

LEGAL COMMENTARIES

Antoinette Maget Dominicé*

antoinette.maget@lmu.de
orcid.org/0000-0001-9056-4544
Institute for Art History
LMU Munich
Zentnerstrasse 31
DE 80798 Munich, Germany

Dario Henri Haux*

dario.haux@unilu.ch
orcid.org/0000-0003-1889-6231
Faculty of Law
University of Lucerne
Frohburgstrasse 3
P.O. Box 4466
CH 6002 Lucerne, Switzerland

The Decision of the German Federal Court of Justice against Facebook: Opportunity to Define Digital Heritage?

* **Antoinette Maget Dominicé** is Professor for the value of cultural objects and provenance research at the Institute for Art History at LMU Munich, Germany, since April 2018. She was previously a lecturer at the Faculty of Law of the University of Lucerne (2013-2018) and a scientific assistant at different French public institutions. Her current work focuses on the circulation of cultural goods, the history of collections, identity relations, and the redefinition of cultural institutions. She is a member of the Funding Committee “Colonial Contexts” at the German Lost Art Foundation and is currently the head of a research project titled “What About Art” at the Centre for Advanced Studies in Munich, together with Prof. Jens Kersten (public law).

** **Dario Henri Haux** is a postdoctoral research assistant at the University of Lucerne and University of Basel, Switzerland. Between 2010 and 2016 he studied law at the Humboldt-Universität zu Berlin, the Université de Genève, and the Luiss Guido Carli University in Rome, focusing in particular on legal policy frameworks in a global context. Subsequently, he gained professional experience at law offices in Rome and Montréal, where he specialized in IT and intellectual property rights law. In 2019-2020, Dario attended Columbia Law School in New York where he specialized in IP & Antitrust law and was awarded a Master’s degree in Law (LLM).

The authors wish to thank Dr. Steven Howe (University of Lucerne) for his careful reading of the manuscript and helpful comments.

Abstract: The German Federal Court of Justice recently ruled (27.08.2020 – III ZB 30/20) that Facebook must grant parents direct access to the account of their deceased daughter. At the same time, the parents are prohibited from actively using the account. In this way, the judges established binding standards for the use of social network accounts of deceased users. Beyond inheritance and data protection law, the judgment provides an opportunity to prompt ongoing discussions about sustainable ways of safeguarding, as well as providing access to, digital content. Against the backdrop of a jurisprudence sensitized to the humanities, the two authors encourage a reflection on “spaces”, “containers”, and more generally on the significance of digital media for our everyday lives and future generations.

Keywords: digital inheritance, digital heritage, access, law & humanities, German Federal Court of Justice

Following on its decision in 2018,¹ the German Federal Court of Justice (BGH) recently made its final ruling on the inheritability of user accounts in social networks.² The court ruled that the inheriting parents must be given direct access to the account of their deceased daughter, whereby the possibilities of active usage can be largely excluded, and as such specified inheritance rights within the digital.

In addition to their significance for German inheritance law, both rulings touched upon many difficult legal issues regarding, *inter alia*, personal data protection, strengthening the concept of dynamic and diverse digital contents, as well as granted a slight lessening of the dominating position of Internet giants. The present case note does not deal with all dimensions of the Court’s decision(s), but focuses on selected aspects in order to contextualize these in a broader interdisciplinary perspective.

The case involved Facebook and the parents of a teenager who died in 2012 and was a frequent user of her account. After her death, the teenager’s parents – her legal heirs – asked Facebook to access her account. This request was based on the parents’ wish to find out more about the circumstances of their daughter’s death, which remained unclear at the time. In the event that her death was a suicide, they hoped to obtain any information about their daughter’s possible intentions or motives.³ Facebook rejected the request, as in the meantime it had, following a request from an unnamed individual, “memorialized” the account. On 17 December

¹ BGH, 12.07.2018 – III ZR 183/17, “Neue Juristische Wochenschrift” 2018, pp. 3178–3187 (“the 2018 BGH ruling”).

² BGH, 27.08.2020 – III ZB 30/20, “Multimedia und Recht” 2020, pp. 688–693 (“the 2020 BGH ruling”).

³ The 2018 BGH ruling, p. 3178.

2015 a Berlin regional court obligated Facebook to grant the parents, as heirs, access to their daughter's account and its communication content.⁴

On 12 July 2018,⁵ the BGH confirmed this decision. Without further weighing in on these normative legal evaluations,⁶ the case presents, with respect to the legal practice in Germany,⁷ a landmark decision in the field of "digital heritage". Firstly, the judges emphasized that neither the secrecy of telecommunications⁸ nor data protection⁹ justify a special right for the digital estate.¹⁰ Secondly, no special rules of inheritance law were identified by the Court.¹¹ It may be concluded that in this way the Court set out standards that will play a decisive role in upcoming decisions.

In response to this judgment, Facebook sent a USB stick containing a PDF file of more than 14,000 pages to the parents. These pages, which were static content, included unstructured data copied from the account. Here the question arose whether the rights and obligations set out by the Berlin regional court in 2015 had been met. While Facebook claimed to have met the requirements, the family still felt that the "access" provided was insufficient. Hence, they brought the case back to the Berlin regional court.¹²

After further legal proceedings,¹³ in a resolution of 27 August 2020 the BGH ruled that Facebook must grant the heirs the possibility to take note of the account

⁴ Landgericht Berlin, 17.12.2015 – 20 O 172/15, "Kommunikation & Recht" 2016, p. 135.

⁵ The 2018 BGH ruling, pp. 3178-3187.

⁶ See e.g. N. Preuß, *Digitaler Nachlass – Vererbbarkeit eines Kontos bei einem sozialen Netzwerk*, "Neue Juristische Wochenschrift" 2018, p. 3146.

⁷ Some authors aim to put this decision into perspective within other law systems, as neither case law nor doctrine currently exists in other States. See e.g. F. Bartolini, F.P. Patti, *Digital Inheritance and Post Mortem Data Protection: The Italian Reform*, "European Review of Private Law" 2019, Vol. 27(5), pp. 1181-1182; M. Grochowski, *Inheritance of the Social Media Accounts in Poland*, "European Review of Private Law" 2019, Vol. 27(5), p. 1196; S. Navas, *Digital Content of the Inheritance: Remarks on the Judgment of the German Federal Court of Justice (BGH) of 12 July 2018 from the Standpoint of Spanish Law*, "European Review of Private Law" 2019, Vol. 27(5), p. 1159; J. Pierer, *Inheritability of Digital Content under Austrian Law*, "European Review of Private Law" 2019, Vol. 27(5); K. Swinnen, *The German Bundesgerichtshof's Decision on Access to the Facebook Account of Your Deceased Child from a Belgian Law Point of View*, "European Review of Private Law" 2019, Vol. 27(5), p. 1142 (quoting the absence of "ready-made" answers); V. Tweehuysen, *Digital Afterlife under Dutch Law: The German Case on Inheriting a Facebook Account from a Dutch Perspective*, "European Review of Private Law" 2019, Vol. 27(5), p. 1149.

⁸ The 2018 BGH ruling, p. 3184, Nos. 54-63.

⁹ *Ibidem*, pp. 3185-3187, Nos. 64-94. See also e.g. C. Etteldorf, *About Dashcams und Digital Estate – German Federal Court of Justice Weighs up Data Protection Interests*, "European Data Protection Law Review" 2018, Vol. 4(3), pp. 370-374.

¹⁰ Joachim Pierer considers that "[l]awyers, who work with abstract legal norms on a daily basis, should be able to recognize legal structures behind new technologies and thus demystify problems". See J. Pierer, *op. cit.*, p. 1129.

¹¹ The 2018 BGH ruling, p. 3180, Nos. 21-63.

¹² Landgericht Berlin, 13.02.2019 – 20 O 172/15, "Zeitschrift für Urheber- und Medienrecht – Rechtsprechungsdienst" 2019, p. 613.

¹³ Kammergericht Berlin, 03.12.2019 – 21 W 11/19, "Multimedia und Recht" 2020, p. 183.

and its contents in the same way as the original account holder, their daughter, had done.¹⁴ Whilst they should not be able to use the Facebook account actively, the parents should nevertheless be able to explore the content on the original platform.¹⁵ In so ruling, the judges made clear that according to their legal evaluation, the obligations related to “access” under the judgment of the regional court of 17 December 2015 had not been fulfilled.

Besides its importance for legal practice concerning (digital) inheritance law in Germany, the observations in both judgments are much more profound. By dealing with possibilities to “access” communication,¹⁶ the concept of “movement” in the digital world,¹⁷ and reflections about the character of content,¹⁸ the ruling offers the opportunity to develop a more in-depth examination. From a more comprehensive, legal-interdisciplinary perspective, questions about digital heritage, its elements, characteristics, preservation, and fragility are thus addressed. The decision of the BGH anchors an extension of the application of inheritance rights within the digital, and thus reflects a necessary evolution/modification of the definition of estate assets, even if still not proposing a final definition.¹⁹ In doing so, a parallel can be noted with the normative developments concerning heritage as a notion and cultural heritage as a responsibility within its “main” discussion and preservation organ, the United Nations Educational, Scientific and Cultural Organization (UNESCO).

Much has been discussed and a lot written about the notion of heritage,²⁰ the use of the concept of “cultural heritage”, and its contextualization.²¹ Yet the most significant change over the last 40 years lies in the temporal, spatial, and contextual extension of its comprehension: A history of the definition/conceptualization of cultural heritage amounts to a history of dematerialization, attempts at decolonization, and reduction of temporalities.²² The last and most challenging step concerns the recognition of digital heritage, whose primacy nowadays trumps the com-

¹⁴ The 2020 BGH ruling, p. 691, Nos. 38.

¹⁵ Ibidem, No. 27.

¹⁶ See D. Wielsch, *Zugangsregeln: die Rechtsverfassung der Wissensteilung*, Mohr Siebeck, Tübingen 2008.

¹⁷ The 2018 BGH ruling, p. 3178, No. 2.

¹⁸ Ibidem, p. 3182, Nos. 50-51.

¹⁹ See BeckOGK/Blum BGB § 2311 Rn. 45-47.

²⁰ See e.g. J. Blake, *On Defining the Cultural Heritage*, “The International and Comparative Law Quarterly” 2000, Vol. 49(1); A.M. Sullivan, *Cultural Heritage & New Media: A Future for the Past*, “The John Marshall Review of Intellectual Property Law” 2016, Vol. 15, pp. 617-621; M. Vecco, *A Definition of Cultural Heritage: From the Tangible to the Intangible*, “Journal of Cultural Heritage” 2010, Vol. 11(3).

²¹ See e.g. L. Lixinski, *A Third Way of Thinking about Cultural Property*, “Brooklyn Journal of International Law” 2019, Vol. 44(1).

²² See J. Schofield, *Forget About “Heritage”: Place, Ethics and the Faro Convention*, in: T. Ireland, J. Schofield (eds.), *The Ethics of Cultural Heritage*, Springer, New York 2015; H. Silverman, *Contested Cultural Heritage: A Selective Historiography*, in: idem (ed.), *Contested Cultural Heritage*, Springer, New York 2011.

plexity of its delineation,²³ its preservation, and of its access.²⁴ In order to address these challenges and to reflect the duality of the current discussion, established approaches and experiences from the UNESCO can be used as a starting point. Both the organization of UNESCO's competences (considering the repartition of heritage fields between the cultural and the informational sector) and the gradation of the texts issued by the Organization – from standard-setting instruments to international conventions – demonstrate this complexity, as digital heritage is considered as both a component of preservation and as a value to be preserved.²⁵ Digitization has been considered as a means to reduce threats to some cultural objects,²⁶ to enhance documentation²⁷, and to broaden the spread of information. At the same time, digitizations²⁸ themselves have been recognized to be worthy of preservation. The UNESCO General Conference adopted the Charter on the Preservation of Digital Heritage in 2003.²⁹ The Charter offers a definition of digital heritage and its access (Part I); and identifies threats (Part II); as well as responses and responsibilities (Parts III and IV).³⁰

Responding to concerns expressed mostly by memory institutions, the Charter on the Preservation of Digital Heritage offers a broad definition. It defines digital heritage as “unique resources of human knowledge and expression”,³¹ “including texts, databases, still and moving images, audio, graphics, software and web pages,

²³ See C. Paloque-Berges, V. Schafer, *Quand la communication devient patrimoine*, “Hermes. La Revue” 2015, Vol. 71(1).

²⁴ See e.g. S. Colley, *Ethics and Digital Heritage*, in: T. Ireland, J. Schofield (eds.), *The Ethics of Cultural Heritage*, Springer, New York 2015; E. Stainforth, *From Museum to Memory Institution: The Politics of European Culture Online*, “Museum and Society” 2016, Vol. 14(2), <https://doi.org/10.29311/mas.v14i2.646>; R.H. Weber, L. Chrobak, *Legal Implications of Digital Heritagization*, “RESET. Recherches en Sciences Sociales sur Internet” 2016, Vol. 6, <https://doi.org/10.4000/reset.826>.

²⁵ See A. Galey, *The Human Presence in Digital Artefacts*, in: W. McCarty, *Text and Genre in Reconstruction. Effects of Digitalization on Ideas, Behaviours, Products and Institutions*, Open Book Publishers, Cambridge 2010, p. 105.

²⁶ As in, e.g., the Memory of the World Programme by the UNESCO. See e.g. R. Edmondson, L. Jordan, A.C. Prodan (eds.), *The UNESCO Memory of the World Programme: Key Aspects and Recent Developments*, Springer, Cham 2019; E. Stainforth, *Disruptive Forms, Persistent Values: Negotiating Digital Heritage and “the Memory of the World”*, in: T. Carter et al. (eds.), *Creating Heritage: Unrecognised Pasts and Rejected Futures*, Routledge, London 2019; F. Shyllon, *Expert Meeting on the 20th Anniversary of UNESCO's Memory of the World Programme: Warsaw, Poland, 8-10 May 2012*, “International Journal of Cultural Property” 2012, Vol. 19(4).

²⁷ UNESCO, *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, June 2018, para. 119.

²⁸ For more on the concept of “digitizations”, see F.R. Cameron, *Theorising Heritage Collection Digitisations in Global Computational Infrastructures*, in: H. Lewi et al. (eds.), *The Routledge International Handbook of New Digital Practices in Galleries, Libraries, Archives, Museums and Heritage Sites*, Routledge, London–New York 2020, p. 55.

²⁹ UNESCO, *Charter on the Preservation of Digital Heritage*, 15 October 2003, <https://unesdoc.unesco.org/ark:/48223/pf00000133171.page=80> [accessed: 29.10.2020].

³⁰ See e.g. Y. de Lusenet, *Tending the Garden or Harvesting the Fields: Digital Preservation and the UNESCO Charter on the Preservation of the Digital Heritage*, “Library Trends” 2007, Vol. 56(1).

³¹ Art. 1(1).

among a wide and growing range of formats”.³² This classification is broadly set and contains no qualitative criteria: digital heritage may derive from various persons, entities, sources, and practices.³³

Considering the 2018 and the 2020 rulings of the German court, as well as the development of the discussion on digital cultural heritage and its embedment in our daily life, three aspects may be underscored. The first concerns the nature of data and their “structurization”. In the decision of 2018, the judges criticized the fact that a “memorialized” account would correspond to a “data graveyard”.³⁴ By doing so, the judges particularly underlined how digital heritage is the combination of content and its functionalities³⁵ and were much more detailed when it comes to the dual nature of digital heritage. In contrast, the UNESCO Charter – which admittedly dates from October 2003 – focused more restrictively on different kinds of “resources”. At the same time, however, the decisive impulses set out by the UNESCO Charter should not be underrated.³⁶

However, the open-mindedness and concern for digital content on the part of the judges, which testifies to their comprehensive involvement with the subject matter, becomes even more evident in the course of the 2020 ruling. When describing the data file on a USB stick delivered by Facebook to the parents, the judges qualified it as being a “data container”.³⁷ Here, strong criticism on the part of the judges emerges, who stress that neither the reproduction nor the interactive navigation within the account would be possible. In this way, they emphasize the importance of access points for dynamic content in order to share the perception of this digital culture and to keep it “alive” in the truest sense of the word. Moreover, by qualifying a PDF document as a “container”, the federal judges relate to notions of preservation and memory,³⁸ known from the field of analogue (cultural) heritage,³⁹ and foster discussions regarding a possible recognition of digital heritage.

The second aspect is that of the language, as the judges point out that the extraction of the data has led to a translation of some of the data from German into

³² Art. 1(2).

³³ See e.g. F. Musiani, V. Schafer, *Digital Heritage and Heritagization*, “RESET. Recherches en Sciences Sociales sur Internet” 2016, Vol. 6, <https://doi.org/10.4000/reset.806>.

³⁴ The 2018 BGH ruling, No. 30.

³⁵ The 2020 BGH ruling, No. 23.

³⁶ See F. Shyllon, *op. cit.*, pp. 573, 576.

³⁷ The 2020 BGH ruling, No. 23.

³⁸ See e.g. D.H. Haux, A. Maget Dominicé, J.A. Raspotnig, *A Cultural Memory of the Digital Age?*, “International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique” 2020, <https://doi.org/10.1007/s11196-020-09778-7>; M. Henninger, P. Scifleet, *How Are the New Documents of Social Networks Shaping Our Cultural Memory*, “Journal of Documentation” 2016, Vol. 72(2).

³⁹ See, among others, J. Blake, *op. cit.*, quoting the famous discourse of M’Bow 1979 at the UNESCO at p. 62 and further referring to the “conservation and preservation” duties required within the UNESCO Constitution at pp. 71-72; M. Vecco, *op. cit.*

English,⁴⁰ and one cannot help but think of the work of the Nubian artist Fathi Hassan and his work on forms, figures, and languages. By integrating calligraphic symbols and traditional multi-functional forms, such as jugs and jars, in his mixed media works of art, like in *Container of Memory* (2000), Hassan asks us to question the imperialist past and its persistence, through its capacity to erase certain communications and uses, and to modify other human traditions. The artist thus emphasizes the tensions that exist between the passage from the past to the present and its transmission to future generations in contexts of unequal relationships and dominations. By addressing the notions of format (and implicitly of supports) and languages, the ruling leads in a similar direction, firmly rooting this scrutiny, in the digital field.

Simultaneously, the judgment carves out the shift of power within the digital, where questions related to a “digital colonialism”,⁴¹ not only through infrastructures and (missing) data protection, but also language, are becoming increasingly important. Far beyond the present ruling of the BGH, it is difficult to ignore the link between Facebook’s expansion plans and the creation of a text-based digital world – as proposed by Mark Zuckerberg’s “Free Basics” initiative.⁴²

Finally, although the numerous approaches indicated by the judges in the ruling can only be mentioned in passing, the BGH also puts forward the notion of access to digital heritage in a highly specific way⁴³ – understood as the possibility of accessing one’s own space, which is not defined as a pure extension of the analog world but as a distinct entity. This builds on the idea of a culturally constructed space,⁴⁴ which evolves in its delimitation and its reception concomitantly with the development of new technologies.⁴⁵ Alongside social networks, the Internet has seen the development of numerous further spaces, whose possible connections (geographical, political, social) raise multiple questions.⁴⁶ The Covid-19 crisis experienced since the spring of 2020 has led to a renewed multiplication of these spaces, particularly in the cultural field: memory institutions, including museums, have multiplied initi-

⁴⁰ The 2020 BGH ruling, No. 39.

⁴¹ See e.g. M. Kwet, *Digital Colonialism: US Empire and the New Imperialism in the Global South*, “Race & Class” 2019, Vol. 60(4); D. Coleman, *Digital Colonialism: The 21st Century Scramble for Africa through the Extraction and Control of User Data and the Limitations of Data Protection Laws*, “Michigan Journal of Race and Law” 2019, Vol. 24(2); P. Ricaurte, *Data Epistemologies, the Coloniality of Power, and Resistance*, “Television & New Media” 2019, Vol. 20(4), pp. 350-365.

⁴² According to the statement, Facebook is trying to connect the “global South” through zero-rated services in English; see e.g. T. Nothias, *Access Granted: Facebook’s Free Basics in Africa*, “Media, Culture & Society” 2020, Vol. 42(3), p. 332.

⁴³ The 2020 BGH ruling, No. 15.

⁴⁴ H. Lefebvre, *La production de l’espace*, 4th ed., Anthropos, Paris 2000.

⁴⁵ N. Werber, *Von der Bagatellisierung des Raums*. „Neue Medien“ als „raumüberwindende Mächte“, in: A. Budke et al. (eds.), *Internetgeographien. Beobachtungen zum Verhältnis von Internet, Raum und Gesellschaft*, Steiner Verlag, Stuttgart 2018.

⁴⁶ M. Starzacher, *Zur Dualität des Raumes im 21. Jahrhundert*, in: M. Buchner, A. Minta (eds.), *Raumkult – Kultraum*, Transcript, Bielefeld 2019, p. 134.

atives in order to stay in touch with their audiences confined to their homes, and by doing so have conceived new spaces.⁴⁷ Circumstances, as well as framework conditions (in terms of funding, infrastructure, and resources), have fostered the growth of different models, ranging from digitizing cultural objects and putting them online to enhancing participation and creating virtual environments. These spaces join the mass of elements that make up the digital heritage, since they are resources of human knowledge and expression. They add to this the particularity of contributing to the conservation of material cultural goods, of developing new participatory exchanges, and of questioning certain interpretative monopolies.

Ultimately, the particular legal impact of this decision will become apparent only in the upcoming months and years. The outcome of the Berlin case underscores the extent to which the efforts undertaken to preserve digital heritage in general, and cultural digital heritage in particular, are out of step with the development of resources. Additionally, in the Western world their hegemony is in the hands of GAFAM.⁴⁸ Seemingly opposing these developments, the judges in the Facebook case are now trying to strengthen the power of the State in the digital and to give a voice to the users. In this way the Court attempts to counterbalance existing imbalances – an endeavour that is particularly noteworthy in light of the objectives set out in Article 4 of the UNESCO Charter.⁴⁹

Hence, for legal practice the tasks remain diverse, as they go far beyond the apparent level of inheritance law. For neighboring disciplines, and for society as a whole, the ruling provides a positive reason to hope that the challenges of digital heritage will be addressed to a greater extent and in more depth in the future.

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⁴⁷ For more on this evolution prior to Covid-19, see e.g. F. Cameron, *Beyond the Cult of the Replicant: Museums and Historical Digital Objects – Traditional Concerns, New Discourses*, in: F. Cameron, S. Kenderdine (eds.), *Theorizing Digital Cultural Heritage: A Critical Discourse*, MIT Press, Cambridge 2007; and most recently, M. Samaroudi, K. Rodriguez Echavarria, L. Perry, *Heritage in Lockdown: Digital Provision of Memory Institutions in the UK and US of America during the COVID-19 Pandemic*, “Museum Management and Curatorship” 2020, Vol. 35(4).

⁴⁸ Acronym for Google, Apple, Facebook, Amazon, and Microsoft.

⁴⁹ “Unless the prevailing threats are addressed, the loss of the digital heritage will be rapid and inevitable. Member States will benefit by encouraging legal, economic and technical measures to safeguard the heritage. Awareness-raising and advocacy is urgent, alerting policy-makers and sensitizing the general public to both the potential of the digital media and the practicalities of preservation”.

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