



DEATH 2.0: WHO INHERITS A SELFIE VIS A VIS THE FUTURE OF DIGITAL WILLS

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ABSTRACT

As more and more number of individuals are using internet for various purposes, speculations regarding retrieval of someone's digital assets by some masked mugs after they become intestate brings forth a matter of concern pertinent to all. Is it that all the rights of a person perish with his death and nobody owns him after the announcement of his funeral? Legislations which were earlier perceived to be a form of shielding have now turned their recognition into a new kind of asset.

In the present scenario, right after the death of the person who died intestate, the family members and acquaintances of the deceased begin to deal or adjust his personal right of privacy or unique digital documentation to their own bleak benefits. In the opinion of the author(s), a person's identity should survive for decades to come and after he leave this world, his gist should augment even if someone else owns it after the intestate's death.

Furthermore, this paper also deals with the state of intricate set of circumstances

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¹ <http://www.hastingslawjournal.org/wp-content/uploads/Wilkens-62.4.pdf> accessed on 28th October 2016.

involved with failure of the Internet service providers to agree with accepted procedure for account management after death and to make these explicit in terms and conditions. This research paper focuses upon the above mentioned aspect of what happens to the privacy rights of people after their death?

Keyword(s): Digital Death, Privacy, Inheritance, Digital Assets, Selfie.

1.1 INTRODUCTION

"Privacy is not something that I'm merely entitled to, it's an absolute prerequisite"

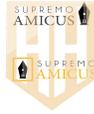
Marlon Brando

The Internet has transformed the way we live our lives. What we have not yet fully realized is how it will impact what happens after we die.¹ As more and more people use social media to share personal information, privacy issues become critical to the discussion about control over user accounts after their death. Although internet service providers (ISP's) like Facebook have policies governing the terms and conditions of a user's account, these policies usually do not fully protect a deceased person's right to privacy.²

Rohan Aurora, an engineering student living in the United States, relies on Facebook to maintain relationships with friends back home in India.³ One day, a friend from high school, Lalit Mendhe,

²<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1240&context=njtip> accessed on 29th October 2016.

³JaweedKaleem, Death on Facebook Now Common As 'Dead Profiles' Create Vast Virtual Cemetery, HUFFINGTON POST (Nov 7, 2012,



posted a photo of himself in a hospital bed.⁴ Hoping to cheer him up with a joke, Aurora posted on the photo: “Did you get a haircut?”⁵ Shortly after making this comment, another friend informed Aurora that Mendhe had been in a car crash and had died in that hospital bed of cardiac arrest and liver failure.⁶ Aurora immediately deleted his comment.⁷

Four months after Mendhe had passed away, however, his Facebook profile remained active.⁸ After all, “[a] Facebook profile is an indication that someone is alive.”⁹ How social media, including Facebook, handles death of its users is becoming increasingly important. As more and more Indians use social media to share personal information, questions about a user’s right to privacy become critical to the discussion about control over users’ accounts after their death. Concerns about control over digital assets¹⁰ such as Facebook profiles, Email

Accounts and Dropbox storage become particularly significant among young adults who die unexpectedly and without a will. Young adults who die suddenly are more likely to leave behind an enormous trove of digital assets.¹¹

ISP’s have policies governing the terms and conditions of a user’s account. These policies, however, do not fully protect a deceased person’s right to privacy. In some instances, these service providers have policies that default to ignoring the deceased person’s privacy interests, instead choosing to act on the pleas of friends or families of the deceased.¹² These policies often give rise to a heightened need for protection of posthumous privacy rights.

Honouring the dead is not a new concept. Societies all across the world have traditions and practices to honour the deceased.¹³ Deceased individuals should

3:40 PM), http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles_n_2245397.html.

⁴*Ibid.*

⁵*Ibid.*

⁶*Ibid.*

⁷*Ibid.*

⁸ The author could not verify whether Mendhe’s Facebook profile remains active at the time of publication of this Comment.

⁹*Ibid.* As a side note, Facebook does process “special requests” and removes profiles of deceased users at the request of “verified immediate family members” or executors. How Do I Submit a Special Request for a Deceased User’s Account on the Site?, FACEBOOK, <https://www.facebook.com/help/265593773453448> (last visited Nov 24, 2014). Family members making a request to remove a deceased user’s account must provide proof of death (e.g., death certificate), the deceased user’s birth certificate,

and verification of their relationship to the deceased.

¹⁰ “A general definition of a digital asset is ‘any file on your computer or in a storage drive or website and any online account or membership.’” Susan Porter, Digital Estates: Handling Digital Assets in the Real World, http://files.article.org/thumbs/datastorage/lacidoirep/forms/TPL1308_Porter_thumb.pdf (last visited Oct. 31, 2016).

¹¹ This is because American young adults are the age group most likely to use the Internet and access social networking websites.

¹² See How Do I Report a Deceased Person or an Account That Needs to Be Memorialized?, FACEBOOK, <https://www.facebook.com/help/150486848354038> (last visited Oct. 31, 2016).

¹³ See, e.g., FUNERALS IN AFRICA: EXPLORATIONS OF A SOCIAL PHENOMENON ix–xi, 142, 210 (Michael



have the right to privacy even after death,¹⁴ and so their dignitary rights should extend posthumously. This is a particular concern for young adult Internet users who are more likely to die intestate.¹⁵

Electronic records are more cumbersome than their paper counterparts: They are harder to find, harder to access, and harder to wade through. A person’s online presence can quickly become unwieldy. He/she may maintain websites and blogs, have accounts on Facebook, Twitter, or other social media sites, or use online storage sites such as Flickr or Google Docs.¹⁶ Shopping accounts on any number of retailers’ websites contain

a consumer’s credit card information to make future visits and purchases easier. Thus, each of these accounts must be known, accessed, and eventually closed after a person dies.

1.2 SOCIAL MEDIA USAGE EMPHASIZES THE NEED FOR PRIVACY PROTECTION OF THE DECEASED’S INFORMATION

“Privacy matters. Privacy is what allows us to determine who we are and who we want to be.”

Edward Snowden

Jindra& Joel Noret eds., 2011) (discussing how funerals are a way for the living to honor the deceased); James Sanders, *The New Ground Zero: Honoring the Dead in the City That Never Weeps*, NYTIMES (Aug. 31, 2003), <http://www.nytimes.com/2003/08/31/article-the-new-ground-zero-honoring-the-dead-in-the-city-that-never-weep.html> (discussing how New York City would commemorate and honor those who died on September 11th). Consider also that holographic wills of a deceased individual, if they meet certain conditions, are legally valid. Wills, FORD+BERGNER LLP, <http://www.fordbergner.com/legal-practiceareas/texas-wills/handwritten-will-texas> (last visited Nov. 20, 2016).

¹⁴ Ronald Z. Domsky, *In Terrorem Clauses: More Bark Than Bite?*, 25 LOY. U. CHI. L.J. 493, 495 (1994) (arguing in favor of enforcing in terrorem clauses include giving “full effect to the intent of the testator,” implying the rights of the deceased extend beyond death).

¹⁵ Sheryl Nance-Nash, *Why More Than Half of Americans Don’t Have Wills*, DAILYFINANCE (Nov. 26, 2016, 3:05 PM), <http://www.dailyfinance.com/2011/08/26/what-america-thinks-about-estate-planning/>. Only 44% of surveyed American adults reported having a

will. Id. People under thirty-five years old “said that it is less important for people to have wills because people are living longer, healthier lives.”

¹⁶ For more information about these websites, see About, Twitter, <http://twitter.com/about> (last visited Nov. 31, 2016) (“Twitter is a real-time information network that connects you to the latest information about what you find interesting. . . . At the heart of Twitter are small bursts of information called Tweets. Each Tweet is 140 characters in length, but don’t let the small size fool you—you can share a lot with a little space.”); About Flickr, Flickr, <http://www.flickr.com/about/> (last visited Nov. 31, 2016) (“Flickr . . . has two main goals: 1. We want to help people make their photos available to the people who matter to them. . . . [and] 2. We want to enable new ways of organizing photos and video.” (emphasis omitted)); Facebook, <http://www.facebook.com/facebook> (last visited Nov. 31, 2016) (“Facebook helps you connect and share with the people in your life.”); Google Docs, <http://docs.google.com> (last visited Nov. 31, 2016) (“Upload . . . files[,] . . . edit and view . . . docs from any computer or smart phone . . . and [engage in] [r]eal-time collaboration” (emphasis omitted)).



An increasing number of people today access and use the Internet.¹⁷ Although research has found that individual Internet use varies according to age, ethnicity, income, and education, research consistently reports that young adults¹⁸ are the age group that most frequently accesses the Internet. As of May 2013, seventy-two percent of American adults with access to the Internet reported using social networking websites.¹⁹ This exponential growth is astounding considering that only eight

percent of adults reported using social networking sites in February 2005.²⁰

Young adults are also more likely to die intestate, raising issues about what happens to their digital assets after death. The 2007 U.S. death statistics showed that the death rate for individuals ages fifteen to thirty-four was 184.8 deaths per 100,000 people in that age group.²¹ In 2011, Entrustet²² predicted that 580,000 U.S.-based online users would die in

¹⁷ The first time the Census Bureau asked Americans about Internet access in 1997, 18.0% of households reported they accessed the Internet. Thom File, Computer and Internet Use in the United States: Population Characteristics, U.S. CENSUS BUREAU 1 (May 2013), available at <http://www.census.gov/prod/2013pubs/p20-569.pdf>. By 2011, 71.7% of households reported they accessed the Internet.

¹⁸ I define “young adults” as eighteen to twenty-nine year-olds. My use of “adult” also reflects the Pew Center study’s use of the word—all individuals eighteen years old and over. See Joanna Brenner & Aaron Smith, 72% of Online Adults are Social Networking Site Users, PEW RESEARCH CENTER (Dec. 5, 2016), <http://pewinternet.org/Reports/2013/social-networkingsites/Findings.aspx>

¹⁹ Amanda Lehnhart & Mary Madden, 55% of Online Teens Use Social Networks and 55% Have Created Online Profiles; Older Girls Predominate, PEW RESEARCH CENTER (Dec 7, 2016), http://www.pewinternet.org/~media/Files/Reports/2007/PIP_SNS_Data_Memo_Dec_2016.pdf.pdf (“Social networking sites” are defined “as sites where users can create a profile and connect that profile to other profiles for the purposes of making an explicit personal network.”)

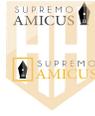
²⁰ Facebook’s statistics are particularly notable. As of December 2012, sixty-seven percent of U.S. adults online were reportedly using Facebook, and eight-three percent of U.S. adults ages eighteen to nineteen reported using the social networking site. Cooper Smith, 7 Statistics About

Facebook Users That Reveal Why It’s Such a Powerful Marketing Platform, BUSINESS INSIDER (Dec. 27, 2016, 1:34 PM), [http://www.businessinsider.com/a-primer-on-](http://www.businessinsider.com/a-primer-on-facebook-demographics-2013-10)

facebook-demographics-2013-10. 27 Worktable 23R. Death Rates by 10-Year Age Groups: United States and Each State, 2007, CENTERS FOR DISEASE CONTROL AND PREVENTION – NATIONAL CENTER FOR HEALTH STATISTICS (Sept. 20, 2010), available at http://www.cdc.gov/nchs/data/dvs/MortFinal2007_Worktable23r.pdf. As a point of reference, the United States’ population in July 2007 was approximate 301.23 million. U.S. Population by Year, MULTPL, <http://www.multpl.com/united-states-population/table> (last visited Dec. 29, 2016).

²¹ Worktable 23R. Death Rates by 10-Year Age Groups: United States and Each State, 2007, CENTERS FOR DISEASE CONTROL AND PREVENTION – NATIONAL CENTER FOR HEALTH STATISTICS (Sept. 20, 2010), available at http://www.cdc.gov/nchs/data/dvs/MortFinal2007_Worktable23r.pdf. As a point of reference, the United States’ population in July 2007 was approximate 301.23 million. U.S. Population by Year, MULTPL, <http://www.multpl.com/united-states-population/table> (Dec. 31, 2016).

²² Entrustet is a company that allows users to securely list all their digital assets and decide what to do with each one after death (e.g., delete, bequest to another individual).



2012.²³ Yet, in a 2009 survey, only about sixty-five percent of Americans reported having any type of will. Most notably, only twenty-five percent of Americans between ages twenty-five and thirty-four have a will²⁴, while fewer than ten percent of people eighteen to twenty-four have one.²⁵

PROTECTING PRIVACY RIGHTS THROUGH CONTRACT LAW IS INSUFFICIENT

The statistics about Internet use, online behaviour, and likelihood of a young adult dying intestate highlight the necessity for the law to evolve in order to sufficiently protect the deceased's right to privacy. One method of protecting the privacy rights of a deceased user is through contract law. Relying on contract law, however, does not provide users

with sufficient privacy protections after death because they agree to terms drafted by the Internet service provider. Instead, these terms focus on the interests of the drafter, the Internet service provider and therefore are unlikely to protect the deceased's right of privacy.

When an individual opens an account with a service provider like Facebook or Dropbox, he or she must agree to the provider's "Terms of Service" by affirmatively clicking "yes."²⁶ Many of these agreements are the modern equivalent of "shrink-wrap" agreements.²⁷ "Click wrap" or "browse wrap" agreements²⁸ are typically utilized when users sign up to use an online service, and such agreements are generally upheld in court.²⁹ Yet, most

²³ Nathan Lustig, 2.89m Facebook Users Will Die in 2012, NATHAN LUSTIG (June 6, 2012), <http://www.nathanlustig.com/2012/06/06/2-89m-facebook-users-will-die-in-2012-580000-in-the-usa/>

²⁴ Wendy S. Goffe & Rochelle L. Halperin, From Zoom to Doom? Risks of Do-It-Yourself Estate Planning, 38 ESTATE PLANNING 27, 27 (Apr. 2011).

²⁵ Tanya Roth, New FindLaw Survey: Most Americans Don't Have Will, FINDLAW (Dec. 20, 2010), <http://www.lawyermarketing.com/blog/new-findlaw-survey-most-americans-dont-have-will/>.

²⁶ See, e.g., Log In, Sign Up or Learn More, FACEBOOK, <https://www.facebook.com> (last visited Feb. 11, 2015) ("By clicking Sign Up, you agree to our Terms and that you have read our Data Policy, including our Cookie Use.").

²⁷ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) ("Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).").

²⁸ Noam Kutler, Protecting Your Online You: A New Approach to Handling Your Online Persona After Death, 26 BERKELEY TECH. L.J. 1641, 1645-46 n.11 (2011) ("'Browsewrap' contracts involve terms of use agreements that are available from the site's home page, but the user is never required to actually click any agreement button. . . . Alternatively, 'clickwrap' agreements require the user to click an 'I Agree' button or some variation thereof to demonstrate acceptance. Both types of contracts are used regularly on the Internet.").

²⁹ See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (enforcing terms of service agreement because the user had notice and was aware of the terms); *Cairo, Inc. v. CrossmediaServs., Inc.*, No. C 04-04825 JW, 2005 WL 756610, at *2 (N.D. Cal. Apr. 1, 2005) (discussing how a contract formed when Cairo continued to use the website, thereby agreeing to the browsewrap agreement). But see *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 791-92 (N.D. Ill. 2011) (finding terms of a browsewrap agreement to be unenforceable because the hyperlink to the Conditions of Use was too buried).



people do not read the terms in their entirety before agreeing to them; only about seven percent of people actually read the full terms.³⁰ Most users are overwhelmed by the various policies and terms governing their use of various websites. For example, if someone were to take the time to read all of the privacy policies she encountered in a year, it would take about 200–250 hours.³¹ By not fully reading all these terms and policies, users may not completely understand what service providers can or will do with their information. However, even if users understood of all the terms, there may not be a good alternative to the service and they therefore effectively have no choice but to accept the terms.

LIMITATIONS OF THE CONTRACTUAL APPROACH

The contractual approach suffers from a primary limitation: users’ rights are limited by what service provider’s state in their terms of use agreements. If users do not affirmatively click “agree” to a service provider’s terms, they cannot

access the website.³² Most users, however, do not even realize what they are agreeing to. This is problematic for many reasons, but especially because users often do not realize that many of the terms are very favourable to the service provider’s interests.³³ Expecting that users review every terms of service agreements they accept is not reasonable. The sheer number of agreements people encounter and the lack of alternatives to these services makes it impossible for users to fully read and understand these agreements. These terms of service agreements ultimately put the privacy of a deceased person at the mercy of a service provider who may disregard the deceased’s wishes regarding how his privacy is treated after death. Because young people are more likely to die intestate, the contractual approach to protecting a deceased person’s online privacy is particularly challenging. Without the user young or old alive to contest his or her understanding of the contract, the immediate default is to interpret the contract on its face.³⁴

³⁰ Rebecca Smithers, Terms and Conditions: Not Reading the Small Print Can Mean Big Problems, THE GUARDIAN (May 11, 2016, 2:00 PM), <http://www.theguardian.com/money/2011/may/11/terms-conditionssmall-print-big-problems>.

³¹ Shankar Vedantam, To Read All Those Web Privacy Policies, Just Take a Month Off Work, NPR (Apr. 19, 2012, 3:30 AM), <http://www.npr.org/blogs/alltechconsidered/2012/04/19/150905465/to-read-all-thoseweb-privacy-policies-just-take-a-month-off-work>

³² See, e.g., Myspace Services Terms of Use Agreement, MYSPACE, <https://myspace.com/pages/terms> (last visited Feb. 11, 2015) (“If you do not agree to this international transfer of data, then you must refrain from using the Myspace Services.”).

³³ See, e.g., Statement of Rights and Responsibilities, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Feb. 11, 2016) (“For content that is covered by intellectual property rights . . . you specifically give [Facebook] the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.”).

³⁴ See, e.g., Puerto Rico v. Russell & Co., 315 U.S. 610, 618 (1942) (The Court interprets the word “deliver” by looking at the agreements



Additionally, because these agreements are written so strongly in favour of the service provider, the privacy rights of the deceased user are left even more vulnerable. The deceased's digital information governed by these service agreements is often very personal and sensitive,³⁵ which makes protecting the privacy rights of the deceased so important.

WHAT THIS MEANS FOR THE DECEASED USER

Most Internet service providers also prohibit the sharing or transferring of account login details to another person, regardless of her relationship to the deceased user.³⁶ Despite an increase in services like Death-switch³⁷ and Legacy Lock, which grant specified individuals access to the deceased's digital assets, online services agreements may act as a barrier to fulfilling the deceased user's final wishes. For example, if Amanda signs up for Death-switch and sets it to send a pre-scripted message with her

Facebook account password to her boyfriend after her death, the boyfriend may violate Facebook's rules by accessing her account after her death.³⁸

If he accesses Amanda's account and violates Facebook's terms of use, it is unlikely that a court would uphold Amanda's desire for her boyfriend to retain access to her account if the matter is litigated. Following the death of an individual intestate, the question of ultimate ownership of the information stored on the deceased's account is troublesome and often dependent on the service provider's terms. For example, Facebook memorializes the profile pages of deceased users.³⁹ In other words, Facebook will turn a deceased user's Facebook page into an online memorial. Users agree to this policy when they sign up for an account.⁴⁰ Although Facebook will not provide the user's account login details, most of the content a deceased user had previously shared (e.g., photos,

themselves, or the "four corners" of the agreements.).

³⁵ See *infra* Part IV.A. (contrasting real and digital property); see also *infra* Part III.A. (discussing the counterargument to the longstanding theory of dead hand control).

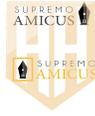
³⁶ Contacting Twitter About a Deceased User, TWITTER, <https://support.twitter.com/articles/87894-contacting-twitter-about-a-deceased-user> (last visited Feb. 11, 2016) ("We are unable to provide account access to anyone regardless of his or her relationship to the deceased."). But see *Can I Access the Dropbox Account of Someone Who Has Passed Away?*, DROPBOX, <https://www.dropbox.com/help/488/en> (last visited Feb. 11, 2016) (a person demonstrating a legal right to access the deceased's files may request access).

³⁷ DEATHSWITCH, <http://deathswitch.com/> (last visited Feb. 11, 2016) ("A deathswitch is an automated system that prompts you for your password on a regular schedule to make sure you are still alive. When you do not enter your password for some period of time, the system prompts you again several times. With no reply, the computer deduces you are dead . . . and your pre-scripted messages are automatically emailed to the individuals you designated.").

³⁸ See *Statement of Rights and Responsibilities*, *supra* note 37.

³⁹ *How Do I Report a Deceased Person or an Account that Needs To Be Memorialized?*, FACEBOOK, <https://www.facebook.com/help/150486848354038> (last accessed Feb. 11, 2016).

⁴⁰ See *Log In, Sign Up or Learn More*, *supra* note 30.



posts) will remain visible.⁴¹ And, while most Internet websites permit only family members to cancel the account of a deceased user,⁴² anyone regardless of their relationship to the deceased individual can request to memorialize a deceased person’s profile, ensuring that the profile will be preserved and remain visible for as long as Facebook exists (or, longer).

In contrast, services such as Dropbox and Gmail consider requests for access to a deceased’s account on a case-by-case basis in order to determine whether or not to grant access.⁴³ Dropbox will only consider granting access to the deceased if the requester can prove the account holder is in fact deceased and that the requester has a “legal right to access the person’s files under all applicable laws.”⁴⁴ On the other hand, a requester seeking access of a deceased individual’s Google account may simply submit a form with proof of death indicating a request to “[o]btain data from a deceased user’s

account” and then wait for Google’s preliminary review.⁴⁵ Despite providing for case-by-case consideration, it seems extremely unlikely that Google will grant the request without a court order.⁴⁶

Being at the mercy of the service provider’s terms is especially concerning when there is no clear rule of law that addresses what happens to an online account following the death of its owner. While perhaps contract law is the most obvious legal theory to apply to interpret the deceased’s privacy rights, it does not fully protect these rights if the individual dies intestate. In fact, the opposite is true: the contractual approach strongly favours the service provider who drafted the terms. As such, a deceased user’s right to privacy is at the mercy of the service provider’s terms under the contractual approach.

1.3 DIGITAL WILLS: PRESERVING DIGITAL LEGACY BEYOND

⁴¹*What Happens When a Deceased Person’s Account Is Memorialized?*, FACEBOOK, <https://www.facebook.com/help/www/103897939701143> (last accessed Feb. 11, 2016).

⁴² See, e.g., *Contacting Twitter About a Deceased User*, TWITTER, <https://support.twitter.com/articles/87894-contacting-twitter-about-a-deceased-user> (last visited Feb. 11, 2016); *How Do I Submit a Special Request for a Deceased Person’s Account on the Site?*, FACEBOOK, <https://www.facebook.com/help/www/265593773453448> (last visited Feb. 11, 2016).

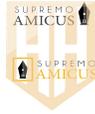
⁴³ See *Can I Access the Dropbox Account of Someone Who Has Passed Away?*, supra note 44 (requires proof of death and proof of requestor’s legal right to access the deceased’s files); *Accessing a Deceased Person’s Mail*, GMAIL, <https://support.google.com/mail/answer/14300?h>

[l=en](#) (last visited Feb. 11, 2016) (involving a two-step process that requires proof of death and “additional legal documents”).

⁴⁴*Can I Access the Dropbox Account of Someone Who Has Passed Away?*, supra note 42.

⁴⁵*See Log In, Sign Up or Learn More*, supra note 30.

⁴⁶ See *id.*; see also Stefanie Olsen, *Yahoo Releases E-Mail of Deceased Marine*, CNET (Apr. 21, 2005, 12:39 PM), http://news.cnet.com/Yahoo-releases-e-mail-of-deceased-Marine/2100-1038_3-5680025.html (discussing how Yahoo finally shared information contained in a deceased Marine’s email account with his father after a court order); Colin Korzec & Ethan A. McKittrick, *Estate Administration in Cyberspace*, 150 TR. & EST. 61, 62 (2011) (discussing how to avoid potential conflict by obtaining a court order).



THE

“Paper wills are dead. Instead, a growing number of people are thinking about recording their last will and testament on video”

Anonymous

The subject of digital wills seems to bring out the black humour in headline writers: **“How to log out permanently”** ran a recent piece in Forbes India. “Death 2.0” screams Wired. But given the entrenched role that cyberspace now plays in our everyday lives, the question of what happens to our online property when we die is increasingly pressing, particularly given the increasing monetary (and sentimental) value of virtual assets.

The concept of a digital will, secure and tamper proof, is yet to catch on in the country.

India has just about a few hundred of digital wills. For wider adoption, the Information Technology Act, 2000, needs to be amended to help people register digital wills. We work, socialise, like and dislike things, post-holiday pictures and more, all online. What happens to that data when we die?

DATA LIFESPAN: ONLINE DATA AFTER DEATH

1. **Aadhaar:** Identity remains on the server.
2. **Google:** Lets users plan what to do with Gmail account, Picasa photos,

GRAVE

YouTube videos. Users can bequeath digital assets.

3. **Twitter:** Tweets are removed, account deleted on submission of death certificate.
4. **Yahoo:** Account deleted on submission of death certificate.

"Hundreds of gigabytes of data are locked up daily as people have passed and their accounts (Gmail, Facebook etc) will never be opened. In this aspect, the law is 10 steps behind technology," said cyber law expert Pavan Duggal.⁴⁷ The IT Act 2000 doesn't cover such virtual records. Social media didn't exist when the Act was passed, while You-Tube was born in 2005, Facebook a year before that and Twitter in 2006.

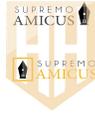
All of these are now mainstream. Duggal said digital wills are the answer. "Like people bequeath moveable and immovable assets, they can will digital assets. Facebook account, iPads etc are moveable assets."⁴⁸

A digital will attested by a digital signature will save loved ones the bother of proving who the legal heir is or getting a succession certificate, which could take 12-18 months, by which time some of the data could be deleted. *A traditional will only addresses real-world property as well as IPR rights*, said SuhailNathani, partner at Economic Laws Practice but when it comes to cyber property, accounts and passwords should be mentioned in the will or they could be lost

⁴⁷<http://economictimes.indiatimes.com/tech/inter-net/concept-of-a-digital-will-to-pass-on-online-assets-is-yet-to-catch-on-in-the->

country/articleshow/32879308.cms last visited on 20th November 2016.

⁴⁸*Ibid.*



to heirs and administrators of the estate.⁴⁹ That's because standard terms of service at internet sites contain strict privacy conditions, which prohibit access to anyone other than the individual who signs up for the account.

The IT Act, which otherwise applies to digital data, doesn't cover testamentary disposition, Nathani said. *"The remedy, if any, will lie in equity, and to that extent depends on the discretion of the court,"* he said.⁵⁰

Remember that while physical wills are legally binding (even if written on bizarre materials), digitally-written wills are not in most territories – and may require a major change in statutory law to become binding. As Indian Supreme Court lawyer, Gopal Sankaranarayana observes.

"If a digital will is to have sanctity, there has to be an amendment in succession laws."

LEGAL GREY AREA

The problem for users is that digital bequeathing remains a legal grey area in jurisdictions globally – testamentary law just hasn't kept up. "Virtual assets have little legal protection in China," observes the Chinese news service ECNS.cn. The same is true everywhere from New York and London to Mumbai. As one Indian pundit observes: "No-one denies the need

for digital wills, but no-one seems to be doing much about it either."⁵¹

The situation is complicated by the failure of internet service providers to agree an accepted procedure for account management after death and to make these explicit in terms and conditions. Because accounts are governed by contracts with individuals, however, most are decidedly unwilling to unlock email and social networking accounts after death.

YOUR ELECTRONIC AFTERLIFE

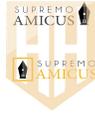
But what of individual privacy? While most people wouldn't bat an eyelid at allowing their heirs to peruse their music or film collections, many would balk at giving them unfettered access to email or social networking accounts. Hence the importance of making it explicitly clear who should have access to what is also something on which a testator needs to ponder upon.

The market has already responded. In recent years, a glut of companies have sprung up to facilitate the transfer (or withholding) of your digital treasures. Companies like Legacy Locker, Entrustet, Passmywill.com and Deathswitch, will allow you to upload personal log-in details and passwords to all your accounts, which can then be released to your executors – along with your instructions on who should see what. These provide a useful service, but

⁴⁹<http://economictimes.indiatimes.com/tech/internet/concept-of-a-digital-will-to-pass-on-online-assets-is-yet-to-catch-on-in-the-country/articleshow/32879308.cms> visited on 20th December 2016.

⁵⁰*Ibid.*

⁵¹<http://www.lexology.com/library/detail.aspx?g=da85a184-df3a-4c4b-af2a-e78ae1861acd> visited on 22nd December 2016.



they're not perfect. Although they claim to be safe repositories, you may have concerns about security and (given the volatile market place they inhabit) longevity. There's not much point in entrusting your digital afterlife to a company that goes bust.

India, though, is still a long way off from such legislation. "The legislations in India presently do not recognize the concept of a 'digital will' or any other form of testamentary disposition by electronic means. The Indian Information Technology Act, 2000, in this regard has specifically excluded wills or other testamentary dispositions from the applicability of its provisions," said **Ramesh Vaidyanathan**, managing partner at Indian commercial law firm Advaya Legal.

In the absence of a specific law for a digital will in India, the execution and enforcement of the testator's will is governed by the Indian Succession Act, 1925, according to Vaidyanathan. In some cases, like with respect to emails or social media pages, the beneficiary may have to request the company concerned such as **Google Inc.** or **Facebook Inc.** for permission to access and, if requested by the testator, keep the website or social media page alive after the death of the person. However, any online operation of the deceased's bank account is illegal and a criminal offence, he added.

Making a digital will could also help since it can be monetized. According to legal experts, online books or research papers, or valuable advertising content, professional photographs all of which

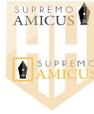
may be subject to copyright or patents can be monetized after a person's death on his or her instructions. The person authorized can then continue to run the digital business, or even sell it.

"In such cases, taxes may also be applicable and the digital will may also be contested in a court of law, just like an ordinary will. However, there needs to be more legal clarity on this since digital wills still make up just a fraction of all the wills made in India," said **Daksha Baxi**, executive director at Indian law firm Khaitan and Co.

The need of the hour, thus, is a more structured legislation to govern the use of technology and e-space in India, say legal experts. Moreover, since electronic documents can be manipulated, a major challenge is ensuring the authenticity of the contents of the will and genuineness of its execution, after a testator's death. The scope for digital wills in India still holds large potential, thanks to the burgeoning Internet user base and use of multiple digital devices.

"With the new Indian government promoting the use of e-governance, social media and technology to encourage the pace of growth in various sectors, and countries positively recognizing testaments made in electronic form, there is an expectation for recognition of such concepts in India," said Vaidyanathan.

Duggal added that despite India having "a largely touch-and-feel culture, making digital wills in the country rare and legal firms dealing with digital firms rarer still", digital wills could become popular



as more people become comfortable with the online mode.

“Given the growing popularity of mobile phones, in the next five years, I expect even digital wills on mobile to become popular in India. Digital assets could even be bought and sold online with permission from the testator to the beneficiary in the future, like in the case of bit coins today,” he added.

1.4 HOW TO LOG OUT PERMANENTLY

“While you log in to live your life, you can also choose the way you log out.”

Anonymous

EXTENDING TORT LAW TO PROTECT THE PRIVACY OF THOSE WHO DIE INTESTATE

Extending existing tort law would be the most effective method of protecting the privacy of a deceased user. Under current common law, a deceased individual does not have a right to privacy, but the judiciary is already well-positioned to fill this gap in tort law to meet this pressing need in order to protect the deceased’s privacy rights. Courts can achieve this by broadening current tort law to apply

posthumously and give the deceased an inherent right of privacy. Currently, only a living individual can bring a tort claim for invasion of privacy.⁵² Not even an heir can recover under this tort on behalf of a deceased individual; only the individual whose privacy has been violated can bring a claim.⁵³ This stems from the idea that the concept of privacy is personal and can only be asserted by the individual whose privacy was invaded.⁵⁴

A. Extending the right to the tort posthumously is justified

Extending the tort of invasion of privacy to apply to posthumous privacy interests is justified because both statutory law and common law already recognize that people can retain their rights posthumously.

1. RECOGNITION IN STATUTORY LAW

Statutes have recognized dignitary interests of deceased individuals. For example, while not prohibited by federal law, twenty-three states in the U.S have laws prohibiting necrophilia or, sex with corpses.⁵⁵ Furthermore, some states mandate the dignified disposal of dead

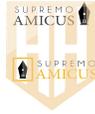
⁵² Cal.App.3d 59, 62 (Cal. Ct. App. 1975) (internal citations omitted) (“It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that his privacy has been invaded. Further, the right does not survive but dies with the person.”).

⁵³J. THOMAS MCCARTHY, 2 THE RIGHTS OF PUBLICITY AND PRIVACY § 9.1 (2d ed. 2014); see, e.g., Bradt v. New Nonpareil Co., 79 N.W. 122, 122 (Iowa 1899) (“The rule that an heir

may recover for a libel of one deceased does not seem to have gained a foothold in this country, and we know of no principle that will sustain such an action.”).

⁵⁴Young v. That Was The Week That Was, 312 F. Supp. 1337, 1341 (N.D. Ohio 1969).

⁵⁵Daily Mail Reporter, Necrophilia Set to be Outlawed in Illinois After Officials Realize It Is Technically Legal, DAILY MAIL (Feb. 18, 2016, 8:09 PM), <http://www.dailymail.co.uk/news/article-2103238/Necrophilia-set-outlawed-Illinois->



bodies in certain places to reduce the risk to public health.⁵⁶ State laws criminalizing certain acts to a corpse exist because the state legislatures believe these acts are undignified. While these laws focus primarily on public health and safety concerns,⁵⁷ they demonstrate a desire for the dead to be disposed of in a dignified manner.⁵⁸ In fact, recommendations for disposing bodies after major disasters do not solely focus on disposing them in the most efficient manner possible.⁵⁹

2. RECOGNITION IN COMMON LAW

Common law also acknowledges deceased persons’ rights after death. Under common law, an individual has the right to decide how to dispose of his or her own body after death.⁶⁰ In *Long v. Alford*, for example, the court upheld the testator’s desire to be buried in a specific cemetery, thereby authorizing exhumation of his body for

reburial.⁶¹ Similar to the UAGA 2006 amendments that permit relatives to decide about donating a deceased’s organ donation only absent a decision by the deceased, various courts have stated that only in the absence of “testamentary disposition . . . [does] the right of preservation and burial . . . belong[] to . . . the next of kin.”⁶² Since common law already recognizes the right of an individual to make decisions about the disposal of his or her own dead body, it should also recognize a deceased person’s interest in the privacy of her digital assets.

3. Nexus BETWEEN PRIVACY AND DIGNITY

Privacy and dignity are two separate, but closely interrelated concepts. Privacy is “about the protection of human autonomy and dignity, the right to control the dissemination of information about one’s private life.”⁶³ The law already recognizes a deceased individual’s

officials-realise-technically-legal.html; 720 ILL. COMP. STAT. ANN. 5 / 12-20.6 (West 2012).

⁵⁶Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is*, 14 MARQ. ELDER’S ADVISOR 197, 233 (2013).

⁵⁷See, e.g., *Management of Dead Bodies After Disasters: A Field Manual for First Responders*, INT’L COMMITTEE OF THE RED CROSS (Apr. 10, 2009), available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0880.pdf>; *Disposal of Dead Bodies in Emergency Conditions*, WORLD HEALTH ORG.,

http://www.who.int/water_sanitation_health/hygiene/envsan/tn08/en/ (last visited Nov. 1, 2016).

⁵⁸ Young, *supra* note 58.

⁵⁹*Disposal of Dead Bodies in Emergency Conditions*, *supra* note 107 (“Burials in common

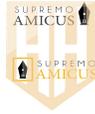
graves and mass cremations are rarely warranted and should be avoided.”).

⁶⁰DAVID A. ELDER, *PRIVACY TORTS* § 1:3 (2013); see, e.g., *Long v. Alford*, 374 S.W.3d 219, 223 (Ark. Ct. App. 2010) (stating that a “decedent’s wishes concerning ultimate disposition of his or her remains are entitled to consideration and should be carried out as far as possible.”); *Booth v. Huff*, 708 N.Y.S.2d 757, 759 (N.Y. Sup. Ct. 2000) (“[A] decedent’s wishes will be taken into account when a dispute erupts over the ultimate disposition of remains and, in some cases, given effect over the objections of family members.”);

⁶¹374 S.W.3d at 223.

⁶² *Lumley*, 7 S.E.2d at 315.

⁶³N. A. Moreham, *Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort*, in *LAW, LIBERTY, LEGISLATION* 231–248 (Jeremy



dignity interests posthumously through organ donation laws and dead body disposal rights. Thus, courts should also recognize a deceased person's interest in the privacy of her personal information. Users have some degree of control over the privacy of their digital assets during their life: Facebook permits accountholders to change what they share with different people;⁶⁴ Twitter allows users to decide whether their tweets are public or private;⁶⁵ and OkCupid gives its users the ability to visit other users' profiles in secret.⁶⁶ Users' control over their privacy interest in their digital assets should extend past death.

1.5 DIGITAL ASSETS PROVIDE MORE INFORMATION FOR A LONGER PERIOD OF TIME

"Privacy is one of the biggest problems in this new electronic age"
Andy Grove

Digital assets raise more privacy concerns than the burial of a dead body. A dead body can only provide a limited amount of information about a person.⁶⁷ In contrast, digital information about an individual can persist and be transferred much more easily than information

derived from a dead body. Firstly, digital assets tend to include very personal information captured over an extended period of time.⁶⁸ Secondly, it is much easier to derive private information from a person's digital assets. Few skills are needed to download or look through content such as photos, tweets, or bank statements. In comparison, gleaning information from a dead body requires skill and, often, special equipment. For example, medical doctors and pathologists are specially trained to perform autopsies on dead bodies to uncover information about the deceased person.

Additionally, digital assets are easily transferrable. Users can send data to anyone in the world over the Internet almost instantaneously, subject to obstacles they may encounter such as Internet connection speed and download speed. The transferability of digital assets allows for 1) unauthorized or unwanted disclosure that damages reputations and 2) exposure, which causes grief and humiliation.⁶⁹ A dead body, on the other hand, is more challenging to transport

Finn & Stephen Todd, eds., 2008), available at <http://www.victoria.ac.nz/law/about/staff/publications-nicole-moreham/nm-law-libertylegislation.pdf>.

⁶⁴ Choose Who You Share With, FACEBOOK, <https://www.facebook.com/help/459934584025324/> (last visited Nov. 2, 2016).

⁶⁵ About Public and Protected Tweets, TWITTER, <https://support.twitter.com/articles/14016-about-publicand-protected-tweets> (last visited Nov. 2, 2016).

⁶⁶Privacy Controls, OKCUPID, <http://www.okcupid.com/help/privacy> (last visited Nov. 2, 2016).

⁶⁷<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1240&context=njtip>.

⁶⁸*Ibid.*

⁶⁹For further discussion on a framework to approach analyzing privacy, see generally Daniel Solove, A Taxonomy of Privacy, 154 U. PENN. L. REV. 477 (2006).



because of various state public health laws.⁷⁰

Lastly, digital assets are less likely to be corrupted. Barring a virus or some affirmative act of destruction, information captured online can persist indefinitely. Even if one tried to destroy digital information, it is very difficult to fully erase the trail left by the information from the Internet.⁷¹ Because digital assets can persist for a very long time and usually contain a plethora of personal information,⁷² they contain more sensitive information than the information revealed by a dead body. Dead bodies are comparatively more destructible because organic matter decomposes.⁷³ Human bodies inevitably decompose unless someone preserves the organic matter.⁷⁴ And, once organic matter begins to decompose, the information that can be gleaned from it decreases.⁷⁵

CONCLUDING REMARKS



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As online activity becomes a greater part of everyday life, much more of the information collected online can be extremely personal. Despite this, very few young adults have a will dictating what should be done with all the personal information collected online during their life. In the absence of testamentary intent, a deceased individual's posthumous right to privacy is tenuous under current law. Since contract law and property law ineffectively protect a deceased individual's online privacy rights, extending the invasion of privacy tort posthumously is the best way to protect an individual's privacy rights after death. Utilizing common law would be most effective because a legislative approach would take too long. Also, common law and state legislatures already recognize posthumous dignitary interests. Since dignity and privacy are closely intertwined and digital assets tend to elicit much more personal information than a dead body, extending the tort posthumously is necessary to protect these rights.

⁷⁰ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 10, § 13.2 (1991); CODE ME. R. tit. 10-146 Ch. 1, § 4.

⁷¹ Polina Polishchuk, Can You Ever Really Delete Yourself from the Internet?, VENTUREBEAT SECURITY (Dec. 29, 2016, 2:38 PM), <http://venturebeat.com/2013/01/29/delete-password/>. The European Union is currently amidst efforts to implement a "Right to be Forgotten" policy, which would give individuals to right to request complete removal of information about them. See Jeffrey Rosen, The Right to be Forgotten, 64 STAN. L. REV. ONLINE 88, 89–90 (2012).

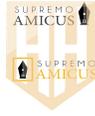
⁷² See Solove, *supra* note 97, 505–09 (discussing information aggregation and how it can "form a portrait of a person").

⁷³ See, e.g., Richard T. Conant et al., Sensitivity of Organic Matter Decomposition to Warming Varies with Its Quality, 14 GLOBAL CHANGE BIOLOGY 868, 868–69 (2008).

⁷⁴ How Long Does It Take a Dead Body to Decompose?, CURIOSITY.COM, <http://curiosity.discovery.com/question/take-dead-body-to-decompose> (last visited Nov. 1, 2016). Even embalmed bodies will eventually decompose.

⁷⁵ See generally Michelle J. Thali et al., Into the Decomposed Body—Forensic Digital Autopsy Using Multislice-Computed Tomography, 134 FORENSIC SCI. INT'L 109 (2003) (implying a need for technology to evaluate a decomposed body by arguing the usefulness of a type of technology to help with forensic documentation of decomposed bodies).

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