Post-Mortem Privacy: A phenomenon worth protecting within the EU data protection regime(s) or permitting ghosts to control our history?
FAUST
I. TEIL

Johann Wolfgang von Goethe

NACH EINER AUFFÜHRUNG DES DÜSSELDORF.
SCHAUSPIELHAUSES

INSZENIERUNG:
GUSTAF GRÜNDGENS

Paul Hartmann
Mephisto
Gustaf Gründgens
Margarette
Käthe Gold
Marthe Schwabe
Elisabeth Flickenschildt
Sänger
Karl Vierach
KLAUS MANN
MEPHISTO
ROMAN EINER KARRIERE
Mephisto

Winner Academy Award
Best Foreign Film

Brilliant
Shouldn't be missed
Extraordinary
Superb! Dazzling, Sensual, Fascinating, Brilliant.

An incredibly dynamic performance. A dazzling tour-de-force.

This film is a work of art.

A masterpiece!

Brilliant

A triumph

Mephisto a film by Istvan Szabo
The “duel of the dead” – The *Mephisto* case

- Mephisto: a 1936 Klaus Mann book portraying his former friend, Gustaf Gründgens, in the character of Höfgen—a ruthless intellectual and an opportunist, advancing his career in the Nazi regime.

- When a publishing house based in Munich, announced its intention to print the novel in 1963, the adopted son and sole heir of Gründgens filed for an injunction. Gründgens had just died, while traveling to Manila (in 1949 Klaus Mann committed suicide).

- At first instance the injunction was refused, at second instance, Gründgens’s heir obtained the injunction prohibiting the publication of the book. The Federal Supreme Court upheld the decision in 1968. The publisher brought a constitutional complaint for infringement of his rights to freedom of speech [Article 5(1) GG] and to narrative artistic freedom [Article 5(3) GG].

- In 1971, the constitutional review affirmed the prior ruling. The Court *held that the human dignity of the deceased was of overriding constitutional value to the right to freedom of speech*. 

- The case *established a post-mortal personality right* (*postmortales Persönlichkeitsrecht*) in Germany (based on the guarantee of human dignity under art.1(1) GG; the general personality right of a living person is based on arts 2, 1(1) GG).

- *Justice strikes back*: 18 years after Gründgens’s death, the novel was published in West Germany. The film *Mephisto* was also released in 1981, receiving two prizes (in Cannes and the Oscar). A play called *Mephisto* (based on the novel) opened in 2005 at the Schauspielhaus Hamburg (ironically, the director of this theatre from 1955 to 1963 was Gründgens).
Post–mortem privacy – protection of deceased’s personal data; preservation of reputation, dignity, integrity, memory of the deceased...

Marginal interest of legal scholarship so far; sociologists, anthropologists, psychologists more interested

However, there is a significant growth of digital natives, digital identities and personal data online - do they want their PD protected post-mortem?

A phenomenon with significant conflicts and controversies:

   Pro: enabling the deceased to shape their image and protect their dignity; respecting wishes of the deceased, protecting mourning families...

   Contra: conflicts with privacy of other people, freedom of expression, media, archives and history, interests of families and society?

Do we want to recognise it as a right? Does it sound frightening and creepy?
Current state of PMP protection

**DPD does not mention the deceased, but:** a hypothetical possibility of protecting the deceased’s data under the regime set by the Directive (A29 WP Opinion 4/2007 or Lindquist case) – fragmentation of protection?

Bulgaria (right of access to PD exercised by heirs), Estonia (consent valid 30 year after death, family entitled to permit processing of PD)
Conversely: Sweden – PD referable to a natural person who is alive; UK – PD: “data which relate to a living individual”

**Actio Personalis Moritur Cum Persona?** In common law: e.g. defamation, publicity rights (US and UK)

However, civil law jurisdictions have taken different stands, see e.g. in Germany Mephisto or Marlene Dietrich case, granting protection to both non-commercial (dignity, privacy) and commercial interests of the deceased (the use of name, voice, or image), but France in SA Editions Plon v. Mitterand, Court of Cassation: “the right to act in respect of privacy disappears when the person in question, the sole holder of that right, dies”
Commodification and propertisation of PD in the EU?

“Our proposal starts from everybody owning their own personal data.” Neelie Kroes personal data as “the new ‘oil’” – a valuable resource of the 21st century“

WEF predicts that “it will emerge as a new asset class touching all aspects of society.”

Consequently: increased propertisation of personal data in the EU (better control over personal data: enabling a form of transfer i.e. data portability and destruction, i.e. right to be forgotten)

Is the new regime favourable to post-mortem privacy? - property entails transfer in life and on death, whereas torts and liability regimes, arguably, protect only the living

However, proposal for GDPR does not mention deceased and the Council of the EU proposes an explicit exclusion

A property rights model for the protection of privacy has been the subject of an extensive debate within US legal and economic scholarship (Westin, Laudon, Schwartz, Mell, Zarsky, Lessig)

Aim: enabling individuals to control the collection, use and transfer of personal data and to participate in sharing the profit resulting from the use of PD

Objection: it would encourage trade in personal data, vest even more control in data controllers and result in less privacy (e.g. Litman, Samuelson); enable control over facts, jeopardise freedom of expression; if privacy is a human right, then...?
**Property, so what?**

- **The right to be forgotten** – *abusus* of property (*right to destroy*)?


- Do dead have this right if PD are property?

- **Data portability** (Art. 18) - transfer, including post mortem, one of the essential features of property, whereas personal obligations “die with a person”

- Value of deceased’s PD?

- Do we want our PD *propertised*? Human rights approach “more human”, at least for Europe?
Conclusion – A regime for ghosts or?

Resemblance to the property base DP model

Promoting protection of deceased's PD

Consistency in DP models

Post mortem privacy – a value worth protecting

Solution: e.g. extend data protection and/or other personality rights to protect privacy of the deceased; testamentary disposition? Intestacy?

But: allowing the ghosts and *Mephistos* to restrict our freedom of speech, artistic freedoms, history?
“What the Facebook profiles of the dead seem to suggest is that our social identities are not necessarily coextensive with the biological life of the individual human organism with which they are associated, and thus it is not the memory of the dead person that is being honoured and sustained through this form of memorialisation, but some dimension or extension of the dead person themselves.” (Stokes, 2012) or “secular afterlife” (Harrison, 2003)
Legacy
Permanently preserve your legacy and heritage with a Virtual Eternity intellitar that looks, sounds, and acts just like you.
Thank you

Edina Harbinja
e.harbinja@strath.ac.uk
@EdinaRl