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## NOTE

### DIGITAL ASSETS AND INTESTACY

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#### INTRODUCTION

What types of property amount to digital assets? To whom do digital assets pass upon death? How might digital assets pass to heirs when a decedent's estate falls into intestacy due to lack of a probative will? These are some of the questions that plague estate planning in the contemporary world.<sup>1</sup> Currently, the generations most affected by digital asset transference are baby boomers and their heirs who are most likely to be passing without any provisions or instructions for transferring their online assets.<sup>2</sup> Today, approximately 26% of the United States' population is made up of baby boomers.<sup>3</sup> Since 2011, 78% of this generation are spending about \$650 per month on online purchases.<sup>4</sup> "Now, baby boomers spend more money on technology and spend more money online than any other demographic."<sup>5</sup>

This Note discusses the consequences for baby boomers and other individuals who are unaware of their digital assets, or who do not plan for digital asset transfer upon death, thereby leaving their heirs unable to access important accounts and transfer digital assets. Part II defines digital assets and discusses current issues surrounding them in intestacy. Next, Part III discusses existing laws relevant to digital assets. Part IV explains the case for intestacy legislation for digital assets. Finally, Part V analyzes alternatives to intestacy legislation for digital assets. This Note concludes by suggesting that, although

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<sup>†</sup> Thank you to Professor David J. Seipp for his guidance and support.

<sup>1</sup> See generally Scott L. David, *Interview: The Challenges of Estate Planning in the Digital Age*, 2006 PRIVACY & DATA SECURITY L. 415 (2006).

<sup>2</sup> Dan Barry, *Boomers Hit New Self-Absorption Milestone: Age 65*, N.Y. TIMES (Dec. 31, 2010), <http://www.nytimes.com/2011/01/01/us/01boomers.html> (archived at <http://perma.cc/87PV-HKZF>).

<sup>3</sup> *Id.*

<sup>4</sup> Leah Haynes, *The Digital Age of 55+ Targeted Media Has Arrived*, SPMG (Apr. 4, 2012), <http://spm360.com/2012/04/04/the-digital-age-of-55-targeted-media-has-arrived/> (archived at <http://perma.cc/6F7R-9PDC>).

<sup>5</sup> David Goldman & Charles Jamison, *The Future of Estate Planning: The Multigenerational Life Plan*, 5 EST. PLAN. & COMMUNITY PROP. L.J. 1, 9 (2012).

2015] *DIGITAL ASSETS AND INTESTACY*

there are available alternatives to safeguarding and planning for a digital estate, legislation regarding digital assets for an intestate estate is essential in order to allocate assets properly to potential heirs.

#### *DEFINING DIGITAL ASSETS*

##### What are Digital Assets?

Digital assets are, at minimum, information stored in an intangible medium on computers or other computer related technology.<sup>6</sup> They are accessed through a tangible piece of property such as a computer, hard drive, smart phone, or third-party server.<sup>7</sup> The prevalence of an individual's online presence can increase the number of assets available for transfer to heirs, thereby affecting access to valuable property. However, current law addressing the inheritance of digital assets in particular is scarce.<sup>8</sup> This problem is exacerbated when a person dies without a will. The up-and-coming use of electronic resources, including data and information systems as well as electronic communications, has a significant effect on estate planning in potentially decreasing access to these assets due to a lack of sufficient guidelines.<sup>9</sup> Estate planning attorneys are now frequently using questionnaires regarding a client's online presence as a means of addressing new issues arising in the digital age.<sup>10</sup>

An estate-planning attorney should consider a variety of digital assets. These include photographs, videos, e-mails, playlists, stored medical records, and tax documents.<sup>11</sup> Social media sites used to store photos and videos, such as Facebook and Twitter, can also produce digital assets.<sup>12</sup> Furthermore, assets that pertain to financial planning include online bill payment systems, online bank accounts, and sites such as PayPal or other shopping sites.<sup>13</sup> Lastly, digital assets include valuable blog and domain names, or stored assets relating to a commercial business such as client or customer information.<sup>14</sup>

Of the Internet users in the United States, 59% use at least one social networking site as part of their online experience.<sup>15</sup> The issue arising from

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<sup>6</sup> Jamie B. Hopkins, *Afterlife in the Cloud: Managing a Digital Estate*, 5 HASTINGS SCI. & TECH. L.J. 209, 211-12 (2013).

<sup>7</sup> *Id.* at 212.

<sup>8</sup> Naomi Cahn, *Postmortem Life Online*, 25 PROB. & PROP. 36, 36 (2011).

<sup>9</sup> *Id.* at 36-37.

<sup>10</sup> *Id.* at 36.

<sup>11</sup> *Id.* at 36-37.

<sup>12</sup> *Id.* at 37.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Keith Hampton et al., *Social Networking Sites and Our Lives*, PEW RESEARCH CENTER (June 16, 2011), <http://www.pewinternet.org/Reports/2011/Technology-and-social->

social networks is that a user's personal page is licensed by the networking site or becomes the property of the site once it has been uploaded to a profile.<sup>16</sup> Therefore, it is unclear whether individuals, or heirs, retain the same rights to manage or remove content once the social media user has passed.<sup>17</sup> Attorneys working in estate planning are now asking clients to consider the following: personal and business e-mails; attachments to e-mails; business websites; records of the sort that were formerly kept in a safe deposit box and are now stored online; digital pictures stored in your camera, on CDs or online; online brokerage or bank accounts; as well as libraries of music, movies, games, and software.<sup>18</sup> An additional problem arises in addressing where these assets are stored or accessed. This can be at home, at work, in handheld devices, in online accounts, or in any electronic source.<sup>19</sup> Furthermore, passwords created for these sites and devices can be challenging to obtain once the owner has passed. "The average individual has twenty-five passwords."<sup>20</sup> In general, people are encouraged to create strong passwords and never to write them down, which makes it difficult for loved ones to access digital assets upon the decedent's death.<sup>21</sup>

#### *What is the Importance of Transferring Digital Assets?*

The right to pass on property to family members has been embedded in the Anglo-American legal system for centuries.<sup>22</sup> "According to a 2011 survey from McAfee, American consumers valued their digital assets, on average, at almost \$55,000."<sup>23</sup> While some websites and social media platforms provide policies explaining what will become of a user's digital assets upon death, many do not.<sup>24</sup> In addition, many states have not enacted legislation regarding

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networks/Part-2/Demographics.aspx (archived at <http://perma.cc/35Z9-34ED>).

<sup>16</sup> Cahn, *supra* note 8, at 36.

<sup>17</sup> FREDERICK K. HOOPS ET AL., FAMILY ESTATE PLANNING GUIDE § 34:19 (4th ed. 2014).

<sup>18</sup> Holly K. Towle et al., *Estate Planning in a Digital Age*, CCH GUIDE TO COMPUTER LAW, No. 289, available at [http://www.klgates.com/files/Publication/babe2366-3d35-4a88-bc95-309d565ca4fb/Presentation/PublicationAttachment/c2c91b04-7c80-48af-a1b4-3501c3c92216/289\\_HKT\\_CCH.pdf](http://www.klgates.com/files/Publication/babe2366-3d35-4a88-bc95-309d565ca4fb/Presentation/PublicationAttachment/c2c91b04-7c80-48af-a1b4-3501c3c92216/289_HKT_CCH.pdf) (last visited Feb. 24, 2015) (archived at <http://perma.cc/C62X-MD7T>).

<sup>19</sup> *Id.*

<sup>20</sup> Rex M. Anderson, *Digital Assets in Estates*, ARIZ. ATT'Y, Mar. 2013, at 44, 44, available at <http://www.azattorney.com/azattorney/201303?folio=44#pg46> (archived at <http://perma.cc/9X2X-3VSE>).

<sup>21</sup> Dennis Kennedy, *Estate Planning for Your Digital Assets*, ABA L. PRAC. TODAY Mar. 2010, <http://www.abanet.org/lpm/lpt/articles/ft03103.shtml> (archived at <http://perma.cc/WV7F-7MJM>).

<sup>22</sup> *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

<sup>23</sup> Anderson, *supra* note 20, at 44.

<sup>24</sup> *Id.*

2015]

*DIGITAL ASSETS AND INTESTACY*

digital assets or the obligations and duties of service providers upon a user's death.<sup>25</sup> The lack of clarity in legislation regarding digital assets and intestacy presents unique problems for estate planning.

Another element of digital asset estate planning is inheritance of the ownership of a copyright, which is permitted by federal law.<sup>26</sup> "Although some digital transmissions may be worthless, such as unsolicited spam, e-mails, pictures, and videos on social networking sites are often 'original works of authorship fixed in [a] tangible medium of expression,' and thereby worthy of copyright protection."<sup>27</sup> Any digital assets to which the decedent held copyright would pass by intestacy as personal property under 17 U.S.C. § 201(d)(1).<sup>28</sup> Some relevant questions regarding the relationship between copyright and digital assets are: once copyright passes to heirs, what are the terms of licenses controlling digital assets? Who owns, hosts, controls or pays for the hardware or service storing digital assets? Intellectual property, such as photos on a Facebook account, is kept on the servers of service providers; who controls access to that property in the event of a user's death?<sup>29</sup> "Some service providers expressly disclaim ownership of the intellectual property, but others' terms of use make no distinction between the copy and the copyright in the work itself."<sup>30</sup> This Note will discuss the interaction between Internet business licenses, 17 U.S.C. § 201(d)(1), and digital assets in Part III.

*How Does Intestacy Relate to Transferring Digital Assets?*

Intestacy legislation is a default rule. The purpose of every state legislature when it changes or adds to its intestacy legislation is to arrive at the probable intent of the average decedent. Throughout the history of intestate succession, intestate laws have changed to reflect what most people are actually putting in their wills. Hierarchical and social forces exist which contribute to the prevalence of intestate estates. Some argue that there is an "intestate class," which is typically made up of certain demographic groups.<sup>31</sup> The majority of

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<sup>25</sup> *Id.* ("Only a minority of states have enacted legislation addressing access to a decedent's digital assets . . . Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, and whether the principal's death or incapacity is covered.")

<sup>26</sup> 17 U.S.C. § 201(d)(1) (2012).

<sup>27</sup> Tyler G. Tarney, Comment, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 CAP. U. L. REV. 773, 783 (2012) (quoting 17 U.S.C. § 102(a)).

<sup>28</sup> 17 U.S.C. § 201(d)(1) (2012).

<sup>29</sup> See Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns a Decedent's E-Mails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 281, 305 (2007).

<sup>30</sup> Tarney, *supra* note 27, at 783.

<sup>31</sup> Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 37, 54 (2009).

Americans are intestate, and minority status, age, education level, and income are all factors that bear upon whether a person takes the initiative to prepare a will.<sup>32</sup> “Although both [testacy and intestacy] generally result in an orderly disposition of property, testacy empowers the individual,” whereas state legislatures try to reflect the probable intent of the typical decedent in their intestacy legislation.<sup>33</sup>

As a general rule, an intestate statute provides that for a married person with no children, everything will go to the surviving spouse.<sup>34</sup> Consequently, intestacy may not be a desirable outcome for everyone, especially other family members of the deceased person. This is true of all assets, including those that make up a digital estate. When considering who makes up this “intestate class,” it is important to note that additional protections may be needed in intestacy statutes. A person with a low level of education may not be aware of intestacy laws, opportunities to create a will, and the consequences of not having a will. Further, such persons may not be aware of the extent of their online presence. Intestacy statutes with protection and guidance in this area could be essential to preserving the full value of digital estates.

Developing intestacy statutes that meet the needs or wishes of every individual is impossible.<sup>35</sup> However, it is necessary to create intestacy legislation that clarifies how intestacy relates to certain types of assets, namely those that arise from the new digital age. It is also necessary for intestacy statutes to reflect the evolving nature of estate planning. The importance of digital assets has increased very quickly, within the space of a single generation. There is not yet a standard norm defining how to bequeath digital assets in a typical way for decedents with wills, never mind for intestate decedents. A 2012 survey from RocketLawyer.com, a legal services website, found that 50% of Americans with children do not have a will.<sup>36</sup> The survey also found that 41% of baby boomers (age 55-64) do not currently have a will.<sup>37</sup> Furthermore, a significant number of people admit that they do not

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<sup>32</sup> *Id.* at 42, 54.

<sup>33</sup> *Id.* at 77.

<sup>34</sup> MASS. GEN. LAWS ch. 190B, § 2-102 (1) (2015).

<sup>35</sup> Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 1 (2000) (noting that “there are too many variations on what decedents want, too many family situations to consider and too many special circumstances surrounding individual decedents”).

<sup>36</sup> Lisa Scherzer, *Half of Americans with Kids Set to Die Without a Will*, YAHOO! FINANCE (May 6, 2012, 3:31 PM), <http://finance.yahoo.com/blogs/the-exchange/half-americans-set-die-without-193140015.html> (archived at <http://perma.cc/64YD-ZYZW>) (noting that “the top three reasons cited by survey respondents for not having a will [are] procrastination, a belief that they don’t need one and cost”).

<sup>37</sup> *Id.*

2015]

*DIGITAL ASSETS AND INTESTACY*

know what happens to their digital assets when they die.<sup>38</sup> Attempts have been made to reconcile traditional copyright, property, and contract laws with the ever-growing and evolving world of digital property, but none of the proposed solutions to the dilemma of transferring digital assets upon death have adequately addressed many digital purchases.<sup>39</sup> In keeping with the objective of legislatures to reflect the presumed intentions of typical decedents, legislators will have to confront the fact that most decedents are leaving digital assets, and that families have expectations about what will happen to these assets.

EXISTING LAW

Digital assets are constantly changing and evolving.<sup>40</sup> While a universally accepted model for disposing of digital assets using wills and trusts has not yet been accepted by attorneys who work in estate planning, some states have enacted laws on this subject.<sup>41</sup> These laws provide guidance where, in the past, a family member who accessed a decedent's digital assets, even with the decedent's permission, could potentially be violating federal law.<sup>42</sup> "Before the invention of the computer, the amount of property an individual could steal or destroy was, to some extent, determined by physical limitations."<sup>43</sup> On October 12, 1984, Congress passed the first federal statute prohibiting specific fraudulent acts involving the use of a computer.<sup>44</sup> This was the Computer Fraud and Abuse Act (the "CFAA"), which provides for fines or even imprisonment of persons who are convicted of "access[ing] a computer without authorized access or exceed[ing] authorized access."<sup>45</sup> 18 U.S.C. §

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<sup>38</sup> *Id.* (stating that "traditional estate planning doesn't take into account this emerging class of assets - and it's not just thinking about what you want to happen to your Facebook page or Match.com profile").

<sup>39</sup> See Quentin Fottrell, *Who Inherits Your iTunes Library?*, MARKET WATCH (Aug. 23, 2012, 4:56 PM), <http://www.marketwatch.com/story/who-inherits-your-itunes-library-2012-08-23?pagenumber=2> (archived at <http://perma.cc/Y3RC-L8JL>).

<sup>40</sup> See Hopkins, *supra* note 6, at 211-12.

<sup>41</sup> Gerry W. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 NAT'L ACAD. ELDER L. ATT'YS J. 135, 136 (2013).

<sup>42</sup> Kendal Dobra, *An Executor's Duty Toward Digital Assets*, PRAC. LAW., Oct. 2013, at 21, 24.

<sup>43</sup> Dodd S. Griffith, Note, *The Computer Fraud and Abuse Act of 1986: A Measured Response to a Growing Problem*, 43 VAND. L. REV. 453, 454 (1990).

<sup>44</sup> Joseph B. Tompkins Jr. & Linda A. Mar, *The 1984 Federal Computer Crime Statute: A Partial Answer to a Pervasive Problem*, 6 COMPUTER L.J. 459, 460 (1986); see Computer Fraud & Abuse Act of 1986, Pub. L. No. 99-474, § 2, 100 Stat. 1213 (codified as amended at 18 U.S.C. § 1030 (2012)).

<sup>45</sup> 18 U.S.C. § 1030(a)(2). The CFAA contains no specific exemption or authorization for heirs attempting to access a decedent's digital assets. See *id.*

1030(a)(5) was also amended “to further protect computers and computer systems covered by the statute from damage both by outsiders, who gain access to a computer without authorization, and by insiders, who intentionally damage a computer.”<sup>46</sup> So, although the CFAA is meant to protect peoples’ computers from damage and fraudulent access, it can also be applied to the collection and distribution of digital assets by accessing a decedent’s personal computer and personal accounts.

A Terms of Service Agreement (“TOSA”), made between service providers and users, may directly address who may access a digital asset.<sup>47</sup> “The agreements typically involve obligations regarding how the parties will settle disputes, licensing (and sub-licensing) of a user’s copyrighted work, restrictions on use of the website and of the site’s control, limitations on a website’s liability, and notifications regarding how the user’s personal information can be used.”<sup>48</sup> Case precedent holds that whether a customer reads an agreement or not does not change the outcome of a dispute over a TOSA.<sup>49</sup> The customer is still bound by the terms of the agreement.<sup>50</sup> Thus, although a decedent may not have been aware of agreeing to any terms of service, the TOSA will apply when a representative of an intestate estate attempts to collect and subsequently distribute any digital assets to heirs. Further, just as a living account owner may not be able to delete his or her account, a TOSA may even prevent a representative of an intestate estate or an heir from deleting a decedent’s account.<sup>51</sup> For example, Skype is a service provider with a TOSA that does not provide users with the option to delete their accounts.<sup>52</sup> Skype includes a provision on their TOSA advising users who wish to delete their accounts to delete all personal information; however, it is

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<sup>46</sup> Deborah F. Buckman, *Validity, Construction, and Application of Computer Fraud and Abuse Act (18 U.S.C.A. § 1030)*, 174 A.L.R. FED. 101, 113 (2001).

<sup>47</sup> Dobra, *supra* note 42, at 24. Additionally, “courts have held that a mere violation of a website’s TOSA can be a violation of the CFAA.” *Id.*

<sup>48</sup> Woodrow Hartzog, *The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?*, 15 COMM. L. & POL’Y 405, 406 (2010) (“These contracts are known as “browsewrap” and “clickwrap” agreements. A clickwrap agreement is electronically presented and requires an individual to click on a button indicating assent (agreement to the terms) prior to downloading software or accessing a website. Browsewrap agreements dictate that any additional “browsing” past the homepage constitutes acceptance of proposed terms located on the Web site.”).

<sup>49</sup> *Id.* at 407.

<sup>50</sup> *Burcham v. Expedia, Inc.*, No. 4:07CV1963, 2009 WL 586513, at \*4 (E.D. Mo. Mar. 6, 2009).

<sup>51</sup> See Victor Luckerson, *7 Surprising Things Lurking in Online ‘Terms of Service’ Agreements*, TIME (Aug. 28, 2012), <http://business.time.com/2012/08/28/7-surprising-things-lurking-in-online-terms-of-service-agreements/> (archived at <http://perma.cc/XCS2-5P3W>).

<sup>52</sup> *Id.*

not clear from the terms what Skype does with stored personal information.<sup>53</sup> Further, an Internet business can change its TOSA with or without notice,<sup>54</sup> creating added complications for an heir attempting to access or delete a family member's account.<sup>55</sup>

The bottom line is that a TOSA is a contractual agreement, and contract law is generally meant to protect the interests and expectations of the parties involved. The question is whether it “makes sense to enforce contracts against a party with no contractual expectations?”<sup>56</sup> If so, the decedent's heir and subsequent administrator of an intestate estate, both of whom had no intention of entering into a contract, would thus be barred from access to digital assets upon death. Legislators can learn why businesses want these provisions in their TOSAs and draft legislation to alleviate the concerns that cause these businesses to draft them.

Access to digital assets is governed not only by the terms of the individual contracts but also by federal statutes. The Stored Communications Act (the “SCA”)<sup>57</sup> protects the privacy interest of a user's stored communications by forbidding access by unauthorized users.<sup>58</sup> “[U]ncertainty over whether and when Internet users can retain a ‘reasonable expectation of privacy’ in information sent to network providers, including stored e-mails,” has led to confusion over whether files held by these providers retain this Fourth Amendment expectation.<sup>59</sup> In an attempt to alleviate this uncertainty, the SCA, through statutory law, protects information stored by network service providers by minimizing access to this information.<sup>60</sup> However, applying the SCA

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<sup>53</sup> *Id.* Additionally, “the blog platform WordPress offers no way to delete your account.” *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* “Some services, like Instagram, promise to inform users before a ‘material’ change to the terms is made.” *Id.* Others, like Yahoo, have no legal obligation to inform a user of a change to the TOSA. *Id.*

<sup>56</sup> Hartzog, *supra* note 48, at 408.

<sup>57</sup> This act has been called by many different names including the “Electronic Communications Privacy Act,” “Chapter 121,” the “Stored Wired and Electronic Communications and Transactional Records Access” statute, “Title II,” and the “Stored Communications Act.” Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1208 n.1 (2004). This Note refers to it as the “Stored Communications Act” or “SCA” for simplicity.

<sup>58</sup> Electronic Communications Privacy Act of 1986, Pub. L. 99-508, § 201, 100 Stat. 1848, 1860 (codified as amended at 18 U.S.C. § 2701 (2012)). The SCA, like the CFAA, does not specifically provide for or deny fiduciary access to the stored communications.

<sup>59</sup> Kerr, *supra* note 57, at 1210. The Fourth Amendment does not offer a strong privacy protection against Internet providers because they are private actors and commercial service providers, not government entities. *Id.* at 1212. *See, e.g.*, *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 456, 458 (E.D. Pa. 1996).

<sup>60</sup> Kerr, *supra* note 57 at 1212.

remains a challenge, and courts, legislatures, and legal scholars struggle to understand the statute.<sup>61</sup> A recent case, *In re Facebook*, exemplifies the modern challenge with accessing digital assets such as social networking sites and applying the CFAA and SCA to estate planning.<sup>62</sup> The court held that in order to uphold the privacy protections instilled by the SCA on service providers, civil subpoenas in general may not compel providers like Facebook to produce the records of a decedent.<sup>63</sup>

“The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) has formed a drafting committee tasked with preparing a uniform law pertaining to ‘Fiduciary Access to Digital Assets.’”<sup>64</sup> The NCCUSL discusses and debates which areas of the law require uniformity among the states and territories and drafts Uniform Acts accordingly.<sup>65</sup> However, the “authorized access” issues arising under the CFFA and the SCA are issues of federal law. The Fiduciary Access to Digital Assets Act, while not creating new law, proposes to “mend a large gap that prohibits fiduciaries from doing their legally mandated job,”<sup>66</sup> thereby causing the applicable law in the field of digital assets to be increasingly confusing and ambiguous.

Some states have enacted statutes to address the ambiguity.<sup>67</sup> The statutes can be divided into three generations based on the technology available at the

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<sup>61</sup> *Id.* at 1208.

<sup>62</sup> *See In re Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012) (examining a decedent’s family’s request for access to the decedent’s Facebook page in order to gain a better understanding of the decedent’s apparent suicide).

<sup>63</sup> *Id.* at 1206 (holding that Facebook could choose whether or not the decedent’s family had standing to “authorize” access on the decedent’s behalf, but declining jurisdiction on this issue).

<sup>64</sup> Anderson, *supra* note 20, at 44. This conference is “drafting amendments to the Uniform Probate Code, Uniform Trust Code, Uniform Guardianship and Protective Proceedings Act, and Uniform Power of Attorney Act.” *Id.* It is “addressing general definitions for digital property, setting sets [sic] out the right of the personal representative to take possession of the digital property, authorizing authorizes [sic] the personal representative to access and manage digital property, and establishing a special procedure for recovery of digital property.” *Id.*

<sup>65</sup> *National Conference of Commissioners on Uniform State Laws (NCCUSL)*, CORNELL UNIV. LAW SCH., [http://www.law.cornell.edu/wex/national\\_conference\\_of\\_commissioners\\_on\\_uniform\\_state\\_laws\\_nccusl](http://www.law.cornell.edu/wex/national_conference_of_commissioners_on_uniform_state_laws_nccusl) (last visited Feb. 24, 2015) (archived at <http://perma.cc/9GS9-DFEJ>). “The results of discussion in the NCCUSL are proposed to the various jurisdictions as either model acts (such as the Model Penal Code) or uniform acts (such as the Uniform Commercial Code).” *Id.*

<sup>66</sup> Victoria Blachly, *Uniform Fiduciary Access to Digital Assets Act What UFADAA Know*, PROB. & PROP. MAG., July - August 2015.

<sup>67</sup> *See Beyer & Cahn, supra* note 41, at 142-46.

time of enactment or proposal.<sup>68</sup> While the statutes are progressive, one criticism is that most do not address future technological developments that will inevitably occur.<sup>69</sup> Further, some websites and Internet businesses have specifically addressed whether or not a digital asset will be transferrable upon a user's death.<sup>70</sup> For example, Yahoo provides that "Yahoo! . . . will not provide information or access to the decedent's account; rather, it will deactivate the account immediately upon proper notification of the user's death."<sup>71</sup> On the other hand, Dropbox, a cloud data storage website, will allow access to data if the person attempting to gain access provides the requisite documentation.<sup>72</sup> This documentation includes proof that the person is in fact deceased, and proof that the executor has a legal right to access the deceased person's files "under all applicable laws."<sup>73</sup> Specifically, an executor or anyone requesting the files must send:

- (1) the full name of the deceased person and the e-mail address associated with his or her Dropbox account;
- (2) Your [the executor's] name, mailing address, e-mail address, and relationship to the deceased person;
- (3) a photocopy of the executor's government-issued ID; and
- (4) a valid court order establishing that it was the deceased person's intent that you [the executor] have access to the files in his or her account after the person passed away and that Dropbox is compelled by law to provide the deceased person's files to you [the executor].<sup>74</sup>

For instance, an heir likely will not be able to satisfy the fourth requirement by proving that it was the deceased person's intent that heirs have access to his or her account after he or she passes away when this is not indicated in any

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<sup>68</sup> See *id.* California, Connecticut, and Rhode Island were the first states to address the issue. *Id.* at 124-43. See CAL. BUS. & PROF. CODE § 17538.35 (West 2008); CONN. GEN. STAT. ANN. § 45a-334a (West 2014); R.I. GEN. LAWS ANN. § 33-27-3 (West 2011). These statutes focus exclusively on access to e-mail accounts. Beyer & Cahn, *supra* note 41, at 142-43. Indiana followed, but extended the access to include other records stored electronically. *Id.* at 144. See IND. CODE ANN. § 29-1-13-1.1 (West 2011). The next generations of state statutes that are enacted and currently being proposed take into consideration social networking sites. Beyer & Cahn, *Digital Planning*, *supra* note 41, at 144-46.

<sup>69</sup> Beyer & Cahn, *supra* note 41, at 146-47.

<sup>70</sup> Dobra, *supra* note 42, at 30. For example, "users of the digital storage provider iCloud will lose stored information forever upon passing." *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Can I Access the Dropbox Account of Someone Who Passed Away?*, DROPBOX, <https://www.dropbox.com/help/488/en> (last visited Feb. 25, 2014) (archived at <http://perma.cc/6RM2-XUVE>).

<sup>74</sup> *Id.*

will, and the decedent had not previously given this issue any thought.

As applied to intestacy, the Massachusetts Uniform Probate Code (“MUPC”) can be taken as representative of what most U.S. jurisdictions provide. It states that a personal representative of an estate “is charged with collecting, managing, safeguarding, and distributing the estate and with paying debts, taxes, and administrative expenses in the proper order.”<sup>75</sup> The term “‘personal representative’ includes [an] executor, administrator, successor personal representative, special administrator, special personal representative, and persons who performs substantially the same function under the law governing [such person’s] status.”<sup>76</sup> The personal representative has the power to “acquire or dispose of tangible and intangible personal property for cash or on credit, at public or private sale; and manage, develop, improve, exchange, change the character of, or abandon an estate asset.”<sup>77</sup>

Although the MUPC sets out the above laws and regulations regarding the role of a personal representative in intestacy as it applies to the administration of assets, it does not go beyond what is presented here. It mentions actions that may be taken with regard to intangible personal property, which would include digital assets, but it does not mention digital assets specifically, creating at least some ambiguity on this matter.<sup>78</sup> The MUPC explains that “[o]nce the creditors’ claim period has passed and the personal representative has set aside sufficient assets to cover the payment of income and estate taxes, he or she may distribute the remaining assets according to the terms of the will or, if there is no will, according to the terms of the intestacy statute in force.”<sup>79</sup> In general, intangible personal property encompasses the decedent’s financial assets, including all the bank accounts, stocks, and cash that the decedent owned. The intangible personal property is divided exactly among the heirs in proportion to their entitlements under the intestacy statute. Digital assets are considered intangible personal property due to their cash value, but this new concept of digital assets may not be easily deciphered by the existing state of the law. The fact that the MUPC and other states’ intestacy statutes do not specifically mention digital assets creates uncertainty in applying current law

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<sup>75</sup> Nancy E. Dempze, *Powers and Duties of the Personal Representative*, in MASSACHUSETTS PROBATE MANUAL 9-i (Thomas P. Jalkut & Hanson S. Reynolds eds., 3d ed. 2012 & Supp. 2014).

<sup>76</sup> MASS. GEN. LAWS ch. 190B, § 1-201(37) (2012). When a person dies without a will, an administrator is considered a personal representative. *See id.* An administrator is given expanded powers under the MUPC to “administer estates without petitioning the Probate Court for specific authority. Dempze, *supra* note 75, at 9.1.

<sup>77</sup> MASS. GEN. LAWS ch. 190B, § 3-715(a)(6).

<sup>78</sup> Dempze, *supra* note 75, at 9-15. The MUPC does explain: “[i]f the decedent died intestate, the personal representative will normally discuss the division of the tangible personal property with the decedent’s intestate heirs.” *Id.*

<sup>79</sup> *Id.* at 9-22.

2015] *DIGITAL ASSETS AND INTESTACY*

to this topic.

#### THE CASE FOR INTESTACY LEGISLATION FOR DIGITAL ASSETS

##### *Drafting Legislation to Address Digital Assets and Intestacy Is in the Best Interests of Both the Decedent and His or Her Heirs.*

###### Easing the Burden on Family Members and Heirs

At present, it can be quite difficult for an heir to access certain digital assets. For example, Gmail has a policy through which anyone may be able to access a deceased person's mail if he or she can provide proof that the "user is known to be deceased."<sup>80</sup> As a first stage, anyone attempting to access a decedent's mail must provide: his or her full name, physical mailing address, e-mail address, a photocopy of his or her government-issued ID or driver's license, the Gmail address of the deceased person, and the death certificate of the deceased person.<sup>81</sup> Once the person provides this information and Google conducts a preliminary review, part two of the process is initiated, in which Google requires a court order.<sup>82</sup> Further, Yahoo's terms of service "explicitly states that an account cannot be transferred."<sup>83</sup> An executor may be able to gain access to a decedent's tangible technology devices; however, the executor may still face obstacles in accessing password protected and encrypted files.<sup>84</sup> The burden on family members in obtaining court orders or deciphering encrypted accounts could be greatly alleviated by more clarity in legislation governing digital assets.

A new type of service available to clients is a Digital Asset Protection Trust ("DAP Trust"), which allows a client to designate individuals who will be provided access to digital assets when the client passes away.<sup>85</sup> This type of trust would clearly ease the burden on family members when a person dies intestate. However, a person who did not take the time to make a will probably

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<sup>80</sup> *Submit a Request Regarding a Deceased User's Account*, GOOGLE, <https://support.google.com/accounts/contact/deceased?hl=en&rd=1> (select "obtain data from a deceased users account" radio button; then scroll down to access form) (last visited Feb. 25, 2015) (archived at <http://perma.cc/JL2U-3HYE>).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Beyer & Cahn, *Digital Planning*, *supra* note 41, at 141. The text of the agreement reads: "You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate on 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://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last updated Mar. 16, 2012) (archived at <http://perma.cc/ZF8M-3GGH>).

<sup>84</sup> Dobra, *supra* note 42, at 24.

<sup>85</sup> *See* Goldman & Jamison, *supra* note 5, at 3.

did not take the time to create a trust of this nature. The DAP Trust will be discussed further in Part V, presenting alternatives to enacting legislation regarding digital asset protection. The issue remains that people are not likely to keep accurate records addressing changed passwords and how to access their accounts.<sup>86</sup> Consistently changing passwords can pose an issue, especially for more secure sites that require monthly updates.<sup>87</sup> The need for legislation on access to digital asset protection in intestacy remains regardless of alternatives such as the DAP Trust.

#### Preventing Losses to an Estate

A digital asset that is not discovered by an executor or heir may lose value.<sup>88</sup> Furthermore, a loss can occur to an estate if an individual is mistaken as to the assets in which he or she has property rights.<sup>89</sup> Contrary to popular belief, unlimited property rights to digital accounts, such as e-mail accounts, may exist only during a person's lifetime and terminate upon his or her death.<sup>90</sup> Legislation enacted to standardize property rights in digital assets would clarify these rights and thereby clarify intestate succession of digital assets.

Other potential losses could occur with regard to terms of service agreements.<sup>91</sup> For example, "[i]ndividuals spend enormous amounts of money over their lifetimes purchasing files for their iTunes account, so a decedent's iTunes account could potentially represent a substantial asset."<sup>92</sup> However, iTunes files are nontransferable at a user's death,<sup>93</sup> and are therefore not considered to be the user's property transmissible at death. Lack of direct access to this type of digital asset could lead to a loss in a person's estate since this type of asset will not be included in any estate planning as actual property. Further, Apple's Terms and Conditions state that "unused balances of Apple Gift Certificates, iTunes Cards, and Allowances are not redeemable for cash

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<sup>86</sup> David Goldman, *Dap Trust: Dealing with Your Digital/Online Rights and Property Correctly*, FLA. EST. PLAN. LAW. BLOG (July 28, 2011, 9:18 PM), <http://www.floridaestateplanninglawyerblog.com/2011/07/dap-trust-dealing-with-your-digital-online-rights-and-propert-correctly.html> (archived at <http://perma.cc/2GK2-ZYWT>).

<sup>87</sup> *Id.*

<sup>88</sup> Beyer & Cahn, *supra* note 41, at 139. (giving the example of a person who "ran an online business and is the only person with access to incoming orders, the servers, corporate bank accounts, and employee payroll accounts.")

<sup>89</sup> *See* Dobra, *supra* note 42, at 29.

<sup>90</sup> *Id.* *See, e.g., iCloud Terms & Conditions*, APPLE, <http://www.apple.com/legal/internet-services/icloud/en/terms.html> (last revised Oct. 20, 2014) (archived at <http://perma.cc/9XL2-BWTM>).

<sup>91</sup> *See* Dobra, *supra* note 42, at 29.

<sup>92</sup> *Id.*

<sup>93</sup> *iCloud Terms & Conditions*, *supra* note 80.

2015]

*DIGITAL ASSETS AND INTESTACY*

(except as required by law).<sup>94</sup> Therefore, an executor conducting an estate inventory or addressing an estate tax return will not be able to account for unused iTunes balances as the iTunes account will have no value, unless state law dictates otherwise.<sup>95</sup>

The TOSA, which a decedent likely agreed to upon creation of an account (such as iTunes) is binding. “[S]electing ‘Agree’ serves as an electronic signature, . . . [and] has the same validity as typing your name in an e-mail or signing a document using a pen.”<sup>96</sup> One of the key components of the iTunes TOSA is the following:

You agree that the Service, including but not limited to Products, graphics, user interface, audio clips, video clips [and] editorial content . . . contains proprietary information and material that is owned by Apple and/or its licensors, and is protected by applicable intellectual property and other laws, including but not limited to copyright.<sup>97</sup>

In other words, when a person buys something on iTunes, he pays to listen to a song or watch a particular movie for his lifetime, but no longer.<sup>98</sup> He bought the license to use the product, not the product itself, and so, he does not own the product.<sup>99</sup> Again, legislation allowing heirs to access a decedent’s accounts could be beneficial given that assets, such as those in iTunes accounts, are not considered the property of the decedent. Intestacy legislation cannot rewrite contracts with its existing users, but it can influence how Internet businesses rewrite their standard terms in order to meet the expectations of new customers and avoid liability.

Consider an income-producing blog or website. If family members have to wait for a court order before they can manage the site, its value could disappear quickly,<sup>100</sup> thereby causing a potentially significant loss to an estate. Suppose that the decedent owns a valuable domain name, but his or her heirs miss the renewal deadline because they were unable to access the decedent’s e-mail

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<sup>94</sup> Jim Lamm, *Rights Under Apple’s iTunes Terms and Conditions*, DIGITAL PASSING (May 10, 2011), <http://www.digitalpassing.com/2011/05/10/rights-apple-itunes-terms-conditions/> (archived at <http://perma.cc/D9U8-YZM9>).

<sup>95</sup> *Id.*

<sup>96</sup> Umika Pidaparthi, *What You Should Know About iTunes’ 56-Page Legal Terms*, CNN (May 6, 2011, 7:08 AM), <http://www.cnn.com/2011/TECH/web/05/06/itunes.terms/index.html> (archived at <http://perma.cc/CRG5-R26T>).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Gerry W. Beyer & Kerri M. Griffin, *Estate Planning for Digital Assets*, in *EST. PLAN. STUD.* 1, 3 (Merrill Anderson ed., 2011).

account.<sup>101</sup> A company called Perpetual Websites offers a service for managing an income-producing website following a decedent's death.<sup>102</sup> The site offers the following services: (1) pay website hosting fees on the decedent's behalf; (2) pay domain name renewal fees; (3) check regularly to make sure the website is displaying properly; (4) arrange for repairs to be made to the site if required to promote generation of income; and (5) liaise with affiliate partners to make sure that the income is channeled to the right people.<sup>103</sup> Although this site alleviates the issues presented above regarding the maintenance and access to an income-producing website, the argument remains that someone who dies intestate may not have thought to use this type of estate planning assistance. Since today's business world has a strong online presence, legislation specifically addressing domain names and income-producing websites is both relevant and essential.

Private Internet businesses generally set forth terms for their licenses and other contracts in a way that appears favorable to the business and acceptable to the customer. Because the concept of digital assets is so new, many online businesses may not have given much thought to succession of digital assets. Due to the evolving online world, businesses may now be considering whether a customer's relatives, beneficiaries of his or her will, or other estate planning entities are the correct people to receive access to digital assets. Businesses are facing the problem of turning over digital assets to the wrong person, as well as turning assets over to an identity thief who convinces the company that the customer is dead when the customer is still living. These are recent issues faced by Internet businesses that must now consider what happens when a customer dies, who can access his or her assets, and how the company can avoid liability in these matters.

#### Avoid Losing the Decedent's Story and Invading the Decedent's Privacy

At the end of 2012, an estimated thirty-million Facebook profiles outlived their owners.<sup>104</sup> Many assets kept online today, such as photos and memoirs, are never printed and remain part of the digital world.<sup>105</sup> Without user names

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<sup>101</sup> *Id.*

<sup>102</sup> PERPETUAL WEBSITES, <http://perpetualwebsites.net> (last visited Feb. 26, 2015) (archived at <http://perma.cc/EDX2-VT22>).

<sup>103</sup> *Perpetual Websites – Long-Term Hosting for your Website*, PERPETUAL WEBSITES, <http://www.perpetualwebsites.net/website-archive-service/> (last visited June 25, 2015) (archived at <http://perma.cc/P429-LBJ2>).

<sup>104</sup> Jaweed Kaleem, *Death on Facebook Now Common as 'Dead Profiles' Create Vast Virtual Cemetery*, HUFFINGTON POST (Jan. 16, 2013, 6:03 PM), [http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles\\_n\\_2245397.html](http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles_n_2245397.html) (archived at <http://perma.cc/3BZK-4J4D>).

<sup>105</sup> Beyer & Cahn, *supra* note 41, at 140 ("Personal blogs and Twitter feeds have replaced physical diaries and e-mails have replaced letters.").

and passwords, personal representatives and heirs may not be able to manage these assets without providing a death certificate and other documentation to the custodian or, in some cases, obtaining a court order.<sup>106</sup> Further, recent studies indicate that ninety-two percent of American children have an online presence by the age of two.<sup>107</sup> “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.”<sup>108</sup> The aggregate of this activity adds up to the stories and narratives of everyone who lives on the Internet, and usually does not manifest itself in tangible form to be passed physically from one generation to the next.

An additional concern is preventing the unwanted discovery of secrets. Websites such as Facebook store all of their historical data indefinitely.<sup>109</sup> Facebook allows people close to a decedent to memorialize an account or delete it, as long as they provide Facebook with a death certificate.<sup>110</sup> However, the site does not allow unauthorized access to a profile page without the decedent’s prior consent or when required by law.<sup>111</sup> Profile pages contain personal information such as familial and extra-familial relationships.<sup>112</sup> Unless a user is able to authorize access to assets contained on a Facebook profile, which a decedent would be incapable of doing, any direct subpoena or request to Facebook for records has usually been denied as violating the Stored Communications Act (“SCA”).<sup>113</sup> Facebook has stated it will “provide the

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<sup>106</sup> Katherine Rosman, *Passing on Wills . . . and Passwords*, WALL ST. J. (Sept. 1, 2007, 12:01 AM), <http://www.wsj.com/articles/SB118860185688415130> (archived at <http://perma.cc/T7AK-K3PH>).

<sup>107</sup> 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://www.pcworld.com/article/207225/nine\\_of\\_ten\\_us\\_kids\\_have\\_online\\_presence\\_by\\_age\\_two\\_study.html](http://www.pcworld.com/article/207225/nine_of_ten_us_kids_have_online_presence_by_age_two_study.html) (archived at <http://perma.cc/99Z3-Y6HV>).

<sup>108</sup> Maria Perrone, Comment, *What Happens When We Die: Estate Planning of Digital Assets*, 21 *COMMLAW CONCEPTUS* 185, 185 (2012); see also Rob Walker, *Cyberspace When You’re Dead*, N.Y. TIMES MAG. (Jan. 5, 2011), <http://www.nytimes.com/2011/01/09/magazine/09Immortality-t.html?pagewanted=all&r=0> (archived at <http://perma.cc/46KG-83SX>).

<sup>109</sup> Carl A. Aveni, II, *Gathering and Preserving Information from the Outset in Probate Litigation*, 21 *PROB. L.J. OHIO* 114, 116 (2011).

<sup>110</sup> Nicole Schneider, *Social Media Wills – Protecting Digital Assets*, 82 *J. KAN. B. ASS’N*, June 2013, at 16, 16.

<sup>111</sup> *Id.*

<sup>112</sup> Aveni, *supra* note 109, at 116 (“The messages, wall posts, photographs, and status updates directly show personal connections and indirectly reflect mental capacity, physical capacity, and expenditures.”).

<sup>113</sup> See 18 U.S.C.A. §§ 2701-2712 (2012); see also Bob Benjy, *How to Subpoena Internet Communications*, 35 *L.A. LAW*, 9, at 9 (2012-2013) (“Litigators serving subpoenas

estate of the deceased with a download of the account's data if prior consent is obtained from or decreed by the deceased, or mandated by law."<sup>114</sup>

The SCA does not specifically provide for or deny access to stored communications by a fiduciary.<sup>115</sup> However, the SCA mandates that "whoever intentionally accesses, without authorization, a facility through which an electronic communication service is provided," is in violation of the Act and shall be punished.<sup>116</sup> Although the SCA does provide applicable penalties in the case of "an offense . . . committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain, or in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or any State," it does not provide penalties for actions taken for other purposes to obtain protected stored communications.<sup>117</sup>

The SCA poses an obstacle to heirs attempting to obtain access to digital assets of a decedent who has died intestate. This can be emotionally difficult and disheartening to heirs who are attempting to maintain a family member's story, which can consist of components of his or her online presence. This is especially relevant in the case of family members attempting to collect photos and videos from sites and applications such as Facebook, Instagram, Flickr, and iPhoto. These digital assets can have significant emotional and personal meaning, and it is important for heirs to have statutory authority to rely on, in obtaining and accessing these assets. A legal position regarding digital assets is essential for decedents who have died intestate and whose family members and personal representatives are in need of legal guidance and support in managing the decedent's digital estate. On the other hand, there may be information that a decedent wanted to keep private from family members or others. A legal safety net is needed to ensure that particular family members, or business associates, do not gain access to potentially harmful online information from a decedent's estate.<sup>118</sup>

#### Prevent Identity Theft

A 2014 study from the United States Department of Justice reports that the average number of U.S. identity fraud victims annually is 11,571,900 and the

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are often stymied by the Stored Communications Act (SCA), which prohibits service providers from disclosing e-communications, even in the face of a civil subpoena.").

<sup>114</sup> Melissa Holmes, *Social Media Users Can Create "Online Executor" in Will*, WGRZ (Feb. 5, 2012, 5:05 PM) <http://archive.wgrz.com/news/article/153959/1/social-media-users-can-create-online-executor-in-will> (archived at <http://perma.cc/8YB6-2ZV3>).

<sup>115</sup> See Electronic Communications Privacy Act of 1986, Pub. L. 99-508, § 201, 100 Stat. 1848, 1860 (codified as amended in 18 U.S.C. §2701 (2012)).

<sup>116</sup> 18 U.S.C. § 2701(a).

<sup>117</sup> *Id.*

<sup>118</sup> Tarney, *supra* note 27, at 782-83.

total financial loss attributed to identity theft in 2013 was \$24.7 billion.<sup>119</sup> Furthermore, according to the Federal Trade Commission, up to 9 million decedents per year are victims of posthumous identity theft.<sup>120</sup> Once the Social Security Administration, local Department of Motor Vehicles, and credit bureaus are notified of a death, it can take a significant amount of time for these organizations to note the person's death in their records."<sup>121</sup> During this waiting period, criminals have access to unmonitored accounts, allowing them to hack into the accounts and commit identity theft including opening credit cards and state identification cards.<sup>122</sup> Unfortunately, methods to protect a decedent's account during this waiting period require access to the account itself.<sup>123</sup> Websites such as MyDeathSpace.com, which is a website that tracks social media profiles of people who have passed,<sup>124</sup> provide information for criminals attempting to steal the identity of a deceased person. "The site, which has an archive of 17,825 profiles of the dead, gets up to 11,000 views per day."<sup>125</sup>

Measures are also necessary to prevent identity thieves from gaining access to online accounts of living persons by representing that the account holders are dead and that the thieves are their authorized personal representatives. Probate can be an effective process for determining that a person is actually dead and that his or her personal representative is responsible for his or her estate. In drafting intestacy legislation, legislators should assure families of intestate persons that court-supervised probate is the best way to show that only authorized personal representatives will acquire a deceased person's digital assets. This will, in turn, prevent this particular type of identity theft via digital assets.

Many people have several online accounts containing important private information, including social security numbers and other identifying information.<sup>126</sup> These are often left unmonitored upon the death of the user and

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<sup>119</sup> *Identity Theft/Fraud Statistics*, STAT. BRAIN, <http://www.statisticbrain.com/identity-theft-fraud-statistics/> (last visited Feb. 26, 2015) (archived at <http://perma.cc/S8RD-UK39>).

<sup>120</sup> Naomi R. Cahn & Gerry W. Beyer, *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, 26 PROB. & PROP. 40, 41 (2012).

<sup>121</sup> Lynn Lionhood, *Dead Ringers: Grave Robbers Turn To ID Theft*, BENEFITS BUZZ, <http://benefitsbuzz.blogspot.com/2009/08/dead-ringers-grave-robbers-turn-to-id.html> (last visited Aug. 15, 2015) (archived at <http://perma.cc/VG34-7XKE>). Until the deaths are registered in the database systems, criminals have free rein to open credit cards, get state identification cards and apply for a job using a dead person's identity. Cahn & Beyer, *supra* note 120, at 41.

<sup>122</sup> Cahn & Beyer, *supra* note 120 at 41.

<sup>123</sup> *Id.*

<sup>124</sup> Kaleem, *supra* note 104.

<sup>125</sup> *Id.*

<sup>126</sup> Emily Stutts, *Will Your Digital Music and E-Book Libraries "Die Hard" with You?:*

vulnerable to unauthorized access by anyone who can crack usernames and passwords.<sup>127</sup> Identity theft is a serious issue in today's society.<sup>128</sup> Legislation addressing digital assets in an intestate estate could curtail identity theft by dealing with the gap between a decedent's death and the administration of the estate.

*Legislation Is Needed to Address the Transfer of Digital Assets in Intestacy in Order to Maintain Privacy and Publicity Rights to Intellectual Property as well as Confidentiality Regarding Personal Assets.*

Privacy has not generally been a concern in probate of intestate estates because the personal representative of an intestate person is typically the closest adult family member who is willing to take on a fiduciary role. However, with the evolving state of affairs regarding digital assets, intestacy legislation should be drafted to authorize a personal representative to make determinations to withhold disclosure of digital assets to heirs in the interests of privacy and confidentiality. These provisions would be applicable in cases where withholding disclosure is appropriate or where the personal representative determines the intestate person would have made this judgment. In this way, privacy becomes relevant to the discussion of transferring digital assets to heirs in an intestate estate.

Currently, there is no universal definition of a digital asset or digital estate.<sup>129</sup> Some assets may exist only in online form.<sup>130</sup> For example, the conductor Leonard Bernstein left behind his memoir in solely electronic, password-protected form.<sup>131</sup> Thus far, no one has been able to break the password.<sup>132</sup> "[T]he policy of some online service providers is to afford either limited or no access to information contained in a decedent's online accounts out of concern for the decedent's privacy, unless required to do so by court

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*Transferring Digital Music and E-Books Upon Death*, 16 SMU SCI. & TECH. L. REV. 371, 375-76 (2013) (citing 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, 321 (2011)).

<sup>127</sup> See 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, 321 (2011)).

<sup>128</sup> See *Identity Theft/Fraud Statistics*, *supra* note 119.

<sup>129</sup> Conner, *supra* note 126, at 303 (noting the absence of definitions in both Webster's Dictionary and Black's Law Dictionary).

<sup>130</sup> See Beyer & Cahn, *supra* note 41, at 137.

<sup>131</sup> Neeli G. Shah, *Disposition of Digital Assets: Reasons for Digital Estate Planning*, LEXOLOGY (May 8, 2012), <http://www.lexology.com/library/detail.aspx?g=220d8c0f-b689-4bbf-95bf-67a1ad741c14> (archived at <http://perma.cc/8SLX-SFRL>).

<sup>132</sup> *Id.* (citing Helen W. Gunnarsson, *Plan for Administering Your Digital Estate*, 99 ILL. B.J. 71 (2011)).

2015]

*DIGITAL ASSETS AND INTESTACY*

order.”<sup>133</sup> In one notable case, Yahoo! refused to give Lance Corporal Justin Ellsworth’s father copies of his e-mails after he died in Iraq in 2004.<sup>134</sup> A Michigan probate court ultimately ordered Yahoo! to provide Justin’s father with copies of the e-mails contained within his account without determining whether the e-mails were Justin’s personal property and subject to probate.<sup>135</sup> Yahoo! maintained that it remained committed to its users’ privacy, was simply following the court order, and was not changing its stance on the issue.<sup>136</sup>

The reason for ambiguity in many statutes about whether they apply to digital assets “is that electronic communication and storage have developed independently of any historical definition of assets.”<sup>137</sup> There is less ambiguity when a statute provides a clear definition of digital assets and how they can be accessed. For example, in October 2013, North Carolina proposed statutory changes to its digital estate laws.<sup>138</sup> These amendments were not enacted into law, but they provide an excellent example of a working definition of digital assets.<sup>139</sup> North Carolina’s proposed definition of digital assets is a model for legislation enacted regarding digital assets and intestacy.<sup>140</sup>

*Legislation Is Needed to Address the Inability to Extend Copyright Law to Protect Digital Assets.*

In the past, the predominant guidelines produced by copyright law were to define “computer program” and dictate who is authorized to acquire, run, and

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<sup>133</sup> Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINNIPIAC PROB. L.J. 376, 383 (2011).

<sup>134</sup> Darrow & Ferrera, *supra* note 29, at 281-82.

<sup>135</sup> 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, 401-02.

<sup>136</sup> *Id.*

<sup>137</sup> *Legislative Proposal*, OR. ST. BAR, [http://osblip2013.homestead.com/Proposals/Estate\\_Planning\\_-\\_Digital\\_Assets.pdf](http://osblip2013.homestead.com/Proposals/Estate_Planning_-_Digital_Assets.pdf) (last visited Feb. 26, 2012) (archived at <http://perma.cc/67J7-W6JW>) (“Current statutes use the historical terms of ‘real property’ and ‘personal property.’”).

<sup>138</sup> See S.B. 279, Leg., Gen. Assemb., Reg. Sess. (N.C. 2013).

<sup>139</sup> Evan Carroll, *Digital Assets: A Clearer Definition*, DIGITAL BEYOND <http://www.thedigitalbeyond.com/2012/01/digital-assets-a-clearer-definition/> (last visited Aug. 14, 2015) (archived at <http://perma.cc/F88B-WWHG>). The amendments addressed access by a custodian, fiduciary, attorney-in-fact, and guardian of the estate. *Id.* The working definition of digital assets which North Carolina established was the following: “files, including, but not limited to, e-mails, documents, images, audio, video and similar digital files which currently exist or may exist as technology develops or such comparable items as technology develops, stored on digital devices . . . mobile telephones, smartphones, and any similar digital device.” *Id.*

<sup>140</sup> See S.B. 279, *supra* note 138.

copy computer programs.<sup>141</sup> Although copyright law has expanded in recent years, some argue it has not expanded enough given the increase of hackers, unauthorized distribution, and limited legal protections to combat digital piracy.<sup>142</sup> Present copyright law may not be sufficient to address the protection of digital assets. Further, the estate planning process may begin to incorporate “tracing copyright authorizations” for decedents who have made a will.<sup>143</sup> The issue remains: how do heirs address copyright law with regard to digital assets of a decedent without a will?

Some digital assets may be the intellectual property of the decedent himself or herself in that he or she holds copyright to personal correspondence, photography, and videos stored in digital assets. In general, 17 U.S.C. § 203(a) states that any transfers of a copyright made by the author, other than by will, can be terminated thirty-five years after the transfer by the author or, if the author is dead, by the author’s spouse, children, and children’s descendants.<sup>144</sup> Traditionally, a decedent’s copyrights were called “literary property” and authors have often designated “literary executors” to deal with their bodies of work, to complete their drafts for publication, and to assert their copyrights for the successor owners of these rights. Although 17 U.S.C. § 203(a)(2) clarifies how transfers of copyright are made in intestacy, questions remain with regard to certain types of digital assets.

Ownership over a digital asset turns on whether the law applies traditional property ownership rights or licensing rights.<sup>145</sup> If an online account takes the form of a traditional property interest, then the individual owns the account.<sup>146</sup> However, an online account that is essentially a license can terminate upon a person’s death.<sup>147</sup> Some questions regarding the handling of digital assets copyrighted by third parties include: What are the terms of licenses controlling digital assets? Who pays for and controls these digital assets?<sup>148</sup> For instance, “[t]he Atlantic reported that America’s top ten most valuable blogs have an

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<sup>141</sup> Peter S. Mennell, *Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 64-65 (2003) (“More pages of copyright law have been added to the U.S. Code in the past decade than in the prior 200 years of the republic, dating back to the first U.S. Copyright Act adopted in 1790.”).

<sup>142</sup> See Melanie Warner, *The New Napsters There’s More Free Downloading of Music than Ever.*, FORTUNE (Aug. 12, 2002), [http://archive.fortune.com/magazines/fortune/fortune\\_archive/2002/08/12/327036/index.htm](http://archive.fortune.com/magazines/fortune/fortune_archive/2002/08/12/327036/index.htm) (archived at <http://perma.cc/H9AH-6DUG>).

<sup>143</sup> Towle et al., *supra* note 18.

<sup>144</sup> See 17 U.S.C. § 203(a)(1)-(3) (2012).

<sup>145</sup> Perrone, *supra* note 108, at 193.

<sup>146</sup> Michael Walker & Victoria Blachly, *Virtual Assets*, 27 J. FIN. PLAN. 311, 311 (2011).

<sup>147</sup> *Id.*

<sup>148</sup> Towle et al., *supra* note 18.

estimated aggregate value of \$785 million.”<sup>149</sup> So how does a blogger ensure that a trademark or intellectual property right in a domain name will be transferrable upon death? Blog contents are protected by copyright for the “life of the author and 70 years after the author’s death.”<sup>150</sup> Section 201(d)(1) of the Copyright Act states that any work to which the decedent held copyright would pass by intestacy as personal property.<sup>151</sup> However, the statute does not mention digital assets specifically,<sup>152</sup> again creating ambiguity regarding this matter.

The law is unclear as to copyrights of e-mail accounts, because most e-mail service providers have their own terms of service.<sup>153</sup> Most e-mail accounts are considered licenses to use a website service which are set to expire upon death.<sup>154</sup> One suggested way an heir of an intestate decedent can get access to a digital asset is to appoint a fiduciary that can communicate with the web service provider to request a copy of the contents of the account.<sup>155</sup> Furthermore, an heir can also obtain a court order or direction granting account access.<sup>156</sup> However, the fact remains that a person can own a type of hardware, such as a Kindle or other handheld device, but that person does not own the content it stores.<sup>157</sup> “This content is not ‘purchased’ in the traditional sense;” it is licensed to the owner of the device.<sup>158</sup> The first sale doctrine clarifies that ownership of a copy of a copyrighted book, film, painting, or music recording can be transferred by sale or by succession to personal property at the death of the owner of the copy,<sup>159</sup> but licensed material is subject to the terms of the particular license.<sup>160</sup> Therefore, a Kindle on which the decedent purchased a movie could be transferred to an heir, but the movie would still be subject to the applicable license.

Applying copyright and intellectual property laws to this type of leased

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<sup>149</sup> Susan Porter, *Digital Estates: Handling Digital Assets in the Real World (with Forms and Resources)*, PRAC. LAW., Aug. 2013, at 35, 36.

<sup>150</sup> 17 U.S.C. § 302(a) (2012).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See Porter, *supra* note 149, at 38.

<sup>154</sup> *Id.* (“When a client creates or puts information on these websites, they are putting it on a server they do not own.”).

<sup>155</sup> Jim Lamm, *Planning Ahead for Access to Contents of a Decedent’s Online Accounts*, DIGITAL PASSING (Feb. 9, 2012), <http://www.digitalpassing.com/2012/02/09/planning-ahead-access-contents-decedent-online-accounts/> (archived at <http://perma.cc/2V2D-4LJ5>).

<sup>156</sup> Colin Korzec & Ethan A. McKittrick, *Estate Administration in Cyberspace*, TR. & EST., Sept. 2011, at 61, 62.

<sup>157</sup> Porter, *supra* note 149, at 41.

<sup>158</sup> *Id.*

<sup>159</sup> 17 U.S.C. § 109(a) (2012).

<sup>160</sup> Porter, *supra* note 149, at 41.

material is difficult because people's expectations about what they can do with their digital assets, both during life and at death, may conflict with the terms of their licenses and other contracts with Internet businesses. Although intestacy legislation cannot override these contracts, it can be used to reflect the probable preferences of a typical decedent, thereby influencing companies in their formation of licenses and contracts.

#### ALTERNATIVES TO INTESTACY LEGISLATION FOR DIGITAL ASSETS

##### *Instead of Legislation for Intestate Handling of Digital Assets, Other Measures Have Been Proposed to Ensure Digital Assets Are Properly Transferred to Heirs.*

Lawyers have begun to offer services for those who want to do what they can to ensure that their digital assets will get where they direct at death. A "password vault," stored online or on a personal computer, is secured by a "master password" and can be used upon death to access digital assets.<sup>161</sup> Thus, providing "a central place to store all your passwords, encrypted and protected by a passphrase or token that you provide."<sup>162</sup> Alternatively, one of the newest and most innovative solutions is a revocable trust governing digital assets.<sup>163</sup> Some digital assets take the form of licenses, which can sometimes be transferred to a trust.<sup>164</sup> In the event of a client's death or disability, the trustee has the authority to manage the assets and transfer them to the beneficiaries according to the client's instructions.<sup>165</sup> "A person who creates a digital asset revocable trust can appoint a successor trustee, who is able to handle all online accounts, usually without violating any terms of service agreements."<sup>166</sup> The problem with these types of trusts is that if a license contract prohibits transfer of a digital asset or terminates on death of the licensee, then the trustee is in violation of the terms of service agreements when he or she accesses the decedent's online accounts.

One useful reason to obtain a revocable living trust specifically for organization and administration of digital assets is to prevent identity theft and

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<sup>161</sup> Conner, *supra* note 126, at 317 (explaining that a client only needs "to supply his family with the master password and then his family would have access to all important user names and passwords regardless of how often the client changed them").

<sup>162</sup> Serdar Yegulalp, *Review: 7 password managers for Windows, Mac OS X, iOS, and Android*, INFOWORLD (Mar. 28, 2012), <http://www.infoworld.com/d/security/review-7-password-managers-windows-mac-os-x-ios-and-android-189597> (archived at <http://perma.cc/3QGG-9MTC>).

<sup>163</sup> See Conner, *supra* note 126, at 319.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Porter, *supra* note 149, at 42.

fraud when a client becomes incapacitated.<sup>167</sup> Some unique digital assets that can be efficiently addressed using a revocable living trust are online credit access to schedule recurring payments, “online password to access your retirement accounts that allow a recipient to change your asset allocation and your distribution schedule . . . [and] online passwords to reach your investment accounts, including setting up recurring investments, or choosing between a dividend payout or dividend reinvestment.”<sup>168</sup>

Furthermore, a DAP Trust addresses issues of transferring digital assets during a person’s lifetime.<sup>169</sup> Most digital assets are non-transferable licenses that become inoperable upon death or inactivity.<sup>170</sup> A DAP Trust overcomes this obstacle by allowing a person to select who will have access to these licensed assets when that person passes, thereby avoiding violations of license terms and other liabilities.<sup>171</sup> Further, a DAP Trust allows this individual to address digital asset concerns during his or her life, which offers the advantage of planning for incapacity and access to assets upon death.<sup>172</sup> “Some examples of digital assets that can be included in a DAP Trust are ‘e-mail accounts, [blogs], social-networking websites, online backup services, photo and document sharing websites, financial and business accounts, domain names, virtual property, and computer files.’”<sup>173</sup> The DAP Trust is relatively new and there are only a few legal professionals able to assist in creating this type of trust.<sup>174</sup> However, this type of trust will allow potential heirs to lawfully access and hold ownership over digital assets that otherwise may have been inaccessible.<sup>175</sup>

The following is a list of alternatives to estate planning that someone without a will might consider in transferring their digital assets:<sup>176</sup>

- (1) AssetLock enables users to upload documents, final letters, final wishes, instructions, important locations, and secret information to an online safe deposit box. Once the

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<sup>167</sup> *Estate Planning for Your Digital Assets, Part 2: Using a Revocable Living Trust*, LAW OFFICE OF SYLVIE L. F. RICHARDS (Apr. 5, 2012), <http://richardsesq.wordpress.com/2012/04/05/estate-planning-for-your-digital-assets-part-2-using-a-revocable-living-trust/> (archived at <http://perma.cc/WZ7H-JXXU>).

<sup>168</sup> *Id.* (“Because Wills are public documents, you may not want to include a list of your digital assets as part of your Will. In any case, a Will is an end-of-life document. Many of us—and our families—will have to deal with mental incapacity long before we die.”).

<sup>169</sup> Goldman & Jamison, *supra* note 5, at 11-12.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 3.

<sup>173</sup> *Id.* at 11.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 11-12.

<sup>176</sup> Porter, *supra* note 149, at 41-42.

user dies and a minimum number of recipients confirm the user's death, AssetLock will release pre-designated information to the pre-designated recipients; (2) Entrustet enables users to create a secure list of online accounts, designate which accounts get passed to heirs or deleted, and designate a Digital Executor; (3) Legacy Locker enables users to save all online account information in a digital safety deposit box and assign beneficiaries for each account.<sup>177</sup>

The counterargument is that someone who dies intestate without a will likely would not have thought to plan for the transfer of their digital assets when they did not plan for the transfer of any other asset or property. However, these measures are available to people despite the lack of legislation pertaining to digital asset transfer. Further, an additional option, as discussed above, is for a person to "transfer ownership of digital assets to a revocable trust, thus enabling a successor trustee to handle all online accounts without violating the terms of service agreements."<sup>178</sup> There are also alternative, traditional ways in which a decedent can use and rely on the Internet to distribute and manage digital assets without resorting to a will.<sup>179</sup> For example, a person could provide a family member with accounts and passwords or dictate this information in a personal document.<sup>180</sup> Furthermore, one "could keep backup copies of all online data in paper or electronic form offline [or] rely on an online service's policy or court intervention to make the account data available to their successors."<sup>181</sup> Additionally, theories such as substantial compliance and the dispensing power should be utilized to shield people from intestacy.<sup>182</sup> In this way, some of the need for legislation could be alleviated, and people would be able to use will documents that are in substantial conformity with the law of wills to distribute their assets as they desire.

*Most Digital Assets Are Not Actually Owned by the User or Decedent.*

A further argument against new intestacy legislation is that many of these digital assets are not actually owned by the decedent. "[T]he terms of the contracts between online service providers and account holders, as construed by courts applying state law, usually govern the ownership and inheritability of

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 41.

<sup>179</sup> Roy, *supra* note 133, at 381-82.

<sup>180</sup> *Id.*; Darrow & Ferrera, *supra* note 29, at 314.

<sup>181</sup> Roy, *supra* note 133, at 381-82

<sup>182</sup> DiRusso, *supra* note 31, at 78 (citing John Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975)); John Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 53 (1987)).

2015]

*DIGITAL ASSETS AND INTESTACY*

‘digital assets.’”<sup>183</sup>

An alternative approach to enacting intestacy legislation is Digital Estate Planning Services (“DEP services”). These services are available on the Internet, and claim the ability to access and manage a decedent’s digital assets.<sup>184</sup> DEP services include “any services capable of passing information from a decedent to another after a decedent’s death, including services that deliver posthumous e-mails.”<sup>185</sup> While these new online services are available to the general public online, it is important to remember that many of these services are suspect, as discussed below.

DEP services are convenient because they lie outside the realm of any legislation that would be created to address the transfer of digital assets in intestacy.<sup>186</sup> A DEP service transfer does not fall neatly into any of the existing Uniform Probate Code categories of nonprobate transfers, such as “an insurance policy, contract of employment, bond, mortgage, promissory note, . . . [security,] account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, [or] employee benefit plan . . .”<sup>187</sup> A DEP service is a “digital identity management service.”<sup>188</sup> The obligations of a DEP service are limited to the scope of the service it provides, which is usually storage and delivery of information to preselected persons upon proof of a user’s death.<sup>189</sup> These services seem to be premised on the assumption that digital assets are merely information, have no cash value, and thus will not be included in an estate. DEP services are an alternative, albeit untested alternative, to legislation focused on digital assets and intestacy. The argument follows that because many digital assets are not actually owned by a decedent, any legislation of this nature would be superfluous and these assets should be addressed using certain DEP services instead.

However, it must be noted that it is not clear DEP services follow the obligations and laws regarding contracts. Users likely violate the terms of service agreements and user contracts signed with various online companies by providing usernames and passwords to their heirs.<sup>190</sup> Further, DEP service providers likely violate the law when they access these accounts and use the

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<sup>183</sup> Roy, *supra* note 133, at 384.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 377, n.6.

<sup>186</sup> See Roy, *supra* note 133, at 387.

<sup>187</sup> UNIF. PROBATE CODE § 6-101 (amended 2010).

<sup>188</sup> See, e.g., *Terms of Service*, PASSWORDBOX, <http://www.passwordbox.com/terms> (last updated Sept. 2, 2014) (archived at <http://perma.cc/Y446-NE54>).

<sup>189</sup> *Id.*

<sup>190</sup> See Tarney, *supra* note 27, at 782-83; Laura McKinnon, *Planning for the Succession of Digital Assets*, 27 *COMPUTER L. & SEC. REV.* 362, 366 (2011).

data held within.<sup>191</sup> DEP services do not provide protection against privacy or identity theft issues and can be risky due to access to important accounts.<sup>192</sup> Although DEP services may appear to be a useful loophole for management of digital assets in intestacy, there are many pitfalls to these services, which make them unreliable.

The new entrepreneurial estate planning tools mentioned above, including DEP services, generally can only deliver on what they promise to the extent that the terms of licenses and other contracts permit transfer of access to digital assets during the user's life as well as at the user's death. However, if any of these estate-planning tools catch on and become popular, this can change customers', families', and devisees' expectations concerning digital assets. Internet businesses will be compelled to modify and amend their standard licenses and other contracts in order to reflect these changing expectations. In this way, new estate planning tools may be the key to defining how and when an heir can access digital assets by encouraging Internet businesses to conform to expectations and set forth these clarifications in their terms of agreement.

Despite the prediction that Internet businesses will cause companies to amend their agreement terms based on these considerations, intestacy legislation is more compelling in encouraging businesses to make these changes. As discussed above, Internet businesses are concerned with avoiding liability in turning over digital assets to the wrong person.<sup>193</sup> Intestacy legislation can relieve third parties of this liability. As stated in MUPC Section 3-714, "a person who in good faith either assists a personal representative or deals with a personal representative for value is protected as if the personal representative properly exercised power."<sup>194</sup> New intestacy legislation could apply this provision of the MUPC to Internet businesses dealing with personal representatives who appear to be qualified to receive digital assets. This sort of immunity from liability for giving access to the wrong survivor may be enough for Internet businesses to change the terms of their licenses and other contracts. Therefore, although there are alternatives to enacting intestacy legislation, drafting new intestacy legislation seems to be the most direct path to clarity in this area of the law.

*Critics of Enacting Intestacy Legislation Regarding Digital Assets May Argue that Such Legislation Would Indirectly Encourage Intestacy, Which May Not Be Ideal for All Decedents.*

The federal government recognizes the importance of modern estate

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<sup>191</sup> See Tarney, *supra* note 27, at 787-89.

<sup>192</sup> Stutts, *supra* note 126, at 379 ("There is a great deal at stake if a DEP service were to ever fail or be hacked.").

<sup>193</sup> See *supra* Part IV.

<sup>194</sup> MASS. GEN. LAWS ch. 190B, § 3-714 (2012).

planning in this digital age.<sup>195</sup> A government sponsored website promotes a social media will which includes: (1) appointment of an online executor; (2) an explanation of how the decedent would prefer his or her profiles be handled; (3) a comprehensive list of online presence; and (4) a stipulation allowing the online executor to obtain a copy of his or her death certificate.<sup>196</sup> In preparation for drafting such a will, “the person is advised to review privacy policies, terms, and conditions of each website where he or she has a presence, and see if any social media websites in question have account management features to let him or her proactively manage what happens to the account after he or she dies.”<sup>197</sup>

Legislation regarding digital assets for an intestate decedent is unnecessary when considering preparation in the form of a social media will. Instead of encouraging intestacy among people who are already skeptical of the costs and necessity of estate planning, the government should further promote this type of digital estate planning, as it does on one of the federal government websites. In a Huffington Post article titled “Why you Need a Social Media Will,” the author points out what any lawyer would tell a prospective client for a will.<sup>198</sup> Intestacy procedures result in: (1) “court-supervised probate that could delay the distribution of an estate and result in costly fees; and (2) assets awarded to surviving spouses, children and other relatives, without considering friends and favored charitable institutions.”<sup>199</sup> People should not rely on intestacy legislation to direct the management of their digital assets upon death. They should be encouraged to plan for the management of, access to, and distribution of digital assets prior to their death.

#### CONCLUSION

Although there are alternatives available for an intestate estate representative to attempt to access, collect, and manage a decedent’s digital assets, legislation is needed to authorize legal ways of managing these assets and to clarify the rights of heirs to access such assets. The bottom line is that a decedent who has not taken the time to create a will almost surely has not had the time, motivation, or resources to pursue other types of estate planning

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<sup>195</sup> See *Writing A Will*, USA.GOV, <http://www.usa.gov/topics/money/personal-finance/wills.shtml> (last updated Feb. 2, 2015) (archived at <http://perma.cc/8X7B-R268>).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* “For example, Google’s Inactive Account Manager allows you to manage how you want your online content to be saved or deleted. This feature also lets you give permission for your family or close friends to access the content you saved on Google websites after you die.” *Id.*

<sup>198</sup> Jason Alderman, *Why you Need a Social Media Will*, HUFFINGTON POST (July 23, 2012, 8:54 AM), [http://www.huffingtonpost.com/jason-alderman/social-media-will\\_b\\_1683487.html](http://www.huffingtonpost.com/jason-alderman/social-media-will_b_1683487.html) (archived at <http://perma.cc/J7LF-9YY2>).

<sup>199</sup> *Id.*

which address his or her online presence. In the case of Justin Ellsworth, whose family sought access to his e-mail account after his death, he likely did not have a will addressing his digital assets.<sup>200</sup> His parents sought access to his e-mail account in order to create a memorial scrapbook in his honor and Yahoo! complied with the request, but only after a Michigan probate court issued an order.<sup>201</sup> Family members and heirs should not have to get court orders in order to access a decedent's online assets. Legislation is needed to address this legal obstacle and make the process of accessing online accounts more simple and straightforward.

While young people are the largest demographic of Internet users, "the biggest increase in Internet use since 2005 has been in the seventy- to seventy-five-year-old age group."<sup>202</sup> It is especially troubling that this age demographic may have an extensive online presence, but may be unaware of what will happen to their digital assets upon death. The fact of the matter is that this issue is not going to go away anytime soon. In addition to increasing Internet use, "[s]ince its creation in 2004 Facebook has grown into a worldwide network of over 1,000 million subscribers."<sup>203</sup> Further, assets including "digital photographs and videos kept on storage websites, digital photographs on photo sharing sites such as Flickr and Shutterfly, personal information, such as medical records or tax information on 'protected' websites, digital information on social networking sites such as Facebook and Twitter, blogs, e-mail accounts, personal and business websites, information from online bank and brokerage accounts and online billing and bill-pay services"<sup>204</sup> are prevalent in a person's online presence and are at risk of being lost in an intestate estate.

In order to ease the burden on family members and heirs, prevent loss to an estate, avoid losing a decedent's story, protect a decedent's privacy, and prevent identity theft, legislation is needed to address these concerns as they pertain to digital assets and intestacy. Legislation is also needed to address privacy and publicity rights to intellectual property as well as confidentiality regarding personal assets, and to address the inability to extend copyright law to certain digital assets. If the objective of intestacy statutes is to reflect a typical decedent's intent, then legislatures need to address digital assets. The

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<sup>200</sup> Darrow & Ferrera, *supra* note 29, at 281-82.

<sup>201</sup> *Id.*

<sup>202</sup> Molly Wilkens, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037, 1055 (2011). More people are beginning to die having a great deal of intangible, digital property. *See id.* at 1041.

<sup>203</sup> *Internet Growth Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last visited Feb. 27, 2015) (archived at <http://perma.cc/59H6-3NQA>).

<sup>204</sup> Frank S. Baldino, *Estate Planning and Administration for Digital Assets*, MD. B.J., Nov. 2012, at 28, 29; Cahn, *supra* note 8, at 36-37.

2015]

*DIGITAL ASSETS AND INTESTACY*

modern typical estate contains numerous digital assets, and legislation is needed to bring intestacy statutes up to date in the evolving digital world.