

Performers and Portrayers

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Shelly Kreiczer-Levy & Ronit Donyets-Kedar, [Better Left Forgotten: An Argument Against Treating Some Social Media and Digital Assets as Inheritance in an Era of Platform Power](#), 84 *Brook. L. Rev.* 703 (2019).

In 1956, sociologist Erving Goffman wrote his now-classic text, [The Presentation of Self in Everyday Life](#). Consciously or not, Goffman posited, people are invariably actors, their lives spent staging and arranging a string of performances across time and space. Were A and B to meet for a walk, their social interaction would comprise complex impression management techniques with each simultaneously actor, and audience, to the other.

Goffman's contributions were neither startling then nor dated now. "[All the world \[was already\] a stage](#)" to a 17th century playwright, and as Rush admonished in the late 20th century – [Limelight: Moving Pictures \(1981\)](#) – “we are merely players, performers and portrayers.” Rush continued, casting the limelight as “the universal dream for those who wish to seem,” by contrast to its incompatibility to a life of authenticity, where seeming – and being – are merged. Goffman might have questioned whether such a life were even possible. But it is likely that none of them – not Shakespeare, nor Goffman, nor even [Geddy Lee](#) or [Neil Peart](#) – could have known the prescience of their observations as applied to the social media platforms on which so many live today. Shelly Kreiczer-Levy and Ronit Donyets-Kedar do, and through *Better Left Forgotten: An Argument Against Treating Some Social Media and Digital Assets as Inheritance in an Era of Platform Power*, they invite us to think longer and harder (or at least, differently) about what it means to propertize online presentations of self through inheritance.

An Argument Against begins by situating social network sites and the profiles or accounts that accompany them within larger arenas of platform power, digital technologies and assets “proper” as well as the online life – with all of its sociocultural subtext – they engender. That orientation is critical for a luddite such as myself, for whom “technology” is a huge word holding fungible widgets and bits within it. Noting that not all digital assets bear the same characteristics, Kreiczer-Levy and Donyets-Kedar carefully frame the uniquely constitutive force that social network profiles and accounts hold for individual development, actualization and expression, through sweeping yet directed accounts of agency and autonomy, value and vulnerability, and relationship with and to others and self. In a way, their relational focus, including between individuals interacting with (and presenting self to) technology, power platforms, and other individuals or groups, replicates a different sort of interchange that arises whenever questions of ownership are posed. If property is the legal relationship between and among persons and a “thing,” then any question involving property can generally distill to “who has what rights to the ‘thing’ relative to whom, and when”? These authors ask: are social network profiles “property” (crudely, “things”) to which such traditional property concepts as “rights to transfer at death” apply?

Here is what I find to be the most elegant and provocative aspect to the paper. Rather than answer that precise question – although the analysis surveys trends and answers on point, including the Uniform Law Commission's Uniform Fiduciary Access to Digital Assets Act and some fine scholarship by Professors Naomi Cahn (Virginia) and Natalie Banta (Drake) – the piece largely sidesteps that inquiry as yet another example of “constantly asking the wrong questions.” It is as though the authors are turning the reader by the chin to say “not there, look over here – stop being so distracted, and focus on the hard part.” Either/or binaries with sorting powers are comfortable and alluring for complex law in a complex world. It is tempting to arrange complex sets as rough yes/no questions, either to drive results or rationalize predicate decisions. For example, the authors observe how the very term “digital asset” suggests that a property determination has already been made, shifting the hard theoretical work of characterizing legal interests toward a routine analysis of rights to use, exclude, enjoy, consume, destroy (and most relevant here, “transfer”) it.

Once classified as property, social media profiles or access rights thereto, the story would go, are subject to (1) relatively few restraints on alienation or acceptance but (2) relatively free donative and testamentary choice.

To Kreiczer-Levy and Donyets-Kedar, however, making that classification first is a bit like putting a cart before a horse, and even one of a different color. Although never quite coming out and saying so, their work periodically intimates that perhaps social constructions of self are more closely tied to personhood or personal rights, thus not properly inheritable, or at least not unquestionably so. And yet: although these lines are rarely uttered, some things that aren't property can nevertheless be "bequeathed," and some things that are property, can't. If all property rights are relative and capable of yielding to countervailing force, perhaps "law writ large" is captured by the same gilded cage of managed impressions of self. Just maybe, whether an Instagram account is deemed "property" v. person, expression, privacy right, communication, or the rest is peripheral to (or non-determinative for) whether it can transfer at death; just maybe, a heavily covertly influenced expression of self ought die along with its maker. Who would decide, and how? For what it is worth, and no matter what we call it, I favor designated postmortem access to digital assets (including personal social media) if clearly so chosen, pre-death, by a user with capacity. Even if at some level an online persona is a manipulated, hyper-documented, socially flattened simulacrum of self, it is still a created and presented one, whether A's manipulation of B's reaction to her was itself manipulated by some corporate actor, C.

Kreiczer-Levy and Donyets-Kedar essentially close by giving to or seeking answers from no one, instead preferring further questions about people, property, privacy, and in a sense, even digital, disembodied and "surviving" consciousness, AI, and what personhood even means mid-stage of an online world. If we are all actors in our own and others' games, it may be that we all know the score, and that Kreiczer-Levy and Donyets-Kedar themselves also have firm answers to different questions than it might seem that their scholarship asks.

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