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## THE POWER OF INTERNET SERVICE PROVIDERS (ISPS) OVER DIGITAL LIFE – CIVIL LAW INSIGHT\*\*\*

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### Abstract

In this paper, the issue of the power the Internet Service Providers (ISPs) have over people's digital lives is examined through the following examples: inheritance of digital assets, users' rights over digital content and their inability to transfer it after purchase, and implicit consent to unexpected clauses found in ISPs' Terms of Service (ToS). This paper draws attention to the rules most people accept daily, without even noticing them or knowing what the consequences of their acceptance are.

1) In the context of inheritance, after users die, ISPs will usually not allow their heirs to access their digital assets and accounts, even if users stated the opposite in their wills. This can pose problems, both for the heirs because many of those assets have a real monetary and emotional value, but also to ISPs, because many of them have faced lawsuits from heirs wanting access to deceased's accounts.

2) The issue of the rights users hold over digital content polemizes those situations in which a person, after purchasing certain digital content, does not become its owner, but acquires only the right of use, until death. Therefore, he/she cannot transfer those assets to anyone, both during his/her life and after death. If he/she would do so, it would, in case of most digital content, constitute copyright infringement.

3) In terms of consent, users often accept various clauses that ISPs put in their ToS, some of which are not expected to be a part of ToS. Some of them have little or nothing to do with the purpose that the users intended to achieve on ISP's websites. In a hurry to use ISP's services, a person may accept many conditions that he/she might not accept in the physical world, which, in turn, might lead to court proceedings after the user becomes aware of what he/she has consented to.

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The authors methodologically deal with the stated issue using analysis, compilation, and case methods, trying to reach valid (civil) legal conclusions. In this regard, the basic problems of the paper will be elaborated analytically, by using valid domestic and foreign civil law literature. Stated conclusions are supported by concrete examples that appear in the (IT) practice.

**Key words:** digital assets, inheritance of digital assets, Internet Service Provider – ISP, use of digital assets, Terms of Service (ToS)

## Introduction

Internet Service Providers (ISP) offer a variety of services. ISPs' websites are used to buy or sell goods and services, socialize, and advertise, send or receive messages, and store various content. All this is done in a digital environment, whose rules, in a way, differ from the ones that exist in the physical world. Many people, for some reason, do not take the digital environment as seriously as they do the physical one. Most move through the digital landscape not knowing what the rules are, and who makes them. However, those rules apply to all who want to procure a service from an ISP. And ISPs make those rules. Those rules are put in Terms of Service (ToS) that are shaped into wrap contracts, mostly in clickwraps and browsewraps (Daiza, 2017; Grochowski, 2019). In this paper, the authors will not deal with the characteristics of various wrap contracts, however, it is important to briefly mention them, since they are the ones dictating the relationship between ISPs and users.

Wrap contracts are contracts of adhesion and they are composed in a take it or leave it fashion – the one composing them (ISP) does not offer the other party (a user) an opportunity to negotiate (Matić, 2008). A user can only accept them as they are or refuse them and forfeit whatever services he/she wanted from an ISP. This is the source of the immense power ISPs hold over digital life and digital commodities.

For example, for all our lives, we were aware that everything we had (both rights and obligations) will be inherited by our heirs, after we die (Art. 5 of Croatian Inheritance Act, IA). However, many of the items that once existed only in a physical form are now digital and therefore, intangible. Today they only exist as ones and zeros, stored on various electronic devices or on ISPs' platforms. When it comes to inheritance, digital assets stored on deceased's devices are inheritable, since the devices exist in a

physical world, so they themselves are inheritable together with their content. But digital assets stored on various digital accounts will most likely not be inherited, since most ISPs prohibit the transfer of those accounts.

Digital content purchased from ISPs is not owned by users; they can only use it for the duration of their lives (licensed digital content). Users are prohibited to transfer licensed digital content in any way, while they live and after they die. Most users are not aware that this applies to them and to the digital content they have purchased, so they wrongfully assume they can treat it the same way as they would its tangible counterparts. In this part, exhaustion doctrine in regard to digital content is also explained, with the emphasis on decisions of Court of Justice of the European Union (CJEU), to show which digital content, and why, cannot be transferred by users.

While agreeing to ToS, users are usually not aware of what they have agreed to. Most users do not read ToS because they are long, ambiguous and their content cannot be influenced, therefore, many users believe that there is no point in reading them anyway (some commentators literally call them “unreadable”, Benoliel and Becher, 2019). Since ISPs are aware that users do not acquaint themselves with ToS, they often take advantage of this and put clauses in ToS that either have little to do with the transaction the user wanted or clauses that put users at a disadvantage while giving ISPs rights they might not otherwise have. Making users accept ToS that they do not read or understand is a great way to exert power over user’s digital life – many users accept various clauses in digital form that they would probably never accept if they were written on paper.

This paper will consist of 3 main parts: the first part will deal with the inheritance of digital assets and their advantages and obstacles as well as possible solutions to these problems. The second part will deal with the rights users have over purchased digital content and reasons why subsequent transfer of this content is not allowed. The third part will concentrate on users’ implicit consent to surprising and unusual clauses found in ToS and possible ways of ensuring users’ attention is drawn to them or on ways of prohibiting them altogether.

## Inheritance of digital assets and digital accounts

Many assets that were tangible in the past, today often exist only in a digital form and are stored on computers, smartphones, flash drives, email accounts, clouds, social media, and the like (Arnold, 2013; Klasiček, 2018). After their owner dies, it might not be clear who, if anybody, inherits them. The reason for this is that the law in many countries does not specifically deal with the inheritance of digital assets. This is also the case in Croatia and general rules of inheritance law should apply accordingly (Matanovac Vučković and Kanceljak, 2019).

However, things are not so simple when it comes to inhering digital assets stored on ISPs' platforms. In those instances, ISPs will actually decide what will happen to those assets after the user dies (Banta, 2017). Many ISPs' ToS have similar rules concerning the transferability of an account during user's life and after his/her death – they prohibit it (Banta, 2014; Kreiczler-Levy and Doeyets-Kedar, 2019; Grochowski, 2019). Because of that, some commentators even state that ToS violate a basic principle of succession law – freedom of testation – since they prohibit heirs from inheriting deceased's accounts and its content, even if that was his/her wish written in a will (Banta, 2014, 2016, 2017; Borden, 2014; Darrow and Ferrera, 2007; Grochowski, 2019; Ronderos, 2017; Truong, 2009; Watkins, 2014). Since ISPs decide what will happen to users' accounts and their content after users die, they will either choose to delete the account and its content or leave it on their servers indefinitely (Banta, 2014; Ronderos, 2017). Regardless of what they decide, one thing is certain: heirs will not benefit from it.

Nonetheless, there are many advantages to digital inheritance. For instance, some digital assets have real monetary value (Banta, 2014; Edwards and Harbinja, 2013; Harbinja (a, b), 2014). For example, a few years ago, a virtual space station on Entropia Universe (an online gaming platform) was sold for \$635,000 (Klein and Parthemer, 2016). If its owner died, his/her heirs would certainly benefit from inheriting the digital asset. Of course, most people's digital assets do not have that kind of monetary value, but they certainly have great emotional value to user's heirs (Banta, 2014; Calem, 2010; McCarthy, 2015). Additionally, if heirs are denied access to the deceased's email accounts, clouds, etc., the rest of their inheritance might suffer, since most people today store their business, banking,

and other information on their digital accounts. Therefore, if heirs cannot access them, they might lack important information about the deceased's business and other important parts of the inheritance, which might lead to serious damages (Banta, 2014; Cahn, 2014; Grochowski, 2019; McCarthy, 2015; Tarney, 2016). Also, certain assets could lose their value if they are not accessed and managed for too long. For example, a website that generates income, if not accessed for some time, might lose its value quickly (Klasiček, 2018). Furthermore, many people receive their bills through email, so if heirs cannot access the deceased's email account, bills will not be paid and penalties might pile up (Beyer and Cahn, 2013).

Although ISPs, as a rule, do now allow heirs to access deceased's account, case law both in the US and in the EU shows that, if heirs are persistent enough, they might have success in gaining access to the deceased user's accounts. Here the authors will only mention two such cases: in the US, one of the first cases of heirs obtaining access to deceased's accounts was the case of Justin Ellsworth's email account (*In re Estate of Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. Mar. 4, 2005)*). After his death, Yahoo! refused to grant family members access to his account. Finally, after a legal battle, the judge ordered Yahoo! to give Ellsworth's father access to it (Edwards and Harbinja, 2013). In the EU, a judge also decided that the deceased's Facebook account is inheritable and that user's parents have the right to access the account and its content (Bundesgerichtshofs decision of 12 July 2018, III ZR 183/17<sup>50</sup>).

Of course, all of these (and similar) cases were decided after the user's death, following their family members' requests to access the accounts. Users themselves were not given an opportunity to decide what will happen to their accounts *postmortem*. However, there are ISPs that started offering users a chance to decide in advance what will happen to their account and its content after they die. Examples of how this could be done can be found in ToS of some of the most popular ISPs in the world today: Facebook and Google.

**1. A) Default rules:** Facebook's policy is to memorialize accounts if a family member, or a close friend, informs Facebook that the user has

50 <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86602&pos=0&anz=1> (accessed on November 9, 2022)

died.<sup>51</sup> Verified immediate family members can also request the removal of a deceased's account from Facebook.<sup>52</sup>

**B) User's choice:** However, Facebook has a feature that allows users to decide, while they are still alive, what will happen to their accounts *post-mortem*: Facebook users can either appoint a legacy contact to look after their memorialized account or choose to have the account permanently deleted after they die.<sup>53</sup>

A person chosen to be a legacy contact will be able to accept friend requests on behalf of a memorialized account; change the cover photo and profile picture and also pin a tribute post to the profile. If the memorialized account has an area for tributes, the legacy contact will be able to decide who can see tributes and who can post them.<sup>54</sup>

On the other hand, if a deceased user wanted his/her account deleted, after Facebook is notified of his/her death, it will delete all messages, photos, posts, comments, reactions and information immediately.<sup>55</sup>

**2. A) Default rules:** If a Google user dies, immediate family members and representatives can request this user's account to be closed and, under certain circumstances, Google will provide them with the content of the deceased user's account (without passwords or other login details). All of this can happen only after a careful review of family members' or representatives' request.<sup>56</sup> It is also possible for family members or representatives to request ownership transfer of a deceased user's domain.<sup>57</sup>

**B) User's choice:** Like Facebook, Google also lets users take certain steps while they are still alive. Google offers a feature called Inactive Account Manager: users can choose whether someone will have access to their

51 [https://www.facebook.com/help/150486848354038?helpref=faq\\_content](https://www.facebook.com/help/150486848354038?helpref=faq_content) (accessed on November 10, 2022)

52 [https://www.facebook.com/help/1518259735093203?helpref=related\\_articles](https://www.facebook.com/help/1518259735093203?helpref=related_articles) (accessed on November 10, 2022)

53 <https://www.facebook.com/help/103897939701143> (accessed on November 11, 2022)

54 [https://www.facebook.com/help/1568013990080948?helpref=faq\\_content](https://www.facebook.com/help/1568013990080948?helpref=faq_content) (accessed on November 11, 2022)

55 <https://www.facebook.com/help/103897939701143> (accessed on November 11, 2022)

56 <https://support.google.com/accounts/troubleshooter/6357590?hl=en> (accessed on November 11, 2022)

57 <https://support.google.com/domains/answer/9389610?hl=en> (accessed on November 11, 2022)

information after they die, or if their account will be deleted.<sup>58</sup> It is also a way to notify someone (a trusted contact) in case an account was inactive for a certain period of time. If an account was inactive for a specified time, a trusted contact (or several) will be informed. They will not be notified during setup, so it is possible for a person not to know that he/she has been chosen as a trusted contact. After a certain period of inactivity, a trusted contact will receive an email that the user wrote during setup, with a footer added by Google. If a user decided to share certain content with a trusted contact, the email will contain a list of data that is to be shared, and a link to download the data.<sup>59</sup>

These are good examples of ISPs offering users a choice of what will happen to their accounts and their content after their death. It would be advisable that other ISPs adopt similar policies. However, so far, if an ISP mentions user's death in ToS at all, it is to offer users' family members or representatives a possibility to request account deletion and/or memorialization.<sup>60</sup>

## **Users' rights over digital assets**

Digital content can be created by users or by someone else and purchased by users from ISP's websites (Matanovac Vučković and Kanceljak, 2019). ISPs usually explicitly state that users own digital content they create and store on their platforms,<sup>61</sup> but when it comes to digital content that the user has purchased from ISPs' websites, their ToS state that only a license to use the digital content (e-books, music, videos, games, apps, software) was acquired, not the content itself (Matanovac Vučković and Kanceljak, 2019). Therefore, regardless of the fact that users usually have to click "buy" or some similar phrase in order to access digital content, it is not actually sold or bought, because to buy something means to acquire

58 <https://myaccount.google.com/inactive?pli=1> (accessed on November 11, 2022)

59 <https://support.google.com/accounts/answer/3036546> (accessed on November 11, 2022)

60 Twitter: <https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account> (accessed on November 15, 2022); Instagram: [https://help.instagram.com/264154560391256/?helpref=search&query=deceased&search\\_session\\_id=ed2e2e06e1c0cf0dd7665b69d8255823&sr=1](https://help.instagram.com/264154560391256/?helpref=search&query=deceased&search_session_id=ed2e2e06e1c0cf0dd7665b69d8255823&sr=1) (accessed on November 15, 2022); LinkedIn: <https://www.linkedin.com/help/linkedin/answer/2842/deceased-linkedin-member?lang=en> (accessed on November 10, 2022)

61 <https://www.facebook.com/legal/terms> (accessed on November 15, 2022)

ownership (the sale agreement is one of the most common ways of obtaining ownership, Vedriš and Klarić, 2014; Eichler, 2016).

Hence, an ISP only transfers the right to use the said digital content. This means that the user is not allowed to “redistribute, transmit, assign, sell, broadcast, rent, share, lend, repurpose, modify, adapt, edit, license or otherwise transfer’ it”.<sup>62</sup> Most users are not aware of this and wrongly assume that, once they have purchased digital content, they became its owners and can do with it as they please (Reis, 2015). This is not so unusual because users do have many of the rights owners have – the right to use, the right to possess, the right to exclude others (these are typical rights an owner has according to Art. 30/1 of Croatian Ownership and Other Proprietary Rights Act; Banta, 2017). However, there is one important right missing – the right to transfer.

Inability to transfer digital content purchased from an ISP applies not only while a person is alive, but also after he/she dies. Some TOS do not mention what will happen to the purchased digital content after their user dies, while others prohibit inheritance explicitly (Banta, 2017; Watkins, 2014). However, even in those instances when ToS do not mention transfer *postmortem*, it can be deduced that it is not allowed, since most ToS state that any transfer of purchased digital content is prohibited. Regardless, here too, if heirs are determined enough, they might be granted access to the deceased’s digital content that he/she has purchased from an ISP. An example of this happening comes from the US, where a widow managed to get a court order to access her deceased husband’s Apple account (Mayo, 2016; Banta, 2017). However, this will only happen if heirs remain persistent enough and manage to get a court order.

Main reasons why users believe they own digital content purchased from ISPs are, firstly, they do not read ToS and, secondly, they treat digital content the same as its tangible counterpart – they think that if they have paid for it, they can do with it as they please. However, there is one crucial difference between tangible and digital content: owners of copies of tangible copyrighted works can indeed, under exhaustion of rights doctrine, sell, donate, bequeath or borrow their copies (Art. 34/4 of Croatian Copyright

62 ‘Amazon Music Terms of Use’ (*Amazon*, last updated on Sept 14, 2021), <https://www.amazon.com/gp/help/customer/display.html?nodeId=201380010> (accessed on November 15, 2022)

See also e.g., ‘Apple Media Services Terms and Conditions’, <https://www.apple.com/legal/internet-services/itunes> (accessed on November 15, 2022)



and Related Rights Act; Art. 4/1 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society<sup>63</sup>, Henneberg, 1996). In the case of digital content obtained from ISPs, users cannot do the same, since exhaustion doctrine does not apply to digital content.

The reason behind ISPs' ban of the transfer of digital content is copyright protection. Transfer of digital content infringes copyright because if a digital file would be transferred to another device, RAM of the recipient's device would have to create a copy of the file that needs to be transferred, because this is the only possible way to achieve the transfer of digital content (Eichler, 2016; Schjønby-Nolet, 2019). So, one copy will remain on the first device and a new copy will be created on a second device. If the file that is being transferred contains copyrighted work, this would mean violation of copyright owner's reproduction right, because his/her permission to create a copy is lacking.

There are two landmark cases decided by the CJEU that the authors believe are important to mention here in order to shed the light on what might happen to users redistributing digital content. The authors will not dwell on details of those cases, only on points of CJEU decisions that are important for this paper.

In *UsedSoft*<sup>64</sup>, CJEU took a stand that the copyright owner cannot prevent the licensee, who has downloaded a software, from reselling his/her license. CJEU concluded that Art 4 of Directive 2001/29 applies to downloaded software. Art. 4 governs distribution rights and the Court ruled that downloading software amounts to a sale. Therefore, exhaustion doctrine applies to software (p. 61 *“It should be added that, from an economic point of view, the sale of a computer program on CDROM or DVD and the sale of a program by downloading from the internet are similar. The on-line transmission method is the functional equivalent of the supply of a material medium. Interpreting Article 4(2) of Directive 2009/24 in the light of the principle of equal treatment confirms that the exhaustion of the distribution*

63 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029> current consolidated version (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02001L0029-20190606>) (both accessed on November 15, 2022)

64 *UsedSoft v. Oracle International Corp.*, <https://curia.europa.eu/juris/document/document.jsf?docid=124564&doclang=EN> (accessed on November, 15, 2022)

right under that provision takes effect after the first sale in the European Union of a copy of a computer program by the copyright holder or with his consent, regardless of whether the sale relates to a tangible or an intangible copy of the program.”; and p. 72 of the decision: “...distribution of a copy of a computer program is exhausted if the copyright holder who has authorised, even free of charge, the downloading of that copy from the internet onto a data carrier has also conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period.”). This is also in accordance with Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, which constitutes a *lex specialis* in relation to Directive 2001/29.

On the other hand, in *Tom Kabinet*<sup>65</sup> CJEU took a stand that what applies to software cannot apply to e-books since that was not the intention of EU legislature when it adopted Directive 2001/29 (p. 56 of the Decision). Therefore, in this case, Art 3 of the Directive 2001/29 should apply, which means that supplying e-books to the public for unlimited time by downloading constituted communication with the public and there is therefore no exhausting of rights (regarding communication to the public, see also Act 17 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC<sup>66</sup>). The rationale behind this decision is best revealed in p. 58 of the ruling: “*The supply of a book on a material medium and the supply of an e-book cannot, however, be considered equivalent from an economic and functional point of view. As the Advocate General noted in point 89 of his Opinion, dematerialised digital copies, unlike books on a material medium, do not deteriorate with use, and used copies are therefore perfect substitutes for new copies. In addition, exchanging such copies requires neither additional effort nor additional cost, so that a parallel second-hand market would be likely to affect the interests of the copyright holders in obtaining appropriate reward for their*

65 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v. Tom Kabinet Internet BV, Tom Kabinet Holding BV, Tom Kabinet Uitgeverij BV*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=221807&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1> (accessed on November 15, 2022)

66 <https://eur-lex.europa.eu/eli/dir/2019/790/oj> (accessed on November 15, 2022)

*works much more than the market for second-hand tangible objects, contrary to the objective referred to in paragraph 48 of the present judgment.”*

One might think that the discussion about digital exhaustion is obsolete, with the growing popularity of streaming services. However, it has to be noted that ISPs offering digital content downloads are still very successful, even in the streaming era. For example, Amazon has been selling more e-books than paper books ever since 2010 (Tweeny, 2010). When it comes to music, the number of music downloads is dropping, but there are still a lot of people who want to “own” a digital copy of their favourite music (in 2021 in the U.S. alone, there were 209.3 million digital music singles downloads. In the EU not as much, but still a considerable amount<sup>67</sup>.) Also, many people like to purchase movies and/or series and watch them at their own convenience. The same applies to games. Some reasons for download are probably connected to its benefits over streaming: once downloaded, a file can be accessed and used over and over again, regardless of the fact that it might no longer be available on streaming services or via download.<sup>68</sup> Also, a person does not have to be online to access and use downloaded content, which can be extremely important due to the cost of streaming or instances when a person cannot be connected to the internet (e.g., on a plane).

If a person wants to pay for digital content to have it on his/her device, rather than stream it, it certainly forms a stronger bond with the object of that purchase (Schjønby-Nolet, 2019). Even more likely, the bond may have already existed before download and was the reason for it. Whatever the case, it can be assumed that a person who purchased such content would, one day, want to donate it, bequeath it or re-sell it if he/she has lost interest in it. Since in the future it is probable that most of us will transfer to digital forms of many copyrighted works (if we have not already), and

<sup>67</sup> <https://www.statista.com/statistics/186688/downloads-of-digital-music-singles-in-the-us-since-2004/> and <https://www.statista.com/outlook/dmo/digital-media/digital-music/music-downloads/europe#revenue> (accessed on November 15, 2022)

<sup>68</sup> For example, lately, Netflix has been severely criticized by the public for removing some of the most favourite shows and movies. Subscribers went so far as to threaten to cancel their subscription because their favourite show was cancelled in the middle of them watching it.

Hein, M., Dawson's Creek' Leaves Netflix, and Fans Are Very Upset, <https://popculture.com/streaming/news/dawsons-creek-leaves-netflix-and-fans-are-very-upset/#1> (accessed on November, 2022)

many will want to download it and later transfer it, the authors believe that exhaustion of digital content will come more and more into focus.

Independent of benefits for users and their families, digital exhaustion has many other benefits: it makes access to works easier by lowering prices and increasing availability; it helps preserve old, abandoned and censored works; it also protects consumer privacy in the acquisition, enjoyment, and transfer of works; it supports innovation and competition between ISPs (Perzanowski and Schultz, 2014). It is connected to the realization of freedom of movement in the EU; it also enhances marketability of copyrighted works by making them more available and affordable through second-hand markets and it establishes access and preservation of works that are not available any more through other channels (Karapapa, 2018).

Many authors who argue in favour of digital exhaustion mention possible solutions on how not to infringe copyright while transferring digital content. The most important issue for this to happen is to make sure that digital content being transferred is removed from sellers' hardware after the transfer is made. An issue of marking each copy of the digital work so that each copy can be identified, as well as limiting the number of times one digital content can be retransmitted, was also raised (Crosby, 2015, Merzei, 2015). Most agree that the technology to do so exists and could be applied to digital content in this regard (Karapapa, 2018; Oprysk, Matulevičius and Kelli, 2017; Perzanowski and Schultz, 2011; Schjensby-Nolet, 2019).

The authors of this paper will not try to suggest ways in which technology can ensure a secondhand market for digital content, nor are they capable of offering a solution in terms of ways in which copyright infringement problems could be solved using this technology, since that would be beyond the scope of their expertise. They would, however, like to stress that the problem of transfer of purchased digital content is not going anywhere any time soon. Therefore, regardless of streaming being the predominant format of using digital content, finding ways to transfer downloaded digital content, while reconciling opposing interests of users (purchasers) and the public with interests of copyright owners, should be one of the future goals for legislators (Mezei, 2015).

## Consent to surprising clauses in ToS

ToS are composed of a large number of clauses, so users often do not notice the ones that might be questionable and, even if they do, they agree to them because they cannot influence them (Kim, 2011). Most ToS consist of the following clauses: an intellectual property clause (informs users that the website data is protected under copyright law); a prohibited use clause (outlines prohibited actions); a modification clause (allows the website to modify ToS unilaterally); a termination clause (lists the conditions under which the web site can deactivate the user's account); a limitation of liability clause (stipulates the degree of legal exposure for the website in actions arising from website usage), a disclaimer clause (states that the web site services are provided to the users without warranties); a class action waiver clause (the user will not file a class action lawsuit against the website); an arbitration clause (which mandates arbitration of disputes concerning the user's rights and duties); a forum-selection clause (establishes the geographic location for litigation between the parties); a governing law clause (specifies which law will govern a dispute between the parties); a time bar clause (sets a time period within which the user is entitled to file any lawsuit against the website) (Benoliel and Becher, 2019, 2266).

Some clauses are there to shield ISPs from possible problems, e.g., from liability (clauses limiting warranty or stating that there is no warranty at all) or to put limitations on the use of the product (license instead of transferring ownership) (Kim, 2011). Other clauses are used to limit or terminate users' rights (e.g., clauses determining exclusive jurisdiction or an arbitration clause) in order to minimize risks for ISPs by cutting down costs and unpredictability (Kim, 2011).

However, many of them are not expected by users, given the nature of the transaction that they wanted to achieve on ISPs' websites. Some of those clauses might even favor ISPs at the expense of users, e.g., clauses giving ISPs the license to user content that is much broader than is necessary, giving ISPs intellectual property rights, etc. (Kim, 2011). Clauses that are certainly unexpected to average users are those banning public criticism of the product, requiring assent to third-party monitoring, forbidding reverse engineering and use in connection with third-party software, disclaimers of liability, requesting assent to all future changes to the terms, etc. (Davis, 2007). Also, concerning different clauses they consist of, many ToS

might be considered non-transparent when it comes to form, substance, behavior towards certain users, inconsistency between what is promised to users and what actually applies to them and also concerning outcomes of contractual disputes (Becher and Benoliel, 2021).

When it comes to contractual disputes, one of the clauses that often leads to them is the arbitration clause (Garcia, 2013; Kunz et al., 2003). Users usually do not expect that, by agreeing to ToS in order to acquire certain goods or services, they have also agreed to an arbitration clause (Kim, 2020-2021). Therefore, users do not know anything about the arbitration court they have agreed to, which puts them at a disadvantage (Triva, 1970).

There are a few examples in Croatian case law of courts dealing with adhesion contracts' clauses that were surprising to the party consenting to the contract. These contracts were not drafted online, but regardless, it is interesting to see which position Croatian courts took. Admittedly, these clauses, while surprising, were also, according to the courts, unfair. The clauses in question determined the jurisdiction of the court of the drafter's place of residence. In one case, the jurisdiction of the Klagenfurt court was even contracted, which, if applied, would have led to a significant financial imbalance between contracting parties. Therefore, courts decided that these clauses were null and void.<sup>69</sup> The reason behind this decision was that the weaker party had no influence over them and it led to a significant imbalance between contracting parties (this is also determined by Croatian Obligations Act (OA), Art. 296 and Consumer Protection Act (CPA), Art. 53, concerning consumer contracts).

In CPA, Art. 54, there is a list of clauses that can be considered to be unfair in consumer contracts. Among them, there are some that are often found in ToS (arbitration clause, clauses limiting certain consumer rights and obligations of the drafter of the contract, etc.). Also, Art 61 of CPA determines that ISPs must inform consumers in a clear and comprehensible manner about various important information concerning online transactions. This obligation of ISPs is not considered fulfilled if the information is only displayed to the consumer in ToS. Unfortunately, no

69 GŽ 1621/2016-1 (<https://www.iusinfo.hr/sudska-praksa/ZSRH2016StGzB1621A1> (accessed on November 15, 2022); Gž 492/2018-2 (<https://www.iusinfo.hr/sudska-praksa/ZSRH2018VuGzB492A2> (accessed on November 15, 2022), Gž 141/2020-2 (<https://www.iusinfo.hr/sudska-praksa/> (accessed on November 15, 2022).

examples were found in Croatian legislation or case law concerning clauses that were only considered surprising and ambiguous, without them also being unfair. However, those unexpected clauses could pose problems for users and should be addressed. Provisions of CPA Arts. 54 and 61 could be indicative of how unexpected clauses could be dealt with.

This problem is obviously not insignificant, because it has already been recognized by some countries. There are examples of provisions or case law, concerning clauses such as these, both in civil and common law countries. For example, German Civil Code (Bürgerliches Gesetzbuch), like Croatian OA (Art. 296), has a provision dealing with clauses in adhesion contracts that are contrary to good faith and disturb the balance between the contracting parties and are therefore void (BGB, Art. 307). However, BGB takes a step further and, in Art. 305c, determines that clauses which are surprising (*überraschende*) and ambiguous (*mehrdeutige*), so the other party has no reason to expect them in the contract, will also not be considered a part of the contract. Something similar was found in U.K. case law, where the judge has, in *Thornton v. Shoe Lane Parking Ltd.*, decided that the drafter is expected to inform consumers of the clauses that are of special interest to them, especially the clauses that are unusual and unexpected for the contract that is being concluded (in addition to clauses that impose unusual obligations, that is, deprive consumer of the rights he/she otherwise has by law).<sup>70</sup> Some US courts also took a similar stand (e.g., *Colgate v. JUUL Labs, Inc.*, *Theodore v. Uber Technologies, Inc.*), where judges concluded that unexpected terms found in ToS, given the nature of the transaction, should require specific notice.<sup>71</sup>

In *Colgate v. JUUL Labs, Inc.* the judge decided “...an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious.” and in *Theodore v. Uber Technologies, Inc.* the judge decided that: “Accordingly, Uber has not met its burden to justify compelling arbitration, and (...) I must deny its motion seeking that relief

70 *Thornton v. Shoe Lane Parking Ltd*, Court of Appeal, <https://www.bailii.org/ew/cases/EWCA/Civ/1970/2.html> (accessed on November 5, 2022)

71 *Colgate v. JUUL Labs, Inc.*, <https://casetext.com/case/colgate-v-juul-labs-inc-1> (accessed on November 5, 2022), *Theodore v. Uber Technologies, Inc.*, <https://casetext.com/case/theodore-v-uber-techs> (accessed on November 10, 2022)

*because parties may not be compelled to arbitrate when they have not agreed to do so.”*

The authors suggest that Croatian legislators also need to acknowledge that drafters of adhesion contracts, made both online and offline, put clauses that consumers do not expect in their adhesion contracts, which can lead to serious problems for consumers. They should not be allowed to do that without at least drawing consumers’ attention to those clauses and making them specifically consent to them. If they did not do that, the solution would be to not consider those clauses to be a part of the contract.

## Conclusion

The problem of what will happen to digital accounts and their content after the death of their user could easily be solved by ISPs themselves. Some of them (Facebook and Google) have already given users the opportunity to choose, while they are still alive, what will happen to their accounts *postmortem*. In the future, ISPs could request users to make that choice during account setup. That could be one of the necessary steps while opening an account (like writing user’s name, DOB, choosing their password etc.) That way, all users would choose, right away, what will happen to their accounts after they die. This would be in the users’ interest, but in the interest of ISPs, as well, because they would avoid possible problems that occur when users’ heirs sue in attempt to access deceased’s accounts and their content (as was the case on several occasions). This would also be beneficial in one more respect: it would draw the attention of the users and consequently the public to this problem and in time it would become normal for users and ISPs to address and resolve this issue.

The authors believe that the problem of transferring digital content purchased from an ISP cannot be solved as simply. To allow transfer of digital content purchased from an ISP, the concept of the exhaustion doctrine would have to be extended to all purchased digital content (not only to software). However, this can be quite inconvenient for copyright owners, given that digital goods (e.g., e-books) do not deteriorate with time and use, so used copies would be in the same condition as the new ones, but much cheaper. This would drive the price of that content down, which is obviously not in the best interest of copyright owners. By using technology



that is already available, some of these issues could be solved or at least, alleviated (e.g., marking each copy of the digital work so that each copy can be identified; ensuring that the file of the person transferring it is deleted from his/her device; limiting the number of times digital content can be transferred). The authors believe that, by using technology, it would even be possible to deteriorate content a little bit, after each transfer, thus making it similar to deterioration of its tangible counterpart with each use. By using technology, it would likely be possible to apply digital exhaustion to most, if not all digital content, in order to reconcile opposing interests of users and copyright owners, since nonexistence of digital exhaustion may now be in accordance with copyright law, but the authors are not sure that this necessarily coincides with the needs of modern life.

As for surprising and unexpected clauses that can be found in many ToS' (but also in all other adhesion contracts), authors suggest that such clauses should not be considered a part of ToS (like it is regulated in Art. 305c of Bürgerliches Gesetzbuch), unless users explicitly agree to clauses like that. Namely, consent to ToS should not automatically mean the consent to the clauses that the average user does not expect. These should be agreed upon specifically or they should not have effect.

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## MOĆ PRUŽATELJA INTERNETSKIH USLUGA (ISPS) NAD DIGITALNIM ŽIVOTOM – UVID U GRAĐANSKO PRAVO\*\*\*

### Sažetak

U ovom se radu pitanje moći pružatelja internetskih usluga (ISP), nad našim digitalnim životom, analizira na sljedećim primjerima: nasljeđivanje digitalne dobara, prava koje korisnici imaju nad digitalnim sadržajem te nemogućnost da taj sadržaj prenose dalje i pristanak na neočekivane klauzule koje se nalaze u uvjetima poslovanja ISP (ToS). Ovim radom želimo skrenuti pozornost na pravila koja većina ljudi svakodnevno prihvaća, a da ih uopće ne primjećuje niti zna kakve su posljedice njihova prihvaćanja.

1) U kontekstu nasljeđivanja, nakon smrti korisnika ISP-ovi u pravilu neće dopustiti nasljednicima pristup ostaviteljevoj digitalnim dobrima i digitalnim računima, čak i ako je korisnik u oporuci tako izjavio. To može predstavljati probleme, kako za nasljednike, jer mnoga od tih dobara imaju stvarnu novčanu i emocionalnu vrijednost, tako i za ISP-ove, jer su se mnogi od njih suočili s tužbama nasljednika koji žele pristup računima preminulog.

2) Pitanje prava korisnika nad digitalnim sadržajem polemizira one situacije u kojima osoba nakon kupnje određenog digitalnog sadržaja ne postaje njegov vlasnik, već stječe samo pravo uporabe, sve do smrti. Stoga on taj sadržaj ne može prenijeti ni na koga, kako za života, tako ni nakon smrti. Ako bi on to i učinio, to bi u slučaju većine digitalnog sadržaja, kršilo autorska prava.

3) Što se tiče pristanka, korisnici često prihvaćaju razne klauzule koje ISP-ovi stavljaju u svoje ToS, od kojih se za neke ne očekuje da budu njihov dio. Neki od njih nemaju nikakve ili malo veze s onim što su korisnici željeli postići na web stranicama ISP-a. U žurbi da koristi usluge ISP-a, osoba može prihvatiti mnoge uvjete koje možda ne bi prihvatiti u fizičkom svijetu, što zauzvrat može dovesti do sudskog postupka nakon što korisnik postane svjestan na što je pristao.

Autori metodološki obrađuju navedenu problematiku analitičkom, kompilacijskom i metodom slučaja, nastojeći doći do valjanih (građansko)pravnih zaključaka. S tim u vezi, osnovni problemi rada bit će obrađeni analitički, korištenjem važeće domaće i strane građanskopravne literature. Navedeni zaključci potkrijepljeni su konkretnim primjerima koji se pojavljuju u (IT) praksi.

**Ključne riječi:** digitalna dobra, nasljeđivanje digitalnih dobara, pružatelji internet-skih usluga – ISP, upotreba digitalnih dobara, uvjeti poslovanja (ToS)