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**Protecting Your Online You: A New Approach to Handling  
Your Online Persona After Death**

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# PROTECTING YOUR ONLINE YOU: A NEW APPROACH TO HANDLING YOUR ONLINE PERSONA AFTER DEATH

*Noam Kutler*<sup>†</sup>

## ABSTRACT

People create online personas through email, social networking, and virtual world services. Upon signing up for one of these services, a person enters into a contractual agreement governing the terms of use. These agreements include limitations on what will happen to his account after he dies. The conditions governing what happens to the account after the creator dies vary widely, which gives rise to a situation where it is nearly impossible to know how all of one's digital assets will be handled after death. Due to the increased use of these services, the lack of clarity in what happens to one's online persona after death is becoming a greater problem.

This Note proposes treating one's online persona as part of one's estate and handling it in a similar manner as other assets, which can be bequeathed to a designated person. An exception to this general probate treatment, however, arises when a person's digital assets are left unresolved in his will. In much the same way that past love letters from a deceased husband offer a window into his life, a person's e-mail, social network postings, and other digital artifacts should also be available after death and the solution proposed here makes that a more likely reality while still protecting the creator's potential privacy interest. Such a system will result in the fulfillment of the digital creator's wishes, better guarantees of privacy, and the assurance of a more equitable and better defined legal system for addressing one's online persona after death.

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### I. INTRODUCTION

In 2004, Marine Lance Corporal Justin Ellsworth died in the line of duty while serving in Iraq. His family wanted to gain access to his Yahoo! e-mail account to capture every last insight into their son's tragically short life. Many people's initial response might be to grant this sentimental request. However, Yahoo! denied the parents' request, citing the e-mail service's Terms of

Service, which mandate the deletion of an account upon notification of the owner's death.<sup>1</sup> In another instance, Pam Weiss's twenty-one-year-old daughter died in a sledding accident. She found comfort through her daughter's Facebook<sup>2</sup> account and the ability to connect with her daughter's friends. Facebook's policy is to freeze the account of the deceased and create a memorial version for friends and family to reconnect and remember.<sup>3</sup> In yet another instance, Orlando radio host Erika Roman died in a car accident, and her family was left with no way to reach out to her online friends and fans because Erika's laptop was destroyed in the accident and no one knew her account passwords.<sup>4</sup> Without any further legal wrangling, her online persona was lost to everyone. Finally, consider the hypothetical situation of a spouse dying suddenly. The surviving spouse potentially is left without access to family photos stored online, e-mail accounts storing important documents, account numbers and passwords, or personal love letters and correspondence between the couple. Such a situation abruptly disconnects the surviving spouse from the digital world and can have ramifications in the real world as well, including the immediate inability to pay bills or liquidate assets.

And yet, what if also stored in the deceased spouse's e-mail or Facebook account were private correspondence with a secret lover or divorce attorney; should not these documents remain private and removed from the prying eyes of third parties? Or what if Ms. Roman's family wanted access to the accounts in order to exploit her celebrity for profit? Would this matter? Or what if Pam Weiss's daughter never imagined her Facebook account existing long after she died and would have preferred its deletion upon her death? Finally, what if Lance Corporal Ellsworth would have preferred a sibling, significant other, or another third party handle the e-mails in his account instead of his father; should the law allow him to dictate such a right of succession? The advent of "Web 2.0"<sup>5</sup> and the ability of internet sites to store

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1. See Susan Llewelyn Leach, *Who Gets To See the E-mail of the Deceased?*, CHRISTIAN SCI. MONITOR, May 2, 2005, at 12 (reporting on Justin's parents' efforts to access their dead son's e-mail); see also *Justin's Family Fights Yahoo over Access to His E-Mail Account*, JUSTIN MARK ELLSWORTH, <http://www.justinellsworth.net/email/yahoofight.htm> (last visited Jan. 1, 2012) (offering links to press releases documenting the parents' battle with Yahoo!).

2. FACEBOOK, <http://www.facebook.com> (last visited Jan. 1, 2012).

3. Gaëlle Faure, *How To Manage Your Online Life When You're Dead*, TIME (Aug. 18, 2009), <http://www.time.com/time/business/article/0,8599,1916317,00.html>.

4. Etan Horowitz, *How Will You Manage Your Virtual Afterlife?*, ORLANDO SENTINEL, Aug. 30, 2009, at A1.

5. "Web 2.0" is the term commonly used to describe the recent advent of web applications that facilitate interactive information sharing between users and web sites. These new applications allow users to interact with the sites and make the web a more participatory environment, rather than the first generation of websites, which were more static. Examples

large amounts of data raise a number of new concerns regarding privacy and data access. In addition, given the relatively young age of the average internet user, many questions regarding death and rights of succession have yet to reach the critical mass necessary to garner public attention—but they will soon.

Currently, when a person signs up for a social network, e-mail service, or virtual community, he enters into a contractual agreement governing the terms of use, including limitations on what will happen to his account after he dies. Such a system gives rise to a situation where it is nearly impossible to know how all of one's digital assets will be handled after death because of the wide variation among terms of service agreements. In addition, because of some of these sites' restrictive terms, potential heirs of a person's estate have little recourse to gain access to a loved one's digital identity.

This Note proposes treating one's online persona as part of one's estate and handling it in a similar manner as other assets are handled. An exception to this general probate treatment, however, arises when a person's digital assets are left unresolved in his will. In that case, rather than applying traditional rules of intestacy, a court should default to deleting the account, while still allowing potential heirs to challenge this action through the probate process. In much the same way that past love letters from a deceased husband offer a window into his life, a person's e-mail, social network postings, and other digital artifacts should also be available after death and the solution proposed here makes that a more likely reality. Such a system will result in the fulfillment of the digital creator's wishes, better guarantees of privacy, and the assurance of a more equitable and better defined legal system for addressing one's online persona after death.

Part II of this Note reviews the current practices of several popular online sites and examines how a person's digital identity is handled after his death. In addition, this Part will look at current solutions available to users who wish to control the use of their accounts after they die. Part III addresses the reasons why a person's online persona should be protected and how such an approach will benefit both the parties using the services and the companies offering these e-mail, social network, and virtual world services. Part IV analogizes posthumous digital rights to past cases dealing with bailment laws and the posthumous transfer of semen, thereby providing additional justification for the proposed solution and demonstrating that it is workable in practice. Finally, Part V compares this argument to other

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of popular Web 2.0 sites include Facebook, Wikipedia, Flickr, and Twitter. See Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O'REILLY (Sept. 30, 2005), <http://oreilly.com/web2/archive/what-is-web-20.html>.

proposed solutions and addresses some of the concerns raised by privacy and business interests.

## II. ASSESSING THE CURRENT HANDLING OF ONE'S ONLINE PERSONA

A persona consists of an individual's attributes that identify him to a reasonable third party and is comprised of his name, signature, photograph, image, likeness, and voice.<sup>6</sup> The persona is an intangible, yet legally protectable, asset that the deceased's heirs can also protect and use after his death.<sup>7</sup> An online persona therefore identifies a person to others online through his e-mail accounts, social network profiles, digital creations, and characters in virtual worlds. Such an encompassing definition includes items on a varying scale of privacy and personal characteristics. E-mails and social network messages may be less personal than the character a person creates through a service such as the online virtual world Second Life. In these virtual worlds, the generated characters become an extension of the person's being and allow for the formation of separate relationships, personalities, and private lives.<sup>8</sup> Somewhere in between those two endpoints on the spectrum lie other digital creations such as photographs and music stored online. While at times a more personal reflection of the person than routine e-mail messages, online photographs are also potentially less personal than a person's online character in a virtual world.

The discussion of the best means to handle posthumously this online persona begins with a discussion of how it is currently handled. When a person signs up for an online service, he usually clicks a small button near the bottom of a web page certifying that he agrees to the service's terms of use.<sup>9</sup>

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6. *See, e.g.*, *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 908–09 (7th Cir. 2005) (explaining what constitutes a person's identity under the law).

7. *See, e.g.*, *Martin Luther King Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 706 (Ga. 1982) (holding that personas are protectable after death, even for those who did not take commercial advantage of their fame during life); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1354 (D.N.J. 1981) (recognizing the right of publicity and holding that a person can transfer such a property right).

8. The extent to which these virtual characters become extensions of a person's persona is apparent by the many social interactions and commitments that people make while participating in Second Life and other virtual worlds. *See, e.g.*, *Second Life Affair Ends in Divorce*, CNN (Nov. 14, 2008), [http://articles.cnn.com/2008-11-14/world/second.life.divorce\\_1\\_second-life-virtual-world-online-relationship](http://articles.cnn.com/2008-11-14/world/second.life.divorce_1_second-life-virtual-world-online-relationship) (describing a British couple who divorced in real life after the wife caught her husband having an "affair" in the online world).

9. These agreements between the user and the website are referred to as "terms of service agreements," and they generally form a contractual agreement governing behavior on the site and the guarantees of service that the site makes in return.

The person rarely reads the agreement<sup>10</sup> and proceeds to use the service while oblivious to the particular terms of service. Such “browsewrap” or “clickwrap” agreements<sup>11</sup> have come into vogue on the Internet, and courts traditionally uphold these agreements.<sup>12</sup> By requiring a person to click “I Agree” or some derivation thereof, the site provides the requisite notice to the user that a contract is being formed, and the person manifests his consent by clicking “I Agree.”<sup>13</sup> As a result, terms that people rarely read<sup>14</sup> govern an individual’s various social network, virtual community, and e-mail accounts, which make up his digital persona. Add to this the wide range of terms used on various sites and these online services create an environment where managing a plethora of accounts may become difficult or confusing.<sup>15</sup>

The Canadian Privacy Commission drew attention to Facebook, the world’s most popular online social network,<sup>16</sup> when it released a report criticizing Facebook’s Terms of Service, and particularly the way it handled

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10. Cf. MARY J. CULNAN & GEORGE R. MILNE, THE CULNAN-MILNE SURVEY ON CONSUMERS & ONLINE PRIVACY NOTICES: SUMMARY OF RESPONSES 2 (2001), <http://www.ftc.gov/bcp/workshops/glb/supporting/culnan-milne.pdf> (reporting that half of the respondents surveyed by the authors stated that they rarely, if ever, read the privacy policies).

11. “Browsewrap” contracts involve terms of use agreements that are available from the site’s home page, but the user is never required to actually click any agreement button. MICHAEL D. SCOTT ET AL., SCOTT ON MULTIMEDIA LAW § 23.08[A][2] (3d ed. 2011). Alternatively, “clickwrap” agreements require the user to click an “I Agree” button or some variation thereof to demonstrate acceptance. Both types of contracts are used regularly on the Internet. See CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 267–68 (6th ed. 2007).

12. See, e.g., *Register.com, Inc. v. Verio, Inc.* 356 F.3d 393, 403–04 (2d Cir. 2004) (enforcing the terms of service agreement on Register.com’s website because Verio was aware of the terms and so by using the website, it implicitly agreed to the terms); *Caspi v. Microsoft Network*, 732 A.2d 528, 530–31 (N.J. Super. Ct. App. Div. 1999) (upholding a forum selection clause included in the terms of service agreement, despite plaintiff’s contention that he had never manifested agreement to the terms). *But see* *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 31 (2d Cir. 2002) (holding that the terms of service agreement was unenforceable when the provider could not prove that the user was at least on inquiry notice that further terms existed).

13. Cf. *Specht*, 306 F.3d at 29 (declining to enforce a clause in the terms of service agreement because the user never manifested his consent by clicking “I agree” and so could not be held to the contractual terms).

14. See CULNAN & MILNE, *supra* note 10 (describing evidence showing that half of survey respondents rarely or never read online privacy policies).

15. See Andrea Coombes, *You Need an Online Estate Plan*, WALL ST. J. MARKETWATCH (July 19, 2009), <http://online.wsj.com/article/SB124796142202862461.html> (recommending an online estate plan in order to ensure that heirs will be able to access these accounts after the user’s death); Faure, *supra* note 3 (describing the various terms websites use to govern their actions upon a user’s death).

16. See *Facebook*, N.Y. TIMES, [http://topics.nytimes.com/top/news/business/companies/facebook\\_inc/index.html](http://topics.nytimes.com/top/news/business/companies/facebook_inc/index.html) (last updated Feb. 1, 2012).

the accounts of the deceased.<sup>17</sup> The Canadian government singled out the social network for what it categorized as a privacy violation—the “memorializing” of a deceased member’s account without offering proper notification or choice to the user.<sup>18</sup> When memorializing a deceased user’s account, Facebook freezes the account but allows previously confirmed friends to continue to access the user’s public posting board, so that “[f]riends and family can leave posts in remembrance.”<sup>19</sup> Until recently, users’ only option was to delete their account before death in order to opt-out of Facebook’s memorializing program. However, Facebook modified this policy in 2010 to allow a close family member to request the account be deleted instead.<sup>20</sup> The effective exercise of that option, however, requires that family members be aware of the account owner’s deletion wishes and be willing to carry them out. Coupled with the strict prohibition against sharing one’s password or transferring one’s account to another person,<sup>21</sup> a Facebook user is still left with no recourse other than to relinquish control over how others will use his account after he dies.

Yahoo!,<sup>22</sup> a leading internet portal that offers an internet search engine, e-mail service, and photo storage capabilities, approaches the issue of one’s digital persona after death in a different manner. Yahoo! explicitly rejects any right of survivorship and requires a user to agree that “[u]pon receipt of a copy of a death certificate, [his] account may be terminated and all contents therein permanently deleted.”<sup>23</sup> Although some privacy advocates laud this response as an appropriate means of handling concerns regarding stolen e-mails or illicit photographs,<sup>24</sup> Yahoo!’s “take-it-or-leave-it” approach still leaves the user with no control over how to handle his digital persona upon his death.

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17. See ELIZABETH DENHAM, ASSISTANT PRIVACY COMM’R OF CAN., REPORT OF FINDINGS INTO THE COMPLAINT FILED BY THE CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC (CIPPIC) AGAINST FACEBOOK INC. UNDER THE PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT 67–68 (2009), available at [http://www.priv.gc.ca/cf-dc/2009/2009\\_008\\_0716\\_e.pdf](http://www.priv.gc.ca/cf-dc/2009/2009_008_0716_e.pdf).

18. See *id.*

19. *Privacy: Deactivating, Deleting, and Memorializing Accounts*, FACEBOOK, <http://www.facebook.com/help/?page=842> (last visited Feb. 20, 2012).

20. See *id.*

21. See *Statement of Rights and Responsibilities*, FACEBOOK, § 4 (Apr. 26, 2011), <http://www.facebook.com/terms.php?ref=pf>.

22. YAHOO!, <http://www.yahoo.com> (last visited Jan. 1, 2012).

23. *Yahoo! Terms of Service*, YAHOO!, § 27 (Nov. 24, 2008), <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html>.

24. See Anick Jesdanun, *Digital Life Can’t Pass On When Someone Passes Away: What Happens to Data Becomes Issue of Conflict*, HOUS. CHRON., Dec. 26, 2004, at 5.

Further underscoring the nebulous and often difficult-to-understand details of terms of service agreements, Google,<sup>25</sup> the leading internet search engine in the United States,<sup>26</sup> offers no clear description of how it will handle a person's account upon death. Although Google's Terms of Service prohibit the transfer or licensing of one's account to another person,<sup>27</sup> it also states that the user retains the copyright and other rights to the data.<sup>28</sup> This leaves it unclear how the transfer of one's digital persona may be treated after death. As a result of Google's prohibition on the transfer or licensing of the account, any effort to transfer access to one's account after death would violate the Terms of Service.

Second Life,<sup>29</sup> a popular virtual community that offers users the opportunity to develop a character, purchase virtual land, and utilize a virtual currency convertible to U.S. dollars,<sup>30</sup> used to have a more permissive policy regarding the rights of succession available to its users. However, in April 2010, Second Life removed a provision in its Terms of Service that stated it would "not unreasonably withhold consent to the transfer of an Account"<sup>31</sup> and replaced it with an explicit statement that a user may not assign or transfer his account.<sup>32</sup>

These are just a few examples of the many approaches companies adopt to deal with the rights of succession and transfer of online accounts and assets. Internet sites use widely varying language and terms, which makes it nearly impossible for a person using several different online services to know

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25. GOOGLE, <http://www.google.com> (last visited Jan. 1, 2012).

26. Press Release, comScore, comScore Releases September 2010 U.S. Internet Search Engine Rankings (Oct. 13, 2010), *available at* [http://www.comscore.com/Press\\_Events/Press\\_Releases/2010/10/comScore\\_Releases\\_September\\_2010\\_U.S.\\_Search\\_Engine\\_Rankings](http://www.comscore.com/Press_Events/Press_Releases/2010/10/comScore_Releases_September_2010_U.S._Search_Engine_Rankings) (reporting that in 2010, Google was the top search engine with a 66.1% market share).

27. *See Google Terms of Service*, GOOGLE, § 10 (Apr. 16, 2007), <http://www.google.com/accounts/TOS>.

28. *See id.* § 11.

29. SECOND LIFE, <http://www.secondlife.com> (last visited Jan. 1, 2012).

30. Second Life's market is called LindeX and has a floating currency averaging around 260 Linden dollars to one U.S. dollar. *See LindeX Market Data*, SECOND LIFE, <http://secondlife.com/statistics/economy-market.php> (last visited Oct. 19, 2011). As of 2009, Second Life's total GDP was estimated at \$567 million U.S. dollars. *See T. Linden, 2009 End of Year Second Life Economy Wrap Up (Including Q4 Economy in Detail)*, SECOND LIFE (Jan. 19, 2010, 9:00 AM), <http://community.secondlife.com/t5/Features/2009-End-of-Year-Second-Life-Economy-Wrap-up-including-Q4/ba-p/653078>.

31. *Linden Labs Official: Terms of Service Archive / Through 29 April 2010*, SECOND LIFE, [http://wiki.secondlife.com/wiki/Linden\\_Lab\\_Official:Terms\\_of\\_Service\\_Archive/Through\\_29\\_April\\_2010](http://wiki.secondlife.com/wiki/Linden_Lab_Official:Terms_of_Service_Archive/Through_29_April_2010) (last visited Oct. 19, 2011).

32. *See Terms of Service*, SECOND LIFE, § 13.2 (Dec. 15, 2010), <http://secondlife.com/corporate/tos.php>.

what his rights within all of those services will be after death. Additionally, most internet sites frequently change their terms,<sup>33</sup> making it burdensome to properly keep abreast of what rules affect one's digital persona.

Websites have arisen to address these questions and propose solutions, but all have their inherent weaknesses. These websites propose several different solutions: (1) storing all of a person's passwords in his will and thereby transferring access to the accounts;<sup>34</sup> (2) using an online service such as Legacy Locker<sup>35</sup> that offers to store all of one's accounts and passwords on its servers and then transfer them to the designee upon death; or (3) seeking a court order to force the online service to turn over the requested information.<sup>36</sup> Each option has serious flaws.<sup>37</sup> The basic problem with these proposals is apparent after only a quick glance at the terms of service of sites such as Facebook and Yahoo!, which strictly prohibit sharing or transferring the passwords to one's accounts. The use of online services such as Legacy Locker therefore depends upon the violation of online services' terms of service.

### III. A PROPOSED MOVE AWAY FROM CONTRACT LAW AND TOWARD A MORE PROPERTY LAW-BASED APPROACH

Contract law does not offer the best solution for handling one's online persona after death. The varying terms and vague wording used by each online service, along with the service's ability to change the terms at its discretion, make the cost of conforming to the various terms of service agreements prohibitively high for the average user. Instead, this Note proposes that the probate process should control one's online persona in a similar manner as it governs other real-world property. This solution would allow a person to leave instructions in his will for the proper handling of his digital assets. If the deceased does not address those digital assets in his will, the court should destroy them after first providing an opportunity through the probate process for potential heirs to challenge the destruction of any assets in court. A state's intestacy laws determine the proper course of

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33. See, e.g., Jill Duffy, *Facebook Changes on Its Terms, Not Yours*, PC MAG. (Sept. 23, 2011), <http://www.pcmag.com/article2/0,2817,2393399,00.asp> (highlighting Facebook's ever-changing privacy controls and user settings).

34. See *Estate Planning—Keep Track of Passwords, Access Keys and PINs*, FINDLAW, <http://estate.findlaw.com/estate-planning/estate-planning-other-topics/keeping-track-of-passwords.html> (last visited Jan. 21, 2012).

35. LEGACY LOCKER, <http://www.legacylocker.com> (last visited Jan. 1, 2012).

36. See Leach, *supra* note 1; text accompanying *supra* note 1.

37. See discussion of Legacy Locker and Deathswitch *infra* text accompanying notes 76–78.

succession and which heirs have standing to potentially inherit the unaddressed items.<sup>38</sup> Although not going so far as to recognize full property rights in all online accounts,<sup>39</sup> the limited approach proposed in this Note of treating online assets as part of a person's estate provides the appropriate legal structures necessary to address the challenge of handling one's posthumous online persona.

#### A. A NEW SOLUTION

When dealing with the matters of a deceased's estate, the first distinction is whether the deceased passed with a will or without one.<sup>40</sup> A person who dies and leaves a will is known as a testator,<sup>41</sup> and a person who dies without a will dies intestate.<sup>42</sup> Following a person's death, his estate goes through a process of administration known as probate, which a court traditionally oversees in order to ensure proper dissemination of the person's property.<sup>43</sup> If a will exists, then the administrator of the deceased's estate handles the appropriate distribution of the estate according to the wishes expressed therein.<sup>44</sup> Alternatively, when all or part of the deceased's estate is not disposed of through a will, those assets are left to be managed intestate.<sup>45</sup>

To allow greater control over the handling of one's online persona after death, one's digital assets should be treated as part of the estate. This would allow the deceased to leave instructions in his will to distribute the various e-mail, social network, and virtual world accounts according to his wishes. This control should, however, be limited to avoid over-burdening the online services. To this end, much like courts limit the deceased's ability to control his estate for generations after death through the rule against perpetuities,<sup>46</sup> courts should limit one's control over the future of one's online assets.

38. *See, e.g.*, DEL. CODE ANN. tit. 12, § 502 (2010); TEX. PROB. CODE ANN. § 38 (West 2009); VA. CODE ANN. § 64.1-1 (2010).

39. Although this Note does not address the larger discussion of granting full property rights to digital assets, others have argued for such recognition. *See* Deven R. Desai, *Property, Persona, and Preservation*, 81 TEMP. L. REV. 67, 77 (2008).

40. *See* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 71 (8th ed. 2009).

41. *See* BLACK'S LAW DICTIONARY 1514 (8th ed. 2004).

42. *See id.* at 840.

43. *See* DUKEMINIER, *supra* note 40, at 40.

44. A detailed accounting of the precise steps and challenges afforded to the beneficiaries of a will is unnecessary here. When discussing the process by which one's digital assets will be distributed via a will, the particular state's estate laws apply and affect the particular details as they would any other aspects of a person's personal estate.

45. *See* UNIF. PROBATE CODE §§ 2-101 to -105 (amended 2008); *see also* DUKEMINIER, *supra* note 40, at 72 (defining partial intestacy).

46. *See* W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 639-40 (1938).

This Note proposes keeping an account open for an additional six months following the completion of probate; after that time, the service should delete the account.<sup>47</sup> Such a system provides the beneficiaries with adequate time to archive past messages, videos, and other digital assets without forcing the online services to spend significant resources maintaining now-defunct accounts.<sup>48</sup> Finally, for those who die without adequately addressing their desires in a will, their digital assets should be treated as a special form of intestate property. For reasons of online security and privacy, courts should default to ordering the deletion of all digital assets left intestate, while still providing an opportunity for any potential beneficiaries<sup>49</sup> to challenge this deletion and apply for control over a particular digital asset. This Note discusses the legal methods for achieving this solution in Part IV, *infra*; the basics described above, however, serve as a foundation for exploring, in the remainder of this Part, the legal and philosophical underpinnings of this new estate law-based approach to handling one's online persona after death.

B. REASONS FOR RECOGNIZING THE RIGHT TO POSTHUMOUSLY CONTROL ONE'S ONLINE PERSONA

The use of the Internet has exploded in recent years, leaving the law to catch up with many new issues.<sup>50</sup> As a result, many traditional business models have caused unforeseen problems leading to a need for refinement and development. With respect to the way current service providers handle online services and virtual accounts, one legal scholar described these providers as trying to act like gods through the use of restrictive service agreements.<sup>51</sup> Such an approach threatens to stifle the future growth of the industry.<sup>52</sup> Evaluating the current handling of online services, he poses the

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47. For a complete proposal, see *infra* Part IV.

48. This solution also provides the added benefit of addressing many of the privacy concerns that arise when storing one's accounts online indefinitely. See Ari Schwartz, Deirdre Mulligan & Indrani Mondal, *Storing Our Lives Online: Expanded E-mail Storage Raises Complex Policy Issues*, 1 I/S: J.L. & POL'Y INFO. SOC'Y 597, 608–09 (2005) (raising concerns regarding the disclosure of private e-mails to family members and noting the rising threat of unwanted disclosure). However, testators should be allowed to take advantage of any special provisions provided by the particular online service in question. As discussed earlier, Facebook memorializes a person's account in perpetuity. This Note's proposal should be seen as not eliminating such options, but rather giving a person the ability to decide whether or not to take advantage of such offers by services such as Facebook.

49. See UNIF. PROBATE CODE § 2-103 (providing a traditional list of survivors to intestate estates).

50. See *supra* note 12 and accompanying text (providing examples of courts' struggles to apply traditional contract law to the Internet).

51. See Joshua A.T. Fairfield, *The God Paradox*, 89 B.U.L. REV. 1017, 1024 (2009).

52. See *id.*

following hypothetical: “imagine if early telephone companies had tried to exercise this level of control” over their phone lines, imposing restrictive and onerous policies; the telephone “would not have become the engine of discourse and communication it currently is.”<sup>53</sup> Such is the current state of the online world. These online service agreements that restrict the means of users to control the future use of their accounts now threaten to stymie the potential growth of the industry. The restrictions impose rules that encourage users to look elsewhere for a creative outlet.<sup>54</sup>

1. *Online Persona: The Modern Right of Publicity*

In particular, these restrictive agreements do not reflect developments in state law regarding the rights and interests of the deceased. Heirs to a person’s estate retain the right to control the deceased’s right of publicity. An online persona concerns the way a person is portrayed to the public through the Internet; similarly, the right to control one’s posthumous right of publicity addresses how a person is portrayed to the public after death. Nearly thirty years ago, the U.S. District Court for the District of New Jersey took up the issue of the rights of a decedent in the seminal case *Estate of Presley v. Russen*.<sup>55</sup> In that instance, the court considered Elvis Presley’s estate’s right to protect his “right of publicity” from being misused after death.<sup>56</sup> The *Estate of Presley* case recognized that personas merited protection and that Presley’s had “attained a concrete form” that permitted its transfer to his beneficiaries.<sup>57</sup> The court held that allowing people to transfer the rights of their personas would encourage them to invest in their personas while alive and therefore benefit all of society.<sup>58</sup> Today, posthumous protection of the right of publicity has become even more important as the use of images of the dead for commercial profit has increased greatly with the advent of digital replicas.<sup>59</sup> And while Elvis Presley is not your average individual, the advent

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53. *Id.*

54. See Robert Levine, *Billy Bragg’s MySpace Protest Movement*, N.Y. TIMES, July 31, 2006, at C5 (detailing the decision of one musician to temporarily remove songs from MySpace after fine print led him to believe content posted on the site became MySpace property).

55. 513 F. Supp. 1339 (D.N.J. 1981).

56. See *id.* at 1354 (asking whether the right of publicity descends to the estate at the death of an individual).

57. *Id.* at 1355 (quoting *Lugosi v. Universal Pictures*, 603 P.2d 425, 446 (Cal. 1979)) (holding that because Elvis made commercial use of his persona during his lifetime, he had the right to transfer that persona and the rights accorded to it).

58. See *id.*

59. Examples of such digital replicas can be seen in television and film today. In recent years, Elvis Presley has appeared in Pizza Hut commercials, Fred Astaire has danced with Dirt Devil vacuum cleaners, and John Wayne has become a pitchman for Coors Beer. See *Ad Strategies Seeking To Raise the Dead*, L.A. TIMES, July 8, 1997, at D13.

of social media and Web 2.0 has created value in everyone's online persona, not just celebrities. Popular viral videos turn regular people into internet celebrities overnight and websites like YouTube commercialize those personas.<sup>60</sup> Today, everyone's right of publicity has value that should be protected to the same extent that Elvis's was after his death.

The court's reasoning in *Estate of Presley* should apply to the control of a person's online persona after he dies. The right to posthumously control one's online persona is akin to controlling one's publicity after death in that both situations address the image of the person to others and some value exists in possessing the online persona or right of publicity. While the exact contours of what makes up a digital identity and what rights one should be afforded regarding that persona are still debated,<sup>61</sup> courts and legislatures recognize that the assets comprising a person's digital identity should be granted some greater protection.<sup>62</sup> Because of the similarities between online personas and the right of publicity, the *Estate of Presley* court's holding that Elvis could transfer the right of publicity to his descendants<sup>63</sup> should also apply to posthumous control of one's online persona and enable a person to control his digital identity through the probate process.

## 2. *An Online Persona Has Value*

The consequences of not recognizing such a right are serious since, without such control, digital creations stand to be lost forever upon the author's death or, alternatively, potential creations will go unmade for fear of lost control.<sup>64</sup> In 1841, Justice William Story, sitting as circuit justice in Massachusetts, recognized the risk to both individuals and society if courts did not protect one's persona and therefore found monetary value in the unpublished private letters of President George Washington.<sup>65</sup> Justice Story's decision allowed him to protect these writings by finding that they had

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60. See Rosemary Ford, *Gone Viral: Online Videos Turning Regular People into Celebrities*, EAGLE-TRIB. (N. Andover, Mass.) (Apr. 10, 2011), <http://www.eagletribune.com/latestnews/x1075334051/Gone-viral-Online-videos-turning-regular-people-into-celebrities>.

61. See generally Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 49 J. COPYRIGHT SOC'Y U.S.A. 441 (2001); Anthony L. Pessino, Note, *Mistaken Identity: A Call To Strengthen Publicity Rights for Digital Personas*, 4 VA. SPORTS & ENT. L.J. 86 (2004) (addressing the broader subject of the legal rights for newly developing digital personas used in television and film).

62. See Pessino, *supra* note 61, at 101 (noting the number of states beginning to pass laws protecting the post-mortem right of commercial appropriation of digital personas).

63. See *Estate of Presley*, 513 F. Supp. at 1355.

64. See *supra* Part II (discussing the terms of service for companies like Yahoo! and Facebook).

65. *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

monetary value and could therefore be owned and transferred like other personal property.<sup>66</sup> This enabled him to recognize ownership in the letters.<sup>67</sup> In so holding, Justice Story developed the proper framework for understanding the value of personal e-mails, Facebook accounts, and other digital artifacts in modern times.

While perhaps not quite as valuable to society as George Washington's private letters, a person's communications and online accounts have value. Not recognizing and protecting those assets harms people. Professor Devin Desai defines three groups of people potentially harmed by not recognizing a property interest in one's digital assets: the creator, "potential inheritor[s]," and society as a whole.<sup>68</sup> Both Immanuel Kant and George Hegel saw literary creations as an embodiment of the person himself<sup>69</sup> and a similar embodiment of the person exists in today's digital identity. A financial and emotional stake also exists for the creator's heirs in many of these creations; these interests are ones Justice Story recognized more than one hundred years ago.<sup>70</sup> Finally, while a more persuasive interest exists for both the creator and his heirs, society also retains an interest in such creations as both informative snapshots of current society for the benefit of future generations and as a means of encouraging societal creativity.<sup>71</sup>

3. *Recognizing Property Rights in an Online Persona Ensures Efficient Ownership*

Jeremy Bentham once wrote that "[p]roperty is nothing but a basis of expectation—the expectation of deriving certain advantages from a thing, which we are said to possess."<sup>72</sup> Such an expectation continues to exist today with regard to this new form of digital creation. People posting on Facebook, Flickr, or Twitter all have a certain expectation of ownership and control. In much the same way that early America was settled through land grants and property rights,<sup>73</sup> granting further control over creations on the Internet will encourage more responsible investment of resources in this new frontier.

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66. *Id.*

67. *Id.*

68. *See* Desai, *supra* note 39, at 72.

69. *See id.* at 85.

70. *See id.* at 87–88.

71. *See id.* at 89.

72. 1 JEREMY BENTHAM, *THEORY OF LEGISLATION* 137 (1840).

73. *See* Douglas W. Allen, *Homesteading and Property Rights; or "How the West Was Really Won,"* 34 J.L. & ECON. 1, 5 (1991) (discussing how the granting of property rights in unsettled land was used to encourage people to quickly settle the land without having to use force to expel the Native Americans already living there).

The development of a more robust means of controlling one's online persona after death is in the interest of both the companies running these sites and the interested parties discussed above—the creators, their heirs, and society as a whole.<sup>74</sup> A similar kind of interest led England in the early twelfth century to recognize the inheritability of land as a way of ensuring greater production and development in service of the King.<sup>75</sup> Incentivizing the development of land by recognizing the ownership claims of both real and personal property led to the foundations of modern property law and continues to justify further recognition in today's virtual assets as well. The website companies will benefit from this control because it will encourage greater use of their services and more creativity in that use. As a result, both business and society benefit by recognizing a person's right to control the use of his online persona.

Absent further legal development and recognition of a person's right to control the use of his online persona, companies and individuals will resort to inefficient, or at times even ineffective, means to assert ownership. Already, websites such as Legacy Locker<sup>76</sup> and Deathswitch<sup>77</sup> offer online options that provide a seeming bridge to mortality and claim to grant loved ones access to the deceased's online assets. These sites do not, however, offer a tenable solution because they depend upon a violation of the online service providers' terms of service to pass along the passwords.<sup>78</sup> In addition, they require the decedent to maintain an active list of passwords so that the services can transfer the accounts to the designated parties as planned. Also, as with any internet service, no guarantee exists that the site will stay in business long enough to fulfill its commitment to the decedent. Finally, such solutions do not provide legal accountability for a beneficiary to enforce his rights to the accounts. Unlike the solution proposed in this Note, the potential recipient of Deathswitch's e-mail or Legacy Locker's list of passwords will likely lack standing in court to assert any claim to the online assets, especially since the access was predicated upon the violation of an online service's terms of service.

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74. See Desai, *supra* note 39.

75. See A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 54–63 (2d ed. 1986) (discussing the historical developments of the feudal land system in England that eventually led to the Quia Emptores Statute in 1290, which fully established the right of alienation and inheritability to all owned land).

76. LEGACY LOCKER, *supra* note 35.

77. DEATHSWITCH, <http://www.deathswitch.com> (last visited Feb. 20, 2012).

78. See *supra* Part II (discussing the terms of service agreements used by most major online services, all of which include a provision against the transfer of passwords to third parties).

#### IV. LEGAL MEANS OF ACHIEVING POSTHUMOUS CONTROL OVER ONE'S ONLINE PERSONA

Companies running online services (e.g., Facebook, Yahoo!, and Google) offer the easiest means of addressing a person's posthumous online persona by simply revising their terms of service to reflect a person's need and right to control his digital assets posthumously. Recognizing that no site has taken this step yet is a strong signal that none will do so any time soon, if for no other reasons than inertia and corporate culture. Thus, legislative or judicial action must offer a solution. This Note proposes two approaches—one legislative and one judicial—that will work well either together or as separate approaches to ensure greater control of one's digital assets after death.

##### A. A LEGISLATIVE APPROACH

First, states should amend current estate laws to address the legal rights of one's posthumous digital identity. Although this Note later addresses the means of asserting this right in court,<sup>79</sup> a legislative approach assures a more standard means of handling this new form of property. The Appendix to this Note details such a solution.<sup>80</sup> A legislative approach should focus on amending the Uniform Probate Code ("UPC"), which serves as a model for many states' estate laws. The amended UPC would provide guidance to state legislatures on how to better protect citizens' online personas.<sup>81</sup>

Section 1-201, which defines the various terms used throughout the UPC, should be amended to define "property" to include one's digital assets, including e-mail, social networking accounts, and other online creations. This expansion would allow these items to be treated similarly to other aspects of one's estate. Additionally, section 2-101 addresses the subject of intestacy and its subsequent distribution. A third subsection should be added to this section that creates an exception for those assets considered to be digital. Instead of the general rights of succession, digital assets should be destroyed following proper notification to potential beneficiaries. This approach strikes a proper balance among the privacy interests of the creator, the potential interests of beneficiaries, and the needs of the online services.

In addressing the administration of the estate, section 3-706 provides for the duties of one's personal representative during probate. An effective amendment to this section would require the administrator of the estate to inventory the decedent's online assets and provide a full accounting to

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79. *See infra* Section IV.B.

80. *See infra* Appendix (offering a chart with all proposed changes to the Uniform Probate Code included in this Section).

81. *See generally* UNIF. PROBATE CODE (amended 2008).

potential beneficiaries. Such a requirement would allow for the proper deletion of all accounts without expressed intent, while also allowing family members or other interested parties to raise timely objections. To manage this added obligation, section 3-709 should grant the administrator of the estate the right to take control not only of all real and tangible property, but also the decedent's digital assets. This addition would provide the necessary legal framework for the administrator to properly carry out the wishes of the deceased, particularly deleting any accounts as expressly stated. Finally, section 3-814 should also be amended to provide the administrator the freedom to pay online service account maintenance fees in order to ensure the accounts remain open through the probate period.<sup>82</sup> If states were to adopt these proposed amendments, they would better protect their citizens' online personas.

#### B. A JUDICIAL SOLUTION

Depending on how many states adopt the amendments suggested in this Note, the judicial process may still have to enforce the decedent's rights in his digital assets. Legal precedent exists to enforce a person's right to control his digital assets as well as a means to invalidate the terms of service agreements that may restrict such efforts. This Section discusses both the means for overcoming the oppressive terms of these online agreements and the proper legal framework for achieving legal recognition of the deceased's right to posthumously control his online persona. Finally, this Section addresses and resolves the subject of waste and the potential of posthumously destroying one's online persona, which some courts could see as an obstacle to the proposed judicial solution.

##### 1. *Overcoming Terms of Service Agreements*

The first obstacle that an estate will face when trying to exert control over the decedent's online persona is the terms of service contract that the decedent and the service already formed. Precedent exists, however, for finding the contractual agreements between the user and the various internet sites unenforceable. In *Bragg v. Linden Research, Inc.*, the court found parts of the arbitration clause in the terms of service agreement unconscionable for the online role-playing game, *Second Life*.<sup>83</sup> Unconscionable terms are those judged to be extremely unfair and oppressive;<sup>84</sup> such terms invalidate a

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82. Online maintenance fees are forms of debt owed by the estate; therefore, this section of the UPC is the best area for this addition.

83. 487 F. Supp. 2d 593, 612 (E.D. Pa. 2007).

84. BLACK'S LAW DICTIONARY, *supra* note 41, at 1561.

contract.<sup>85</sup> To succeed on a claim of unconscionability, a party must prove both that the contract terms unreasonably favor the other party and that a “gross inequality of bargaining power” exists that leaves the claiming party with no meaningful choice as to the terms of the agreement.<sup>86</sup> The court considers the reasonableness of the terms under the commercial standards used at the time of the contract’s formation.<sup>87</sup> Unconscionable terms are those “so extreme as to appear unconscionable according to the mores and business practices” used at the time.<sup>88</sup>

In *Bragg*, Marc Bragg sued the corporate owners of Second Life after they expelled him from the online community and reclaimed his virtual assets.<sup>89</sup> Second Life moved to compel arbitration according to the terms of service agreement. Bragg, however, argued successfully that the contractual terms between Bragg and Second Life were unconscionable because the service agreement assumed too much power and was unreasonably biased against the user.<sup>90</sup> *Bragg* demonstrates that courts are inclined to invalidate terms of service agreements when companies assert too much control over the user’s creations. And lest one believe that Second Life is the outlier, legal scholars are already turning to Facebook’s Terms of Service and finding similar provisions and controls.<sup>91</sup> Given the *Bragg* decision and the similarity in the structure of the agreements among other services, future challenges to terms of service agreements are likely to fare similarly when challenged in court.

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85. See U.C.C. § 2-302 (amended 2003).

86. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); see also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600–01 (1991) (Stevens, J., dissenting) (approving of the approach used in *Walker-Thomas*, which applied a reasonableness standard to contracts of adhesion).

87. See *Walker-Thomas*, 350 F.2d at 450.

88. 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS 78 (rev. ed. 1995).

89. See *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 597 (E.D. Pa. 2007) (describing the situation where Second Life reclaimed a parcel of virtual land that Bragg had purchased and then expelled him from the game world, “effectively confiscating all of the virtual property and currency that he maintained on his account”).

90. *Id.* at 611 (outlining the aspects of the arbitration clause that were substantively unconscionable—in particular, Second Life’s ability to unilaterally suspend or expel users’ accounts).

91. See Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two—Agreements Between Users and Mega-sites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829, 843 (2008) (drawing similarities between Facebook’s Terms of Service and Second Life’s Terms of Service, particularly that both provide inadequate notice to users and bury surprise clauses deep within the terms).

2. *Beyond the Contractual Agreement: Asserting Control over an Online Persona in Court*

Defeating any existing contractual agreement with an online service, however, is only the first part of effectively asserting the deceased's right to handle his online estate posthumously. A party arguing this right in court must still justify legally recognizing the right to designate the future of one's online assets. Bailment laws offer further support for protecting one's online persona. Much like probate law, states primarily determine the laws of bailment.<sup>92</sup> A bailment relationship arises, for example, when a person drops his clothes off at the dry cleaner, leaves a watch at the repair shop, or deposits jewelry in a safe deposit box at a bank. In all of these situations, personal property is given to the bailee for a specific reason, but the original person always maintains ownership of the personal property.<sup>93</sup> In much the same way as parties establish traditional bailment relationships,<sup>94</sup> a person submits digital assets to the e-mail server or social network provider with the understanding that when he accesses his account, the assets will be available.

Courts consider intangible property, such as the contents of a letter, as also holdable in bailment,<sup>95</sup> and a reasonable extension of that thinking would apply bailment laws to one's e-mail or social network account stored on a third-party server. The safe deposit box provides a particularly relevant example because in both instances the user retains some key (or password) to open the box and retrieve the items inside. Furthermore, even if a person loses the key to a safe deposit box, the bank still cannot withhold access to the contents. Those items belong to the beneficiary of the estate, not the bank.<sup>96</sup> The bank is responsible for ensuring the proper transfer of the assets

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92. The Ninth Circuit defines a bailment relationship as occurring "when the owner, while retaining general title, delivers personal property to another for some particular purpose upon an express or implied contract to redeliver the goods when the purpose has been fulfilled." *Maulding v. United States*, 257 F.2d 56, 60 (9th Cir. 1958); *see also* *Barnette v. Casey*, 19 S.E.2d 621, 623 (W. Va. 1942) (explaining that bailment is a type of contractual relationship and therefore state law applies).

93. *See* *Little, Brown & Co. v. Am. Paper Recycling Corp.*, 824 F. Supp. 11, 17 (D. Mass. 1993).

94. *See, e.g.,* *Christensen v. Hoover*, 643 P.2d 525, 528–59 (Colo. 1982) (holding that a bailment relationship exists anytime a person takes possession of another person's property with an agreement that the property will be returned upon the bailor's request).

95. *See* *Liddle v. Salem Sch. Dist.*, 619 N.E.2d 530, 533 (Ill. App. Ct. 1993) (holding that information contained within a letter is still subject to bailment rules).

96. *See* *Hurt v. Bank One*, 718 N.E.2d 485, 486 (Ohio Ct. App. 1998) (providing an example of a beneficiary recovering, after her husband's death, the assets in the box, despite the lost key).

to the deceased's next of kin.<sup>97</sup> Banks and other bailees must exercise ordinary care in returning goods held in bailment to the rightful beneficiary of the estate.<sup>98</sup> Similarly, when a person dies, the online service should properly transfer the digital assets held in bailment to the decedent's authorized heirs. Postal carriers<sup>99</sup> and mailbox rental centers<sup>100</sup> are in bailment relationships with customers, and so too should e-mail providers and social networking services.

Additionally, legal developments regarding the treatment of posthumous reproductive rights offer further insight into the proper handling of one's posthumous online identity.<sup>101</sup> A person's online persona ranges from traditional e-mail accounts to more personal virtual world characters, or avatars. While bailment laws may provide a means to address parts of the digital persona such as e-mail and Facebook postings, the bailment approach falls short when addressing the more personal and less definite parts of a digital persona—the online avatars and personalities developed in the virtual world. These types of creations take on more personal attributes, reflecting the Hegelian view of serving as embodiments of the creator.<sup>102</sup> As such, these online assets become a part of the person's very being.<sup>103</sup> Avatars and other more personal aspects of one's digital persona do reflect a person's actual

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97. *See Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 69 (1914) (affirming the view that the bank does not own the property in the safe deposit box and must transfer the property to the authorized heir); *Glynn v. Mercantile Safe Deposit Co.*, 143 N.Y.S. 849, 850–51 (App. Div. 1913) (holding that banks merely act as bailees when storing a person's property in a safe deposit box and therefore the items must be transferred to the beneficiary regardless of any other repercussions).

98. *See* 11 AM. JUR. 2D *Banks and Financial Institutions* § 1024 (1997) (stating that upon “the death of a depositor, a safe deposit company is bound to deliver the contents of the box only to the person or persons on whom the law casts the title” and must exercise ordinary care to prevent loss); *see also Jewelers Mut. Ins. Co. v. Firststar Bank Ill.*, 820 N.E.2d 411, 417 (Ill. 2004) (holding that a bank cannot contract out of exercising reasonable care over the properties left in its safe deposit boxes); *Hurt*, 718 N.E.2d at 487.

99. *See, e.g., U.S. Fid. & Guar. Co. v. United States*, 246 F. 433, 435 (9th Cir. 1917).

100. *See, e.g., Thompson v. Anderson*, 824 P.2d 712, 714–15 (Alaska 1992) (finding that plaintiff was in a bailment relationship with Mailboxes Etc. when he shipped goods through their service).

101. As technology has advanced, science's ability to preserve semen and allow for impregnation after a man dies has created a new challenge in estate law: how to deal with the challenges to this new type of asset that has a particularly personal characteristic. The relative infancy of this science results in limited case law, but the cases that do exist provide a good path for further discourse. *See generally* Monica Shah, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547 (1996).

102. *See* Desai, *supra* note 39, at 84 n.95.

103. *See Second Life Affair Ends in Divorce*, *supra* note 8 (discussing a spouse's reaction to her husband's online infidelity on the website Second Life as something akin to the more traditional notion of infidelity).

being more than other, traditional assets. As a result, the way that courts address a person's right to posthumously control the use of his reproductive abilities provides guidance for how courts should handle the more personal, representative aspects of one's estate.

California courts have addressed this struggle for posthumous ownership over sperm, which can offer a good framework for how courts should deal with some of the more personal parts of an online persona. The cases involve two parties contesting ownership over the deceased's sperm: the deceased's significant other and his children from a previous marriage. In a series of decisions,<sup>104</sup> the California courts took up the issue of how a contractual arrangement between the parties affects the terms of a will and the deceased's wishes regarding the transfer of his semen.

In 1991, William Kane committed suicide, leaving behind two children from a previous marriage and a will that named the woman he was living with at the time, Deborah Hecht, as recipient of a large part of his estate.<sup>105</sup> Mr. Kane's children contested the will and eventually reached a settlement agreement with Ms. Hecht regarding the distribution of Kane's estate.<sup>106</sup> The agreement, however, did not specifically address the issue of fifteen vials of Mr. Kane's frozen semen that he had bequeathed to Ms. Hecht.<sup>107</sup> The children and Ms. Hecht subsequently fought over who had the right to the semen and whether the contractual agreement distributing the assets also applied to this item.

Five years after Mr. Kane's death, a California court of appeal overruled the contract arrangement and granted the semen to Ms. Hecht.<sup>108</sup> The court held that the decedent's sperm is "unique material" and therefore "not subject to division through an agreement among . . . potential beneficiaries."<sup>109</sup> The court reasoned that reproductive assets, such as a man's sperm, are different from traditional property and merit greater protection.<sup>110</sup> The court looked only to the intent of the sperm donor to control the disposition and held that a "decedent's right to procreate with whom he

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104. *Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222 (Ct. App. 1996); *Kane v. Superior Court*, 44 Cal. Rptr. 2d 578 (Ct. App. 1995); *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

105. *See Kane*, 44 Cal. Rptr. 2d at 580.

106. *See id.*

107. *See id.*

108. *See Hecht*, 59 Cal. Rptr. 2d at 223.

109. *Id.* at 226.

110. *See id.* (characterizing the sperm as "the seed of life" that was a fundamental aspect of the person's being).

chooses cannot be defeated by some contract.”<sup>111</sup> Other courts found similarly, holding that when it comes to personal items with special meaning, such as a man’s semen, the decedent’s intent overcomes any contractual obligation.<sup>112</sup> For instance, the Tennessee Supreme Court struggled with this issue, eventually holding that such pre-embryonic items hold a special classification in probate law.<sup>113</sup> Since such pre-embryonic assets are neither living beings nor pure property, courts should accord assets such as the deceased’s sperm special rights in probate disputes.<sup>114</sup>

While not to the same degree as pre-embryonic material, the more personal aspects of one’s digital identity also reflect an intimate aspect of the individual and therefore merit greater protection than traditional properties. A person’s Facebook account or avatar in a virtual world provides a very intimate and personal glance into the individual, far beyond that which money, stock options, or real estate provide. Viewed on a spectrum of varying property interests, for many, a person’s online persona carries deep personal meaning more closely aligned with that of a donor’s sperm than traditional property. In a sense, it becomes an extension of his or her very being. Therefore, courts should grant similar deference to the decedent’s intent. Courts only allow for posthumous conception when intent is explicit; if the decedent fails to provide that intent in his will, the pre-embryonic material is destroyed.<sup>115</sup> Courts should adopt a similar approach to a person’s online persona. When a person leaves digital assets intestate, courts should destroy those assets unless a potential beneficiary can demonstrate the deceased’s intent. While regular intestate law transfers unaddressed assets to the proper heir, the courts’ treatment of reproductive assets demonstrates that such rules can be overcome when public policy warrants. The importance of privacy and intent, as discussed above, warrants such an approach when addressing parts of one’s online persona left intestate.

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111. *Id.*

112. *See, e.g.,* Woodward v. Comm’r of Soc. Sec., 760 N.E.2d 257, 269 (Mass. 2002) (holding that any potential beneficiary must demonstrate the clear intent of the decedent in order to successfully assert a claim to the deceased’s sperm); A.Z. v. B.Z., 725 N.E.2d 1051, 1056–57 (Mass. 2000) (finding that without the husband’s clear intent, the ex-wife could not lay claim to his frozen sperm in the final distribution of their estate).

113. *See* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

114. *See id.*

115. *See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 784 (2009).

3. *Potential Problems with Recognizing a Person's Right To Control His Online Persona After Death*

This proposed solution raises some concerns regarding destruction and waste of property. In the legal sense, destruction occurs “when an owner’s acts or omissions eliminate the value of all otherwise valuable future interests in a durable thing.”<sup>116</sup> Although historically the right to destroy one’s property has been inherent in ownership,<sup>117</sup> later courts have demonstrated their unwillingness to permit the frivolous destruction of property.<sup>118</sup> Courts do, however, recognize a person’s right to be buried with his wedding ring, in a nice suit, or in other clothing, so there is some line-drawing, primarily on the grounds of excessive waste and public policy reasoning.<sup>119</sup> Professor Lior Strahilevitz suggested that the current application of the law encourages people to destroy their property, both electronic and real, before they die and as a result, this application of the law actually harms society even more.<sup>120</sup> Instead, he proposes allowing greater flexibility when determining whether to permit posthumous destruction—not to allow this only encourages a person to destroy the property while still living.<sup>121</sup>

In much the same way, by not permitting a person to control the destruction of his online persona, the current law only encourages him to destroy the accounts before he dies. Such a situation benefits no one and, as Strahilevitz argues, “creates perverse incentives for sincere testators who care about what happens to their property after death[.]”<sup>122</sup> Unlike the situation in *Eyerman v. Mercantile Trust Co.*, in which a court upheld the plaintiff’s right to prevent the carrying out of the deceased’s wish to destroy her house because the destruction would harm the neighbors,<sup>123</sup> here no one is unduly harmed by the posthumous destruction of a person’s Facebook or Yahoo! account. The *Eyerman* court defined the public policy concern as that which “contravenes any established interest of society” and causes harm to the

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116. See Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 793 (2005).

117. See *id.* at 788 (discussing the early American legal tradition regarding the right to destroy one’s own property).

118. See, e.g., *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 217 (Mo. Ct. App. 1975) (refusing to recognize the decedent’s right to destroy her home after she died); *In re Meksras Estate*, 63 Pa. D. & C.2d 371, 373 (Orphans’ Ct. 1974) (refusing to allow the decedent to be buried with her valuable jewelry); *In re Capers Estate*, 34 Pa. D. & C.2d 121 (Orphans’ Ct. 1964) (holding void the clause in the deceased’s will that called for the destruction of her dog).

119. See Strahilevitz, *supra* note 116, at 806 (discussing various reasons for tolerable forms of destruction).

120. See *id.* at 849–50.

121. See *id.* at 852.

122. *Id.* at 854.

123. *Eyerman*, 524 S.W.2d at 214.

state.<sup>124</sup> Such a public policy concern does not arise, however, with the destruction of one's online persona, and therefore, the policy against destruction does not apply. This policy still benefits society even when a particularly famous person, say a modern-day Shakespeare, wants to destroy his online persona. In such a situation, the lack of posthumous control would only encourage the modern-day Shakespeare to destroy his accounts before dying and thereby deprive society of his creations.<sup>125</sup> Adopting this proposed policy of giving a person more control over the posthumous destruction of his online persona would at least provide society with this famous person's work for a longer time.

## V. CRITIQUES AND RESPONSES TO RECOGNIZING POSTHUMOUS CONTROL OF ONE'S ONLINE PERSONA

A legal solution that recognizes posthumous control of one's online persona faces several hurdles. This Part addresses those concerns and offers accommodations and explanations as to how courts should reconcile such issues. As the court in *Intel Corp. v. Hamidi* made clear,<sup>126</sup> courts are loathe to recognize full property rights in what are essentially a few lines of code residing on a computer server. And while this Note does not advocate full recognition of property rights including such common tort remedies as trespass to chattels and conversion, a limited acceptance of this property right is necessary to establish the right to transfer after death. In addressing the issue of courts' recognition of virtual property, scholars point out that over the past 200 years, the law has continued to move from defining property as purely tangible to including more intangible assets. These scholars predict that this continued progression in the law soon may include virtual assets as well.<sup>127</sup>

One proposed solution defines this new virtual property as code that is (1) persistent, in that it does not disappear when the computer is turned off;

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124. *Id.* at 217.

125. Alternatively, this modern-day Shakespeare may choose to simply not post his works online and shun these online services all together. Such a situation arose with musician Billy Bragg and demonstrates the likelihood of similar situations occurring again in the future. *See* Levine, *supra* note 54.

126. 71 P.3d 296, 308–11 (Cal. 2003) (rejecting plaintiff's argument that computer servers should be treated as real property and accordingly refusing to apply the tort of trespass to chattels to plaintiff's sending of electronic messages).

127. *See* F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 43–50 (2004) (discussing the normative accounts of property as applied to virtual property).

and (2) interconnected, so that “[o]ther people can interact with” the code.<sup>128</sup> By adopting this virtual property definition, courts could limit the scope of virtual property while still recognizing certain rights inherent in these assets. Such recognition would adequately protect a person’s posthumous online persona and allow for its proper dissemination through the probate process. As discussed earlier, the historical development of property is predicated upon the belief that greater ownership will encourage further development in the assets. As such, it is in society’s, and therefore the courts’, interest to recognize such a right in this new online frontier.

Another critique raised in considering potential property rights inherent in digital items, such as e-mail and virtual world accounts, is the ability to duplicate these digital items an infinite number of times. However, it is because of this potential for duplication that property rights can exist in the virtual world simultaneously with both sender and recipient. In *McCormick Estates*, the court held that the letters a soldier wrote to his daughter were the property of the daughter, not the soldier’s estate, affirming the rule that the “property rights in the material on which the letter is written is in the receiver.”<sup>129</sup> With a letter, the sender writes the letter and then transfers ownership of the contents—and the physical letter—to the recipient. With an e-mail, on the other hand, both the sender and recipient retain simultaneous possession of the e-mail’s contents. The general jurisprudence regarding ownership of letters and other communication<sup>130</sup> would seem to prohibit the decedent’s retention of his e-mails and virtual world accounts, and therefore prevent their eventual posthumous dissemination. The unique nature of e-mails and other virtual communication methods, however, suggests that the traditional transfer of ownership for communications should not occur. Since both the sender and the receiver retain digital copies of the e-mail and never surrender them, concurrent ownership over the particular e-mail exists rather than the exclusive ownership that occurs with traditional letters.<sup>131</sup> This recognition allows for a better refinement of the idea of one’s digital assets. Ownership of such a digital item entails

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128. Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1049–50 (2005).

129. *In re McCormick Estates*, 80 Pa. D. & C. 413, 415 (Orphans’ Ct. 1952).

130. *See generally* *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (establishing the essential right to ownership and value in letters, particularly those of the late George Washington); *Baker v. Libbie*, 97 N.E. 109, 112 (Mass. 1912) (outlining the currently accepted law regarding transfer of rights when a letter is sent).

131. This concurrent ownership applies to both sent and received e-mails. When leaving orders for the transfer or destruction of one’s e-mail account, the decedent is controlling his ownership over those e-mails while not affecting the same rights in the other corresponding party.

ownership not over the actual item but over the particular set of bytes used in that particular setting.

Besides the property concern, privacy is another issue frequently raised when considering the handling of one's online assets after death. Yahoo! automatically deletes the accounts of all users upon notification of their death in order to ensure their privacy.<sup>132</sup> Ari Schwartz, currently the Internet Policy Advisor within the Department of Commerce, raised many of these concerns in a 2005 article, eventually concluding that further study was required before he could offer an appropriate policy recommendation.<sup>133</sup> However, extreme privacy policies, such as those used by Yahoo! and other services, are actually detrimental to the privacy of individuals. By not recognizing the rights of a person to transfer his accounts, services like Yahoo! only encourage greater password sharing and other unsecure behavior, which the emergence of services such as Legacy Locker demonstrates. In addition, online service providers should not primarily focus on the privacy concerns of the deceased because courts generally hold that the right to privacy ends upon the person's death.<sup>134</sup>

Finally, at least two states have taken strides to address the question of posthumously controlling an online persona. Connecticut enacted legislation that requires e-mail providers to supply copies of all e-mails sent and received by the deceased to the executor or administrator of the deceased's estate.<sup>135</sup> And Oklahoma amended its probate procedure in 2010 to give the administrator of an estate the power to control and terminate online accounts of the decedent.<sup>136</sup> While these solutions are a great step forward in recognizing the value of controlling one's online persona through the decedent's estate rather than through a terms of service agreement, they end up creating another set of problems. Currently, the Connecticut statute provides the executor of the estate with complete copies of all electronic correspondence, but the statute still ignores the wishes of the deceased.<sup>137</sup> Returning to the example at the beginning of this Note,<sup>138</sup> had Marine Lance Corporal Ellsworth wanted to delete his e-mails rather than transfer them to his father, the same restrictive situation would have existed under this Connecticut law as it did when Yahoo!'s Terms of Service governed.

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132. See Leach, *supra* note 1 (providing Yahoo!'s reasoning for denying the dead soldier's father access to his son's e-mail account).

133. See Schwartz, Mulligan & Mondal, *supra* note 48, at 616–17.

134. See RESTATEMENT (SECOND) OF TORTS § 652I(b) (1977).

135. CONN. GEN. STAT. § 45a-334a(2)(b) (2005).

136. OKLA. STAT. tit. 58, § 269 (2010).

137. See CONN. GEN. STAT. § 45a-334a(2)(b).

138. See *supra* Part I.

A more effective version of Connecticut's statute would recognize the importance of the deceased's intent in deciding whether to compel the e-mail provider to turn over copies of all e-mails. Additionally, legislators should consider expanding the scope of the statute from just e-mail services to also cover other forms of a person's online persona. The Oklahoma statute grants the control of the online accounts to the executor, but it fails to address whether the executor even has the ability to take control of these accounts that often reside in other states.

## VI. CONCLUSION

The solution proposed in this Note attempts to strike a balance between the interests of the individual and his heirs with those of the companies providing the online services. Rather than existing in a state of constant tension, both sides share a common interest in developing new mediums for communication and self-expression. Recognizing the special rights inherent in a person's online persona will encourage greater use of these online services. Posthumous control over one's online persona will be better accomplished by states adopting this Note's proposed amendments to the UPC and/or by potential beneficiaries enforcing their rights in court.

The proposed solution would increase the level of posthumous control over online personas in prior instances where such control was lacking, such as in the examples in Part I, *supra*.<sup>139</sup> For instance, in the case of Lance Corporal Ellsworth, had the proposed legal solution been adopted at the time, Ellsworth's digital estate would have been intestate. Although the father would still have had to go to court to challenge the deletion of his son's account, the court's focus would have shifted to Corporal Ellsworth's intent rather than the mere interest of the beneficiary. The outcome in this instance may not have changed, but the added guarantee of greater privacy would have encouraged people to remain confident in the sanctity of their online assets.

In the second situation, that of Pam Weiss's daughter,<sup>140</sup> the proposed solution would allow Pam's daughter to grant Pam control over her Facebook account in the event of her death, while also ensuring that this would have been what Pam's daughter wanted. In the instance of Orlando radio host Erika Roman,<sup>141</sup> rather than having her online persona lost forever, Ms. Roman could have left instructions in her will for the proper

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139. See Leach, *supra* note 1.

140. See Faure, *supra* note 3.

141. See Horowitz, *supra* note 4.

handling of her online persona—e-mail, social networking accounts, and other services would have been transferred to the designated beneficiary and handled accordingly. Rather than encouraging the sharing of passwords or depending on third-party websites, Ms. Roman could have handled this part of her estate in much the same way as she would the rest of her estate. Such a system is both more efficient and more equitable than the current system, which often leaves people confused and powerless to control the future of their digital assets.

Inherent in these new solutions is the continued emphasis on estate planning. Estate attorneys will need to inform online account holders about the issue of posthumous control and how to address it. In the future, when someone sits down with his estate attorney to plan out the posthumous distribution of his assets, that conversation will also include a look at the person's online persona. And now, by providing a person with the ability to control how to manage his persona after death, a person planning his estate will possess the necessary tools to address that situation.

A person's online persona has inherent value. Similar to other real assets, a person should have the right to dispose of that persona as he sees fit upon his death. Probate law is the natural vehicle for exercising that control. The best means of ensuring this is for legislatures to amend the state probate laws to ensure adequate protection, but even without such legislative action the legal structures already exist for people to assert their rights to control their online personas after death. Court rulings on issues such as posthumous recreation, bailment law, and contract law all offer a framework for enforcing a person's wishes regarding the handling of his online persona. Such an approach is in everyone's interest and like the progression of traditional property and probate rights, it is a natural succession that should occur. This Note offers a path for such progression to follow that ensures the greatest growth for this important, developing field.

**APPENDIX: PROPOSED CHANGES TO THE  
UNIFORM PROBATE CODE<sup>142</sup>**

**UPC § 1-201: General Definitions**

Current Text	Proposed Amended Language
(38) “Property” includes both real and personal property or any interest therein and means anything that may be the subject of ownership.	<p>“Property” includes both real and personal property or any interest therein and means anything that may be the subject of ownership, <u>including one’s digital assets.</u></p> <p><u>“Digital assets” include those accounts that make up one’s online identity including e-mail, social network, and other online interactive accounts.</u></p>

**UPC § 2-101: Intestate Estate**

Current Text	Proposed Amended Language
(a) Any part of a decedent’s estate not effectively disposed of by will passes by intestate succession to the decedent’s heirs as prescribed in this Code, except as modified by the decedent’s will.	[Added at the end of the section.]
(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent’s intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his [or her] intestate share.	<u>(c) The digital assets of one’s estate are excluded from traditional intestate succession and instead, for reasons of privacy and security, deleted. Potential heirs are, however, provided an opportunity to demonstrate the intent or wishes of the deceased and thereby transfer the account accordingly.</u>

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142. UNIF. PROBATE CODE (amended 2008).

**UPC § 3-706: Duty of Personal Representative; Inventory and Appraisement**

Current Text	Proposed Amended Language
<p>Within 3 months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or mail an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item.</p> <p>The personal representative shall send a copy of the inventory to interested persons who request it. He may also file the original of the inventory with the Court.</p>	<p>[Added at the end of the section.]</p> <p><i><u>Additionally, a listing of all e-mail, social network, and other Internet-based accounts that comprise the deceased's digital assets should be compiled with reasonable care and conveyed along with the rest of the inventory to interested parties.</u></i></p>

**UPC § 3-709: Duty of Personal Representative; Possession of Estate**

Current Text	Proposed Amended Language
<p>Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto . . . .</p>	<p>Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property <i><u>and digital assets</u></i>, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto . . . .</p>

**UPC § 3-814: Encumbered Assets**

Current Text	Proposed Amended Language
<p>If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance . . . .</p>	<p>If any assets, <i><u>real or digital</u></i>, of the estate are encumbered by mortgage, pledge, lien, <i><u>rent</u></i>, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance . . . .</p>