



Post-mortem Privacy 2.0: Reconceptualising the phenomenon in the light of the recent changes in law and technology

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This paper builds on the finding set out in the author's earlier work (*Protecting Post-mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World*, Lilian Edwards and Edina Harbinja, *Cardozo Arts & Entertainment Law Journal*, Vol. 32, No. 1, 2013).

The first paper on post-mortem privacy (PMP) provides a definition of the phenomenon, i.e. the right of a person to preserve and control what becomes of his or her reputation, dignity, integrity, secrets or memory after their death. This notion has so far received little attention in law, especially in the common law countries. The authors argue that the new circumstances of the digital world, and in particular the emergence of a new and voluminous array of "digital assets" created, hosted and shared on web 2.0 intermediary platforms, and often revealing highly personal or intimate personal data, require a revisiting of this stance. An analysis of comparative common and civilian law institutions, focusing on personality rights, defamation, moral rights and freedom of testation, confirms that there is little support for post-mortem privacy in common law. Conversely, personality rights in general have greater attraction in civilian law, including their survival after death. The authors also find that primary role taken by contract regulation may still mean that users of US-based intermediary platforms, wherever they are based, are deprived of post mortem privacy rights. Having established a crucial gap in online legal privacy protection, the authors suggest that future protection may need to come from legislation, contract or "code" solutions, of which the first emergent into the market is Google Inactive Account Manager.

This paper builds on the general survey of post-mortem privacy set out in the author's earlier work and develops a first classification of the concept, i.e. negative PMP (the right to keep one's personal data secret post mortem) and positive PMP (the right to actively control one's personal data). The concept of PMP will be further developed both at a theoretical level (underpinned by theories of autonomy established in the works of Bentham, Locke, Mill, Kant, Hegel et.al.) and a doctrinal level (considering concepts such as testamentary freedom, personal data and the right to PMP, with the adequate checks and balances). Finally, the paper will look at the current developments in technology (tech solutions for the protection of PMP) and law/policy (mainly the work done by the US Uniform Law Commission on the Uniform Fiduciary Access to Digital Assets Act – UFADAA, as revised), arguing that both of these regulatory modalities provide a further support for recognising PMP more widely and more specifically, especially in the online environment.

The paper is, therefore, setting the scene further in this under-explored area, with the aim to set the basis for the author's subsequent empirical research (attitudes towards PMP, quantitative and qualitative).