

# Verdict

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## Facebook's "If I Die" App Should Remind Us That We Each Need a Digital Death Plan

Facebook now has an app that can be used to reach your friends from beyond the grave, via a video or text message. The app is the work of an Israeli company specializing in time-capsule products. Upon confirmation of your passing from three user-appointed *trustees*, the app posts your video or text message on your Facebook wall. Of course, you will want to make sure you keep the message current. For instance, if you change your mind about revealing a secret upon your death, you will need to update your message accordingly.



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The "If I Die" app reminds us all that, increasingly, we are using the Internet and computer networks to store much of our personal data, such as music, photos, emails, financial records, and more. Even our bills and bank statements exist online. And those who run online businesses—for instance, on Etsy or eBay—may keep business records and accounts online, too. If we don't let at least one trusted other know how to access our accounts if and when we die, those funds might end up being unclaimed property.

In this column, I will discuss various aspects of the intersection of death and online activity. I will also discuss how the private sector is stepping in to help heirs and relatives deal with the situation in which a decedent maintained various online accounts. I will also argue that state legislators need to examine existing laws, and possibly update them, to reflect the growing presence of digital property in our society.

**Death and Digital Property: It's All About Various Sites' Terms of Service**

Currently, what happens to your online property and online records when you die relates largely to the Terms of Service (ToS) of the different Web sites or online companies with which you have accounts. These ToS should answer questions such as, Can you access a deceased loved one's email or other online accounts? The answer varies. Yahoo!, for example, requires the families of deceased customers to obtain a court order before accessing the accounts.

This rule famously came into play in early 2005, when military dad John Ellsworth made national headlines with his request to access the Yahoo! e-mail account of his deceased son Justin, a Marine who had been killed by a roadside bomb in Iraq. Ellsworth wanted to retrieve e-mails from Justin's tour in Iraq in order to create a memorial for his son. But Yahoo!, Justin's email service provider, only honored that request after receiving an order from a Michigan probate court.

Yahoo!'s ToS #27 is labeled "No Right of Survivorship and Non-Transferability." The clause reads as follows: "You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted."

But what if deletion is not what you want? Or, what if a relative needs access to your account after you die, in order to help pay your bills or manage your business matters? The answer is that your relative may have to go to probate court. Yahoo! notes that it "may access, preserve and disclose your account information and Content if required to do so by law or in a good faith belief that such access preservation or disclosure is reasonably necessary to . . . comply with legal process . . ."

What does this mean in practical terms? At present, the only way for your heirs, family, or friends to access your account is to take Yahoo! to court—and quickly. If you don't give your username and password to an heir, then your Yahoo! account may be locked and deleted after 90 days if inactive. If you want your family to have access to your Yahoo! account without having to go to court while they are in mourning, you may want to give some relative your user name and password.

Google also has a procedure in place for dealing with a person's email once he or she is dead. But like Yahoo!'s procedure, it is cumbersome. The person seeking access must provide several documents to Google via mail or fax, including (i) the full header from an email message he or she has received at his or her verifiable email address, from the Gmail address in question; (ii) the entire contents of the message; (iii) proof of death;

and (iv) if the decedent was 18 or older, proof of authority under local law that you are the lawful representative of the deceased or his or her estate.

After Google receives the relevant documents from you, it requires 30 days to process your request. Google will also provide information pursuant to a valid third-party court order, or other appropriate legal process. Once again, the last resort is to go to court.

Facebook has gone further than other sites in giving its users some control over their page and its content. Users are able to download their profile data to their hard drives whenever they want. After jumping through some security hoops, you can request a zip file of all your profile data. Facebook also allows friends and family to "memorialize" the profile of a deceased person—which means that the deceased's page is removed from search results, does not accept any new friend requests, and Facebook stops asking people to become friends with the deceased. Loved ones may also delete a deceased's profile if they submit proof of the death and their authority to act for the deceased.

Apple takes a different approach. It notes, for example, that after death, no one has a right to the content or tunes that may be in a person's library or in Apple's MobileMe cloud service. Apple's ToS notes that, "You agree that your MobileMe account is non-transferable and that any rights to your Subscriber ID or Content within your account terminate upon your death. Upon receipt of a copy of a death certificate your account may be terminated and all content within your account deleted."

Finally, to access a YouTube account when the accountholder is deceased, you'll need to provide your contact information, a copy of the death certificate, and a power-of-attorney document. If it is a child's account, you'll need a copy of his or her birth certificate, but not a power-of-attorney document.

In sum, different sites' ToS spell out different policies. Thus, dealing with a person's online activity may be cumbersome and complicated, if the person had many accounts. In an era when the sheer volume of our online property and accounts may dwarf that of our paper records and correspondence, the detective work for heirs and executors may be quite time-consuming.

### **Do Heirs Inherit the Rights to Digital "Property"?**

Access to a deceased person's email may help loved ones clean up the deceased's business transactions, pay his or her bills, and contact his or her online friends. Moreover, heirs may find that valuable property that is owned by the deceased exists

online. Again, reading a given site's ToS is key. For instance, the ToS may determine if the deceased, or the site, has the copyright on the deceased's work.

Moreover, in addition to copyrighted work, some other digital property may also have real monetary value. Virtual goods can be earned or exchanged on online role-gaming sites, including Second Life and World of Warcraft. These virtual goods together have a value estimated at over a billion dollars. And that value can be converted back into real money.

The fate of such accounts upon the user's death remains uncertain. Second Life altered its policies to permit accounts to be bequeathed to others. However, other companies refuse to hand over such contractual rights. World of Warcraft's ToS appear to prohibit transfer of a user's account or its contents upon death. World of Warcraft's creators, Blizzard Entertainment, states in block letters that "NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, YOU ACKNOWLEDGE AND AGREE THAT YOU SHALL HAVE NO OWNERSHIP OR OTHER PROPERTY INTEREST IN ANY ACCOUNT STORED OR HOSTED ON A BLIZZARD SYSTEM."

Even those digital assets that lack any market value may have sentimental value. Our memories may be celebrated on Picasa or Flickr. And access to the intangible memoirs (including blogs) of today may prove critical to reporters and historians—rendering a portrait of someone's life that provides far greater detail and nuance than old-fashioned journals and letters.

Yet probate laws are not clear on the status of these assets—and a company's ToS may prohibit transfer of the relevant virtual goods, as World of Warcraft's or Apple's do.

### **Is Using a Digital Undertaker the Best Option?**

Some people may simply want to grant a loved one full access to their online communications. But others may want to safeguard certain things as private—and thus may want to ask someone to have some, or all, of their accounts totally deleted. Some people may, for instance, have a private email account the contents of which they would not want to share with all—or perhaps any—of their heirs.

There are some basic things that we all should do: identify and put someone in charge of our online accounts, should we die; tell that person what we want to have done with the accounts; and compile a list of our account passwords for that person.

Moreover, there are now companies dedicated to ensuring that online information is distributed according to a digital testator's express wishes. At death, these "digital undertaking" companies notify the deceased heirs of virtual wealth, and reveal the passwords that are required to access that property.

Companies such as Entrustet and Legacy Locker help consumers identify and aggregate their passwords in one place. Entrustet states that it "helps you protect those digital assets so after you pass away, they are managed, shared or deleted according to your wishes." It not only allows you to identify relevant digital assets and specify what you want to do with them upon death (such as deleting them), but also helps you work with attorneys to create a digital will, which specifies how you wish to have virtual property handled and transferred

Other sites – such as the nonprofit Lifonaut.com—allow consumers to create online digital archives of their lives and memories. Lifonaut, for example, allows people to "upload biographical pictures, videos, and documents to a digital archive that will be preserved for generations," and "organize through geo mapping, timelines, and tagging, a rich portrait of information about you. The places you've been and the people you've met can be stored." With Lifonaut, you can even upload genetic and DNA information.

### **What Role Can—and Should—State Law Play With Respect to the Digital Property of the Deceased?**

In general, state legislators will have to consider how to balance an individual's right to privacy while he or she is alive, with the rights or needs of heirs to have access to digital information and property upon that person's death.

Only one state has drafted legislation outlining the rights and responsibilities of the executors, administrators, and beneficiaries of digital property. In 2010, Oklahoma enacted a digital-estate law authorizing heirs "to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking site, any micro blogging or short message service website or any e-mail service website."

It is unclear whether this law will be effective in guiding courts in digital inheritance disputes. Despite Oklahoma's express grant of authority, the statute contradicts the privacy policies and ToS of many online service providers. While statutes are typically held to trump contracts, websites may be reluctant to relinquish ownership rights.

In the long run, it will probably prove desirable for states to amend their laws to address e-mail ownership and transfer, and other types of virtual property. Probate

laws could be amended, for example, to clarify whether e-mail is considered personal property, whether personal representatives of a decedent may obtain the contents of his or her e-mail accounts, and what obligations they have in terms of paying fees to service providers in order to access and use such accounts. Emails are the modern-day version of letters that may be easily transferred upon a person's death. Probate laws should be reviewed to make such analogies explicit.

State probate codes could also examine the types of documents that are necessary for executors to have access to a deceased person's accounts. Is a digital will sufficient, or is a power of attorney also necessary?

### **The Application of the Rights of Privacy and Publicity After Death Is Still Unclear in Some States**

States may also want to examine their existing right-of-publicity and right-of-privacy laws to ensure that these rights continue after a person's death. Right-of-publicity statutes protect a person from having his or her likeness commercially exploited without his or her permission. Not all states have a right of publicity, and of those that do, some hold that the right ends at the person's death, and others say it continues even after death. The same may hold to for a state-based right of privacy.

A 2010 California appellate decision provides a useful example of the dilemma that heirs face, when the Internet is used to display photos of a loved one after they die. In *Catsouras v. Department of California Highway Patrol*, a state court determined that surviving family members have a right to sue for invasion of privacy with respect to "death images of a decedent." Previously, California cases had said that a person's right to privacy was personal, meaning that it ended when the person died.

But the *Catsouras* decision held otherwise. There, court documents alleged that "graphic and horrific photographs" of an accident, taken by the California Highway Patrol, were circulated via email and on the Internet purely for their shock value.

The deceased's family members hired ReputationDefender, a company specializing in online reputation management, to help them get the photos taken off the Internet. The firm reportedly helped to remove the photos from about 2,500 Web sites, but admitted that it would be impossible to get them removed from all sites.

### **The Bottom Line: It's Worth Thinking About Your Digital Life Now, Before It's Too Later to Put Your Digital Property and Other Digital Affairs in Order**

Reportedly, more and more people are becoming fans of the "If I Die" app—and thus are presumably recording their last messages. Yet using that app is far from enough. Everyone should also take some time to plan for his or her digital afterlife, in the ways I have described above.



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