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NIGHT OF THE LIVING DATA: Estates Law and the Phenomenon of Digital Life After Death

ABSTRACT. We live in the age of the Internet. In 2011, 71% of households accessed the Internet. In 2013, A Pew Research Foundation survey concluded that 51%. In the age of the Internet, adults in the United States are increasingly reliant on online services to manage every area of their lives. We pay bills, communicate with friends and family and shop for almost anything we may need through our computers. But also, our computers entertain us, we download movies and TV shows, we post pictures to Facebook and we Instagram our meals. We live out real life in a virtual world. However, unlike our physical bodies, our Internet alter-egos have the ability to exist in perpetuity.

Despite an ever-increasing virtual presence during people's lives, many people do not consider that when they die or become incapacitated, that these accounts can cause great issues for their loved-ones. Those individuals who have sought to deal properly which their digital assets upon their death face a lack of consistency in state laws, ranging from limited grants of access to online accounts for executors to complete silence on the subject. It is the individual contracts that we make with our online providers that ultimately govern what happens to our emails, Facebook photographs and our ITunes account when we die. The terms of those contracts, we rarely read or understand in our live-times, and are even less likely to comprehend when planning for our death.

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ARTICLE CONTENTS

INTRODUCTION

In the age of the internet, adults in the United States are increasingly reliant on online services to manage every area of their lives. We pay bills, communicate with friends and family and shop, to name just a few things we do on the internet. Our computers also entertain us, we download movies and TV shows, we post pictures to Facebook and Instagram our meals. We live out life online. However, unlike our physical bodies, our internet alter-egos have the ability to exist in perpetuity. When we pass away, our physical imprint on the world is managed; we are placed in the ground, our will is probated, our belongings are given away (usually subject to our will) or sold and our executor or administrator winds up our estate. The "Digital Asset Dilemma," however, has created a series of complex questions for the administrator of our estates. What should be done with our Gmail account or our Facebook account? Having been appointed as an executor of an estate, does that person have the right to read through the decedent's private emails or private messages? Does their duty to wind up the estate and pay the beneficiaries, enable him to use the online banking account of the decedent. The answer to these questions have, for the most part, not been answered by state laws, and thus individual online service providers must craft their own rules. This has led to a gap in the market, which digital estate planning (DEP) companies have sought to fill. Some front-runners have attempted to craft their own policies to deal with death (Google and Facebook are examples) but many have not. The law remains unsettled and even those who believe that they have taken every precaution to affect a smooth transition from life to the digital afterlife, may find themselves on the wrong side of case-law as it emerges.

Similarly, we now own (or believe that we do) an increasing amount of content that has no physical manifestation. The digital area is transforming probate law. Some people have much more in the way of digital assets then they might first think. Decedents who have small websites devoted to their hobbies may not think of the website as an asset but if it generates income from advertising, then it should be in the estate plan. Some people have less in their estate than they believe. This is the ITunes generation; downloading music, apps, video to our phones and computers. Many of us believe that we own our music on ITunes, but in fact, we merely license it and this has implications for the worth of an estate. If you ever read the fictitious story of Bruce Willis suing Apple over his ITunes collection, then you know that the story may have been made up, but the underlying legal question is valid; can I devise my ITunes to my children?

Section I explores what is meant by "online services" and "digital assets," and why they create such a unique challenge for the probate laws in most American jurisdictions. Section II looks into the current business practices for companies in the United States and how the terms and conditions we agree to every time we set up a new account online may impact our estate when we die. Section III looks at how the law has shaped these company practices, and how legislators have yet to lead the way in providing for a definitive after death digital plan.

I. THE UNIQUE ESTATE PROBLEMS OF THE INTERNET AGE

There is no doubt that we live in the internet age. In 2001, 75.6 percent of households in the United States reported a computer in their home (compared to 8.2

percent in 1984 and 61.8 percent in 2003).[1] There has also been a large increase in the number of household who reported that they accessed the internet in 2011. In 2011 71.7 percent of households accessed the internet, which is an increase from 18.0 percent in 1997 (the first year the question was asked) and 54.7 percent in 2003.[2] A Pew Research Center report on online banking activity found that in 2013, 51% of adults in the US did some banking online and 32% "transact business on their mobile device."[3] In addition to banking, we send an ever increasing amount of emails, share more on our social media accounts and have the ability to shop for almost anything online. Most of these online activities require accounts to be created, which require both a user name and password. Unlike bank books in the earlier days, these accounts leave almost no physical trace. For security reasons, they exist on the server and in the memory of the account user exclusively.

What happens to these accounts when we die is largely unchartered territory for the law and for businesses that provide these online services for their customers. The law has been very slow to change, in no small part as a result of the recent technology and the relatively ancient laws upon which the laws of probate are based.

A. What are "online services" and why do they pose a unique challenge for estates law?

All online services perform three core functions; "[f]irst the user of an online service can access data on a service's servers from anywhere, at any time, as long as she has a working internet connection. Second, the user or the online service can keep that data private or share it with persons of the user's or service's choosing. Finally, backup

[1] U.S. CENSUS BUREAU, Computer and Internet Use in the United States (2013) *available at* http://www.census.gov/prod/2013pubs/p20-569.pdf
[2] U.S. CENSUS BUREAU, Computer and Internet Use in the United States (2013) *available at* http://www.census.gov/prod/2013pubs/p20-569.pdf
[3]Susannah Fox, 51% of U.S. Adults Bank Online, Pew Research Center (2013), http://pewinternet.org/~/media//Files/Reports/2013/PIP_OnlineBanking.pdf

copies of the user's data remain with an online service and can be substituted for the originals if the originals are lost."[4] As a practical matter, such information is tailored to the individual online user and thus must be unique to their account. Put another way, the online service must identify and then verify the identity of the person accessing the account, to confirm that it is the same person who created the account. There are two distinct legal issues that arise for the heir or administrator of a digital estate from gate-keeper system. The first is presented when the heir or executor attempts to gain access to the combination of username and password, which often proves more complicated that one might expect. [5] Second, the prevalence of standard-form contracts in the online service industry, means that the expectation of access to a loved-one's old data may not match with the privacy policy the deceased agreed to when he or she was alive.

There is a great deal of anecdotal evidence of struggles faced by recently bereaved people, especially spouses, whose deceased spouse's accounts are inaccessible. In February 2013, the Wall Street Journal ran an article about a couple, two journalists, who believed that they had planned the estate quite thoroughly until one of them passed away.[6] At the age of 57, Jeff Kaye suffered a heart attack and died. His widow, Alexandra Kaye, was left with a "tangled web" of online accounts, bills, and banking to untangle. In addition, accounts such as Spotify and Netflix, which may never have crossed Mr. Kaye's mind as he built his estate plan, became a time-consuming and frustrating exercise for the bereaved wife. They ran into trouble first and foremost with their bank, HSBC. Interestingly, the Kaye's banked with HSBC both in the UK and the

[4] Michael D. Roy, Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?, 24 Quinnipiac Prob. L.J. 376, 379-80 (2011)
[5] See, Kelly Greene, What Tangled Web We Leave, WALL ST. J, Feb. 3, 2013, http://online.wsj.com/news/articles/SB10001424127887323644904578272352355489198
[6] See, Kelly Greene, What Tangled Web We Leave, WALL ST. J, Feb. 3, 2013, http://online.wsj.com/news/articles/SB10001424127887323644904578272352355489198

USA. The British branch removed his name immediately from the joint account while the American branch told her that they could not perform this function. Instead, she was required to close the account and open a new one in her name only. This meant that all of the accounts that were automatically paid out of this account went into arrears. Owing to the nature of accounts such as Netflix and Spotify, there is no physical trace of these accounts, outside of confirmation emails and monies debited from a current account. Without access to any of these accounts, Mrs. Kaye's access to these services was lost. So too was Mrs. Kaye's paycheck, which was automatically deposited into the shared account. An HSBC spokesman declined to comment on the facts of the case but noted that the account closing was required for "tax reporting" purposes.

While the Kayes believed that they had sufficient estate planning, in fact they had failed to account for the transition of their online services from real life to the digital afterlife. In fact, "Mrs. Kaye says she and her sons have logged hours trying to tap into Mr. Kaye's email account, to let friends overseas know about his death, and to get into their Netflix account. They finally figured out that his password for Spotify, a digital music service, was a word spelled phonetically and backward."[7] This is not unusual, particular in the case of sudden, tragic deaths where there has been no ability to consider the impact of the loss of the account holder on his online life. Families in their situation have limited options when they attempt to plan for the future.

Until recently there were three alternatives available to a person looking to plan for online accounts after death. First, he could simply keep a list of his accounts, with the name and password for each and give the list to somebody he trusts.[8] While this may

[7] See, Kelly Greene, What Tangled Web We Leave, WALL ST. J, Feb. 3, 2013, http://online.wsj.com/news/articles/SB10001424127887323644904578272352355489198

[8] Michael D. Roy, Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?, 24 Quinnipiac Prob. L.J. 376, 381 (2011)

be the simplest alternative, allowing access to continue after death, it is open to abuse during the testator's life and after death. It may also be in breach of the terms of service with individual accounts to continue use after the death of the account holder.[9] The second alternative is listing the accounts, with name and password along with the personal effects, as a codicil in a will or in the cloud.[10] This is likely to avoid abuse while the testator is alive (if it remains with a lawyer) but is so subject to change that it may rendered useless by the time the testator passes away. It requires constant updating to be useful.[11] Finally, as often becomes the default position of families who fail to plan for their online service accounts, a user can rely on the individual user agreements for the individual accounts to determine access to the decedent's accounts.

Companies such as Yahoo! terminate their user's account upon notification of death and do not allow for the right of survivorship in accounts.[12] Other companies, such as Facebook.com allow for accounts to become 'memorialized" upon the showing of an obituary. This allows the account to remain accessible to Facebook "friends" but the site will not allow the family members to gain access to the account, which means that content is lost to all those who it has not been previously shared with.[13] Finally, there are many sites that simply state their policy in case of death, though this is becoming

[9] E.g., Yahoo! Terms of Service, Yahoo!, § 28 http://info.yahoo.com/legal/us/yahoo/utos/en-us/ (Last updated March 16, 2012) [hereinafter Yahoo! TOS] ("No Right of Survivorship and Non-Transferability. 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.")
[10] Michael D. Roy, Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?, 24 Quinnipiac Prob. L.J. 376, 381 (2011)
[11] Michael D. Roy, Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?, 24 Quinnipiac Prob. L.J. 376, 381-83 (2011)
[12] Yahoo! TOS, supra note 9.
[13] Facebook Memorialization Policy, How do I report a deceased person or an account that needs to be memorialized?, https://www.facebook.com/help/150486848354038/ (Last updated November 2013) [hereinafter Facebook Memorialization Policy] ("We will memorialize the Facebook account of a deceased person when we receive a valid request. We try to prevent references to memorialized accounts from appearing on Facebook in ways that may be upsetting to the person's friends and family, and we also take measures to protect the privacy of the deceased person by securing the account. Please keep in mind that we cannot provide login information for a memorialized account. It is always a violation of our policies to log into another person's account.")

increasingly less frequent. Most websites (as will be the topic of both Sections II and III) have no incentive to provide a policy for assignment of these accounts because it leaves them in an uncertain legal situation both as to the privacy of their users and the potential for fraud that may arise when accounts are available after the account-holder's death.

B. What are "Digital Assets" and why do they pose a unique challenge for estates law?

In September 2012, stories of Bruce Willis' ITunes account started to emerge. Reports circulated that Willis, an avid music fan and ITunes enthusiast, decided to sue Apple when he realized that he was not able to devise his collection to his children upon his demise.[14] The story turned out to be fabricated. However, the underlying legal question remains. Many believe that when purchasing and downloading music through ITunes, they own that music. In estate-planning terms, this would grant these digital assets the same rights of assignability as a physical vinyl record or compact disc. The reality is not so clear and thus this fictitious story contains more truth that it would first appear; that what we believe to be ours (whether we are Bruce Willis or not), may not be in our estate. Put succinctly:

> In their traditional, print media format, music and books are protected by the first sale doctrine: when the owner passes away, his or her children can inherit that content; the children can then sell, give away, or discard the content. The publisher of the content cannot interfere with either the inheritance or the children's ultimate disposal. The purchase of digital media, however, is universally governed by an "end user license

[14] This story circulated throughout the entertainment news as well as more serious media outlets. It was later retracted by all new sources when it emerged that the story had been fake. See e.g., Ben Child, Bruce Willis to fight Apple over right to leave iTunes library in will, http://www.theguardian.com/film/2012/sep/03/bruce-willis-apple-itunes-library (Monday 3rd September, 2012); see also, Neil Sears, Bruce Willis fights to leave his iPod tunes to his family: Actor considering legal action against Apple in battle over who owns songs downloaded from iTunes, http://www.dailymail.co.uk/news/article-2197248/Bruce-Willis-fights-leave-iPod-tunes-family-Actor-considering-legal-action-Apple-battle-owns-songs-downloaded-iTunes.html?ito=feeds-newsxml (Tuesday September 4, 2012)

> agreement" or EULA. The purchase also universally requires creating an account with the content provider, an account also governed by a EULA.[15]

Thus, Bruce Willis may not have cause to bring an action against ITunes, but others may wish to in the future.

The ITunes question captures both issues of online service (outlined in Section I(a)) but a wider issue of what digital assets, or at least what many believe to be their digital assets, mean for estate planning. Even after the speculation died down about Bruce Willis' legal action, the question remained; could he leave his ITunes to his children? There is a great deal of confusion around the issue of ITunes ownership because of the ambiguity of the language, the untested nature of the law and the lack of clarity about the status of the end user license agreement (hereinafter "EULA"). In order to purchase music on ITunes, the end user must first create an account and then purchase the music. Both interactions with Apple, Inc. require the user to adhere to Apple's standard terms of contract. The first line of Apple's "Licensed Application End User License Agreement" states "[t]he Products transacted through the Service are licensed, not sold, to You for use only under the terms of this license, unless a Product is accompanied by a separate license agreement, in which case the terms of that separate license agreement will govern, subject to Your prior acceptance of that separate license agreement."[16] Despite the reference to other potential agreements between Apple and the user, it is the language of this contract that will govern when decedents attempt to devise their ITunes account.

[15] Claudine Wong, Can Bruce Willis Leave His Itunes Collection to His Children?: Inheritability of Digital Media in the Face of Eulas, 29 Santa Clara Computer & High Tech. L.J. 703 (2013)
[16] Apple Licensed Application End User License Agreement, https://www.apple.com/legal/internet-services/itunes/appstore/dev/stdeula/, (hereinafter "Apple's EULA").

The EULA creates a different set of rights and obligations than those that have governed the passing of assets from decedent to their beneficiaries. Owners of a music collection (on any physical format) have, since 1972, been protected by the "First Sale Doctrine," which allows them to gift, sell or devise their collection without interference from the rights holder. The First Sale Doctrine arises by operation of two sections of the Copyright Act, §107 ("Fair Use")[17] and §109(a) ("Transfer").[18] They limit the ability of the rights holder to block the transfer of their copies for bone fide purchasers of a copy of the work. Thus, the impact to of the First Sale Doctrine on probate is well-settled:

> [a] person… who has purchased a paper book or CD, or a person authorized by the owner of the object--such as an executor, or, by default, a probate judge--can transfer the person's copy of the book or CD to the person's heirs or beneficiaries without violating copyright law. The heirs and beneficiaries themselves can choose to keep the book or CD, or sell it or otherwise dispose of it also without violating copyright law--first sale applies as well to transfer by gift, and does not require a sale.[19]

However, the prevalence of EULAs in the digital music era has changed the nature of these rights for the purpose of devising digital assets; how large this change has been and will be remains to be seen.

The EULA creates to create two blocks on the transfer of these assets. First, in signing up to a provider such as ITunes, the user agrees to one set of contract terms. These usually restrict the ability of the user to use the account or platform for anything

[17] The Copyright Act, § 107, 17 U.S.C.A. § 107, ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;(2) the nature of the copyrighted work;(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and(4) the effect of the use upon the potential market for or value of the copyrighted work.")

[18] The Copyright Act, § 109(a), 17 U.S.C.A. § 109, ("Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.)

[19] Claudine Wong, Can Bruce Willis Leave His Itunes Collection to His Children?: Inheritability of Digital Media in the Face of Eulas, 29 Santa Clara Computer & High Tech. L.J. 703, 740-41 (2013)

other than personal use, thus restricting the means by which content is delivered. The contract terms within the EULA are distinctly personal.[20] The use of an account in another's name is a breach of the EULA. In much the same way, the accounts outlined in Section I, simply knowing the account name and password is not enough to lawfully access the account. The second block is that the music itself is licensed through the EULA and companies such as Apple have been very careful to restrict the ownership rights that transfer upon "purchase" of this content. There have been some early indications that limits placed on the ownership of digital assets by rights owners appear enforceable.

In Capital Records, LLC v. ReDigi, Inc., a Federal Court was called upon to decide whether the First Sale Doctrine applied to digital rights. ReDigi, Inc. provided an online business that acted like a marketplace for digital assets. The Company described itself as providing a "website [that] invites users to "sell their legally acquired digital music files, and buy used digital music from others at a fraction of the price currently available on iTunes."[21] Thus, when an owner of a digital recording no longer wants it and seeks to sell it, like a second-hand record store, ReDigi would provide a space for him to re-sell his digital records. ReDigi argued that no copying took place; instead, when the seller sold the record, the system "migrates" the record to ReDigi's server but does not copy it.[22] This, it argued made it more like a physical record and less like a copy of a digital file. The Court stated that its decision "holds regardless of whether one or multiple copies of the file exist. Most of these cases concern multiple copies of one digital music file. But that distinction is immaterial under the plain language of the Copyright Act.

[20] See, Apple's EULA
[21] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 645 (S.D.N.Y. 2013)
[22] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 650 (S.D.N.Y. 2013)

Simply put, it is the creation of a new material object and not an additional material object that defines the reproduction right."[23] Alleging that the facilitation of such sales brought ReDigi into violation of the Copyright Act, Capital Records brought suit in Southern District New York. At first glance, this case seems only marginally related to the question of whether the digital assets may be devised but, in answering the underlying issue of whether digital assets are worthy of protection by the Copyright Act's First Sale Doctrine, the Court decided a question at the heart of this issue; do digital assets act like other assets?

In answering this question, Judge Richard J. Sullivan ruled that digital recordings are not the same as CDs and records and thus were not worthy of the protection of the First Sale Doctrine. In deciding this, the Court reaffirmed the First Sale Doctrine does not operate in the case of digital assets. In roundly rejecting ReDigi's First Sale Defense, the Court stated, "the first sale defense is limited to material items, like records, that the copyright owner put into the stream of commerce. Here, ReDigi is not distributing such material items; rather, it is distributing reproductions of the copyrighted code embedded in new material objects, namely, the ReDigi server in Arizona and its users' hard drives. The first sale defense does not cover this any more than it covered the sale of cassette recordings of vinyl records in a bygone era."[24]

ReDigi was neither the first, nor will it be the last company to attempt to facilitate the re-sale market for digital assets. This will be driven by individuals and opportunistic developers and their lawyers, who will attempt to keep pushing this debate. On an individual level, there has been some evidence that this has begun to happen, such as the case of George Hotelling, who attempted to sell his ITunes copy of a

[23] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 650 (S.D.N.Y. 2013)
[24] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013)

song, "Double Dutch Bus," on E-Bay.[25] There have also been other attempts to create digital marketplaces by companies other than ReDigi, such as Bopaboo, who provide an "e-Bay like marketplace for 'used' digital music files."[26] Bopaboo, like ReDigi, were blocked by immediate litigation and there is no evidence that any attempt in the future would be met by anything other than a zealous reaction by rights-holders. The ruling in the ReDigi case appears to be as applicable to the first attempt to devise digital assets as to sell them.

II. HOW BUSINESSES DEAL WITH THE DEATH OF THEIR CLIENT

When an account owner passes away, there is often very little provision for what happens to their account next. As we have seen in Section I, the terms of these accounts are almost universally governed by individual EULAs and many simply do not make any provision for the death of their client. As we will see in Section III, some states have attempted to enact legislation to deal with this. There have been instances were policies have had to change or, on a case-by-by basis, families have had to bring law suits to compel companies to release their loved one's account. In the case of Justin Ellword's family, a soldier killed by a road-side bomb in Iraq, his family obtained an order from a Michigan probate Court to compel Yahoo! to release his email account.[27] Similarly, the

[25] See, Alorie Gilbert, "iTunes auction treads murky legal ground," http://news.cnet.com/2100-1025_3-5071108.html?tag=st_rn (Last Accessed March 4, 2014); See also, George Hotelling, Does the Right of First Sale Still Exist?, 90% Crud (Sept. 3, 2003, 12:20AM) http://george.hotelling.net/90percent/geekery/does_the_right_of_first_sale_still_exist.php (last accessed March 4, 2014), (George Hotelling was a web developer who listed the ITunes song, "Double Dutch Bus" by Devin Vasquez that he bought legally from ITunes on E-Bay on Sept 3, 2003. On his own website, he stated, "I just posted an eBay auction for a song I bought from the iTunes music store. It should be interesting to see how this works out. I only spent $0.99 on it but I bought the song just as legally as I would a CD, so I should be able to sell it used just as legally right?" Very shortly after he posted this listing, he was informed by E-Bay that he had violated their "Downloadable Media Policy." The reviewed a great deal of coverage at the time.)

[26] Greg Sandoval, Reselling MP3s: The music industry's new battleground?, CNet, (Dec. 11, 2008, 4.00 AM), http://news.cnet.com/8301-1023_3-10120951-93.html; Emily Stutts, Will Your Digital Music and E-Book Libraries "Die Hard" with You?: Transferring Digital Music and E-Books Upon Death, 16 SMU Sci. & Tech. L. Rev. 371, 392 (2013)

[27] Paul Sancya, Yahoo will give family slain Marine's e-mail account, USA Today, http://usatoday30.usatoday.com/tech/news/2005-04-21-marine-e-mail_x.htm?POE=TECISVA (Last Updated April 21,

family of Benjamin Stassen were left without answers when he committed suicide and did not leave a note.[28] They requested the Facebook and Google let them look through his account but they both refused. The family had to obtain a court order to compel Google and Facebook to release their son's accounts.[29] For families to sue every digital company when a decedent had an account to gain an order granting them access is an unworkable situation in the long-term. This creates very real privacy concerns for decedent account holders, but for the most part, these remain issues that many online providers have not had to deal with.[30]

A. The current landscape.

Google and Facebook are two forerunners in the development of EULAs that address their clients' deaths. Google has created a webpage advising the relatives of deceased users on "Accessing a deceased person's mail."[31] This advises that Google, "in rare cases [we] may be able to provide the contents of the Gmail account to an authorized representative of the deceased person."[32] It notes their concern about the trust that their account-holders place in Google, acknowledging the real dilemma at the heart of this question. As in the case of Benjamin Stassen, whose suicide prompted his family to search for answers in his digital life (including his Google account), the email

2005. 12:49 PM); Emily Stutts, Will Your Digital Music and E-Book Libraries "Die Hard" with You?: Transferring Digital Music and E-Books Upon Death, 16 SMU Sci. & Tech. L. Rev. 371, 375 (2013)

[28] Jessica Hopper, Digital Afterlife: What happens to your online accounts when you die?, http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite (Last updated Jun 1, 2012 7:53 AM)

[29] Jessica Hopper, Digital Afterlife: What happens to your online accounts when you die?, http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite (Last updated Jun 1, 2012 7:53 AM); Emily Stutts, Will Your Digital Music and E-Book Libraries "Die Hard" with You?: Transferring Digital Music and E-Books Upon Death, 16 SMU Sci. & Tech. L. Rev. 371, 375 (2013)

[30] Emily Stutts, Will Your Digital Music and E-Book Libraries "Die Hard" with You?: Transferring Digital Music and E-Books Upon Death, 16 SMU Sci. & Tech. L. Rev. 371, 375 (2013)

[31] Google, Accessing a deceased person's mail, https://support.google.com/mail/answer/14300?hl=en (last accessed March 4, 2014)

[32] Id.

provider was reluctant to open the account and ultimately required a court order.[33] But in a situation as tragic as that of Mr. Stassen, the notion that the family has an absolute right to trawl through that young man's most private of communications because he died without leaving them any answers is perhaps more unsettling than an email account laying dormant upon the death of the account holder.

In many ways Facebook's remedy to this issue is a far better one. Upon the request of a family member and the necessary documentation, the account is "memorialized."[34] This essentially freezes the account in time, allowing for friends to still leave messages and for that person's contacts remain be a part of their network. [35]

B. How DEP's have attempted to bridge the gap.

As rules that govern the digital afterlife appear to be almost wholly the construction of individual EULAs, which individual users tend to have no real bargaining power to influence, the gap grows between how users want to devise their assets and the limitations of their EULA. The digital estate planning services (DEP) market has attempted to bridge this gap. In 2011, approximately twenty DEP services existed and they had been increasing steadily since 2008.[36] In his supplement to his 2011 Note in the Quinnipiac Probate Law Journal, Michael D. Roy noted the varying range of the sophistication of these services (a number of which are no longer in

[33] Jessica Hopper, Digital Afterlife: What happens to your online accounts when you die?, http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite (Last updated Jun 1, 2012 7:53 AM)

[34] Facebook Memorialization Policy, How do I report a deceased person or an account that needs to be memorialized?, https://www.facebook.com/help/150486848354038/ (Last updated November 2013) [hereinafter Facebook Memorialization Policy] ("We will memorialize the Facebook account of a deceased person when we receive a valid request. We try to prevent references to memorialized accounts from appearing on Facebook in ways that may be upsetting to the person's friends and family, and we also take measures to protect the privacy of the deceased person by securing the account. Please keep in mind that we cannot provide login information for a memorialized account. It is always a violation of our policies to log into another person's account.")

[35] Id.

[36] Roy, 24 Quinn. Prob. Law Jour. 376, 387

business), many of which come from a technical and not an estate planning background.[37] He described the market as a "free-for-all."[38]

What the DEP services have in common is that a triggering event will unlock the information stored by the decedent and this content will be delivered to a designated person, most likely an executor.[39] The DEP service has a number of benefits over leaving a list of accounts and passwords as an addendum to the will. First, it is more easily changed. Second, it is a private rather than public document and would not pass through probate. Third, the service is designed to protect the privacy and security interest of the user. Unlike, for example, a written list of account details given to a trusted friend or kept in a "safe place," the DEP is designed to assure security until the triggering event. However, there are some serious flaws with these services too. First, they could very easily become a target for identity thieves. The sheer volume of valuable information spanning banking records and investment portfolios to ITunes and YouTube accounts, would make them a very attractive target for a hacker. Second, the nature of the Services, as start-up ventures by entrepreneurs (for the most part) means that the usual protections arising from attorney-client relationship are lacking in the DEP service sector.

III. HOW THE LAW DEALS WITH DEATH AND DIGITAL LIFE.

As discussed in Section II, part of the reason that businesses have been unable to form consistent strategies in dealing with the death of their clients is due to the lack of decision and clarity in the law. States that have enacted legislation dealing with digital assets have taken a variety of approaches, all leading to a lack of cohesion across types of accounts and the various states laws. The problem is best summarized as an issue of

[37] Roy, 24 Quinn. Prob. Law Jour. 376, 387
[38] Roy, 24 Quinn. Prob. Law Jour. 376, 388
[39] Roy, 24 Quinn. Prob. Law Jour. 376, 388-9

state law "slowly evolving and trying to catch up… Until the law catches up, clients are exposed to the possibility of losing significant sentimental and financial assets into cyberspace upon death or disability. Many clients have not even recognized this issue yet, assuming their modern assets will transfer in the same way the old-fashioned ones did."[40]

A. How states have crafted their own solutions.

In 2005, Connecticut made the first attempt to provide executors a legal right to access the email account of the decedent.[41] This law places the burden on an email provider within Connecticut to provide the contents of the account upon being provided with the necessary documentation.[42] In 2007, Rhode Island followed suit. Its law was nearly identical to the law in Connecticut. [43] Both Rhode Island and Connecticut are limited only to email. However, they do not impose a duty onto the e-mail provide to keep the contents of the account. It has been suggested that, although limited in scope, these moves by states such as Connecticut and Rhode Island to compel e-mail service providers to allow access to accounts by executors after the death of the account holder, may have changed the landscape anyway. In this way, "[while] most other states do not

[40] David M. Lenz, Esq., Death and Downloads: The Evolving Law of Fiduciary Access to Digital Assets, 23 No. 1 Ohio Prob. L.J. NL 2 (2012)

[41] Conn. Gen. Stat. Ann. § 45a-334a ("An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his or her death, access to or copies of the contents of the electronic mail account of such deceased person upon receipt by the electronic mail service provider of: (1) A written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor or administrator; or (2) an order of the court of probate that by law has jurisdiction of the estate of such deceased person.")

[42] Conn. Gen. Stat. Ann. § 45a-334a

[43] R.I. Gen. Laws Ann. § 33-27-3 ("An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his or her death, access to or copies of the contents of the electronic mail account of such deceased person upon receipt by the electronic mail service provider of:(1) A written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor and administrator; and(2) An order of the court of probate that by law has jurisdiction of the estate of such deceased person, designating such executor or administrator as an agent for the subscriber, as defined in the Electronic Communications Privacy Act, 18 U.S.C. § 2701, on behalf of his/her estate, and ordering that the estate shall first indemnify the electronic mail service provider from all liability in complying with such order.")

appear to have similar statutes, major online services have users in every state and will probably adopt policies that conform to the most stringent of the state requirements."[44]

On November 1, 2010, Oklahoma followed the lead of Connecticut and Rhode Island in passing laws attempting to deal with the issues caused by the "Digital Asset Dilemma."[45] This time, the law dealt with the powers of the executor rather than the duty of the e-mail service providers. Within the powers granted to Executors and Administrators of a decedent's estate in Oklahoma there is a provision that they "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 e-mail service websites."[46] Although still confined within the terms of the individual terms of service, this law at least empowers executors to act within the law while taking over the accounts of the decedent. It arguably led to more debate and discussion about the subject in Oklahoma. One local news source stated that "Oklahoma's the trailblazer" in this area and recommended ways in which Oklahomans could protect their digital life after death.[47] This way, Oklahoma legislators have gone some way to empowering executors through codified legislative powers and through turning the spotlight on the issue.

Oklahoma's legalisation in turn spurned an increase in laws increasing the powers of executors. Indeed, "Oklahoma, Nebraska, and Idaho have all enacted

[44] Michael D. Roy, Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?, 24 Quinnipiac Prob. L.J. 376, 386 (2011)
[45] Michael D. Roy, Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?, 24 Quinnipiac Prob. L.J. 376, 381-83 (2011)
[46] Okla. Stat. Ann. tit. 58, § 269
[47] When Making Your Will In Oklahoma, Consider Your Digital Estate Too, Oklahoma's Own News Nine, http://www.news9.com/story/18603499/when-making-your-will-oklahoma-suggests-digital-estate-planning ("Do an inventory of all of your digital information, like bank accounts, pictures, account passwords, blogs, etc. Then, decide who you would allow access to that information if something happens to you.")

substantially similar statutes."[48] Nebraska and Idaho empower the executor 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" in much the same way as the Oklahoma statute.[49] Idaho goes further, however, as it extends the rights to for decedents, executors and conservators. This acknowledges the a different but associated legal digital dilemma faced when account-holders become incapacitated.[50]

The most expansive law, however, has come out of Indiana. It goes further than the laws of Connecticut, Rhode Island, Oklahoma, Nebraska and Idaho in that it extends the access of fiduciaries to the decedent's digital assets. It has two distinguishing features from the other laws: "First, it applies to custodians of any kind of electronic information, so entities that store photos, videos, and other important files are subject to the law (not just e-mail or social networking providers). Second, it also prohibits the custodian from destroying electronic records for two years from the date of receipt of a request. Recall that Yahoo!'s policy called for termination and deletion of an account upon notice of death.[51] The Indiana law aims to prevent deletion before an executor can gain rightful access."[52] It is this assortment of state laws that we find in operation today, struggling to deal with the terms and conditions of national and global companies. For this reason an increasing number of scholars are calling for a large-scale approach to the

[48] David M. Lenz, Esq., Death and Downloads: The Evolving Law of Fiduciary Access to Digital Assets, 23 No. 1 Ohio Prob. L.J. NL 2 (2012)
[49] See, Neb.Rev.St. § 30-2472; see also, Idaho Code Ann. § 15-3-715 ("Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 15-3-902 of this code, a personal representative, acting reasonably for the benefit of the interested persons, may properly: Take control of, conduct, continue or terminate any accounts of the decedent on any social networking website, any microblogging or short message service website or any e-mail service website.")
[50] Idaho Code Ann. § 15-3-715
[51] Yahoo! TOS, supra note 9.
[52] David M. Lenz, Esq., Death and Downloads: The Evolving Law of Fiduciary Access to Digital Assets, 23 No. 1 Ohio Prob. L.J. NL 2 (2012)

issue: "As a patchwork of state laws develops granting fiduciaries varying rights to access information held by multistate and multi-national firms such as Google, Facebook, and Yahoo!, it has become clear that this is an area that would benefit from the adoption of a new uniform state law."[53]

B. The Uniform Law Commission And The Future

In acknowledging the inadequacies of the "patchwork"[54] system of individual state laws that have sought to deal with the Digital Asset Dilemma, The Uniform Law Commission has formed a Fiduciary Access to Digital Assets Committee.[55] The Committee has the following stated aim:

> The Committee will draft a free-standing act and/or amendments to ULC acts, such as the Uniform Probate Code, the Uniform Trust Code, the Uniform Guardianship and Protective Proceedings Act, and the Uniform Power of Attorney Act, that will vest fiduciaries with at least the authority to manage and distribute digital assets, copy or delete digital assets, and access digital assets.[56]

The Committee continues to meet regularly and to develop a strategy towards a uniform law. In addition it has received a number of submissions from interest groups related to this issue. Notably, the ACLU submitted an Open Letter to the Committee registering its concern about the privacy rights of citizens. In a letter dated July 3, 2013, Allison S. Bohm, Advocacy & Policy Strategist, articulated many of the concerns that cases such as those of Justine Ellwood and Benjamin Stassen have brought to the fore. She stated:

> …privacy concerns associated with providing fiduciaries nearly unfettered access to online accounts or online content are substantial, both for the individual whose information is shared and for individuals with whom he or she communicated online. In many ways, digital

[53] David M. Lenz, Esq., Death and Downloads: The Evolving Law of Fiduciary Access to Digital Assets, 23 No. 1 Ohio Prob. L.J. NL 2 (2012)
[54] David M. Lenz, Esq., Death and Downloads: The Evolving Law of Fiduciary Access to Digital Assets, 23 No. 1 Ohio Prob. L.J. NL 2 (2012)
[55] The Uniform Law Commission, Fiduciary Access to Digital Assets Committee, http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets
[56] The Uniform Law Commission, Fiduciary Access to Digital Assets Committee, http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets

> estates differ not just in degree, but in kind, from their offline analogues. This is to say that individuals do not simply retain more correspondence in online storage than they ever could in paper form, but that the keys to an individual's online accounts are likely to provide access to highly sensitive materials, such as internet dating profiles, that lack offline equivalents.[57]

The Law Commission will need to draft laws that tread this fine line between privacy and disclosure, which will be a large undertaking. Beyond the issue of privacy, Ms. Bohm hints at another challenge for the drafters of this new approach; that it must, in fact, be a new approach. As discussed in Section II, the traditional mold of copyright law and property law simply does not fit the assets that we are dealing with and thus, for probate to catch up, other areas of the law must do so too.

CONCLUSION

This area of probate law is governed by a jumble of laws; the state laws of probate. The providers of online accounts and digital content set the terms. For the most part, they have crafted EULAs that limit the scope of end users to own, sell, transfer or devise their "digital assets." These companies may act in this manner because of the legal vacuum that exists in this area. States that have tried to develop laws to deal with digital assets upon death have struggled to create broad laws that go beyond simply allowing email access. Those faced with the challenge of creating the Uniform Laws have also decided to tread carefully. Congress' formulation of Copyright Law, most notably the First Sale Doctrine, has benefited the creators and distributors of digital content at the expense of users and this formulation will need to change if digital rights are to be assignable in the future. There can be no doubt that digital assets are not like other assets. The question for law makers will be how they meet the challenge that arises from

[57] Allison S. Bohm, Letter from ACLU to Fiduciary Access to Digital Assets Committee, http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets (July 3, 2013)

this new technology, crafting new approaches to ownership and transfer and how they balance privacy interest with the need of grieving families to handle their loved one's estates.