

Practitioner's Perspective

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Estate Planning in a Digital Age

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Computers and other new technologies have radically altered the conduct of commerce and will also affect estate planning relating to digital assets. Think of the ways that you and your clients already use these technologies:

- You use e-mail at work (including personal emails and attachments);
- You have additional e-mail accounts and might have personal, family or "moonlighting" business websites;
- You have important records (formerly kept in your safe deposit box) stashed in your computer or other electronic devices;
- You have digital pictures stored in your camera, at work, on CDs or online;
- You may have a library of music, movies, games, computer software or other digital works stored in numerous places (e.g., home, work, handheld devices, online accounts); or
- You have online accounts such as brokerage and bank accounts.

How are you going to leave any or all of these assets to your heirs? Your executor may be your spouse, significant other, son or daughter or other relative, family friend, lawyer or trust company—do you want that person to read or see all of the above? Even if you do, how will they locate them and get access?

The broad use of digital and electronic products and services has myriad implications, including for the deceased, heirs, employers, service providers and estate planners. This article explores some of those estate planning implications.

The New Reality

Historically, estate planning focused on two broad groups of assets: tangible property and intangible property (such as accounts and stocks or bonds). Occasionally, estate planners dealing with artists (e.g., writers or musicians) and inventors were faced with issues arising in copyright, trademark or patent law. Now everyone is faced with those issues, as well as issues relevant to information services and digitized data not protected by copyright law. Some of the fundamental differences between digital and traditional assets are:

- Digital assets can be created and defined by contract;
- Some digital assets are subject to intellectual property laws;
- Digital assets can be infinitely duplicated;
- Digital assets have no specific location and multiple locations;

- Digital assets may be stored in tangible assets (such as a computer or other device, and may affect the value of those assets); and
- Digital assets are usually licensed, not sold, and rights often are not transferable.

An approach

Nearly everyone will write a will one day (or, if they die intestate, leave their heirs to cope with the lack of one). One way to think about how to deal with digital assets in the will is to ask these questions:

1. What are your digital assets?
2. What are they worth?
3. Where are they, who can access them and what passwords or other access controls (such as encryption, etc.) are required?
4. Who owns, hosts, controls or pays for the hardware or service storing them?
5. Where can copies of the licenses controlling them, including privacy policies, be located?
6. Are the digital assets legally transferable and if so, how can a transfer be effected?

We will focus on a few of these questions to illustrate why new thinking is required.

1. What are your digital assets? Many records will not be stored in the decedent's home or safety deposit box. They will be held in electronic form by *third parties* such as employers or online service providers that will have required consent to a service contract and/or privacy policy. Those contracts and policies create and restrict rights, so they need to be considered in the planning process.

You may have heard the news story about the American soldier who died in Iraq; his father wanted access to his son's emails held by an online service provider. The privacy policy allowed access only by the soldier, and there was a service contract making the account non-transferable, which together restricted access by the soldier's family. The parties settled, but advance planning might have prevented the heartbreak and the litigation.

What about personal emails sent to the workplace, or emails concerning an employee's "moonlighting" business. Putting aside the question of whether such mails violate the employer's computer usage policy, those emails will sit on the employer's computer system and be subject to a policy providing that the employer, not the decedent, owns them and may read them. It is easy to clean out an employee's locker and return personal items—but cleaning out an "electronic locker," *i.e.*, e-mail files, is quite different. The personal items will be commingled with business e-mail: which items are personal, who is going to decide, who is going to conduct a review without exposing proprietary or confidential data of the employer or its customers, and how will any of this

be done at reasonable cost and without disruption? These questions should be considered by the employer and, as part of the estate planning process, the employee.

What if the digital asset is a domain name? A father may obtain the name www.SmithFamily.com or have a page at "www.onlineservice.com/Smith" where the Smiths, friends and relatives post baby pictures and news. Or the website may be devoted to the father's business. If the father dies, what happens to that URL? Is it transferable and, if so, to whom? There is currently a legal debate regarding whether a domain name is even "property" for various purposes (e.g., can a secured creditor seize it or can it be the subject of an in rem action)—the same debate may extend to estate planning issues, and they should be addressed up front.

2. What are your digital assets worth? Most assets can have some economic or sentimental value and digital assets are no different. What if Jimmy Hendrix had received emails from Janis Joplin—those emails would have value and, unlike valued traditional paper letters saved from tons of mail discarded during life, might be commingled with thousands of valueless emails. Locating valuable assets in the future may require much the same techniques as used in electronic discovery in litigation. Other examples of "digital assets" with potential value include the family genealogy records; digital archives of music, films, photos, writings, personal journals, blogs, email, and so on.

What is the *worth* of the music archive if copyright-infringing, illegal copies are included in an archive sold or licensed by the estate, and what is the *liability* of the estate? An estate tax valuation reflecting a low value because of any infringement risk might make interesting evidence in an infringement suit. If the deceased avoided infringement under the "fair use" doctrine (which creates a defense to infringement), what happens to that defense upon death? Even if "fair use" was a defense for the deceased, executors may not qualify for it—the executor who sells or licenses the archive will make money for the estate, whereas the deceased's "fair use" defense may have rested on the absence of commercial use. As the law in this area develops, perhaps individuals will have to provide a warranty against infringement to their estates; perhaps tracing copyright authorizations will become part of the estate planning process.

This issue is very different than the traditional sale or other transfer by estates of rare book collections or film libraries. Copies of books (and videos) have traditionally been sold, not licensed, and (under the "first sale doctrine") one of the rights of an *owner* of a copy of a copyrighted work is the right to transfer the copy. The same is not true for licensed copies of digital assets (they are licensed, not sold).

There are also new "objects" of value. For example, individuals are selling in online auctions, "credits" generated in online role-playing games. The credits are also bartered

for products and services within and outside the game environment. Some gamers are even hiring workers in other countries to play the game for them, generating credits that are then sold. How will an accumulation of credits by a decedent be treated in estate tax valuations and for purposes of allocating shares of the estate to heirs. More important to eager gamer-heirs, which one will inherit the game credits?

3. Where are the digital assets, who can access them and what passwords or other access controls are required?

Suffice it to say that if a digital asset is encrypted or otherwise protected by strong passwords or the like, the asset is effectively lost without the tools that would permit access. This is not just a problem for assets covered by the will—it extends to information needed for the heirs to continue to use the affected accounts and services. For example, if the keeper of the family’s digital checkbook, or the person paying bills online, utilizes a password that hasn’t been shared, how will the family get at that information short of court orders (assuming the password can be broken)?

Even assuming that the heirs are able to overcome the technological measures, if the assets are copyrighted and protected by technological measures, circumventing those measures may violate the Digital Millennium Copyright Act. Decedents can shield their heirs from this situation by granting permission for circumvention of the measures in the will (assuming decedent added the measures). Who would sue, you say? Siblings fighting over what to do with the protected assets might well find suit a handy way of preventing the executor (and the competing heir) from obtaining the asset.

Other Issues

There will be other new problems to solve. For example, assume the family matriarch scanned into an online archive 50 years of family photos (accessible only by her registered family members). No one misuses the archive because of the force of her personality (or from fear of being cut out of her will). But after she dies, various family members use their

access to start selling pictures to earn money or embarrass family members with whom they are feuding. Issues that did not arise during her life will need to be addressed after her death: should she have written “site terms of use” restricting certain behaviors? If niece #10 has hated a particular picture for years but never had the nerve to say so, can she demand removal of the picture? What privacy, intellectual property or publicity rights exist that were not voiced during life, but which rankle after death?

There are real world implications to these issues as well. Decedents who fail to realize that their executor might plow through *all* of their emails unless they leave other instructions, may not leave the memories they had intended. Consider,

- A decedent’s Hotmail account (such as a personal, not a work, email account) containing commercial communications the executor should not see; complaints about family members, children or spouses that decedent didn’t intend anyone but the recipient to see; revelations about things the family wasn’t supposed to know (*e.g.*, agony over illness or evidence of an affair); and
- A decedent’s shopping account history (*e.g.*, online bookstore account showing purchase of “How to Commit Suicide;” Tiffany online account showing jewelry purchases of which the spouse was not aware...).

Our point? We think that a little, actually a lot, of planning is in order in this digital age. Digital assets are owned by every family, not just wealthy or famous families. Many jurisdictions provide special privileges to executors and personal representatives or heirs permitting access to most assets. Even if those rules apply to all digital assets (perhaps a bold assumption), that access may cover ground the decedent might not have wanted covered. In addition, third parties bound by privacy, identity theft and other new laws or concepts, might have something to say about whether those assets really will be made available to the executor. These issues are best handled ahead of time, and planning is critical.