Some open issues concerning digital inheritance

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The number of digital assets held by an average person increases on a daily basis, so it is not surprising that the questions surrounding the disposition of these assets upon death are becoming more common. Nearly every individual has some type of on-line account and some of the most popular email and social media providers in the world are U.S. based (Gmail, Yahoo, Facebook, Instagram, Twitter….). Since providers of these accounts are U.S. based, they are regulated by U.S. laws. The law most important for this topic is Electronic Communications Privacy Act, Title II, commonly known as Stored Communications Act (SCA), especially its chapter 2702. Said chapter prohibits certain providers from disclosing account content to unauthorized individuals. However, SCA is not clear in respect whether it should apply to estates accessing deceased users' accounts, so, to protect themselves, U.S. based providers have chosen to adopt policies that do not allow anyone, other than the user, accessing the deceased user's account.

It has to be noted that in the EU, there is a lack of legislation concerning digital inheritance. But even if there was legislation, it still would not be applicable to accounts managed by U.S. providers.
There are certain exceptions that SCA provides concerning digital inheritance. For example, email and social media providers can grant access to deceased user's account if a) a user consents to another party accessing accounts and content, and b) if a court order is issued requiring providers to grant access or content.

However, these exceptions do not relive digital inheritance problem because:

a) Account users seldom leave instructions about what will happen to their digital assets after they die (in a will, for example). Even if they did, these instructions might often be contrary to the terms of service agreements (TOSA), which govern user's relationship with a service provider. Among other things, this paper addresses the fact that in spite of TOSA, testators could, to a certain extent, influence what will happen to (at least some of) their digital assets after they die by making provisions about them in a will.
b) Concerning the SCA exception that allows providers to grant access in case a court order is issued, it is not easy and certainly not cheap to obtain a court order. Furthermore, even in one initiates a procedure of obtaining a court order, it can last a very long time, and some service providers have a policy of deleting user accounts after a very short time of inactivity (for example 6 months).

Here, another question arises that is addressed in this paper: what about the protection of deceased's privacy? It is possible for a person not to have left any instructions concerning digital assets in a will, believing those assets will be deleted or forgotten after his/her death. However, family members could start court proceeding in order to obtain a court order that will make email or social media providers grant them access to deceased accounts. Should the deceased privacy be protected, since it is highly likely that he/she never intended anyone to access his/her digital assets post-mortem?