

Freedom of Testation and Digital Assets

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Based on research completed for my LLM in Estate Law at the North-West University.



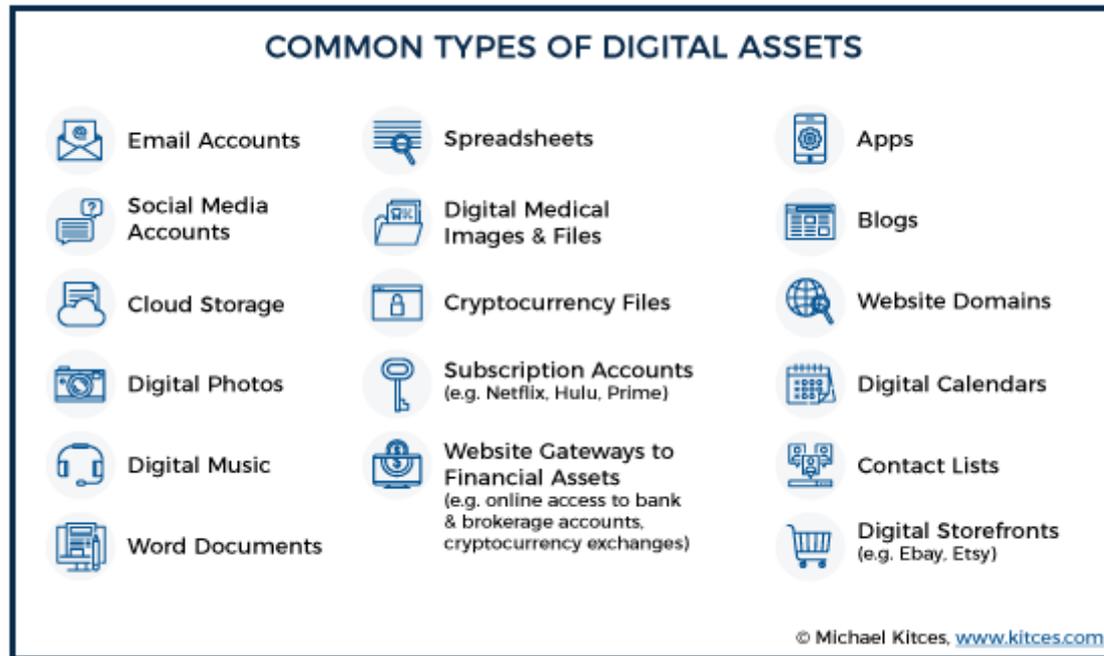
Someone knows my password, so I am OK...

While it might seem simple enough to solve the problem by just keeping a list of account credentials “in a safe place” for someone to use “just in case”, the fact that they might have the information to access to the accounts doesn't necessarily mean that they have the legal authority to do so, especially when a website's Terms of Service do not permit a transfer of ownership. In fact, heirs could potentially be found guilty of “hacking” by trying to access a loved one's online accounts after he/she is gone...even if it was the individual's dying (but not legally binding) wish!

- Jeffrey Levine

What are digital assets?

With the development of our digital lifestyles, our assets are becoming digitalised at an astounding rate.



Defining digital assets

- Categorising Digital Assets
 - Monetary value (cryptocurrencies, domains, websites)
 - Login credentials to such sites (usernames & passwords email accounts)
 - Social media profiles & actual media files (digital photos)
- Legislative attempts at a definition
 - USA's attempts ranged from a narrow definition (2007 Indiana statute / Rhode Island and Connecticut statutes) to an exhaustive list (Tennessee House Bill – which splits digital info. into “digital assets” & “digital accounts”); and
 - Including digital assets in the traditional definition of property (Texas Property Code)
- Digital Assets Defined as Traditional Property
 - Support for this approach: We are giving digital assets real world attributes



Assigning real world attributes to digital assets

- Amazon.com's Orwellian Gaffe illustrated the user's perception of ownership and privacy
 - I "bought" the eBook
 - I "owned" it
 - Amazon's actions were that of an electronic burglar who stole something the user had in their "possession"
 - I realised I cannot lend my eBook to someone
 - I cannot resell it after I am done with it
 - Apparently I cannot count on still having my eBooks tomorrow



The impact of terms of service agreements & privacy policies

- The assignment of real world attributes to digital assets have impacted how people are perceiving their rights they obtain through Terms of Service agreements
- Service provider v the user, who is to blame?
 - Obar and Oeldorf-Hirsch: 74% of participants did not read the TOS, those who did “read” the TOS missed the “gotcha clause” & the clause stating that they offered their first-born as payment for the service
- Clear disconnect as to where the problem lies



The impact of terms of service agreements & privacy policies

- A legal contract?
 - Click-wrap or Browse-wrap accepted by USA Courts
 - Specific terms the user consented to is becoming important (*Dillion v BMO Harris Bank* - USA)
 - In SA:
 - *Electronic Communication and Transactions Act*
 - Section 24(1) states that unilateral statements made by means of data messages in online agreements are valid
 - *Consumer Protection Act*
 - Was the terms reasonably communicated
 - *S v Blom*
 - Under traditional contract law parties cannot avoid contractual obligations due to their own neglect to read the terms thereof



The impact of End User Licence Agreements

- So what exactly are users consenting to?



Ownership, access & control

- Facebook & YouTube, have adapted their TOS agreements to explicitly state that the **content** and information posted by the user is also **owned by the user**
- Others state that all content belongs to the service provider
 - Amazon, Google & Apple state that a **licence agreement** is created; and
 - No property rights can vest in the user, as ownership is not transferred and no transferable rights are created for the user
- Service providers not only dictate where ownership lies, they also take it one step further by **granting themselves a broad spectrum of rights**:
 - the right to transfer, sub-licence or use the content royalty free and worldwide



Ownership, access & control

Ownership of content or account

- Emails:
 - Copyright - Darrow & Ferrera
 - *Fairstar Heavy Transport NV v Adkins*, UK
 - User owns the content (the messages) but the service provider controls the access to the content
 - *In Re Ellsworth*, USA
 - Yahoo retains right to deny access
 - Content may pass to heirs
- Digital Music and eBooks:
 - User gains a licence of use that is non-transferable
 - Traditional attributes assigned
 - Copyright weathered format changes before (tape to CD), why not in the digital age?
 - Non-perishability & First sale doctrine



Ownership, access & control

Login details influencing access & control:

- While some service providers such as Google and Facebook do prohibit the transfer of an account as well as the sharing of a user's password, they have addressed access and control to some extent.
 - Memorialising the deceased
 - Becoming a Legacy Contact
 - Inactive account manager
- Gives user the option to choose who may receive what level of access and control



Ownership, access & control

- Question of whether or not service providers shouldn't place the responsibility on the user to decide how much access to his account should be afforded to a third party after the user has passed on
- If a user was given the option to decide how his privacy should be treated after he has passed on, service providers might be less inclined to unilaterally alter their privacy policies
- This would also provide heirs with a clear answer as to what their rights are and conversely also provide service providers with a means to compel heirs and family to respect a deceased user's privacy
- Should service providers have the power to deny access even if the testator has granted such access to his heirs?



Freedom of Testation

- Recognised in our law that a testator has an almost unrestricted right to leave his property to anyone or any cause he chooses – some limitations in terms of common law & statutory provisions
 - Maintenance of Surviving Spouse Act
 - Pension Fund Act
 - Immovable Property (Removal or Modification of Restrictions) Act
 - Constitution of the Republic of South Africa
- Section 25 of the Constitution & *Nemo plus iuris transferre potest quam ipse habet?*



Freedom of Testation

Current legislation impacting digital assets in a deceased estate:

- The Copyright Act
 - Makes provision for the protection of various forms of intellectual expression including literary and artistic works, as long as it satisfies the conditions set out in the Act
 - This copyright vests in the author and accordingly can be inherited by heirs
 - Emails? – Original works that can be materialised - Darrow & Ferrera
 - Facebook acknowledges that copyright of post lies with user
 - Even if the service providers did acknowledge these rights, it is still the aspect of accessing these digital assets that remains challenging
- Administration of Estate Act
 - Definition of “property” includes “any contingent interest in property” - broad definition that might include digital assets
 - Could also address access



Freedom of Testation

Privacy after death?

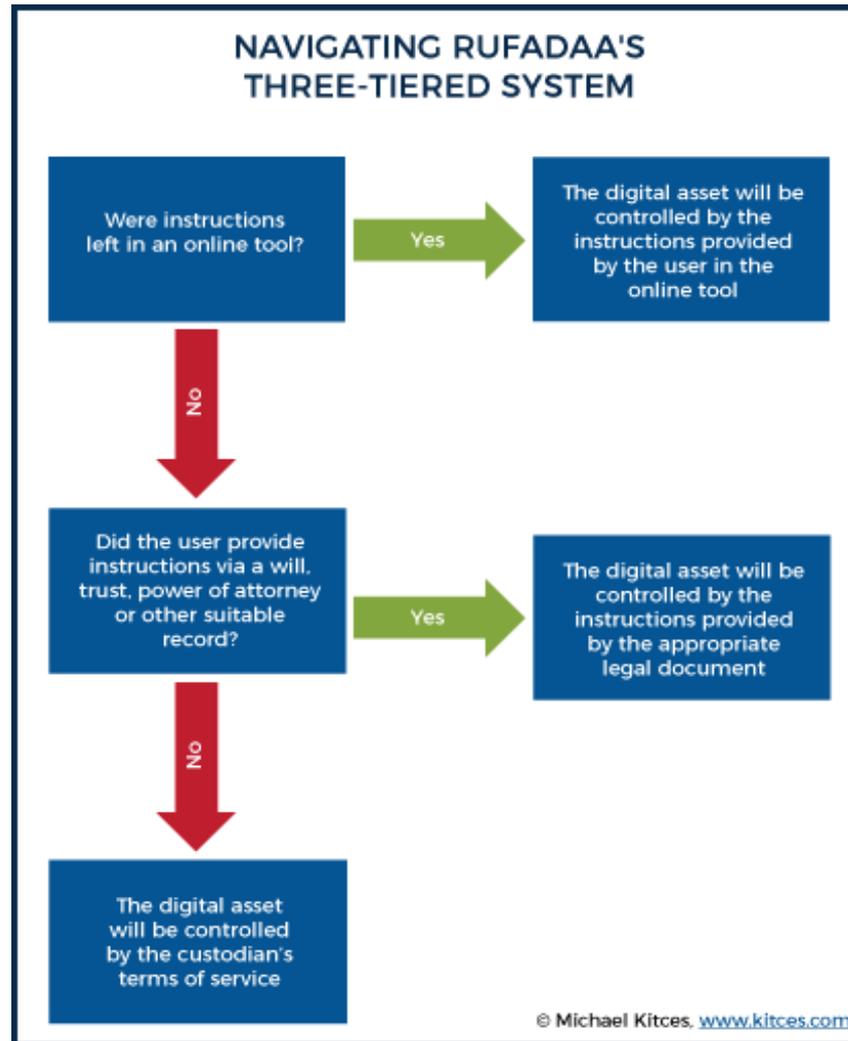
- Post-mortem privacy - The right to preserve and control what becomes of his/her reputation, dignity, integrity, secrets or memory after death
- *In Re Ellsworth* - Yahoo sited privacy concerns
- *In Re Request for Order Requiring Facebook, Inc. to Produce Documents and Things* the English court stated “to rule otherwise would run afoul of the specific (privacy) interest” that the law seeks to protect
- In SA
 - S34 & 63 of PAIA “refuse a request for access to a record of the body if its disclosure would indicate the unreasonable disclosure of personal information about a third party, including a deceased individual
 - POPI defines “personal information” *inter alia* as “information relating to an identifiable, living, natural person..”
- Non-transferability clause
 - Owner of the account but cannot transfer access and control thereof
 - Real world attributes assigned to assets



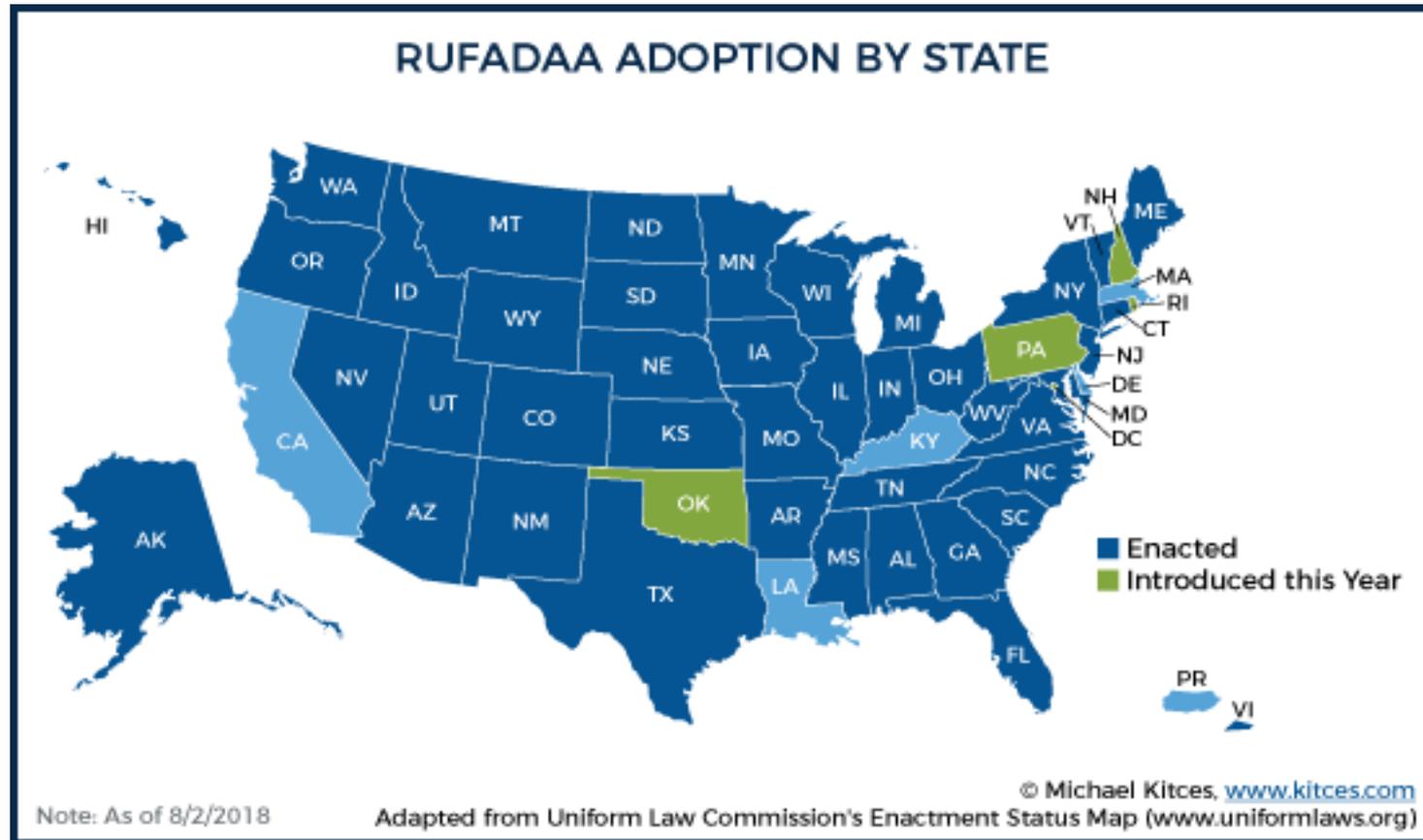
Other Jurisdictions

- *Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)* for the United States of America
- Aim is to override privacy laws and TOS that prohibit fiduciary access to digital assets
- Does not grant fiduciary authority to transfer the title, nor does it mean ownership vest in the fiduciary
- Simply means to grant fiduciary access to a deceased user's account in order to settle the estate
- Fiduciary cannot take any action that the user could not have taken legally
- Definition of digital assets is narrow - electronic records
 - Still leaves many types of digital assets in uncertainty





RUFADAA



Conclusion

- The only concern is not just ownership of the digital assets, but also access to digital assets
- Service providers often cite privacy concerns as reason to deny access
- Question as to whether or not privacy extends beyond death
- RUFADAA may be solution, but not for wide spectrum of assets & not in terms of inheritance only administration of estate
- What about eBooks & digital music?
 - Benefit Authors Without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003
 - Argument of real world attributes – difficulty lies in weighing the rights of service providers and users



Conclusion

- There are many interesting aspects that can still be examined in this regard
 - The relationship between digital assets and the first sale doctrine
 - The nature of the rights in licensed digital assets and how service providers assign rights
 - With no legislation to the contrary, do service providers have the unilateral task of deciding how their user's privacy is to be treated in terms of their TOS
 - If privacy rights are not extended beyond death, then service providers have no need to extend their privacy policies beyond the user's death
- RUFADAA keeps service providers in control of how digital assets are to be treated in a deceased estate, as the hierarchy of the Act places the online tools of service providers above the wishes dictated in a user's will
- Whose interest takes precedence?
 - Is it interest of the living, who might require access to a deceased user's account in order to conclude the estate?
 - Or is it the interest of the deceased user, who might have intentionally chosen to leave no indication that access to his account is to be granted?



END | thank you