
WHAT HAPPENS WHEN WE DIE: ESTATE PLANNING OF DIGITAL ASSETS

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I. INTRODUCTION

When most people envision sorting through the belongings of departed loved ones, they imagine encountering old pictures, journals, letters, and knick-knacks. Due to the proliferation of digital technology, coupled with society's ever-increasing reliance on the Internet, that picture is rapidly changing.¹ Recent studies indicate that ninety-two percent of Americans have an online presence by the age of two.² As of January 2011, there were approximately five billion images on Flickr, hundreds of thousands of videos uploaded on YouTube per day, an endless supply of content from twenty million bloggers, 500 million Facebook users, and approximately two billion tweets per month.³ In addition to reviewing the journals and letters of deceased loved ones, people are increasingly faced with administering a loved one's digital assets.⁴

Digital assets include digital images from photographs, electronic bank and

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¹ Naomi Cahn, *Postmortem Life On-Line*, 25 PROB. & PROP. 36, 36-37 (2011).

² See e.g., Jeff Bertolucci, *Nine of Ten U.S. Kids Have Online Presence by Age Two, Study Says*, PC WORLD (Oct. 7, 2010, 2:45 PM), <http://commcns.org/SQmMdD>. "In the [United] States, 92 percent of children have a digital presence by age two, compared to 73 percent in the EU5," which includes the United Kingdom, France, Germany, Italy, and Spain. *Id.* In another recent study, only 29 percent of adults age 71 or older use the Internet, compared with "almost 80% among the Baby Boom generation and [more than] 90% for those 30 and younger." Michael Walker & Victoria D. Blachly, *Virtual Assets*, ST003 A.L.I.-A.B.A. 175, 177 (2011).

³ Rob Walker, *Things to Do in Cyberspace When You're Dead*, N.Y. TIMES MAG., Jan. 9, 2011, at 32.

⁴ See Gerry W. Beyer & Naomi Cahn, *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, 26 PROB. & PROP. 40, 40-41 (2012).

investment account statements, e-mail records and associated passwords, and social media accounts such as Facebook, Linked-In, Twitter, and YouTube.⁵ The culmination of these digital assets forms a person's digital estate.⁶ Not surprisingly, given the ever-increasing role of digitalization in our daily lives,⁷ digital estate planning has become a major issue for estate planners.⁸ Still, only five states have laws governing digital estate planning.⁹ In order to adequately plan for the digital estates of Americans, the law must accommodate recent technological advancements.¹⁰ The establishment of a uniform set of laws will ensure that the digital assets of Americans are adequately protected.

Part II of this Comment provides a general overview of traditional estate planning. Part III then examines the practicalities of estate planning for digital assets. It will then evaluate the major issues associated with digital estate planning, beginning with the digital asset policies of various companies. Included in this analysis will be the general rationale underlying digital estate planning. Part IV will provide real-life examples of planning for digital assets and its effects on decedents' families. Part V will outline the state laws that currently provide for digital estate planning, highlighting the need to establish a set of uniform laws for digital assets that are tailored to the current digital age. Part VI explores efforts underway to create such uniform laws. Part VII discusses certain websites that seek to help people plan for their digital estates. Part VIII delves into a discussion of the privacy issues and the implications that are raised by digital estate planning. Part IX will then examine how recent technological advancements, such as cloud computing, may affect planning for digital assets, as well as the policy implications of digital estate planning as a whole. Finally, this Comment concludes by evaluating the policy implications underlying the creation of a uniform digital estate planning law.

II. ESTATE PLANNING: A BACKGROUND

In order to fully analyze digital estate planning, it is useful to begin with a brief introduction to traditional estate planning, with a focus on basic principles and terminology. A review of the underlying principles of estate planning in general highlights the need for and importance of digital estate planning.

⁵ Walker & Blachly, *supra* note 2, at 177.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Alissa Skelton, *Facebook After Death: What Should the Law Say?*, MASHABLE (Jan. 26, 2012), <http://commcns.org/10BZYRX>. Oklahoma, Idaho, Rhode Island, Indiana and Connecticut have all enacted laws regarding digital estate planning. *Id.*

¹⁰ *See generally id.*

A. Traditional Estate Planning

An estate is defined as, “[t]he amount, degree, nature, and quality of a person’s interest in land or other property”¹¹ A person’s estate is comprised of his or her assets, which are defined as “[i]tem[s] that [are] owned and ha[ve] value.”¹² Thus, a person’s estate can be comprised of anything that a person owns, including real property, bank accounts, stocks, bonds, and various securities, life insurance policies, as well as personal property including automobiles, jewelry, and works of art.¹³ Therefore, estate planning is essentially comprised of the final steps that individuals take to ensure that their wishes are honored and that their loved ones are sufficiently provided for.¹⁴

A “decendent” is the deceased person whose estate is being administered.¹⁵ An “executor” is the person named in a decendent’s will to ensure that its provisions are properly managed.¹⁶ The executor carries out all aspects of the decendent’s will, ensuring that the final wishes of the decendent are respected.¹⁷ In the absence of a will, the court will appoint an “administrator” to manage the assets and liabilities of the intestate decendent.¹⁸ On the other side of the transaction, the person who “inherits real estate or personal property, whether by will or by intestate succession”, is commonly referred to as an “heir.”¹⁹ Similarly, the term “beneficiary” is used to reference the person for whom property is held in trust; in particular, the beneficiary is the person who is selected to gain from an “appointment, disposition, or assignment (as in a will, insurance policy, etc.),” or to benefit from a legal arrangement.²⁰ A person who acts on behalf of a beneficiary is labeled a “fiduciary.”²¹ Finally, a “power of attorney” is an

¹¹ BLACK’S LAW DICTIONARY 626 (9th ed. 2009).

¹² *Id.* at 134.

¹³ *What is Estate Planning?*, FINDLAW (Mar. 26, 2008), <http://commcns.org/WiC1bG>. A residual or residuary estate is “[t]he part of a decendent’s estate remaining after payment of all debts, expenses, statutory claims, taxes, and testamentary gifts . . . have been made.” BLACK’S, *supra* note 11, at 629.

¹⁴ FINDLAW, *supra* note 13.

¹⁵ BLACK’S, *supra* note 11, at 465. A decendent is officially defined as, “[a] dead person, esp[ecially] one who has died recently.” *Id.*

¹⁶ *Id.* at 651. A “will” is defined as “[t]he legal expression of an individual’s wishes about the disposition of his or her property after death; esp[ecially], a document by which a person directs his or her estate to be distributed upon death” *Id.* at 1735.

¹⁷ See STEPHEN G. CHRISTIANSON, *HOW TO ADMINISTER AN ESTATE: A STEP-BY-STEP GUIDE FOR FAMILIES AND FRIENDS* 11 (5th ed. 2004).

¹⁸ BLACK’S, *supra* note 11, at 52. “Intestate” means “[o]f or relating to a person who has died without a valid will” *Id.* at 898. Additionally, a “managing conservator” may be appointed by the court to “[m]anage the estate or affairs of someone who is legally incapable of doing so” *Id.* at 347. Furthermore, a “prepetition agent who has taken charge of any asset belonging to [a]debtor,” is referred to as the “custodian.” *Id.* at 441.

¹⁹ *Id.* at 791.

²⁰ *Id.* at 176.

²¹ *Id.* at 702. A fiduciary is required to act in the beneficiary’s interest “on all matters

instrument that gives someone the “authority to act as agent or attorney in fact for the grantor.”²²

Each role has a significant impact on the dynamic process of traditional estate planning. While digital estate planning includes all of these key players, the extensive technological advancements of the digital age have altered the core of the traditional “estate” or “asset.”

B. Digital Estate Planning

Currently, there is no universal definition of a digital asset or digital estate,²³ which can be troublesome for attorneys seeking to assist clients with digital estate planning.²⁴ According to one industry resource, the term “digital asset” encompasses e-mail, word processing documents, audio and video files, and images, which are stored on digital devices such as desktop and laptop computers, tablets, peripherals, storage devices, and mobile devices, without regard to the ownership of the physical device in which the digital asset is stored.²⁵ By contrast, a person’s “digital account” may consist of a variety of personal assets, including e-mail accounts, software licenses, social networking accounts, social media accounts, file sharing accounts, financial management accounts, and domain registration accounts.²⁶ Simply put, digital assets are the actual files, and digital accounts are the “access rights to files.”²⁷ This account/asset distinction can be critical; even if the files themselves are readily available, their management and transfer to an executor or agent may be subject to an Internet-based service agreement.²⁸

It may be helpful to think of digital assets in terms of four different categories: personal, financial, business, and social media.²⁹ Although there is some overlap, people often develop separate plans for the disposition of each asset

within the scope of their relationship” *Id.* More generally, a fiduciary is “one who owes to another the duties of good faith, trust, confidence, and candor” *Id.*

²² *Id.* at 1290.

²³ John Conner, Comment, *Digital Life After Death: The Issue of Planning for a Person’s Digital Assets After Death*, 3 EST. PLAN. & COMMUNITY PROP. L. J. 301, 303 (2011) (noting the absence of definitions in both Webster’s Dictionary and Black’s Law Dictionary).

²⁴ See Beyer & Cahn, *supra* note 4, at 41; Cahn, *supra* note 1, at 37-38.

²⁵ Evan Carroll, *Digital Assets: A Clearer Definition*, DIGITAL EST. RESOURCE (Jan. 30, 2012), <http://commcns.org/13IjL5>.

²⁶ *Id.* Additional personal assets that are encompassed by a digital account include domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, and affiliate programs. *Id.*

²⁷ *Id.*

²⁸ Beyer & Cahn, *supra* note 4, at 41. See also discussion *infra* Part III. A.

²⁹ Cahn, *supra* note 1, at 36-37.

category.³⁰ To elaborate, personal assets are files that are “typically stored on a computer or smartphone or uploaded onto a web site,” including photographs, videos, or even music playlists.³¹ Social media assets, on the other hand, generally entail social interactions with a network of people through various mediums, including websites such as Facebook and Twitter, as well as e-mail accounts.³² Financial assets may include bank accounts, Amazon accounts, PayPal accounts, accounts with other shopping sites, or online bill payment systems.³³ By contrast, business assets generally include customer addresses and patient information.³⁴

When administering digital assets for a decedent’s estate, there are eight steps that experts recommend fiduciaries take.³⁵ In addition to these eight steps, a fiduciary should also take care to adhere to common practices required by law when dealing with digital assets.³⁶ By following such steps, a fiduciary can begin to decrease the amount of hardship and stress associated with digital estate planning.³⁷

³⁰ *Id.* at 36.

³¹ *Id.*

³² *Id.* at 37 (noting that while these sites are used for messaging, but may also serve as storage for photos, videos, and other assets).

³³ *See id.* at 37.

³⁴ *See id.*

³⁵ Walker & Blachly, *supra* note 2, at 184-85. The eight steps are:

1. Seek the assistance of technical help if necessary.
2. Work on consolidating virtual assets to as few “platforms” as possible (e.g. have multiple e-mail accounts set to forward to a single e-mail account).
3. Obtain statements (or data) of the prior twelve months of the decedent’s important financial accounts.
4. Consider notifying the individual [sic] in the decedent’s e-mail contact list and other social media contacts.
5. Change passwords to those that the fiduciary can control (and remember).
6. Keep all account open for at least a period of time to make sure all relevant or valuable information has been saved and all vendors or other business contacts have been appropriately notified, and so all payables can be paid and accounts receivable have been collected.
7. Remove all private and/or personal data from online shopping accounts (or close them as soon as reasonably possible).
8. The fiduciary should plan on archiving important electronic data for the full duration of the relevant statutes of limitations.

Id.

³⁶ *Id.* at 184. For example, any virtual asset that has extrinsic value, like “a commercial website or online publication,” should be listed separately on an estate’s asset inventory list.

Id.

³⁷ *See generally id.* at 182-85.

III. CURRENT ISSUES WITH DIGITAL ESTATE PLANNING

A. Website Service Agreements

There are presently a host of issues associated with digital estate planning, particularly when dealing with service agreements. The service agreements of various companies play a large role in determining what happens to a decedent's digital estate. The problem arises from the fact that every company's service agreement is vastly different; thus, there is no uniformity in what happens to the information stored in a decedent's e-mail account versus his Facebook account.³⁸

1. E-mail Service Providers

Yahoo! considers a decedent's account to be private property, so the family members of a decedent must take legal action in order to receive desired e-mail account information.³⁹ Moreover, Yahoo! may permanently delete all of a decedent's accounts and their contents upon receipt of a death certificate.⁴⁰

Microsoft's Hotmail will honor requests to access or close a decedent's account so long as the requisite information is included; namely, a copy of the death certificate and documents verifying the requestor's relationship to the decedent (*i.e.*, benefactor, executor, next of kin).⁴¹ The Custodian of Records will then confirm the identity of the requestor, and subsequently mail a DVD containing the decedent's account information, including contacts and emails.⁴²

Google rarely allows the release of Gmail content to family members of a deceased account user.⁴³ In order to gain access to desired information, a fami-

³⁸ *See id.* at 178.

³⁹ *See id.*

⁴⁰ *See id.* Yahoo! expressly declares, "You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted." *Yahoo! Terms of Service*, YAHOO!, <http://commcns.org/11C2eYH> (last updated Nov. 24, 2008).

⁴¹ *Microsoft Next of Kin Process: What to Do in the Event of the Death or Incapacitation of a Loved One with a Hotmail Account*, MICROSOFT ANSWERS (Mar. 15, 2012), <http://commcns.org/U41SG3>; *see* Walker & Blachly, *supra* note 2, at 179.

⁴² MICROSOFT ANSWERS, *supra* note 41; *see also* Walker & Blachly, *supra* note 2, at 179. Once the decedent's heirs successfully assemble the documents, Hotmail's verification process is quick, taking no longer than three business days to complete. MICROSOFT ANSWERS, *supra* note 41.

⁴³ *Accessing a Deceased Person's Mail*, GOOGLE, <http://commcns.org/S95RkT> (last updated Nov. 8, 2012). Google explains that its strict stance on releasing decedent's account information stems from its keen awareness of "the trust users place in [Google]." *Id.*; *see*

ly member must submit a copy of his or her government-issued ID, the deceased user's death certificate, and a copy of an email received by the requestor from the decedent.⁴⁴ Upon receipt of this information, Google will conduct a preliminary review in order to determine whether the family members may complete further steps to receive the information.⁴⁵ While this process rarely results in obtaining the relevant information, Google reserves the right to terminate an account that has been inactive for a period of nine months.⁴⁶

2. Social Media Websites

Facebook is concerned with protecting a decedent account holder's privacy. Upon receiving notice that a user has passed away, Facebook puts the profile in "memorial state," such that certain profile sections are hidden from view.⁴⁷ That is, only the decedent's confirmed Facebook friends can locate and post on the decedent's profile.⁴⁸ This privacy setting allows friends and family members to post on the decedent's "wall" in remembrance, while preventing anyone from logging into the account.⁴⁹ Additionally, Facebook will remove a decedent's account from the site upon request by verified immediate family members.⁵⁰

Myspace does not allow a decedent's heirs to access his or her account.⁵¹ As

also Walker & Blachly, *supra* note 2, at 179.

⁴⁴ GOOGLE, *supra* note 43; see Walker & Blachly, *supra* note 2, at 179-80.

⁴⁵ GOOGLE, *supra* note 43.

⁴⁶ *Gmail Program Policies*, GOOGLE, <http://commcns.org/SQnI1w> (last updated Sept. 12, 2008).

⁴⁷ See Walker & Blachly, *supra* note 2, at 180. On Facebook a user's "profile" is called a "Timeline" which is defined as a user's "collection of . . . photos, stories, and experiences that tell [the user's] story." *Glossary of Terms, Timeline*, FACEBOOK, <http://commcns.org/SQnQy7> (last visited Nov. 10, 2012).

⁴⁸ See *What does memorializing an account mean? Does it deactivate or delete it?*, FACEBOOK, <http://commcns.org/VMzpFG> (last visited Dec. 23, 2012) (stating that the memorialized account retains the account's previous privacy settings, controlling who can and cannot view the profile).

⁴⁹ *Id.* A Facebook "wall" is the space on [a user's] profile where friends can post and share." *Glossary of Terms, Wall*, FACEBOOK, <http://commcns.org/WiD0IN> (last visited Nov. 10, 2012).

⁵⁰ *How do I report a deceased user or an account that needs to be memorialized or deleted?*, FACEBOOK, <http://commcns.org/WKP30e> (last visited Nov. 10, 2012).

⁵¹ See Walker & Blachly, *supra* note 2, at 180. MySpace allows the decedent's heirs "hav[ing] access to the [decedent's] email account tied to the Myspace profile" to retrieve the decedent's Myspace password, effectively giving the heirs backdoor access. *Browse by Topic*, MYSFACE, <http://commcns.org/Vrff2Y> (last updated July 9, 2012, 11:28 AM) [hereinafter MYSFACE] (in the search bar, search for "Deceased", then follow the "Deceased" hyperlink); see generally *Myspace.com Terms of Use Agreement*, MYSFACE (May 9, 2012), <http://commcns.org/Xdwamt>.

Myspace's terms of agreement imply, the profile dies with the user.⁵² That being said, Myspace will assist family members in preserving, deleting, or removing information from a profile, but it does not allow the family members to make these changes themselves.⁵³

Upon notification of a user's death, Twitter will remove the decedent's account from its "Who to Follow" suggestions.⁵⁴ Additionally, family members can contact Twitter to either delete the decedent's account entirely, or they may "obtain a permanent backup of the deceased user's public tweets."⁵⁵ Still, Twitter will not grant family members access to a decedent's account. If a family wishes to post last messages from the account, he or she must obtain the decedent's login information through individual means.⁵⁶

Lastly, heirs having power of attorney can access the decedent's YouTube account.⁵⁷

⁵² See Walker & Blachly, *supra* note 2, at 180. MySpace will, upon notification of the user's death, either preserve or remove the decedent's profile. MYSFACE, *supra* note 51.

⁵³ MYSFACE, *supra* note 51. Before Myspace will assist family members with either the preservation, deletion, or removal of the decedent's profile, the family members must send Myspace the death certificate and the decedent's Myspace ID. *Digital Afterlife – Planning Your Digital Legacy 101*, WORLD WITHOUT ME (Oct. 7, 2011), <http://commcns.org/13lkGHi>; see generally Walker & Blachly, *supra* note 2, at 180.

⁵⁴ See Jolie O'Dell, *What Happens to Your Twitter Account When You Die?*, MASHABLE (Aug. 10, 2010), <http://commcns.org/XGQkIf>. Twitter's "Who to Follow" suggestion box offers users personalized recommendations of other users to follow. *The Twitter Glossary*, TWITTER, <http://commcns.org/YbIn1N> (last visited Aug. 14, 2010); see also Adam Ostrow, *Twitter Starts Offering Personalized Suggestions of Users to Follow*, MASAHABLE (July 30, 2010), <http://commcns.org/UT2bAJ>.

⁵⁵ See O'Dell, *supra* note 54.

⁵⁶ See *id.*

⁵⁷ John Romano, *So What *Does* Happen to Your Digital Assets After You Die?*, DIGITAL BEYOND (Dec. 21, 2010), <http://commcns.org/10hesWg>. YouTube requires the following information before it will allow an authorized representative to access the decedent's account:

1. [The representative's] full name and contact information, including a verifiable email address.
2. The YouTube account name of the individual who passed away.
3. A copy of the death certificate of the deceased.
4. A copy of the document that gives [the representative] Power of Attorney over the YouTube account.
5. If [the representative is] the parent of the individual, please send [YouTube] a copy of the Birth Certificate if the YouTube account owner was under the age of 18. In this case, Power of Attorney is not required.

Id.; see also Walker & Blachly, *supra* note 2, at 181.

3. Websites Registered to the Decedent

Websites that are registered to the decedent are considered true assets; therefore, they transfer with the decedent's residual estate.⁵⁸

* * *

Ultimately, seemingly inconsistent service agreements further complicate the process of delineating digital assets. In determining which form of ownership governs the decedent's digital assets, it is necessary to articulate the difference between traditional property ownership rights and licensing rights.⁵⁹ If an online account takes the form of a traditional property interest, then the individual owns the account.⁶⁰ On the other hand, an online account that takes the form of a license typically terminates after death.⁶¹

Although some agreements limit access to the actual account owner—here, problematically the decedent—others grant exclusive ownership to the provider, such that content is non-transferable following the user's death.⁶² Some companies will share a decedent's password with a surviving family member, giving them access to account information and full use of the account itself.⁶³ Nonetheless, because such actions do not legally transfer the account, the question still remains as to who owns the account information.⁶⁴ There are even more questions surrounding the disposition of digital assets should the website shut down, expire, or disappear—who would own this information, the account holder or the company?⁶⁵

B. Online Demographics

Beyond online service agreements, several broader issues arise when planning for and administering digital assets. First, online demographics have played a large role in the trend towards digital estate planning.⁶⁶ It comes as no

⁵⁸ See Walker & Blachly, *supra* note 2, at 181; see also Jim Lamm, *Estate Planning For Domain Names*, DIGITAL PASSING (Sept. 2, 2010), <http://commcns.org/S977nT>; Yuki Noguchi, *Death Often Brings Disputes Over Online Lives*, NAT'L PUB. RADIO (May 11, 2009), <http://commcns.org/XhlQKR>.

⁵⁹ See Walker & Blachly, *supra* note 2, at 178.

⁶⁰ See *id.* at 178.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See generally *id.* at 178-82.

⁶⁴ See *id.* at 178-80; see also YAHOO!, *supra* note 40 (“You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.”).

⁶⁵ See Walker & Blachly, *supra* note 2, at 181.

⁶⁶ See Scott R. Zucker, *5 Reasons Digital Estate Planning Hasn't Caught On . . .*

surprise that the generation most concerned with creating an estate plan happens to be the least likely to use the Internet.⁶⁷ According to a recent industry survey, most clients who are interested in estate planning are in their sixties.⁶⁸ Meanwhile, the Pew Research Center confirms that adults in that very same age bracket use the Internet less than any other adult group.⁶⁹ Because people in the older generation are also the least commonly online, they do not have digital estates for which they need to be planning.⁷⁰

C. Purposeful delay of estate planning

As with traditional estate planning, there are many barriers to the adoption of proper digital estate planning.⁷¹ People generally avoid estate planning in both forms until an event relating to death occurs.⁷² In addition to this postponement, the sheer amount of work involved in tracking every online account and password presents a task that many people may consider too daunting to undertake.⁷³

D. Hesitation to rely on online services

Despite the proliferation of social media and digital storage technologies, many people, especially those in the older generation bracket, are hesitant to rely on online services to store information.⁷⁴ Instead, they often retain hard copies of documents and original film negatives to ensure the safety of critical information and photographs stored online.⁷⁵ As a result, these items are removed from the realm of digital estate planning and are adequately governed by standard estate planning laws and practices.⁷⁶ In extreme cases, people refuse to include sensitive information in emails or online accounts, which fur-

Yet, ZUCKER L. FIRM PLLC (July 30, 2011), <http://commens.org/UT2jQM>; *see also* Michael Robinson, *Your Digital Life Part 2 – Digital Estate Planning For Younger People*, THE LAW OFFICE OF MICHAEL ROBINSON, P.C. (Feb. 24, 2012) <http://commens.org/XhIXWG> (offering specialized advice to young adults regarding estate planning).

⁶⁷ *See* Zucker, *supra* note 66.

⁶⁸ Zucker, *supra* note 66; *see also* A LOOK INSIDE THE ESTATE PLANNING INDUSTRY, RESULTS OF THE 2008 WEALTH COUNSEL INDUSTRY TRENDS SURVEY 3 (2009).

⁶⁹ KATHRYN ZICKUHR, PEW RESEARCH CTR., GENERATIONS 2010, at 4 (2010), *available at* <http://commens.org/W2LaaI>; Zucker, *supra* note 66.

⁷⁰ Zucker, *supra* note 66.

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *See generally id.*

ther decreases their need for digital asset protection.⁷⁷

E. Limited Government Involvement

As previously mentioned, nominal governmental intervention regarding the issue of digital estate planning has created a barrier for those hoping to utilize it.⁷⁸ Due to the minimal number of lawsuits and disputes between families and online service providers, significant government action is not warranted.⁷⁹ In fact, only five states have enacted laws to address digital estate management.⁸⁰ Moreover, there is currently no uniform law governing the distribution of digital assets.⁸¹

F. Uncertainty on the part of attorneys

Finally, ambivalence in the legal profession has also delayed changes to meet the market demand for digital asset planning.⁸² Because some lawyers have been reluctant to embrace change, people are turning to software and other non-legal resources for answers to their digital asset questions.⁸³ In order to bring uniformity and continuity to digital estate management, it is necessary for the legal profession to undergo extensive alterations to traditional estate planning to keep pace with these technological changes.

IV. DIGITAL ESTATE PLANNING IN THE NEWS

In recent years, the failure of traditional estate planning to account for the rapid evolution of the digital economy has significantly impacted the average American.⁸⁴ In November 2004, less than two months after arriving in Iraq, Lance Corporal (L/Cpl) Justin Ellsworth was killed by a roadside bomb.⁸⁵ During his time in Iraq, L/Cpl Ellsworth exchanged emails with his parents, often using his Yahoo! webmail account.⁸⁶ According to his father, John Ellsworth,

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ Skelton, *supra* note 9. Oklahoma, Idaho, Rhode Island, Indiana, and Connecticut have all enacted laws regarding digital asset management. *Id.*

⁸¹ *Id.*

⁸² Zucker, *supra* note 66.

⁸³ *Id.*

⁸⁴ *See generally* Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning*, 24 QUINNIPIAC PROB. L.J. 376 (2011).

⁸⁵ *Who Owns Your E-mails?*, BBC NEWS (Jan. 11, 2005, 2:29 PM), <http://commcns.org/13109d7>.

⁸⁶ *Id.*

L/Cpl Ellsworth was keeping a journal to ensure that his generation, and the generations that follow have “actual words from somebody who was there [in Iraq].”⁸⁷ When John Ellsworth approached Yahoo! regarding access to his son’s e-mails, the company denied his request on the basis of privacy.⁸⁸ Despite the emotions at stake, Yahoo! adhered to its terms of service, which denied survivors the rights to the e-mail accounts of the deceased.⁸⁹ Eventually, the Ellsworth family filed suit, and, in April 2005, a Michigan probate judge ordered Yahoo! to release the contents of L/Cpl Ellsworth’s email account to his family.⁹⁰

A similar dispute arose in 2005 after twenty-two-year-old Loren Williams was killed in a motorcycle accident.⁹¹ Hoping to learn more about her son after his death, Loren’s mother Karen turned to Facebook.⁹² After finding her son’s password, Karen e-mailed the company requesting that administrators maintain the account in order for her to review his posts and comments by his friends.⁹³ Within two hours of Karen’s request, Facebook administrators had changed her son’s passwords, essentially locking her out of his account.⁹⁴ Karen subsequently filed a lawsuit against Facebook, and, after a two-year legal battle, Facebook granted her ten months of access to Loren’s account.⁹⁵ After this ten-month period, Loren’s Facebook profile was removed.⁹⁶

On December 18, 2011, twenty-year-old Anthony Cannata committed suicide.⁹⁷ Before deciding to take his own life, Anthony uploaded a photograph to his Facebook account that showed him “holding a gun to this mouth.”⁹⁸ After Anthony’s death, his family and friends petitioned Facebook to remove the photograph or grant them access to his account in order for them to remove it themselves.⁹⁹ However, because they faced obstacles to gaining access to Anthony’s account, this disturbing photograph remained online for more than a

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Yahoo! Will Give Family Slain Marine’s E-mail Account*, USA TODAY TECH (Apr. 21, 2005, 12:49 PM), <http://commcns.org/UT2r2A>.

⁹¹ *Karen Williams’ Facebook Saga Raises Question of Whether Users’ Profiles Are Part of ‘Digital Estates’*, HUFF POST TECH (Mar. 15, 2012, 5:57 PM), <http://commcns.org/1022IHS>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Steve Eder, *Deaths Pose Test for Facebook*, WALL ST. J., Feb. 11, 2012, at A3.

⁹⁸ *Id.*

⁹⁹ *See e.g.*, Jennifer Kabbany, *Grieving Mother Calls for Facebook Hotline*, NORTH COUNTY TIMES (Jan. 13, 2012, 6:00 PM), <http://commcns.org/13IjXI>.

month.¹⁰⁰ It was not until Anthony's mother sent Facebook a link to a local newspaper article about the story that the graphic photograph was removed.¹⁰¹

Families have encountered similar resistance even when the decedent is a minor.¹⁰² Eric Rash, a fifteen-year-old resident of Crewe, Virginia, committed suicide in January 2011.¹⁰³ Eric's parents did not know their son's Facebook password, but hoped to gain access to his account in order to look for clues regarding Eric's death.¹⁰⁴ Initially denied access to his account, Eric's parents were finally given access to his information after ten months of lobbying, but even then only received a copy of his account on a CD.¹⁰⁵ Facebook refused to divulge Eric's password, citing its own privacy policies and federal privacy laws.¹⁰⁶ Outraged with the situation, his parents have continued to lobby on his behalf for lawmakers to intervene.¹⁰⁷

The importance of digital estate planning is also evident in cases with more positive outcomes. On October 18, 2009, after updating his blog and sending some public tweets and a private message via Twitter, Mac Tonnies went to bed and died of cardiac arrest.¹⁰⁸ Mac was unmarried, had no children, and paid his bills by working day jobs.¹⁰⁹ He had, however, garnered a small but devoted audience through a blog he launched in 2003.¹¹⁰ Mac was an "extremely active" social media user and had ongoing friendships with many people that he had never met in person.¹¹¹

Mac's final blog post was a set of three images without any corresponding text.¹¹² It was not long before followers commented on the post inquiring why Mac had not blogged or tweeted in a few days.¹¹³ The news of Mac's death was later posted by an anonymous user, prompting a "back and forth" of blog commentary described as "a remarkable mix of tributes, grieving, and com-

¹⁰⁰ Eder, *supra* note 97.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Tracy Sears, *Eric Rash: Facebook Sends VA Family Information About Son's Page Before His Suicide*, WTVR.COM (Nov. 4, 2011, 8:27 AM), <http://commcns.org/WKPojn>; *see also* Eder, *supra* note 97.

¹⁰⁴ Eder, *supra* note 97.

¹⁰⁵ *Id.*; Sears, *supra* note 103.

¹⁰⁶ Eder, *supra* note 97.

¹⁰⁷ *Id.*

¹⁰⁸ Walker, *supra* note 3, at 30.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; Mac Tonnies, *Triptych #15*, POSTHUMAN BLUES (Oct. 18, 2009, 6:57 PM), <http://commcns.org/U439gb> (containing 426 comments reacting to Mac Tonnies' final blog post and the news of his subsequent death).

¹¹¹ Walker, *supra* note 3, at 30; *see e.g.*, *Mystery Death: Mac Tonnies*, 34, TWILIGHT LANGUAGE (Oct. 24, 2009), <http://commcns.org/XhmfwN> (blog tribute to Mac Tonnies by a fan whom had never met Tonnies in person).

¹¹² Walker, *supra* note 3, at 33; *see also* Tonnies, *supra* note 110.

¹¹³ Walker, *supra* note 3, at 33.

miseration.”¹¹⁴ Mac’s parents acknowledged the oddity of having no control over what was being said about their son online immediately following his death.¹¹⁵ Mac’s parents did not own a computer and, while close to their son, they did not understand or know anything about his digital presence.¹¹⁶

Since inheriting their son’s computer and learning to navigate the Internet, the Tonnieys have formed bonds with people who were emotionally touched by Mac’s blog and Twitter page, many of whom he had never met.¹¹⁷ Mac’s mother began reading through her son’s blog from its earliest postings, reviewing the posts and comments of Mac’s followers.¹¹⁸ Mac’s story demonstrates how a person’s digital presence can, after death, provide meaning to those still living.

Mac’s story underscores the need for better management of digital assets.¹¹⁹ Mac had a Flickr account, to which he potentially uploaded thousands of photographs.¹²⁰ However, since his account lapsed after his death, most of Mac’s pictures can no longer be viewed.¹²¹ If Mac’s parents were able to renew his Flickr account, they would have access to all of their sons’ photographs—no doubt treasured memories.¹²² Yahoo!, Flickr’s owner, does not allow families to either renew or delete a decedent’s account.¹²³ Without Mac’s password, his parents cannot access his account and cannot view his pictures.¹²⁴ Had these photos been kept in traditional albums in Mac’s bedroom, his parents would have had no problem accessing them. However, because they are online, Mac’s parents may never get to share in all of his memories.

Without a more uniform approach to dealing with digital assets, friends and families of decedents will continue to run into issues managing their loved ones’ digital estates. Because the companies that house the majority of people’s digital assets are located in, and serve clients in, multiple jurisdictions, uniformity in law is a dire need.¹²⁵

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 34.

¹¹⁸ *Id.*

¹¹⁹ *See id.*; accord Noam Kutler, Note, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641, 1643 (2011).

¹²⁰ Walker, *supra* note 3, at 34.

¹²¹ *Id.*

¹²² *See id.*

¹²³ *See* YAHOO!, *supra* note 40 (providing no right of survivorship or transferability upon death of a user).

¹²⁴ Walker, *supra* note 3, at 34.

¹²⁵ *See* Turney P. Berry, *Issues Under Consideration by the ULC, TR. & EST.*, Mar. 2012 at 12, 14.

V. CURRENT STATE LAWS

Five states currently have laws governing digital estate management: Oklahoma, Idaho, Rhode Island, Indiana, and Connecticut.¹²⁶ In structuring respective statutes, each state built upon the language of the states that had acted before it.¹²⁷

Connecticut was the first state to enact digital estate planning legislation, doing so in 2005.¹²⁸ The Connecticut statute refers to “electronic mail accounts” and “electronic mail service providers,” yet fails to speak to “blogs, online bank accounts, payment accounts, photo sharing accounts, or Facebook and other social accounts.”¹²⁹

Rhode Island and Indiana soon followed Connecticut, enacting their respective laws in 2007.¹³⁰ Rhode Island’s statute is similar to Connecticut’s, again only referencing “electronic mail providers,” “electronic mail accounts,” and only allowing for an executor to gain access to copies of the contents of the electronic mail account if a written request is made and an order of the probate court accompanies the request.¹³¹ Indiana’s statute builds upon the Connecticut model, providing that a “custodian” must give access to a representative of the decedent’s estate if a written request and court order are received.¹³² Indiana’s law, however, goes further by dictating that, “[a] custodian may not destroy or dispose of the electronically stored documents or information of the deceased person for two (2) years after the custodian receives a request or order”¹³³

In 2010, Oklahoma enacted its law, becoming the first to include, “social networking, microblogging, [and] e-mail accounts of the deceased.”¹³⁴ The Ok-

¹²⁶ Skelton, *supra* note 9.

¹²⁷ Cahn, *supra* note 1, at 38.

¹²⁸ Skelton, *supra* note 9; 2005 Conn. Acts 251-52 (Reg. Sess.) (codified at CONN. GEN. STAT. ANN § 45a-334a (West Supp. 2012)).

¹²⁹ Skelton, *supra* note 9.; *see* CONN. GEN. STAT. ANN § 45a-334a (West Supp. 2012).

The statute states:

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

Id.

¹³⁰ 2007 R.I. Pub. Laws 895-96 (codified at R.I. GEN. LAWS §§ 33-27-1 to -5 (2011)); 2007 Ind. Acts 970 (codified at IND. CODE ANN. § 29-1-13-1.1 (LexisNexis 2011)).

¹³¹ *See* R.I. GEN. LAWS § 33-27-3 (2011).

¹³² IND. CODE ANN. § 29-1-13-1.1 (LexisNexis 2011) (defining “custodian” as “any person who electronically stores the documents or information of another person”).

¹³³ *Id.*

¹³⁴ 2010 Okla. Sess. Laws 621-22 (codified at OKLA. STAT. ANN. tit. 58, § 269 (West

lahoma law gives more power to the executor of the decedent's estate, stating, "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."¹³⁵ Acknowledging that the law may conflict with some companies' terms of use, one of the law's co-sponsors shared his hope that, "[t]he law would remind the people of Oklahoma as they go about their estate planning that, in addition to their personal and real property, they should make plans for the vast amount of intellectual property we leave behind."¹³⁶

In 2011, Idaho amended its probate code, enhancing the powers of personal representatives to include digital estate administration.¹³⁷ Borrowing language from Oklahoma's statute, Idaho legislators simply added a paragraph to an existing code section to allow conservators 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."¹³⁸

As of January 2012, both Oregon and Nebraska's legislatures had begun discussions about digital estate planning.¹³⁹ The Nebraska legislation, modeled after the Oklahoma and Idaho statutes, proposes that the decedent's personal representative be granted access to and control over the decedent's digital assets, including social media and e-mail accounts.¹⁴⁰ The personal representative would have the ability to delete and otherwise modify any of the decedent's social media or e-mail accounts.¹⁴¹

As Oregon has yet to enact a digital estate law, some estate planners in Oregon have been directing clients to create a virtual asset instruction letter ("VAIL") and retain it in a safety deposit box.¹⁴² A VAIL identifies all of a

Supp. 2012)). "Microblogging is the practice of posting small pieces of digital content—which could be text, pictures, links, short videos, or other media—on the Internet." *7 Things You Should Know About Microblogging*, EDUCAUSE LEARNING INITIATIVE (ELI) (July 07, 2009), <http://commns.org/SQqbcg>. Twitter is one of the most popular microblogging services. Mark Glaser, *Your Guide to Microblogging and Twitter*, MEDIASHIFT (May 15, 2007), <http://commns.org/10C1rrE>.

¹³⁵ OKLA. STAT. ANN. tit. 58, § 269 (West Supp. 2012).

¹³⁶ *New Oklahoma Law Puts Control of Deceased's Social Media Accounts in Estate Executors*, INT'L BUS. TIMES (Dec. 2, 2010, 4:47 PM), <http://commns.org/SQqnZd>.

¹³⁷ 2011 Idaho Sess. Laws 144-46 (codified at IDAHO CODE ANN. § 15-3-715(Supp. 2012)).

¹³⁸ IDAHO CODE ANN. § 15-3-715(28) (Supp. 2012).

¹³⁹ Skelton, *supra* note 9.

¹⁴⁰ *See* L.B. 783, 102 Leg., 2d Sess. (Neb. 2012; *see also* Eder, *supra* note 97; Skelton, *supra* note 9).

¹⁴¹ Neb. L.B. 783.

¹⁴² *See* Skelton, *supra* note 9.

decedent's online accounts and assets and provides web addresses, user names, and passwords to give to a designated representative access to those accounts.¹⁴³ It is possible that this practice will play a role in shaping the language of the Oregon legislation.¹⁴⁴

VI. MORE UNIFORMITY IN THE FUTURE

The Uniform Law Commission (ULC) is a non-profit unincorporated association that provides states with “non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”¹⁴⁵ ULC members are attorneys, who are qualified to practice law, including practicing lawyers, judges, legislators, legislative staff, and law professors, who have been appointed by state governments.¹⁴⁶ The ULC's role is to “research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.”¹⁴⁷

In late January 2012, the ULC proposed creating a committee to study issues related to digital estate planning.¹⁴⁸ The committee would examine “fiduciary power and authority to access digital property and online accounts during incapacity and after death.”¹⁴⁹ Gene Henning, one of Minnesota's ULC commissioners, estimated that the ULC proposal would take “three years or more and will let estates gain access to the dead person's online property with ease—while also allowing you to have a say in how you want your digital assets to be handled after death.”¹⁵⁰

The ULC committee's proposed work would be invaluable to digital estate planning.¹⁵¹ If the ULC was able to propose a set of uniform laws that all states could adopt, the questions and confusion surrounding digital estate planning

¹⁴³ Walker & Blachly, *supra* note 2, at 183.

¹⁴⁴ See *Virtual Assets: Part I*, OR. EST. PLAN. AND ADMIN. SEC. NEWSL., Vol. XXIX, no. 1 (Est. Plan. and Admin. Sec. of the Or. State Bar), Jan. 2010, at 2, 5.

¹⁴⁵ *About the ULC*, UNIFORM L. COMMISSION, <http://commcns.org/WiERgJ> (last visited Nov. 10, 2012).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Gavin Johnson, *Who Can Access Your Digital Accounts When You Die?*, THE IVLG BLOG (Feb. 14, 2012), <http://commcns.org/V9X0BU>.

¹⁴⁹ See Skelton, *supra* note 9.

¹⁵⁰ Skelton, *supra* note 9.; see also Kelly Greene, *Passing Down Digital Assets*, WALL ST. J., Sept. 1, 2012, at B8 (noting the ULC is working on “a recommended statute that more states could adopt”).

¹⁵¹ Letter from Gene H. Hennig, Comm'r Unif. L. Comm'n, to Harriet Lansing, Chair, Unif. L. Comm'n Comm. On Scope and Program 1-3 (May 31, 2011) (on file with *CommLaw Conspectus*) (presenting a proposal to draft a uniform law for granting fiduciaries access to digital estates).

would slowly begin to disappear.¹⁵² People would no longer have to rely on companies' varying terms of use to determine how to manage digital assets, and there could be uniformity amongst states, which would ease the process for families who are not located in the same state as the decedent.¹⁵³ Still, even with the promise of uniformity from the ULC, there are issues facing digital estate planning.

VII. COMMERCIAL ALTERNATIVES FOR DIGITAL ESTATE PLANNING

Because legislation governing digital assets has been slow to materialize, private industry has capitalized on this legal gap and has begun to offer products as a work-around.¹⁵⁴ There are currently a host of websites that market their ability to help users plan for their digital assets.¹⁵⁵ These websites provide users the ability to store their digital assets and set up a means by which designated beneficiaries can gain access to those assets.¹⁵⁶ They encourage users to specify how their digital estate should be handled upon their death.¹⁵⁷ While these websites can be beneficial for people looking to plan for their digital afterlife,¹⁵⁸ experts note that users must be cautious when utilizing these services.¹⁵⁹

First, users are cautioned to be certain that they choose a reputable website, as giving sensitive information about one's digital existence could lead to the improper dissemination of entrusted personal information.¹⁶⁰ Second, people should keep in mind that "giving someone access to information about an asset is not the same as giving that asset to that individual."¹⁶¹

¹⁵² *Id.* at 1-3.

¹⁵³ *Id.* at 1-3.

¹⁵⁴ See Walker & Blachly, *supra* note 2, at 185 (discussing a "cottage industry" of digital asset storage services); see also Jessica Hopper, *Digital Afterlife: What Happens to Your Online Accounts When You Die?*, NBC NEWS (June 1, 2012), <http://commcns.org/YbIXg4> (describing how uncertainty has led to private sector solutions for passing on digital assets).

¹⁵⁵ See e.g., *Digital Death and Afterlife Online Services List*, DIGITAL BEYOND, <http://commcns.org/Ux5rn7> (last visited Nov. 10, 2012) (providing a list of online service providers specializing in digital asset planning). Such websites include SecureSafe and Legacy Locker. See Evan Carroll, *SecureSafe Acquires Entrustet*, DIGITAL BEYOND (Apr. 17, 2012), <http://commcns.org/SQr58E>; Walker & Blachly, *supra* note 2, at 185.

¹⁵⁶ See Walker & Blachly, *supra* note 2, at 185.

¹⁵⁷ See *id.*

¹⁵⁸ See *Features*, LEGACY LOCKER, <http://commcns.org/VMAfSY> (last visited Nov. 10, 2012); Evan Carroll, *Value Now, Value Later From DataInherit*, DIGITAL BEYOND (July. 18, 2010), <http://commcns.org/V9XbNr>.

¹⁵⁹ See Walker & Blachly, *supra* note 2, at 186.

¹⁶⁰ See *id.*

¹⁶¹ *Id.* at 185 (explaining that a will or trust should ultimately determine the disposition of assets and not an online service provider in possession of information about a digital

Some websites, such as Deathswitch.com, send e-mails with account information to a named beneficiary if the user does not respond to an “are you still alive” notice.¹⁶² If a user simply forgets to respond, then other people will gain access to his or her account even though the user is still alive.¹⁶³ Estate planners should keep in mind the multitude of legal and tax implications that might accompany digital estates.¹⁶⁴ Some websites refer to “electronic wills” when discussing digital assets.¹⁶⁵ People are urged to remember that in most states, “a will requires certain formalities . . . and the absence of these formalities can render one’s good intentions legally invalid.”¹⁶⁶

Finally, experts caution that many of these websites essentially provide an “online safety deposit box” while representing themselves as “digital afterlife planning sites,” which may lead to litigation in the future.¹⁶⁷ For example, using these services to transfer online accounts with actual financial worth, such as PayPal or Ebay accounts, could lead to litigation, as a decedent cannot simply use a website to “give” assets to a beneficiary following his or her death without a correctly executed estate planning document.¹⁶⁸

The Digital Beyond, a blog about maintaining digital assets, keeps a list of digital estate planning websites.¹⁶⁹ To date, the list includes forty providers offering digital death and afterlife services.¹⁷⁰ This is a testament to the growing popularity of planning for one’s digital estate.¹⁷¹ Still, even by planning ahead with digital estate websites, or even including instructions in a will about what is to happen to a digital estate, the family of a decedent might still run into privacy issues and terms of use problems.

VIII. PRIVACY ISSUES

The implication of privacy rights is a significant digital estate planning dilemma, as seen in the case of L/Cpl Ellsworth.¹⁷² If e-mail providers are forced

asset).

¹⁶² *Id.* at 186.

¹⁶³ *Id.*; see, e.g., Michael S. Rosenwald, *Web Sites Let Online Lives Outlast the Dearly Departed*, WASH. POST (Jan. 25, 2010), <http://commcns.org/10hgC8m>.

¹⁶⁴ Walker & Blachly, *supra* note 2, at 185.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; see also Beyer & Cahn, *supra* note 4, at 43.

¹⁶⁸ Walker & Blachly, *supra* note 2, at 186; see, e.g., David Shulman, *Estate Planning for Your Digital Life, or, Why Legacy Locker is a Big Fat Lawsuit Waiting to Happen* (March 21, 2009), <http://commcns.org/W2LWEC>.

¹⁶⁹ DIGITAL BEYOND, *supra* note 155.

¹⁷⁰ *Id.*

¹⁷¹ See Hopper, *supra* note 171; cf. Walker & Blachly, *supra* note 2, 186 (discussing the creation of “digital cemeteries”).

¹⁷² See *supra* notes 84-90 and accompanying text.

to give decedents' family members access to personal accounts, there will be great tension between the rights of the family and the e-mail provider's obligation to protect an individual's privacy after death.¹⁷³ Likewise, this raises questions as to a decedent's individual privacy and property rights.¹⁷⁴

Today, many people share the intimate details of their lives through e-mail and social media accounts, such as Facebook. If a person dies intestate, should his or her next of kin have the right to view the details of the decedent's personal life on "the basis that the messages should pass through intestacy in the same manner as other property?"¹⁷⁵ Web companies are sure to draw a clear distinction between access to an account itself and access to the contents of an online account.¹⁷⁶ Web companies' terms of service often state "the account itself is not transferrable or only transferrable with permission."¹⁷⁷ Likewise, most companies will not reveal or reset a decedent's password, so family members are not able to fully access the account itself, unless they know the decedent's password.¹⁷⁸

Not granting a decedent's family control of the account does not diminish the sentimental value that is gained from allowing access to the contents of the account.¹⁷⁹ Still, terms of use contracts at most major web companies specifically prohibit anyone else from being able to access a person's account.¹⁸⁰ Additionally, all fifty states and the federal government have enacted laws that penalize unauthorized access to types of private or protected personal data.¹⁸¹

Some legal experts believe that the terms of service which users agree to when signing up for social media sites could take precedent over current state laws.¹⁸² Lawmakers have expressed concern that there is a risk in creating laws that are "toothless."¹⁸³ As was previously discussed, when Facebook denies access to an account, it cites various state and federal laws, including the federal Electronic Communications Privacy Act.¹⁸⁴ Additionally, Richard Down-

¹⁷³ See Hopper, *supra* note 171.

¹⁷⁴ *Id.*

¹⁷⁵ Justin Atwater, Note, *Who Owns E-mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life?*, 2006 UTAH L. REV. 397, 404 (2006).

¹⁷⁶ See Jim Lamm, *Planning Ahead for Access to Contents of a Decedent's Online Accounts*, DIGITAL PASSING (Feb. 9, 2012), <http://commcns.org/V9XfwO>.

¹⁷⁷ *Id.*

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² Eder, *supra* note 97.

¹⁸³ *Id.*

¹⁸⁴ *Id.* ("[T]he federal Electronic Communications Privacy Act . . . generally forbids [Facebook] from 'providing access to any person who is not an account owner.'"); *see* Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2702 (2006) ("[A] person or entity providing an electronic communication service [or remote computing service] to the public

ing, Deputy Chief of the Department of Justice's Computer Crime and Intellectual Property Section testified before Congress on November 15, 2011, stating that the Computer Fraud and Abuse Act "permits the government to charge a person with violating the CFAA when that person has exceeded his access by violating the access rules put in place by the computer owner and then . . . obtains information."¹⁸⁵

A 2009 Michigan criminal decision highlights how computer fraud statutes can hamper digital estate transfers. From July 2009 through August 2009, Leon Walker, of Rochester Hills, Michigan, accessed the password-protected Gmail and Yahoo! e-mail accounts of his estranged wife without her permission.¹⁸⁶ Based on preliminary hearings, a Michigan trial court determined that there was sufficient evidence to charge Mr. Walker with violating Michigan's computer fraud statute,¹⁸⁷ which states, "[a] person shall not intentionally and without authorization or by exceeding valid authorization do any of the following: (a) Access or cause access to be made to a computer program, computer, computer system, or computer network"¹⁸⁸ After a series of motions and interlocutory appeals, the Michigan Court of Appeals remanded the case back to trial court, affirming the lower court's decision stating that, "[t]he prosecutor presented sufficient evidence of each element of unauthorized access of a computer, MCL 752.795, to support the district court's decision to bind the defendant over for trial."¹⁸⁹

Beneficiaries to digital estates could potentially be viewed as accessing the decedent's online accounts in an unauthorized fashion.¹⁹⁰ Even people with express permission from a decedent to access accounts could be violating not

shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service [or which is carried or maintained on that service]") (emphasis added).

¹⁸⁵ *Cyber Security: Protecting America's New Frontier: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 14 (2011) (statement of Richard W. Downing, Deputy Chief, Computer Crime and Intellectual Property Sec., Crim. Div., U.S. Dep't. Of Justice), available at <http://commcns.org/XGRZgY>; see Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (2006) (making it unlawful to "intentionally access[] a computer without authorization or exceed[] authorized access, and thereby obtain[] . . . information from any [computer used in interstate or foreign commerce or communication] if the conduct involved an interstate or foreign communication").

¹⁸⁶ *Michigan v. Walker*, No. 304593, 2011 WL 6786935, at *1-2 (Mich. Ct. App. Dec. 27, 2011); see also Ann Zaniwski, *Rochester Hills Man Charged for Snooping On His Then-Wife's E-mail Weighs Options After Losing Appellate Bid*, OAKLAND PRESS (Dec. 28, 2011, 5:36 PM EST), <http://commcns.org/W95QdU>; Jeanne M. Hannah, *Updates Michigan in Family Law*, JEANNE M. HANNAH (Dec. 31, 2011), <http://commcns.org/S99RSt>.

¹⁸⁷ MICH. COMP. LAWS ANN. § 752.795 (West 2004).

¹⁸⁸ *Id.*; *Walker*, 2011 WL 6786935, at *8.

¹⁸⁹ *Id.* at *11.

¹⁹⁰ See Lamm, *supra* note 176.

only terms of use, but also privacy laws. If one plans ahead for incapacity or death and specifically authorizes someone to access his or her account after death, the question remains as to whether this would solve the problem of “unauthorized access.”¹⁹¹ Jim Lamm, editor of the blog Digital Passing, concedes that while this would clarify the decedent’s intent, it also raises a potential “second layer” to the problem of planning for digital assets.¹⁹² Lamm discusses that if the terms-of-use for e-mail and social networking sites prohibit someone from allowing anyone else to access his or her accounts, then it may not make a difference whether or not that person is authorized – they would still be violating the terms of use, and this could potentially be construed as “unauthorized access” under criminal laws.¹⁹³

IX. HOW WILL THE ADVANCEMENT OF TECHNOLOGY AFFECT DIGITAL ESTATE PLANNING?

In order to fully accommodate people’s needs, digital estate planning will need to advance with new innovations in technology.¹⁹⁴ One such advance that might play a role in digital estate planning is cloud computing.¹⁹⁵ Cloud computing allows users to have “every piece of data that [they] need for every aspect of [their] life at [their] fingertips and ready for use.”¹⁹⁶ Data is “mobile, transferable, and instantly accessible.”¹⁹⁷ Cloud computing allows a user to sync all of their data to many different devices and allows access to shared data (shared data being the data we access online in a number of places—such as “social networks, banks, blogs, newsrooms, paid communities, etc.”).¹⁹⁸

A user’s personal cloud can eventually connect with public clouds and other personal clouds.¹⁹⁹ This connectivity could raise interesting issues in digital

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *See id.* (referring to the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006), and MICH. COMP. LAWS § 752.795 (West 2004)).

¹⁹⁴ The wealth management and estate planning industries have already begun considering how to handle digital assets of monetary value. *See* BMO RETIREMENT INSTITUTE REPORT, ESTATE PLANNING IN THE 21ST CENTURY: NEW CONSIDERATIONS IN A CHANGING SOCIETY 1-2 (Apr. 2012), available at <http://commcns.org/10C27gs>.

¹⁹⁵ *See generally* CTR. FOR CREATIVE AND SOC. TECH., GENERATION CLOUD 5-7 (2011), available at <http://commcns.org/V8fn6z>.

¹⁹⁶ Rivka Tadjer, *What is Cloud Computing?*, PCMAG.COM (Nov. 18, 2010), <http://commcns.org/V8fqPM>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* The National Institute of Standards and Technology defines cloud computing as: “a model for enabling convenient, on-demand network access to a shared pool of configurable computer resources . . . that can be rapidly provisioned and released with minimal management effort or service provider interaction.” *Benefits of Cloud Computing for Digital Asset Management*, WIDEN (March 3, 2011), <http://commcns.org/VritUj>.

¹⁹⁹ Tadjer, *supra* note 196.

estate planning. In October 2011, the Centre for Creative and Social Technology (CAST) at Goldsmiths, University of London, released a study of Internet use in the U.K. entitled “Generation Cloud.”²⁰⁰ Generation Cloud determined that British users have at least GBP 2.3 billion worth of digital assets stored within the cloud.²⁰¹ Generation Cloud analyzed the data even further: 66% of respondents use the cloud without realizing it; 53% have “treasured possessions” in the cloud; and 11% have made or are planning to make provisions for their digital assets in their will.²⁰² Analysts see these results as a sign that the British are “more aware and concerned about passing on their digital assets” than people in America.²⁰³

X. NEED FOR UNIFORMITY

There is a demonstrated need for a uniform set of laws addressing digital estate planning. Although it is encouraging that states are beginning to create individual state laws to deal with problems, without a uniform set of laws enacted by all states, problems will continue to exist. Because online service providers serve clients in multiple states across the country, “the need for uniformity is clear and the demand for legal clarity increases every day.”²⁰⁴ If online service providers and online companies have to sort through the differing requirements of state-specific digital estate planning laws, they will be more likely to continue relying on the established state and federal privacy regimes.

Any uniform set of laws also needs to address the problem of privacy. As discussed, companies such as Facebook and e-mail providers not only have their own privacy policies included in their terms-of-use, but these companies’ business models are structured around complying with privacy laws.²⁰⁵ A uniform law needs to address privacy concerns in the context of a family needing access to the digital assets of a decedent. Privacy is obviously a major concern for users of sites, but when someone is deceased, the concern should shift to the friends and family of the decedent.²⁰⁶ With typical estate planning, the family is given access to items that the decedent may have deemed personal

²⁰⁰ CTR FOR CREATIVE AND SOC. TECH, *supra* note 195. The study was commissioned by cloud computing company Rackspace Hosting. *See id.* at 1, 17.

²⁰¹ *Id.* at 5.

²⁰² *Id.* at 5-6, 8.

²⁰³ *See Digital Estate Planning: Is the U.K. Ahead of the U.S.*, ZUCKER L. FIRM PLLC (Oct. 21, 2011), <http://commcns.org/S9af3l>.

²⁰⁴ *See Berry*, *supra* note 125, at 14.

²⁰⁵ *See FACEBOOK*, *supra* note 48; *Information we receive about you*, FACEBOOK, <http://commcns.org/YbJrmh> (last visited Nov. 10, 2012).

²⁰⁶ *See generally* Greene, *supra* note 150.

and private—such as pictures and journals. While considered private during the life of the decedent, these items can become important and personal to the family after death. Digital assets should not be treated differently.

The language of any uniform law should look to the laws that states have adopted.²⁰⁷ Connecticut, the first state to enact a digital assets law, did not include mentions of blogs, photo sharing accounts, or social media accounts.²⁰⁸ As these platforms have become more ubiquitous, states have made sure to include these platforms in their laws.²⁰⁹ Oklahoma, which enacted its law in 2010, was the first state to incorporate social networking and blogging in its law.²¹⁰ In 2011, Idaho followed suit,²¹¹ and a proposed bill in Nebraska includes language with reference to social media accounts.²¹²

Any proposed uniform law should be broad enough to account for technological advances that have not yet occurred, in addition to those that have become a part of daily life, including e-mail accounts, social media accounts, photo sharing sites, blogs, video upload sites, customer accounts (such as E-bay or Amazon), online banking, and music accounts.²¹³ By first defining what a digital asset is, the law would provide scope as to what constitutes a digital estate and should be broad enough to incorporate new forms of technology which will undoubtedly work their way into daily life. What needs to be avoided is drafting a law, such as Connecticut's, that is restricted to certain types of digital assets—namely, those available at the time the law was written. Because technology will continue to evolve—and people will die—a law that can evolve along with technology is truly needed.

In addition to a uniform law, online service providers should include references to any such law in their terms of use. If the new uniform law incorporates privacy concerns into its language, online companies may be more apt to defer to it, rather than existing privacy laws. Online companies should ensure that their terms of use and privacy terms are amended to specifically detail what can happen to an account when a user dies.

XI. CONCLUSION

Our daily lives have changed. Instead of sending letters, writing in paper

²⁰⁷ See *supra* Part V.

²⁰⁸ See *supra* notes 128-29 and accompanying text.

²⁰⁹ See *supra* notes 134-38 and accompanying text.

²¹⁰ See 2010 Okla. Sess. Laws 621-22 (codified at OKLA. STAT. ANN. tit. 58, § 269 (West Supp. 2012)).

²¹¹ See 2011 Idaho Sess. Laws 144-46 (codified at IDAHO CODE ANN. § 15-3-715(Supp. 2012)).

²¹² See L.B. 783, 102 Leg., 2d Sess. (Neb. 2012).

²¹³ See *generally* Skelton, *supra* note 9.

journals, and keeping photo albums on a bookshelf, people are more inclined to send e-mail, keep blogs, and upload pictures to social media accounts.²¹⁴ This means that when someone dies, a large portion of his or her life will no longer be tangible. Digital assets are becoming more and more important in our lives, and it is likewise becoming more and more important to deal with them after death.

There are currently many issues that stand in the way of successful digital estate planning.²¹⁵ Web service agreements that hinder access for friends and family to a decedent's accounts play a large role in creating issues with digital assets.²¹⁶ The fact that senior citizens are the people most likely to use standard estate planning and least likely to use the Internet has likewise created a barrier to digital estate planning becoming more ubiquitous.²¹⁷ Avoidance and fear of digital estate planning, as well as a limited government reaction, have all lent a hand to causing barriers to the management of digital assets.²¹⁸ Finally, ambivalence in the legal profession has also helped to create a host of issues standing in the way of truly successful digital estate planning.²¹⁹

There have been several examples in the news over the last few years of families and friends of decedents who have been thwarted in their attempts to fully administer a decedent's digital assets.²²⁰ People are being kept from the intimate details of a loved one's life—details that they would have access to if the assets were not stored online and under websites' terms of use. The law needs to evolve in order to ensure that these situations no longer occur.

There are currently five states with laws on the books regarding digital estate planning, and as each state has enacted a law, the law has evolved to include more and more technology.²²¹ The ULC has been tasked with creating a uniform law that could serve the entire country.²²² A uniform law is desperately needed, in order to combat issues such as privacy rights and service agree-

²¹⁴ See *supra* notes 1-4 and accompanying text.

²¹⁵ See *supra* Part III.

²¹⁶ See *supra* Part III.A.

²¹⁷ See *supra* Part III.B.

²¹⁸ See *supra* Parts III.C.–E.

²¹⁹ See *supra* Part III.F.

²²⁰ See discussion *supra* Part IV.

²²¹ See *supra* Part V.

²²² See *supra* Part VI; Press Release, Unif. L. Comm'n, New ULC Drafting Committees and Study Committees (Aug. 15, 2012), available at <http://commcns.org/S9as6D> (announcing the creation of the Drafting Committee on Fiduciary Access to Digital Assets).

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

Id.

ments of online companies.²²³ Currently, privacy laws are positioned to stand in the way of families of decedents who are trying to gain access to a decedent's online assets.²²⁴ The law needs to account for both privacy and computer fraud and access laws and, in effect, trump them in order to preserve the rights of decedents' friends and family when dealing with digital assets. The law should also address advances in technology, such as the cloud, to ensure that it the law remains relevant as technology continues to evolve.²²⁵ Enacting a law that would become obsolete with technological advances would be counterintuitive to the drive behind ensuring that digital assets are protected.

Hopefully, within the next few years a uniform law will be drafted and enacted by the states, allowing families to easily gain access to a decedent's digital estate. Once this law is in place, people can fully utilize the digitalization of the world that continues to increase each day—both during life and after it.

²²³ *See supra* Part VIII.

²²⁴ *See supra* Part VIII.

²²⁵ *See supra* text accompanying notes 207-213.