



**LEGAL MEASURES FOR MANAGING
THE DECEASED'S DIGITAL ASSETS
IN ONLINE ACCOUNTS**

BY

MISS TULSIRI WATA

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS**

IN BUSINESS LAWS (ENGLISH PROGRAM)

FACULTY OF LAW

THAMMASAT UNIVERSITY

ACADEMIC YEAR 2015

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THESIS

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ENTITLED

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was approved as partial fulfillment of the requirements for
the degree of Master of Laws in Business Laws (English Program)

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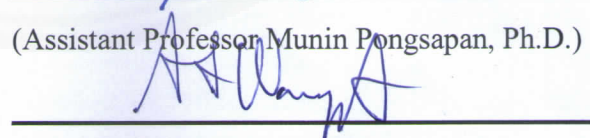
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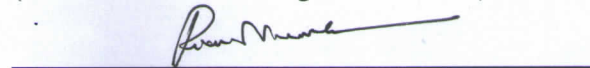
(Assistant Professor Munin Pongsapan, Ph.D.)

Member



(Professor Amnat Wongbandit, D.Jur.)

Member



(Associate Professor Pinai Nanakorn, Ph.D.)

Dean



(Professor Udom Rathamarit, Docteur en droit)

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Author	Miss Tulsiri Wata
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Thesis Advisor	Assistant Professor Munin Pongsapan, Ph.D.
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ABSTRACT

In the Internet Age, the digital media play an increasingly important role in people's lives since a lot of people conduct more and more activities online. For example, they may store their photos in social media sites, write their personal blogs on websites and back up their document files in the cloud storage services. As a result of these activities, the online users have created their digital assets which are stored in their online accounts. These digital assets, undeniably, possess economic or sentimental value, which should be considered as part of their estate after their death and shall be passed on to their heirs in the similar way as other tangible property. In this connection, if the digital assets are qualified as copyright works, the heirs shall continue to have copyrights over such digital assets for a period of fifty years after the death of online users.

This thesis concerns inheritance problems of digital assets which are usually barred by the terms of services (TOS), as set out by the internet service providers (ISP). These TOS generally restrict the right of survivorship and transferability of the digital assets in order to protect the online users' data privacy and to reduce their administrative cost. As a result, these terms inevitably prohibit the succession of digital assets by the online users' heirs who have the legal rights to enjoy the benefits of these digital assets. Moreover, Thai law does not currently recognize nor facilitate the access and management of such digital assets by the heirs.

In contrast, certain states in the United States have passed laws and regulations to govern the access and management of these digital assets after the death of the online users since 2005 as several internet service providers, e.g. Apple, Facebook, Google, and Yahoo!, are located there. Therefore, it may be more appropriate for us to learn from the United States' development in order to draft the new law to manage the digital assets of the deceased online users.

As such, this thesis explores the legal approaches under the laws of the United States which govern the access and management of digital assets of the deceased users. Pursuant to the study, the writer is of the view that passing a particular law to deal with the access and management of the digital assets after the death of the online users should be an appropriate approach for Thailand. This is because the proposed law can facilitate the digital executor in accessing the digital assets by requiring the internet service providers to disclose online accounts, while respecting the privacy of the online users.

Keywords: Digital Asset, Online Account, Succession

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Love and Thanks

Tulsiri Wata

TABLE OF CONTENTS

	Page
ABSTRACT	(1)
ACKNOWLEDGEMENTS	(3)
LIST OF TABLES	(10)
LIST OF FIGURES	(11)
CHAPTER 1 INTRODUCTION	1
1.1 Background and Problems	1
1.2 Hypothesis	6
1.3 Objectives of Study	6
1.4 Scope of Study	7
1.5 Methodology	7
1.6 Expected Results	8
CHAPTER 2 BACKGROUND OF DIGITAL ASSETS AND TERMS OF SERVICE AGREEMENTS BETWEEN USERS AND INTERNET SERVICE PROVIDERS	9
2.1 Digital Asset as Property	9
2.1.1 Definition of Digital Asset and Account	9
2.1.2 Types of Digital Assets	11
2.1.2.1 Access Information	11
2.1.2.2 Tangible Digital Asset	11
2.1.2.3 Intangible Digital Asset	12
2.1.2.4 Metadata	12
2.1.3 Particular Types of Protected Digital Assets after Death	13

2.1.3.1 Personal Assets	13
2.1.3.2 Social Media	14
2.1.3.3 Financial Accounts	14
2.1.3.4 Business Accounts	14
2.1.3.5 Domain Names or Blogs	15
2.1.3.6 Loyalty Program Benefits	15
2.1.3.7 Other Digital Assets	15
2.2 Terms of Service Agreements	15
2.2.1 Definition of Terms of Service (TOS)	15
2.2.2 Legal Characteristics of Terms of Service	16
2.3 Significances of Access to Digital Asset	17
2.3.1 Benefits of Digital Asset	17
2.3.1.1 Sentimental Value	17
2.3.1.2 Financial Value	17
2.3.2 Prevention of Identity Theft	18
2.4 Digital Asset Inheritance	19
2.5 Barriers to Access the Deceased's Account	19
2.6 Specification of Digital Asset Disposition Provided by the Internet Service Providers (ISPs)' Online Tools	20
CHAPTER 3 MANAGEMENT OF DECEASED USERS' DIGITAL ASSETS: LEGAL APPROACH IN THE UNITED STATES (US)	24
3.1 The User's Ownership Right over Digital Asset	24
3.1.1 Digital Asset as Property under US Law	24
3.1.1.1 Definition as Property	24
3.1.1.2 Digital Asset as Property	25
3.1.2 Digital Asset Inheritance under Succession and Copyright Laws	26
3.1.2.1 Digital Asset Inheritance under Succession Law	26
3.1.2.2 Digital Asset Inheritance under Copyright Law	26
3.2 The Restriction of User's Right under Terms of Service Agreements	28

3.2.1 Freedom of Contract	28
3.2.2 Formation of Contract of Adhesion	29
3.2.2.1 General Types of Contracts of Adhesion	29
(1) Clickwrap Agreement	29
(2) Browsewrap Agreement	29
3.2.2.2 Specific Terms Contained in TOS	30
(1) No Right of Survivorship	30
(2) Non Transferability	30
3.2.3 Unfair Contract Term under Unconscionability Doctrine	31
3.3 The User's Right to Privacy under Federal Legislation	38
3.3.1 The Stored Communications Act (SCA) of 1986	38
3.3.2 The Computer Fraud and Abuse Act of 1986	39
3.4 State Legislation Concerning Death and Digital Assets	39
3.4.1 Connecticut and Rhode Island	40
3.4.2 Oklahoma and Idaho	41
3.4.3 Indiana	42
3.4.4 Delaware	43
3.4.5 Nevada and Virginia	44
3.4.6 Oregon	44
3.5 Revised Uniform Fiduciary Access to Digital Assets Act (2015)	46
3.5.1 Background of Revised UFADAA	46
3.5.2 Analysis of Revised UFADAA Concept	50
CHAPTER 4 MANAGEMENT OF DECEASED USERS' DIGITAL ASSETS:	54
LEGAL APPROACH IN THAILAND	
4.1 The User's Ownership Right over Digital Asset	54
4.1.1 Digital Asset as Property under Thai Civil and Commercial Code	54
4.1.1.1 Definition of Property	54
4.1.1.2 Digital Asset as Property	57
4.1.2 Digital Asset Inheritance under Succession and Copyright Laws	57

4.1.2.1 Digital Asset Inheritance under Succession Law	57
(1) Definition of Estate and its Devolution	57
(2) The Exception of Devolution	58
4.1.2.2 Digital Asset Inheritance under Copyright Law	59
4.2 The Restriction of User's Right under Terms of Service Agreements	60
4.2.1 Thai Unfair Contract Terms Act B.E. 2540	60
4.2.2 Public Order or Good Morals under the CCC	69
4.3 The User's Right to Privacy under Existing Laws	74
4.3.1 Thai Civil and Commercial Code (Tort Law)	74
4.3.2 Thai Penal Code Section 366/4 and 327	76
CHAPTER 5 ANALYSIS OF LEGAL APPROACH DEVELOPMENT FOR MANAGING THE DECEASED'S DIGITAL ASSETS IN THAILAND	77
5.1 Problems on Access and Management of the Deceased's Digital Asset	77
5.2 Lesson learnt from US Laws	79
5.3 Observation for Further Study concerning Choice of Law and Forum Clauses in TOS	84
CHAPTER 6 CONCLUSIONS AND RECOMMENDATIONS	90
6.1 Conclusions	90
6.2 Recommendations	91
REFERENCES	97
APPENDICES	105
APPENDIX A: REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (2015)	106
APPENDIX B: GOOGLE ENDORSEMENT	120

APPENDIX C: FACEBOOK ENDORSEMENT

121

BIOGRAPHY

122



LIST OF TABLES

Tables	Page
5.1 Summary of Section 4 Revised UFADAA (2015)	82



LIST OF FIGURES

Figures	Page
2.1 Inactive Account Manager	21
2.2 Legacy Contact	22
3.1 No Right of Survivorship clause of iCloud TOS	35
3.2 No Right of Survivorship clause of Yahoo TOS	36
3.3 Legislative Enactment Status	47
6.1 Inactive Account Manager	94
6.2 Legacy Contact	95



CHAPTER 1

INTRODUCTION

1.1 Background and Problems

In the digital era, nearly everyone around the world increasingly uses the Internet, and spends their time on their smartphones, tablets, computers surfing the Internet with different purposes, e.g. entertainment, education, work, and business purposes. According to “Thailand Internet User Profile 2015” survey, which was conducted through the Internet questionnaires by ETDA¹ from March to May 2015 with 10,434 completed answers, it shows the behavior of Thai Internet users. That is Thai users use the Internet via personal mobile devices at the average of 5.7 hours per day, computers (PC), and movable computers (Laptops, Notebooks) respectively. Also, the highly popular activities via mobile devices used by Thai users are connecting social networks, searching information, and reading e-news or e-books respectively.² This is such a clear survey to highlight that the number of the Internet users is fast growing in Thailand.

As a result of the global growth of the Internet users, there has been a rapid and large increase of data and information from such uses. Many people store their digital contents on their own digital devices, e.g. smartphones, tablets, external hard disks, memory cards, and flash drives. For instance, a person might save digital contents on his own flash drive and keep it in the box at home. Thus, the digital devices storing digital contents can be handed on as the same way as other physical assets.³ However, the users are increasingly using the Internet, also known as cloud

¹ Electronic Transactions Development Agency (Public Organization) (ETDA) Ministry of Information and Communication Technology MICT (สำนักงานพัฒนาธุรกรรมทางอิเล็กทรอนิกส์ (องค์การมหาชน) (สพธอ.) กระทรวงเทคโนโลยีสารสนเทศและการสื่อสาร)

² it24hrs, *Thailand Internet User Profile 2015*, available at <http://www.it24hrs.com/2015/thailand-internet-user-profile-2015-2558/> (last visited June 25, 2016).

³ Evan E. Carroll, et al., *Helping Clients Reach Their Great Digital Beyond: Estate Planning for Electronic Assets*, 150 TR. & EST. 66, 66 (2011).

services to store the digital contents⁴ organized by internet service providers (ISP), e.g. email accounts, social media sites, cloud storage services, and blogs with user names and password-protected accounts. The password-protected accounts assist either ISPs with the protection and management of the users' accounts or online users with the protection of the online users' digital contents from use or theft by others.⁵

In the digital age, the online users may store their photos in social media sites, write their personal blogs on websites and back up their document files in the cloud storage services. As a result of these activities, the online users have created their digital contents which are stored in their online accounts via email accounts, cloud storage services, or social media sites. Moreover, most users have numerous online accounts with different usernames and passwords in order to acquire a variety of services. It can be clearly seen that those digital contents are created by the users and stored in the online accounts operated by the services of internet service providers, which differ from the digital contents stored in digital devices owned by the users such as smartphones, memory cards, or flash drives.

The question arises in aspect of what will happen to the online accounts with the digital contents stored therein in the post-mortem world.⁶ One of the problems needed to be concerned is what should be the proper definition of digital asset or digital estate. Without its scope or its definition, it is impossible to scope the legal protection for digital assets in order to plan and manage online accounts and digital assets a digital estate planning; the proper definition must be clarified.⁷ Such digital assets certainly have the economic value such as computer data⁸, the law articles, the science theories, and the outstanding photos created by the famous photographers in the forms of digital files.

To illustrate, a well-known photographer may have his estate consisting of a computer, and his photo collection on the computer. The computer may be worth

⁴ *Id.*

⁵ Michael D. Roy, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 Quinnipiac Prob. L.J. 376, 381 (2011).

⁶ John Conner, *Digital life after death: The issue of planning for a person's digital assets after death*, 3 Est. Plan. & Community Prop. L.J. 301, 303 (2011).

⁷ *Id.*

⁸ See Pinai Nanakorn, Commentaries on Succession Law 41 (4th ed. 2015).

only \$1,000, but his photo collection may be sold with many thousands of dollars.⁹ To support the value of digital asset, McAfee survey in 2011 found that the average Americans believed his or her digital assets to be worth about \$55,000.¹⁰ Moreover, in a global survey, McAfee found that digital assets stored in digital devices are worth more than \$35,000.¹¹ Surprisingly, the survey shows that personal memories, e.g. photos, videos are the digital assets women value the most. These digital assets, undeniably, possess economic or sentimental value, which should be considered property as part of the estate after the death of online users and shall be passed on to their heirs in the similar way as other tangible property.

An author and a copyright owner are generally the same person unless there is an exception.¹² When the digital assets are created by the users via the online services such as websites, social medial sites, the copyright of the original works is vested in the author. To support the prior mentioned concept, some of the ISP's terms of service (TOS) expressly states that "*users retain ownership of the contents*

⁹ See Evan E. Carroll, *supra* note 3, at 67.

¹⁰ Katy Steinmetz, *Your Digital Legacy: States Grapple with Protecting Our Data After We Die*, TIME (Nov. 29, 2012), available at <http://techland.time.com/2012/11/29/digital-legacy-law/> (last visited July 17, 2016)(explaining that "*Last year, security-software company McAfee surveyed 3,000 people in 10 countries, asking about the financial value they'd assign to assets such as music files and online photo albums: the U.S. average was just under \$55,000.*")

¹¹ Robert Siciliano , *How Do Your Digital Assets Compare?*, Consumer Blog (May 14, 2013), available at <https://blogs.mcafee.com/consumer/digital-assets/> (last visited July 17, 2016)(describing that "*In fact the study showed that on average globally we have over \$35,000 worth of assets stored on our devices. This includes things like:*
-Personal memories (photos, videos) are what we as consumers value the most and women value these more than men
-Consumers in Singapore, Brazil and Germany place a higher value on personal records (health information, financial records, wills/trusts) than consumers in other countries
-Not surprising, millenials (18-24 year olds) who grew up in the digital world (and have probably never owned a CD), place a higher value on entertainment files (music, tv shows, ebooks, video games, apps) than other age groups and consumers in India rate their entertainment files higher than other countries
-Italian and UK consumers have the most personal communication assets stored on their digital devices.")

¹² E.g., the works-for-hire doctrine applies or the work has been assigned; See section 10 Thai Copyright Act B.E. 2537 and 17 U.S.C. § 101.

generated by them.”¹³ In this connection, if the digital assets are qualified as copyright works, the heirs shall continue to have copyrights over such digital assets for a period of fifty years after the death of online users.¹⁴

Determining the ownership right and intellectual right over digital assets is the supportive reason to assure that the digital assets shall be considered part of the estate of online users after death, and shall be passed on to their heirs, according to the principle of succession law. Nevertheless, there are some difficulties for their heirs to access the deceased users’ online accounts to acquire such digital assets. Accordingly, the digital assets cannot be transferred to the heirs after the death of online users because the users are bound by terms of services (TOS).

This thesis, therefore, concerns inheritance problems of digital assets which are usually barred by the terms of services, as set out by the internet service providers (ISP). These TOS generally restrict the right of survivorship and transferability of the digital assets in order to protect the online users’ data privacy and to reduce their administrative cost. As a result, these terms inevitably prohibit the succession of digital assets by the online users’ heirs who have the legal rights to enjoy the benefits of these digital assets.

Regarding to the prohibition of digital asset inheritance, another problem is whether the contractual terms seem to be unfair or unconscionable under the principle of contract law. Before the users are able to utilize the online services, they must sign up for an account, consent to the terms of service agreements, and accept all terms and service without thoroughly reading or understanding the detailed consequences by clicking “Agree” or “Continue” of such so-called clickwrap agreements.¹⁵ There are specific terms: “No Right of Survivorship,”¹⁶ “Non Transferability,”¹⁷ or similar terms within the terms of service agreements.

¹³ Nathan J. Dosch & Joseph W. Boucher, *E-Legacy: Who Inherits Your Digital Assets?*, available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=83&Issue=12&ArticleID=1907> (last visited June 25, 2016).

¹⁴ See section 18 and 19 Thai Copyright Act B.E. 2537.

¹⁵ Rachel Pinch, *Protecting Digital Assets after Death: Issues to Consider in Planning for Your Digital Estate*, 60 Wayne L. Rev. 545, 551 (2015).

¹⁶ iCloud actually addresses death particularly with No right of Survivorship clause which states that “Unless otherwise required by law, You agree that your Account is

Apparently, such terms address the consequences after the death of users, which mainly restrict the right of survivorship and transferability of the digital assets, and then terminate the digital assets upon death.¹⁸ Consequently, the terms prohibit the heirs either to access the accounts or to acquire those digital assets contained in the accounts. These terms seem to violate the right of the heirs who shall inherit all estate not only tangible property but also intangible property from the deceased users under the law of succession.

As above mentioned, the users shall have the ownership rights and copyrights over the digital assets, but their rights to bequeath the digital assets to their heirs are restricted by TOS in order to protect the online users' data privacy and to reduce the ISPs' administrative cost.

Noticeably, the access and management of digital assets may result in either positive or negative outcomes. In aspect of positive outcome, this provides both sentimental and economic value to the heirs. In terms of negative outcome, it may lead to the access of the users' data privacy and confidentiality such as private photos, contents of communications, and confidential files. Hence, the users' privacy interest tends to be a key problem that some legal scholars will claim as the drawbacks of such access. However, the good value of digital asset inheritance should outweigh the disadvantage of privacy issue.

It can be noted that ultimately, the underlying problem is the conflict of digital asset inheritance and terms of service agreements (TOS) in compliance with

non-transferable and that any rights to your Apple 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."(Last revised: September 16, 2015), iCloud Terms and Conditions, <http://www.apple.com/legal/internet-services/icloud/en/terms.html> (last visited June 25, 2016).

¹⁷ Yahoo actually addresses death particularly with No Right of Survivorship and Non-Transferability clause which states that "*Your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account will be cancelled upon your death. If we receive a copy of a death certificate, the relevant account may be cancelled and all its contents permanently deleted.*" (Terms dated 20 January 2014.), Yahoo Terms of Service, <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm> (last visited June 25, 2016).

¹⁸ See iCloud and Yahoo Terms of Service (TOS).

the privacy policies of the internet service providers (ISP)¹⁹ based on protection of users' data privacy and reduction of their administrative cost.

1.2 Hypothesis

Thai existing laws are insufficient because the laws could not facilitate the heirs to access the deceased's online accounts for managing the digital assets.

It is, therefore, necessary to thoroughly study this problem in order to find the guidance and appropriate approaches to improve or amend the existing laws, or provide the new specific law for reaching economic and sentimental benefits together with balancing the users' privacy interests and protecting the internet service providers from any liabilities.

1.3 Objectives of Study

a) To study the characteristics of digital assets and the similarities and differences between digital assets and property in physical world.

b) To identify the ownership rights of the online account users over digital assets under the property law, succession law, and intellectual property law; especially the rights in relation to the succession of such digital assets to the heirs.

c) To study roles and legal characteristics of clickwrap agreements and terms of service (TOS) under the contract law; especially legal results in relation to the terms "No right of survivorship," or "Non Transferability," which govern and rule out all practice in digital assets created and owned by the online account users and its impacts on devolving on the heirs.

d) To identify the legislation on the access and management of the deceased's digital assets in Thailand and in the United States (US).

e) To provide recommendations on the development of Thai laws regarding the access and management of the deceased's digital assets for reaching

¹⁹ Matt Borden, *Covering your digital assets: Why the Stored Communications Act stands in the way of digital inheritance*, 75 OHSLJ 405, 411 (2014).

economic and sentimental benefits together with balancing users' privacy interests and protecting the internet service providers from any liabilities.

1.4 Scope of Study

This thesis studies on the characteristics of digital assets and the ownership rights of the online account users over digital assets under property law, succession law, and intellectual property law; especially the rights in relation to the succession of the digital assets to the heirs under Thai and US laws.

This thesis additionally studies the legal characteristics of terms of service agreements, also known as clickwrap agreements, under contract law; especially legal results in relation to the specific terms "No Right of Survivorship," "Non Transferability," or other similar terms provided by ISPs, e.g. Apple (iCloud Account) and Yahoo! (Yahoo Account), which govern and rule out all practice in digital assets created and owned by the online account users, and this thesis is explored to find the consequences in case where the digital asset inheritance to the heirs under Thai and US laws.

Moreover, the legislation on the access and management of the deceased's digital assets in certain states in the United States will be thoroughly studied.

Also, the scope of this study does not extend to the matter of the choice of law and forum selection clauses (the governing law and court's jurisdiction clauses) in specific to the relationship between Thai users and ISPs under the terms of service agreements. It is reasonable assumed that the relationship between the Thai users and the ISPs shall be governed by Thai laws and any dispute arising shall be under Thai court jurisdiction.

1.5 Methodology

This thesis will be carried out by documentary research including articles, journals, textbooks, statutory laws, court decisions, scholars' opinions, official

documents, electronic data both domestic and foreign laws, and other relevant documents.

1.6 Expected Results

a) Achieving on the better understanding concerning the legal characteristics of digital assets and the users' ownership rights; especially the rights in relation to the succession of such digital assets to the heirs, and the terms of service agreements; especially legal results in relation to the specific terms "No right of survivorship," or "Non Transferability," and the impacts on the heirs of online account users;

b) Achieving on raising the public awareness of the importance of the access and management of the deceased's digital assets and the positive outcomes of such access and management;

c) Achieving on recommendations of the development of Thai laws regarding the access and management of the deceased's digital assets for reaching economic and sentimental benefits together with balancing deceased users' privacy interests and protecting the internet service providers from any liabilities.

CHAPTER 2

BACKGROUND OF DIGITAL ASSETS AND TERMS OF SERVICE AGREEMENTS BETWEEN USERS AND INTERNET SERVICE PROVIDERS

Many problematic issues are arising in the growth of the Internet and technology. For example, do you have your copyrighted blogs or family photo albums stored via online services such as Flickr²⁰, iCloud? If you die, what will happen to your digital assets? The digital assets to date have increasingly become a significant part of the legacy or the estate of deceased users leave behind. Before using these services, the users must sign up by clicking “Agree” to the terms of services agreements. It is certainly true that the users have not thoroughly read such terms of services (TOS), which may deny the heirs’ access to their accounts. It also prohibits an executor of an estate from carrying out specified wish of the deceased users by managing such estate, or administrating such estate under the law of intestacy. In some cases, the internet service providers (ISP) may even delete the account at death, destroying the digital assets with high monetary value²¹ according to the terms of services. Moreover, the financial information may be stored only in digital form, secured by passwords. This leads to the inaccessibility to the heirs or the executors.²²

2.1 Digital Asset as Property

2.1.1 Definition of Digital Asset and Account

Some digital assets are any digital files which could be stored on personal devices belonging to individuals, such as mobile phones, computers, or flash drives. Others could be stored on devices accessed via online accounts operated by

²⁰ Flickr, a Yahoo company, <https://www.flickr.com/> (last visited January 18, 2016).

²¹ See Evan E. Carroll, *supra* note 3, at 66.

²² *Id.*

internet service providers (ISPs), e.g. various social media sites, websites, email accounts, or cloud storage sites.²³

To define the online accounts, “*Account means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.*”²⁴ An online account is a broad range to cover completely any contractual arrangement under a terms-of-service agreement designed by ISPs. The ISPs (custodians under the said definition) carry, maintain, process, receive, or store the digital assets of the users, according to the Comment of “Revised Uniform Fiduciary Access to Digital Assets Act (2015).”

Importantly, definition of digital asset is needed to be broad enough to cope with the rapid growth of technologic development in this digital era, and is required to be sufficiently clear for the best management of the deceased users’ digital assets, the protection of ISPs and the general public understanding.²⁵ Thus, the definition officially provided by The Uniform Law Commission (ULC) is “*Digital Asset means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.*”²⁶”

As the Comment of “Revised Uniform Fiduciary Access to Digital Assets Act (2015),” its definition expressly excludes underlying assets such as funds held in the online bank accounts. This definition gives the clear explanation that digital asset “includes any type of electronically-stored information, such as: 1) information stored on the user’s computer and other digital devices; 2) content uploaded onto websites; and 3) rights in digital property.”

The online accounts (or digital accounts) are separate from the digital assets. The accounts are created by ISPs, and the online accounts are like the

²³ *Id.*

²⁴ See Section 2 Definition of Account of Revised Uniform Fiduciary Access to Digital Assets Act (2015) (published March 8, 2016).

²⁵ Samantha D. Haworth, *Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act*, 68 U. Miami L. Rev. 535, 537 (2014).

²⁶ See Section 2 Definition of Digital Asset of Revised Uniform Fiduciary Access to Digital Assets Act (2015) (published March 8, 2016).

doors with secured passwords protecting the access to the digital assets placed inside each user's house. However, the digital assets are often created by users. The digital assets mean any type of electronic information that holds sentimental, financial, or other practical value. They can be anything from digital document files, written blogs on the websites, to photo albums uploaded on the websites.

2.1.2 Types of Digital Assets²⁷

As the definition of the digital asset has the broad meaning, to categorize them, it is of importance for properly addressing all digital assets. Such digital assets are divided into four types: (1) Access Information. (2) Tangible Digital Assets. (3) Intangible Digital Assets, and (4) Metadata.²⁸

2.1.2.1 Access Information

The access information is often separate from the digital assets that shall be protected. David M. Lenz, an attorney,²⁹ described that “*access information as not an asset in and of itself, but rather as a means to accessing other assets.*”³⁰ To illustrate, accessing to email contents or document files needs a log-in password of that email account to receive the email's contents.

2.1.2.2 Tangible Digital Asset

Tangible assets of this type are not the same type of tangible assets in the physical sense such as houses, watches, and necklaces. They hold a definable form that enables to be named and transferred to others, for example, sending an email with the photo collections to a friend. This type has a variety of digital assets in digital forms, e.g. PDFs files, documents, photographs, online savings account balances³¹, and blog posts.

Significantly, these tangible digital assets can be transformed into physical forms. For instance, digital assets can be printed out as pictures or

²⁷ See Samantha D. Haworth, *supra* note 25, at 537.

²⁸ Categories proposed by Samantha D. Haworth.

²⁹ David M. Lenz is certified by the Ohio State Bar Association as a specialist in Estate Planning, Trust, and Probate Law, available at <http://www.ssrl.com/david-m-lenz.html> (last visited at January 18, 2016).

³⁰ David M. Lenz, *Death and Downloads: The Evolving Law of Fiduciary Access to Digital Assets*, 23 OHio PRoB. L.J.NL 2 (2012).

³¹ See Samantha D. Haworth, *supra* note 25, at 538.

document papers. These assets may have economic, sentimental, or cultural value,³² and the heirs want to receive it as digital asset inheritance.

2.1.2.3 Intangible Digital Asset

This type is harder to identify than tangible digital assets. Intangible assets in this sense are, for example, “likes” on Facebook, websites, profiles, “comments” left on YouTube, Facebook, or “reviews” left on blogs. The intangible digital assets continually spread over cyberspace in volumes because many online users increasingly use the Internet with smartphones to conduct business and leisure activities. The intangible digital assets tend to be deleted or shut down³³ because they seem useless and less value.

2.1.2.4 Metadata

Metadata typically means data electronically stored within websites concerning accessing “data history, location tags, hidden text, author history, deleted data, code, and more.”³⁴ For example, when users have surfed the Internet via web browsers, the web browsers automatically record the data’s access history. The websites often collect this information every time the online users click on links or sites.³⁵ These assets often leave a trail whenever the user access to the Internet sites.³⁶

However, this type of information is vague and does not matter for the deceased users’ heirs to seek out because the metadata does not benefit them. On the other hand, it can be valuable to the ones who need to find out the cause of death or to investigate such wrongful act for litigation. This type seems to be useful for investigation in the case of unlawful acts.³⁷

³² *Id.* at 538.

³³ *Id.*

³⁴ *Id.*

³⁵ *E.g.*, Yahoo!’s Privacy Policy provides that “*Yahoo automatically receives and records information from your computer and browser, including your IP address, Yahoo cookie information, software and hardware attributes, and the page you request.*”, Yahoo!, <https://policies.yahoo.com/us/en/yahoo/privacy/index.htm> (Last Updated: September 25, 2014) (last visited January 18, 2016).

³⁶ *See* Samantha D. Haworth, *supra* note 25, at 538.

³⁷ *Id.*

2.1.3 Particular Types of Protected Digital Assets after Death³⁸

Firstly, “Intangible digital assets” as above mentioned should not be considered the property belonging to each individual because the online users leave their footprints everywhere they go through the cyberspace. To demonstrate, they leave “likes”, “comments”, and “reviews” and more throughout the cyberspace and those are easily searchable and changeable. Similarly, we sign guest books at museums and hotels, or we leave the comments and details how we like the restaurants in the comment boxes. It can be said that these pieces of personal information are left every place we go.³⁹

Secondly, “Access information” should not be considered the property of itself, which does not need the legal protection as well. It is just the means to access or acquire other property.⁴⁰

Lastly, “Tangible digital assets” as the intangible asset sense, commonly known as “intangible property,” should be differently treated apart from other assets, because they have the monetary value, priceless cultural works, and sentimental value. This type is sharply definable, and its value is required legal protection. Thus, it is worth providing the legal protection for ownership over digital assets, and the digital assets should be considered as part of the deceased users’ estate.⁴¹

2.1.3.1 Personal Assets

The personal assets can be stored on personal devices such as handy drives, smartphones, or computers. They also can be uploaded onto websites organized by the internet service providers (ISP) such as Flickr⁴² or Shutterfly.⁴³ These assets are, for example, photographs, videos, e-mails. Also, these assets can be stored in various cloud storage sites, such as iCloud, Dropbox. The assets are, for example, photographs, videos, e-mails’ contents. They are required the different ways of the access, e.g. passwords for logging onto the computer, usernames, and

³⁸ See Samantha D. Haworth, *supra* note 25, at 539 to 541.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Flickr, available at <https://www.flickr.com/> (last visited June 26, 2016).

⁴³ Shutterfly, available at <https://www.shutterfly.com/> (last visited June 26, 2016).

passwords for logging in the services of ISPs. In some cases, the necessary files may require the password to open and save them.⁴⁴

2.1.3.2 Social Media

Social media assets, nowadays, are rapidly increasing because most of the people connect each other through social media websites such as Facebook, MySpace, LinkedIn, and Twitter. It also includes e-mail accounts, e.g. Yahoo mail, Gmail.

The social media sites not only can be used for social interaction and messaging, but they also can be used as cloud storage for videos, photos, and other electronic documents.⁴⁵ For example, a Facebook user can post status, share and chat with friends, as well as create photo albums.⁴⁶

2.1.3.3 Financial Accounts

Most of bank and investment accounts commonly have physical accounts; however, the online accounts accessed via the Internet are increasing. For instance, a user may have an Amazon.com account. If the user needs to maintain the account, the user must register with the financial sites, e.g. PayPal, Bitcoin. Today, people have changed their lives to be easier, for example, they pay bills online, e.g. income tax, mobile phones, credit cards.⁴⁷

2.1.3.4 Business Accounts

In today's commercial practice, many people are involved in commercial businesses. Such businesses have the data and information of customers such as personal information (birthdays, names of friends and family members), customers' preferences and orders, credit card information, bank account numbers. In the case of physicians and attorneys, they have stored the patient information and the client information respectively.⁴⁸

⁴⁴ Gerry W. Beyer, "Cyber Estate Planning and Administration," Lecture, San Antonio, Estate Planners Council, San Antonio Country Club, Texas, May 19, 2015: p.1-2, available at <http://www.sanantonioepc.org/assets/Councils/SanAntonioTX/Library/Cyber%20Estate%20Planning%20and%20Administration%20%2005.19.15.pdf> (last visited July 18, 2016).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

2.1.3.5 Domain Names or Blogs

It is undeniable that blogs and domain names, especially blogs created by celebrity, can be invaluable because they have commercial value.⁴⁹

2.1.3.6 Loyalty Program Benefits

In the competitive business world, most companies provide many beneficial options to consumers. One of examples is that airlines offer programs for the frequent flyers. They can collect “miles” or “points in return for free or discounted trips, e.g. BIG Loyalty program provided by AirAsia. Furthermore, this Big Loyalty program⁵⁰ mentions “points inheritance” in its terms and conditions that *“In the event of death of a Member, the Executor or the Administrator of the deceased Member’s estate is able to request inheritance of the BIG Points from the deceased’s Member’s Account...”* Thus, the point is inheritable under this program.

2.1.3.7 Other Digital Assets

In the virtual world, the user may own digital assets in the forms of virtual property or avatars in the online games, e.g. World of Warcraft or Second Life.⁵¹

2.2 Terms of Service Agreements

2.2.1 Definition of Terms of Service (TOS)

Terms and conditions agreement or terms of service agreement are interchangeable. The internet service providers (ISP) rule all relevant details by their absolute power in the terms and conditions, also known as “terms of service (TOS).” The users who need to use services must accept them with no choice to negotiate with ISPs by clicking “I agree” or “I accept.”⁵² The terms of service agreements are

⁴⁹ *Id.*

⁵⁰ Air Asia, *BIG Loyalty Membership Program Terms and Conditions*, available at http://www.airasiabig.com/my/en/assets/pdf/tnc-big-loyalty_en-GB.pdf (last visited January 18, 2016).

⁵¹ See Gerry W. Beyer, *supra* note 44, at 2.

⁵² Alp Toygar, et al., *A New Asset Type: Digital Assets*, 22 *Journal of International Technology and Information Management* 113, 115 (2013).

commonly referred to clickwrap agreements,⁵³ and such agreements are typically upheld by the courts.⁵⁴

2.2.2 Legal Characteristics of Terms of Service

When a user enrolls for an online account or a service, a completed process requires an agreement to the internet service provider's terms of service. The relationship between ISP and the user is governed by "a standard form of contract," known as "a contract of adhesion," "user agreement," "terms of use," or "terms of service (TOS)."⁵⁵ TOS is a valid and binding obligation of the users who signed up the accounts. Moreover, ISPs provide either (1) the policy on consequence in the event of death or incapacity of the account users or (2) the particular term in TOS concerning this issue, but the users rarely read TOS thoroughly.

The terms of service (TOS) contain all clauses to police the user's rights and obligations. Some clauses have a major impact on the distribution of digital assets, leading to the difficulties of digital asset inheritance. One of the examples is a clause stating that an account is not transferable, or a clause indicating that your password cannot be shared with others, otherwise, you are in breach of the terms of service. Finally, regarding the explicit death clause, it has rarely been found in TOS. At least two worldwide services, i.e. iCloud and Yahoo! have "No Right of Survivorship" clause.⁵⁶

Consequently, both services explicitly disclaim any right of survivorship. Therefore, such digital assets in the online accounts cannot be transferred to the heirs and they may be permanently deleted. This clause attempts to

⁵³ Robert Lee Dickens, *Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases*, 11 *Marquette Intellectual Property Law Review* 379, 401 (2007).

⁵⁴ See Gerry W. Beyer, *supra* note 44, at 5.

⁵⁵ Kristina Sherry, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 *Pepp. L. Rev.* 185, 204 (2012).

⁵⁶ Ashley F. Watkins, *Digital Properties And Death: What Will Your Heirs Have Access To After You Die?*, 62 *Buff. L. Rev.* 193, 217-218 (2014).

protect user privacy because it prohibits the transfer of digital assets, while it likely causes losing valuable documents and access information for surviving family.⁵⁷

2.3 Significances of Access to Digital Asset

2.3.1 Benefits of Digital Asset⁵⁸

The more individuals spend their time online, the more digital assets are increased. The digital assets have the same value as the tangible assets. Thus, digital assets should be treated as other tangible assets.

2.3.1.1 Sentimental Value

Nowadays, people have changed the lifestyle because of the Internet Age. From family or friend photos, videos, letters, diaries, blogs, websites, to social network pages, users enjoy and spend their time on online presence. These assets have replaced the physical assets like the journals, albums, and post boxes, having the very personal value or the memorable value to family members. However, if family members are unable to access these sentimental assets, they have possibly lost the deceased's family history and inheritance of the deceased's assets, which are traditionally passed down from generation to generation.⁵⁹

Therefore, even though some of the digital assets have no financial value, it is always a good reason to preserve and administer them, because more and more memorabilia are stored digitally.⁶⁰

2.3.1.2 Financial Value

The digital property may be intellectual property rights of value, for example, the blogs created by the famous bloggers or digital Photographs taken by the well-known photographers can be sold at significant price. This shows

⁵⁷ Elizabeth Holland Capel, *Conflict and Solution in Delaware's Fiduciary Access to Digital Assets and Digital Accounts Act*, 30 Berkeley Tech. L.J. 1211, 1217 (2015).

⁵⁸ Jennifer A. Davis, *Counseling Clients for #DigitalDeath*, 71 J. Mo. B. 134, 135-36 (2015).

⁵⁹ *Id.*

⁶⁰ James D. Lamm, Christina L. Kunz, Damien A. Riehl, and Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 391 (2014).

that those blogs, web pages or social media sites can produce huge revenue.⁶¹ To illustrate, the digital content posted on the social media sites by the celebrity such as Facebook, or Twitter would be financial value if that content is offered for sale after the celebrity's death.⁶² This leads to the huge revenue to the celebrity's family.

2.3.2 Prevention of Identity Theft

It is undeniable that in today's online world, identity theft is a serious problem because many people have numerous online accounts storing significantly private information. In fact, the deceased's online accounts have not been monitored, and thus there may be the potential risk from unauthorized access by the hackers who can crack usernames and protected passwords.⁶³

The management of digital assets does not only provide the sentimental and financial value to the heirs, but it also prevents the identity theft regarding a cybercrime.⁶⁴ The identity theft⁶⁵ is one of the criminal activities involving the use of the Internet, which means someone steals personal information and uses it to gain money or goods. Accessing to the deceased's online accounts, family members can quickly monitor and take care of the deceased's identity to prevent stealing deceased's identity.⁶⁶

Moreover, the personal information (such as names, birthdays, email addresses, telephone numbers, or other online accounts), and digital contents remain spread out on cyberspace. The monetary value such as contents of blogs, or outstanding photos, may be at risk for the theft because the deceased cannot monitor their digital assets, and report any misuse conducted by others. This possibly leads to

⁶¹ See Jennifer A. Davis, *supra* note 58, at 135-36.

⁶² Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. Rev. 1644, 1650 (2012).

⁶³ Laura McCarthy, *Digital assets and intestacy*, 21 B.U. J. SCI. & TECH. L. 384,401 (2015).

⁶⁴ See Jennifer A. Davis, *supra* note 58, at 135-136.

⁶⁵ **Identity theft** (Criminal law). "*The unlawful taking and use of another person's identifying information for fraudulent purposes; specif., a crime in which someone steals personal information about and belonging to another, such as a bank-account number or driver's-license number, and uses the information to deceive others usu. for financial gain.*" Black's Law Dictionary 1964 (10th ed. 2014).

⁶⁶ See Gerry W. Beyer, *supra* note 44, at 3.

the theft of the contents and photos, causing the copyright infringement and the destruction of its value.⁶⁷

2.4 Digital Asset Inheritance

Nowadays, digital assets, such as emails, photos, blogs, and any personal information stored online, have been rapidly increased. They are becoming more important in the same way of tangible assets. It is possible that those digital assets could be of great financial value to the online users and their heirs. In addition, some may have the financial value on which the online users place an importance as the part of their traditional estate like physical property, e.g. cars, lands, watches, and houses. It is undeniable that some may have the significantly sentimental, cultural and historical value to next generations⁶⁸ such as family photo digital files or videos. Thus, digital asset inheritance tends to be the discussed issue.⁶⁹

2.5 Barriers to Access the deceased's online Account

Because digital assets possess financial and sentimental value, the online users would like those to be distributed to their heirs. However, terms of service (TOS) are contained in the clickwrap agreements, limiting the transferability of digital assets upon death, prohibiting the ability of account users to distribute the digital assets to the heirs. Such terms lead to the permanent loss of digital assets aimed to pass down to future generations.⁷⁰

The internet service providers (ISP) provide the services such as social networking sites, emails, cloud storages, and blogs to the online users while those companies address TOS limiting the transfer of digital asset upon death. However, not only terms of services agreements but also company policies mainly address one of four methods of transferability of digital assets after death as follows:

⁶⁷ See Jennifer A. Davis, *supra* note 58, at 136.

⁶⁸ Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 Fordham L. Rev. 799, 813-814 (2014).

⁶⁹ *Id.*

⁷⁰ *Id.* at 816.

- (1) The policy or term explicitly prohibits either transferability of account in the event of user's death or transferability in general;
- (2) The policy or term expressly prohibits the transfer but allows the transferability with permission from the service provider;
- (3) The policy or term specifically allows the transferability upon death with certain proof; or
- (4) The policy or term is silent on whether the account can be transferred upon death.⁷¹

Thus, regarding these four methods, all policies or terms are interpreted as the transfer limitation of the deceased's assets. Other methods could be the implied limitation of the transfer of digital assets. For instance, if the TOS allows the ISP to terminate the online account at any time for any reason, this term may also be interpreted as the term prohibiting the transfer of the deceased's assets, resulting in the termination of the users' accounts without considering users' intent.⁷² Consequently, the digital assets contained in online accounts could not be acquired by the users' heirs. In the severe case, these assets may be permanently deleted and lost.

2.6 Specification of Digital Asset Disposition Provided by the Internet Service Providers (ISPs)' Online Tools

Regarding a policy on what will happen if the online users pass away, the policies are not in the visible place. Thus, the users may not concern and be aware of those policies.

In the aspect of such policy contained in TOS, the term concerning death may not be prominent on the computer screen when the users quickly scroll down to click "Agree."

Interestingly, some ISPs start to place the importance on the users' digital assets together with respecting the wishes of the deceased users. The ISPs provide proactive features for the users. They can decide what they want to plan for their accounts and digital assets when they die or no longer use their accounts.

⁷¹ *Id.* at 817.

⁷² *Id.* at 818.

For example, Google provides the new feature “Inactive Account Manager” that allows the Google accounts’ users to decide that “what will happen to their digital assets if they’ve been inactive for a certain period of time.”⁷³

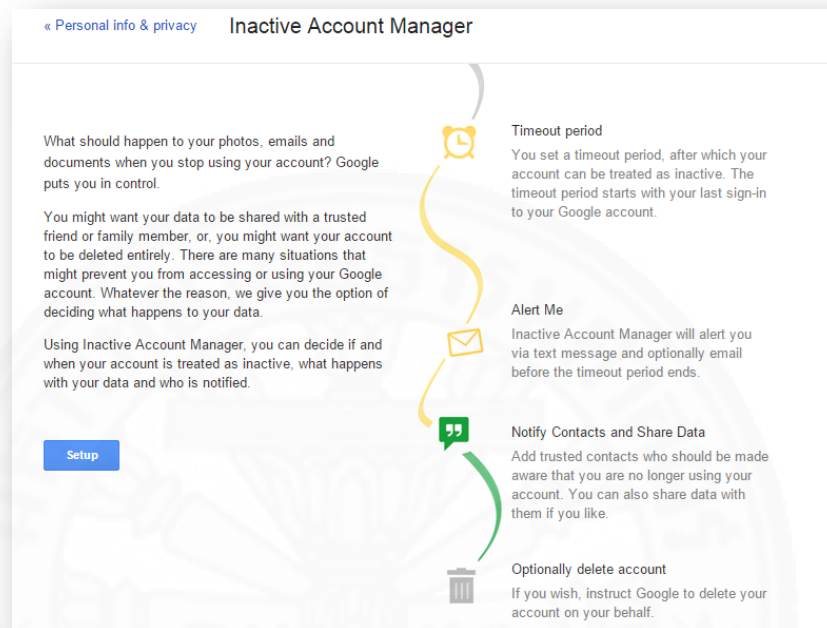


Figure 2.1, Inactive Account Manager

(Source: ©2015 Google - Google Home - Privacy & Terms - Help.)

Facebook, the world’s most popular social media site, has a new option for users after they pass away. Before this new option, Facebook has provided a feature for the deceased’s family members by allowing a family member or friend submits a request to ask Facebook to “memorializes” a loved one’s account. This feature is for the purpose of preserving some of the media contents posted or uploaded by the deceased users, but Facebook prohibits the family members from accessing the accounts to retrieve such media. Thus, this account is only viewable by contacts approved as “friends” while these “friends” cannot be modified after the account is memorialized.⁷⁴

⁷³ Google, *About Inactive Account Manager*, available at <https://support.google.com/accounts/answer/3036546?hl=en> (last visited June 25, 2016).

⁷⁴ See Elizabeth Holland Capel, *supra* note 57, at 1218.

However, the new option allows the users to name a “Legacy Contact”--any person assigned by the users to look after their accounts if such accounts are memorialized--to manage certain parts, e.g. photos and videos uploaded by the users, wall posts, and profile, of their accounts after they die. Also, the users may choose the option on deletion of the account. It can be noted that the legacy contact will not be notified until Facebook account is memorialized. This feature also concerns the privacy of deceased users because it does not allow the legacy contact to “log into account, remove or change past posts, photos and other things shared on the users Timeline, read messages the users have sent to their friends.”⁷⁵

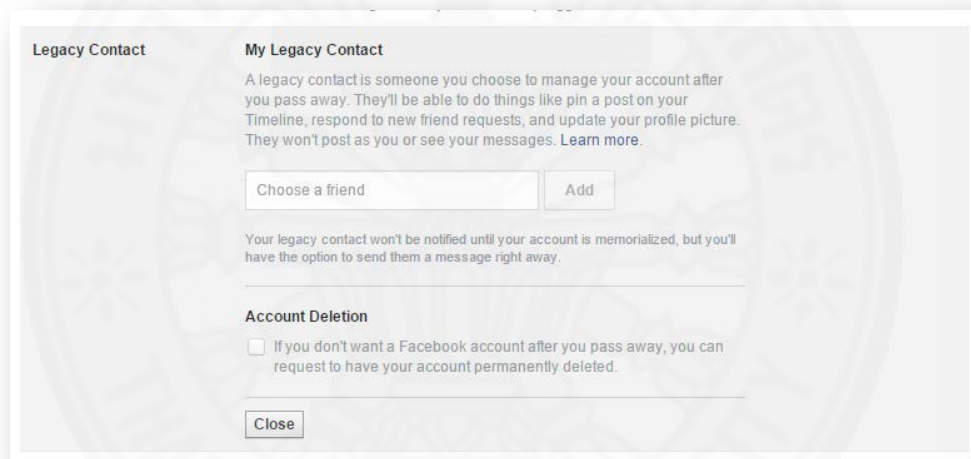


Figure 2.2, Legacy Contact

(Source: Facebook © 2015 English (US))

According to the proactive features as above mentioned, it can be highlighted that today digital assets are of importance, and are viewed as the valuable items. The ISPs have concerned these assets on how to treat them in appropriate ways, so some ISPs have developed the online tools to preserve these assets following users' directions either distribution or deletion. In addition, the online tools are designed to respect the deceased users' wishes because the users have a reasonable

⁷⁵ Facebook, *Legacy Contact*, available at <https://www.facebook.com/help/1568013990080948> (last visited December 3, 2015).

expectation of privacy and security. However, ISPs avoid guaranteeing access to fiduciaries or families. Notably, Gmail, Google's emails service, has a policy that "*in certain circumstances we may provide content from a deceased user's account.*"⁷⁶

Allowing the access, Google requires several documents for reviews, such as a death certificate of the account user and identification of the person who wishes to have access to the account. On the contrary, Yahoo! (Yahoo service) and Apple (iCloud service) will not provide the access to the deceased user's account because they include the "No Right of Survivorship or Non Transferability Clause" in their TOS.⁷⁷



⁷⁶ Google, *Submit a request regarding a deceased user's account*, available at <https://support.google.com/accounts/troubleshooter/6357590?hl=en&rd=1> (last visited May 3, 2016).

⁷⁷ See Elizabeth Holland Capel, *supra* note 57, at 1218.

CHAPTER 3

MANAGEMENT OF DECEASED USERS' DIGITAL ASSETS: LEGAL APPROACH IN THE UNITED STATES (US)

Considering that the heirs who would like to obtain the digital assets contained in the deceased's online accounts, they need to prove that the deceased users have the ownership interests over the assets. As a result, those assets shall be passed on to them. Then, they also need to invalidate "No Right of Survivorship," "Non Transferability," or similar clause by so-called "noninheritability" clause.⁷⁸

3.1 The User's Ownership Right over Digital Asset

3.1.1 Digital Asset as Property under US Law

3.1.1.1 Definition of Property

In US property law system, property is broadly defined as legally enforceable rights among people that relate to things of value. In general, property is categorized into two types, i.e. real property and personal property. Real property typically is land. Personal property has two types, i.e. (1) tangible property such as cars, bags, pens, rings and (2) intangible property such as property rights in copyrights, patents, trademarks, and other forms of intellectual property, and stocks, bonds.⁷⁹

There are two aspects concerning property. Firstly, property as legally-enforceable rights is classically defined as a "bundle of rights." The bundle of rights at the minimum includes "(a) the right to possess and use, (b) the right to exclude others, and (c) the right to transfer."⁸⁰ Secondly, "things" may hold property rights, for example, land, tangible property, and intangible property.⁸¹

It is vital to spot the difference between intangible and tangible property because the potential of digital assets is to be converted from

⁷⁸ David Horton, *Contractual Indescendibility*, 66 Hastings L.J. 1047, 1059 (2015).

⁷⁹ John G. Sprankling, et al., Global Issues in Property Law 1 (Thomson/West. 2006).

⁸⁰ *Id.* at 2.

⁸¹ *Id.* at 8.

intangible asset to tangible one. This is the tangible digital asset type in digital asset sense according to Chapter 2 as previously mentioned. This type is worth protecting at death. For example, the digital asset, such as digital photo or digital document file, can be converted to tangible property by printing its copy.⁸²

3.1.1.2 Digital Asset as Property

According to US property law, it mainly focuses on the real estate (real property) and personal property which consists of tangible and intangible property.

With respect to the definition of digital asset, “*digital asset means an electronic record in which an individual has a right or interest.*” As the Comment of “Revised Uniform Fiduciary Access to Digital Assets Act (2015)”, it gives clear explanation that digital asset “*includes any type of electronically-stored information, such as: 1) information stored on a user’s computer and other digital devices; 2) content uploaded onto websites; and 3) rights in digital property.*”

Considering that whether items referred to as “digital assets” are assets in the property law, digital assets do not completely fit into any type mentioned above. According to the closest form of digital asset, it should be considered “**intangible property**” as long as it continues its digital form online or on a computer. Furthermore, most of digital assets are copyright works, because the users create such digital assets by themselves. Thus, they are considered intangible property which the users have the ownership right over, and it can be transferred by the users. On the contrary, a printed digital asset is tangible property because it can be seen, touched, moved, or felt.⁸³

In the writer’s opinion, the digital asset should be viewed as intangible personal property.

⁸² See John Conner, *supra* note 6, at 304.

⁸³ Nathan J. Dosch & Joseph W. Boucher, *E-Legacy: Who Inherits Your Digital Assets?*, State Bar of Wisconsin (2010), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=83&Issue=12&ArticleID=1907> (last visited July 24, 2016).

3.1.2 Digital Asset Inheritance under Succession and Copyright Laws

3.1.2.1 Digital Asset Inheritance under Succession Law

Generally, a concept of inheritance law is that a person who owns the property enjoys the right to distribute such property after death. It is to say that “[i]t is hard for most Americans to imagine a system of private property that doesn’t include a right to control what happens to their property after death.”⁸⁴ Thus, a residuary clause is typically in a valid will, distributing any item not specifically mentioned to particular beneficiaries. In addition, even though a person dies without leaving behind the valid will, the intestacy law will pass on the properties to the heirs.⁸⁵ It is undeniable that when someone dies, all his or her properties will be passed on to the particular beneficiaries according to the deceased’s wish under his expressed will or passed on to the heirs as the intestate succession.

Like tangible property, intangible property can be distributed to beneficiaries through the last will, and in case of intestacy law, it shall be passed on to the deceased’s heirs.⁸⁶ Consequently, the digital asset viewed as intangible property, a part of the deceased’s estate, should be passed on to the heirs in the similar way of distribution of tangible property by the will or the law of intestate succession.

3.1.2.2 Digital Asset Inheritance under Copyright Law

Another reason for supporting the issue regarding ownership right over digital assets is that the copyright law will be taken into account. In general, copyright law provides term of protection for the author’s lifetime plus seventy years.⁸⁷ Whether it is registered does not affect the condition of copyright

⁸⁴ See David Horton, *supra* note 78, at 1052.

⁸⁵ Lawrence Meir Friedman, A Social History of Wills, Trusts, and Inheritance Law 18 (Stanford Law Books. 2009).

⁸⁶ See Jason Mazzone, *supra* note 62, at 1648; See Section 3-101A.[Devolution of Estate at Death; Restrictions.] of UNIFORM PROBATE CODE (1969)(amended in 2010) states that “*Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will . . . or in the absence of testamentary disposition, to his heirs.*”; See also section 1-201 states that “*Property includes both real and personal property or any interest therein and means anything that may be the subject of ownership.*”

⁸⁷ 17 U.S.C. § 302(a) Duration of copyright states that “(a) *In General.--Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as*

protection. When the author creates the work, the copyright subsists in that work at the moment of creation. The copyright protects “*original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*”⁸⁸ Thus, emails, “[p]oems, essays, photographs, videos, commentary, and even status updates are all potentially eligible for copyright protection.”⁸⁹

Apparently, the online users do not rely on the internet service providers (ISP) to obtain copyright, according to the copyright law.⁹⁰ It affirms that the copyright in the work belongs to the author of such work at the moment of fixation and lasts for the author’s lifetime plus seventy years.⁹¹ Furthermore, the copyright is automatically inheritable and can be changed only through writing with express intent of transferability.⁹² Therefore, the heirs shall

provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.”

⁸⁸ 17 U.S.C. § 102 Subject matter of copyright: In general states that

“(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;*
- (2) musical works, including any accompanying words;*
- (3) dramatic works, including any accompanying music;*
- (4) pantomimes and choreographic works;*
- (5) pictorial, graphic, and sculptural works;*
- (6) motion pictures and other audiovisual works;*
- (7) sound recordings; and*
- (8) architectural works.*

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”

⁸⁹ See Ashley F. Watkins, *supra* note 56, at 215-16.

⁹⁰ 17 U.S.C § 201 Ownership of copyright states that “*(a) Initial Ownership.-- Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.*”

⁹¹ See 17 U.S.C. § 302(a).

⁹² See Ashley F. Watkins, *supra* note 56, at 216; See 17 U.S.C. § 201(d)(1) states that “*Transfer of Ownership.--(1) The ownership of a copyright may be transferred in*

continue to have copyrights over the digital assets for a period of seventy years after the death of online users, and they can exploit such copyright works for their best benefits—to license, distribute, or to perform it. The digital assets shall be passed on to the heirs pertaining to the law of intestate succession.⁹³

In summary, as all above reasons, the online users have the ownership rights and copyrights over the digital assets as well as have the legal right to bequeath these assets to their heirs.⁹⁴ When the users die, these assets shall be passed on to the heirs as the intestacy law. However, the heirs have the difficulties in accessing to the deceased's accounts due to terms of service agreement (TOS), especially the term of No Right of Survivorship.

3.2 The Restriction of User's Right under Terms of Service Agreements (TOS)

3.2.1 Freedom of Contract

*“The principle of freedom of contract is itself rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises.”*⁹⁵ In general, the parties are able to bargain and decide their contents in their contracts as they wish without governmental interference as long as such contents are not contrary to the law, morals or public policy.⁹⁶ However, in some situations, the courts will intervene in the agreements of parties based on freedom of contract if the interest of society (public interest) overrides the interest in freedom of contract (private interest). The courts will decline to enforce such agreement on grounds of public policy.⁹⁷

whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”

⁹³ See 17 U.S.C. § 201(d)(1).

⁹⁴ *Id.*

⁹⁵ Restatement (Second) of Contracts, 8 Intro. Note (1981), Chapter 8. Unenforceability on Grounds of Public Policy, Database updated October 2015.

⁹⁶ Legal Information Institute (LII), *Freedom of Contract*, available at https://www.law.cornell.edu/wex/freedom_of_contract (last visited June 25, 2016).

⁹⁷ *Id.*

3.2.2 Formation of Contract of Adhesion

Digital asset contracts are contracts of adhesion or online standard form contracts, generally referred to clickwrap agreements governed by terms of services. In general, the courts do not tend to make digital asset contracts illegal and unenforceable in accordance with the principles of contract formation. According to the case law of *Ajemian v. Yahoo!, Inc.*,⁹⁸ a digital asset contract will be valid, if the terms of service (TOS) shall be reasonably communicated to a user and a user must manifest assent to such contract.

3.2.2.1 General Types of Contracts of Adhesion⁹⁹

In the most situations, before using the online services, the users must sign up or enroll online accounts within terms and conditions or terms of services provided by the ISPs. That is to say that the users must enter in to the clickwrap or browsewrap agreements before they will be allowed to use services.

(1) Clickwrap Agreement

In general, the clickwrap agreements, also known as the online standard form contract, are enforceable. The users give the consent thereto by clicking “I agree” or “I accept”.¹⁰⁰ If the user needs to sign up the account to use the service, the user must give the consent by clicking “Agree”. In fact, the clickwrap agreements are enforceable; it can be found that TOS of such agreements are reasonably communicated to the users, and the users manifest the assent by clicking “I agree” to use online services.

(2) Browsewrap Agreement

Unlike clickwrap agreements, browsewrap agreements, another form of online standard form contracts, do not require the online users to give the consent to the terms of service by clicking “I agree” or “I accept” option. The

⁹⁸ *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 611 (Mass. App. Ct. 2013) (collecting cases). Accordingly, on summary judgment (“*Yahoo! had the burden of establishing, on undisputed facts, that the provisions of the TOS were **reasonably communicated and accepted.***” “*Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.*”).

⁹⁹ See Natalie M. Banta, *supra* note 68, at 821-828.

¹⁰⁰ Cheryl B. Preston, *'Please Note: You Have Waived Everything': Can Notice Redeem Online Contracts?*, 64 Am. U. L. Rev. 535, 544 (2015).

users' consents are occurred via the continued use of the site beyond the home page, which is commonly hyperlink (using words like "Legal Terms", "Terms of Use") at the edge of the home page.¹⁰¹ The browsewrap agreements are also enforceable if the users have "actual or constructive knowledge" of terms and conditions of the services. However, the courts seem to less favor the browsewrap agreements. In fact, the user never affirmatively accept the TOS, therefore, such browsewrap agreements are viewed by courts as more skepticism. Thus, as the new trend, most of ISPs favor to set their terms of services as clickwrap agreements, because they are generally valid and enforceable.¹⁰²

3.2.2.2 Specific Terms Contained in TOS

(1) No Right of Survivorship

The most cited example is Apple's iCloud Terms and Conditions: "*No Right of Survivorship. Unless otherwise required by law, You agree that your Account is nontransferable and that any rights to your Apple 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.*"

(2) Non Transferability

The most cited example is Yahoo!'s Terms of Service: "*No Right of Survivorship and Non Transferability. 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.*"

According to the terms as above mentioned, both terms may be called "noninheritability" or "indescendibility" terms or provisions. These explicit terms in the TOS address the consequences of the deceased's online accounts. Such boilerplate terms mainly remove the right to bequeath digital assets through law of intestacy by limiting the transferability of accounts, and terminating the contents upon

¹⁰¹Michael J. Milazzo, *Facebook, Privacy, and Reasonable Notice: The Public Policy Problems with Facebook's Current Sign-up Process and How to Remedy the Legal Issues*, 23 Cornell J.L. & Pub. Pol'y 661, 668 (2014).

¹⁰² *Id.*

death. As a result, such terms prohibit the heirs either from accessing the accounts or acquiring the digital assets contained in the accounts. The deceased's heirs must invalidate such terms in order to access and administer those digital assets. Considering that such terms seem to be unfair as an unconscionable clause, these particular terms should not bind the parties to the online contract.

3.2.3 Unfair Contract Term under Unconscionability Doctrine

The Uniform Commercial Code (UCC) § 2-302(1) states that *“If the court as a matter of law finds the contract or any clause of the contract to have been **unconscionable** at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”*

§ 2-302(2) states that *“When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.”*

Even though UCC does not give the definition of unconscionability, the official comments are useful for understanding this doctrine.¹⁰³ The official comments propose that *“This section is intended to make it possible for the courts to police explicitly against the contracts . . . they find to be unconscionable ... The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are **so one-sided** as to be unconscionable under the circumstances existing at the time of the making of the contract. The principle is one of the prevention of **oppression and unfair surprise** ... and not disturbance of allocations of risks based on superior bargaining power.”*¹⁰⁴

¹⁰³ Peter Apostol, *Sales - Unconscionable Contract or Clause - Uniform Commercial Code*, 15 DePaul L. Rev. 499, 501(1966), available at <http://via.library.depaul.edu/law-review/vol15/iss2/22> (last visited May 23, 2016).

¹⁰⁴ The Official Comment of § 2-302 Unconscionable Contract or Clause., Unif.Commercial Code § 2-302 (Current through 2015 annual meetings of the

The courts in its discretions are empowered by § 2-302(1) to make the decision whether the contract or clause is contrary to the doctrine of unconscionability. There are two major factors in the application of this doctrine.

(1) Whether a clause involved is so one-sided must consider the circumstances existing at the time of making contract.

(2) Whether a clause involved is oppression and unfair surprise must be taken into consideration.

(2.1) In the unfair surprise basis, it often applies to rules of assent to form contracts.

(2.2) In the oppression basis, it often arises in the case of unequal bargaining power depending on different situations.¹⁰⁵

Even though the unconscionability doctrine is codified in the UCC which applies exclusively to the sale of goods contracts, the courts generally apply this doctrine to other types of contracts as well, e.g. service contracts, contracts pertaining to insurance, the sale of real estate, or intangible assets other than goods¹⁰⁶ by analogy with the § 2-302(1) of the UCC. Later, the unconscionability doctrine was codified in Restatement (Second of Contract), which is the Code of Contract Law, and is applied to all contracts. The unconscionability doctrine was apparently codified in Restatement (Second) of Contract § 208 (1981), therefore, the doctrine becomes general principle of contract law, and this leads to the recognition of this doctrine in the common law system.¹⁰⁷ Noticeably, this doctrine does not only govern the sale of goods contracts, but also extends to other contracts.¹⁰⁸

National Conference of Commissioner on Uniform State Laws and American Law Institute).

¹⁰⁵ See Peter Apostol, *supra* note 103, at 501.

¹⁰⁶ Gamarello, Thomas, *The Evolving Doctrine of Unconscionability in Modern Electronic Contracting* 6-7 (2015). Law School Student Scholarship. Paper 647. http://scholarship.shu.edu/student_scholarship/647 (last visit May 10, 2016).

¹⁰⁷ *Id.*

¹⁰⁸ พินัย ณ นคร, “กฎหมายว่าด้วยข้อสัญญาที่ไม่เป็นธรรม : แนววิเคราะห์ใหม่เชิงเปรียบเทียบ,” *วารสารนิติศาสตร์*, ปีที่ 30, ฉบับที่ 4, น. 546, 564 (2543). (Pinai Nanakorn, “Unfair Contract Terms Law: Comparative Analysis,” *Thammasat Law Journal*, Vol.30, Iss.4, p. 546, 564 (2000).)

Restatement (Second) of Contract § 208 Unconscionable Contract or Term states that

*“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”*¹⁰⁹

The doctrine of unconscionability is a key choice against unfair terms in online adhesion contracts, known as clickwrap agreements. The unconscionability doctrine is one of various defenses for contract law in order to invalidate the enforceable contracts due to unfair terms. In most jurisdictions, a party to such contracts must prove procedural and substantive unconscionability to invalidate such unconscionable clauses or terms.¹¹⁰

The online contracts are generally valid and enforceable because they have been formed according to the elements of contract formation. However, “No Right of Survivorship” or “noninheritability” clause may be invalid and unable to bind the parties because of its unfairness. With respect to the doctrine of unconscionability, the heirs can argue that such “No Right of Survivorship” clause in online contracts is unconscionable or unfair.

This doctrine consists of two tests to invalidate the unconscionable term (unfair term): the procedural unconscionability and the substantive unconscionability.¹¹¹

Firstly, **the procedural unconscionability** is usually based on a “take-it-or-leave-it” criteria surrounding contract formation; the party has a superior bargaining power more than another party¹¹² in formation of contracts. In the case of *Williams v. Walker-Thomas Furniture Co.*,¹¹³ the court explained that “[W]hen a party of little bargaining power, and hence little real choice, signs a commercially

¹⁰⁹ Restatement (Second) of Contracts, Chapter 9. The Scope of Contractual Obligations, Topic 2. Considerations of Fairness and the Public Interest (Database updated October 2015).

¹¹⁰ See Gamarello, Thomas, *supra* note 106, at 7-8.

¹¹¹ David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 393 (2012).

¹¹² See David Horton, *supra* note 78, at 1068.

¹¹³ 350 F.2d 445 (D.C. Cir. 1965).

unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.”

Under unconscionability doctrine, it gives power to the courts to invalidate any provision that falls outside the manifestation of consent that constitutes the actual agreement.¹¹⁴

Notably, it appears that the unequal bargaining power has been found in the contractual formation.¹¹⁵ As the general concept of procedural unconscionability, it focuses on **“oppression”** (by the superior party), or **“surprise”** (by the weaker party) elements due to the inequity of bargaining power.¹¹⁶

The superior party is the internet service provider (ISP) who sets the standardized terms of service agreements (TOS), and has the absolute power to add “No Right of Survivorship” term (“noninheritability” or “indescendibility” term) in TOS. If the users need to sign up the account to use service, the users cannot exclude this clause before clicking “I agree” option tied in the clickwrap agreements. Thus, the users have no choice if they want to use the service, they must click “I agree.”¹¹⁷

In the judges’ views, most “indescendibility” clause will probably be procedurally unconscionable¹¹⁸ because the parties have inequity of bargaining power during the process of making the contracts of adhesion. In other words, it may be said that the “noninheritability,” or “No Right of Survivorship” clause in clickwrap agreements will probably be procedurally unconscionable contracts.

In another scenario for considering procedural unconscionability other than the take-it-or-leave-it criteria (unequal bargaining power), whether the location of “No Right of Survivorship” clause is noticeable must be taken into

¹¹⁴ See David Horton, *supra* note 111, at 393.

¹¹⁵ See Gamarello Thomas, *supra* note 106, at 8.

¹¹⁶ AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1746 (U.S. 2011)(“A finding of unconscionability requires a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.”)(as cited in Gamarello Thomas, *supra* note 106, at 9.)

¹¹⁷ See David Horton, *supra* note 78, at 1068.

¹¹⁸ *Id.* at 1070.

consideration. Undeniably, the appearance and language of the contracts are also one of procedural unconscionability factors in examining whether it is procedurally unconscionable.¹¹⁹ This raises the question of whether has the term been “*hidden in a maze of fine print.*”¹²⁰ It is a fact that some contracts are designed to be “unnecessarily complex, confusing language, or misleading headings by using fine print and other tactics.” Thus, courts usually find out the reasonable expectations of a party; if an unusual clause has been effectively hidden, there would be such a good case for procedural unconscionability.¹²¹

According to Yahoo’s and iCloud’s TOS, “No Right of Survivorship” clause has been prominently seen in these TOS and the language is also easy to understand the legal consequences as the below figures.

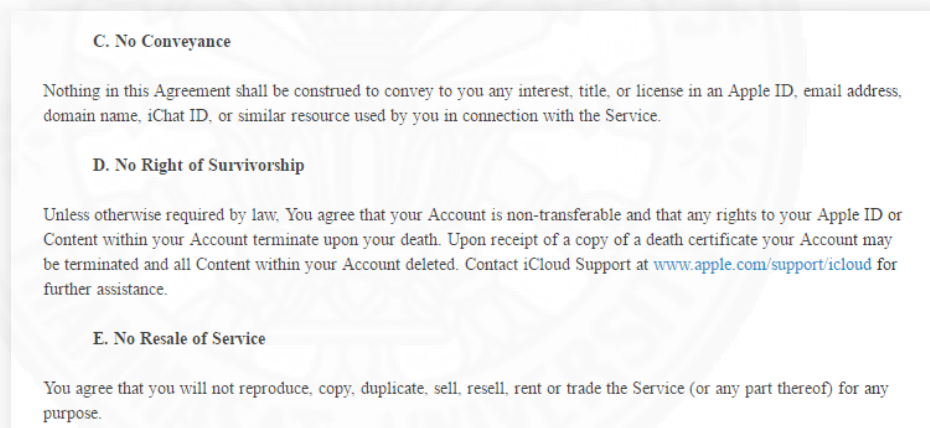


Figure 3.1, No Right of Survivorship clause of iCloud TOS¹²²

(Source: Copyright © 2016 Apple Inc.)

¹¹⁹Gustafsson, Per, “The Unconscionability Doctrine in U.S. Contract Law,” (Master of Laws Thesis, Lund University, 2011) p.17.

¹²⁰ Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

¹²¹ See Gustafsson, *supra* note 119, at 17.

¹²² Last revised: September 16, 2015

28. GENERAL INFORMATION

Entire Agreement. The TOS constitutes the entire agreement between you and Yahoo and governs your use of the Yahoo Services, superseding any prior version of this TOS between you and Yahoo with respect to the Yahoo Services. You also may be subject to additional terms and conditions that may apply when you use or purchase certain other Yahoo services, affiliate services, third-party content or third-party software.

Choice of Law and Forum. You and Yahoo each agree that the TOS and the relationship between the parties shall be governed by the laws of the State of California without regard to its conflict of law provisions and that any and all claims, causes of action or disputes (regardless of theory) arising out of or relating to the TOS, or the relationship between you and Yahoo, shall be brought exclusively in the courts located in the county of Santa Clara, California or the U.S. District Court for the Northern District of California. You and Yahoo agree to submit to the personal jurisdiction of the courts located within the county of Santa Clara, California or the Northern District of California, and agree to waive any and all objections to the exercise of jurisdiction over the parties by such courts and to venue in such courts.

Waiver and Severability of Terms. The failure of Yahoo to exercise or enforce any right or provision of the TOS shall not constitute a waiver of such right or provision. If any provision of the TOS is found by a court of competent jurisdiction to be invalid, the parties nevertheless agree that the court should endeavor to give effect to the parties' intentions as reflected in the provision, and the other provisions of the TOS remain in full force and effect.

No Right of Survivorship and Non-Transferability. 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.

Statute of Limitations. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of the Yahoo Services or the TOS must be filed within one (1) year after such claim or cause of action arose or be forever barred.

Figure 3.2, No Right of Survivorship clause of Yahoo TOS¹²³

(Source: Copyright © Yahoo! Inc.)

It can be seen that this clause is not effectively hidden at all, but it is clearly noticeable. Thus, under the appearance and language scenario, this clause is not procedurally unconscionable.

It is of importance to be noted that even though this clause is not a procedural unconscionability under the appearance and language scenario, it is still procedurally unconscionable under the take-it-or-leave-it criteria as the previous discussion.

Secondly, **the substantive unconscionability** needs to be taken into account. If the provisions or terms are **“unfair, one-sided, or ‘unreasonably favorable’ to drafter,”**¹²⁴ they will be substantively unconscionable. In fact, the substantive unconscionability case laws have been found mostly in arbitration clauses.¹²⁵ This may be hard to analogize to the noninheritability clause. Nevertheless, in the similar way of undue unfairness, the noninheritability clause causes the problem on transferability of digital assets for the heirs. This term

¹²³ Last updated March 16, 2012

¹²⁴ *Id.*

¹²⁵ *Id.*; See David Horton, *supra* note 111, at 387.

eliminates the users' ownership right to pass on their digital assets through a will or the law of intestacy, because "*people feel very strongly about their ability to transmit property to their loved ones after they die.*"¹²⁶

Substantive unconscionability in other way of analysis is concerned about a "*reasonable justification . . . based on 'business realities.'*" To avoid the administrative cost, the "pure" indescendibility term is contained in TOS by ISPs.¹²⁷ In addition to another reason concerning privacy, some ISPs and scholars have claimed that the indescendibility protects the deceased users' privacy particularly in emails and social media sites.¹²⁸

On the other hand, such privacy argument does not override the fruitful inheritance of digital asset. David Horton (2015, 1071)¹²⁹ opines that if the deceased have expressly intent to distribute their digital assets, the noninheritability clause should not be applied thereto. It is clear that they believe the advantages of succession outweigh the dangers of the access to their privacy. Furthermore, whether the noninheritability clause is the proper clause for the users who died intestate or who died with estate planning without mentioning their online accounts in the estate plan. By analogy with the traditional administration of tangible property, a personal representative often accesses to the privacy of the deceased. He seeks everything from her personal diaries, old letters, to safe deposit boxes.¹³⁰ Therefore, it is not

¹²⁶ See Lewis Mallalieu Simes, Public Policy and the Dead Hand 21 (1955) ("*[T] he desire to dispose of property by will is very general, and very strong.*") (as cited in David Horton, *supra* note 78, at 1070.)

¹²⁷ See David Horton, *supra* note 78, at 1070.

¹²⁸ *Id.* at 1071.

¹²⁹ See David Horton, *supra* note 78, at 1071. ("*[Y]et the privacy argument is not fully compelling. For one, it does not apply to decedents who have expressly attempted to bequeath their digital assets. Indeed, those individuals have decided for themselves that the advantages of descendibility outweigh the dangers. Moreover, I doubt that noninheritability is the appropriate default even for people who died intestate or with estate plans that do not mention their online accounts. The specter of embezzlement or discovery of salacious information is not unique to the Internet. To the contrary, it exists any time a personal representative steps into a decedent's shoes and begins sorting through her diaries, old letters, and safe deposit boxes. Thus, it is not clear that ISPs should be able to justify noninheritability provisions on this ground.*").

¹³⁰ Naomi Cahn, *Probate Law Meets the Digital Age*, 67 Vand. L. Rev. 1697, 1716 (2014) ("*While there is always the potential that even an executor or administrator could misappropriate [online] information, this risk is present in the administration*

very clear about why ISPs should be able to justify noninheritability provisions on this ground of privacy concern.¹³¹

In the writer's point of view, the writer strongly agrees with David Horton's above explanation. The noninheritability term should be considered unfair term based on unconscionability doctrine. Moreover, the good value of digital asset inheritance should outweigh the disadvantage of privacy issue. Some worldwide ISPs, like Google and Facebook, provided the new features (Inactive Account Manager and Legacy Contact) showing that they recognize the digital asset inheritance by means of the appointment of the trusted persons to manage the account as the user's wish. However, other persons like heirs or executors of an estate may not obtain such assets. Thus, this point will be discussed on how to create the proper way for digital asset inheritance in general.

3.3 The User's Right to Privacy under the Federal Legislation

The legislation does not particularly deal with the issue on the succession of digital assets, but it intentionally protects the users' privacy. Thus, it affects fiduciaries trying to carry out the duty of collecting the deceased users' digital assets.

3.3.1 The Stored Communications Act (SCA)¹³², the component of The Electronic Communication Privacy Act of 1986 (ECPA)

With respect to The Stored Communications Act, 18 USC § 2701(a), it will criminalize to a person who "*intentionally accesses without authorization a facility through which an electronic communication service is provided.*" Thus, any authorized conduct by users will be beyond the scope of this Act's application.¹³³

In addition, Section 2702 prohibits an ISP (an electronic communication service or a remote computing service) from revealing the contents of

of tangible assets as well as digital ones, and state fiduciary law is designed to guard against just such misuse.") (as cited in David Horton, *supra* note 78, at 1071.)

¹³¹ See David Horton, *supra* note 78, at 1071.

¹³² See Jennifer A. Davis, *supra* note 58, at 136.

¹³³ *Id.*

a communication stored by its service, unless the disclosure is made “*with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.*”

3.3.2 The Computer Fraud and Abuse Act of 1986 (CFAA)

With respect to The Computer Fraud and Abuse Act, 18 U.S.C. § 1030, it also prohibits the unauthorized access to computer system.¹³⁴

In short, the core concept of these Acts is protecting the right to privacy¹³⁵ of the users and preventing unauthorized access to their online accounts. The internet service providers (ISP) subject to SCA and CFAA have terms of service agreements (TOS) that typically limit the access to the users’ accounts, and strictly prohibit “unauthorized access.” The agreements are, therefore, commonly contained with the provision that the account is non-transferable to comply with these SCA and CFAA. This leads to the difficulties for the heirs or the executors who want to access the online accounts upon the users’ death even if the executor’s access should be authorized access.

3.4 State Legislation Concerning Death and Digital Assets¹³⁶

Prior to the laws governing the deceased’s digital assets, there was the most cited case, i.e. In re. Ellsworth, No. 2005-296, 651-DE, (Mich. Prob. Ct. 2005); in early 2005, John Ellsworth, US marine Justin’s father, asked Yahoo! corporation to allow him access to his deceased son’s e-mail accounts after the son was killed in Fallujah on November 13, 2004, by a roadside bomb. He wanted to collect his son’s e-mails to make a memorial scrapbook in his son’s honor,¹³⁷ but Yahoo! rejected such

¹³⁴ *Id.*

¹³⁵ For the useful definitions of privacy; See Alan F. Westin, Privacy And Freedom 7 (1967) (defining privacy as “*the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others*”) (as cited in Jason Mazzone, *supra* note 62, at 1652).

¹³⁶ See Kristina Sherry, *supra* note 55, at 216-220; See Natalie M. Banta, *supra* note 68, at 830; See Rachael E. Ferrante, *supra* note 146, at 51-54; See Ashley F. Watkins, *supra* note 56, at 220-223; See Samantha D. Haworth, *supra* note 25, at 541-542.

¹³⁷ Darrow, Jonathan J. and Ferrera, Gerald, *Who Owns a Decedents E-Mails: Inheritable Probate Assets or Property of the Network*, 10 N.Y.U. J. Legis. & Pub.

request with the statement that “*in the absence of a court order, such disclosure to a third party would violate its privacy policy.*”¹³⁸ Thus, Mr. Ellsworth raised this issue to court, which became the national attention and concern. After six months, the Michigan probate court appointed him as personal representative of an estate and signed court order directing Yahoo! to provide copies of the emails and photographs. Finally, Yahoo! ultimately provided a CD of emails’ contents.¹³⁹

It can be seen that after In re. Ellsworth case in early 2005, Connecticut was the first state reforming the law relating to the access of the deceased’s e-mail content in 2005 according to the general public concern, and then other states began developing their legislation to govern these assets.

3.4.1 Connecticut¹⁴⁰, and Rhode Island¹⁴¹: Access to E-mail Contents

Connecticut was the first state reforming the law relating to the access to digital assets after death in 2005, and then later in 2007, a similar law was shortly enacted in Rhode Island. Connecticut’s and Rhode Island’s laws require email service providers to grant executors access to, or copies of, the email of deceased persons if a request is made or if ordered by a probate court. The Connecticut statute states, in part:

*“An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his or her death, access to or copies of the contents of **the electronic mail account** of such deceased person upon receipt by the electronic mail service provider of: (1) A written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of*

Pol’y 281, 281-282 (2006); Carroll, Evan and John Romano, Your Digital Afterlife: When Facebook, Flickr and Twitter Are Your Estate, What’s Your Legacy? 11-14 (New Riders, 2011).

¹³⁸ Darrow, Jonathan J. and Ferrera, Gerald, *Who Owns a Decedents E-Mails: Inheritable Probate Assets or Property of the Network*, 10 N.Y.U. J. Legis. & Pub. Pol’y 281, 281-282 (2006).

¹³⁹ *Id.*; See Carroll, Evan, *supra* note 137, at 11-14.

¹⁴⁰ Conn. Act of June 24, 2005, No. 05-136 (approved June 24, 2005 and effective Oct. 1, 2005).

¹⁴¹ H.B. 5647, Gen. Assemb., Jan. Sess. (R.I. 2007) (approved and effective May 1, 2007).

the certificate of appointment as executor or administrator; or (2) an order of the court of probate that by law has jurisdiction of the estate of such deceased person.”

Both states have similar laws requiring “e-mail providers to turn over the copies of all e-mails (sent and received) to the executor or administrator of the deceased’s estate.”

It can be noted that this legislation shows the right direction of dealing with the deceased’s digital assets. However, it does not solve all issues because these laws in Connecticut and Rhode Island cover only electronic mail transferability after death not extend to other forms of digital assets. In fact, there are many forms of digital assets emerged these days such as social networking; therefore, these laws do not fit in the rapid growth of technology.

3.4.2 Oklahoma¹⁴² and Idaho¹⁴³: The First to Encompass Social Networking

Oklahoma’s and Idaho’s legislation has been enacted with rather broad scope in 2010 and 2011 respectively, allowing the executor or administrator of an estate to control or terminate any social networking, blog, or email account. The Oklahoma statute states, in part:

*“The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on **any social networking website, any microblogging or short message service website or any e-mail service websites.**”* It can be seen that this law is more expansive to deal with the various forms of digital assets. Later, in 2011, Idaho passed a similar law. These two laws grant the executors the expansive power to take control of the accounts; it seems reasonable to assume that such social networking accounts are the property of the deceased. However, such laws do not give the completely power to the executor to access to the deceased’s all forms of digital assets, but only the forms provided by this provision. Importantly, the laws grant the executor power only where otherwise authorized. It means the executors

¹⁴² H.B. 2800, 524 Leg. 2d Sess. (Okla. 2010) (approved Apr. 29, 2010 and effective Nov. 1, 2010).

¹⁴³ S.B. 1044, 61st Leg. 1st Sess. (Idaho 2011) (approved Mar. 16, 2011 and effective Jul. 1, 2011).

must have the authority to act on the deceased's behalf affirmed by a will or other legal mechanism.¹⁴⁴

Conversely, there is a convincing argument as to why the ISPs should have the right to control those online accounts pursuant to their terms of service agreements (TOS) the deceased users made with. Therefore, ISPs may claim that the state laws are in violation of terms of service agreements. Because these state laws extend more power to the executors, the law may conflict with Terms of Service provided by ISPs, not allowing anyone to access to the account except the account owner.¹⁴⁵ The solution to this argument is that the regulator should include a remarkable provision. This provision should limit TOS that are intended to prevent the access to digital assets.¹⁴⁶

3.4.3 Indiana¹⁴⁷: A Broader Interpretation of Electronically Stored Documents

In 2007, Indiana's statute became effective. This law was boarder than Connecticut's and Rhode Island's laws. This law uses a wide definition of digital assets. This definition covers all electronically stored information of the deceased's accounts. Indiana statute states in part:

*“any person who electronically stores the documents or information of another person’ to ‘provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of **any documents or information of the deceased person stored electronically by the custodian upon receipt by the custodian of:***

(1) a written request for access or copies made by the personal representative, accompanied by a copy of the death certificate and a certified copy of the personal representative's letters testamentary; or

(2) an order of a court having probate jurisdiction of the deceased person's estate”

¹⁴⁴ See Jason Mazzone, *supra* note 62, at 1675.

¹⁴⁵ See Rachel Pinch, *supra* note 15, at 554.

¹⁴⁶ Rachael E. Ferrante, *Relationship between Digital Assets and Their Transference at Death: It's Complicated*, 15 Loy. J. Pub. Int. L 37, 53 (2013).

¹⁴⁷ Ind. Code § 29-1-13-1.1 (West 2012) (approved Mar. 6, 2007 and effective Jul. 1, 2007).

Regarding to “any documents or information of the deceased person stored electronically by the custodian,” this term of language is significantly broader than the language in the prior four statutes mentioned. This language can suitably serve the fast growing of digital asset forms as they have fast changed in several forms. In addition to the application of this statute, it is applied to all ISPs in Indiana. This law also provides only for the right to obtain data held in the account; it does not provide the right to access and use the user’s account.¹⁴⁸

Moreover, the law further states that “A custodian may not destroy or dispose of the electronically stored documents or information of the deceased person for two (2) years after the custodian receives a request or order...” It shows that the ISP may not immediately destroy the digital assets. Consequently, the assets are protected according to the deceased’s wishes.¹⁴⁹

3.4.4 Delaware

In 2014, Delaware passed the broadly new law. It defines digital assets and accounts as well as allowing a fiduciary to “*exercise control over any and all rights in digital assets and digital accounts of an account holder.*”¹⁵⁰ The fiduciary shall have power over digital assets, and shall have the same right on access as the account owner.¹⁵¹ Delaware enacted such statute which was substantially similar to a final draft of Uniform Fiduciary Access to Digital Assets (UFADAA). This law shows the use of term on digital assets and digital accounts in the context of the statute.

¹⁴⁸ See Jason Mazzone, *supra* note 62, at 1674.

¹⁴⁹ See Rachel Pinch, *supra* note 15, at 554.

¹⁵⁰ An Act to Amend Title 12 of the Delaware Code relating to Fiduciary Access to Digital Assets and Digital Accounts (effective Jan. 1, 2015).

“§ 5004. *Control of digital accounts and digital assets by a fiduciary.*

Except as otherwise provided by a governing instrument or court order, a fiduciary may exercise control over any and all rights in digital assets and digital accounts of an account holder...”

¹⁵¹ “§ 5005. *Recovery of digital assets and digital accounts from a custodian.*

(a) A fiduciary with authority over digital assets or digital accounts of an account holder under this chapter shall have the same access as the account holder, and is deemed to (i) have the lawful consent of the account holder and (ii) be an authorized user under all applicable state and federal law and regulations and any end user license agreement.”

3.4.5 Nevada and Virginia

Both Virginia and Nevada passed the very narrow statutes concerning digital assets. In March 2013, Virginia's law¹⁵² was enacted a very limited law, which "*grants a personal representative of a deceased minors access to the minor's digital accounts.*" Due to the public support and attention, the parents of the minor committing suicide needed to access their son's Facebook in order to figure out the reason of his suicide.¹⁵³

Nevada's law was enacted, which "*grants a personal representative power to terminate an online account of a deceased subject to the restrictions prescribed by a deceased in a will or court order.*"¹⁵⁴ This law gives the power to a representative only to terminate online accounts, but not access to, email, social networking, and similar accounts.¹⁵⁵

3.4.6 Oregon

In 2013, Oregon proposed legislation with a more advanced language than other enacted statutes. It was expressly provided by the Oregon State Bar proposed law that the access, control, and disposal of "*any digital assets and digital accounts*" are allowed. The proposed legislation requires "*a custodian of digital accounts and digital assets to transfer, deliver or provide access to accounts or electronic copies of assets to [a] personal representative, conservator or settlor upon written request.*" If it was enacted, Oregon would be the state to provide the practical term of "digital accounts and digital assets" in a statutory context,¹⁵⁶ which are broadly defined to cover all forms of digital property.

There are four major aspects of this proposed legislation. Firstly, the Oregon proposed law would grant fiduciaries access to "digital assets" and "digital accounts." Secondly, it would require ISPs to provide the access to digital accounts and copies of digital assets within 14 days of a written request. Thirdly, it

¹⁵² 2014 Virginia Code Title 64.2 - Wills, Trusts, and Fiduciaries § 64.2-110. Power granted to personal representative (VA Code § 64.2-110 (2014)).

¹⁵³ Evan Carroll, *Virginia Passes Digital Assets Law*, thedigitalbeyond (Feb. 19, 2013), <http://www.thedigitalbeyond.com/2013/02/virginia-passes-digital-assets-law/> (last visited June 20, 2016).

¹⁵⁴ See Natalie M. Banta, *supra* note 68, at 830.

¹⁵⁵ See Gerry W. Beyer, *supra* note 44, at 7.

¹⁵⁶ See Samantha D. Haworth, *supra* note 25, at 541.

would prohibit the destruction of digital property for two years. Lastly, it would discharge the ISPs from any liability or responsibility in granting access to the information.¹⁵⁷

It is apparent that the proposed Oregon legislation is the broadest mechanism and efficiency in order to address the relevant issues of digital assets, and deal with them in the estate administration. To provide the broad definition, to prohibit the destruction of assets in the certain period of time, and to discharge ISPs from liability for disclosure of information to the authorized representative are a must in the right balance between the estate administration and privacy protection . This law may be the excellent model for the legislation because it allows the distribution of digital assets in the similar way with the distribution of tangible property.¹⁵⁸

To date, the updated Oregon Bill (SB 1554) will be effective on January 1, 2017. This Bill has adopted the whole concept of Revised UFADAA even its national model language.¹⁵⁹ The big ISPs like Google and Facebook do support the enactment of the Revised UFADAA by endorsing it.

Also, in Oregon, the Technology and Association of Oregon (TAO), a leader in the technology industry and broader business community, values a legal system especially for dealing with digital assets of the deceased. Therefore, it attempts to ask the Senate Judiciary to pass SB 1554. In addition to the Oregon State Bar's Estate Planning and Administration Section, this Section also expresses its support for the Revised UFADAA, which will be enacted by SB 1554.

¹⁵⁷ Oregon State Bar, *Digital Assets Legislative Proposal*, available at http://osblip2013.homestead.com/Proposals/Estate_Planning_-_Digital_Assets.pdf (May 9, 2012) (last visited March 9, 2016).

¹⁵⁸ *Id.*

¹⁵⁹ Oregon State Legislature, *SB 1554 A (the current version)*, available at <https://olis.leg.state.or.us/liz/2016R1/Measures/Overview/SB1554> (last visited March 9, 2016).

3.5 Revised Uniform Fiduciary Access to Digital Assets Act (2015) (Revised UFADAA)¹⁶⁰

3.5.1 Background of Revised UFADAA

In fact, before the Revised Uniform Act has been announced, there was a prior one, “Uniform Fiduciary Access to Digital Assets (UFADAA),” approved in 2014. Surprisingly, this version of the Uniform Act was introduced in 28 states, while it has not been enacted in any state of the United States in 2015.¹⁶¹

Recently, the revised version of the Uniform Act was approved in July, 2015 by “the Uniform Law Commission (ULC)”, also known as “National Conference of Commissioners on Uniform State Laws (NCCUSL).” The ULC members have the responsibility to conduct the research, draft, and promote the enactment of uniform state laws, where uniformity is desirable and practical.

The Revised Uniform Fiduciary Access to Digital Assets Act (2015) provides a consistent framework as a guideline for each state in the United States. In 2016, this Act is continuously introduced to at least thirteen states: Alabama, Illinois, Iowa, Louisiana, Maine, Mississippi, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island, Utah, and West Virginia. Moreover, it has been already enacted in eighteen states, i.e. Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Nebraska, North Carolina, Oregon, South Carolina, Tennessee, Washington, Wisconsin, and Wyoming.¹⁶² These states have drafted the Bills or the proposed laws to each state legislation in compliance with this framework of the Revised Uniform Act.

¹⁶⁰ Uniform Law Commission, *Fiduciary Access to Digital Assets Act, Revised (2015)*, available [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited May 15, 2016).

¹⁶¹ The Florida Senate, *Bill Analysis and Fiscal Impact Statement (CS/SB 876)*, prepared by The Professional Staff of the Committee on Fiscal Policy, available at <https://www.flsenate.gov/Session/Bill/2015/0876/Analyses/2015s0876.fp.PDF> (last visited December 7, 2015).

¹⁶² Uniform Law Commission, *Legislative Tracking*, available at [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited July 21, 2016).

(1) This Act authorizes fiduciaries to manage digital assets and electronic communications in the same way they manage tangible assets, and

(2) This Act authorizes custodians (ISPs) operating digital assets and electronic communications to handle with the fiduciaries of the users, together with respecting the right to users' privacy for personal communications.

Moreover, this Act not only facilitates the fiduciary's access to digital property, it also does not affect other laws, such as copyright, fiduciary, probate, trust, banking, investment securities, agency, and privacy law. The existing laws prohibit the fiduciaries from violating fiduciary responsibilities. They are prohibited from publicizing any information obtained by the fiduciaries while carrying out their fiduciary duties.¹⁶⁴

The essence of this Act is that the fiduciary is a person who is appointed to administer the properties of other persons in compliance with responsibilities and strict duties to act for the individuals' best interest. Commonly, the fiduciaries are sorted into four types, namely executors of the deceased's estate, trustees, conservators, and agents authorized by the power of attorney. The fiduciary is extended the typically traditional power from managing tangible property to digital property. The examples of digital property are digital files on computer, virtual currency like bitcoins, and web domains. However, the fiduciary is not allowed to access to the content of electronic communications, e.g. email, text messages, and social media accounts unless the users' consents have been found in the will, trust, power of attorney, or other record.¹⁶⁵

This Act differentiates the authority of fiduciaries who act on behalf of the users, from any other efforts to access to the digital assets. Noticeably, even the family members or friends may seek for such access, but they are unable to access thereto under this Act unless they act as fiduciaries.

This Act is applied to digital assets in which individuals have the right or interest. However, the underlying asset or liability is excluded unless it is

¹⁶⁴ *Id.*

¹⁶⁵ Uniform Law Commission, Description of the Revised UFADAA, available at [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited January 17, 2016).

itself an electronic record to deal with the disposition of these assets upon the individual's death or incapacity. There are varieties of these assets, such as digital photos, digital music, e-books, online game items or characters, and documentary files. Only few existing legislation on the rights of fiduciaries over digital assets was passed. In reality, the individuals who own digital assets may totally unaware of their online presence. In other words, the users may not expressly consent to the distribution of their digital assets in the event of their death or incapacity. Even though their directions can be done as their wishes, this may come into the conflict with ISPs' terms of service agreements. Some ISPs to date clearly express their policies on the consequences of users' death. On the other hand, others do not mention such policies, leading to the users' unawareness of the implications of these provisions upon the users' death or incapacity. The conflict between ISPs' policies and estate plans becomes an unresolved problem. Thus, the courts may figure out this issue.

It can be seen that the fiduciaries' access to digital assets currently seems uncertain; it is controlled by federal and state privacy and computer crime laws as well as state probate law. More recently, few states have already enacted the legislation on fiduciary access to digital assets, and many states have considered, or are considering the legislation because they understand and appreciate the importance of digital asset administration in the event of the users' death or incapacity.

In the last few years, many states have passed the legislation on fiduciary access to digital assets in relation to the scope of digital assets, the rights and responsibilities of fiduciary, the types of fiduciary, and the application particularly in the case of the users' death or incapacity. Hence, this Revised Uniform Act will be the guidance concerning fiduciaries' ability to access digital properties, which leads to the predictability and certainty for courts, users, fiduciaries, and internet service providers.

3.5.2 Analysis of Revised UFADAA Concept¹⁶⁶

Having reviewed the Revised UFADAA, the writer considers that the underlying sections and its fundamental concept will be explored as discussed below.

Firstly, definitions are in section 2, for example, the definition of online account, and digital asset, which both have been studied in Chapter 2. Noticeably, there are two terms, i.e. the term of “catalogue of electronic communications”, and the term of “content of electronic communication,” and these terms are totally different in the meanings to balance the users’ privacy interests in case of digital asset administration through online accounts.

The term of catalogue of electronic communications covers log-type information concerning an electronic communication, for example, the sender and the recipient’s email addresses, and the date and time of the communications were responded.

The term of content of electronic communications refers to “*information in the body of an electronic message that is not readily accessible to the public.*”¹⁶⁷ If it was publicly accessible, this would not be considered the content of electronic communications under the scope of this Act.

The user is any person who has the account with the custodian, including the deceased user making the agreement with the custodian while alive.

The custodian includes any entity, known as the internet service provider (ISP) that operates or maintain electronic data for the user.

The online tool is the mechanism provided by the custodian. The user enables to name the trusted person to manage the user’s digital assets and online accounts after the future occurrence, i.e. the user’s death or incapacity. The named person may act on behalf of the user as the user’s wishes.

The terms of service agreement is any agreement that controls the relationship between the user and the custodian (or the internet service provider), also

¹⁶⁶ This topic heavily relies on the Revised UFADAA and its Comment.

¹⁶⁷ If such information were readily accessible to the public, it would not be subject to the privacy protections of the federal law under ECPA as mentioned in Title 3.3 in this chapter.

known as terms of use agreement, click-wrap agreement, click-through license, or similar term.

Secondly, section 3 mentions the scope of applicability, which is divided into three subsections. With respect to subsection (a), this Act is applied to the fiduciary acting under the will or power of attorney, **personal representative acting for the decedent**, conservator, or trustee. In the event of applying to the personal representative, the decedent dies intestate – the decedent has not made the will.

With respect to subsection (b), this Act is applied to the custodian in case where the user was the resident of the state by which such act has been enacted at the time of the user's death. Thus, even the out-of-state custodian must comply with the request for access to digital assets.

Subject to subsection (c), it is not applied to the employer's digital assets used by the employee in the ordinary course of the employer's business.

Thirdly, the writer views that section 4 is the most important section regarding the disposition of digital assets as well as the user's privacy protection. This addresses **a three - tier priority system**¹⁶⁸ as the following.

1. If the custodian, generally known as the internet service provider (ISP), provides **an online tool**, separately from the terms of service (TOS), that allows the user to appoint the specific person to act as the user's wishes: (1) to access to the user's online accounts and manage the digital assets or (2) to direct the custodian to delete the user's digital assets.

To demonstrate, Facebook and Google, the worldwide corporations have already provided the online tools – Legacy Contact, and Inactive Account Manager respectively- as mentioned in Chapter 2. These two corporations realize the significance of providing the online tools in their online services and also endorsed the Revised UFADAA.

2. If the custodian does not provide the online tool, or if the user refuses to use such online tool, **the traditional estate plan**, i.e. the will, trust¹⁶⁹,

¹⁶⁸ A Summary of the Revised UFADAA

¹⁶⁹ Notably, under section 1686 Thai Civil and Commercial Code (the CCC), it states that *“Trusts created whether directly or indirectly by will or by any juristic act*

power of attorney, or other written records will be the legal mechanism in which the user give direction for the disposition of digital assets.

3. If the user does not provide any direction, either in online tool or in the traditional estate plan, the terms of service (TOS) for the user's online account will be taken into account whether the fiduciary has the right to access to the user's digital assets. If the terms of service do not address the access to digital assets by fiduciary, the default rules of Revised UFADAA will be applied.

Revised UFADAA's default rules have been created to keep the balance between the user's privacy interests and the fiduciary's need for the access to the user's digital assets. Subject to section 8, it is intended to give personal representatives access to "the catalogue of electronic communications and digital assets," other than "the content of electronic communications." This default rule makes distinction among "the content of electronic communications", "the catalogue of electronic communications", and "other types of digital assets."

To illustrate, "**the content of electronic communication**" refers to the body messages responded to other persons by the user, e.g. text messages, email messages, instant messaging, and other type of messages between private parties. One of the default rules is that the fiduciary is not allowed to access to the content of electronic communications unless the user's consent has been found. However, in case of necessity, the fiduciary may have the right to access to "**the catalogue of electronic communications.**" By way of illustration, the executor of the decedent's estate may need to compile the inventory of estate assets, so he has the right to access to the catalogue of the decedent's communications. Then, he discovers that monthly email message was sent to the deceased by the company, therefore, the executor can directly contact that company and ask for the statement of the deceased's account. Apart from either "the content of electronic communications" or "the catalogue of electronic communications," "**other types of digital assets**" are intangible personal

producing effect during lifetime or after death shall have no effect whatever, are not effective, unless by virtue of the provisions of the law of trust creation." As a result, only Trust for Transactions in Capital Market Act B.E. 2550 (2007) is recognized by Thai law. Trust under Thai law is not similar to Trust under Revised UFADAA, falling outside the scope of this thesis.

property not communications, are worth obtaining, for example, business files or photos uploaded on the cloud. Thus, under Revised UFADAA, the executor, who has distributed the deceased's family photo albums to heirs, will also have the right to access to photos uploaded by the deceased via photo-sharing websites, e.g. Flickr, Instagram, Shutterfly.

Fourthly, under section 6, the custodian (the ISP) has its discretion to disclose digital assets by allowing the authorized fiduciary to entirely access, partially access, or to obtain only the copy of digital assets. Moreover, the custodian may assess the reasonable administrative charge for disclosure cost of the user's digital assets.

Fifthly, under Section 15, the fiduciary duties are explicitly addressed: the duty of care, the duty of loyalty, and the duty of confidentiality. If the executor publishes the deceased's confidential pictures or communications, that executor shall be liable for his act. The management and access of digital assets may also be restricted by other laws. According to the copyright law, the fiduciary may not copy or distribute digital files in violation of the author's right. Similar to the contract law, the fiduciary may not exceed the sphere of user's authority under the online account's TOS.

Lastly, to obtain the right to access digital assets, Revised UFADAA requires the fiduciary to send the official written request in physical or electronic form to the custodian, accompanied by the certified copy of the document granting fiduciary authority, such as the letter of appointment, small-estate affidavit, court order, or certification of death. The custodians that receive the apparently valid request for access are discharged from any liability for the acts done in good faith in compliance with section 16.

CHAPTER 4

MANAGEMENT OF DECEASED USERS' DIGITAL ASSETS: LEGAL APPROACH IN THAILAND

As chapter 4, Thai legislation has been concerned with the access of deceased's digital account and digital assets at death because the Thai legislatures have placed the importance on digital asset after death. Under Thai exiting laws, how do the laws deal with this issue if the executors of an estate or the heirs would like to obtain the digital assets contained in the deceased's online accounts? First of all, they need to prove that the deceased users have the ownership interests over the digital assets. Next, they need to invalidate "No Right of Survivorship" or "Non Transferability" or similar clause by so-called 'the noninheritability clause' as an unfair contract term.

4.1 The User's Ownership Right over Digital Asset

4.1.1 Digital Asset as Property under Thai Civil and Commercial Code (CCC)

4.1.1.1 Definition of Property

Section 138 of the CCC states that "*Property includes things as well as incorporeal objects, susceptible of having a value and of being appropriated.*"¹⁷⁰

Section 137 of the CCC states that "*Things are corporeal objects.*"¹⁷¹

With respect to section 138, the property consists of two types: 1) Things and 2) Incorporeal objects. In this regards, thing means any tangible property which is in physical forms that enable a person to touch or see, for example,

¹⁷⁰ มาตรา ๑๓๘ ทฤษฎีสิน หมายความว่ารวมทั้งทรัพย์สินและวัตถุไม่มีรูปร่าง ซึ่งอาจมีราคาและอาจถือเอาได้

¹⁷¹ มาตรา ๑๓๗ ทฤษฎี หมายความว่า วัตถุมีรูปร่าง

a house, a building, a car, a land¹⁷² while incorporeal object means any intangible property¹⁷³ which is unable to be directly seen or touched by a person. However, the intangible property may be a legal fiction which is acknowledged and recognized by laws. That is “Rights” or “Benefits/Interests.” Thus, whoever obtains the rights; others shall not violate or infringe such rights. Otherwise, they shall be liable to punishment or shall be bound to make compensation.¹⁷⁴ The rights as legal fiction are, therefore, the intangible property, i.e. intellectual property rights: copyright¹⁷⁵, trademark right, and patent right.¹⁷⁶ It can be seen that intangible property includes rights to business having economic value such as intellectual property rights (IP rights) as the previous mentioned, and right to computer data.¹⁷⁷ Rights additionally under the CCC such as a rental right, a possessory right or any right of claim is considered property.¹⁷⁸

To consider the meaning of “property”, it needs to consider such property susceptible of having the value and of being appropriated as the important condition.

Firstly, the value of property means “Value” not “Price” in accordance with section 453, the Contract of Sale. The “Value” has a broader meaning than Price. In other words, while the value means the value of itself, “Price”

¹⁷² ศรีราชา เจริญพานิช, คำอธิบายกฎหมายว่าด้วยทรัพย์สิน, พิมพ์ครั้งที่ 5 (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2557), น.19. (Sriracha Charoenpanich, Commentaries on Property Law, 5th ed. (Bangkok: Winyuchon Press, 2014), p.19.)

¹⁷³ Intangible Asset means “Any nonphysical asset or resource that can be amortized or converted to cash, such as patents, goodwill, and computer programs, or a right to something, such as services paid for in advance.” (Black’s Law Dictionary 1899 (10th ed. 2014).

¹⁷⁴ See Sriracha Charoenpanich, *supra* note 172, at 21-22.

¹⁷⁵ *Id.* at 22 (“Furthermore, technology and computer are increasingly important all over the world because people have communicated via the Internet, leading to the interesting issue of copyright in Data.”).

¹⁷⁶ *Id.*

¹⁷⁷ พินัย ฌ นคร, คำอธิบายกฎหมายลักษณะมรดก, พิมพ์ครั้งที่ 4 (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2558), น.41. (Pinai Nanakorn, Commentaries on Succession Law, 4th ed. (Bangkok: Winyuchon Press, 2015), p.41.)

¹⁷⁸ See Sriracha Charoenpanich, *supra* note 172, at 23.

means the market price that both parties need to purchase and sell in the market.¹⁷⁹ To illustrate, something cannot be traded in the market, but it has its own value. For example, something may have the sentimental value for a person and such person gives the importance to that thing as the high value thing, while another person thinks that thing has no value at all such as ancestors' bones, a lover's letter.

Even though that thing costs the low price, or has no price, it is valuable enough to be property if any person needs it as desirable thing. It is able to be appropriated.¹⁸⁰ The value under section 138 includes, therefore, either the value of itself (worth value), or the economic value.¹⁸¹

Secondly, the ability of "being appropriated" means capability of possessing of such object or claiming for the ownership over that objects, including restricting the property from others. Therefore, the possessor also has authority to control and manage such incorporeal object.¹⁸² Notably, "being appropriated" means the assertion of rights in general. It does not restrict only the level of ownership because there could be various meanings of assertions such as rights of holding the stocks, and rental rights.¹⁸³

Thus, the examples of intangible property are right of claim for compensation,¹⁸⁴ right of claim for Severance Pay,¹⁸⁵ stocks,¹⁸⁶ rental rights¹⁸⁷ and intellectual property rights.

¹⁷⁹ เสนีย์ ปราโมช, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ กฎหมายลักษณะทรัพย์สิน (กรุงเทพมหานคร: โรงพิมพ์ อักษรสาส์น, 2521), น.13. (Sanee Pramoch, Commentaries on Property Law (Bangkok: Aksornsan Press, 1978), p.13.)

¹⁸⁰ See Sriracha Charoenpanich, *supra* note 172, at 23-24.

¹⁸¹ สมจิตร ทองศรี, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วยทรัพย์สิน (กรุงเทพมหานคร: สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา, 2557), น.2. (Somjit Thongsri, Commentaries on Thai Civil and Commercial Code: Property Law (Bangkok: Institute of Legal Education of the Thai Bar under the Royal Patronage, 2014), p.2.)

¹⁸² See Sriracha Charoenpanich, *supra* note 172, at 24-25.

¹⁸³ *Id.*

¹⁸⁴ Thai Supreme Court Decision No. 329/2524

¹⁸⁵ Thai Supreme Court Decision No. 1269/2524 (If the employee has the right of Severance Pay under the law and then he died, such Severance Pay shall devolve on the heirs because it is not his personal right.)

¹⁸⁶ Thai Supreme Court Decision No. 3853/2524 (Stocks which are the things, susceptible of having a value and of being appropriated, are deemed to be property under the Thai Civil and Commercial Code.), No. 1850/2531

It can be concluded that the property under section 138 consists of two elements: (1) it must be the tangible property or intangible property, and (2) it must be susceptible of having value and of being appropriated.

4.1.1.2 Digital Asset as Property

In the writer's opinion, according to the definition of "Property" under section 138 of the CCC, a digital asset should be categorized as an intangible property. Firstly, it has the value either sentimental value (worth value) depending on subjective view of each individual or economic value. Secondly, it is able to be appropriated because it is similar to holding the rights over IP rights, or stocks. The examples of digital assets are the family photos uploaded onto websites, the blogs written onto websites, the documents saved on the cloud storage services, or the how-to videos uploaded onto websites.

4.1.2 Digital Asset Inheritance under Thai Succession and Copyright Laws

4.1.2.1 Digital Asset Inheritance under Succession Law

(1) Definition of Estate and its Devolution

Section 1599 of the CCC states that "*When a person dies, his estate devolves on the heirs.*

An heir may lose his right to the succession only under the provisions of this Code or other laws."

Section 1600 of the CCC states that "*Subject to the provisions of this Code, the estate of a deceased includes his properties of every kind, as well as his rights, duties and liabilities, except those which by law or by their nature are purely personal to him.*"

The essential condition of the estate devolution is the death of a person in accordance with section 1599. In case of the person's death, there are (1) the in fact death (the brain stem death), and (2) the death deemed by law (a missing

¹⁸⁷ Thai Supreme Court Decision No. 875/2525 (Rental right has the value and is transferable. Therefore, it shall be deemed to be property.), No. 4001/2530 (Rental right of the building is susceptible of having a value and of being appropriated, so it is property and estate to be passed on the heirs.)

person under section 61-63, 1602).¹⁸⁸ Thus, when a person dies, all his estate will devolve on the heirs. Anything owned by the deceased until the moment of his last breath is called “the estate”. Moreover, section 1600 mentions the definition of the estate that it is all types of property, as well as rights, duties and liabilities.¹⁸⁹

All properties owned by the deceased are both tangible and intangible properties. The rights either recognized by contracts or recognized by laws are also the estate.¹⁹⁰ Nowadays, the technology and the Internet become a part of people’s lives. Thus, properties or rights to business have economic value such as intellectual property rights (IP rights), or computer data.¹⁹¹ The rights to those intangible properties are also the estate that is able to devolve on the heirs.¹⁹² All properties as the estate will be automatically distributed to the heirs upon the property owners’ death as the intestate succession. Thus, those digital assets as the digital estate will be passed on to the heirs. It is undeniable that in every-day human activities, digital assets, e.g. computer data, the IP rights such as the novel written by the deceased (copyright work) saved as electronic file in the his cloud storage account, are of importance for both economic and sentimental value.

(2) The Exception of Devolution

Even though the estate means all types of property, as well as rights, duties and liabilities, there are the exceptions in accordance with section 1600 stating that “*except those which by law or by their nature are purely personal to him.*” In case that the exception by the nature is purely personal to the deceased, it could be “right to privacy of the users” that always comes along with the digital assets.

¹⁸⁸ See Pinai, *supra* note 177, at 33-34.

¹⁸⁹ *Id.* at 41.

¹⁹⁰ *Id.* at 41.

¹⁹¹ Section 3 Thai Computer Crime Act B.E. 2550, **Computer Data** means “*data, statements, or sets of instructions contained in a computer system, the output of which may be processed by a computer system including **electronic data**, according to the Law of Electronic Transactions.*”

Section 4 Thai Electronic Transactions Act B.E. 2544, **Electronic Data** means “*information generated, sent, received, stored or processed by electronic means, such as electronic data interchange (EDI), electronic mail, telegram, telex.*”

¹⁹² See Pinai, *supra* note 177, at 41.

Thus, in the writer's opinion, the right to privacy of the users, such as a love letter of email written by the users, or any content of electronic communications communicated with others by the users, will not be viewed as digital estate, and then it will not be passed on to the heirs under this section.

4.1.2.2 Digital Asset Inheritance under Copyright Law

With respect to Thai Copyright Act B.E. 2537 (1994), most of digital assets are copyright works, such as digital photos taken by the users, blogs written by the users, or videos created by the users. If the digital assets are created by the authors, they will be legally protected by copyright law. The law needs to protect the author's originality over the works. Such copyright works have the value of themselves which are able to be traded, distributed, and passed on to the heirs. The value can be sentimental value, or economic value, or both.

The copyright is vested in the author's lifetime and fifty years after his death. Thus, the heirs shall continue to have copyrights over such digital assets for a period of fifty years after the death of online users subject to section 18¹⁹³ and 19.¹⁹⁴ In this regards, the copyright is automatically inheritable under section 17.¹⁹⁵

In conclusion, digital assets as copyright works will be the "property" in the type of intangible property recognized by section 138 of Thai Civil and Commercial Code, and also it will be protected by Thai Copyright Act.

¹⁹³ Section 18 states in part: "*When the author has died, the heir of the author is entitled to litigation for the enforcement of his right through the term of copyright protection unless otherwise agreed in writing.*"

¹⁹⁴ Section 19 states in part: "*Copyright by virtue of this Act subsists for the life of the author and continues to subsist for fifty years after the death of the author.*"

¹⁹⁵ Section 17 states in part: "*The assignment of copyright by other means except by inheritance must be made in writing with the signatures of the assignor and the assignee.*"

4.2 The Restriction of User's Right under Terms of Service Agreement

4.2.1 Thai Unfair Contract Terms Act B.E. 2540¹⁹⁶

4.2.1.1 The Reasons for Announcement of this Act¹⁹⁷

In general, under the principle of contract law based on the liberty of people, according to the principle of sacredness of declaration of intention¹⁹⁸ as well as the principle of freedom of contract,¹⁹⁹ the parties have freedom to make agreements and contracts as long as they are not contrary to the laws, public order, or good morals. However, according to the reason behind this Act, it is for controlling the sacredness of declaration of intention made by the parties in order to protect the party who has a weaker bargaining power in economy.²⁰⁰ Even though this Act seems to refuse the principle of sacredness of declaration of intention under general principle of Thai contract law, in an in-depth analysis, this Act is for empowering a court to use it as a guideline in its discretion for considering any term in the contracts in order to bring fairness to all contractual parties. It is undeniable that the equity may be one of many reasons for passing this law, which is similar to English law: The Unfair Contract Terms Act 1977. Such law is adopted as a model law for this Act, especially, in the essential part stating that any term will be enforceable if it is fair and reasonable.²⁰¹

Thus, this Act is not in violation of the principle of sacredness of declaration of intention, but it provides the legal framework for parties.

¹⁹⁶ Effective Date was May 15, 1998 (B.E.2541).

¹⁹⁷ Published in the Royal Gazette, volume 114, section 72 kor, page 32, dated 16th November, B.E.2540 (1997) (The English Translation of the Thai Unfair Contract Terms Act, available at <http://www.samuiforsale.com/law-texts/unfair-contract-terms-act.html> (last visited January 5, 2016).

¹⁹⁸ หลักความศักดิ์สิทธิ์ของการแสดงเจตนา

¹⁹⁹ ศนันท์กรณ (จำปี) โสทธิพันธุ์, คำอธิบายนิติกรรม-สัญญา พร้อมคำอธิบายในส่วนของ พ.ร.บ. ว่าด้วยข้อสัญญาที่ไม่เป็นธรรม พ.ศ. 2540 และกฎหมายใหม่ที่เกี่ยวข้อง, พิมพ์ครั้งที่ 18 (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2557), น. 496-499. (Sanankorn (Champi) Sotthibundhu, Commentaries on Juristic Act-Contract Law, the Unfair Contract Terms Act B.E. 2540 and New Relevant Laws, 18th ed. (Bangkok: Winyuchon Press, 2014), pp. 496-499.)

²⁰⁰ *Id.* at 499.

²⁰¹ *Id.*

This Act shall be taken into the parties' consideration prior to making any juristic acts or contracts; otherwise the terms or contract may be unenforceable.²⁰²

4.2.1.2 Unfair Contract Term under Unfairness Concept

The contracts or any term of contracts set forth by the parties, and the contracts falling within the scope of this Act are valid due to the formation of contracts.²⁰³ Even though the terms or contracts are “unfair,”²⁰⁴ they are valid and legally enforceable. When the contracts or terms are “not just,” this Act gives the authority to the courts. Therefore, the courts may render an order that such contracts or terms shall only be enforceable to the extent that they are fair and reasonable according to the circumstances in the case-by-case exercise of their discretion, which follows the methods of section 10.²⁰⁵

Terms of Service Agreements (TOS) are the contracts between users and internet service providers (ISPs). They are generally governed by the contract law under Thai Civil and Commercial Code (the CCC) because both are private parties who enter into the agreements.

²⁰² สุพจน์ ภูมานะชัย, คู่มือศึกษาสาระสำคัญของพระราชบัญญัติว่าด้วยข้อสัญญาที่ไม่เป็นธรรม พ.ศ. 2540, พิมพ์ครั้งที่ 3, กรุงเทพมหานคร: สำนักพิมพ์นิติธรรม, 2549), น.12. (Supot Kumanachai, Handbook of Study on the essence of the Thai Unfair Contract Terms Act B.E. 2540, 3rd ed. (Bangkok: Nititham Press, 2006), p.12.)

²⁰³ Formation of contract means one party makes an offer which is accepted by another party and both parties have a mutual intent to be legally bound by the contract regardless of one party having a strong bargaining power and prescribing such unfair term in advance. ; See Sanankorn (Champi) Sothibundhu, *supra* note 199, at 516.

²⁰⁴ *Id.* at 517.

²⁰⁵ *Id.* at 518; See Section 10 of this Act, it states that “*In determining to what extent the terms be enforceable as fair and reasonable it shall be taken into consideration all circumstances of the case, including:*

(1) *good faith, bargaining power, economic status knowledge and understanding, adeptness, anticipation, guidelines previously observed, other alternatives, and all advantages and disadvantages of the contracting parties according to actual condition*

(2) *ordinary usages applicable to such kind of contract;*

(3) *time and place of making the contract or performing of the contract;*

(4) *the much heavier burden borne by one contracting party when compared to that of the other party.”*

However, if those terms of service agreements are applied by Thai Civil and Commercial Code (the CCC) based on the freedom of contract, it seems to be unfair for the online users because they are taken advantage by the ISPs.

Thus, the writer considers that the Unfair Contract Terms Act B.E. 2540 must be taken into account as the followings.

General principle of unfair contract terms under this Act can be found in the first paragraph of section 4²⁰⁶ stating that, *“The terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract or in a contract of sale with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract or the buyer an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.”*

According to the said section, the scope of application of this Act concerning “No Right of Survivorship” term in the TOS consists of three conditions as follows;

(1) There have been found the terms in the following contracts:

(1.1) the terms in the contract between the consumer and the business, trading or professional operator, or

(1.2) the terms in the standard form contract, or

(1.3) the terms in the contract of sale with right of redemption.

(2) Such terms render the business, trading or professional operator, or the party prescribing the standard form contract, or the buyer **an unreasonable advantage over the other party.**

²⁰⁶ พินัย ณ นคร, “กฎหมายว่าด้วยข้อสัญญาที่ไม่เป็นธรรม : แนววิเคราะห์ใหม่เชิงเปรียบเทียบ,” วารสารนิติศาสตร์, ปีที่ 30, ฉบับที่ 4, น. 546, 582-583 (2543). (Pinai Nanakorn, “Unfair Contract Terms Law: Comparative Analysis,” Thammasat Law Journal, Vol.30, Iss.4, p. 546, 582-583 (2000).)

(3) Such terms shall be regarded as **unfair contract terms**, and **shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.**

To consider **(1.2) the terms in a standard form contract**, TOS is an adhesion of contract, known as a clickwrap agreement. As its characteristic, it will be considered the standard form contract under section 3 of this Act, stating that “*Standard form contract means written contract in which essential terms have been prescribed in advance, regardless whether being executed in any form, and is used by either contracting party in his business operation.*”

Terms of Service Agreement (TOS) in the form of written electronic contract has been prescribed in advance by internet service providers (ISPs), and is used for the services of ISPs. Thus, all terms contained in TOS are governed by this Act, because TOS is considered the standard form contract.

With respect to status of the parties, it is apparent that the ISPs and the online users are inequality of bargaining power. Moreover, terms of services agreements, or the online adhesion of contracts are generally known as clickwrap agreements. They do not give any chance for users to negotiate with ISPs before signing up the online accounts in order to use the services. The users must click “I agree” or “I accept” if they would like to sign up or enroll online accounts to acquire the services such as email accounts, social media sites, and cloud storage services.

It can be noted that TOS is considered the standard form contract under section 3, and thus the terms contained in TOS fall within this Act in the first paragraph of section 4, regardless of whether users pay fees for using services.

To consider **(1.1) the terms in the contract between the consumer and the business, trading or professional operator**, online users are the parties to the standard form of contracts under this Act if they are considered “**consumers**” under section 3.

Section 3 states in part: “*other person entering into a contract so as to acquire property, service or any other benefits with remuneration*

*for however, the said entering into such contract shall not be for trade of such property, service or benefits*²⁰⁷

It can be clearly seen that an online user shall be considered a consumer, which consists of two conditions.

(1) A user enters into the terms of service agreements (TOS) **with remuneration**, and

(2) Such executing of the contracts is **not for a commercial purpose**.

In this case, online users utilize the services for personal use not for commercial purpose.

Moreover section 3 is intended to provide a broader language in the term of **“with remuneration”** instead of using the term of “paying remuneration.” It could be elaborated that users entering into the contracts so as to acquire property, service or any other benefits with the remuneration are deemed to be consumers, regardless of whoever paying the remuneration to ISPs for the use of services.²⁰⁸

From the writer’s point of view, the users entering into the services can be categorized into two types: (1) users with remuneration by paying the fees to the ISPs, and (2) users without remuneration by not paying fees or giving anything to the ISPs.

²⁰⁷ Section 3 the Unfair Contact Term Act B.E. 2540 states that “ *consumer means a person entering into a contract in the capacity of a buyer, lessee, hire-purchaser, borrower, insured or other person entering into a contract so as to acquire property, service, or any other benefits with remuneration for however, the said entering into such contract shall not be for trade of such property, service or benefits, and it shall mean to include a person entering into a contract in the capacity of a guarantor of the said person who does not execute the same for trade as well.*”

²⁰⁸ จรรย์ ภักดีธนากุล. “สรุปสาระสำคัญของพระราชบัญญัติว่าด้วยข้อสัญญาที่ไม่เป็นธรรม พ.ศ.2540” *จุลพาห* ปีที่ 45 ฉบับที่ 1, น.77, 86-87 (ม.ค.-มิ.ย. 2541) (Charan Phakdithanakun, “The concept of the Unfair Contact Term Act B.E. 2540” *Dulpaha* Vol.45 Iss.1, p.77, 86-87 (January-June 1998); อรรยา สิงห์สงบ, *กฎหมายว่าด้วยสัญญา*, พิมพ์ครั้งที่ ๒ (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2550), น. 233. (Aunya Singsangob. *Contract Law*, 2nd ed. (Bangkok: Winyuchon Press, 2007), p.233.).

In case of (1) users with remuneration, the users shall be considered “consumers” under section 3 because the ISPs receive the remuneration from the users or others pay fees for users’ use of services.

In case of (2) users without remuneration, the users acquire free services. Therefore, such users shall not be considered “consumers” under section 3. Even though the ISPs receive the remuneration, e.g. profit through advertising, and profit through data collection²⁰⁹ from advertising companies as the third party (not contractual party in TOS), they do not receive the remuneration from the service users.

According to “professional operator” under section 3, the internet service providers (ISPs) are considered “business or professional operators” under section 3 of this Act²¹⁰ because the internet service providers (ISPs) have their ordinary course of business, and enter into the contracts in order to supply services to consumers.

Noticeably, even though the users not paying fee or giving anything to the ISPs are not considered consumers under section 3, they are entitled to bring a case of unfair contract term against the ISPs under section 4, according to the terms in the standard form contracts.

Therefore, under the scope of application of this Act, the two types of users who pay fees, or do not pay fees for using service are entitled to file a lawsuit in unfair contract terms against the ISPs in accordance with the first paragraph of section 4, because the terms are in the contract between the consumer and the business, trading or professional operator, or the terms are in the standard form contract.

²⁰⁹ Investopedia, *How do Internet companies profit if they give away their services for free?*, available at <http://www.investopedia.com/ask/answers/040215/how-do-internet-companies-profit-if-they-give-away-their-services-free.asp> (last visited January 1, 2016).

²¹⁰ Section 3 Thai Unfair Contract Term Act B.E. 2540; **Business, trading or professional operator** means “a person entering into a contract in the capacity of a seller, lessor, seller by hire-purchase, lender, insurer or any person entering into a contract so as to supply property, service or any other benefits; in any case, such entering into the contract must be for the trade of such property, service or benefits according to their ordinary course of business.”

Under Thai Unfair Contract Terms Act B.E. 2540, it does not explicitly prescribe that the contractual term which shall be deemed unfair must consist of two types of unfairness: (1) the substantive unfairness in content of the term, and (2) the procedural unfairness in executing the contract. Possibly, when the court determines whether such term is unfair, it may consider only the content of the term the party prescribes in advance to render an unreasonable advantage to another party (the substantive unfairness) without considering the unfairness during the process of making contact (the procedural unfairness). Thus, this law should be explicitly prescribed the determination of unfairness in the contract term for exercising court's discretion. To be considered an unfair contract term shall consist of a procedural and a substantive unfairness. The separation of unfairness appears in U.C.C. § 2-302.²¹¹

As above mentioned, the writer would examine the unfairness of "No Right of Survivorship" clause in TOS by considering two types of unfairness.

By way of analysis of **the procedural unfairness** in the process of the formation of contract under section 10 of this Act, it states in part that *"In determining to what extent the terms be enforceable as fair and reasonable it shall be taken into consideration all circumstances of the case, including: (1)good faith²¹², bargaining power, economic status, knowledge and understanding,..."*

The circumstance of bargaining power and economic status of parties to the TOS is applied to examine the procedural unfairness.

The terms of service agreement (TOS) is considered the contract of adhesion or standard form contract, because it is the written contract that its contents of terms and conditions have been prescribed in advance by the ISPs based on a take-it-or-leave-it basis. Moreover, TOS is executed by the inequality of bargaining power of parties. It is undeniable that TOS is the one-side drafted contract which has been done by the ISPs who are the party with superior bargaining power. The ISPs have absolute power over executing agreements and controlling the contents. There is no chance for online users in order to negotiate or change the

²¹¹ See Pinai Nanakorn, *supra* note 206, at 587.

²¹² *Id.*(explaining that Procedural Unfairness should not be referred to "Good Faith.").

contents in the TOS. Thus, the process of making TOS is considered the procedural unfairness because of unequal bargaining power.

Whether the location of “No Right of Survivorship” clause in TOS is noticeable must be taken into account as one of various factors in determining procedural unfairness. According to Yahoo’s and iCloud’s TOS, “No Right of Survivorship” clause has been prominently seen in these TOS,²¹³ so it is not effectively hidden. Thus, the Thai users cannot argue that this clause is procedural unfairness from the lack of notice scenario.

However, “knowledge and understanding” is also the circumstance to examine procedural unfairness.²¹⁴ The assessment of contractual parties’ knowledge and understanding may consider, for example, whether language used in contracts is simple and easy to understand for parties, whether the size of letters is apparently seen, or educational background and experience.²¹⁵ In writer’s opinion, in the event of Thai users who are laymen and are not the English native speakers, they may claim on the “knowledge and understanding” under section 10 of this Act as the matter of procedural unfairness with the reason that they do not have the education background in English and they do not fully understand the entire terms of service agreements including the legal result of No Right of Survivorship clause during the process of signing up the accounts under TOS.

In reality, more and more terms of service agreements, known as standard form contracts have been rapidly increased because in business world, the economic and industrial system needs to reduce transaction cost or administrative cost in making contracts with consumers, e.g., a time-consuming negotiation with each online user, and the high cost for each drafted contract to satisfy each user.

²¹³ See Figure 3.1 and 3.2

²¹⁴ วิลัยพร เจียรกิตติวงศ์, “ความไม่เหมาะสมของหลักเกณฑ์ในการพิจารณาข้อสัญญาที่ไม่เป็นธรรมตามกฎหมายว่าด้วยข้อสัญญาที่ไม่เป็นธรรม,” (วิทยานิพนธ์มหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2555), น. 94-95. (Wilaiporn Jiarakittiwong, “Flaws surrounding the criteria for determining unfair terms under the law of unfair contract terms,” (Master of Laws Thesis Thammasat University, 2012), p.94-95.)

²¹⁵ *Id.*

Consequently, the basic purposes of the standard form contract are for providing convenience to ISPs and rapidly forming agreements.²¹⁶

It can be seen that if the courts consider only the procedural unfairness, it seems to be unfair to the internet service providers (ISP) because all standard form contracts have been drafted in advance by ISPs who have superior bargaining power.

The substantive unfairness must be taken into consideration to examine the unfairness of content of any term in contracts.

Under the third paragraph of section 4, an unfair contract term is *“to render unreasonable advantage to a business or professional operator, while a consumer is obliged to comply or bear more burden than that could have been anticipated by a reasonable person in normal circumstance.”*

Considering that whether “No Right of Survivorship,” “Non Transferability,” or “similar term” by so-called ‘noninheritability term’ is the substantive unfairness, it prohibits distribution of digital assets after death.

In the writer’s opinion, the restriction of the users’ ownership rights over their digital property after death is unfair to the users, because the users have invested time and effort, and also their originality and creativity in creating such digital assets, constituting copyright works.

By way of illustration, a famous photographer has lost his physical photo collections taken by his own originality and his creativity, constituting his copyright works; however, he still has digital photos backed up via his iCloud account. What will happen if he passes away? No one in his family knows his username and secured password to access to his digital photos. Due to the “No Right of Survivorship” term, all of the contents including his photos will be permanently deleted. Such digital photos are worth quite a lot of money.

Therefore, it is unfair for the users whose digital assets shall be bequeathed to their heirs under the succession law. Consequently, the users’ heirs

²¹⁶ Krongvika Aphaivongs, “Legal Measures on virtual property transaction in online games” (Master of Laws Thesis (English Program) Thammasat University, 2014), p.75.

shall obtain all digital assets subject to the intestacy law, because the digital assets shall be recognized by the law as the intangible property and copyright work.

The “No Right of Survivorship” term prohibits the users’ right to bequeath the estate to their heirs, together with restricts the heirs’ right to acquire the estate. Therefore, this causes the online users to be obliged to comply or bear more burden than that which could have been anticipated by a reasonable person in normal circumstances under section 4 and section 10 of Thai Unfair Contract Terms Act B.E. 2540. Whereas, even ISPs offer the base-level free service, they also gain a lot of benefits, known as “remuneration” under section 3 of this Act, from the paid-for upgraded service for which the online users pay fees, e.g. iCloud storage upgrades.²¹⁷ Moreover, the ISPs gain advertising revenue from the advertising companies like e-commerce companies such as advertising fees in the event of the free service; the online users’ heirs are unable to obtain the digital assets.

According to iCloud Terms and Conditions, even if the users use the iCloud storage upgrades service by paying monthly fee, the prominent “No Right of Survivorship” term is still contained in terms of service agreement (TOS), resulting in the deletion of all digital assets after death.

Upon comparison of gaining advantages between the ISPs and the online users under section 4 and section 10, “No Right of Survivorship” term prohibiting the distribution of digital assets is considered the unfair term under Thai Unfair Contract Terms Act B.E. 2540. However, this Act does not provide the complete protection to the online users because the interpretation of the unfair contract terms according to section 4 is uncertainty since the word ‘fair and reasonable’ depends on the discretion of the courts.

4.2.2 Public Order or Good Morals under Thai Civil and Commercial Code (CCC)

Public order or good morals under Thai law is the principle of law aimed to serve justice and preserve the public interest in society. It exists in almost all legal systems, and is used as the legal framework for private parties who are doing juristic act or making contract. Hence, individuals have the freedom to any contract

²¹⁷ See iCloud Terms and Conditions, available at <http://www.apple.com/legal/internet-services/icloud/en/terms.html> (last visited June 27, 2016).

or agreement based on the principles of the autonomy of the will and freedom of contract²¹⁸ as long as it is not contrary to public order or good morals.²¹⁹ In addition, the legal consequence of legal transactions contrary to public order or good morals is void.²²⁰

To understand the characteristic of a declaration of intention concerning public order, public order means a condition that citizens live together peacefully in social security. Therefore, if the declaration of intention leads to the destruction of social security, e.g. the declaration of intention has a major impact on social security, administration of justice, interests or economic system of country, family institution, as well as public security, such action is contrary to public order, and thus it becomes unenforceable. For instance, the private parties have the agreement—they are able to force another party by themselves for compulsory performance instead of making a demand to courts. Moreover, there are more examples similar to the agreement of lawyer fee depending on the final judgment, the purchase contract of human organs, and the purchase contract of sexual services.²²¹

To understand the characteristic of the law regarding public order, its aim is to refrain the public interests from being destroyed by the private parties in

²¹⁸ อภิสิทธิ์ ไตรระหันทต์, “ความสงบเรียบร้อยของประชาชน,” (วิทยานิพนธ์มหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2556), น.24. (Aphisit Teirahunt, “Public Order,” (Master of Laws Thesis Thammasat University, 2013), p.24.)

²¹⁹ Section 150 of the CCC states that “*An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals.*” Section 151 of the CCC states that “*An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good moral.*”

²²⁰ See Section 172 of the CCC states that “*A void act cannot be ratified, and its nullity may be alleged at any time by any interested person.*”

The return of a property arising from a void act shall be governed by the provisions on Undue Enrichment of the Code.”

Section 406 states that “*Any person who, through an act of performance made by another person or in any other manner, obtains something to the prejudice of such other person without legal ground, must return it to the latter. The acknowledgment of the existence or non-existence of a debt is deemed to be an act of performance.*”

The same provision shall apply if something has been obtained on account of a cause which has not been realized or of a ceased to exist.”

²²¹ See Aphisit Teirahunt, *supra* note 218, at abstract.

declaration of intention, for example, provisions prohibiting private parties from making agreements differently from legal requirements in such provisions, e.g., contractual forms, acts causing to prosecution, status and capacity of people, **law of property, family and succession**, characteristic of contracts, as well as the law protecting the interest of third party or the weak party, which has the most influence on laws concerning public order.²²²

In addition to good morals, good morals of people, which are the sphere of private parties' declaration of intention, are parts of public order with respect to customs and religions. Morality is of importance in social living.²²³

In general terms of "public order and good morals," it is broadly prescribed in section 150, 151 of the CCC. However, its definition is not provided by the law, but depends on court's discretion on the basis of case by case.

For better understanding to help solve the issue of whether "No Right of Survivorship" clause is void as the matter of public order under Thai law, the writer would suggest to learn the public policy in US legal system. Public policy mainly concerns notions of public, which are divided into three main categories: public interest, public morality, and public security.²²⁴ First, public interest tries to maintain a balance between the private arrangement of citizens and public arrangements. Second, public security aims to protect the well-being and security of citizens from further danger caused by outside threats, which leads to the elimination of the public sphere. Third, public morality maintains between the ties and mutual identities of citizens and societal life.²²⁵

Regarding the public order under Thai Law and the public policy under US law, both mainly aim to protect public interest, public security, and good morals.

According to "No Right of Survivorship" clause in TOS under law of contract, this clause prohibits the inheritance and ignores the will of testators under

²²² *Id.*

²²³ *Id.*

²²⁴ Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 Neb. L. Rev. 685, 689(2015).

²²⁵ *Id.*

succession law, which is the law regarding public order under Thai law, because law of property family and succession are related to the public interests.²²⁶ To support, the doctrine of public policy in common law legal system is related to various areas of law, for example, employment law, arbitration law, contract law, conflict of laws, and family law.²²⁷ This illustrates that law of property, family and succession is the area of law concerning public order or public policy in both legal systems.

Even though either Thai courts in civil law legal system or courts in the United States in common law legal system do rely on the different systems, the writer is of the view that a precedent²²⁸, which is the judicial decisions to be applied in the decisions of later cases by analogy with similar question of laws or facts, would be the way to find out the legal effect of “No Right of Survivorship” clause in TOS.

However, there has been no precedent or even a court decision in both legal systems concerning whether this clause is void as a matter of public order. Therefore, the writer would study this point by analogy with US experiences or opinions from the several scholars. In fact, many scholars and law students have attempted to reform the legislation and make suggestions about digital estate planning, but such knowledge has not been clarified the legal result in the alteration of American succession law by contractual terms in TOS to prohibit the inheritance of property.²²⁹

Hence, it may raise an argument that the wills, a time-honored method of distribution of property, have made by the testamentary intent of the decedent, so the contracts should only be valid when they are bound by principles of succession law. It means when the contracts facilitate the transfer of property as the

²²⁶ See Aphisit Teirahunt, *supra* note 218, at abstract.

²²⁷ See Public Policy in U.S. common law system; See Farshad Ghodoosi, *supra* note 224, at 687.

²²⁸ William M. Lile et al., Brief Making and the Use of Law Books 288 (Roger W. Cooley & Charles Lesley Ames eds., 3rd ed. 1914) (explaining that “*In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts.*”).

²²⁹ See Natalie M. Banta, *supra* note 68, at 802-803.

testamentary intent of the deceased. However, the new form of contracts, clickwrap agreements or terms of services agreements, have been emerging. Undeniably, they damage the nature of American succession law.²³⁰

Some scholars strongly argue that the clause threatening the inheritance of assets should be unenforceable as against public policy²³¹ because it violates the intestacy law of “[A]merican succession law by allowing parties to opt out of one of the most fundamental rights of property –the right to devise.” Although the contracts may be valid under the principle of contract law, the said clause of contracts may violate the principle of succession law. As a result, such “No Right of Survivorship” clause inevitably prohibits the inheritance of personal digital assets should be void as the matter of public policy.²³²

Thus, “No Right of Survivorship” clause restricts the right of survivorship and transferability of digital assets. In the other words, it prohibits the right of disposition of digital assets on death.

In the writer’s point of view, the writer disagrees that “No Right of Survivorship” clause is contrary to public order under Thai law as the following reasons:

(1) Subject to the principle of succession law in the light of testate succession (the individual leaves a will on death), the estate will be distributed as his bequest in the will. For example, the individual can exclude some statutory heirs from their estate, can give his whole estate to others, or even can donate all estate for charity by making the will. It can be seen that the testator has the legal right to disinherit the statutory heirs; the testator’s intent is legally recognized by law even to restrict the right of disposition of the estate on death;

(2) As the matter of public order, it must affect the public interest. In the case of each online user bound by “No Right of Survivorship” clause, it is

²³⁰ *Id.*

²³¹ See Natalie M. Banta, *supra* note 68, at 854.

²³² See generally *Id.* at 803; Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. Rev. 1643 (2012); John Conner, *Comment, Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 3 Est. Plan. & Community Prop. L.J. 301 (2011); Kristina Sherry, Note, *What Happens to Our Facebook Account When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 Pepp. L. Rev. 185 (2012).

considered as private interest of the user and his heirs; the digital estate is not inheritable to the heirs; and

(3) If this clause becomes void (unenforceable by law) as the matter of public order, the writer is of the view that this legal effect seems to take more advantage of ISPs particularly in usage of free services. Possibly, in the sooner future, this may indeed lead to the difficulties of signing up the accounts for the Thai users in utilizing online service because the ISPs will be aware of providing services through TOS to the Thai users.

For all the reasons mentioned above, the “No Right of Survivorship” clause is not void as the matter of public order, but the writer considers that it is unfair, and hence, the Thai courts may enforce such clause as the reasonable result under Thai Unfair Contract Terms Act B.E. 2540.

In summary, the online users have the ownership rights over their digital assets as property, which can be passed on to the heirs upon death as digital estate under law of intestacy. The “No Right of Survivorship” clause is not void as the matter of public order, but such term is unfair to the online users who enter into the standard form contracts provided by the internet service providers (ISPs). However, to access to the deceased’s accounts to manage, administer, and obtain the digital asset needs to be considered along with the privacy interests of the users, because when the heirs or executors access to online accounts, they will access to the entire digital assets both economical and sentimental assets, which is worth obtaining. Apart from the valuable assets, they will also access to the confidential data and information of the deceased. This privacy issue will be the strong argument. Therefore, it is important to find the suitable solution to maintain the balance between acquiring economic and sentimental benefits for the heirs and protecting the right to privacy of the deceased users.

4.3 The User’s Right to Privacy under Existing Laws

4.3.1 Thai Civil and Commercial Code (Tort Law)

Section 420 states that “A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or *any right of another*

person, is said to commit a wrongful act and is bound to make compensation therefore.”

Even though the deceased user is not considered the “person,” and not granted any right by the law,²³³ his or her family rights will be protected under section 420 as “any right of another person”, e.g. right of privacy.²³⁴

“Such right to personality consists of Privacy, that protects right to be let alone no matter whether public figure or not, and includes the Self-Determination, Reputation, and Dignity without considering that whether spreading the message that violates the truth or not.”²³⁵

As the above statement, the right to privacy is part of right to personality.

Even though the deceased user is not considered the “person” in accordance with the Tort law, the privacy right of his or her family such as reputation, dignity will be protected by the law. As a result of digital asset management, the digital executors may violate the privacy right in some particular cases. For example, the heir gives the consent to the digital executor to access to the online accounts to manage digital assets, and it appears that some private pictures of the deceased are released to the public, causing the ruination of reputation’s family members of the deceased. In this case, such executor is liable for this wrongful act under section 420 to the deceased’s heirs or the deceased’s family members.

²³³ Section 15 the Thai Civil and Commercial Code states that “*Personality begins with the full completion of birth as a living child and ends with death.*”

A child *en ventre sa mere* is capable of rights provided that it is thereafter born alive.”

²³⁴ จิตติ ดิงศภัทย์; ปรับปรุงโดย เขมภูมิ ภูมิถาวร, ชวิน อุ่นภัทร, อำนาจ ตั้งศิริพิมาน, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ เรียงมาตรา ว่าด้วยจัดการงานนอกสั่ง ลากมิควรได้ ละเมิด บรรพ 2 มาตรา 395-452

(กรุงเทพมหานคร: กองทุนศาสตราจารย์จิตติ ดิงศภัทย์, 2555), น.119. (Jitti Thingsabadh; revised by Khemapoom Bhumithavara, Chawin Oinpat, Amnart Tangkiriphimarn, Commentaries on Thai Civil and Commercial Code: Management of affairs without mandate, Undue enrichment, and Tort Laws Title II Section 395-452 (Bangkok: Foundation of Jiti Thingsabadh, 2012), p.119).

²³⁵ พิเศษ น้อยวงศ์คลัง, “สิทธิอย่างหนึ่งอย่างใด,” (วิทยานิพนธ์มหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2557), บทคัดย่อ. (Piset Noiwangklang, “The other rights of the another,” (Master of Laws Thesis Thammasat University, 2014), abstract.)

4.3.2 Thai Penal Code section 366/4, and section 327

4.3.2.1 Criminal Law section 366/4 with respect to the offence of insulting of the deceased

Section 336/4²³⁶ states that “Whoever, doing by any means to insult or deride the deceased person, shall be punished with imprisonment not exceeding three months or fined not exceeding five thousand Baht, or both.”

Acting by means to insult or deride the deceased, the person violates his or her family’s rights, dignity, and reputation.²³⁷

4.3.2.2 Criminal Law section 327 with respect to the offence of defamation of the deceased

Section 327 states that “Whoever, imputing anything the deceased person before the third person, and that imputation to be likely to impair the reputation of the father, mother, spouse or child of the deceased or to expose that person hated or scammed to be said to commit defamation, and shall be punished as prescribed by Section 326.²³⁸”

According to both criminal offences, these provisions protect the deceased’s family rights, dignity, and reputation. Even though the access to the deceased accounts is conducted by the executors who are appointed and given consent by heirs, the executors destroy the deceased family’s rights, dignity, or reputation by means of act provided under these provisions. They will be liable to the punishments.

²³⁶ มาตรา ๓๖๖/๔ “ผู้ใดกระทำความผิดด้วยประการใด ๆ อันเป็นการดูหมิ่นเหยียดหยามศพ ต้องระวางโทษจำคุกไม่เกินสามเดือน หรือปรับไม่เกินห้าพันบาท หรือทั้งจำทั้งปรับ” (เพิ่มโดยพระราชบัญญัติแก้ไขเพิ่มเติมประมวลกฎหมายอาญา (ฉบับที่ ๒๒) พ.ศ. ๒๕๕๘).

²³⁷ The Rationale behind the Penal Code Amendment Act (No. 22) B.E. 2558 (2015)

²³⁸ Section 326 of Thai Penal Code states that “Whoever, imputes anything to the other person before a third person in a manner likely to impair the reputation of such other person or to expose such other person to be hated or scorned, is said to commit defamation, and shall be punished with imprisonment not exceeding one year or fined not exceeding twenty thousand Baht, or both.”

CHAPTER 5

ANALYSIS OF LEGAL APPROACH DEVELOPMENT FOR MANAGING THE DECEASED'S DIGITAL ASSETS IN THAILAND

5.1 Problems on the Access and Management of the Deceased's Digital Asset

According to the study on accessing and managing the deceased users' digital assets through online accounts in Thai laws, the access to digital assets is usually governed by the terms of service agreement (TOS) rather than by property law. It appears that Thai users' heirs are unable to access to the deceased's accounts to acquire the digital assets, even though they have the legal rights to enjoy the benefits of these digital assets. In fact, the users have the ownership rights over their digital assets as property as well as the copyrights over the works created by the users, which are recognized by law.²³⁹ Therefore, the digital property shall be passed on to the heirs after the death of the users.

Nevertheless, the terms of service (TOS), particularly iCloud's and Yahoo!'s terms, contain the prominent clause "No Right of Survivorship," or other similar terms, which generally restrict the right of survivorship and transferability of the digital assets in order to protect the online users' data privacy and to reduce the ISP's administrative cost. As a result, these terms inevitably prohibit the succession of digital assets by the online users' heirs, leading to the deletion of digital assets after death. In other words, it prohibits the succession of the estate under Book VI Succession, Thai Civil and Commercial Code. As a result, the heirs will lose the whole categories of financial and sentimental assets. These terms lead to the inheritance problems of digital assets.

Even though the contracts of adhesion, known as the terms of service agreements, may be enforceable, the terms prohibiting digital asset inheritance seem to be unfair for the users under Thai Unfair Contract Terms Act B.E. 2540. With

²³⁹ Thai Civil and Commercial Code and Thai Copyright Act B.E. 2537

respect to these terms, the heirs or executors are unable to access to the deceased's accounts to manage, administrate, and gain the value of the digital assets.

Despite the fact that the heirs have the legal right to inherit the digital estate, there is no existing law in Thailand to facilitate the heirs to access and manage the digital assets.

Compared to the Thai laws, some states in the United States have passed laws relating to the access and management of digital assets after death, since 2005. The laws have been developed to respond to the situations in the Internet age. According to such laws, the executors are allowed to access to the deceased's online accounts, i.e. email accounts, social networking accounts, electronically stored documents, and digital accounts in order to obtain, manage the assets, or terminate the online accounts. Furthermore, the Uniform Law Commission (ULC) provides the legal guidance to address the significant provisions for each state's legislative enactment. That is Revised Uniform Fiduciary Access to Digital Assets Act (2015). This Act "extends the traditional power of a fiduciary to manage tangible property to include management of the person's digital assets."²⁴⁰

It can be clearly seen that either American or Thai users, both of them are online citizens who are facing the same problem concerning the disposition of digital assets after death. Notably, the American users have initially concerned about digital assets planning and its value. Thus, US laws come to satisfy the users' wishes regarding their estate planning or the heirs' access to the online accounts. Also, such laws reduce the loss of digital assets after death.

However, the Thai users will shortly realize the significance of management of digital assets after death, because the growth of the number of the Internet users is rapidly increasing. Hence, it is necessary to have a particular law dealing with this issue in Thailand.

²⁴⁰ Fiduciary Access to Digital Assets Act, Revised (2015), or Revised UFADAA

5.2 Lesson learnt from US Laws

Since 2005, certain states in the United States have passed legislation on the access and management of the digital assets after the death of the online users. Such state statutes allow the executor or administrator of an estate to access and manage digital assets initially in e-mail contents, social networking sites, electronically stored documents, and then extended to digital assets and accounts in 2014.²⁴¹ However, this legislation leads to the problem on the privacy of account users and persons whom users have electronically communicated with.

Later, in 2015 Revised Uniform Fiduciary Access to Digital Assets Act (2015), known as Revised UFADAA, resolves all relevant privacy issues, and help compromise between acquiring the economic and sentimental value and protecting users' privacy interest. For example, the internet service providers (ISP) shall be granted immunity from liability for acts or omissions done in good faith. Recently, at least eighteen states – Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Nebraska, North Carolina, Oregon, South Carolina, Tennessee, Washington, Wisconsin, and Wyoming – have already enacted these statutes in accordance with the Revised UFADAA.²⁴²

According to an in-depth study on either US state statutes or the Revised UFADAA (RUFADAA), the writer considers that the Revised UFADAA is suitable for Thai legal system, rather than the state statutes enacted before Revised UFADAA because this Uniform law clearly provides all detailed relevant issues, in addition to a compromise between the fiduciary's need to access to digital assets and the privacy interest of users and persons whom users have electronically communicated with.

The fiduciary is a trusted person with legal authority to manage another's property, and the duty to act in that person's best interest. The revised UFADAA addresses four common types of fiduciaries as the following:

²⁴¹ See Kristina Sherry, *supra* note 55, at 216-220; See Natalie M. Banta, *supra* note 68, at 830; See Rachael E. Ferrante, *supra* note 146, at 51-54; See Ashley F. Watkins, *supra* note 56, at 220-223; See Samantha D. Haworth, *supra* note 25, at 541-542.

²⁴² Uniform Law Commission, *Legislative Tracking*, available at [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited July 21, 2016).

- 1) Executors or administrators of deceased persons' estate;
- 2) Court-appointed guardians or conservators of protected persons' estate;
- 3) Agents appointed under powers of attorneys; and
- 4) Trustees.

The revised UFADAA supports the online users to make their digital estate plans by their own directions to manage or delete digital assets. However, it is possible that there is a conflict of instructions. A **three - tier priority system** under section 4, a fundamental concept, will be used for solving this issue. Also, this Act makes the user's direction legally enforceable.

The three - tier priority system of Revised UFADAA mainly focuses on the user's direction for disclosure of digital assets.

“(a) A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(b) If a user has not used an online tool to give direction under subsection (a) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(c) A user's direction under subsection (a) or (b) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.”

It can be seen that subsection (a) gives top priority to the user's wishes as expressed using **an online tool**.²⁴³ The examples of online tools are “Legacy Contact” provided by Facebook and “Inactive Account Manager” provided by Google.

²⁴³ **Online tool** is an electronic service provided by a custodian (an internet service provider as mentioned in this thesis) that *“allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.”*

Therefore, if the internet service provider (ISP) allows the user to provide directions for handling those digital assets in case of the user's death or incapacity, and the user does so, it provides the clearest possible indication of the user's intent and is specifically limited to those particular digital assets. Thus, **the ISP or the named person** may manage digital assets as user's directions.

If the user does not give any direction via the online tool, or the ISP does not provide the online tool, but the user makes the clear provisions in **an estate plan**, i.e. a will, power of attorney, or other written record for the disposition of digital assets, it can be seen that (b) the user's directions become effective in legal. Thus, the named person has a duty for managing the user's digital assets in accordance with the user's wishes.

Both subsections (a) and (b) are to protect the privacy and respect the intent of the account users via the online tool or the estate plan.

If the user provides no other directions, the terms-of-service (TOS) governing the account will be applied. However, if the terms-of-service do not address fiduciary access to digital assets, the default rules provided in this Uniform Act will be applied.²⁴⁴

²⁴⁴ Comment of section 4 Revised UFADAA

Table 5.1: Summary of Section 4 Revised UFADAA (2015)

Process	Instructions	Results
Stage 1 Top priority	Online Tool provided by ISPs, e.g. Google, Facebook	The user's wishes (the user's directions) via the online tool override the traditional estate plan: a will, trust, power of attorney, and other written record.
Stage 2	None of Online tools	The user's wishes (the user's directions) can be found in the traditional estate plan.
The user's directions under stage (1) and (2) override a contrary provision in a terms of service agreement that does not require the user to affirmatively act concerning the disposition and access of digital assets, and separately from the user's assent to the general terms of service agreement.		
Stage 3	No any direction (asserted in both the online tool and the traditional estate plan)	The terms of service (TOS) will be applied. Noted that if such terms of service do not address fiduciary access to digital assets, the default rules of Revised UFADAA will be applied.

(Source: National Conference of Commissioners
on Uniform State Laws (NCCUSL) Copyright © 2015)

As **the three - tier priority system** of Revised UFADAA, the writer strongly agrees that this system will be suitable to Thai legal system because it provides a clear process: how to manage digital assets and preserve privacy interests of users and others whom users responded to.

Thai legislation should adopt this aforementioned concept, requiring the appointment of a **digital executor** by the statutory heirs after the online account user's death in the event of no user's direction unless the user named the specific person or directed the internet service provider to manage or terminate the online account and digital assets via the online tool or estate plan as user's expressed wishes (the will or other written records).

There are two ways taken into consideration.

(1) Whether the user made his direction via the online tool provided by the ISP or estate plan (the will or other written records) to terminate the account or distribute digital assets to others.

(1.1) if a user used the online tool, the named person or internet service provider appointed by the user will take the management therefor as the user's wish.

(1.2) if the user does not use the online tool, the estate plan would be considered how to manage digital assets and whom a user appointed to handle.

(2) If the user has not named any specific person or directed any internet service provider via the online tool or estate plan, the digital executor appointed by statutory heirs will proceed his duty to access and manage digital assets in which the user has their rights or interests.

However, this digital executor is not allowed to access to **the contents of electronic communications**, e.g. instant text messages like Line, Skype, WhatsApp, Messenger, and iMessage unless the user give the consent therefor, the court decides to disclose the content of electronic communications, or the user expressly provides direction by using the online tool, will, or other written records evidencing the user's consent for the disclosure of electronic communication's contents.

Like a traditional succession of tangible property, the digital asset inheritance will be managed as the user's wish first. Then the digital assets will be passed on to the heirs as intestate succession, excluding the content of electronic communications according to the right to privacy of communications because the content is not considered the user's property.

In summary, only certain states in the United States have passed laws and regulations to govern the access and management of these digital assets after the death

of the online users since 2005 as several internet service providers, e.g. Apple, Facebook, Google, and Yahoo!, are located there, however, in European Union (EU) there was Annual Conference and General Assembly in 2015 concerning the Revised Uniform Fiduciary Access to Digital Assets Act (2015) which focused on the transfer of property and information at death or incapacity in a digital age²⁴⁵ held by the European Law Institute (ELI). The ELI and the U.S. Uniform Law Commission (ULC) collaborated on the study of whether this Revised UFADAA can be adapted to European Law. It can be seen that the US, EU, Asia and even global harmonization is of significance for reducing the gap between law and technology since the Internet becomes a part of human life.²⁴⁶ It is time for Thailand to raise the public awareness of disposition of digital assets, and also to develop our Thai legislation to catch up with the technologic development in the Internet age.

5.3 Observation for Further Study concerning Choice of Law and Forum clauses in TOS

Apart from Hotmail governed by the laws of the State of Washington and subject to jurisdiction in Washington, most of global internet service providers (ISPs), namely Shutterfly, Twitter, LinkedIn, Apple, Yahoo!, Facebook and Google, are each governed by the laws of the State of California and subject to jurisdiction in California. For example, choice of law and forum clause in Yahoo's Terms of Service is *"You and Yahoo each agree that the TOS and the relationship between the parties shall be governed by the laws of the State of California without regard to its conflict of law provisions and that any and all claims, causes of action or disputes (regardless of theory) arising out of or relating to the TOS, or the relationship between you and Yahoo, shall be brought exclusively in the courts located in the county of Santa Clara, California or the U.S. District Court for the Northern District*

²⁴⁵ European Law Institute (ELI), "Panel on the Revised Uniform Fiduciary Access to Digital Assets Act (2015)," Annual Conference and General Assembly, Vienna, September 2-4, 2015, available at <http://www.europeanlawinstitute.eu/about-eli/structure/general-assembly/ga-2015/panel-iv-fiduciary-access-to-digital-assets-feasibility-study-with-ulc/> (last visited July 22, 2016).

²⁴⁶ *Id.*

of California. You and Yahoo agree to submit to the personal jurisdiction of the courts located within the county of Santa Clara, California or the Northern District of California, and agree to waive any and all objections to the exercise of jurisdiction over the parties by such courts and to venue in such courts.”

In practice, even though the deceased user resides in a state where there is the statute dealing with the access and management of the deceased’s digital assets, the choice of law selection clause in TOS may override such state law. Also, the forum selection clause will be adopted to determine in which court’s jurisdiction any action may be brought, which in fact, it certainly leads to a barrier for family members of the deceased user.²⁴⁷

As above mentioned, the heirs or fiduciaries must also consider which state statutes are applied for each internet service provider. Nearly all of them include choice of law and forum selection clauses in their TOS. For instance, Idaho’s statute governing the disposition of the deceased’s digital assets may not apply to the internet service provider with the California choice of law clause in its TOS, even if the account holder resides in Idaho. In fact, the writer has observed the California legislation and found that there has been no either its state statute or the proposed statute which adopts the concept of Revised UFADAA in California. Therefore, the heirs of the deceased may never exploit the valuable digital assets as their right because the California choice of law clause in TOS may override the Idaho’s state law based on the residence of the deceased.

It can be seen that the matter of choice of law and forum clauses is the practical problem relating to the access and management of the deceased’s digital assets, because when the users enter into the terms of services agreements, they will be bound by all clauses including choice of law and forum clauses. Therefore, Thai lawmakers should timely propose the particular law dealing with the problems of digital asset inheritance to facilitate Thai users’ heirs in legally acquiring digital assets, even if the users are the contractual parties to the terms of service agreements organized by the ISPs, and they are also bound by the choice of law and forum clauses.

²⁴⁷ Jill Choate Beier, Esq., “Planning for Digital Assets,” New York Banker’s Association Trusts and Investment Conference, October 2, 2015, p.15.

In the case of litigation in Thailand, when the ISP does not allow the heirs to access to the online accounts in compliance with the TOS, the heirs who reside in Thailand or who have Thai nationality may make the claim by raising the issue of inaccessibility. The heirs have the legal right to access to the deceased's accounts.

In contrary, the ISP may counterclaim that the deceased user is bound by the choice of law and forum clause in the terms of service agreement the user made. As a result, the heirs or executors must comply with this contractual term. In Fact, most of the TOS and the relationship between users and internet service providers are governed by the laws of the State of California and subject to jurisdiction in California.

To consider **choice of forum clause**, Thai court also recognizes the concept of long-arm jurisdiction²⁴⁸ which extends the court jurisdiction to cover the case where the cause of action does not arise within Thailand, and the defendant is not domiciled within Thailand with the specific condition-- the plaintiff has Thai nationality or domicile within Thailand-- in accordance with section 4 ter of Thai Civil Procedure Code.

It states that *“The other plaint as provided other than the Section 4 bis, which the defendant is not domiciled within the Kingdom and the cause of action is not arose within the Kingdom, if the plaintiff has Thai nationality or domicile within the Kingdom, it shall be submitted to the Civil Court or to the Court within the territorial jurisdiction of which the plaintiff is domiciled.*

In the case of the plaint according to the first paragraph, if the defendant has the property subject to execution within the Kingdom, irrespective of temporization or performance, the plaintiff shall submit the plaint to Court within then territorial jurisdiction of which such property is situated.”

It must be noted that, according to the first paragraph of section 4 ter, if the plaintiffs have Thai nationality or have domiciled within Thailand, the writer gives an opinion that the Thai deceased user's heirs who are Thai or domicile in Thailand shall have the rights to files the case against the internet service providers (ISPs) because this provision extends the jurisdiction of the Thai court over the ISPs

²⁴⁸ Sorawat Wongkawepairot, “Liability for cloud computing under copyright law,” (Master of Laws Thesis (English Program). Thammasat University, 2011), p. 130.

who are not Thai nationality, or do not domicile in Thailand, or any property is not located within Thailand. Thus, the Thai court may establish the jurisdiction over the ISPs who have domiciled in other countries, however, the judgment rendered by the Thai court may not be recognized by the foreign court, and the foreign court may refuse to execute this judgment.²⁴⁹

To consider **choice of law clause**, an adhesion contracts containing the choice of law clause, known as the terms of service agreement (TOS), are the contracts between both private parties: the user who clicks “Agree” to accept all terms and conditions and the internet service provider who provides the services. This contract is generally governed by the contract law under Thai Civil and Commercial Code (the CCC). However, if such terms of service agreement are applied by Thai Civil and Commercial Code based on the freedom of contract, it seems to be unfair for the online users. Thus, Thai Unfair Contract Terms Act B.E. 2540 must be taken into consideration.

Having considered both procedural and substantive unfairness, the writer views that TOS is the one-side drafted contract which has been completely done by the ISP. The ISP has absolute power over executing agreements and controlling the contents. Thus, TOS is procedurally unfair. The choice of law selection clause is generally acceptable in online transaction contracts. Also, the user expressly consents to agree all clauses in TOS including this choice of law selection clause. As a result, this choice of law clause binds the user. However, if the parties do not select the governing law in the case of the dispute, the court will find the implied intention of the parties in accordance with section 13 of Conflict of Laws Act B.E. 2481.²⁵⁰

²⁴⁹ See กิตติวัฒน์ จันทร์แจ่มใส, “เขตอำนาจศาลคดีแพ่งและพาณิชย์ในไซเบอร์สเปซ: ศึกษาในเชิงกฎหมายเปรียบเทียบ,” (วิทยานิพนธ์มหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2552), น.82 (Kittiwat Chunchaemsai, “Jurisdiction concerning civil and commercial matters in cyberspace: A comparative law study,” (Master of Laws Thesis Thammasat University, 2009), p.82; See also กนกลักษณ์ อมรรวิทย์, “ปัญหาทางกฎหมายว่าด้วยข้อตกลงเลือกศาลในสัญญาธุรกิจการค้าระหว่างประเทศ,” (วิทยานิพนธ์มหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2552), น.1-2 (Kanokluk Amornworawit, “Legal problems concerning choice of court agreements in international business contract,” (Master of Laws Thesis Thammasat University, 2009), p.1-2.).

²⁵⁰ See section 13 of Conflict of Laws Act, B.E. 2481 states that “*The question as to what law is applicable in regard to the essential elements or effects of a contract is*

Moreover, the writer considers that, according to Thai Unfair Contract Term Act, the substantive unfairness conditions concerning the choice of law selection clause is not mentioned therein. Also, this clause is not against public order or good morals under the CCC. Thus, this clause is valid and enforceable.

It can be seen that the parties can generally agree which law shall be applicable to the contract through choice of law selection clause. This chosen law will be respected by Thai court. Notably, the law of another country (foreign law) other than Thai law will only be applied if it is not against the public order or good morals of Thailand.²⁵¹ However, the Thai court will apply such foreign law in case where there is a copy of relevant law involving to a Thai translation version provided to the Thai court.²⁵² Moreover, the foreign law is “the fact”, therefore, the parties shall allege and adduce in proof of such foreign law to the satisfaction of the court.²⁵³ If the parties are unable to prove in order to satisfy the court, the Thai court is able to

determined by the intention of the parties to it. If such intention, express or implied, cannot be ascertained, the law applicable is the law common to the parties when they are of the same nationality, or, if they are not of the same nationality, the law of the place where the contract has been made.

When the contract is made between persons at a distance, the place where the contract is deemed to have been made is the place where notice of acceptance reaches the offeror.

If such place cannot be ascertained the law of the place where the contract is to be performed shall govern.

A contract shall not be void when made in accordance with the form prescribed by the law which governs the effects of such contract.”

²⁵¹ See section 5 of Conflict of Laws Act B.E. 2481 states that “Whenever a law of a foreign country is to govern, it shall apply in so far as it is not contrary to the public order or good morals of Thailand.”

²⁵² Stefan Ewers, *Thailand: Validity of Clauses concerning Choice of Law, Choice of Court and Arbitral Awards in International Contracts* (last updated 14 February 2011), available at <http://www.mondaq.com/x/122820/Arbitration+Dispute+Resolution/Validity+of+Clauses+concerning+Choice+of+Law+Choice+of+Court+and+Arbitral+Awards+in+International+Contracts> (last visited April 30, 2016).

²⁵³ See section 8 of Conflict of Laws Act B.E. 2481 states that “Whenever the law of a foreign country which is to govern is not proved to the satisfaction of the Court, the internal law of Thailand shall apply.”

refuse to apply such foreign law, and the Thai internal laws shall be applied to the international contracts.²⁵⁴

As a result, the law governing the disposition of digital assets has been passed in Thailand and the deceased user resides here. Thus, the digital executor acting on behalf of the heirs of the deceased user enables to bring the case against ISP under Thai court jurisdiction. The question is whether the choice of law clause in the TOS between ISP and user can override the application of the new law which remains untested.

However, the global internet service provider (ISP) like Apple Inc. accepts the law and leaves some room for overriding its contract terms. To demonstrate, iCloud's TOS addresses the consequence of the death of users with No Right of Survivorship clause which states that *“Unless otherwise required by law, You agree that your Account is non-transferable and that any rights to your Apple 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.”*

According to iCloud's TOS, the writer suggests that Thailand should pass the law governing the disposition of digital assets, and this law should include the clear provision stating that *“any choice of law governing the effect of the terms of service agreement that prevents digital executor access is unenforceable.”*²⁵⁵

²⁵⁴ สุวัฒน์ ชัยวรมุขกุล, “การเลือกกฎหมายเพื่อใช้บังคับกับสัญญาระหว่างประเทศ,” วารสารนิติศาสตร์ ปีที่ 36 ฉบับที่ 2, น. 281, 295-296 (มิถุนายน 2550). (Supat Chaiworamukkun, “The selection of governing law to apply in international contract,” Thammasat Law Journal Vol.36 Iss.2, p. 281, 295-296 (June 2007).)

²⁵⁵ Victoria Blachly, *Uniform Fiduciary Access to Digital Assets Act: what UFADAA know*, 29-AUG Prob. & Prop. 8, 18 (2015); See section 5004 (c) An Act to Amend Title 12 of the Delaware Code relating to Fiduciary Access to Digital Assets and Digital Accounts states that *“a choice- of -law provision in an end user license agreement is unenforceable against a fiduciary action under this law by which designates law that enforces or would enforce a limitation on a fiduciary's access to or control over digital assets or digital accounts is void under this law.”*, available at <http://delcode.delaware.gov/sessionlaws/ga147/chp416.shtml> (last visited April 26, 2016).

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

According to the study on the problems of the access and management of the deceased users' digital assets in online accounts, it has been discovered that, in the present digital world, many people have numerous online accounts all over the world including Thailand, while most of them do not realize the value of digital assets stored in the online accounts as well the insecurity of online accounts left behind, such as identity theft, when they pass away. Compared to the traditional estate plan of tangible property, they rarely make their digital estate plan: the inventory of online accounts and digital property with all user names and passwords, the selection of trusted person who are capable to satisfy the users' wishes, instructions concerning management of digital assets or its deletion, and the proper authorization in the forms of the online tool, will, or other written records.²⁵⁶

The digital asset is considered property under the CCC and is qualified as copyright work under Thai Copyright Act B.E. 2537. It shall be passed on to the heirs under the law of succession. Indeed, the users have the ownership right and copyright over this estate and the heirs have the right to receive this legacy. However, there are the difficulties in the disposition of digital assets after death, which barred by TOS explicitly No Right of Survivorship clause, as set out by ISPs. These TOS generally restrict the right of survivorship and transferability of the digital assets in order to protect the online users' data privacy and to reduce their administrative cost. As a result, the heirs of deceased users are unable to access to the online accounts to obtain these estate. Such terms shall be considered as unfair terms under Thai Unfair Contract Terms Act B.E. 2540. Nevertheless, this interpretation is still debatable because the word 'fair and reasonable' depends on the courts' discretions.

²⁵⁶ James D. Lamm, Christina L. Kunz, Damien A. Riehl, and Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 407 (2014).

Having reviewed the relevant Thai laws, the writer considers that the existing laws are not sufficient because the laws could not facilitate the executor's access to the online accounts in order to manage and obtain the digital assets for the heirs. Thus, the enactment of particular law dealing with digital assets after death would be an appropriate legal approach since such law would provide the legal measures for accessing and managing digital assets, and clarifying the right of users over the digital assets and the right of heirs to access and acquire such assets. The proposed law should be taken into consideration to the privacy of the deceased users and those whom the deceased responded to as well the protection of the internet service providers from liability.

Even though today's the access and management of the deceased's digital assets seems to be overlooked in Thailand, it is anticipated that more and more Thai online society will realize the benefits of access and management of digital assets in the near future. It is important to note that good value of digital asset inheritance should outweigh the privacy arguments.

6.2 Recommendations

Digital and Internet technology has changed the people's lives around the world including Thailand. Thai users have created, acquired, and stored electronic information, communication, and any paperless transaction. Thus, those traditional paper documents have been replaced by digital files, digital photos, and e-mailboxes. With the advantages of the new technology in aspect of the vest value of digital asset, the law should facilitate the executor's access to the online accounts for managing digital asset and gain its value for the heirs.

However, it needs to concern and respect the right to privacy of deceased users, because when the executors access to the online accounts, they are able to reach the whole digital assets both economical and sentimental assets, which are worth obtaining as users' digital estate under property and succession law. Apart from the valuable assets, they will also access to the confidential information of the deceased, or their privacy such as content of electronic communications, confidential files, or indecent photographs, which are not the digital estate of the deceased, but are the right

to privacy for them. In case that the deceased pursues professional careers, e.g., physicians, or attorneys, they may possess the confidential information of clients stored in their online accounts. This privacy issue will likely to be strongly arguable.

In addition to the access and management of digital assets, the designation of the appropriate person is of importance. If an unsuitable person comes across this privacy, and uses it in an inappropriate way, this may cause the damage to the deceased's family, or other persons. It is, therefore, important to find suitable solutions. To maintain the balance between acquiring economic and sentimental benefits for the heirs, protecting the right to privacy of the deceased and persons whom the deceased responded to, and protecting ISPs from liability in case of disclosure of the deceased's accounts should be a desired goal.

Therefore, the writer would suggest that passing a particular statutory guidance governing digital assets after death would be the appropriate legal approach.

Its aim is to adjust the current Thai laws so as to better align with the increasing percentage of Thai online citizens who are conducting transaction online.

The general goal of the proposed law aims to facilitate digital executor access and ISP disclosure together with respecting both privacy and intent of the account user, also respecting privacy of other persons whom the deceased digitally responded to. This law would adhere to the traditional approach of succession law with respect to the intent of the account user and promotion of the digital executor's ability to administer the account user's property in accordance with legally-binding digital executor duties.

The main purposes of the proposed law are as follows:

1) To provide digital executors the legal authority to manage digital assets and electronic communications in the same manner that traditional executors manage tangible property under succession law;

2) To provide the internet service providers (ISPs) who possess the digital assets and electronic communications in accordance with terms of service agreement with legal authority in order to deal with the digital executors of the deceased users;

3) To protect the users' reasonable expectation of privacy in their personal communications;²⁵⁷ and

4) To grant ISPs immunity from liability for acts or omission done in good faith.²⁵⁸

As lesson learnt from US legislation mentioned in chapter 5, the writer would suggest that the Revised UFADAA- the Revised Uniform Fiduciary Access to Digital Assets Act (2015) - is the most suitable guidance, therefore, the fundamental concept of this Act should be adopted into Thai legal system.

The proposed law should provide the ways for users to direct the disposition or deletion of their digital assets after death, and establish **the three –tier priority system**²⁵⁹ in the case of conflicting instructions. The proposed law should not only establish the three - tier priority system, but it should also provide a variety of requirements.

Firstly, the three-tier priority system should be established because this system resolves the conflict of instructions which could be found in an online tool or a traditional estate plan as the way of respecting the user's intent to direct the disposition or deletion of digital assets after death.

However, if there is no any instruction as previously mentioned and TOS does not address the executor or administrator of an estate access to digital assets, this proposed law should require the appointment of digital executor by statutory heirs after the death of online user. This digital executor should be a technology specialist²⁶⁰ and liable person. The digital executor may access and manage the digital asset of deceased users but may never access the content of electronic communications without the user's consent.²⁶¹

²⁵⁷ Prefatory Note of Revised Uniform Fiduciary Access to Digital Assets Act (2015).

²⁵⁸ The Florida Senate, *Bill Analysis and Fiscal Impact Statement*; Prefatory Note of Revised Uniform Fiduciary Access to Digital Assets Act (2015).

²⁵⁹ The analysis of this fundamental concept is in the previous chapter.

²⁶⁰ Jill Choate Beier and Susan Porter, *The Digital Asset Dilemma*, NYSBA Trusts and Estates Law Section Newsletter Vol. 46 No. 2, 7 (Summer 2013), available at http://www.mcglawyer.com/pdf_files/TrustsandEstatesSummer2013.pdf (last visited July 24, 2016).

²⁶¹ See A Summary of UFADAA (March 2016).

Secondly, the proposed law should require the internet service provider to grant the digital executor of the deceased person “access, take control of, conduct, continue, or terminate any online account,” and manage the digital asset.

It is noticeable that if this law is enacted in Thailand, it may indirectly force the ISPs in the future to add the online tools, known as the proactive options, for the users in order to respect the users’ intent and prevent the violation of the deceased’s privacy. The users can express their true intention and decide what they want to do with their accounts and digital assets when they die or no longer use their accounts. For example, Google provides the new feature “Inactive Account Manager” that allows the users of Google accounts to decide that “what will happen to their digital assets if they’ve been inactive for a certain period of time.”²⁶²

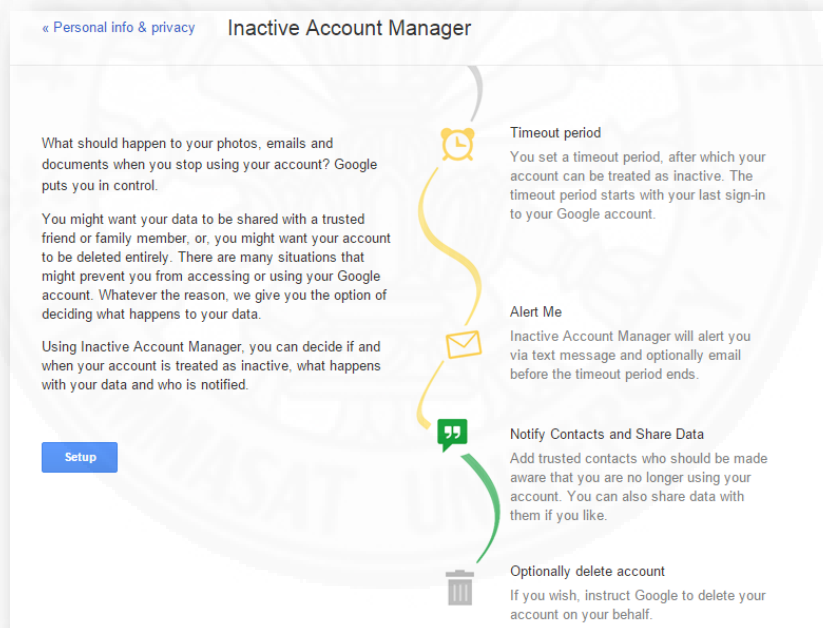


Figure 6.1, Inactive Account Manager

(Source: ©2015 Google - Google Home - Privacy & Terms - Help.)

²⁶² Google, *About Inactive Account Manager*, available at <https://support.google.com/accounts/answer/3036546?hl=en> (last visited June 27, 2016).

Facebook, the world’s most popular social media, also have a new option for users after they pass away. It allows users to name a “legacy contact” to manage certain parts, e.g. photos and videos they uploaded, wall posts, profile, of their account after they die. However, the legacy contact will not be notified until Facebook account is memorialized. This feature also concerns the privacy of deceased users because it does not allow “the legacy contact to log into account, remove or change past posts, photos and other things shared on Timeline, and read messages the users have sent to other friends.”²⁶³

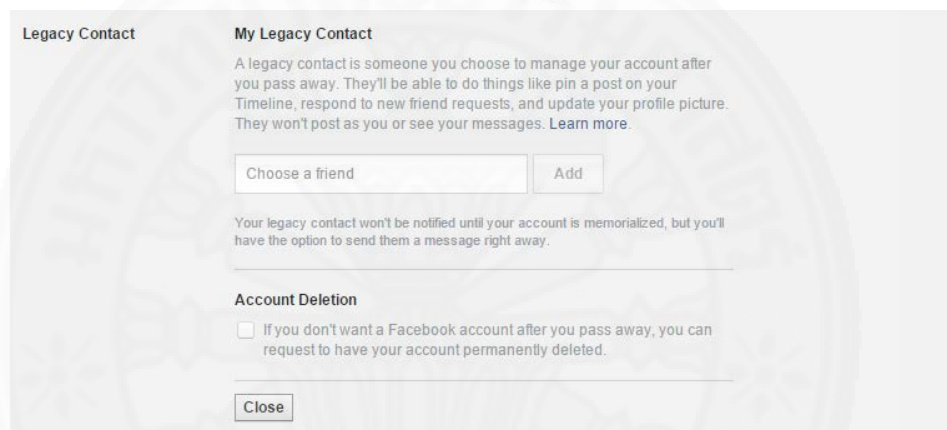


Figure 6.2, Legacy Contact
(Source: Facebook © 2015 English (US))

It shows that proactive option by ISPs would likely protect privacy of the users, minimize litigation and probate processing, preserve digital assets, and honor the digital outcome that the users wish after they die. Thus, the ISPs should provide the proactive option for the users to specify in advance what should happen to their online accounts and contents after death. Nevertheless, the ISPs, at least, should be required to allow users to choose “whether their accounts will be transferable upon death”.²⁶⁴

²⁶³ Facebook, *Legacy Contract*, available at <https://www.facebook.com/help/1568013990080948> (last visited June 27, 2016).

²⁶⁴ Ashley F. Watkins, *Digital Properties and Death: What Will Your Heirs Have Access to after You Die?*, 62 *Buff. L. Rev.* 193, 233 (2014).

Thirdly, the proposed law should grant the immunity from liability for ISP' acts or omissions done in good faith when the ISP discloses online account to the digital executor.

Lastly, in the privacy concern, the proposed law should be drafted a particular provision. It authorizes the digital executor to determine to withhold disclosure of digital assets to the heirs in the interests of privacy and confidentiality of deceased users or other persons whom the deceased responded with. This provision would be applicable in cases where the refusal of disclosure is appropriate, or where the digital executor determines the deceased user would have made this decision.²⁶⁵

In addition to privacy concern, the proposed law should have the criminal sanction provision for misconduct made by the digital executors. If they disclose the deceased' confidential information to the public, which are likely to cause the damage to the deceased' family or others, the digital executor shall be liable therefor. Compared to the offence of disclosure of private secret in section 323²⁶⁶ under Thai Penal Code, the digital executors access to the online accounts, and then know all private and confidential information of the deceased as legal power to complete the duty, from the writer's point of view, the criminal punishment should be higher than section 323 in order to force the digital executors to carefully carry out the duty in good faith.

²⁶⁵ Laura McCarthy, *Digital assets and intestacy*, 21 B.U. J. SCI. & TECH. L. 384,402 (2015).

²⁶⁶ “Section 323 Whoever, knows or acquires a private secret of another person by reason of his functions as a competent official or his profession as a medical practitioner, pharmacist, druggist, midwife, nursing attendant, priest, advocate, lawyer or auditor, or by reason of being an assistant in such profession, and then discloses such private secret in a manner likely to cause injury to any person, shall be punished with imprisonment not exceeding six months or fined not exceeding one thousand Baht, or both.”

“A person undergoing training and instruction in the profession mentioned in the first paragraph has known or acquired the private secret of another person in the training and instruction in such profession, and discloses such private secret in a manner likely to cause injury to any person, shall be liable to the same punishment.”

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Jill Choate Beier, Esq., "Planning for Digital Assets," New York Banker's Association Trusts and Investment Conference, October 2, 2015.

APPENDICES



APPENDIX A
REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL
ASSETS ACT (2015)

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT
(2015)

SECTION 1. SHORT TITLE. This [act] may be cited as the Revised Uniform Fiduciary Access to Digital Assets Act (2015).

SECTION 2. DEFINITIONS. In this [act]:

(1) “Account” means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(2) “Agent” means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(3) “Carries” means engages in the transmission of an electronic communication.

(4) “Catalogue of electronic communications” means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) “[Conservator]” means a person appointed by a court to manage the estate of a living individual. The term includes a limited [conservator].

(6) “Content of an electronic communication” means information concerning the substance or meaning of the communication which:

(A) has been sent or received by a user;

(B) is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and

(C) is not readily accessible to the public.

(7) “Court” means the [insert name of court in this state having jurisdiction in matters relating to the content of this act].

(8) “Custodian” means a person that carries, maintains processes,

receives, or stores a digital asset of a user.

(9) “Designated recipient” means a person chosen by a user using an online tool to administer digital assets of the user.

(10) “Digital asset” means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(11) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(12) “Electronic communication” has the meaning set forth in 18 U.S.C. Section 2510(12)[, as amended].

(13) “Electronic-communication service” means a custodian that provides to a user the ability to send or receive an electronic communication.

(14) “Fiduciary” means an original, additional, or successor personal representative, [conservator], agent, or trustee.

(15) “Information” means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(16) “Online tool” means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(17) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(18) “Personal representative” means an executor, administrator, special administrator, or person that performs substantially the same function under law of this state other than this [act].

(19) “Power of attorney” means a record that grants an agent authority to act in the place of a principal.

(20) “Principal” means an individual who grants authority to an agent in a power of attorney.

(21) “[Protected person]” means an individual for whom a [conservator] has been appointed. The term includes an individual for whom an application for the

appointment of a [conservator] is pending.

(22) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(23) “Remote-computing service” means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. Section 2510(14)[, as amended].

(24) “Terms-of-service agreement” means an agreement that controls the relationship between a user and a custodian.

(25) “Trustee” means a fiduciary with legal title to property under an agreement or declaration that creates a beneficial interest in another. The term includes a successor trustee.

(26) “User” means a person that has an account with a custodian.

(27) “Will” includes a codicil, testamentary instrument that only appoints an executor, and instrument that revokes or revises a testamentary instrument.

Legislative Note: In paragraphs (5) and (21), an enacting jurisdiction should replace the bracketed language with local terminology, if different. Enacting jurisdictions should insert the appropriate court in paragraph (7) that would have jurisdiction over matters relating to this act. In jurisdictions in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in paragraphs (12) and (23).

SECTION 3. APPLICABILITY.

(a) This [act] applies to:

(1) a fiduciary acting under a will or power of attorney executed before, on, or after [the effective date of this [act]];

(2) a personal representative acting for a decedent who died before, on, or after [the effective date of this [act]];

(3) a [conservatorship] proceeding commenced before, on, or after [the effective date of this [act]]; and

(4) a trustee acting under a trust created before, on, or after [the effective date of this [act]].

(b) This [act] applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(c) This [act] does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

Legislative Note: In subsection (a)(3), an enacting jurisdiction should replace the bracketed language with local terminology, if different.

SECTION 4. USER DIRECTION FOR DISCLOSURE OF DIGITAL ASSETS.

(a) A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a **direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.**

(b) If a user has not used an online tool to give direction under subsection (a) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(c) A user's direction under subsection (a) or (b) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

SECTION 5. TERMS-OF-SERVICE AGREEMENT.

(a) This [act] does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(b) This [act] does not give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

(c) A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under Section 4.

SECTION 6. PROCEDURE FOR DISCLOSING DIGITAL ASSETS.

(a) When disclosing digital assets of a user under this [act], the custodian may at its sole discretion:

(1) grant a fiduciary or designated recipient full access to the user's account;

(2) grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or

(3) provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(b) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this [act].

(c) A custodian need not disclose under this [act] a digital asset deleted by a user.

(d) If a user directs or a fiduciary requests a custodian to disclose under this [act] some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:

(1) a subset limited by date of the user's digital assets;

(2) all of the user's digital assets to the fiduciary or designated recipient;

(3) none of the user's digital assets; or

(4) all of the user's digital assets to the court for review in camera.

SECTION 7. DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS OF DECEASED USER.

If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:

- (1) a written request for disclosure in physical or electronic form;
- (2) a [certified] copy of the death certificate of the user;
- (3) a [certified] copy of [the letter of appointment of the representative or a small-estate affidavit or court order];
- (4) unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications; and
- (5) if requested by the custodian:
 - (A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
 - (B) evidence linking the account to the user; or
 - (C) a finding by the court that:
 - (i) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A);
 - (ii) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. Section 2701 et seq.[, as amended], 47 U.S.C. Section 222[, as amended], or other applicable law;
 - (iii) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or
 - (iv) disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

***Legislative Note:** In jurisdictions that certify legal documents, the word "certified" should be included in paragraphs (2) and (3). Other jurisdictions may substitute a word or phrase that conforms to the local practice for authentication. Enacting jurisdictions should insert into paragraph (3) the local term given to a document that authorizes a personal representative to administer a decedent's estate.*

In jurisdictions in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in paragraph (5)(C)(ii).

SECTION 8. DISCLOSURE OF OTHER DIGITAL ASSETS OF DECEASED USER.

Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:

- (1) a written request for disclosure in physical or electronic form;
- (2) a [certified] copy of the death certificate of the user;
- (3) a [certified] copy of [the letter of appointment of the representative or a small-estate affidavit or court order]; and
- (4) if requested by the custodian:
 - (A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user’s account;
 - (B) evidence linking the account to the user;
 - (C) an affidavit stating that disclosure of the user’s digital assets is reasonably necessary for administration of the estate; or
 - (D) a finding by the court that:
 - (i) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A); or
 - (ii) disclosure of the user’s digital assets is reasonably necessary for administration of the estate.

Legislative Note: *In jurisdictions that certify legal documents, the word “certified” should be included in paragraphs (2) and (3). Other jurisdictions may substitute a word or phrase that conforms to the local practice for authentication. Enacting jurisdictions should insert into paragraph (3) the local term given to a document that authorizes a personal representative to administer a decedent’s estate.*

SECTION 9. DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS OF PRINCIPAL.

To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:

- (1) a written request for disclosure in physical or electronic form;
- (2) an original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;
- (3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
- (4) if requested by the custodian:
 - (A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or
 - (B) evidence linking the account to the principal.

SECTION 10. DISCLOSURE OF OTHER DIGITAL ASSETS OF PRINCIPAL.

Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:

- (1) a written request for disclosure in physical or electronic form;
- (2) an original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;
- (3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
- (4) if requested by the custodian:
 - (A) a number, username, address, or other unique subscriber or

account identifier assigned by the custodian to identify the principal's account; or

(B) evidence linking the account to the principal.

SECTION 11. DISCLOSURE OF DIGITAL ASSETS HELD IN TRUST WHEN TRUSTEE IS ORIGINAL USER.

Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

SECTION 12. DISCLOSURE OF CONTENTS OF ELECTRONIC COMMUNICATIONS HELD IN TRUST WHEN TRUSTEE NOT ORIGINAL USER.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a certified copy of the trust instrument[or a certification of the trust under [cite trust-certification statute, such as Uniform Trust Code Section 1013]] that includes consent to disclosure of the content of electronic communications to the trustee;

(3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(4) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(B) evidence linking the account to the trust.

SECTION 13. DISCLOSURE OF OTHER DIGITAL ASSETS HELD IN TRUST WHEN TRUSTEE NOT ORIGINAL USER.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

- (1) a written request for disclosure in physical or electronic form;
- (2) a certified copy of the trust instrument[or a certification of the trust under [cite trust-certification statute, such as Uniform Trust Code Section 1013]];
 - (3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and
 - (4) if requested by the custodian:
 - (A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or
 - (B) evidence linking the account to the trust.

SECTION 14. DISCLOSURE OF DIGITAL ASSETS TO [CONSERVATOR] OF [PROTECTED PERSON].

(a) After an opportunity for a hearing under [state conservatorship law], the court may grant a [conservator] access to the digital assets of a [protected person].

(b) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a [conservator] the catalogue of electronic communications sent or received by a [protected person] and any digital assets, other than the content of electronic communications, in which the [protected person] has a right or interest if the [conservator] gives the custodian:

- (1) a written request for disclosure in physical or electronic form;
- (2) a [certified] copy of the court order that gives the [conservator] authority over the digital assets of the [protected person]; and
- (3) if requested by the custodian:
 - (A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the [protected person]; or

(B) evidence linking the account to the [protected person].

(c) A [conservator] with general authority to manage the assets of a [protected person] may request a custodian of the digital assets of the [protected person] to suspend or terminate an account of the [protected person] for good cause. A request made under this section must be accompanied by a [certified] copy of the court order giving the [conservator] authority over the protected person's property.

Legislative Note: Throughout this section, an enacting jurisdiction should replace the bracketed terms [conservator] and [protected person] with local terminology, if different. In jurisdictions that certify legal documents, the word "certified" should be included in subsections (b) and (c). Other jurisdictions may substitute a word or phrase that conforms to the local practice for authentication.

SECTION 15. FIDUCIARY DUTY AND AUTHORITY.

(a) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

- (1) the duty of care;
- (2) the duty of loyalty; and
- (3) the duty of confidentiality.

(b) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:

- (1) except as otherwise provided in Section 4, is subject to the applicable terms of service;
- (2) is subject to other applicable law, including copyright law;
- (3) in the case of a fiduciary, is limited by the scope of the fiduciary's duties; and
- (4) may not be used to impersonate the user.

(c) A fiduciary with authority over the property of a decedent, [protected person], principal, or settlor has the right to access any digital asset in which the decedent, [protected person], principal, or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, [protected person], principal, or

settlor for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including [this state's law on unauthorized computer access].

(e) A fiduciary with authority over the tangible, personal property of a decedent, [protected person], principal, or settlor:

(1) has the right to access the property and any digital asset stored in it; and

(2) is an authorized user for the purpose of computer-fraud and unauthorized-computer-access laws, including [this state's law on unauthorized computer access].

(f) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(g) A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

(1) if the user is deceased, a [certified] copy of the death certificate of the user;

(2) a [certified] copy of the [letter of appointment of the representative or a small-estate affidavit or court order,] court order, power of attorney, or trust giving the fiduciary authority over the account; and

(3) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user; or

(C) a finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A).

Legislative Note: States with a computer trespass statute should cite to it in subsections (d) and (e), and may want to amend those statutes to be in accord with this act. In jurisdictions that certify legal documents, the word "certified" should be included in subsection (g). Other jurisdictions may substitute a word or phrase that conforms to the local practice for authentication. In subsections (c) and (e), an

enacting jurisdiction should replace the bracketed language with local terminology, if different.

SECTION 16. CUSTODIAN COMPLIANCE AND IMMUNITY.

(a) Not later than [60] days after receipt of the information required under Sections 7 through 15, a custodian shall comply with a request under this [act] from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(b) An order under subsection (a) directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. Section 2702[, as amended].

(c) A custodian may notify the user that a request for disclosure or to terminate an account was made under this [act].

(d) A custodian may deny a request under this [act] from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(e) This [act] does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this [act] to obtain a court order which:

(1) specifies that an account belongs to the [protected person] or principal;

(2) specifies that there is sufficient consent from the [protected person] or principal] to support the requested disclosure; and

(3) contains a finding required by law other than this [act].

(f) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this [act].

Legislative Note: *In jurisdictions in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (b). In subsection (e), an enacting jurisdiction should replace the bracketed language with local terminology, if different.*

SECTION 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 19. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: Include this section only if the jurisdiction lacks a general severability statute or a decision by the highest court of the jurisdiction stating a general rule of severability.

SECTION 20. REPEALS; CONFORMING AMENDMENTS.

- (a)
- (b)
- (c)

SECTION 21. EFFECTIVE DATE. This [act] takes effect....

APPENDIX B

GOOGLE ENDORSEMENT



25 Massachusetts Ave., NW
Washington, DC 20001
Phone: 202-346-1100

October 13, 2015

Ben Orzeske
Chief Counsel
Uniform Law Commission
111 N. Wabash Ave.
Suite 1010
Chicago, IL 60602

Dear Mr. Orzeske:

I am writing to express Google's support for the Revised Uniform Fiduciary Access to Digital Assets Act. We are pleased to have found common accord with the Uniform Law Commission in both of our efforts to address access issues to digital information of decedents and others.

The revised Uniform Act accommodates the needs of settling and administering estates, providing full or limited access to information for guardians, holders of powers of attorney and others assisting people who may be incapacitated, while respecting the account holder's rights to privacy. In addition to commitments made to users, custodians' obligations under the federal Electronic Communications Privacy Act prohibit disclosures of content or account information except under specific circumstances. The Uniform Act appropriately recognizes these limitations and provides a consistent framework for anyone petitioning for information related to the contents of another's account.

Support for this legislation extends only as far as bills based on the Uniform Act remain consistent with it and we reserve the right to support or oppose individual bills based on the Uniform Act after their review.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ron Barnes".

Ron Barnes
Head of State Legislative Affairs

APPENDIX C

FACEBOOK ENDORSEMENT

October 12, 2015

Uniform Law Commission
111 N. Wabash Avenue
Suite 1010
Chicago, Illinois 60602

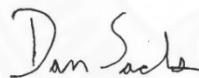
Dear Uniform Law Commission:

Facebook appreciates the work of the ULC commissioners and staff in crafting a uniform act – the Revised Uniform Fiduciary Access to Digital Assets Act (“RUFADAA”) – which we believe creates a reasonable compromise regarding disposition of digital accounts upon death or incapacitation. We support the enactment of RUFADAA by state legislatures.

Recognizing that this is a sensitive issue involving an extremely complicated legal landscape and each state must conform RUFADAA to its own statutes, we will need to review proposed bills individually before determining our position. Uniformity in state law on this issue is important to Facebook and we are unlikely to support language that materially differs from RUFADAA.

Again, we appreciate the hard work of the ULC on this issue.

Sincerely,



Dan Sachs
Manager, State Policy
Facebook, Inc.



1 Hacker Way
Menlo Park, CA 94025

BIOGRAPHY

Name	Miss Tulsiri Wata
Date of Birth	October 11, 1987
Educational Attainment	2009: Bachelor of Laws (LL.B.) Thammasat University, Thailand
Work Position	General Manager WATA & BOONYAWAT Attorney and Tutors
Scholarship	2016: CPG Spring School 2016 at Goethe University of Frankfurt (DAAD-Project)

