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## **DIGITAL LIFE AFTER DEATH: THE ISSUE OF PLANNING FOR A PERSON'S DIGITAL ASSETS AFTER DEATH**

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## DIGITAL LIFE AFTER DEATH: THE ISSUE OF PLANNING FOR A PERSON'S DIGITAL ASSETS AFTER DEATH

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On November 13, 2004, Lance Cpl. Justin M. Ellsworth was killed in action while serving as a Marine in Fallujah.<sup>1</sup> His father, John Ellsworth, decided to create a memorial for his son by using the e-mails that Justin had sent and received while he was serving in Iraq.<sup>2</sup> In order to do this, however, John Ellsworth needed access to his son's account, a request Yahoo! denied.<sup>3</sup> Yahoo! claimed that if it granted Justin's parents access to his account, it would be in direct violation of its privacy agreement that it's over 40 million users must agree to.<sup>4</sup> Finally, after a heated court battle that lasted over three months, a Michigan court finally granted the Ellsworths access to their son's e-mail.<sup>5</sup>

The case of Lance Cpl. Justin Ellsworth provides an excellent illustration of the problem that is currently facing estate planners as they work to ensure that their client's estates are properly planned for upon the client's death. Specifically, there is an issue facing estate planners and attorneys in regards to how they should be properly planning for a person's "digital assets"

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<sup>1</sup> See *Who Owns Your E-Mails?*, BBC NEWS, Jan. 11, 2005, available at [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/4164669.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/4164669.stm).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.* (stating that "survivors have no rights to the e-mail accounts of the deceased").

<sup>5</sup> See *Yahoo Will Give Family Slain Marine's E-Mail Account*, USA TODAY, Apr. 21, 2005, available at [http://www.usatoday.com/tech/news/2005-04-21-marine-e-mail\\_x.htm?POE=TECISVA](http://www.usatoday.com/tech/news/2005-04-21-marine-e-mail_x.htm?POE=TECISVA)

and “digital estate” in the event of their death. This comment seeks not only to provide a better definition for digital assets and digital estates, but also to provide a practical discussion as to what estate planners can and should be doing to ensure that their client’s digital estates and assets are properly planned for after their client’s death.

Specifically, this comment will discuss the issue of digital assets as they pertain to estate planning, what many of the websites that contain a person's digital assets (Facebook, MySpace, Twitter, etc.) are doing in order to protect a person’s personal information after their death, and will provide estate planners with a number of options for dealing with these issues in their daily practice. Part I of this comment will provide a general definition of digital assets.<sup>6</sup> As there is currently no such definition available in any legal or general resource, this section will lay the foundation for determining what a digital asset is, and therefore will provide the foundation for understanding how to properly plan for a client’s digital assets and digital estate after the client’s death.<sup>7</sup> This section will also include a discussion of the emergence and growth of digital assets and the issues that these digital assets are causing for estate planners.<sup>8</sup> Part II of this comment will discuss what websites and email services are doing in regards to the accounts of their deceased patrons and the effect this is having on estate planning.<sup>9</sup> Part III this comment will provide suggestions for what estate planners can/should be doing when facing these issues on a daily basis.<sup>10</sup> The overall purpose of this section is to provide a practical look at digital assets and how to prepare for them in regards to estate planning.<sup>11</sup> Part IV of the comment will provide a brief look at the possible consequences of not ensuring that a client’s digital assets and estate are properly planned for.<sup>12</sup> Finally, Part V will provide a brief conclusion to the comment.<sup>13</sup>

## I. THE ISSUE OF DIGITAL ASSETS AND ESTATE PLANNING

### A. *Defining Digital Assets*

With the ever-increasing landscape of online accounts, social networking websites, and web-based email accounts, it has become more and more common for people to have numerous online accounts with different usernames and passwords. This creates an issue for estate planners in terms of what will happen to these accounts and the personal information stored in them after a person’s death. One of the first problems facing estate planners is that there is currently no proper definition of a digital asset or a digital estate provided in either Webster’s Dictionary or Black’s Law Dictionary. With no definition to act as a compass, estate planners are left guessing as to what will qualify as a digital asset.

Before pressing on into how digital assets and estates should be planned for, a working definition must first be established. Currently, no definition exists, which proves to be a challenge to estate planners. A proper definition, however, would not only provide practicing

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<sup>6</sup> See discussion *infra* Part I.A.

<sup>7</sup> See discussion *infra* Part I.

<sup>8</sup> See discussion *infra* Part I.

<sup>9</sup> See discussion *infra* Part II.

<sup>10</sup> See discussion *infra* Part III.

<sup>11</sup> See discussion *infra* Part III.

<sup>12</sup> See discussion *infra* Part IV.

<sup>13</sup> See discussion *infra* Part V.

estate planners with a proper compass, but it would also serve to allow estate planners, courts, and other practicing attorneys to be able to identify digital assets and to decide what amount of legal protection the assets should receive.<sup>14</sup>

Nathan Dosch, an estate planning and tax attorney with Neider & Boucher and creator of the Digital Estate Planning Blog, pieced together definitions of “digital” and “asset” from Webster’s Dictionary in order to define digital asset as “any file on your computer in a storage drive or website and any online account or membership.” Examples of digital assets include documents created via a Microsoft Office Program (e.g. Word, Excel, or PowerPoint), digital photos, digital videos, music on iTunes.<sup>15</sup> Additionally, digital assets include online accounts and memberships such as e-mail accounts, profiles on social networking sites such as Facebook and MySpace, online digital photo accounts, online banking and credit card accounts, and websites or domain names owned by a person, and any online subscription accounts.<sup>16</sup>

Additionally, digital assets and estate might be considered “virtual property” (note that virtual property and digital assets are one and the same), which would include things such as “a website, a bidding agent, a video game character, or any number of other intangible, digital commodities.”<sup>17</sup> Therefore, the working and suggested definition of a digital asset for this comment will be: any digital file on a person’s computer as well as online accounts and memberships.

While this definition might seem broad, it should be noted that a broad definition is necessary in order to encompass everything that is in fact a digital asset. Therefore, digital assets must not only include those documents that a person creates (via Microsoft Word, Excel, or PowerPoint), but it must also include all owned domain names, any legally downloaded files (e.g. mp3 Music Files and Movies), and any web-based personal accounts that require a username and password for access (e.g. a social networking account, a web-based e-mail account, and any accounts storing personal information; such as online banking accounts and online shopping accounts).<sup>18</sup>

It is also important to determine what definition of property that digital assets will fall into. Generally, property is divided into two types: real and personal.<sup>19</sup> On the one hand you

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<sup>14</sup> See Charles Blazer, *The Five Indicia of Virtual Property*, 5 PIERCE L. REV. 137 (December 2006) (discussing the “five indicia” for determining what is a legally protectable digital asset).

<sup>15</sup> Nathan Dosch, Over View of Digital Assets: Defining Digital Assets for the Legal Community, <http://www.digitalestateplanning.com/> (May 14, 2010).

<sup>16</sup> See *id.* (noting that any web-based account that requires a username and password in order to access it can be classified as a digital asset).

<sup>17</sup> See Blazer, *supra* note 14, at 137 (providing “five indicia” for determining which forms of virtual property should be protected by the courts, a discussion of protectable virtual property is outside the scope of this comment, but the cited article provides an excellent discussion of this issue if further reading is desired).

<sup>18</sup> Note that I have only included “legally downloaded files” into the discussion of properly planning for a person’s digital estate. A discussion of illegally downloaded content is outside the scope of this comment but is an issue that estate planners, attorneys, and courts will surely be facing in the near future. For a short discussion of this issue see Patricia H. Char, ALI-ABA Continuing Legal Education. *Emerging Issues for Fiduciaries*. February 19 – 21, 2009.

<sup>19</sup> See Over View of Digital Assets: Defining Digital Assets for the Legal Community, <http://www.digitalestateplanning.com/> (May 14, 2010).

have real property, which is essentially land and anything that is attached to it.<sup>20</sup> Personal property, on the other hand, is anything that is not real property.<sup>21</sup> Additionally, personal property is further divided into two subcategories, “tangible (car, furniture, jewelry, art, clothing, appliances) and intangible (stocks, bonds, patents, trademarks, copyrights).”<sup>22</sup> This distinction is important because digital assets have the unique potential to change from an intangible asset to a tangible one.<sup>23</sup> A digital asset, such as a digital photo or e-mail, can change from intangible property to tangible property simply by printing out a copy of it.<sup>24</sup> Whether an item of personal property is classified as intangible or tangible has the potential to completely alter the probate process.<sup>25</sup> Therefore, unless a proper definition is established and decided upon, estate planners will continue to have issues not only deciding what exactly will qualify as a digital asset, but they will also face substantial issues regarding how to properly prepare for what will happen client’s digital assets and estates after their death.

### *B. Issues in Estate Planning Created by Digital Assets*

The Internet is a tool used constantly in a person’s day-to-day life. People use the Internet for countless reasons, ranging from posting thoughts and pictures onto blogs, to keeping up with friends and family, and even maintaining bank accounts and credit card balances. The posts, pictures, and any and all files posted on these Internet sites (e.g. Facebook) are what are being qualified as digital assets, and collectively, a person’s digital assets make up that person’s digital estate. As the vast majority of the sites are username and password protected, an important issue is emerging in regards to what is to happen to not only the accounts themselves, but also all of the digital assets locked behind the usernames and passwords when a person dies without revealing what any of the possibly numerous usernames and passwords might be. As

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<sup>20</sup> See *id.*

<sup>21</sup> Telephone Interview with David M. Goldman, Esq., Founder, Apple Law Firm PLLC (September 22, 2010).

<sup>22</sup> See Over View of Digital Assets: Defining Digital Assets for the Legal Community, *supra* note 19.

<sup>23</sup> See Over View of Digital Assets: Defining Digital Assets for the Legal Community, *supra* note 19.

<sup>24</sup> See Over View of Digital Assets: Defining Digital Assets for the Legal Community, *supra* note 19.

<sup>25</sup> See Over View of Digital Assets: Defining Digital Assets for the Legal Community, *supra* note 19.

For instance, in Wisconsin a testator can have a list signed and dated after the execution of his or her Will in which they leave specific items of tangible personal property to specific heirs. There is no such provision for intangible assets. As such a testator must specifically direct the management and disposition of intangible assets in the Will or through contractual designation, such as transfer on death or payable on death designations or beneficiary designations. This requirement limits a person’s ability to control the management and distribution of their assets without first consulting with an attorney to update their estate planning documents. *Id.*

there is no legislation and little if any case law, estate planners are left without any real advice to give their current clients, or without any sort of a compass to guide them when this issue arises in their daily practice.

Another prominent issue facing estate planners is that many persons have realized the risk in leaving personal information online and protecting them all by the same exact username and password, and it is often the case that people do not write these passwords down or share them with anybody out of fear of being the next identity theft victim.<sup>26</sup> All of these different usernames and passwords can create a significant issue for those responsible for ensuring the security of someone's estate after their death.<sup>27</sup> Without the correct usernames and passwords the information stored on these web-based accounts cannot be accessed and will essentially be left floating in cyber space with the possibility of being preyed upon by identity thieves.

There is also the issue of who really owns information once it is uploaded or stored onto a website.<sup>28</sup> While many of these websites do say that they have compassion for the families of the deceased, they also state that their first priority is to protect the user who undoubtedly signed a "privacy agreement" with whichever website he/she chose to use.<sup>29</sup> These privacy agreements, which the person wishing to set up an account must acquiesce to before setting up the account, often provides that under no circumstances will the website release their personal information.<sup>30</sup> Some websites even go so far as to say that any information (pictures, videos, etc.) that you upload onto their website becomes their property.<sup>31</sup> This issue of the effect that the Terms of Service and newly created "deceased user policies" are having on estate planners and attorneys will be discussed later in this comment.

Along those same lines are the issues that blogs create for estate planners. One of the major areas of concern regarding blogs has to do with copyrights.<sup>32</sup> More specifically, "if you've got a blog, you've also got intellectual property including copyright to your writings and any trade-marks associated with your site."<sup>33</sup> As copyrights last for the entirety of a person's life

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<sup>26</sup> Andrea Coombes, *You Need an Online Estate Plan*, Wall St. J., July 19, 2009, available at <http://online.wsj.com/article/SB124796142202862461.html>.

<sup>27</sup> See *id.*

<sup>28</sup> Ariana E. Cha, *After Death, a Struggle for Their Digital Memories*, The Washington Post, Feb. 3, 2005 available at <http://www.washingtonpost.com/wp-dyn/articles/A58836-2005Feb2.html>

<sup>29</sup> See *id.* (in this case the parents of a slain Marine fought with an E-Mail and Web hosting company, Mailbank.com Inc., to release the information that their son had posted to his website).

<sup>30</sup> RYANNE LAI, *What Happens to Your Web-Based Email After You Die?*, Presentation given June 21, 2005. <http://www.slideshare.net/laihiu/what-happens-to-your-webbased-email-after-you-die> (providing an excerpt from the Yahoo! Privacy Agreement which states that "No Right of Survivorship and Non-Transferability. You agree that your Yahoo! account is non transferable and any rights to your Yahoo! I.D. 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.").

<sup>31</sup> Chris Walters, *Facebook's New Terms of Service: "We Can Do Anything We Want With Your Content. Forever."*, The Consumerist, Feb. 15, 2009 <http://consumerist.com/2009/02/facebooks-new-terms-of-service-we-can-do-anything-we-want-with-your-content-forever.html>

<sup>32</sup> *Planning Your Digital Estate: Dealing With Online Data After Death*. Law Vibe, June 25, 2009 <http://lawvibe.com/planning-your-digital-estate-dealing-with-online-data-after-death/>

<sup>33</sup> See *id.*

and for 70 years after death, there is a substantial amount of protection that is available to a person's written material after his death, but without the proper protection, information could be stolen directly from the decedent's blog and could thus be used illegally by a third party for her own monetary gain.<sup>34</sup> This problem however, is not really one that faces those bloggers that own their own domain, but rather this issue is one that impacts those persons that use blog-hosting websites that require the user to first agree to the websites Terms of Service before gaining access to the website and its services.<sup>35</sup>

There is an additional problem facing estate planners in regards to blogs, and that is that many blog-writers do not own their own domain name, but rather they use a third-party hosting service.<sup>36</sup> This is an issue because many of the most popular host sites are hesitant to make the necessary log in information available, even to executors.<sup>37</sup>

Additionally, there is also the issue of a blogger continuing to post, even after death.<sup>38</sup> This might, understandably, seem like something out of a ghost story, but in fact many bloggers often write several blogs at a time and then set them to post at a later date, which means that a writer could have written any number of blogs and left them to post post-mortem.<sup>39</sup> These postings also have the possibility of being of a defamatory nature, which in turn could lead to possible lawsuits against the decedent's estate.<sup>40</sup>

Another problem possibly facing estate planners is that even though a person might leave behind the required passwords and usernames, it does not necessarily mean that they have passed on the legal right to use the account and all the information contained therein.<sup>41</sup> This is important because in the case of those sites where you set up and maintain an account (e.g. Facebook, Twitter, web-based e-mail accounts, etc.), you have not purchased anything, but instead you have merely been granted a license to use that website.<sup>42</sup> The unfortunate problem with only being

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<sup>34</sup> See *The Copyright Term Extension Act* 17 U.S.C. §303 (1998) (extending the term of copyright life from 50 to 70 years past the death of the author); see also *supra* note 30; see also *infra* note 156.

<sup>35</sup> See discussion Part II.C. and text accompanying. While the specific Terms of Service for WordPress and Blogger will be discussed later in this comment, it is enough for now to know that in general, these Terms of Service make it clear that any content posted onto their domain is the property of the blog-hosting website, i.e. WordPress or Blogger, and not the user who actually posted the content.

<sup>36</sup> See *Planning Your Digital Estate: Dealing With Online Data After Death*, *supra* note 32.

<sup>37</sup> See *Planning Your Digital Estate: Dealing With Online Data After Death*, *supra* note 32.

<sup>38</sup> See *Planning Your Digital Estate: Dealing With Online Data After Death*, *supra* note 32.

<sup>39</sup> See *Planning Your Digital Estate: Dealing With Online Data After Death*, *supra* note 32. In one case, a young man set his blog to continue posting after he had committed suicide. See *id.* One post even commiserated his birthday: "YAY, I'd be 26." *Akuma Prime*, WordPress, September 11, 2007 <http://www.akumaprime.com/wordpress/>.

<sup>40</sup> See *Blog Spot Sued for Dead Blogger's Content – Davis v. Google*, April 13, 2009 [http://blog.ericgoldman.org/archives/2009/04/blogspot\\_sued\\_f.htm](http://blog.ericgoldman.org/archives/2009/04/blogspot_sued_f.htm). Note that this is a lawsuit against Google (who actually owns Blogger) and not against a particular estate.

<sup>41</sup> See Telephone Interview with David M. Goldman, Esq., Founder, Apple Law Firm PLLC (September 22, 2010).

<sup>42</sup> See *id.*

granted a license is that licenses, by their definition, expire upon death.<sup>43</sup> This problem is compounded by the fact that wills tend only to deal with those assets that survive death, and this unfortunately may not include those online accounts that a person has been granted a license to use.<sup>44</sup> Essentially, this means that anything that a person puts into a will will have no bearing or rights over anything that ceases to exist upon the death of the individual.<sup>45</sup> Hence, if the license granted to persons to use the websites, on which they have set up an account, does in fact expire upon death then whoever receives the usernames and passwords actually has no legal right to use and access the information contained in these accounts.<sup>46</sup> For that reason, it may not be enough for an estate planner or attorney to simply advise their client to prepare a will that properly passes on the required usernames and passwords. Therefore, as Mr. Goldman suggests, the pertinent information that is required to access these accounts must be put into an instrument that will survive death.<sup>47</sup>

Finally there is the issue of what happens to those digital assets and estate that are not properly planned for.<sup>48</sup> Generally, online accounts can be removed, canceled, or shut down as soon as the website receives proper notice of a person's death, usually by a death certificate, but the problem is that many persons simply do not inform the hosts of those online accounts of the death, which leaves the person open to potential identify theft even after they are deceased.<sup>49</sup> Moreover, while it is true that the privacy agreements agreed to when a person set up the account will be able to provide a substantial amount of protection, the real issue is that the digital assets, and all the personal information that comes with them, are still out there floating in cyberspace. Some of these accounts are not just your everyday social-networking accounts where a person lists their favorite movies and films.<sup>50</sup> Furthermore, many of these accounts might include sensitive information like credit card and bank account numbers, and simply leaving these accounts open to the public could spell disaster.<sup>51</sup> Unless the deceased has made it known that these accounts exist, then it is entirely feasible these accounts could remain open forever, or at least as long as the company protecting them remains in business, leaving those precious numbers vulnerable.<sup>52</sup> Additionally, it would be careless to overlook the possibility that the decedent may not wish for any other person (friend, loved-one, or otherwise) to have access to their accounts.<sup>53</sup> Therefore, unless estate planners and attorneys have ensured that their clients

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<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See id.*

<sup>47</sup> *See id.*; *see also infra* part III (discussing possible steps and solutions for ensuring that a client's digital estate is properly planned for).

<sup>48</sup> *See Aleksandra Todorova, Dead Ringers: Grave Robbers Turn to ID Theft*, SmartMoney Aug. 4, 2009 <http://www.smartmoney.com/personal-finance/estate-planning/dead-ringers-grave-robbers-turning-to-identity-theft/?hpadref=1>.

<sup>49</sup> *See id.*

<sup>50</sup> *See id.*, *see also infra* part II.A-C.

<sup>51</sup> *See Coombes, supra* note 26.

<sup>52</sup> *See Coombes, supra* note 26.

<sup>53</sup> *See Planning Your Digital Estate: Dealing With Online Data After Death, supra* note 32 (noting that "while some old messages may bring some joy or shed some light on aspects of [the decedent's] life, there are a lot of messages that are nobody's business but [the decedent's]). *Id.*

have properly prepared their digital estates, they are potentially leaving their clients open to post-mortem identity theft.<sup>54</sup>

Perhaps the biggest problem facing not only estate planners, but their clients as well is a general lack of knowledge about how to properly prepare for what will happen to their digital estates after their death.<sup>55</sup> In general, the only things that people really think about are their tangible assets (such as property) and their intangible assets (such as stocks and bonds).<sup>56</sup> People simply do not think about things of a digital nature, such as user names, passwords, e-mail accounts, digital photo directories, or anything else that might qualify as a digital asset.<sup>57</sup>

In the following sections, this comment will address the above issues. Additionally, this comment will show how many of these websites that act as hosts for these online accounts are taking steps to ensure the privacy of their users. This comment will also provide a detailed discussion that will provide different options for estate planners and attorneys to help ensure that that their client's digital assets and digital estates are properly planned for.

## II. HOW THE WEBSITES ARE DEALING WITH DIGITAL ASSETS: THE EFFECTS OF PRIVACY ACTS AND DECEASED-USER ACTS

Recently, many social-networking sites (such as Facebook and Twitter), blogs (such as WordPress and Blogger), and web-based e-mail providers (such as Yahoo! and G-Mail) have adopted policies aimed at protecting the assets and privacy of not only their current users but also their deceased users.<sup>58</sup> These policies are important because of the effect they can have on someone managing the digital estate of the deceased and the processes necessary to ensure that the deceased's assets and privacy are protected even after their death.

### A. Social-Networking Sites

In the past decade, the Internet has seen an explosion of what are generally classified as social-networking websites (e.g. Facebook, MySpace, and Twitter). Essentially these websites allow a person to create accounts and then begin uploading information and pictures in order to keep up with friends, family, co-workers, and seemingly everybody else that the person has ever had contact with. With people constantly uploading more and more information onto these websites, what is to happen to that information in the event that the account-holder dies?

Social-networking websites provide estate planners with a special problem, because unlike web-based e-mail accounts, where the account holder and only the account holder have access to the information there on, social-networking websites are much more public in nature.<sup>59</sup> Additionally, as many of these social-networking websites allow for a person to become

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<sup>54</sup> See *Planning Your Digital Estate: Dealing With Online Data After Death*, *supra* note 32.

<sup>55</sup> See Telephone Interview with Jesse Davis, founder of [www.entrustet.com](http://www.entrustet.com), and Nathan Dosch, in-house estate planner for Entrustet.com and estate planning and tax attorney with Neider & Boucher (September 22, 2010).

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See discussion *infra* part II.A-C.

<sup>59</sup> See *Planning Your Digital Estate: Dealing With Online Data After Death*, *supra* note 32.

“friends” with any number of other people, a person’s profile will appear as a friend of a myriad others, and will continue to appear until the account is either closed or deleted.<sup>60</sup>

Many of these social-networking websites have begun creating what are termed “deceased-user policies.” As was mentioned earlier in this comment, Facebook’s current user policy dictates that once a person uploads any information onto his Facebook account, it is, for all intents and purposes, property of Facebook.<sup>61</sup> Facebook, however, has also recently adopted a new deceased-user policy in an effort to allow the family and friends of the deceased user to have options as to what will happen to the deceased user’s account.<sup>62</sup> Essentially, this plan offers the friends and family of the deceased user two options: they may either have the deceased user’s profile taken off of Facebook, or they may choose to memorialize the account.<sup>63</sup> This was done in an effort to ensure the continued protection of the deceased user’s privacy even after his/her death “by removing sensitive information such as contact information.”<sup>64</sup> Memorializing an account “also prevents anyone from logging into it in the future.”<sup>65</sup>

Other notable social networking websites have also set up similar deceased-user policies, which have helped to ensure the protection of the digital assets and estates of the deceased users.<sup>66</sup> An important characteristic to note regarding Twitter’s deceased user policy is that it requires not only some form of notification of the death (this can be achieved by simply providing them with a link to the obituary in a newspaper), but also that the person requesting that the account be deactivated provide either his full name and his relation to the deceased user, or the username of the account or a link to the profile page of the account.<sup>67</sup>

While these policies are certainly a step in the right direction in regards to properly protecting the digital assets and estates of the now deceased user, unless estate planners and attorneys ensure that their clients have properly prepared instructions and properly passed on the rights to access these accounts the security that these deceased-user policies offer will be unusable. Essentially, these social-networking sites can only help you if you help them, and the only way to do this is for people to properly prepare for what will happen to your digital assets

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<sup>60</sup> See *Planning Your Digital Estate: Dealing With Online Data After Death*, *supra* note 32.

<sup>61</sup> Chris Walters, *Facebook’s New Terms of Service: “We Can Do Anything We Want With Your Content. Forever.”*, The Consumerist, Feb. 15, 2009 <http://consumerist.com/2009/02/facebook-new-terms-of-service-we-can-do-anything-we-want-with-your-content-forever.html>

<sup>62</sup> See The Facebook Blog: Memories of Friends Departed Endure on Facebook, <http://blog.facebook.com/blog.php?post=163091042130> (October, 26, 2009 10:48 AM).

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> Josh Lowensohn, *Twitter’s New Deceased User Policy vs. Facebook’s*, CNNTech, Aug. 11, 2010, <http://www.cnn.com/2010/TECH/social.media/08/11/twitter.deceased.user.policy.cnet/index.html?hpt=T2>; see also *How Can You Delete or Access a Deceased’ User’s Profile?*, Myspace.com, June 8, 2010, [http://faq.myspace.com/app/answers/detail/a\\_id/369/~/delete-or-access-deceased-user's-profile](http://faq.myspace.com/app/answers/detail/a_id/369/~/delete-or-access-deceased-user's-profile).

<sup>67</sup> See Lowensohn *supra* note 66. By requiring some form of a proof of death, Twitter is seeking to protect the privacy rights of those account users that are actually still living. Essentially, this requirement is ensuring against protection from any possible fraudulent claims of death.

and estates after their death.<sup>68</sup>

### *B. Web-Based E-Mail Accounts*

As noted earlier, many web-based e-mail accounts, such as Yahoo! and G-Mail, also have user policies that the e-mail providers argue remains binding even upon death, and which are vitally important for estate planners to be aware of.<sup>69</sup> While all web-based e-mail accounts require an acceptance of their Terms of Service, the one that will be focused on for this comment is Yahoo!'s. The reason for choosing Yahoo! is because it remains one of the largest online e-mail account servers on the Internet.

As a general rule, e-mails that the decedent composed can be considered "literary work" and are therefore protected under copyright law.<sup>70</sup> However, if your family or executors do not know the required password required to access the account, they may be unable to reclaim the correspondence.<sup>71</sup> It is at this point that loved-ones, executors, or any other person charged with the handling of the decedent's estate will have to pay close attention to the specific user policies of the website that hosts the web-based e-mail account. For example, Yahoo!'s user policy, which must be agreed to in order to start an account, has a specific provision that does not allow for any survivorship rights or any transferability of the e-mail account.<sup>72</sup> Specifically, this provision notes that any rights that a person has in the account die along with that person.<sup>73</sup> Essentially, this provision means that it is the account creator, and only the account creator, that will ever have access to the information stored in this account.<sup>74</sup> In fact, the only thing that a friend or family member of the deceased can do is to send a death certificate to Yahoo! so that they will terminate the account.<sup>75</sup> Unfortunately, however, all of the information and messages contained in the account will be deleted as well.<sup>76</sup>

The question still remains though: who really owns a decedent's e-mails? As a general rule, the author's rights in her e-mail should be equivalent to her rights in her private letters.<sup>77</sup> Essentially, the author retains not only a copyright in any e-mails that she writes, but also ownership rights in any messages that she receives.<sup>78</sup> When confronted with loved ones wanting

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<sup>68</sup> See discussion *infra* Sec. III (discussing possible steps and solutions for ensuring that a client's digital estate is properly planned for).

<sup>69</sup> See generally Yahoo! Terms, available at <http://info.yahoo.com/legal/us/yahoo/mail/mailplustos/mailplustos-297.html>; see also G-Mail Privacy Policy, available at <http://www.google.com/intl/en/privacy/privacy-policy.html>.

<sup>70</sup> See Lai, *supra* note 30.

<sup>71</sup> See *Planning Your Digital Estate: Dealing With Online Data After Death*, *supra* note 32.

<sup>72</sup> See Lai, *supra* note 30.

<sup>73</sup> See Lai, *supra* note 30.

<sup>74</sup> See Lai, *supra* note 30.

<sup>75</sup> See Lai, *supra* note 30.

<sup>76</sup> See Lai, *supra* note 30.

<sup>77</sup> See Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns A Decedent's E-Mails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 281, at 313 (2007).

<sup>78</sup> See *id.*

to recover the e-mail correspondence of the decedent, many of the host websites point directly to their privacy agreements, but this privacy agreement argument might be misplaced.<sup>79</sup> This is because “while the privacy of the account holder is often cited as a factor weighing against disclosure, privacy rights are generally considered to cease upon death.”<sup>80</sup> However, it should be noted that e-mail service providers have a legitimate interest in protecting the privacy rights of those account holders that are still living, and may be concerned about the possibility of any fraudulent claims of death.<sup>81</sup>

In order to avoid any of these issues, it is imperative that estate planners ensure that their clients have properly planned for what will happen to their digital estates after their death. By doing so, the families of the deceased will legally be able to discover, memorialize, or take any other action they so choose, and they can do so without worrying that they are violating any of the privacy or user-agreements of the hosting website.

### C. Blogs and Online Content

Blogs and the information contained therein provide an interesting set of issues for estate planners.<sup>82</sup> More specifically, blogs and their contents not only create issues in the area of estate planning, but they can also create issues in regards to copyrights.<sup>83</sup> This is important for estate planners to be aware of because of the potential for content theft. In theory, a person could take the content that only the decedent had a legal right to, and could then use it for her own financial gain. The real issue here though is that the only way to prevent content from being stolen from the decedent’s blog is to have it removed, but this may prove difficult given the privacy policy’s currently in place.<sup>84</sup> For instance, the privacy policy currently in place for the blog-hosting website Blogger, which is owned and operated by Google, will only release personal information, such as your username and password information required for log-in, if the user has consented to the release of the personal information.<sup>85</sup> This could potentially create an issue for those in charge of the decedent’s estate if nothing has been mentioned about how to access the blog, and the content therein, and whether or not the decedent wishes to shut down or continue to maintain the blog.

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<sup>79</sup> See *id.*

<sup>80</sup> See *id.*, at 313 (2007); see also RESTATEMENT (SECOND) OF TORTS §652I (1977); see also Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>81</sup> Darrow & Gerald R. Ferrera, *Who Owns A Decedent’s E-Mails: Inheritable Probate Assets or Property of the Network?*, *supra* note 70, at 314 (2007).

<sup>82</sup> See discussion *supra* notes 32 – 40.

<sup>83</sup> See discussion *supra* notes 32 – 40; see also *Planning Your Digital Estate: Dealing With Online Data After Death*, *supra* note 30 (nothing that “if you’ve got a blog, you’ve...got...copyright to your writings and any trade-marks associated with your site”).

<sup>84</sup> For purposes of this section of the comment, we will be analyzing the Privacy Policy’s of two of the most popular blogging sites, WordPress and Blogger. It is important to note that Blogger is owned and operated by Google and thus is covered by Google’s general Privacy Policy.

<sup>85</sup> See Privacy Policy, Google Privacy Center, available at <http://www.google.com/privacypolicy.html> (requiring “opt-in consent for the sharing of any sensitive personal information”).

This however, is not the only important language in the privacy policy from Blogger. It is also noted that if Google has

“A good faith belief that access, use, preservation or disclosure of such information is reasonably necessary to (a) satisfy any applicable law, regulation, legal process or enforceable governmental request, (b) enforce applicable Terms of Service, including investigation of potential violations thereof, (c) detect, prevent, or otherwise address fraud, security or technical issues, or (d) protect against harm to the rights, property or safety of Google, its users or the public as required or permitted by law.”<sup>86</sup>

This language might in fact provide estate planners, attorneys, and executors the ability to access the information and content contained in the decedent’s blog. The downside, however, is that the language does seem to suggest that before Google would release the personal log-in information, Google would have to have a good-faith belief that it was “necessary to satisfy...legal process,” i.e. a court order, which sounds all too familiar to the court battle that the parents of Justin Ellsworth found themselves in.<sup>87</sup> It is, however, likely that all of these issues could be avoided if estate planners and attorneys ensure that their clients digital estates are properly planned for.<sup>88</sup>

An additional privacy policy of interest is the policy that is currently in place for the blog-hosting website WordPress. Specifically, this policy provides that WordPress will only release personal information, such as usernames and password, “when required to do so by law, or when WordPress.org believes in good faith that disclosure is reasonably necessary to protect the property or rights of WordPress.org, third parties, or the public at large.”<sup>89</sup> This also seems to suggest that WordPress will only release the personal information when it is required to, or more specifically when it has been required to by court order. Again, the whole issue of actually reaching the content that the decedent has posted to their blog can be avoided so long as estate planners ensure that their clients have properly planned for each aspect of their digital estates.

The issue of who actually owns the content posted onto blogs is also an issue facing estate planners. In order to try and determine ownership, the most important place to look is the Terms of Service.<sup>90</sup> There are two reasons for referencing the Terms of Service. The first is that because the Terms of Service act as the rules by which a new user must agree to abide by in order to use the blogging service that the user selected; and the second is that each and every user of a website that uses a Terms of Service has been required to agree to the terms in order to use and access the website.<sup>91</sup> Therefore, it is likely that any court would likely find that a decedent’s

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<sup>86</sup> See *id.*

<sup>87</sup> See *id.*; see also *See Who Owns Your E-Mails?*, BBC NEWS, Jan. 11, 2005, available at [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/4164669.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/4164669.stm).

<sup>88</sup> See discussion *infra* Part III.

<sup>89</sup> WordPress.org Privacy Policy, available at <http://wordpress.org/about/privacy/>.

<sup>90</sup> See *Generally Your Book Publishing Coach, Who Owns Your Blog Content*, <http://www.yourbookpublishingcoach.com/who-owns-your-blog-content/> (advising that because of the reach of blog-hosting websites’ terms of service, it is best to maintain a blog through a domain that you actually own).

<sup>91</sup> Wikipedia page on Terms of Service, [http://en.wikipedia.org/wiki/Terms\\_of\\_service](http://en.wikipedia.org/wiki/Terms_of_service).

estate would be just as subservient to the agreed upon Terms of Service as would the decedent be if they were still alive.

The Terms of Service for WordPress, for example, provides that “by submitting Content to Automattic for inclusion on your Website, you grant Automattic a world-wide, royalty-free, and non-exclusive license to reproduce, modify, adapt and publish the Content solely for the purpose of displaying, distributing and promoting your blog.”<sup>92</sup> Additionally, the Terms of Service from WordPress continue on to say that an agreement to the Terms of Service “does not transfer from Automattic to you any Automattic or third party intellectual property, and all right, title and interest in and to such property will remain (as between the parties) solely with Automattic.”<sup>93</sup> This language provides an issue not only for those who planned the digital estate of the decedent, but also for those in charge of the decedent’s estate after they have died because even though the decedent’s wish may be for the content to be treated a certain way, that may not be possible depending on the language contained in the Terms of Service of whichever blog-hosting website the decedent was using. It is important to note though that the issue may be on a smaller scale if the decedent merely wishes for the content posted on the blog to be deleted.<sup>94</sup>

The Terms of Service used by the Google-owned Blogger provide something a little different than the Terms of Service from WordPress. Specifically, Blogger provides that “Google claims no ownership or control over any Content submitted, posted or displayed by you on or through Google services.”<sup>95</sup> Yet, the Terms of Service continue on then to use the same language found in the WordPress Terms of Service:

By submitting, posting or displaying Content on or through Google services which are intended to be available to the members of the public, you grant Google a worldwide, non-exclusive, royalty-free license to reproduce, publish and distribute such Content on Google services for the purpose of displaying and distributing Google services. Google furthermore reserves the right to refuse to accept, post, display or transmit any Content in its sole discretion.<sup>96</sup>

This language seems contradictory of the language used only two sentences earlier in the Blogger Terms of Service, but the effects are likely to be the same. Specifically, it seems evident that even though a person may continue to possess the intellectual property rights in their postings, Google will still have the ability to do whatever they want with the posted content.<sup>97</sup>

These Terms of Service seem to suggest that blog-hosting websites such as WordPress and Blogger can and will continue to use the content that a person posts to their domains, even after they are deceased, unless the decedent has ensured that their digital estate has been properly planned for.<sup>98</sup> As you will see in the next section, this includes providing those in charge of their

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<sup>92</sup> See WordPress.com Terms of Service, *supra* note 89.

<sup>93</sup> See WordPress.com Terms of Service, *supra* note 89.

<sup>94</sup> See WordPress.com Terms of Service, *supra* note 89 (providing that “if you delete Content, Automattic will use reasonable efforts to remove it from the Website, but you acknowledge that caching or references to the Content may not be made immediately unavailable”).

<sup>95</sup> Blogger Terms of Service, available at <http://www.blogger.com/terms.g>.

<sup>96</sup> *Id.*

<sup>97</sup> See generally *id.*; see also Google Privacy Policy, *supra* note 85 and accompanying text.

<sup>98</sup> See generally *id.*; see also WordPress.com Terms of Service, *supra* note 89.

estate after death with proper personal and log-in information, as well as proper instructions for what the decedent wishes to have happen to their digital assets and digital estates after their death.

### III. SUGGESTIONS FOR DEALING WITH DIGITAL ASSETS IN REGARDS TO ESTATE PLANNING

One of the major problems facing estate planners in regards to digital assets is that because estate planners do not know what to do, they are not properly preparing their clients for what will happen to the client's digital assets after their death. This uncertainty is largely a product of the fact that the Internet and all the information and services that it provides is, in comparison to most other things that are a part of our daily lives, new and uncharted territory. Furthermore, the Internet is not slowing down in order to give estate planners time to catch up to all of its flashy new services that it provides to its billions of users. Rather, the Internet continues to expand, and the number of users of e-mail services, blogs, and social networking sites has expanded just as quickly.<sup>99</sup> To try and put the magnitude of how quickly the sites continue to expand consider these numbers: As of July 1, 2010, Facebook had 500 million users and that number continues to grow; adding an estimated 300,000 users a day, Twitter hit 150 million users in April of 2010 after only 4 years of existence; and if all the different e-mail providers were to combine their users the number would reach an estimated, and astonishing, 1.4 billion users.<sup>100</sup> Perhaps most interesting about these numbers is that they continue to grow, and furthermore, the pace at which they are growing has not even started to decline.

This section will provide several possible methods by which estate planners can help to ensure that their client's digital assets and estates are properly planned for in the event of the client's death. This section will look at a number of different alternatives for dealing with digital assets that will range from placing specific instructions as to what will happen to the digital assets in a will, to placing the actual rights to access the different accounts the information contained therein into a trust. It should be noted however, that the different solutions provided for in this section are by no means exclusive.

#### A. *Proper Planning*

Digital assets and estates, just like real and personal property, can be properly planned for before a person's death. These assets are capable of being passed onto a loved one just like any other asset. The problem, however, is that too many people do not simply take the time to do

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<sup>99</sup> See *Growth of Social Networking Sites*, Ezine Articles, Mar. 10, 2010 <http://ezinearticles.com/?Growth-of-Social-Networking-Sites&id=3904963> (providing a look at the history and rapid expansion of the social networking universe).

<sup>100</sup> See 500 Million Stories, <http://blog.facebook.com/blog.php?post=409753352130#> (July 21, 2010, 11:23am); see also Marc Chacksfield, *Twitter Boasts 105 Million Registered Users*, TechRadar.com <http://www.techradar.com/news/internet/twitter-boasts-of-105-million-registered-users-683663?src=rss&attr=all>; see also Mark Brownlow, *8 E-Mail Statistics to Use at Parties*, Email Marketing Reports <http://www.email-marketing-reports.com/iland/2009/08/8-email-statistics-to-use-at-parties.html>.

this.<sup>101</sup> Therefore, it is imperative that estate planners provide their clients with a proper plan, regarding the client's digital assets and estates, in order to help ensure that the client's entire digital estate can be planned for.

The first step is to have the client take an inventory of all of their different online accounts.<sup>102</sup> A person can aid his family and any designated successors, in regards to digital assets, by simply preparing a list of assets and then leaving the prepared list in a place that is easy for them to obtain.<sup>103</sup> While it is advisable for a person to take inventory of all things that have a digital presence (this would include any hardware, software, file structures, and work information) the focus of this comment will remain with those items that are based on the Internet (e.g. blogs, accounts, and e-mails).<sup>104</sup> "The more detailed and accurate the better, of course, but even a small start can be of help."<sup>105</sup>

An additional part of the inventory process is that the client must also provide the questions and answers to any security questions they may have created.<sup>106</sup> This helps to prevent against being unable to access an account because a password was unknowingly changed.<sup>107</sup> By providing the correct answers to any security questions, the client will be able to better ensure that their accounts can be accessed and that their wishes will be complied with.<sup>108</sup>

Once an inventory of the digital assets has been compiled, the estate planner and client then need to appoint the appropriate person to handle the digital estate. One option for doing this is to nominate a "digital executor".<sup>109</sup> It will be the duty of the digital executor to ensure the proper transfer of the decedent's accounts after their death.<sup>110</sup> It will be the digital executor who receives the listed inventory of the different digital assets, and it the digital executor who will be responsible for ensuring that the wishes of the decedent are met.<sup>111</sup> If the client decides that she wishes to include her digital assets into her will then it is imperative that the solicitor who draws up the will is aware of whom the digital executor will be.<sup>112</sup> While making sure that a client has inventoried all of their digital assets and appointed a digital executor certainly puts a person on the path to protecting their digital estate after their death, those steps really on get a person half way home. It is the next step in the process that is by far the most important, and probably the most uncertain as well.

### *B. Giving the Keys to the Estate*

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<sup>101</sup> See David Kennedy, *Estate Planning for Your Digital Assets*, Law Practice Today, Mar. 2010 <http://www.abanet.org/lpm/lpt/articles/ft03103.shtml>.

<sup>102</sup> See *id.*; see also Maija Palmer, *How to Pass On Your Passwords*, Financial Times, Apr. 14, 2010 <http://www.ft.com/cms/s/0/42bf71a0-4809-11df-b998-00144feab49a.html>.

<sup>103</sup> See Kennedy, *supra* note 101.

<sup>104</sup> For a discussion of hardware, software, file structures, and work information see Kennedy, *supra* note 101.

<sup>105</sup> See Kennedy, *supra* note 101.

<sup>106</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>107</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>108</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>109</sup> See Palmer, *supra* note 102.

<sup>110</sup> See Palmer, *supra* note 102.

<sup>111</sup> See Palmer, *supra* note 102.

<sup>112</sup> See Palmer, *supra* note 102.

In order to enter a home or start a car a person will undoubtedly require a key. The key grants power and access, but without it a person might very well be left out in the cold. Digital assets are no different. Without proper instruction and without the proper usernames and passwords (i.e. the keys) it may be difficult to not only identify any potential digital assets, but to properly access them as well.<sup>113</sup> This begs the question of how a person properly passes on the keys to their digital estate.

One of the more simple ideas that an estate planner can advise their client to do is to keep a list of the different usernames and passwords that they use.<sup>114</sup> It would also be useful for a client to include in this a list of instructions for how the decedent wishes to have their digital estate handled (i.e. all the different accounts) after their death.<sup>115</sup> Given the constant growth and availability of the internet and all of its resources it is not uncommon for a person to have several different accounts with several different websites, and thus it is not uncommon for a person to have different a different username and password for each individual account.<sup>116</sup> Therefore, by simply keeping a list of the different accounts, usernames, and passwords and by making it available to loved ones upon their death a person will give themselves a better chance of ensuring that her digital assets and estate will be properly cared for in the event of their death. By advising clients to provide their families with instructions on how to locate and access digital assets, an estate planner can help the client avoid a great deal of inconvenience, stress, and costly delays.<sup>117</sup> However, this alone will unlikely be enough to ensure that a client's digital estate is properly cared for after their death.<sup>118</sup> Consequently, further options for assisting clients in planning for their digital assets and estates must be explored.

One way to accomplish this is to provide a "letter to your executor."<sup>119</sup> This is "an informal letter, easily revised, that lists important URLs, user names, passwords, security codes, and other information needed to access online accounts."<sup>120</sup> This letter can also provide specific instructions to the executor as to how the digital assets are to be handled.<sup>121</sup>

An additional tool that can be used to ensure that the proper usernames and passwords are passed on for any and all Internet accounts is to use a "password vault."<sup>122</sup> These are available for simple download via several websites. The crux of these vaults is that a person can store any number of usernames and passwords into the vault, and the vault itself is then protected by one single "master password."<sup>123</sup> Thus, the client would only need to supply his family with the

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<sup>113</sup> Joseph M. Mentrek, *Estate Planning in a Digital World*, 19 OHIO PROB. L.J. 195 (May/June 2009).

<sup>114</sup> See Palmer, *supra* note 102; see also Mentrek, *supra* note 113 (providing that it is better to maintain an electronic list as opposed to a written list because the electronic list is more likely to continuously maintained, while a written list is more easily lost or difficult to maintain).

<sup>115</sup> See Palmer, *supra* note 102.

<sup>116</sup> See Coombes, *supra* note 26.

<sup>117</sup> See Palmer, *supra* note 102.

<sup>118</sup> See Kennedy, *supra* note 101.

<sup>119</sup> Mentrek, *supra* note 113.

<sup>120</sup> Mentrek, *supra* note 113.

<sup>121</sup> See Mentrek, *supra* note 113.

<sup>122</sup> See Mentrek, *supra* note 113.

<sup>123</sup> See Mentrek, *supra* note 113.

master password, and then his family will be granted access to all important usernames and passwords regardless of how often the decedent may have changed them.<sup>124</sup>

There are also a number of different online alternatives that offer an array of different services to estate planners and their clients. An example of one of these websites is Entrustet. Entrustet offers a wide range of services including helping a person to organize his digital assets, determining where a person's digital assets will go after his death, and assisting a person's loved ones in following the wishes of the deceased in regards to the deceased's digital assets and estates.<sup>125</sup> Once a person signs up for Entrustet, the program basically takes the client through the process of adding, via a wizard, any amount of different online accounts by dividing them into different categories such as social networking and e-mail accounts.<sup>126</sup> Then upon completion of the wizard the client will have accumulated all of her passwords for all of her web-based accounts, as well as provided specific instructions for each of the individual accounts, and she will have also supplied contact information for the heirs to the individual accounts as well as the digital executor.<sup>127</sup> Once a person has included all of the necessary information she will be encouraged to find a local practicing estate planner who can take the summary of her instructions and help to build them into a working document for her.<sup>128</sup>

Entrustet also provides a "directory of attorneys" which assists persons in finding estate planners in their localities.<sup>129</sup> Realizing that working with digital assets in terms of estate planning is a relatively new idea, the lawyers at Entrustet also offer to provide a form of certification for the estate planners so that it can be ensured that the estate planner understands how to properly plan for digital assets, and thus ensuring that the digital assets will be properly dealt with.<sup>130</sup> It should also be noted that Entrustet is only one of a number of different websites that offer similar services.<sup>131</sup> If this is the path that an estate planner and their client wish to take then they would be wise to explore the other options that are available.

While these online websites do offer an assortment of useful services, there also may be a few fundamental issues that hamper their ability to ensure the proper distribution and treatment of these digital assets.<sup>132</sup> When a person devises something through a will, she is not only giving a person possession of the item (be it real or personal property) she is also passing on the legal right of ownership to the devisee.<sup>133</sup> However, the products offered by these online websites may actually turn out to be somewhat defective.<sup>134</sup> While the websites maintain to transfer the rights upon death, in actuality the only thing that these websites do is grant a person the ability to

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<sup>124</sup> See Mentrek, *supra* note 113.

<sup>125</sup> Any further information regarding Entrust can be found at [www.entrustet.com](http://www.entrustet.com)

<sup>126</sup> See Telephone Interview with Jesse Davis, founder of [www.entrustet.com](http://www.entrustet.com), and Nathan Dosch, in-house estate planner for Entrustet.com and estate planning and tax attorney with Neider & Boucher (September 22, 2010).

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See *id.*

<sup>130</sup> See *id.*

<sup>131</sup> For an expanded list of those websites that provide services regarding digital assets after death see <http://www.thedigitalbeyond.com/online-services-list/>.

<sup>132</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>133</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>134</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

access the different accounts. In fact, it is probable more akin to a digital repository, but in effect there is actually no legal right for someone to actually use, access, or possess the accounts, and this has the potential to create a lot of liability for both the estate and the beneficiaries.<sup>135</sup> Unfortunately these websites may not be considering the difference between merely obtaining the username and passwords, and actually having the legal right to use those usernames and passwords.<sup>136</sup>

Perhaps the biggest problem with these websites, however, is that the websites are trying to treat digital assets as personal property when in fact digital assets are not personal property but are instead intellectual property.<sup>137</sup> Additionally, in the case of many of these accounts a person has merely been granted a license to establish an account with the website, and, as was noted earlier, a license by definition expires upon death.<sup>138</sup> This creates an issue for merely providing instructions for digital assets into a will because wills deal with the passing on of items that survive death.<sup>139</sup> “Whatever you put into a will has absolutely no bearing and no rights over anything that doesn’t exist after the death of the individual.”<sup>140</sup>

Additionally, the crux of the service provided by these different websites is that they really provide for a separate memorandum to be included in the will, but there may be state laws (or a lack of state laws) that do not allow for the use of a separate memorandum with a will.<sup>141</sup> “If your particular state does not authorize a separate writing memorandum for a will, then websites like Entrustet or Death Switch are not going to work because you are amending the will without any formality.”<sup>142</sup> Therefore, while these websites might be an excellent tool for creating an inventory of a client’s different accounts, usernames, and passwords, they may not be a suitable alternative for ensuring that the rights to access and use these accounts have been passed on properly.

### C. A More Workable Alternative?

When you consider the fact that the license to access and use the accounts expires upon death, then it stands to reason that a vehicle that survives death must be used in order to ensure that the actual rights to access and use the accounts are passed on.<sup>143</sup> Therefore, one of the vehicles that estate planner should consider using is a trust.<sup>144</sup> Of course there is still the issue of making sure that the assets are properly placed into a trust and that the assets are placed into the trust before the client dies, otherwise those assets cease to exist.<sup>145</sup>

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<sup>135</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>136</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>137</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>138</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>139</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41. For a more in depth discussion of the possibility of using wills as a way of passing on digital assets see Part III.D.

<sup>140</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>141</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>142</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>143</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>144</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>145</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

Mr. Goldman suggests setting up a trust in which to store the usernames and passwords for all the different accounts the client has set up, so that when a person opens any new accounts in the future that the person can name the trust as the owner of the account.<sup>146</sup> It could potentially be as simple as a person putting the word “trustee” after his last name in order to make it obvious that these assets are part of a trust.<sup>147</sup> By putting the assets into a trust the creator of the account ensures that the account not only survives his death, but that the legal right to access and use the account also passes on to the beneficiary of the trust.<sup>148</sup> There is also the possibility that trusts could be capable of working with websites such as Entrustet assuming that a state does not require any formality when alter a trust.<sup>149</sup> If, however, the state in which the client lives does require certain formalities in altering either a will or a trust then those websites will not work in either case.<sup>150</sup>

Perhaps the biggest issue facing trusts, both in regards to digital assets as well as estate planning in general, is that after the trust has been set up a person will fail to update them at any time in the future.<sup>151</sup> Therefore, the easier it is for a person to access and modify the trust the more likely they are to actually update it whenever it becomes necessary to do so.<sup>152</sup> As a result, Mr. Goldman and his firm are currently developing software that would enable a person to create the required beneficiary designations on the fly.<sup>153</sup> The feeling is that if a person does all of the required steps in updating her trust from the comfort of her own home then she will be much more likely to keep the trust up to date, thus ensuring that all of her digital assets are properly planned for in the unfortunate event of her death.<sup>154</sup> The most important thing to keep in mind, however, is that the trust must still comply with all of the formalities required by each individual state.<sup>155</sup>

#### *D. A Note on Wills*

One of the few constants seen through the different articles discussing digital assets is that many of the authors suggest putting digital assets into a will.<sup>156</sup> In fact, the lawyers at Entrustet recently became the first people in North America to execute a will that included digital assets.<sup>157</sup> This advice, however, may be too simple, and may not fully protect a client’s digital assets.

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<sup>146</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>147</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>148</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>149</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>150</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>151</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>152</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>153</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>154</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>155</sup> See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>156</sup> See *Planning Your Digital Estate: Dealing With Online Data After Death*, *supra* note 32; see also Palmer, *supra* note 102.

<sup>157</sup> *Entrustet Founders Execute North America’s First Wills That Incorporate Digital Assets*, PRWeb.com, May 24, 2010 <http://www.prweb.com/releases/2010/05/prweb4029134.htm>.

For starters a will is a public document, which means that any person technically has access to view the document.<sup>158</sup> This means that a will is likely not the proper, or most secure, way for passing on important usernames and passwords.<sup>159</sup> Additionally, and as was discussed earlier, a will really only serves to deal with property that survives death, and assuming that persons are truly only granted a license that grants them access to use the account, this further provides weight to the argument against using wills as a vehicle for passing on digital assets.<sup>160</sup>

The actual cost of creating and maintaining a will is also something that cannot be ignored. For one thing, having a lawyer create a proper working will for a client is a costly venture.<sup>161</sup> Then, when you consider the likelihood that a person will change his username, his password, or both over the course of his lifetime it simply becomes “too costly and burdensome for clients to amend their wills every time they change their passwords.”<sup>162</sup> Therefore, advising a client to provide for his digital assets in his wills may not be the proper advice.

#### IV. THE FATE OF THE ILL-PREPARED

##### A. *Post-Mortem Identity Theft*

Proper preparation prevents poor performance, and that mantra remains true even when discussing digital assets and estates. An improperly planned for digital estate can lead to any number of digital assets remaining open, viewable, and even worse, accessible. In the age of online banking statements, credit card accounts, and payment services such as PayPal identity theft has become a growing problem for persons of any pulse rate, or even a lack thereof.<sup>163</sup> Indeed it makes one feel dismayed at the very thought of a person who would cause an already grieving family even more heartache by stealing the identity of the deceased.<sup>164</sup> Unfortunately, that is the state of the world today, and it is the quintessential reason of why it is vitally important that estate planners ensure that a person’s digital estate has been properly planned for. Listed on any number of web-based accounts, in particular social-networking sites, a potential identity thief could find a decedent’s name, birthday, address, and other information an identity thief would need to open up a credit card account in the decedent’s name.<sup>165</sup> However, with proper planning (i.e. providing loved ones with the necessary passwords, usernames, and security code answers) post-mortem identity theft can be avoided, and an already grieving family can avoid more sorrow.

##### B. *Post-Mortem Content Theft From the Deceased’s Blogs*

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<sup>158</sup> See Mentrek, *supra* note 113.

<sup>159</sup> See Mentrek, *supra* note 113.

<sup>160</sup> See Mentrek, *supra* note 113.

<sup>161</sup> See Mentrek, *supra* note 113.

<sup>162</sup> See Mentrek, *supra* note 113.

<sup>163</sup> See Todorova, *supra* note 48.

<sup>164</sup> See Todorova, *supra* note 48.

<sup>165</sup> See Todorova, *supra* note 48.

As soon as an author publishes any work onto the blog that he owns, that content becomes the legal copyright of the author.<sup>166</sup> This effectively means that no person would have the legal right to re-publish another author's work without first getting their consent. It should also be noted that copyrights last for the entirety of a person's life and then extends an additional 70 years after a person's death.<sup>167</sup> This provides another essential reason for estate planners to ensure that a client's digital estate is properly planned for because if it is not then any currently posted blog content could become a victim to content theft. Therefore, estate planners and clients need to ensure that they have properly passed on any instructions and legal rights to access any blogging accounts (either through a personally owned domain name or through a blog-hosting website). If a decedent's loved ones and heirs are unaware of the existence of any blogs and any content therein then this leaves open the possibility of another blogger improperly copying and posting of another bloggers legally protected content. This, in theory, could lead to the improperly possessing party gaining monetarily from the deceased's copyright material. Of course, this can more easily be avoided so long as the estate planner and client work to ensure that a person's digital estate, including any blog postings, is properly planned for.

## V. CONCLUSION

As the Internet continues to grow and expand, so does the need for estate planners who are able to assist their clients in ensuring that the client's digital assets and estate are properly planned for. Unfortunately, however, despite the increasing popularity of web-based accounts there has still been little to no legislation regarding this area of estate planning.<sup>168</sup> In fact, it was only recently that Oklahoma passed the first bit of legislation aimed at assisting estate planners and executors in dealing with the decedent's digital assets and estate.<sup>169</sup> Essentially, the bill works to assume that a person's social networking account (e.g. a person's Facebook or Twitter account) is "the property of the person who creates and uses the account."<sup>170</sup> While it is admitted that this law might conflict with some of the service agreements used by the different social-networking sites, the real goal of the law was to make people think about those things that they are leaving behind on the numerous web-based accounts that people possess.<sup>171</sup>

While the new law from Oklahoma might not be perfect, it might finally be a step in the right direction for estate planners who are currently left stumbling through the social-networking jungle without a compass. Until the time that more states have provided legislative guidance estate planners will simply have to do their best to assist their clients in properly protecting and passing on their digital assets and estates. For now all that estate planners can do is use the currently available legislation in their state, which is unlikely to mention or provide in any way

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<sup>166</sup> See Gary Illyes, *Copyright, Blogging, and Content Theft*, ProBlogger Feb 7, 2009, available at <http://www.problogger.net/archives/2009/02/07/copyright-blogging-and-content-theft/>.

<sup>167</sup> See 17 U.S.C. § 302 (1976).

<sup>168</sup> See generally Telephone Interview with David M. Goldman, Esq., *supra* note 41.

<sup>169</sup> See *New Oklahoma Law Puts Control of Deceased's Social Media Accounts in Estate Executors*, BUSINESS & LAW, Dec. 2, 2010, <http://www.ibtimes.com/articles/88106/20101202/new-oklahoma-law-puts-control-of-deceased-s-social-media-accounts-in-estate-executors.html>.

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

<sup>171</sup> See *id.*; see also discussion *supra* part II.

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for digital assets and estates, to ensure that they not only grant access to the decedent's digital assets, but that they also provide the beneficiaries the legal right to use those accounts.