

War & PEAC:
Negotiating with the Tech Industry
Over Fiduciary Access to Digital Property

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Fiduciary Access to Digital Assets

Stored Communications Act (“SCA”)

Congress enacted the Stored Communications Act (“SCA”) in 1986, as a part of the Electronic Communications Privacy Act (“ECPA”). See generally 18 U.S.C. §§ 2701-2711.

“Content” is Key

The way the privacy protections of the SCA work is to prohibit certain providers of public communications services from disclosing the contents of its user’s communications to a government or non-government entity.

Non-Content Information

Service providers are allowed under the SCA to divulge non-content information, such as the user’s name, address, electronic connection records, IP address and account information. Those things are not considered “contents” of communications.

Providers are balking at granting executors access to the contents of decedents’ e-email accounts.

Ajemian v. Yahoo!, Inc., 83 Mass App Ct 565 (2013). Yahoo! refused to accept a co-administrator’s authority to access his deceased brother’s Yahoo! emails, even though the surviving brother had opened and had shared access to the account, but had forgotten the password.

Computer Fraud and Abuse Act (“CFAA”)

May create criminal liability when anyone (no carve-out for fiduciaries) “exceeds authorized access” by violating the access rules set forth in a provider’s Terms of Service agreement.

Terms of Service (“TOS”) for Popular Internet Accounts

1. **iCloud:** There is no right of survivorship. Your account is non-transferable and your rights terminate upon your death. **Upon receipt of a copy of a death certificate, your account may be terminated and all content deleted.** (<https://www.apple.com/legal/internet-services/icloud/en/terms.html>)
2. **Yahoo!:** Your Yahoo! Account is non-transferable and any rights terminate upon your death. **Upon receipt of a copy of a death certificate, your account may be terminated and all contents permanently deleted.** (<https://info.yahoo.com/legal/us/yahoo/utos/en-us/>)

3. **Google:** User affirmatively opts-in to Inactive Account Manager. Can choose either delete account after some determined period of inactivity, or, name a “trusted contact” and determine access level for the trusted contact. Google sends email notice to trusted contact.

[Inactive Account Manager](#) is the best way for you to let us know who should have access to your information, and whether you want your account to be deleted.

Make a request for a deceased person's account

We recognize that many people pass away without leaving clear instructions about how to manage their online accounts. We can work with immediate family members and representatives to close the account of a deceased person where appropriate. In certain circumstances we may provide content from a deceased user's account. In all of these cases, our primary responsibility is to keep people's information secure, safe, and private. We cannot provide passwords or other login details. Any decision to satisfy a request about a deceased user will be made only after a careful review.

Inactive Account Manager is a way for users to share parts of their account data or notify someone if they've been inactive for a certain period of time. To set up Inactive Account Manager, go to www.google.com/settings/account/inactive and click **Setup**.

How do we detect activity? We look at several signals to understand whether you are still using your Google Account. These include your last sign-ins, your recent activity in [My Activity](#), usage of Gmail (e.g., the Gmail app on your phone), and Android check-ins.

What happens when your account gets deleted?

Deleting your Google Account will affect all products associated with that account (e.g., Blogger, AdSense, Gmail), and affect each product differently. You can review the data associated with your account on the Google Dashboard. If you use Gmail with your account, you'll no longer be able to access that email. You'll also be *unable to reuse your Gmail username*.

Why do I need to provide a phone number for a trusted contact?

We'll use the phone number for the sole purpose of ensuring that only the trusted contact can actually download your data. Verifying the identity using a mobile phone number prevents data access from unauthorized people who might get hold of the email we send to your trusted contact.

What will trusted contacts receive?

Contacts will only receive notification once your account has been inactive for the specified amount of time -- they will not receive any notification during setup. If you chose to only notify your contacts of your inactive account, they'll receive an email

with a subject line and content that you wrote during setup. We'll add a footer to that email, explaining that you've instructed Google to send an email on your behalf after you've stopped using your account. This footer might say something like this:

John Doe (john.doe@gmail.com) instructed Google to send you this mail automatically after John stopped using his account.

Sincerely,
The Google Accounts Team

If you chose to share data with your trusted contact, the email will additionally contain a list of the data you have chosen to share with them, and a link they can follow to download the data. An example of such message could be:

John Doe (john.doe@gmail.com) instructed Google to send you this mail automatically after John stopped using his account.

John Doe has given you access to the following account data:

- +1s
- Blogger
- Drive
- Mail
- YouTube

Download John's data here.

Sincerely,
The Google Accounts Team

4. **Microsoft:** Microsoft does not currently have a process for the treatment of deceased user accounts. They had a **Next-of-Kin process** in the past but there is no indication of it on its website or any of its affiliates.

Microsoft Next of Kin Process: What to do in the event of the death or incapacitation of a loved one with a Outlook.com account.

If you have lost a family member, or have a family member who has become medically incapacitated, the following information will help you contact Microsoft regarding their Outlook.com account.

What can Microsoft provide me with in relation to my family member's Outlook.com account?

The Microsoft Next of Kin process allows for the release of Outlook.com contents, including all emails and their attachments, address book, and Messenger contact list, to the next of kin of a deceased or incapacitated account holder and/or closure of the

Microsoft account, following a short authentication process. We cannot provide you with the password to the account or change the password on the account, and we cannot transfer ownership of the account to the next of kin. Account contents are released by way of a data DVD which is shipped to you. Unfortunately, the Next of Kin department cannot assist you with password resets, account recovery, or any other support for your own account.

What products does the Microsoft Next of Kin process support?

At this time, the Microsoft Next of Kin process supports only Outlook.com accounts (email accounts ending in @outlook.com, @hotmail.com, @live.com, @windowslive.com, or @msn.com). We do not provide support for SkyDrive, MSN Dial-up, or Xbox Live.

How do I request the contents of my family member's account, or request the closure of the account?

In order to request that the contents of the email account be released to you, or to request the closure of the account, please contact the Microsoft Custodian of Records by emailing msrecord@microsoft.com to initiate the process. To process your request, we require that you provide some information about the account as well as copies of documentation to verify the status of the account holder and your kinship. Please refer to "What information and documentation will I need to provide for the next of kin process?" Please also provide us with an email address where we can reach you in case we have any follow-up questions and so we can notify you of the status of your request.

What documentation will I need to provide for the next of kin process?

In order to prove that you are legal next of kin and that the account holder is deceased or incapacitated, we require the following documentation:

1) An official death certificate for the user, if the user is deceased. Unfortunately, we cannot accept anything other than an official, government issued death certificate.

Examples of documents which we cannot accept are:

- a. An obituary
- b. A coroner's interim death certificate
- c. A coroner's statement of inquest into a death
- d. A funeral director's statement of services performed

2) A certified document signed by a medical professional in charge of the care of the user, if the user is incapacitated. A note signed by the doctor in charge and notarized will suffice, as will a signed court document showing that you have power of attorney or executorship of a trust for the account holder.

3) A Document showing that you are the user's next of kin and/or executor or benefactor of their estate, or that you have power of attorney. We accept any of the following documents as proof of kinship or executor status:

- a. A marriage certificate showing that you are the surviving spouse of the account holder.
- b. Signed power of attorney paperwork.
- c. A copy of a will or trust document naming you as executor or beneficiary.

- d. A birth certificate for the user, if you are their parent; or guardianship paperwork for legal guardians.
- 4) A photocopy of your government issued photo ID.

What information will I need to know about the Outlook.com account?

We require answers to all of the following questions about the account holder's email account.

- 1) What is or are the email address or addresses?
- 2) What is the first and last name that the account holder used when creating the account?
- 3) What is the date of birth that the account holder gave when creating the account?
- 4) What city, state, and zip code (for U.S. users) or country did the account holder enter as their place of residence when the account was created?
- 5) Approximately when was the account created? This doesn't need to be anything specific. "During the late 1990s," or "Around 2004" are perfectly acceptable answers.
- 6) Approximately when was the account last accessed? It is important that you tell us if you have been checking the account past the account holder's date of death, or if you suspect that the account has been accessed by an unauthorized individual after the account holder's death.
- 7) Your shipping address, if you are requesting a copy of the contents of the account. Please note that we cannot ship to a P.O. Box. Since your shipment will be coming from the U.S., please include your shipping address in the following format:
 - a. Attention
 - b. Street Address
 - c. City
 - d. State/Province
 - e. Zip/Postal Code
 - f. Country
 - g. Contact Phone Number
- 8) What type of computer you use, if you are requesting a copy of the contents of the account. We support PC, Mac, and Linux users, but we need to know what type of computer you use for preservation purposes. (http://answers.microsoft.com/en-us/outlook_com/forum/oaccount-omyinfo/my-familymember-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6)

5. **Facebook:** You can tell us in advance whether you'd like to have your account memorialized or permanently deleted from Facebook.

Memorialized Accounts: Memorialized accounts are a place for friends and family to gather and share memories after a person has passed away. Memorialized accounts have the following key features:

- The word **Remembering** will be shown next to the person's name on their profile
- Depending on the privacy settings of the account, friends can share memories on the memorialized Timeline

- Content the person shared (ex: photos, posts) stays on Facebook and is visible to the audience it was shared with
- Memorialized profiles don't appear in public spaces such as in suggestions for People You May Know, ads or birthday reminders
- No one can log into a memorialized account
- Memorialized accounts that don't have a [legacy contact](#) can't be changed
- Pages with a sole admin whose account was memorialized will be removed from Facebook if we receive a valid request

Deleting Your Account: You can choose to have your account [permanently deleted](#) should you pass away. To do this:

1. From the top right of Facebook, click ▼ and select **Settings**
2. From the left menu, click **Security**
3. Click **Legacy Contact**
4. Check the box below **Account Deletion** and follow the on-screen instructions

6. **Amazon/Kindle: License to Digital Content.** Subject to payment of any applicable fees to rent, purchase, or access Digital Content, and your compliance with all terms of this Agreement, Amazon grants you a personal, non-exclusive, non-transferable, non-sublicensable, license, during the applicable Viewing Period, to access, view, use and display the Digital Content in accordance with the Usage Rules, for Non-Commercial, Private Use.
7. **iTunes: No Right of Survivorship** – 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.** Contact iCloud Support at www.apple.com/support/icloud for further assistance.
8. **Bitcoin:** Because Bitcoin is not subject to any central regulation or storage system, the way it is treated after death is very dependent on how the owner managed and stored it. For instance, if the files were kept on the decedent's personal computer and the password given to a trusted beneficiary, then the Bitcoin could pass on as any other personal property would. However, if there were several layers of encryption or no one knew the password to get to the files, then the Bitcoin would be lost forever.

Estate Planning Provisions - Fiduciary Authorization

The following sample language could also be modified for a stand-alone Power of Attorney, Will or Trust. Note - different states may have different statutory requirements for estate planning documents. Consult with an estate planning attorney.

The powers of my Personal Representative and the Trustee shall also include the following powers:

Digital Assets and Accounts. My Personal Representative or the Trustee may take any action (including, without limitation, changing a terms of service agreement or other governing instrument) with respect to my Digital Assets and Digital Accounts as my Personal Representative or the Trustee shall deem appropriate, and as shall be permitted under applicable state and Federal law. My Personal Representative or the Trustee may engage experts or consultants or any other third party, and may delegate authority to such experts, consultants or third party, as necessary or appropriate to effectuate such actions with respect to my Digital Assets or Digital Accounts, including, but not limited to, such authority as may be necessary or appropriate to decrypt electronically stored information, or to bypass, reset or recover any password or other kind of authentication or authorization. If my Personal Representative or the Trustee shall determine that it is necessary or appropriate to engage and delegate authority to an individual pursuant to this paragraph, it is my request that *[Insert Name of Digital Asset Representative]* be engaged for this purpose. This authority is intended to constitute "lawful consent" to a service provider to divulge the contents of any communication under The Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et seq.), to the extent such lawful consent is required, and a Personal Representative or Trustee acting hereunder shall be an authorized user for purposes of applicable computer-fraud and unauthorized-computer-access laws. The authority granted under this paragraph shall extend to all Digital Assets and Digital Accounts associated with or used in connection with the Business (as defined in the Article herein entitled "The Closely-Held Business"). The authority granted under this paragraph is intended to provide my Personal Representative or the Trustee with full authority to access and manage my Digital Assets and Digital Accounts, to the extent permitted under applicable state and Federal law and shall not limit any authority granted to my Personal Representative or the Trustee under such laws.

The following definitions and miscellaneous provisions shall apply under this Will:

Digital Assets, Accounts and Devices. The following definitions and descriptions shall apply to the authority of the Personal Representative and Trustee with respect to my Digital Assets and Accounts:

“Digital Assets” shall include files created, generated, sent, communicated, shared, received, or stored on a Digital Device, regardless of the ownership of the physical device upon which the digital item was created, generated, sent, communicated, shared, received or stored (which underlying physical device shall not be a "Digital Asset" for purposes of this Will)

A "Digital Device" is an electronic device that can create, generate, send, share, communicate, receive, store, display, or process information, including, without limitation, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smart phones, cameras, electronic reading devices and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops.

"Digital Account" means an electronic system for creating, generating, sending, sharing, communicating, receiving, storing, displaying, or processing information which provides access to a Digital Asset stored on a Digital Device, regardless of the ownership of such Digital Device.

For the purpose of illustration, and without limitation, Digital Assets and Digital Accounts shall include email and email accounts, social network content and accounts, social media content and accounts, text, documents, digital photographs, digital videos, software, software licenses, computer programs, computer source codes, databases file sharing accounts, financial accounts, health insurance records and accounts, health care records and accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online store accounts and affiliate programs and other online accounts which currently exist or may exist as technology develops, or such comparable items and accounts as technology develops, including any words, characters, codes, or contractual rights necessary to access such items and accounts.

The steps that we recommend for a **Virtual Asset Instruction Letter (“VAIL”)**:

- First, identify each internet account that you have and determine how each company handles an account when the account holder dies.
- Second, determine which accounts you want your representative to maintain and have access to, and prepare a written and electronic file list of those accounts with their passwords.
- Third, determine which accounts you wish to have deleted and provide the necessary written instructions to do so.
- Fourth, consider saving the account and access information on a CD or memory stick and store it in a safe place. Give your representative instructions about how to access this information. Don’t forget to update it as passwords change.
- Fifth, if you have a collection of pictures or other memorabilia that are being stored on the internet, consider making a backup of that information to a disk drive or CD that you control. Store this information in a safe place, and provide your personal representative with instructions on how to obtain that information.
- Sixth, upgrade your power of attorney to include provisions authorizing your agent to access your emails and other electronic data.
- Seventh, if someone other than your personal representative is being designated to handle your electronic data, then those individuals should be named in your will or other estate planning documents.

For more detailed information go to www.wealthlawblog.com

THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

- A Summary -

In the Internet age, the nature of property and our methods of communication have changed dramatically. A generation ago, a human being delivered our mail, photos were kept in albums, documents in file cabinets, and money on deposit at the corner bank. For most people today, at least some of their property and communications are stored as data on a computer server and accessed via the Internet.

Collectively, a person's digital property and electronic communications are referred to as "digital assets" and the companies that store those assets on their servers are called "custodians." Access to digital assets is usually governed by a terms-of-service agreement rather than by property law. This creates problems when Internet users die or otherwise lose the ability to manage their own digital assets.

A fiduciary is a trusted person with the legal authority to manage another's property, and the duty to act in that person's best interest. The Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) addresses four common types of fiduciaries:

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

Revised UFADAA gives Internet users the power to plan for the management and disposition of their digital assets in a similar way as they can make plans for their tangible property. In case of conflicting instructions, the act provides a three-tiered system of priorities:

1. If the custodian provides an online tool, separate from the general terms of service, that allows the user to name another person to have access to the user's digital assets or to direct the custodian to delete the user's digital assets, Revised UFADAA makes the user's online instructions legally enforceable.
2. If the custodian does not provide an online planning option, or if the user declines to use the online tool provided, the user may give legally enforceable directions for the disposition of digital assets in a will, trust, power of attorney, or other written record.
3. If the user has not provided any direction, either online or in a traditional estate plan, the terms of service for the user's account will determine whether a fiduciary may access the user's digital assets. If the terms of service do not address fiduciary access, the default rules of Revised UFADAA will apply.

Revised UFADAA's default rules attempt to balance the user's privacy interest with the fiduciary's need for access by making a distinction between the "content of electronic communications," the "catalogue of electronic communications", and other types of digital assets.

The content of electronic communications includes the subject line and body of a user's email messages, text messages, and other messages between private parties. A fiduciary may never access the content of electronic communications without the user's consent. When necessary, a fiduciary may have a right to access a catalogue of the user's electronic communications – essentially a list of communications showing the addresses of the sender and recipient, and the date and time the message was sent.

For example, the executor of a decedent's estate may need to access a catalogue of the decedent's communications in order to compile an inventory of estate assets. If the executor finds that the decedent received a monthly email message from a particular bank or credit card company, the executor can contact that company directly and request a statement of the decedent's account.

Other types of digital assets are not communications, but intangible personal property. For example, an agent under a power of attorney who has authority to access the principal's business files will have access under Revised UFADAA to any files stored in "the cloud" as well as those stored in file cabinets. Similarly, an executor that is distributing the decedent's family photo albums to heirs will also have access under Revised UFADAA to photos the decedent uploaded to a photo-sharing web site.

Under Revised UFADAA Section 15, fiduciaries for digital assets are subject to the same fiduciary duties that normally apply to tangible assets. Thus, for example, an executor may not publish the decedent's confidential communications or impersonate the decedent by sending email from the decedent's account. A fiduciary's management of digital assets may also be limited by other law. For example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not exceed the user's authority under the account's terms of service.

In order to gain access to digital assets, Revised UFADAA requires a fiduciary to send a request to the custodian, accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust. Custodians of digital assets that receive an apparently valid request for access are immune from any liability for acts done in good faith compliance.

Revised UFADAA is an overlay statute designed to work in conjunction with a state's existing laws on probate, guardianship, trusts, and powers of attorney. It is a vital statute for the digital age, and should be enacted by every state legislature as soon as possible.

For further information about Revised UFADAA, please contact ULC Legislative Counsel Benjamin Orzeske at 312-450-6621 or borzeske@uniformlaws.org.

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 5029

Chapter 140, Laws of 2016

64th Legislature
2016 Regular Session

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

EFFECTIVE DATE: 6/9/2016

Passed by the Senate March 7, 2016
Yeas 47 Nays 1

BRAD OWEN

President of the Senate

Passed by the House March 3, 2016
Yeas 80 Nays 15

FRANK CHOPP

Speaker of the House of Representatives

Approved March 31, 2016 4:41 PM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Hunter G. Goodman, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5029** as passed by Senate and the House of Representatives on the dates hereon set forth.

HUNTER G. GOODMAN

Secretary

FILED

April 1, 2016

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 5029

AS AMENDED BY THE HOUSE

Passed Legislature - 2016 Regular Session

State of Washington

64th Legislature

2016 Regular Session

By Senate Law & Justice (originally sponsored by Senators Pedersen and O'Ban; by request of Uniform Law Commission)

READ FIRST TIME 01/22/16.

1 AN ACT Relating to the revised uniform fiduciary access to
2 digital assets act; and adding a new chapter to Title 11 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** SHORT TITLE. This act may be known and
5 cited as the revised uniform fiduciary access to digital assets act.

6 NEW SECTION. **Sec. 2.** DEFINITIONS. In this chapter:

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

11 (2) "Agent" means an attorney in fact granted authority under a
12 durable or nondurable power of attorney.

13 (3) "Carries" means engages in the transmission of an electronic
14 communication.

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

19 (5) "Content of an electronic communication" means information
20 concerning the substance or meaning of the communication which:

- 1 (a) Has been sent or received by a user;
- 2 (b) Is in electronic storage by a custodian providing an
3 electronic communication service to the public or is carried or
4 maintained by a custodian providing a remote computing service to the
5 public; and
- 6 (c) Is not readily accessible to the public.
- 7 (6) "Court" means the superior court of each county.
- 8 (7) "Custodian" means a person that carries, maintains,
9 processes, receives, or stores a digital asset of a user.
- 10 (8) "Designated recipient" means a person chosen by a user using
11 an online tool to administer digital assets of the user.
- 12 (9) "Digital asset" means an electronic record in which an
13 individual has a right or interest. The term does not include an
14 underlying asset or liability unless the asset or liability is itself
15 an electronic record.
- 16 (10) "Electronic" means relating to technology having electrical,
17 digital, magnetic, wireless, optical, electromagnetic, or similar
18 capabilities.
- 19 (11) "Electronic communication" has the meaning set forth in 18
20 U.S.C. Sec. 2510(12), as it existed on the effective date of this
21 section.
- 22 (12) "Electronic communication service" means a custodian that
23 provides to a user the ability to send or receive an electronic
24 communication.
- 25 (13) "Fiduciary" means an original, additional, or successor
26 personal representative, guardian, agent, or trustee.
- 27 (14) "Guardian" means a person appointed by a court to manage the
28 estate or person, or both, of a living individual. The term includes
29 a limited guardian or certified professional guardian.
- 30 (15) "Incapacitated person" means an individual for whom a
31 guardian has been appointed.
- 32 (16) "Information" means data, text, images, videos, sounds,
33 codes, computer programs, software, databases, or the like.
- 34 (17) "Online tool" means an electronic service provided by a
35 custodian that allows the user, in an agreement distinct from the
36 terms-of-service agreement between the custodian and user, to provide
37 directions for disclosure or nondisclosure of digital assets to a
38 third person.

1 (18) "Person" means an individual, estate, business or nonprofit
2 entity, public corporation, government or governmental subdivision,
3 agency, or instrumentality, or other legal entity.

4 (19) "Personal representative" means an executor, administrator,
5 special administrator, or person that performs substantially the same
6 function under law of this state other than this chapter.

7 (20) "Power of attorney" means a record that grants an agent
8 authority to act in the place of a principal.

9 (21) "Principal" means an individual who grants authority to an
10 agent in a power of attorney.

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

14 (23) "Remote computing service" means a custodian that provides
15 to a user computer processing services or the storage of digital
16 assets by means of an electronic communications system, as defined in
17 18 U.S.C. Sec. 2510(14), as it existed on the effective date of this
18 section.

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

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

24 (26) "User" means a person that has an account with a custodian.

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

28 NEW SECTION. **Sec. 3.** APPLICABILITY. (1) This chapter applies
29 to:

30 (a) A fiduciary acting under a will or power of attorney executed
31 before, on, or after the effective date of this section;

32 (b) A personal representative acting for a decedent who died
33 before, on, or after the effective date of this section;

34 (c) A guardian acting for an incapacitated person appointed
35 before, on, or after the effective date of this section;

36 (d) A trustee acting under a trust created before, on, or after
37 the effective date of this section; and

38 (e) A custodian if the user resides in this state or resided in
39 this state at the time of the user's death.

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

NEW SECTION. **Sec. 4.** USER DIRECTION FOR DISCLOSURE OF DIGITAL ASSETS. (1) 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.

(2) If a user has not used an online tool to give direction under subsection (1) of this section 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.

(3) A user's direction under subsection (1) or (2) of this section 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 agreement.

NEW SECTION. **Sec. 5.** TERMS-OF-SERVICE AGREEMENT. (1) This chapter 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.

(2) This chapter does not give a fiduciary or a 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.

(3) 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 of this act.

NEW SECTION. **Sec. 6.** PROCEDURE FOR DISCLOSING DIGITAL ASSETS. (1) When disclosing digital assets of a user under this chapter, the custodian may at its sole discretion:

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

3 (b) Grant a fiduciary or designated recipient partial access to
4 the user's account sufficient to perform the tasks with which the
5 fiduciary or designated recipient is charged; or

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

10 (2) A custodian may assess a reasonable administrative charge for
11 the cost of disclosing digital assets under this chapter.

12 (3) A custodian need not disclose under this chapter a digital
13 asset deleted by a user.

14 (4) If a user directs or a fiduciary or designated recipient
15 requests a custodian to disclose under this chapter some, but not
16 all, of the user's digital assets, the custodian need not disclose
17 the assets if segregation of the assets would impose an undue burden
18 on the custodian. If the custodian believes the direction or request
19 imposes an undue burden, the custodian or the fiduciary or designated
20 recipient may seek an order from the court to disclose:

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

22 (b) All of the user's digital assets to the fiduciary or
23 designated recipient;

24 (c) None of the user's digital assets; or

25 (d) All of the user's digital assets to the court for review in
26 camera.

27 NEW SECTION. **Sec. 7.** DISCLOSURE OF CONTENT OF ELECTRONIC
28 COMMUNICATIONS OF DECEASED USER. If a deceased user consented to or a
29 court directs disclosure of the contents of electronic communications
30 of the user, the custodian shall disclose to the personal
31 representative of the estate of the user the content of an electronic
32 communication sent or received by the user if the personal
33 representative gives the custodian:

34 (1) A written request for disclosure in physical or electronic
35 form;

36 (2) A certified copy of the death certificate of the user;

37 (3) A certified copy of the letter of appointment of the
38 representative, or a small estate affidavit or court order;

1 (4) Unless the user provided direction using an online tool, a
2 copy of the user's will, trust, power of attorney, or other record
3 evidencing the user's consent to disclosure of the content of
4 electronic communications; and

5 (5) If requested by the custodian:

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

9 (b) Evidence linking the account to the user; or

10 (c) A finding by the court that:

11 (i) The user had a specific account with the custodian,
12 identifiable by the information specified in (a) of this subsection;

13 (ii) Disclosure of the content of electronic communications of
14 the user would not violate 18 U.S.C. Sec. 2701 et seq. and 47 U.S.C.
15 Sec. 222, existing on the effective date of this section, or other
16 applicable law;

17 (iii) Unless the user provided direction using an online tool,
18 the user consented to disclosure of the content of electronic
19 communications; or

20 (iv) Disclosure of the content of electronic communications of
21 the user is reasonably necessary for administration of the estate.

22 NEW SECTION. **Sec. 8.** DISCLOSURE OF OTHER DIGITAL ASSETS OF
23 DECEASED USER. Unless the user prohibited disclosure of digital
24 assets or the court directs otherwise, a custodian shall disclose to
25 the personal representative of the estate of a deceased user a
26 catalogue of electronic communications sent or received by the user
27 and digital assets, other than the content of electronic
28 communications of the user, if the representative gives the
29 custodian:

30 (1) A written request for disclosure in physical or electronic
31 form;

32 (2) A certified copy of the death certificate of the user;

33 (3) A certified copy of the letter of appointment of the
34 representative, or a small estate affidavit or court order; and

35 (4) If requested by the custodian:

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

39 (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 (a) of this subsection; or

(ii) Disclosure of the user's digital assets is reasonably necessary for administration of the estate.

NEW SECTION. **Sec. 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, user name, 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.

NEW SECTION. **Sec. 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, user name, 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.

NEW SECTION. **Sec. 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 that account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

NEW SECTION. **Sec. 12.** DISCLOSURE OF CONTENT 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 RCW 11.98.075, 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, user name, 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.

1 NEW SECTION. **Sec. 13.** DISCLOSURE OF OTHER DIGITAL ASSETS HELD
2 IN TRUST WHEN TRUSTEE NOT ORIGINAL USER. Unless otherwise ordered by
3 the court, directed by the user, or provided in a trust, a custodian
4 shall disclose, to a trustee that is not an original user of an
5 account, a catalogue of electronic communications sent or received by
6 an original or successor user and stored, carried, or maintained by
7 the custodian in an account of the trust and any digital assets,
8 other than the content of electronic communications in which the
9 trust has a right or interest, if the trustee gives the custodian:

10 (1) A written request for disclosure in physical or electronic
11 form;

12 (2) A certified copy of the trust instrument or a certification
13 of the trust under RCW 11.98.075;

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

17 (4) If requested by the custodian:

18 (a) A number, user name, address, or other unique subscriber or
19 account identifier assigned by the custodian to identify the trust's
20 account; or

21 (b) Evidence linking the account to the trust.

22 NEW SECTION. **Sec. 14.** DISCLOSURE OF DIGITAL ASSETS TO GUARDIAN
23 OF INCAPACITATED PERSON. (1) Unless otherwise ordered by the court, a
24 guardian appointed due to a finding of incapacity under RCW
25 11.88.010(1) has the right to access an incapacitated person's
26 digital assets other than the content of electronic communications.

27 (2) Unless otherwise ordered by the court or directed by the
28 user, a custodian shall disclose to a guardian the catalogue of
29 electronic communications sent or received by an incapacitated person
30 and any digital assets, other than the content of electronic
31 communications, if the guardian gives the custodian:

32 (a) A written request for disclosure in physical or electronic
33 form;

34 (b) Certified copies of letters of guardianship and the court
35 order appointing the guardian; and

36 (c) If requested by the custodian:

37 (i) A number, user name, address, or other unique subscriber or
38 account identifier assigned by the custodian to identify the account
39 of the person; or

(ii) Evidence linking the account to the incapacitated person.

(3) A guardian may request a custodian of the incapacitated person's digital assets to suspend or terminate an account of the incapacitated person for good cause. A request made under this section must be accompanied by certified copies of letters of guardianship and the court order appointing the guardian.

NEW SECTION. **Sec. 15.** FIDUCIARY DUTY AND AUTHORITY. (1) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

- (a) The duty of care;
- (b) The duty of loyalty; and
- (c) The duty of confidentiality.

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

- (a) Except as otherwise provided in section 4 of this act, is subject to the applicable terms-of-service agreement;
- (b) Is subject to other applicable law, including copyright law;
- (c) In the case of a fiduciary, is limited by the scope of the fiduciary's duties; and
- (d) May not be used to impersonate the user.

(3) A fiduciary with authority over the property of a decedent, incapacitated person, principal, or settlor has the right to access any digital asset in which the decedent, incapacitated 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.

(4) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, incapacitated person, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws.

(5) A fiduciary with authority over the tangible, personal property of a decedent, incapacitated person, principal, or settlor:

- (a) Has the right to access the property and any digital asset stored in it; and
- (b) Is an authorized user for the purpose of computer fraud and unauthorized computer access laws.

(6) 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.

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

4 (a) If the user is deceased, a certified copy of the death
5 certificate of the user;

6 (b) A certified copy of the letter of appointment of the
7 representative or a small estate affidavit or court order, court
8 order, power of attorney, or trust giving the fiduciary authority
9 over the account; and

10 (c) If requested by the custodian:

11 (i) A number, user name, address, or other unique subscriber or
12 account identifier assigned by the custodian to identify the user's
13 account;

14 (ii) Evidence linking the account to the user; or

15 (iii) A finding by the court that the user had a specific account
16 with the custodian, identifiable by the information specified in

17 (c)(i) of this subsection.

18 NEW SECTION. **Sec. 16.** CUSTODIAN COMPLIANCE AND IMMUNITY. (1)

19 Not later than sixty days after receipt of the information required
20 under sections 7 through 15 of this act, a custodian shall comply
21 with a request under this chapter from a fiduciary or designated
22 recipient to disclose digital assets or terminate an account. If the
23 custodian fails to comply, the fiduciary or designated recipient may
24 apply to the court for an order directing compliance.

25 (2) An order under subsection (1) of this section directing
26 compliance must contain a finding that compliance is not in violation
27 of 18 U.S.C. Sec. 2702, as it existed on the effective date of this
28 section.

29 (3) A custodian may notify the user that a request for disclosure
30 or to terminate an account was made under this chapter.

31 (4) A custodian may deny a request under this chapter from a
32 fiduciary or designated recipient for disclosure of digital assets or
33 to terminate an account if the custodian is aware of any lawful
34 access to the account following the receipt of the fiduciary's
35 request.

36 (5) This section does not limit a custodian's ability to obtain
37 or require a fiduciary or designated recipient requesting disclosure
38 or termination under this chapter to obtain a court order which:

1 (a) Specifies that an account belongs to the incapacitated
2 person, trustor, decedent, or principal;

3 (b) Specifies that there is sufficient consent from the
4 incapacitated person, trustor, decedent, or principal to support the
5 requested disclosure; and

6 (c) Contains a finding required by law other than this chapter.

7 (6) A custodian and its officers, employees, and agents are
8 immune from liability for an act or omission done in good faith in
9 compliance with this chapter.

10 NEW SECTION. **Sec. 17.** UNIFORMITY OF APPLICATION AND
11 CONSTRUCTION. In applying and construing this chapter, consideration
12 must be given to the need to promote uniformity of the law with
13 respect to its subject matter among states that enact it.

14 NEW SECTION. **Sec. 18.** RELATION TO ELECTRONIC SIGNATURES IN
15 GLOBAL AND NATIONAL COMMERCE ACT. This chapter modifies, limits, or
16 supersedes the electronic signatures in global and national commerce
17 act, 15 U.S.C. Sec. 7001 et seq., but does not modify, limit, or
18 supersede 15 U.S.C. Sec. 7001(c) or authorize electronic delivery of
19 any of the notices described in 15 U.S.C. Sec. 7003(b).

20 NEW SECTION. **Sec. 19.** SEVERABILITY. If any provision of this
21 act or its application to any person or circumstance is held invalid,
22 the remainder of the act or the application of the provision to other
23 persons or circumstances is not affected.

24 NEW SECTION. **Sec. 20.** Sections 1 through 19 of this act
25 constitute a new chapter in Title 11 RCW.

Passed by the Senate March 7, 2016.

Passed by the House March 3, 2016.

Approved by the Governor March 31, 2016.

Filed in Office of Secretary of State April 1, 2016.

Enrolled Senate Bill 1554

Sponsored by Senator PROZANSKI; Representatives BARKER, HUFFMAN, OLSON (at the request of The Estate Planning Section of the Oregon State Bar) (Presession filed.)

CHAPTER

AN ACT

Relating to access to digital assets.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 to 18 of this 2016 Act may be cited as the Revised Uniform Fiduciary Access to Digital Assets Act (2015).

SECTION 2. As used in sections 2 to 18 of this 2016 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 a person designated as an agent under a power of attorney in accordance with ORS 127.005 to 127.045.

(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” has the meaning given that term in ORS 125.005.

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

(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 a circuit court in this state.

(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. “Digital asset” 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. 2510(12).

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

(14) “Fiduciary” means a person that is an original, additional or successor personal representative, conservator, agent or trustee.

(15) “Information” means data, text, images, videos, sounds, codes, computer programs, software, databases and similar intelligence of any nature.

(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 the 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 or special administrator, or a person legally authorized to perform substantially the same functions.

(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. “Protected person” 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. 2510(14).

(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 person. “Trustee” 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.

SECTION 3. (1) Sections 2 to 18 of this 2016 Act apply to:

(a) A fiduciary acting under a will or power of attorney executed before, on or after the effective date of this 2016 Act;

(b) A personal representative acting for a decedent who died before, on or after the effective date of this 2016 Act;

(c) A conservatorship proceeding commenced before, on or after the effective date of this 2016 Act; and

(d) A trustee acting under a trust created before, on or after the effective date of this 2016 Act.

(2) Sections 2 to 18 of this 2016 Act apply to a custodian if the user resides in this state or resided in this state at the time of the user’s death.

(3) Sections 2 to 18 of this 2016 Act do not apply to a digital asset of an employer used by an employee in the ordinary course of the employer’s business.

SECTION 4. (1) 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.

(2) If a user has not used an online tool to give direction under subsection (1) of this section, 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.

(3) A user's direction under subsection (1) or (2) of this section 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. (1) Sections 2 to 18 of this 2016 Act do 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.

(2) Sections 2 to 18 of this 2016 Act do not give a fiduciary or a 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.

(3) 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 of this 2016 Act.

SECTION 6. (1) When disclosing digital assets of a user under sections 2 to 18 of this 2016 Act, the custodian may, in the custodian's sole discretion:

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

(b) 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

(c) 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.

(2) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under sections 2 to 18 of this 2016 Act.

(3) A custodian need not disclose under sections 2 to 18 of this 2016 Act a digital asset deleted by a user.

(4) If a user directs, or a fiduciary requests, a custodian to disclose some, but not all, of the user's digital assets under sections 2 to 18 of this 2016 Act, the custodian need not disclose the digital assets if segregation of the digital 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:

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

(b) All of the user's digital assets to the fiduciary or designated recipient;

(c) None of the user's digital assets; or

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

SECTION 7. If a deceased user consented to, 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 personal 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 personal 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, user name, 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:

(A) The user had a specific account with the custodian, identifiable by the information specified in paragraph (a) of this subsection;

(B) Disclosure of the content of electronic communications of the user would not violate 18 U.S.C. 2701 et seq., 47 U.S.C. 222 or other applicable law;

(C) Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

(D) Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

SECTION 8. 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 personal 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 personal representative or a small estate affidavit or court order; and

(4) If requested by the custodian:

(a) A number, user name, 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:

(A) The user had a specific account with the custodian, identifiable by the information specified in paragraph (a) of this subsection; or

(B) Disclosure of the user's digital assets is reasonably necessary for administration of the estate.

SECTION 9. 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, user name, 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. Unless otherwise ordered by the court, directed by the principal or provided in 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, user name, 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. 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. 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 ORS 130.860 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, user name, 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. 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 ORS 130.860;

(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, user name, 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. (1) After an opportunity for a hearing, the court may grant a conservator access to the digital assets of a protected person.

(2) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to the 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:

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

(b) A certified copy of the court order that gives the conservator authority over the digital assets of the protected person; and

(c) If requested by the custodian:

(A) A number, user name, 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.

(3) 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 the account of the protected person for good cause. A request made under this subsection must be accompanied by a certified copy of the court order giving the conservator authority over the protected person's property.

SECTION 15. (1) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

(a) The duty of care;

(b) The duty of loyalty; and

(c) The duty of confidentiality.

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

(a) Except as otherwise provided in section 4 of this 2016 Act, is subject to the applicable terms of service;

(b) Is subject to other applicable law, including copyright law;

(c) In the case of a fiduciary, is limited by the scope of the fiduciary's duties; and

(d) May not be used to impersonate the user.

(3) 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 has a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(4) 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 laws on unauthorized computer access.

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

(a) Has the right to access the property and any digital asset stored in the property; and

(b) Is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including this state's laws on unauthorized computer access.

(6) 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.

(7) 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:

(a) If the user is deceased, a certified copy of the death certificate of the user;

(b) A certified copy of the letter of appointment of the personal representative, a small estate affidavit or court order, a court order, a power of attorney or a trust giving the fiduciary authority over the account; and

(c) If requested by the custodian:

(A) A number, user name, 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) of this paragraph.

SECTION 16. (1) Not later than 60 days after receipt of the information required under sections 7 to 15 of this 2016 Act, a custodian shall comply with a request 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.

(2) An order under subsection (1) of this section directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. 2702.

(3) A custodian may notify the user that a request for disclosure or to terminate an account was made under sections 2 to 18 of this 2016 Act.

(4) A custodian may deny a request under sections 2 to 18 of this 2016 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.

(5) Sections 2 to 18 of this 2016 Act do not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination to obtain a court order that:

(a) Specifies that an account belongs to the protected person or principal;

(b) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and

(c) Contains a finding required by law other than under sections 2 to 18 of this 2016 Act.

(6) A custodian and the custodian's officers, employees and agents are immune from liability for an act or omission done in good faith in compliance with sections 2 to 18 of this 2016 Act.

SECTION 17. 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 the enacting states.

SECTION 18. Sections 2 to 18 of this 2016 Act modify, limit or supersede the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but do not modify, limit or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

Passed by Senate February 10, 2016

Received by Governor:

.....M.,....., 2016

.....
Lori L. Bocker, Secretary of Senate

Approved:

.....M.,....., 2016

.....
Peter Courtney, President of Senate

Passed by House February 23, 2016

.....
Kate Brown, Governor

Filed in Office of Secretary of State:

.....
Tina Kotek, Speaker of House

.....M.,....., 2016

.....
Jeanne P. Atkins, Secretary of State

War & PEAC: Negotiating with the Tech Industry Over Fiduciary Access to Digital Property



Northwest Planned
Giving Roundtable
September 16,
2016

Darlene Pasieczny
Walker Clark





> 1.65 billion active users
<http://en.wikipedia.org/wiki/Facebook>



> 433 million accounts
<http://en.wikipedia.org/wiki/LinkedIn>

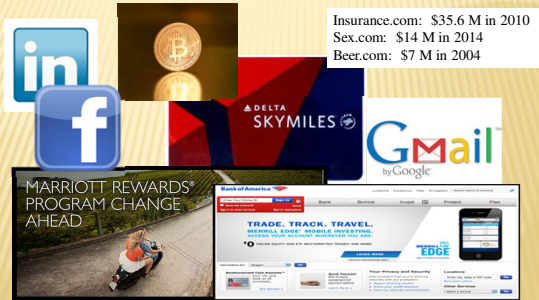


> 313 million monthly active users
<https://about.twitter.com/company>



> 200 million hours of videos
viewed per day
http://www.youtube.com/press_statistics

DIGITAL ASSETS – ARE THEY WORTH ANYTHING?



Insurance.com: \$35.6 M in 2010
Sex.com: \$14 M in 2014
Beer.com: \$7 M in 2004

\$635,000 FOR CLUB NEVERDIE (2010)

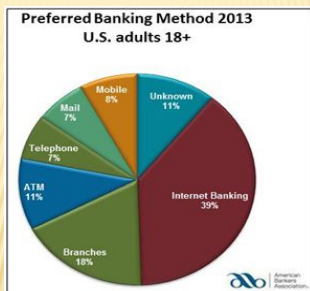
- ✧ Digital Real Estate in Entropia Universe on-line game
- ✧ Annual revenue was about \$200,000



DIGITAL ASSET USERS

- ✧ 2013 McAfee Survey: Global average places over \$35,000 value on digital assets PP
 - ✧ Personal memories
 - ✧ Personal & business records
 - ✧ Career information
 - ✧ Hobbies & Projects
 - ✧ Personal communications
 - ✧ Entertainment files
- ✧ Average number of passwords per individual: 25

FINDING ASSETS – DIGITAL MAILBOX



CHALLENGES



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.**



TERMS OF SERVICE AGREEMENTS ("TOS")

HAVE YOU READ YOURS?

- ✗ **Yahoo:** 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.**

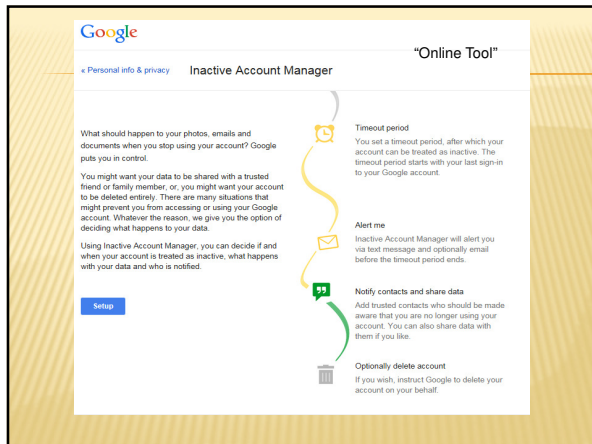
FACEBOOK



- ✗ User can **select in advance** to have account memorialized or permanently deleted upon death



- ✗ Memorializing – user must identify "legacy contact" in advance to make changes to memorialized page
- ✗ No one can log on to memorialized page
- ✗ Content is visible to audience originally shared with



BITCOIN AND “VIRTUAL CURRENCIES”

- ✦ IRS Notice 2014-21: Considered “property” for federal tax purposes
- ✦ Basis is FMV in US dollars as of the date of receipt

- ✦ Bitcoin units are entries on a permanent digital ledger in blockchains
- ✦ Need a “wallet” to receive, store, and send Bitcoin

- ✦ PASSWORD TO ACCESS YOUR “WALLET”
- ✦ Software wallet can be installed on a personal computer
- ✦ Hosted “web wallets” through a secure online platform (with own TOS)

- ✦ Bitcoin itself can pass (gift, inheritance) as personal property
- ✦ BUT: Lose a password to access, LOSE THE BITCOIN FOREVER

- ✦ Decentralized & Not Regulated – no one to call to recover password
- ✦ AND: If using a hosted web wallet, TOS may prohibit non-user access

In Re Justin Ellsworth

GRIEVING FATHER PLEADS WITH APPLE TO UNLOCK HIS DEAD SON'S IPHONE

BY DAVID GOLDMAN @DAVIDGOLDMANCNN
APRIL 1, 2016: 11:56 AM ET



✕ Dama and Leonardo Fabbretti

WHY SO DIFFICULT?

Oregon State Anti-Hacking Laws:

ORS 164.377 (Computer crime)

...

- + (4) Any person who knowingly and without authorization uses, accesses or attempts to access any computer, computer system, computer network, or any computer software, program, documentation or data contained in such computer, computer system or computer network, commits computer crime.
- + Class A misdemeanor

WHY SO DIFFICULT?

Washington State Anti-Hacking Laws:

RCW 9A.52.110 (Computer Trespass in First Degree)

- ✕ (1) A person is guilty of computer trespass in the first degree if the person, without authorization, intentionally gains access to a computer system or electronic database of another, and
- ✕ (a) The access is made with the intent to commit another crime; or
- ✕ (b) The violation involves a computer or database maintained by a government agency.
- ✕ (2) Computer trespass in the first degree is a class C felony.

RCW 9A.52.120 (Computer Trespass in the Second Degree)

- ✕ (1) A person is guilty of computer trespass in the second degree if the person, without authorization, intentionally gains access to a computer system or electronic database of another under circumstances not constituting the offense in the first degree.
- ✕ (2) Computer trespass in the second degree is a gross misdemeanor.

Federal Law

Stored Communications Act ("SCA")

Contents of Digital Accounts:

SCA prohibits certain providers of public communications services from disclosing the **contents** of its user's communications

Non-Content Information:

SCA allows providers to divulge non-content information, such as the user's name, address, connection records, IP address and account information



18 U.S.C. §§ 2701-2711

TWO RELEVANT PROHIBITIONS

18 U.S.C. Section 2701(a):

- + illegal to "intentionally access...without authorization a facility through which an electronic communication service is provided", as well as to "intentionally exceed...an authorization to access that facility."
- + However, "conduct authorized...by a user of that service with respect to a communication of oriented for that user" is not prohibited.

18 U.S.C. Section 2702 :

- × Prohibits an electronic communication service or a remote computing service from knowingly divulging the contents of a communication that is stored by or carried or maintained on that service
- × unless 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".

COMPUTER FRAUD & ABUSE ACT ("CFAA"), 18 U.S.C. §1030

- ✧ Prohibits unauthorized access to computers.
- ✧ The U.S. Department of Justice takes the position that this Section supports a **criminal charge** when **anyone** "exceeds authorized access" by violating the access rules set forth in the provider's terms of service ("TOS") agreement.
- ✧ There is **NO** specific exemption or authorization in the CFAA for fiduciaries attempting to access a decedent's digital assets.

WHY SHOULD FIDUCIARIES CARE?

- ✧ Fighting with a service provider = delays, additional costs, and maybe deletion / loss.
 - + *Example: Yahoo! Subpoena*
- ✧ Potential liability. Even though does not appear to have heavy enforcement, need to advise fiduciaries on potential liabilities when marshalling assets.
- ✧ Digital Assets may have real \$\$ monetary value.
- ✧ Sentimental value also important.

Legislative Developments



UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT ("UFADAA")

- ✗ Developed by ULC in 2014
- ✗ Moved forward quickly
- ✗ Hard fought by some online providers
- ✗ ACLU misunderstands privacy issues

PRIVACY EXPECTATION AFTERLIFE AND CHOICES ACT ("PEAC")



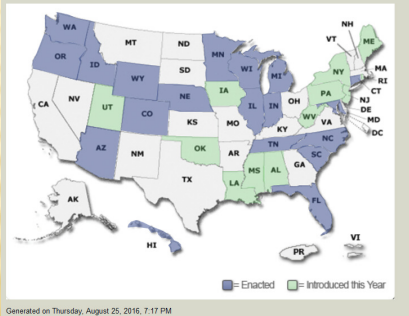
- ✗ Social Media Bill
- ✗ Requires Court Order (Probate)
 - + Avoiding Probate will no longer be an option
 - + Need a Court Finding: Disclosure will not violate the Stored Communications Act and other federal law
- ✗ Estate required to indemnify service provider from liability
- ✗ PRs and administrators must provide extensive documentation to get order
- ✗ Service provider can object to order if unduly burdensome
- ✗ AND..... Terms of Service Agreement still controls

REVISED UFADAA 2015 ("RUFADAA")



- ✗ Brings fiduciary law into the internet age
- ✗ Gives Account Holders Some Control over their Digital Assets
- ✗ Authorizes the following fiduciaries:
 - + Executors and personal representatives
 - + Guardians and conservators
 - + Trustees
 - + Agents under power of attorney

Legislative Enactment Status
Fiduciary Access to Digital Assets Act, Revised (2015)



NEED FOR REFORM

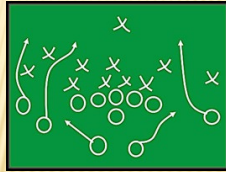
Without RUFADAA, fiduciaries are violating state and federal law every time they access online accounts and information, EVEN IF the decedent had the wherewithal to write down their password in advance.

OREGON AND WASHINGTON

- ✗ OR SB 1554
- ✗ Effective January 1, 2017
- ✗ Oregon as First State to Adopt RUFADAA

- ✗ WA SB 5029
- ✗ Effective June 9, 2016

ESTATE PLANNING AND CHARITABLE GIVING FOR DIGITAL ASSETS



"VAIL"
Virtual Asset Instruction Letter

IDENTIFY ACCOUNTS:

INSTRUCTIONS: MAINTAIN

INSTRUCTIONS: DELETE

MAINTAIN: LIST OF ACCOUNTS

SELECT PEOPLE TO HANDLE ASSETS:

UPDATE WILL & TRUST

UPDATE POWER OF ATTORNEY

UPDATE FORMS & EDUCATE

- ✦ Add comprehensive language to POA, Trust, and Will authorizing access
- ✦ Client Counseling – All Hail the VAIL
- ✦ Use Online Tools
- ✦ Danger of "digital will"
- ✦ Use of online lockboxes
- ✦ Participate in educating your legislators

SAMPLE LANGUAGE FOR POA, WILL, TRUST (SEE HANDOUT)

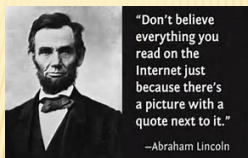
The powers of my Personal Representative and the Trustee shall also include the following powers:

Digital Assets and Accounts. My Personal Representative or the Trustee may take any action (including, without limitation, changing a terms of service agreement or other governing instrument) with respect to my Digital Assets and Digital Accounts as my Personal Representative or the Trustee shall deem appropriate, and as shall be permitted under applicable state and Federal law. My Personal Representative or the Trustee may engage experts or consultants or any other third party, and may delegate authority to such experts, consultants or third party, as necessary or appropriate to effectuate such actions with respect to my Digital Assets or Digital Accounts, including, but not limited to, such authority as may be necessary or appropriate to decrypt electronically stored information, or to bypass, reset or recover any password or other kind of authentication or

Words of Caution



Giving access to information about an
asset \neq Giving the asset



5TH LAW BLOG
Samuel's Yoelin Kantor LLP

DIT Legal Advice: You Get What You Pay For
David T. Pasieczny, Esq.

Who Will Manage Your Estate? Consider Carefully
David T. Pasieczny, Esq.

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