

DATA AFTER DEATH: LEGAL CONSEQUENCES OF POSTHUMOUS DATA MANAGEMENT

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Abstract: This research examines the legal and emotional implications of managing digital data after death. The current framework lacks clear guidelines, leading to privacy concerns, emotional distress for families, and legal ambiguities. The study proposes that the deceased must have control over the fate of their digital data after death, and accordingly, recommends that every data fiduciary be required to solicit explicit instructions from the data principal at the time of account creation regarding the management of their data post-mortem. This approach would empower individuals to dictate their digital legacies, ensuring respect for their autonomy and preferences.

Keywords: Posthumous Data Management; Digital Legacy; Privacy Rights After Death; Digital Wills; Data Fiduciaries' Responsibilities.

INTRODUCTION

Posthumous asset management has traditionally been governed by law, but with the rise of online assets, managing digital data after death has emerged as a pressing concern. This evolving landscape presents complex and often contentious challenges, highlighting the urgent need for clear frameworks to navigate the intricacies of posthumous online data management. Despite contributions from technology policy advisors like Naom Kutler in "Protecting Your Online You: A New Approach to Handling Your Online Persona After Death"¹ and Jason Mazzone in "Facebook's Afterlife,"² significant change has yet to be achieved. The absence of clear and mandatory guidelines on posthumous data management leaves families in anguish, questioning the privacy of their loved ones and facing the daunting prospect of navigating a legal labyrinth.

Consider the Yahoo case³, where a father sought access to his deceased

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¹ Kutler, Noam. "Protecting Your Online You: A New Approach to Handling Your Online Persona After Death." *Berkeley Technology Law Journal*, vol. 26, no. 4, 2011, pp. 1641–70. *JSTOR*, <http://www.jstor.org/stable/24118668>. Accessed 25 Aug. 2024.

² Jason Mazzone, 'Facebook's Afterlife' (2012) 90 NC L Rev 1643 <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/nclr90§ion=48> Accessed: 24 August 2024).

³ Mali, Dr Prashant and G, Aswathy Prakash (2019) "Death in the Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and its Legal Implications," *National Law School Journal*: Vol. 15: Iss. 1, Article 8.

son's email account. Yahoo refused, arguing that the account was non-transferable under their terms and conditions. While the court allowed partial access by providing email content, it raises a troubling scenario: What if the deceased had never intended for his family to access his account? This situation underscores a significant breach of privacy, highlighting how the lack of explicit directives can lead to unintended consequences that deeply affect families during their most vulnerable moments.

Similarly, the Facebook case⁴ illustrates the emotional turmoil surrounding digital legacy. A German court permitted the mother of a deceased teenager to access her daughter's Facebook account following a tragic accident. The court ruled that the account was part of the daughter's legacy and should be passed on to the mother, granting her access to private messages and posts. Yet, this raises an agonizing question: What if the girl had never wanted her most intimate thoughts shared, even with her closest family members? Such scenarios evoke a profound sense of loss, as families grapple with the ethical implications of accessing the private lives of those they have lost.

Rachel Thompson vs. Apple⁵ brings forth another heart-wrenching example. In her pursuit of accessing photos and videos stored in her late husband's Apple account, Rachel faced resistance from the tech giant, which demanded a court order for access. Apple's strict adherence to privacy policies, while commendable, exacerbated the emotional pain of a widow seeking to preserve memories of her husband and their young daughter. Eventually, Mrs. Thompson obtained access, but the ordeal serves as a stark reminder of how inadequate policies can prolong grief and complicate the healing process.

The Microsoft Skydrive⁶ case highlights similar challenges. A user struggled to manage their deceased son's account, facing bureaucratic hurdles that could have been avoided had there been a nominee-selection process at the time of account creation. Nearly a decade has passed without meaningful changes in policy, leaving families vulnerable and unsure of how to navigate their loved ones' digital legacies.

These cases are not isolated incidents; they reflect a widespread issue that many individuals fear. According to survey data, a staggering 84.4% of

⁴ Mali, Dr Prashant and G, Aswathy Prakash (2019) "Death in the Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and its Legal Implications," *National Law School Journal*: Vol. 15: Iss. 1, Article 8.

⁵ Mali, Dr Prashant and G, Aswathy Prakash (2019) "Death in the Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and its Legal Implications," *National Law School Journal*: Vol. 15: Iss. 1, Article 8.

⁶ Available at: <https://answers.microsoft.com/en-us/windows/forum/all/death-in-the-family-need-access-to-microsoft/66a76149-dd2e-42a1-bd83-958669eac27f> (Accessed: 27 August 2024).

respondents expressed concern about what happens to their digital data after death, emphasizing the urgency of addressing this issue. Furthermore, 95.6% believe users should have the choice regarding the fate of their data after death, illustrating a clear desire for control over personal digital legacies. The emotional turmoil faced by families in these cases resonates with the overwhelming concern expressed by survey participants, who often feel helpless and insecure about their digital futures.

The current framework in India, governed by the Digital Personal Data Protection Act (DPDP Act), 2023, provides for the optional nomination of a representative to manage digital assets. However, this provision remains largely underutilized, leaving significant legal ambiguities surrounding the treatment of personal data after death. Families should not have to endure additional stress during already painful times, and the lack of clear directives can lead to misunderstandings and emotional strain.

There is an urgent and undeniable need for an amendment to the policies governing posthumous data management in the digital age. Such an amendment would compel data fiduciaries to respect and adhere to the explicit wishes of the deceased data principal, providing much-needed clarity and peace of mind for their families.

To address this critical gap, I propose that every data fiduciary be legally required to ask a mandatory question at the point of user sign-up regarding the handling of their data after death. This question must offer a clear set of options: whether the data should be deleted, memorialized, or passed on to a designated next of kin or nominated representative. Implementing this policy would give individuals greater control over their digital afterlife, ensuring that their personal choices are honoured and relieving families of the emotional and legal burden of managing these sensitive matters without guidance.

Without such measures, the current legal framework fails to protect individual privacy after death, raising both ethical and legal concerns, and leaving families to navigate the heartache of unresolved digital legacies.

I. THE LEGAL SIGNIFICANCE OF POSTHUMOUS DATA

In the rapidly evolving digital landscape, the legal treatment of posthumous data has gained significant relevance. As individuals increasingly integrate digital platforms into their personal and professional lives, the question of what becomes of their digital assets after death demands urgent attention. Despite this growing necessity, current legislative frameworks, such as the Digital Personal Data Protection Act (DPDP Act), 2023, remain conspicuously silent on the obligatory management of personal

data posthumously. This legislative gap leaves data vulnerable to unauthorized access, potential breaches, and conflicts among legal heirs or representatives. Although Section 14(1) of the DPDP Act allows the data principal to nominate a representative for data management, this provision is discretionary, not compulsory. The absence of a mandatory requirement to address the fate of personal data after death exacerbates uncertainties, placing families in legally and emotionally fraught situations.

A. Digital data as personal property

Digital data has increasingly come to be recognized as a form of personal property, holding not only sentimental value but also significant economic worth. Courts in various jurisdictions, including India, are gradually acknowledging that digital assets—ranging from social media accounts to financial and professional records—constitute an integral part of an individual's estate. In light of this evolving perspective, it is imperative that data protection laws extend their reach to govern such assets after death.

The DPDP Act, 2023, currently lacks mandatory provisions concerning the posthumous management of digital assets, thus leaving them susceptible to misuse, disputes, and uncertainty. While Section 14(1)⁷ provides for the optional nomination of a representative by the data principal, this lack of compulsion creates significant legal ambiguities. Furthermore, the Indian Succession Act, 1925, recognizes the concept of testamentary disposition, but Indian courts have yet to explicitly determine whether personal data should automatically transfer to legal heirs or whether explicit consent for posthumous data management must be secured beforehand. As digital data becomes increasingly monetizable, the legal recognition of such assets as part of an individual's inheritable estate is inevitable. However, without mandatory regulations or provisions for explicit consent regarding posthumous data management, this area remains fraught with legal and ethical uncertainties.

B. Analysing current data fiduciaries' policies

1. Instagram's policy

Instagram offers limited options for posthumous account management, primarily memorialization or deletion. Upon request by a legal representative, an account may be deleted, or, alternatively, it can be turned into a memorial. However, these procedures lack robust legal safeguards,

⁷ Digital Personal Data Protection Act, 2023

especially within jurisdictions like India where statutory and judicial oversight over such requests remains ambiguous. The absence of a formal process for verifying claims made by representatives raises concerns over potential misuse, privacy violations, or unintended breaches of the deceased's personal data.

2. Facebook's policy

Facebook provides a more structured framework for managing the digital presence of deceased users, offering options such as memorialization, deletion, or appointing a legacy contact. If designated by the deceased before death, a legacy contact can manage the memorialized account by updating certain features—like the profile picture—and even respond to friend requests. They can also request the deletion of the account if desired. In the absence of a legacy contact, immediate family members can still request account deletion. However, content shared by the deceased remains visible to the original audience. Facebook also ensures that pages managed solely by the deceased are removed upon request. While Facebook's policy is more comprehensive than Instagram's, it still lacks legally binding obligations, particularly in the Indian context where a structured legal framework is absent.

3. X's policy

X (formerly Twitter) adopts a minimalistic approach to posthumous data management. The platform allows only the deletion of a deceased user's account, initiated through a request by the user's family or legal representatives. X's policy does not offer the option of memorialization or legacy contact assignment, reflecting a lack of user control over posthumous data management. Similar to Instagram, X's policy does not provide sufficient legal safeguards or verification mechanisms, especially in regions where statutory provisions for posthumous data are underdeveloped.

4. Memorialization and deletion as legal options

Social media platforms like Instagram and Facebook primarily offer two options for managing the accounts of deceased users: memorialization or deletion. While these options provide a basic structure for handling digital legacies, they are riddled with uncertainties. The lack of a clear legal framework, particularly in jurisdictions like India, creates vulnerabilities. For instance, in the absence of judicial oversight, the process of verifying the legitimacy of requests for memorialization or deletion by purported legal

representatives is susceptible to errors or misuse. This can lead to privacy breaches or violations of the deceased's wishes.

5. Privacy violations in memorialized accounts

Memorialized accounts pose substantial privacy risks, which are further exacerbated by the absence of explicit legal provisions governing posthumous data. Under Indian law, particularly the landmark judgment in Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.⁸, privacy is recognized as a fundamental right, which extends to informational privacy, even posthumously. The lack of informed consent from a deceased individual and the potential misuse of their data by surviving parties contravenes this constitutional right. In cases where memorialized accounts remain active without explicit instructions from the deceased, privacy violations may occur, undermining the deceased's right to informational self-determination.

6. Legal responsibilities of social media platforms

In India, the legal responsibilities of data fiduciaries such as Instagram and Facebook in managing posthumous data are currently vague. DPDP Act mandates the "fair and reasonable" use of personal data, does not explicitly cover posthumous scenarios. This legal vacuum leaves social media platforms without clear compliance guidelines regarding their obligations to both the deceased and their legal heirs. The absence of definitive legal obligations raises serious concerns about the role and responsibilities of data fiduciaries in preventing unauthorized data access, ensuring privacy, and respecting the digital legacies of deceased users. Establishing a legal framework that mandates fiduciaries to adhere to specific posthumous data management practices would mitigate these risks and bring much-needed clarity to this complex issue.

C. Limitations of current practices of posthumous data management

1. Privacy concerns

Privacy concerns related to posthumous data management are particularly pertinent under the Digital Personal Data Protection Act (DPDP Act), 2023. Social media platforms such as Instagram, which store extensive amounts of personal data, may expose sensitive information that the deceased did not intend to disclose to family members or third parties. The optional nature of

⁸ Justice K.S. Puttaswamy v. Union of India (AIR 2018 SC (SUPP) 1841).

nominating a representative under Section 14(1) exacerbates these risks. In the absence of explicit instructions or consent, there exists a substantial possibility of sensitive data being misappropriated, infringing upon the fundamental right to privacy as recognized in Justice K.S. Puttaswamy v. Union of India.⁹

In Yahoo's¹⁰ matter, the Honourable Court granted a father access to the contents of his deceased son's Yahoo account, while simultaneously denying access to the account itself. This decision raises critical privacy concerns regarding the deceased's intentions and the sanctity of personal data.

In a similar vein, the Honourable Court in Germany permitted a mother to access her deceased daughter's Facebook account¹¹, recognizing it as part of the daughter's legacy. However, this ruling introduces complex issues surrounding the deceased's right to privacy, particularly if the deceased did not intend for family members to access her private communications.

Rachel Thompson vs. Apple¹², In this case, Ms. Rachel Thompson was required to secure a court order to gain access to her late husband's Apple account, which contained personal family photographs and videos. This necessity for judicial intervention underscores the inherent tension between upholding privacy rights and addressing the needs of surviving family members.

2. Emotional impact on families

The absence of concrete legal frameworks for posthumous data management frequently burdens grieving families with challenging decisions, thereby leading to emotional distress. Social media platforms generally place the onus of managing digital legacies—whether through deletion or memorialization—upon the bereaved, without offering clear legal guidance. This lack of support can exacerbate emotional suffering, as evidenced in the tragic cases of Brianna Ghey and Molly Russell¹³, both of

⁹ Justice K.S. Puttaswamy v. Union of India (AIR 2018 SC (SUPP) 1841).

¹⁰ Mali, Dr Prashant and G, Aswathy Prakash (2019) "Death in the Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and its Legal Implications," National Law School Journal: Vol. 15: Iss. 1, Article 8.

¹¹ Mali, Dr Prashant and G, Aswathy Prakash (2019) "Death in the Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and its Legal Implications," National Law School Journal: Vol. 15: Iss. 1, Article 8.

¹² Mali, Dr Prashant and G, Aswathy Prakash (2019) "Death in the Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and its Legal Implications," National Law School Journal: Vol. 15: Iss. 1, Article 8.

¹³ Crawford BJB and A, "Brianna Ghey's Mother and Molly Russell's Father Join Forces to Combat Online Harm" (February 15, 2024) < <https://www.bbc.com/news/uk-68309102> > (Accessed: 25 August 2024).

whom faced devastating revelations about their children's online activities following their deaths.

Brianna Ghey's mother, Esther, only became aware after her daughter's passing that Brianna had engaged with harmful online content, including self-harm websites. Similarly, Ian Russell, the father of Molly Russell, discovered that his daughter had been exposed to disturbing materials on social media, which contributed to her deteriorating mental health. In both instances, families were left to navigate the aftermath of online harm, enduring profound emotional turmoil while grappling with the management of their children's digital accounts.

3. Legal ambiguities

Indian law, including the DPDP Act, lacks sufficient clarity concerning the management of posthumous data. Section 14(1) merely permits, rather than mandates, the nomination of a data representative, which results in legal uncertainty and potential disputes among family members. The absence of comprehensive legislation often culminates in prolonged legal battles, further compounding the grief experienced by those left behind.

In Microsoft Skydrive Case¹⁴, the challenges encountered by a user attempting to access his deceased son's Microsoft SkyDrive account exemplify the inefficiencies inherent in current systems, underscoring the urgent need for clearer legal frameworks regarding digital assets following death.

4. The risk of misuse

The absence of enforceable posthumous data management regulations presents a significant risk of misuse. Social media platforms are frequently left to interpret their responsibilities regarding the handling of the digital assets of deceased users, thereby creating opportunities for unauthorized access and exploitation by malicious actors.

These real-life cases serve to highlight the pressing necessity for robust legislative measures to safeguard the data of the deceased and prevent misuse, ensuring that digital legacies are adequately managed with the required respect and security parameters.

¹⁴ Available at: <https://answers.microsoft.com/en-us/windows/forum/all/death-in-the-family-need-access-to-microsoft/66a76149-dd2e-42a1-bd83-958669eac27f> (Accessed: 27 August 2024).

D. International comparison

1. The United States: RUFADA

The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADA)¹⁵ provides a comprehensive framework for managing digital estates in the United States, now enacted in 45 states. This legislation empowers users to designate fiduciaries who can access their digital assets upon death, facilitating a more organized approach to digital estate planning. RUFADA allows individuals to specify their wishes through online tools, wills, or trusts, ensuring that their preferences are honoured. Importantly, it restricts fiduciary access to sensitive communications unless explicitly authorized by the decedent. This provision addresses the complexities of digital ownership and privacy, compelling individuals to proactively consider their digital legacies. By establishing clear guidelines for fiduciaries and custodians, RUFADA represents a significant step forward in protecting users' digital rights and preferences, offering a model that could inspire similar reforms within India's DPDP Act for posthumous data management.

2. The GDPR's position on posthumous data

The General Data Protection Regulation (GDPR) largely neglects the management of posthumous data, leaving significant gaps in legal protection. Nevertheless, certain countries, such as France, have taken proactive measures by enacting national laws that empower heirs to manage digital accounts in accordance with Digital Republic Act. This provision grants individuals the right to establish instructions concerning the preservation, deletion, and disclosure of their personal data after death. Importantly, even in the absence of explicit instructions from the deceased, next of kin can exercise these rights, enabling them to close the deceased's accounts and demand the deletion or transfer of data. Such an approach imposes clear obligations on data fiduciaries and presents a potential model for legislative reform that could be beneficial if integrated into India's DPDP Act.

II. DIGITAL WILLS FOR POSTHUMOUS DATA MANAGEMENT

In our increasingly digital world, personal data has become a significant asset that extends beyond an individual's lifetime. However, the absence of

¹⁵ Hicks P, 'Rufadaa' (*Trust & Will*, 11 November 2021) <<https://trustandwill.com/learn/what-is-rufadaa>> accessed 22 September 2024

clear mechanisms for managing this data posthumously leads to complex legal, emotional, and ethical dilemmas. Digital Wills present a forward-thinking solution to bridge this gap, offering a legally binding framework that ensures personal data is handled according to the deceased's wishes.

A Digital Will outlines explicit instructions for managing an individual's digital assets—ranging from social media profiles and online banking to digital content like photos and videos—after their death. This document specifies whether the data should be deleted, memorialized, or passed on to heirs or nominees. While similar to traditional wills, Digital Wills focus on managing non-tangible online assets that carry both sentimental and financial value.¹⁶

India's Digital Personal Data Protection (DPDP) Act, 2023, allows for the nomination of a representative to manage personal data after death, but this remains optional. Consequently, significant gaps exist regarding how personal data is treated upon an individual's passing. Implementing Digital Wills as a mandatory requirement during data collection would compel data principals to clearly articulate their posthumous data preferences, eliminating ambiguity and potential misuse.

Making this a compulsory part of data collection, akin to traditional wills under the Indian Succession Act, 1925, would empower individuals to outline their digital legacies. They could make decisions about account deletion, transferring data to heirs, or memorializing accounts. Such provisions would create a more robust structure for posthumous data management under the DPDP Act, offering clarity and protection for both the deceased and their families.

Incorporating Digital Wills into the existing framework would not only address the emotional and legal uncertainties families face but also respect individual privacy and autonomy. As the digital landscape continues to evolve, it is imperative to adopt forward-looking measures that ensure the responsible and respectful management of digital legacies, providing peace of mind to individuals and their loved ones in an increasingly complex world.

III. SURVEY ANALYSIS

The survey, encompassing 45 responses, primarily aims to gauge participants' awareness of posthumous data management and their opinions regarding its significance. It explores their understanding of what happens to

¹⁶ Connor, J. (2011) *Digital Life After Death: The issue of planning for a person's Digital Assets After Death*, SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811044> (Accessed: 27 August 2024).

their digital assets after death and their preferences for handling this data. By assessing these insights, the survey seeks to illuminate the level of concern and the demand for options in managing digital legacies.¹⁷

The survey results reveal a profound disconnect between individuals' concerns about their digital legacies and their understanding of how these assets are managed after death. Notably, 84.4% of respondents are unaware of what will happen to their digital data—such as social media accounts and emails—after they pass away, despite 84.4% expressing a clear concern for this issue. This significant gap illustrates a troubling reality: while individuals are deeply invested in the fate of their online identities, many remain uninformed about the mechanisms or options available to them.

The emotional weight of these findings cannot be overstated. 68.9% of participants reported feeling concerned or insecure about their data posthumously, signalling an urgent need for clarity and assurance in a domain that is increasingly vital in our digital age. This anxiety is compounded by the fact that 66.7% of respondents would be uncomfortable sharing personal data—like search history or content consumption—with family members after their death, highlighting a desire for privacy even in the context of familial relationships.

When given the choice regarding the fate of their digital accounts, a majority—51.1%—prefer to have their accounts deleted permanently. This preference underscores a strong inclination towards autonomy and the control of one's digital legacy, with 26.7% favouring the preservation of accounts as memorials and only 22.7% willing to allow family members to take control. Such responses reflect a clear desire for individuals to dictate their digital legacies rather than leaving these critical decisions in the hands of corporations.

The overwhelming consensus is that individuals should retain the power to determine what happens to their data after death, with 95.6% asserting that users must have the choice rather than relinquishing it to the multinational companies that manage their data. This finding emphasizes the need for legal frameworks that empower users and safeguard their digital rights, ensuring that their wishes are honoured.

Furthermore, 95.5% of participants believe social media platforms should actively inquire about users' preferences regarding their data during the sign-up process. This expectation highlights a collective call for proactive engagement from companies in facilitating user autonomy and transparency, thus alleviating concerns about posthumous data management.

¹⁷ Survey for Data After Death: Legal Consequences of Digital Data After Death Under the DPDP Act

<https://docs.google.com/spreadsheets/d/1ea71NITZt8wiNEQb_ip53mX95ZS6iZH1hcLa0Xt3dhA/edit?resourcekey=&gid=408056579#gid=408056579>

Despite this strong demand for agency, it is alarming that 64.4% of respondents are aware of the concept of a 'digital will,' which allows individuals to specify instructions for their online assets after death. This awareness indicates that while the desire for control exists, the mechanisms to enact that control—such as digital wills—are still not well understood or utilized.

In summary, the survey reveals a critical need for educational initiatives and legal reforms that inform individuals about their rights and options concerning digital data after death.

IV. POLICY PROPOSAL

To address the urgent need for effective posthumous data management, I propose the following policy. Every data fiduciary must require users to specify their preferences regarding the management of their data upon death at the time of account creation. This policy will offer users three clear options:

- i. *Delete Data After Death*: Users can choose to have all their personal data permanently deleted upon their passing, ensuring that no digital trace remains.
- ii. *Memorialize Account*: Users may opt to have their accounts memorialized, transforming them into a digital tribute that preserves their memory while restricting access to sensitive information.
- iii. *Nominate a Representative*: Users can appoint a nominee who will be granted access to their account after providing proof of death. This nominee will be responsible for managing the data according to the deceased's wishes, ensuring that their preferences are respected.

By mandating these options, we empower individuals to take control of their digital legacies, alleviating potential distress for families during challenging times. This proactive approach not only honours personal preferences but also promotes clarity and understanding among heirs, reducing the likelihood of disputes. In an era where personal data is increasingly recognized as a form of property, this policy aligns with contemporary values and underscores the importance of safeguarding individual rights and privacy.

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