

### From the Estate Planning & Probate Group

#### What are digital assets?

Technically, digital assets are intangible personal assets formatted into a binary source. These include all files and information stored over the Internet—on social networking sites, blogs, photo and video sharing sites, email accounts, online storage accounts such as “cloud” storage, and online sales accounts—as well as online music and online video games. It also includes domain names and any intellectual property rights (such as copyrights, patents, trademarks, and trade secrets) associated with digital property.

#### Do digital assets have value?

Yes. Some digital assets, such as blogs with advertising revenue or PayPal accounts, have economic value. Other digital assets, such as photo sharing accounts, may have only sentimental value. And still other digital assets, such as video game accounts, may have neither economic nor sentimental value.

#### How prevalent are digital assets?

Until just a few years ago, most of us stored our important documents in a filing cabinet or in a safety deposit box at a bank. But now, with computers and easy access to the Internet, many of us store our important documents solely in digital form, on a hard drive or an Internet storage site. In addition, we are creating new digital assets at an extraordinary rate. According to 2011 estimates, every 60 seconds: (a) over 168,000,000 emails are sent; (b) over 695,000 Facebook status updates are written; (c) over 6,600 digital photos are added to Flickr; (d) about 600 digital videos are added to YouTube; (e) about 320 new Twitter accounts are created; (f) over 100 new LinkedIn accounts are created; (g) about 70 new Internet domain names are registered; and (h) over 60 new blogs are created. Digital assets are not only being created by us, but also are being purchased by us at extraordinary rates. In July 2010, Amazon reported that Kindle books outsold all hardcover book sales. By May 2011, Amazon reported that Kindle books outsold all books, both hardcover and paperback combined. The number one seller of all music (not just digital music) is iTunes. In February 2010, the iTunes store sold its 10 billionth song.

#### Why is identifying digital assets important?

If you become incapacitated, your appointed Agent must be able to maintain your digital assets. This means continuing to pay bills that arrive in paperless form, maintaining registered domain names, and being able to contact and communicate with your friends and family. Likewise, when you pass away, your Personal Representative (aka your Executor) must inventory all of your assets and distribute them as your will instructs. As more of us manage our finances and maintain records, data, and music online, finding these assets is becoming increasingly difficult. By identifying your digital assets for your Agent or your Personal Representative, you save your estate time and expense and minimize the possibility that your online photo accounts or your blogs (today’s version of photo albums, diaries, and shoeboxes full of love letters) will be lost forever.

### **Lost forever? Don't I own my digital assets?**

Most digital assets have both a license element and a property right component. For example, with email accounts, social networking sites, and photo sharing sites, the user often has a license from the Internet service provider to access the email system, the social networking site, or the photo sharing site in accordance with the Terms of Use Agreement. The user generally retains a property interest in emails in the inbox, all user-generated content, and contact lists. Contrast this with music directory sites, such as iTunes. With these sites, the user has a license from the Internet service provider to access the music system in accordance with the Terms of Service, no different from an email site. However, unlike email, the licensed copy of lawfully downloaded music is not categorized as property, per se. Instead, the user has purchased an indefinite license to use one copy of the file.

### **What happens to my email when I die?**

The answer to this depends on the state in which you reside and your email provider. Most states are far behind the times, providing little or no legislation or caselaw regarding accessing and transferring digital assets at death. Only a handful of states have attempted to address this issue. Connecticut and Rhode Island require email service providers to grant a Personal Representative access to a decedent's email account upon a written request and substantiating documents. Oklahoma (effective November 2010) and Idaho (effective July 2011) have taken a much broader stance and passed laws giving a Personal Representative of an estate "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 email service websites." To date, Washington has not enacted any similar legislation.

### **If I'm not a resident of those states, what happens to my digital assets?**

Regardless of where you live, when you set up an online account, you are initially presented with a "clickwrap agreement." These are the Terms of Use and the conditions upon which the account is offered. In order to use the service, the user must click an "Agree" or "Accept" button. While each site's clickwrap agreement contains different provisions, almost all sites contain language stating that the offered accounts are solely for the individual account holder's use and are not assignable. Therefore, once an account holder dies, the service provider can reclaim the username and all information.

### **Can you give me some examples?**

Most free online email accounts such as Yahoo, Microsoft, and Google will typically delete a user's data after four to nine months of inactivity. After eight to twelve months of inactivity, those sites will entirely delete the person's account. In addition to enacting terms to address periods of inactivity, certain sites are beginning to adopt policies to specifically deal with the death of an account holder. For example, upon receipt of a copy of a death certificate, Yahoo's policy is to permanently delete all content and terminate the account. This policy extends to other companies owned by Yahoo including the popular photo-sharing website, Flickr. Once deleted, all information that could have been useful to notify friends and family, to settle the estate, and to pay bills, would be lost. For a summary and hyperlink to policies of common websites, see the back page of this FAQ.

## How do I preserve my digital assets and provide for a smooth transition following my death or incapacity?

Preserving your digital assets and providing for a smooth transition is a five-step process:

**1. Identify and inventory your digital assets.** To get started, try answering the following questions:

- a. If your computer and all peripherals (i.e., backup drives and flash drives) were stolen, what valuable or sentimental digital assets would you lose?
- b. If all of your online accounts or passwords were deleted, what are the valuable or sentimental digital assets to which you would no longer have access?
- c. If you died today, what valuable or sentimental digital assets would you want your family or friends to have?
- d. If you were in an accident and became incapacitated today, who, if anyone, would be able to access your digital assets and continue to pay your bills online?

When compiling a list of your digital assets, include all hardware and flash drives (and their location), all software (including Quicken, Turbo Tax, and other programs where you may store financial and tax information), your online presence (online document and photo storage sites, social media accounts, and blogs), online shopping accounts (wherever your credit card information may be stored so your Agent can delete this information and prevent fraud), and online licenses (newspapers and other sites, either accessed personally or professionally) that should be cancelled.

**2. Identify the person best suited to take control of your digital assets following death or incapacity.**

Many people name their spouse or adult child as Personal Representative of their estate. However, if this person is not computer savvy, he or she might not be the right person to handle your digital assets. Make sure you have someone technologically inclined to assist with inventorying, accessing, and distributing your digital assets.

**3. Provide access.** While we are frequently told never to write down passwords and PINs, the reality is that without this information, your computer and accounts may not be accessible to your Agent. This may cause delay, frustration, inconvenience, and expense. Many websites now exist that will store passwords which are then accessible through a master password. However you choose to store them, providing access to your passwords is extremely important.

**4. Provide instructions.** There are a number of areas where you can provide advance instructions to your Agent. If you have a social networking page or account where friends and followers communicate regularly, let your Agent know if there is any particular way you wish to have your illness or death communicated. Additionally, let your Agent know if you prefer to have your site shut down or have a memorial page created in your honor. If you have a regular blog, you may want to write your own final goodbye post. And finally, if you have digital photos, let your Agent know if they should be copied and to whom they should be distributed.

**5. Update your estate plan.** Most estate plans are silent as to the disposition of your digital assets. In your Last Will and Testament, you should provide clear instructions to your Personal Representative. It is no longer sufficient to say, "I leave my computer to my son and all of my other personal property, including my photos, to my daughter." Does this mean that your computer with all of your files, online music, digital photos, and loaded software should be given to your son and everything else given to your daughter? Or should all of those digital assets be downloaded and given to your daughter and a clean computer given to your son? Should copies of your digital assets be made and given to each child? A specific bequest of digital assets is imperative for today's online generation.

The law has a long way to go to catch up with our use of technology. While states are slowly taking steps to define the legal standing of a digital executor, the burden remains on each of us to inventory our digital assets and ensure access for a smooth transition or risk losing these assets forever. For more information about estate planning for your digital assets, please contact our estate planning attorneys.

### Resources for Planning:

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**Gmail** provides instructions for gaining access to the deceased user's account, and in some instances it may be able to provide the account content to an authorized representative of the deceased user.

[bit.ly/2GgFMN](https://bit.ly/2GgFMN)

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**Hotmail** will send a copy of any email messages that may be stored on the deceased user's account, and any existing contact lists, and it will ultimately close the account upon request. [bit.ly/bpRPer](https://bit.ly/bpRPer)

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**Yahoo's** policy is to permanently delete all content and terminate the account upon receipt of a copy of a death certificate. [bit.ly/HRJf](https://bit.ly/HRJf)

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**Facebook** will, upon request, memorialize a decedent's account to allow friends and family to write on the decedent's Wall in remembrance. The account may be closed upon a formal request from the decedent's next of kin or upon a legal request. [on.fb.me/3M2X9f](https://on.fb.me/3M2X9f)

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**LinkedIn** will remove a decedent's account after receiving a Verification of Death form and the email address registered to the deceased member's account. [bit.ly/yENiPF](https://bit.ly/yENiPF)

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**Twitter** allows family members to remove the decedent's account or save a backup of the decedent's public Tweets. [bit.ly/com7fa](https://bit.ly/com7fa)

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**YouTube** permits the Personal Representative to access a decedent's account. [bit.ly/cqphYM](https://bit.ly/cqphYM)

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**Paypal** allows only the Personal Representative to close the account. If there are funds in the PayPal account, a check will be issued in the account holder's name. [bit.ly/w3ObIj](https://bit.ly/w3ObIj)

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**iTunes** states that when you purchase digital files (music, movies, and books), you have merely purchased a license for personal use. While the Terms of Service Agreement has a provision covering nuclear weapons ("You also agree that you will not use these products for any purposes prohibited by United States law, including, without limitation, the development, design, manufacture, or production of nuclear, missile, or chemical or biological weapons"), nothing specifically addresses the transfer of your media on death. It appears that legally, for now, there is no way to transfer iTunes media on death. [bit.ly/17yGNw](https://bit.ly/17yGNw)

**To learn more, contact our**

**Estate Planning & Probate Group**

**Helsell Fetterman LLP**

**Seattle** 1001 Fourth Avenue, Suite 4200

Seattle, WA 98154

**Bellevue** 10900 NE Fourth Street, Suite 2300

Bellevue, WA 98004

[WWW.HELSELL.COM](http://WWW.HELSELL.COM)