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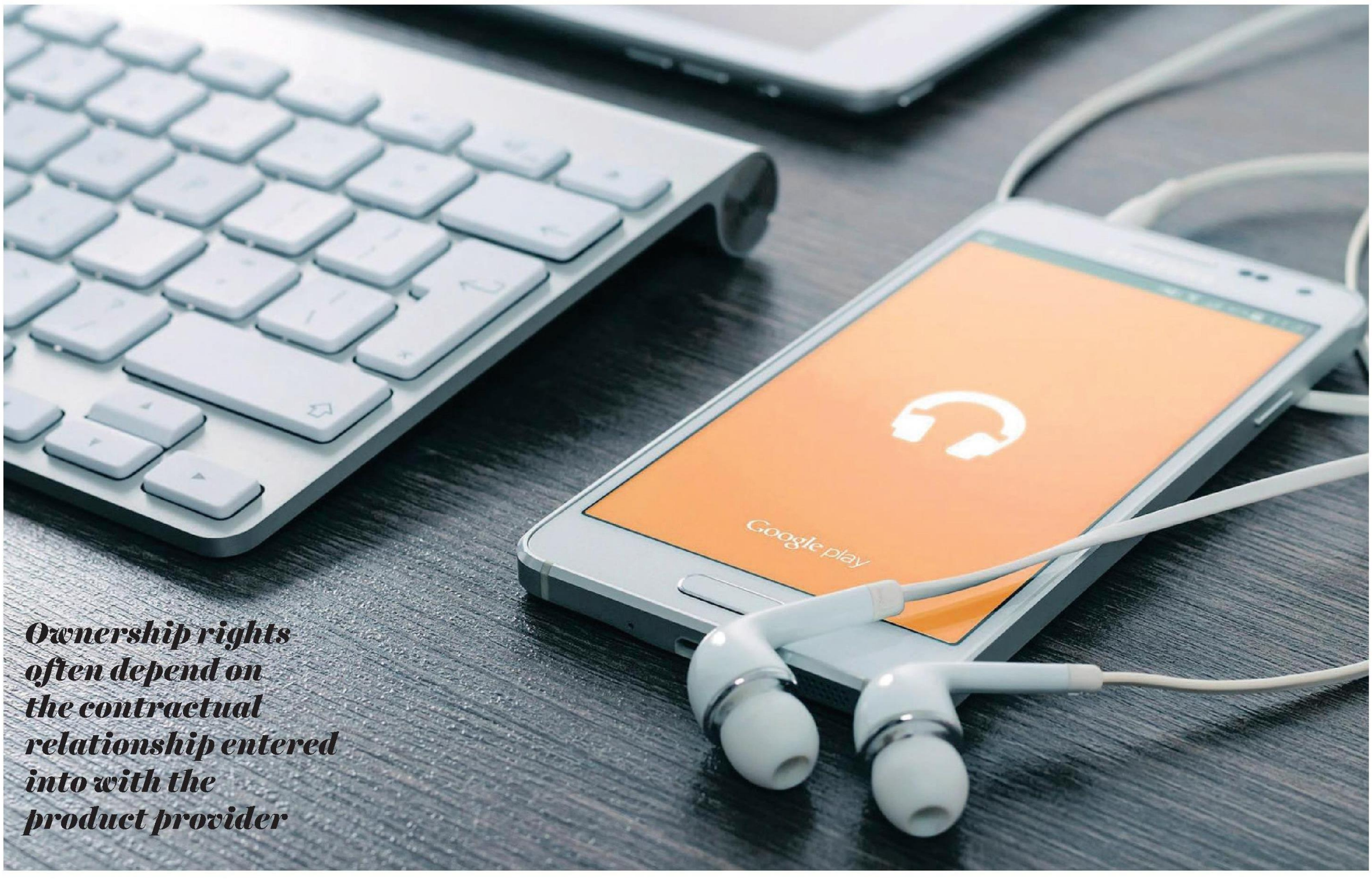

Ownership rights often depend on the contractual relationship entered into with the product provider

Asset digitisation poses complex **legal** problems

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TECHNOLOGY has crept into almost all aspects of our lives, and digitisation has made redundant many goods that traditionally had physical form. This has posed some vexing, and fascinating, questions for lawmakers trying to keep abreast of the digital revolution.

In a presentation at the recent annual conference in Sandton of the Fiduciary Institute of Southern Africa, financial planner Deidré Booyens spoke on the legal issues around digital assets, the topic of her thesis for her LLM in Estate Law at the North-West University.

She says assets are being digitised at an amazing rate. They include digital pictures, books, documents, music recordings, videos, cryptocurrency, apps and online accounts for email, social media and cloud storage facilities.

It is difficult to categorise them, Booyens says, because while some, such as e-books, are digital versions of "real-world" objects, others are inherent to the digital sphere.

But even with digitised versions of traditional assets, questions arise on ownership, privacy, and the right of an individual to bequeath such assets to heirs. For example, if you buy an e-book from Amazon, you cannot lend it to a friend or resell it, or even bequeath it to your child in your will, as you could with a physical book.

What other controls would Amazon have over your book?

Booyens cites a case where, because of copyright problems on novels by George Orwell, in 2009 Amazon electronically removed Orwell's novels *1984* and *Animal Farm* from all Kindle electronic reading devices. This provoked a storm of protest from people who had bought the book and believed they owned it, with Amazon's action being likened to theft.

She says until legislation catches up with current practice, your rights in such instances often boil down to your contract with the provider, and this applies equally to social media and other content you may store in the "cloud". Contracts vary among providers, with some granting you more rights than others.

"Facebook and YouTube have adapted their terms of service agreements to explicitly state that the content and information posted by the user is also owned by the user. Others, such as Amazon, Google and Apple, state that no property rights vest in the user, as ownership is not transferred," she says.

Booyens says providers not only dictate where ownership lies; they take it one step further by granting themselves a broad spectrum of rights, such as the right to transfer, sub-licence or use content royalty-free and worldwide.

A related issue facing legislators is that of freedom of testation, a legal principle that states that you are free to bequeath your possessions to whoever you please. But this may be impossible when it comes to digital assets – the ownership of an e-book, for example, is non-transferable.

In the case of social media, email and cloud storage accounts, some providers grant users the rights of ownership, but restrict access. This protects your privacy, but also presents problems when, for example, an heir needs access to your emails after your death. On the other hand, you might not want members of your family accessing private information on your death.

Booyens says the question is whether or not service providers shouldn't place the responsibility on the user to decide how much access to his or her account should be afforded to a third party after the user has died.

"This would also provide heirs with a clear answer as to their rights, while conversely also providing service providers with a means to compel heirs and family to respect a deceased user's privacy."

With freedom of testation such a strong principle in law, should service providers have the power to deny access if you have granted such access to your heirs, Booyens asks.

In the US, Booyens says the Revised Uniform Fiduciary Access to Digital Assets Act has been enacted in most states.

Its aim is to override privacy laws and contractual terms that prohibit fiduciary access to digital assets. It simply grants fiduciary access to a deceased user's account in order to settle the estate. However, the definition of digital assets is narrow: it applies to electronic records only, not assets such as e-books and music recordings. And the act applies to the administration of the estate only, not to inheritance.

CRYPTOCURRENCY INVESTORS URGED TO BE RESPONSIBLE

WITH the rise in the number of South Africans holding cryptocurrencies, international family office Stonehage Fleming says many investors have failed to give their beneficiaries a full picture of their crypto holdings, meaning that in the event of death, it would be very difficult for them to access these assets.

"As a young industry, with little regulation, it is crucial for investors to become more responsible in their attitude towards cryptocurrency investing," says Eran Brill, director in the investment management division at Stonehage Fleming in South Africa.

He says investors need a storage execution strategy for account information as well as advice on the implications regarding the deceased estate, including access to accounts, distribution to beneficiaries, and tax implications.

With every layer of protection you add, another layer of complexity at death is created.

One way to secure access to accounts and e-wallets is to hold partial passwords in various locations through a trustworthy third party. Only specified people in selected locations should have permission to access this information, Brill says.

The limitations on transferring money from one country to another may seem irrelevant for investors, who simply drag coins from one e-wallet to another. However, Brill says cryptocurrency should be treated like any other asset class, and as part of the estate. Exchange controls, estate duties and ownership all need to be considered and discussed with someone who already has a good understanding of the general composition of your estate as a whole.