

COMMENT

Digital Properties and Death: What Will Your Heirs Have Access to After You Die?

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INTRODUCTION

*It's easy to assume that your digital things aren't significant. After all, they take up virtually no physical space and you do not see them everyday. But as you live an increasingly digital life, this collection grows. It's more than just computer data, it's a set of artifacts that has the potential to chronicle your life.*¹

Twenty years ago, lives were chronicled by letters, photos, home movies, and other items that could easily be passed on from generation to generation. These tangible items held emotional value for families and were able to act as mementos after the passing of a loved one.² Today, these items can—and frequently are—stored digitally on a computer hard drive, a photo storage site, an email account, or something along those lines.³ Although the method of

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1. EVAN CARROLL & JOHN ROMANO, YOUR DIGITAL AFTERLIFE: WHEN FACEBOOK, FLICKR AND TWITTER ARE YOUR ESTATE, WHAT'S YOUR LEGACY? 32 (2011).

2. Gerry W. Beyer & Naomi Cahn, *When You Pass On, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan.-Feb. 2012, at 41.

3. *Id.*

storage has changed, these items are no less valuable than they were in the past.

Mementos are not the only personal assets to move from the physical to the digital. In the twenty-first century, an individual could have a wide array of digital assets, many of which may be only accessible via a digital account. For example, an individual could have an email and photo storage account, along with a financial account, business account, music and applications account, shopping account, social networking account, and numerous other accounts with virtual property.⁴ In total, the average person has anywhere from twenty to twenty-five online accounts—all of which are digital property and part of one's estate.⁵

What will happen to this property after you die? Given that these assets are intangible, it is easy to overlook this type of property when writing your will.⁶ Indeed, it might be hard to see these assets as having any value or as a form of property at all; and while it is true that some digital assets are more disposable than others—those blurry photos of the neighbors' bushes are not likely to be important in any circumstance—there will be those that should be passed on because of their emotional value.⁷ Digital assets may have more than just emotional value though. They may also have financial value.⁸ Consider, for instance, that personal

4. Jim Small, *What Happens to Digital Assets After Death?*, CAMPBELL L. OBSERVER (Dec. 4, 2012), <http://campbelllawobserver.com/2012/12/what-happens-to-digital-assets-after-death/>; see also Naomi Cahn, *Postmortem Life On-line*, PROB. & PROP., July-Aug. 2011, at 36, 36-37.

5. *PBS News Hour: Law Lags Behind in Defining Posthumous Protocol for Online Accounts* (PBS television broadcast Mar. 11, 2013) (quoting Naomi Cahn), available at http://www.pbs.org/newshour/bb/science/jan-june13/digitalassets_03-11.html.

6. See Christopher Paul, *Know the Law: Make Plans for Digital Assets After Death*, UNION LEADER (Dec. 9, 2012, 7:08 PM), <http://www.unionleader.com/article/20121210/NEWS02/121219987>.

7. See Beyer & Cahn, *supra* note 2, at 41.

8. In September 2007, a World of Warcraft character sold for about \$9,500. Jim Lamm, *Estate Planning for Video Games and Virtual Worlds*, DIGITAL PASSING (Aug. 16, 2010) [hereinafter Lamm, *Virtual Worlds*], <http://www.digitalpassing.com/2010/08/16/estate-planning-video-games-virtual-worlds/>.

websites and YouTube accounts can bring in ad revenue⁹ and that a World of Warcraft character could be sold for thousands of dollars.¹⁰ Even MP3s may have financial value—especially now that Amazon has been granted a patent that covers a secondary market for used digital goods.¹¹ All these assets can really add up. In fact, a recent McAfee survey found that the average American believed his or her digital assets to be worth about \$55,000.¹²

Even if you see the value in these assets, it is “easy to assume that your digital possessions will always be there” and not prepare for the many obstacles that your heirs will face in asserting ownership of these assets after your passing.¹³ First and foremost, simply locating digital properties can be troublesome for heirs as they are less likely to stumble upon an unknown digital property than an unknown physical property.¹⁴ Second, even if heirs are aware of the existence of digital properties, they are likely to face several obstacles in accessing these properties.¹⁵ The four main obstacles they will likely face are: “(1) passwords;

9. *Monetize Your Videos*, YOUTUBE, <https://www.youtube.com/yt/creators/creator-benefits.html> (last visited Nov. 11, 2013) [hereinafter YOUTUBE].

10. *See id.*

11. U.S. Patent No. 8,364,595 B1 (filed May 5, 2009) (issued Jan. 29, 2013); *see* Chuong Nguyen, *Apple, Amazon Pave Way for Digital Garage Sale*, GOTTABEMOBILE (Mar. 12, 2013), <http://www.gottabemobile.com/2013/03/12/apple-amazon-pave-way-for-digital-garage-sale/>. Apple has also filed for a patent that will cover a secondary market for used digital goods. Nguyen, *supra*.

12. Katy Steinmetz, *Your Digital Legacy: States Grapple with Protecting Our Data After We Die*, TIME (Nov. 29, 2012), <http://techland.time.com/2012/11/29/digital-legacy-law/>. “Last year, security-software company McAfee surveyed 3,000 people in 10 countries, asking about the financial value they’d assign to assets such as music files and online photo albums: the U.S. average was just under \$55,000.” *Id.*

13. CARROLL & ROMANO, *supra* note 1, at 2.

14. *Id.* at 75. For instance, it is easy to stumble on to a box of photos in a closet. It is a lot harder to stumble on to a collection of photos on a website when you are not aware of the existence of any photo sharing accounts.

15. Jim Lamm, *Jim Lamm Presents at 2013 Miami Law Review Symposium on “Will You Have a Digital Afterlife?”*, DIGITAL PASSING (Feb. 18, 2013) [hereinafter Lamm, *Miami*], <http://www.digitalpassing.com/2013/02/18/jim-lamm-presents-2013-miami-law-review-symposium-digital-afterlife/>; *see also* CARROLL & ROMANO, *supra* note 1, at 76-77.

(2) encryption; (3) federal and state criminal laws that penalize ‘unauthorized access’ to computers and data (including the Computer Fraud and Abuse Act); and (4) federal and state data privacy laws (including the Stored Communications Act).¹⁶ Interwoven between these obstacles is arguably an even bigger hurdle—that of the terms of service.¹⁷

When you set-up an online account, more often than not you agree to a set of terms of service.¹⁸ These terms of service are often referred to as clickwrap agreements.¹⁹ A clickwrap agreement creates a contract between you and the provider of the online account.²⁰ This contract might have any number of clauses relevant in the event of the death of a loved one. For instance, a clickwrap agreement will often include a clause stating that it is a violation of the terms of service to provide your password to another individual.²¹ Should the provider discover that an individual other than you—even after your death—has accessed the account, not only may your account be terminated and your data deleted, but the individual who accessed the account could be charged with a cybercrime under federal law.²²

16. Lamm, *Miami*, *supra* note 15. Note that while encryption can help to secure your data now, it can cause access problems down the line. However, given the technical nature of encryption, it is not discussed in this Comment. However, see Part II.B for a discussion of the Computer Fraud and Abuse Act codified in 18 U.S.C. § 130 and the Stored Communication Act codified in 18 U.S.C. § 2702.

17. See Andy MacDonald, *Facebook Digital Assets Hard to Reach from Beyond the Grave*, CBC NEWS (Mar. 1, 2013, 3:03 PM), <http://www.cbc.ca/newsblogs/yourcommunity/2013/03/facebook-digital-assets-hard-to-reach-from-beyond-the-grave.html>.

18. CARROLL & ROMANO, *supra* note 1, at 76.

19. “Clickwrap is now defined by the courts as an electronic agreement that automatically presents contractual terms to a user and requires the user to affirmatively click an ‘I agree’ icon prior to the agreement taking.” Robert Lee Dickens, *Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases*, 11 MARQ. INTELL. PROP. L. REV. 379, 387 (2007). See further discussion of clickwrap agreements in Part II.A.2.

20. See Dickens, *supra* note 19, at 387.

21. MacDonald, *supra* note 17.

22. See *id.*

Potentially, the clickwrap agreement could also have clauses dealing with the transferability of the account and forum selection in the event of a lawsuit. Very few clickwrap agreements have provisions that specifically detail what will happen to your account after your death.²³

Despite the rising importance of digital properties, the law remains uncertain.²⁴ Only seven states have enacted legislation on fiduciary access to digital assets,²⁵ although eighteen more states have considered or are considering legislation on the topic.²⁶ At a national level, the Fiduciary Access to Digital Assets Committee (FADAC) of the Uniform Law Commission (ULC) is “draft[ing] a free-standing act and/or amendment[] to [the] ULC acts . . . that will vest fiduciaries with at least the authority to manage and distribute digital assets, copy or delete digital assets, and access digital assets.”²⁷ This draft is not expected to be done until July 2014.²⁸ Even when the draft is complete, the “success of the provisions under consideration will depend

23. See CARROLL & ROMANO, *supra* note 1, at 76.

24. Tyler G. Tarney, Comment, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 CAP. U. L. REV. 773, 790 (2012).

25. See Jim Lamm, *August 2013 List of State Laws and Proposals Regarding Fiduciary Access to Digital Property During Incapacity or After Death*, DIGITAL PASSING (Sep. 20, 2013) [hereinafter Lamm, *August 2013*], <http://www.digitalpassing.com/2013/08/30/august-2013-list-state-laws-proposals-fiduciary-access-digital-property-incapacity-death/>. The seven states that have enacted legislation are Connecticut, Idaho, Indiana, Nevada, Oklahoma, Rhode Island, and Virginia. *Id.* These laws differ “with respect to the types of digital assets covered, the rights of the fiduciary, and whether the principal’s death or incapacity is covered.” NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS (NCCUSL), FIDUCIARY TO DIGITAL ASSETS ACT (DRAFT) 1 (2013) [hereinafter NCCUSL Proposal], available at http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013feb7_FADA_MtgDraft_Style.pdf.

26. See Lamm, *August 2013*, *supra* note 25; discussion *infra* Part II.C.

27. *Fiduciary Access to Digital Assets Committee*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets> (last visited Sep. 26, 2013).

28. Memorandum from Suzanne Brown Walsh, Chair, Fiduciary Access to Digital Assets Comm., to Fiduciary Access to Digital Assets Comm. (Feb. 22, 2013), available at http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013feb22_FADA_ChairReport.pdf.

on uniform adoption across many or all states of the union.”²⁹

As the existence of digital properties is a relatively recent phenomenon, there is a lot of uncertainty amongst people and the law about how to handle these properties, particularly digital assets accessed via an online account. Given this uncertainty, this Comment seeks to clarify where the law currently stands on digital assets accessed through an online account and how the law will need to change in the future to address these new assets. Part I of this Comment provides a brief description regarding what exactly a digital asset is and the types of digital assets that exist. Part II describes the laws and legal documents that impact how digital assets are currently handled after death. Part III discusses the options that an individual has today in settling his or her digital estate. Part IV delves into the changes being proposed for managing digital asset inheritance and proposes a few realities to be considered when making these changes.

I. DEFINING TYPES OF DIGITAL PROPERTIES AND WHY THEY MATTER

According to the Draft Committee Notes of the National Conference of Commissioners on Uniform State Laws, digital property can be defined as “the ownership and management of and rights related to a digital account and digital asset.”³⁰ In the draft notes, a digital account is defined as an “electronic system for creating, generating, sending, receiving, storing, displaying, or processing information that provides access to a digital asset or digital service.”³¹ In other words, a digital account is the method by which one reaches his or her emails, MP3s, and other digital assets.³² The committee defines a digital asset as

29. Jason Mazzone, *The Right to Die Online*, 16 J. INTERNET L. 13, 15 (2013) [hereinafter Mazzone, *The Right to Die Online*].

30. NCCUSL Proposal, *supra* note 25, at 3-4.

31. *Id.* at 3.

32. See Evan Carroll, *Digital Assets: A Clearer Definition*, DIGITAL ESTATE RESOURCE (Jan. 30, 2012) [hereinafter Carroll, *A Clearer Definition*],

“information created, generated, sent, communicated, received, or stored by electronic means on a digital service or device; the term includes a username, word, character, code, or contract right under the terms-of-service agreement.”³³ That is to say, digital assets are the actual files—whether they are emails, JPEGs, or something else—stored in a digital account.³⁴

Since the vast majority of digital assets are located within a digital account, the two tend to blend together in discussion. Thus, when an article mentions an individual’s email account, it is likely referring not only to the account but all of the emails within the account as well. However, it is important to recognize the distinction between digital assets and digital accounts as they are treated differently under the law.³⁵ For example, while an heir might have a right to a digital asset, he or she would not necessarily have the right to the digital account where the asset is stored.³⁶ Part of the reason for this difference in treatment is that digital accounts may be nontransferable per the terms of service.³⁷ If an account is nontransferable, then the right to the account expires with the user’s death.³⁸ The content, however, belongs to the decedent’s estate so long as it represents the decedent’s own original work.³⁹

Knowing the difference between a digital account and a digital asset is not the end of the digital property analysis

<http://www.digitalestateresource.com/2012/01/digital-assets-a-clearer-definition/>.

33. NCCUSL Proposal, *supra* note 25, at 3.

34. See Carroll, *A Clearer Definition*, *supra* note 32.

35. See *id.*

36. For instance, a family brought suit against Yahoo! for any emails received by their deceased son. Cahn, *supra* note 4, at 37-38. While they did end up receiving copies of the emails, they did not receive access to the account. *Id.*

37. See Olivia Y. Truong, *Virtual Inheritance: Assigning More Virtual Property Rights*, 21 SYRACUSE SCI. & TECH. L. REP. 57, 83 (2009).

38. See *id.* at 83.

39. See Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns a Decedent’s E-Mails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 281, 287-88 (2007) [hereinafter Darrow & Ferrera, *Who Owns a Decedent’s E-mails*].

as there are several types of digital accounts and assets, each of which has its own unique considerations. An individual's digital assets could include emails, photos, tweets, blog posts, videos, MP3s, eBooks, and even online characters.⁴⁰ Each type of digital asset is likely associated with a unique digital account. For example, an individual may access his or emails through Gmail, but access his or her photos through Flickr. This section will explore the most prevalent types of digital accounts. These include: personal financial accounts, email accounts, social media accounts, digital media accounts, reward program accounts, cloud storage accounts, online gaming accounts, and business accounts.⁴¹ Although these accounts will be described individually, these accounts and their digital assets can overlap.⁴²

A. *Financial Accounts*

Financial accounts are perhaps the most "traditional" digital property in the sense that "financial accounts such as banking, retirement, and insurance" were never tangible in the first place.⁴³ In the past, individuals would generally receive paper statements of these accounts documenting their existence.⁴⁴ With the advent of online financial transactions, "hard copies now often form only a small fraction of a person's records" as people now tend to maintain financial information digitally.⁴⁵ While

40. See generally Cahn, *supra* note 4, at 36-37; Charles Herbst, *Death in Cyberspace*, RES GESTÆ, Oct. 2009, at 19-20.

41. See generally Cahn, *supra* note 4, at 36-37; Tarney, *supra* note 24, at 776-77; Small, *supra* note 4.

42. Cahn, *supra* note 4, at 36-37.

43. CARROLL & ROMANO, *supra* note 1, at 58.

44. See Molly Wilkens, Note, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037, 1038-39 (2011).

45. *Id.* at 1038. As of 2011, "[n]early half of all adults with internet access in the United States use the Internet to bank or pay bills." *Id.* at 1039. This percentage will only go up with time as people turn to "[i]nternet banking because of the high convenience, independence, and the typically better value it can offer." *Id.* (internal citations omitted).

maintaining account records online can be convenient for account holders, it can be a “nightmare” for their heirs.⁴⁶

Heirs and executors used to be able to count on financial statements coming in the mail to make them aware of any unknown accounts.⁴⁷ However, now that many financial accounts are managed “solely online without the option for paper statements,” there is no longer any guarantee that heirs and the executor will be made aware of a financial account,⁴⁸ especially since this information could be stored across multiple computers and email accounts.⁴⁹ Furthermore, even when these accounts are known, accounts may have different passwords, security questions, and personal identification numbers that remain unknown to anyone but the decedent.⁵⁰ Although managing digital financial accounts can be problematic, these types of accounts do have a leg up, so to speak, over other digital accounts as their disposition is controlled by either a legal will or the inheritance laws of the state in which the decedent lived if there was no will.⁵¹ As a result, once a financial account has been identified, the appropriate fiduciary may need only to reach out to the organization to

46. *Id.* at 1038.

47. CARROLL & ROMANO, *supra* note 1, at 150.

48. *Id.* For example, on January 1, 2012 the U.S. Treasury ended the sale of over-the-counter paper savings bonds at financial institutions. TREASURY DIRECT, <http://www.treasurydirect.gov/instit/savbond/savbond.htm> (last visited Oct. 28, 2013); see John Romano, *All-Electronic Finances a Powerful Reason to Plan for Digital Assets*, Digital Estate Resource (July 13, 2011), <http://www.digitalestateresource.com/2011/07/all-electronic-finances-a-powerful-reason-to-plan-for-digital-assets/>. The sale of treasury bonds is now completely digital. TREASURY DIRECT, *supra*. As a result, if an individual passes with no records of the purchase of the bonds, heirs may be completely unaware of their existence. Romano, *supra*.

49. Wilkens, *supra* note 44, at 1046.

50. *Id.*

51. CARROLL & ROMANO, *supra* note 1, at 151-52. However, it should be noted that delays in accessing these accounts can be costly. See Wilkens, *supra* note 44, at 1047, 1056-57.

gain access to the account.⁵² With other digital accounts this is not necessarily the case.

Beyond the above traditional financial accounts, an individual may also have any number of digital accounts with merchants such as Amazon, PayPal, Condé Nast, and so on.⁵³ For these accounts, an automatic online payment may have been established.⁵⁴ These accounts could also potentially have credits which could only be put to use if the account is known and active.⁵⁵

B. *Email Accounts*

According to one survey, seventy-six percent of employed adults have at least one personal email account.⁵⁶ Email is widely used not only to keep in contact with people near and far, but for communicating with providers of other digital accounts.⁵⁷ Since information for other digital accounts might be stored in saved emails, email might serve as a “master key” to digital property.⁵⁸

The status of email is murky as there is confusion as to whether heirs have a right to inherit email.⁵⁹ Theoretically, heirs should be able to inherit email as they would private

52. Jim Lamm, *Estate Planning for Online and Electronic Financial Accounts*, DIGITAL PASSING (Sept. 9, 2010) [hereinafter Lamm, *Electronic Financial Accounts*], <http://www.digitalpassing.com/2010/09/09/estate-planning-online-electronic-financial-accounts/>. An institution may refuse to cooperate though due to privacy concerns. Wilkens, *supra* note 44, at 1063.

53. Cahn, *supra* note 4, at 37.

54. *Id.*

55. Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINNIPAC PROB. L.J. 376, 383 (2011).

56. *How Many E-mail Accounts Do Americans Have?*, IT FACTS (Dec. 17, 2008), <http://www.itfacts.biz/how-many-e-mail-accounts-do-americans-have/> 12128. Given that this survey was completed in 2008, *id.*, it is likely that these numbers are even higher today.

57. CARROLL & ROMANO, *supra* note 1, at 109.

58. *Id.* at 109, 152.

59. *Id.* at 121.

letters.⁶⁰ Indeed, there have been a variety of attempts to compare email to the storage and transfer of physical letters.⁶¹ However, many of these arguments are defeated by an agreement to the terms of service and various privacy laws.⁶²

Given the importance of email, an individual should give a lot of thought to any instructions that will be left to heirs regarding an email account. In providing these instructions, there are a few important questions to consider. These questions include: What information is available in the account? Who needs access to the account? What emails need to be archived? What emails need to be forwarded?⁶³ The answers to these questions will help an individual determine what should be done with an email account after his or her death.

C. Social Media Accounts

“More than one billion people [currently] use social networking websites.”⁶⁴ These include websites like Facebook, MySpace, Twitter, Tumblr, Blogger, Flickr, and Foursquare.⁶⁵ Not only do these websites often host digital assets such as photos and videos, but they also host status

60. See, e.g., Jonathan J. Darrow & Gerald R. Ferrera, *Email is Forever . . . Or is It?*, 11 J. INTERNET L. 1 (2008) [hereinafter Darrow & Ferrera, *Email is Forever*].

61. *Id.* at 14-15. For example, an email service provider could be compared to a bailee, akin to the US Postal Service. *Id.* at 14-16. As a bailee, the email service provider would have a duty to return the emails to heirs. *Id.* However, email service providers argue that the term of service modify this right and eliminates the obligation to provide the emails. *Id.* Email service providers have also been compared to a warehouse in accepting goods for storage and a safe deposit box. *Id.* The emails within the account have been described as a probate asset. *Id.*

62. See generally Wilkens, *supra* note 44, at 1053.

63. See CARROLL & ROMANO, *supra* note 1, at 130.

64. Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643, 1644 (2012) [hereinafter Mazzone, *Facebook's Afterlife*].

65. CARROLL & ROMANO, *supra* note 1, at 135.

updates and blogs.⁶⁶ These snippets of an individual's thoughts have the ability to act as a diary of sorts.⁶⁷

An individual may post to these websites because he or she may want to share his or her beliefs and thoughts with a wide audience⁶⁸ or because he or she wants to interact with a different group of people online than in real life.⁶⁹ Either way, death creates a number of issues to consider about each social media account. Should the account be maintained?⁷⁰ Should followers be notified?⁷¹ Should the website be allowed to grow?⁷² Should the account be memorialized?⁷³ Does anything need to be archived?⁷⁴ Or is there something that needs to be immediately deleted as no friends or family should ever know about it?⁷⁵ Regardless of what needs to be done, an individual needs to take stock of these accounts and write his or her wishes down, otherwise the fate of these accounts will be left completely up in the air.⁷⁶

An individual might be tempted to ignore these types of accounts as he or she may see no value in providing access to a Facebook profile with status updates such as "Nickelodeon cartoons were infinitesimally better when I was a kid. #Aaahh!!!RealMonstersForever." But these accounts may hold more value than one realizes.

66. See Mazzone, *Facebook's Afterlife*, *supra* note 64, at 1644.

67. *See id.*

68. CARROLL & ROMANO, *supra* note 1, at 135.

69. *Id.* at 136.

70. *Id.* at 139.

71. *Id.* at 139-40.

72. *Id.* at 140-41.

73. *Id.* at 142.

74. *Id.* at 142-43.

75. *Id.* at 144.

76. *Id.* at 135-36, 139. However, even if wishes have been recorded, there is no guarantee that they will be followed as the terms of service or privacy laws could stand in the way. *See id.* at 144.

Consider the case of Ricky and Diane Rash. In January 2011, their fifteen-year-old son committed suicide.⁷⁷ Like any parents left in that situation, they were left with numerous questions as to why their son would take such a course of action.⁷⁸ In their quest for answers, they sought access to their son's Facebook page.⁷⁹ However, Facebook blocked their access citing state and federal privacy laws.⁸⁰

Facebook has similarly blocked access for a number of other parents. For example, Karen Williams attempted to gain access to her son's account after he passed away as a result of a motorcycle accident in 2005.⁸¹ Williams only gained access to her son's account after a two-year legal battle.⁸² And even then she was only granted ten months access before Facebook removed the page.⁸³ Not all family left behind will be successful in their quest for access. Sahar Datary died in June 2008 after falling from the twelfth floor of her ex-lover's apartment.⁸⁴ Although Sahar's death was ruled a suicide, Sahar's mother believed it to be murder.⁸⁵ In

77. Fredrick Kunkle, *Virginia Family, Seeking Clues to Son's Suicide, Wants Easier Access to Facebook*, WASH. POST (Feb. 17, 2013), http://articles.washingtonpost.com/2013-02-17/local/37149666_1_facebook-page-facebook-spokesman-andrew-noyes-privacy-laws.

78. *Id.*

79. *Id.*

80. *Id.* In response to this incident, the Virginia General Assembly "passed legislation that will provide a parent or guardian access to a minor's digital accounts." *PBS News Hour, What Happens to Our Digital Lives When We Die?*, NET NEB. (Mar. 11, 2013), <http://www.netnebraska.org/node/845245>; see also S.B. 913, VA. CODE ANN. § 64.2-109 (2013).

81. Lauren Gambino, *In Death, Facebook Photos Could Fade Away Forever*, ASSOCIATED PRESS (Mar. 1, 2013, 2:47 PM), <http://bigstory.ap.org/article/death-facebook-photos-could-fade-away-forever>.

82. *Id.*

83. *To Thee I Leave My Facebook Account: New Laws Considered to Make Social Networks Part of Your Inheritance*, DAILY MAIL (Apr. 4, 2012, 3:08 PM), <http://www.dailymail.co.uk/news/article-2125102/Is-life-Facebook-New-laws-considered-make-social-networks-estate.html>.

84. Declan McCullagh, *Facebook Fights for Deceased Beauty Queen's Privacy*, CNET NEWS (Sep. 21, 2012, 1:43 PM), http://news.cnet.com/8301-13578_3-57518086-38/facebook-fights-for-deceased-beauty-queens-privacy/.

85. See *id.*

attempting to prove this, Sahar's mother sought access to her daughter's Facebook account.⁸⁶ However, in late 2012, a U.S. magistrate judge in California refused to issue a subpoena stating that "the Stored Communications Act does not require Facebook to comply with such a subpoena in a civil case."⁸⁷ In fact, in the opinion, the judge stated that "[t]o rule otherwise would run afoul of the 'specific [privacy] interests that the [SCA] seeks to protect.'"⁸⁸

So although it might be tempting to write off social media accounts as irrelevant and unimportant, that is clearly not the case. As the above illustrates, there have been several instances where access to social media accounts would be valuable to those left behind. For these reasons, these accounts should not be ignored.

D. *Digital Media Accounts*

MP3s, eBooks, apps, podcasts, digital games, and movies can all be part of an individual's digital media collection. When legally purchased, these items are often linked to a digital media account such as Amazon or iTunes from which a person is able access his or her digital content anywhere and on any device. However, this convenience is not without its drawbacks. One of the biggest drawbacks is that the purchaser is only acquiring a limited license to use the media.⁸⁹

86. *Id.*

87. *Id.* The judge did suggest an alternative possibility though. The judge stated that if the mother could prove she had consent to access the account, Facebook might release the account as, according to the judge, "[n]othing prevents Facebook from concluding on its own that applicants have standing to consent on Sahar's behalf and providing the requested materials voluntarily." *Id.*

88. *In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1206 (N.D. Cal. 2012).

89. Both Amazon and iTunes state that one gets a nontransferable license when buying digital content. Small, *supra* note 4. For example, when digital media is purchased via iTunes, the scope of the license is as follows:

This license granted to you for the Licensed Application by Licensor is limited to a nontransferable license to use the Licensed Application on any Apple-branded products running iOS (including but not limited to iPad, iPhone, and iPod touch) ("iOS Devices") or Mac OS X ("Mac

Interest in this aspect of digital media soared at the end of 2012 when it was falsely reported that Bruce Willis was going to sue Apple “to win the right to leave his iTunes library in his will.”⁹⁰ While the report was proven false, people’s interest remained piqued as many people had not realized that these restrictions existed before the report was published.

In addition to the digital media being licensed, digital media accounts generally are nontransferable as well.⁹¹ This means that not only can digital media assets not be left to heirs, but neither can one’s digital media account.⁹²

Computers”), as applicable (collectively, “Apple Device(s)”) that you own or control and as permitted by the usage rules set forth in the Mac App Store, App Store and iBooks Store Terms and Conditions (the “Usage Rules”). This license does not allow you to use the Licensed Application on any Apple Device that you do not own or control, and except as provided in the Usage Rules, you may not distribute or make the Licensed Application available over a network where it could be used by multiple devices at the same time. You may not rent, lease, lend, sell, transfer, redistribute, or sublicense the Licensed Application and, if you sell your Mac Computer or iOS Device to a third party, you must remove the Licensed Application from the Mac Computer or iOS Device before doing so. You may not copy (except as expressly permitted by this license and the Usage Rules), decompile, reverse-engineer, disassemble, attempt to derive the source code of, modify, or create derivative works of the Licensed Application, any updates, or any part thereof (except as and only to the extent that any foregoing restriction is prohibited by applicable law or to the extent as may be permitted by the licensing terms governing use of any open-sourced components included with the Licensed Application). Any attempt to do so is a violation of the rights of the Licensor and its licensors. If you breach this restriction, you may be subject to prosecution and damages.

Terms and Conditions, iTUNES (Sept. 18, 2013), <http://www.apple.com/legal/itunes/us/terms.html#SALE>.

90. Martin Wilson, *Digital Content is Everywhere—Do You Know Who Owns the Copyright?*, CMS WIRE (Nov. 29, 2012), <http://www.cmswire.com/cms/digital-asset-management/digital-content-is-everywhere-do-you-know-who-owns-the-copyright-018479.php>.

91. See Jim Lamm, *What Happens to Your Apple iTunes Music, Videos, and eBooks When You Die?*, DIGITAL PASSING (Sept. 4, 2012) [hereinafter Lamm, *iTunes Music*], <http://www.digitalpassing.com/2012/09/04/apple-itunes-music-videos-ebooks-die/>; see also *Conditions of Use*, AMAZON (Dec. 5, 2012), <http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088>.

92. Lamm, *iTunes Music*, *supra* note 91.

However, Xuan-Thao Nguyen, an intellectual property law professor at Southern Methodist University, takes a different view on digital licensing.⁹³ He believes that “if a company does not specify a specific period for content licensing, users may argue that the content belongs to them in perpetuity,” and thus they are able to pass the content on to heirs.⁹⁴

Individuals might not see the value in their digital assets beyond their own use and, as a result, they might be tempted to ignore these accounts. But these digital media accounts may have financial value in the future and therefore should not be ignored. For example, although an individual’s heir may not be interested in owning an MP3 of Jefferson Starship’s “We Built This City,” that MP3 could potentially be sold on a secondary market for used digital media in the future.

Currently, at least one online site allows individuals to sell their used digital media. ReDigi.com allows users to buy and sell used MP3s.⁹⁵ The caveat is that an individual who “sells” his or her MP3s does not get money, but rather credits to buy used songs on the ReDigi marketplace.⁹⁶ Advocates of this secondary market believe that the “‘first sale doctrine’ [will] protect[] the enterprise.”⁹⁷ In copyright law, the first sale doctrine “permits the owner of a lawfully-made copy to sell or otherwise dispose of that copy.”⁹⁸ For several reasons, however, the first sale doctrine has not

93. Roger Yu, *Digital Inheritance Laws Remain Murky*, USA TODAY (Sept. 19, 2012, 2:55 PM), <http://www.usatoday.com/story/tech/2012/09/19/digital-inheritance-law/1578967/>.

94. *Id.*

95. *Frequently Asked Questions*, REDIGI, <https://www.reddigi.com/site/faq.html> (last visited Sept. 20, 2013).

96. *Id.*

97. Eriq Gardner, *Amazon Gains Patent on Market for ‘Used’ Digital Movies, Songs, Books*, HOLLYWOOD REP. (Feb. 6, 2013, 4:20 PM) [hereinafter Gardner, *Amazon*], <http://www.hollywoodreporter.com/thr-esq/amazon-gains-patent-market-used-418909>. The first sale doctrine is codified in 17 U.S.C. § 109(a). See 17 U.S.C. § 109(a) (2006).

98. Lamm, *iTunes Music*, *supra* note 91 (citing 17 U.S.C. § 109(a)).

been previously thought to apply to digital media.⁹⁹ In a Ninth Circuit case, the court held that licensees in general cannot invoke the first sale doctrine.¹⁰⁰ On March 30, 2013, the court declared that the first sale doctrine could not be applied to digital media.¹⁰¹ Despite this ruling, ReDigi currently remains in business.¹⁰²

Complicating matters further, Amazon was granted a patent for “[a]n electronic marketplace for used digital objects” in early 2013.¹⁰³ Apple filed for a similar patent creating a secondary market for digital goods.¹⁰⁴ Since these secondary markets will be established by the service provider, they present a slightly different issue than ReDigi. However, given that the entertainment industry is against

99. One reason is that digital media can be thought to be “fixed” to whatever device you downloaded them to. “In other words, giving away or selling a digital music file separate from the iPod involves reproducing the copyrighted song from the iPod to a new storage device, and the ‘first sale doctrine’ only permits you to sell or otherwise dispose of the ‘material object’—the iPod.” *Id.*

100. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010).

101. Jonathan Stempel & Alistair Barr, *Capitol Wins Digital Records Lawsuit vs. ReDigi Start-Up*, REUTERS (Apr. 1, 2013, 3:44 PM), <http://www.reuters.com/article/2013/04/01/us-capitolrecords-redigi-lawsuit-idUSBRE9300GB20130401>. Specifically, the court stated:

In addition, the first sale doctrine does not protect ReDigi’s distribution of Capitol’s copyrighted works. This is because, as an unlawful reproduction, a digital music file sold on ReDigi is not “lawfully made under this title.” 17 U.S.C. § 109(a). . . . Here, a ReDigi user owns the phonorecord that was created when she purchased and downloaded a song from iTunes to her hard disk. But to sell that song on ReDigi, she must produce a new phonorecord on the ReDigi server. Because it is therefore impossible for the user to sell her “particular” phonorecord on ReDigi, the first sale statute cannot provide a defense.

Capitol Records, LLC v. ReDigi, Inc., No. 12 Civ. 95 (RJS), 2013 WL 1286134, at *10 (S.D.N.Y. Mar. 30, 2013).

102. See generally REDIGI, <https://www.redigi.com/site/> (last visited Sept. 20, 2013).

103. U.S. Patent No. 8,364,595 abstract (filed May 5, 2009) (issued Jan. 29, 2013).

104. Nguyen, *supra* note 11. The two patents are slightly different in that Apple’s patent would allow for the original publishers to get a cut of the resale value. *Id.*

used digital goods, it is unlikely that these markets will go into effect without some opposition.¹⁰⁵

Due to the above aspects of digital media property, the future of these types of accounts and assets is even more uncertain than other types of digital property. However, this uncertainty just provides all the more reason to make provisions for this type of digital property in one's will.

E. *Reward Program Accounts*

Any rewards program that an individual is a part of will likely have some sort of financial value—even if it is diminutive. For example, consider one rewards program: the Westlaw Rewards program. A law student probably would not consider his or her reward points as having any financial value. But, for only 3000 points, someone could get a JVC Xtreme Xplosive Headset.¹⁰⁶ A similar headset is valued at \$49.50 on Amazon.com.¹⁰⁷ A more commonly cited—and likely more valuable—rewards program is a frequent flyer loyalty program. These miles can quickly accumulate for people who are frequent flyers.¹⁰⁸ Furthermore, money earned cash back programs linked to credit cards can also add up. However, like with social media accounts and digital media accounts, there is often a

105. Gardner, *Amazon*, *supra* note 97. Entertainment industry opposition stems from the fact that they are not getting a cut of the re-sale profit. Although Apple's patent attempts to address that problem, there is still the issue of cheap used copies flooding the market—and unlike physical copies—still in perfect condition. Lauren Indvik, *Apple and Amazon Lay Foundations for "Used" Digital Goods Stores*, MASHABLE (Mar. 8, 2013), <http://mashable.com/2013/03/08/apple-amazon-used-goods-marketplaces/>. To address the potential for a flood of used copies, Amazon has proposed limiting how many times a digital object can be resold. Gardner, *Amazon*, *supra* note 97.

106. Westlaw Rewards, WESTLAW, <http://www.westlawrewards.com/> (follow "Rewards Catalog" hyperlink; then click the "Electronics" hyperlink; then limit your list to items with a minimum and maximum value of 3000 points; the headphones will be one item that appears) (last visited Sept. 30, 2013).

107. JVC Ham5X Xtreme Around Ear Headphones, AMAZON, <http://www.amazon.com> (search for "JVC Ham5X Xtreme Around Ear Headphones"; the headphones will be the first item on the list) (last visited Sept. 30, 2013).

108. See Beyer & Cahn, *supra* note 2, at 41.

clause in the terms of service stating that the asset cannot be transferred.¹⁰⁹

F. *Cloud Storage Accounts*

Cloud storage refers to the online storage of digital assets. Anything that is stored in the “cloud” can be accessed anywhere with an internet connection.¹¹⁰ Online cloud storage accounts include servers such as DropBox, SkyDrive, iCloud, or the Amazon Cloud Drive. As with other digital media accounts, problems exist not only in informing heirs of the accounts’ existence, but also in the terms of service limiting transferability. In fact, iCloud actually addresses death specifically with a “No Right of Survivorship” clause.¹¹¹ This clause states that “[y]ou agree that your Account is non-transferable Upon receipt of a copy of a death certificate your Account may be terminated and all Content within your Account deleted.”¹¹² Considering that cloud storage is nothing but an external hard drive with an individual’s personal assets made accessible everywhere via the internet, it seems strange to think that this could not be passed on to heirs.

109. For example, the American Airlines Terms and Conditions for its AAdvantage program states that:

At no time may AAdvantage mileage credit or award tickets be purchased, sold or bartered (including but not limited to transferring, gifting, or promising mileage credit or award tickets in exchange for support of a certain business, product, or charity and/or participation in an auction, sweepstakes, raffle, or contest). Any such mileage or tickets are void if transferred for cash or other consideration. Violators (including any passenger who uses a purchased or bartered award ticket) may be liable for damages and litigation costs, including American Airlines attorney’s fees incurred in enforcing this rule.

Terms and Conditions: General AAdvantage Program Conditions, AMERICAN AIRLINES, <http://www.aa.com/i18n/AAdvantage/programInformation/termsConditions.jsp> (last visited Sept. 20, 2013).

110. See Kenneth Bostick, *Pie in the Sky: Cloud Computing Brings an End to the Professionalism Paradigm in the Practice of Law*, 60 BUFF. L. REV. 1375, 1381 (2012).

111. *iCloud Terms and Conditions*, APPLE (Sept. 18, 2013) [hereinafter APPLE], <http://www.apple.com/legal/icloud/en/terms.html>.

112. *Id.*

G. *Online Gaming Accounts*

Online gaming accounts may not seem like a source of digital property, but the virtual property on these accounts might actually be worth a great deal of money and are worth passing on to heirs. For example, in *Second Life*, users are able to “interact, socialize, and even conduct business with each other in the same world known as ‘the grid.’”¹¹³ In this world, users are able to build virtual objects and sell them to other users for real money.¹¹⁴ In fact, “*Second Life* generated approximately \$55 million of real money” in 2009.¹¹⁵ In another example, someone paid \$16,000 for a virtual sword to use in *Age of Wulin*.¹¹⁶ Since these items involve real money, as well as an individual’s actual time and money, it seems as if these things should be able to be transferred to heirs and assigns.¹¹⁷

When planning for online gaming accounts, it is important to consider whether there are monthly fees to pay and how the virtual property can ultimately be sold.¹¹⁸

H. *Business Accounts*

An individual might have any of the above accounts—in addition to a variety of others—in relation to a business. This relationship can add an extra layer of complexity. For example, when a business email account cannot be accessed,

113. David Goldman, *Second Life After Death*, FLA. EST. PLAN. LAW. BLOG (July 29, 2010) [hereinafter Goldman, *Second Life*], <http://www.floridaestateplanninglawyerblog.com/2010/07/second-life-after-death.html>.

114. See Truong, *supra* note 37, at 64; Goldman, *Second Life*, *supra* note 113.

115. Goldman, *Second Life*, *supra* note 113.

116. Jim Lamm, *Unique Virtual Sword Sells for \$16,000 in Age of Wulin Video Game*, DIGITAL PASSING (Jan. 11, 2012), <http://www.digitalpassing.com/2012/01/06/virtual-sword-16000-age-wulin-video-game/> [hereinafter Lamm, *Sword*].

117. Truong, *supra* note 37, at 82-83.

118. Lamm, *Sword*, *supra* note 116. Keep in mind that it might be difficult for someone who has never accessed an online gaming account to try to determine what is what. Due to the complexities that come with these types of accounts, care should be taken when planning for this type of property. See Herbst, *supra* note 40, at 21.

not only do the heirs suffer for lack of access, but the customers may as well.¹¹⁹

Lack of access to certain accounts could be particularly problematic for small businesses.¹²⁰ For example, when Karin Prangley's father-in-law became incapacitated, previously-ordered building supplies arrived at the business, but no one knew where the supplies were supposed to go because his email account was inaccessible.¹²¹ Small businesses may also have social networking sites and blogs that need to be maintained for customers.¹²²

Additionally, a person might have had an individual enterprise through a site like eBay or Etsy that needs to be considered.¹²³ Or they may have a YouTube channel that receives revenue.¹²⁴ As with all of the above assets, business accounts should be carefully reviewed for what needs to happen after the account's owner passes away.

Recognizing these different types of digital accounts is essential for understanding what could happen to your digital property as different rules and regulations apply to different types of digital property.

119. See Darrow & Ferrera, *Who Owns a Decedent's E-mails*, *supra* note 39, at 318. For instance, one heir was unable to notify customers of his father's internet business that his father had died. *Id.* This could potentially lead to problems, especially if there were standing orders or money that had been paid.

120. See Tarney, *supra* note 24, at 786-87.

121. *Id.* at 787.

122. See *id.* Depending on the size of the business, another issue could arise. An employer might believe that it owns certain accounts used by its employees due to the fact that tech savvy employees use social media such as LinkedIn and Twitter to conduct business. For this reason, businesses are considering establishing guidelines and rules for social media. One such rule would be that the business would own any social media accounts that the employee was operating in relation to the business. See Matt Chandler, *Who Really Owns 'Your' Social Media Accounts?*, BUFFALO BUS. FIRST (Jan. 18, 2013, 6:00 AM), <http://www.bizjournals.com/buffalo/print-edition/2013/01/18/who-really-owns-your-social-media.html>.

123. See CARROLL & ROMANO, *supra* note 1, at 155.

124. See YOUTUBE, *supra* note 9.

II. WHAT IMPACTS WHAT HAPPENS TO YOUR DIGITAL PROPERTY?

In general, there are four entities that impact what can happen to an individual's digital property: 1) the service provider; 2) the federal legislature; 3) the legislature of the state in which one lives; and 4) the judiciary. Although each of these entities can impact one's property in unique ways, ultimately the four interact to determine what one can do with his or her assets.

A. *The Service Provider*

A terms of service agreement (or terms and conditions agreement) nearly always exists between users and service providers of online accounts.¹²⁵ Generally, the terms of service agreement "governs the account and nearly always defines a choice of law."¹²⁶ It may also state whether someone other than the account holder may access the account, whether the account can be transferred, if the account will be deleted after a period of inactivity, or what happens in the event of the account owner's death.¹²⁷ All of these clauses can have a large impact on what happens to an individual's digital assets—especially when there are no federal or state laws on the issue.¹²⁸

1. *Does the Website Own Your Digital Property?* Earlier, a distinction between digital accounts and digital assets was made. This distinction is relevant because digital assets are often the creation of the user, while digital accounts are the creation of the provider. If the user created the digital asset, then it is possible that although the heir does not have a

125. John Romano, *A Working Definition of Digital Assets*, DIGITAL EST. RESOURCE (Sept. 1, 2011) [hereinafter Romano, *A Working Definition*], <http://www.digitalestateresource.com/2011/09/a-working-definition-of-digital-assets/>.

126. *Id.*

127. *Id.*

128. See discussion *infra* Parts II.B, II.C.

right to access the account, they do have the right to the digital asset.¹²⁹ This argument can be made in two ways.

The first argument is that a service provider is merely a bailee or a warehouse, and the same law that applies to physical bailees and warehouses should apply here.¹³⁰ Service providers that transmit email can be seen as bailees since the sender never intended the provider to own the property.¹³¹ The only intent of the sender was for the provider to transfer the property.¹³²

Another argument for the ownership of digital assets can be made using copyright law.¹³³ In general, “copyright law provides protection for the life of the author plus seventy years.”¹³⁴ Copyright protection occurs whether or not something is registered.¹³⁵ It protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹³⁶ Thus, emails, “[p]oems, essays, photographs, videos, commentary, and

129. Some providers explicitly state that they do not own their user’s digital assets. See *Dropbox Terms of Service*, DROPBOX (Mar. 26, 2012), <https://www.dropbox.com/dmca#terms>.

130. “A bailment is created when personal property is transferred from one person (the bailor) to another (the bailee) for a specific purpose, where there is no change in ownership.” Darrow & Ferrera, *Email is Forever*, *supra* note 60, at 14. “A warehouse operator is a special type of bailee who accepts goods for storage.” Darrow & Ferrera, *Who Owns a Decedent’s E-mails*, *supra* note 39, at 308-09. Should an email provider be seen as a warehouse, it would be unable to insert a clause that would prevent the delivery of email to any heirs. *Id.* This is because under warehouse law, which is governed by article 7 of the Uniform Commercial Code, a warehouseman cannot impair his obligation of delivery to the bailor. *Id.*

131. *Id.* at 304-05.

132. *Id.*

133. See *id.* at 292.

134. *Id.* Courts have consistently found that private letters are copyrightable and there is little doubt that emails are too. Darrow & Ferrera, *Email is Forever*, *supra* note 60, at 12.

135. *Id.*

136. Mazzone, *Facebook’s Afterlife*, *supra* note 64, at 1649.

even status updates are all potentially eligible for copyright protection.”¹³⁷

The inheritance of copyright is automatic and can only be altered via a “writing evincing a clear intent to transfer.”¹³⁸ Since this transfer is automatic, it would seem to follow that the heirs would have a right to the email. However, complications arise because copyright law only provides copyright *protection* to the heirs; it does not necessarily guarantee the copy of the letter that was sent to the recipient.¹³⁹ As a result, it is unclear whether heirs must be given copies.¹⁴⁰ However, “Hotmail, Gmail, and America Online allow heirs to obtain access to decedent’s email account content upon the presentation of certain documentation.”¹⁴¹ This copyright analysis could be applied to other types of online accounts as well.

The value of copyright protection for digital property is not always apparent, but consider a celebrity tweet—an eloquent last quote or a terrible last rant—such material might be valuable after death and worth owning the copyright to.¹⁴² Even for non-celebrities, a copyright might have value if the individual was a prolific blogger or frequently posted original content such as stories or art online.¹⁴³

2. *The Effect of Your Terms of Service.* A user’s relationship with a service provider is governed by the terms of service.¹⁴⁴ The terms of service is a contract of adhesion which is “generally defined as a standardized contract, imposed by a party of superior bargaining strength, that provides the other party only the ability to

137. *Id.*

138. Darrow & Ferrera, *Email is Forever*, *supra* note 60, at 12.

139. *Id.*

140. *Id.* at 12-14. Although, some states have passed laws clarifying this issue stating that heirs have a right to the digital assets of email accounts. *See* discussion *infra* Part II.C.

141. Darrow & Ferrera, *Email is Forever*, *supra* note 60, at 13.

142. Mazzone, *Facebook’s Afterlife*, *supra* note 64, at 1650.

143. *See id.*

144. *See* CARROLL & ROMANO, *supra* note 1, at 121.

reject or accept it.”¹⁴⁵ These terms of service are generally referred to as a clickwrap agreement.¹⁴⁶

Since the terms of service is a contract of adhesion, it might be tempting to argue that it is unenforceable as a result. However, the Supreme Court found in *Carnival Cruise Lines, Inc. v. Shute* that whether the terms were negotiated does not determine whether the contract is enforceable.¹⁴⁷ What determines whether a contract of adhesion is unenforceable is whether it was “both procedurally and substantively unconscionable.”¹⁴⁸ While generally a clickwrap agreement will always be procedurally unconscionable as the buyer has no opportunity to bargain in the contract, they are rarely found substantively unconscionable.¹⁴⁹ Thus, clicking “I agree” or something similar is sufficient “requisite notice to the user that a contract is being formed[] and the person manifests his consent.”¹⁵⁰

As previously discussed, the terms of service contain a variety of clauses that can impact the disposition of your digital property. For instance, a terms of service agreement will often contain a clause stating that the account cannot be transferred.¹⁵¹ The reason that these clauses are legal—

145. Dickens, *supra* note 19, at 401.

146. *Id.*

147. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991). The issue was whether the standardized contract on the back of a ticket was enforceable. *Id.* at 595.

148. Dickens, *supra* note 19, at 412.

149. *Id.* For a list of cases upholding clickwrap agreements, see generally RICHARD GILLMAN & MICHAEL R. COHEN, SHRINKWRAP, CLICKWRAP OR BROWSEWRAP LICENSES—ARE THEY ENFORCEABLE?, 27A WEST’S LEGAL FORMS, SPECIALIZED FORMS § 10:35 (4th ed.).

150. Noam Kutler, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641, 1646 (2011). Even though individuals rarely read the terms of service, it is not likely to impact the legality of the agreement. *Id.*

151. Kristina Sherry, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social Media Assets Postmortem*, 40 PEPP. L. REV. 185, 204 (2012). Several service providers have such provisions. For examples, see *Conditions of Use*, AMAZON (Dec. 5, 2012), <http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088>;

even if heirs may own the digital assets—is because “state law does not generally require [digital accounts or assets] to pass via will, intestacy, or nonprobate transfer.”¹⁵² There may also be clauses stating that sharing your password is in violation of the terms of service.¹⁵³

Forum provision and choice of law clauses are also important. For instance, users of Facebook agree to “litigate any claims in Santa Clara County under the laws of California.”¹⁵⁴ This is extremely important as these kinds of clauses have the possibility of nullifying “the applicability of the law of another state governing the disposition of the account.”¹⁵⁵ In other words, it would not matter if your state had a clause allowing for the transfer of digital assets because that law would not govern.

Finally, it is also important to examine the terms for a clause regarding death. Although rare, at least two prominent service providers have “No Right of Survivorship” clauses: iCloud and Yahoo!.¹⁵⁶ The existence of such clauses will control in most situations.

Microsoft Services Agreement, MICROSOFT (Aug. 27, 2012), <http://windows.microsoft.com/en-us/windows-live/microsoft-services-agreement>; *Terms and Conditions*, SHUTTERFLY (Sept. 17, 2012), <http://www.shutterfly.com/help/terms.jsp>; *Terms of Use*, SIMON & SCHUSTER (Mar. 6, 2013), http://www.simonandschuster.com/about/terms_of_use.

152. Sherry, *supra* note 151, at 204. The different aspects of will and probate will be examined in Part III.A, *infra*.

153. See Mazzone, *The Right to Die Online*, *supra* note 29, at 14. For examples, see *Statement of Rights and Responsibilities*, FACEBOOK (Dec. 11, 2012), <https://www.facebook.com/legal/terms>; *Myspace Services Terms of Use Agreement*, MYSPACE (June 10, 2013), <https://myspace.com/pages/terms>; *Nook Terms of Service*, BARNES & NOBLE, <http://www.barnesandnoble.com/u/Terms-of-Service-NOOK-Simple-Touch/379003279/> (last visited Sept. 27, 2013).

154. Mazzone, *The Right to Die Online*, *supra* note 29, at 14-15.

155. *Id.*; see also Romano, *A Working Definition*, *supra* note 125.

156. See APPLE, *supra* note 111; *Yahoo! Terms of Service*, YAHOO! (Mar. 16, 2012), <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html>. Yahoo!’s “No Right of Survivorship” clause states the following: “You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.” *Yahoo! Terms of Service*, *supra*.

B. *The Federal Legislature*

Current federal legislation on digital assets is sparse. Relevant acts include: the Electronic Communication Privacy Act of 1986 (ECPA), along with its component, the Stored Communications Act (SCA), and the Computer Fraud and Abuse Act (CFAA).¹⁵⁷ These acts do not deal specifically with digital property and inheritance. Rather, they were written with the intent of protecting an individual's privacy.

The SCA, codified in title 18 of the United States Code, sections 2701 through 2712,¹⁵⁸ "creates privacy rights to protect the contents of certain electronic communications and files from disclosure by certain service providers."¹⁵⁹ It was enacted in order to "prevent[] 'providers' of communication services from divulging private communications to certain entities and individuals."¹⁶⁰ Under this act, unauthorized use and use that exceeds the authorization is a crime.¹⁶¹ The act also prohibits content disclosures unless made "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service."¹⁶² Some online service providers and courts have stated that the SCA, in the interest of protecting privacy, prevents providers from complying with civil subpoenas.¹⁶³ Many agree that the SCA is out of date,

157. Sherry, *supra* note 151, at 211; see NCCUSL Proposal, *supra* note 25, at 11.

158. 18 U.S.C. §§ 2701-2712 (2006).

159. Jim Lamm, *Facebook Blocks Demand for Contents of Deceased User's Account*, DIGITAL PASSING (Oct. 11, 2012) [hereinafter Lamm, *Facebook Blocks Demand*], <http://www.digitalpassing.com/2012/10/11/facebook-blocks-demand-contents-deceased-users-account/>.

160. *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 971-72 (C.D. Cal. 2010).

161. NCCUSL Proposal, *supra* note 25, at 10.

162. See 18 U.S.C. § 2702(b)(3).

163. McCullagh, *supra* note 84. In *Crispin v. Christian Audigier, Inc.*, the court stated that "the statute limits the right of an Internet Service Provider ("ISP") to disclose information about customers and subscribers to the government voluntarily." *Crispin*, 717 F. Supp. 2d at 972.

but an attempt to change it failed in the House Judiciary in 2012.¹⁶⁴

The CFA, codified in title 18 of the United States Code at section 1030,¹⁶⁵ potentially allows for civil or criminal penalties to be placed against someone who uses someone else's password to access an account.¹⁶⁶ Should this ever be definitively upheld by a court, this act has the potential to have a "chilling effect on fiduciaries trying to carry out their duties of gathering a deceased person's assets."¹⁶⁷

C. State Legislatures

Currently, seven states have laws regarding digital assets. These states are Connecticut, Idaho, Indiana, Nevada, Oklahoma, Rhode Island, and Virginia.¹⁶⁸

Oklahoma was the first state to enact legislation on the topic of death and digital property.¹⁶⁹ It requires that: "[t]he executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any email service websites."¹⁷⁰

Similarly, Idaho's legislation only allows for a conservator to "[t]ake control of, conduct, continue or

164. Gambino, *supra* note 81.

165. See 18 U.S.C. § 1030 (2006).

166. Beyer & Cahn, *supra* note 2, at 43.

167. Jim Lamm, *Update on Whether It's a Crime for Fiduciaries to Access a Decedent's Online Accounts*, DIGITAL PASSING (Apr. 11, 2012) [hereinafter Lamm, *Update*], <http://www.digitalpassing.com/2012/04/11/update-whether-crime-fiduciaries-access-decedent-online-accounts/>.

168. Lamm, *August 2013*, *supra* note 25.

169. Roy, *supra* note 55, at 385.

170. OKLA. STAT. ANN. Tit. 58, § 269 (2013). In the legislative record, Oklahoma State Representative Ryan Kiesel, the sponsor of this legislation, is quoted as saying "[w]hen a person dies, someone needs to have legal access to their accounts to wrap up any unfinished business, close out the account if necessary or carry out specific instructions that the deceased left in their will." Mazzone, *Facebook's Afterlife*, *supra* note 64, at 1675 (internal citations omitted).

terminate any accounts of the protected person on any social networking website, any microblogging or short message service website or any email service website.”¹⁷¹

Indiana’s statute seems to be the broadest of the seven.¹⁷² It requires “any person who electronically stores the documents or information of another person’ to ‘provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person’s death, access to or copies of any documents or information of the deceased person stored electronically by the custodian.”¹⁷³ This means that the statute applies to all online service providers in Indiana and not just social networking websites, microblogging or short message service websites, or email providers.¹⁷⁴

Connecticut, Rhode Island, Nevada, and Virginia have less comprehensive statutes. Connecticut and Rhode Island only require email providers to turn over “all e-mails (sent and received) to the executor or administrator of a decedent’s estate.”¹⁷⁵ Furthermore, they “only apply to e-mail services and do not expressly require the e-mail service provider to retain the contents of the decedent’s e-mail account.”¹⁷⁶ Nevada’s statute merely gives a representative the power to terminate an account.¹⁷⁷ Virginia’s statute only gives adults “the power to assume [a] minor’s Terms of Service agreement.”¹⁷⁸ With such limited scope, these statutes are likely of limited value.¹⁷⁹

171. IDAHO CODE ANN. § 15-5-424 (2013).

172. Roy, *supra* note 55, at 386.

173. IND. CODE § 29-1-13-1.1 (2013); *see also* Cahn, *supra* note 4, at 38.

174. *See generally* Roy, *supra* note 55, at 386.

175. Cahn, *supra* note 4, at 38; *see* CONN. GEN. STAT. §45a-334a (2013); R.I. GEN. LAWS § 33-27-2 (2013).

176. Sherry, *supra* note 151, at 219.

177. Lamm, *August 2013*, *supra* note 25; *see* NEV. REV. STAT. §143.510 (2013); S.B. 131, 2013 Leg., 77th Sess. (Nev. 2013).

178. Lamm, *August 2013*, *supra* note 25; *see* VA. CODE ANN. §64.2-110 (2013).

179. No one has attempted to use these statutes in court yet, so it is hard to say for sure the statutes’ value.

D. The Judiciary

Beyond contracts, federal laws, and state laws, digital property recovery can also be governed by the judiciary. However, this is something that must be done on a case-by-case basis and can be a long, expensive process. Nonetheless, it is sometimes the only recourse available to those left behind. Consider the case of *In re Ellsworth*, the quintessential example about a family's attempt to recover a deceased's digital assets by going to court.¹⁸⁰

John Ellsworth was the father of Justin Ellsworth, a twenty-year-old marine in Iraq.¹⁸¹ While on duty, Justin used Yahoo! to send emails to his father and other members of his family.¹⁸² In 2004, Justin was killed in Fallujah by a roadside bomb.¹⁸³ Hoping to make a scrapbook about Justin, the family requested that Yahoo! provide copies of all the emails he had received.¹⁸⁴ Yahoo! refused, stating that their accounts were non-transferable per their terms of service.¹⁸⁵ The Ellsworths took the matter to the Probate Court of Oakland County, Michigan.¹⁸⁶ In the end, the probate judge ordered Yahoo! to turn over copies of the emails.¹⁸⁷ However, access to the account was not provided.¹⁸⁸

Another example is that of Helen and Jay Stassen, a Wisconsin couple.¹⁸⁹ In 2010, the Stassens' son committed suicide.¹⁹⁰ In an attempt to gain answers, the Stassens

180. This story is frequently cited in articles about digital asset management. See, e.g., CARROLL & ROMANO, *supra* note 1, at 11-13 (2011); Cahn, *supra* note 4, at 37-38; Herbst, *supra* note 40, at 21.

181. CARROLL & ROMANO, *supra* note 1, at 11-13; Herbst, *supra* note 40, at 21 (citing Justin's age as 20).

182. CARROLL & ROMANO, *supra* note 1, at 11-13.

183. *Id.* at 12; see also Herbst, *supra* note 40, at 21.

184. CARROLL & ROMANO, *supra* note 1, at 13.

185. *Id.*

186. *Id.* at 11-13.

187. Cahn, *supra* note 4, at 37-38.

188. *Id.* at 38.

189. Steinmetz, *supra* note 12.

190. *Id.*

sought a court order that would grant them access to his Google and Facebook accounts.¹⁹¹ Although Google gave the parents access to the emails in their son's account, Facebook refused to provide the parents access.¹⁹² In the end, Facebook—despite the court order—would not release any of the contents until the Stassens signed “a contract stating that they [would] never show the contents . . . to anyone outside the immediate family.”¹⁹³

Due to the variances and uncertainties in the law, not everyone is able to prevail in these cases, even when they involve the same company. For example, in September 2012, “Facebook obtained a court order blocking a demand to turn over the contents” of Sahar Daftary's Facebook to her mother.¹⁹⁴ Part of the reason for these variances is that Facebook has a strong interest in controlling its data.¹⁹⁵

III. PLANNING FOR YOUR DIGITAL PROPERTY TODAY

Although the above helps to determine what can currently be done with one's digital assets, it should be noted that general estate rules still must be considered. When an individual dies, “all of a decedent's assets can [generally] be placed into one of two categories”: probate and nonprobate.¹⁹⁶ Usually, “probate property is that which ‘passes through probate under the decedent's will or by intestacy.’”¹⁹⁷ Nonprobate property, however, “is that which passes outside the probate system under an instrument other than a will, such as a contract, deed, or trust.”¹⁹⁸ In charge of a decedent's estate is the executor. The executor is

191. *Id.*

192. *Id.*

193. *Id.*

194. Lamm, *Facebook Blocks Demand*, *supra* note 159.

195. Mazzone, *The Right to Die Online*, *supra* note 29, at 15.

196. Sherry, *supra* note 151, at 205.

197. *Id.* at 206. Probate is “the legal process for administering [an] estate,” whereas intestacy refers to the default property rules for those who die without a valid will. *Id.* at 206-07.

198. *Id.* at 206.

responsible for fulfilling fiduciary duties related to the estate including distributing any assets.¹⁹⁹

In general, planning for one's digital assets should occur in five stages: "(1) inventory the digital assets, (2) identify appropriate help, (3) provide for access, (4) provide instructions, and (5) give appropriate authority."²⁰⁰ Establishing a plan for one's digital assets is exceedingly important for ensuring that one's wishes are fulfilled. Not only will it provide written documentation of what an individual would like to happen to his or her digital property, it will also force the individual to list all accounts, user names, passwords, and security questions that might be needed. Furthermore, it might encourage an individual to weed out some of his or her digital assets. Consider how many digital photos a person might have—it is easy to imagine a situation where someone has over 10,000 photos.²⁰¹ Will anyone really want to sort through those?²⁰² The answer is probably not.²⁰³ Thus, when you are taking inventory of your digital assets, you can tag the important ones and eliminate anything that is unnecessary.²⁰⁴

Planning for one's digital estate can be completed using a variety of methods, including a will, a letter stored elsewhere, a digital executor, an online repository for digital information, or a trust. Each of these processes has its own advantages and disadvantages that shall be briefly considered. Beyond these options, there is always the possibility of doing nothing. Considering the impact of this option is important given that a significant portion of the population doesn't have a will.²⁰⁵

199. Wilkens, *supra* note 44, at 1043. Given the executor's fiduciary responsibilities, the executor is sometimes referred to as the fiduciary.

200. *Id.* at 1063.

201. *See, e.g.,* CARROLL & ROMANO, *supra* note 1, at 71.

202. *See id.*

203. *See id.*

204. *See id.*

205. *See* Sheryl Nance-Nash, *Why More than Half of Americans Don't Have Wills*, DAILY FIN. (Aug. 26, 2011, 3:05 PM), <http://www.dailyfinance.com/2011/08/26/what-america-thinks-about-estate-planning/>.

Regardless of what method is chosen to implement a digital estate plan, one must realize that the plan runs up against terms of service, federal law, and state law. Also, just because something is written down does not mean that it will happen.²⁰⁶ And until the law catches up with technology, this will always be the case. Nonetheless, creating a plan is the best way to attempt to ensure that what you want to happen actually does happen.

A. *A Will*

Generally speaking, wills require “(1) a writing, (2) the testator’s signature, and (3) attestation by at least two competent witnesses.”²⁰⁷ While wills have the advantage of being long-standing, legally recognized documents, they are generally unsuitable for digital property.²⁰⁸ Wills are unsuitable because they are a matter of public record, and as a result, it would be unsafe to put any passwords or sensitive information in a will.²⁰⁹ Additionally, the will would need to be continuously updated with new account information. Instead of account information, though, an individual could specify in a will where a letter or further information regarding digital property could be found.

B. *In a Letter Stored Elsewhere*

After writing a will detailing one’s wishes, leaving a hardcopy letter of all your digital assets may be the simplest option.²¹⁰ This letter could be stored in a number of places including one’s house, a safe deposit box, with an attorney—

206. And just because something happens does not mean it is legal. For example, if one wishes to leave their iTunes account to his or her daughter, he or she might simply write down the password. It would be easy enough for the daughter to access the account. However, it would be a violation of the terms of service, and if iTunes discovers the violation the account could be terminated as previously discussed. *See generally* ITUNES, *supra* note 89.

207. Karen J. Sneddon, *Speaking for the Dead: Voice in Law Wills and Testaments*, 85 ST. JOHN’S L. REV. 683, 687 (2011).

208. Beyer & Cahn, *supra* note 2, at 42.

209. Carroll & Romano, *supra* note 1, at 158.

210. *See id.* at 113.

basically anywhere your heirs would have access to it.²¹¹ While this option is simple, it tends to be as impractical as a will.²¹² This impracticality stems from the fact that this letter would need to be continuously updated with new accounts, changes in passwords, etc.²¹³

C. *Digital Executor*

A digital executor is similar to the executor of the will in that both are responsible for carrying out your wishes.²¹⁴ However, instead of managing your wishes for your physical assets, the digital executor manages your wishes for your digital assets.²¹⁵ The digital executor would be responsible for informing heirs of any and all digital property and ensuring that they have access to them.²¹⁶ Unlike a traditional executor of the will, a digital executor has no legal obligation.²¹⁷ Given that there is no legal obligation for your digital executor to follow your wishes, this person needs to be someone who is absolutely trusted.²¹⁸ However, even a “trusted person may not carefully safeguard the decedent’s list against theft, misuse, or misplacement.”²¹⁹

In choosing a digital executor, another thing to consider is how tech savvy the individual is.²²⁰ It will not matter how

211. Cahn, *supra* note 4, at 38.

212. Roy, *supra* note 55, at 382-83.

213. CARROLL & ROMANO, *supra* note 1, at 113.

214. *See id.* at 77-78; *see also* Cahn, *supra* note 4, at 38.

215. *See* CARROLL & ROMANO, *supra* note 1, at 77.

216. *Id.* at 100.

217. *Id.* at 78.

218. *Id.* at 164. However, one might consider having a second, perhaps less trusted, digital executor to manage digital property that should not be seen by friends or family. *Id.*

219. Roy, *supra* note 55, at 382.

220. Jenna Wortham, *The Digital Afterlife and Morning-After Messaging*, N.Y. TIMES (Oct. 19, 2009, 5:59 AM), <http://gadgetwise.blogs.nytimes.com/2009/10/19/dealing-with-the-digital-afterlife-and-morning-after-messaging/>.

trusted someone is if they do not know how to close accounts, change statuses, or pay for webhosting.²²¹

As with wills and letters, there is still the problem of determining how account information will be updated. Unlike wills and letters though, one has the option of verbally telling a digital executor about any changes that occur.

D. *Online Repositories for Digital Property*

Unlike the above options, an online repository does not require the involvement of any other people. Instead, with these services, one stores all of his or her digital property information in an online account.²²² These services list every account, every password,²²³ and every security question. Once the account information has been listed, one can specify what is supposed to happen to each piece of digital property.²²⁴ All of these services have a trigger that will notify the individual of your choosing of the existence of this information.²²⁵ For instance, one service might send you emails every so often that require a response, while other services might have friends of the user set up as verifiers who will provide a death certificate to the website when the user dies.²²⁶

These services cost money though: money that younger individuals may not want to spend since they believe that they will not need such services for decades.²²⁷ Plus, there is

221. *See id.*

222. CARROLL & ROMANO, *supra* note 1, at 87. Websites that offer this type of service include Legacy Locker and DataInherit. Jennifer Saranow Schultz, *Managing Online Accounts After Death*, N.Y. TIMES (Jan. 20, 2011, 12:00 PM), <http://bucks.blogs.nytimes.com/2011/01/20/managing-online-accounts-after-death/>.

223. CARROLL & ROMANO, *supra* note 1, at 87.

224. *Id.*

225. *See id.* at 158.

226. *Id.* at 160.

227. *Id.* at 165.

no guarantee that one's data will remain safe. The company could get hacked, go under, or be sold.²²⁸

Beyond the mere uncertainty of the continued existence of the website, an individual is still responsible for ensuring that passwords and accounts are kept up to date.²²⁹

E. *Trusts*

Another option for an individual is to form a trust. A trust is nonprobate under the Uniform Probate Code and does not have to go through official channels.²³⁰ A trust, unlike the other methods of digital estate planning, can be a good way to transfer licensed digital property since the trustee will have the authority to manage it.²³¹ Indeed, trust beneficiaries have the right to use all trust property and can dissolve the trust at any time.²³² And, unlike wills, trusts are not a matter of public record.²³³ Furthermore, compared to wills, trusts are easier to alter.²³⁴

Given their usefulness, some attorneys are beginning to advocate their use with clients.²³⁵ However, there are some caveats to consider. While Amazon will allow you to change an account name to that of a trust, the only way to place iTunes assets into a trust is if the trust is the entity purchasing the digital assets.²³⁶ A trust could not be formed

228. Kutler, *supra* note 150, at 1655. For example, in early 2012, online repository Secure Safe acquired Entrustet. *Secure Safe Acquires Entrustet*, DEATHANDDIGITALLEGACY.COM (April 17, 2012), <http://www.deathanddigitallegacy.com/2012/04/17/securesafe-acquires-entrustet/>. Although users had the option to migrate their data to Secure Safe, if they failed to respond to an email notice by a certain date, all of their data would be permanently deleted. *Id.*

229. Tarney, *supra* note 24, at 790.

230. Roy, *supra* note 55, at 396-98.

231. Cahn, *supra* note 4, at 38.

232. Roy, *supra* note 55, at 396-97.

233. Beyer & Cahn, *supra* note 2, at 42.

234. *Id.* at 42.

235. *See id.*

236. Email from David Goldman, Attorney, Apple Law Firm PLLC, to author (Mar. 11, 2013, 12:44 PM) (on file with author).

if an individual originally purchased the assets.²³⁷ So while a trust might seem like a good option, it should be considered before the acquisition of digital property, rather than after.

F. *Do Nothing*

An individual can always choose to do no digital planning. Without a will, an individual's assets will follow the "default rules."²³⁸ The default rules are the probate laws of the state.²³⁹ Given that many states do not have probate rules for digital assets, there is a risk that one's digital property will be lost if no action is taken.²⁴⁰

IV. PRESERVING DIGITAL ASSETS IN THE FUTURE

In the past, there has been a lack of clear legislative intent as to what should happen with digital property and, as a result, service providers have erred on the side of privacy.²⁴¹ As the twenty-first century progresses, it must be considered whether privacy should really be the primary goal in dealing with the digital properties of the deceased. Regardless, given that an increasing number of people's assets are digital and that the majority of individuals die without a will, it is important that legislatures and service providers address the uncertainties that surround this type of property. There are a number of possible changes, including further changes to state law, changes to federal law, and changes to the terms of service offered.

A. *Further Changes to State Law*

States may continue to enact their own legislation in an attempt to address the problem. Indeed, within the past year, eighteen states have considered or are still considering legislation that would allow executors access to different

237. *Id.*

238. Wilkens, *supra* note 44, at 1041.

239. *Id.*

240. CARROLL & ROMANO, *supra* note 1, at 58.

241. *See* Wilkens, *supra* note 44, at 1053.

types of digital accounts.²⁴² Half of these states are considering legislation similar to that of Oklahoma. These states include Maryland, Michigan, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, and Virginia.²⁴³ While state laws allow for experimentation to discover what the most effective type of legislation is, experimentation is not ideal for service providers as it can lead to uncertainty. Furthermore, managing different laws for each state can get quite complicated.²⁴⁴ Google opposed a proposal in Massachusetts regarding digital assets for that very reason.²⁴⁵ Indeed, the tech industry in general has been shown to oppose these bills not only because of a lack of uniformity, but due to the industry's belief that these bills would violate the SCA.²⁴⁶

As a result of the lack of uniformity, comprehensiveness of the bills, and opposition from service providers, these laws are not likely to sufficiently address the digital property problem.²⁴⁷

B. *A Uniform State Law*

The Uniform Probate Code (UPC) was drafted by the Uniform Law Commission (ULC) to attempt to unify state law.²⁴⁸ The UPC specifically attempts to “align state inheritance law closer to public expectations, as reflected by recent important changes in family and living patterns”²⁴⁹

242. Lamm, *August 2013*, *supra* note 25.

243. This corresponding legislation is: S.B. 29, 2013 Leg., 433th Sess. (Md. 2013); H.B. 5929, 2011-2012 Leg. (Mich. 2012); Legis. B. 783, 102 Leg., 2d Sess. (Neb. 2012); H.B. 116, 2013 Leg. (N.H. 2013); Assemb. B. 2943, 215th Leg., Reg. Sess. (N.J. 2012); Assemb. B. A823, 2013-2014 Leg., Reg. Sess. (N.Y. 2013); H.B. 1455, 63rd Leg. (N.D. 2013); S.B. 54, 77th Leg., Reg. Sess. (Or. 2013); H.B. 2580, 2011-2012 Gen. Assemb., Reg. Sess. (Pa. 2012); and S.B. 914, 2013 Gen. Assemb., Reg. Sess. (Va. 2013).

244. *See* Steinmetz, *supra* note 12.

245. *Id.*

246. Gambino, *supra* note 81.

247. *See generally* Lamm, *August 2013*, *supra* note 25.

248. Tarney, *supra* note 24, at 797.

249. *Id.* at 797-98 (internal citations omitted).

and “discover and make effective the intent of the decedent in distribution of his [or her] property.”²⁵⁰

The general purpose of the ULC is to keep “state law up-to-date by addressing important and timely legal issues.”²⁵¹ The UPC is a “nationally recommended and up-to-date model for the improvement of state law relating to the succession of property at an owner’s death, as controlled by will, intestacy statute, and the probate process.”²⁵² In the interest of this emerging issue, the ULC “severely expedited its study” of the issue of digital assets.²⁵³ Although the first draft of the Fiduciary Access to Digital Assets Act was proposed in July 2011, the committee still has not passed a final act.²⁵⁴

The most recent draft was created for its February 15-16, 2013 committee meeting.²⁵⁵ According to the draft, the purpose of the Act “is to vest fiduciaries with the authority to access, manage, distribute, copy, or delete digital assets and accounts.”²⁵⁶ Specifically, this draft allows the personal representative to administer all digital property related to an estate.²⁵⁷ It also establishes that the representative must be authorized by the court and that interested parties may object to the fiduciary’s request for control.²⁵⁸

250. Sneddon, *supra* note 207, at 712 (internal citations omitted).

251. Tarney, *supra* note 24, at 797 (internal citations omitted).

252. *Id.* (internal citations omitted).

253. Steinmetz, *supra* note 12.

254. Tarney, *supra* note 24, at 798-99; *see also* *Fiduciary Access to Digital Assets Committee*, *supra* note 27.

255. NCCUSL Proposal, *supra* note 25, at 1.

256. *Id.* There are four types of potential fiduciaries: “personal representatives of decedents’ estates, conservators for protected persons, agents acting pursuant to a power of attorney, and trustees.” *Id.*

257. Specifically, the act states that “[e]xcept as [the decedent has] otherwise provided by will or until a court otherwise orders, a personal representative, acting reasonably for the benefit of the interested persons, may exercise control over the decedent’s digital property to the extent permitted under applicable law and a terms-of-service agreement.” *Id.* at 6.

258. *Id.* at 9, 11-12.

In general, this uniform code is preferable to piecemeal state legislation, since it provides enough guidance to allow for some uniformity, but also allows the states to experiment with different approaches.²⁵⁹

C. *Changing Federal Law*

Since many online providers feel as if the SCA and the CFA restrict them from granting access to the decedent's heirs, it might be worth the federal legislature's time to update these laws to reflect the heirs' and executors' need to access the digital assets of those deceased—despite its reluctance to take up the issue.²⁶⁰ In updating these statutes, Congress should definitively state “whether using someone's password without the individual's permission might be subject to civil or criminal penalties under the federal Computer Fraud and Abuse Act.”²⁶¹ Congress also needs to consider: “(1) the privacy and ownership interests of account holders; (2) the interests of heirs in obtaining the property of loved ones; and (3) the interests of e-mail service providers in reducing liability exposure and administrative expenses.”²⁶² Beyond updating the SCA and the CFA, Congress could also simply pass legislation that would make executors of the will part of the “limited list of exceptions for disclosures of electronic communications” and thus able to access various digital properties.²⁶³

D. *Changing the Terms of Service Offered by the Service Provider*

Although changing the laws is definitely part of the solution to the digital properties problem, it cannot be the

259. Darrow & Ferrera, *Who Owns a Decedent's E-mails*, *supra* note 39, at 317-18.

260. *See* Gambino, *supra* note 81.

261. Beyer & Cahn, *supra* note 2, at 43.

262. Darrow & Ferrera, *Who Owns a Decedent's E-mails*, *supra* note 39, at 317.

263. Wilkens, *supra* note 44, at 1061.

only solution.²⁶⁴ Online service providers also need to change how they address the transfer of digital assets.²⁶⁵ Currently, providers handle death retroactively.²⁶⁶ Instead, death could be handled proactively by asking users when they sign up what they want done with their accounts.²⁶⁷ A proactive step at sign in would ask: “Upon your incapacity or death, do you a) want no living soul to ever sift through your messages or b) want access given to the executor of your estate?”²⁶⁸ Such an action by providers would likely: “(1) safeguard privacy; (2) minimize litigation and probate proceedings; (3) preserve assets when preservation is appropriate and desired; and (4) honor the digital outcome(s) that social-media users would ‘Like’ to have happen when they die.”²⁶⁹ This change could be taken even further if providers were to ask users not only if they wanted their information shared, but with whom they would want to share it.²⁷⁰ Presumably, such information would be able to be modified at any time.

Beyond clarifying the user’s intent for the account, changing the terms of service slightly could ease some providers’ concerns about the cost of fulfilling users’ wishes. Basically, a clause could be inserted stating that heirs pay all associated costs.²⁷¹ If heirs had to pay these costs, then it is likely that only digital property that was really valued would be sought.²⁷² However, at a minimum, “service providers should be required to allow users to choose whether their account content is to be transferable upon death.”²⁷³

264. Sherry, *supra* note 151, at 249-50.

265. *Id.* at 250.

266. See CARROLL & ROMANO, *supra* note 1, at 88.

267. Sherry, *supra* note 151, at 250. However, it has been suggested that absent any legal challenges, providers are unlikely to change their policies. *Id.*

268. Steinmetz, *supra* note 12.

269. Sherry, *supra* note 151, at 250.

270. CARROLL & ROMANO, *supra* note 1, at 173.

271. Tarney, *supra* note 24, at 799-800.

272. *Id.* at 800.

273. *Id.*

E. Practicalities to Consider

In changing the way that digital property is handled, there are two things that need to be generally considered. First, is it desirable to have one set of laws or policies that cover all types of digital assets? Arguably, MP3s cannot and should not be handled the same way as personal photos, since the decedent did not have the same property rights in the two to begin with. A second consideration is how technology will change. In the book *Your Digital Afterlife*, Evan Carroll and John Romano propose that in the future death records will be made available online.²⁷⁴ As a result, websites will automatically be made aware of a user's passing and adjust their services accordingly.²⁷⁵ How would online death records impact how digital property is handled after death? For one thing, in any instance where accounts were non-transferable, heirs would automatically lose access to the account regardless of the possession of a password. Potentially, providers would also immediately delete the account and all associated data, thus preventing heirs from even getting copies of the various digital assets located within the account.

By taking such questions into consideration now, perhaps the system can be a step ahead of the technological changes that impact how individuals store and handle their digital property.

CONCLUSION

It is not easy to discuss death.²⁷⁶ People do not like to be reminded of their own mortality. But death is something that we all face, and while you may not be able to control this facet of life, you can control what you leave behind. By taking a proactive stance, you can ensure that your heirs get the digital property they deserve. Despite being proactive, no digital estate plan will be perfect, and there is no guarantee that one's wishes will be followed exactly. The

274. CARROLL & ROMANO, *supra* note 1, at 56.

275. *Id.*

276. *Id.* at 44.

reason for this lack of a guarantee is due to the fact that the laws and rules governing digital property are currently in flux. This is likely to change in the future with the advent of a uniform code concerning digital property as the code is likely to encourage states to pass legislation related to digital property.

Beyond changes in state law, federal law will need to change as well. The SCA and the CFA need to be updated to allow access to an individual's accounts after death. If nothing else, Congress needs to clarify whether accessing someone's account after death without his or her permission can be subject to a civil or criminal penalty. Service providers will also need to adjust their relationship with users and try to take a more proactive approach to finding out their users' wishes.

Ultimately, before moving forward with new laws or terms of service, it might be worth the time to take a step back and consider the types of digital property that need to be addressed and how users' relationships with these properties will change in the future. By taking the time now, we can ensure that the changes made are the right ones for the future.