

A CALL FOR LEGISLATION TO PERMIT THE TRANSFER OF DIGITAL ASSETS AT DEATH

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I. INTRODUCTION

“A quiet revolution is quickly coming to the probate and estate planning world.”¹ The Internet has fundamentally changed the way society communicates and expresses itself,² and there is now tremendous value lying in one’s e-mails, social networking accounts, blogs, and other digital assets.³ Younger generations that embraced the Internet and created this value are getting older and confronting death.⁴ Unfortunately, the same technologies that are driving the digital age are creating new legal problems for estate planners.⁵

As society’s online presence becomes increasingly complex, protection of online assets at death is an emerging concern.⁶ “[F]amily members, estate planning attorneys, and . . . service providers are increasingly grappling with what happens to [individuals’] digital information when [they] die.”⁷ “In one form or another, the right to pass on property to one’s family . . . has been part of the Anglo-American legal system since feudal

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¹ Charles Herbst, *Death in Cyberspace*, 53 RES GESTÆ 16, 16 (Oct. 2009).

² Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921, 924 (9th Cir. 2007).

³ See Dennis Kennedy, *Estate Planning for Your Digital Assets*, ABA L. PRAC. TODAY (Mar. 2010), <http://www.abanet.org/lpm/lpt/articles/ft03103.shtml>.

⁴ Herbst, *supra* note 1, at 16.

⁵ Justin Atwater, *Who Owns E-Mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life?*, 2006 UTAH L. REV. 397, 397 (2006). See also *Fair Hous. Council*, 489 F.3d at 924.

⁶ See Herbst, *supra* note 1.

⁷ Atwater, *supra* note 5, at 397.

times.”⁸ Despite this growing value of digital assets, given the current state of the law, “[s]imply leaving cyber property in a will . . . is often going to be inadequate.”⁹

The traditional understanding to keep unique, complex passwords for each account and to change them frequently becomes counterproductive and difficult to manage as the number of accounts rapidly increases.¹⁰ When heirs desire access but are not in possession of log-in information, service providers are “in exclusive control of the account content.”¹¹ Without a remedy, heirs are forced to consult the provisions in the terms of use regarding the disposition of the account holder’s account contents at death.¹² However, the terms drafted by service providers are highly restrictive to maintain the privacy of their users.¹³

Considering the current complexities in retrieving digital assets at death, legislation mandating transferability and timely compliance by service providers upon legally-recognized authorization of the decedent is necessary. Part II of this article underlines the value in digital assets and the policy concerns motivating service providers in drafting these restrictive terms, making the disposition of these assets at death so complex. Part III examines the solutions offered by state statutes, service providers, and the current market, and explains how these solutions are insufficient and shortsighted. Ultimately, Part IV explains why a uniform law permitting the transferability of digital assets upon legally-recognized intent is advantageous and how it resolves the competing concerns of account users and service providers.

⁸ *Hodel v. Irving*, 481 U.S. 704, 716 (1987). See also *Atwater*, *supra* note 5, at 397 (Traditionally, “[o]ne of the most powerful rights granted to citizens of the United States is the right to dictate the disposition of their property at death”).

⁹ *Herbst*, *supra* note 1, at 23.

¹⁰ *Id.*

¹¹ Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns a Decedent’s E-Mails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y, 281, 305 (2006–2007).

¹² *Id.* at 291 (“Provisions addressing the disposition of an . . . account holder’s account contents . . . are particularly relevant in the case of death . . .”).

¹³ See *infra* Part II.C.

II. BACKGROUND

A. Types of Digital Assets and Their Value

The prevalence of digital assets in society illustrates their growing value and importance.¹⁴ It is unrealistic for individuals to expect the post-death financial revenues of Elvis;¹⁵ however, “[i]n the case of popular blogs, photography sites, or online videos, your estate might be able to realize income from licensing, creating a book or taking other steps to ‘monetize’ content.”¹⁶

1. E-mails

Written personal correspondence can be tremendously valuable. For example, letters from historical figures may have substantial historical and economic value.¹⁷ In addition to historical and economic value, written correspondence often has tremendous sentimental value.¹⁸ 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.¹⁹ Today, piecing together e-mails can offer an archive of people’s lives.²⁰

Even though the number of users wondering whether they have a property interest in their email is growing, the number of state statutes and courts addressing the issue remains sparse.²¹ However, the uncertainty surrounding the ownership of e-mail is a matter of immediate and significant relevance.²² State legislatures have a unique opportunity to

¹⁴ Olivia Y. Truong, *Virtual Inheritance: Assigning More Virtual Property Rights*, 21 SYRACUSE SCI. & TECH. L. REP. 57, 60 (2009).

¹⁵ Kennedy, *supra* note 3.

¹⁶ *Id.*

¹⁷ Truong, *supra* note 14, at 84 (citing Mark D. Rasch, *A Corporal’s Death Starts with a Dispute on E-Mail Ownership: Should E-Mail Accounts Perish Along with Their Owners?*, LAW.COM, (Mar. 23, 2005) <http://www.law.com/jsp/article.jsp?id=1111485911670>).

¹⁸ Darrow & Ferrera, *supra* note 11, at 283.

¹⁹ *Id.*

²⁰ Alejandro Martínez-Cabrera, *Dealing with Digital Assets After We Die*, S.F. CHRON., Feb. 1, 2010, at D1.

²¹ Darrow & Ferrera, *supra* note 11, at 282.

²² *Id.*

resolve this uncertainty by enacting legislation attaching legal protection to emails for purposes of a person's probate estate."²³

2. Social Networking Sites

The growth of social networking websites over the past decade has been phenomenal.²⁴ Once dismissed as a passing fad, social networking websites have since grown to astronomical proportions.²⁵ For example, there are more than 845 million active users on Facebook.²⁶ The new and exciting opportunities on social networking sites for generating value and utility are exerting a profound effect on legal and policy decisions.²⁷

a. Individuals

The explosion of social networking sites has fundamentally altered the way individuals interact with one another.²⁸ For example, "[a] recent study found that 73 percent of Americans regularly use social media."²⁹ Individuals use social networking sites like Facebook and Twitter to manage both their personal and professional relationships.³⁰ For many individuals, social networking sites serve as the primary way of staying in

²³ *Id.* at 283–84.

²⁴ Mrinal Todi, *Advertising on Social Networking Sites*, WHARTON RES. SCHOLARS J., 1, (May 1, 2008), http://repository.upenn.edu/cgi/viewcontent.cgi?article=1054&context=wharton_research_scholars.

²⁵ *Id.*

²⁶ *Newsroom*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Feb. 11, 2012).

²⁷ Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 741, 757 (2008).

²⁸ Alan N. Sutin, *Inside The World Of Web 2.0*, N.Y. L.J., Jan. 29, 2007, at 1.

²⁹ Irwin A. Kishner & Brooke E. Crescenti, *The Rise of Social Media*, 27 ENT. & SPORTS L. 24, 24 (2010).

³⁰ Facebook allows its users to share and communicate information and "to stay connected with friends and family . . ." *Newsroom*, *supra* note 26. Twitter provides a platform that allows its users to release timely bits of information (through "Tweets" of 140 characters or less) that allow single voices "that might have gone otherwise unnoticed" to reach "millions of people." *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Feb. 12, 2012).

touch with family and friends.³¹ In addition to using social networking sites to stay in touch with friends, users may have thousands of pictures or videos on sites such as Facebook, YouTube, Shutterfly, Photobucket, or Flickr.³² As the world becomes more dependent on technology, it is becoming more likely that the only copies of these pictures remain within password-protected accounts.³³

b. Businesses

Businesses are realizing the potential for reaching out to their target audiences through social networking and have begun extensive advertising efforts to do so.³⁴ For example, businesses of all shapes and sizes “use Twitter 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.”³⁵ In addition to Twitter, advertisers also capitalize on the structure of Facebook, which encourages people to register with their real names and post relevant personal information such as their hometown, favorite books, activities, and other demographic information.³⁶ This structure allows Facebook to

³¹ *What Happens to All My #Social Networking Information When I Die?*, READALOO (Dec. 5, 2009), <http://www.readaloo.com/what-happens-to-all-my-social-networking-info-0>.

³² YouTube “allows billions of people to discover, watch and share originally-created videos.” *About YouTube*, YOUTUBE, http://www.youtube.com/t/about_youtube (last visited Feb. 12, 2012). Shutterfly is a website that “make[s] it easy to exchange, share, and store your digital photos.” *Learn More*, SHUTTERFLY, www.shutterfly.com/learn/index.jsp (last visited Feb. 13, 2012). Photobucket is a website that allows users to “[u]pload all your best pictures, images, graphics, icons, and videos and share them by email or link them to your favorite sites like Facebook and Twitter.” PHOTOBUCKET, <http://www.photobucket.com> (last visited Feb. 13, 2011). Flickr is an online photo sharing community with “over 5 billion . . . photos.” FLICKR, <http://www.flickr.com/> (last visited Feb. 14, 2012).

³³ *See infra* text accompanying notes 105–09. These struggles arose because there were no other copies available. *Id.*

³⁴ Todi, *supra* note 24, at 1.

³⁵ *About Twitter*, *supra* note 30.

³⁶ Todi, *supra* note 24, at 1. *See also Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/legal/terms> (last visited Feb. 13, 2012) (“Facebook users provide their real names and information, and we need your help to keep it that way You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission.”).

offer businesses the ability to target their advertising to extremely specific groups of prospective customers.³⁷

The increased advertising and marketing efforts by businesses through the use of social networking is partly attributable to the fact that advertising through social media is less expensive than all other types on online advertising.³⁸ Facebook allows companies to target their exact demographic.³⁹ For example, it permitted CM Photographic to isolate the twenty-four to thirty year old engaged women demographic—after only twelve months they generated \$40,000 from a \$600 advertisement.⁴⁰ Saving money by isolating a target demographic is extremely attractive to businesses, especially considering that the average fifteen second ad on network TV costs about \$20,000.⁴¹

B. The Restrictive Terms of Use

Upon a user's death, "[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."⁴² Therefore, when a person dies the contract provisions addressing what happens to account content upon termination are pivotal.⁴³ However, the terms often found in these contracts are so restrictive that they raise questions of enforceability, which adds increased uncertainty to users' interests.⁴⁴

Some have argued that users specifically contract with providers to keep their account private from everyone, including the subscriber's survivors.⁴⁵ However, a recent study by Robert A. Hillman, a leading authority on software contracts, found that only 4% of online customers

³⁷ *Statement of Rights and Responsibilities*, *supra* note 36, at § 11.

³⁸ See Edmund Lee, *Social Network Sink Online-Ad Pricing*, ADAGE DIGITAL (Jul. 12, 2010), <http://adage.com/article/digital/social-networks-sink-online-ad-pricing/144884/>.

³⁹ *Facebook Ads*, FACEBOOK, http://www.facebook.com/advertising/?campaign_id=402047449186&placement=pflo&extra_1=0 (last visited Feb. 13, 2012).

⁴⁰ *Id.*

⁴¹ Emily Fredrix, *TV Commercials Shrink to Match Attention Spans*, USA TODAY, Oct. 30, 2010, available at http://www.usatoday.com/money/advertising/2010-10-30-shorter-v-commercials_N.htm.

⁴² Darrow & Ferrera, *supra* note 11, at 305.

⁴³ *Id.* at 292.

⁴⁴ Charles Blazer, *The Five Indicia of Virtual Property*, 5 PIERCE L. REV. 137, 137–38 (2006).

⁴⁵ See Herbst, *supra* note 1, at 21.

actually read the provisions of the account terms “[b]eyond price and product description.”⁴⁶ The same study found that few individuals look at contract terms other than the price and the description, despite the fact that the Internet makes comparison shopping quicker.⁴⁷ Considering the likelihood of a user actually reading an online contractual agreement, it is unrealistic to assume that prospective users shop for different service providers based on transferability provisions.

Some of the reasons offered to explain the lack of inquiry by online consumers include online contracts’ “lack of lucidity, consumers’ lack of bargaining power and choices, and the relative likelihood that nothing will go wrong.”⁴⁸ Further, online consumers may not consider how important the terms they quickly agree to are to their future remedies under the contract.⁴⁹ Dispute resolution and forum selection clauses, “terms that apply when things go wrong,” are often ignored by users.⁵⁰

As Hillman has noted, e-commerce offers businesses new and inexpensive strategies for manipulating consumers to minimize standard-term shopping. Considering the likelihood that nothing will go wrong, online consumers are likely to continue to spend their time on another activity instead of analyzing boilerplate contract language.⁵¹

Perhaps service providers would be inclined to draft less-restrictive terms if online account holders were able to generate enough concern about allowing the transferability of their assets.⁵² However, Hillman notes that “market pressure may be insufficient to discipline businesses” into drafting more favorable contractual terms.⁵³ Therefore, legislative attention is necessary.

⁴⁶ Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 842 (2006).

⁴⁷ *Id.*

⁴⁸ *Id.* at 840–41.

⁴⁹ *Id.* at 841.

⁵⁰ *Id.*

⁵¹ *Id.* at 841.

⁵² Hillman, *supra* note 46, at 843.

⁵³ *Id.*

1. E-mail Service Providers

The terms of use drafted by service providers can be highly restrictive.⁵⁴ In fact, “some [commentators] believe Yahoo!’s policies regarding customer information stored on its e-mail server are stricter than hospital policies regarding medical records.”⁵⁵ Yahoo’s e-mail account policy requires users to agree that the “account is non-transferable and any rights to [the] account terminate upon . . . death.”⁵⁶

Even service providers that have taken a more proactive approach require the executor to go through a long and complex procedure before gaining control of a decedent’s assets.⁵⁷ For example, Google requires the full contact information of individuals requesting the account contents including a verifiable e-mail address, a copy of their driver’s license, the Google e-mail (Gmail) address of the decedent, the full header and contents of an e-mail from the decedent’s account to the person requesting access, and proof of death.⁵⁸ Upon this showing, Google’s discretion to grant access is further conditioned upon the requesting party’s ability to get “an order from a U.S. Court” or “submit[] additional materials.”⁵⁹ Similarly, the *New York Times* reported that the president of Myspace expressed concern for user privacy, noting that “the company does not allow people to assume control of the MySpace accounts of users after their deaths.”⁶⁰ Rather, the president stated that the company “handles each incident on a case-by-case basis when notified, and will work with

⁵⁴ See Blazer, *supra* note 44, at 138 n. 2 (discussing unconscionability as applied to terms of use, or “click-wrap” agreements).

⁵⁵ Atwater, *supra* note 5, at 403.

⁵⁶ *Yahoo! Terms of Service*, YAHOO!, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last visited Oct. 13, 2010). Section 27, titled “*No Right of Survivorship and Non-Transferability*” states that “[y]ou 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.” *Id.* See also Herbst, *supra* note 1, at 21.

⁵⁷ See *infra* notes 58–61.

⁵⁸ *Accessing a Deceased Person’s Mail*, GOOGLE, (Oct. 3, 2011), <http://mail.google.com/support/bin/answer.py?hl=en&answer=14300>.

⁵⁹ *Id.*

⁶⁰ Warren St. John, *Rituals of Grief Go Online as Web Sites Set Up to Celebrate Life Recall Lives Lost*, N.Y. TIMES, Apr. 27, 2006, at A19.

families to respect their wishes.”⁶¹ These procedures are a step in the right direction, but fail to appreciate the time sensitivity of digital assets.

2. *Social Networking Sites*

Upon learning of a user’s death, often through an obituary or news article, Facebook “memorializes” the decedent’s profile where it prevents any log in attempts and only allows “friends” to view the profile.⁶² As a consequence, if someone has already reported the death of the user to Facebook, it leaves a surviving relative without a remedy—even if they are in possession of the decedent’s password. Although Facebook allows the option of removing the profile completely, it will not allow survivors access to the account to remove its content.⁶³ Some wonder whether Facebook should have the right to decide what to do with a deceased member’s account content without confirmation from a relative.⁶⁴ Under Facebook’s current policy, an inaccurate news article could cause an account to be improperly blocked.⁶⁵

Twitter’s policy is more liberal in allowing survivors access to a decedent’s account, but fails to consider the importance of a the user’s intent.⁶⁶ Twitter requires family members requesting account information to present their contact information and relationship to the decedent, the username of the decedent’s account, and a link to a public obituary or news article.⁶⁷ Upon this showing, Twitter will “either remove a deceased user’s account entirely, or provide an archive of [the decedent’s] tweets so family members can access them offline.”⁶⁸ Jeremy Toeman, CEO and founder of online password storage provider Legacy Locker, criticized this policy for

⁶¹ *Id.* (quoting Tom Anderson, president of Myspace).

⁶² Josh Lowensohn, *Twitter’s New Deceased-User Policy vs. Facebook’s*, CNET NEWS (Aug. 10, 2010, 2:52 PM), http://news.cnet.com/8301-27076_3-20013219-248.html.

⁶³ *See id.*

⁶⁴ Kristen Nicole, *Facebook Changes Policy on Deceased Users Accounts?*, ALLFACEBOOK (Feb. 27, 2010, 3:25 PM), <http://www.allfacebook.com/facebook-changes-policy-on-deceased-users-accounts-2009-02>.

⁶⁵ In fact, Facebook has expressly designated a site to deal with improperly memorialized accounts. *My Personal Account Is in a Special Memorialized State*, FACEBOOK, http://www.facebook.com/help/contact.php?show_form=special_memorialized_state (last visited Feb. 16, 2011).

⁶⁶ Lowensohn, *supra* note 62.

⁶⁷ *Id.*

⁶⁸ *Id.*

not accounting for situations where “the desires of the [deceased] user are in conflict with those who support them, or [where there is] a conflict within the surviving family members.”⁶⁹

C. *Privacy and Confidentiality Concerns*

The tension between restrictive contractual agreements and digital development is “brewing into a perfect storm” that the states and courts must address.⁷⁰ The current complexities in acquiring digital assets at death are the direct result of the underlying privacy and confidentiality concerns that motivate service providers in drafting the restrictive terms of use.⁷¹

Websites and service providers draft strict terms to protect the privacy and confidentiality of their users, recognizing that people often create accounts they do not want people to know about, or even be made public;⁷² for example, an adulterous man who was facilitating an extramarital affair through e-mail⁷³ or “a typical teenager who share[d] the most intimate details of her life with her closest friends through instant and text messag[es].”⁷⁴ In these types of situations, “service providers have a legitimate interest in protecting the privacy rights of living account holders, and may be concerned about fraudulent claims.”⁷⁵ In the case of the adulterous man or a teenager’s intimate secrets, eventual disclosure of this private information would be inconsistent with the privacy expectations the decedent had when creating the account.

Although the restrictive provisions drafted by service providers are often intended to protect the user, they may be in direct conflict with the intentions of the decedent who explicitly consented to their use.⁷⁶ Service

⁶⁹ *Id.*

⁷⁰ Truong, *supra* note 14, at 66.

⁷¹ See *infra* text accompanying notes 72–75.

⁷² See Herbst, *supra* note 1, at 21 (“One of the major tensions in accommodating the request of [the decedent’s representative] is concern for the user’s privacy.”).

⁷³ *Id.*

⁷⁴ Atwater, *supra* note 5, at 404.

⁷⁵ Darrow & Ferrera, *supra* note 11, at 314.

⁷⁶ See, e.g., Anick Jesdanun, *As More of Life Gets Digitized, Questions Raised About What Happens in Death*, THE SEATTLE TIMES (Dec. 23, 2004, 12:00 AM), <http://community.seattletimes.nwsources.com/archive/?date=20041223&slug=webdigitized23>.

providers are essentially caught in a no-win situation.⁷⁷ “If they decline to release the information, they are labeled villains by people supporting the families. If they give it up, they are chastised for violating their own privacy statements.”⁷⁸

D. *The Inability to Extend Copyright Law to Protect Digital Assets Further Supports the Need for a Legislative Solution*

Digital property ownership is an area of “intense debate.”⁷⁹ Commentators have recognized that traditional property concepts have created a substantial ambiguity in defining the ownership status of digital assets.⁸⁰ Federal law permits inheritance of the “ownership of a copyright.”⁸¹ “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression”⁸² Although some digital transmissions may be worthless, such as unsolicited spam,⁸³ e-mails, pictures, and videos on social networking sites are often “original works of authorship fixed in [a] tangible medium of expression,”⁸⁴ and thereby worthy of copyright protection.⁸⁵

Even when an intellectual property interest is successfully asserted, the information is kept on the servers of service providers who control access to that property in the event of a user’s death.⁸⁶ As discussed, these accounts are often governed by restrictive terms of use.⁸⁷ Some service providers expressly disclaim ownership of the intellectual property,⁸⁸ but others’ terms of use make no distinction between the copy and the copyright in the work itself.⁸⁹ Yet, it is unrealistic to assume that that the

⁷⁷ Ariana Eunjung Cha, *After Death, a Struggle for Their Digital Memories*, WASHINGTON POST, Feb. 3, 2005, at A1.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Atwater, *supra* note 5, at 412.

⁸¹ 17 U.S.C. § 201(d)(1) (2006).

⁸² *Id.* § 102(a).

⁸³ See Darrow & Ferrera, *supra* note 11, at 282–83.

⁸⁴ 17 U.S.C. § 102(a).

⁸⁵ See Darrow & Ferrera, *supra* note 11, at 287–89.

⁸⁶ See *id.* at 304–05.

⁸⁷ See Herbst, *supra* note 1, at 21.

⁸⁸ E.g., *Google Terms of Service*, GOOGLE (Mar. 1, 2012), <http://www.google.com/policies/terms/>.

⁸⁹ Darrow & Ferrera, *supra* note 11, at 292.

parties would intend or expect a copyright to transfer from the user to the service provider merely by consenting to the terms of use.⁹⁰

As Professors Jonathan Darrow and Gerald Ferrera have pointed out, “[a] copyright owner’s exclusive intellectual rights do not include preventing the destruction of a copy lawfully obtained.”⁹¹ Likewise, “the destruction of a copy does not destroy the copyright in the work” itself.⁹² For example, a person who purchases a book is not prohibited from destroying the book, nor does doing so affect the author’s copyright.⁹³ The inability to extend copyright law⁹⁴ has prompted Professors Darrow and Ferrera to suggest the use of bailment law as an appropriate framework for a potential solution.⁹⁵ Accordingly, the current intellectual property landscape and its inability to effectively protect digital property at death support use of the state’s power to regulate the orderly disposition of its citizens’ property.⁹⁶

A strong argument exists that the onus is on the user to back up digital information if it is valuable; however, with the rapid digitization of individuals’ daily lives, the effectiveness of doing so is becoming

⁹⁰ *Id.* at 293.

⁹¹ *Id.* at 292.

⁹² *Id.*

⁹³ *See id.* at 292 n.61.

⁹⁴ *See* Daniel Gould, *Virtual Property in MMOGs*, VIRTUALLY BLIND, 2, 11 (June 6, 2008), http://virtuallyblind.com/files/reading-room/gould_virtual_property.pdf. Gould notes:

The number one problem hindering the development of virtual property rights is that everybody from journalists to judges tends to conflate virtual property with copyright, and consider virtual property as a subset of intellectual property The use of copyright claims to resolve these kinds of disputes will only further confuse intellectual and virtual property issues.

Id. Although the author seeks to underline the advantages in allowing transferability of these interests, defining the exact extent of the interest is beyond the scope of this article.

⁹⁵ Darrow & Ferrera, *supra* note 11, at 301. Darrow also draws an analogy to the law governing safety deposit boxes. *Id.* at 311 (“When transferring the contents of a safe deposit box to the next-of-kin, banks are held to a reasonable standard of care in ensuring that contents are delivered to the rightful possessors . . .”).

⁹⁶ *See* *Trimble v. Gordon*, 430 U.S. 762, 771 (1976).

increasingly inefficient and inaccurate.⁹⁷ Consequently, the copy (containing the copyright) in the possession of the service provider may be the only copy that exists.

Although Darrow and Ferrera note that “parties are generally free to contract to whatever terms they wish,”⁹⁸ 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.⁹⁹ Upon a user’s death, it is highly desirable to permit the transfer of digital assets or postpone termination of the account for a specified period.¹⁰⁰

III. RECENT DEVELOPMENTS

A. *Value Lost and Ineffectiveness of the Service Provider’s Own Solutions*

Many of the terms of use drafted by service providers are extremely restrictive with respect to any attempt to retrieve digital assets.¹⁰¹ “Denying account holders access . . . potentially upsets business and personal communications on a grand scale.”¹⁰² Because of the time sensitivity of digital assets,¹⁰³ even the terms of service providers who have taken a more proactive approach provide inadequate solutions to individuals and businesses who may suffer a significant loss in value during the time it takes to gain access to the decedent’s account.¹⁰⁴

1. *Consequences to Individuals*

The consequences created by the current complexities can be severe to individuals in particular.¹⁰⁵ For example, one individual had to seek court intervention after the individual’s email service provider suspended access

⁹⁷ Atwater, *supra* note 5, at 417.

⁹⁸ See Darrow & Ferrera, *supra* note 11, at 293–94.

⁹⁹ See Joshua A.T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 53 MCGILL L.J. 427, 427 (2008).

¹⁰⁰ See *infra* Part III.B.

¹⁰¹ See *supra* Part II.B.

¹⁰² Darrow & Ferrera, *supra* note 11, at 296.

¹⁰³ Kennedy, *supra* note 3.

¹⁰⁴ See, e.g., *Accessing a Deceased Person’s Mail*, *supra* note 58; Herbst, *supra* note 1, at 18 (discussing the delay in getting access to a Gmail account); Lowensohn, *supra* note 62 (comparing the relative delays between obtaining access to a decedent’s Twitter and Facebook accounts). Some service providers explicitly foreclose the possibility of access, forever. E.g., *Yahoo! Terms of Service*, *supra* note 56 and accompanying text.

¹⁰⁵ See Darrow & Ferrera, *supra* note 11, at 295.

to the account over a billing dispute, resulting in the expiration of an e-mailed job offer.¹⁰⁶

Yahoo!'s stringent e-mail account policy made national headlines in 2005 after Justin Ellsworth, a twenty year old marine fighting in Fallujah, was killed by a bomb.¹⁰⁷ Justin used e-mail to communicate with his family and friends and wanted to eventually turn his correspondence from Iraq into a scrapbook.¹⁰⁸ When his father attempted to collect Justin's e-mails to create a memorial after his death, Yahoo! rejected the request—citing policy concerns and its terms of use agreement.¹⁰⁹ Yahoo! only complied when Justin's father obtained a court order.¹¹⁰

Like Ellsworth, a Marine named Karl Linn communicated with the outside world solely by sending e-mails and posting pictures while he was stationed in Iraq.¹¹¹ When he was tragically killed, his parents immediately contacted the account service provider to preserve his account.¹¹² Predictably, the service provider cited its strict privacy policy and refused to comply with the request.¹¹³ The above examples illustrate the value of digital assets to individuals and how drastic the consequences can be in the absence of legislative intervention.

2. *Consequences to Businesses and Other Entities*

The consequences caused by the complexities of retrieving digital assets can be financially crippling for companies and entities, particularly when a single person has control over a password.¹¹⁴ For a small business especially, e-mail and attachments can be very valuable.¹¹⁵ For instance,

¹⁰⁶ Darrow & Ferrera, *supra* note 11, at 295.

¹⁰⁷ See Jesdanun, *supra* note 76; Paul Sancya, *Yahoo! Will Give Family Slain Marine's E-mail Account*, USA TODAY (Apr. 21, 2005, 11:32 AM), http://www.usatoday.com/tech/news/2005-04-21-marine-e-mail_x.htm?POE=TECISVA; John Bebow, *Dad Fights Yahoo! for E-mail of Slain GI; Company Cites Need for Privacy*, CHI. TRIB., Dec. 29, 2004, at A1.

¹⁰⁸ Atwater, *supra* note 5, at 400–01.

¹⁰⁹ *Id.* at 401.

¹¹⁰ Darrow & Ferrera, *supra* note 11, at 281.

¹¹¹ Cha, *supra* note 77.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See Scott Reeves, *Estate Planning in the Digital Age*, FORBES (Jan. 30, 2006, 6:00 AM), http://www.forbes.com/2006/01/27/microsoft-google-yahoo-cx_sr_0130death.html.

¹¹⁵ *Id.*

Roger Van Oosten's "father had a niche Internet business"¹¹⁶ and upon his father's death, although business continued, access to his e-mail account did not.¹¹⁷ Among other complications, Roger Van Oosten was stuck with overdraft charges and angry customers.¹¹⁸ Similarly, when Karin Prangley's father-in-law became incapacitated, "his building supplies business lost between \$10,000 and \$15,000 because packages continued to arrive at his warehouse and no one had any idea where they were expected to go. His address book and e-mails were locked behind password-protected accounts."¹¹⁹ Prangley was not able to obtain access in a timely fashion, but with the help of relatives, was able "to reconstruct her father-in-law's list of contacts."¹²⁰

There is tremendous value in online advertising and "goodwill" generated by businesses through e-mail, social networking sites, and blogs.¹²¹ "[B]usinesses have recognized the potential value of certain virtual properties and . . . have developed business models based on trading such properties in secondary markets [W]here a free market cultivates value, courts should protect that value."¹²² Letting these intangible assets go to waste and lie dormant is economically inefficient.¹²³

B. State Statutes

At the state level, the concern over the significance of account access has prompted legislatures to pass laws attempting to clarify the rights between account holders and service providers.¹²⁴ States such as California, Connecticut, Indiana, and Rhode Island were among the first to pass this type of legislation.¹²⁵ As early as 2002, California mandated a thirty-day notice period prior to the termination of e-mail service by a

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Martínez-Cabrera, *supra* note 20.

¹²⁰ *Id.*

¹²¹ See *Social Commerce Statistics*, BAZAAR VOICE, <http://www.bazaarvoice.com/resources/stats> (last visited Feb. 13, 2012) (providing survey results quantifying the value of online advertising).

¹²² Blazer, *supra* note 44, at 146.

¹²³ See *id.* at 147.

¹²⁴ Darrow & Ferrera, *supra* note 11, at 291–92.

¹²⁵ See *infra* notes 127–34.

service provider.¹²⁶ In 2005, Connecticut passed a provision stating “[a]n electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person . . . access to or copies of the contents of the . . . account . . . upon receipt . . . of [a] written request made by such executor . . . accompanied by a copy of the death certificate . . . or an order from a probate court.”¹²⁷ In 2007, Indiana and Rhode Island passed laws similar to Connecticut.¹²⁸

Unfortunately, California’s law falls short of resolving the uncertainty regarding the legal status of e-mail, and does not shed light on the rights of relatives seeking access to a decedent’s e-mail account.¹²⁹ The problem with the California notification scheme, according to Darrow and Ferrera, is that the thirty-day notice period “will likely be given to account holders via e-mail,” rendering it wholly useless to those who do not already have access to the account.¹³⁰ Further, the type of statutes offered by Connecticut, Indiana, and Rhode Island may be contrary to the intent of the user.¹³¹ For example, the Indiana statute does not provide the account holder the opportunity to opt-out of providing future access to the account in the case of death.¹³² As discussed earlier, users often create accounts with the assumption that they will remain private.¹³³ By providing access to the account without first examining the decedent’s intent, Indiana’s statute may provide access to heirs in direct violation of the decedent’s wishes.¹³⁴

Although these state statutes are well-intentioned and driven by solid public policy considerations,¹³⁵ they have been largely ineffective.¹³⁶ Consumers often have dozens of accounts in different jurisdictions, each

¹²⁶ CAL. BUS. & PROF. CODE § 17538.35(a) (West 2010).

¹²⁷ CONN. GEN. STAT. § 45a-334a(b) (West 2011).

¹²⁸ See IND. CODE § 29-1-13-1.1(a)–(b) (West 2010); R.I. GEN. LAWS ANN. § 33-27-3 (West 2010).

¹²⁹ Darrow & Ferrera, *supra* note 11, at 297.

¹³⁰ *Id.*

¹³¹ See Herbst, *supra* note 1, at 21.

¹³² See IND. CODE § 29-1-13-1.1(a)–(b).

¹³³ See *supra* text accompanying notes 72–74.

¹³⁴ See Herbst, *supra* note 1, at 21.

¹³⁵ See Jonathon J. Darrow & Gerald R. Ferrera, *Email Is Forever . . . or Is It?*, 11 J. INTERNET L. 1, 13 (2008).

¹³⁶ See Herbst, *supra* note 1, at 18.

governed under a separate contractual agreement.¹³⁷ Choice of law and forum selection issues are especially problematic because they are typically found in the terms of use or the privacy policy of the service provider.¹³⁸ A court in one state may uphold the terms while another state may legislatively mandate access to the decedent's account.¹³⁹ Ultimately, these considerations are often resolved by the provider's terms of service, which explicitly state that a particular state's laws govern any potential conflict.¹⁴⁰ Thus, unless the provider's terms of service choose a state with a statutory access scheme, these state statutes have had a very minimal effect on the problems they were enacted to solve, leaving service providers "in de facto control of the account and [with] . . . the ability to delete the account contents."¹⁴¹

Even the drafters of these statutes contemplated the laws would eventually be superseded by federal legislation.¹⁴² California's legislature anticipated that its notice law might be superseded by federal law when it stated: "This section shall become inoperable on the date that a federal law or regulation is enacted that regulates notice requirements in the event of termination of electronic mail service."¹⁴³

¹³⁷ *Id.* at 16. Additionally, "it's increasingly likely that a user would have an account in a foreign country." *Id.* at 23.

¹³⁸ Darrow & Ferrera, *supra* note 11, at 297 n.81.

¹³⁹ *Id.*

¹⁴⁰ See *Yahoo! Terms of Service*, *supra* note 56 ("You and Yahoo! each agree that the [terms of service] and the relationship between the parties shall be governed by the laws of the State of California without regard to its conflict of law provisions and that any and all claims."); *Statement of Rights and Responsibilities*, *supra* note 36 ("You will resolve any claim . . . arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement . . . without regard to conflict of law provisions."); *Terms of Service*, TWITTER, <http://twitter.com/tos> (last visited Feb. 13, 2012) ("These terms and any action related thereto will be governed by the laws of the State of California without regard to or application of its conflict of law provisions or your state or country of residence.").

¹⁴¹ Darrow & Ferrera, *supra* note 11, at 297.

¹⁴² *Id.* at 297 n.80.

¹⁴³ CAL. BUS. & PROF. CODE § 17538.35(f).

C. Private Market Developing Has Been Ineffective

The uncertainty in the law has created an emerging market for dealing with the complex issues associated with retrieving digital assets at death.¹⁴⁴ Companies such as Entrustet and Legacy Locker effectively serve as password databases where log in information and letters are passed on to friends and family when one passes away.¹⁴⁵ A large part of their marketing strategy is reaching out to will and estate planning professionals.¹⁴⁶ For a \$300 one-time fee, or \$30 yearly payments, Legacy Locker will store usernames and passwords to important accounts.¹⁴⁷ In fact, the company boasts “greater than bank level security.”¹⁴⁸ The emergence of these growing companies reflects the consumer demand for protecting the value and transferability of digital assets.

1. Password-Dependent Solutions Are Shortsighted

Password-dependent solutions, such as those offered by Legacy Locker and Entrustet, are inadequate. Considering the large number of accounts one may own, it is unrealistic to keep a perfectly updated list of the passwords to those accounts.¹⁴⁹ “[P]asswords are a moving target because

¹⁴⁴ See *The Safe and Secure Way to Pass Your Online Accounts To Your Friends and Loved Ones*, LEGACY LOCKER, <http://legacylocker.com/> (last visited Feb. 13, 2012); ENTRUSTET, <https://www.entrustet.com/> (last visited Feb. 13, 2012).

¹⁴⁵ *About Us*, LEGACY LOCKER, <http://legacylocker.com/company/about> (last visited Feb. 13, 2012). Jeremy Toeman, the CEO of Legacy Locker, was inspired to start the company after being unable to access important online accounts held by his own grandmother, an avid web user, when she died. *Id.* Entrustet was created by two University of Wisconsin students who were inspired by the Justin Ellsworth case, which was discussed in *The World Is Flat* by Thomas Friedman. *About Us*, ENTRUSTET, <https://www.entrustet.com/about-us> (last visited Feb. 13, 2012).

¹⁴⁶ Marshall Kirkpatrick, *Jeremy Toeman Finds a Traditional Business Model in a Web 2.0 World*, READWRITEWEB (Mar. 10, 2009 9:28 AM), <http://www.readwriteweb.com/enterprise/2009/03/preserving-digital-assets-after-death.php>.

¹⁴⁷ *Id.*

¹⁴⁸ *Estate Planners*, LEGACY LOCKER, <http://legacylocker.com/estate-planners> (last visited Feb. 13, 2012).

¹⁴⁹ See Atwater, *supra* note 5, at 417 (“Clients would have to update their estate plans every time a password changes, which is not practical.”); Kennedy, *supra* note 3 (noting that any sort of password directory “we create will be out of date when the time comes to use it”). Herbst suggests “writing down a list of accounts, user names and passwords, and

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you should be changing them on a regular basis.”¹⁵⁰ Because “[h]aving more than twenty passwords is not uncommon,”¹⁵¹ any attempt of keeping a perfectly updated list of these passwords, which often require periodic changing, is likely to be time-consuming, outdated, incomplete, and inaccurate.¹⁵² This approach is shortsighted because, as individuals’ daily lives become increasingly digitized with more usernames and passwords, this inaccuracy will only be compounded.

A person who does “a great job on security [can] all but guarantee that no one, including their heirs, can get easy and timely access to [the person’s digital assets] when the time comes.”¹⁵³ Even if a deceased person provided log in information, it may be insufficient to successfully retrieve the account contents.¹⁵⁴ For instance, a friend who sends Facebook a link to an obituary will cause the account to be locked, leaving the relatives without a remedy—despite having the correct log in information.¹⁵⁵ Further, even if an updated, complete, and accurate list is successfully accomplished, keeping all of your passwords in a centralized location increases the potential harm that may result if the list is compromised.¹⁵⁶ Although password-dependent solutions can be helpful, they are inadequate and fall short of solving what can be more thoroughly accomplished through effective legislation.

2. Password-Dependent Solutions Are Counterproductive

A password-dependent solution is counterproductive because it perpetuates the privacy and confidentiality concerns fueling the current complexities in accessing digital assets at death¹⁵⁷ by requiring another

treating them the same as a set of keys.” Herbst, *supra* note 1, at 23. However, even he foresees problems arising with the password’s expiration or computer glitches. *Id.*

¹⁵⁰ Kennedy, *supra* note 3.

¹⁵¹ Herbst, *supra* note 1, at 23. Another estate planning attorney suggests that the number of password-protected accounts one may have could reach into the hundreds. Kennedy, *supra* note 3.

¹⁵² Atwater, *supra* note 5, at 417.

¹⁵³ Kennedy, *supra* note 3.

¹⁵⁴ See Lowensohn, *supra* note 62.

¹⁵⁵ *Id.*

¹⁵⁶ Kennedy, *supra* note 3.

¹⁵⁷ See *infra* notes 159–62.

person to assume the user's identity.¹⁵⁸ When looking at a business's reputation, "consumer trust is the key to success"¹⁵⁹ and therefore, businesses have an incentive to provide a secure environment where its users can trust that their accounts will not be fraudulently accessed. Those in control of a user's password can "wreak havoc on their cyber life."¹⁶⁰ This consideration is precisely what motivates service providers in drafting such restrictive terms of use.¹⁶¹ Often, these terms expressly prohibit access of one account by another.¹⁶² As it stands today, service providers are rewarding those who explicitly violate their terms by providing access to those who have assumed the user's identify,¹⁶³ despite their cited concerns.¹⁶⁴ Although password-dependent solutions may provide temporary relief, continued use of this approach is likely to increase the current tension.

IV. ANALYSIS

A. Legislation Is Necessary Due to the Ineffective Solutions Offered by Service Providers, State Statutes, and the Private Market

Service providers, current state legislation, and the market have failed to offer an effective solution for protecting digital assets at death.¹⁶⁵ Proposed solutions that are password-dependent are shortsighted and insufficient because they fail to recognize the underlying privacy and confidentiality concerns that often conflict with a user's interest in

¹⁵⁸ A personal representative who obtains Facebook log in information from a service such as Legacy Locker or Entrustet is in direct violation of Facebook's terms of service which requires users to agree that they "will not share [their] password" or "let anyone else access [their] account." *Statement of Rights and Responsibilities*, *supra* note 36.

¹⁵⁹ Hillman, *supra* note 46, at 846.

¹⁶⁰ See Herbst, *supra* note 1, at 23–24.

¹⁶¹ See *supra* Part II.B.

¹⁶² See, e.g., *Statement of Rights and Responsibilities*, *supra* note 36 ("You will not share your password, . . . let anyone else access your account, or do anything else that might jeopardize the security of your account."); *MYLEGAL.Com Terms of Service*, MYLEGAL.COM, <http://www.mylegal.com/TermsOfUse.aspx> (last visited Feb. 13, 2012) ("Only one Member can use one Member name and password and, thus, one account. Doing so [e]nsures that only you will be able to access your account on the Site.").

¹⁶³ See *supra* note 158.

¹⁶⁴ See Herbst, *supra* note 1, at 21.

¹⁶⁵ See *supra* Part III.

protecting the assets.¹⁶⁶ In view of the rapid growth and uncertainty in this area,¹⁶⁷ a long-term solution is necessary.¹⁶⁸

Contracts alone cannot, by their very nature, provide for all the legal needs of online communities.¹⁶⁹ Further, boilerplate provisions (often not even read by users) should be barred from rewriting probate laws that would otherwise govern whether a particular asset is inheritable.¹⁷⁰ Unless individuals fail to specify where they want their property to go when they die, contracts abrogating those rights should be disregarded.¹⁷¹ Conversely, “service providers need legal stability and certainty to design effective services and to craft enforceable contracts.”¹⁷²

Helping to frame the call for legislation is the keen observation made by Professors Darrow and Ferrera that “[i]n the absence of legislation, . . . service providers have the upper hand in disputes with account holders and the heirs of deceased account holders.”¹⁷³ Echoing Professors Darrow and Ferrera’s call for legislation is insight from Olivia Truong that “[c]ontractual agreements that take away individual’s rights should be secondary to an individual’s desire to do what he wants with his property.”¹⁷⁴ Individuals should be able to transfer the value housed in their digital assets¹⁷⁵ because, to some extent, it is a type of investment created by the user.¹⁷⁶

Due to the strong and growing prevalence of online networks, courts will necessarily need to “address the networks’ inner dynamics.”¹⁷⁷ In light of the complexities of the various networks’ inner workings and the growing value in digital assets, legislation should provide the courts with a workable solution to consult when confronted with these issues.

¹⁶⁶ See *supra* Part III.C.

¹⁶⁷ See *supra* Part II.A.

¹⁶⁸ See Darrow & Ferrera, *supra* note 11, at 314.

¹⁶⁹ Fairfield, *supra* note 99, at 427.

¹⁷⁰ Darrow & Ferrera, *supra* note 11, at 314.

¹⁷¹ Truong, *supra* note 14, at 80.

¹⁷² Blazer, *supra* note 44, at 154.

¹⁷³ See Darrow & Ferrera, *supra* note 11, at 295.

¹⁷⁴ Truong, *supra* note 14, at 79.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 78.

¹⁷⁷ Zarsky, *supra* note 27, at 743.

B. What the Proposed Legislation Can Accomplish

1. Shared Interests of Service Providers and Users

The proposed legislation “must not only balance the interest of users against the interest of other users; [it] must also balance the interests of users against the interests of service providers.”¹⁷⁸ Although it may seem that the interests of users and service providers are in direct tension, a closer look reveals that they actually have a lot in common.¹⁷⁹

a. Privacy and Confidentiality

Both parties are interested in eliminating fraudulent access of user accounts.¹⁸⁰ When a third party has control over a person’s password they have the potential to destroy a user’s cyber life.¹⁸¹ Sometimes users create private accounts specifically under the assumption the accounts will remain private even when they die.¹⁸² In these instances, service providers want to protect user privacy interests by providing a secure environment where users can trust that their accounts will not be fraudulently accessed.¹⁸³ If the service provider develops a reputation for disclosing information that was meant to be private, future users may elect to choose other providers who will keep their information more secure.¹⁸⁴ Therefore, a closer look reveals a common desire to maintain certain accounts confidential and maintaining privacy.¹⁸⁵

b. Certainty

Without a change in the law, courts must conduct a challenging balancing test where they weigh the intent of the testator found in estate planning document against the enumerated terms of use signed by the testator at an earlier date.¹⁸⁶ In light of what one author has termed the

¹⁷⁸ Blazer, *supra* note 44, at 140.

¹⁷⁹ *Id.* at 156, 159.

¹⁸⁰ See *supra* text accompanying notes 159–60.

¹⁸¹ See Herbst, *supra* note 1, at 23–24.

¹⁸² See *supra* notes 72–75.

¹⁸³ Hillman, *supra* note 46, at 846.

¹⁸⁴ See, e.g., Nicholas D. Kristof, Op-Ed, *China’s Cyberdissidents and the Yahoos at Yahoo*, N.Y. TIMES, Feb. 19, 2006, at 13 (describing how the decision by Yahoo! to release e-mails to and from three Chinese dissidents led to “an Internet campaign to boycott Yahoo”).

¹⁸⁵ See Herbst, *supra* note 1, at 17.

¹⁸⁶ Atwater, *supra* note 5, at 413.

“notoriously fickle and rapidly shifting loyalties of Internet consumers,” it is in the interests of both the service provider and the consumer to quickly settle disputes over virtual property.¹⁸⁷ Therefore, businesses and individuals will have an incentive to create, use, and further generate valuable digital assets through these mediums if they know the assets will be protected.¹⁸⁸ The current “uncertainty must be clarified to provide security for [individuals’] private digital lives.”¹⁸⁹

2. *A Legally Recognized Authorization Requirement Resolves Users’ and Service Providers’ Shared Interests*

The right to pass on property to family members has been embedded in the Anglo-American legal system for centuries.¹⁹⁰ Legislation permitting the transferability of digital assets should require the same level of legally recognized authorization typically required by most probate courts. Under this standard, to convey intent, people could explicitly list their accounts in a will, or another similar document, designating their intentions next to each. This sort of online asset inventory would be a simple addition to the process one goes through in drafting a conventional will. Because legislation would require compliance by a service provider, only listing the username of the account would be necessary. Therefore, once an account was added, it would not require the same frequent and imperfect maintenance as that of a password-dependent solution.¹⁹¹ As is the case with traditional assets, it may require additions from time to time if new accounts are added or if intentions change. However, these occasional additions would be simpler than services like Legacy Locker and Entrustet, which require perpetually maintaining an accurate password database—a procedure described as “even less enticing than cleaning out the attic.”¹⁹² Additionally, it would not require an executor to assume the identity of the

¹⁸⁷ Blazer, *supra* note 44, at 154, 159–60.

¹⁸⁸ Gould, *supra* note 94, at 31 (“[F]ailing to meet modern expectations about . . . property rights will ultimately inhibit the real promise of creative expression and commerce growth that we see in the distance.”).

¹⁸⁹ Atwater, *supra* note 5, at 413.

¹⁹⁰ *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

¹⁹¹ *See id.* at 417.

¹⁹² Rob Walker, *Things to Do in Cyberspace When You’re Dead*, N.Y. TIMES MAG., Jan. 9, 2011, at 35.

decedent to access the account—potentially in violation of the terms of use.¹⁹³

Similarly, users can explicitly deny access to an account through instructions in their will. The will should specify how the digital assets are to be disposed of, including whether any copies are made, and who receives them. In sum, this approach accomplishes the shared interests of users and service providers by maintaining privacy in cases where an account is created with the expectation that it will remain private at death, while still allowing the opportunity to transfer the account content. Moreover, a showing of legally-recognized intent on the part of the decedent is desirable because it reconciles situations where states like Indiana have passed legislation requiring transferability without an opt-out provision.¹⁹⁴

Occasionally, an account holder may elect not to list an account in a will because they want to keep the mere existence of the account private.¹⁹⁵ Presumably, if heirs are unaware of the existence of an account, they will not be able to request access to it.¹⁹⁶ In the absence of a clear intent to choose to disclose an account, the default provisions of any terms of service making the account inaccessible to the decedent's survivors will control.¹⁹⁷ This would apply even if an account was not included in a will but was subsequently discovered by an heir.

Further, the privacy concerns associated with upholding the “agreed upon” terms should be outweighed by the user's intent before the user dies because legally recognized documents where an account is listed would most accurately and recently reflect the user's true intent.¹⁹⁸ This approach

¹⁹³ See, e.g., *Statement of Rights and Responsibilities*, *supra* note 36.

¹⁹⁴ See Herbst, *supra* note 1, at 21 (discussing a hypothetical in which the lack of an opt-out provision frustrates the intention to keep some accounts private after death); *supra* Part III.B.

¹⁹⁵ See *id.* at 24.

¹⁹⁶ See Martínez-Cabrera, *supra* note 20.

¹⁹⁷ Truong, *supra* note 14, at 79.

¹⁹⁸ See, e.g., *In re Estate of Ike*, 454 N.E.2d 577, 577 (Ohio Ct. App. 1982) (noting that a will is the only document allowable under Ohio law to show testamentary intent). *But see* UNIF. PROB. CODE § 2-510 (1990) (“A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.”). Presumably, the foregoing provision in states that have adopted the Uniform Probate Code would allow for incorporation of a list
(continued)

alleviates the privacy and confidentiality concerns of both sides because it merely requires a clear proof of intent rather than perpetual password maintenance or requiring someone else to assume the decedent's identity. Here, the individual with an actual interest in the property will draft the terms. This would be preferred to the service provider's boilerplate contract drafted and signed years before. If service providers are truly concerned about protecting their users, they should honor user requests upon legal proof of intentions. By defaulting to the terms of use in the event of an omission, this approach preserves service-providers' deference. Therefore, legislation mandating the transferability upon a showing of legally-recognized authorization reconciles service providers' and users' interests in privacy and certainty.

C. Implementing a Uniform Law

Because "state courts have more expertise in deciding probate questions,"¹⁹⁹ a uniform state law could provide an effective method to achieve the shared interests of individuals and service providers. The Uniform Law Commission (ULC) "keeps state law up-to-date by addressing important and timely legal issues."²⁰⁰ The Uniform Probate Code (UPC), a product of the ULC, "is a nationally recommended and up-to-date model for the improvement of state law relating to the succession of property at an owner's death, as controlled by will, intestacy statute, and the probate process."²⁰¹ The National Conference of Commissioners on Uniform State Laws (NCCUSL) "provides states with non-partisan, well-conceived, and well-drafted legislation that brings clarity and stability to critical areas of state statutory law" through the use of a commission of state-appointed commissioners who meet to draft various uniform laws.²⁰² One of the main functions of the UPC is to "align state inheritance law

of accounts, rather than inclusion in the will itself, facilitating privacy until the decedent's demise.

¹⁹⁹ *In re Estate of Threefoot*, 316 F. Supp. 2d 636, 642 (W.D. Tenn. 2004).

²⁰⁰ *About the ULC*, UNIFORM LAW COMMISSION, <http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC> (last visited Feb. 6, 2012).

²⁰¹ *Probate Code Summary*, UNIFORM L. COMMISSION, <http://www.nccusl.org/ActSummary.aspx?title=Probate%20Code> (last visited Feb. 6, 2012).

²⁰² *About the ULC*, *supra* note 200. "Each jurisdiction determines the method of appointment and the number of commissioners actually appointed [and m]ost jurisdictions provide for their commission by statute." *Id.*

closer to public expectations, as reflected by recent important changes in family and living patterns.”²⁰³

This mode of national legislation could help solve some of the jurisdictional issues and pick up where the state statutes have fallen short. Specifically, the UPC “sets forth efficient procedures for dealing with an estate with property located in two or more states.”²⁰⁴ NCCUSL’s work supports the federal system and facilitates the movement of individuals and businesses with rules that are consistent from state to state.²⁰⁵ The drafters include “practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments . . . to research, draft, and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.”²⁰⁶

Some consider proposed laws promulgated by the NCCUSL as “‘consistently higher’ in quality than federal legislation.”²⁰⁷ The ULC’s reform provisions have helped shorten and simplify the probate process.²⁰⁸ The ULC’s unique expertise in expediting the estate settlement process makes it an “ideal vehicle” for resolving the problems associated with transferring digital assets at death.²⁰⁹

I. Current Status

On July 8, 2011, the ULC received a proposal that would provide fiduciaries with authority to access online accounts and digital property during incapacity and after death.²¹⁰ The proposal reiterated the need for guidance in this uncertain area, the inadequacy of current state legislation, and the notion that a uniform law could be the solution.²¹¹ Even though the

²⁰³ *Probate Code Summary*, *supra* note 201.

²⁰⁴ *Id.*

²⁰⁵ *About the ULC*, *supra* note 200.

²⁰⁶ *Id.*

²⁰⁷ Darrow & Ferrera, *supra* note 11, at 318 (quoting Lawrence J. Bugge, *Commercial Law, Federalism, and the Future*, 17 DEL. J. CORP. L. 11, 23 (1992)).

²⁰⁸ *Probate Code Summary*, *supra* note 201.

²⁰⁹ *Id.*

²¹⁰ *Annual Meeting of the Committee on Scope and Program*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Shared/Minutes/scope070811mn.pdf> (last visited Jan. 20, 2012).

²¹¹ *Id.* (“When an individual dies or becomes incapacitated, fiduciaries need to find, access, value, protect, and transfer the individual’s valuable or significant property A
(continued)

proposal did not pass, the ULC recommended and later formed a Study Committee to investigate the topic.²¹²

2. *Transaction Costs Involved in Implementation*

The value and certainty gained by permitting the transferability of digital assets would outweigh the costs associated with compliance by service providers.²¹³ However, some service providers have millions of users²¹⁴ and may have a legitimate concern with an obligation to comply with an overwhelming number of requests. Requiring service providers to comply may force them to hire staff whose main function is to locate and transfer copies of the assets to a personal representative.²¹⁵ Considering these increased costs, and the fact that the deceased user failed to back up the information prior to death, it may be appropriate to require the decedent's estate to bear the transaction costs associated with the transfer.

The proposed procedure would be analogous to a doctor-patient relationship where the medical records belong to the patient, but it is the doctor who maintains possession.²¹⁶ If a patient desires a copy of medical records, the patient may properly be assessed the cost of retrieving,

uniform law would provide clear rules and guidance for both fiduciaries and online providers.”).

²¹² *Id.*; *Meeting of the Executive Committee Minutes*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/shared/docs/executive/ExecMin071111.pdf> (last visited Jan. 20, 2012) (passing resolution to form the Study Committee).

²¹³ *See* Gould, *supra* note 94, at 8, 31.

²¹⁴ *See, e.g., Statement of Rights and Responsibilities*, *supra* note 36.

²¹⁵ Allowing a personal representative access to an account is a presumably simple procedure that would be minimal when compared to other legal expenses incurred by service providers. For example, in 2006, Google set aside \$200 million in anticipation of copyright lawsuits arising from YouTube alone. *See, e.g., Larry Dignan, Google Sets Aside YouTube Fund, May Need More if Howard Stern Calls*, ZDNET (Nov. 15, 2006, 7:53 PM), <http://www.zdnet.com/blog/btl/google-sets-aside-youtube-fund-may-need-more-if-howard-stern-calls/3958>.

²¹⁶ *See, e.g., OHIO REV. CODE ANN. § 3701.74(B)* (West 2011). A patient who wishes to obtain a copy of a medical record should submit a request and the health care provider shall permit the patient to examine or provide a copy of the record. *Id.* The service provider shall provide a copy of that record and can require the patient to pay the costs associated with retrieval in accordance with section 3701.741. *Id. See also* Joy Pritts, *Your Medical Record Rights in Ohio*, 1 (2005), available at <http://ihcrp.georgetown.edu/privacy/stateguides/oh/oh.pdf>.

copying, and sending the copy from the health care provider.²¹⁷ Similarly, in an attorney-client relationship, the client owns the files while the attorney maintains possession.²¹⁸ If the client wants the files, the attorney must comply.²¹⁹

The more users a service provider has, the more requests it is likely to receive. However, these increased costs could be gradually offset with a nominal fee paid by the estate. Further, although a person might have dozens of online accounts, it is unlikely that more than a few would have enough valuable information to make them worthwhile for the estate to pursue. Therefore, shifting the financial burden of the transaction costs to the estate would ease the burden imposed on service providers and aid legislative implementation.

3. *Alternative Approach: An “Opt-In” Requirement*

If the transaction costs are deemed too onerous, an opt-in alternative may alleviate the burden of compliance. Although this approach would not require retroactive modification of existing contracts, many of the current problems will still arise. After users create accounts, their desires are likely to change over the course of their lifetime until their death. At a minimum though, service providers should be required to allow users to choose whether their account content is to be transferable upon death.

D. A Similar Approach Has Been Effectively Implemented with Domain Names

The Internet Corporation for Assigned Names and Numbers (ICANN)—the entity “responsible for managing domain names and IP addresses”—recently made domain names transferable upon “express authorization from the grantor.”²²⁰ The “Inter-Registrar domain name transfer processes [is designed to] be clear and concise in order to avoid

²¹⁷ Pritts, *supra* note 216.

²¹⁸ *Cf.*, OHIO PROF. COND. RULE 1.17(e)(3) (discussing mandatory disclosure to a current or former client by an attorney purchasing another lawyer’s practice that “[t]he client[] [has the] right to . . . take possession of [their] case files”).

²¹⁹ *Id.* See, e.g., Cincinnati Bar Ass’n v. Selnick, 759 N.E.2d 764, 771 (Ohio 2001) (describing a case which permanently disbarred an attorney for, among other things, failing to return his clients’ files).

²²⁰ Truong, *supra* note 14, at 82.

confusion.”²²¹ Similar to what is proposed in this article,²²² ICANN also requires the entity making the request to demonstrate that it is legally authorized to do so.²²³ Digital assets deserve the same treatment.²²⁴

ICANN acknowledges that instances of fraud and mistake may still arise and therefore sets forth a predictable and cost-efficient dispute resolution procedure for this contingency.²²⁵ The Registry Operator can undo a transfer if the Registry Operator receives notice “that the transfer was made by mistake or otherwise not in accordance with the [proper] procedures” or upon receipt of a “final determination of a dispute resolution body having jurisdiction over the transfer, or [an] Order of a court having” such jurisdiction.”²²⁶ A similar procedure in the context of digital assets may also alleviate concerns about fraudulently obtained access.

V. CONCLUSION

The rapid growth of technology and the Internet has allowed society to create tremendous value in the form of digital assets.²²⁷ However, the current complexities in acquiring digital assets at death are increasingly forcing individuals and businesses to forfeit this value.²²⁸ These complexities are a direct result of the restrictive terms drafted by service providers that intend to protect the privacy of users, but are often in direct conflict with the intentions of the decedent.²²⁹ Service providers and current state laws have failed to offer an effective solution.²³⁰ Further, the

²²¹ *Policy on Transfer Registration Between Registrars*, ICANN <http://www.icann.org/en/transfers/policy-en.htm> (last visited Feb. 13, 2012) (“Registrars should make reasonable efforts to inform Registered Name Holders of, and provide access to, the published documentation of the specific transfer process employed by the Registrars.”).

²²² See *supra* note Part IV.B.2.

²²³ See *Policy on Transfer Registration Between Registrars*, *supra* note 221 (“[A]cceptable forms of physical identity are: Notarized statement, Valid Driver’s license, Passport, Article of Incorporation, Military ID, State/Government issued ID, Birth Certificate.”).

²²⁴ Truong, *supra* note 14, at 83.

²²⁵ *Policy on Transfer Registration Between Registrars*, *supra* note 221.

²²⁶ *Id.*

²²⁷ See *supra* Part II.A.

²²⁸ See *supra* Part III.A.

²²⁹ See *supra* Part II.C.

²³⁰ See *supra* Parts III.A and III.B.

password-dependent approach offered by the emerging market is likely to compound the current tension.²³¹

As the world becomes more dependent on technology, courts will increasingly be called on to balance the interests of users against service providers, and would benefit from legislative guidance.²³² Mandating the transferability of digital assets upon a showing of legally recognized authorization reconciles service providers' and users' interests in privacy and certainty.²³³ A uniform state law could provide an effective method of legislation and help solve jurisdictional issues—one area where recent state statutes have fallen short.²³⁴ Ultimately, the proposed legislation will give individuals and businesses an increased incentive to further pursue value-creating opportunities,²³⁵ encourage service providers to draft less restrictive provisions,²³⁶ and assist estate planners in protecting the value of their clients' digital assets.²³⁷

²³¹ *See supra* Part III.C.

²³² *See supra* Part IV.A.

²³³ *See supra* Part IV.B.

²³⁴ *See supra* Part III.B.

²³⁵ *See supra* Part IV.B.

²³⁶ *See supra* Part IV.B.

²³⁷ *See supra* Part IV.B.1.b.