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“A Private Affair”: A Look into Posthumous Privacy Rights after the Rise of Digital Assets and Why There Must be a Federal Privacy Statute to Protect these Assets

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I. Introduction

Currently, the right to privacy for the living is one of the most contested rights in our nation, while the existence of privacy interests after death remains muddled.[1] Death is a significant legal act, in which it terminates marriages, contractual obligations, and initiates property transfers.[2] A dead person may not vote, marry, speak, enter contracts, or enforce any rights or privileges.[3] Yet, the rise of the digital age prompts even more questions regarding privacy interests.[4] For instance, there has never been more information about our lives produced and stored.[5] This dramatic increase in personal data collection has prompted a debate as to what needs to be done to ensure that this increasing quantity of data does not interfere with individual's privacy interests during their lives.[6]

When developers created online services and platforms, it is unlikely they deeply considered the issue of what would happen to these accounts after the account holder died. However, this issue arises where the online platforms become the proprietor of the deceased individual's account. This is because when individuals die, they leave password-protected sites

[1] Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C.L. Rev. 927, 928 (2016).
[2] Banta, *supra* note 1, at 928.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id.* at 929.

full of personal information, without any immediate plan from providers to delete or deactivate said account.[7] The account holder does not have immediate access or control over this, as it is the third party server that hosts the account that has access to the password protected information, and thus owns the deceased person's account.[8]

These digital assets are not only complicated in the logistical ownership, but also the legal ownership. A deceased individual's digital assets are not governed by the same framework structure as the deceased person's property assets. Property assets are governed by the laws of testation and intestacy.[9] Property law did not account for the rise of the digital assets and social media. These assets, left without a *living* counterpart who could actively control the subjective rights associated with the persona, call into question a post-mortem digital persona with an appropriate legal framework that will govern the survival or extinction of these assets.[10]

The digital assets this paper addresses includes social media websites, digital "cloud" assets, online bank accounts, and personal emails. Also, this paper addresses the specific situation of what may govern when a deceased individual does not provide his or her fiduciaries with a "digital asset password list" or book. Although it is fairly common for people to keep lists full of passwords, and it comes highly recommended by many attorneys, many people do not think to grant access to their fiduciaries, leaving their accounts open to risks.[11] For example, bank accounts could go unmonitored and thus become drained before fiduciaries gain access to them.[12] Another

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[7] Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C.L. Rev. 927, 930 (2016).
[8] *Id.* at 930.
[9] J.C. Buitelaar, *Post-mortem privacy and informational self-determination*, 19 ETHICS INFO. TECH. 129, 134 (2017).
[10] *Id.*
[11] Munk, Cheryl, *Make Sure to Include Digital Assets in Your Estate Plans*, THE WALL STREET JOURNAL (Apr. 19, 2020), https://www.wsj.com/articles/make-sure-to-include-digital-assets-in-your-estate-plans-11587161327 (last visited Dec. 15, 2020).
[12] Monk, *supra* note 11.

risk is that heirs might be unaware of accounts, which could lead to loss of assets and mounting debt of unpaid bills, if they arrive by email.[13]

Presently, there are two major statutes states may choose to enact to protect digital assets after death. First, the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA") gives fiduciaries certain powers to manage digital assets, but it also attempts to provide some privacy protections for the deceased owners of the digital assets as well.[14] Second, the Privacy Expectation Afterlife and Choices Act ("PEAC") aims to balance the interests of the deceased user, the privacy of the people with whom the deceased corresponded, the needs of the fiduciary, and existing federal law.[15] Both of these proposed model statutes have advantages and disadvantages that could lead to the protection of the digital assets of the deceased. However, neither provide comprehensive coverage to postmortem digital assets, and thus neither have been enacted federally. Thus, the United States needs a comprehensive posthumous privacy statute to be enacted federally so that all citizens have equal coverage of their digital assets once deceased.

Because there is no federal statute, this has become an issue of state's rights, and thus citizens of one state will have different rights regarding their digital assets than people in another state. However, as digital assets are readily accessible to every state citizen regardless of state, these digital assets should be governed federally, so every citizen has equal protection for these assets. Therefore, a federal posthumous digital privacy statute is the best and only way to protect the digital assets of the deceased.

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[13] Monk, *supra* note 11.
[14] *The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA),* NOLO.COM (2019), https://www.nolo.com/legal-encyclopedia/ufadaa.html (last visited Nov. 4, 2020).
[15] *Privacy Expectation Afterlife and Choices Act: Balancing Fiduciary Needs, Privacy Rights, and Complying with Federal Law,* NETCHOICE, https://netchoice.org/wp-content/uploads/Privacy-Expectations-Afterlife-and-Choices-Act-2pager-FINAL.pdf (last visited Nov 4, 2020) [hereinafter "PEAC Balance"].

This paper argues that there should be a federally mandated posthumous digital privacy statute to protect the digital assets of the deceased from third parties retaining personal information long after they die. This paper also examines a variety of options by which post-mortem digital privacy could be ruled, instead of being controlled exclusively by privacy law. Additionally, as social media use continues to rise, it should be easier for the personal representative, sibling, spouse, or child of the decedent to gain access to these digital assets of their deceased loved one. Part II of this paper will discuss the administrative and privacy issues that arise when a deceased person leaves an array of digital assets behind without leaving clear access to these accounts for their fiduciaries. Part III will discuss the posthumous privacy problems that are created through increased use of digital assets with a focus specifically on social media and email accounts. Part IV will discuss privacy rights people have after death in general, such as those rights within property law and contract law. Part V will discuss model statutes like RUFADAA and PEAC which target the specific problem of posthumous digital asset privacy that individual states can enact into their state constitutions. While neither of these proposed statutes satisfy privacy protection adequately, both have advantages and disadvantages. Because neither of these statutes are sufficient, Part VI will introduce viable remedies in order to protect posthumous digital assets correctly and will argue a sufficient way to enact a federal posthumous digital privacy statue.

II. Administrative and Privacy Issues

Once, a woman held a power of attorney for her husband who had been diagnosed with dementia.[16] She managed his online bank account with Bank of America for several years until

[16] Gerry W. Beyer and Naomi Cahn, *Planning for Passwords and Other Digital Assets*, AMERICANBAR.ORG (Mar. 1, 2012),

she was informed that she had the wrong password.[17] Although she was able to answer a series of questions on the website, including her husband's social security number, she could not answer questions about the numbers on his Bank of America credit card, as she cut it up knowing her husband would no longer be able to use it.[18] Thus, she would have to go through a court and official process with Bank of America to retrieve this information and hopefully close out the account.[19] This is just one of the many examples of what may happen administratively to digital assets if they are not properly planned for.

Since digital assets are intangible, it is generally easy to overlook them.[20] Thus, many estate lawyers recommend people to engage in digital asset planning, so these assets are not forgotten once deceased.[21] Digital asset planning ensures that the client's wishes are respected in the disposition of these assets.[22] Yet, as there is uncertainty of existing law, digital assets have not been deemed estate property to put in a will.[23] Many estate lawyers do not even consider digital asset property when drafting a will, and even then, most Americans do not have wills to begin with.[24] Thus, even in instances where digital assets are recognized, many estate planning attorneys rely on traditional planning principles for their disposition, therefore failing to address the privacy and fiduciary access concerns that are specific to them.[25]

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https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2012/summer/planning-for-passwords-and-other-digital-assets/ (last visited Dec. 16, 2020).
[17] Beyer, *supra* note 16.
[18] *Id*.
[19] Beyer, *supra* note 16.
[20] Elizabeth Sy, *The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught Up with Technology?,* 32 TOURO L. REV. 647, 648 (2016).
[21] Sy, *supra* note 90 at 648.
[22] *Id*.
[23] *Id*.
[24] Maggie Germano, *Despite Their Priorities, Nearly Half Of Americans Over 55 Still Don't Have A Will*, FORBES (Feb. 15, 2019) https://www.forbes.com/sites/maggiegermano/2019/02/15/despite-their-priorities-nearly-half-of-americans-over-55-still-dont-have-a-will/?sh=1f8d1b365238 (last visited Dec. 16, 2020).
[25] Sy, *supra* note 90 at 648.

Because there is a lack of clear laws for the rights of executors, agents, guardians, and beneficiaries with regard to digital assets, there are many different interpretations on how these should be managed.[26] Not all states have begun to deal with the issue, and the interstate application of these laws may be problematic.[27] Although many online services have their own policies for how to deal with a user's death or incapacity, not all states have developed policies.[28] Moreover, a client may not be entirely satisfied with a particular site's procedures.[29] Also, many digital assets are not inherently valuable, but have emotional value.[30] They may have established online photo albums or accounts that preserve love letters or recipes.[31] Without alerting family members that these assets exist and without telling them how to get access to them, the deceased risks losing the story of her life forever.[32]

When digital assets have value, the client may be able to dispose of them through a will or transfer ownership to a trust.[33] But, there are many problems that come along with putting digital assets in a will, for instance, the nature of the digital asset leaves wills awkward and vulnerable.[34] Also, wills are unsuitable as repositories for passwords or other information that is critical to accessing online assets.[35] Not only might the information change before a new will can be executed, but also wills become public information.[36] A trust may be more desirable for ownership and account information because it would not become part of the public record.[37] However, this

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[26] Sy, *supra* note 90 at 648.
[27] Beyer, *supra* note 16.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.

does not rid privacy issues involving the actual terms of digital asset platforms, and whether transfer of these usernames and passwords is actually feasible due to digital asset platform's Terms of Service agreements. Thus, this increase in concerns about the disposition and administration of digital assets made it apparent that states should either create or update their estate laws or federal legislatures should pass a statute for posthumous digital asset privacy.[38]

III. Relationship between Digital Assets and Privacy

Digital assets are defined as "any term of text or media which has been formatted into a binary source that includes the right to use it."[39] There has been a rise of the popularity of social media since the turn of the century.[40] Statistics show that most American adults use social networking websites.[41] As of May 18, 2020, there was 4.14 billion people with active social media around the globe.[42] In the United States alone, there was an approximate 247 million social media users as of 2019.[43] Social media has become important for social interactions like staying in touch with friends and family and reconnecting with old acquaintances.[44] Beyond that, social media plays a role in the way people participate in civic and political activities, launch and sustain projects, get and share health information, gather scientific information, perform job related activities and get news.[45]

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[38] Sy, *supra* note 90 at 648.
[39] *Id.* at 650.
[40] Lee Rainie, *Americans' Complicated Feelings About Social Media in an Era of Privacy Concerns*, PEW RES. CTR. (Mar. 27, 2018), https://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/ (last visited Nov. 4, 2020).
[41] Natasha Chu, *Protecting Privacy After Death*, 13 NW. J. TECH & INTELL. PROP. 255, 259 (2015).
[42] J. Clement, *Social media – Statistics and Facts,* STATISTICA.COM (May 18, 2020), https://www.statista.com/topics/1164/social-networks/ (last visited Dec. 16. 2020).
[43] J. Clement, *Share of U.S. Population who use social media 2008-2019*, STATISTICA.COM (May 19, 2020), https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/ (last visited Dec. 16, 2020).
[44] Rainie, *supra* note 40.
[45] Rainie, *supra* note 40.

However, with the rise of social media, people have also lost control over how their personal information is collected and used. Social media accounts are governed by the third-party platform providers; thus it is the platform that actually owns the data on private accounts, not the individual.[46] Online service providers are reluctant to permit access to fiduciaries or transfer digital information to the deceased's estate for the fear of violating the Stored Communications Act ("SCA"), which is a portion of the larger Electronic Communications Privacy Act.[47] Section 2702(a)(1) of the SCA states that "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service."[48] The statute was enacted to prevent unauthorized access to online accounts, but has proved to be a wall for personal representatives trying to gain access to deceased accounts.[49]

Many times, platforms like Facebook rely on the SCA in refusing to give records of a deceased user's accounts to their family.[50] For example, in 2008 a woman died, and 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.[51] Facebook moved to quash the subpoena on the ground that it violated the SCA.[52] The court granted Facebook's order to quash, finding that the SCA did not compel Facebook to give the woman's information to her family, regardless of need for evidence surrounding the woman's death.[53]

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[46]Alberto B. Lopez, *Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets*, 24 GEO. MASON L. REV. 183, 188 (2016).
[47] Lopez, *supra* note 46 at 188.
[48] 18 U.S.C. §2702(a)(1) (2012).
[49] Sy, *supra* note 90 at 657.
[50] *Id*. at 660.
[51] *In re Facebook*, 923 F. Supp. 2d 1204, 1205 (N.D. Cal. 2012).
[52] *In re Facebook*, *supra* note 51 at 1205.
[53] *In re Facebook*, *supra* note 51 at 1206.

A major problem is that digital property left behind from the deceased does not automatically cease to exist. A fiduciary must be able to access an account holder's digital property in order to manage it and potentially delete it.[54] If a personal representative does in fact discover a decedent's online accounts and passwords, actual access to those accounts may violate state privacy laws.[55] Violations of such laws are deemed criminal offenses, punishable by monetary fines and/or prison time.[56] Thus, in many circumstances where a personal representative is attempting to access post-mortem accounts, access to the account is requested to the online-service provider so as to not defy any laws or terms of service agreements.[57] However, in many instances, the online service provider denies access to these accounts which forces families to file complaints to courts seeking compulsory disclosure of the account's contents.[58]

There are exceptions to the SCA that permit voluntary disclosure.[59] However, transferring the contents of an online account to a personal representative during estate administration is not one of these exceptions.[60] Thus, for many accounts, disclosure of an account holder's username and password is a violation of the Terms of Service agreement between the third party social media platform and the user.[61] A Terms of Service agreement is a set of terms that users must agree to follow before using a service.[62] The Terms of Service sets the way in which the product, service,

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[54] Sy, *supra* note 90 at 654.
[55] Lopez, *supra* note 46 at 186.
[56] *Id*. at 186-187.
[57] *Id*. at 199.
[58] *Id*.
[59] Lopez, *supra* note 46 at 188.
[60] *Id*.
[61] Sy, *supra* note 90 at 654.
[62] *Id*. at 655.

or content may be used in a legally binding way.[63] The Terms of Service agreement covers a broad array of issues such as copyright notices, marketing policies, and acceptable user behavior.[64]

Terms of Service agreements are usually drafted in a way to protect content from a copyright perspective, as well as protection from potential liabilities.[65] These Terms of Service are enforceable even where users do not affirmatively manifest assent, so long as the site provides its users with reasonable notice of these contractual terms.[66] Most people do not read the terms in their entirety before agreeing to them; only about seven percent of people actually read the full terms.[67] 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.[68] Hence, people end up signing an agreement that would hamper the access to their account after they are deceased.[69]

IV. Privacy Rights for the Deceased in General

Privacy rights are an important element in protecting one's posthumous reputation. When it comes to reputation, constitutional privacy interest, or information gleaned from testamentary estates, the law does not honor a decedent's interest in controlling the dissemination of private or

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[63] *What are the Terms and Conditions and When are they Needed?*, IUBENDA.COM, https://www.iubenda.com/en/help/2859-terms-and-conditions-when-are-they-needed (last visited Dec. 16, 2020).
[64] Sy, *supra* note 90 at 655.
[65] Terms and Conditions, *supra* note 63.
[66] James R. Bucilla II, *The Online Crossroads of Website Terms of Service Agreements and Consumer Protection: An Empirical Study of Arbitration Clauses in the Terms of Service Agreements for the Top 100 Websites Viewed in the United States*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 101, 103 (2014).
[67] Rebecca Smithers, *Terms and Conditions: Not Reading the Small Print Can Mean Big Problems*, THE GUARDIAN, (May 11, 2010) https://www.theguardian.com/money/2011/may/11/terms-conditions-small-print-big-problems (last visited Dec. 16, 2020).
[68] Chu, *supra* note 41 at 261.
[69] Cynthia M. Pedersen, *Digital Assets After Death*, J. OF ACCT. (Aug. 1, 2019), https://www.journalofaccountancy.com/issues/2019/aug/estate-planning-for-digital-assets.html (last visited Nov. 4, 2020).

false information about herself after death.[70] The law of testation, which relates only what happens to the assets of economic value that someone leaves behind after death.[71] Property testation theory evaluates whether a deceased user's digital assets may be treated similarly to "real property" after death.[72] These assets attach to the inheritor and do not stay with the deceased person.[73] However, laws of testation do not shed any light on the question of who inherits the persistence of the non-economic, digital elements of the deceased.[74]

The feelings and mental processes that are protected by the right to privacy make the right to privacy a personal right.[75] Thus, the right can only be vindicated through a personal cause of action and thus cannot be assigned, inherited, or transferred to fiduciaries.[76] Because of these personal feelings, courts have been hesitant to increase privacy protections after death, as feelings do not continue after death.[77]

Courts have regularly stated that the right to privacy is too personal for others to bring suit on behalf of the person. For instance, in *Kelly v. Johnson Publishing Co*, a surviving family member of a boxing champion sued a publisher for stating that the champion was an "impoverished, dope-sodden derelict" and that his knife scarred body had been fished from San Francisco bay.[78] The plaintiff, the deceased's sister, argued that the publication was a wrongful invasion of the general right to privacy.[79] However, the court rejected the sister's claim, saying

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[70] Banta, *supra* note 1 at 933.
[71] Buitelaar, *supra* note 9 at 134.
[72] Chu, *supra* note 41 at 258.
[73] Buitelaar, *supra* note 9 at 134.
[74] *Id*.
[75] Banta, *supra* note 1 at 936.
[76] *Id*.
[77] Melissa Gaied, *Data After Death: An Examination into Heir's Access to a Decedent's Private Online Account*, 49 SUFFOLK L. REV. 281, 292 (2016).
[78] *Kelly v. Johnson Publishing Co*, 325 P.2d 659 (Cal. Dis. Ct. App 1958).
[79] *Kelly*, *supra* note 78 at 659.

that the right to privacy was a personal one that cannot be asserted by the deceased's relatives.[80] In another case, *Jesse James Jr. v. Screen Gems, Inc*., the widow of Jesse James Jr. filed a suit against Screen Gems claiming the use of his name in a documentary was an invasion of her deceased husband's privacy.[81] However, the court ruled that the widow's claim was insufficient because it applied to her husband's privacy, and his privacy interests did not survive his death.[82] Because courts believed that privacy rights died with the deceased, people were unable to stop damaging information about their loved ones from spreading. Thus, protecting privacy after death would require courts to enforce the testamentary intent of an individual concerning information stored in her digital accounts after her death.[83]

However, in property and estate law, deceased people have more protection. Property rights are not seen as personal privacy rights, so a decedent's estate can enforce property rights on the decedent's behalf.[84] Yet the common law majority view remains that a decedent's estate may not bring an action to protect the decedent's privacy.[85] This is because of the argument that legal rights exist only where one is sentient and capable of making choices.[86]

When concerned with privacy interests after death, the most significant consideration is the degree of posthumous control that decedents should exert in the name of privacy.[87] Currently, no protections are in place.[88] This is because the courts base their refusal to extend privacy rights beyond death on the common law notion that a person's rights die with the person.[89] However,

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[80] *Kelly*, *supra* note 78 at 659.
[81] *Jesse James, Jr. v. Screen Gems, Inc*., 344 P.2d 799, 800 (Cal. Ct. App. 1959).
[82] *Id.*
[83] Banta, *supra* note 1 at 933.
[84] *Id.* at 936.
[85] *Id.* at 933.
[86] Kristen Rabe Smolensky, *Rights of the Dead,* 37 HOFSTRA L. REV. 763, 768 (2009).
[87] Smolensky, *supra* note 86 at 768.
[88] *Id*.
[89] *Id*. at 935-936.

this view does not mirror in the eyes of the public. In a NetChoice commissioned survey conducted on January 27, 2015, more than 70% of Americans reported that they wanted private online communications to remain private after death.[90] Hence, this desire should be codified through a federal statute enacted to protect these privacy interests for deceased Americans and for their estate or descendants to easily be able to delete these digital assets.

Postmortem medical confidentiality however, is much narrower than the privacy protections guaranteed to the living.[91] Most states allow persons who are direct descendants of the decedent, and those who can prove blood relation to the decedent, to obtain a copy of the death certificate.[92] Yet, access to patient medical records, whether living or dead is heavily restricted under both state and federal law.[93] Under the Heath Insurance Portability and Accountability Act ("HIPPA"), only covered entities, business associates, and person seeking medical information for lawful purposes are allowed to have access to a living competent person's medical records.[94] However, after death, the confidentiality rules of HIPPA are relaxed, and usually next of kin or a personal representative of the estate is entitled to the deceased person's full medical records.[95] Yet still, HIPPA provides virtually no guidance when it comes to postmortem confidentiality.[96] Thus, a federal statute regarding postmortem privacy rights would be useful to provide guidance to virtually all forms of assets, e.g. digital, medical, and estate, to third party operators and fiduciaries.

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[90] State Legislatures Tone Deaf to Americans' Desire To Control Personal Privacy After Death, CISION (Feb. 24. 2015, 09:30 AM), https://www.prnewswire.com/news-releases/state-legislatures-tone-deaf-to-americans-desire-to-control-personal-privacy-after-death-300039100.html (last visited Dec. 17, 2020).
[91] Smolensky, *supra* note 86 at 768.
[92] *Id.* at 796.
[93] *Id*. at 794.
[94] *Id*.
[95] *Id*. at 795.
[96] *Id*.

V. PEAC and RUFADAA

Although there is currently no federal posthumous digital privacy statute, the RUFADAA and PEAC statutes have been written to specifically target the deceased digital assets problem. However, neither of these statutes have been enacted federally. These acts are not enforceable by themselves but serve as models for states to adopt. The Uniform Law Commission ("ULC") wrote the RUFADAA to try to create a bridge between the will and the web.[97] The Internet Coalition, an organization comprised of some of the largest technology companies, backed PEAC in response to privacy concerns.[98] Forty states so far have adopted RUFADAA, while only a handful of states have enacted PEAC.[99] The main problem for states is that many internet companies are challenging such legislation because they are concerned that digital asset inheritance could negatively affect user privacy concerns.[100] Yet, eight states have already passed their own legislation giving fiduciaries access to a decedent's digital accounts after death.[101]

a. The Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA")

The RUFADAA, which is the revised version of the Uniform Fiduciary Access to Digital Assets Act ("UFADAA") was drafted to specifically become the national standard for addressing the right of fiduciaries to access social media and other digital accounts of the deceased.[102] The

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[97] Sy, *supra* note 90 at 649.
[98] *Id*. at 650.
[99] Jeffery Levine, *RUFADAA and The Importance of Digital Estate Planning,* KITCES.COM (Aug. 8, 2018, 11:57 AM), https://www.kitces.com/blog/rufadaa-digital-estate-planning-rights-three-tiers-online-tool-fiduciary/; Holly Isdale, *Digital Assets: Managing Fiduciary Access and Cybersecurity Risks for Client Information*, BLOOMBERG LAW (June 27, 2016, 11:59 AM), https://news.bloomberglaw.com/tech-and-telecom-law/digital-assets-managing-fiduciary-access-and-cybersecurity-risks-for-client-information (last visited Nov. 4, 2020).
[100] Banta, *supra* note 1 at 930.
[101] *Id*.
[102] The Honorable Mark Obenshain & the Honorable Jay Leftwich, *Protecting the Digital Afterlife: Virginia's Privacy Expectation Afterlife and Choices Act*, 19 RICH. J. OF L. & PUB. INT. 39, 42 (2015).

UFADAA statute created a presumption of access to digital assets by a fiduciary of the deceased.[103] There, the fiduciary of the deceased would have the same right to access the deceased person's accounts as the deceased person had during life.[104] Digital assets were the aim of such protection, being defined as "an electronic record," but not included within the definition of a digital asset were "underlying assets or liability, unless such asset or liability was itself an electronic record."[105]

The UFADAA bills were so popular at its first introduction that 26 states introduced bills into legislatures during their 2014-2015 sessions.[106] However, 25 out of 26 states failed to enact the bill into a law because of lobbying efforts based on the right to privacy.[107] Privacy advocacy groups, like the American Civil Liberties Union ("ACLU"), argued that providing executors the authority to access all of a deceased person's digital assets would invade the deceased person's privacy, raise liability concerns for the companies who promised to keep the accounts secure, infringe on privacy of third parties who communicated with the deceased, as well as create conflicts with privacy provisions in federal law.[108]

Several big tech companies also opposed the bill, such as Yahoo! and Facebook.[109] These companies asserted that permitting such access violated the Terms of Service agreements between the company and the deceased account holder.[110] For instance, Yahoo!'s Terms of Service declares that "you agree that your account is non-transferable and any rights to your identification or

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[103] Obenshain & Leftwich, *supra* note 102 at 42.
[104] *The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA),* NOLO.COM (2019), https://www.nolo.com/legal-encyclopedia/ufadaa.html (last visited Nov. 4, 2020).
[105] Obenshain & Leftwich, *supra* note 102 at 42.
[106] Lopez, *supra* note 46 at 189.
[107] *Id*. at 190.
[108] RUFADAA, *supra* note 104.
[109] Lopez, *supra* note 46 at 190.
[110] *Id*.

contents within your account will terminate upon your death."[111] This results in leaving only one remedy for fiduciaries to recover information about a deceased loved ones account, obtaining a copy of the death certificate.[112] Only then would the deceased account be terminated and all contents permanently deleted.[113] Similarly, Facebook's Terms of Service state that you cannot transfer your account to anyone without first getting written permission.[114] Therefore, if an account holder shares his or her password with a fiduciary, the account holder would violate Facebook's Terms of Service 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.[115] However, Facebook's Terms of Service only applies to *inter vivos* transfers—transfers during life—which leaves post-mortem availability in doubt.[116] Nonetheless, Facebook does allow for a memorialization of an individual's Facebook page if they so wish, as demonstrated by users' option when they sign up for a Facebook account.[117]

Because of the strong opposition from big tech companies and public advocacy groups, the ULC revised the UFADAA into the RUFADAA.[118] Some key differences between the two are that (1) now an executor no longer has authority over the contents of electronic communications unless the deceased person explicitly consented to disclosure, (2) an executor must petition the court and explain why the asset is needed to settle the decedent's estate, and (3) if a fiduciary does not have explicit permission through a will, trust, or power of attorney, custodians can look to the

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[111] Verizon Media Terms of Service, Verizon §3, https://www.verizonmedia.com/policies/us/en/verizonmedia/terms/otos/index.html (last updated August 2020).
[112] *Id.*
[113] *Id.*
[114] Statement of Rights and Responsibilities, Facebook §3(1), https://www.facebook.com/legal/terms (last revised 22 October 2020).
[115] Sy, *supra* note 90 at 657.
[116] Lopez, *supra* note 46 at 199.
[117] Chu, *supra* note 41 at 262.
[118] RUFADAA, *supra* note 104.

Terms of Service agreements to determine whether to comply with requests for access to a deceased person's account.[119]

Now, the RUFADAA has been adopted by more than forty states.[120] In California, one of the states that have enacted RUFADAA, the statute provides rules addressing the treatment at death of a user who resided in California at the time of the user's death.[121] However, California changed their version of the RUFADAA to delete provisions addressing digital assets while the user is alive.[122] Thus, the fiduciary would only be able to receive the contents of or access to the electronic communications pursuant to the decedent's online designation, authorization in a testamentary document, or by court order for the purpose of administering the decedent's trust or estate.[123]

The RUFADAA has certain advantages, such as the involvement of court when necessary. For 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.[124] 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.[125] But this still was not enough for Apple, and the company said that a court order was necessary.[126] Yet this requirement, of involving the court, raises the concern of unjustifiable costs of the current system.[127]

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[119] RUFADAA, *supra* note 104.
[120] Levine, *supra* note 99.
[121] Michael T. Yu, *Towards a New California Revised Uniform Fiduciary Access to Digital Assets Act,* 39 LOY. L.A. ENT. L. REV. 115, 116 (2019).
[122] *Id.* at 117.
[123] *Id.* at 125.
[124] Sy, *supra* note 90 at 674.
[125] *Id.*
[126] *Id.*
[127] *Id*.

The RUFADAA also does not allow the custodian to have full discretion in the manner of disclosing digital assets.[128] For instance, if a custodian only needs partial access to the user's account to sufficiently perform necessary tasks, the custodian will not be granted full access.[129] But the RUFADAA does provide more explanation of the differences between providing the requester full access to the account and providing the requester with a data dump, which will at least give fiduciaries a basis as to why they are being denied full access.[130]

b. Privacy Expectation Afterlife and Choices Act ("PEAC")

Another statute states can choose to enact is the Privacy Expectation Afterlife and Choices Act ("PEAC").[131] This legislation was formed as a consequence of concerns expressed from the UFADAA.[132] This statute focuses primarily on balancing the interests of all parties such as the privacy of the deceased user, the privacy of people with whom the deceased corresponded, the needs of the fiduciary, and existing federal law.[133] PEAC complies with existing federal law under the Electronic Communications Protection Act ("ECPA") which establishes standards for access to private information transmitted and stored on the internet, such as emails, photos, or direct messages.[134] Also, PEAC provides a clear path for fiduciaries to get access to information needed to handle the deceased's estate.[135] Under PEAC, fiduciaries can see the banks, stock managers, and accountants with whom the deceased corresponded, allowing fiduciaries to identify accounts

[128] Sy, *supra* note 90 at 675.
[129] *Id*.
[130] *Id*.
[131] Va. Code. Ann. §64.2-109
[132] Obenshain & Leftwich, *supra* note 102 at 44.
[133] PEAC Balance, *supra* note 15.
[134] *Id.*
[135] *Id*.

for purposes of wrapping up the estate.[136] Also, if the deceased bequeathed contents of digital communications to fiduciaries, service providers will comply subject to verification and indemnification processes.[137]

The goal of PEAC is twofold: it seeks to promote efficient state estate administration following the death of decedents while simultaneously striving to maintain privacy within a decedent's digital property.[138] Section three of PEAC focuses on the decedent's intent, prohibiting a judge from compelling Internet Service Providers ("ISPs") divulgement if the decedent's intent demonstrates a desire for maintaining privacy in the communications.[139] PEAC sets a high threshold for a judicial determination permitting disclosure by proposing a rebuttable presumption against disclosure.[140] Also, PEAC does not treat stored communications as an asset of the user or account holder, primarily because many Terms of Service agreements establish that much of the content stored online is not owned by the user or account holder, but rather owned by the internet platform.[141]

Virginia is one state who has enacted a form of PEAC into their state legislation to protect its citizen's posthumous privacy rights.[142] In Virginia, a personal representative can obtain records for the last 18 months of a decedent's life, provided that he or she attests to a series of facts.[143] These facts include whether or not the decedent is deceased, what the decedent's username is, information about the decedent's account, and whether the decedent did not object to disclosure

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[136] PEAC Balance, *supra* note 15.
[137] *Id*.
[138] Matthew W. Costello, *The "PEAC" of Digital Estate Legislation in the United States: Should States "Like" That?*, 49 Suffolk U. L. Rev, 429, 442 (2016).
[139] *Id*. at 443.
[140] *Id*. at 448.
[141] Obenshain & Leftwich, *supra* note 102 at 44.
[142] *See* Va. Code. Ann. §64.2-109
[143] Obenshain & Leftwich, *supra* note 102 at 46-47.

of these records in his or her will.[144] The request for disclosure is tailored to effectuate the purpose of the administration of the estate.[145] Like the general PEAC statute, in Virginia, if a personal representative needs to obtain content, they can only do so if the decedent expressly consented to disclosure in their will or through an affirmative election with the internet third-party service provider.[146] Virginia's statute is consistent with federal privacy law, which also prohibits providers from disclosing content unless there is a warrant or consent.[147]

Notwithstanding, like RUFADAA, PEAC has limitations. For instance, PEAC has a limited scope in what is covered under the statute.[148] It includes email communications, but not other digital assets like cloud-stored files and blogs, which leads to a gap in posthumous privacy interests for those types of digital assets.[149] Also, it is burdensome for fiduciaries who need to obtain a court order formally authorizing a fiduciary to access a decedent's digital property, which may also prove to be expensive.[150] Hence, because both the RUFADAA and PEAC have disadvantages that leave gaps of protection, neither of these proposed statutes can adequately protect privacy interests of the deceased.

VI. Remedies to create a federal posthumous privacy legislation for digital assets

The language of the model statutes of RUFADAA and PEAC makes it clear that the drafters did not seek to respect an account holder's posthumous privacy designations.[151] Granting

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[144] Obenshain & Leftwich, *supra* note 102 at 46-47.
[145] *Id*.
[146] *Id*. at 48.
[147] *Id*.
[148] Steven Orloff and Matthew J. Frerichs, *Digital Assets After Death: RUFADAA and its Implications*, 73 BENCH & B. OF MINN. 20, 22 (2016).
[149] Orloff & Frerichs, *supra* note 148 at 22.
[150] *Id*.
[151] Lopez, *supra* note 46 at 239.

disclosure of desired information following reception of those instruments would bring postmortem access in line with other assets held by third parties after the death of an account holder.[152] Providing access and disclosure without court involvement for an account holder who leaves a validly executed will puts the account holder in full control of account contents after death and reflects a firm commitment to honoring the intent of a deceased account holder.[153]

Because neither PEAC nor RUFADAA can adequately codify post-mortem privacy interests, there are many options the United States can and should adopt for protection of deceased privacy rights. Importantly, it should be easier for estates and fiduciaries of deceased people to gain information to protect their deceased loved one's privacy.

One proposition is that the status of a digital asset could be changed to a property interest. The status of digital assets as a property interest is a compelling question that academics, courts, and legislatures have just begun to address.[154] The question comes up in a variety of ways, including such questions as how traditional copyright laws can be applied to digital assts or whether digital assets can be treated as a property in contract.[155]

Copyright law could provide an avenue to establishing posthumous privacy protection. Copyrights are "an original work of authorship fixed in any tangible medium of expression."[156] Copyright is a type of property interest wherein the copyright holder owns title to the material.[157] In addition, federal law allows the copyright holder the exclusive rights to reproduce copyrighted work, prepare derivative works, distribute copies, perform the work, and create digital audio

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[152] Lopez, *supra* note 46 at 239.
[153] *Id*.
[154] Natalie M. Banta, *Property Interests in Digital Assets: The Rise of Digital Feudalism*, 38 Cardozo L. Rev. 1099, 1101 (2017).
[155] Banta, *supra* note 154 at 1101.
[156] Banta, *supra* note 1 at 985.
[157] *Id*.

transmissions of the work.[158] The owner of the copyright can transfer her title to the copyright by conveyance during life or testamentary instrument after death.[159] Because heirs continue to hold the copyright in the decedent's works of authorship, they are able to protect the privacy of that information, especially when it comes to written documents.[160]

Copyright law aims to protect a commercial, proprietary interest in an artistic material in order to encourage, not prohibit, public access.[161] But copyright does not take into account privacy rights unless there is a claim of commercial harm.[162] Thus, digital assets that may hold noncommercial but desired information about a decedent's life would not be protected on grounds of copyright.[163]

Yet there are examples of how copyright can protect posthumous privacy many years after an individual's death and may be applicable to digital accounts in the future.[164] One such example is from the late Jacqueline Kennedy Onassis, who willed her copyright interests in her writings, as well as the physical writings themselves to her children.[165] Over a period of fifteen years during her adult life, Ms. Onassis wrote intimate letters to an ecclesiastical leader in Ireland and an Irish auction house planned to sell the letters, which were valued at $1.3 million.[166] Caroline Kennedy, the last remaining child of Ms. Onassis, had her lawyers contact the auction house, resulting in the auction's cancellation.[167] Although the house owned the physical letters, Caroline Kennedy owned the copyright to their expressive content, thus Ms. Onassis's privacy interests were protected

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[158] Banta, *supra* note 1 at 985.
[159] *Id.*
[160] *Id*. at 988
[161] *Id.* at 985.
[162] *Id*, at 986.
[163] *Id*. at 987.
[164] *Id*. at 988.
[165] *Id.*
[166] *Id.* at 988-989.
[167] *Id*. at 989.

through the copyright law.[168] Adding a copyright to the content of one's digital assets would allow fiduciaries more control over the privacy interests of their deceased predecessors.

Contract law may also be able to provide a legal remedy for post-mortem privacy protection. A careful reading of digital asset contracts reveals that the underlying assumption in these contracts is that account holders have property rights in these assets that are being modified by the terms of the contract.[169] Email and social networking platforms consistently protect a user's property interests in the content she creates, uploads, or stores on the platforms.[170] For example, Google specifically states that "some of our Services allow you to upload, submit, store, send or receive content."[171] In short, what belongs to you stays yours.[172]

Contract theory relies on analyzing Terms of Service agreements that users accept to determine the scope of their posthumous privacy rights.[173] Assuming that death terminates a contract, the death of a data subject should bring an end to the processing of his or her data.[174] It can be argued that the digital asset contracts in Terms of Service agreements threaten the very nature of American succession law by allowing parties to opt out of the right to devise, which is a fundamental right of property.[175] Although these Terms of Service contracts may be valid under the principles of contract law, the terms of the contracts violate the principles of succession law.[176] Contracts that prohibit succession of personal assets should be void as a matter of public policy.[177]

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[168] Banta, *supra* note 1 at 989.
[169] Banta, *supra* note 154 at 1105.
[170] *Id*.
[171] Google Terms of Service, Google, https://policies.google.com/terms?hl=en (effective Mar. 31, 2020).
[172] Banta, *supra* note 154 at 1105.
[173] Chu, *supra* note 41 at 258.
[174] Victoria Oloni, *Life After Death: Data Protection Rights of Deceased Persons*, AFR. ACAD. NETWORK ON INTERNET POL'Y (Jan. 29, 2020), https://aanoip.org/life-after-death-data-protection-rights-of-deceased-persons/ (last visited Nov. 4, 2020).
[175] Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799, 803 (2014).
[176] Banta, *supra* note 175 at 803.
[177] *Id*.

Finally, legislature could just adjust the RUFADAA, which has already been passed in forty states, to reduce the disadvantages of the law. First, court involvement can be reduced if the legislature altered the RUFADAA to allow fiduciaries access to digital assets without having to go through the trouble of involving the court and explaining why it is necessary to wrap up the estate.[178] Also, the custodian, or third-party account such as Facebook or Yahoo!, should not have full discretion in the manner of disclosing digital assets.[179] RUFADAA should require first that the custodian grant the petition for partial access to digital accounts, and 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 of the accounts.[180]

Another way the RUFADAA can be changed to become more universal is to become a federal law, yet remain general enough to allow for community property states and non-community property states to coexist.[181] Enacting RUFADAA as a federal law will prevent state jurisdictional confusion and companies from claiming they purchased the product in another state, thus preventing issues with long-arm statutes.[182] By forcing, not encouraging, companies to have the digital beneficiary established at sign-up will take the law another step further.[183] The new federal law should require users to make an initial disclosure of a fiduciary and secondary fiduciary at sign-up, or the user cannot create the account.[184] Conversely, to encourage compliance from companies who manage digital assets or host social media platforms, the Federal Communication

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[178] Sy, *supra* note 90 at 674.
[179] *Id*. at 675
[180] *Id*.
[181] Jared Walker, *Return Of The UFADAA: How Texas And Other States' Adoption Of The RUFADAA Can Change The Internet*, 8 TEX TECH EST PLAN PROP LJ 577, 595 (2016).
[182] Walker, *supra* note 181 at 596
[183] *Id*.
[184] Walker, *supra* note 181 at 596

Commission and the Internal Revenue Service should jointly regulate the compliance with repercussions ranging from a fine to the loss of the company's URL.[185]

Finally, the RUFADAA should clarify the effect of the unauthorized-computer access laws for federal law, not just state laws.[186] It should make clear that the fiduciary is authorized to access digital assets stored on tangible personal property for purposes of federal laws on unauthorized computer access.[187] With these changes, RUFADAA will be able to provide more comprehensive protection to postmortem digital assets. Once included in the legislative balance, the weight of a decedent's interest in privacy can tip the scale toward non-disclosure for individuals who die intestate and toward disclosure if a testator has instructed that account contents be available in a will.[188] Doing this would most closely conform to the fundamental law of wills, which honors a decedent's intent, and thus is what postmortem privacy laws should aim to mirror.[189]

VII. Conclusion

Digital asset protection for deceased people is currently not federally mandated in America. Although many states have enacted a form of digital asset privacy legislation like RUFADAA or PEAC, neither of these statutes in its current state is sufficiently comprehensive protection for both the deceased's digital assets themselves and the fiduciaries trying to gain access to the deceased's accounts. Although the right to privacy for the deceased's digital assets is a fairly new problem, legislatures can fix this problem by looking to other sources of laws that

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[185] *Id*.
[186] Sy, *supra* note 90 at 676.
[187] *Id*.
[188] Lopez, *supra* note 46 at 242.
[189] *Id.*

aim to protect the deceased's rights such as copyright law, tort law, or the laws of testation. By using a combination of these rights after death, legislature can make a unique law to adequately protect the privacy of digital assets of the deceased and allow their families or estates to access these accounts easier without involvement from third-party custodians.