

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

| | | |
|------|--|-----|
| I. | THE ISSUE OF DIGITAL ASSETS AND ESTATE PLANNING..... | 302 |
| A. | <i>Defining Digital Assets</i> | 302 |
| B. | <i>Issues in Estate Planning Created by Digital Assets</i> | 304 |
| II. | HOW THE WEBSITES ARE DEALING WITH DIGITAL ASSETS: THE EFFECTS OF PRIVACY ACTS AND DECEASED-USER ACTS..... | 308 |
| A. | <i>Social-networking Sites</i> | 309 |
| B. | <i>Web-Based E-Mail Accounts</i> | 310 |
| C. | <i>Blogs and Online Content</i> | 311 |
| III. | SUGGESTIONS FOR DEALING WITH DIGITAL ASSETS IN REGARDS TO ESTATE PLANNING | 314 |
| A. | <i>Proper Planning</i> | 315 |
| B. | <i>Giving the Keys to the Estate</i> | 316 |
| C. | <i>A More Workable Alternative?</i> | 319 |
| D. | <i>A Note on Wills</i> | 320 |
| IV. | THE FATE OF THE ILL-PREPARED | 321 |
| A. | <i>Post-Mortem Identity Theft</i> | 321 |
| B. | <i>Post-Mortem Content Theft from the Deceased’s Blogs</i> | 321 |
| V. | CONCLUSION | 322 |

On November 13, 2004, Lance Cpl. Justin M. Ellsworth was killed in action while serving as a Marine in Fallujah.¹ 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.² In order to do this, however, John Ellsworth needed access to his son’s account, a request Yahoo! denied.³ Yahoo! claimed that if it granted Justin’s parents access to his account, Yahoo! would be in direct violation of the privacy agreement that its users must agree to.⁴ Finally, after a heated court battle that lasted over three months, a Michigan court granted the Ellsworths access to their son’s e-mail.⁵

1. See *Who Owns Your E-Mails?*, BBC NEWS, Jan. 11, 2005, http://news.bbc.co.uk/2/hi/uk_news/magazine/4164669.stm.

2. See *id.*

3. See *id.*

4. See *id.* (stating that “survivors have no rights to the e-mail accounts of the deceased”).

5. 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.

The case of Lance Cpl. Justin Ellsworth illustrates a problem that is currently facing estate planners as they work to ensure that their clients' digital estates are properly planned for in the event of their death.

There is an issue facing estate planners and attorneys in regards to how they should properly plan for a client's "digital assets" and "digital estate" in the event of the client's death. This comment seeks to provide a better definition for digital assets and digital estates and to provide a practical discussion as to what estate planners can do to ensure that their client's digital assets and estates are properly planned for after their 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 to protect the person's personal information after their death, and what options are available to estate planners to deal with these issues in their daily practice. Part I of this comment will provide a general definition of digital assets.⁶ Because there is no such definition currently available in any legal or general resource, this section will attempt to define digital assets and provide the foundation for understanding how to properly protect a client's digital assets and digital estate after the client's death.⁷ This section will also include a discussion of the emergence and growth of digital assets and the issues that digital assets are causing for estate planners.⁸ Part II of this comment will discuss what websites and e-mail services are doing in regards to the accounts of their deceased patrons and the effect this is having on estate planning.⁹ Part III of this comment will provide suggestions for what estate planners should be doing when facing these issues on a daily basis.¹⁰ 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.¹¹ Part IV of this comment will provide a brief look at the possible consequences of failing to ensure that a client's digital assets and estate are properly planned for.¹² Finally, Part V will provide a brief conclusion to the comment.¹³

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 e-mail accounts, it has become common for people to

6. See discussion *infra* Part I.A.

7. See discussion *infra* Part I.

8. See discussion *infra* Part I.

9. See discussion *infra* Part II.

10. See discussion *infra* Part III.

11. See discussion *infra* Part III.

12. See discussion *infra* Part IV.

13. See discussion *infra* Part V.

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 user'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 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 for estate planners. A proper definition, however, would provide practicing estate planners with a proper compass and allow estate planners, courts, and other practicing attorneys to identify digital assets and decide what amount of legal protection the assets should receive.¹⁴

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 a digital asset as "any file on your computer in a storage drive or website and any online account or membership."¹⁵ Examples of digital assets include documents created via a Microsoft Office Program (e.g., Word, Excel, or PowerPoint), digital photos, digital videos, and music on iTunes.¹⁶ Digital assets also include online accounts and memberships, such as e-mail accounts, profiles on social-networking sites, online digital photo accounts, online banking and credit card accounts, websites or domain names owned by a person, and online subscription accounts.¹⁷

Additionally, digital assets and estates might be considered "virtual property" (virtual property and digital assets are synonymous), which would include things such as "a website, a bidding agent, a video game character, or any number of other intangible, digital commodities."¹⁸ Therefore, the working and suggested definition of a digital asset for this comment will be the following: any digital file on a person's computer, as well as online accounts and memberships.

While this definition might seem broad, 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

14. See Charles Blazer, *The Five Indicia of Virtual Property*, 5 PIERCE L. REV. 137, 139–40 (Dec. 2006) (discussing the "five indicia" for determining what is a legally protectable digital asset).

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

16. *Id.*

17. 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).

18. See Blazer, *supra* note 14, at 137. 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.

domain names, any legally downloaded files (e.g., audio files and movies), and any web-based personal accounts that require a username and password for access (e.g., social-networking account, web-based e-mail account, and any accounts storing personal information).¹⁹

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.²⁰ Real property is essentially land and anything that is attached to the land.²¹ Personal property, on the other hand, is anything that is not real property.²² Additionally, personal property is further divided into two subcategories: “tangible (car, furniture, jewelry, art, clothing, appliances) and intangible (stocks, bonds, patents, trademarks, copyrights).”²³ This distinction is important because digital assets have the unique potential to change from an intangible asset to a tangible one.²⁴ 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.²⁵ Whether an item of personal property is classified as intangible or tangible has the potential to completely alter the probate process:

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.²⁶

Therefore, unless a proper definition is established, estate planners will continue to have issues deciding what will qualify as a digital asset and how to properly prepare for what will happen to a 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 day-to-day life. People use the Internet for countless reasons, ranging from posting thoughts and pictures onto

19. For a short discussion of *illegally* downloaded files, see Patricia H. Char, ALI-ABA Continuing Legal Education, *Emerging Issues for Fiduciaries*, Feb. 19–21, 2009.

20. See Dosch, *supra* note 15.

21. See *id.*

22. Telephone Interview with David M. Goldman, Esq., Founder, Apple Law Firm PLLC (Sept. 22, 2010).

23. See Dosch, *supra* note 15.

24. See *id.*

25. See *id.*

26. *Id.*

blogs, to keeping up with friends and family, and even maintaining bank accounts and credit card balances. The posts, pictures, and all files posted on these Internet sites qualify 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 should happen to accounts and digital assets locked behind usernames and passwords when a person dies without revealing what any of the usernames and passwords might be. As there is no legislation—and little case law—estate planners are left without any real advice to give their current clients and without 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 it all by the same exact username and password. Thus, 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.²⁷ All of these different usernames and passwords can create significant issues for those responsible for ensuring the security of someone's estate after their death.²⁸ Without the correct usernames and passwords, the information stored on these web-based accounts cannot be accessed and will be left floating in cyberspace, exposed to identity thieves.

There is also the issue of who owns information once it is uploaded or stored onto a website.²⁹ 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 or she chose to use.³⁰ These privacy agreements, to which the person wishing to set up an account must acquiesce, often provides that under no circumstances will the website release the person's personal information.³¹ Some websites even go so far as to say that any information (pictures, videos, etc.) uploaded onto their website becomes the property of the website.³²

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

28. *See id.*

29. 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>.

30. *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.

31. 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.").

32. 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>.

Blogs create similar issues for estate planners. One of the major areas of concern for blogs is copyright protection.³³ More specifically, “[i]f you’ve got a blog, you’ve also got intellectual property including copyright to your writings and any trade-marks associated with your site.”³⁴ Because copyrights last for the entirety of a person’s life and for 70 years after death, there are substantial protections available for a person’s written material after death. Without the proper protection, however, information could be stolen directly from the decedent’s blog and used illegally by a third party for monetary gain.³⁵ It should be noted though that this problem is not one that faces bloggers who own their own domain; rather, the issue is one that impacts individuals who use blog-hosting websites that require the user to first agree to the website’s Terms of Service before gaining access to the website and its services.³⁶

An additional problem facing estate planners with regards to blogs is that many blog-writers do not own their own domain name, but rather use a third-party hosting service.³⁷ This is an issue because many of the most popular host sites are hesitant to make the necessary login information available after death, even to executors.³⁸

Additionally, there is also the issue of a blogger continuing to post, even after death.³⁹ Understandably, this might 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. This means that an author could have written any number of blogs and left them to publish post-mortem.⁴⁰ These postings also have the possibility of being defamatory in nature, which might lead to possible lawsuits against the decedent’s estate.⁴¹

Another problem facing estate planners are the legal rights to use the account and all the information contained on the website. Even though a person might leave behind the required passwords and usernames, it does not

33. *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/>.

34. *See id.*

35. *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* Lai, *supra* note 31; *see also* *Planning Your Digital Estate: Dealing with Online Data After Death*, *supra* note 33.

36. *See* discussion *infra* Part II.C and accompanying text. 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, e.g., WordPress or Blogger, and not the user who actually posted the content.

37. *See* *Planning Your Digital Estate: Dealing with Online Data After Death*, *supra* note 33.

38. *See id.*

39. *See id.*

40. *See id.* 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, Sept. 11, 2007, <http://www.akumaprime.com/wordpress/>.

41. *See* *Blog Spot Sued for Dead Blogger’s Content – Davis v. Google*, Apr. 13, 2009, http://blog.ericgoldman.org/archives/2009/04/blogspot_sued_f.htm. Note that this is a lawsuit against Google (which owns Blogger) and not against a particular estate.

necessarily mean that they have passed on that legal right.⁴² This is important because in the case of sites in which an individual sets up and maintains an account (e.g., Facebook, Twitter, web-based e-mail accounts, etc.), the individual has not purchased anything; rather, he has merely been granted a license to use the website.⁴³ The unfortunate problem with only being granted a license is that it expires upon death.⁴⁴ This problem is compounded by the fact that wills tend only to deal with assets that survive death and may not include online accounts that a person has been granted a license to use.⁴⁵ Essentially, this means that any provisions a person puts into a will will have no bearing on anything that ceases to exist upon the death of the individual.⁴⁶ Hence, if the license granted to persons to use the websites does in fact expire upon death, whoever receives the usernames and passwords has no legal right to use or access the information contained in the accounts.⁴⁷ For this reason, it may not be enough for an estate planner or attorney to simply advise his client to prepare a will that properly passes on the required usernames and passwords. Therefore, as Mr. Goldman suggests, the pertinent information required to access these accounts must be put into an instrument that will survive death.⁴⁸

There is also the issue of what happens to digital assets and estates that are not properly planned for.⁴⁹ Generally, online accounts can be removed, canceled, or shut down as soon as the website receives proper notice of a person's death.⁵⁰ But the problem is that many people do not inform the online account hosts of the death, leaving the person open to potential identity theft even after they are deceased.⁵¹ While it is true that online account privacy agreements 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 floating in cyberspace. Not all of these accounts are casual social-networking accounts where people list their favorite movies and films.⁵² Some of these accounts might include sensitive information, such as credit card and bank account numbers, and leaving these accounts open to the public could lead to disaster.⁵³ Unless the deceased has made known the existence of these

42. See Telephone Interview with David M. Goldman, Esq., Founder, Apple Law Firm PLLC (Sept. 22, 2010).

43. See *id.*

44. See *id.*

45. See *id.*

46. See *id.*

47. See *id.*

48. See *id.*; see also *infra* Part III (discussing possible steps and solutions for ensuring that a client's digital estate is properly planned for).

49. 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>.

50. See *id.*

51. See *id.*

52. See *id.*; see also *infra* Parts II.A–C.

53. See Coombes, *supra* note 27.

accounts, it is feasible that the accounts could remain open forever—leaving those sensitive numbers vulnerable.⁵⁴ 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 his accounts.⁵⁵ Therefore, unless estate planners and attorneys ensure that their clients have properly prepared their digital estates, they are potentially leaving clients open to post-mortem identity theft.⁵⁶

Perhaps the biggest problem facing estate planners and their clients is a general lack of knowledge about how to properly prepare for the passage of their client's digital estates after death.⁵⁷ In general, the only property a person really considers is his tangible assets (such as property) and intangible assets (such as stocks and bonds).⁵⁸ People simply do not think about their digital assets, such as user names, passwords, e-mail accounts, digital photo directories, and anything else that might qualify as a digital asset.⁵⁹

In the following sections, this comment will address the above issues. Additionally, this comment will show how many of the websites that act as hosts for online accounts are taking steps to ensure the privacy of their users. This comment will also discuss in detail the different options for estate planners and attorneys to help ensure 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 their deceased users.⁶⁰ 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 the deceased's assets and privacy are protected.

54. *See id.*

55. *See Planning Your Digital Estate: Dealing with Online Data After Death*, *supra* note 33 (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]”).

56. *See id.*

57. *See* Telephone Interview with Jesse Davis, founder of www.entrustet.com, and Nathan Dosch, in-house estate planner for Entrustet.com and estate planning and tax attorney with Neider & Boucher (Sept. 22, 2010).

58. *See id.*

59. *See id.*

60. *See* discussion *infra* Parts II.A–C.

A. Social-Networking Sites

In the past decade, the Internet has seen an explosion of social-networking websites (e.g., Facebook, MySpace, and Twitter). These websites allow a person to create an account and begin uploading information and pictures in order to keep up with friends, family, co-workers, and other contacts. With people constantly uploading more and more information onto these websites, what should 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 only the account holder has access to the information contained therein, social-networking websites are much more public in nature.⁶¹ Additionally, because many of these social-networking websites allow for a person to become “friends” with many other people, a person’s profile will appear as a friend to several people and will continue to do so until the account is either closed or deleted.⁶²

Many of these social-networking websites have also begun creating “deceased-user policies.” As 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.⁶³ However, Facebook has also recently adopted a new deceased-user policy in an effort to allow the family and friends of the deceased user to have two options to determine what will happen to the deceased user’s account.⁶⁴ Essentially this plan offers the friends and family of the deceased user the choice of either having the deceased user’s profile taken off of Facebook or having the profile of the deceased memorialized.⁶⁵ This was done in an effort to ensure the continued protection of the deceased users’ privacy even after their death “by removing sensitive information such as contact information.”⁶⁶ “Memorializing an account also prevents anyone from logging into it in the future.”⁶⁷

Other notable social-networking websites have set up similar deceased-user policies, which have helped ensure the protection of the digital assets and estates of deceased users.⁶⁸ An notable characteristic of Twitter’s deceased-

61. See *Planning Your Digital Estate: Dealing with Online Data After Death*, *supra* note 32.

62. See *id.*

63. 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>.

64. See Posting of Max Kelly to The Facebook Blog, <http://blog.facebook.com/blog.php?post=163091042130> (Oct., 26, 2009, 10:48 AM).

65. See *id.*

66. *Id.*

67. *Id.*

68. Josh Lowensohn, *Twitter’s New Deceased User Policy vs. Facebook’s*, CNET, 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 I 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.

user policy is that it requires not only some form of notification of the death (e.g., a link to an obituary in the newspaper), but also that the person requesting 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.⁶⁹

While these policies are certainly a step in the right direction, 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 the deceased-user policies offer will be unusable. Essentially, 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 their digital assets and estates after their death.⁷⁰

B. Web-Based E-Mail Accounts

Many web-based e-mail accounts, such as Yahoo! and G-Mail, have user policies that the e-mail providers argue remain binding even upon death, making them vitally important for estate planners to be aware of.⁷¹ While all web-based e-mail accounts require acceptance of the Terms of Service, this comment will focus on Yahoo!, which remains one of the largest online e-mail account servers on the Internet.

As a general rule, e-mails that the decedent composed are considered “literary work” and are therefore protected under copyright law.⁷² However, if a decedent’s family or executors do not know the password required to access the account, they may be unable to reclaim the correspondence.⁷³ Therefore, it is imperative that loved-ones, executors, or any other person charged with handling the decedent’s estate 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 open an account, has a specific provision that does not allow for any survivorship rights or any transferability of the e-mail account.⁷⁴ Specifically, this provision notes that any rights that a person has in the account die along with that person.⁷⁵ Essentially, this provision means that the account creator, and only the account creator, will ever

69. See Lowensohn, *supra* note 68. By requiring some proof of death, Twitter is seeking to protect the privacy rights of account users who are still living. *Id.* This requirement ensures against possible fraudulent claims of death. *Id.*

70. See discussion *infra* Part III (discussing possible steps and solutions for ensuring that a client’s digital estate is properly planned for).

71. See generally Yahoo! Terms, <http://info.yahoo.com/legal/us/yahoo/mail/mailplustos/mailplustos-297.html> (last visited Mar. 9, 2011). See also G-Mail Privacy Policy, <http://www.google.com/intl/en/privacy/privacy-policy.html> (last visited Mar. 9, 2011).

72. See Lai, *supra* note 31.

73. See *Planning Your Digital Estate: Dealing with Online Data After Death*, *supra* note 33.

74. See Lai, *supra* note 31.

75. See *id.*

have access to the information stored in the account.⁷⁶ In fact, the only thing that a friend or family member of the deceased can do is send a death certificate to Yahoo! so that Yahoo! will terminate the account.⁷⁷ Unfortunately, however, all of the information and messages contained in the account will be deleted as well.⁷⁸

The question still remains though: who really owns a decedent's e-mails? As a general rule, the author's rights to her e-mail should be equivalent to her rights in her private letters.⁷⁹ Essentially, the author retains a copyright in any e-mails that she writes and ownership rights in any messages that she receives.⁸⁰ When confronted with loved ones wanting to recover the e-mail correspondence of the decedent, many host websites point directly to their privacy agreements, but this privacy agreement argument might be misplaced.⁸¹ 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."⁸² However, "e-mail service providers have a legitimate interest in protecting the privacy rights of living account holders and may be concerned about fraudulent claims of death."⁸³

In order to avoid 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. With proper planning, families of the deceased will be able to legally discover, memorialize, or take any other action they so choose regarding digital content, and they will be able to do so without violating any of the privacy 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.⁸⁴ More specifically, blogs and their content create issues in the areas of estate planning and copyrights.⁸⁵ Estate planners should be aware of these issues 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 then use it for his own financial gain. The real issue here, though, is that the

76. See *id.*

77. See *id.*

78. See *id.*

79. 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).

80. See *id.*

81. See *id.*

82. *Id.* at 313. See also RESTATEMENT (SECOND) OF TORTS § 652I (1977); Telephone Interview with David M. Goldman, Esq., *supra* note 42.

83. Darrow & Ferrera, *supra* note 79, at 314.

84. See discussion *supra* notes 32–40.

85. See *supra* notes 32–40. See also *Planning Your Digital Estate: Dealing with Online Data After Death*, *supra* note 33 (noting that "[i]f you've got a blog, you've . . . got . . . copyright to your writings and any trade-marks associated with your site.").

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 policies currently in place.⁸⁶ For instance, the privacy policy currently in place for the blog-hosting website Blogger will only release personal information, such as usernames and passwords required for logging in to the account—if the user has consented to release the personal information.⁸⁷ This could potentially create an issue for the executor of the decedent's estate if the decedent's will does not mention how to access the blog and its content, or whether the decedent wishes to continue to maintain the blog.

However, this is not the only important language in Blogger's privacy policy. For instance, 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.⁸⁸

This language might provide estate planners, attorneys, and executors with the ability to access the information and content contained in the decedent's blog. The downside, however, is that the language seems 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 similar to the court battle that the parents of Justin Ellsworth found themselves in.⁸⁹ However, it is likely that all of these issues can be avoided if estate planners and attorneys ensure that their clients' digital estates are properly planned for.⁹⁰

An additional privacy policy of interest is the policy that is currently in place for WordPress.⁹¹ 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."⁹² This also suggests that

86. For purposes of this section of the comment, we will analyze the Privacy Policies 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.

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

88. See *id.*

89. See *id.*; *Who Owns Your E-Mails?*, BBC NEWS, Jan. 11, 2005, http://news.bbc.co.uk/2/hi/uk_news/magazine/4164669.stm.

90. See discussion *infra* Part III.

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

92. *Id.*

WordPress will only release personal information when it is required to, or more specifically, when it has been required to by court order. Again, the whole issue of reaching the content that the decedent has posted to his blog can be avoided as long as estate planners ensure that their clients have properly planned for each aspect of their digital estates.

The question of who actually owns the content posted onto blogs is also an issue facing estate planners.⁹³ In order to determine ownership, the most important place to look is the Terms of Service.⁹⁴ There are two reasons for referencing the Terms of Service: the first reason is that the Terms of Service act as the rules by which a new user must agree to abide in order to use the blogging service that the user selected, and the second is that each 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.⁹⁵ Therefore, it is likely that any court will find that a decedent's estate is subservient to the Terms of Service, just as the decedent would be if they were still alive.

The Terms of Service for WordPress, for example, provide that "[b]y 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."⁹⁶ 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."⁹⁷ This language raises an issue for those who planned the decedent's digital estate and the estate's executor; because even though the decedent's wish may be for the content to be treated a certain way, such treatment may be impossible depending on the language contained in the Terms of Service of whichever blog-hosting website the decedent used. 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.⁹⁸

Blogger's Terms of Service provide something a little different than the Terms of Service for WordPress.⁹⁹ Specifically, Blogger provides that "Google claims no ownership or control over any Content submitted, posted or displayed

93. See, e.g., Your Book Publishing Coach, *Who Owns Your Blog Content*, <http://www.yourbookpublishingcoach.com/who-owns-your-blog-content/>.

94. See generally *id.* (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).

95. Wikipedia page on Terms of Service, http://en.wikipedia.org/wiki/Terms_of_service.

96. See WordPress.com Terms of Service, *supra* note 91.

97. See *id.*

98. See *id.* (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").

99. See Blogger Terms of Service, <http://www.blogger.com/terms.g>.

by you on or through Google services.”¹⁰⁰ Yet, the Terms of Service continue 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.¹⁰¹

This language seems contradictory to the language used 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 it wants with the posted content.¹⁰²

These Terms of Service suggest that blog-hosting websites such as WordPress and Blogger may continue to use the content that a person posts to their domains—even after they are deceased—unless the decedent has ensured that his digital estate has been properly planned for.¹⁰³ This includes providing executors with proper personal and log-in information, as well as proper instructions for what the decedent wishes to have happen to his digital assets after 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 death. This uncertainty is largely a product of the fact that the Internet, and all the information and services that it provides, is 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. 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.¹⁰⁴ To quantify the expansion of these sites, consider the staggering numbers. As of July 1, 2010, Facebook had 500 million users, and that number continues to grow. Adding

100. *Id.*

101. *Id.*

102. *See generally id.* *See also* Google Privacy Policy, *supra* note 87.

103. *See generally id.* *See also* WordPress.com Terms of Service, *supra* note 91.

104. *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).

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.¹⁰⁵ Perhaps the most interesting thing about these numbers is that they continue to grow, and the pace at which they are growing has not even begun to decline.

This section will provide several possible methods by which estate planners can help ensure that their client's digital assets are properly planned for in the event of the client's death. This section will also look at different alternatives for dealing with digital assets, ranging from placing specific instructions in a will to placing the actual rights to access the different accounts and their information into a trust. 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, and these assets are capable of being passed on to a loved one just like any other asset. The problem, however, is that too many people do not take the time to plan accordingly.¹⁰⁶ Therefore, it is imperative that estate planners provide their clients with a proper plan regarding the client's digital assets and estates.

The first step is to have the client take an inventory of all their different online accounts.¹⁰⁷ A person can aid his family and any designated successors by preparing a list of assets and then leaving the prepared list in a place that is readily accessible.¹⁰⁸ 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 Internet-based (e.g., blogs, accounts, and e-mails).¹⁰⁹ “The more detailed and accurate the better, of course, but even a small start can be of help.”¹¹⁰

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

105. 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>; 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>.

106. See David Kennedy, *Estate Planning for Your Digital Assets*, LAW PRACTICE TODAY, Mar. 2010, <http://www.abanet.org/lpm/lpt/articles/ft03103.shtml>.

107. 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>.

108. See Kennedy, *supra* note 106.

109. See *id.*

110. *Id.*

created.¹¹¹ This helps prevent against being unable to access an account because a password was unknowingly changed.¹¹² By providing the correct answers to security questions, the client will be able to ensure that their accounts can be accessed and their wishes complied with.¹¹³

Once an inventory of the digital assets has been compiled, the estate planner and client need to appoint the appropriate person to handle the digital estate.¹¹⁴ One option is to nominate a “digital executor.”¹¹⁵ It will be the duty of the digital executor to ensure the proper transfer of the decedent’s accounts after death.¹¹⁶ The digital executor will receive the listed inventory of the different digital assets and will be responsible for ensuring that the decedent’s wishes are met.¹¹⁷ If the client decides that he wishes to include his digital assets into his will, it is imperative that the attorney who draws up the will is aware of digital executor’s identity.¹¹⁸ Although making sure that a client has inventoried all digital assets and appointed a digital executor puts a person on the path to protecting his digital estate, those steps only get a person halfway home. The next step in the process is by far the most important and most uncertain.

B. Giving the Keys to the Estate

In order to enter a home or start a car a person requires a key. A key grants power and access, and without it a person might be left out in the cold. Digital assets are no different. Without proper instruction and proper usernames and passwords (i.e., the keys) it may be difficult to identify and protect any potential digital assets.¹¹⁹ This begs the question of how a person properly passes on the keys to their digital estate.

One of the more simple solutions is for the client to keep a list of the different usernames and passwords that he uses.¹²⁰ It would also be useful for a client to include a list of instructions for how he wishes the executor to handle his digital estate (i.e., all the different accounts) after death.¹²¹ Given the constant growth and availability of the Internet and all of its resources, it is not uncommon for a person to have different accounts with several websites. Additionally, a person may have a different username and password for each

111. See Telephone Interview with David M. Goldman, Esq., *supra* note 41.

112. See *id.*

113. See *id.*

114. See Palmer, *supra* note 107.

115. See *id.*

116. See *id.*

117. See *id.*

118. See *id.*

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

120. See Palmer, *supra* note 102; see also Mentrek, *supra* note 119 (providing that it is better for a client to maintain an electronic list as opposed to a written list because the electronic list is more likely to be continuously maintained, while a written list is more easily lost or difficult to maintain).

121. See Palmer, *supra* note 107.

individual account.¹²² Therefore, an attorney should advise the client to keep a list of the different accounts, usernames, and passwords. By making this list available to loved ones upon their death, a person will give himself a better chance of ensuring that their digital estate will be properly cared for. Further, by advising clients to provide his family with instructions on how to locate and access digital assets, an estate planner can help clients avoid a great deal of inconvenience, stress, and costly delays.¹²³ However, this action alone will not be enough to ensure that a client's digital estate is properly cared for.¹²⁴ Consequently, further options for assisting clients in planning for the client's digital assets and estates must be explored.

An additional option is to provide a "letter to your executor."¹²⁵ This is "an informal letter, easily revised, that lists important URLs, user names, passwords, security codes, and other information needed to access online accounts."¹²⁶ This letter can also provide specific instructions as to how the executor should handle the digital assets.¹²⁷

A "password vault" is an additional tool that can be used to ensure that the proper usernames and passwords are passed on for any Internet accounts.¹²⁸ Password vaults are available for download via several websites. The crux of these vaults is that a person can store several usernames and passwords into the vault, which is protected by one single "master password."¹²⁹ Thus, the client would only need to supply his family with the master password, and then his family would have access to all important usernames and passwords regardless of how often the client changed them.¹³⁰

There are also a number of online alternatives that offer an array of services to estate planners and their clients. One example 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 digital wishes of the deceased.¹³¹ Once a person signs up for Entrustet, the program takes the client through the process of adding different online accounts by dividing them into different categories, such as social-networking and e-mail accounts.¹³² Upon completion of the information, the client will have accumulated all of his passwords for his web-based accounts and provided specific instructions for

122. See Coombes, *supra* note 27.

123. See Palmer, *supra* note 107.

124. See Kennedy, *supra* note 106.

125. Mentrek, *supra* note 119, at 11.

126. *Id.*

127. See *id.*

128. See *id.*

129. See *id.*

130. See *id.*

131. Entrustet.com, <http://www.entrustet.com>.

132. See Telephone Interview with Jesse Davis, founder of www.entrustet.com, and Nathan Dosch, in-house estate planner for Entrustet.com and estate planning and tax attorney with Neider & Boucher (Sept. 22, 2010).

each of the individual accounts. The client will also have supplied contact information for the heirs to the individual accounts and the digital executor.¹³³ Once a client has included all of the necessary information, he will be encouraged to find a local practicing estate planner who can take the summary of his instructions and help build them into a working document.¹³⁴

Entrustet also provides a “directory of attorneys,” which assists persons in finding estate planners in their localities.¹³⁵ Realizing that working with digital assets in terms of estate planning is a relatively new concept; the lawyers at Entrustet also offer a form of certification for the estate planners so that the estate planner understands how to properly plan for digital assets.¹³⁶ Entrustet is only one of a number of different websites that offer similar services.¹³⁷ If this is the path than an estate planner and their client wish to take, they would be wise to explore the other options that are available.

While these online websites do offer an assortment of useful services, there may be a few fundamental issues that hamper their ability to ensure the proper distribution and treatment of digital assets.¹³⁸ When a person devises something through a will, he is giving the devisee possession of the item (be it real or personal property) and passing on the legal right of ownership to the devisee.¹³⁹ However, the products offered by these online websites may actually turn out to be somewhat defective.¹⁴⁰ While the websites maintain to transfer the rights upon death, the only thing that these websites actually do is grant a person the ability to access the different accounts.¹⁴¹ In fact, it is more akin to a digital repository in that it provides access to the account but fails to grant a person the legal right to actually use, access, or possess the accounts.¹⁴² This has the potential to create liability for both the estate and the beneficiaries.¹⁴³ Unfortunately, these websites may not consider the difference between merely obtaining the username and passwords and actually having the legal right to use those usernames and passwords.¹⁴⁴

Perhaps the biggest problem with these websites is that they are trying to treat digital assets as personal property when they are in fact intellectual property.¹⁴⁵ Additionally, many of these accounts merely grant a license to establish an account with the website, and a license, by definition, expires upon

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

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

138. *See* Telephone Interview with David M. Goldman, Esq., *supra* note 42.

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.*

145. *See id.*

death.¹⁴⁶ This creates an issue for providing instructions concerning digital assets into a will because wills deal with the passing of property that survives death.¹⁴⁷ “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.”¹⁴⁸

Additionally, the core of the service provided by these different websites is that they provide for a separate memorandum to be included in the will, but there may be state laws that do not allow for the use of a separate memorandum with a will.¹⁴⁹ “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.”¹⁵⁰ Therefore, while these websites may be an excellent tool for creating an inventory of a client’s different accounts, usernames, and passwords, they may not be a suitable alternative to ensure that the rights to access and use these accounts have been passed on properly.

C. A More Workable Alternative?

When one considers that a license to access and use online accounts expires upon death, it stands to reason that a vehicle that survives death must be used to ensure that the actual rights to access and use online accounts are passed on.¹⁵¹ Therefore, one of the vehicles that an estate planner should consider using is a trust.¹⁵² Of course, the assets must be properly placed into a trust before the client dies; otherwise, those assets cease to exist.¹⁵³

Mr. Goldman suggests creating a trust to store the usernames and passwords of all the client’s different accounts, so that if the client opens any new accounts in the future, he can name the trust as the owner of the account.¹⁵⁴ In fact, it may be that a client can accomplish this by simply putting the word “trustee” after her last name in order to make it obvious that these assets are part of a trust.¹⁵⁵ By putting the assets into a trust, the creator of the account ensures that the account survives his death and the legal right to access and use the account passes on to the beneficiary of the trust.¹⁵⁶ There is also the possibility that trusts could work with websites such as Entrustet—assuming that a state does not require any formality when altering a trust.¹⁵⁷ However, if

146. *See id.*

147. *See id.* For a more in depth discussion of the possibility of using wills as a way of passing on digital assets, see *infra* Part III.D.

148. *See* Telephone Interview with David M. Goldman, Esq., *supra* note 42.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.*

the state in which the client lives does require certain formalities in altering either a will or a trust, these websites will not work.¹⁵⁸

Perhaps the biggest issue facing trusts—in regards to digital assets and estate planning in general—is that after the trust has been created, a person may fail to update it in the future.¹⁵⁹ Therefore, the easier it is for a person to access and modify the trust, the more likely they are to update it whenever necessary.¹⁶⁰ 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.¹⁶¹ The idea is that if a person is able to update their trust from the comfort of their own home, they will be more likely to keep the trust up to date, thus ensuring that all of their digital assets are properly planned for in the event of their death.¹⁶² The most important thing to keep in mind, however, is that the trust must comply with all of the formalities required by each individual state.¹⁶³

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 placing digital assets into a will.¹⁶⁴ In fact, the lawyers at Entrustet recently became the first in North America to execute a will that included digital assets.¹⁶⁵ Their advice, however, may be too simple and may not fully protect a client's digital assets.

A will is a public document, which means that any person has access to the document.¹⁶⁶ This means that a will is likely not the proper—or most secure—way for passing on important usernames and passwords.¹⁶⁷ Additionally, a will only disposes of property that survives death, and assuming that online accounts only grant a mere license to use the website's services, using wills as a vehicle for passing on digital assets may thwart a client's true wishes.¹⁶⁸

The actual cost of creating and maintaining a will is something that cannot be ignored. For one thing, having a lawyer create a proper working will for a client is a costly venture.¹⁶⁹ Then, when one considers the likelihood that a

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

164. *See Planning Your Digital Estate: Dealing with Online Data After Death*, *supra* note 33; *see also* Palmer, *supra* note 107.

165. *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>.

166. *See Mentrek*, *supra* note 119.

167. *See id.*

168. *See id.*

169. *See id.*

person will change his username, password, or both over the course of his lifetime, it becomes “too costly and burdensome for clients to amend their wills every time they change their passwords.”¹⁷⁰ Therefore, advising a client to provide for his digital assets in his will may not be the proper advice.

IV. THE FATE OF THE ILL-PREPARED

A. Post-Mortem Identity Theft

Proper preparation prevents poor performance; it is a mantra that remains true even when discussing digital assets and estates. An improperly planned 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, identity theft has become a growing problem for millions of people.¹⁷¹ Indeed, the very thought of a person who would cause an already grieving family even more heartache by stealing the deceased’s identity is disheartening.¹⁷² This is why estate planners must ensure that their client’s digital estate has been properly planned. A potential identity thief could find a decedent’s name, birthday, address, or other information they would need to open a credit card account in the decedent’s name by checking various social media sites for the information.¹⁷³ However, with proper planning (e.g., providing loved ones with passwords, usernames, and security code answers), clients can avoid post-mortem identity theft, and an already grieving family can avoid more sorrow.

B. Post-Mortem Content Theft from the Deceased’s Blogs

As soon as an author publishes content on a blog, the content becomes the legal copyright of the author.¹⁷⁴ This means that no person has the legal right to re-publish another blogger’s work without first obtaining her consent.¹⁷⁵ This provides another reason for estate planners to ensure that a client’s digital estate is properly planned for because if it is not, any currently posted blog content could fall victim to content theft. Therefore, estate planners and clients need to ensure that they have properly passed on the instructions and legal rights to access blog accounts. If a decedent’s loved ones are unaware of the existence of the decedent’s blogs, it leaves open the possibility of another blogger improperly copying and posting the author’s legally protected content. This, in

170. *See id.*

171. *See* Todorova, *supra* note 49.

172. *See id.*

173. *See id.*

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

175. Copyrights last for an additional 70 years after the person’s death. *See* 17 U.S.C. § 302 (1976).

theory, could enable the content thief to gain financially from the deceased's copyrighted material. Of course, this situation can be avoided as long as the estate planner and client work to ensure that a person's digital estate—including blog posts—is properly planned for.

V. CONCLUSION

As the Internet continues to grow and expand, the need for estate planners who are able to assist their clients in planning for the client's digital estates expands as well. However, despite the increasing popularity of web-based accounts, there has been very little legislation concerning this area of estate planning.¹⁷⁶ In fact, Oklahoma recently passed the first piece of legislation aimed at assisting estate planners and executors in dealing with the decedent's digital estate.¹⁷⁷ 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."¹⁷⁸ While this law may conflict with some of the Terms of Service agreements used by different social-networking sites, the real goal of the law is to make people think about the extent of their digital assets and how to properly plan for their disposition.¹⁷⁹

While Oklahoma's new law might not be perfect, it is a step in the right direction for estate planners who are currently left stumbling through the social-networking jungle without a compass. Until more states provide legislative guidance, estate planners will have to do their best to assist clients in properly protecting and passing on the client's digital estates. For now, all that estate planners can do is use the currently available legislation in their state to ensure that they grant access to the decedent's digital assets and provide the beneficiaries the legal right to use those accounts.

by John Conner

176. See generally Telephone Interview with David M. Goldman, Esq., *supra* note 42.

177. 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>.

178. *Id.*

179. See *id.* See also *supra* Part II.