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2016

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Elizabeth Sy

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### Recommended Citation

Sy, Elizabeth (2016) "The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught up with Technology?," *Touro Law Review*: Vol. 32: No. 3, Article 7.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol32/iss3/7>

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## THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT: HAS THE LAW CAUGHT UP WITH TECHNOLOGY?

*Elizabeth Sy\**

### I. INTRODUCTION

The use of the internet has skyrocketed.<sup>1</sup> We now live in a world where we can buy apparel online from bed at three in the morning,<sup>2</sup> order food without having to make a phone call,<sup>3</sup> and quickly deposit a check by photographing it with our smartphones.<sup>4</sup> Some people may not even realize that a simple keyboard stroke, mouse-click, or tap on a touch-screen device may have the possibility of creating property.<sup>5</sup> According to a global study conducted by McAfee, the average internet user has over \$37,000 in digital assets

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\* J.D. Candidate 2017, Touro College Jacob D. Fuchsberg Law Center; B.S. 2012 in Legal Studies, St. John's University. I would like to thank Professor Rena C. Sepowitz for her guidance with this Comment. I also thank my Comments Editor, Kristen Curley, for her kindness and valuable assistance during the writing process. Finally, I would like to thank my family for their unconditional love, support and patience throughout my law school career.

<sup>1</sup> See generally *American's Internet Access: 2000-2015*, PEWRESEARCHCENTER (Jun. 26, 2015), <http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/>.

<sup>2</sup> See, e.g., MACY'S, <http://www.macys.com/> (last visited Dec. 4, 2015).

<sup>3</sup> See, e.g., GRUBHUB, <https://www.grubhub.com/> (last visited Dec. 4, 2015); SEAMLESS, <https://www.seamless.com> (last visited Dec. 4, 2015); DELIVERY.COM, <https://www.delivery.com/> (last visited Dec. 4, 2015).

<sup>4</sup> See, e.g., *Deposit your check without the trip to the bank, Mobile Check Deposit*, BANK OF AMERICA, <https://www.bankofamerica.com/online-banking/mobile-check-deposit.go> (last visited Dec. 4, 2015); *Deposit checks from virtually anywhere, Chase Quick Deposit*, CHASE, <https://www.chase.com/online/digital/mobile-deposits.html> (last visited Dec. 4, 2015); *Everything you need to know about mobile deposit is right here, Hello, Time Saver*, CAPITAL ONE, <https://www.capitalone.com/olb-sites/rdc-demo/> (last visited Dec. 4, 2015).

<sup>5</sup> See Kendal Dobra, *An Executor's Duty Toward Digital Assets*, 59 No. 5 PRAC. LAW. 21 (2013).

across multiple devices.<sup>6</sup> Here in the United States, people value their assets, on average, at \$55,000, a larger figure than anywhere else in the world.<sup>7</sup> Although today's fast-paced digital world provides for a more convenient lifestyle, it is important to be aware of the legal and privacy implications of leaving behind a digital estate.

Since digital assets are intangible, it is generally easy to overlook them.<sup>8</sup> Even in the instances when they are recognized, many estate planning attorneys rely on traditional planning principles for their disposition, failing to address the privacy and fiduciary access concerns that are specific to them.<sup>9</sup> The cost of overlooking or improperly planning for digital estate disposition can be quite significant, leaving billions of dollars' worth of assets unaccounted for.<sup>10</sup> Some private entities have attempted to provide account holders with options for digital estate planning through online tools, but these mechanisms alone are insufficient.<sup>11</sup> Increasing concerns about the disposition and administration of digital assets made it apparent that States should either create or update their estate laws.

In 2014, there were only a few, albeit inadequate, state laws that governed digital assets.<sup>12</sup> In an attempt to keep pace with changing technology, on March 3, 2014, the Uniform Law Commission (ULC) took a shot at creating a bridge between the will and the web by proposing the Uniform Fiduciary Access to Digital Assets Act (the UFADAA).<sup>13</sup> Its purpose was to "vest fiduciaries with the authority

<sup>6</sup> McAfee Reveals Average Internet User Has More Than \$37,000 in Underprotected 'Digital Assets', MCAFEE, <http://www.mcafee.com/us/about/news/2011/q3/20110927-01.aspx> (last visited Dec. 4, 2015).

<sup>7</sup> *Id.*

<sup>8</sup> Ashley F. Watkins, *Digital Properties and Death: What Will Your Heirs Have Access to After You Die?*, 62 BUFF. L. REV. 193, 194 (2014).

<sup>9</sup> See McNeese Wallace & Nurick LLC, *McNeese Insights: Estate Planning for Digital Assets*, LEXISNEXIS (Apr. 10, 2014), <http://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/archive/2014/04/10/mcneese-insights-estate-planning-for-digital-assets.aspx>.

<sup>10</sup> Hopkins & Lipin, *Viable Solutions to the Digital Estate Planning Dilemma*, 99 IOWA L. REV. BULL. 61 (2014).

<sup>11</sup> See *infra* notes 165, 175 and accompanying text.

<sup>12</sup> See Jim Lamm, *Delaware Enacts Fiduciary Access to Digital Assets Act*, DIGITAL PASSING (Aug. 27, 2014), <http://www.digitalpassing.com/2014/08/27/delaware-enacts-fiduciary-access-digital-assets-act/>.

<sup>13</sup> *Fiduciary Access to Digital Assets Act*, UNIFORMLAWS, [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014\\_UFADAA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf) (last visited Dec. 4, 2015). [hereinafter UFADAA].

to access, manage, copy, or delete digital assets and accounts.”<sup>14</sup> However, in response to privacy concerns, NetChoice<sup>15</sup> played defense by proposing the Privacy Expectation After-life Choice Act (the PEACA). The PEACA<sup>16</sup> “aims to let fiduciaries have access to digital service providers to view only select contents of accounts,”<sup>17</sup> such as the “To” and “From” lines of an email, so they know what organization to contact to close an account.<sup>18</sup> The PEACA is backed by the Internet Coalition, an organization comprised of some of the largest technology companies including Amazon, Google and Facebook.<sup>19</sup> On September 28, 2015, shortly after the opposition to its proposal, the ULC substantially revised the UFADAA, by creating what is now known as the Revised UFADAA (the RUFADAA), which not only sets forth comprehensive default laws, but also recognizes and protects the deceased user’s privacy.<sup>20</sup>

Part II of this comment discusses the ever-evolving term “digital asset,” the emergence of the digital world, and their related legal implications. Part III provides two sample scenarios that trigger post mortem privacy concerns and introduces related societal opinions. Part IV addresses the effects of Internet Service Providers (ISPs), federal laws, state laws and the judiciary on the fate of digital assets. Part V briefly explains the ULC’s influence in the trust and estates area, analyzes one of its latest proposed laws – the RUFADAA, and proposes several changes. Ultimately, this comment advocates for the

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<sup>14</sup> *Id.* at 1.

<sup>15</sup> “NetChoice is a trade association of eCommerce businesses and online consumers all of whom share the goal of promoting convenience, choice and commerce on the Net.” NetChoice represents companies including AOL Corp., Lyft Inc. and PayPal Holdings, Inc. *About Us*, NETCHOICE, <http://netchoice.org/about/> (last visited Dec. 4, 2015).

<sup>16</sup> *Privacy Expectation Afterlife and Choices Act (PEAC)*, NETCHOICE, <http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/> (last visited Dec. 4, 2015). [hereinafter PEACA].

<sup>17</sup> Alessandra Malito, *Two groups battle it out to create uniform national rule for fiduciaries to access digital assets*, INVESTMENTNEWS (May 28, 2015), <http://www.investmentnews.com/article/20150528/FREE/150529924/two-groups-battle-it-out-to-create-uniform-national-rule-for>.

<sup>18</sup> *Federal, State Laws Needed To Address Access to Deceased Individuals’ Online Communications* 19, COMMUNICATIONS DAILY (Aug. 7, 2015), [http://www.gpmlaw.com/portalresource/Communications\\_Daily.pdf](http://www.gpmlaw.com/portalresource/Communications_Daily.pdf) [hereinafter Communications].

<sup>19</sup> Malito, *supra* note 17.

<sup>20</sup> *Revised Uniform Fiduciary Access to Digital Assets Act*, UNIFORMLAWS, [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Revised%202015/2015\\_RUFADAA\\_Final%20Act\\_2015sep28.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Revised%202015/2015_RUFADAA_Final%20Act_2015sep28.pdf) (last visited on Dec. 4, 2015) [hereinafter RUFADAA].

nationwide adoption of the RUFADAA in a revised form because it is the most comprehensive law that tackles both digital assets and privacy concerns.

## II. DIGITAL ASSET/DIGITAL WORLD

So what exactly is a digital asset? A digital asset is defined as any item of text or media which has been formatted into a binary source that includes the right to use it.<sup>21</sup> In simpler terms, digital assets comprise any information created that exists in digital form,<sup>22</sup> either online or on an electronic storage device,<sup>23</sup> including the information necessary to access them.<sup>24</sup> Digital assets can be split up into five categories:<sup>25</sup> electronic documents;<sup>26</sup> social media outlets;<sup>27</sup> financial assets;<sup>28</sup> business assets;<sup>29</sup> and miscellaneous assets.<sup>30</sup> Two decades ago, people passed items such as letters, photos, and videotapes from generation to generation.<sup>31</sup> Today, these items are frequently stored digitally either on a hard drive or online account.<sup>32</sup>

The usual role of an executor involves identifying the dece-

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<sup>21</sup> A. Toygar et al., *A New Asset Type: Digital Assets* 113, CSUSB SCHOLARWORKS (Nov. 4, 2013), <http://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1024&context=jitim>.

<sup>22</sup> “Digital asset encompasses e-mail, word processing documents, audio and video files, and images . . .” Maria Perrone, *What Happens When We Die: Estate Planning of Digital Assets*, 21 COMMLAW CONSPECTUS 185, 188 (2012).

<sup>23</sup> Digital devices include smartphones, tablets and smartwatches. *Definition of: digital device*, PC, <http://www.pcmag.com/encyclopedia/term/68194/digital-device> (last visited Feb. 17, 2016).

<sup>24</sup> *A Helpful Overview Of All Your Digital Property And Digital Assets*, EVERPLANS, <https://www.everplans.com/articles/a-helpful-overview-of-all-your-digital-property-and-digital-assets> (last visited Feb. 19, 2016).

<sup>25</sup> Jennifer L. Zegel, *Digital Asset Planning*, REGERLAW, <http://www.regerlaw.com/digital-asset-planning.html> (last visited Feb. 17, 2016).

<sup>26</sup> Some examples include e-mail, text, Microsoft Word document, Microsoft excel spreadsheet, etc.

<sup>27</sup> Some examples include Facebook, Twitter, Instagram, Linked-in, Snapchat, etc.

<sup>28</sup> Some examples include PayPal, Google Wallet, Amazon, eBay, Robinhood, online bank accounts, YouTube Account that generates ad revenue, etc.

<sup>29</sup> Some examples include digital customer information, databases, trademarks, trade-secrets, websites, domain names, etc.

<sup>30</sup> Some examples include blogs, music, videos, online gaming, loyalty programs, etc.

<sup>31</sup> Ashley F. Watkins, *Digital Properties and Death: What Will Your Heirs Have Access to After You Die?*, 62 BUFF. L. REV. 193 (2014).

<sup>32</sup> *Id.*

dent's assets, paying the decedent's bills, and distributing the decedent's assets according to his or her Last Will and Testament.<sup>33</sup> The traditional process of wrapping up the estate requires a search of the decedent's records such as accounts and bills.<sup>34</sup> These records are identified through stored records or subsequently received mail.<sup>35</sup> However, the emergence of the digital world results in less paper trail.<sup>36</sup>

In 1978, F.W. Lancaster predicted a paperless society.<sup>37</sup> In *Toward Paperless Information Systems*, he wrote:

The paperless society is rapidly approaching, whether we like it or not. Everyone reading this book will be affected by it one way or another. We cannot bury our heads in the sand. We may choose to ignore the electronic world, but this will not make it go away . . . If we do not plan now for the years ahead, we may find that transition to be one of disruption and chaos rather than one of ordered evolutionary progress.<sup>38</sup>

As of January 2012, the U.S. Treasury Department ceased the sale of paper savings bonds,<sup>39</sup> which are now only issued electronically online.<sup>40</sup> On March 1, 2013, the Department of Treasury required almost all Social Security beneficiaries to receive payments through direct deposit.<sup>41</sup> The Internal Revenue Service received over 128 million returns through e-file in 2015, which amounts to 91% of the total returns filed that year.<sup>42</sup> In an effort to “go green,” numer-

<sup>33</sup> Andrew S. Rusniak, *McNees Insights: Estate Planning for Digital Assets*, LEXISNEXIS (Apr. 10, 2014), <http://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/archive/2014/04/10/mcnees-insights-estate-planning-for-digital-assets.aspx>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See generally FREDERICK W. LANCASTER, *TOWARD PAPERLESS INFORMATION SYSTEMS* (Illustrated ed. 1978).

<sup>38</sup> FREDERICK W. LANCASTER, *TOWARD PAPERLESS INFORMATION SYSTEMS* 166 (Illustrated ed. 1978).

<sup>39</sup> *Buying Savings Bonds, Services*, TREASURY, <http://www.treasury.gov/services/Pages/Savings-Bonds.aspx> (last visited Feb. 16, 2016).

<sup>40</sup> *About TreasuryDirect*, TREASURYDIRECT, <http://www.treasurydirect.gov/about.htm> (last visited Dec. 4, 2015).

<sup>41</sup> *Social Security Payments Go Paperless: Protecting Seniors From Fraud and Confusion*, OIG, <http://oig.ssa.gov/newsroom/congressional-testimony/june19> (last visited Dec. 4, 2015).

<sup>42</sup> *U.S. Taxpayers efiled More Than 128 Million Returns in 2015*, EFILE,

ous banks and credit card companies offer the option for paperless billing statements.<sup>43</sup> Amazon revolutionized book reading in 2007 when it introduced its Kindle e-book reader.<sup>44</sup> Now, the digital reading revolution has even expanded to smartphones.<sup>45</sup> According to a study conducted by Publishing Technology, 43% of consumers across the United States and United Kingdom have read an e-book or part of an e-book on their mobile devices.<sup>46</sup> Furthermore, the annual revenue of the United States Postal Service (USPS) for first-class single piece mail has declined by 24.4 billion dollars from 2005 to 2014.<sup>47</sup> About two hundred four million USPS online customers emerged in 2009, and as of 2014, the online customer count has increased to a whopping five hundred million.<sup>48</sup>

### III. POSTMORTEM RIGHT TO PRIVACY

Consider the following two scenarios:

1. John and Jane have been married for 45 years. Their marriage had its ups and downs, and during the downs, John started seeking relationships with others. John downloaded dating apps on his smartphone and created a new email account to correspond with his mistress. This lasted for about a year before he and Jane mended their relationship. John and Jane put their differences aside and began to cherish each other more than ever before. Unfortunately, John suddenly died in a car crash on his way home from work. Jane wants to access his newest email account to pay his remaining bills and his smartphone to save memorable pictures of them. Is this what

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<http://www.efile.com/efile-tax-return-direct-deposit-statistics/> (last visited Feb. 15, 2016).

<sup>43</sup> See Jeremy M. Simon, *Paperless credit card statements: Right for You?*, CREDITCARDS.COM, <http://www.creditcards.com/credit-card-news/bill-pay-paperless-statements-1273.php> (last visited Dec. 4, 2015); See also *Paperless Statements*, CHASE, <https://www.chase.com/online/digital/paperless-statements.html> (last visited Feb. 14, 2016).

<sup>44</sup> Caroline McCarthy, *Amazon debuts Kindle e-book reader*, CNET (Nov. 19, 2007), <http://www.cnet.com/news/amazon-debuts-kindle-e-book-reader/>.

<sup>45</sup> Jennifer Maloney, *The Rise of Phone Reading*, THE WALL STREET JOURNAL (Aug. 14, 2015), <http://www.wsj.com/articles/the-rise-of-phone-reading-1439398395>.

<sup>46</sup> *Mobile phone reading on the rise in US and UK*, PUBLISHING TECHNOLOGY (Oct. 7, 2014), <http://www.publishingtechnology.com/news-article/mobile-phone-reading-on-the-rise-in-us-and-uk/> (the sample size was 3,000 consumers).

<sup>47</sup> *A Decade of Facts and Figures*, USPS, <https://about.usps.com/who-we-are/postal-facts/decade-of-facts-and-figures.htm> (last visited Dec. 4, 2015).

<sup>48</sup> *Id.*

John would want? How would Jane feel if she read conversations between John and other women?

2. Maria is a seventeen-year-old Muslim who, in her eyes, comes from a ‘conservative’ family. During her senior year of high school, she was diagnosed with stage three melanoma. Maria’s tumor and cancerous lymph nodes were surgically removed, but she still needed chemotherapy. During the period of treatment, Maria created a private Tumblr account<sup>49</sup> to express her well-established feelings about religion. One of her posts was called, “Muslim Turned Atheist: M’s Story.” Maria knew that her condition was worsening, and she wanted to log her feelings before she died. In addition, Maria felt good speaking to other people across the world via email who recently converted as well. Would Maria have wanted her family and friends to access the blog and her email account?

According to a NetChoice-commissioned survey conducted on January 27, 2015, more than 70% of Americans wanted private online communications to remain private after death.<sup>50</sup> These Americans also believed that the law “should err on the side of privacy when individuals die without documenting their preference about how to handle their private communication and photos.”<sup>51</sup> Steve DelBianco, executive director of NetChoice, stated that, “For nearly 30 years, federal law has prioritized the privacy of email and other electronic communications. Estate attorneys want to dismantle these privacy protections so they can more easily access and distribute your digital legacy.”<sup>52</sup> Additional findings include: 65% of Americans say that if their private communications and photos are shared without their consent, it violates their privacy; 43% would want their online communications deleted upon death; and fewer than 10% would permit an estate attorney or executor to fully access private communications.<sup>53</sup>

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<sup>49</sup> TUMBLR, <https://www.tumblr.com/> (last visited Feb. 20, 2016).

<sup>50</sup> *Americans Overwhelmingly Want To Control Personal Privacy Even After Death*, NETCHOICE, <http://netchoice.org/library/decedent-information/> (last visited Dec. 4, 2015) [hereinafter *Privacy After Death*].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*



#### IV. THE FATE OF DIGITAL ASSETS

Currently, rights of fiduciaries<sup>54</sup> with regard to digital assets are unclear. On the one hand, fiduciaries need access to online accounts to properly administer estates. On the other hand, there is a question of how broad this access should be. For the most part, Terms of Service (TOS) agreements with ISPs prohibit access by anyone but the account holder.<sup>55</sup> When an account holder dies, the person administering the estate must go through the process of obtaining a court order, which is time consuming, costly and without guaranteed results.<sup>56</sup> Even if the fiduciary has the username and password for the account, the fiduciary could possibly face legal consequences due to current electronic privacy and anti-hacking laws.<sup>57</sup> Therefore, it can be said that digital assets ultimately lay in the hands of: (1) ISPs; (2) federal laws; (3) the legislature in the state in which one lives; and (4) the judiciary.

##### A. ISPs

A fiduciary must be able to access an account holder's digital property in order to manage it.<sup>58</sup> The account holder may decide to disclose her username and password to the fiduciary, but for some online accounts, this disclosure results in a violation of the TOS,<sup>59</sup> the agreement that governs a user's relationship with a service provider.<sup>60</sup> ISPs have strict terms in place to protect the privacy of users, recognizing that people create accounts they do not necessarily want others

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<sup>54</sup> Fiduciary: someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure. Black's Law Dictionary (10<sup>th</sup> ed. 2014).

<sup>55</sup> The Electronic Communications Privacy Act and the Computer Fraud and Abuse Act. William Bissett & Andrew W. Blair, *Planning Implications of New Legislation for Digital Assets*, JOURNAL OF FINANCIAL PLANNING, <https://www.onefpa.org/journal/Pages/DEC14-Planning-Implications-of-New-Legislation-for-Digital-Assets.aspx> (last visited Dec. 4, 2015).

<sup>56</sup> *Id.*

<sup>57</sup> *See infra* notes 86, 87.

<sup>58</sup> James D. Lamm et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries From Managing Digital Property*, 68 U. MIAMI L. REV. 385, 399 (2014).

<sup>59</sup> *Id.*

<sup>60</sup> Watkins, *supra* note 8, at 214.

to know about.<sup>61</sup> A TOS Agreement is a set of terms that users must agree to follow before using a service.<sup>62</sup> These regulations cover a broad array of issues, such as copyright notices, marketing policies, and acceptable user behavior.<sup>63</sup> ISPs have varying versions of TOS agreements<sup>64</sup> that either fail to address fiduciary access or postmortem options, or prohibit any postmortem transfer.<sup>65</sup>

For example, Yahoo!'s TOS provide a "No Right of Survivorship and Non-Transferability" section which states, "You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted."<sup>66</sup> In another example, Facebook only allows for an account to be memorialized or permanently deleted.<sup>67</sup> Although memorialized accounts allow for friends and family to share memories after a person has passed away, no one has the ability to log into the account.<sup>68</sup> If family members wish to access the content in a Facebook account, they must obtain a court order.<sup>69</sup> Nevertheless, Facebook describes this process as "rare" and without a guarantee.<sup>70</sup>

Section 4 of Facebook's TOS states, "You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize

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<sup>61</sup> Tyler G. Tarney, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 CAP. U.L. REV. 773, 782 (2012).

<sup>62</sup> *What Is a Terms of Service Agreement?*, TERMSFEED.COM, <https://termsfeed.com/blog/terms-service-agreement/> (last visited Oct. 26, 2015).

<sup>63</sup> *Id.*

<sup>64</sup> *Compare Google Terms of Service*, GOOGLE (last modified Apr. 24, 2014), <http://www.google.com/intl/en/policies/terms/> with *Apple Website Terms of Use*, APPLE, <http://www.apple.com/legal/internet-services/terms/site.html> (last visited Feb. 19, 2016).

<sup>65</sup> Victoria Blachly, *Uniform Fiduciary Access to Digital Assets Act: What UFADAA Know*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/publications/probate\\_property\\_magazine\\_2012/2015/july\\_august\\_2015/2015\\_aba\\_rpte\\_pp\\_v29\\_3\\_article\\_blachly\\_uniform\\_fiduciary\\_access\\_to\\_digital\\_assets\\_act.html](http://www.americanbar.org/publications/probate_property_magazine_2012/2015/july_august_2015/2015_aba_rpte_pp_v29_3_article_blachly_uniform_fiduciary_access_to_digital_assets_act.html) (last visited Jan. 20, 2015).

<sup>66</sup> *Yahoo Terms of Service*, YAHOO!, <https://policies.yahoo.com/sg/en/yahoo/terms/utos/> (last visited Jan. 20, 2015).

<sup>67</sup> *What will happen to my account if I pass away?*, FACEBOOK, <https://www.facebook.com/help/103897939701143> (last visited Feb. 18, 2016).

<sup>68</sup> *Id.*

<sup>69</sup> *How do I request content from a deceased person?*, FACEBOOK, <https://www.facebook.com/help/123355624495297> (last visited Feb. 18, 2016).

<sup>70</sup> *Id.*

the security of your account.”<sup>71</sup> Furthermore, Section 14 states, “If you violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, we can stop providing all or part of Facebook to you.”<sup>72</sup> Therefore, if an account holder shares his or her password with a fiduciary, the account holder would violate Facebook’s TOS and ignite Facebook’s reserved right to terminate the agreement, in which the account holder may possibly lose his or her own access to any digital property of the account.<sup>73</sup> Should TOS Agreements be valid after death, and should all ISPs address death in their TOS Agreements? *In re Ellsworth* demonstrates the difficulties in litigating access to digital accounts, even when an ISP provided for terms and conditions governing death.<sup>74</sup>

In 2005, a father of a slain soldier in Iraq petitioned Yahoo! to give [him] the contents of his son’s email account despite the clear term in Yahoo!’s service agreement stating that accounts were terminated upon death and not transferable. When Yahoo! refused, the father took the issue to Michigan probate court. The Michigan probate court ordered Yahoo! to give the contents of the email account to the father. Instead of challenging the order, Yahoo! obliged but did not change its policy.<sup>75</sup>

In another case:

[A] dispute arose in which a mother, Karen Williams, turned to her twenty-two year old son’s Facebook account after his sudden death in hopes of learning more about him. Ms. Williams found her son’s password and emailed the Facebook administrators, asking them to maintain her son’s account so she could look

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<sup>71</sup> *Statements of Rights and Responsibilities*, FACEBOOK (last updated Jan. 30, 2015), [www.facebook.com/legal/terms](http://www.facebook.com/legal/terms).

<sup>72</sup> *Id.*

<sup>73</sup> James D. Lamm et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries From Managing Digital Property*, 68 U. MIAMI L. REV. 385, 399 (2014).

<sup>74</sup> Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799, 833 (2014).

<sup>75</sup> *Id.*

through his posts. However, within two hours, her son's password was changed, essentially locking her out of the account. It was not until she filed a lawsuit that Facebook granted her ten months of access to her son's account and after this period, his profile was removed.<sup>76</sup>

This ultimately means that cases may be litigated in an inconsistent manner depending on whether the court wants to uphold the ISP's TOS. Without a uniform digital estate management procedure, the individuals closest to the decedent will continue to face obstacles in the pursuit of administering the digital estate.

## B. Federal Laws

The two federal laws governing digital assets are the Stored Communications Act<sup>77</sup> (SCA) and the Computer Fraud and Abuse Act (CFAA).<sup>78</sup> These laws were enacted to prevent unauthorized access to online accounts.<sup>79</sup> However, they present a roadblock to estate administration of digital assets because access may be prohibited despite the fiduciary's possession of the decedent's login information.<sup>80</sup> Moreover, the expansion of the digital world in the past thirty years may make these laws outdated.<sup>81</sup> In 1986, "it was hardly possible for Congress to imagine a world where internet providers became the main custodians of personal correspondence, pictures, entertainment and documents."<sup>82</sup>

The SCA, a component of the Electronic Communications Privacy Act of 1986 (ECPA),<sup>83</sup> creates a set of Fourth Amendment-

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<sup>76</sup> Jennifer Mispagel, *Have You Heard of Digital Estate Planning?*, LONICH & PATTON, LLP (Nov. 3, 2015), <http://www.lonichandpatton.com/blog/2015/have-you-heard-of-digital-estate-planning/>.

<sup>77</sup> 18 U.S.C. §§ 2701-12 (2012).

<sup>78</sup> 18 U.S.C. § 1030 (2012).

<sup>79</sup> *Federal and State Computer Fraud and Abuse Acts, Estate Planning for your Digital Assets*, LOEB & LOEB (Apr. 2015), <http://www.loeb.com/publication-clientreport-20150408-estateplanningdigitalassets>.

<sup>80</sup> *Id.*

<sup>81</sup> See Sasha A. Klein & Mark R. Parthemer, *Plan Ahead: Protect Your #DigitalFootprint*, *The Florida Bar* (Jan. 2015), <http://www.floridabar.org/divcom/jn/jnjournal01.nsf/8c9f13012b96736985256aa900624829/27e399ad4b93728785257db8005768c1>.

<sup>82</sup> Banta, *supra* note 74, at 841.

<sup>83</sup> Richard M. Thompson II & Jared P. Cole, *Stored Communications Act: Reform of the Electronic Communications Privacy Act (ECPA)*, FAS (May 19, 2015),

like privacy protections, regulating the relationship between government or nongovernment entities (different rules apply to each) and service providers in regard to obtaining users' private information.<sup>84</sup> Initially, the SCA was enacted by Congress for the sole purpose of preventing government access to a user's electronic communications.<sup>85</sup> Section 2701 of the SCA criminalizes unauthorized access to electronic communications.<sup>86</sup> Section 2702 creates an exception, allowing ISPs to disclose a customer's private data to agents of the customer or with his or her "lawful consent."<sup>87</sup> The SCA prohibits the disclosure of the content of communications, but providers are allowed to disclose non-content information such as the user's contact and account information.<sup>88</sup> According to Marc K. Zwillinger and Christian S. Genetski,<sup>89</sup> since the SCA was designed primarily to protect electronic communications from government reach, "the civil cases involving the SCA often result in odd decisions."<sup>90</sup> In addition, it seems as if ISPs quickly hide behind the SCA as a defense, as a liability prevention mechanism, while leaving the digital estate issue in the hands of the judiciary. This ultimately results in increased litigation costs and delayed estate administration.

In *Ajemian v. Yahoo!, Inc.*, the decedent John's executors and siblings sued to declare that his estate owned the email messages he sent and received through his Yahoo! Account.<sup>91</sup> In 2002, John's brother Robert opened a Yahoo! email account for him.<sup>92</sup> Although John was the primary user of the account, Robert shared the account as a co-user.<sup>93</sup> According to Yahoo!, "prospective users are given an opportunity to review the TOS and Privacy Policy prior to submitting

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<https://www.fas.org/sgp/crs/misc/R44036.pdf>

<sup>84</sup> Suzanne B. Walsh, *Coming Soon to A Legislature Near You: Comprehensive State Law Governing Fiduciary Access to Digital Assets*, 8 CHARLESTON L. REV. 429, 433 (2014).

<sup>85</sup> Marc J. Zwillinger & Christian S. Genetski, *Criminal Discovery of Internet Communications Under the Stored Communications Act: It's Not A Level Playing Field*, 97 J. CRIM. L. & CRIMINOLOGY 569, 573 (2007).

<sup>86</sup> 18 U.S.C. § 2701.

<sup>87</sup> 18 U.S.C. § 2702(b)(3).

<sup>88</sup> Walsh, *supra* note 84, at 434.

<sup>89</sup> Zwillinger & Genetski were previous partners in the Information Security and Internet Enforcement group at Sonnenschein, Nath & Rosenthal LLP. Zwillinger & Genetski, *supra* note 85, at 569 n.1.

<sup>90</sup> Zwillinger & Genetski, *supra* note 85, at 570-71.

<sup>91</sup> *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. App. Ct. 2013).

<sup>92</sup> *Id.* at 607.

<sup>93</sup> *Id.*

registration data.”<sup>94</sup> The TOS at that time noted that: (1) Yahoo! preserved the right to update the terms without providing notice to the user; (2) Yahoo! may terminate the user account for any reason; (2) Yahoo! granted a personal, non-transferable and non-exclusive right and license to use the object code of its Software on a single computer; and (3) disputes would be handled in Santa Clara, California under California laws.<sup>95</sup> On August 10, 2006, John was hit and killed by a motor vehicle.<sup>96</sup> A new version of the TOS<sup>97</sup> provided that: (1) the user agrees that there shall be no third-party beneficiaries to the agreement; (2) the user agrees that the account is non-transferable and rights to the Yahoo! ID or contents within the account terminate upon death; and (3) upon receipt of a copy of a death certificate, the account may be terminated and all contents therein permanently deleted.<sup>98</sup> Shortly after John’s death, the plaintiffs initially tried to gain access of his email account to obtain the email addresses of his friends to notify them of his death and memorial service.<sup>99</sup> After their appointment as co-administrators of John’s estate, the plaintiffs requested the emails to help identify and locate assets and administer John’s estate.<sup>100</sup> At first, Yahoo! agreed to disclose information when the family provided a copy of John’s birth and death certificates, but it later refused them access, relying on the SCA, which Yahoo! interpreted to prohibit disclosing John’s emails even to the administrators of his estate.<sup>101</sup> Later negotiations resulted in partial resolution between the parties, in which Yahoo! was required to produce all subscriber records and email header information, but not actual contents of the emails.<sup>102</sup> Subsequently, the co-administrators filed a second

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 607-09

<sup>96</sup> *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d at 608.

<sup>97</sup> Since the relationship between the ISP and the user is governed by contract law, if the ISP wants to modify the TOS, the user must assent to it. ISPs generally include a provision in the TOS that reserves their right to change the terms without notice. Additionally, they may include a provision clarifying that if the user continues to visit the website after any changes to the TOS, the user is deemed to have assented to the new terms. *See generally* Mark Rasch, *Changing Terms of Service? Be Ready For A Class Action Lawsuit*, FIERCERETAIL (Jul. 26, 2013), <http://www.fierceretail.com/story/changing-terms-of-service-be-ready-for-a-class-action-lawsuit>.

<sup>98</sup> *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d at 608.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 608-09.

<sup>102</sup> *Ajemian v. Yahoo!*, VENABLE.COM, <https://www.venable.com/files/Publication/7c32b4a6-42f7-4cdb-85f7-d064016bbf74/Preview/PublicationAttachment/0c00c078-b376->

complaint to seek the contents of the emails on the ground that they were the property of John's estate and Robert as co-owner of the account.<sup>103</sup> The complaint was dismissed, and the judge held that the Yahoo! forum selection clause in the TOS required lawsuits to be brought in California.<sup>104</sup> The Appeals Court of Massachusetts determined that the record failed to indicate whether the forum selection clause had been reasonably communicated and accepted by the email account users.<sup>105</sup> The Appeals Court never reached the question of whether Yahoo! was required to keep the emails confidential under the SCA.<sup>106</sup>

Facebook has also relied on the SCA in refusing to give records of a deceased user's account to her family.<sup>107</sup> On December 20, 2008, a woman died after falling from the twelfth floor of her apartment building in Manchester, England.<sup>108</sup> Her family sought a court order forcing Facebook to give them information about her account in the belief that it contained critical evidence showing her state of mind on the day leading up to her death.<sup>109</sup> Facebook moved to quash the subpoena on the ground that it violated the SCA and alternatively, it moved for an order establishing the family's authority to tender consent on the woman's behalf.<sup>110</sup> The court granted Facebook's order to quash, finding that the SCA did not compel Facebook to give her information to her family.<sup>111</sup> The court refused to decide whether the family's consent qualified as consent under the SCA, and unhelpfully stated that, "under the plain language of Section 2702, while consent may *permit* production by a provider, it may not *require* such a production."<sup>112</sup>

The second federal law that raises issues in estate administration of digital assets is the CFAA.<sup>113</sup> The CFAA provides that, "whoever intentionally accesses a computer without authorization or

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40fe-aed8-db3c16ba1b96/Ajemian\_v\_Yahoo.pdf (last visited on Dec. 4, 2015).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Banta, *supra* note 74, at 841.

<sup>108</sup> *In re Facebook*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1206.

<sup>112</sup> *Id.*

<sup>113</sup> *Supra* note 78.

exceeds authorized access, and thereby obtains information from any protected computer if the conduct involved an interstate or foreign communication shall be punished under the Act.”<sup>114</sup> While the CFAA is a criminal law, a 1994 amendment permits civil actions to be brought under the statute.<sup>115</sup> A violation of the CFAA can be committed (1) by an outsider who trespasses into a computer, or (2) an intruder who goes beyond the scope of his given authorization.<sup>116</sup>

Although the CFAA does not define “authorization” or “authorized access,” the Ninth Circuit has interpreted these terms as any permission at all.<sup>117</sup> Even with this definition, it is still not clear as to how a court would rule on whether a fiduciary has authorization.<sup>118</sup> If there is no evidence the account holder gave formal documentation of authorization, then a court would likely find no authorization.<sup>119</sup> But even if there was evidence of formal authorization, the fiduciary may still be in the danger zone of breaking the law.<sup>120</sup> Since access to an account requires accessing ISPs or third-party vendor computers, the fiduciary must obtain the account holder’s authorization *and* the ISP’s authorization.<sup>121</sup>

Many lawyers and computer experts argue that the CFAA is outdated, claiming that it is too broad and allows the United States Attorneys to abuse it.<sup>122</sup> In one instance, family and friends of internet prodigy Aaron Swartz claimed that his suicide was “the product of a criminal justice system rife with intimidation and prosecutorial overreach.”<sup>123</sup> As a result, U.S. Representative Zoe Lofgren intro-

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<sup>114</sup> *Computer Fraud and Abuse Act (CFAA)*, EFF, [https://ilt.eff.org/index.php/Computer\\_Fraud\\_and\\_Abuse\\_Act\\_\(CFAA\)](https://ilt.eff.org/index.php/Computer_Fraud_and_Abuse_Act_(CFAA)) (last visited Feb. 17, 2016).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> James D. Lamm et. al, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 400 (2014).

<sup>118</sup> *Id.* at 400-01.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (emphasis added).

<sup>122</sup> Stephanie F. Ward, *Hacker’s Hell: Many want to narrow the Computer Fraud and Abuse Act*, ABA JOURNAL (May. 1, 2013), [http://www.abajournal.com/magazine/article/hackers\\_hell\\_many\\_want\\_to\\_narrow\\_the\\_computer\\_fraud\\_and\\_abuse\\_act/](http://www.abajournal.com/magazine/article/hackers_hell_many_want_to_narrow_the_computer_fraud_and_abuse_act/).

<sup>123</sup> David Amsden, *The Brilliant Life and Tragic Death of Aaron Swartz*, ROLLINGSTONE (Feb. 15, 2013), <http://www.rollingstone.com/culture/news/the-brilliant-life-and-tragic-death-of-aaron-swartz-20130215>. On January 11, 2013, Aaron Swartz committed suicide at the age of 26 by hanging himself in his Brooklyn apartment. *Id.* Two years earlier, he was arrested and indicted for computer fraud and illegally obtaining documents from Massachusetts Institute of Technology computers. *Id.* The case was supposed to go to trial in April of



duced amendments to the CFAA, called “Aaron’s Law,” in 2010 and has re-introduced them in April of 2015.<sup>124</sup> The first proposal was designed to eliminate criminal exposure for mere terms of use violations.<sup>125</sup> The second proposal was intended to eliminate CFAA’s Section 4, which allows defendants to be charged twice for the same offense.<sup>126</sup>

### C. Current State Laws

In 2014, only nine states addressed fiduciaries’ access to digital assets.<sup>127</sup> The first eight include: Connecticut, Idaho, Indiana, Louisiana, Oklahoma, Rhode Island, Nevada, and Virginia.<sup>128</sup> The Connecticut and Rhode Island statutes address only personal representatives’ access to email accounts; Indiana’s statute addresses only personal representatives’ access to electronically stored documents; Oklahoma’s statute gives the executor or administrator the power to take control of social networking websites, short message service websites or any email service websites; the Nevada statute gives power to the personal representative to direct termination of digital assets, but it does not address powers to access the account or copy the contents; the Louisiana statute gives the succession representative

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2013, and if Swartz lost, he faced up to 35 years in prison. *Id.* Swartz helped develop RSS and was one of the creators of Reddit.

See *What Is RSS? RSS Explained*, WHATISRSS.COM, <http://www.whatirss.com/> (last visited Mar. 10, 2016) (“RSS (Rich Site Summary) is a format for delivering regularly changing web content. Many news-related sites, weblogs and other online publishers syndicate their content as an RSS Feed to whoever wants it.”); Christy Loerzel, *What is Reddit and why should you care?*, SYMANTEC (Apr. 11, 2013), <http://www.symantec.com/connect/blogs/what-reddit-and-why-should-you-care> (“Reddit . . . is an online social media community where users vote on content. There are sub-communities, or subreddits, that any user may create that are independent and moderated by a team of volunteers. . . . Reddit users submit links to online content and vote on which stories and discussions are important.”).

<sup>124</sup> Cindy Cohn, *Aaron’s Law Reintroduced: CFAA Didn’t Fix Itself*, EFF (Apr. 29, 2015), <https://www.eff.org/deeplinks/2015/04/aarons-law-reintroduced-cfaa-didnt-fix-itself>.

<sup>125</sup> Justin Peters, *Congress Has a Chance to Fix Its Bad “Internet Crime” Law*, SLATE (Apr. 24, 2015), [http://www.slate.com/articles/technology/technology/2015/04/aaron\\_s\\_law\\_why\\_it\\_s\\_needed\\_to\\_fix\\_the\\_horrendously\\_bad\\_cfaa.html](http://www.slate.com/articles/technology/technology/2015/04/aaron_s_law_why_it_s_needed_to_fix_the_horrendously_bad_cfaa.html).

<sup>126</sup> *Id.*

<sup>127</sup> See *infra* notes 128, 130.

<sup>128</sup> Conn. Gen. Stat. Ann. § 45a-334a (2013); Idaho Code Ann. §15-5-424(3)(z) (2011); Ind. Code § 29-1-13-1.1 (2007); La. Code Civ. Proc. Ann. art. 3191 (2014); Okla. Stat. tit. 58, § 269 (2013); R.I. Gen. Laws § 33-27-3 (2011); Nev. Rev. Stat. § 143.188 (2013); VA Code Ann. § 64.2-110 (2013).

of the deceased the power to take control of, handle, conduct, continue, distribute, or terminate any digital account unless the Will says otherwise; and the Virginia statute gives only the personal representative of a deceased minor's estate the power to assume the minor's TOS agreements.<sup>129</sup> As for the remaining states, Delaware enacted UFADAA in 2014<sup>130</sup> and Virginia enacted the PEACA as an amendment to its statute in 2015.<sup>131</sup> The PEACA is also currently being reviewed in California.<sup>132</sup> The limitations of the UFADAA and the PEACA will be discussed more thoroughly below. In sum, these statutes are too limited in scope because they do not cover all fiduciaries and digital assets.<sup>133</sup>

### 1. UFADAA

The UFADAA was created to “modernize fiduciary law for the Internet age.”<sup>134</sup> The ULC recognized that TOS Agreements, passwords that can be reset only through the account holder's email, and privacy laws that fail to contemplate the account holder's death may prevent fiduciary access to these assets.<sup>135</sup> The UFADAA focused on ensuring that fiduciaries would be able to “access, delete, preserve, and distribute digital assets as appropriate.”<sup>136</sup> The UFADAA was designed to give legally appointed fiduciaries broad powers to access digital assets as they would with other types of assets.<sup>137</sup> A fiduciary who did not have password information could re-

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<sup>129</sup> Jim Lamm, *Delaware Enacts Fiduciary Access to Digital Assets Act*, DIGITAL PASSING (Aug. 27, 2014), <http://www.digitalpassing.com/2014/08/27/delaware-enacts-fiduciary-access-digital-assets-act/>.

<sup>130</sup> Del. Code Ann. § 5002 (2014).

<sup>131</sup> Va. Code Ann. § 64.2-109 (2015).

<sup>132</sup> *AB-691 The Privacy Expectation Afterlife and Choices Act*, California Legislative Information (2015-2016), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB691](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB691).

<sup>133</sup> See Susan Porter, *Digital Estates: Handling Digital Assets In The Real World (With Forms and Resources)*, FILES.ALI-CLE.ORG (Oct. 11-12, 2012), [http://files.ali-cle.org/thumbs/datastorage/lacidoirep/forms/TPL1308\\_Porter\\_thumb.pdf](http://files.ali-cle.org/thumbs/datastorage/lacidoirep/forms/TPL1308_Porter_thumb.pdf).

<sup>134</sup> Victoria Blachly, *Inadequate Laws, Uniform Fiduciary Access to Digital Assets Act: What UFADAA Know*, AMERICANBAR.ORG, [http://www.americanbar.org/publications/probate\\_property\\_magazine\\_2012/2015/july\\_august\\_2015/2015\\_aba\\_rpte\\_pp\\_v29\\_3\\_article\\_blachly\\_uniform\\_fiduciary\\_access\\_to\\_digital\\_assets\\_act.html](http://www.americanbar.org/publications/probate_property_magazine_2012/2015/july_august_2015/2015_aba_rpte_pp_v29_3_article_blachly_uniform_fiduciary_access_to_digital_assets_act.html) (last visited Dec. 4, 2015).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *The Uniform Fiduciary Access to Digital Assets Act (UFADAA)*, NOLO, <http://www.nolo.com/legal-encyclopedia/ufadaa.html> (last visited Feb. 17, 2016) [hereinafter

quest access and the ISP would have to comply.<sup>138</sup> The personal representative is “presumed to have access to all of the decedent’s digital assets unless that is contrary to the decedent’s expressed intent or to other applicable law.”<sup>139</sup> This broad access gives personal representatives everything they need to take care of the estate, such as paying off bills and canceling subscriptions.<sup>140</sup> The UFADAA was introduced in 26 states in 2015, but, as mentioned earlier, only Delaware enacted it.<sup>141</sup>

Technology companies and privacy rights groups lobbied against the UFADAA.<sup>142</sup> On January 12, 2015, the Center for Democracy & Technology published a joint letter with the American Civil Liberties Union, the Electronic Frontier Foundation, and Consumers Union.<sup>143</sup> The letter stated, “Any model that grants full access to all of a decedent’s digital accounts and information by default fails to address the unique features of digitally stored content and creates acute privacy concerns”.<sup>144</sup> The letter then listed several reasons for the opposition.<sup>145</sup> The first reason was that digital assets are not analogous to physical records.<sup>146</sup> Since online accounts are generally accessed in private and with passwords, it is unlikely that consumers would expect others to have the power to access their communications unless they actually make that information available.<sup>147</sup> In addition, digital assets differ from physical assets in three ways: (1) digital accounts usually store content by default rather than the individual’s active choice; (2) there are generally no storage costs for saving digital content which eliminates the burden of storing large volumes of personal data; and (3) the types of digital assets and con-

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NOLO].

<sup>138</sup> *Id.*

<sup>139</sup> UFADAA, *supra* note 13, at 2.

<sup>140</sup> UFADAA, *supra* note 13, at 2.

<sup>141</sup> Email from Benjamin Orzeske, Chief Counsel, Uniform Commission to Elizabeth Sy (Jan. 4, 2016) (on file with author).

<sup>142</sup> *Civil Liberty Organizations Respond to the Uniform Fiduciary Access to Digital Assets Act*, CDT, <http://cdt.org/insight/civil-liberty-organizations-respond-to-the-uniform-fiduciary-access-to-digital-assets-act/> (last visited Feb. 17, 2016).

<sup>143</sup> *Re: Civil Liberty Organizations Respond to the Uniform Fiduciary Access to Digital Assets Act*, CDT (Jan. 12, 2015), <https://cdt.org/files/2015/01/Joint-Letter-re-ULC-Bill-general-statement-2-FINAL.pdf>. [hereinafter Opposition Letter].

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

sumer expectations vary greatly and governing them by an unconditional rule is unworkable.<sup>148</sup> Second, digital assets implicate the privacy of third parties because turning over access to the content of communications compromises the privacy of the individuals who wrote to the decedent.<sup>149</sup> Third, conservators should not be given access because their role is to assist a living person with financial or healthcare decisions.<sup>150</sup> Last, the proposed law conflicts with the ECPA, presuming that a fiduciary can fully access the account without determining whether such fiduciary is considered an agent under the ECPA.<sup>151</sup> These arguments had an effect on legislatures across the country, and almost all UFADAA bills died in committee.<sup>152</sup>

## 2. PEACA

NetChoice drafted the PEACA for the purpose of both protecting a decedent's privacy and facilitating administration of a decedent's estate.<sup>153</sup> The Act covers executors and administrators, and it requires them to demonstrate a good faith belief that account records are relevant to administer the decedent's estate.<sup>154</sup> In order to obtain contents of a deceased user's account, the executor or administrator must first obtain a court order by proving: (1) the user is deceased; (2) the deceased user was the subscriber to or customer of the provider; (3) the accounts of the deceased user have been identified with specificity; (4) there are no other authorized users or owners of the deceased user's accounts; (5) disclosure is not in violation of the applicable federal laws; (6) the request for disclosure is narrowly tailored to effect the purpose of the administration of the estate; (7) the request seeks information spanning no more than a year prior to the date of death; and (8) the request is not in conflict with the deceased's will.<sup>155</sup> Then, the executor or administrator must give the internet service provider: a written request; a copy of the death certificate; and the court order.<sup>156</sup>

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<sup>148</sup> Opposition Letter, *supra* note 143.

<sup>149</sup> Opposition Letter, *supra* note 143.

<sup>150</sup> Opposition Letter, *supra* note 143.

<sup>151</sup> Opposition Letter, *supra* note 143.

<sup>152</sup> NOLO, *supra* note 137.

<sup>153</sup> PEACA, *supra* note 16.

<sup>154</sup> PEACA, *supra* note 16.

<sup>155</sup> PEACA, *supra* note 16.

<sup>156</sup> PEACA, *supra* note 16.

Although the PEACA seems to protect a user's privacy, it does not help the estate planning world as a whole, as it is too narrow in scope. The PEACA falls short by covering only two types of fiduciaries: executors and administrators.<sup>157</sup> In addition, the executor or administrator is only able to request records spanning no more than one year prior to the date of death.<sup>158</sup> Some individuals keep their unused credit cards open for years as a way to maintain credit scores.<sup>159</sup> In addition, they may also have long-term stock investments through phone apps that only send an email notification if there is a purchase, sale, deposit or withdrawal.<sup>160</sup> This means that a deceased person's estate will not be effectively administered if he or she has not been active with any online accounts because the executor or administrator will not be able to access this information. The UFADAA's proponents viewed the PEACA as "creating an expensive, cumbersome, and prohibitive process . . . to obtain information necessary to administer a decedent's estate."<sup>161</sup> Fiduciaries often have to act swiftly to meet federal and state tax filing requirements, and most importantly, they have to act before any online accounts are closed by the service provider due to inactivity.<sup>162</sup> Requiring a court order every time a fiduciary seeks access to electronic communications would increase caseloads and cost more than what a typical probate estate requires.<sup>163</sup> Furthermore, the PEACA goes against America's shift towards less court oversight and nonprobate transfers.<sup>164</sup>

Recently, companies have been creating online tools for users

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<sup>157</sup> PEACA, *supra* note 16. Other fiduciaries play active roles in the estate administration process – conservators, agents and trustees.

<sup>158</sup> PEACA, *supra* note 16.

<sup>159</sup> Lucy Lazarony, *Does Closing a Credit Card Affect Your Credit Score? Find Out Before it's Too Late*, CREDIT.COM (Dec. 5, 2013), <https://www.credit.com/credit-scores/does-closing-credit-card-account-affect-credit-score/>.

<sup>160</sup> See, e.g., ROBINHOOD, <https://www.robinhood.com/> (last visited Apr. 3, 2016); ACORNS, <https://www.acorns.com/> (last visited Apr. 3, 2016).

<sup>161</sup> Mark Obsenshain & Jay Leftwich, *Protecting the Digital Afterlife: Virginia's Privacy Expectation Afterlife and Choices Act*, 19 RICH. J.L. & PUB. INT. 39, 45 (2015).

<sup>162</sup> Jim Lamm, *Thoughts on the Stored Communications Act, Federal Preemption and Supremacy, and State Laws on Fiduciary Access to Digital Property*, DIGITAL PASSING (Nov. 4, 2013), <http://www.digitalpassing.com/2013/11/04/thoughts-stored-communications-act-federal-preemption-supremacy-state-laws-fiduciary-access-digital-property/>.

<sup>163</sup> Dan Kelly, *Private Law in the Digital Age*, NEW PRIVATE LAW (Aug. 14, 2015), <https://blogs.harvard.edu/nplblog/2015/08/14/private-law-in-the-digital-age-dan-kelly/>.

<sup>164</sup> *Id.*

to decide what happens to their accounts when they die.<sup>165</sup> These tools “allow[] the user, in an agreement distinct from the terms of service agreement between the custodian and user, to prove directions for disclosure or nondisclosure of digital assets to a third person.”<sup>166</sup> For example, Facebook rolled out an update letting U.S. users assign a Facebook friend as a “legacy contact” for their accounts, granting special postmortem access to the accounts.<sup>167</sup> The legacy contact will not be able to post on the decedent’s behalf or see his or her private messages, but will be able to download the decedent’s photos, and post a memorial note at the top of the decedent’s profile page.<sup>168</sup> Similarly, Google has launched the Inactive Account Manager, which allows account holders to tell Google what they want done with their Google accounts in the event of death.<sup>169</sup> By using this feature, account holders can choose to have an account deleted after a certain number of months of inactivity, or they can designate a trusted contact to receive their data, among other options.<sup>170</sup> In addition, a free online service called PasswordBox enables customers to store their digital assets online to be released to designated individuals upon death.<sup>171</sup> The account holder stores all passwords online and selects a digital heir; once the account holder passes away, the digital heir notifies PasswordBox of the death; PasswordBox validates the death certificate; and the digital heir receives access to the decedent’s online passwords and executes the decedent’s last wishes.<sup>172</sup> PasswordBox markets itself as the internet’s first “digital life manager.”<sup>173</sup>

Although this progress reflects a step forward in the digital age, it is not enough. For example, PasswordBox relies entirely on the consumer to frequently update the information contained on these sites.<sup>174</sup> Moreover, PasswordBox requires someone to notify the

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<sup>165</sup> Alethea Lange, *Everybody Dies: What is Your Digital Legacy?*, CDT (Jan. 23, 2015), <https://cdt.org/blog/everybody-dies-what-is-your-digital-legacy/>.

<sup>166</sup> RUFADAA, *supra* note 20, at 4.

<sup>167</sup> *What is a legacy contact?*, FACEBOOK, <https://www.facebook.com/help/1568013990080948>, (last visited Jan. 20, 2016) [hereinafter Legacy Contact].

<sup>168</sup> *Id.*

<sup>169</sup> *About Inactive Account Manager*, GOOGLE, <https://support.google.com/accounts/answer/3036546?hl=en> (last visited Jan. 20, 2015) [hereinafter Inactive Account Manager].

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

<sup>171</sup> PASSWORDBOX, <https://www.passwordbox.com/legacylocker> (last visited Mar. 10, 2016).

<sup>172</sup> *Id.*

<sup>173</sup> *PasswordBox*, LEGACY LOCKER, <https://legacylocker.com/> (last visited Apr. 12, 2016).

<sup>174</sup> Molly Wilkens, *Privacy and Security During Life, Access After Death: Are They Mu-*

company that a person has died.<sup>175</sup> However, notification can only happen if such person has knowledge that the decedent had an account.<sup>176</sup> Since these online tools are fairly new, many individuals may be unaware of them. Even if an individual engages in advanced planning through these tools, he or she may forget to store all passwords. A default law would be better suited to provide uniform protection for internet users who die intestate.<sup>177</sup> The RUFADAA balances privacy concerns and incorporates these new online tools as part of a three-tier hierarchy system.<sup>178</sup>

## V. INFLUENCE OF THE UNIFORM LAW COMMISSION AND THE FINAL PRODUCT

### A. The Uniform Law Commission

The ULC is a state organization designed to promote uniformity of law through state government cooperation.<sup>179</sup> The ULC is active in all areas of state law,<sup>180</sup> but most particularly in the area of trusts and estates.<sup>181</sup> The Uniform Probate Code (UPC), originally promulgated in 1969 and subsequently amended in 1990 and 2008, and the Uniform Trust Code (UTC), originally promulgated in 2000 and amended thereafter, have been influential across the country.<sup>182</sup> The UPC is enacted in 17 states and has been introduced in Maine in 2016,<sup>183</sup> and the UTC is enacted in 32 states and has been introduced

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*tually Exclusive?*, 62 HASTINGS L.J. 1037, 1060 (2011).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See *infra* note 208 and accompanying text.

<sup>179</sup> Thomas P. Gallanis, *Trust and Estates: Teaching Uniform Law*, 58 ST. LOUIS U. L.J. 671, 672 (2014).

<sup>180</sup> E.g., Family Law, Medical & Public Health Laws, Civil Procedure & Courts, Tax & Miscellaneous, Business Organizations, any many more. *Acts*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Acts.aspx> (last visited Feb. 17, 2016).

<sup>181</sup> Gallanis, *supra* note 199, at 673.

<sup>182</sup> *Id.*

<sup>183</sup> *Legislative Fact Sheet – Probate Code*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Probate%20Code> (last visited Feb. 17, 2016). Other states have enacted portions of the UPC. See *Uniform Probate Code (UPC) Adoption by the States*, American Bar, [http://www.americanbar.org/content/dam/aba/publications/litigation\\_committees/trust/50-state-probate-code-survey.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/litigation_committees/trust/50-state-probate-code-survey.authcheckdam.pdf) (last visited Apr. 6, 2016).

in Illinois in 2016.<sup>184</sup> The ULC's efforts have extended beyond these acts, with the passage of over twenty additional acts within the field.<sup>185</sup> The uniform laws are continually monitored and periodically amended by a committee called the Joint Editorial Board for Uniform Trust and Estates Act (JEB)<sup>186</sup> JEB is composed of representatives from the ULC, the American College of Trust and Estate Counsel, and the American Bar Association's Section on Real Property, Trust and Estate Law.<sup>187</sup> Uniform laws are "the product of societal changes and changes in legal culture,"<sup>188</sup> and "will continue to be highly active and influential in the field of trust and estates law."<sup>189</sup>

In January 2012, a Study Committee was appointed by the ULC to brainstorm and address issues in connection to fiduciary access to digital assets.<sup>190</sup> After the Study Committee presented its final report, a Drafting Committee was appointed on July 17, 2012 to create a uniform law.<sup>191</sup>

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<sup>184</sup> *Legislative Fact Sheet – Trust Code*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code> (last visited Feb. 17, 2016).

<sup>185</sup> *Id.* (Probate Code (1969); Disposition of Community Property Rights at Death Act (1971); International Wills Act (1977); Transfers to Minors Act (1983); Fraudulent Transfer Act (1984); Statutory Rule Against Perpetuities Act (1986); Custodial Trust Act (1987); Nonprobate Transfers on Death Act (1989); TOD Security Registration Act (1989); Testamentary Additions to Trusts Act (1991); Health-Care Decisions Act (1993); Simultaneous Death Act (1993); Prudent Investor Act (1994); Guardianship and Protective Proceedings Act (1997); Principal and Income Act (1997); Trust Code (2000); Disclaimer of Property Interests Act (2002); Estate Tax Apportionment (2003); Anatomical Gift Act (2006); Power of Attorney Act (2006); Prudent Management of Institutional Funds Act (2006); Adult Guardianship and Protective Proceedings Jurisdiction Act (2007); Principal and Income Act Amendments (2008); Probate Code Amendments (2008); Real Property Transfer on Death Act (2009); Statutory Trust Entity Act (2009); Insurable Interest Amendment to Uniform Trust Code (2010); Premarital and Marital Agreements Act (2012); Powers of Appointment Act (2013); Recognition of Substitute Decision-Making Documents Act (2014); and Trust Decanting Act (2015)).

<sup>186</sup> Gallanis, *supra* note 179, at 676.

<sup>187</sup> Gallanis, *supra* note 179, at 676.

<sup>188</sup> David M. English, *The Impact of Uniform Laws on the Teaching of Trusts and Estates*, 58 ST. LOUIS U. L.J. 689, 695 (2014).

<sup>189</sup> Gallanis, *supra* note 179.

<sup>190</sup> Jim Lamm, *Uniform Law Commission's Drafting Committee on Fiduciary Access to Digital Assets*, DIGITAL PASSING (Nov. 19, 2012), <http://www.digitalpassing.com/2012/11/19/uniform-law-commission-drafting-committee-fiduciary-access-digital-assets/>.

<sup>191</sup> *Id.*



## B. THE RUFADAA

After multiple drafts, meetings and compromises,<sup>192</sup> the RUFADAA was created to significantly advance digital estate administration by harmonizing both the furtherance of fiduciary access and personal privacy.<sup>193</sup> First, it gives fiduciaries the legal authority to manage digital assets and electronic communications similar to the way they manage tangible assets and financial accounts (to the extent possible).<sup>194</sup> Second, it gives custodians of digital assets and electronic communications legal authority to deal with the fiduciaries of their users, all while respecting reasonable privacy expectations.<sup>195</sup> As of April 2016, the RUFADAA has been enacted in Colorado, Florida, Idaho, Indiana, Michigan, Oregon, Tennessee, Washington, Wisconsin, and Wyoming.<sup>196</sup> It is introduced in eighteen states<sup>197</sup> and will likely be introduced in more states for consideration during the 2016 legislative sessions.<sup>198</sup>

### 1. Key Changes

#### a. Default Privacy for Electronic Communications

Under the UFADAA, fiduciaries had the same right to access digital assets as the account holder.<sup>199</sup> Opponents argued that email is different from paper mail because of its automatic archiving feature;

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<sup>192</sup> *ACTEC 2015 Fall Meeting Musings 7*, BESSEMER TRUST (Nov. 2015), [http://www.bessemertrust.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Advisor/Presentation/Print%20PDFs/ACTEC%202015%20Fall%20Meeting%20Musings\\_FINAL.pdf](http://www.bessemertrust.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Advisor/Presentation/Print%20PDFs/ACTEC%202015%20Fall%20Meeting%20Musings_FINAL.pdf).

<sup>193</sup> See generally RUFADAA, *supra* note 20.

<sup>194</sup> RUFADAA, *supra* note 20, at 1.

<sup>195</sup> RUFADAA, *supra* note 20, at 1.

<sup>196</sup> *Fiduciary Access to Digital Assets Act, Revised (2015)*, UNIFORM LAW COMMISSION, [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited Mar. 12, 2016).

<sup>197</sup> *Id.* (Alabama, Arizona, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, New Jersey, Oklahoma, Pennsylvania, South Carolina, Utah, and West Virginia.).

<sup>198</sup> Email from Benjamin Orzeske, Chief Counsel, Uniform Commission to Elizabeth Sy (Jan. 4, 2016) – on file with author.

<sup>199</sup> Blachly, *supra* note 65.

fiduciaries would have access not only to current mail, but potentially to a multi-year history of the user's communications.<sup>200</sup> The RUFADAA switched the default rule, providing that fiduciaries will not have access to the content of a user's electronic communications unless the user consented.<sup>201</sup> Fiduciaries will still have default access to a catalogue of electronic communications consisting of a list of messages sent or received, showing only the addresses of the sender and recipient and the date and time sent.<sup>202</sup> The catalogue should provide sufficient information for most fiduciaries to perform necessary tasks, such as the name of the entity to contact to close an account.

Although the catalogue should provide sufficient information for most fiduciaries to perform necessary tasks, it is arguable that the process can be significantly delayed or even impossible for the fiduciary who needs to dig deeper to find certain accounts of the deceased. Many people now receive bills and financial statements via email.<sup>203</sup> In order to access information about these bills and financial accounts, one may have to open the actual email to obtain the necessary information. Fiduciaries should be able to open the emails to determine whether there are accounts, rather than identifying an entity and waiting for a representative to relay information of the existence of an account. Fiduciaries should have broad powers because even if they come across private information, they have the duty to keep the information confidential.<sup>204</sup>

Ultimately, these arguments are weak because, unlike paper mail, most email programs archive all correspondence automatically. This means that fiduciaries would likely have access to years' worth of the correspondence, many of which may be personal in nature. As mentioned earlier, many Americans want their private communications to remain private after they die.<sup>205</sup> And, although fiduciaries

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<sup>200</sup> Suzanne Brown Walsh et al., *You Can't Always Get What You Want*, Murthalaw.com (Nov. 2015), [http://www.murthalaw.com/files/trustsandestates.com\\_ufadaa\\_article\\_sbw\\_11.15.pdf](http://www.murthalaw.com/files/trustsandestates.com_ufadaa_article_sbw_11.15.pdf).

<sup>201</sup> RUFADAA, *supra* note 20, at 2.

<sup>202</sup> RUFADAA, *supra* note 20, at 6.

<sup>203</sup> *Panel on the Revised Uniform Fiduciary Access to Digital Assets Act (2015)* 10, THE EUROPEAN LAW INSTITUTE (Sept. 2-4, 2015), [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/General\\_Assembly/2015\\_conference\\_materials/LANSING\\_UFADAA\\_-\\_ELI\\_Presentation\\_v5\\_-\\_September\\_2015.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2015_conference_materials/LANSING_UFADAA_-_ELI_Presentation_v5_-_September_2015.pdf) [hereinafter Panel on RUFADAA].

<sup>204</sup> *Id.*

<sup>205</sup> See Privacy After Death, *supra* note 50 and accompanying text.

have a duty to keep private information confidential, a decedent's private correspondence is simply irrelevant to estate administration.<sup>206</sup> Moreover, the RUFADAA strikes an equal balance by allowing fiduciary access to the contents of the deceased electronic communications so long as she consented beforehand.

### b. Three-tier Hierarchy for User Directions

Under the original UFADAA, boilerplate terms of service that prevented fiduciary access to digital assets were deemed void as against public policy.<sup>207</sup> Now, the RUFADAA uses a three-tier system of priority for user directions regarding fiduciary access. First, it incorporates the new online tools for directing fiduciary access.<sup>208</sup> Some examples, as mentioned earlier, include Facebook's Legacy Contact, Google's Inactive Account Manager, and PasswordBox.<sup>209</sup> The RUFADAA allows a custodian to offer these online tools and provides that a direction regarding disclosure using an online tool supersedes any contrary directions in a will, trust or power of attorney and the TOS if the direction can be modified or deleted at all times.<sup>210</sup> Second, a user's written direction in a will, trust, power of attorney, or other record overrides boilerplate TOS agreements.<sup>211</sup> Third, if a user provides no direction, the TOS controls, or other law controls if the TOS is silent on fiduciary access.<sup>212</sup>

This three-tiered hierarchy system is consistent with the advances of technology because it gives first priority to the new online tools. Although there are currently only a few online tools, two are the products of the two largest technology companies: Google and Facebook. If the RUFADAA is enacted in more states, there will be

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<sup>206</sup> Panel on RUFADAA, *supra* note 203.

<sup>207</sup> *Comparison of the Uniform Fiduciary Access to Digital Assets Act (Original UFADAA), the Privacy Expectations Afterlife and Choices Act (PEAC ACT), and the Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA)*, UNIFORMLAWS, <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Comparison%20of%20UFADAA%20PEAC%20and%20Revised%20UFADAA.pdf> (last visited Feb. 17, 2016) [hereinafter *Comparison of UFADAA and RUFADAA*].

<sup>208</sup> RUFADAA, *supra* note 20, at 10.

<sup>209</sup> See *supra* notes 165-73 and accompanying text.

<sup>210</sup> RUFADAA, *supra* note 20, at 10.

<sup>211</sup> RUFADAA, *supra* note 20, at 10.

<sup>212</sup> RUFADAA, *supra* note 20, at 10.

an incentive for other ISPs to provide for their own online tools.<sup>213</sup> Instead of hiding behind the veil of the SCA and CFAA, ISPs can work with their users by allowing them to express their wishes regarding their accounts in the event that they pass away. In addition, following instructions from an online tool will be cost-effective because there will be less need for “staffing in-house compliance departments to read and interpret estate planning documents for every deceased user.”<sup>214</sup>

On the other hand, there is a question of who actually writes the online tools, and whether the writer has had any exposure to the basics of estate planning.<sup>215</sup> Some online tools may be created in a way that encourages users to choose the option that lowers compliance costs for the company.<sup>216</sup> Even so, internet tools will raise awareness and allow users to empower themselves to think about possibilities in the event of death. According to a survey by Rocket Lawyer, 51% of Americans between the ages of 55 to 64 do not have wills.<sup>217</sup> When asked why they did not have wills, 57% said they “haven’t gotten around to making one.”<sup>218</sup> Online tools may increase estate planning awareness by allowing users to quickly express their wishes through mouse clicks. The three-tiered hierarchy system effectively focuses on the intent of the deceased before taking TOS Agreements into consideration.

### c. More Court Involvement When Necessary

Under the UFADAA, custodians of a user’s digital assets were required to grant access to any validly appointed fiduciary for the user who submitted a request.<sup>219</sup> However, opponents pointed out

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<sup>213</sup> Anne W. Coventry, *Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA): Online Tools*, PASTERNAK & FIDIS (Feb. 15, 2016), <http://www.pasternakfidis.com/revised-uniform-fiduciary-access-to-digital-assets-act-rufadaa-online-tools/>.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Richard Eisenberg, *Americans’ Ostrich Approach to Estate Planning*, FORBES (Apr. 9, 2014), <http://www.forbes.com/sites/nextavenue/2014/04/09/americans-ostrich-approach-to-estate-planning/#72008821f07b>.

<sup>218</sup> *Id.*

<sup>219</sup> *Uniform Fiduciary Access to Digital Assets Act* 21, UNIFORMLAWS (Apr. 2, 2015), <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/>

that these providers may be unable to determine whether a fiduciary's request was a valid request or an attempt at identity theft. The RUFADAA changed this to permit fiduciaries access to digital assets only if they petition the court with an explanation of why the asset is needed to wrap up the estate.<sup>220</sup> Custodians can also deny access in certain cases unless a court verifies that fiduciary access is legal and necessary.<sup>221</sup>

Arguably, court involvement should only be necessary after the custodian has denied access. The opponent's argument that providers would have no way to determine whether a fiduciary's request is valid or an attempt at identity theft is weak. In fact, custodians are already engaged in some form of identity verification. For example, in a recent instance, a 72-year old widow was told by Apple that she needed to obtain a court order to retrieve her deceased husband's Apple ID password in order to continue to play a card game app.<sup>222</sup> The couple owned the iPad, and the husband's Apple ID was used to purchase apps.<sup>223</sup> The couple's daughter provided Apple with the iPad serial number, proof that her father's will left everything to his wife, and a notarized death certificate.<sup>224</sup> However, this was not enough for Apple, and a rep said that a court order was needed.<sup>225</sup> Custodians are perfectly capable of being able to request specific documents as a way to screen for identity theft. However, a question still remains of whether the current system would appear to increase unjustifiable costs.

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2014\_UFADAA\_Final.pdf.

<sup>220</sup> See generally Comparison of UFADAA and RUFADAA, *supra* note 229.

<sup>221</sup> See generally Comparison of UFADAA and RUFADAA, *supra* note 229.

<sup>222</sup> Sophia Rosenbaum, *Apple demands widow get court order to unlock dead husband's iPad*, NEW YORK POST (Jan. 19, 2016), <http://nypost.com/2016/01/19/apple-demands-widow-get-court-order-to-unlock-dead-husbands-ipad/>.

<sup>223</sup> Jim Lamm, *Widow Told by Apple to Get Court Order So She Can Continue to Play a Card Game on the Couple's iPad After Her Husband's Death*, DIGITAL PASSING (Jan. 18, 2016), <http://www.digitalpassing.com/2016/01/18/widow-told-by-apple-to-get-court-order-so-she-can-play-card-game-couples-ipad-after-her-husbands-death/>.

<sup>224</sup> Rosa Marchitelli, *Apple demands widow get court order to access dead husband's password*, CBC (Jan. 18, 2016), <http://www.cbc.ca/beta/news/business/apple-wants-court-order-to-give-access-to-appleid-1.3405652>.

<sup>225</sup> *Id.*

**d. Procedure for Disclosing Digital Assets**

Under the UFADAA, the procedure for disclosing digital assets was not specifically addressed.<sup>226</sup> Rather, the term “access” was utilized throughout the act, which arguably can be construed as the fiduciary logging onto the user’s account.<sup>227</sup> Under the PEACA, the custodian was not required to allow the requesting party to assume control over the deceased’s account.<sup>228</sup> Section 6 of the RUFADAA provides for something more comprehensive by giving the custodian three options: (1) Allow the requestor to access the user’s account; (2) Allow the requestor to partially access the user’s account if sufficient to perform the necessary tasks; or (3) Provide the requestor with a “data dump” of all digital assets held in the account.<sup>229</sup>

Although the RUFADAA provides for more options for digital asset disclosure, it should not allow the custodian to have full discretion in the manner of disclosing digital assets. Instead, the RUFADAA should mirror privacy concerns by requiring first that the custodian grant the requestor partial access to the user’s account if sufficient to perform the necessary tasks. If partial access to the user’s account is sufficient to perform the necessary tasks, there is no need for the requestor to have full access to the account or receive a data dump of all the digital assets. Second, if partial access does not assist in effective estate administration, then the custodian may have discretion to give full access to the user’s account or provide a data dump. However, the RUFADAA should provide more explanation of the differences between providing the requestor full access to the account and providing the requester with a data dump. The ULC’s commentary to this provision unhelpfully states that “[s]ubsection (a) gives the custodian of digital assets a choice of methods for disclosing digital assets to an authorized fiduciary. Each custodian has a different business model and may prefer one method over another.”<sup>230</sup> The problem with a data dump is that it may cause delay in estate administration because it requires a longer process. Instead of obtaining full access to the account to identify digital assets, the requestor

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<sup>226</sup> Comparison of UFADAA and RUFADAA, *supra* note 229, at 4.

<sup>227</sup> Comparison of UFADAA and RUFADAA, *supra* note 229, at 4.

<sup>228</sup> Comparison of UFADAA and RUFADAA, *supra* note 229, at 4.

<sup>229</sup> RUFADAA, *supra* note 20, at 12.

<sup>230</sup> RUFADAA, *supra* note 20 at 13.

tor must wait for the custodian to compile records of all the digital assets before he or she can start sifting through them.

**e. Addresses Unauthorized-Computer-Access Laws**

Section 15(d) of the RUFADAA states that, “A fiduciary acting within the scope of the fiduciary’s duties is an authorized user of the property of the decedent . . . for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including the state’s law on unauthorized computer access.”<sup>231</sup> In addition, subsection (e) makes clear that the fiduciary is authorized to access digital assets stored on tangible personal property for purposes of state or federal laws on unauthorized computer access.<sup>232</sup> For criminal law purposes, this clarifies that the fiduciary is authorized to access all of the user’s digital assets, whether held locally or remotely.<sup>233</sup> The accompanying comment further explains that “state law treats the fiduciary as “authorized” under state laws criminalizing unauthorized access.”<sup>234</sup> However, the comment warns that “Federal courts may look to these provisions to guide their interpretations of ECPA and the [CFAA], but fiduciaries should understand that federal courts may not view such provisions as dispositive in determining whether access to a user’s account violated federal criminal law.”<sup>235</sup> Although it seems the RUFADAA clarified the effect of the unauthorized-computer access laws, it really only made clarifications on state laws, and not on federal law. Even though some clarification is better than none, States may be apprehensive to enact the RUFADAA without a full disclosure of the effect of federal laws.

**VI. CONCLUSION**

Digital assets should not be destroyed at death. These assets often hold both financial and sentimental value, and can be passed to loved ones just like any other tangible or intangible property. The nature of property in the digital age has significantly changed from

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<sup>231</sup> RUFADAA, *supra* note 20 at 24.

<sup>232</sup> RUFADAA, *supra* note 20 at 24.

<sup>233</sup> RUFADAA, *supra* note 20 at 27.

<sup>234</sup> RUFADAA, *supra* note 20 at 26.

<sup>235</sup> RUFADAA, *supra* note 20 at 27.

financial accounts on paper to online bank accounts, paper money to virtual money,<sup>236</sup> paper correspondence to emails, paper records in file cabinets to cloud storage,<sup>237</sup> and financial or personal social value held on social media.<sup>238</sup> Without clear direction, the digital world will continue to be dictated by various TOS Agreements made by lawyers who draft them favorably for their clients,<sup>239</sup> two federal statutes enacted about thirty years ago, inadequate state laws,<sup>240</sup> or the judiciary. The RUFADAA is the best default law, as compared to the PEACA and other enacted statutes, because it (1) addresses four types of fiduciaries; (2) recognizes technological advances in the trust and estates world; (3) takes into consideration the deceased's intent; (4) balances post-mortem privacy concerns; and (4) is more comprehensive than any other law today.

In the future, it may be appropriate for Congress to enact laws governing digital assets; but, for now, the States should be given the chance to experiment and test out possible solutions without affecting the rest of the nation. The States are in a better position to address changing public needs. However, despite whether the States adopt the RUFADAA, internet users should plan ahead by keeping a physical or electronic list<sup>241</sup> of digital assets with specific instructions about how to access them and what to do with them.<sup>242</sup> It is also advisable to keep the list updated and placed in a safe location such as a safe deposit box.<sup>243</sup> It is important to address this preventatively to ensure that these protections will be in place at death.

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<sup>236</sup> See, e.g., Paypal and Google Wallet.

<sup>237</sup> See, e.g., DropBox, Google Drive, iCloud.

<sup>238</sup> See, e.g., Facebook, LinkedIn, Instagram, iTunes, Pandora, Spotify, Ebay, Google+.

<sup>239</sup> Online service providers retain lawyers to protect them from frivolous lawsuits. These lawyers represent the online service providers and owe no duty to website users to protect their privacy rights.

<sup>240</sup> See *supra* note 81 and accompanying text.

<sup>241</sup> See, e.g., ASSETSINORDER, <http://www.assetsinorder.com/> (last visited Mar. 12, 2016); LEGACYVAULT, [https://www.legacyvault.com/?redirect\\_bbq=true](https://www.legacyvault.com/?redirect_bbq=true) (last visited Mar. 12, 2016).

<sup>242</sup> NOLO, *supra* note 154.

<sup>243</sup> Jim Lamm, *Keeping a Secure List of Passwords, Online Accounts, and Digital Property*, DIGITAL PASSING (Jan. 12, 2015), <http://www.digitalpassing.com/2015/01/12/keeping-secure-list-passwords-online-accounts-digital-property/>.