

The Possession and Treatment of Tangible and Intangible Assets: A Procedural Analysis of the Defense of Digital Assets

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Abstract

This article aims to describe the treatment of digital assets from the perspective of procedural protection of possession, emphasizing the importance of proper treatment and its economic implications. Documentary research addresses the historical evolution of possession and ownership of tangible and intangible assets, highlighting the need for legislative and doctrinal updates to include digital assets. The article also analyzes Precedent 228 of the Brazilian Superior Court of Justice and its implications for contemporary law, suggesting the possibility of revisiting the possessory protection of immaterial assets. It concludes that legal protection of digital assets is necessary to keep up with technological and social changes, ensuring legal certainty and effective defense of these assets.

Keywords

Digital Assets, Intangible Assets, Procedural Protection of Possession, Civil Law, Changes in the Private Order

1. Introduction

This article discusses the possessory treatment of digital assets and the legal nature of the doctrine that regulates them. The analysis begins with the historical evolution of property, possession, and the treatment of tangible and intangible assets, highlighting changes from the Roman period to the present. As a doctrine, possession has been a subject of millennia-old discussions, and its definitions have undergone various changes over time, reflected in Brazilian legislation and doctrine.

During the Roman period, the concept of possession went through several phases. Initially, it was seen as a de facto lordship without transforming into a right. Later, it combined subjective and objective elements and eventually admitted the possession of rights. This evolution included the distinction between material and legal elements, introducing the “animus possidendi,” i.e., the intention to possess.

In addition to Roman influence, medieval Germanic law shaped the modern treatment of possession. The concept of “Gewere,” blending ethnic, religious, and cultural aspects, significantly impacted the definition of possession. The interaction between church and State and the doctrinal amalgamation of the 13th and 15th centuries also contributed to this formation.

More recently, the theories of Savigny and Ihering have influenced possession treatment. Savigny linked possession to the intention of dominion while Ihering based it on the legal cause of possession. According to the subjective theory, possession is characterized by the combination of physical control (*corpus*) and the intention to possess (*animus*). Conversely, physical control alone was sufficient to define possession, regardless of the intention of dominion (Ihering, 1974).

The distinction between tangible and intangible assets is crucial for understanding possession in the contemporary context. The Romans were the first to separate tangible from intangible things legally. Intangible assets are defined as those with abstract existence, not tangible reality, but intangibility should not be confused with the materiality of the title that supports them.

The article also explores the complexity of legal relationships in contemporary times, such as digital assets. In this context, the data operator owns the platform and grants users the right to use it, who hold the intangible right to use it. Digital assets can be classified as rival or non-rival (Fairfield, 2005: pp. 1047-1102), with the former belonging to a person responsible for controlling them. In contrast, anyone can use the latter without preventing others from using them.

The topic’s relevance is evident, as digital assets have economic value and are subject to inheritance. Today, it is inadmissible to link an asset solely to the object’s corporeality but to the possibility of appropriating the asset. The coronavirus pandemic brought new privacy threats and intensified the use of digital platforms, transmitting personal data and digital property instruments that deserve legal protection (Veliz, 2021).

Legal experts are already looking at digital assets and regulation in relation to cloud services and intangible ownership. This paper aims to demonstrate that intangible assets can be subject to possession and that the relationship with servers reflects acts of mere permission by the direct possessor of the photos, allowing the use of possessory remedies against the server in that condition by mere permission or tolerance. The discussion is justified by the need for legislative and doctrinal updates to include digital assets, ensuring legal certainty and effective defense of these assets.

The legal nature of possession reveals a greater appreciation for the use of electronic goods, as possession is generally associated with the use of the thing and the effectiveness of the social function that overrides human development.

Bibliographic research in classical and modern literature relevant to the subject will be used to ensure adequate coverage of the topic without prejudice to presenting practical cases. Additionally, considering the need to expand the discussion, exploratory research will consolidate an attempt to show new paradigms about the possession of intangible assets (Martins-Costa, 2008: pp. 631-653). Furthermore, considering the debate about the possible update of Precedent 228 of the Brazilian Superior Court of Justice, the research proves to be interventionist.

In this regard, the information society attracts a new valuation of digital assets, and generation, storage, and transfer have unprecedented value, potentially being considered objects of commercial transactions (Finkelstein & Finkelsteins, 2019).

According to an English study from October 2011, titled Generation Cloud, conducted by the Centre for Creative and Social Technology (CAST) at Goldsmiths, University of London (Perrone, 2012: p. 207), British users had 2.3 billion pounds sterling in remotely stored assets. The same study indicated that 66% of respondents used cloud technology without realizing it; 53% had valuable assets stored there, and 11% planned to include their digital assets in their wills.

The present article is structured into three topics. It begins with analyzing dematerialized property and the importance of procedural adaptation to new intangible doctrines, such as cloud services. Next, the doctrine of possession will be revisited to present a view of intangible but tangible scope according to new paradigms. Finally, cases of judicial protection of digital assets and the legislative approach under discussion to update the Brazilian Civil Code will be addressed.

2. Dematerialized Property and the Roman Distinction between Res Corporales and Res Incorporales

The definition of tangible and intangible assets has undergone various transformations over the centuries. In Aristotelian conception, tangible assets are linked to the idea of corpus, tangibility, meaning something that can be felt and touched. Conversely, res incorporales are assets that cannot be touched and are conceived by the intellect (Beghini & Zambotto, 2023).

For the Stoics, everything that produces effects is corpus. The Romans adopted the Aristotelian conception as appropriate. Evidence of this is the author's assertion that Cicero considered res incorporales to be things of the human mind, while corporeal ones are those with material existence (Beghini & Zambotto, 2023).

According to (Savatier, 1959: pp. 145-195), technological innovations revolutionized immaterial property, necessitating the consolidation of an abstract value for these assets. New products came to represent value and, for obvious reasons,

cannot be excluded from legal analysis.

The rapid evolution generated by social and technological development, not accompanied by positive law, forces the interpreter to divide between written laws and what has been called the “logical priority of unwritten law” (Passarelli, 1972). It is up to the interpreter to assess whether this analyzed relationship is one of appropriation, especially since legislation cannot adequately reflect all forms susceptible to human power.

The function of property is to regulate human interests over assets, enabling control of access and interference within social relations. Furthermore, commercial establishments have become much more than physical headquarters, possessing virtual properties accessible via the Internet (Maia, 2023).

Consequently, property now includes assets created by legal doctrine, which often lack a concrete object. This innovation gained strength since the Industrial Revolution due to the amplification and specialization of production means. New forms of dominion and use were created, evidently updating the concept of property (Savatier, 1959).

This new context of appropriation leads to groupings of assets taking the form of universality, which, when unified, acquire an intangible character deserving legal treatment. (Savatier, 1959: p. 172) highlights that these new institutions even forced a revisitation of the property concept, shifting individual property to allow individuals to unite to form patrimony, like societies.

The Industrial Revolution, which began in the 18th century, paved the way for new categories of intangible assets: universalities, social actions, clientele, privileges of creators of intellectual works, and economic privileges and advantages distributed by the state (Savatier, 1959).

In this context, the creation of doctrines admitting the union of tangible and intangible assets and their consequent transaction and market entry was accepted. An example is commercial property, which revolutionized the old real estate property.

Possession, in turn, did not remain untouched by human transformations. Even the most traditional theories, such as Savigny’s subjective and Ihering’s objective theories, changed (Gonçalves, 2021). In addition, new theories were proposed to encompass the new context of human relations, among which are Raymond Saleilles’s economic appropriation theory (Saleilles, 1894), Perozzi’s Social Theory (Perozzi, 1906), and Antonio Hernandez Gil’s functional theory (Gil, 1969).

According to the economic appropriation theory (Saleilles, 1894: p. 207), possession is the conscious and voluntary realization of the economic appropriation of things. This means that what differentiates possession from detention is the observation of social facts. Where there is a fact establishing the financial independence of the possessor, there would be possession. (Saleilles, 1894: p. 209) understands that possession derives from itself due to the economic purpose independent of the thing.

For social theory, a relationship between the person and the thing and between the possessor and society is unnecessary. Social acceptance suffices, that is, the existence of social customs for coexistence in society. Therefore, possession implies a third party's abstention from interference due to the thing's belonging (Perozzi, 1906).

Finally, the functional theory argues that possession and property are independent; possession has an economic character, and the social function must respect socially predominant evaluative criteria (Gil, 1980). The author asserts that possession will only receive social phenomenon treatment when the thing has received economic utility, that is, has been productive (Gil, 1980: p. 105).

This diversity of theories occurs because the possessory phenomenon can no longer be explained solely by a material theory institutionalized in an environment where the appropriation of assets revealed necessary tangible participation. The current historical moment must give value and legal treatment to the logic of being and modern doctrines (Farias & Rosenvald, 2023).

The new theories seek to strengthen possession and offer more excellent protection to the possessor. Therefore, they aim to guarantee autonomous and specific protection, sometimes prevailing even against property rights. By emphasizing possession's economic and social character, the social function of possession stands out. Thus, possession reflects the use of the asset, and criminal law has already recognized that intangibility is also subject to possession by acknowledging the crime of theft of energy and cable television signal (Article 155, Paragraph 3 of the Penal Code¹).

(Monteiro, 1994: p. 18) argues that this notion of the relationship with the corpus changed even within the subjective theory. Initially, this concept was entirely related to physical contact, that is, tangible. Later, it became the simple possibility of exercising contact, that is, the disposition of the thing. Direct ownership cannot be confused with physical ownership, as it represents the possibility of exploiting the thing and giving it the intended destination, even if it is intangible, as long as it is perceivable by third parties.

(Gil, 1980: pp. 62-63) reports that influence over the thing is necessary for its acquisition rather than conservation. For the latter form of relationship, it is enough for the possessor to maintain it in their power and influence of will. As this possibility ceases, possession is lost or disturbed.

Today's interpreter has the challenging task of reflecting on the notion of assets and things within the limits of the Italian Civil Code. The concept of property has gained greater scope than in antiquity; there needs to be more concern for redefining it (Beghini & Zambotto, 2023).

(Miranda, 2012: p. 56), pointing to these new forms of appropriation and the human relationship with things, highlights that what matters is that possession is a factual relationship, even if its content is not the same and its extent varies

¹Article 155—To take someone else's movable property for oneself or another: [...] Paragraph 3—Electrical energy or any other that has economic value is equated to movable property.

from person to person.

In this context, digital assets emerge, are available to individuals directly and immediately, are subject to their will, and are protected from external intervention. (Carnelittu, 1945: p. 68) consolidates the understanding by stating that all portions of nature serve human needs. Between the material and the personal, there is an intermediate thing because it does not come from nature and does not have human characteristics. This is the concept of immateriality.

Digital assets can be defined as instructions coded and organized in computer language and stored in digital form, either on the device itself or external cloud servers, ensuring the user access via computer devices (Fachin & Pinheiro, 2018).

Digital assets are better refined as intangible assets with evident economic and social interest by individuals, such as libraries of films, music, photos, client lists, games, etc. Therefore, digital possession is plural and should be dimensioned based on the legal relationship of natural right or obligation or by its factual dimension that does not relate to the fundamental right or obligation legal world but only by the human appropriation perspective. In this last dimension, the social function of possession usually resides.

Possession should not be reduced to the field of things, as its application reaches other hypotheses of exercising actual powers over immaterial assets. This is an update on the understanding of the concept of possession. Indeed, the limitation of possession was restricted to the determinability of assets, a different thought from the theory that argues that this differentiation is between tangible and intangible (Miranda, 1983).

Among the legal relationships established by internet use is the cloud service, which uses a virtual tool for storing data, information, and files. Thus, considering that digital goods stored remotely can become vulnerable and have their rights limited, it is necessary to consolidate property rights, including: using and recovering the thing from anyone who unduly possesses or holds it (de Sá Lima & de Albuquerque, 2024).

The Brazilian Civil Code² establishes that the holder is the one who acts dependently for another, maintaining possession in their name or following their orders and instructions without having their right over the thing. They act only as servants, exercising actual rights by the owner's authorization.

This is a matter of relevant appreciation due to the inevitable dematerialization and digitalization of contemporary society, the digital assets. The digitalization of assets generated the production of digital assets, usually stored on local disks with small storage capacity. Later came Internet 2.0, and finally, cloud computing was consolidated (Taveira Jr., 2018).

In this study, the analysis focuses on the "iCloud" tool. According to its terms

²Article 1198. A holder is considered to be one who, being in a relationship of dependence on another, maintains possession on their behalf and complies with their orders or instructions. Sole paragraph. One who has begun to act in the manner prescribed by this article concerning the asset and another person is presumed to be a holder until proven otherwise.

of use, the platform owner establishes the service as a modality where the user can use internet services, including digital content storage, ensuring access to devices and computers connected to the network (Apple Inc., 2023).

Among the storable items are photos, videos, notes, reminders, documents, emails, contacts, and calendars. The service's terms and conditions of use clarify that it is merely a deposit relationship of assets, with the possibility of even granting access to third parties.

By recognizing that the assets under deposit have an inevitable legal facet, the contract addresses the "digital legacy," according to which the user can choose people to access and download data from their account after death, *mutatis mutandis*, it is a recognition of the possibility of a testamentary succession of such data (Perrone, 2012: p. 207). Digital assets challenge the static view of property, revolutionizing it far beyond appropriation, replacing markets with a network economy where the physical loses space to the digital, intangible, and incorporeal (Teixeira & Konder, 2021).

Would a possessory measure be applicable in the case of misappropriation or misuse of the data? The answer seems optimistic. Apple's terms and conditions initially foresee that the company's copyright agent should be contacted in case of suspected copyright infringement. At this point, the infringers' accounts may be suspended or terminated.

However, the issue is problematic, because by signing the terms and conditions the user has access to unilateral regulations, in long texts that do not seek to regulate thorny points of the contract such as: the end of the service provision, loss of access or other hypotheses of contractual termination (de Sá Lima & de Albuquerque, 2024).

It is in this area that the jurist must focus, as the terms of service must have clear provisions and, not only that, the user must receive due protection in the event of termination or loss of access, in order to mitigate risks and guarantee the protection of digital assets (de Sá Lima & de Albuquerque, 2024).

In times of cloud computing, people store their content on electronic sites. According to (Millard & Hon, 2013: pp. 407-431), these clouds enable browser-linked software that sends data over the internet and allows use via phones, tablets, etc.

This is precisely why (Levy, 1999: p. 21) emphasizes that these cloud services are no longer intended to occupy space on computers. Google, Yahoo, and YouTube have used registration centers connected to machines distributed in various locations worldwide. These are the computing clouds. Thus, even with digital assets linked to a click, they are spread worldwide and distributed across digital centers.

The new computing paradigm used by the public and private sectors serves only as a giant information data center, similar to a caretaker on a rural site. That is, it is a situation of mere legal detention. Data centers can be characterized by three types: the "enterprise," which serves a single entity; the "cloud," which can sell services to other companies; and the "colocation," configured by

several companies locating their data centers in a single place, sharing resources and leveraging potentialities (Zuffo et al., 2013).

Considering that this new intangible facet of assets and services deserves legal protection, the article will discuss rights violations and the possibility of possessory measures to safeguard their security.

3. The Doctrine of Possession and the Protection of Res Incorporales

In modern possession theory, two elements are always present: a thing and a will exercised over it. These combined elements establish the possession relationship. However, as highlighted, the concept of the “thing” has evolved to include the appropriation of something immaterial.

Savigny understood corpus as a material element of the thing, the natural and immediate faculty of physical disposition of the component. Ihering, on the other hand, saw possession as merely the external relationship of disposition of the thing without the need for a physical relationship with the element. Therefore, for the latter, there was no need for the psychic element, only the will to act as the owner typically does. These are the bases of the subjective and objective theories of possession (Pereira, 2004).

(Pereira, 2004: p. 22) warns that possession is the exercise of rights that does not require the intention of dominion or physical contact with the thing. It is, in fact, the factual connection of the thing with the person to ensure some economic use. Therefore, it is the externalization of conduct.

This was the wording adopted by the Brazilian legislator in Article 1196 of the Civil Code³. However, the legislator also aimed to regulate the relationship of one who acts as a servant of possession, that is, one who maintains possession in the name of another, fulfilling orders or instructions (Pereira, 2004).

Further, the Civil Code establishes that acts of mere permission or tolerance do not induce possession⁴. Tangible and intangible assets can be objects of possession, provided they can exercise dominion or power (Pereira, 2004). The author adds that the basis of possessory protection is the defense against anyone who threatens, disturbs, or dispossesses the possessor.

In the case addressed in this article, there is a contractual relationship between Apple and the owner/possessor of digital files. According to the contract, a relationship is established in which Apple is the custodian of the user’s files. In other words, it serves as a caretaker/guardian of the immaterial files.

Judicial measures can be taken as the company fails in this contractual relationship and jeopardizes the factual situation. Therefore, in the next section, some parameters regarding the procedural protection of digital assets will be outlined.

³Article 1196. A possessor is anyone who exercises, fully or not, some of the powers inherent to ownership.

⁴Article 1208. Acts of mere permission or tolerance do not induce possession, nor do violent or clandestine acts authorize its acquisition until the violence or clandestinity has ceased.

4. The Possessory Protection of Digital Assets

Articles 560⁵ to 567⁶ of the Brazilian Code of Civil Procedure (CPC) provide for procedural protection (Brazil, 2015: art. 560 to 567). The legislator clearly stated that the possessor has the right to be maintained in possession in case of disturbance, reinstated in case of dispossession, and assured in case of imminent dispossession or disturbance.

In case of a threat, the possessor should resort to procedural remedies, taking the measures indicated in Article 561 of the CPC (Brazil, 2015: art. 561)⁷. Thus, they must demonstrate their possession, the disturbance or dispossession committed by the defendant, the date, and the situation following the reported incident.

This article analyzes the figure of the possessor who has deposited their assets on a digital cloud platform, which serves as the custodian of their assets. As mentioned, the platform itself, in its contractual instrument, treats the item as unequivocally belonging to the contractor.

According to Precedent 237 of the Brazilian Federal Justice Council, possession may be altered if behavior changes. That is, if the company, previously the holder due to a contract, begins to infringe on this relationship and threatens the possessory rights of the owner, a possessory action is warranted.

Consider a scenario where the cloud service provider prevents the owner from accessing the system. This violates the factual exercise rights over the protected assets. The company could only exercise possession on its behalf if a factual situation broke the subordination and adopted the exploitation of the thing in its name. The action is warranted if the owner takes appropriate measures immediately after verifying such a circumstance.

The single paragraph of Article 1198⁸ of the Brazilian Civil Code clearly states that it is up to the holder to prove the contrary situation to disprove such a condition. Despite the apparent presumption of continuity of possession provided in the cited provision, detention cannot strictly be converted into possession due to its vicissitudes. In other words, the holder cannot disobey the possessor's orders and power. Nor can possession invalidate the dominial use respecting the social function of property (Miranda, 1983).

This provision only authorizes the conversion of detention into possession when the person who exercised in the name of another begins to have autonomy to act on their behalf. It is like an employee who is dismissed but continues to

⁵Article 560. The possessor has the right to be maintained in possession in case of disturbance and reinstated in case of dispossession.

⁶Article 567. The direct or indirect possessor with a just fear of being disturbed in possession may request the judge to protect them from imminent disturbance or dispossession through a prohibitory order, which imposes a specific monetary penalty on the defendant in case of violation.

⁷Article 561. The plaintiff is responsible for proving: I—their possession; II—the disturbance or dispossession committed by the defendant; III—the date of the disturbance or dispossession; IV—the continuation of possession, though disturbed, in the maintenance action, or the loss of possession, in the reinstatement action.

⁸Article 1198—[...] Sole paragraph. One who has begun to act in the manner prescribed by this article concerning the asset and another person is presumed to be a holder until proven otherwise.

occupy the house intended for employees without the employer removing them from the location. If this occupation continues, there will be an apparent transformation of detention into possession (Farias & Rosenvald, 2023).

This article highlights two precedents in Brazilian jurisprudence regarding the admissibility of possessory actions when the holder causes disturbance in the factual situation. In the first case (TJPR, 2021)⁹, the infringement of possession and the dispossession practiced by someone who was merely a holder was proven, and the court guaranteed the reinstatement of possession to the possessor.

The treatment of digital assets should be the same. These are legally protected assets, and possession is configured as a custodian for the cloud service. As a mere holder, the service must restore the status quo ante immediately after being notified.

When the holder does not comply with such an order, it results in unjust and bad-faith possession. Unjust possession occurs when it is violent, clandestine, or precarious. The latter usually results from a breach of trust, such as when a cloud service provider refuses to return documents under their custody and restore the previous status.

Moreover, when the document owner notifies the service and it fails to fulfill its obligation, bad faith becomes evident. In this case, the cloud service provider ignores the flaws in their factual situation, consolidating bad-faith possession.

In the second ruling (TJSP, 2021)¹⁰, the court recognized that the documents stored in the cloud service are the property and possession of the user. Therefore, the company could accept these documents. Although the action was a mandatory injunction, the context of the process makes it clear that, due to the asset's availability, the situation could be subject to possessory actions, as the mere detention of documents by a service contract was evident.

The growing modernization and importance of cloud-stored digital files create a favorable environment for the Superior Court of Justice (STJ) to re-evaluate Precedent 228 (STJ, 1999)¹¹. At the time of its issuance, the rulings that led to the consolidation of understanding involved the Brazilian Central Copyright Licensing Office (locally ECAD), created to protect copyright. In the case of cloud service contracts, explicit detention is established by the agreement. Unlike the relationship with ECAD, which is intangible, the relationship with cloud services is identifiable and allows for asset reappropriation. Thus, the owner's relationship with the cloud service must be protected through possessory measures.

The issue is so relevant that the proposed update of the Civil Code regulated it. It recognizes the possibility of adaptation as a consumer of those who exercise some of the powers inherent to property, even if the asset is immaterial¹². Fur-

⁹Court of Appeals of the State of Paraná, Case No. 00013351-35.2018.8.16.0019.

¹⁰Court of Appeals of the State of São Paulo, Interlocutory Appeal No. 2103257-75.2021.8.26.0000.

¹¹Precedent 228—A prohibitory injunction for copyright protection is inadmissible.

¹²Article 1,196. A possessor is anyone who exercises, fully or not, some of the powers inherent to ownership. Sole paragraph. The rule in the main clause applies to intangible assets as applicable, subject to the provisions of special legislation.

thermore, attesting to the necessary update of the property doctrine, the proposal also recognizes patrimonial ownership of intangible assets¹³.

Therefore, the matter previously relegated to the field of doctrine gained space in legislation and brought to the fore the discussion about the possessory appropriation of immaterial assets, for which ownership recognition is sought.

Law is a field of study that values respect for traditions, and legislators usually base their decisions on habits consolidated in everyday culture. The concepts of possession and property provided in current legislation reflect the objects and circumstances existing when the codification process was established in the Western legal system (Maia, 2023).

The author notes that this situation demonstrates an unjustifiable attachment to classical Roman law, which can hinder the evolution of the law itself. Therefore, the codifications still rely on ancient institutions and models for asset verification. Even the jurisprudence, which is generally pioneering, still needs to be reluctant to abandon these traditions.

5. Final Considerations

The possession doctrine has undergone numerous changes in recent years, paralleling human evolution. Therefore, legislators and jurisprudence must seek the same updates to fit new legal relationships. The doctrine applies to tangible and intangible assets, indicating its potential use in the defense of digital assets, especially from the perspective of modern possession theories.

It is urgent to discuss Precedent 228 of the Superior Court of Justice and adjust its interpretation to ensure the recognition of possessory defenses over digital assets, particularly in the relationships between users and data and cloud storage servers. Revising this precedent is essential to ensure that users/possessors are respected and protected. This reflects the intention to modernize and include new forms of appropriation, use, and enjoyment of assets, as exemplified by the proposal to update the Civil Code, which recognizes that intangible assets are subject to possessory protection.

Recognizing possessory rights over intangible assets, mainly digital ones, represents respect and legal protection for an essential doctrine in the contemporary world. Adapting traditional possession theories to digital reality is necessary to keep up with the institutional and technological changes in current society, ensuring legal certainty and the protection of digital assets as objects of economic and social value.

Therefore, due to the possibility of the judge getting closer to the world of facts when it comes to a possessory dispute, it is necessary for these intangible assets to be protected by this law, with a guarantee of use and protection for those who use the cloud service.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

¹³Article 1228-A. The ownership of patrimonial rights over immaterial assets is recognized.

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