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THE RELATIONSHIP BETWEEN DIGITAL ASSETS AND THEIR TRANSFERENCE AT DEATH: “IT’S COMPLICATED”

By Rachael E. Ferrante

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I. Introduction

A poll conducted in early 2012 revealed that there were 1.2 billion Facebook users worldwide.¹ It also provided that those users shared 70 billion pieces of content each month.² Science and technology have drastically altered the world we live in, “fundamentally chang[ing] the way society communicates and expresses itself.”³ Society has transitioned from the days of writing letters and developing photographs, to now sending emails and uploading our pictures to the Internet with the click of a button. Much of what we do in our daily lives is reflected through our social media outlets, email accounts, and online banking services, to name a few. However, the haunting reality is that someday each user will die. In fact, “according to projections, more than 580,000 Facebook users will die in the United States this year.”⁴

This prediction turned out to be the harsh truth for a grieving Minnesota family in 2010.⁵ The Stassen family was devastated when they received the news that their youngest son, Benjamin, a twenty-one year old student at the University of Wisconsin, had committed suicide.⁶ He left no letter or clue as to why he decided to end his life, and the family searched for

1. *Social Networking Statistics*, STATISTICBRAIN.COM, <http://www.statisticbrain.com/social-networking-statistics/> (last visited Oct. 19, 2013).

2. *Id.*

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

4. 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, 186 (2012) (this projection was for the year 2012).

5. Emily Anne Epstein, *Family Fights to Access Son’s Facebook Account after his Suicide*, MAILONLINE, (June 1, 2013), <http://www.dailymail.co.uk/news/article-2153548/Family-fights-access-sons-Facebook-Gmail-accounts-suicide.html>.

6. *Id.*

answers, beginning with his Facebook page.⁷ Twenty years ago, the Stassens may have turned to a journal or some other personal item in an attempt to learn more about their son.⁸ Today, however, “young people tend not to keep things on paper; instead, their most intimate thoughts are likely to be online – in emails, social media posts, and personal blogs.”⁹

As the Stassens began their search to find answers regarding their son’s suicide, they found themselves in the middle of a battle with Facebook. The company sought to honor its contract with their deceased son, which guarantees privacy and limits access to the user only.¹⁰ Although a judge granted a court order directing Facebook to allow the family access to their son’s account, “the company has refused, saying they have received the order but it’s being processed by their legal department, leaving the family in limbo.”¹¹

The Stassen family is not the first, nor will they be the last, to lose someone whose life was chronicled through some form of social media. In fact, an Oregon woman found herself in a similar situation in 2005.¹² After the death of her twenty-two year old son, Karen Williams found comfort in old pictures of him with friends, kind words, and other mementos stored on his Facebook page.¹³ Seeking full access to her son’s account, she contacted Facebook directly, asking administrators for permission to maintain the webpage.¹⁴ Instead, within two hours Facebook had changed the password, thwarting her efforts to learn more about her son.¹⁵ Williams filed suit and ultimately won, though she was only granted ten months of access to her son’s account before it was permanently removed.¹⁶

7. Epstein, *supra* note 5.

8. Jessica Hopper, *Digital Afterlife: What Happens to your Online Accounts when You Die?*, NBCNEWS, (June 1, 2012), http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite.

9. *Id.*

10. *Id.*

11. Epstein, *supra* note 5.

12. *Karen Williams’ Facebook Saga Raises Question of Whether Users’ Profiles are part of ‘Digital Estates,’* HUFFINGTONPOST, (Oct. 1, 2013), http://www.huffingtonpost.com/2012/03/15/karen-williams-facebook_n_1349128.html.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* (This was before Facebook ‘memorialized’ its deceased user’s accounts).

The Stassens' and Williams's stories are just two examples of the growing number of families finding themselves caught in the legal nightmare of fighting companies for "access to a deceased[s]. . . digital assets."¹⁷ Because this concept of having an "online life" is relatively new, it has created an unresolved problem within the area of estate law, specifically regarding how to deal with a decedent's digital assets after their death. To date, five states have enacted digital assets laws, though they vary widely.¹⁸

In response, the Oregon legislature developed "a proposal that would have made it easier for loved ones to access the 'digital assets' of the deceased," essentially giving those assets "the same treatment as material property for estate purposes."¹⁹ Their proposal was met with pressure and criticism from the technology industry, which argued that the Stored Communications Act (SCA) prevents companies from sharing a person's online information.²⁰ The problem, as well as the need for legal action, is clear: "without clarity or direction, the digital information left behind by a deceased person can spark emotional legal battles, pitting big business against devastated families."²¹

This Comment explores defining "digital assets" as property, and suggests that the SCA is far too outdated for the modern world that we live in. It further proposes that the U.S. Congress should enact a law, preferably one modeled after an Oklahoma statute, that would standardize the way digital assets are handled for estate purposes. In doing so, the statute would provide one law with which companies must comply, rather than forcing them to choose between state and federal regulations. This uniform law will also soften the blow to families trying to grieve the loss of a loved one in a way they see fit. The first section will define digital assets as being the equivalent to tangible property for purposes of estate law. The second section will provide a historical background of The Electronic Communications Privacy Act and The Stored Communications Act. The third section will explore the struggle that exists

17. Hopper, *supra* note 8.

18. Laura Gambino, *Facebook Profiles of the Dead Show Conflict over Rights to Digital Assets*, MSNNEWS, (Mar. 1, 2013), <http://news.msn.com/science-technology/facebook-profiles-of-the-dead-show-conflict-over-rights-to-digital-assets>.

19. *Id.*

20. *Id.*

21. *Id.*

between privacy and estate laws, specifically regarding service agreements between online service providers and users. The fourth section will examine the five states that currently have digital assets laws in effect. The fifth section will explain that, while executing a will *may* help to resolve the issue, it is not guaranteed to do so. The final section proposes that the federal government adopt a law that is modeled after a relevant Oklahoma statute in order to standardize the way digital assets are to be handled at death.

II. Defining ‘Digital Assets’ as Property

The laws of successions were set forth “to facilitate the transfer of an individual’s private property upon death.”²² This means that for a decedent’s property to transfer at death, it must be just that: his or her actual private property.²³ There are generally three ways in which an individual may dispose of his or her property: wills, will substitutes, and through intestacy laws.²⁴ This legal process of administering the estate of a deceased person is often referred to as the “probate,” thus such property is labeled “probate property.”²⁵ In other words, probate property is “that which ‘passes through probate under the decedent’s will or by intestacy.’”²⁶ Ordering where and how an individual’s private property is to be disposed of has been recognized as a fundamental right.²⁷ However, there are limits attached to such a right, one of which is the testator’s ability to dictate that the property be destroyed, rather than transferred, upon death.²⁸

The first step in incorporating digital assets into property law is to define what a digital asset is. Understanding the true nature and complexity of the Internet is difficult; therefore, it is not surprising that definitions of what constitutes digital assets vary significantly. For lack of a better description, a “default

22. Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 280 (2010).

23. *Id.*

24. *Id.* at 281 (See Jesse Dukeminier et al., *Wills Trusts, and Estates* 62 (7th ed. 2005) “Basically, a will-substitute is the functional equivalent of a will executed during life. For example, revocable inter vivos trusts, contracts, life insurance, pension plans, and joint accounts are all will-substitutes”).

25. Sherry, *supra* note 4, at 205-06.

26. *Id.* (quoting Jesse Dukeminier, Robert H. Stikoff, & James Lindgren, *Wills Trusts, and Estates* 38- 39 (8th ed. 2009)).

27. Sherry, *supra* note 4, at 208.

28. *Id.*

working definition of digital assets will be anything owned that is in a digital file.”²⁹

The relationship between digital assets and their transference at death is further complicated because social media’s status as “property” remains uncertain.³⁰ This lack of clarity is also present within the scheme of e-mails “for which there is no legal precedent with respect to ownership or inheritance rights.”³¹ The need to appropriately categorize digital assets as property is clear and the consequences for not doing so are serious. If such rights are not recognized, the property stands to be lost forever upon the owner’s death.³² An analysis of whether or not the assets have monetary value may help clarify the confusion regarding their status as property.

Justice William Story, sitting in 1841 as a circuit judge in Massachusetts, “recognized the risk to both individuals and society if courts did not protect one’s persona and therefore found monetary value in the unpublished private letters of President George Washington.”³³ In concluding that the writings were of monetary value, he correctly noted that the letters were to be treated like other items of personal property, in that they could be owned and transferred as such.³⁴ By doing this, Justice Story established the framework for understanding the value of today’s version of an individual’s persona; i.e., the value of social media, e-mail accounts, and other online belongings.³⁵ Digital assets are increasingly becoming more prevalent throughout society, as is their growing value.³⁶

Furthermore, the fact that an individual’s digital assets possessing monetary value are more easily classified as their property is not suggestive that those with purely sentimental value are not to be considered as such.³⁷ These online assets holding solely sentimental value may be best analogized to a

29. Sherry, *supra* note 4, at 194 (emphasis omitted).

30. *Id.* at 208.

31. *Id.*

32. Noam Kutler, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641, 1653 (2011).

33. *Id.* (citing *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841)).

34. *Id.* at 1653-54.

35. *Id.* at 1654.

36. Tarney, *supra* note 3, at 773-74.

37. Sherry, *supra* note 4, at 210.

picture in a frame or a shoebox full of old mementos; all clearly fall within the scope of an individual's personal property, and are ultimately passed on through his or her estate at death.³⁸ Regardless of whether or not they hold any monetary value, items such as these are considered personal property, and thus, it follows that their intangible, online counterparts should be as well. Essentially, an individual's digital legacy should be given the same treatment as his or her tangible assets upon death.

Even if the online accounts are erroneously regarded as not being an individual's property, it still remains a fact that the content within them may constitute the user's *intellectual* property.³⁹ Intellectual property consists of certain intangible things that an individual owns.⁴⁰ "Usually, as the word 'intellectual' implies, these products are from [one's] mind, such as a song, a poem, or a photograph."⁴¹ There is a real right in one's intellectual property, meaning that such rights are capable of being owned, sold, and later transferred at death.⁴² To deny the successor's access to a decedent's online accounts would substantially frustrate their ownership interests in the intellectual property – a right legally bestowed to them by the laws of successions.⁴³

a. Types of Digital Assets

Just as important as the need to properly define digital assets as part of an individual's property is the need to understand the different types of digital assets that exist. Categorizing an individual's digital assets will help to create and manage an inventory of his or her property – both tangible and intangible, for estate planning purposes.⁴⁴ Although there is bound to be some overlap, one way to organize digital assets is by placing them into one of the three major categories – e-mails,

38. *Karen Williams' Facebook Saga*, *supra* note 12.

39. Daniel E. Smith, *Intellectual Property Rights in the Facebook Afterlife*, DAN SMITH LAW (March 18, 2011), <http://coyelow.com/dansmith/2011/03/intellectual-property-rights-in-the-facebook-afterlife/>.

40. *Id.*

41. *Id.*

42. *What is Intellectual Property?*, NATIONAL PARALEGAL COLLEGE, http://nationalparalegal.edu/public_documents/courseware_asp_files/patents/IntroIP/WhatIs.asp (last visited Sept. 24, 2013).

43. Sherry, *supra* note 4, at 208.

44. Naomi Cahn, *Postmortem Life On-Line*, 25 PROBATE & PROPERTY 36 (2011).

social media assets, and financial accounts.⁴⁵

E-mails

The desire and need to communicate with one another has led to numerous technological advances over the years, most notably through the development of e-mail. E-mails serve a wide range of purposes, including both personal and business communications. Written correspondences can be substantially valuable, for both sentimental and monetary reasons.⁴⁶ Examples of this include letters from historical figures, which undoubtedly possess economic value, as well as emotional significance.⁴⁷ “The intangible value that individuals attach to today’s written electronic communications can be fairly compared to the value they formerly attached to things such as letters and pictures.”⁴⁸

Social Media Assets

An individual’s social networking needs may stem from a personal desire to connect with old friends and family. Nevertheless, what may have started as a recreational tool has quickly adapted to meet its user’s other needs, both personally and professionally.⁴⁹ Many businesses have realized the potential to reach out to their target audiences using social networking as a means.⁵⁰ For example, businesses use social media “to quickly share information with people interested in their products and services, gather real-time market intelligence and feedback, and build relationships with customers, partners and influencers.”⁵¹ These assets involving interactions between users serve a wide range of purposes, including the ability to communicate with one another, as well as a storage system for photographs, videos, and other personal information.⁵²

Financial Accounts

While many of the physical buildings housing public bank accounts and investments are still operational today, the

45. Tarney, *supra* note 3, at 775-78.

46. *Id.* at 775.

47. *Id.*

48. *Id.*

49. *Id.* at 776.

50. Tarney, *supra* note 3, at 777.

51. *Id.*

52. Cahn, *supra* note 44, at 37.

progressive efficiency of the internet allows many users to access most of their financial assets via computers or their mobile devices.⁵³ In addition, other popular Internet sites will register their users with a PayPal account, or some other means to access their bank accounts, for payment purposes.⁵⁴ Society's presence online has grown to include areas of financial concern, for reasons of both account management and commercial transactions. The government recognized the need for privacy in these types of communications by enacting legislation to protect user interests from unauthorized access by third parties.

III. Historical Background: The Electronic Communications Privacy Act

“The Electronic Communications Privacy Act (‘ECPA’) was passed in 1986 to expand and revise federal wiretapping and electronic eavesdropping provisions.”⁵⁵ The act was meant “to create a fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement.”⁵⁶ Although the ECPA has been amended several times since its inception, it “has not been significantly modified since becoming law.”⁵⁷ The federal statute “regulates when electronic communications can be intercepted, monitored, or reviewed by third parties, making it a crime to intercept or procure electronic communications unless otherwise provided for under law or an exception to ECPA.”⁵⁸

The ECPA encompasses three provisions within its realm: the Wiretap Act, the Pen Register statute, and the Stored Communications Act (SCA).⁵⁹ The Wiretap Act and Pen Register statute only apply to the transfer of electronic information

53. Cahn, *supra* note 44, at 37.

54. *Id.*

55. *Electronic Communications Privacy Act (ECPA)*, ELECTRONIC PRIVACY INFORMATION CENTER, <http://epic.org/privacy/ecpa/> (last visited Oct. 20, 2013) (“The ECPA updated the Federal Wiretap Act of 1968. The older Wiretap Act had been written to address interception of conversations using “hard” telephone lines. The onset of computer and other digital and electronic communications prompted the need to make the update.” *Electronic Communications Privacy Act of 1986 (ECPA)*, 18 U.S.C. § 2510-22, JUSTICE INFORMATION SHARING, <http://www.it.ojp.gov/default.aspx?area=privacy&page=1285> (last visited Oct. 20, 2013)).

56. *Electronic Communications Privacy Act*, *supra* note 55.

57. *Id.*

58. *Id.*

59. Courtney M. Bowman, *A Way Forward After Warshak: Fourth Amendment Protections for E-mail*, 27 BERKELEY TECH. L. J. 809, 818 (2012).

between users, meaning that the communications are in the process of traveling between users, and therefore susceptible to interception.⁶⁰ The SCA, on the other hand, regulates electronic communications that have already been stored, or in other words, information that has already reached its intended destination.⁶¹ This comment will only focus on the modernization of the SCA with regards to digital assets, as the information within them is no longer in transit between users.

a. The Stored Communications Act

The SCA regulates when electronic communication service (ECS) providers are allowed to disclose the contents of a customer's online life, such as emails or other electronic communications, to third parties.⁶² Congress passed the statute to prevent providers "from knowingly divulging the contents of any communication while in electronic storage by that service to any person other than the addressee or intended recipient."⁶³ This law is a reflection of Congress' recognition that customers have legitimate interests in keeping their communications confidential within the electronic storage system set up by their providers.⁶⁴ Under the SCA, an offense is committed when one "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to . . . electronic communication while it is in electronic storage in such system."⁶⁵

The SCA was written in 1986, long before the arrival of Facebook and Twitter, highlighting its need for reform. Although the act follows public policy by promoting privacy interests, it is lacking in its applicability to the modern world. In its origins, the Internet was primarily used to share information among experts, whereas today people also use it for personal reasons.⁶⁶ This

60. Bowman, *supra* note 59, at 818.

61. *Id.* at 818-19.

62. *Privacy: Stored Communication Act*, INTERNET LAW TREATISES, http://ilt.eff.org/index.php/Privacy:_Stored_Communications_Act (last modified Jan. 29, 2010).

63. *Id.*

64. *Id.*

65. 18 U.S.C.A § 2701 (2002).

66. Walt Howe, *A Brief History of the Internet*,

underlying right to privacy has led to countless legislative actions, including the SCA and ECPA. Still not addressed, however, is whether or not the person has the same privacy rights once he or she passes away. The struggle then shifts to finding an appropriate balance between the privacy of the deceased Internet user and the need to dispose of their estate.

IV. The Struggle between Privacy and Estate Laws

The Fourth Amendment to the United States Constitution guarantees “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁶⁷ Generally, all persons are entitled to a certain level of privacy from government intrusion. Courts have consistently held this to be a fundamental right, meaning that its violation causes irreparable harm.⁶⁸

The protections of the Fourth Amendment, as well as the rest of the Constitution, apply to all persons, including both citizens and aliens of the United States.⁶⁹ An individual’s right to privacy is infringed upon when the government interferes with one’s expectation of privacy to a degree that society would find unreasonable.⁷⁰ Although the effects of the Fourth Amendment are more prevalent in criminal proceedings, this right to privacy is extended to the civil law as well.⁷¹ The question then remains – what is the standard of reasonableness if the person in question is deceased? Although one may want to shield embarrassing or intimate facts from certain people or family members postmortem, the existence of this right has not been addressed. Many commentators have begun to realize that, “as society’s online presence becomes increasingly complex, protection of online assets at death is an emerging concern.”⁷² This realization

<http://www.walthowe.com/navnet/history.html> (last updated Sept. 13, 2012).

67. U.S. Const. amend. IV.

68. *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1292 (M.D. Fla. 2011).

69. *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 626 (5th Cir. Tex. 2006).

70. *Fourth Amendment*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/fourth_amendment (last visited Oct. 25, 2013).

71. *The Fourth Amendment, Privacy, and its Application to Technology*, TECHNICALLY LEGAL (Jan. 19, 2010), <http://www.technicallylegal.org/4th-amendment-privacy-technology/> (“A number of torts recognized in the U.S. legal system which have evolved from the ‘expectation of privacy’ concept. In other words, should a person find themselves the victim of a civil privacy injury, they can sue another person... for damages and sometimes equitable relief...”).

72. Tarney, *supra* note 3, at 773.

begins with the understanding that the most prevalent roadblock to gaining access to a decedent's online assets starts with the contractual obligations of the service provider.

a. Service Agreements between the User and Service Provider

The relationship between online service providers and their users is generally governed by a contract commonly referred to as the "user agreement,' 'terms of use,' or 'terms of service.'" ⁷³ Generally, "a potential user reads [through] several screens worth of legalese, and then registers by clicking a box and agreeing to the terms therein."⁷⁴ This type of contract is referred to as a contract of adhesion, where users are not given a meaningful opportunity to "bargain for an alternative arrangement."⁷⁵

Courts "may deem a contract provision unconscionable, and therefore unenforceable, only if it is both procedurally and substantively unconscionable."⁷⁶ The procedural element focuses on oppression and surprise, whereas the substantive aspect refers to the level of fairness in the actual terms of the agreement.⁷⁷ Oppression stems from an inequality of bargaining power resulting in the absence of any meaningful choice or real power to negotiate.⁷⁸ Surprise involves the extent to which the terms of the agreement are hidden within a verbose form drafted by the enforcing party.⁷⁹

Some proponents seeking enforceability of these agreements suggest that the users have specifically contracted with their providers for the purpose of maintaining privacy, including privacy from their survivors.⁸⁰ However, these arguments lack merit because online customers tend to not inquire into the terms of such service agreements.⁸¹ In fact, Robert Hillman, a professor of software contracts, recently conducted a study in which he

73. Sherry, *supra* note 4, at 204.

74. *Id.* at 204-05.

75. Michael D. Roy, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINNIPIAC PROB. L.J. 376, 381 (2011).

76. *In re iPhone Application Litig.*, No. 11-02250, 2011 U.S. Dist. LEXIS 106865, at *7 (N.D. Cal. Sept. 20, 2011).

77. *Id.*

78. *Id.*

79. *Id.*

80. Tarney, *supra* note 3, at 778.

81. *Id.* at 779.

found that a mere “4% of online customers actually read the provisions of the account terms beyond price and product description.”⁸² The truth is, we are an impatient society that wants to “like,” “share,” and “post” our way through making connections with others as quickly as possible. This relaxed and impatient attitude towards electronic communications indicates that users are not as concerned with the prospective legal ramifications as service providers are.⁸³

The actual terms of the service agreement are pivotal in determining what should happen to a user’s account in the event he or she dies.⁸⁴ “[I]f the heirs are not in possession of [the decedent’s] log in information, the . . . service provider is in fact in exclusive control of the account content.”⁸⁵ However, due to the often restrictive nature of these contracts, questions of enforceability are again brought to light, adding “increased uncertainty [as] to users’ interests.”⁸⁶

Many social media services are still lacking provisions concerning what to do with an account in the event of death.⁸⁷ Others, through mediocre attempts to consider public demand, fall short of any real solution.⁸⁸ For example, Google’s terms of service do not address the situation of a user’s death at all.⁸⁹ Unlike its parent company, Gmail, a subset of Google services, includes a policy for releasing a decedent’s e-mails to either a representative or parent, though they admit such content *may* be provided and do not guarantee any assistance.⁹⁰

Facebook, arguably the most popular social network, responded with a feature that is an attempt, at best, to consider

82. Tarney, *supra* note 3, at 778-79 (internal quotations omitted).

83. See Scott Bender, *Privacy in the Cloud Frontier: Abandoning the “Take It or Leave It” Approach*, 4 DREXEL L. REV. 487, 488 (2012).

84. Tarney, *supra* note 3, at 778.

85. *Id.*

86. *Id.*

87. Sherry, *supra* note 4, at 228-29.

88. *Id.*

89. Cahn, *supra* note 44, at 37 (“Google’s terms of service state that the individual agrees not to assign... your rights to use the Software, grant a security interest in or over your rights to use the Software, or otherwise transfer any part of your rights to use the Software”) (internal quotations omitted).

90. *Id.*; *Accessing a Deceased Person’s Mail*, GMAIL.COM, <http://support.google.com/mail/bin/answer.py?hl=en&answer=14300> (last visited Oct. 14, 2013).

the public's demand for a solution by "memorializing" its deceased users.⁹¹ In the event a user dies, Facebook will "memorialize" his or her page, meaning "only confirmed friends can see the timeline or locate it" and "leave posts in remembrance."⁹² However, this attempt "still fails to resolve more substantive uncertainties aroused by a digital passing, such as who should dictate the fate of a loved one's account, for how long a memorialized presence should persist, and whether Facebook memorialization is what the decedent would have truly wanted."⁹³ The memorialization feature also denies third parties, including family members, access to login and/or password information for the decedent's account, effectively bringing the families and executors of the estate no closer to a resolution.⁹⁴

Although the provisions drafted in these service agreements are often meant to protect the user, they could potentially be in direct conflict with the decedent's intentions. This is because the user likely consented to their use without ever reading the terms.⁹⁵ This traps the service providers in a "lose-lose" situation because "[i]f they decline to release the information, they are labeled villains by people supporting the families", and "[i]f they give it up, they are chastised for violating their own privacy statements."⁹⁶ Online service providers have a legitimate interest in ensuring that the user's information remains private.⁹⁷ A reputation to the contrary could have detrimental effects on the company, deterring potential future users from entrusting the company with their electronic information.⁹⁸

Essentially, these service agreements have made it difficult for online companies to respect the privacy of their users and comply with families managing the estate of their loved one. It has become a growing "concern of Internet service providers being caught between privacy and the meaning of their contracts and

91. Sherry, *supra* note 4, at 229.

92. *Id.*

93. *Id.* at 187.

94. Jilian Fama, *Facebook After Death: Who Owns Your Pages When You Die?*, ABCNEWS.COM (Feb. 4, 2013), <http://abcnews.go.com/Politics/OTUS/facebook-death-control-digital-accounts-twitter-gmail-flickr/story?id=18401047&page=2>.

95. Tarney, *supra* note 3, at 778-79, 782.

96. *Id.* at 783. (citing Ariana Eunjung Cha, *After Death, a Struggle for Their Digital Memories*, WASHINGTON POST, Feb. 3, 2005, at A1).

97. *Id.* at 782.

98. *Id.* at 794.

being faced with a court order to which there could be quite severe penalties if they don't comply with it."⁹⁹ The recognition of this growing problem has led to a small movement by certain states to address the issue of transferring a decedent's digital assets at his or her death.

V. States with Digital Assets Laws

There are currently five states with some variance of a digital assets law in effect, which include Connecticut, Rhode Island, Indiana, Oklahoma, and Idaho.¹⁰⁰ Although they differ considerably, each law seeks to provide the requisite, clarified guidelines needed to accomplish the difficult task of estate planning with regards to digital property.¹⁰¹ The earlier versions of these statutes were somewhat narrow in their scope, as they were limited to a decedent's e-mail accounts.¹⁰² Throughout the years, however, the statutes have grown broader in their range to cover more relevant areas of digital assets.¹⁰³

a. Connecticut & Rhode Island – Granted Access to the Contents of a Decedent's E-mail Accounts

In 2005, Connecticut became the first state to enact a digital assets law with respect to estate planning.¹⁰⁴ Rhode Island was next to follow this approach by approving a similar bill in May 2007.¹⁰⁵ Although the statutes came nearly two years apart, they shared almost identical language.¹⁰⁶ The Connecticut statute states, in part:

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

99. Hopper, *supra* note 8.

100. Law, DIGITAL ESTATE RESOURCE, <http://www.digitalestateresource.com/law/> (last visited Oct. 26, 2013).

101. *See id.*

102. *Id.*

103. *Id.*

104. *See id.*

105. *See Law, supra* note 100.

106. Sherry, *supra* note 4, at 218-19.

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.¹⁰⁷

The statutes are similar in that they both require “e-mail providers to turn over copies of all e-mails (sent and received) to the executor or administrator of a decedent’s estate.”¹⁰⁸ Although this legislation proved to be a step in the right direction, it left other issues unresolved. For example, it does not encompass other forms of online accounts that are much more popular today, and it is unclear whether a testator may require the provider to communicate the contents to other individuals.¹⁰⁹ By limiting their focus solely on the issue of e-mail transmission at death, the Connecticut and Rhode Island statutes are hindered in their ability to deal with other developing areas of digital assets.¹¹⁰

b. Indiana – A Broader Interpretation of Electronically Stored Documents of the Deceased

Indiana’s statute regarding digital assets at death became effective in July 2007, shortly after Rhode Island’s.¹¹¹ This law was more expansive than its Connecticut and Rhode Island counterparts in that it included all electronically stored information of the decedent’s e-mail accounts.¹¹² It is the broadest of the e-mail statutes, “mandating that a custodian provide the decedent’s personal representative with ‘access to or copies’ of such data.”¹¹³ In other words, the Indiana statute expressly requires that the service provider retain the contents of a decedent’s e-mail account, whereas the Connecticut and Rhode Island statutes do not.¹¹⁴ This statute is a notable expansion of the regulation of e-mails in that it classifies the decedent’s digital

107. Conn. Gen. Stat. Ann. § 45a-334a (West Supp. 2012).

108. Cahn, *supra* note 44, at 38.

109. Chelsea Ray, *Til Death Do Us Part: A Proposal for Handling Digital Assets After Death*, 47 Real Prop. Tr. & Est. L.J. 583, 602 (2013) (“The Connecticut law leaves the management of online payment accounts, online bank accounts, social media accounts, photo sharing accounts, blogs, and other digital accounts without any governance.”).

110. *Id.* at 603.

111. *Law, supra* note 100.

112. *Id.*

113. Sherry, *supra* note 4, at 217-18.

114. *Id.* at 219.

assets as any documents or information that is stored electronically.¹¹⁵ However, by not defining the terms “documents or information”, it is uncertain whether or not the statute will be applicable to many of the digital assets of a deceased individual.¹¹⁶

c. Oklahoma & Idaho – The First Statutes to Encompass Social Networking in Estate Planning

In 2010, the Oklahoma legislature passed the first bill of this kind to enumerate and include the field of social networking within its range.¹¹⁷ The act states, “the 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 e-mail service websites.”¹¹⁸ This became the most expansive digital assets law to date with respect to estate plans. Shortly thereafter, in July 2011, Idaho passed its own version of a similar statute that was modeled after the Oklahoma bill.¹¹⁹ Because these statutes grant an executor the power to take control of these accounts, they assume that such social networking accounts are the property of the decedent.¹²⁰ These statutes do not authorize an executor to have complete access to the decedent’s online assets, but only those assets covered in the provision.¹²¹ Also, service providers may claim the right to control the online accounts as provided in their terms of use or service agreements with the decedent, claiming that the state law violates such an agreement.¹²² This foreseeable conflict is why this comment also proposes that, while following the Oklahoma model, the legislation should include a provision limiting contractual agreements that prevent access to digital assets.¹²³

115. Ray, *supra* note 109, at 604.

116. *Id.*

117. Sherry, *supra*, note 4, at 216.

118. Law, *supra*, note 100.

119. Sherry, *supra* note 4, at 217.

120. *Id.* at 216.

121. Cahn, *supra* note 44, at 38.

122. *Id.*

123. Tarney, *supra* note 3, at 785 (Professors Jonathan Darrow and Gerald Ferrera note that “[although] ‘parties are generally free to contract to whatever terms they wish,’ because of the growing value of digital assets, it is in the state’s best interest to pass legislation limiting contractual agreements that prevent access to these copies”).

These aforementioned statutes merely scratch the surface of a growing issue by addressing what executors are to do, and more specifically, what they are entitled to, regarding the transmission of a decedent's digital assets. Ryan Kiesel, the author of the Oklahoma statute, has been clear about the reality as well as his hopes for the future of this area of legislation.¹²⁴ The goal was "to provide a legal way for Oklahomans to address social networking sites and other digital assets when a person dies and to generate a dialogue about the issue."¹²⁵ Also, given the increasing number of digital substitutions for physical property, Kiesel sought to encourage the public to begin thinking carefully about their wishes for those items once they pass away.¹²⁶

In addition to those states with laws already in effect, a number of other states have considered similar proposals for legislation regarding fiduciary access to digital assets.¹²⁷ Although this is undoubtedly a step in the right direction, it does little to alleviate the underlying problem for three reasons. First, forty-five states remain without a governing statute to guide them when this issue arises. Second, although these five states have direction on the issue, federal laws, and more specifically the SCA, may still preempt them.¹²⁸ Finally, online service providers are still caught in the delicate struggle between enforcing their service agreements with the decedent and complying with these state and/or federal laws.

VI. Where there is a Will, there *May* be a Way

When an individual leaves behind a will – a legal instrument declaring the manner in which the estate is to be distributed – he or she is deemed to have died testate.¹²⁹ Estate laws will govern these particular situations, though they vary from state to

124. Ray, *supra* note 109, at 597.

125. *Id.*

126. *Id.* at 598.

127. Jim Lamm, *August 2013 List of State Laws and Proposals Regarding Fiduciary Access to Digital Property During Incapacity or After Death*, DIGITAL PASSING: ESTATE PLANNING FOR PASSWORDS AND DIGITAL PROPERTY (Aug. 30, 2013), <http://www.digitalpassing.com/2013/08/30/august-2013-list-state-laws-proposals-fiduciary-access-digital-property-incapacity-death/> (includes 18 states with proposals).

128. "Under the Supremacy Clause, when state law conflicts, or is incompatible, with federal law, federal law preempts the state legislation." *White v. Baker*, 696 F. Supp. 2d 1289, 1296-97 (N.D. Ga. 2010).

129. Sherry, *supra* note 4, at 207.

state.¹³⁰ “Generally speaking, the law of the state where the decedent was domiciled at death governs the disposition of personal property, and the law of the state where the decedent’s real property is located governs the disposition of real property.”¹³¹ Assuming again that an individual’s digital assets are included in their inventory of personal property, such laws of the state in question will control accordingly. Though the real problem of transferring digital assets at death lies in the area of intestacy – situations wherein the decedent dies without a will – there still remains little to no guidance on how to resolve these issues when a decedent explicitly provides for the disposition of his or her digital assets. This dilemma has led to a movement promoting individuals to take advantage of online estate planning services, though the legality of such measures remains unclear.¹³²

a. Digital Estate Planning (DEP) Services

If the user has privacy concerns regarding his or her online property, the ideal solution is to execute a will declaring what should happen to his or her digital assets at death. That way, the decedent can direct the administrator to delete any content that he or she wishes to keep private. Proponents of this movement suggest that planning for the disposition of one’s digital assets at death could serve as both a practical and “attractive solution” to the problem.¹³³ Exploring such digital assets with regard to other laws applicable to more traditional assets “might be productive in recognizing the rights of an executor to the on-line property of the deceased.”¹³⁴ The idea of Digital Estate Planning (DEP) applies this concept.¹³⁵ DEP services are similar to other estate planning services, in that they both allow an individual to direct transmission of certain assets throughout the estate.¹³⁶ However, while other planning services refer to the more traditional tangible assets within a decedent’s estate, DEP services focus on the intangible assets.¹³⁷

130. Sherry, *supra* note 4, at 207.

131. *Id.* quoting, Jesse Dueminier, Robert H. Sitkoff, & James Lindgren, *Wills, Trusts, and Estates* 38, 72 (8th ed. 2009).

132. *Id.* at 192-93.

133. Roy, *supra* note 75, at 387.

134. Cahn, *supra* note 44, at 38 (citing Jonathan J. Darrow & Gerald R. Ferrera, *Email Is Forever...Or Is It?*, 11 J. INTERNET L. No. 10,1,18 (2008)).

135. *Id.*

136. Sherry, *supra* note 4, at 192.

137. *Id.*

This idea of DEP is a relatively new concept “describing collective protocols that allow account holders to distribute their digital assets upon death by passing account passwords on to predesignated executors.”¹³⁸ On its surface, this concept of incorporating a plan for one’s digital assets into a will may seem like a viable solution, though there are some drawbacks.¹³⁹ First, DEP services only emerged in the last few years, making them relatively young.¹⁴⁰ Due to their novelty, society’s expectations as to what specific functions they ought to serve are quite varied.¹⁴¹ “Some creators design their services to provide a solution to a problem they have experienced after the death of a loved one, while other creators attempt to copy and expand on an existing service’s features.”¹⁴² Although most of the DEP services in effect work in different ways, they all seek to solve many of the same problems.¹⁴³ One common feature of all DEP services is a scheme wherein each provider releases the digital content of the decedent to the user’s intended recipients upon his or her death.¹⁴⁴

This designated individual, fictitiously known as a “digital executor,” would essentially be given the passwords protecting the very data to be transferred.¹⁴⁵ This again brings up issues of privacy between the user and the service provider, because allowing a third person access to the decedent’s accounts could be a direct violation of the service agreement between them.¹⁴⁶ Also, the SCA could still theoretically undermine such a provision in a will, regardless of whether or not the state in question has enacted a law on the topic.¹⁴⁷ “Notwithstanding their potential, these legacy services may not provide the promised solutions inherent in the concept of a digital executor.”¹⁴⁸ By their very nature, these DEP services are likely to disrupt the contractual obligations of service providers, while also offering no solution to the problematic reality of preemption by the SCA.¹⁴⁹ Finally, DEP

138. Sherry, *supra* note 4, at 192.

139. Roy, *supra* note 75, at 390.

140. *Id.* at 387.

141. *Id.*

142. *Id.*

143. *Id.*

144. Roy, *supra* note 75, at 388.

145. Cahn, *supra* note 44, at 38.

146. *Id.*

147. Gambino, *supra* note 18.

148. Cahn, *supra* note 44, at 39.

149. *Id.*

services only consider situations in which a decedent has left behind a testament articulating how to divulge of his or her estate. At best, they do little more than offer insight into what *may* be possible regarding the transference of digital assets at death when there is a will present.

VII. Proposal – Standardizing a Law for the Handling of Digital Assets at Death

This Comment proposes that the federal government adopt a statute, preferably modeled after the Oklahoma law, which would standardize the way society handles digital assets following an individual's death. The Oklahoma statute provides a good basis on which to model federal legislation because it addresses issues not yet modernized by the SCA. The new federal standard would allow the executor of an estate to “[t]ake 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.”¹⁵⁰ The Oklahoma law is the best source for guidance on the journey to standardizing a method for handling these issues, as it encompasses the broadest range of digital assets. The drawback, however, is that it does not offer a solution to the counterargument by service providers that their contracts, which restrict the accessibility to such accounts, are binding (unless of course they are deemed unconscionable). This is why this comment further proposes that the new federal statute add a provision that would limit the contractual ability of service providers attempting to prevent access to such accounts upon death.¹⁵¹ Doing so would help to pull the ECS providers out of this “no-win” situation that they currently find themselves in.

This comment recognizes that there are certain areas of law which traditionally have been reserved for the states – family law being one of them.¹⁵² Because state law governs the intricate processes and procedures of probate, the rules illustrating how to properly dispose of an estate will vary accordingly from state to

150. Sherry, *supra* note 4, at 217.

151. Tarney, *supra* note 3, at 785.

152. Linda D. Elrod, *The Federalization of Family Law*, Human Rights Magazine, 36 Human Rights Magazine, no. 3, Summer 2009, available at http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law.html (“State legislatures define what constitutes a family and enact the laws that regulate marriage, parentage, adoption, child welfare, divorce, family support obligations, and property rights”).

state.¹⁵³ In the event that states are hesitant to relinquish control over this area of law, this comment proposes an alternative to a federal solution by suggesting that the Oklahoma statute serve as a model uniform law to be adopted by all fifty states. The National Conference of Commissioners on Uniform State Laws (NCUSL) was formed in 1892 for the purpose of encouraging “uniformity in state laws on all subjects where uniformity is deemed desirable and practicable.”¹⁵⁴ The NCUSL oversees the proposals of uniform laws, which states are encouraged to adopt.¹⁵⁵ By adopting the Oklahoma statute, each state would effectively address the problem of the uncertainty regarding digital assets at death by stipulating its own formula for their disposal.

Other commentators have recognized that the NCUSL can help to facilitate “the movement of individuals and businesses with rules that are consistent from state to state.”¹⁵⁶ Although the adoption of a model uniform state law might seem like a fitting solution, it is more aspirational than it is practical for several reasons. First, approval by the NCUSL does not make a uniform law an enforceable law anywhere in the United States, but rather it serves only as a legislative proposal to be addressed to all fifty states.¹⁵⁷ Second, there is no guarantee that any one state will actually adopt the proposal, making it highly unlikely that all, or even a majority, of the states will adopt it.¹⁵⁸ Further, the versions of the uniform law being passed in the states will rarely result in true uniformity, as states could still be led to accept or reject changes at the outset.¹⁵⁹

The efforts by certain states to enact digital estate laws, as well as those considering proposals, have brought attention to the need for new, updated legislation.¹⁶⁰ However, some lawmakers agree that the real solution still lies in legislative action at the

153. Definition of “Probate,” Legal Dictionary, <http://legal-dictionary.thefreedictionary.com/probate> (last visited Oct. 25, 2013).

154. Cornell Univ. Law Sch., *Unif. Commercial Code Locator*, <http://www.law.cornell.edu/uniform/uniform.html>; (last visited Nov. 3, 2013).

155. *Id.*

156. Tarney, *supra* note 3, at 798.

157. Elrod, *supra*, note 152.

158. *Id.*

159. *Id.*

160. Fama, *supra* note 94.

federal level.¹⁶¹ Ryan Kiesel, a proponent of the movement to modernize the SCA, has said, “[t]he federal government should pass uniform laws to govern all digital assets because it is quite difficult for an estate to have to navigate endless numbers of digital policies postmortem.”¹⁶² In addition, a federal standard will do little, if anything, to upset the states’ traditional regulation of their own estate laws. Each state will still be free to govern its own formalities regarding the transmission of an estate at death – only now, digital assets shall be required to be treated as other tangible assets would be under the applicable laws of each state.

VIII. Conclusion

Today, we put our lives on public display as we expose almost everything that we do – from what we had for breakfast to what we plan on doing that night.¹⁶³ While some aspects arguably remain undisclosed, such as our financial accounts and communications via e-mails, most of what we do is publicized through our use of social networking.¹⁶⁴ By their very nature, online forums allow us to express ourselves to the world while still feeling the veil of safety from behind a computer screen or other mobile device. We can share pictures and videos, meet new people from all over the world, shop for clothing and other household items, and access our bank accounts, all without leaving the comfort of our own home. The privacy discussion that is invoked regarding our online assets is likely attributed to these very characteristics, “given the increasing proportions of our lives embodied therein.”¹⁶⁵

As if the Stassens’ and Williams’s heartbreaking stories were not sufficient to illustrate the need for legislative action, consider this: a teenage girl is bullied and harassed by her peers to the point of depression and self-destruction. After several failed attempts to take her own life, she posts a video to YouTube crying

161. Fama, *supra* note 94 (“Ryan Kiesel, then a state legislator from Oklahoma, sponsored a similar bill in 2010 called the Digital Property Management After Death law. Though he supports states’ efforts to bring light to this issue, saying that it is a good way to get the conversation started, he also believes that this is a case that should eventually taken up by the federal government”).

162. *Id.*

163. Sherry, *supra* note 4, at 248.

164. *Id.*

165. *Id.*

out for help in a desperate attempt to make her troubles known to anyone who would listen. Unfortunately, her efforts fall on deaf ears, as no one has reached out in her defense. Just a few weeks later, the girl decides to end the pain once and for all by again attempting suicide; however, this time she is successful and is later found dead inside of her home.

Unfortunately, this nightmare is no hypothetical. In fact, it is the story of fifteen-year-old Amanda Todd, who was found hanged in her home after battling for nearly two years with the depression and anxiety stemming from the unimaginable cruelties imposed on her by others.¹⁶⁶ Although this is undoubtedly a tragic story, what happened after Amanda's death is what truly shocks the conscience. Facebook memorialized her page, as is their current policy for when a user dies, but again refused to allow the family access to her account.¹⁶⁷ After Amanda's death, the taunting and harassing continued on her Facebook page, with comments ranging from a "picture of a hanged girl which reads 'Todding' – to the unsympathetic victim-blaming that seems rampant these days on the web."¹⁶⁸ The family was at a complete standstill; they were unable to access the account, remove the comments, or take the page down permanently.¹⁶⁹ The comments served as a constant reminder to the Todd's of why their daughter ended her life, forcing them to endure the pain of losing her over and over again.¹⁷⁰ Without a change in the law, situations such as these pose a very real threat to families when a loved one dies, though they may not always be as extreme.

Adopting a federal statute similar to the Oklahoma law would bridge the gap between estate laws and the policies of online service providers regarding the privacy of their posthumous users. It will ultimately alleviate many of the problems stemming from the impracticability of complying with

166. Rob Bleaney, *Amanda Todd: Suicide girl's mum reveals more harrowing details of cyber bullying campaign that drove her daughter to her death*, Mirror News (last visited Oct. 25, 2013), <http://www.mirror.co.uk/news/world-news/amanda-todd-suicide-girls-mum-1379909>.

167. Amanda Crum, *Amanda Todd: Teen Still Bullied After Death*, WebProNews (last visited Oct. 25, 2013), <http://www.webpronews.com/amanda-todd-teen-still-bullied-after-death-2012-10>.

168. *Id.*

169. Fama, *supra* note 94.

170. *Id.*

both the outdated federal law and the varying state laws. Limiting the contractual ability of service providers will also reduce the conflict between enforcing their service agreements and respecting the wishes of a grieving family. If there were no provisions preventing access to digital assets, then there would be fewer disputes as to their transmission.

Take the Todd family for example – if there were a federal statute providing that the executor of her estate had the power to control her social networking, microblogging and messaging accounts, her parents (as the likely executors) would have been able to do as they wished with her Facebook page, whether it was to merely remove the comments or take the page down altogether. Also, the statute would resolve many of these issues for future families in similar predicaments by limiting the contractual ability of companies to prevent such access. Although Facebook is merely the chosen outlet demonstrating this growing epidemic, the benefits of a standardized law will be applicable to all digital assets.

There are new social media websites created almost daily, and society's willingness to participate with them has grown tremendously. In fact, February 2013 "mark[ed] the ninth Anniversary of the launch of Facebook, which currently has over 1 billion active users," as opposed to its mere one million users in 2004.¹⁷¹ Society's increasing use of the Internet suggests that there is already a large population comprised of deceased users.¹⁷² As our presence online has grown and most likely will continue to grow, so too will the number of deceased users, furthering uncertainty regarding the transmission of their digital assets. This foreshadowing of what is to come only further emphasizes the importance of implementing a solution today, rather than tomorrow, for the need to do so is becoming increasingly apparent as we continue to live and die online.

171. Fama, *supra* note 94.

172. *Id.*

