

CONFLICT AND SOLUTION IN DELAWARE'S FIDUCIARY ACCESS TO DIGITAL ASSETS AND DIGITAL ACCOUNTS ACT

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*“Without some type of digital asset reform now, we will
remain indebted to archaeologists . . . to tell future
generations about the electronic world we live in today.”*¹

The problem of law lagging behind reality is not a new one, but the growing volume of Americans' assets that exist in digital form and often cannot be successfully transferred to heirs starkly illustrates this problem. Economic and emotional considerations regularly play into related disputes.² Delaware's Fiduciary Access to Digital Assets and Digital Accounts Act (“Delaware Act”), which was enacted on August 12, 2014³ and follows the Uniform Law Commission (“ULC”)’s recommended legislation⁴ on the topic, serves as a response to this issue. Broadly, digital assets can be defined as any electronic record, including passwords and

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1. Letter from Richard O. and Diane H. Rash to Suzanne Brown Walsh and members of the ULC FADA Committee (July 5, 2013), *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013jul5_FADA_Comments_Rash.pdf. Richard and Diane Rash are the parents of a Virginia man who committed suicide, and they have subsequently sought to increase accessibility of social media accounts to surviving family after the death of the accountholder. *See generally Virginia family, seeking clues to son's suicide, wants easier access to Facebook*, PEACE AND FREEDOM: POLICY AND WORLD IDEAS (Feb. 18, 2013, 7:46 PM), <https://johnib.wordpress.com/tag/richard-and-diane-rash/>.

2. *See, e.g.,* April Dembosky, *Technology: Dead man's data*, FINANCIAL TIMES (Nov. 15, 2013), *available at* <http://www.ft.com/cms/s/0/7fc0b8e0-4d1c-11e3-9f40-00144feabdc0.html#axzz3QKmGzfQd> (commenting on the difficulties, compounded by grief, of accessing deceased loved ones' digital property ranging from social media accounts to airline frequent flier miles).

3. Fiduciary Access to Digital Assets and Digital Accounts Act, H.B. 345, 147th Gen. Assemb. (Del. 2014), *available at* <http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/HB+345> (the bill was enacted August 12, 2014 and became effective January 1, 2015).

4. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (Final Draft, Jan. 22, 2015), *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf.

other credentials to access online accounts, photographs, documents, domain names, blog posts, social media accounts, and emails.⁵ Legislation that attempts to provide a system for the transfer of these assets at the death of a user faces challenges from its inception, as many companies whose services would be affected have contracted with users in such a way that choice of forum, transferability of licenses, and deletion of accounts at a user's death are pre-set.⁶ Competing interests of freedom of contract, the importance of preserving valuable digital assets, user privacy, and service providers' business autonomy are at stake here.

The Delaware Act is the first instance of state legislation that establishes digital assets as part of a decedent's estate.⁷ This legislation begins to address the problems that exist when passing down digital assets and accounts.⁸ However, the Delaware Act only operates where service providers have not set conflicting contractual terms.⁹ With this fact in mind, even if all fifty states created similar laws, uncertainties would still exist because of the conflicting authorities of service providers' terms of use, decedents' wills, privacy laws, and privacy expectations. A more viable solution lies in the ability of service providers to assess users' wishes for the fate of their assets and accounts, as well as their privacy expectations, in a way that makes these competing forces compatible. A co-regulatory proposal would be a more ideal solution, with legislation requiring that service providers implement policies to comply with users' wishes where feasible.

Part I of this Note describes and discusses digital assets in depth and includes a brief history of the overwhelming shift to digitization of certain types of assets and the factors contributing to this shift. Part II summarizes the relevant legislation on the topic, including the ULC's

5. Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3.

6. See, e.g., APPLE, *iCloud Terms and Conditions* (last modified Oct. 20, 2014), <http://www.apple.com/legal/icloud/en/terms.html>; FACEBOOK, *What Happens When a Deceased Person's Account is Memorialized?* (last visited Feb. 1, 2015), <https://www.facebook.com/help/103897939701143>.

7. See Uniform Law Commission, *Fiduciary Access to Digital Assets: Legislation*, <http://www.uniformlaws.org/Legislation.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets> (last visited Feb. 1, 2015); Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3; Danielle Feller, *Delaware Becomes First State to Pass Digital Assets Bill*, CAMPBELL L. OBSERVER (Sept. 24, 2014), available at <http://campbelllawobserver.com/2014/09/delaware-becomes-first-state-to-pass-digital-assets-bill>.

8. Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3.

9. Delaware's Act contains no preemption clause as to service providers' terms of use. See Section II.C, *infra*.

recommended legislation, and Part III analyzes that legislation in combination with other forces that affect the ultimate disposition of digital assets at user death such as service providers' terms of use and users' testamentary instruments. After weighing and balancing the various digital estate rights interests at stake, this Note proposes in Part III that the best solution available is a combined legislative and user-policy plan that assesses and respects users' individualized wishes for their digital assets.

I. DIGITAL ASSETS AND ACCOUNTS

Understanding the value of digital assets and accounts is key to analyzing related legislative and privacy concerns. This Part defines, broadly, what the phrase "digital assets" encompasses, and it then discusses how that definition interacts with traditional notions of physical property and estate planning. A working definition of the term digital asset is provided by a draft of the Uniform Fiduciary Access to Digital Assets Act:

- a) information created, generated, sent, communicated, received, or stored by electronic means on a digital device or system that delivers digital information, and includes a contract right; and b)
- an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information which the account holder is entitled to access.¹⁰

Samantha D. Haworth further separates digital assets into four categories: access information (usernames, passwords, and other log-in credentials), tangible digital assets (photographs, PDFs, documents, e-mails, online savings account balances, domain names, and blog posts), intangible digital assets ("likes" on Facebook, comments on blog posts, website profiles, and the like), and metadata (data that is electronically stored within a document or website about access history, tags, hidden text, deleted data, code, etc.).¹¹ The average person has a large amount of data stored in digital form—estimates suggest that an individual accumulates eighty-eight gigabytes of this type of data in a lifetime¹²—and has twenty

10. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (Committee Meeting Draft, Oct. 22, 2013), *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013nov_FADA_Mtg_Draft.pdf; *see also* Samantha D. Haworth, *Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act*, 68 U. MIAMI L. REV. 535, 537 (2014).

11. Haworth, *supra* note 10, at 537–38.

12. EVAN CARROLL AND JOHN ROMANO, *YOUR DIGITAL AFTERLIFE: WHEN FACEBOOK, FLICKR, AND TWITTER ARE YOUR ESTATE, WHAT'S YOUR LEGACY?* 39 (1st ed. 2011).

to twenty-five online accounts.¹³ Some digital assets may have sentimental value and are worthy of passing down to heirs for that reason, while others have monetary value: “[i]n the case of popular blogs, photography sites or online videos, [an] estate might be able to realize income from licensing, creating a book or taking other steps to ‘monetize’ content.”¹⁴ Further, archiving e-mails can serve as a memorial of a deceased person’s life in a way that loved ones and also the public (in the case of celebrities or influential figures) could value. Tyler G. Tarney succinctly notes, “society [has created] tremendous value in the form of digital assets. . . . However, the current complexities in acquiring digital assets at death are increasingly forcing individuals and businesses to forfeit this value.”¹⁵ Countervailing interests in individuals’ privacy and businesses’ autonomy in creating terms of use make this problem all the more difficult.

In grasping the breadth of what can be called a digital asset, it is worth noting that all assets might not be equal in terms of value that can or should be transferrable upon death of the owner or user.¹⁶ For instance, the third and fourth categories of digital assets proposed by Haworth, “intangible digital assets” and “metadata,” can be analogized to real-world interactions and property that would never be considered part of a decedent’s estate upon death.¹⁷ Facebook “likes,” comments or reviews left on websites, and internet browser history are akin to signing hotel guest books and museum visitor logs, business card exchanges, past food delivery orders, or dry-cleaning schedules.¹⁸ While it may be unlikely that heirs would have any desire to inherit a record of these seemingly mundane online activities and interactions, the possibility that these records could be included in a person’s cyber-profile “dump” may offend users’ privacy expectations and not further the overall policy behind digital estate rights legislation.¹⁹ For this reason, this Note focuses on users’ ability to control

13. Ashley F. Watkins, *Digital Properties and Death: What Will Your Heirs Have Access to After You Die?*, 62 BUFF. L. REV. 193, 194 (2014).

14. Dennis Kennedy, *Estate Planning for Your Digital Assets*, ABA L. PRAC. TODAY (Mar. 2010), available at <http://apps.americanbar.org/lpm/lpt/articles/ft03103.shtml>.

15. Tyler G. Tarney, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 CAP. U. L. REV. 773, 801 (2012).

16. Haworth, *supra* note 10, at 540.

17. *Id.*

18. *Id.* Existing estate and property law does not provide for the transfer of such assets at death, if only because they are intangible or unreachable in the physical world (for example, a signature in a public guestbook can’t be inherited).

19. *Id.*

the disposition of online account access information and “tangible” digital assets.²⁰

Analogizing digital assets to physical ones can be helpful in understanding what unfamiliar online records or actions may represent in more digestible terms. However, this Note does not suggest that analogizing digital to physical property is always easy or wise. While it is logical that “there is no need to formulate a completely new paradigm of law to protect the interests of all involved”²¹ in digital estate rights issues, the advent of the cloud and other online storage options truly represents a new frontier, not just a different type of “warehouse.” In fact, because physical property often has limitations that are eliminated in the streamlined use of the internet and electronic computing systems, treating digital property like physical property can involve unwanted implications. For example, in terms of constitutional rights, a recognized privacy right exists regarding a person’s “papers and effects,” but that phrase is largely unhelpful in determining how far that privacy extends.²² “Undisputedly, digital property is different from the ‘papers’ and ‘effects’ that the Founding Fathers contemplated”²³ Individuals may also have very different privacy expectations for their online assets than for those assets’ physical analogues.²⁴ Whereas surviving family or the estate executor is likely to find a box of letters left physically behind, people generally do not have that same expectation with online communications, which might have also been written hastily and with less inhibition than tangible

20. Similarly, the ULC’s Uniform Fiduciary Access to Digital Assets Act addresses “only interests capable of ownership and management,” likely precluding items such as comments on externally-owned blogs. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (Drafting Committee Meeting Draft for Nov. 30–Dec. 1, 2012), *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2012nov30_FADA_Mtg_Draft.pdf.

21. 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, 319 (2007).

22. *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1178 (9th Cir. 2010) (Kozinski, J., concurring).

23. RayMing Chang, *Why the Plain View Doctrine Should Not Apply to Digital Evidence*, 12 SUFFOLK J. TRIAL & APP. ADVOC. 31, 35 (2007).

24. Telephone Conference Call with Joint Internet Privacy Working Group & Digital Privacy and Security Working Group on Decedent Digital Assets (Oct. 21, 2014). On the open conference call, representatives from major Internet-based companies discussed the issue of digital assets at death and commented on Delaware’s newly-adopted legislation. Among other things, participants discussed the difference between the “box of letters” analogy and the more shielded, private character of online communications.

methods of communication.²⁵ Without completely accepting or avoiding the use of analogies between digital and physical property, this Note will use caution when employing such comparisons; they can be both usefully illustrative and overly simplistic or even inaccurate.

With important distinctions between physical/traditional property and digital property in mind, it is significant that the field of estate planning by no means precludes digital property in its policies and definitions, as seen in Casner and Pennell's useful treatise on estate planning. It does not specifically discuss digital assets, but it notes in defining the "gross estate":

The word "property" . . . is not limited in its scope by concepts of property that existed when the estate tax was conceived The economy and many of the elements of life today are different than they were even a generation or less ago. The Congress in its wisdom decided to use a general word like property rather than trying to envision what the ingenuity of man would evolve as something substantial.²⁶

This has particular resonance for digital property, and Casner and Pennell's estate planning treatise does not discuss doctrines or policies that exclude digital property by nature (other than those specific to real property).²⁷ For this reason, digital property is best understood not as a separate aspect of estate planning and testators' rights but as an aspect still being incorporated due to advances in technology that move more quickly than does the law.

The cloud is a development that particularly defies analogy to the physical world; its very purpose is to provide electronic storage space for large volumes of digital documents and data.²⁸ Although the technology that powers the cloud is not new, the democratization of cloud access has led to a major shift in the way individuals store digital information. As more and more information is stored on hard drives and in the cloud, the volume of digital assets grows. David Lametti, Professor of Law at McGill University, defines the "cloud" as "the Internet as it evolves towards more centralized computing capacities and virtual 'in the air,' 'over the Internet' storage."²⁹ Though media has been stored in digital formats since before

25. *Id.*

26. A. JAMES CASNER & JEFFREY N. PENNELL, ESTATE PLANNING §1.3.1, at 1029 (7th Ed. 2011) (quoting *First Victoria Nat'l Bank v. United States*, 620 F.2d 1096, 1104 (5th Cir. 1980)).

27. *Id.*

28. See, e.g., David Lametti, *The Cloud: Boundless Digital Potential or Enclosure 3.0?*, 17 VA. J.L. & TECH. 190, 195 (2012).

29. *Id.*

the advent of the internet, use of the cloud has vastly increased the volume of resources and assets stored digitally.³⁰ The cloud makes it possible (and profitable) to engage in large-scale data storage in the pooled resources of a non-local, centralized computer network.³¹

While the cloud represents the overall exponential increase of digitally stored assets, as an online service it comes with its own limitations relating to transfer of those assets. For instance, the terms of use for Apple's iCloud service explicitly disclaim any right of survivorship.³² This means that the assets stored using the service (or, at least, copies of assets) are not transferrable from iCloud to heirs.³³ iCloud is not alone in having restrictive terms of service. Companies like Amazon and Apple similarly limit users' ability to pass on digital media by structuring the purchase so that the user acquires only a non-transferrable limited license to use the media, not full ownership.³⁴ Terms of use in some popular services present other limitations: Facebook users, for instance, agree to litigate any claims in Santa Clara County under California law.³⁵ The result of these kinds of terms of use is that users' acceptance of forfeiture of abilities and rights (especially in the case of states with relevant legislation) is often requisite for the use of such websites or features offered by online service providers.

Approaches vary widely for how online service providers deal with digital assets at user death; there is no universal "default."³⁶ One of the simplest and most restrictive of these approaches is Apple's iCloud terms of service.³⁷ This method preserves user privacy because it prohibits the transfer of digital assets, but it likely comes at the price for surviving family of losing valuable documents and access information. Facebook uses a hybrid approach, where the site "memorializes" accounts of users

30. *Id.* at 207–09.

31. *Id.*

32. Watkins, *supra* note 13, at 218.

33. *Id.*

34. *Id.* at 206–07.

35. Jason Mazzone, *The Right to Die Online*, 16 J. INTERNET L. 1, 14–15 (2013).

36. Compare APPLE, *iCloud Terms and Conditions*, *supra* note 6, at IV.D with TWITTER, *Contacting Twitter about a deceased user or media concerning a deceased family member*, available at <https://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/87894-how-to-contact-twitter-about-a-deceased-user> (last visited Feb. 1, 2015). While both providers allow for deactivation of an account on proof of a death certificate and other information, the procedures and access provided to survivors varies widely.

37. APPLE, *iCloud Terms and Conditions*, *supra* note 6.

who have died.³⁸ This method attempts to preserve some of the media uploaded by these users, but the website does not allow family to access the account to retrieve such media.³⁹ The account is only viewable by contacts approved as “friends” while the account was still active; these “friends” cannot be modified after the account becomes memorialized.⁴⁰ Instagram, a picture-sharing social media app, has a policy of removing the accounts of deceased individuals.⁴¹ The policy states, “To protect the privacy of people on Instagram, we’re unable to provide anyone with login information to an account.”⁴² Interestingly, Instagram’s policy on this issue is not identical to Facebook’s policy, even though Facebook is the parent company of Instagram.⁴³ This difference implies a settings-based analysis of users’ privacy expectations and a somewhat tailored approach based on the differences between the two social media platforms. Twitter provides only for deactivation of deceased users’ accounts and appears to only deactivate accounts when formally requested to do so by someone with authority over the person’s estate (rather than deactivating simply upon receiving obituaries or death notices).⁴⁴ Flickr is used exclusively to store and showcase photographs, and Yahoo is its parent company.⁴⁵ Flickr’s policies regarding accounts of deceased users follow those of the parent company.⁴⁶

E-mail providers are in some cases more willing to work with fiduciaries/surviving family to provide access, especially where a family can get a court order.⁴⁷ However, providers are generally careful to avoid

38. FACEBOOK, *What Happens When a Deceased Person’s Account is Memorialized?*, *supra* note 6.

39. *Id.*

40. Carroll and Romano, *supra* note 12, at 142.

41. INSTAGRAM, *How Do I Report a Deceased Person’s Account on Instagram?*, <https://help.instagram.com/264154560391256/> (last visited Feb. 1, 2015).

42. *Id.*

43. Evelyn M. Rusli, *Facebook Buys Instagram for \$1 Billion*, N.Y. TIMES DEALBOOK (Apr. 9, 2012), *available at* <http://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/>.

44. TWITTER, *Contacting Twitter about a deceased user or media concerning a deceased family member*, *supra* note 36.

45. *See generally* YAHOO, *Corporate Information – Products & Services*, <https://info.yahoo.com/products-services> (last visited Feb. 1, 2015).

46. *See* Part I, *infra*; YAHOO, *Yahoo Terms of Service* (last updated Mar. 16, 2012), <https://info.yahoo.com/legal/us/yahoo/utos/utos-173.html>.

47. *See, e.g.*, Stefanie Olsen, *Yahoo Releases E-mail of Deceased Marine*, CNET (Apr. 21, 2005), http://news.cnet.com/Yahoo-releases-e-mail-of-deceased-Marine/2100-1038_3-568025.html.

guaranteeing access to fiduciaries or families.⁴⁸ Gmail, Google's e-mail service, has a policy that states "in certain circumstances we may provide content from a deceased user's account."⁴⁹ Google requires several documents for review, including a death certificate of the account holder and identification of the person wishing to access the account. After a review period Google may allow access.⁵⁰ Though this approach appears somewhat piecemeal, Google does have a specified review department just for these kinds of inquiries.⁵¹ Yahoo Mail, however, will not provide access at all, and it includes a "No Right of Survivorship and Non-Transferability Clause" in its policies.⁵²

Part II outlines the legislation that has come into place amidst the landscape defined in Part I.

II. DEVELOPMENT OF DIGITAL ASSET LEGISLATION

Recent state and model legislation complicates the understanding and application of these companies' policies.⁵³ Delaware's recently enacted law granting fiduciaries access to digital assets and accounts in the case of the account holder's death or incapacitation is the first example of state legislation mirroring the Uniform Law Commission's suggested law on this issue.⁵⁴ Other states have passed legislation dealing with access to digital accounts (primarily e-mail accounts) after the death of the account holder, but none is as comprehensive as Delaware's.⁵⁵ Still other states have laws requiring that digital account service providers give notice

48. See, e.g., GOOGLE, *Submit a request regarding a deceased user's account*, <https://support.google.com/mail/answer/14300?hl=en> (last visited Feb. 1, 2015).

49. *Id.* (select "Obtain data from a deceased user's account." option).

50. *Id.*

51. *Id.*

52. YAHOO, *Yahoo Terms of Service*, *supra* note 46; cf. Allison Grande, *Yahoo Slams Move to Open Deceased Users' Data Records*, LAW360 (Sept. 16, 2014), <http://www.law360.com/articles/577799/yahoo-slams-move-to-open-deceased-users-data-records> (noting that Yahoo disagrees with the new Delaware law as not respectful of users' privacy).

53. The legislation discussed herein often conflicts with service providers' terms of use. See, e.g., APPLE, *iCloud Terms and Conditions*, *supra* note 6; FACEBOOK, *What Happens When a Deceased Person's Account is Memorialized?*, *supra* note 6; INSTAGRAM, *How Do I Report a Deceased Person's Account on Instagram?*, *supra* note 41.

54. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, *supra* note 4; Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3. This proposal is discussed in more detail in Section II.A.1, *infra*.

55. See, e.g., R.I. GEN. LAWS § 33-27-3 (2007) (providing a fiduciary access to a deceased person's e-mail account(s)); IND. CODE § 29-1-13-1.1 (2007) (providing a fiduciary access to a deceased person's digitally stored documents and other information).

before termination of an account.⁵⁶ While legislation requiring notice of termination does not address the issue of account access after the death or incapacitation of the original accountholder, it does point to the seriousness of account termination in cases where the account is very valuable.⁵⁷ This concern is closely intertwined with the desire to pass down access to digital accounts and assets after death.

The need for legislation governing access to digital accounts after death or incapacitation is highlighted by legal battles to gain access to an account where the service provider does not wish to cooperate.⁵⁸ Companies are concerned about upending users' privacy expectations if laws allow fiduciaries access to private accounts.⁵⁹ Online service providers may also fear business costs and having to make difficult decisions about who should get access to deceased persons' accounts.⁶⁰ On the other side of the debate is an argument that the privacy disputes on the issue of fiduciary access to digital assets are misplaced.⁶¹ One author explains, "[W]hile the privacy of the account holder is often cited as a factor weighing against disclosure, privacy rights are generally considered to cease upon death."⁶²

In this evolving field, the interests at stake must find a balance between properly valuing access to digital assets and accounts, privacy of users, and freedom of contract. In this Part, this Note will provide the reader with background on the contents and drafting history of the Uniform Fiduciary Access to Digital Assets Act and Delaware's digital estate rights legislation. This Note also includes a brief survey of other states' relevant legislation.

A. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

The ULC produces the "Uniform Probate Code and numerous other Model and Uniform laws."⁶³ The ULC's purpose is to guide the

56. *See, e.g.*, CAL. BUS. & PROF. CODE § 17538.35(a) (West 2010).

57. *See id.*

58. *See, e.g.*, Olsen, *supra* note 47.

59. Geoffrey A. Fowler, *Life and Death Online: Who Controls a Digital Legacy?*, WALL ST. J. (Jan. 5, 2013), *available at* <http://online.wsj.com/news/articles/SB10001424127887324677204578188220364231346>.

60. *Id.*

61. Darrow & Ferrera, *supra* note 21, at 313.

62. *Id.*

63. Haworth, *supra* note 10, at 542. For a list of Acts, Codes, and other model legislation produced by the ULC, see UNIFORM LAW COMMISSION, *Acts*, <http://www.uniformlaws.org/Acts.aspx> (last visited Feb. 1, 2015).

formulation of uniform state legislation.⁶⁴ In order for a proposed ULC Act to be adopted, the drafted Act must be submitted for debate before the entire Uniform Law Commission during at least two annual meetings.⁶⁵ Once adopted by the ULC, states can choose to adopt official Uniform Acts in whole or in part. A Uniform Act is not binding authority, but it “provides a helpful model for other states looking to draft their own legislation.”⁶⁶ Delaware is thus far the only state to adopt the Uniform Fiduciary Access to Digital Access Act into its own legislation.⁶⁷

1. *The Uniform Fiduciary Access to Digital Assets Act*

The National Conference of Commissioners on Uniform State Laws approved the Uniform Fiduciary Access to Digital Assets Act (“UFADAA”) in 2014.⁶⁸ The UFADAA’s goal is to “remove barriers to a fiduciary’s access to electronic records” while “respecting the privacy and intent of the account holder.”⁶⁹ In creating the UFADAA, the ULC stated that “[l]ogically there should be no difference between a fiduciary’s right to access information from an online bank or business and from one within a brick and mortar storefront. In practice, however, businesses are refusing to recognize fiduciary authority over digital assets. UFADAA seeks to close that gap.”⁷⁰

The UFADAA deems the fiduciary to have the lawful consent of the account holder for the custodian to grant access to the digital asset.⁷¹ Custodians of online services that host digital assets must comply with fiduciaries’ requests for access to, control of, and copies of the asset to the

64. See UNIFORM LAW COMMISSION, *Constitution* § 1.2, available at <http://www.uniformlaws.org/Narrative.aspx?title=Constitution> (“It is the purpose of the [ULC] to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable”); see also Haworth, *supra* note 10, at 542.

65. Haworth, *supra* note 10, at 542–43.

66. *Id.* at 543.

67. UNIFORM LAW COMMISSION, *Fiduciary Access to Digital Assets: Legislation*, <http://www.uniformlaws.org/Legislation.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets> (last visited Feb. 1, 2015); *Fiduciary Access to Digital Assets and Digital Accounts Act*, *supra* note 3; Feller, *supra* note 7.

68. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, *supra* note 4, at cover.

69. *Id.* at 1–2.

70. Memorandum to the Committee of the Whole, Uniform Law Commission 2014 Annual Meeting from Suzanne Brown Walsh, Chair, Regarding Uniform Fiduciary Access to Digital Assets Act, Final Reading 1 (May 27, 2014), available at http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014am_ufadaa_issues%20memo.pdf.

71. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8, *supra* note 4, at 14–15.

extent permitted by copyright law.⁷² Custodians are given sixty days to comply with fiduciaries' requests.⁷³ Custodians and officers, employees, and agents of custodians are immune from liability for any act done in good faith in compliance with the UFADAA.⁷⁴ The UFADAA also notes that its coverage is limited by the definition of "digital assets," because it can only apply to electronic records.⁷⁵ Such records do not include the underlying asset or liability unless it is itself an electronic record.⁷⁶

Importantly, the UFADAA explicitly states that it preempts contradictory terms of service in the absence of a separate affirmative agreement.⁷⁷ It states in § 8(b):

Unless an account holder . . . agrees to a provision in a terms-of-service agreement that limits a fiduciary's access to a digital assets of the account holder, by an affirmative act separate from the account holder's assent to other provisions of the agreement: the provision is void as against the strong public policy of this state; and the fiduciary's access under this [act] does not violate the terms-of-service agreement⁷⁸

While the ULC creates model legislation that it recommends for implementation in all states, states are free, of course, to modify the text. This suggests that the ULC strongly values the rights of testators and fiduciaries. Looking into the drafting process behind the UFADAA provides even more information about what the drafters' goals were.

2. "Legislative" Intent of the UFADAA

Because records of legislative intent are unavailable for the Delaware legislation, the ULC's memos, drafting meeting notes, and earlier drafts of the Act provide a useful glimpse into the framing and intent of the UFADAA on which the Delaware Act is based (and on which any future state legislation will likely be based). These documents allow examination of the motivations, fears, and pressures that molded the UFADAA into its final draft as it now stands.⁷⁹

72. *Id.* at § 9, *supra* note 4, at 21–23

73. *Id.*

74. *Id.*

75. *Id.* at § 2(9), *supra* note 4, at 4.

76. *Id.*

77. *Id.* at § 8, *supra* note 4, at 14–15.

78. *Id.*

79. *See, e.g.*, Letter from NetChoice to Suzanne Brown Walsh and the Uniform Law Commission (July 8, 2013), *available at* <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Asset>

The records of the ULC in drafting the UFADAA reveal that the Committee as well as outside consultants were highly concerned about conflicts between the Act's granting of authority to fiduciaries over digital accounts and digital assets, and federal laws (like the Electronic Communications Privacy Act ("ECPA")) that criminalize unauthorized access to such assets.⁸⁰ The ULC struggled with how to address this issue, as a conflict with federal law could derail the goals of the UFADAA and make it ineffective or even void. These federal laws, including the ECPA and the Stored Communications Act, are also a source of businesses' potential risks in complying with digital asset reform litigation.

NetChoice, a trade association of leading e-commerce businesses, together with the State Privacy and Security Coalition, noted in a July 2013 letter to the ULC, "[w]ithout a court order and in the absence of further guidance, a provider who makes a unilateral decision to disclose such content is subject to litigation from third parties who disagree with this conclusion."⁸¹ While consent to fiduciary access to digital accounts after the death of the accountholder can be expressed through a will, most Americans die intestate.⁸² For those who die without a will, NetChoice noted that whether or not to release information to fiduciaries is an unsettled issue of federal law, and "it is far from clear that a state law enacted years after the ECPA will control how a courts [sic] rule on whether consent may be assumed."⁸³

After wavering on how to handle the issue of federal computer fraud and privacy laws, the "Final Read" of the UFADAA Committee's notes proposes a solution that is included in the final draft of the UFADAA. The Committee provides:

UFADAA codifies that fiduciaries, who "step into the shoes of" the persons they represent, are authorized to consent to

s/2013jul_FADA_NetChoice_Szabo%20et%20al_Comments.pdf. NetChoice's letter represents one of the many voices advocating for the ULC to take a particular position in drafting the UFADAA. For a full record of comments and letters submitted to the ULC on this topic, see UNIFORM LAW COMMISSION, *Drafts, available at* <http://www.uniformlaws.org/Committee.aspx?title=Fiduciary+Access+to+Digital+Assets> (last visited Feb. 1, 2015).

80. See, e.g., Letter from NetChoice to Suzanne Brown Walsh and the Uniform Law Commission, *supra* note 79.

81. *Id.*

82. Sheryl Nance-Nash, *Why More than Half of Americans Don't Have Wills*, DAILY FINANCE (Aug. 26, 2011), *available at* <http://www.dailyfinance.com/2011/08/26/what-america-thinks-about-estate-planning/>.

83. Letter from NetChoice to Suzanne Brown Walsh and the Uniform Law Commission, *supra* note 79.

electronic communications disclosures under federal privacy laws. This allows the public communications provider to disclose or allow access without liability, and places electronic assets and communications on the same footing as traditional assets and communications (“asset neutrality”).⁸⁴

By defining fiduciaries as equivalent to the account holders themselves, the Act circumvents federal privacy laws with respect to accessing decedents’ accounts and assets. It is not clear whether this attempt at “opting out” of federal regulation will prove entirely successful, but the lack of widely-accepted privacy rights on behalf of deceased individuals does bolster support for allowing access to their accounts and assets after death.

Though the UFADAA largely favors access to and preservation of digital accounts and assets over user privacy, the UFADAA Committee was aware of and may have been sensitive to privacy issues when drafting.⁸⁵ In fact, the American Civil Liberties Union (“ACLU”) expressed its concern to the Committee about its overall goal in drafting the UFADAA, writing that the privacy concerns associated with the “nearly unfettered access” provided to fiduciaries in the UFADAA were substantial and suggesting that digital estates differ in important ways from their offline analogues.⁸⁶ The ACLU noted:

In many ways, digital estates differ not just in degree, but in kind, from their offline analogues. This is to say that individuals do not simply retain more correspondence in online storage than they ever could in paper form, but that the keys to an individual’s online accounts are likely to provide access to highly sensitive materials, such as internet dating profiles, that lack offline equivalents.⁸⁷

Perhaps with this warning in mind, the Committee ultimately tempered the sweeping access it codifies through “access neutrality.”⁸⁸ The UFADAA calls for preservation of the option for account holders to opt out of fiduciary access through a deliberate process so that default

84. Memorandum Regarding Uniform Fiduciary Access to Digital Assets Act, Final Reading, *supra* note 70.

85. *See, e.g.*, Letter from Allison S. Bohm, Advocacy and Policy Strategist for the ACLU, to Suzanne Brown Walsh (July 3, 2013), *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013jul3_FADA_Comments_ACLU.pdf.

86. *Id.*

87. *Id.*

88. *See generally* UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, *supra* note 4.

legislation will not apply to their estate.⁸⁹ However, the drafters were careful to note that this opting out should not be a requirement to access or use the service in question.⁹⁰ Removing the possibility of a forcible waiver alleviated the concerns raised by the ACLU by protecting individual privacy rights.⁹¹ This protects users against a forced waiver of their rights to fiduciary access in order to take part in a website or digital product.

The ULC's "legislative" intent also raises questions of whether the fiduciary's authority is to own, manage, and distribute, or simply to seek copies from the provider. Interestingly, the UFADAA's preemptory clause, stating that contradictory terms-of-service agreements are void, only became part of the UFADAA in later drafts.⁹² Gaining a better understanding of the intent behind the UFADAA is critical in grasping the full purpose of the model legislation as well as the state legislation based on the UFADAA.

B. A REPRESENTATIVE SAMPLE OF OTHER STATE LEGISLATION

The Delaware Act is not the first state legislation on the topic of fiduciary access to digital assets. At least six states in addition to Delaware have some form of digital estate legislation, and many more have proposed such legislation.⁹³ Those states with current legislation are Connecticut,⁹⁴ Idaho,⁹⁵ Indiana,⁹⁶ Nevada,⁹⁷ Oklahoma,⁹⁸ and Rhode Island.⁹⁹ None is as

89. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8(b), *supra* note 4, at 14–15; *see also* Letter from Evan Carroll to Suzanne Brown Walsh & Naomi Cahn (Mar. 18, 2014), *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014mar18_FADA_Comments_Carroll.pdf (illustrating discussions during drafting regarding this point). Evan Carroll is the co-founder of the Digital Beyond, <http://www.thedigitalbeyond.com/>, and co-author of *YOUR DIGITAL AFTERLIFE: WHEN FACEBOOK, FLICKR, AND TWITTER ARE YOUR ESTATE, WHAT'S YOUR LEGACY?*, *supra* note 12.

90. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8(b), *supra* note 4, at 14–15.

91. *Id.*; *see also* Letter from Allison S. Bohm to Suzanne Brown Walsh, *supra* note 85.

92. Although some of the drafts waver with the terms included and can be inconsistent until the final version, history of the drafts shows that as late as February 2013, this clause was not included.

93. *See* EVERPLANS, *State-by-State Digital Estate Planning Laws*, <https://www.everplans.com/articles/state-by-state-digital-estate-planning-laws> (last visited Feb. 1, 2015).

94. CONN. GEN. STAT. ANN. § 45a-334a (West 2015).

95. IDAHO CODE ANN. § 15-5-424 (West 2014).

96. IND. CODE ANN. § 29-1-13-1.1 (West 2007).

97. NEV. REV. STAT. ANN. § 143.188 (West 2014).

inclusive as Delaware's; most deal only with electronic communication and password access, rather than actual ownership of digital assets.¹⁰⁰ In addition, California has a statute that requires service providers to give thirty days' notice before terminating a user's e-mail account.¹⁰¹ Below are summaries of a representative sample of state laws.

1. *Rhode Island*

Rhode Island's statute on access to decedents' digital assets is limited to electronic mail.¹⁰² The statute requires, in part,

An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his or her death, access to or copies of the contents of the electronic mail account of such deceased person¹⁰³

This language makes this legislation very limited as compared with other statutes enacted by states that have addressed this issue.¹⁰⁴ This statute only covers electronic mail, and it treats the issue as one of recovering files and perhaps sentimental messages rather than focusing on the potential value of digital assets.¹⁰⁵ Connecticut's statute is similar and equally limited.¹⁰⁶

2. *Indiana*

Indiana's statute requires a custodian who electronically stores the documents or information of a deceased person to give the executor access

98. OKLA. STAT. ANN. tit. 58, § 269 (West 2014).

99. R.I. GEN. LAWS ANN. § 33-27-3 (West 2014).

100. See Sections II.B.1, II.B.2, and II.B.3, *infra*; see also Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3.

101. CAL. BUS. & PROF. CODE § 17538.35(a) (West 2010). This statute is much more limited than those of the other states discussed in this Note in terms of protection for users' digital assets. Further, it may in some cases be useless in the event of a user's death, because the only notice would be sent to the e-mail account which would be inaccessible after the user's death, assuming s/he did not leave access information with anyone else.

102. R.I. GEN. LAWS ANN. § 33-27-3 (West 2014).

103. *Id.*

104. Compare R.I. GEN. LAWS ANN. § 33-27-3 (West 2014), with OKLA. STAT. ANN. tit. 58, § 269 (West 2014) (providing executor access to "any social networking website, any microblogging or short message service website or any e-mail services").

105. R.I. GEN. LAWS ANN. § 33-27-3 (West 2014).

106. CONN. GEN. STAT. ANN. § 45a-334a (West 2015). ("An electronic mail service provider shall provide . . . access to or copies of the contents of the electronic mail account of [the] deceased person . . .").

to, or copies of, the decedent's stored documents or information.¹⁰⁷ It also prohibits a custodian from destroying or disposing of documents or information of a deceased person for two years after receiving a request from a personal representative or court order for the material.¹⁰⁸ This legislation is more inclusive than that of Rhode Island but is nonetheless limited because it refers only to "stored documents or information,"¹⁰⁹ potentially leaving assets such as domain names or accounts without stored information unprotected.

3. *Oklahoma*

Oklahoma's statute represents a third, more inclusive type of legislation.¹¹⁰ The law provides:

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 website.¹¹¹

This law covers more of the full scope of potential digital assets than does the type of legislation represented by Rhode Island's and Indiana's statutes.¹¹² States with similar proposed laws include Idaho, Michigan, Nebraska, New York, North Carolina, Oregon, Pennsylvania, and Virginia.¹¹³ However, Delaware's newly-adopted legislation on the matter and the UFADAA are still more inclusive and broad ranging than any other digital estate legislation in the United States.¹¹⁴ The rapidly-developing nature of the types of assets themselves is a critical issue here, and Delaware's recently enacted law mitigates this issue to a greater extent than that seen in other states' statutes. As such, it is the first law requiring that the full scope of a person's digital assets be deemed a part of their estate upon death.

C. DELAWARE'S NEW LEGISLATION

The Delaware Act closely parallels the UFADAA. This Section outlines the Delaware Act and notes where it diverges from the model

107. IND. CODE ANN. § 29-1-13-1.1 (West 2007).

108. *Id.*

109. *Id.*

110. OKLA. STAT. ANN. tit. 58, § 269 (West 2014).

111. *Id.*

112. *Id.*

113. See EVERPLANS, *supra* note 93.

114. See Section II.C, *infra*.

legislation. The Delaware Act states that the executor is entitled to control over digital assets and accounts, and the entities (corporations and service providers) that handle them are required to give access to the executor.¹¹⁵ These requirements also apply in cases where a person becomes incapacitated or is under conservatorship.¹¹⁶ The bill was signed on August 12, 2014, and it took effect January 1, 2015.¹¹⁷

In order to remain as inclusive as possible in light of technological evolution, the legislation defined terms broadly. “Digital account” is defined as:

an electronic system for creating, generating, sending, sharing, communicating, receiving, storing, displaying, or processing information which provides access to a digital asset which currently exist[s] or may exist as technology develops . . . including but not in any way limited to, email accounts, social network accounts, social media accounts, file sharing accounts, health insurance accounts, health care accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online store accounts and affiliate programs thereto, and other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.¹¹⁸

This definition attempts to cover the range of existing digital assets as well as those that have not yet been developed or imagined.¹¹⁹ The Delaware Act’s purpose is to give a fiduciary control over any and all rights in digital assets and digital accounts to the extent permitted under applicable state or federal law or regulations and/or any end user license agreement.¹²⁰ An executor granted authority over digital assets is to have the legal consent of the account holder and be an authorized user under all applicable state and federal law and the terms of use of the service.¹²¹ Custodians of digital assets must comply with fiduciaries’ requests for access.¹²² Further, as in the UFADAA, custodians and officers, employees, and agents of

115. Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3.

116. *Id.* at Section 1 § 5002(1).

117. *Id.* at Section 5.

118. *Id.* at Section 1 § 5002(4).

119. This interpretation is highlighted by language in the Delaware Act such as “including but not limited to.” *Id.*

120. *Id.* at Section 1 § 5004.

121. *Id.* at Section 1 § 5005(a).

122. *Id.* at Section 1 § 5005(b).

custodians are immune from liability for any act done in good faith in compliance with the Delaware Act.¹²³

This bill specifically states that its purpose is to adjust the current Delaware law so as to better align with the increasing percentage of citizens' lives that are being conducted online.¹²⁴ As such, it states, "The [Delaware] Act should be construed liberally to allow such access and control, especially when expressly provided for in a written instrument."¹²⁵ This bolsters support for transfers of digital assets when included in a will or other written instrument, but the Delaware Act also provides for situations where there is no such writing.¹²⁶

It is interesting to note that the bill does not purport to preempt other law or online service providers' terms of service.¹²⁷ Section 5004 of the bill acknowledges that an executor can only gain access to a digital account or asset "to the extent permitted under applicable state or federal law or regulations or any end user license agreement."¹²⁸ This implies that the law will not apply where it is contradicted by a service provider's end user license agreement.

As will be discussed in Part III, many service providers do have such agreements in place.¹²⁹ This results in a mix of conflicting interests, giving rise to a need for a solution beyond the legislation currently in place.

III. DISCUSSION: PRIVACY VERSUS PROBATE

Varied interests are at stake in the implementation of any initiative that aims to facilitate fiduciary access to decedents' digital assets, whether or not it is legislative in nature. The most significant of those interests are (1) the value that lies in the ability to pass down digital assets through wills or intestacy; (2) users' privacy interests, which may not align with default inheritance of digital assets; and (3) businesses' freedom to contract

123. *Id.* at Section 1 § 5006. Notably, the Delaware Act carves out an exception for digital accounts retained by an employer that are regularly used by an employee in the usual course of business. These accounts are not subject to this legislation.

124. *Id.* at Synopsis.

125. *Id.*

126. The wording "*especially* when" seen in the language of the Delaware Act (emphasis added) implies that the Delaware law applies even in cases of intestacy. *Id.*

127. Compare Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3 with UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, *supra* note 4.

128. Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3.

129. See, e.g., APPLE, *iCloud Terms and Conditions*, *supra* note 6; FACEBOOK, *What Happens When a Deceased Person's Account is Memorialized?*, *supra* note 6; INSTAGRAM, *How Do I Report a Deceased Person's Account on Instagram?*, *supra* note 41.

to limit their responsibilities or liability attached to digital assets once the original user or owner dies or becomes incapacitated.

A. CONFLICTING INTERESTS

1. *Should Inheritance of Digital Assets Be Allowed?*

As far as general estates and trusts policy is concerned, “[o]ne of the most powerful rights granted to citizens of the United States is the right to dictate the disposition of their property at death.”¹³⁰ With that principle in mind, it seems natural and fair that if a testator includes a digital asset in her will or trust, the authorities handling her estate should respect that expressed desire toward the disposition of the asset. In practice, however, online service providers may have business approaches to the situation of inheritance of digital assets that do not promote inheritance.¹³¹ In the case of an owner of digital assets who dies without a will, many would argue that the nature of digital assets is private in a way that is not conducive to inheritance through intestacy.¹³²

General property law policies promoting the ability to pass down one’s assets informs some of the background of an analysis of what to do about inheriting digital assets.¹³³ This background is especially relevant because one study found that U.S. consumers value their digital estate, on average, at \$55,000.¹³⁴ Further, if an analogy to physical property is accepted, understanding online service providers (such as e-mail service providers) as similar to warehouse operators, subject to the field of warehouse law, provides a basis for requiring the transfer of digital assets to heirs upon the death of the original owner.¹³⁵ If e-mail service providers are considered analogous to warehouse operators, then as a general rule, they should be obligated to transfer e-mail messages to heirs.¹³⁶ In addition, the Uniform

130. Justin Atwater, *Who Owns E-mail? Do You Have the Right to Decide the Disposition of your Private Digital Life?*, 2006 UTAH L. REV. 397, 397 (2006) (citing *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (“In one form or another, the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times.”)).

131. *See, e.g.*, Letter from Allison S. Bohm, Advocacy and Policy Strategist for the ACLU, to Suzanne Brown Walsh, *supra* note 85.

132. *Id.*

133. *See generally* *Hodel v. Irving*, 481 U.S. at 716.

134. Kelley Greene, *Passing Down Digital Assets*, WALL ST. J. (Aug. 31, 2012), available at <http://www.wsj.com/articles/SB10000872396390443713704577601524091363102>.

135. Darrow & Ferrera, *supra* note 21, at 308. Warehouse law is a field of law governing long-term storage of goods and personal property.

136. *Id.* at 309–10.

Commercial Code prohibits warehouse operators from including in the receipt for warehouse services a provision that impairs the obligation of delivery to the owner or person entitled to possession of the property.¹³⁷ While the field of warehousemen law and the Uniform Commercial Code do not explicitly apply to e-mail service providers, California law that requires thirty days' notice be given to e-mail account holders prior to termination of service already mirrors the Uniform Commercial Code's requirement of thirty days' notice prior to terminating storage.¹³⁸

Analogizing digital assets to physical property and storage provides a strong case for allowing the inheritance of digital assets and for fiduciary access to digital accounts where the accountholder has expressed the desire to pass those assets to heirs upon his or her death. The more difficult question, however, lies in whether or not inheritance of these assets should be the default. Creating such a default would in many instances not be welcomed by businesses or by users wishing to retain personal privacy even after death.

2. *Businesses' Interests*

Companies may have an interest in not allowing inheritance of digital assets and especially of digital media. Online service providers' terms of use frequently limit users' rights to transfer their digital accounts or assets.¹³⁹ One notable example is Apple's iTunes service, which structures purchases of digital media as nontransferable limited licenses.¹⁴⁰ Interestingly, both Apple and Amazon have recently filed patents for a new service that would allow for a digital media "garage sale" of sorts, whereby users could buy and trade digital media, but this new frontier is

137. U.C.C. § 7-202(3) (2005) ("A warehouseman may insert in its receipt any other terms which are not contrary to the provisions of this Act and do not impair his obligation of delivery Any contrary provisions shall be ineffective.")

138. U.C.C. § 7-206(1) (2005):

A warehouseman may on notifying the person on whose account the goods are held . . . require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period not less than thirty days after the notification.

Id.; see also CAL. BUS. & PROF. CODE § 17538.35(a) (West 2010).

139. See, e.g., APPLE, *iCloud Terms and Conditions*, *supra* note 6; FACEBOOK, *What Happens When a Deceased Person's Account is Memorialized*, *supra* note 6; INSTAGRAM, *How Do I Report a Deceased Person's Account on Instagram?*, *supra* note 41.

140. APPLE, *iCloud Terms and Conditions*, *supra* note 6; see also Carroll and Romano, *supra* note 12, at 78.

limited in a number of ways.¹⁴¹ Publishers of original content may limit the number of times an asset can be transferred,¹⁴² and the kind of transfers allowed by this new marketplace would not likely include inheritance transfers.

Implementing policies that discourage the transfer of digital media may serve a dual purpose of encouraging more direct purchases from the digital media provider and avoiding copyright disputes from publishers of the content. When it comes to default inheritance of digital accounts and assets, online service providers may also want to avoid unsettling users' privacy expectations. In September of 2014, soon after the ULC adopted the UFADAA, Yahoo publicly disagreed with the newly proposed inheritance law, calling the idea that decedents would have wanted default fiduciary access a "faulty presumption."¹⁴³ A law that would place more affirmative duties on an e-mail service provider is not an attractive one to Yahoo.¹⁴⁴ This underscores the importance of assessing individual users' wishes regarding their digital assets in order to avoid making any presumptions about the disposition of those assets after users' deaths.

3. *Users' Privacy Interests*

While businesses' motives for wanting to bar inheritance of digital assets are partially driven by profit, concern for user privacy fuels these policies as well. An often-cited example of a conflict between digital account holders' privacy and the interests of individuals who may wish to gain access to those accounts after the holders' death is that of Alison Atkins, a sixteen-year-old girl who died after a long battle with illness.¹⁴⁵ Her family wished to retain access to her Facebook account and other online records as a way of remembering her, but the various online service providers with which Alison had been affiliated gradually shut off the family's access, in line with the services' terms of use to protect user privacy.¹⁴⁶ To many individuals, the thought of family gaining access to online accounts containing records such as "dark, private journals" is an unwelcome one.¹⁴⁷

141. Chuong Nguyen, *Apple, Amazon Pave Way for Digital Garage Sale*, (Mar. 12, 2013), <http://www.gottabemobile.com/2013/03/12/apple-amazon-pave-way-for-digital-garage-sale/>.

142. *Id.*

143. Grande, *supra* note 52.

144. *See id.*

145. *See, e.g.*, Haworth, *supra* note 10, at 535–536; Fowler, *supra* note 59.

146. *Id.*

147. Haworth, *supra* note 10, at 535–536.

At the same time, some have called this privacy argument “misplaced,” as deceased individuals are generally thought not to have privacy interests.¹⁴⁸ Jonathan J. Darrow and Gerald R. Ferrera note that “private diaries, letters, and photographs can be inherited, and may contain equally private information [as their digital counterparts].”¹⁴⁹ In fact, the privacy interests generally asserted in regard to deceased individuals are actually that of “surviving family members’ right to personal privacy with respect to their close relative’s [personal information].”¹⁵⁰ In contrast, in the field of digital estate rights, privacy rights of deceased individuals are often asserted against families.¹⁵¹ That being said, general freedom of contract principles may make it possible to create a contractual right of privacy between account holders and account custodians (e.g., services like Facebook and e-mail service providers) that can effectively protect the privacy of deceased individuals, giving those individuals assurances that their request for privacy will be maintained.¹⁵²

Where services’ terms of use seek to protect user privacy, legislation tends to temper that on behalf of surviving families’ sentimental and economic interests.¹⁵³

B. POWER OF LEGISLATION

The legislation discussed *infra* in Part III provides a response to services’ terms of use as well as other areas without clear answers to estate rights issues. Legislation on the topic of digital estate rights generally conflicts to some degree with standards and terms of use set forth by online service providers.¹⁵⁴ In some cases, state legislation may also ostensibly conflict with federal privacy and computer crime law, making its viability questionable.¹⁵⁵ The UFADAA deals with both of these issues by

148. Darrow & Ferrera, *supra* note 21, at 313.

149. *Id.* at 314.

150. Nat’l Archives and Records Admin. v. Favish, 541 U.S. 157, 157 (2004) (holding that the family of Vince Foster, Deputy White House Counsel, had a prevailing privacy interest that outweighed interests calling for public disclosure of Foster’s death scene photographs).

151. See, e.g., CNET, *Yahoo Releases E-mail of Deceased Marine*, *supra* note 47.

152. Darrow & Ferrera, *supra* note 21, at 314.

153. See Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3; UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, *supra* note 4.

154. Compare Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3, with UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, *supra* note 4.

155. Compare Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3, with Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 (2012).

including sweeping preemption clauses that either override or sidestep the conflicting law or policy.¹⁵⁶

With respect to potential conflicts found in companies' terms of service, section 8(b) of the UFADAA provides that any terms-of-service clause that conflicts with the UFADAA's provisions is:

void as against the strong public policy of this state . . . unless an account holder . . . agrees to a provision in a terms-of-service agreement that limits a fiduciary's access . . . by an affirmative act separate from the account holder's assent to other provisions of the agreement.¹⁵⁷

Delaware, however, the first state to adopt the substance of the UFADAA, did not choose to include this particular clause.¹⁵⁸ This means that the effect of the legislation is limited because of choice of forum clauses in terms of service like the "clickwrap" agreement employed by Facebook.¹⁵⁹ Because the Delaware Act contains no preemption clause, services' terms of use will control in some instances.

Importantly, the UFADAA's preemption clause leaves open the ability for users and companies to create valid contracts that could include choice of forum restrictions, as long as such contracts actually reflect a bargained-for position on behalf of both parties, rather than a default "clickwrap" agreement to which users must assent in order to use the service at all.¹⁶⁰ The UFADAA's preemption clause demonstrates that although the ULC is primarily concerned with protecting users from unwittingly waiving their litigation rights, the ULC also respects the value in allowing freedom of contract where the parties have both bargained for the position. Because Delaware has not enacted this particular provision of the ULC's suggested law,¹⁶¹ it has not been tested in practice. However, the Delaware Act represents a good step toward compromise between competing interests in the field. The opportunity for meaningful contract negotiations between a Facebook user and the underlying service, as one example, though, is minimal or nonexistent.

As previously noted, the possible conflict between state legislation allowing probate transfer of digital assets and federal legislation

156. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, *supra* note 4.

157. *Id.*

158. See Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3.

159. See *E.K.D. ex rel Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894 (S.D. Ill. 2012).

160. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8(b), *supra* note 4.

161. Fiduciary Access to Digital Assets and Digital Accounts Act, *supra* note 3; UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, *supra* note 4.

criminalizing unauthorized access to digital accounts was a major concern of the drafters of the UFADAA.¹⁶² The Act attempts to bypass the conflict by setting up fiduciaries as “step[ping] into the shoes of” authorized users, so that persons or entities granted access to decedents’ digital accounts are never considered unauthorized users in the first place.¹⁶³ This solution seems logical, as the computer crime laws that penalize unauthorized access are likely aimed more at preventing identity theft and other types of fraud than protecting the privacy of deceased individuals, especially since such privacy rights are not clearly recognized in all fields.¹⁶⁴ However, like the provision against conflicting terms of use, the effectiveness of such a clause in practice has not been tested. The much simpler way to avoid criminal liability for accessing a deceased person’s digital accounts and records is to obtain the person’s consent prior to their death. Because a sweeping change in the trend of individuals writing wills is unlikely,¹⁶⁵ the best way to do this is at the level of the digital service or product itself.

The next Section proposes a way to reach digital service providers directly and engage them in finding the best way to handle these privacy conflicts.

C. THE PROPOSED SOLUTION: PROACTIVE SERVICE PROVIDERS

This Section outlines a possible co-regulatory solution. The idea is that rather than using sweeping terms of use that almost inevitably create disagreement, it would be better to implement an individualized approach to granting fiduciary access. Further, legislative incentives would substantially increase service provider compliance with such an initiative. One approach to making sense of the conflicting interests of legislation and service providers is to accept that not all digital assets should be treated equally. For example, one author convincingly argues that “intangible” digital assets, such as hidden text in blogs and website profiles, Facebook “likes,” and comments or reviews left on websites and blogs, are akin to client information collected and protected by physical businesses, and as such no statutory protection should be required for these types of assets at death.¹⁶⁶

162. See Section II.A.2, *infra*.

163. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (Draft As Approved Before Styling Changes, July 22, 2014).

164. See, e.g., *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157, 167 (2004).

165. Nance-Nash, *supra* note 82.

166. Haworth, *supra* note 10, at 538–540.

For assets with real value to decedents and possible heirs, however, a solution is needed. Legislation as it currently stands will face continuing challenges, and on an individual level, time is of the essence for a person who may be unaware of or unprepared for dealing with the fate of their digital estate. Rather than relying on legislative solutions alone, providers of online services and producers of digital products and media can implement systems that follow users' wishes for the disposition of their accounts and assets in the event of their death. By asking users whether they assent to heirs or executors accessing their accounts or obtaining ownership of their assets, businesses may be able to not only avoid later conflict, but also to assure current users that their privacy expectations, if they exist, will be respected and in that way increase the strength of trust in the brand. Having a record of individual users' preferences in this area avoids a problematic default approach to privacy.

In fact, social media services generally already allow a somewhat personalized approach to privacy of accounts.¹⁶⁷ Instagram and Twitter, for example, have "private" settings, where users can specify that other users must request permission to view their stream of photos or status updates.¹⁶⁸ The people who choose to select this setting are likely those who do not want their personal media to show up in a public search of the site. Institutions or individuals building a brand who want to allow unrestricted access to their shared media, however, may prefer the non-private setting. Just as there are legitimate reasons for selecting either the public or private setting for one's Instagram or Twitter feed, users have undoubtedly varied expectations regarding the fate of their digital accounts if they die or become incapacitated. Users should have the same degree of choice in that matter as they are given in the arrangement of their active use of services.

1. Potential Format

One option is for online service providers to introduce a question about desired disposition of digital accounts and assets as a pop-up style question that must be answered in order to continue to access the account. Though ascertaining users' wishes at creation of the account would be ideal, service providers will generally want to avoid transaction costs at service sign-up such as requiring users to answer additional questions before creating an account. For this reason, providers should be allowed to

167. *See generally* INSTAGRAM, <http://www.instagram.com>; TWITTER, <http://www.twitter.com>.

168. *Id.*

assess users' wishes regarding their digital assets later, once the user has already established an account with the service and begun using it. A simple example of how such a question could be posed is: *Upon your incapacity or death, do you: a) authorize the deletion of your account and all stored documents, information, and other data, or b) wish to have access given to the executor of your estate?*

Simplicity in this question will reduce the likelihood that a user's answer conflicts with other documents of testamentary expression, such as a will or instructions left with an attorney or executor. For example, if an online service asks a user to name an individual who is allowed access to an online account in the case of the user's death or incapacitation (an "emergency contact" of sorts), there is a reasonable chance that the user could name a person different from the legal executor of his or her estate. Such an inconsistency could give rise to litigation and general confusion, which is exactly what the inclusion of this kind of question aims to avoid. For that reason, simply asking whether the executor may access the content, and leaving the identity of the executor to be identified through other means, will reduce the likelihood of conflict in this area.

In order for an added terms-of-service provision of this kind to be successful, users' wishes regarding access should be assessed outside of the typical clickwrap agreement. It should not be styled as a single "agree" box to be checked in order to proceed in the process of account creation, as very few users typically read the provisions that they are agreeing to in this type of form. Instead, users should be addressed in clear (preferably large-type) language that makes them aware that one of two choices, neither of which affects their ability to use the service, must be selected in order to move forward. The language suggested above serves as an example of a clear, simplified version that offers total deletion as an option for users particularly concerned about privacy. Though the choices are starkly different (total deletion of all data versus complete access given to the executor), adding more options would be likely to confuse users and create a greater burden on online service providers to follow individualized digital estate plans for each user. Alternatively, a third, hybrid solution could ask users if they wished to preserve all information that was "public" (to approved contacts) but not preserve "private" information such as private messages, chat conversations, notes, and the like.

2. *Benefits and Drawbacks*

This simple solution is not perfect. For one thing, even the basic language proposed here could be foreign to users who are unfamiliar with the fundamentals of wills and estates principles. The word "executor,"

while not exactly a term of art, may be a word that is unknown to some. Unfortunately, the danger with using a more generic term is that it may conflict with the legal understanding of who should get access to the account. This reflects a general conflict in drafting terms-of-use agreements between wanting to have legally suitable wording while keeping it digestible for laymen users. In this instance in particular, where users are creating an individualized portion of the terms of service, making sure that a variety of users will understand the question is imperative. Also, a procedure for allowing users to change their decision on the issue of what will happen to their online accounts and assets should be implemented wherever individualized answers to the question are allowed. The nature of a particular online account may drastically change between the time of its creation and the death of the original owner; for example, a casually used Flickr account may later become a portfolio for a professional artist if a user keeps the same account throughout her photography education and career. Fortunately, these drawbacks do not make this solution potentially unworkable; rather, they illustrate the fact that thought, trial, and error will have to go into the implementation of this new type of policy across various platforms.

This solution could also help avoid the issue of criminal liability for accessing deceased users' digital accounts without authorization. NetChoice's warning that consent may not be assumed by courts in cases where state legislation gives fiduciaries access to decedents' digital accounts,¹⁶⁹ mentioned earlier, bolsters support for the proposition that explicit consent should be obtained if possible. Consent could also be made explicit through wills or other testamentary instruments, but obtaining consent at the level of the individual service is preferable. This is because more than half of Americans do not have wills,¹⁷⁰ and those who have made a will are unlikely to update the document every time a new social media account is joined or even when signing up for a service like Cloud storage of files.

A major question in assessing the strength of this solution is whether companies will willingly make these changes to their privacy policies. There is evidence that some may not have the incentive to do so or that this change would actually be incompatible with policies currently in place. For example, Facebook, upon receiving confirmation of a user's death, "memorializes" the person's Facebook account page, which includes

169. Letter from NetChoice to Suzanne Brown Walsh and the Uniform Law Commission, *supra* note 83.

170. Nance-Nash, *supra* note 82.

locking the account from access by anyone.¹⁷¹ This means that the service will delete any photos or other media stored in the person's account but not viewable to the public.¹⁷² There are strong policy reasons for the company's decision to use a memorialization solution rather than allowing access by family members. In the past, allowing access to a person's page after their death made the account appear active, prompting reminders sent to the person's connections to reconnect with the deceased person or send them birthday wishes.¹⁷³ This caused increased grief to the friends and family of the decedent, prompting the memorialization solution.¹⁷⁴ This is an instance of where there are legitimate reasons why online service providers may not wish to implement a policy of asking users whether they grant permission for the executor of their estate to gain access to their accounts or assets. Additionally, it is important to remember that some types of online accounts are only stand-ins for a tangible underlying asset. An online banking account, for example, cannot vanish as easily as a Facebook page that a user wants deleted after her death. With these differences in mind, a one-size-fits-all approach is probably not viable. For online service providers whose accounts or products fit this kind of solution, however, some incentives may be necessary if this type of solution is to have broad-ranging effect.

If online service providers' chief concern is the privacy of users and avoiding related disputes, many companies should strongly consider adding at least a deletion option for users. While it is understandable in certain cases that businesses may not find it in their best interest to give account access to fiduciaries (in the case of non-transferable limited licenses employed by Apple, for example), in almost all cases it would only make online service providers' jobs easier if they obtained user consent to simply delete all accounts and data upon death. This may not be the best solution in terms of property conventions against waste of valuable assets, but if privacy is truly the motivating factor for online service providers, then a question asking users whether they wish for their account to be

171. FACEBOOK, What Happens When a Deceased Person's Account is Memorialized?, *supra* note 6.

172. *Id.*

173. Carroll and Romano, *supra* note 12, at 142.

174. Jon Yates, *Family finds it difficult to memorialize Facebook account*, CHI. TRIB., available at http://articles.chicagotribune.com/2014-05-01/business/ct-facebook-death-account-remains-problem-0501-biz-20140501_1_facebook-account-facebook-page-social-media-company (last visited Feb. 23, 2015) ("On what would have been [the decedent's] 36th birthday, Facebook reminded friends and his siblings to wish him a happy birthday.").

deleted upon death would further that interest and also open the door for a policy of incorporating individual users' wishes into company approaches.

3. *A Co-Regulatory Solution*

Because widespread, organized change in this area is unlikely to happen without an impetus, legislative incentives should be created to encourage it. Online service providers' own motivation to create a procedure for when users and owners of digital assets die combined with legislative requirements that they do so would spur digital asset reform doubly, making change in this area all the more meaningful. Federal legislation, however unlikely, is possible based on the Commerce Clause,¹⁷⁵ but legislation from almost any state would effectively require compliance no matter where the company is based because it would be likely to have at least one user from any U.S. state (or could anticipate having such a user). However, based on the concerns previously noted regarding companies that have legitimate business reasons for creating a "No Right of Survivorship" clause or memorializing accounts, this legislation would ideally provide exceptions to a strict rule.

Ira Rubenstein, Senior Fellow at the Information Law Institute of New York University, posits that the best solution for making real progress in the realm of privacy changes online is "co-regulation" (regulation that is a combination of government and private-sector initiatives) rather than either self-regulation or government regulation.¹⁷⁶ He states "it is better to think of voluntary codes and direct government regulation as opposing ends of a regulatory continuum, with most self-regulatory schemes falling somewhere in the middle."¹⁷⁷ Allowing the industry to entirely self-regulate has not generally been successful; issues include lack of accountability and transparency and weak oversight and enforcement.¹⁷⁸ In practice, co-regulation would allow the industry to

175. Congress is authorized to create laws to regulate the "instruments of interstate commerce." *Houston E. & W. Tex. Ry. Co. v. U.S.*, 234 U.S. 342, 351 (1914). Here, the digital assets or value of digital accounts are the instruments, and creation and use over the Internet generates the interstate quality of the commerce.

176. Ira S. Rubenstein, *Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes*, 6 I/S: J. L. & POL'Y FOR INFO. SOC'Y 355, 357 (2011), available at <http://ssrn.com/abstract=1510275>.

177. *Id.*

178. See, e.g., Peter P. Swire, *Markets, Self-Regulation, and Government Enforcement in the Protection of Personal Information*, in *PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE* (U.S. Dep't of Commerce ed., 1997), available at <http://www.ntia.doc.gov/report/1997/privacy-and-self-regulation-information-age>.

enjoy flexibility in determining what its self-regulatory guidelines will look like, while the government (whether state or federal) sets default requirements and reserves the ability to approve and enforce its defaults.¹⁷⁹ In the area of digital estate rights, this could take the form of stipulated self-regulation, where the industry would be allowed to provide its own solution for the problem or else be required to follow a UFADAA-like approach. Organizations such as the Electronic Privacy Information Center (“EPIC”)¹⁸⁰ already work with various electronic communications industries to create trade guidelines so extending this type of industry-organizing method to this area seems feasible.

One example of how this could work is legislation requiring that companies without a clear policy for what happens to a user’s digital accounts or digital assets upon death must create such a policy or, ideally, ask users their individual preferences by a specified date. This may simply incentivize companies to create highly limiting terms of service and implement deletionist policies, but the benefit is that those policies will at least be defined where before they were not. An approach that may better result in the desired form of change is to require certain types of accounts—for example, those on which user-uploaded photographs, videos, and other media are stored—to give users the choice of whether they want the media deleted upon death or whether they authorize fiduciary access. This would create a hard line and impose obligations where potentially valuable digital media is concerned. Online accounts such as Facebook, Twitter, Instagram, and Flickr, all of which have photo-uploading capabilities, would be required to give users the option to have this media preserved after death (in the form of fiduciary access), while maintaining the privacy-g geared option of calling for total deletion of media. Again, this type of legislative action would work best if it gave online service providers a specified amount of time to implement the changes and outlined sanctions for noncompliance.

Regardless of how well-thought-out any legislative action is, some users and situations will fall through the cracks of this kind of protection. Though rare, there are bound to be users who uploaded valuable digital media to sites but seldom log on, making it hard to reach them to assess

179. Rubenstein, *supra* note 176, at 357.

180. *See generally* ELECTRONIC PRIVACY INFORMATION CENTER, <http://www.epic.org> (last visited Feb. 1, 2015) (“[A]n independent non-profit research center in Washington, DC.[.] EPIC works to protect privacy, freedom of expression, democratic values, and to promote the Public Voice in decisions concerning the future of the Internet.”).

their wishes for their digital media after death. This prompts the possibility of creating a default option that users are then invited to change, but deciding what the default “should” be is a difficult question that only circles back to all of the original issues raised herein. To some extent, both users and online service providers will have to accept that disputes will inevitably arise in this realm and hope that the individuals most concerned with the fate of their assets and accounts will be proactive.

In sum, a practical solution would focus on an individualized approach to digital estate rights, inviting service providers to come up with a best-fit strategy but also allowing government minimums or boundaries to frame that strategy.

IV. CONCLUSION

Customized agreements between users and online service providers could better meet users’ expectations for privacy and control over the disposition of their digital assets than legislation could alone. Although legislation such as the UFADAA and the Delaware Act represents steps toward digital assets being considered part of a person’s account upon death, legislation must be supplemented with other initiatives in order to adequately balance all interests involved. Especially because legislative action is a slower approach to solving a growing problem, proactive initiatives by online service providers to ascertain and respect users’ wishes are the best solution currently available to balance users’ rights to both privacy and the disposition of their digital assets with service providers’ business autonomy and freedom of contract. A co-regulatory solution whereby online service providers are able to come up with an industry-specific solution to these privacy issues but government regulations can set minimums and defaults would go far toward achieving that balance.