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**Accessing and Managing Digital Assets After Death****Maite Elorduy Gomez****Hailey M. Hanners****Osborne, Helman, Scott, Knisely & Stanton, LLP****301 Congress Avenue, Suite 1910****Austin, Texas 78701**

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## I. INTRODUCTION<sup>1</sup>

As more and more of the world is going "paperless" many possessions that people accumulated over their lifetime in physical form, such as photographs, correspondence, music, movies, and books, now exist primarily in digital form. In addition to the emotional significance attached to many digital assets, there is real money at stake as well, especially given the rise in popularity of cryptocurrencies and non-fungible tokens ("NFTs"). A recently published White House Fact Sheet reported that 16% of American Adults have purchased digital assets, which reached a market capitalization of \$3 trillion globally in November of 2021.<sup>2</sup>

Personal representatives of estates are faced with the seemingly daunting task of locating, accessing, and then distributing these digital assets. This paper aims to provide some basic information on digital assets to estate planners as well as attorneys representing personal representatives of estates, while providing practical advice for how to access and manage such digital assets.

This paper first provides a discussion on what are "digital assets" and highlights some of the ownership issues associated with digital assets. Next, this paper provides an overview of the Texas Revised Uniform Fiduciary Access to Digital Assets Act.

## II. WHAT ARE DIGITAL ASSETS?

The term "digital assets" is commonly used to describe everything that people own online, from e-mail and social media posts, to music and books, to cryptocurrencies and NFTs. However, it is not

entirely clear what it is that online users "own," and the classification of "digital assets" as "property" has been questioned by practitioners.<sup>3</sup>

Digital assets contain property-like characteristics, such as the right to use, transfer, exclude, control and destroy the digital asset (at least during the owner's lifetime) that raise expectations of property protection.<sup>4</sup> But, digital assets are created and controlled by private contracts that often restrict the owner's ability to transfer his or her digital assets, especially once the owner of the digital asset dies.<sup>5</sup> Thus, it has been argued that digital assets are "not a form of property but rather a creature of contract."<sup>6</sup>

Regardless of whether digital assets should be afforded the same protections as other property, it is undeniable that more and more of life is taking place online, and personal representatives of estates must know how to access and dispose of such assets. This section classifies digital assets into three broad categories, (1) digital accounts, (2) digital copyright, and (3) blockchain assets, and explores what the digital asset is and how a personal representative can access it after the owner dies. These are the types of digital assets that a majority of Americans possess today, and they are the digital assets personal representatives of estates are most likely to encounter.

### A. Digital Asset vs. Digital Account

It is important that personal representatives and their attorneys understand the distinction between a digital *asset* and a digital *account*. Perhaps the easiest way to explain the difference is by way of example. The vast majority of American adults who use the internet use e-mail.<sup>7</sup>

<sup>1</sup> This paper was originally written and presented by Jason S. Scott and Michael B. Knisely in 2013, with the law firm Osborne, Helman, Scott, Knisely & Stanton, LLP, and we would like to thank them for allowing us to expand upon their original contributions.

<sup>2</sup> Fact Sheet: White House Releases First-Ever Comprehensive Framework for Responsible Development of Digital Assets. Whitehouse.gov (Sept. 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/16/fact-sheet-white-house-releases-first-ever-comprehensive-framework-for-responsible-development-of-digital-assets/#:~:text=Millions%20of%20people%20globally%2C>

%20including,remain%20at%20the%20technological%20frontier.

<sup>3</sup> See Natalie M. Banta, Property Interests in Digital Assets: The Rise of Digital Feudalism, 38 *Cardozo L. Rev.* 1101, 1101 (2017).

<sup>4</sup> See *id.* at 1104-05.

<sup>5</sup> See *id.* at 1120; see also, Natalie M. Banta, Inherit The Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death, 83 *Fordham L. Rev.* 799, 801-02 (2014).

<sup>6</sup> See Banta, Property Interest, *supra* note 2.

<sup>7</sup> Kristin Purcell, *Search and e-mail still top the list of most popular online activities*, Pew Research Center (August 9,

Many Americans use free e-mail providers such as Google's Gmail or Microsoft's Outlook. As will be addressed in more detail below, the free e-mail *accounts* cannot be transferred at death to another person. They are web-based services particular to an individual. However, the content created or acquired by the users of these accounts (in this case, the actual e-mails) constitute digital assets. It may also be helpful to think of it this way: digital assets are actual files, while digital accounts are a means of accessing those files.<sup>8</sup> This concept can be expanded from e-mail accounts to social media accounts, like Facebook, Instagram, and Twitter. Whether the files or digital assets held in these accounts can be transferred will depend on each individual provider's terms of use. The specific terms of use of Apple, Google, and Facebook are discussed in more detail below in Section IV(C).

Of course, there are also digital accounts that do not allow for the creation or permanent acquisition of digital content, such as Netflix and Spotify. However, it is important to not ignore these types of accounts as they usually have a monthly subscription fee associated with them. It has been reported that the average consumer in the United States spends more than \$200 a month on subscription services.<sup>9</sup> Therefore, it is important for personal representatives to timely close or cancel these accounts to avoid unnecessary fees and reduce the risk of identity fraud even though it is unlikely that there will be digital assets associated with these types of accounts.

## B. Digital Copyright Assets

There is another category of online accounts that may appear to hold digital assets, but in reality only hold licenses to use digital copyrighted materials. Common examples of such accounts

include iTunes, Kindle, and Amazon Prime Video. With these types of accounts, a user may purchase copyrighted materials, such as books, music, and movies. However, the account holder is only purchasing the license to the digital copyright and unlike their physical counterparts, they are usually non-transferrable.

The physical versions of copyrighted material can be transferred pursuant to the "first sale doctrine." Section 109 of the Copyright Act codifies this common law doctrine and provides:

Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title...is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.<sup>10</sup>

Therefore, an owner of a lawfully-made copy is permitted to sell or otherwise dispose of that copy. The practical effect of this allowance is that, in general, an individual purchaser can sell, gift, or devise her paper books, vinyl records, CD's, DVD's etc. without violating copyright law.<sup>11</sup> Thus, a personal representative of an estate may pass these items on to beneficiaries in accordance with the decedent's wishes.

However, the application of the first sale doctrine to copyrighted materials has been made problematic in light of the digital world we now live in.<sup>12</sup> In 2013, for example, a court from the Southern District of New York considered whether a digital music file, lawfully made and purchased, could be resold by its owner under the first sale doctrine.<sup>13</sup> The court held that it cannot.<sup>14</sup>

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2011), <https://www.pewresearch.org/internet/2011/08/09/search-and-e-mail-still-top-the-list-of-most-popular-online-activities/>. (stating that 92% of online adults use e-mail).

<sup>8</sup> Maria Perrone, *What Happens When We Die: Estate Planning of Digital Assets*, 21 CommLaw Conspectus 185, 188 (2012).

<sup>9</sup> Bailey Shulz, *Subscription Fatigue: More companies are charging for monthly fees. How much more can consumers take?*, USA Today (Feb. 22, 2023), <https://www.usatoday.com/story/money/2023/02/22/monthly-subscription-fees-tiring-out-consumers/11313797002/>.

<sup>10</sup> 17 U.S.C. § 109.

<sup>11</sup> *See id.*; *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055, 1059 (C.D. Cal. 2008), *aff'd*, 628 F.3d 1175 (9th Cir. 2011)(finding that the passing of title may occur through a transfer by gift).

<sup>12</sup> *See generally, Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013), *aff'd*, 910 F.3d 649 (2d Cir. 2018)

<sup>13</sup> *See id.* at 648.

<sup>14</sup> *Id.*

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