

An Executor's Duty Toward Digital Assets



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In today's world, you need to assume that the estate contains digital assets and you need to seek them out.

INDIVIDUALS USE the Internet as a medium to keep in touch with family and friends, store information, pay bills, share photographs, and for countless other uses.¹ The primary form of modern communication is email, not handwritten letters or phone calls.² Assets that were once discoverable by looking through a person's papers or filing cabinet can now exist solely in cyberspace,³ and they can have substantial value. Blogs and domain names have sold for millions of dollars,⁴ and fortunes have been generated solely through the participation in virtual games.⁵

¹ Victoria Blachly & Michael Walker, *Virtual Assets*, ST003 ALI-ABA 175, 177 (2011).

² *Id.*

³ Colin Korzec & Ethan A. McKittrick, *Estate Administration in Cyberspace*, *Trusts & Estates*, Sept. 2011, at 61, 61.

⁴ See Jeff Bercovici, *AOL Buys the Huffington Post for \$315 Million*, *Forbes* (Feb. 7, 2011, 12:38 a.m.), <http://www.forbes.com/sites/jeffbercovici/2011/02/07/aol-buys-the-huffington-post-for-315-million/> (claiming the Huffington Post Blog was purchased for \$315 million).

⁵ Rob Hof, *Second Life's First Millionaire*, *Bloomberg Bus. Wk.* (Nov. 26, 2006), http://www.businessweek.com/the_thread/techbeat/archives/2006/11/second_lifes_fi.html (revealing the first individual

How should executors deal with the emergence of new digital property?

This article discusses exclusively an executor's duty toward digital assets, but all fiduciaries, such as conservators, agents, and trustees, face challenges when dealing with digital assets. Executors have a fiduciary duty toward digital assets, and this article explores how an executor should satisfy this duty and the potential impediments to doing so.

WHAT ARE DIGITAL ASSETS? • One of the difficulties in managing digital assets is that there is not a universal definition.⁶ Contributing to that problem is the fact that digital assets themselves are in a state of constant evolution.⁷ Email, social media accounts, blogs, and even some virtual games have the potential to be deemed property.⁸ People are creating digital assets with button clicks or keyboard strokes, possibly without even realizing that they could be creating property.

Regardless of the precise definition, experts agree that digital assets are, at minimum, information stored in an intangible medium on computers or other computer related technology.⁹ They are accessed through a tangible piece of property such as a computer, hard drive, smartphone, or third-party server,¹⁰ and they often require a password in order

to generate \$1 million in revenue from their participation in the virtual game *Second Life*).

⁶ Gerry W. Beyer, *Estate Planning in the Digital Age*, 1 (Apr. 21, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166422.

⁷ See Jamie B. Hopkins, *Afterlife in the Cloud: Managing a Digital Estate*, 5 *Hastings Sci. & Tech. L.J.* 210, 211-12 (Summer 2013).

⁸ Korzec & McKittrick *supra* note 3 at 61, 62..

⁹ Hopkins, *supra* note 7.

¹⁰ See *id.* at 212.

to be accessed.¹¹ They can be categorized as personal, social media, financial, and business.¹²

ARE DIGITAL ASSETS VALUABLE? • Internet users in the United States are estimated to own approximately \$55,000 worth of digital assets per user,¹³ but digital assets such as pictures and videos also represent significant sentimental value to the loved ones of a decedent.¹⁴ The monetary value and the sentimental value of digital assets are both being recognized by estate planners,¹⁵ and they are beginning to offer clients advice regarding how to plan for the disposition of these digital assets.¹⁶

Personal Digital Assets

Traditionally, photo albums and letters were stored in boxes in closets, but technology has transformed them from their traditional physical form in to an intangible medium stored in cyberspace.¹⁷ Users create free online email accounts and use those accounts for any range of correspondence, personal and business. Users often receive banking statements, notifications of online subscriptions, and notifications of pending sales in online auction houses only through their email accounts.¹⁸ While

¹¹ *Id.*

¹² Gerry W. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 *NAELA J.* 135, 137 (2013).

¹³ *McAfee Reveals Average Internet User Has More Than \$37,000 in Underprotected Digital Assets*, MCAFEE (Sept. 2011), <http://www.mcafee.com/us/about/news/2011/q3/20110927-01.aspx> (asserting that users are unaware of the value of their digital property).

¹⁴ Beyer & Cahn, *supra* note 8, at 140.

¹⁵ Gerry W. Beyer & Naomi Cahn, *When you Pass On, Don't Leave the Passwords Behind*, 26 *Prob. & Prop.* 40, 41 (Jan./Feb. 2012).

¹⁶ *Id.*

¹⁷ Hopkins, *supra* note 7, at 217.

¹⁸ James D. Lamm, Remarks at the Annual Heckerling Inst. on Est. Plan., *Digital Death: What to Do When Your Client Is Six Feet Under, But His Data Is in the Cloud*, 35 (Jan. 17, 2013) (outline available by contacting author at James.Lamm@gpmlaw.com).

the monetary value of personal digital assets usually less than an individual's other more liquid assets, the sentimental value of those same assets may be priceless to a decedent's family.¹⁹

Social Media Assets

Social media accounts like Facebook and Twitter are growing exponentially.²⁰ Information stored in Facebook messages or pictures can provide families with a glimpse into their loved one's life that may be unavailable in any other method.²¹ Like personal digital assets, the monetary value of one's social media accounts will be nominal at best, but the information contained could be paramount to the families of a decedent.²²

Financial Accounts

Financial accounts come in various forms and they include accounts where money is exchanged online such as online bill payments or other online financial accounts.²³ Online transfer services, such as PayPal, provide users with a venue to transfer funds from one individual to another without writing a check or swiping a debit card.²⁴ PayPal alone has 132 million active accounts and facilitates approximately \$7.8 million in transfers daily.²⁵ Online currencies also represent a form of financial digital

assets.²⁶ Bitcoins, for example, are an exclusively online currency that are acquired by creation using a complex economic algorithm or are purchased through online exchanges.²⁷ The overall value of all bitcoins being traded is estimated to be above \$1 billion.²⁸ Financial assets also come in the form of computer accounting programs that are designed to make it easier for individuals to store personal financial records solely on their computers.²⁹ Those records are necessary to administer an estate, especially when the decedent did not keep hard copies of records.³⁰

Business Accounts

Traditional businesses are flocking to the Internet to meet the public's expectation that they have a Web presence, and they are innovating ways to facilitate Web interaction with customers.³¹ Not only can traditional businesses be found online, but new types of virtual businesses are emerging as well. Blogs, for instance, offer individuals a medium to project their opinions and advice to the world via the Internet through daily entries on specific topics. Blogs could be classified as personal assets akin to a diary, but they can also generate a steady revenue stream.³² Bloggers can sell ad space on their pages or incorporate product promotions into their blog entries, or they can create an eBook out of their most popular blog entries.³³ In extreme circum-

¹⁹ See Beyer & Cahn, *supra* note 12, at 137.

²⁰ *Twitter Statistics*, Statistic Brain (May 7, 2013) <http://www.statisticbrain.com/twitter-statistics/> (stating that Twitter has 554,750,000 active registered users with 135,000 new users signing up daily).

²¹ See Maria Perrone, Comment, *What Happens When We Die: Estate Planning of Digital Assets*, 21CommLaw Conspectus 185, 196-99 (2012) (summarizing cases where loved ones sought content preserved on social media accounts).

²² *Id.*

²³ Beyer & Cahn, *supra* note 12, at 138.

²⁴ *About PayPal*, PayPal, <https://www.paypal-media.com/about> (last visited August, 2013) (describing PayPal's services and the extent to which they are used).

²⁵ *Id.*

²⁶ Richard Satran, *How Did Bitcoin Become a Real Currency?*, U.S. News (May 15, 2013), <http://money.usnews.com/money/personal-finance/articles/2013/05/15/how-did-bitcoin-become-a-real-currency> (discussing the creation and use of bitcoins).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Lamm, *supra* note 18, at 37.

³⁰ *Id.*

³¹ Hopkins, *supra* note 7, at 214-15.

³² See, e.g. Lauren Elizabeth, *The Lauren Elizabeth*, <http://www.thelaurenizabeth.com> (last visited August 2013).

³³ *Id.*

stances, they may even be able to market their blog content into a movie or book.³⁴ The value of the blog is often directly related to the blog's followers and content generated by the blogger, so when the blogger passes away, it is likely their blog will no longer have substantial monetary value. That being said, outstanding revenues may need to be collected or the family of a decedent may try to market the blog content. The blogger's content may have at least sentimental value for family and friends.³⁵

Blogs have two distinct property interests belonging to the blogger: the copyrightable content and the domain name.³⁶ Domain names can become inactive if they are not renewed, and when they are inactive for up to 12 months, they can be recycled and resold without notification or the knowledge of the original owner.³⁷ Domain names likely have nominal value, but they could represent a significant asset of a decedent.³⁸

PROBLEMS EXECUTORS FACE TODAY •

Someone well acquainted with the duties of an executor might logically assume that an executor has the right to access all of the decedent's assets, but an executor faces a plethora of challenges when accessing digital assets.³⁹ Even when an executor takes possession of a decedent's tangible technology devices, they still face the challenge of accessing the stored digital assets if the tangible device is pro-

tected by a password or if the files themselves are encrypted.⁴⁰ A common solution presented by estate planners is for individuals to leave behind a list of digital assets and the associated passwords with instructions that their executors and/or loved ones use the information to access their digital assets and accounts.⁴¹ Even with the decedent's authorization, accessing a decedent's digital assets through the use of their existing passwords could potentially violate federal law.⁴²

The Potential Criminal Liability Under The Computer Fraud And Abuse Act

The Computer Fraud and Abuse Act (the "CFAA") fines or even imprisons persons who are convicted of "access[ing] a computer without authorized access or exceed[ing] authorized access."⁴³ Terms of Service Agreements ("TOSAs") sometimes state that no one but the registered user is authorized to access the digital asset,⁴⁴ and courts have held that a mere violation of a website's TOSA can be a violation of the CFAA.⁴⁵ However, the interpretation and applicability of the CFAA varies and is still being solidified.⁴⁶ The potential for an executor's violation of the CFAA centers around whether or not violation of a website's TOSA indeed violates the "without authorized access or exceeds authorized access" portion of the CFAA.⁴⁷

³⁴ See Lamm, *supra* note 18, at 56 (stating that a movie based on one blogger's experience grossed over \$129 million).

³⁵ See Perrone, *supra* note 21, at 196-99.

³⁶ Lamm, *supra* note 18, at 56.

³⁷ *What Happens if my Protected Domain Name Expires*, Go Daddy Support (May 21, 2012), <http://support.godaddy.com/help/article/1289/what-happens-if-my-protected-domain-name-expires>.

³⁸ Alyson Shontell, *The 25 Most Expensive Domain Names of All Time*, Bus. Insider (Dec. 23, 2012, 8:03 AM) <http://www.businessinsider.com/the-20-most-expensive-domain-names-2012-12?op=1> (stating that sex.com sold for \$13,000,000 in 2010, and fund.com reportedly sold for \$9,999,950 in 2008).

³⁹ Lamm, *supra* note 18, at 7-17.

⁴⁰ *Id.* at 8-9.

⁴¹ Beyer & Cahn, *supra* note 15, at 42.

⁴² Korzec & McKittrick, *supra* note 3, at 61.

⁴³ Computer Fraud & Abuse Act, 18 U.S.C. §1030(a) (2) & (c) (2008).

⁴⁴ Lamm, *supra* note 18, at 10.

⁴⁵ *Ajemian v. Yahoo!*, 987 N.E.2d 604, 613-14 (Mass. App. Ct. 2013) (holding that the probate court had jurisdiction over the dispute regardless of the provision found in the terms of service agreement).

⁴⁶ See Lamm, *supra* note 18, at 9-11.

⁴⁷ *Id.* at 10-11.

The CFAA contains no specific exemption or authorization for executors attempting to access a decedent's digital assets.⁴⁸ Proposed revisions to the CFAA have been rebuffed by the Department of Justice whose representatives have gone on record as interpreting the CFAA to allow the government to determine whether someone "exceeds authorized access" based solely on the definition found in the associated TOSA.⁴⁹ Consequently, it is foreseeable that an executor could face criminal liability under the CFAA by using a decedent's passwords or by accessing a decedent's computer files,⁵⁰ presenting a potentially huge impediment to fiduciary access to digital assets.

The Stored Communications Act

The Stored Communications Act (the "SCA") protects the privacy interest of a user's stored communications by forbidding access by unauthorized users.⁵¹ However, service providers may give access to unauthorized users if one of the explicitly listed exceptions apply.⁵² The SCA, like the CFAA, does not specifically provide for or deny fiduciary access to the stored communications.⁵³

Adding to the uncertainty surrounding "unauthorized access" under the SCA, a jury recently awarded \$450,000 in damages for unauthorized access of a user's email account.⁵⁴ In *Cheng v. Romo*,

a physician gave his co-worker his password to his personal email account with the implied understanding that the co-worker would use it for a limited, business purpose.⁵⁵ The co-worker accessed the physician's email years later using the password for an un contemplated use, and the physician sued for damages.⁵⁶ The jury's damage award seems to confirm that the determination of whether or not access is authorized or unauthorized is fact specific.⁵⁷ Consequently, executors who utilize passwords that have been left behind by a decedent could be liable for damages if their use is deemed "unauthorized,"⁵⁸ but conversely, a court may find the same executor as having "authorized access" depending on the specific circumstances.

The relationship between a service provider's adherence to the SCA and an executor's access to a decedent's digital assets where passwords were not left behind was tentatively explored in *In re Facebook*.⁵⁹ A family of a decedent approached Facebook for access to the decedent's account in order to gain a better understanding of the decedent's apparent suicide.⁶⁰ The court held that in order to uphold the privacy protections instilled by the SCA on service providers, civil subpoenas in general may not compel providers like Facebook to produce the records of a decedent.⁶¹ The court pointed out that its ruling did not prevent Facebook from revealing the records, an action permitted by the SCA.⁶² The court then suggested that Facebook could choose

⁴⁸ See Computer Fraud & Abuse Act, 18 U.S.C. §1030 (2008).

⁴⁹ Richard Downing, Deputy Section Chief, Dep't. of Justice, Statement before the House Judiciary Subcomm. on Crime, Terrorism and Homeland Security (Nov. 15, 2011) (available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-1111151.html>).

⁵⁰ See Lamm, *supra* note 18, at 10-11.

⁵¹ See Stored Communications Act, 18 U.S.C. §2702 (2008).

⁵² See Orin Kerr, *A User's Guide to the Stored Communications Act, and A Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1223 (2004).

⁵³ *Id.*

⁵⁴ Jury Verdict Form at 1-3, *Cheng v. Romo*, No. 11-cv-10007-DJC, 2013 WL 2245312 (D.Mass. Apr. 23, 2013).

⁵⁵ *Cheng v. Romo*, No.11-10007-DJC, 2012 WL 6021369, at *1-3 (D.Mass. Nov. 28, 2012).

⁵⁶ *Id.*

⁵⁷ See generally *id.*

⁵⁸ Lamm, *supra* note 18, at 11.

⁵⁹ *In re Facebook*, No. C 12-80171 LHK (PSG), 2012 WL 7071331, at *1 (N.D. Cal. Sept. 20, 2012).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

whether or not the decedent's family had standing to "authorize" access on the decedent's behalf, but declined jurisdiction over the issue.⁶³ Bearing in mind that this is merely one federal district court's interpretation of the SCA, the ambiguity now surrounding the interpretation of the SCA has arguably led to a variety of fiduciary access policies among service providers.⁶⁴

LEGISLATION ADDRESSING DIGITAL ASSETS • Proposed Uniform Fiduciary Access To Digital Asset Statute

The Uniform Law Commission is attempting to clarify of the ambiguities of the CFAA and the SCA, and it has created a committee tasked with drafting a Uniform Fiduciary Access to Digital Asset Act (the "Act"). The Act promises to clear current ambiguities with respect to digital assets and gives fiduciaries the requisite "authorized access" required under both the CFAA and the SCA.⁶⁵ That being said, the committee still faces the challenges of finalizing the Act and its subsequent uniform adoption by the 50 states. Furthermore, the "authorized access" issues arising under the CFAA and the SCA are issues of federal law, and the Act proposes to alter state law.⁶⁶

Existing State Legislation

Some states have recognized the growing problem of a fiduciary's lack of access to digital assets and have directly addressed the issue via state stat-

utes.⁶⁷ The statutes can be divided into three generations seemingly based on the technology available at the time of enactment or proposal.⁶⁸ California, Connecticut, and Rhode Island were the first states to address the issue, and all three statutes focus exclusively on a fiduciary's access to email accounts.⁶⁹ Indiana followed, but extended the access to include records stored electronically.⁷⁰ The third generation of state statutes are being proposed at the writing of this article, and they take into consideration social networking sites.⁷¹ While the statutes are progressive, one criticism is that most do not address future technological developments that will inevitably occur.⁷²

HOW DOES AN EXECUTOR MANAGE DIGITAL ASSETS? •

An executor is charged with the responsibility of settling a decedent's estate which entails discovering, protecting, and facilitating the transfer of all of the decedent's property.⁷³ To that end, it is not uncommon for an executor to physically go through a decedent's file cabinet, records, safe deposit box, or even the deceased's personal effects.⁷⁴ Generally, if a decedent had the right to do something with his or her property an executor has that right as well,⁷⁵ but how do these duties translate to the digital world?

If there are reasonable steps available to an executor to ascertain whether or not a decedent has digital assets or if it is established that a decedent does have digital assets, an executor is obligated to

⁶³ *Id.*

⁶⁴ See Perrone, *supra* note 21, at 190-92.

⁶⁵ See *Draft Fiduciary Access to Digital Assets*, NAT'L. CONF. OF COMM'RS. OF UNIF. STATE LAWS, 9-11 (Feb. 2013), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013feb7_FADA_MtgDraft_Styled.pdf.

⁶⁶ Beyer & Cahn, *supra* note 12, at 152-53.

⁶⁷ Beyer & Cahn, *supra* note 12, at 142-46 (summarizing various state statutes addressing digital assets).

⁶⁸ *Id.*

⁶⁹ *Id.* at 143.

⁷⁰ *Id.* at 144.

⁷¹ *Id.* at 144-46.

⁷² *Id.* at 146-47.

⁷³ Unif. Probate Code §3-709 (2010).

⁷⁴ See Korzec & Mckittrick, *supra* note 3, at 61.

⁷⁵ See *id.*

take those steps reasonably necessary to discover and marshal those assets in an effort to administer an estate.⁷⁶ If the executor does not take these steps, she risks breaching her fiduciary duty.⁷⁷ The estate administration of digital assets may be made easier if a decedent contemplated digital assets in their estate plan,⁷⁸ but even if digital assets were not contemplated, it is necessary for an executor to seek them out.

The following is an accumulation of suggested methods that would be reasonable for an executor to use while settling an estate. The intent is not to create an exhaustive list of solutions; rather, it is meant to illustrate the reasonableness and simplicity of the steps available to an executor to avoid potential liability under the current laws.

Step One: Marshal The Assets

An executor has the duty to marshal all of a decedent's assets in order to facilitate the transfer of those assets in accordance with the decedent's wishes or state intestacy laws.⁷⁹ The duty to marshal extends to all the property owned by a decedent.⁸⁰ Where applicable, an executor should include all assets of an estate on the decedent's estate tax return including digital and non-digital assets.⁸¹ If an executor does not marshal all of the assets of the estate, she risks filing an incomplete inventory or estate tax return or losing the value of the asset all together resulting in potential liability to the executor for penalties or fees associated with not reporting the asset.

Another consequence of not marshaling a decedent's digital assets is that the assets could be lost

to the beneficiaries.⁸² For example, funds remaining in a PayPal account that has remained inactive for a period of two years will first be forwarded to the owner's indicated primary address and, if necessary, will be escheated to the state of their primary address.⁸³ An executor who unknowingly allowed a domain name such as "sex.com," which sold for \$13 million in 2010, to be recycled and sold by the registry rather than by the decedent's estate will likely face extremely unhappy beneficiaries not to mention liability for not reporting assets on an estate tax return.

Digital assets play an important role during an individual's lifetime, and can be a significant part of a decedent's estate. They should not be allowed to disappear simply because they have not been marshaled by an executor. The following explores several methods available to an executor to marshal digital assets.

Secure Physical Technology Devices Owned By A Decedent

Computers and other various tangible technology devices serve as portals to and storage of digital assets.⁸⁴ Files of written works or pictures and computer programs are loaded directly on the computer hard drive, and passwords to online accounts can be saved automatically through the Internet browser.⁸⁵ However, due to various security measures, an executor may not have the skills to even access the computer itself; consequently, an executor may have to hire a computer expert to "break-in" to the computer.⁸⁶

⁷⁶ *See id.*

⁷⁷ *See* Unif. Probate Code §3-703 (a) (2010).

⁷⁸ Beyer & Cahn, *supra* note 12, at 138-39.

⁷⁹ Unif. Probate Code §3-709 (2010).

⁸⁰ Unif. Probate Code §3-706 (2010).

⁸¹ *See* I.R.C. §2033 (2013).

⁸² Beyer & Cahn, *supra* note 12, at 139.

⁸³ *PayPal User Agreement*, PAYPAL, https://cms.paypal.com/us/cgi-bin/?cmd=_render-content&content_ID=ua/UserAgreement_full&locale.x=en_US#7.%20Closing%20Your%20Account (last updated Aug. 20, 2013).

⁸⁴ Lamm, *supra* note 18, at 33.

⁸⁵ *See id.* at 34.

⁸⁶ *Id.* at 33.

Once a computer is accessed, the executor should look through the computer's files and programs to ascertain what digital assets are present on the hard drive and to determine if those assets are valuable — be it sentimentally or monetarily.⁸⁷ Next, the executor should look through the browser history and favorites stored in the Internet browser to determine if the decedent had an online presence.⁸⁸ An executor may be able to access a decedent's digital assets by utilizing the saved passwords in the browser, but an executor should keep in mind that accessing a decedent's online account could violate the website's TOSA and could potentially be a punishable offense under the CFAA.⁸⁹

Google The Decedent

Substantial information regarding a decedent's online presence could be gleaned by entering the decedent's name into one of several Internet search engines. The search may not be revealing because of the anonymity of the Internet, but this represents a reasonable, simple step that an executor could take in attempting to discover online digital assets. An executor can also search various free search engines for domain names by searching for the decedent's computer's Internet protocol address.⁹⁰ If an executor has reason to suspect a decedent did own a domain name, but free searches have not revealed the asset then an executor should take the additional step of hiring a professional search service for a fee.⁹¹

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ *Id.* at 31.

⁹⁰ *Who Is Behind That Domain?*, Network Solutions, <http://www.networksolutions.com/whois/index.jsp> (last visited Aug. 2013).

⁹¹ Lamm, *supra* note 18, at 41.

Analyze Bank Statements And Paper Records

Just because a decedent has digital assets does not mean that they have not left a paper trail of those digital assets.⁹² A decedent's bank or credit card statements should be examined for regular charges for a domain name or an online storage facility or transfers between a PayPal account or a Bitcoin exchange.⁹³ An executor should be aware of signals that a decedent may have had digital assets or digital accounts.

Search Emails

Much like a decedent's physical mail, email can provide valuable information to an executor such as: notice of outstanding debt, notification of financial accounts and other insights into a decedent's life.⁹⁴ Considering the amount of emails one account might contain, a computer program could be used to electronically search the emails for keywords or by sender. One of the primary roadblocks to executing this step is the potential for email service providers to deny fiduciaries in general access to the decedent's content and/or account.⁹⁵ This possibility is more thoroughly explored later in this article.

Accessing a decedent's employer-provided email accounts presents additional issues.⁹⁶ In addition to the protections invoked by email service providers, the decedent's employer may refuse to provide the content, claiming the protection of trade secrets or policy violations.⁹⁷ An executor should still request the decedent's email contents as they could contain valuable information regarding the decedent's as-

⁹² See *id.* at 39.

⁹³ See *id.* at 38-39.

⁹⁴ Lamm, *supra* note 18, at 35.

⁹⁵ Blachly & Walker, *supra* note 1, at 178-81 (describing various email service provider's policies in regards to fiduciary access).

⁹⁶ See Lamm, *supra* note 18, at 36.

⁹⁷ *Id.*

sets regardless of whether or not the employer will deny access.

Deactivate Social Media Accounts

An executor should discover whether or not a decedent had a social media presence. Once ascertained, the decedent's family may be interested in obtaining the content stored in those accounts whereby the executor should attempt to gain access to them. If the beneficiaries do not wish to access the decedent's social media accounts, an executor should merely contact those social media sites to notify them of the death, and the social media site will take the step outlined in their respective TOSA. An executor should also be aware of whether or not the decedent had other online accounts such as dating services, and she should contact those sites and notify them of the decedent's passing.

Step Two: Procure Digital Assets

Once the assets have been marshaled, an executor should take into their possession all of the assets of an estate that are necessary for the administration of the estate, including digital assets.⁹⁸ The following offers suggested methods an executor can take when attempting to procure intangible digital assets.

Determine If The Digital Asset Is Property

An executor should first determine whether or not the digital asset discovered is an asset that was able to be owned and transferred by the decedent. Individuals might assume they have an unlimited property right to digital accounts like their email accounts when, in reality, the user might only have a right to access those assets during life and the right to those assets terminates at their death.⁹⁹ For instance, a Yahoo! email address is non-transferrable

and will be de-activated upon notice to Yahoo! of a user's passing.¹⁰⁰

Music files might also be assumed to be the transferable property of a decedent, but that is not always the case. Individuals spend enormous amounts of money over their lifetimes purchasing files for their iTunes account,¹⁰¹ so a decedent's iTunes account could potentially represent a substantial asset.¹⁰² Nevertheless, iTunes files downloaded during a user's lifetime are nontransferable at their death.¹⁰³ Consequently, the TOSA associated with each asset should be examined to determine if the user is granted a property interest, and, if a property interest is granted, to what extent is the interest transferable.

Use Your State's Access To Digital Asset Statute

Previously discussed in this article were several existing and proposed state statutes that specifically address a fiduciary's access to certain digital assets. If the state where an estate is being settled has a statute that allows the executor to obtain access to digital assets and if an executor deems that a decedent has or may have digital assets, the executor is under an obligation to utilize that statute to its full extent. The reasonableness of this step is contingent on the state in which the estate is being settled.

¹⁰⁰ *Options Available When a U.S. Yahoo! Account Owner Passes Away*, Yahoo! Help, http://help.yahoo.com/kb/index?page=content&id=SLN9112&actp=search&viewlocale=en_US&searchid=1368405914648&locale=en_US&y=PROD_ACCT (last updated Aug. 26, 2013).

¹⁰¹ Eric Slivka, *Apple Announces 40 Billion App Store Downloads, Nearly 20 Billion in 2012*, MacRumors (Jan. 7, 2013) <http://www.macrumors.com/2013/01/07/apple-announces-40-billion-app-store-downloads-nearly-20-billion-in-2012/>.

¹⁰² Horace Dediu, *iTunes Users Spending at the Rate of \$40/yr*, Asymco (May 12, 2013, 4:51 PM) <http://www.asymco.com/2013/05/12/user-spend-on-itunes/>.

¹⁰³ *iCloud Terms & Conditions*, *supra* note 99.

⁹⁸ Unif. Probate Code §3-709.

⁹⁹ See *iCloud Terms & Conditions*, Apple Legal, <http://www.apple.com/legal/internet-services/icloud/en/terms.html> (last revised Aug. 1, 2013).

Ask The Service Provider For Access To Stored Digital Assets

Once an executor discovers that digital assets exist and determines that further exploration of those assets is warranted, an executor should ask the service provider for access to or copies of the stored digital assets¹⁰⁴ — a deceptively simple task. Service providers are generally reluctant to provide an executor with access to or copies of a decedent's stored communications; hence, an industry standard for fiduciary access to digital assets does not exist.¹⁰⁵

Consider the following examples. Email providers such as Hotmail and Google each provide separate procedures for accessing a decedent's emails.¹⁰⁶ Yahoo! on the other hand, will not provide information or access to the decedent's account; rather, it will deactivate the account immediately upon proper notification of the user's death.¹⁰⁷ Dropbox, a digital data storage facility, will give an executor access to a decedent's stored files if the executors produce the necessary documentation.¹⁰⁸ In contrast, users of the digital storage provider iCloud will lose stored information forever upon passing.¹⁰⁹ Again, an executor should be familiar with the TOSA of the digital account they are attempting to access.

Petition A Court For Access To The Digital Assets

If a service provider refuses to provide an executor with access to digital assets upon request, it might be necessary for the executor to seek a court order compelling the service provider to reveal the

information.¹¹⁰ The success of these types of actions has varied, but there is one common theme throughout the cases: in each instance, the families of the decedent were aware that digital assets existed and actively sought possession of those assets.¹¹¹ An executor should balance the wishes of the heirs of the estate with the potential cost of litigation for the release of the digital assets to determine if this step is reasonable. Depending on a family's wishes and potential of discovery, an executor may not need to take this step.

Use Passwords Left Behind

Estate planners are advising clients to leave a list of their passwords behind in some medium.¹¹² If a decedent does leave a list of digital assets and accounts with the associated passwords and the express permission that an executor may use them then it is reasonable to expect an executor to use them.¹¹³ Again, an executor should be wary of the potential violation of the SCA¹¹⁴ or the CFAA.¹¹⁵ As previously discussed, it is uncertain whether or not using the decedent's left-behind passwords constitutes authorized access under the federal laws.¹¹⁶ An executor has to circumstantially assess for herself whether accessing those assets is worth the risk of the potential for criminal liability.

Step Three: Protect The Estate

In addition to traditional concerns when administering an estate, the presence of digital assets raises various new concerns such as the identity theft of a decedent or the monitoring of copyrighted mate-

¹⁰⁴ See Lamm, *supra* note 18, at 30.

¹⁰⁵ See Blachly & Walker, *supra* note 1, at 178-81.

¹⁰⁶ *Id.*

¹⁰⁷ See *supra* note 100.

¹⁰⁸ *Can I Access the Dropbox Account of Someone Who Passed Away?*, Dropbox, <https://www.dropbox.com/help/488/en> (last visited Aug. 2013).

¹⁰⁹ *iCloud Terms & Conditions*, *supra* note 99.

¹¹⁰ Lamm, *supra* note 18, at 31.

¹¹¹ See Perrone, *supra* note 21, at 195-98.

¹¹² Beyer & Cahn, *supra* note 15, at 42-43.

¹¹³ Korzec & McKittrick, *supra* note 3, at 62; *see also id.*

¹¹⁴ See generally Cheng, *supra*, 2012 WL 6021369.

¹¹⁵ See Lamm, *supra* note 18 at 9-11.

¹¹⁶ Korzec & McKittrick, *supra* note 3, at 62.

rial. An executor should take all steps reasonably necessary to protect and preserve the estate.¹¹⁷

Delete Files From Tangible Digital Property

A computer and other hard technology devices are considered tangible personal property under a decedent's will; therefore, they will pass as the decedent directs their tangible personal property to be disposed.¹¹⁸ Before an executor delivers these assets to the intended beneficiary, he or she should consider wiping, at minimum, the browsing history and stored passwords of the technology device in an effort to protect the estate.¹¹⁹

An Internet browser has the capability to retain user names and passwords for various online accessible accounts. If the device is passed to an individual without clearing the device of these portals to digital accounts then the executor takes the risk that a decedent's various online accounts could be accessed by an unauthorized third party.¹²⁰ Contrastingly, by deleting files from a technology device, an executor may be irrevocably destroying assets that the decedent's heirs would traditionally be able to access if the assets existed in a non-digital form.¹²¹ The executor should consider copying the digital files prior to deletion to prevent irretrievability of certain files, but should keep in mind the specific copyrights of each file. An executor should weigh their duty to the estate's beneficiaries and their duty to the estate, and, based on that assessment, should determine their course of action.

Notify Credit Agencies Of The Decedent's Death

Identity theft of deceased individual's identities is a frequent occurrence with a reported 800,000 of

deceased Americans' identities intentionally targeted annually.¹²² Any one of the many uses of a stolen identity could delay the settlement of the estate. Various methods exist for protecting against identity theft. One recommendation is to vigilantly monitor banking accounts and credit reports,¹²³ however, an executor may not have the ability to monitor certain accounts that are accessible only online. An executor has the ability to notify the credit reporting agencies of the decedent's death.¹²⁴ Each of the credit reporting agencies will accept notification of a decedent's death from the executor and will place a death notice on the decedent's file.¹²⁵ Although each agency has slightly varying requirements for notification, the notification can generally be completed with a simple letter and proof of executor appointment.¹²⁶

An executor has the duty to protect the assets of the estate, which extends to protecting the deceased's identity. Dealing with a decedent's stolen identity could prolong the settlement of the estate and unnecessarily increase the executor fees charged the estate. Executors can hedge against the potential of identity theft by taking the simple step

¹²² *Identities of Nearly 2.5 Million Deceased Americans Misused Each Year*, ID Analytics (Apr. 23, 2012), <http://www.idanalytics.com/news-and-events/news-releases/2012/4-23-2012.php>.

¹²³ *How to Detect Fraud & Identity Theft*, Ally Bank, <http://www.ally.com/security/how-to-detect-fraud-and-identity-theft.html> (last visited Aug. 2013).

¹²⁴ Sid Kirchheimer, *Protecting the Dead From Identity Theft*, AARP Bull. (Mar. 6, 2013), <http://www.aarp.org/money/scams-fraud/info-03-2013/protecting-the-dead-from-identity-theft.html> (advising how to protect a decedent's identity from theft).

¹²⁵ *IRTC Fact Sheet 117- Identity Theft and the Deceased: Prevention and Victim Tips*, Identity Theft Resource Center, <http://www.idtheftcenter.org/Fact-Sheets/fs-117.html> (Last visited Aug. 2013).

¹²⁶ *See id.*

¹¹⁷ Unif. Probate Code §3-709 (2010).

¹¹⁸ Lamm, *supra* note 18, at 35.

¹¹⁹ *Id.*

¹²⁰ *See* Lamm, *supra* note 18, at 33.

¹²¹ *See id.* at 35.

of notifying the credit reporting agencies of a decedent's death.

Protect Copyrighted Digital Assets

If an executor discovers that the decedent owned copyrighted digital content displayed online, such as a blog or photographs, an executor should take necessary steps to protect those assets from copyright infringement. They should be aware of potential copyright infringing uses of the decedent's works, and, if possible, an executor should remove the copyrighted material from the purview of the public so as to minimize the chance of copyright infringement.¹²⁷ If an infringing use is found, the executor should take the necessary steps to report the infringement pursuant the provisions outlined in the Digital Millennium Copyright Act of 1998. However, an executor may face unique challenges in filing this claim stemming from the fact that the

¹²⁷ Lamm, *supra* note 18, at 47.

executor themselves do not own the copyright.¹²⁸ The possibility of failure does not preclude an executor from attempting to protect the work.

CONCLUSION • Digital assets are the wave of the future as evidenced by their continuing exponential development, and executors can no longer afford to assume that a decedent does not have an online presence. An executor has the duty to seek out digital assets, procure those with value, and distribute them in the same manner non-digital assets have been administered for decades. Proper planning and contemplation of digital assets and accounts in an estate plan will help an executor successfully administer an estate, but an executor cannot rely on proper planning alone. She has the duty to seek out and administer digital assets and faces the potential to be held liable for not exhausting reasonable methods to satisfy that duty.

¹²⁸ *See id.* at 47-48.

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