

That requirement is not fulfilled. When someone signs up for Facebook, no identity check is carried out. The new user is not required to present his or her passport or any other official document and the veracity of the personal data he or she enters is not checked. In practice, there is nothing that prevents the new user from using a random name as his or her account name, although Facebook's current Terms of Service state that users must use the same name as they use in everyday life and provide accurate information about themselves. That means that often Facebook does not know whom it is actually entering into an agreement with. Taking into account how easy it is to sign up for Facebook, one could say that knowing who its new users actually are, is not Facebook's top priority. If it does not really matter who the other party to the contract really is, it certainly does not matter what that party's person, skills or qualities look like.

That conclusion would not be different if Facebook carried out identity checks or did not accept fake accounts. The mere fact that a contracting party wants to know who the other party really is, does not render the contract an *intuitu personae* contract. Much more is needed, such as research into the person of the potential new user, his skills and qualities, his reputation, etc. and, on the side of Facebook, the determination to only enter into an agreement with the new user if the aforementioned aspects of the new user meet its standards or expectations. Such research and determination are absent in the present case, so the contract between Facebook and its users is no*intuitu personae* contract. Likewise, the German *Bundesgerichtshof*, although it has not mentioned the concept of *intuitu personae* contracts, has held that the parties' obligations (and, implicitly, also rights) under the contract '*sind nicht höchstpersönlicher Natur.*'[30]

3.4. Conclusion

19. Under Belgian law, the rights that the deceased girl derived from her contract with Facebook are inheritable rights. In its decision the German *Bundesgerichtshof* has come to the same conclusion with regard to their inheritability under German law. As I have demonstrated above, these rights were not established for the girl's lifetime only as there is no legal or contractual provision, at least not one that was accepted by the deceased girl, that provides otherwise. These rights are not derived from an *intuitu personae* contract either, because a new user's person, skills or qualities are no things Facebook makes the latter's membership dependent on.

30 Para. 35, first sentence.

4. Some Potential Obstacles

4.1. Introduction

20. The mere fact that the girl's rights under the contract with Facebook are inheritable does not necessarily mean that her parents must be granted access to her Facebook account. There might be provisions that prevent them from being granted access or that, at least, complicate things. Given the specific facts of the case presented to the German *Bundesgerichtshof*, particular attention must be paid to provisions of privacy and data protection law as well as to provisions of human rights law and constitutional law.

4.2. The Electronic Communications Act (ECA) of 13 June 2005

21. The Electronic Communications Act of 13 June 2005[31] (hereafter: ECA) is the result of the transposition in Belgian law of a number of EU directives in the field of electronic communication.[32] Article 124, 1° ECA states that without the permission of all parties (directly or indirectly) involved, no one shall intentionally take note of the existence of information of any kind that has been sent electronically and that was not intended for him personally. Breaches of this provision are punishable by fine ranging from 50 euro to 50.000 euro (Art. 145, § 1 ECA).

The question arises whether this provision forbids the parents to take note of the (existence of the) information their daughter has shared with or sent to other Facebook users as well as of the information the latter have shared with or sent to their daughter.

22. It can be inferred from the definitions in Article 2 ECA that the aforementioned information is sent electronically and hence covered by the ECA.[33] A more pressing issue is whether there is permission of all parties involved to take note of the communication that is accessible through the deceased girl's Facebook

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31 In Dutch: Wet van 13 juni 2005 betreffende de elektronische communicatie, *BS (Belgisch Staatsblad)* 20 June 2005, p 28070.

32 See Art. 1 ECA.

33 This was confirmed in e.g. Labor Court (*Arbeidshof/Cours du travail*) Brussels 3 September 2013, *Oriëntatie* 2013, p 231. See with regard to information sent by email (among others): Court of Cassation 1 October 2009, *I.R.D.I. (Intellectuele Rechten – Droits intellectuels*) 2010, p 339; Labor Court Brussels 17 January 2017, *Oriëntatie* 2017, p 27; Labor Court Brussels 7 February 2013, *Oriëntatie* 2013, p 131; President Commercial Tribunal Antwerp 3 April 2014, *Jaarboek Marktpraktijken* 2014, p 832; President Commercial Tribunal Tongeren 26 September 2006, *Jaarboek Handelspraktijken & Mededinging* 2006, p 607. See also H. Deckers, case note under Labor Tribunal (*Arbeidsrechtbank/Tribunal du travail*) Namur 10 January 2011, *Soc. Kron. (Sociaalrechtelijke Kronieken)* 2013, p (114) at 115; J. Dumortier, 'Internet op het werk: controlerechten van de werkgever', *Oriëntatie* 2000, p (35) at 37 (who wrote this with regard to very similar provisions that applied before ECA's predecessor was introduced).

account. Have the girl's conversation partners given permission by sending information to her Facebook account? And do the parents need their daughter's (*ante mortem*) permission, or are they the ones to give permission now as they have inherited their daughter's rights?

As far as I can judge, current Belgian law does not hold ready-made answers to these questions, the main reason being that the Belgian courts and tribunals have not yet had to rule on these specific issues. The absence of ready-made answers is also due to the fact that Belgian courts and tribunals have found differently with regard to similar issues (e.g. the issue of access to a deceased's health data – infra 23-24) as well as with regard to how Article 124 ECA is to be applied (infra 25).

23. I have discussed earlier that under Belgian Law the deceased's rights are inherited by his or her heirs (supra 19). However, not all of his or her rights are inherited. According to legal doctrine, a person's so-called 'extra-patrimonial rights' (*extrapatrimoniale rechten/les droits extrapatrimoniaux)* are not inherited by his or her heirs[34], although a more subtle approach is advocated by a growing number of scholars.[35] Rights that relate to the person's legal status, such as the right to file for divorce and the right to acknowledge a child, make up the main category of these rights.

The 'problem' is that not all extra-patrimonial rights are as manifestly related to someone's person as the examples I have just mentioned. One could think of certain rights a person derives from privacy and data protection law regulations. For instance, it was decided that the right to confidentiality of the mail is inherited by a deceased's heir.[36] Likewise, the Tribunal of Brussels has held that after his death a patient's right to access to his health data can be exercised by his heirs. According to the tribunal, the heirs are not to be considered third parties as meant by the then Privacy and Data Protection Act[37] because they continue the deceased's personality.[38] That was also confirmed by the Minister of Justice in response to a question regarding the draft of the aforementioned act.[39]

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34 See about this, e.g., R. Barbaix, *Handboek familiaal vermogensrecht* (Antwerp: Intersentia 2018), p 396; W. Pintens, Ch. Declerck, J. Du Mongh & K. Vanwinckelen, *Familiaal vermogensrecht*, pp 720–721; M. Puelinckx-Coene, *VI. Erfrecht – Deel 1*, pp 9–14.

35 See e.g. E. Adriaens, 'Digitale nalatenschap. Terreinverkenning en wegmarkering', *NjW (Nieuw juridisch Weekblad)* 2015, p (218) at 229; Ch. Declerck, 'Hoog in « de wolken». De rechtszaak-Claus', *RW (Rechtskundig Weekblad)* 2011-12, p (1172) at 1174 (with regard to the moral rights that stem from a copyright); F. Swennen, 'Er is leven na de dood. Persoonlijkheidsrechten na overlijden', *TPR* 2013, p (1489) at 1546.

36 Tribunal Brussels 12 July 1955, *RW* 1955-56, column (1384) at 1386.

37 Full name (in Dutch): Wet van 8 december 1992 tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens, *BS* 18 March 1993, p 5801.

38 Tribunal Brussels 23 April 1999, *T. Gez. (Tijdschrift voor gezondheidsrecht*) 1999-00, p (353) at 355.

39 See *Ontwerp van wet tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens. Verslag namens de Commissie voor de Justitie uitgebracht door de heer*

24. Building on this reasoning, on the aforementioned decision with regard to the confidentiality of the mail and on the more subtle approach certain scholars take on the inheritability of extra-patrimonial rights[40], one could (try to) take the stand that also for the purpose of Article 124 ECA the heirs should be identified with the deceased, because that provision also aims at protecting a person's privacy and personal data[41], and that therefore the parents are now the ones to grant permission (to themselves).

It must be remarked, however, that with regard to the right of access to health data, there are (more) decisions where the court has decided otherwise.[42] Moreover, the Privacy and Data Protection Act's provisions on a patient's rights to access to his health data were changed in 2002.[43] Among others, the changes consisted of providing the patient's heirs with an individual right to access (subject to conditions), i.e. a right that is not inherited from the deceased, which could be understood as if they do not inherit the deceased's right to access.

As far as the deceased girl's permission is concerned, there is also a very different course her parents could try to take in a Belgian context. At the core of that course is the fact that in principle personal data protection is limited to a person's lifetime (infra 31). In the previous paragraph it was mentioned that Article 124 ECA is a provision of (data) protection law, so the parents could (try to) argue that their daughter's permission is not required as she is no longer protected by that provision.

25. Another issue under Article 124 ECA is the absence of permission on the side of the deceased girl's communication partners. Without the latter's consent, the parents cannot read the information shared with or sent to their daughter on Facebook as this inevitably involves taking note of the existence of that information as meant by Article 124 ECA.[44] The protection of the communication partners is

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Vandenberghe, 27 October 1992 (445-2), p 82, http://www.senate.be/lexdocs/S0533/S05330431.pdf (accessed 1 Dec.. 2018).

40 See the authors mentioned in fn. 35 and the authors they refer to.

41 See recitals 7 to 10 to Directive 2002/58/EC, which (partially) underlies the ECA, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0058&.

42 See e.g. Court of Appeal Brussels 7 June 1979, *Rev. not. belge (Revue du notariat belge*) 1982, p 43; Tribunal Brussels 25 March 2005, *RGAR (Revue Générale des Assurances et des Responsabilités)* 2007, no. 14219; Tribunal Liège 5 December 1988, *JLMB* 1990, p (506) at 508. See also *Advice No 18/2000 of 15 June 2000 issued by the (former) Belgian Privacy Commission*, p 3, which is available on https://www.gegevensbeschermingsautoriteit.be (accessed 1 Dec.. 2018).

43 They were changed by the Patient Rights Act of 22 August 2002. In Dutch: Wet van 22 augustus 2002 betreffende de rechten van de patiënt, *BS* 26 September 2002, p 43719.

44 See e.g. Court of Cassation 1 October 2009, *I.R.D.I.* 2010, p 399; J. Dumortier, *Oriëntatie* 2000, p (35) at 37; G. Remy, 'Bescherming van het privé-leven. Internet en elektronische briefwisseling', *Tijdschrift voor verzekeringen* 2013, p (163) at 166.

left untouched by the girl's death and obviously there are no rights the parents have inherited from these persons, so when trying to tackle this (missing) permission issue, the approaches I have just discussed are of no avail to the parents. There might, however, be another way out.

In a case where an employer wanted to use text messages deleted from a former employee's cell phone in court, it was held that the rule of Article 124 ECA is not an absolute one and must be applied in light of the principle of proportionality.[45] In order to assess whether the requirement of proportionality is fulfilled, the interests of the parties involved need to be balanced against each other. In the case at hand, the tribunal found the employer to have the right to investigate potentially harmful acts performed by its employees if it turns out that harm is about to be done or has already been done, which the tribunal has balanced against the privacy and data protection interests of the people involved in the text communications. Notwithstanding the negative outcome of the balancing test (in this specific case) and given the fact that the rights and interests of the parents carry more weight (than these of the aforementioned employer), this decision holds possibilities for the parents, because it calls for the interests of the communication partners to be balanced against their interests.

26. In its decision of 12 July 2018, the German *Bundesgerichtshof* has elaborated on the parents' interests. Most of these interests are of a patrimonial nature, although the parent's interest in finding out whether their daughter has committed suicide is obviously (also)of a very different nature. As far as the patrimonial interests are concerned, the *Bundesgerichtshof* has held that parties to a contract have a considerable interest in being able to exercise their main rights under the contract. Still according to the court, the parents also have an interest in knowing which specific rights and obligations are in their daughter's estate (as they have inherited the latter), information on which might be found on her Facebook account. On top of that, the parents have an interest in taking note of the information available on that account because the information might prove useful when defending themselves against a claim for damages filed by the driver of the subway train the girl was run over by.

The German *Bundesgerichtshof* has held that the privacy and data protection of interests of the daughter's communication partners do not outweigh the aforementioned interests of the parents, although it has done so in the specific context of determining whether the processing of the personal data on the girl's account would be lawful under Article 6 GDPR (infra 32 ff.). It is, however, hard to predict how a random Belgian court or tribunal would rule on this. It is at least equally hard

45 President Commercial Tribunal Antwerp 3 April 2014, *Jaarboek Marktpraktijken* 2014, p (832) at 836.

to predict whether that court or tribunal would balance the parties' interests at all, because the decisions in which a balancing test was carried are scarce.

27. Thinking out of the box, and taking a step away from article 124 ECA, it is also worth exploring the possibilities article 15 GDPR provides. Under that provision, a data subject has the right to obtain from the controller, in this case Facebook, access to his or her personal data that are processed by the latter. Given the limited space of this article and the fact that the GDPR is part of the law of all EU member states (and for that reason is not of a purely Belgian law nature), I will not elaborate on this, but the parents of the deceased girl could try to argue, based on the elements I have touched upon in the previous paragraphs, that they have inherited the right their daughter derives from article 15 GDPR.

4.3. The Confidentiality of the Mail

28. Article 29 of the Belgian Constitution (hereafter: BC) explicitly protects the confidentiality of the mail. Because the Articles 460 and 460*bis* of the Belgian Criminal Code penalize violations of the confidentiality of the mail, the latter also applies to the relationship between civilians and not only to the relationship between the state and civilians.[46]

29. Article 29 BC was written with paper mail in mind, which raises the question whether it also applies to electronic mail.[47] Opinions differ on this matter[48], with some Belgian courts and scholar applying Article 29 BC to electronic mail[49] and others refusing to do so.[50] As a result, it is doubtful whether a court would apply Article 29 BC to the case of Facebook and the deceased girl.

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46 J. Vande Lanotte & G. Goedertier, *Handboek Belgisch publiekrecht* (Bruges: die Keure 2010), pp 462–463.

47 It must be remarked that the confidentiality of the mail is also protected by Art. 8 of the European Convention on Human Rights, which provision was held to apply to emails in *Copland v. the United Kingdom* (European Court of Human Rights 3 April 2007, available on https://hudoc.echr.coe.int).

48 Explicitly about this lack of consensus: E. Lecroart, 'La prise de connaissance d'e-mails « en cours de transmission », un parcours sans fin?', *RDTI (Revue du droit des technologies de l'information)* 2014, p (19) at 24.

49 See e.g. (although not always explicitly) Court of Appeal Antwerp 21 April 2010, *T.Fam (Tijdschrift voor Familierecht)* 2011, p (223) at 225; Labor Tribunal Liège 3 September 2008, available on http://jure.juridat.just.fgov.be; Labor Tribunal Verviers 20 March 2002, *J.T.T. (Journal des tribunaux du travail),* p 183; J.-T.Debry, 'Le droit constitutionnel à l'épreuve de la société de l'information', *Act. dr. (Actualités du droit)* 2002, p (9) at 22; C. Van Roy, 'De machtiging tot afzonderlijke verblijfplaats fnuikt het recht op nieuwsgierigheid', *T.Fam.* 2011, p 227.

50 See e.g. Labor Court Liège 23 March 2004, *RRD (Revue régionale de droit)* 2004, p 73; Labor Court Liège 25 April 2002, *RRD (Revue régionale de droit)* 2002, p (266) at 271; A. Alen & K. Muylle, *Handboek van het Belgisch staatsrecht* (Mechelen: Kluwer 2011), p 932; J. Vande Lanotte

Moreover, at numerous occasions Belgian courts have held that the protection only extends to mail that was not yet received by the addressee.[51] The Facebook messages sent to and shared with the deceased girl during her lifetime were most likely received by the latter, which seems to imply that the (messages of the) girl's communication partners are not protected by Article 29 of the BC. I leave this to constitutional law specialists, but in my opinion the situation of the aforementioned messages is somewhat ambiguous. It is true that they were (most likely) received by the addressee, but it is equally true that they are also still in the power of the postal service, Facebook to be precise, and the constitutional protection is precisely about mail that is consigned to the postal service. Does that not justify the conclusion that Facebook is still bound by the confidentiality of the mail?

30. If Article 29 BC does apply to the Facebook messages at hand, which remains to be seen, the parents' request is not necessarily to be rejected. It follows from both case law and legal doctrine[52] that the protection of the confidentiality of the mail is not absolute. The Belgian Constitutional Court has held that other constitutional provisions as well as international treaties must be considered when Article 29 BC is applied, and that the protection it provides can be limited if that is necessary to safeguard other fundamental rights.[53] Again it looks like the decision in the case of Facebook and the deceased girl will largely depend on the outcome of a balancing test (see supra 25-26 and infra 32-33), where the rights and interests of the parents are balanced against the rights and interests of their daughter's communication partners. However, it is not certain that a Belgian court would find Article 29 CA to apply to the case in the first place (see supra 29).

4.4. The GDPR

31. A significant part of the German *Bundesgerichtshof*'s decision deals with the issue of whether the GDPR, which applies to this case because granting the parents access to their daughter's account constitutes the processing of personal data (Art. 4(2) GDPR)[54], forbids Facebook to grant the deceased girl's parents access to her account.

& G. Goedertier, *Handboek Belgisch publiekrecht* (Bruges: die Keure 2010), p 463; G. Remy, *Tijdschrift voor verzekeringen* 2013, p 163.

51 See e.g. Cass. 26 September 2012, *Arr.Cass.* 2012, p 2033; Cass. 21 October 2009, *Arr.Cass.* 2009, p 2418; Labor Court Liège 25 April 2002, *RRD* 2002, p (266) at 271; Court of Appeal Antwerp 25 January 2001, *Limb.Rechtsl. (Limburgs Rechtsleven)* 2001, p 156.

52 See e.g. A. Alen & K. Muylle, *Handboek van het Belgisch staatsrecht*, p 930-931; E. Lecroart, *RDTI* 2014, p (19) at 22; J. Vande Lanotte & G. Goedertier, *Handboek Belgisch publiekrecht*, p 465.

53 Constitutional Court 21 December 2004 (202/2004), http://jure.juridat.just.fgov.be.

54 In this provision, 'processing' is defined as '*any operation or set of operations which is performed on personal data*', examples of which are disclosure by transmission, dissemination or otherwise

The *Bundesgerichtshof* has started of its analysis by underlining that not the deceased girl's privacy law interests and protection are at stake as the GDPR exclusively applies to living (natural) persons, which is explicitly stated in the recitals to the regulation.[55] Instead, the privacy law interests and protection of the daughter's communication partners are at stake. As the Belgian legislature has not provided for specific rules that grant deceased persons protection under the GDPR, which it was entitled to do[56], on this point a Belgian court or tribunal's decision would not be different from the German *Bundesgerichtshof*'s decision.

32. A Belgian court or tribunal's decision would not be different either as to how the rules of the GDPR are to be applied to this case. Article 5, 1 (a) GDPR provides that personal data '*shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.*' In order for the processing of personal data to be lawful, one of the lawful bases mentioned in Article 6 GDPR needs to apply. Just like the German *Bundesgerichtshof* has done, a Belgian court or tribunal would focus on the lawful basis of '*necessary for the purposes of the legitimate interests pursued by the controller or by a third party [...]'* (Art. 6, 1 (f) GDPR), because that is the only legal basis that can be used in this case. It follows from the word 'overridden' in the second part of the description of this lawful basis that it requires the interests of the parties involved to be balanced against each other, which the German *Bundesgerichtshof* has done in its decision and a Belgian court or tribunal would do when dealing with the case at hand, in this case the interests of the parents ('*a third party*') and the interests of the deceased daughter's communication partners. As far as the different stages of the balancing test are concerned, reference can be made to the decision of the German *Bundesgerichtshof.*

33. When balancing the interests of the parties, a court must consider a number of key factors, which the German *Bundesgerichtshof* has also done. It has paid particular attention to the impact the processing of the personal data would have on the data subjects , the fact that the latter are most likely underage and the reasonable expectations of these data subjects with regard to the use and disclosure of their data.[57] With regard to these expectations, The German *Bundesgerichtshof* seems to make a valid point where it states that a Facebook user has no control (at

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making available. These examples cover what happens to the personal data on the deceased daughter's account when Facebook allows the parents to access them.

55 See recitals 27, 158 and 160.

56 Recital 27.

57 Article 29 Data Protection Working Party, *Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC*, p 40, available on https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf (accessed 1 Dec.. 2018).

all) of what happens to (i.e. what the addressee does with) the information he or she has sent to or shared with the addressee.[58] A comment must be made, though.

Facebook provides its users with means to share information in both a private and a public way. To share information privately, users can send messages to another user's inbox or start a conversation in Facebook Messenger. In that case, only the addressee has access to the information. To share information publicly, on the other hand, Facebook users can for instance post something on their own wall or on another user's wall. Consequently, one could say that by opting for the private means of communication, the sender has (implicitly) made clear that with regard to that information, which is likely to include personal data, he or she values confidentiality. Put differently, the user had specific, possibly above-average privacy expectations. It is my understanding that the publicly shared information is still available on a memorialized account, unlike the privately shared information, which is the information the parents want to access.

5. Conclusion

34. It was demonstrated in this article that also under Belgian law the rights that the deceased girl derived from her contract with Facebook would be inherited by her parents. These rights are part of the girl's estate, because they were not established for her lifetime only nor do they originate from an *intuitu personae* contract. Moreover, Facebook's rules on memorialized estates were found not to apply to the aforementioned contract under Belgian law.

In the second part of this article, a number of legal grounds that might prevent the rights from being inherited were elaborated on. The focus of the discussion was on the Electronic Communications Act of 13 June 2005, Article 29 of the Belgian Constitution, which protects the confidentiality of the mail, and the GDPR. With regard to each of these legal grounds the answer to the question whether it prevents the parents from inheriting their daughter's rights under the contract with Facebook appears to be same: it depends on the outcome of a balancing test in which the rights and interests of the parents are balanced against the rights and interests of the communication partners of their daughter.

58 See Para 89 to 91.