

A Primitive Study on Privacy Protection of Digital Heritage--From the Perspective of Social media accounts

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Abstract. Under the background of digital survival, the boundary between personal space and public space is gradually disappearing, and users' sensitivity to digital privacy is greatly reduced. As a tool of information communication and personal performance, social media accounts carry more and more personal privacy. Protecting the privacy of the deceased is not only reasonable in theory, but also of great significance to the deceased, the living and even the whole nation in practice. Currently, after the death of the user, the privacy of his digital heritage cannot be well protected due to the limitation of platform management and his own media literacy. Through comparison, it is found that many countries have made useful explorations. For the protection of citizens' "freedom" and "dignity", this paper puts forward the protection path of "strengthening the privacy autonomy of the deceased before his death and ensuring that personal information is forgotten after his death". Through the joint efforts of users, social media platforms and laws, the privacy and safety of citizens' digital heritage are jointly protected and citizens' personal information rights are defended.

Keywords: digital heritage; digital privacy; personality interests of the deceased; social media.

1. Introduction

1.1 The Background of the Topic Selection

Nowadays, the size of China's Internet users has exceeded three-quarters of the total population. According to relevant reports [1], Internet users spend 29.5 hours a week online per capita, and 99.6% of Internet users use mobile phones to surf the Internet, all these figures indicate that we have entered a new digital era. Mediated existence has become a distinctive feature of the digital age, meaning that we are creating and leaving behind a large digital footprint on the internet, constructing an online 'self' image. However, when our offline physical 'selves' disappear, what happens to the personal information that remains in our virtual 'selves' on the internet? This article will take social media accounts as a starting point to explore why it is important to protect the privacy of the dead, the current state of digital inheritance in the face of conflicting privacy rights, and how to better protect the social media accounts of the deceased.

1.2 Literature Review

The most authoritative definition of digital heritage currently comes from the Digital Heritage Charter [2], which considers digital heritage to be a unique form of human knowledge and expression. From the perspective of the individual, some scholars have divided digital heritage into three categories: personal account information, virtual currency involving money and personal property related to intellectual property [3]. The scholar Feng Zhanjiang has also adopted a quarter-method [4], adding user-paid online content. There is also a scholar who has divided digital heritage into as many as 11 categories [5], but regardless of the classification, the value of digital heritage can generally be categorized into economic, cultural and emotional values. In actual judicial practice, the first two types of value can basically be protected under the "attachment theory", while the emotional value is slightly less protected.

There are two opposing views on the protection of the privacy of the dead. The negative view is based on the logic that "the legal capacity of citizens begins at birth and ends at death". When a person dies, he or she loses the capacity to be a subject of rights, and that capacity is extinguished at the same time. The law no longer protects personality rights, including the right to privacy [6] and

the rights of personality will be transferred to the near relatives. However, firstly, this point of view is difficult to ensure that the wishes and behaviors of the close relatives of the deceased are consistent with the privacy rights and interests of the deceased, and the personal interests of the deceased will not be protected if the deceased has no close relatives at all; Secondly, the network information retained by the deceased not only has its personal privacy, but also is likely to have common privacy with third parties. Therefore, it is debatable whether it is reasonable for close relatives to inherit the private information of the deceased.

The affirmative view mentions the theory of protecting the rights of the deceased [7] and the theory of protecting the legal interests of the deceased.[8] The former thinks that after the death of a natural person, although the right ability ends with death, some personality rights will still extend and have the necessity of protection after death; The latter advocates that the personal interests of natural persons after death are still legal interests and should be protected for the sake of maintaining social morality and public interests. In recent years, judicial cases related to the privacy of the deceased have become more and more frequent, which makes people pay more and more attention to the privacy protection of digital heritage, which also reflects the legitimacy of this view to a certain extent.

2. A Question Raised

2.1 Why do social media accounts constitute the privacy of the deceased?

The concept of the right to privacy of the deceased [9] put forward by British scholars Edwards and Habinga holds that it is "the right of a person to retain and control his or her reputation, dignity, integrity, secrets or memory after death". In the digital age, people's traces on the Internet have been preserved actively or passively, and Foucault's "panoramic prison" has almost become a reality through digital monitoring.

American sociologist Goffman's "dramaturgical theory" [10] divides the life stage into the front stage and the back stage. A relatively unrestricted, private space to reveal your true self and communicate effectively is the back stage area, such as the WeChat private chat. However, in the virtual space of network, the "static scene" of the original theory is changed into "dynamic scene", and the boundary between them is becoming more and more blurred. The privacy of the back stage area constructs an ideal space for privacy circulation, so the disseminator has reasonable expectations that the information will not be disseminated again. The information in the front stage seems to be disclosed voluntarily by people, but as long as the data mining technology is used, the digital traces left by people on the network can be regularly integrated into "integrated privacy" [11]. In addition, with the implementation of real-name authentication system and biometric technology, personal identification information such as user ID number (photo), fingerprint and portrait may also be stored on social media accounts, which all touch people's core privacy.

2.2 Justification of protecting the privacy of the deceased

Article 994 of the Civil Code stipulates that "the actor who infringes on the personal interests of the deceased shall bear civil liability", which has affirmed the legitimacy of protecting the privacy of the deceased at the legislative level.

From a theoretical point of view, there is no clear answer about the termination time of legal personality in academic circles. In judicial practice, the legal personality of the testamentary sphere extends to the post-death period, meaning that the law allows the deceased to control his or her property after death [12] by means of a will, in other words, a natural person can escape the bonds of death by making a will. [13] In empirical law, there are also legal provisions in France that allow the personal rights [14] of works to last forever. Therefore, as one of the legal personality rights, the right to privacy should also be able to transcend death, survive and be protected after death.

From a practical point of view, protecting the privacy of the deceased is an inevitable requirement for safeguarding the freedom of natural persons and social order and morals. For the

deceased, if there is no promise that the interests of the deceased person's personality will not be impaired after his or her death, the deceased may be forced to adjust his behavior before his death, which is obviously not conducive to the free development of natural person's personality; For the living, this is the future guarantee of their personal dignity, the continuation of the ethics of the Chinese nation, and one of the cornerstones for maintaining national identity and national unity.

3. Current status of social media account protection in the context of privacy conflicts

3.1 The Realistic Dilemma of Privacy Protection of the Deceased in China

First of all, we analyze it from the platform level. On the one hand, the user agreement is unfair. Service agreements signed between social media platforms and users often stipulate that the ownership of social media accounts [15] belongs to the platform, and the users only enjoy the right to use accounts. Although this regulation protects users' personal information and privacy to a certain extent and avoids the intervention of third-party subjects, it is essentially an unfair treaty concluded by the platform using its own dominant position. According to statistics, the number of words in the service agreements of major social media users ranges from more than 7,000 (such as Weibo) to tens of thousands (such as QQ and Tiktok), and it is almost impossible for users to spend 20 or 30 minutes reading, which leads to a lack of clarity about their rights. What's more, if the user wants to transfer the private information or documents in the account to the designated person for safekeeping after death, then the agreement obviously violates the reasonable privacy expectation of the deceased.

On the other hand, most social media platforms are not well-established for the management system of the deceased accounts. Some platforms will directly delete the account number of the deceased. For example, when the user has not logged in to QQ for a long time, QQ will take recycling measures to save resources. Even if the deceased account is set as a protected account in some platforms like Weibo, the management method needs to be optimized. The protected account almost completely freezes the information processing function-it cannot log in, publish, delete or change the content. In 2014, the girl Holly was stabbed 14 times by her ex-boyfriend and died unfortunately. Her parents were distressed to find that there were a large number of photos of her daughter and murderer on Facebook. They applied to Facebook to delete the photos, but Facebook refused the request on the grounds of protecting users' privacy rights. Finally, Holly's parents applied to the court on the grounds that Holly enjoyed the copyright of the photos, and then they were able to delete the photos [16]. This case shows that such a "one size fits all" approach may bring extended harm to the relatives of the deceased.

Secondly, it is the user level. Death is so taboo in traditional Chinese culture that when we talk about it, our hearts become filled with fear and we are afraid we can't avoid it. We can't even look death in face, how can we think about our "afterlife"? Coupled with the blurring of the boundary between public space and private space in the era of intellectual media, people have become accustomed to selling their privacy in exchange for corresponding convenience and people's sensitivity to privacy is greatly reduced. Therefore, even if users know the concept of "deceased privacy", it is very possible for them not to use or activate the tools for managing deceased privacy. The embedding of digital platform into daily life makes the types of digital heritage rich and diverse, and the rights and interests involved are also complicated. Facing the emerging field of digital heritage management, users' media literacy still needs to be improved.

3.2 Protection of Privacy of Digital Heritage under Extraterritorial Law

In common law countries, the Britain, which previously held a negative view on the personal interests of the deceased, has gradually turned to a certain extent with the advancement of social digitalization. Article 1 of the British Data Protection Act 1998 [17] stipulates that personal data

only refers to the data of living and identifiable individual, that is, it does not protect the personal data of the deceased. However, in the British Identity Card Act promulgated in 2006, "individual" was defined as a natural person [18] who was born, whether he was alive or dead at present. Guided by GDPR [19], 12 member States in the European Union have provided legal protection for the protection of personal information (data) of the deceased, and one member state has set a 30-year protection period for the data processing of the deceased [20]. Nevertheless, such protection is sporadic and fragmented, lacking uniform norms and guidelines.

In contrast, the protection of digital heritage privacy in the United States is more perfect. Around 2014, the United States issued a series of bills to deal with disputes brought about by digital heritage, including UFADAA [21], PEACA [22] and RUFADAA [23]. The evolution of legal revision reflects the attitude of American legislators to protect the privacy of digital heritage more neutrally and consider multiple interests. The change from apparently tilting the balance of interests in favor of ISPs, by which the administrator of an estate could be granted access to the deceased's digital estate by default, to requiring the consent of the decedent to access his or her digital estate, has gone some way to reconciling the tension between access to the digital estate by the heirs and the digital privacy of the deceased. At the same time, RUFADAA has established a "Three-tier system of priority" [24] of "online will (disclosure instruction of online tools) effect > offline will (will, trust, power of attorney or other records) effect > user agreement effect" for the trustee's access to digital assets.

In civil law countries, German law, which is famous for its rigor, did not directly protect the personality of the deceased in the era of German Civil Code, and the protection of the personality interests of the deceased can only be completed through a series of precedents. The most representative one is the "First Case of Digital Heritage Inheritance in Germany" in 2012, which has gone through three judgments. The first instance in 2015 and the final judgments in 2018 all recognized that social media accounts and content data can be used as inheritance. However, it should be noted that social media accounts have various functions and the content they produce is also diverse. If the text, pictures and videos released by users are not original, copying other people's works without authorization may be suspected of infringement; One-to-one chat records may contain the privacy of the deceased or the privacy of a third party. This case reflects that the German legislature advocates interpreting the current laws and supporting users to make wills for digital heritage in advance. This practice has been questioned by some German scholars. For example, Professor Mario advocates that digital heritage should be divided into property rights and non-property rights, the latter is not inheritable, and this division takes into account the personal interests of the deceased including privacy.

4. Possible ways to protect the privacy of the deceased's social media accounts

4.1 Privacy Autonomy: Strengthen Source Governance

It should be made clear that social media accounts have become a complex integrating digital property, digital archives and digital footprints. These contents may intersect with the privacy of the deceased, and the users themselves are undoubtedly the ones who have the most say in the access rights and management rights of these contents. Therefore, users should be given the corresponding right to self-determination of information and handle the ownership of these digital heritages independently.

From the operational level, the most prerequisite for privacy autonomy is the user's privacy awareness and management awareness. The convenience of digital life paralyzes users' privacy perception. In many cases, citizens' private information is generated and retained by themselves in the course of transmitting information and using the internet. This kind of situation will lead to the fact that even if citizens feel that their rights have been violated afterwards, it is difficult to obtain legal protection because the information is actively shared themselves, but if it is uploaded by

others or collected, used and disseminated by data companies without authorization, it can be protected by law.

Based on this reality, it is necessary for the government to put on the agenda as soon as possible to improve citizens' media literacy through various channels such as school education and social propaganda. The specific popularization contents are as follows: First, clarify the connotation and value of privacy [25], help citizens grasp the correct privacy cognition, and realize the significance of privacy to individuals, so as to make trade-offs on the published information content in daily online life; Secondly, understand the process of data production and information dissemination, which can help citizens realize the hidden digital privacy such as browsing traces and shopping records that are often ignored on weekdays, and always clean up and reduce hidden dangers; Thirdly, users are encouraged to plan the digital heritage in advance, and meet the reasonable privacy expectations of the deceased by disposing of the heritage independently in advance, so as to prevent the possibility of privacy infringement of the deceased from the source.

The realization of privacy autonomy is also inseparable from technological innovation. The protection of domestic social media platforms tends to be an after-the-fact protection, which is, giving permission settings to users' accounts after their death. For example, according to the new regulations issued by Weibo in 2020, the account of the deceased will be set to the protection status of "unable to log in, publish new content, delete content and change status", and the commemorative account launched by Bilibili in the same year also adopts similar protection measures. On the other hand, the foreign social media platform, Google introduced the function of "Inactive Account Manager" as early as 2013. Users can decide to appoint an entrusted agent to handle digital assets within the scope specified by the account user before their death, and the scope of escrow can be decided by the users themselves, or users can choose to entrust Google to delete all data in the account after their death. Facebook (now Meta) also launched the "Legacy Contact" function in 2015, which also allows users to appoint a relative and friend as an agent before their death and the agent has the right to publish obituaries on the account page and download the digital heritage of the deceased. In 2022, Apple also officially released the "Legacy Contact" function. After the user dies, the Legacy Contact can apply to access the iCloud account and transmit the data stored by the user. Compared with domestic social media platforms, foreign social media platforms give the living a certain degree of autonomy, but it is not difficult to find that the management and disposal of digital heritage after the death of users is only transferred from the original platform to the hands of agents, who have not achieved full autonomy over their own digital heritage. The social media platform should take the initiative to assume the social responsibility of protecting the privacy of the deceased, provide digital heritage planning services that fully respect users' wishes, and give users a variety of ways to dispose of digital heritage. In addition to the existing methods of deleting account data and entrusting agents to digital trust, it can also cooperate with notaries to develop the network will function [26], facilitate the conclusion and modification of users' wills by means of video recording and digital signature collection, supported by data encryption technology, so as to reduce disputes over the digital heritage of the deceased and give full play to the subjective initiative of natural persons. Of course, considering the cost factor, the platform can charge users a certain digital heritage management fee to maintain its operation.

The law should also protect the privacy of the deceased, and the idea of platform technology needs the recognition of legal provisions in order to be more truly implemented. At the legislative level, we should improve the notarization system of electronic wills as soon as possible to build a convenient and legal channel for the privacy protection of the deceased. In the newly promulgated Civil Code, new forms of printed wills and video wills have been added with the progress of the times. However, in real life, people rarely make arrangements for online digital property offline, let alone the disposal of online private information. Therefore, electronic wills that meet the needs of digital life should be recognized by courts and legislative departments. At the judicial level, with the rapid development of Internet technology, Internet courts represented by Hangzhou, Beijing and Guangdong have become innovative judicial explorations in the digital age of China. Internet courts

have made breakthroughs in case jurisdiction system, court and trial mode, technology integration, substantive adjudication rules and so on, providing new ideas and new paths for solving new disputes caused by Internet technology. Privacy protection of digital heritage is also a new problem in the information age, which is handled by professional trial teams who are proficient in law and familiar with the network in Internet courts. While improving efficiency, it can also centralize precedents, summarize commonalities and laws, and provide judicial guidance for the adjudication of digital heritage.

4.2 Right to Be Forgotten: Safeguard Relief Afterwards

If the deceased did not plan for the digital heritage before his death, it will be implemented according to the network service agreement of the social media platform in general. In practice, there are a large number of social media platforms that will keep Internet users' online records and other information for a long time, which leads to the fact that after users die without living plans, their social media accounts will still remain unprotected on the Internet for a period of time. If the accounts are stolen during this period, it is very likely that the privacy of the deceased will be leaked.

At the same time, a considerable number of users have said that they do not want their social media accounts to be discovered by anyone. Although they upload information and their own opinions independently, they intend to cut the account from real life, such as using alternative accounts; permission settings such as "visible only to friends" and "visible in 3 days" also reflect the user's limitation of self-cyberspace. Research [27] shows that most users refuse to leave their social accounts within the reach of the public, and "forgotten" has become a new user demand instead.

In response to such a realistic situation, the platform needs to establish a dynamic verification mechanism for users' personal information as soon as possible, through real-name authentication, verification of the identity of close relatives and other measures to dynamically and quickly monitor the user's survival status, take timely measures for deceased user accounts, reduce the management gap time, and strive for more time for subsequent processing. Secondly, it is necessary to set a life cycle for users' data on this basis, that is, to completely delete the account of the deceased after a certain period of time without clear intention before his death, so as to play the role of correcting the privacy paradox.

From the global legislative practice and judicial precedents, the right to be forgotten put forward by Viktor Mayer-Schönberger has gained legal status in the GDPR mentioned above, and other countries such as the United States have adopted different models to meet the needs of their netizens. Although the protection path of the right to be forgotten has not been clearly defined in China at present, the provisions in Cyber Security Law have already involved the right to delete personal information and other related issues.

In the process of localization of the right to be forgotten, it is necessary to follow the principle of proportionality to achieve the balance between cases, and take different measures for special subjects (such as public figures and minors) to balance public values.

In conclusion, for the accounts of the deceased who have not expressed their intention, it is recommended to adopt the idea of "deleting them principally and keeping them exceptionally". In addition to the situation that the close relatives of the deceased offered to keep the account of the deceased as a memento, the website of social media platform should guide and assist in deleting the account of the deceased to better protect their personal privacy and information security. In legislation and law enforcement, relevant departments should also pay attention to the management of the account number of the deceased.

5. Conclusion

Regardless of the changes in the form of information carried by technology, the core of protecting personal privacy remains the same, and the protection of citizens' "freedom" and

"dignity" is always the starting and ending point of protection. This paper emphasizes and confirms the value of "human" under the background of civilization and technological progress by discussing how to strengthen citizens' consciousness of privacy and autonomy before their death to realize freedom and how to exercise the right to be forgotten of personal information of the deceased to protect dignity. This paper hopes to arouse the academic attention to the privacy protection of digital heritage, promote further discussion and research in this field in the future, and look forward to better protecting citizens' rights related to personal information through the cooperation of users, platforms and laws.

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