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Kristina Sherry

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What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem

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I. (DON’T FRIEND) THE REAPER: AN INTRODUCTION TO DIGITAL DEATH’S COMPLEXITIES

In the vast cyber-universe of millions of websites, billions of e-mails sent daily,¹ and approximately twenty hours worth of amateur video uploaded to YouTube in the time it takes you to read this sentence²—collectively sucking our psyches into digital excursions like baby pandas sneezing,³ small children shimmying to Beyoncé,⁴ and increasingly non-sequitur Internet memes⁵—there are few things creepier than the dead Facebook friend.

Yet, according to projections, more than 580,000 Facebook users will die in the United States this year, leaving just as many friends and family members wondering how to best handle a loved one’s persisting postmortem digital presence.⁶ Without third-party intervention, a dead Facebooker’s “profile” page will be frozen in time like a pixilated Dorian Gray, colored by iPhone photos, “pokes,” and “LOL!”s—possibly for an eternity.⁷ For some,

1. See, e.g., *Email Statistics Report, 2011–2015—Executive Summary*, THE RADICATI GROUP, INC. (Sara Radicati ed., May 2011), available at <http://www.radicati.com/wp/wp-content/uploads/2011/05/Email-Statistics-Report-2011-2015-Executive-Summary.pdf> [hereinafter *Email Statistics Report*] (projecting more than three billion worldwide e-mail accounts in 2012, with an average of about thirty-five e-mails sent per user each day).

2. See *infra* text accompanying notes 122–26 (explaining YouTube).

3. *The Sneezing Baby Panda*, YOUTUBE, <http://www.youtube.com/watch?v=FzRH3iTQPrk> (last visited Oct. 2, 2012).

4. *Arianna Dancing to Beyonce’s “Single Ladies” (Picture-in-Picture)*, YOUTUBE, <http://www.youtube.com/watch?v=5CU2JhYM8tY> (last visited Oct. 2, 2012).

5. See, e.g., *Typographer Ryan Gosling*, LAYMAN’S LAYOUT BLOG (Jan. 29, 2012, 8:15 PM), <http://laymanslayout.wordpress.com/2011/11/21/layout-typographer-ryan-gosling/> (summarizing itself as “a very funny tumblr blog using Ryan Gosling to talk about typography”); see also SELLECK WATERFALL SANDWICH, <http://selleckwaterfallsandwich.tumblr.com/> (last visited Oct. 2, 2012) (displaying exactly what its title suggests).

6. Nathan Lustig, *2.89m Facebook Users Will Die in 2012, 580,000 in the USA*, NATHAN LUSTIG BLOG (June 6, 2012), <http://www.nathanlustig.com/2012/06/06/2-89m-facebook-users-will-die-in-2012-580000-in-the-usa/>. These same projections estimate that 2.89 million Facebook users worldwide will pass away in 2012; thus, at least four users have probably died since you began reading this Comment. *Id.*

7. See *infra* notes 95–98 and accompanying text (explaining Facebook profiles). The debate

a dead friend's or family member's abandoned profile might serve as a beautiful and appropriate reminder of its creator.⁸ But for others it might trend closer to a macabre eyesore in need of termination.⁹

Responding to its inadvertent but inevitable digital graveyard, Facebook in 2009 implemented its "memorializing" feature, allowing friends and families to request that a decedent's account become effectively frozen amid efforts to avoid awkward invitations to "connect" with dead people or "tag" them in photos.¹⁰ But Facebook's responsive amenity still fails to resolve more substantive uncertainties aroused by a digital passing, such as who should dictate the fate of a loved one's account, for how long a memorialized presence should persist, and whether Facebook memorialization is what the decedent would have truly wanted.¹¹

Eeriness, propriety, and eternal online notoriety are not the only factors rendering digital death an emerging area of the law and in life. There are more practical, everyday concerns as well.¹² Take, for instance, the

may have even higher stakes in the wake of Facebook's relatively new "Timeline" feature, which replaced prior iterations of the user profile amid efforts to give each user the chance to tell his or her "life story." See *Introducing Timeline*, FACEBOOK (Aug. 28, 2012, 2:00 PM), <http://www.facebook.com/about/timeline>; see also Anick Jesdanun, *Facebook Forces Timeline; Tips To Hide Users' Past*, YAHOO! FINANCE (Jan. 24, 2012, 6:08 PM), <http://finance.yahoo.com/news/facebook-forces-timeline-tips-hide-230805761.html> (explaining that "Facebook will start requiring people to switch to a new profile format known as Timeline, making photos, links and personal musings from the past much easier to find."). The change has prompted some concern, particularly among young professionals whose wilder and more debauchery-filled college years may come back to haunt them. See, e.g., *Facebook Timeline Brings the Past Back to the Future*, NATIONAL PUBLIC RADIO ALL TECH CONSIDERED (Jan. 19, 2012, 4:17 PM), <http://www.npr.org/blogs/alltechconsidered/2012/01/30/145733245/facebook-timeline-brings-the-past-back-to-the-future>.

8. See *infra* note 282 and accompanying text.

9. See *infra* notes 102–04, 268 and accompanying text.

10. See *infra* notes 102–04, 282 and accompanying text (explaining Facebook's memorialization feature); see also Dan Fletcher, *What Happens to Your Facebook After You Die?*, TIME (Oct. 28, 2009), <http://www.time.com/time/business/article/0,8599,1932803,00.html> (recounting Facebook's unveiling of the memorializing feature). But unfortunately, memorializing accounts has not solved the "tagging" issue, as a response on Facebook's Help Center suggests:

The "Tag a Friend" feature is asking me to tag a deceased friend in a photo.

We're very sorry for any discomfort this feature has caused. The "Tag a Friend" feature identifies untagged faces in photos you have uploaded. Unfortunately, we do not have the technical ability to determine whether the person shown in the photo is deceased. As always, you have the option to delete any photo that you have uploaded to Facebook.

Privacy: Deactivating, Deleting, and Memorializing Accounts, FACEBOOK HELP CENTER, <https://www.facebook.com/help/?page=185698814812082> (last visited Oct. 4, 2012).

11. See discussion *infra* Parts IV–V.

12. See, e.g., Charles Herbst, *Death in Cyberspace*, RES GESTAE, Oct. 2009, at 16. In this 2009 article, Herbst calls death and disability in cyberspace "a novel issue" and identifies "four basic problems" that it poses: (1) *Finding accounts and gaining access*, referring to the likelihood that a

hypothetical small business owner who relies on LinkedIn¹³ or similar services to connect with his business contacts, and consider what his death would mean if none of his kin or colleagues could access these contacts.¹⁴ Or consider the even likelier inability to access a decedent's entire digital photograph collection or notify his cyber-friends of his passing, then consider how these problems worsen if a family member or executor is unaware of certain accounts.¹⁵ Finally, consider the issues raised by social-

decedent's surrogate or executor may not be *aware* of each of the decedent's accounts, especially those stored remotely, and then the subsequent challenge of *accessing* those accounts once they are identified; (2) *Updating online content*, referring to the problem of managing a decedent's valuable blog, for instance, or updating a social media profile to share information about the decedent's tragic death; (3) *Social and obituary notices*, referring to the problem of identifying and notifying online acquaintances (e.g., from a chat room geared toward a particular interest like fishing or hunting) of a user's death or illness, given that there is nothing akin to a local "Obituaries" section for the entire Internet; and (4) *Digital property management*, referring mostly to monetary value staked online by decedents, such as through "online [gaming] characters [that] have reached certain proficiency and skill (and resultant gam[ing] privileges) . . ." or a profitable eBay selling business, for example, and the tenuous rules of business succession in cyberspace.

Id. at 17–21.

13. See *infra* text accompanying notes 116–18 (explaining LinkedIn).

14. To better illustrate the everyday problems posed by digital death, Herbst offers three hypothetical scenarios. Herbst, *supra* note 12, at 16. One of these is that of "Brian":

Brian Brian lived in Silicon Valley and was a computer wizard. In addition to being a software consultant in great demand, Brian has been a successful eBay Power Seller for more than five years. He also manages a financially successful virtual business in Second Life. Brian has a popular blog, which is read widely by other consultants in the software industry. Collectively, his cyber businesses earns about \$100,000 per year. Last week, Brian was run over and killed by a car in California. Brian was single, 30, and survived by his parents in Indianapolis. Brian's parents have e-mail accounts and are generally familiar with the Internet, but are not savvy about running an Internet business. They have no idea what to do first, but know that, like any business, time is of the essence in protecting Brian's franchise.

Id. (footnotes omitted).

15. Herbst illustrates each of these problems with two additional hypothetical scenarios. *Id.*

Ole and Selma After 55 years of marriage to Ole, Selma is now widowed and living in Jeffersonville. Selma is Ole's executor and is trying to put his affairs in order. Ole had a computer, and he used it to pay the couple's utility bills. In addition, Ole used it to correspond with a few friends, including many of the relatives in Sweden. Ole stored all the couple's pictures of the grandchildren online at what Selma calls "the Barney Googler." Selma can't type. Moreover she has an aversion to putting her hand on anything that is gray and called a "mouse." Selma doesn't know Ole's passwords, but she would like to read the Swedish correspondence and to be able to see the pictures of her grandchildren.

John and Mary John and Mary are both in their 50s, living in Fort Wayne. They have done basic estate planning: Both of them have wills and powers of attorney for health care and property. They have named each other as power of attorney and personal representative. Last week, John had a massive stroke and is convalescing in the hospital. John spent a lot of time at the computer. In addition to using it to pay bills and do several miscellaneous chores, he also used it to correspond with his mistress, "Lily Belle." John is fond of visiting an adult-oriented chat room, where, in addition to meeting Lily Belle, he has made a lot of friends. These cyber friends have noted John's absence and are

media assets with real tangible value, such as that of the hypothetical celebrity with millions of Twitter¹⁶ followers, whose online accounts may be worth a great deal of money even after she dies of a drug overdose.¹⁷

Given the personal, sentimental, and, in some cases, tangible value linked to decedents' social-media usage,¹⁸ one might argue that related assets should be regarded as property and distributed as part of the decedent's estate, possibly subject to probate.¹⁹ But online services like Twitter or Facebook, on the other hand, might point to their contractual terms, which oftentimes declare ownership of accounts, or, even more drastically, provide for their termination upon death,²⁰ and argue that digital assets, like their users, should someday die. Thus, as social-media users pass on and the stakes become higher, the search for a standard dispositional protocol for social-media assets may face competing power extremes: on one end of this continuum lies *traditional property law*, generally in the form of states' probate codes, while on the other lies *corporate policy*, typically in the form of user agreements called Terms of Service (ToS).²¹ Contrary to what these extremes might suggest in terms of the best solutions to the quandaries posed by digital death,²² this Comment argues in its second half that viable compromise solutions exist *between* these two legal extremes, and that a mid-continuum solution—that is, lying somewhere between probate law and corporate contractual policy—will likely serve the greatest number of societal interests.²³

This Comment explores the legal quandaries posed by “digital death,” a term linked to the fallout and uncertainty created in cyberspace by a human being's passing.²⁴ Given that digital death's legal implications have been

wondering what has happened to “Loverboy Johnny.”

Mary, knowing that bills had to be paid, uses John's computer and is aghast as she reads the cooing e-mails from Lily Belle.

Id. (footnotes omitted). Herbst also offers the following pithy observation: “Probate has arrived in cyberspace, and its citizens are now in need of an undertaker.” *Id.*

16. See *infra* text accompanying notes 111–15 (explaining Twitter).

17. See discussion *infra* Part IV.A.

18. See discussion *infra* Part II.A.3 (delineating social media).

19. See *infra* notes 144–72 (explaining the probate process).

20. See *infra* notes 131–143; 274–88 and accompanying text (discussing ToS).

21. See discussion *infra* Parts IV.A–B.

22. See discussion *infra* Parts IV.A–B.

23. See discussion *infra* Part V.

24. See, e.g., DIGITAL DEATH DAY, <http://digitaldeathday.com/> (last visited Oct. 2, 2012) (a website dedicated to a worldwide day devoted to answering the question: “Where does data go when you die?”).

philosophized for nearly a decade with respect to better-defined digital realms such as e-mail and online financial accounts,²⁵ this Comment focuses on the growing and consequently more amorphous digital asset type known as “social media”—a term added to dictionaries as recently as 2011.²⁶ Part II explores the short history of digital death by first conceptualizing “digital assets” and their elusive social-media subcomponent, then surveys the underlying legal principles of contracts, probate, property, and privacy concerns.²⁷ Part III provides a snapshot of current law, emphasizing recent state legislative responses to digital death, including an Oklahoma statute enacted in 2010 that grants executors and administrators power over decedents’ social-networking accounts and other cyber-things.²⁸ Beyond the legal realm, Part III explores the burgeoning market response known as “digital estate planning services” (DEPs) that allow individuals to prepare for digital death by putting their digital affairs in order.²⁹ Part IV continues this discussion by analyzing what the current state of the law means for individuals facing death (i.e. everyone) as social media interacts with both (1) *probate law* and (2) *policy*, as reflected by ToS.³⁰ It also provides a brief glimpse of solutions proposed beyond these two legal extremes.³¹ Part V explores how potential solutions may address the salient policy goals of (1) honoring decedents’ postmortem wishes; (2) respecting privacy; (3) preserving our digital world; and (4) minimizing probate, litigation, and other paperwork-type hassles.³² Part V calls for a less “extreme” solution somewhere between probate and contract law, suggesting that while legislation may call attention to the importance of digital estate planning, reactionary statutes like Oklahoma’s could potentially exacerbate the pains caused by digital death.³³ Social-media services themselves may therefore be in the best position to quell the perfect storm of legal uncertainty that looms.³⁴ Part VI concludes.³⁵

II. DIGITAL ASSETS AND DEATH: A PROFILE PICTURE

The purgatorial existence of decedents’ “digital assets”—to use broad

25. See discussion *infra* Part II.D.

26. See discussion *infra* Part II.A.3 (attempting to define “social media”).

27. See discussion *infra* Part II.

28. See discussion *infra* Part III.B (discussing state legislative efforts).

29. See discussion *infra* Part III.D (providing examples of DEPs).

30. See discussion *infra* Part IV.

31. See discussion *infra* Part IV.

32. See discussion *infra* Part V.

33. See discussion *infra* Part V.

34. See discussion *infra* Part V.

35. See discussion *infra* Part VI.

terminology—is nothing new.³⁶ Courts have already grappled with the propriety of accessing decedents' e-mail accounts,³⁷ digitized financial accounts,³⁸ and even the distribution of Second Life assets³⁹—to provide just

36. See generally Michael D. Roy, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINNIPIAC PROB. L.J. 376 (2011) (exploring the post-mortem fate of decedents' digital assets). Referring to previous scholarly articles concerning the disposition of e-mail accounts, Roy introduces what he calls the "Digital Asset Dilemma" (DAD), describing "the need to pass the contents of online accounts to heirs when such accounts are accessible only with usernames and passwords that often remain private during one's lifetime," *id.* at 378, or, phrased alternately, "the difficulty that users of online service have in trying to ensure that the contents of their online accounts are passed to heirs." *Id.* at 378 n.7; see also 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, 398–402 (coining the term "digital dilemma," according to Roy, *supra*, at 378 n.7).

Roy identifies four ways the DAD can be resolved under current law: (1) leave a list of accounts with a trusted person; (2) leave accounts and login credentials among personal effects; (3) keep backup copies of all online data in paper form; (4) rely on an online service's policy or court intervention to make the data available to successors. Roy, *supra*, at 381–82. Roy weighs the pros and cons of each, noting that the first and second options may compromise decedents' privacy and security. *Id.* at 382.

37. See Samuel A. Thumma & Darrel S. Jackson, *The History of Electronic Mail in Litigation*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (1999) (reviewing the history of e-mail in litigation while focusing on employment, commercial, procedural, and criminal cases, along with personal jurisdiction); see also EVAN CARROLL & JOHN ROMANO, YOUR DIGITAL AFTERLIFE, 11–14 (2011). In a highly publicized and oft-cited dispute, Yahoo! refused to give Lance Corporal Justin Ellsworth's father copies of his son's e-mails after Justin died in Iraq in November 2004, with the company citing a clause in its ToS stating that accounts were non-transferable. CARROLL & ROMANO, *supra*, at 12–13. However, the Probate Court of Oakland County, Michigan ultimately ordered Yahoo! to provide Justin's father with copies of the account's e-mails. *Id.* at 13. For more coverage of the court battle, see *Justin's family fights Yahoo over access to his e-mail*, <http://www.justinellsworth.net/email/yahoofight.htm> (last visited Oct. 8, 2012); see also *Yahoo Gives Dead Marine's Family E-mail Info*, MSNBC.COM (Apr. 21, 2005, 5:47 AM), <http://www.msnbc.msn.com/id/7581686/>; Jim Hu, *Yahoo Denies Family Access to Dead Marine's E-mail*, CNET (Dec. 21, 2004, 2:49 PM), http://news.cnet.com/Yahoo-denies-family-access-to-dead-marines-e-mail/2100-1038_3-5500057.html. See generally discussion *infra* Part III.A (explaining the Ellsworth case in greater detail).

Notably, the Ellsworth case served as a reference point for two scholarly articles highly relevant to this Comment. See generally Atwater, *supra* note 36; 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 (2007).

38. See generally Molly Wilkens, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037 (2011) (noting that migration of financial services online and corresponding elimination of paper records will hamper access to a decedent's financial assets, and exploring how federal financial and internet privacy laws affect the disclosure of a person's private financial information).

39. Chris V. Nicholson, *Virtual Estates Lead to Real-World Headaches*, NEW YORK TIMES (Nov. 1, 2009), <http://www.nytimes.com/2009/11/02/technology/internet/02assets.html?pagewanted=all> (discussing two avatars who met and married in Second Life and built a virtual home together on a virtual island that had been bought and owned by the husband's avatar;

a few illustrations of the murkiness of post-mortem digital property rights. Scholars have further noted the need for a legal framework governing virtual reality, such as in online gaming.⁴⁰ And beyond online estate-planning services for the more tangible assets in decedents' estates,⁴¹ there is a growing movement toward "digital estate planning" (DEP), a relatively new term describing collective protocols that allow account holders to distribute their digital assets upon death by passing account passwords on to predesignated executors.⁴² The legality of these measures, however, is unclear.⁴³

But for various reasons, a state of legal limbo persists.⁴⁴ For one, the definition of digital assets, which is already vague,⁴⁵ is continuously broadening to incorporate once-tangible assets now undergoing complete digitization,⁴⁶ as well as previously unforeseen cyber innovations.⁴⁷ This

about six months after the husband's actual death, the island and all its property were erased under Second Life's ToS, much to the wife's chagrin).

40. *Id.*; see also GREG LASTOWKA, VIRTUAL JUSTICE: THE NEW LAWS OF ONLINE WORLDS 9 (2010) (exploring how law relates to virtual worlds, summarized as "Internet-based simulated environments that feature software-animated objects and events"); Olivia Y. Truong, *Virtual Inheritance: Assigning More Virtual Property Rights*, 21 SYRACUSE SCI. & TECH. L. REP. 57, 60 (2009) (calling it "imperative" that virtual property "be legally recognized as property" while specifying that virtual properties may include "email addresses, websites, avatars, video game characters, virtual accessories, and any other intangible digital commodities") (emphasis added). Lastowka notes that courts have left unanswered the "fundamental question" of the legal status of virtual property interests. LASTOWKA, *supra*, at 19.

41. See, e.g., Gerry W. Beyer, *Estate Planning and Technology*, <http://www.professorbeyer.com/Articles/Technology.html> (providing an overview of how technology may be used to enhance wills, trusts, and estates practice).

42. See discussion *infra* Part III.D (surveying some digital-afterlife services and their common components); see generally Colin Korzec & Ethan A. McKittrick, *Estate Administration in Cyberspace*, TRUSTS & ESTATES, Sept. 2011, at 61 (surveying the technical and legal issues an executor must address in retrieving someone else's digital files and noting that "[M]ost current state laws are either unclear or have little to say about an executor's role in gaining access to a deceased individual's digital property."); Roy, *supra* note 36 (exploring how DEP services may solve the digital asset dilemma).

43. See Roy, *supra* note 36, at 378, 384–85.

44. See discussion *infra* Part III.D.

45. See discussion *infra* Parts II.D, III.B.4 (discussing the semantics of "assets" versus "access" and other sources of confusion with respect to delineating "social media").

46. See CARROLL & ROMANO, *supra* note 37, at 14–18 (exploring the widespread shift from print to digital photography); see also Evan E. Carroll et al., *Helping Clients Reach Their Great Digital Beyond*, TRUSTS & ESTATES, Sept. 2011 [hereinafter *Helping Clients*] (noting that in April 2010, the U.S. Department of the Treasury announced its all-electronic initiative, meaning that it would stop issuing paper savings bonds in January 2012 and all Social Security payments after March 2013 would be electronic).

47. See, e.g., Todd Wasserman, *Google's Emotional Chrome Commercials Go Viral [VIDEO]*, MASHABLE BUSINESS (May 5, 2011), <http://mashable.com/2011/05/05/google-chrome-commercial/> (discussing the popularity of a Google ad called "Dear Sophie," showing "a father using Google products to catalog his daughter's life events from birth to a hospital stay for an unnamed illness, to the loss of her baby teeth. He writes her notes using Gmail, for instance, and posts videos of her on YouTube").

ever-expanding property type, coupled with an exponential growth in its usage,⁴⁸ prompts a prerequisite inventory of its components and a reexamination of basic legal principles underlying digital ownership, before considering more closely the law's current state.⁴⁹

A. Defining "Digital Assets"

Defining digital assets and its subcomponent, social media—the major focus of this Comment—is helpful in conceptualizing these terms with respect to contract and property principles, as well as in understanding apparent progeny terms like “digital executor”⁵⁰ and similar language that could soon become staples in wills or even statutes.⁵¹ Digital asset definitions range from the terse⁵² to the meticulously delineated.⁵³ So, for

For a more philosophical discussion of social media's modern role, see Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228 (2011).

48. This exponential growth is thanks especially to the younger generation's habits. See *Millennials: Confident, Connected. Open to Change*, PEW RESEARCH CENTER, SOCIAL & DEMOGRAPHIC TRENDS (Feb. 24, 2010), <http://pewsocialtrends.org/pub/751/millennials-confident-connected-open-to-change>. In response to an open-ended survey, twenty-four percent of Millennials reported feeling “distinctive” because of their use of technology—twice the percentage of Gen Xers, the only other generation to cite technology usage as a distinguishing trait. *Id.* Further, seventy-five percent of Millennials reported having created a social-networking profile—compared to just fifty percent of Gen Xers, thirty percent of Boomers, and six percent of the Silent Generation (with birth-year designations for generations as follows: “Silent,” 1928–45; “Boomer,” 1946–64; “Gen X,” 1965–79; “Millennials,” 1980–99; and, the youngest, “Digital Natives,” 2000–present). *Id.*; see also, Dodai Stewart, *Hello, I am a Digital Hoarder*, JEZEBEL (Sept. 16, 2011, 10:30 PM), http://jezebel.com/5841123/hello-i-am-a-digital-hoarder?utm_source=Jezebel+Newsletter&utm_campaign=a615490fe2-UA-142218-20&utm_medium=email (lamenting the difficulty of deleting e-mails and confessing to having 112,775 e-mails stored in personal e-mail inbox, as well as 2,498 photos, 178 videos, etc., on an iPhone).

49. It is particularly important to conceptualize social media. See discussion *infra* Part II.A.3–4.

50. “[A] person appointed to handle the distribution of your digital assets after you pass away.” See CARROLL & ROMANO, *supra* note 37, at 77. However, “Digital executors are not presently recognized by law.” *Id.* at 100. As such, Carroll and Romano suggest “making your legal executor your digital executor also. Or consider adding your digital executor as a co-executor of your estate (just realize that co-executors have full legal authority over the whole estate).” *Id.* Further, digital executors “will be responsible for making heirs [i.e. the people who will be given your content and access to your accounts] aware of accounts and content and will make sure that they have access to them.” *Id.*; see also Nicholson, *supra* note 39 (defining a digital executor as someone “who will receive a person's latest passwords when a death occurs”).

51. See discussion *infra* Part III.B.

52. “A simple definition is that a digital asset is content owned by an individual that is stored in digital form.” John Romano, *A Working Definition of Digital Assets*, DIGITAL ESTATE RESOURCE BLOG (Sept. 1, 2011), <http://www.digitalestateresource.com/2011/09/a-working-definition-of-digital-assets/>.

simplicity's sake, this Comment's default working definition of digital assets will be *anything owned that is in a digital file*.⁵⁴ It is helpful to further subdivide digital assets by common characteristics. Evan Carroll, co-founder of The Digital Beyond blog,⁵⁵ a leading online resource exploring death and the notion of one's digital legacy,⁵⁶ identifies two categories of digital assets: (1) those stored *locally*, on tangible electronic devices a person owns, and (2) those stored elsewhere on devices accessed by contract with the device owner.⁵⁷ This latter type is often referred to as "cloud" or "cloud-based" service because the information is stored and accessed *away* from the account holder's devices, usually on a third party's server.⁵⁸

Carroll further delineates at least five "types" of digital assets.⁵⁹ The

But Romano also notes that this definition may not be inclusive enough and proposes the following, slightly longer definition: "[A] digital asset is digitally stored content or an online account owned by an individual." *Id.*

53. See, e.g., *Helping Clients*, *supra* note 46, at 66.

In short, digital assets are anything someone owns that's in a digital file stored either on a device the person owns (that is, stored locally) or elsewhere on devices accessed by contract with the owner. This latter type of digital assets includes everything stored online (that is, in the "cloud") at various social media sites or other websites.

Id. Carroll further suggests the following sample language for possible inclusion in a will:

"Digital assets" includes files stored on my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops. The term "digital assets" also includes but is not limited to emails received, email accounts, digital music, digital photographs, digital videos, software licenses, *social network accounts*, *file sharing accounts*, financial accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts and similar digital items which currently exist or may exist as technology develops, *regardless of the ownership of the physical device upon which the digital item is stored.*

Sample Language, DIGITAL ESTATE RESOURCE, <http://www.digitalestateresource.com/sample-language/> (last visited Oct. 3, 2012) (emphasis added).

But cf. Roy, *supra* note 36, at 379–81. Roy uses the term "online services" as a basis for his DAD discussion, noting that online services share three defining functions: Users can (1) "access data on a service's servers from anywhere, at any time," via internet; (2) "keep that data private or share it with persons of the user's or service's choosing"; and (3) the online service retains backup copies of user data that may be substituted for lost originals. *Id.* at 379–80. Thus, Roy appears more cautious about using the term "digital assets," given that users' "ownership" of them per se is uncertain given the current state of law amid contractual terms. *Id.* at 384. As such, Roy cautions against assuming that *both* the (1) *use* and (2) *contents* of accounts are inheritable property. *Id.*

54. However, this definition is dynamic. See discussion *infra* Part III.B.4 (summarizing efforts to clarify what is meant by digital assets to ensure that the term allows for adequate postmortem access).

55. THE DIGITAL BEYOND, <http://www.thedigitalbeyond.com/> (last visited Oct. 3, 2012).

56. Carroll is also co-author of the 2011 book *Your Digital Afterlife: When Facebook, Flickr and Twitter Are Your Estate, What's Your Legacy?*. See *supra* note 37.

57. See CARROLL & ROMANO, *supra* note 37, at 39–40.

58. See *id.* at 49–50.

59. *Helping Clients*, *supra* note 46, at 66. Although Carroll's five digital asset types are the basis for this Comment, other scholars have presented slightly different schema. See, e.g., Naomi

first is *devices and data*, such as a decedent's computer and the documents contained therein.⁶⁰ The second is *electronic mail* ("e-mail"), which, from an assets perspective, includes both *messages received* and *continued access* to the account.⁶¹ Third is *online accounts*,⁶² which, like e-mail, typically

Cahn, *Postmortem Life On-line*, 25 PROB. & PROP. 36, 36–37 (2011), (identifying four digital asset types).

**Personal Assets*: In the first category are personal assets typically stored on a computer or smartphone or uploaded onto a web site, such as Flickr or Shutterfly. These can include treasured photographs or videos and e-mails or even playlists. Photo albums can be stored on an individual's hard drive or created through an on-line system. (They also can be created through social media, as discussed in the next paragraph.) People can store medical records and tax documents for themselves or family members. The list of what a client's computers can hold is, almost literally, infinite. Each of these requires different means of access; in fact, simply logging onto someone's computer generally requires a password, and then each of the different files on the computer can require separate passwords.

**Social Media Assets*: These assets involve interactions with other people and include the web sites Facebook and Twitter, for example, as well as e-mail accounts. Not only are these sites used for messaging, but they also can serve as storage for photos, videos, and other assets.

**Financial Assets*: Although some bank accounts have no connection to brick-and-mortar buildings, most bank accounts and investments retain some connection to physical space. But increasingly they are set up to be accessed via a computer. An individual also can have an Amazon account, be registered with Paypal or on other shopping sites, have magazine subscriptions, and so on. An online bill payment system also may have been established.

**Business Accounts*: An individual engaging in any type of commercial practice probably stores some information on a computer. Businesses collect customer orders and preferences, even customer addresses, and physicians store patient information; eBay sellers have an established presence and reputation. Lawyers might store client files or use a Dropbox.comtype service that allows access to litigation documents through shared folders to a team that is spread across the United States. A blog or domain name can be valuable, yet may only be capable of access and renewal through a password or e-mail.

Id.

60. "For example, a photographer's estate may contain a computer worth \$1,000, but his photo collection on that computer may be worth many thousands of dollars." *Helping Clients*, *supra* note 46, at 66.

However, devices and data themselves have at least one important property distinction, in that "A device is a single object" that can be given to only one person, whereas files and data on devices can be shared with many. CARROLL & ROMANO, *supra* note 37, at 108.

61. *Helping Clients*, *supra* note 46, at 66.

62. In some discussions this term may be used somewhat interchangeably with "online services." See discussion *supra* Part II.A. Cf. Roy, *supra* note 36, at 380–81. In short:

[O]nline services would not work without keeping each person's identity and business affairs separate from everyone else's . . . [which] is accomplished through the use of separate personal accounts for each online service. A user creates an account by

require a username and password, but may store content in addition to textual messages, such as photographs and videos, and thus may include social media.⁶³ The fourth type, *financial accounts*,⁶⁴ overlaps somewhat with online accounts given that the latter may be linked directly to banking and other financial accounts.⁶⁵ Lastly, the fifth type, *online businesses*, includes online stores with potential for revenue streams.⁶⁶

Although this Comment focuses on social media, it is helpful to summarize other types of digital assets given the five types' characteristic overlap and functional interconnectedness.⁶⁷ E-mail access, for instance, is a common thread throughout most digital-asset types because it often serves as the "master key" to online and other accounts, including social-media accounts.⁶⁸ What this means is that online services frequently rely on users' e-mail addresses as "unique and personal identifier[s]" and often use them "as a means of resetting an [online] account password."⁶⁹ Devices themselves may also serve as a master key,⁷⁰ considering that as users access their e-mail, social media, financial, and other accounts, they create and interact with cloud-based content and "leave breadcrumbs on [their] device[s] . . . like saved passwords, browsing history, and installed applications."⁷¹

selecting a unique username by which she is identified, and entering a password that only she should know. With these login credentials, an online service can match an account with a user and confirm that the person logging in is the same person who created the account. Depending upon the services used, each account could contain various combinations of personal information, transactional data, and user-generated content, all of different degrees of personal and financial importance to the user.

Id. (footnotes omitted).

63. *Helping Clients*, *supra* note 46; *see* discussion *infra* Part II.A.3 (synthesizing definitions of social media).

64. *See generally* Wilkens, *supra* note 38 (including a discussion of financial accounts' online migration).

65. For example, "PayPal enables individuals to purchase products online and send or receive money directly to their checking accounts. Amazon and other online retailers can connect directly to bank accounts as well." *Helping Clients*, *supra* note 46, at 66.

In a relevant sign of the times, the U.S. Treasury Department on January 1, 2012, ended its sale of over-the-counter paper bonds as "the next step in the Treasury's all-electronic initiative that will save the U.S. government \$400 million dollars in the first five years. This [followed] their May announcement that as of March 2013, all benefits, including social security, will be paid via direct deposit." John Romano, *All-Electronic Resources a Powerful Reason to Plan for Digital Assets*, DIGITAL ESTATE BLOG (July 13, 2012), <http://www.digitalestateresource.com/2011/07/all-electronic-finances-a-powerful-reason-to-plan-for-digital-assets/>.

66. *Helping Clients*, *supra* note 46, at 66. While personal online accounts and probate typically implicate individuals, "the line between personal digital assets and those of a business may be blurred. Bloggers, small online retailers and avid eBay users are great examples." *Id.*

67. *See supra* notes 59–66.

68. *Helping Clients*, *supra* note 46, at 66.

69. *Id.*

70. *See supra* note 57 and accompanying text.

71. CARROLL & ROMANO, *supra* note 37, at 109.

1. Devices and Data

With respect to the two location-based categories, devices and data fall under the first category (i.e. “local”)⁷² by encompassing tangible personal properties like “[c]omputer, storage and mobile devices . . . that will be distributed as part of the estate.”⁷³ Devices and data therefore differ from the remaining digital-asset types—that is, e-mail, online and financial accounts, and online businesses—because these latter types are increasingly stored beyond individuals’ personal devices.⁷⁴ E-mail, however, exhibits some categorical crossover.⁷⁵

2. E-mail

E-mail’s crossover between local and cloud-based storage stems from its dual nature.⁷⁶ E-mail messages may be located and stored directly on a user’s device, particularly if the user hosts his or her own e-mail server, or they may be stored remotely via a cloud-based service (even long after an e-mail message has been received).⁷⁷ Carroll and Romano clarify this distinction by delineating three ways to access e-mail: (1) *desktop software*, (2) *mobile devices*, and (3) *webmail*.⁷⁸ Desktop software “downloads or synchronizes” e-mail messages to the user’s computer or device and may sometimes delete the message from the original server once it has been downloaded to the device.⁷⁹ Mobile devices work similarly in that their built-in e-mail applications allow users to store e-mail messages directly on the devices themselves, often leaving backup copies of messages on a server

72. See *supra* text accompanying notes 57–58 (distinguishing between local and cloud-based storage).

73. See *Helping Clients*, *supra* note 46, at 66. And, of course, these might contain other digital assets in the form of photos, videos, music, etc. *Id.*

74. *Id.* “The issue of digital assets is just now emerging because, until recently, most personal digital content was stored locally on personal computers or devices. The result has been litigation, with likely more litigation to come.” *Id.*

75. See *infra* notes 76–82 and accompanying text.

76. See *supra* notes 68–71 and accompanying text (explaining the “master key” analogy); see also CARROLL & ROMANO, *supra* note 37, at 120 (noting that “[F]our of the top fifteen most popular sites on the Internet are Web-based email sites.”).

77. See, e.g., CARROLL & ROMANO, *supra* note 37 at 120–25; *Helping Clients*, *supra* note 46, at 66.

78. CARROLL & ROMANO, *supra* note 37, at 123–24. Of course, it is possible to access the same e-mail messages more than one way. *Id.*

79. *Id.* In these cases the user’s device will then have the sole copy of the e-mail, making storage in such cases exclusively local. *Id.* at 124.

as well as on a device.⁸⁰ Webmail, in contrast, allows users to manage e-mail with an Internet browser, meaning that e-mail messages are stored on a company's server and are not downloaded onto a user's computer (or other device).⁸¹

Ascertaining e-mails' storage location highlights another important point with respect to digital asset ownership and its putative status as property: the distinction between (1) *e-mails themselves*, often stored in files, and (2) *continued access* to e-mail accounts, wherein access means simply "the ability to continue receiving new e-mail messages."⁸² This distinction was made clear in *In re Ellsworth*, a high profile case decided by a Michigan probate court in 2005.⁸³ The distinction between obtaining individual e-mails or their copies and continuously accessing their source thus may be a relevant consideration in drafting and interpreting wills and statutes.⁸⁴

3. Online Accounts and Their Subcomponent "Social Media"

The content-versus-access distinction that is illustrated by e-mail, as well as e-mail's capacity for cloud storage, renders this digital-asset type a helpful analogy to the highly related asset type of online accounts.⁸⁵ In conjunction with an increased use of online or cloud-based services for storing individuals' digital assets, the prevalence of online accounts is skyrocketing.⁸⁶ The most prominent examples of sites and services allowing for cloud storage include Facebook, Twitter, LinkedIn, Flickr, and

80. *Id.* Examples of mobile devices include Android or BlackBerry phones. *Id.*

81. *Id.* Thus, webmail is stored in a cloud. Web-based e-mail accounts are operated by companies like Google (which operates Gmail), Yahoo!, and Microsoft, whose e-mail services can be accessed via Web browsers like Firefox, Safari, Google Chrome, or Internet Explorer. *Id.*; *Helping Clients*, *supra* note 46, at 66.

Finally, another distinction worth drawing with respect to e-mail services is the one between the above-listed Web-based e-mail services (which are often free) and e-mail operated by users' Internet Service Providers ("ISPs"), like AT&T, Comcast, RoadRunner, and Verizon (in which cases email users might pay for their e-mail accounts along with their Internet access). CARROLL & ROMANO, *supra* note 37, at 121; *Helping Clients*, *supra* note 46, at 66.

82. *Helping Clients*, *supra* note 46, at 66.

83. See *In re Ellsworth*, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005); see, e.g., Cahn, *supra* note 59, at 38. For further discussion of Justin Ellsworth's e-mails, see *infra* Part III.A.

84. See *infra* note 395 and accompanying text (providing suggested language for wills).

85. E-mail provides an invaluable analogy to online accounts not only because of its storage commonalities with and master key relationship to social media, but because it has already raised similar questions about ownership. See generally, Atwater, *supra* note 36. Further, e-mail, like social media, may include "personal photos, intimate private online conversations, informal instant message chats, and financial records." *Id.* at 399.

86. See generally *Email Statistics Report*, *supra* note 1 (projecting rapid growth in online accounts through 2015).

YouTube.⁸⁷ These and similar sites, labeled “social media,” are the largest subcomponent of online accounts.⁸⁸

“Social media” is defined by Merriam-Webster’s dictionary as “forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).”⁸⁹ Some scholars, however, prefer more hybridized definitions such as: “[W]eb sites, software tools, and mobile applications that allow individuals or groups to generate and public content, engage in peer-to-peer conversations, and participate in the exchange of published content.”⁹⁰ Both definitions seem apt to describe some of the most popular social media.

4. The Most “Liked” Social Media and How They Work

In 2011 there were an estimated 2.4 billion social networking accounts worldwide, comprising both consumer and corporate accounts, a figure expected to grow to nearly 3.9 billion by the end of 2015.⁹¹ Contributing to this growth is Facebook, hailed as “far and away” the most popular social

87. *Helping Clients*, *supra* note 46, at 66.

88. *Id.* Carroll also draws a slight distinction between social media and less social “sites that store personal content like Google Docs, Dropbox and online backup accounts. These services function much like a computer drive that’s located at the service provider and holds content that belongs to the user and is sometimes shared with other users.” *Id.* These less social sites pose greater problems than social media for executors, who might not be aware of their existence. *Id.*

89. *Social Media*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Oct. 3, 2012). Note that “social media” was a new entry to the dictionary in 2011. *New Dictionary Words for 2011*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/info/newwords11.htm> (last visited Sept. 27, 2012).

Among relevant articles and books, “social media” is used interchangeably with “social networking,” “social websites,” “Web 2.0,” and similar terms. *See, e.g.*, CARROLL & ROMANO *supra* note 37, at 134–47; *see also* Strutin, *supra* note 47, at 236 (“The social media phenomenon is part of Web 2.0, i.e., the shifting of content from top-down publishing to user- and consumer-generated information; in other words, people powered publishing.”).

In their chapter titled “Social Websites,” Carroll and Romano further subdivide social media by content. CARROLL & ROMANO, *supra* note 37, at 135. For instance, “connections” and messages are kept by Facebook, My Space, Orkut, and LinkedIn; photos are kept by Flickr, Facebook, Picasa, Snapfish, and Photobucket; videos are kept by YouTube, Vimeo, Flickr, and Facebook; “writings or blog articles” are kept by WordPress, Blogger, TypePad, and LiveJournal; short messages are kept by Twitter and Tumblr, and “check-ins” and messages are kept by Foursquare, Gowalla, Facebook, and Brightkitte. *Id.*

90. John M. Miller, *Is MySpace Really My Space? Examining the Discoverability of the Contents of Social Media Accounts*, 30 TRIAL ADVOC. 28, 28 (2011).

91. *See Email Statistics Report*, *supra* note 1, at 4.

media outlet (or “social website”) on the Internet.⁹² Launched in 2004,⁹³ the site boasts more than 955 million users as of January 2012.⁹⁴ Facebook allows users to create accounts, develop personal profiles, and maintain a home page displaying personal profile information.⁹⁵ Beyond merely creating profiles, Facebook users may share videos, photographs, websites, “events” (akin to invitations), and groups through core applications that are compatible with users’ profiles.⁹⁶ Among Facebook’s defining features is the ability to “friend” other users, thereby allowing Facebook users to connect with and observe their friends’ collective activity in the “news feed.”⁹⁷ Depending on friend status, users may send messages and live chat with other users, permanently post material on other users’ walls, and comment on content posted on other users’ profiles (users might also “Like” content, as indicated by a tiny thumbs-up icon).⁹⁸

Several instances of Facebook playing fast and loose with user data have served as inflammatory reminders that the site’s users do not enjoy unfettered ownership of their profiles. In April 2010, for instance, Facebook tweaked its privacy policy by sharing users’ personal information with “partner sites” like Yelp.com, whilst prompting users to opt out of this feature rather than opt in.⁹⁹ This breach perhaps echoed Facebook’s prior “Beacon” fiasco, wherein Facebook suddenly began publishing “stories” on its news feed of users’ separate activity on third-party websites.¹⁰⁰ For instance, users’ online movie-ticket purchases suddenly became known to their Facebook friends, and there was even a report of a high schooler’s online book purchase—a book titled *How Long Does it Hurt: A Guide to Recovering from Incest and Sexual Abuse for Teenagers, Their Friends, and Their Families*—subsequently appearing in all of the students’ friends’ news

92. Miller, *supra* note 90, at 29; *see also* CARROLL & ROMANO *supra* note 37, at 134.

93. *Key Facts*, FACEBOOK NEWSROOM, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Oct. 3, 2011).

94. *Id.*

95. Each user’s personal profile may contain some or all of the following: “name, age, date of birth [allowing for omission of the year if the user so desires], hometown, address, telephone number, e-mail address, employment, marital or relationship status, interests, friends, and status updates.” Miller, *supra* note 90, at 29.

96. *Id.*

97. Likewise, that user’s friends can see the user’s updates and information. *Id.*

98. *Id.*; *Products*, FACEBOOK NEWSROOM, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=19> (last visited Oct. 3, 2012). However the account holder has the ability to delete content from his or her own wall. For a further discussion of Facebook’s features, see Amy Morganstern, *In the Spotlight: Social Network Advertising and the Right of Publicity*, 12 INTELL. PROP. L. BULL. 181, 181–83 (2010).

99. *See* CARROLL & ROMANO *supra* note 37, at 27. “A Google search for ‘Facebook instant personalization backlash’ lists blog posts around the Web that called the alarm to change your privacy settings and to demand more privacy from Facebook.” *Id.*

100. Morganstern, *supra* note 98, at 183.

feeds.¹⁰¹ Facebook has additionally sparked smaller-scale outrage after refusing to let a woman alter her deceased brother's Facebook page.¹⁰² The woman's protests ultimately prompted the "memorializing" feature introduced in 2009,¹⁰³ but the feature is not without its faults, given that it has led to some unfortunate cases of still-alive users discovering that their accounts have been mistakenly memorialized.¹⁰⁴

With Facebook as the arguably dominant social-media tool, it is easy to forget that Myspace came first.¹⁰⁵ Similar to Facebook, Myspace users may create personalized profiles while sharing personal information, photos, and videos.¹⁰⁶ One distinction, however, is that users' profiles are generally viewable to other Myspace users regardless of their connectedness, unlike Facebook's privacy-layering contingent on friend status.¹⁰⁷ Myspace users typically skew younger than Facebook's,¹⁰⁸ and, in 2010, Myspace announced its new strategy of focusing on music and entertainment.¹⁰⁹

More textual than Facebook and Myspace,¹¹⁰ Twitter is a

101. *Id.* at 184. A mass online protest involving a MoveOn.org-led petition pressured Facebook to offer a permanent Beacon opt-out, and Facebook's CEO, Mark Zuckerberg, apologized in a blog post. *Id.*

102. Ben Popken, *Facebook Won't Let You Remove Dead Relative's Page, per "Policy,"* CONSUMERIST (Feb. 20, 2009, 8:17 PM), <http://consumerist.com/2009/02/facebook-wont-let-you-remove-dead-relatives-page-per-policy.html>. Facebook's refusal was reportedly in contrast to every other social networking site contacted by the decedent's sister. *Id.*; see also Matthew Moore, *Facebook Introduces 'Memorial' Pages to Prevent Alerts About Dead Members*, THE TELEGRAPH (Oct. 27, 2009, 10:59 AM), <http://www.telegraph.co.uk/technology/facebook/6445152/Facebook-introduces-memorial-pages-to-prevent-alerts-about-dead-members.html> (explaining Facebook's decision to allow friends and family to contact the company and request to "memorialize" deceased members' pages); Ben Popken, *Update: Facebook Agrees to Take Down Dead Relative's Page*, CONSUMERIST (Feb. 21, 2009, 4:52 PM), <http://consumerist.com/2009/02/update-facebook-agrees-to-take-down-dead-relatives-page.html>.

103. See *supra* Part I.

104. 'Someone memorialized my Facebook profile but I'm still alive!' *Social network kills off user who isn't dead*, DAILY MAIL (June 26, 2012), <http://www.dailymail.co.uk/news/article-2164952/Facebook-kills-user-isnt-dead.html>. Carroll and Romano note that "Once death records are made available online, the Web will be 'aware' of a person's passing [and] [o]nline service providers will be able to automatically close, memorialize, or terminate services. But for the time being, nothing happens." CARROLL & ROMANO, *supra* note 37, at 56.

105. Myspace was founded in 2003. See *About Us*, MYSPACE, http://www.myspace.com/Help/AboutUs?pm_cmp=ed_footer (last visited Oct. 9, 2012).

106. See Miller, *supra* note 90, at 29 (citing *Privacy Policy*, MYSPACE.COM, <http://www.myspace.com/Help/Privacy> (last visited Oct. 3, 2011)).

107. *Id.*

108. *Id.*

109. *Id.* at 29 (citing Miguel Helft, *For Myspace, a Redesign to Entice Generation Y*, N.Y. TIMES (October 27, 2010), <http://www.nytimes.com/2010/10/27/technology/27myspace.html>).

110. Twitter users may also post photographs and links to other websites as components of their

“microblogging”¹¹¹ application that allows users to post prose no longer than 140 characters at a time (“tweets”), which are then published on the user’s Twitter “feed” and viewable to all who “subscribe” to that particular Twitter user.¹¹² Depending on a Twitter user’s privacy settings, tweets may also be searchable on the Internet.¹¹³ Celebrities are fixtures of the service, providing fodder for news stories via unfiltered tweets.¹¹⁴ Further, celebrities’ ability to garner large numbers of Twitter followers is regarded as a sort of honor badge.¹¹⁵

For job and career networking, LinkedIn operates the world’s largest professional network on the Internet, allowing for a “fracturing of identity [from sites like Facebook] to control the way [individuals] communicate to different audiences.”¹¹⁶ Based in Mountain View, California, the site officially launched in 2003 and now boasts more than 175 million professional members worldwide who conducted more than four billion professionally oriented searches in 2011.¹¹⁷ More than two million companies have LinkedIn Company Pages.¹¹⁸

Flickr, founded in 2004 and owned by Yahoo!, claims to be the largest photo-sharing site on the Internet and allows users to upload personal photos from home computers or mobile devices (like camera phones) onto Yahoo!-owned servers.¹¹⁹ Flickr’s “two main goals” are to (1) “help people make

tweets. *Id.*

111. Microblogging has been defined as “a form of blogging that allows a user to post a small amount of information on an online forum.” *Id.* Microblogging has gained tremendous popularity in recent years “because it is quick and easy and can be done from a number of different platforms, including mobile devices.” *Id.* Specifically, for Twitter:

Users will typically post information about their status: what they are doing, who they are with, where they are, what they are feeling, and so on. Twitter feeds are searchable, so if a user posts information about the user’s activities or feelings, another user can search that feed for key words to locate relevant tweets. For some users, Twitter functions as an online diary

Id.

112. *Id.*

113. *See, e.g., id.*

114. *See, e.g.,* Amber James, *Best Celebrity Twitter Stories of 2009*, HUFFPOST CELEBRITY (Dec. 21, 2009), <http://www.popeater.com/2009/12/21/best-celebrity-twitter/>.

115. *See, e.g.,* John D. Sutter, *Ashton Kutcher Challenges CNN to Twitter Popularity Contest*, CNNTECH (Apr. 15, 2009), http://articles.cnn.com/2009-04-15/tech/ashton.cnn.twitter.battle_1_cnn-twitter-account-followers?_s=PM:TECH.

116. CARROLL & ROMANO, *supra* note 37, at 49. “Your colleagues may not care what you are doing for the weekend, your family may not care that you joined a specific professional group, and your friends may not care that your aunt has bunions.” *Id.*

117. *About Us*, LINKEDIN PRESS CENTER, <http://press.linkedin.com/about> (last visited Oct. 3, 2012).

118. *Id.*

119. *See* CARROLL & ROMANO, *supra* note 37, at 28, 144. However, Snapfish is the *oldest* photo-sharing service, founded in 2000 and purchased by Hewlett-Packard in 2004. *See About Snapfish*, SNAPFISH, <http://www.snapfish.com/snapfish/aboutUs> (last visited Oct. 3, 2012). Like

their photos available to the people who matter to them”; and (2) “enable new ways of organizing photos and video.”¹²⁰ Notably, cloud services like Flickr and Snapfish mean that companies like Yahoo! “often become the sole home for many people’s photos.”¹²¹

YouTube is a video-sharing site founded in February 2005 that allows users to upload videos on the Internet and potentially make them accessible to anyone, regardless of viewers’ member status with the site.¹²² By YouTube’s estimates, about forty-eight hours of video are uploaded onto the company’s servers every minute, resulting in nearly eight years worth of content being uploaded every day.¹²³ YouTube users may monetize their shared videos through the YouTube Partner Program, in which YouTube runs advertisements across partners’ videos or makes them available for rent, then gives the “majority” of ad-generated money to the Partners.¹²⁴ Since 2007, the Partner Program has gathered more than a million partners from at least twenty-seven countries,¹²⁵ and hundreds of these Partners are now earning six figures a year.¹²⁶

Other services arguably fall under the umbrella of accepted definitions for social media, but are more commonly categorized more specifically as virtual reality, blogs, business sites, dating sites, et cetera. Second Life, for instance, is a three-dimensional virtual universe in which users (“Residents”) interact with persons worldwide, including through the buying and selling of property with real-world money.¹²⁷ LiveJournal is a blogging platform with

Flickr, Snapfish is a web-based photo-sharing service for which users register for accounts and offers the following: unlimited online photo sharing and storage; private group rooms for sharing photos with friends and family; free uploading from mobile phones; and subscription video-sharing and storage plans. *Id.*

120. *About Flickr*, FLICKR, <http://www.flickr.com/about/> (last visited Oct. 3, 2012).

121. CARROLL & ROMANO, *supra* note 37, at 28.

122. *See* Miller, *supra* note 90, at 29; *see also* *About YouTube*, YOUTUBE, http://www.youtube.com/t/about_youtube (last visited Oct. 3, 2012).

123. *Statistics*, YOUTUBE, http://www.youtube.com/t/press_statistics (last visited Oct. 3, 2012) (providing the following statistics: over three billion videos are viewed a day; seventy percent of traffic comes from outside the U.S.; and 800 million unique visitors visit YouTube each month).

124. *Frequently Asked Questions: YouTube Partners*, YOUTUBE, <http://www.youtube.com/t/faq> (last visited Oct. 3, 2012).

125. *Statistics*, YOUTUBE, http://www.youtube.com/t/press_statistics (last visited Oct. 3, 2012).

126. Megan O’Neill, *Hundreds of YouTube Partners Now Making Over \$100,000 Per Year*, SOCIAL TIMES (July 5, 2011), http://socialtimes.com/hundreds-of-youtube-partners-now-making-over-100000-per-year_b69239. Further, “The number of partners that are making over \$1,000 per month is up 300% since early 2010.” *Id.*

127. *See* Herbst, *supra* note 12, at 16 n.11; *see also* LINDEN LAB, <http://lindenlab.com/> (last visited Oct. 3, 2012).

more than “52.2 million journals and communities”¹²⁸ providing users the chance to earn money from their Journals.¹²⁹ Finally, eBay is the world’s largest online marketplace, facilitating an estimated \$2,000 in sales every second.¹³⁰

Now for the sad and more complicated part: Inevitably, users of these services will die, and determining what should happen legally to decedents’ assets, which are inextricably linked to these and similar sites, may implicate probate law, property law, privacy law, or many combinations thereof. Companies, meanwhile, offer varying death provisions within their terms of usage, introducing a contractual element to this legal equation.

B. What Did I Just Agree To? Terms of Service (ToS) and Contract Law

The relationship between online service providers and their users is almost always governed by a contract of adhesion,¹³¹ generally called the “user agreement,” “terms of use,” or terms of service (ToS).¹³² Though ToS may not specify what happens to a social-media account after a user’s death, their allusions to non-transferability or termination of accounts may have a binding effect, preventing online accounts from passing to heirs as more tangible properties would.¹³³ This possibility exists despite existing contract law that would otherwise allow for such transfers.¹³⁴ One reason for this is the absence of provisions in state law, as “state law does not generally require that an online account or its contents pass via will, intestacy, or nonprobate transfer.”¹³⁵

The most common scenario in initiating a social-media account is that a potential user reads several screens worth of legalese, and then registers by

128. LIVE JOURNAL, <http://www.livejournal.com/> (last visited Oct. 3, 2012).

129. *Press Releases*, LIVE JOURNAL (Sep. 22, 2009), http://www.livejournalinc.com/press_releases/20090921.php; *see also Helping Clients*, *supra* note 46, at 66.

130. *Who We Are*, EBAY, <http://www.ebayinc.com/who> (last visited Oct. 3, 2012). eBay relies on PayPal, for which there are more than 100 million active registered accounts worldwide. *Id.*

131. *See* 30 WILLISTON ON CONTRACTS § 77:72 (4th ed. 2010).

132. *See* Roy, *supra* note 36, at 381. For the current ToS of social media discussed in this Comment, *see* discussion *infra* Part III.C.

133. *See generally* Roy, *supra* note 36.

134. *See* Miller v. S.F. Newspaper Agency, 210 Cal. Rptr. 159, 161 (Ct. App. 1985) (citing Ark. Valley Smelting Co. v. Belden Mining Co., 127 U.S. 379, 389–90 (1888)) (acknowledging that the rights of a decedent under a contract may be assigned to an executor by operation of law at the decedent’s death).

135. *See* Roy, *supra* note 36, at 381. However, recent state legislative efforts may pose a challenge to the law’s current state. For another perspective, at least one scholar has suggested that Facebook’s agreement with its users might be deemed a “personal services contract” because users promise to keep account up-to-date and refrain from sharing info with anybody else. *Id.* at 384 n.39. Thus, if an executor takes the user’s place, these terms would be violated. *Id.*; *see* CARROLL & ROMANO, *supra* note 37, at 28.

clicking a box and agreeing to the terms therein.¹³⁶ Such online contracts are often called “clickwrap” and are typically upheld by courts despite their nature as contracts of adhesion.¹³⁷ Their enforceability also comes despite the fact that those who even skim ToS “may be about two in every one thousand.”¹³⁸ In rare instances, however, courts have been willing to find an online service’s terms unconscionable.¹³⁹

Alongside non-transferability and termination provisions, social-media services wield power through forum-selection clauses, which overwhelmingly dictate that the state law that controls any service-related disputes shall be California’s.¹⁴⁰ Notably, Facebook had formerly declared that the laws of Delaware, Facebook’s state of incorporation, would control.¹⁴¹ But like most online services, Facebook’s choice of law is now California’s.¹⁴² Given that not all users are situated in California, then, “It’s questionable whether the estate laws of a decedent’s resident state would supersede the contractual agreements with the various online services,” irrespective of legislation specifically addressing social-media assets.¹⁴³

C. *The Young and the Will-less: Probate Law and Intestacy*

At death, all of a decedent’s assets can be placed into one of two categories: (1) probate property, or (2) nonprobate property.¹⁴⁴ “Probate”

136. See Darrow & Ferrera, *supra* note 37, at 314–19; Roy, *supra* note 36, at 385.

137. See Cahn, *supra* note 59, at 37.

138. LASTOWKA, *supra* note 40, at 18 n.39 (citing Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* (Oct. 6, 2009), <http://ssrn.com/abstract=1443256>).

139. See, e.g., *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) (finding unconscionable Second Life’s ToS after Second Life forcibly evicted a user from its virtual world).

140. See *Helping Clients*, *supra* note 46, at 66. “Many of the online services’ contracts state that California law will control because it’s the home (principal place of business) to many of these companies.” *Id.*

141. See Morganstern, *supra* note 98, at 185.

142. Facebook’s “Terms,” under the heading of “Disputes,” now read:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.

Statement of Rights and Responsibilities, FACEBOOK (Apr. 26, 2011), <http://www.facebook.com/legal/terms?ref=pf> (last visited Oct. 3, 2012).

143. *Helping Clients*, *supra* note 46.

144. See JESSE DUKEMINIER, ROBERT H. SITKOFF, & JAMES LINDGREN, *WILLS, TRUSTS, AND*

generally refers to the legal process of administering the estate of a deceased person, thus probate property is that which “passes through probate under the decedent’s will or by intestacy,” sometimes requiring a court proceeding, depending upon a jurisdiction’s requirements.¹⁴⁵ Nonprobate property, in contrast, is that which passes outside the probate system under an instrument other than a will, such as a contract, deed, or trust—rather than involving a court proceeding.¹⁴⁶ Four major categories of nonprobate transfer are *joint tenancy properties*,¹⁴⁷ *life insurance*,¹⁴⁸ *contracts with payable-on-death (“POD”) provisions*,¹⁴⁹ and *interests in trust*.¹⁵⁰ While social-media and other digital-type assets may resemble nonprobate property that could feasibly be held jointly¹⁵¹ or assigned away sans court proceedings, as the DEP trend in particular might further suggest,¹⁵² recent efforts by legislatures to streamline the postmortem disposition of dead people’s accounts seem to be shifting this discussion into the realm of probate and intestacy.¹⁵³

It has been said that probate performs three core functions: (1) providing evidence of transfer of title; (2) protecting creditors via established procedure for debt payment, and after payment of the decedents’ debts; and (3) distributing property as the decedent intended.¹⁵⁴ Despite its apparent functions, however, questions remain as to probate’s necessity, especially

ESTATES 38 (8th ed. 2009) [hereinafter DUKEMINIER].

145. *Id.* at 38–39. Accordingly, “to go through probate” means to have an estate administered in a court having jurisdiction over decedents’ assets. *Id.* at 40. “One court in each county has jurisdiction over administration of decedents’ estates,” and while the names of each court vary by state, they are collectively referred to as probate courts. *Id.*

146. *Id.* at 39.

147. Under the theory of joint tenancy, which may apply to both real and personal property, no interest passes to the survivor at the decedent’s death; instead, the decedent’s interest merely vanishes and the survivor has the whole (typically upon filing the decedent’s death certificate). *Id.* Married couples typically hold bank accounts, brokerage and mutual fund accounts, and real estate in joint tenancy. *Id.*

148. Life insurance companies pay proceeds of a policy to the beneficiary named in the insurance contract upon receipt of the insured’s death certificate. *Id.*

149. Decedents may have contracts with banks, employers, or other persons or corporations to distribute property to a named beneficiary at the decedent’s death (e.g. pension plans often have survivor benefits). *Id.*

150. Interests in trust refer to situations where a trustee holds property for the benefit of one or more named beneficiaries and distributes the property “in accordance with the terms of the trust instrument.” *Id.* Property held within these instruments may pass through probate when they are created under the decedent’s will (“testamentary trust”), but may avoid probate when placed in an “inter vivos” trust during the decedent’s life (the preferred type of trust in most states). *Id.*

151. This is assuming, of course, that these digital assets can even be considered property or subject to ownership. See discussion *infra* Part II.D.

152. This trend might be likened to an *inter vivos* transfer. See *supra* note 150.

153. See discussion *infra* Part III.B.

154. DUKEMINIER, *supra* note 144, at 39.

given its costliness¹⁵⁵ in conjunction with the availability of other property-transfer methods.¹⁵⁶

A further distinction with respect to probate property depends on whether an individual dies with a will—a legal instrument detailing how a decedent’s estate should be distributed.¹⁵⁷ Persons who leave wills are said to die “testate,” while those who die without a valid will die “intestate.”¹⁵⁸ The laws of intestacy (which may be likened to “default rules”) govern the latter scenario, which are, in turn, controlled by the states’ respective statutes of descent and distribution.¹⁵⁹ “Generally speaking, the law of the state where the decedent was domiciled at death governs the disposition of personal property, and the law of the state where the decedent’s real property is located governs the disposition of real property.”¹⁶⁰ The laws of intestacy are crucial to any probate discussion given recent studies suggesting that upwards of fifty-eight percent of American adults do not have a will.¹⁶¹

A further dispositional nuance affecting both wills and intestacy is the system of community property (CP), whereby in certain states, spouses or registered domestic partners “own the earnings and acquisitions from earnings [during marriage] of both spouses in undivided, equal shares.”¹⁶² Anything that is not CP is “separate property,” and state probate codes further differ on whether income from separate property is CP.¹⁶³ Where

155. Probate costs are primarily attributable to “probate court fees, the commission of the personal representative, the attorney’s fee, and, sometimes, appraiser’s and guardian ad litem’s fees.” *Id.* at 45–46. For even further discussion of the probate process, see *id.* at 42–46.

156. See *supra* notes 147–50. When property owners make transfers during life or arrange for other forms of nonprobate transfer, “the will serves a backup function to catch overlooked property or property acquired after inter vivos changes in ownership have been made.” DUKEMINIER, *supra* note 144, at 46.

157. *Id.* at 71.

158. *Id.*

159. *Id.* at 71–72. Descent and distribution statutes vary by state, but the general trend across these and within the Uniform Probate Code (UPC) is to give the large share to the decedent’s spouse. See, e.g., *id.* at 73–79. Notably, two of the major policies underlying intestacy statutes are (1) “to carry out the probable intent of the average intestate decedent” and (2) family protection. *Id.* at 75–76.

160. *Id.* at 72; Wilkens, *supra* note 38, at 1041 n.21.

161. *Most Americans Don’t Have a Will, Says New FindLaw.com Survey*, FindLaw.com (June 30, 2008), <http://commonlaw.findlaw.com/2008/06/findlaw-survey.html>; see also Wilkens, *supra* note 38, at 1041 n.24.

According to Dukeminier, roughly half the population dies without a will, for reasons including the unpleasantness of thinking about one’s death, the time and costs involved, and the fact that going to a lawyer seems like a “big deal.” DUKEMINIER, *supra* note 144, at 71–72.

162. DUKEMINIER, *supra* note 144, at 508.

163. *Id.*

property's characterization is doubtful, there is a presumption in favor of CP.¹⁶⁴ However, couples may arrange between themselves a re-characterization of separate property to CP and vice-versa.¹⁶⁵ Nine states in the United States, including California,¹⁶⁶ adhere to a CP system.¹⁶⁷ Thus, in a CP state, digital assets created during a marriage could be owned jointly by a husband and wife.

Dictating the disposition of one's property at death is regarded as a fundamental American right.¹⁶⁸ But there are limits. One of these is testators' ability to order that property be *destroyed* upon death.¹⁶⁹ Because "A fundamental justification of private property is that society's total wealth usually is maximized by permitting individuals to decide what is the best use of their property," it is assumed that during life individuals will make rational choices to maximize wealth, including the choice to destroy property because he or she will absorb the economic consequences, good or bad.¹⁷⁰ However, deceased persons have no such incentive, so allowing testators to order property destruction is far less likely to achieve the underlying policy goal of wealth maximization.¹⁷¹ On the other hand, testators' *knowledge* that their postmortem property wishes may not be honored could potentially pervert incentives during one's lifetime.¹⁷² Whether and how these considerations should pertain to digital assets remains unclear.

D. Social-Media Assets as "Property"

Probate and intestacy laws' relevance to social media is further complicated by the fact that social-media assets' "property" status remains unclear.¹⁷³ A similar lack of clarity pervades the more familiar and homogeneous digital-asset type of e-mail,¹⁷⁴ for which there is no legal precedent with respect to ownership or inheritance rights.¹⁷⁵ But conceding

164. *Id.* at 507.

165. *Id.*

166. See CAL. PROB. CODE § 28 (West 2012) (defining community property).

167. DUKEMINIER, *supra* note 144, at 508. A tenth state, Alaska, allows married couples to elect to hold their property as CP. *Id.* at 471.

168. See, e.g., *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." (citing *United States v. Perkins*, 163 U.S. 625, 627–28 (1896))).

169. See DUKEMINIER, *supra* note 144, at 37.

170. *Id.*

171. *Id.*

172. *Id.* For examples of the complexities in this debate, see *id.* at 37–38.

173. See generally John Connor, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 301 (2011).

174. See discussion *supra* Part II.A.2 (conceptualizing e-mail).

175. See Atwater, *supra* note 36, at 398. Further, "[P]rivate e-mail has not received explicit

that social-media assets are even more complex, the discussion that has evolved with respect to e-mail may provide useful analogies.¹⁷⁶

A particularly helpful analogy exists between e-mail and the human body, which, like e-mail, contains highly personal and intimate characteristics and may be subject to hybrid—if not seemingly inconsistent—property classifications depending upon whether a person is alive or deceased.¹⁷⁷ Also similar to e-mail, as in the *Ellsworth* case, the law must provide for when a decedent's wishes differ from those of his or her family.¹⁷⁸ Amid further efforts to delineate e-mail's property status, scholars have further analogized e-mail to the laws of bailment,¹⁷⁹ warehouses,¹⁸⁰ and safety-deposit boxes,¹⁸¹ and have considered e-mail in the context of copyright,¹⁸² joint-ownership rights,¹⁸³ and intellectual-property rights.¹⁸⁴

To bring social media more squarely into a probate discussion, it may be

treatment from legislatures or U.S. courts with respect to ownership and transferability." *Id.* at 406. Case law has even left unresolved the legal status of virtual property, even when users are paying real-world money for virtual properties (in this case in Second Life). *See, e.g.,* LASTOWKA, *supra* note 40, at 17 (summarizing *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007), which left unanswered the legal status of virtual property interests).

176. One purpose for this discussion is that analogizing social-media to "more traditional types of probate assets might be productive in recognizing the rights of an executor to the on-line property of the deceased." *See* Cahn, *supra* note 59, at 38.

177. *See* Atwater, *supra* note 36, at 407–10. For example, the Uniform Anatomical Gift Act (UAGA) allows the donation of certain body parts during life and by will, but the National Organ Transplant Act prohibits the sale of body parts during or after life. However, during our lives we do have the right to sell certain bodily fluids, such as blood and semen. The only explanation for this bifurcation of transferability seems to be the overriding social dynamic. *Id.* at 408.

178. For a recent explanation of the UAGA, please see Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REF. 899, 923 n.126. Noting that:

The 1987 Uniform Anatomical Gift Act (UAGA) made clear that a decedent's donation is valid and 'does not require family concurrence,' [but the] 2006 UAGA states that '[t]he decedent's wish for or against donation is not subject to change by others. . . . Still, in practice, the hospital may refuse to proceed if the family objects.

Id. (internal citations omitted).

Knaplund also highlights the Official Commentary to the 2006 revision of the UAGA:

While the 1987 [Uniform Anatomical Gift] Act provided that a donor's anatomical gift was irrevocable (except by the donor), until quite recently it had been a common practice for procurement organizations to seek affirmation of the gift from the donor's family. This could result in . . . a reversal of a donor's donating decision.

Id. (internal citations omitted).

179. Darrow & Ferrera, *supra* note 37, at 303–11.

180. *Id.* at 308–10.

181. *Id.* at 310–11.

182. *Id.* at 284–96.

183. *See* Atwater, *supra* note 36, at 414.

184. *Id.* at 410–11.

further helpful to distinguish between social-media assets with (1) purely sentimental value and those with (2) actual monetary value. This is not to suggest that social-media assets without monetary value are not property.¹⁸⁵ Yet, unlike e-mail copies or continued account access, financial assets are finite and may therefore give rise to more high-stakes disputes and implicate a greater number of probate and intestacy laws.¹⁸⁶

As introduced earlier,¹⁸⁷ one final distinction that may be drawn with respect to the bundle of rights implicated by social-media assets is that which lies between mere contents of an account and unfettered access to it.¹⁸⁸ While users might “assume” that both the contents and usage of online accounts are inheritable property, social-media services’ ToS may in fact be construed otherwise.¹⁸⁹ Additionally, “use” of an account could be further subdivided into (1) access to existing assets and (2) continued, active use of the account, giving rise to at least three possible elements in that amorphous bundle of social-media property rights: (1) contents or copies of social-media assets; (2) limited access to social-media assets; and (3) unfettered access to, and continued use of, social-media assets.¹⁹⁰

E. Postmortem Privacy Settings

Unfettered access to a dead person’s accounts raises other legal concerns with respect to privacy. While there is no constitutionally enumerated “right” to privacy, such may be construed under the “penumbras” of several amendments.¹⁹¹ An 1890 *Harvard Law Review* article by Samuel Warren and Louis Brandeis, *The Right to Privacy*,¹⁹² laid further groundwork for the notion of U.S. privacy law.¹⁹³ Modern concepts of privacy include “limited access to the self,” “secrecy,” and “control over

185. See, e.g., In re Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005) (listing as personal property “Decedant’s Yahoo! e-mail account documents (1 CD-ROM; 1 Fed Ex envelope and 3 banker boxes of e-mail print-outs): \$0.00”).

186. See, e.g., CAL PROB. CODE §§13000–200 (West 2011) (exempting estates valued under \$150,000 from probate administration and listing property that may be excluded from this calculation).

187. See *supra* notes 57–58, 82–83 and accompanying text.

188. See *infra* text accompanying notes 215–24 (explaining that in *Ellsworth*, Yahoo! only gave the family copies of the requested e-mails, and not access to Justin’s account).

189. See Roy, *supra* note 36, at 384.

190. However, these distinctions remain unclear. See *infra* notes 241–46 and accompanying text.

191. These are the First, Third, Fourth, Fifth, and Ninth Amendments. See, e.g., Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1117 n.159 (2002) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

192. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The article conceptualized privacy as the “right . . . to be let alone,” with the underlying policy goal of “inviolate personality.” *Id.* at 205.

193. See, e.g., Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 704 (1990).

personal information”—concepts intended to protect dignity, individuality, and autonomy; and to aid in the “development of personal relationships,” among other societal virtues and interests.¹⁹⁴

In tort law, four privacy-related causes of action have developed over time: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the name or likeness of another; (3) public disclosure of private facts; and (4) publicity placing another in a false light.¹⁹⁵ Although cases have held generally that privacy rights perish with the individual,¹⁹⁶ there are exceptions. For instance, appropriating a decedent’s likeness may give rise to a “right of publicity” cause of action,¹⁹⁷ and existing statutory frameworks may allow for the possibility of privacy rights surviving the individual, such as the Health Information Protection and Privacy Act (HIPPA), which protects patient information after death.¹⁹⁸

Alongside tort law and potentially relevant statutes, online service providers must also navigate more explicit statutory barriers to informational disclosures, including the Electronic Communications Privacy Act of 1986 (ECPA)¹⁹⁹ and its component Stored Communications Act (SCA), which, broadly speaking, prohibits unauthorized access to stored electronic communications.²⁰⁰ Within the realm of financial accounts especially,²⁰¹ scholars have noted that Internet laws may inhibit the probate process because prohibitions on disclosure of private information make access

194. Solove, *supra* note 191, at 1102–09, 1116, 1121.

195. See, e.g., *McNally v. Pulitzer Publ’g. Co.*, 532 F.2d 69, 78 n.10 (8th Cir. 1976) (citing W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117 (4th ed. 1971)) (holding that plaintiff had no right to recover under public disclosure of private facts theory because the published information was in public records and a matter of public interest).

196. See, e.g., *Smith v. Long Is. Jewish–Hillside Med. Ctr.*, 499 N.Y.S.2d 167, 168 (1986) (observing generally that privacy rights typically cease at death).

197. “Right of publicity” is sometimes seen as a subset of the appropriation cause of action. CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 22:32 (4th ed.). For an interesting discussion of right of publicity, see generally Morganstern, *supra* note 98.

198. See 45 C.F.R. § 164.512(a). See generally *Law v. Zuckerman*, 307 F. Supp. 2d 705, 709–10 (D. Md. 2004).

199. Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.: 18 U.S.C. §§2510, 2522, 2701–10, 2711 (2006)). The ECPA “prohibits companies that process, handle, and intercept electronic communications from knowingly divulging the contents of the communications . . . [and] prohibits electronic communications service providers from intentionally disclosing the contents of communications to any party other than the sender or the designated recipient.” Wilkens, *supra* note 38, at 1040.

200. See 18 U.S.C. § 2701(a). The SCA does not apply to the user of the electronic communications service himself, nor does it impose civil or criminal liability when action is taken in good faith pursuant to a court order. See 18 U.S.C. § 2701(c)(2); 18 U.S.C. § 2707(e)(1).

201. See *supra* notes 64–66.

difficult for executors.²⁰² Perhaps unsurprisingly, then, “[O]nline service providers have erred on the side of protecting privacy, even after death.”²⁰³

III. DIGITAL ASSETS AND DEATH: A STATUS UPDATE!

With numerous moving parts and such varied underlying interests at stake, the law governing decedents’ social-media assets appears hopelessly uncertain. It remains admittedly “unsettled,” “in a state of flux,”²⁰⁴ and still under development—resulting in tremendous confusion among estate attorneys.²⁰⁵ The persistence of such murkiness seems puzzling at first, given that there has been nearly a decade of controversy surrounding the analogous quandaries posed by decedents’ e-mails,²⁰⁶ as well as a handful of corporate and legislative efforts to remedy such digital uncertainties.²⁰⁷ But a closer inspection of today’s conditions, including certain proposed “solutions,” explains why the potential for litigation may actually be increasing.

One explanation is that social media’s inherent amorphousness, as discussed,²⁰⁸ renders it more difficult to delineate as an asset type than e-mail, and thus more elusive when promoting blanket policies via legislation or conveying testators’ wishes in wills and trusts.²⁰⁹ Such amorphousness also creates countless possibilities for its disposition, unlike e-mail messages, which, once sent and received, are comparatively static.²¹⁰ Social-media’s complexity relative to e-mail seems poised to expand even further as more sites and services are created, thereby creating even greater opportunity for litigation. This may be further exacerbated by the reality that individuals’ “most personal” digital assets are increasingly being stored remotely as opposed to locally,²¹¹ that many once-tangible assets are

202. Privacy laws governing financial accounts include the Right to Financial Privacy Act of 1978 (RFPA) and the Financial Services Modernization Act of 1999 (Gramm-Leach-Bliley Act) (GLBA). See Wilkens, *supra* note 38, at 1041, 1049–52.

203. *Id.* at 1053. For a succinct timeline of privacy and the law, see *Timeline: Privacy and the Law*, NATIONAL PUBLIC RADIO, <http://www.npr.org/templates/story/story.php?storyId=114250943> (last visited Oct. 4, 2012).

204. See Atwater, *supra* note 36, at 397.

205. See *Helping Clients*, *supra* note 46, at 66.

206. See discussion *supra* Part II.E. Further, perhaps the continuation of e-mail quarrels after nearly a decade suggests that post-mortem disposition of e-mail, like social-media’s other digital assets, itself remains an emerging legal issue.

207. See discussion *infra* Parts III.B–D.

208. See discussion *supra* Parts II.A.3, II.B (providing an overview of online accounts and some of the most popular social media services therein).

209. “Type” here is used generally, given that social-media may be classified more specifically as a subtype. See discussion *supra* Part II.A.3.

210. *But cf.* discussion *supra* Part II.D (exploring the “bundle” of digital-asset property rights).

211. See *Helping Clients*, *supra* note 46, at 66.

becoming permanently digitized;²¹² and that younger generations' use of social media portends rapid growth in usage in the future.²¹³ Another explanation, albeit an unpleasant one, is the likelihood that not enough people—especially the young and the will-less—have died to call attention to the questions raised by dead persons' unmanned social-media accounts.²¹⁴ In short, the confluence of legal uncertainty and further innovation may be a perfect storm for social-media-centric litigation; and, somewhat paradoxically, it is possible that hasty corporate and legislative solutions like DEPs and new state laws are exacerbating this uncertainty rather than resolving it.

A. *In Re Ellsworth and the Current Climate for Social Media Litigation*

Since 2005, when a Michigan probate court decided *In re Ellsworth*, the battle over Lance Corporal Justin Ellsworth's e-mails has been perhaps the most cited case in both media and scholarly discussions of digital assets and ownership rights.²¹⁵ Even so, the case may have "little precedential value."²¹⁶ Evan Carroll, who has spoken via telephone to Justin's father, John Ellsworth, believes that the only reason the probate court heard the case was because "[John] embarrassed Yahoo! in the media," giving the company little choice but to respond.²¹⁷ "Mr. Ellsworth very much knew that he was

212. *See id.* (noting recent United States Treasury initiative).

213. *Id.* ("As younger generations begin planning their estates, the quantity of these assets will increase."); *see also supra* note 48 (comparing different generations' use of social media).

214. *See, e.g.,* Atwater, *supra* note 36, at 418.

Despite their widespread use, legislatures and courts have not needed to deal in great detail with the disposition and ownership of personal e-mail accounts. This is attributable, in part, to the novelty of email, *but is more likely the result of the lag between the advent of e-mail and the death of those that most often use it.*

Id. (emphasis added). Although this observation was made with respect to e-mail, the same observation could be made with respect to social media at this time.

Consider also that younger generations (i.e. those most likely to use the Internet and create social media accounts, *see supra* note 48) are less likely to have wills. *See, e.g., Where There is a Will . . . : Legal Documents Among the 50+ Population: Findings from an AARP Survey*, AARP, 2 fig.1 (2000), available at <http://assets.aarp.org/rgcenter/econ/will.pdf> (noting percentages of adults with wills by respective age brackets).

215. *In re Ellsworth*, No. 2005-296, 651-DE (Mich Prob Ct. 2005). *See, e.g.,* Atwater, *supra* note 36; Darrow & Ferrera, *supra* note 37.

216. Atwater, *supra* note 36, at 402. The case has, however, been cited in at least one motion to compel production of a decedent's e-mails. *See, e.g.,* Memorandum of Points & Authorities, *In re Air Crash Near Clarence Ctr., N.Y.*, on Feb. 12, 2009, No. 09-CV-961-S, 2011 WL 6370189 (W.D. N.Y. Dec. 20, 2011) (citations omitted) (requesting e-mails for purposes of determining decedent's place of domicile at death, and citing *In re Ellsworth* therein).

217. Telephone Interview with Evan Carroll, Co-founder, *The Digital Beyond* blog (Feb. 1, 2012)

talking to the media with a real purpose,” Carroll said.²¹⁸

The controversy began on November 13, 2004, when twenty-year-old Justin was killed while inspecting a bomb in Al Anbar, Iraq.²¹⁹ Justin’s primary method of corresponding with friends and family throughout his two years in Iraq had been through a Yahoo! e-mail account.²²⁰ Justin had reportedly conveyed to his father an interest in making a scrapbook of his Iraq e-mails but died before sharing his login information with anyone.²²¹ Because Justin died intestate, unmarried, and without children, Justin’s father argued that the Yahoo! account should pass to him, as Justin’s next of kin, under the theory that e-mail accounts are personal property.²²² Yahoo! eventually responded by conditioning its compliance on a court order, then later providing Justin’s father copies of the requested e-mails.²²³ In doing so, however, the company maintained that it was merely obeying the court order and would continue to “defend its commitment to treat user e-mails as private and confidential.”²²⁴

Given *Ellsworth*’s dearth of legal discussion in its holding, not to mention the apparent absence of subsequent case law concerning ownership of decedents’ social-media assets,²²⁵ any forthcoming litigation addressing the complex issues of e-mail and social media access and ownership would necessarily proceed by analogy, drawing from related practices and case law. Discovery, for instance, is one realm in which parties, including attorneys, often seek decedents’ social-media assets, and at least one court has ordered production of decedent e-mails despite privacy-based objections.²²⁶ In the realm of tort law, at least one court has held that disclosure of a decedent’s patient information on Myspace satisfied the “publicity” element for a claim of privacy invasion,²²⁷ while another court

[hereinafter Carroll Interview, 2012].

218. *Id.*

219. Jennifer Chambers, *Family Fights to See Soldier’s Last Words; A Fallen Wixom Marine’s E-mail Messages from Iraq are Held up by Yahoo! Over a Privacy Issue*, THE DETROIT NEWS, Dec. 21, 2004, at 1A.

220. *Id.*

221. *Id.*

222. *Id.*

223. Carroll Interview, 2012, *supra* note 217.

224. *See* Atwater, *supra* note 36, at 401.

225. David Shulman, Nathan J. Dosch & Ronald P. Wargo, II, *Estate Planning for Digital Assets and Online Financial Accounts*, STRAFFORD (Jul. 27, 2011), <http://media.straffordpub.com/products/estate-planning-for-digital-assets-2011-07-27/presentation.pdf> (noting the dearth of set case law regarding social-media assets).

226. *See In re Air Crash Near Clarence Ctr.*, N.Y., on Feb. 12, 2009, No. 09-CV-961-S, 2011 WL 6370189 (W.D. N.Y. Dec. 20, 2011) (requesting emails for purposes of determining decedent’s place of domicile at death).

227. *See generally* Morganstern, *supra* note 98 (discussing the publicity element of tort claims in the context of social-media services).

found causes of action for identity theft, libel, and “making obscene electronic communication with intent to annoy” after a minor “willfully obtained” a victim’s e-mail password even though the defendant did not solicit it.²²⁸ Suits involving “nontransferable” items like contest prizes, concert tickets, or even use permits may provide further helpful analogy, as may recent news articles exploring the ownership of iTunes and Kindle libraries after a user’s death.²²⁹

Carroll believes that “the real breakout legal battle” will occur between ToS declaring that users have no right of survivorship, and newly enacted state laws like Oklahoma’s, declaring that social-media accounts may pass like tangible property to beneficiaries and heirs.²³⁰ Specifically, Carroll suggests that this battle will be most apparent in the conflict-of-law issues presented—whether or not, for example, a California-based company would be subject to Oklahoma or North Carolina probate law.²³¹ Compounding this uncertainty is the fact that state legislative efforts are still in their early stages.

B. State Legislative Responses

Motivated by varying concerns, several states are responding to the uncertainties posed by digital death by operating under the assumption that decedents’ digital assets are probate property. While the majority of state laws still make no specific provisions for information assets stored in clouds,²³² at least five states have enacted statutes specifically granting executors the ability to handle some form of digital assets,²³³ while at least four others are exploring the passage of similar legislation.²³⁴ Those with

228. See *In re Rolando S.*, 197 Cal. App. 4th 936 (Ct. App. 2011) (involving a minor who received an unsolicited text message containing a girl’s e-mail password, which defendant then used to access victim’s Facebook account and post “prurient messages” under her name).

229. See, e.g., *Anza Parking Corp. v. City of Burlingame*, 195 Cal. App. 3d 855 (Ct. App. 1987) (holding that a city did not have the power to make a conditional use permit nontransferable); see also Quentin Fottrell, *Who Inherits Your iTunes Library?: Why Your Digital Books and Music May Go to the Grave*, MARKETWATCH (Aug. 23, 2012), <http://www.marketwatch.com/story/who-inherits-your-itunes-library-2012-08-23>.

230. Carroll Interview, 2012, *supra* note 217.

231. *Id.* Further, “The question of whether a choice of law clause in the agreement between online service and user can defeat the application of one of the new statutes remains untested.” Roy, *supra* note 36, at 386–87 n.53.

232. See *Helping Clients*, *supra* note 46, at 66.

233. See Law, DIGITAL ESTATE BLOG, <http://www.digitalestateresource.com/law/#ID> (last visited Oct. 3, 2012).

234. See discussion *infra* Part III.B.4 (exploring states’ proposed and emerging legislative

statutes currently in effect, in order of passage, are: Connecticut²³⁵ (approved June 24, 2005 and effective Oct. 1, 2005); Rhode Island²³⁶ (approved and effective May 1, 2007); Indiana²³⁷ (approved Mar. 6, 2007 and effective Jul. 1, 2007); Oklahoma²³⁸ (approved Apr. 29, 2010 and effective Nov. 1, 2010); and Idaho²³⁹ (approved Mar. 16, 2011 and effective Jul. 1, 2011).

1. Oklahoma, Then Idaho: The First to Enumerate “Social Networking”

Oklahoma’s law has perhaps gained the most notoriety, as it was the first statute to specifically enumerate social media with respect to estate plans.²⁴⁰ Section 269 of Oklahoma Statute Title 58 Probate Procedure now reads: “The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any *social networking website*, any microblogging or short message service website or any e-mail service websites.”²⁴¹ Thus the law assumes that a social networking account is the property of the person who creates and uses it, despite what the social networking ToS might say. However, as the law still awaits court interpretation, at least one scholar has noted that “[The statute] does not, on its face, appear to grant executors any new powers not already conferred by the contract terms.”²⁴² In a somewhat nontraditional manifestation of legislative intent, HB 2800’s co-author, former state Representative Ryan Kiesel (D-Seminole), perhaps signaled anticipated legal challenges when he remarked that the law could still be useful in encouraging people to consider what might happen to their profiles after they die.²⁴³ As a footnote to the

efforts).

235. Conn. Act of June 24, 2005, No. 05-136: Concerning Access to Decedents’ Electronic Mail Accounts.

236. H.B. 5647, Gen. Assemb., Jan. Sess. (R.I. 2007): Concerning Access to Decedents’ Electronic Mail Accounts Act.

237. IND. CODE ANN. 29-1-13-1.1 (West 2012): Electronically stored documents or information; custodians; providing access or copies to personal representative.

238. H.B. 2800, 524 Leg. 2d Sess. (Okla. 2010): Control Over Certain Social Networking, Microblogging or E-mail Accounts of the Deceased.

239. S.B. 1044, 61st Leg. 1st Sess. (Idaho 2011): Control of certain social networking, microblogging or e-mail accounts of the deceased.

240. See Roy, *supra* note 36, at 385; see also Deidre R. Wheatley-Liss, *Facebook, Flickr, YouTube, Twitter—Where Does it Go When You Do?* ELDER LAW BLOG (Jan. 28, 2011), <http://www.njelderlawestateplanning.com/2011/01/articles/estate-planning/facebook-flickr-youtube-twitter-where-does-it-go-when-you-do/> (discussing Oklahoma law).

241. OKLA. STAT. ANN. tit. 58, § 269 (West 2012) (emphasis added).

242. See Roy, *supra* note 36, at 385.

243. See *House Approves Social Media Probate Legislation* (Oklahoma House of Representatives press release) (Mar. 15, 2010). “Digital photo albums and e-mails are increasingly replacing their physical counterparts, and I encourage Oklahomans to think carefully about what they want to happen to these items when they pass away,” Kiesel declared in announcing HB 2800’s unanimous

Oklahoma story thus far—and perhaps evidence that the fate of decedents’ social-media assets is *not* a traditional, principled clash between big-government overreach and corporate free-market interests—Kiesel is now directing Oklahoma’s chapter of the American Civil Liberties Union (ACLU).²⁴⁴

Idaho shortly thereafter enacted a statute with language nearly identical to Oklahoma’s, declaring that an executor can: “(z) Take control of, conduct, continue or terminate any accounts of the [decedent] on any social networking website, any microblogging or short message service website or any e-mail service website.”²⁴⁵ Prior to Oklahoma and Idaho’s enumeration of social networking in their similar statutes, three states already had laws aimed at helping the decedent’s personal representatives gain access to, if not ownership of, data contained in online accounts: Indiana, Connecticut, and Rhode Island.²⁴⁶

2. Indiana: Broad Electronic Access Rights to the Custodian

Indiana’s statute—titled “Electronically stored documents or information”²⁴⁷—is seen as the broadest of these three pioneering e-mail statutes,²⁴⁸ mandating that a custodian²⁴⁹ provide the decedent’s personal

passage in the Oklahoma House of Representatives. *Id.* The press release also noted:

“This legislation will bring Oklahoma probate law into the 21st century,” Kiesel, D-Seminole, said. “The number of people who use Facebook today is almost equal to the population of the United States. When a person dies, someone needs to have legal access to their accounts to wrap up any unfinished business, close out the account if necessary or carry out specific instructions the deceased left in their [sic] will.”

Kiesel went on to say that he hopes House Bill 2800 will remind Oklahomans as they go about their estate planning that, in addition to their personal and real property, they should make plans for the vast amount of intellectual property we leave behind.

Id.

244. See Darla Shelden, *ACLU of Oklahoma Names Ryan Kiesel Executive Director*, THE CITY SENTINEL (Sept. 20, 2011), <http://city-sentinel.com/?p=1714>.

245. IDAHO CODE ANN. § 15-5-424(z) (West 2012).

246. “Three states have already passed legislation aimed at helping the decedent’s personal representative gain access to data contained within an online account: Indiana, Connecticut, and Rhode Island.” Roy, *supra* note 36, at 386.

247. IND. CODE ANN. § 29-1-13-1.1 (West 2012).

248. Connecticut, Rhode Island, and Indiana, respectively, were the first three states chronologically to address e-mail disposition in their probate statutes. See *supra* notes 235–37 and accompanying text.

249. That is, any person storing a decedent’s “documents or information,” which would presumably include social networking services. IND. CODE ANN. § 29-1-13-1.1 (West 2012).

representative with “access to or copies” of such data.²⁵⁰ However, the representative must comply with certain evidentiary requirements.²⁵¹ Further, online services must comply with court order and must keep such data for two years following receipt of the written request.²⁵² This is achieved through the following language:

(a) As used in this section, “custodian” means *any person who electronically stores the documents or information of another person.*

(b) A custodian shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person’s death, *access to or copies of any documents or information of the deceased person stored electronically* by the custodian upon receipt by the custodian of: (1) a written request for access or copies made by the personal representative, accompanied by a copy of the death certificate and a certified copy of the personal representative’s letters testamentary; or (2) an order of a court having probate jurisdiction of the deceased person’s estate.

(c) A custodian may not destroy or dispose of the electronically stored documents or information of the deceased person for two (2) years after the custodian receives a request or order under subsection (b).

(d) Nothing in this section shall be construed to require a custodian to disclose any information: (1) in violation of any applicable federal law; or (2) to which the deceased person would not have been permitted access in the ordinary course of business by the custodian.²⁵³

3. Connecticut and Rhode Island: Access to E-mail Contents

Narrower than their more recent counterparts, the Connecticut²⁵⁴ and

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *See* CONN. GEN. STAT. ANN. § 45a-334a (West 2012).

(a) For the purposes of this section: (1) “Electronic mail service provider” means any person who (A) is an intermediary in sending or receiving electronic mail, and (B) provides to end-users of electronic mail services the ability to send or receive electronic mail; and (2) “Electronic mail account” means: (A) All electronic mail sent or received by an end-user of electronic mail services provided by an electronic mail service provider

Rhode Island²⁵⁵ statutes, which share nearly identical language, only apply to e-mail services and do not expressly require the e-mail service provider to retain the contents of the decedent's e-mail account, as Indiana does for online services.²⁵⁶ The effect of Connecticut's statute then, would presumably resolve *Ellsworth*-type scenarios by requiring "e-mail providers to turn over copies of all emails (sent and received) to the executor or administrator of a decedent's estate."²⁵⁷ However, this requirement would not extend beyond the digital asset type of e-mail, as noted, and it is furthermore "unclear whether a testator could *prevent* [the production of e-

that is stored or recorded by such electronic mail service provider in the regular course of providing such services; and (B) any other electronic information stored or recorded by such electronic mail service provider that is directly related to the electronic mail services provided to such end-user by such electronic mail service provider, including, but not limited to, billing and payment information.

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

Id. (emphasis added).

255. See R.I. GEN. LAWS ANN. §§ 33-27-2 to -3 (West 2012).

As used in this chapter: (1) "Electronic mail service provider" means any person who: (i) Is an intermediary in sending or receiving electronic mail; and (ii) Provides to end-users of electronic mail services the ability to send or receive electronic mail. (2) "Electronic mail account" means: (i) All electronic mail sent or recorded by an end-user of electronic mail services provided by an electronic mail service provider that is stored or recorded by such electronic mail service provider in the regular course of providing such services; and (ii) Any other electronic information stored or received by such electronic mail service provider that is directly related to the electronic mail services provided to such end-user by such electronic mail service provider, including, but not limited to, billing and payment information. . . .

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

Id.

256. See discussion *supra* Part III.B.2; Roy, *supra* note 36, at 386.

257. See Cahn, *supra* note 59, at 38.

mails to the executor or administrator] or require the provider to transmit the emails to another individual.”²⁵⁸ In other words, Connecticut’s and similar state statutes lack an opt-out provision.²⁵⁹ Another small but notable distinction is that Rhode Island’s statute, unlike Connecticut’s, grants explicit deference to e-mail providers by exempting them from relinquishing content that might violate federal law—including, perhaps, privacy law.²⁶⁰

4. Delaware and Ambiguous Statutory Implications

Although scholars and digital death blogs generally do not list Delaware among the states with law relevant to this discussion, at least one memorandum has cited Delaware’s Durable Powers of Attorney Act as relevant authority in obtaining the content of a decedent’s electronic communications.²⁶¹ Meanwhile, states’ existing probate statutes may be overdue for clarification as a result of the categorical uncertainties posed by social media. For example, one scholar has noted that “New York has an estate exemption for immediate family members, EPTL 5.3.1(a), which includes, among other items: (1) ‘electronic and photographic devices’ and (2) ‘computer tapes, discs, and software, DVDs, CDs, audio tapes, record albums, and other electronic storage devices,’” raising uncertainty as to whether these exempted categories would include “Flickr photo albums, Facebook profiles, YouTube videos, and Twitter accounts. . . .”²⁶²

A few other states are reportedly contemplating legislation in the spirit of Oklahoma’s. North Carolina, for instance, is considering addressing digital assets during its 2013 legislative session. In fact, Carroll, Romano, Jean Gordon Carter, and others with the Digital Estate Resource blog recently reviewed draft language for the state in conjunction with the North Carolina State Bar.²⁶³ Conscious of potential ambiguity-induced limits to Oklahoma’s statute, Carroll and other drafters are working to update all prior accepted definitions of “digital assets” to clarify that executors should be

258. *Id.* (emphasis added).

259. *See, e.g.*, Herbst, *supra* note 12, at 21 (noting that “I.C. § 29-1-13-1.1 does not contain an opt-out provision.”).

260. This is suggested in the following clause: “Nothing in this chapter shall be construed to require an electronic mail service provider to disclose any information in violation of any applicable federal law.” R.I. GEN. LAW ANN. §§ 33-27-2 to -3 (West 2012).

261. DEL. CODE ANN. tit. 12, § 49A-203(9) (West 2012). This section grants a power of attorney (POA) the power to “(9) Access communications intended for, and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means. . . .” *Id.*

262. *See, e.g.*, Ken Strutin, *What Happens to Your Digital Life When You Die?: OK, Let’s get MORBID! What Happens to Your Digital Life When You Die?* CORPORATE COUNSEL (ONLINE) (2011).

263. Carroll Interview, 2012, *supra* note 217; Evan Carroll, Digital Assets: A Clearer Definition, DIGITAL ESTATE RESOURCE, <http://www.digitalestateresource.com/category/articles/> [hereinafter DIGITAL ESTATE BLOG] (last visited Oct. 4, 2012).

granted power over both (1) *digital assets*,²⁶⁴ referring at a minimum to digital files and copies, and (2) *digital accounts*, which would more unambiguously grant the executor the right to *access* an account, rather than merely obtain copies or files of the contents therein.²⁶⁵ The drafted language for North Carolina's potential bills, as Carroll explains, would more explicitly "break out" the powers bestowed on an executor, including the rights to "access, control, or dispose of" social-media assets.²⁶⁶ In other

264. "Digital assets" was intended all along to refer to both files and access, but Carroll is now drawing this distinction to ensure that executors gain control over both. Carroll Interview, 2012, *supra* note 217.

265. DIGITAL ESTATE BLOG, *supra* note 263.

In [reviewing draft legislation for North Carolina], we questioned our working definition of digital assets, which created ambiguity between digital assets (the files) and digital accounts (access rights to files). The account/asset distinction is important, as it relates to requirements placed on service providers. . . . As such, we have expanded our working definition to include this distinction.

Digital Assets. The term "digital assets" means, but is not limited to, files, including but not limited to, emails, documents, images, audio, video, and similar digital files which currently exists or may exist as technology develops or such comparable items as technology develops, stored on digital devices, including, but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops, regardless of the ownership of the physical device upon which the digital asset is stored.

Digital Accounts. The term "digital accounts" means, but is not limited to, email accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.

Id.

266. Carroll Interview, 2012, *supra* note 217.

According to an e-mail correspondence from Carroll dated February 2012, Carroll, John Romano, and Jean Gordon Carter collaborated to propose the following draft legislation for North Carolina, approved by the North Carolina Bar as of October 2012, titled "AN ACT CONCERNING ACCESS TO AND CONTROL OF DIGITAL ASSETS AND ACCOUNTS BY VARIOUS FIDUCIARIES":

The advent of the internet and computers has changed how we access and store information. In particular, it has changed how we manage our financial lives. An increasing number of persons and businesses communicate by email or social networking sites, bank electronically, and have electronically accessed credit. It is expected that credit cards will soon be replaced by smart phone applications that serve the same functions.

Another dynamic is the existence of value in some electronically stored assets. This would include value in an email address or social networking account, the content of a financial account such as PayPal, internet domain names and online photographs.

While we are alive and competent, access to and possession of digital assets and accounts

poses no legal problems. However, at the death or incompetence of the owner, the fiduciary (personal representative, attorney-in-fact, guardian or trustee) may find his or her authority under North Carolina law non-existent or unclear.

The duly appointed fiduciary is statutorily charged to take care of the assets of the estate or the protected person. A trustee may be charged to take care of the trust corpus. An attorney-in-fact and guardian have similar duties. In all instances, the fiduciary must have access to the necessary information to carry out his or her tasks. Current statutes do not clearly authorize this access.

The reason for the ambiguity in the statutes is that electronic communication and storage has developed independently of the historical definitions of assets. Current laws use the historical terms of "real property" and "personal property."

Ambiguity may also create unintended criminal and civil consequences for alleged cybercrime or financial elder abuse or financial exploitation when an authorized fiduciary seeks to access, control, or transfer digital assets or accounts.

The goals of the proposed statutory changes are to:

- (1) extend the authority of fiduciaries to (1) access and (2) possess digital assets and accounts;
- (2) provide a working definition of digital assets and accounts; and
- (3) subject to the necessities of (1) and (2), not affect the underlying contractual relations between the decedent, protected person or beneficiary, and the internet-based entity holding the asset or information.

Section 1. G.S. 28A-13-3(a) is amended by adding the following paragraph:

- (34) To access, take control of, handle, conduct, continue, distribute, dispose of, or terminate any digital assets as defined in G.S. 28A-13-11(d)(2) and digital accounts as defined in G.S. 28A-13-11(d)(3) owned by the decedent at death.

Section 2. G.S. 28A-13-11 is added as follows:

G.S. 28A-13-11. Access to Digital Assets and Accounts by Personal Representative

(a) A custodian shall provide to the personal representative of the estate of a decedent, who was domiciled in North Carolina at the time of the person's death, access to any digital accounts of the decedent operated by the custodian and copies of any digital assets of the decedent stored by the custodian, upon receipt by the custodian of either:

- (1) a written request for access to digital accounts and digital assets made by the personal representative, accompanied by a copy of the death certificate and a copy of the personal representative's letters testamentary or letters of administration; or
- (2) an order of the clerk of superior court having jurisdiction over the decedent's estate or an order of a court having probate jurisdiction over the decedent's estate.

(b) A custodian shall not destroy, disable or dispose of any digital account or digital asset of the deceased person for two (2) years after the custodian receives a request or order under subsection (a) above, unless directed to do so by the personal representative.

(c) Nothing in this section shall be construed to require a custodian to disclose, or

grant access to, any digital asset or digital account:

- (1) in violation of any applicable federal law; or
- (2) to which the deceased person would not have been permitted access in the ordinary course of business by the custodian.

(d) As used in this section the term,

(1) "Custodian" means any person who electronically stores the digital assets of another person or who operates the digital accounts of another person.

(2) "Digital assets" means, but is not limited to, files, including but not limited to, emails, 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, including, but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops, regardless of the ownership of the physical device upon which the digital asset is stored.

(3) "Digital accounts" means, but is not limited to, email accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.

Section 3. G.S. 32-27 is amended by adding the following paragraph:

(30a) **Control Digital Assets and Accounts.** - To access, take control of, handle, conduct, continue, distribute, dispose of, or terminate any digital assets as defined in G.S. 32-29(d)(2) and digital accounts as defined in G.S. 32-29(d)(3).

Section 4. G.S. 32-29 is added as follows:

G.S. 32-29. Access to Digital Assets and Accounts by Fiduciary

(a) A custodian shall provide the fiduciary access to any digital accounts of the decedent operated by the custodian and copies of any digital assets of the decedent stored by the custodian, upon receipt by the custodian of either:

(1) a written request for access to digital accounts and digital assets made by the fiduciary, accompanied by a copy of the instrument creating the fiduciary relationship or certification thereof; or

(2) an order of the clerk of superior court having jurisdiction over the estate or trust involved or an order of a court having jurisdiction over the estate or trust involved.

(b) A custodian shall not destroy, disable or dispose of any digital account or digital asset for two (2) years after the custodian receives a request or order under subsection (a) above, unless directed to do so by the fiduciary.

(c) Nothing in this section shall be construed to require a custodian to disclose, or grant access to, any digital asset or digital account:

(1) in violation of any applicable federal law; or

(2) to which the decedent or the settlor would not have been permitted access in the ordinary course of business by the custodian.

(d) As used in this section the term,

(1) "Custodian" means any person who electronically stores the digital assets of another person or who operates the digital accounts of another person.

(2) "Digital assets" means, but is not limited to, files, including but not limited to, emails, 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, including, but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops, regardless of the ownership of the physical device upon which the digital asset is stored.

(3) "Digital accounts" means, but is not limited to, email accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.

Section 5. G.S. 32A-1 is amended by adding (18)

(18) Digital Assets and Accounts. . . .

Section 6. G.S. 32A-2 is amended by adding the following paragraph:

(18) **Control of Digital Assets and Accounts.** - To access, take control of, handle, conduct, continue, distribute, dispose of, or terminate any digital assets as defined in G.S. 32A-4(d)(2) and digital accounts as defined in G.S. 32A-4(d)(3) which the principal owns at the time of execution or may thereafter acquire, under such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper.

Section 7. G.S. 32A-4 is added as follows:

G.S. 32A-4. Access to Digital Assets and Accounts by Attorney-in-fact

(a) A custodian shall provide the attorney-in-fact access to any digital accounts operated by the custodian and copies of any digital assets stored by the custodian which the principal owns at the time of execution or may thereafter acquire. A custodian shall provide access to the digital accounts and copies of the digital assets upon receipt by the custodian of either:

(1) a written request for access to digital accounts and digital assets made by the attorney-in-fact, accompanied by a copy of the power of attorney; or

(2) an order of the clerk of superior court having jurisdiction over the power of attorney or an order of a court having jurisdiction over the power of attorney.

(b) A custodian shall not destroy, disable or dispose of any digital account or digital asset for two (2) years after the custodian receives a request or order under subsection (a) above, unless directed to do so by the attorney-in-fact.

(c) Nothing in this section shall be construed to require a custodian to disclose, or grant access to, any digital asset or digital account:

(1) in violation of any applicable federal law; or

(2) to which the principal would not have been permitted access in the ordinary course of business by the custodian.

(d) As used in this section the term,

(1) "Custodian" means any person who electronically stores the digital assets of another person or who operates the digital accounts of another person.

(2) "Digital assets" means, but is not limited to, files, including but not limited to, emails, 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, including, but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops, regardless of the ownership of the physical device upon which the digital asset is stored.

(3) "Digital accounts" means, but is not limited to, email accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.

Section 8. G.S. 35A-1251 is amended by adding the following paragraph:

(25)To access, take control of, handle, conduct, continue, distribute, dispose of, or terminate any digital assets as defined in G.S. 35A-1254(d)(2) and digital accounts as defined in G.S. 35A-1254(d)(3) owned by the ward.

Section 9. G.S. 35A-1252 is amended by adding the following paragraph:

(18)To access, take control of, handle, conduct, continue, distribute, dispose of, or terminate any digital assets as defined in G.S. 35A-1254(d)(2) and digital accounts as defined in G.S. 35A-1254(d)(3) owned by the ward but absent a court order with respect to a minor, this power shall be no greater than the power of a natural guardian.

Section 10. G.S. 35A-1254 is added as follows:

G.S. 35A-1254. Access to Digital Assets and Accounts by Guardian of the Estate

(a) A custodian shall provide the general guardian or guardian of the estate access to any digital accounts and copies of any digital assets owned by the ward and

words, although legislators referring to “digital assets” might have

operated by the custodian. A custodian shall provide access to the digital accounts and digital assets upon receipt by the custodian of either:

(1) a written request for access to digital accounts and digital assets made by the general guardian or guardian of the estate, accompanied a copy of the general guardian or guardian of the estate’s letters of appointment general guardian or guardian of the estate; or

(2) an order of the clerk of superior court having jurisdiction over the ward or an order of a court having jurisdiction over the ward.

(b) A custodian shall not destroy, disable or dispose of any digital account or digital asset for two (2) years after the custodian receives a request or order under subsection (a) above, unless directed to do so by the guardian.

(c) Nothing in this section shall be construed to require a custodian to disclose, or grant access to, any digital asset or digital account:

(1) in violation of any applicable federal law; or

(2) to which the ward would not have been permitted access in the ordinary course of business by the custodian.

(d) As used in this section the term,

(1) “Custodian” means any person who electronically stores the digital assets of another person or who operates the digital accounts of another person.

(2) “Digital assets” means, but is not limited to, files, including but not limited to, emails, 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, including, but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops, regardless of the ownership of the physical device upon which the digital asset is stored.

(3) “Digital accounts” means, but is not limited to, email accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.

Section 11. G.S. 36C-8-816 is amended by adding paragraph (33) as follows:

(33)Access in accordance with G.S. 32-29, take control of, handle, conduct, continue, distribute, dispose of, or terminate any digital assets and digital accounts held as part of the trust property or received as trust property from a settlor or any other person.

Section 12. This act shall become effective October 1, 2013.

E-mail correspondence from Evan Carroll, co-founder, The Digital Beyond, to Kristina Sherry, J.D. Candidate, Pepperdine University (Oct. 2012) (on file with author).

previously *intended* to convey *access* rights—such as the case in Oklahoma—Carroll and others hope to crystallize this intent within future statutory language.²⁶⁷

5. Emerging Efforts

As of 2012, at least three states in addition to North Carolina are reportedly exploring Oklahoma-like legislation. These include Nebraska and New York, whose reported discussions pose two notable twists to state legislative efforts thus far: (1) the news stories illustrating the problem tend to focus more on the right to terminate accounts, rather than preserve them;²⁶⁸ and, as such, (2) statutory language thus far proposed in these two states seems to focus more on friends and family members than “executors.”²⁶⁹ Lastly, there are early reports that Wisconsin is considering legislation.²⁷⁰

Though the majority of state probate codes remain devoid of digital-asset provisions, scholars view pioneering states’ efforts as a “good start,” with the caveat that statutes should eventually “cover users for the full range

267. E-mail correspondence from Evan Carroll, co-founder, The Digital Beyond, to Kristina Sherry, J.D. Candidate, Pepperdine University (Feb. 2012) (on file with author).

268. *Living Online After Death Faces Nebraska Legal Battle*, BBC (Jan. 30, 2012), <http://www.bbc.co.uk/news/magazine-16801154> (last visited Oct. 4, 2012) (discussing a woman who was killed in a snow-blower accident, and whose family would like for her Facebook account to be terminated because they are uncomfortable seeing her photo every time they log on to the site; however, no one knows the decedent’s login information, and Facebook will not terminate her account per their requests).

269. *Facebook’s Date with Death*, STATEN ISLAND ADVANCE (Jan. 31, 2012), http://www.silive.com/news/index.ssf/2012/01/facebooks_date_with_death.html. According to the office of the Assemblyman Felix W. Ortiz:

Many individuals continue to live on after death through their digital presence. This can prove to be painful for close family members and friends who are constantly reminded of their loss. This legislation will provide individuals with the opportunity to designate an individual as their “online executor”; someone who will have control over their online social networking and messaging accounts. Other States are considering and have even passed similar legislation, such as Oklahoma (LB2800) and Nebraska (LB783).

Furthermore, many social media websites aren’t built to verify users’ deaths and have far too many users to even attempt this. “It is important that we have options for individuals who may not want to continue an online presence after they have passed,” said Ortiz, “This legislation provides personal representative with the authority to take control of and terminate these accounts.”

Id.

270. E-mail correspondence from the DIGITAL ESTATE BLOG to Kristina Sherry, J.D. Candidate, Pepperdine University (Feb. 2012) (on file with author).

of online services.”²⁷¹ Scholars also predict that “major online services . . . will probably adopt policies that conform to the most stringent of the state requirements.”²⁷² Further, as more states adopt legislation, the potential for choice-of-law disputes may diminish. However, California has shown no signs of considering Oklahoma-like legislation, which is notable given that the majority of online services are situated (i.e., claim their principal place of business) in California and that many online service contracts state that California law will control.²⁷³

C. Current ToS and User Agreements

Though few users of social media read ToS in full,²⁷⁴ those concerned about the postmortem fate of their assets should take heed of three particular ToS staples: (1) provisions for death; (2) transferability of accounts; and (3) choice-of-law and forum-selection clauses.²⁷⁵ Many social-media services continue to lack explicit provisions for death within their ToS,²⁷⁶ and in such cases the other ToS elements may be the extent of a service’s postmortem policy.²⁷⁷ Even after the court order in *Ellsworth*, Yahoo!’s ToS continue to state that a user’s rights to the content of the account terminate at death and that the account is not transferable.²⁷⁸ Other policies meanwhile may distinguish between copies and access.²⁷⁹ Finally, those sites with explicit death provisions may have a range of evidentiary requirements.²⁸⁰

271. See Roy, *supra* note 36, at 386 n.46.

272. See *id.* at 386; see also Carroll Interview, 2012, *supra* note 217.

273. See *Helping Clients*, *supra* note 46, at 66. In such situations, “It’s questionable whether the estate laws of a decedent’s resident state would supersede the contractual agreements with the various online services, making for future litigation.” *Id.*

274. See *supra* note 138 and accompanying text.

275. See CARROLL & ROMANO, *supra* note 37.

276. See *id.* at 144.

277. *Id.*

278. See Yahoo! Terms of Service, YAHOO!, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last visited Oct. 4, 2012). The terms read in relevant part:

No Right of Survivorship and Non-Transferability. You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.

Statute of Limitations. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of the Yahoo! Services or the TOS must be filed within one (1) year after such claim or cause of action arose or be forever barred.

Id.

279. See *supra* note 265.

280. See generally Jim Lamm, *Digital Passing: Estate Planning for Passwords and Digital Property*, <http://www.digitalpassing.com/> (last visited Oct. 4, 2012) (providing general tips for accessing decedents’ e-mail accounts depending on the service provider); see also Darrow & Ferrera *supra* note 37, at 294–95; Roy, *supra* note 36, at 382 n.29.

As discussed, a few social-media services have signaled willingness to consider public demand. In the wake of controversies,²⁸¹ Facebook also updated its privacy policy to recognize decedents' rights under the heading of "Memorializing Accounts," which now states:

It is our policy to memorialize all deceased users' accounts on the site. When an account is memorialized, only confirmed friends can see the timeline or locate it in Search. The timeline will also no longer appear in the Suggestions section of the Home page. Friends and family can leave posts in remembrance.

In order to protect the privacy of the deceased user, we cannot provide login information for the account to anyone. However, once an account has been memorialized, it is completely secure and cannot be accessed or altered by anyone.

If you need to report a timeline to be memorialized, please click here [containing a link that takes the user to a page requesting information including email address, "relation to [decedent]" and "proof of death (an obituary or news article)."²⁸²

Nonetheless, memorializing may not respect the wishes of those preferring outright termination,²⁸³ and Facebook's terms still do not explicitly provide for the transferability of an account upon death.²⁸⁴ Further, like many sites, Facebook's choice of law is California.²⁸⁵

LinkedIn similarly lacks explicit provisions for death, but prohibits transferring a LinkedIn account to another party, and it further specifies that California law shall govern all disputes.²⁸⁶ Flickr follows Yahoo!'s terms of service, thus any rights to a user's Flickr account terminate upon death, and the contents may be permanently deleted.²⁸⁷ Finally, YouTube, which is

281. See *supra* note 102.

282. *Privacy: Deactivating, Deleting, and Memorializing Accounts*, FACEBOOK HELP CENTER, <https://www.facebook.com/help/?page=1856988814812082> (last visited Oct. 4, 2012).

283. See *supra* note 268.

284. These are Facebook's terms as of February 2012. See Roy, *supra* note 36, at 394–85 n.39.

285. See Roy, *supra* note 36, at 384–85 n. 39.

286. See *User Agreement*, LINKEDIN, http://www.linkedin.com/static?key=user_agreement&trk=hb_ft_userag (last visited Oct. 4, 2012). "*Sign-In Credentials*. You agree to: (1) Keep your password secure and confidential; (2) not permit others to use your account; (3) refrain from using other Users' accounts; (4) refrain from selling, trading, or otherwise transferring your LinkedIn account to another party . . ." *Id.*

287. See *supra* note 278.

operated by Google, also lacks specific death policies, but contains a similar non-transferability clause.²⁸⁸

D. Another Corporate Response: DEPs

Not content to concede our collective digital fate to hazy user-agreement policies,²⁸⁹ the market has responded with digital estate plans, or DEPs, of which there are a “surprising” number already in effect “to help with the planning and execution of one’s digital bequest.”²⁹⁰ An estimated two-dozen distinct DEPs are available on the market,²⁹¹ and “no two work in quite the same way.”²⁹² But the general scheme is as follows: Each DEP aims to store a user’s data securely during life and later release it to intended recipients upon a “triggering” event confirming the user’s passing.²⁹³ Carroll and Romano view DEPs as helpful to creating “personal digital estate plans,” which they believe must contain four components: (1) storage—a place to keep your inventory and instructions; (2) a “trigger”—an event that releases the plan from storage; (3) a “digital executor”—a person or service to distribute or delete assets; and finally (4) heirs—the people who receive the assets.²⁹⁴

Entrustet,²⁹⁵ for instance, was a service that had been likened to a “supplement” to an individual’s will or trust, allowing users to create secure lists of digital assets and nominate heirs for each asset—a service that was recently acquired by SecureSafe.²⁹⁶ SecureSafe itself (previously named

288. See *Terms of Service*, YOUTUBE, <http://www.youtube.com/t/terms> (last visited Oct. 4, 2012). “Assignment. These Terms of Service, and any rights and licenses granted hereunder, may not be transferred or assigned by you, but may be assigned by YouTube without restriction.” *Id.*

289. Or, just as likely, entrepreneurs saw an opportunity. Michael Krim is credited with inventing DEP-like services after he survived a turbulent flight in 1999 and shortly thereafter created FinalThoughts.com, allowing users to store messages to be delivered posthumously via e-mail. See CARROLL & ROMANO, *supra* note 37, at 86. Krim was perhaps “a bit too early to the market,” for the concept to catch on; but in 2008, Jeremy Toeman created Legacy Locker, perhaps the first DEP, after he faced difficulties accessing his deceased mother’s Hotmail account. *Id.*

290. Tom Barlow, *Digital Executor Can Honor Your Digital Legacy*, DAILYFINANCE (Feb. 15, 2011), <http://www.dailyfinance.com/2011/02/15/digital-executor-can-honor-your-digital-legacy/>.

291. See CARROLL & ROMANO, *supra* note 37, at 158–62.

292. See Roy, *supra* note 36, at 387.

Only forty percent of the services advertise having consulted an attorney in their design, deployment, or operations. About two-thirds are based in the United States, and only a few do not charge for their services. In sum, the business climate may be described as a free-for-all, with numerous entrepreneurs seeking to establish their place in a new market. *Id.* at 388.

293. *Id.* at 388. But note that “Some DEP services assume the user has died if the user does not ‘check in’ with the service after a specified period of time has elapsed.” *Id.*

294. See CARROLL & ROMANO, *supra* note 37, at 158.

295. *Welcome Entrustet Users!*, SECURESAFE, <http://www.securesafe.com/en/partners/entrustet.html> (last visited Oct. 4, 2012).

296. *Id.* (noting the acquisition of Entrustet by SecureSafe); see also *Entrustet FAQs*,

Data Inheritance²⁹⁷) allows authorized family members, partners, or others to access users' digital data in the event that anything should happen.²⁹⁸ Another popular DEP, Legacy Locker, likens itself to a "digital safety deposit box," allowing its living users to not only retrieve forgotten passwords, but also to specify a beneficiary or beneficiaries for each of their separate accounts in the event of death or incapacitation.²⁹⁹ The slightly more aggressive Digital Estate Services, in contrast, is billed as a "digital locksmith" allowing survivors to "get into locked computers, archive the contents, and potentially discover the names and passwords for other services."³⁰⁰ Other DEPs and similar digital afterlife planning offer slight variations upon these better known services.³⁰¹

IV. ANALYZING SOCIAL MEDIA'S "COMPLICATED" RELATIONSHIPS

Social-media assets are facing a critical legal juncture. With the exception of DEPs, whose interaction with ToS remains uncertain,³⁰² and whose effectiveness will depend on social media users' awareness of digital death, the fate of postmortem social-media assets appears likely fall to one of two power extremes. On one end are (1) state laws like Oklahoma's,³⁰³ declaring in one fell swoop that social-media assets are probate property,

ENTRUSTET, <http://entrustet.com/faq#1> (last visited Feb. 12, 2012). Notably, Entrustet does not bill itself as a legal service, "nor does [it] provide legal advice. Entrustet provides products and services that complement traditional estate plans and are designed to be used in conjunction with representation by an estate planning attorney or with a do it yourself [sic] solution like LegalZoom." *Id.* Entrustet's FAQs further clarify that it does not "try to replace lawyers." *Id.*

297. SECURE SAFE, <http://www.securesafe.com> (last visited Oct. 4, 2012).

298. The service, "in a nutshell," allows for the following: "(1) Store documents and passwords in the SecureSafe online safe; (2) Specify beneficiaries who are to be given access to the data should anything happen to you; (3) Allocate your data and passwords to your beneficiaries; (4) In the event of an emergency, the DataInherit-function guarantees the safe notification of your beneficiaries and the secure transfer of your data." *What Is Data Inheritance?*, SECURE SAFE, <http://www.secure-safe.com/en/faq/> (last visited Oct. 4, 2012).

299. *Features*, LEGACY LOCKER, <http://legacylocker.com/features/locker> (last visited Oct. 4, 2012).

300. See CARROLL & ROMANO, *supra* note 37, at 92.

301. These include but are not limited to the following: AssetLock (www.assetlock.net, providing DEP services); Dead Man's Switch (www.deadmansswitch.net, providing posthumous e-mail services); Estate++ (www.estateplusplus.com, providing DEP services); Executor's Resource (www.executorsresource.com, providing DEP services); The Estate Vault (www.estatvault.com, providing DEP services); My Web Will (www.mywebwill.com, providing DEP services); and Xsen.de (www.xsen.de, providing DEP and posthumous e-mail services). See CARROLL & ROMANO, *supra* note 37, at 183-84.

302. See *supra* note 289 and accompanying text.

303. See discussion *supra* Part III.B.1.

and on the other are (2) social-media companies' ToS and other user-agreement-type policies, typically in the form of contracts of adhesion,³⁰⁴ which appear to favor companies' best interests by clearing out decedents' assets and safeguarding privacy.³⁰⁵

Because each of these extremes is likely to favor particular societal and personal interests at the expense of others, this Part argues that neither extreme promises ideal solutions, and that policymakers and social-media users should identify shared interests between these two ends in an effort to establish more optimal digital-postmortem frameworks.³⁰⁶ Some such solutions have been proposed, albeit more quietly, and are discussed later on.³⁰⁷ In the meantime, however, state legislative efforts appear to be particularly ill-equipped as solutions beyond their ability to raise public awareness of digital death.

A. *Probate*

State legislation may not only invite challenges, but could further complicate the uncertainties posed by digital death. To date, Oklahoma's pioneering statute has not yet faced a court challenge, nor do any records reflect its utilization.³⁰⁸ Thus, any critical analysis of Oklahoma's and similar legislative efforts to assign executors control of social media is necessarily speculative.³⁰⁹

Scholars have nonetheless posited likely challenges to such laws, which generally fall into one of two categories. First, social-media services' ToS may *supersede* such law, given that many social-media companies "can claim the ability to control the transfer of accounts through their user agreements, and these service agreements can contain terms that, arguably, would not permit the accounts to survive the decedent or allow anyone else, even an executor, to access the accounts."³¹⁰ Second, and more broadly, choice of law—whether stated explicitly in ToS or not—might mean that California law,³¹¹ rather than Oklahoma law, controls.³¹²

304. See discussion *supra* Part II.B (providing a general discussion of ToS and contracts of adhesion).

305. This is not to suggest that companies' existing ToS completely disregard user interests; but it is perhaps fair to assume that ToS will generally comprise terms in the *best interest* of social-media providers. Indeed, some ToS changes have apparently been spurred by public demand. See, e.g., *supra* text accompanying note 103 (discussing Facebook's memorializing feature).

306. See discussion *infra* Part V (discussing four major policy goals).

307. See discussion *infra* Part IV.C (providing a brief overview of mid-continuum solutions).

308. Carroll Interview, 2012, *supra* note 217.

309. For the sake of simplicity this discussion will focus on Oklahoma's statute and regard it as a model of contemporary legislative efforts.

310. Cahn, *supra* note 59, at 38.

311. Or wherever social-media services are incorporated or have a principal place of business.

Putative challenges by social-media services aside, a more immediate statutory shortcoming is that “by its own terms, [the Oklahoma law] does not authorize full-blown access to all of the decedent’s digital property.”³¹³ This is because the statutory power only extends so far as “the sites that are covered,”³¹⁴ and because the statute “explicitly grants the executor power only ‘where otherwise authorized.’”³¹⁵ Carroll admits there has been debate as to the meaning of “where otherwise authorized,” noting that the most commonsense interpretation is that the law seeks to grant executors power over accounts *where the decedent had access*.³¹⁶ Other scholars and practitioners, however, have interpreted the language to mean that executors shall be given power only *where the company would allow the executor access*—which would seemingly, if not admittedly, render the statute pointless.³¹⁷ Because the law has not yet been applied or challenged, however, its meaning, breadth, and potential to confront ToS remain unclear.³¹⁸

Nebraska’s potential legislation as portrayed to the public thus far already appears to be arousing concern, albeit of a different kind than that prompted by Oklahoma’s. In contrast to preservation advocates like Carroll, who fear that Oklahoma-like laws will not go far enough,³¹⁹ social-media and Internet companies worry that Nebraska may prompt overly-liberalized access to decedents’ accounts. That is, privacy experts and lawyers for social-media companies suggest that Nebraska’s bill “needs to clarify whether an executor should be named in a will before online accounts are

See, e.g., supra note 142 and accompanying text (providing Facebook’s choice-of-law clause).

312. *Id.* And scholars have noted that any superseding laws as the result of choice-of-law conflicts would render the first concern moot. *Id.* With respect to an Indiana executor in a tussle with Yahoo!, for instance, “An argument could be made that a user specifically contracted with Yahoo! to keep his account private and not share it with survivors. Moreover, the Yahoo! Terms of Service state that California law—not Indiana law—shall govern the agreement.” Herbst, *supra* note 12, at 21.

313. Cahn, *supra* note 59, at 37.

314. *Id.* But looking to enhance such statutes’ applicability and effect, scholars have suggested that analogizing “on-line [sic] content to laws applicable to . . . more traditional types of probate assets might be productive in recognizing the rights of an executor to [decedents’ digital assets].” *Id.*

315. *Id.*

316. Carroll Interview, 2012, *supra* note 217.

317. *Id.*

318. Furthermore, it is unclear whether the law remains unutilized because the issue is simply *too new* to have generated much precedent or because the issue is best resolved through non-legal channels.

319. *See supra* notes 264–66 and accompanying text.

handed over.”³²⁰ New York’s proposed bill, similar to Nebraska’s, may invite similar privacy concerns, given that New York state assemblymen are framing the bill as a way to “provide individuals with the opportunity to designate an individual as their ‘online executor’; someone who will have control over their online social networking and messaging accounts.”³²¹ Interestingly, these distinct concerns—preservation advocates’ concerns over Oklahoma’s law alongside anti-probate forces’ concerns over the ambiguity of New York’s and Nebraska’s proposed “executor” roles—reveal that *both* power extremes alike have qualms about states’ inchoate legislation.

Alongside its choice-of-law and technical-textual ambiguities, Oklahoma-like legislation may invite further statutory chaos by calling attention to the social media’s inherent ambiguities, which in turn may have the unintended and long-term consequence of generating and muddling more litigation than it resolves.³²² Further, as Carroll and others have noted, neither in the Oklahoma statute nor anywhere else in Oklahoma’s probate code is a definition of “social networking” provided,³²³ thus leaving open to interpretation the law’s technical applicability for an already ambiguous digital-asset subset.³²⁴ Consider, then, that even if a definition were to be provided, this definitive embodiment of “social networking” might not only fail to resolve uncertainty, but could confound existing understanding of the social media’s composites. For example, consider that Second Life could be considered a social-networking site because it involves interaction with other users, while it could also be reasonably argued that Second Life is predominantly a virtual gaming site.³²⁵ Conversely, one might successfully argue that YouTube, which is typically placed under the social-media

320. *Living Online After Death Faces Nebraska Legal Battle*, BBC (Jan. 30, 2012), <http://www.bbc.co.uk/news/magazine-16801154> (last visited Oct. 4, 2012); *supra* notes 268–270 and accompanying text (discussing legislative efforts to place family members in charge of decedents’ accounts). Notably, Facebook paid a Nebraska lobbyist \$25,000 for the month of January 2012 to lobby against the bill. *What Happens to Your Facebook Page When You Die?*, NEBRASKA LEGISLATURES (Jan. 30, 2012), <http://legislature.omaha.com/2012/01/30/nebraska-legislature-what-happens-to-your-facebook-page-when-you-die/>.

321. *Facebook’s Date with Death*, STATEN ISLAND ADVANCE (Jan. 31, 2012) http://www.silive.com/news/index.ssf/2012/01/facebooks_date_with_death.html; *see also supra* note 269.

322. *See* discussion *supra* Part II.A.3 (delineating social media).

323. However, “social networking” is the term used in Oklahoma’s statute. *See* discussion *supra* Part III.B.1.

324. *See* discussion *supra* Part II.A.3. This also raises the legitimate question of *what effect* including a definition would have on the law’s applicability, given that a definition seeking to expand the law’s reach could have the counterintuitive effect of *restricting* and *excluding* soon-to-be-developed social-media types if the language failed to incorporate subsequent and unforeseen social-media innovation.

325. *See* discussion *supra* Part II.A.3 (briefly describing Second Life).

umbrella, involves much less networking than Second Life.³²⁶ Finally, a further indication that Oklahoma-like statutes may be futile if not confounding is that Oklahoma's attempt to *expand* the reach of prior statutes—for example Connecticut's and Rhode Island's, whose applicability remains limited mostly to e-mail, with no mention of social media³²⁷—comes at a time when disposing of postmortem e-mails, a much simpler digital-asset type, has yet to be resolved.³²⁸

Statutes like Oklahoma's also lack nuance in accounting for the eclectic and seemingly limitless possibilities for disposing of social-media assets, including: (1) outright termination of a decedent's account by the social-media service; (2) termination of the account by an executor; (3) allowing an executor to obtain the *contents* of an account; (4) allowing the executor *access for limited purposes*; (5) granting the executor uninhibited access to the account; and more. The permutations and computations of decedents' potential wishes become even greater given additional variables, including: (1) that individuals are likely to have more than one social-media account;³²⁹ (2) that account holders' specifications for disposition may vary by account; (3) that more than one person could be granted access to an account; or (4) that dispositional wishes might be extremely specific (e.g., requesting particular Facebook status updates or instructions for carrying on an online business).³³⁰

This smorgasbord of potential postmortem digital wishes is not likely to be granted by Oklahoma's and similar statutes,³³¹ whose blunt-force swipe at ToS could arguably eviscerate the privacy concerns inherent in the many ToS on the opposite end of the power continuum.³³² In fact, statutes' probate-based solutions appear to be based on the default assumption that users have nothing to hide in their social-media assets,³³³ an assumption

326. Likewise, it could also be argued that photo-sharing is not "social networking," per se. See *supra* notes 119–21 and accompanying text (discussing Flickr and Snapfish).

327. See discussion *supra* Part III.B.3 (discussing Connecticut and Rhode Island statutes).

328. See *supra* note 204 and accompanying text (conceding that digital-asset disposition in general remains "unsettled" and "in a state of flux").

329. See generally *Email Statistics Report*, *supra* note 1.

330. See, e.g., *supra* note 14 (providing a hypothetical scenario involving a profitable online account).

331. As discussed, statutes' policy goals appear to include erring on the side of *preservation* and *maximum access* to decedents' social media by wresting power from, and in some cases essentially gutting the meaning of, social-media services' ToS. See discussion *supra* Part III.B.

332. See discussion *supra* Parts II.B, II.E (providing a general overview of ToS and privacy concerns); discussion *infra* Part IV.B (analyzing ToS-based solutions).

333. In this regard, it seems especially inappropriate to analogize social-media assets to tangible

prone to easy attack from a privacy standpoint,³³⁴ with the added detriment of possibly running counter to policy goals underlying intestacy statutes.³³⁵ Take, for example, a widow given unfettered access to her deceased husband's Facebook or LinkedIn accounts who discovers from his secret e-mails that he had been having an affair throughout their marriage.³³⁶ Such outcomes would run counter to intestacy statutes' worthwhile societal goals of promoting familial harmony and minimizing family quarrels.³³⁷ Finally, in a related privacy concern, probate-based default assumptions fail to consider that disclosures from liberal access policies may violate the privacy of individuals *other than the decedent*, such as a still-alive mistress or the patients of a deceased psychiatrist.³³⁸ The latter case could also violate doctor-patient confidentiality laws.³³⁹

Oklahoma-like statutes also fail to consider that a decedent may have regularly accessed accounts unbeknownst to executors and beneficiaries.³⁴⁰ In such cases, delayed discovery of an account by executors and family members could foreclose intended beneficiaries' ability to benefit from these accounts—an ability that they would be more likely to have in the absence of legislation due to probate and intestacy laws' statutes of limitations.³⁴¹

property assets, which, by their very nature, can be seen. Although studies might suggest that the "average testator" wants the bulk of his or her property to pass to a spouse, see discussion *supra* Part II.D, the same has not been established for the unique category of social-media assets.

334. See discussion *infra* Part V.B (focusing on potential solutions in light of privacy interests).

335. See *supra* text accompanying note 154 (identifying goals of intestacy statutes).

336. Worse still, what if the husband had been sending photos of his genitalia to multiple women?:

At a recent public hearing on [Nebraska's legislative] proposal, the case of former U.S. Rep. Anthony Weiner, D-N.Y. came up. Weiner resigned in disgrace after it was discovered that he was, among other things, chatting about sex on Facebook with women other than his wife. Guys like Weiner, presumably, wouldn't want their wives or relatives discovering such chats if they died.

Paul Hammel, *Nebraska Legislature: What Happens to Your Facebook Page When You Die?*, OMAHA.COM (Jan. 30, 2012), <http://legislature.omaha.com/2012/01/30/nebraska-legislature-what-happens-to-your-facebook-page-when-you-die/>.

337. See *supra* text accompanying note 154 (identifying goals of intestacy statutes).

338. See *supra* note 336 (such disclosure of mistresses' personal information in the hypothetical situation would likely violate privacy rights).

339. In fact, a lawyer for DLA Piper made a similar point in a BBC interview:

The sort of situation where [clarifying in Nebraska's proposed bill whether an executor must first be appointed] would be helpful is if someone has e-mailed some information to the deceased person, for example in a doctor-patient relationship, that the person who sent that communication to the individual isn't surprised if the recipient of the communication passes away and the executor gets access to that information.

Living Online After Death Faces Nebraska Legal Battle, BBC (Jan. 30, 2012), <http://www.bbc.co.uk/news/magazine-16801154>.

340. That is, executors are not likely to be aware of each and every account and asset accessed by the decedent during his or her lifetime. See, e.g., Herbst, *supra* note 12, at 17 (listing "finding accounts" as a major problem associated with death in cyberspace).

341. See, e.g., CAL. PROB. CODE § 16460 (West 2012).

Such an outcome would be particularly detrimental to those who stand to benefit from a decedent's financially valuable social-media assets. Taken together, overlooked complexities relating to privacy could inhibit, rather than facilitate, the administration of an estate.

Within existing probate law, Oklahoma-like statutes lend further credence to social-media assets' status as "property," which could birth unintended precedent for other probate statutes or even in other realms of law. For example, if a decedent's Twitter or LiveJournal³⁴² account were deemed monetarily valuable, this could increase the estate's value over the minimum allowable value for probate exemption, thus forcing a probate proceeding where one otherwise might not be necessary.³⁴³ Even in the absence of monetary value, social-media assets' enhanced property status could throw further confusion into existing probate statutes, as at least one scholar has suggested in the context of New York's exemption statutes.³⁴⁴ Further still, social-media assets' "probate" designation could subject these assets to CP rules in CP states like California.³⁴⁵ Oklahoma-like statutes in CP states could, therefore, dictate that any married or domestically partnered person own half of every social-media account obtained by his or her spouse or registered domestic partner over the course of the marriage or domestic partnership.³⁴⁶ This would almost certainly contravene ToS clauses prohibiting transferability.³⁴⁷ Also, under a CP scheme, social-media assets would more easily be subject to multiple probate jurisdictions, typically organized by county,³⁴⁸ if the assets were prone to joint ownership or control by individuals, or if social-media services contested ownership of assets or accounts—either of which could prompt ancillary probate proceedings.³⁴⁹

342. See *supra* note 129 and accompanying text.

343. See discussion *supra* Part II.C (discussing probate proceedings).

344. See Strutin, *supra* note 262 and accompanying text (observing the ambiguities posed by social media alongside existing New York probate statutes, which contain an estate exemption for immediate family members for "computer tapes, discs and software, DVDs, CDs, audio tapes, record albums, and other electronic storage devices.").

345. See *supra* text accompanying note 164.

346. See *supra* text accompanying notes 162–67.

347. See *supra* text accompanying notes 133–34.

348. See Herbst, *supra* note 12, at 23.

Probate is based upon a model in which the deceased's property will generally be found in a single county in a single state. While ancillary probate is not a new concept, estate planners generally try to avoid multiple probate proceedings because of the added expense. In addition, the estate's lawyer often is not licensed in the ancillary jurisdiction, and it requires hiring an additional attorney.

Id.

349. *Id.* Ancillary probate proceedings could become more commonplace regardless of CP

That is, although a decedent's place of domicile typically dictates which jurisdictional law controls,³⁵⁰ it may nonetheless be necessary to consult with jurisdictions where property is located or held jointly amid international choice-of-law conflicts.³⁵¹ Finally, social-media assets with continuing revenue streams, such as the YouTube Partner Program,³⁵² could further complicate CP disposition schemes.³⁵³

A worst-case outcome of Oklahoma-like probate approaches could be that such statutes give social-media services greater impetus to challenge state legislatures' recent power grabs on a large legal scale. If social-media companies were successful in challenging state statutes, the long-term effect might be a more solidified legal precedent falling too far to that policy-based power extreme which more permanently forecloses friends' and families' opportunities to gain access to loved ones' accounts.³⁵⁴ In other words, fearing that their ToS could be rendered moot by legislatures, social-media services may be more apt to challenge Oklahoma's and similar probate schemes in court. Such activity would be a departure from the current legal climate in which social-media services do not appear to be ready or willing to target more informal transfers of ownership,³⁵⁵ like DEPs,³⁵⁶ digital bequests in wills or trusts, or the presumably common scenario of social-media users sharing account information with trusted beneficiaries.³⁵⁷ In sum, Oklahoma-like statutes may serve as lightning rods for social-media services' interest in controlling the disposition of their derivative assets.

On the other hand, strong arguments admittedly support a statutory-based disposition scheme for social-media assets, even if it comes at the

status.

350. See discussion *supra* Part II.C (summarizing probate law).

351. This is especially true of international social-media assets. See *supra* notes 14–15 and accompanying text (presenting the hypothetical scenarios involving Ole and Brian).

In addition to having a cyberspace provider in California or another state, in cyberspace it's increasingly likely that a user would have an account in a foreign country. For example, Ole might well have used a Swedish-language site in Sweden. Flickr . . . originally started in Canada before being acquired by Yahoo! In settling Brian's cyber estate, his parents potentially could be subjected to a dizzying array of ancillary proceedings throughout the world!

Herbst, *supra* note 12, at 23.

352. See *supra* notes 123–26 and accompanying text (explaining the YouTube Partner Program). Again, this could potentially violate ToS non-transferability clauses.

353. See LASTOWKA, *supra* note 40, at 12. Yet another slippery-slope type danger of declaring social-media assets to be probate property is that this designation could more easily enable POA access to accounts in instances of *incapacity*—not just death. While this would arguably be helpful in certain cases, especially in small-business situations, it could nevertheless exacerbate privacy erosion. *Id.*

354. See discussion *infra* Part V.

355. See discussion *supra* Part III.A.

356. See discussion *supra* Part III.D.

357. "Informal" here means that it does not invoke the law.

expense of decedents' and others' privacy. One of the strongest arguments relates to an executor's implicit duty to avoid wastage and safeguard against the destruction of property,³⁵⁸ a concern most relevant to social-media assets with tangible monetary value, as in the examples of small-business owners who use social media to connect with clients, eBay power sellers, or profitable bloggers.³⁵⁹ Similarly, one can imagine the scenario of a respected writer who has published prose on LiveJournal,³⁶⁰ such that his family members and fans would have great interest in preserving his online writings. Deferring to probate law rather than ToS—which are more inclined to prescribe account-freezing or termination³⁶¹—is more in line with the executorial duty and property-law goal of maximizing value.³⁶²

The same holds true with respect to social-media assets of purely sentimental value. For example, consider the young widower whose wife passed away and who wishes to share regular updates regarding his child's growth with all of his deceased wife's Facebook friends. While the argument could be made that Facebooking or Tweeting on behalf of a dead person is eerie, Carroll notes that activity from a decedent's social-media account should be no less creepy than a friend or family member sending hard-copy letters to a decedent's friends.³⁶³ As such, Carroll suggests that it might be time for our "social norms" to catch up to technology: "There are some things that the law should not handle; there are some things that we should allow our social norms to handle," he said.³⁶⁴ Lending further support to probate schemes, Carroll also believes that the cyber-environment might soon become more amenable to probate-based solutions, in light of the federal government's National Strategy for Trusted Identities in

358. Carroll Interview, 2012, *supra* note 217.

There's notion in estate law that an executor is legally responsible to avoid wastage. For example, if I'm responsible for cats, then I can't let cats die. If I'm letting [a social-media] estate die, I'm doing that. My point is that we're transacting businesses of *real value* online: Ebay, PayPal, etc.

Id.

Countering the argument that granting liberal access to decedents' accounts might unveil embarrassing or unflattering information about a decedent, Carroll emphasizes the importance of attending to these sorts of digital trails during life: "We're going to have to practice *good digital hygiene*." *Id.* (emphasis added).

359. See *supra* notes 14–15 (providing Herbst's three illustrative vignettes).

360. See *supra* notes 128–29 and accompanying text.

361. See *supra* Part III.C.

362. See 25 CAL. JUR. 3D *Decedents' Estates* § 925 (2006).

363. Carroll Interview, 2012, *supra* note 217.

364. *Id.*

Cyberspace (NSTIC).³⁶⁵

Finally, given that varying state laws may confound estate lawyers and testators, especially those seeking to comply with more than one state probate code, the long-term effect of disparate state laws may be that social-media services facing similar challenges in complying with said laws will determine that it is in their best interest to simply comply with the most stringent.³⁶⁶ This might have the added benefit of curbing privacy breaches before they occur, because as Beacon and similar fiascos illustrate,³⁶⁷ many social-media companies demonstrate a marked lack of discipline when it comes to privacy.³⁶⁸ State legislation could also have the simpler effect of making social-media services aware of public demand for more nuanced policies.³⁶⁹

B. Policy

The imperfections of probate-based solutions are not to suggest that corporate control over social-media assets is necessarily better. In fact, allowing social-media services' ToS total and unchecked control over the disposition of decedents' social-media assets raises its own areas of concern, namely (1) disregard for the nuanced dispositional schemes of social-media users; and (2) the slippery slope toward social media's increasingly audacious maneuvers with user data—as clearly illustrated by Facebook's recent privacy breaches.³⁷⁰ Despite these concerns, however, social-media services themselves may be in a better position than state legislatures to initiate interim or even longer-term answers to digital death.

With respect to nuance (or lack thereof) in disposition of assets, social-media services' desire for standardized postmortem provisions, express or implied, are understandable given the likely burden of case-by-case administration of decedents' dispositional wishes while simultaneously navigating privacy protections from statutes and ToS promises.³⁷¹ Such standardized “policies,” unfortunately, are indifferent to compelling stories

365. U.S. Commerce Secretary Gary Locke, White House Cybersecurity Coordinator Howard A. Schmidt Announce Next Steps to Enhance Online Security, Planned National Office for Identity Trust Strategy, UNITED STATES DEPARTMENT OF COMMERCE (Jan. 7, 2011), available at <http://www.commerce.gov/news/press-releases/2011/01/07/us-commerce-secretary-gary-locke-white-house-cybersecurity-coordinato> (discussing the NSTIC, an Obama administration initiative aimed at establishing identity solutions and privacy-enhancing technologies that will make the online environment more secure and convenient for consumers).

366. Roy, *supra* note 36, at 386 n.52; see also Carroll Interview, 2012, *supra* note 217.

367. See *supra* notes 101–02.

368. See *supra* notes 101–02.

369. See *supra* note 243 and accompanying text.

370. See *supra* text accompanying notes 101–02.

371. See, e.g., *supra* note 199 and accompanying text.

like Justin Ellsworth's,³⁷² or a small-business owner's,³⁷³ or even that of the woman discomfited by her sister's eerily persistent Facebook profile.³⁷⁴ In short, they are inflexible and fail to account for cyber-nuance.

With respect to the slippery slope towards privacy obliteration, one of the biggest problems with bestowing free reign of social-media assets to social-media ToS is that many social-media services have exhibited an unchecked audacity when it comes to testing the boundaries of public tolerance.³⁷⁵ Facebook is perhaps the best illustration of this, seemingly perfecting a three-step pattern comprising (1) an audacious breach of privacy, followed by (2) an apology and promise that it will never happen again, succeeded by (3) a relative honeymoon period, lasting until the next outrageous assault on privacy.³⁷⁶ Scarily, in some cases Facebook's maneuvers have been accepted over time—as part of a cycle in which social-media services, rather than the public or legislatures, make the first move.³⁷⁷

Accordingly, there is little stopping Facebook from unilaterally altering its decedent policy at any time, as the company has in fact already done via its memorializing feature.³⁷⁸ Although this 2009 reform was ostensibly a response to public demand, memorialization arguably does little to improve previous policy, and even effectively reduces the number of postmortem possibilities to zero.³⁷⁹ Most egregiously, Facebook does not appear to have solved the upsetting problem of dead people's profile pictures intermittently appearing in others' profiles.³⁸⁰ The feature also fails to take into account decedents whose wishes might have been for termination, and freezing access implicitly guarantees that neither executors nor anyone else will be able to access the account.³⁸¹ This restriction could further upset decedents' loved ones if, for example, a "friend" wrote something hurtful or defamatory on a decedent's memorialized wall. In such cases, family members and executors would have virtually no recourse.

On the other hand, given companies'—albeit limited—receptivity to public concern, it is perhaps not farfetched to think that companies might

372. *See supra* text accompanying notes 219–24.

373. *See supra* note 14.

374. *See supra* note 268.

375. *See supra* note 268 and accompanying text.

376. *See supra* text accompanying notes 100–03.

377. *See supra* note 355 and accompanying text.

378. *See supra* notes 103, 282 and accompanying text.

379. *See supra* notes 103, 282 and accompanying text.

380. *See supra* note 268.

381. *See supra* notes 360–65 and accompanying text.

conform to public demand in the absence of legislation—or, given states’ recent flurry of activity, be spurred by the very threat of it.³⁸² Social-media companies’ responses to digital death would likely occur in a timelier fashion than waiting for legislative majorities to keep up with changing technologies. Further, given that social-media companies are at the forefront of these changes, and are closer to their users than state legislatures, social-media companies may be better positioned than legislatures to initiate interim or even long-term solutions.

C. Proposed Solutions and Lawyers in Limbo

Garnering much less attention than state laws or corporate policy tweaks are a handful of mid-continuum solutions seeking to address the same issues and interests as state legislatures and social-media services. These solutions include DEPs,³⁸³ homegrown testamentary suggestions,³⁸⁴ and changes to default presumptions with respect to the Uniform Probate Code (UPC).³⁸⁵ Among the most promising of these, however, is a system by which users would indicate their postmortem wishes by clicking a box upon registering for a social-media account in a simple process akin to becoming an organ donor.³⁸⁶ Taken together, these solutions may enlighten both companies and legislatures to accept solutions that compromise amongst numerous personal and societal interests.³⁸⁷

Beyond the market response of DEPs,³⁸⁸ scholars and estate lawyers have floated more homegrown proposals for ensuring smoother disposition of postmortem social-media assets. Some of these merely require that users plan ahead, such as by maintaining a list of usernames and passwords, or providing a “letter to your executor” that includes such lists alongside specific dispositional instructions for each account.³⁸⁹ Among the most basic and privacy-oriented of these would be to limit purely sensitive information during one’s lifetime to separate e-mail accounts, which may go undetected by heirs and eventually be erased pursuant to service providers’ inactivity policies.³⁹⁰

382. See discussion *supra*, Part III.B (surveying states’ probate legislation).

383. See *supra* text accompanying notes 289–301.

384. See, e.g., *supra* notes 263–67 accompanying text.

385. See *supra* note 159.

386. See *infra* notes 410–14 and accompanying text.

387. See discussion *supra*, Part V (exploring solutions’ ability to address salient policy interests).

388. See discussion *supra*, Part III.D (introducing DEPs).

389. Connor, *supra* note 173, at 316–17. For example, account holders could somehow instruct executors to delete particularly sensitive files after death. Scott Reeves, *Estate Planning in the Digital Age*, FORBES, (Jan. 30, 2006), http://www.forbes.com/2006/01/27/microsoft-google-yahoo-cx_sr_0130death.html.

390. See Darrow & Ferrera, *supra* note 37, at 315–16, 316 n.171 (providing examples of various

Somewhere between these basic solutions and the more digital-commercial DEPs lies something called a “password vault,” in which individuals can protect their listed inventory of e-mail and social-media accounts with a single “master password.”³⁹¹ This would allow users to change their passwords during life without having to continually update the vault, as would be the case for a handwritten listing of accounts.³⁹² Closer to property law, rather than having digital assets succumb to deletion per corporate policy, individuals could create trusts and give trustees detailed instructions, similar to as they would with a password vault.³⁹³ With respect to including digital assets in full-fledged wills, lawyers have suggested that estate planners add Internet and e-mail passwords to after-death estate-plan checklists and “update their initial questionnaire[s] to encompass e-mail and other digital matters.”³⁹⁴ Scholars have also proposed sample language for inclusion in wills with the goal of giving attorneys-in-fact “power” over digital assets.³⁹⁵

e-mail account policies promising to terminate accounts following specified periods of inactivity).

391. Connor, *supra* note 173, at 317.

392. *Id.*

393. *See, e.g., id.* at 319–20.

[One estate lawyer] suggests creating a trust to store the usernames and passwords of all the client’s different accounts, so that if the client opens any new accounts in the future, he can name the trust as the owner of the account. In fact, it may be that a client can accomplish this by simply putting the word ‘trustee’ after her last name in order to make it obvious that these assets are part of a trust. By putting the assets into a trust, the creator of the account ensures that the account survives his death and the legal right to access and use the account passes on to the beneficiary of the trust. There is also the possibility that trusts could work with websites such as Entrustet—assuming that a state does not require any formality when altering a trust. However, if the state in which the client lives does require certain formalities in altering either a will or a trust, these websites will not work.

Id.; *see also* Darrow & Ferrera, *supra* note 37, at 315 (citing Susan Llewelyn Leach, *Who Gets to See the E-Mail of the Deceased?*, CHRISTIAN SCI. MONITOR (May 2, 2005), available at <http://www.csmonitor.com/2005/0502/p12s02-usju.html>).

394. *See* Atwater, *supra* note 36, at 417.

395. *See Helping Clients*, *supra* note 46, at 66. Carroll notes that while broadly drafted power of attorney (POA) language should already provide for such power, the law’s current uncertainty may warrant more specific language to ensure power over digital assets. The following is a suggestion for such language (subject to modification for adherence to state laws):

My attorney-in-fact shall have (i) the power to access, use and control my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops for the purpose of accessing, modifying, deleting, controlling or transferring my digital assets, and (ii) the power to access, modify, delete, control and transfer my digital assets, including but not limited to, my emails received, email accounts, digital music, digital

From a legislative perspective broader than the state laws previously discussed, scholars have also suggested that “uniform laws”³⁹⁶ should eventually address the ownership and transfer of e-mail, which, perhaps by extension, could be applied to social media accounts as well.³⁹⁷ Consistent with what seems to be the current trend,³⁹⁸ scholars have suggested that state law would be the best vehicle toward eventual uniformity, given that (1) states can optimally “experiment” with the boundaries of e-mail ownership until the best approach(es) “emerge with greater clarity” in something akin to the Uniform Commercial Code, and (2) the alternative, i.e. a federal law, might be adopted “too quickly,” without full appreciation for its implications, thus creating “a sub-optimal standard.”³⁹⁹ This would appear, at least, to resolve the problem posed by choice-of-law ambiguities.⁴⁰⁰

Beyond legislatures’ revisions to probate codes or efforts to tweak corporate ToS, UPC modifications could further help ease the current law’s

photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts and similar digital items which currently exist or may exist as technology develops or such comparable items as technology develops.

Id.

In addition to possessing power, executors must be able to *handle* decedents’ digital assets; thus Carroll suggests the following language to “facilitate” executors’ ability to act: “My executor shall have the power to access, handle, distribute and dispose of my digital assets.” *Id.*

In cases where the executor named in the will is *not* the desired person to handle the assets, Carroll suggests allowing the executor to engage someone else in this task via language along the lines of the following: “I authorize my executor to engage _____ to assist in accessing, handling, distributing and disposing of my digital assets.” *Id.*

Where testators have specific instructions, Carroll notes that either the will or “a direction outside the will” may suffice—“much like the often-used incorporation by reference of a list outside the will for tangible personal property, which may be mandatory under state law.” *Id.* Such language might read as follows: “I have prepared a memorandum with instructions concerning my digital assets and their access, handling, distribution and disposition. I direct my executor and beneficiaries to follow my instructions concerning my digital assets.” *Id.*; *see also* DIGITAL ESTATE BLOG, *supra* note 263.

Lastly, and most importantly, Carroll notes: “the will needs to explain what digital assets are.” *Id.*; *see also supra* note 53 (providing the Digital Estate Resource blog’s sample language to expand and clarify the definition of digital assets).

396. *See* Darrow & Ferrera, *supra* note 37, at 317. According to the authors, such laws should balance “(1) the privacy and ownership interests of account holders; (2) the interests of heirs in obtaining the property of loved ones; and (3) the interests of e-mail service providers in reducing liability exposure and administrative expenses.” *Id.*

397. *Id.* at 317–19.

398. *See* discussion *supra* Part III.B (synthesizing recent state legislative efforts).

399. “Additionally, it has been suggested that proposed laws such as those promulgated by the National Conference of Commissioners on Uniform State Laws are ‘consistently higher’ in quality than federal legislation.” Darrow & Ferrera, *supra* note 37, at 318 (citing Lawrence J. Bugge, *Commercial Law, Federalism, and the Future*, 17 DEL. J. CORP. L. 11, 23 (1992)).

400. *See supra* notes 311–14.

unsettledness.⁴⁰¹ Most drastically, UPC modifications could clarify that e-mail—and similar social-media assets—be considered personal property.⁴⁰² Alternately, in a solution that “need not even touch on the laws of property,” the UPC could be modified to craft a rebuttable presumption in favor of *destroying* e-mail accounts absent instructions to the contrary in a decedent’s estate plan.⁴⁰³ Thus, “Absent a specific devise by will or other testamentary instrument, a family member could only receive the account by showing clear and convincing extrinsic evidence of the deceased’s intent to the contrary.”⁴⁰⁴ This would err on the side of privacy while still leaving room for nuance.⁴⁰⁵

But before any of these suggestions can be implemented amid the present potential for legal clash between contract and probate law, it must be determined whether estate plans seeking to pass along digital assets, and thus potentially circumventing ToS and similar user agreements, stand on solid legal footing.⁴⁰⁶ The same could be said of DEPs, which may similarly violate non-transferability clauses.⁴⁰⁷ Failing efforts to bequeath and dispose of digital assets on one’s own and within the confines of standard user agreements and ToS, the hierarchy of options for heirs seeking access to

401. See, e.g., UNIF. PROBATE CODE §§ 3-706, 3-709, 3-711, 3-814; see also Darrow & Ferrera, *supra* note 37, at 319 nn.183–86.

402. See, e.g., Darrow & Ferrera, *supra* note 37, at 319. Specifically, the authors recommend modifying Section 2-203 to read as follows: “E-mail stored in an account of the decedent, regardless of the physical location of the storage device on which the contents of the account are stored, shall be considered inheritable personal property.” *Id.* They also propose specifying that property includes e-mail accounts (per Section 3-706); that “personal representatives may obtain the contents of e-mail accounts” (per Section 3-709); “that personal representatives may access private e-mail accounts of the deceased” (per Section 3-711); and that “personal representatives may pay e-mail service provider account fees as necessary to obtain the contents of a deceased’s email account (per Section 3-814).” *Id.*

403. See Atwater, *supra* note 36, at 415. “The [UPC] and the rules of intestate succession [already] establish numerous default rules creating rebuttable presumptions designed to carry out the average testator’s intent.” *Id.* Atwater uses Section 2-507(c) as an example, which states:

The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator’s estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator’s death.

Id. at 415 n.102.

404. See *id.* at 415.

405. See discussion *supra* Part IV.B (lamenting policy-based solutions’ disregard for nuance).

406. See, e.g., *supra* notes 53, 265 (providing sample language to define digital assets).

407. “[P]eople may mistakenly believe that they can use DEP services to legally transfer property of all types, when in fact, the legality of any attempted DEP service transfer is far from certain.” Roy, *supra* note 36, at 378.

decedents' e-mail and social-media accounts would probably next fall to the terms of e-mail and social media providers' specific death policies, if such policies exist.⁴⁰⁸ Next, failing previous options, the fate of social-media assets postmortem would probably fall to "state law commanding such transfer, or, failing that, [would be dictated by] a court order as in the *Ellsworth* case."⁴⁰⁹

Among the most promising solutions put forth in this discussion is user choice regarding digital asset disposition—which may or may not need to be legislatively mandated.⁴¹⁰ Under such a mandate, e-mail and social-media providers would be forced to disclose in their ToS the "possibilities" regarding users' digital assets postmortem, and, in a procedure somewhat akin to organ donation, users would "check the box" [hereinafter "check-a-box provisions"] indicating whether they would like for their digital assets to be destroyed or passed on after death.⁴¹¹ Under such mandate, users might be more inclined to read the ToS and would be given a "conscious choice" regarding their digital assets' fate post mortem.⁴¹² Of course, social-media services would also be free to implement this feature on their own, even absent legislative mandates.⁴¹³ Combining this solution with other proposals, social-media services would nonetheless be free to dictate their own default rules, which, depending on the type of service and the privacy concerns implicated, would presumably default to account destruction.⁴¹⁴

V. IMPACT ON PERSONAL AND SOCIETAL "INTERESTS"

The foregoing discussion of the legal climate for postmortem social-media assets suggests certain interest-based patterns, namely that the "probate" end of the solution continuum favors access and preservation, while the "policy" end favors non-transferability or outright termination of assets, in an apparent effort to safeguard privacy and perhaps avoid fraudulent claims. Not surprisingly, the rather blunt-force solutions emerging from each of these extremes often sacrifice values on the opposite end of the continuum. Thus, devising optimal solutions to digital death's complexities may depend on what society values most.

408. *Id.* at 384–86.

409. Darrow & Ferrera, *supra* note 37, at 316.

410. *See* Atwater, *supra* note 36, at 416.

411. *Id.* A similar corporate solution in the online gaming world involves prompting gamers and users to *choose* what they wish to have happen to their accounts upon death—erasure or access—and if the choice is access, to name an executor. *See* Nicholson, *supra* note 39. As one insider said of the solution: "I think we're heading in that direction It's an easy way to address this issue on a large scale." *Id.*

412. Atwater, *supra* note 36, at 417.

413. *See* discussion *infra* Part V.

414. *See, e.g., supra* note 278 and accompanying text.

Fortunately, this may not be a zero-sum game. To the contrary, mid-continuum proposals may achieve multiple policy goals simultaneously.⁴¹⁵ For example, the check-a-box proposal⁴¹⁶ addresses privacy concerns by inquiring into social-media users' postmortem wishes, but meanwhile leaves room for the interest of asset preservation if the user so desires. This would also be attractive to social-media companies, whose fear of privacy violations might be mollified given that each user would be put on notice in agreeing to a binding contract via the dispositional box-checking. Social-media services would also be free to dictate their own default rules. Thus, the check-a-box solution would appear to have far less negative impact on individuals and companies than existing solutions would, and could simultaneously address the interests most common to this discussion, including: (1) honoring decedents' wishes;⁴¹⁷ (2) protecting privacy;⁴¹⁸ (3) preserving social media assets for both sentimental and financial purposes;⁴¹⁹ and (4) minimizing the time-consuming processes of litigation, probate, and arduous paperwork.

A. *People's Intent*

Intestacy, and to some extent probate, laws are often based on a developed notion of the "average person," given that a stated goal of intestacy statutes is to "carry out the probable intent of the average intestate decedent."⁴²⁰ For example, studies have shown that most people want everything to go to a surviving spouse, while intestacy schemes seek to maximize family harmony.⁴²¹ However, putting aside debate as to social media's status as property, it is unclear whether this analogy appropriately extends to social media. This is because intestacy laws typically focus on *to whom* property should pass,⁴²² whereas social media's disposition gives rise to a multiplicity of variables beyond beneficiaries, including how assets should be used, for what purposes, and for how long.⁴²³ Further, the "to whom" question is multiplied in the social-media realm because more than

415. See discussion *supra* Part IV.C (providing examples of mid-continuum solutions).

416. See *supra* text accompanying note 411.

417. See discussion *supra* Part II.C.

418. See discussion *supra* Part II.E.

419. See *supra* note 343 and accompanying text.

420. DUKEMINIER, *supra* note 144, at 75.

421. *Id.* at 75–76.

422. See discussion *supra* Part II.C.

423. See discussion *supra* Part II.A.4.

one person may have copies of—or even access to—an account. Further still, there does not yet appear to be any survey or polling data suggesting what the wishes of the “average person” would be for any of these variables.

Social media therefore demands greater nuance with respect to dispositional wishes than more tangible property. The check-a-box provision would respect such nuance by allowing social-media services to specifically tailor their options to their services—even their default options.⁴²⁴ For instance, given that most content on Facebook is viewable among a user’s friends, Facebook could opt for the twin defaults of (1) preserving this semi-public content, such as photos posted on users’ walls, while (2) destroying private content such as personal messages. As another illustration, LinkedIn’s default postmortem protocol might prescribe (1) preservation of contact names and e-mail addresses, and (2) deletion of past messages and correspondences by the decedent. Thus, the appeal of the check-a-box solution should be apparent to both social-media services and their users and family members, who need not consult an executor, alter a will or trust, or invest in a DEP to ensure that the user’s postmortem wishes will be honored. In other words, legislatures appear to be ill equipped to govern a rapidly changing cyber-world.

B. Privacy

It seems ironic that social media—a forum in which people literally publicize what they ate for breakfast—should invoke a privacy discussion.⁴²⁵ But it is perhaps this very nature of social media that makes privacy discussion so compelling, given the increasing proportions of our lives embodied therein. Although at this point it seems ToS have a greater concern in privacy, therein lies the possibility of a unilateral privacy breach. Check-a-box provisions, by offering a contract of choice, would impart dual responsibility on social-media services and their users with respect to privacy. That is, users would be put on notice by not only agreeing to, but also choosing, their postmortem dispositional wishes, and social-media services might be less inclined to unilaterally alter their privacy policies, vested with this responsibility.

C. Preservation

Although check-a-box provisions may give users the option to terminate their accounts and destroy the contents therein at death, such an outcome

424. See *supra* notes 403–06 and accompanying text (discussing proposals to alter UPC default provisions).

425. See, e.g., *supra* text accompanying notes 95–98.

might be less likely than it would be under purely ToS-based schemes, which oftentimes prohibit transferability and default to destruction.⁴²⁶ Social-media services would furthermore have the option to include rebuttable presumptions that could allow family members to challenge destruction in special circumstances or if certain requirements are met. Check-a-box provisions might, paradoxically, give companies even greater power, when *Ellsworth*-type holdings threaten to de-legitimize ToS.

D. Paperwork and Litigation Minimization

Given the potential for choice-of-law conflicts, not to mention social-media assets' tenuous status as property, probate-centric solutions including writing social-media assets into wills or relying on Oklahoma-like statutes in cases of intestacy may prove to be futile. Though company-led, check-a-box provisions would paradoxically wrest some control from social-media companies themselves—by gathering evidence of users' postmortem wishes, and, assuming these wishes were followed, limiting the services' ability to control content and access after death—they would nevertheless minimize the chance of litigation or probate complications.

One final benefit of the check-a-box solution is that it would require minimal contemplation of one's death. As the law currently exists, social-media users are best advised to resort to a variety of strategies, such as SecureSafe and similar services, to ensure that their postmortem wishes are honored. This is attributable to the tenuous legal basis upon which existing solutions rest, not to mention the changing nature of these services themselves.⁴²⁷ Check-a-box provisions would register on the user's consciousness upon signing up for a new social-media service, then likely never again.

VI. CONCLUSION

Between the two power extremes of (1) state probate codes and (2) social-media services' ToS lies a continuum of potentially collaborative solutions that may be better equipped than either extreme to serve the policy goals discussed. While legislative remedies like Oklahoma's 2010 statute may be helpful in the short term in (1) calling public attention to digital death and encouraging individuals to consider digital assets in their estate

426. See, e.g., *supra* note 278 and accompanying text.

427. See *supra* note 296 (noting the recent acquisition of Entrustet by SecureSafe).

planning, and (2) spurring companies to pay greater heed to decedents' (and their friends' and families') wishes, it appears likely that purely legislative solutions may not only fall short of resolving the digital-asset quandary, but may in fact exacerbate existing uncertainties—especially in the realm of social media. At the other extreme, however, purely ToS-based “solutions” seem to err on the side of non-transferability and termination, and allow little room for nuance.⁴²⁸

One of the most promising proposed solutions, and one which rests somewhere between the two power extremes, is a procedure analogous to organ donation (and not unlike existing social-media privacy settings) by which social-media services would prompt users to check a box indicating their postmortem instructions for social-media asset disposition.⁴²⁹ This would effectively ascertain decedents' wishes for the endless array of social-media services available in cyberspace, not to mention the multitude of dispositional options for each service.⁴³⁰ Logically, it seems to be in social-media companies' best interests to implement this feature immediately, given its potential to shield companies from *Ellsworth*-type court orders,⁴³¹ or from lawsuits with statutory backing in the wake of untested and therefore potentially overreaching legislation like Oklahoma's.⁴³² But absent immediate legal challenge it may be unrealistic to expect social-media services to self-impose these ToS accoutrements. Therefore, state⁴³³ or federal legislation may be necessary to spur social-media services into making such user-led disposition schemes standard practice.

Although it is not without its faults, such a compromise would achieve to some extent the foremost policy goals implicated by digital death, as it would likely: (1) safeguard privacy; (2) minimize litigation and probate proceedings; (3) preserve assets when preservation is appropriate and desired; and (4) honor the digital outcome(s) that social-media users would “Like” to have happen when they die.

Kristina Sherry*

428. See discussion *supra* Part IV.B (lamenting policy-based solutions' disregard for nuance).

429. See *supra* note 411 and accompanying text.

430. See discussion *supra* Part IV.A (discussing the various possibilities for social-media asset disposition).

431. See *supra* note 224 and accompanying text.

432. See discussion *supra* Part III.B.1.

433. As the principal place of business for many social-media sites and services, California would arguably be in the best position to lead this effort. See *supra* note 140.

* J.D. Candidate, 2013, Pepperdine University School of Law; B.A. in Psychology; Certificate in Spanish, 2004, Princeton University. I thank my parents and my sister, Joanna, for everything. I thank this esteemed Law Review staff and each professor who has taught me at Pepperdine School of Law, especially Mireille Butler and Kristine S. Knaplund. I thank God for Malibu weather.