The impact of privacy policies and terms of service on a user's freedom of testation

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DECLARATION

I declare that: "The impact of privacy policies and terms of service on a user's freedom of testation" is my own work; that all sources used or quoted have been indicated and acknowledged by means of complete references, and that this mini-dissertation has not previously been submitted by me or any other person for degree purposes at this or any other university.

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ABSTRACT

We live in a digital society where online accounts, social media websites and web-based email accounts form part of our daily lives. Through the use of these online platforms digital assets are generated which often carry sentimental or economic value. With the rapid growth of the digital world there are also new legal questions emerging such as: What will happen to these digital assets and accounts upon the user's death? The first step to take in answering this question is to define what is included in the phrase "digital assets." This is also the first problem that arises as the phrase has not yet been uniformly defined in literature or legislation, and neither has the South African legislator attempted a classification of what a "digital asset" would comprise. As a result, the concept of a "digital estate" that can be bequeathed is also undeveloped. In recent years some online service providers have put in place their own policy initiatives to try to regulate what happens to a user's account upon death. Google, for example, has begun to define its policies with regard to the right to access a deceased's account. Amazon.com on the other hand is a company that stipulates that the online account cannot be transferred and will ultimately end with the user. Regardless of the approach chosen by service providers, they ultimately limit the rights of the user. However, service providers require the user to accept a pre-drafted contract before an account is created, as a result the user is placed in an unequal bargaining position. In addition, there is a distinction between access to the account itself and access to the content of the account. The first problem a deceased user's heirs could encounter is being denied access to the account and/or its content. Lastly, service providers are maintaining that they cannot allow access to accounts or in some instances the content, as that would violate the privacy policy that was part of the agreement they had entered into with the deceased user. As a result of this lack of access and the non-transferability of digital assets, there could be real monetary loss, along with potentially significant and valuable intellectual property disappearing. Without legislation governing the position of digital assets after death, the service providers dictate how the assets are to be handled after the user has passed away. In this light, a user that agrees to the terms of an online service provider without due

regard for the consequences of the agreement may well be limited in his freedom to bequeath his digital assets.

KEYWORDS:

Digital death; digital assets; freedom of testation; privacy policy; terms of service; service provider; user; virtual property; virtual estate.

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LIST OF ABBREVIATIONS

ALJST	Albany Law Journal of Science and Technology
BALANCE	Benefit Authors Without Limiting Advancement or Net Consumer Expectations Act
BUJSTL	Boston University Journal of Science and Technology Law
CULR	Capital University Law School
DR	De Rebus
EPCPLJ	Estate Planning and Community Property Law Journal
EPLJ	European Property Law Journal
EULA	End User Licence Agreement
FLR	Fordham Law Review
HBTLJ	Houston Business and Tax Law Journal
HSTLJ	Hastings Science and Technology Law Journal
ILRB	Iowa Law Review Bulletin
IRLCT	International Review of Law, Computers and Technology
JJS	Journal for Juristic Science
LJPIL	Loyola Journal of Public Interest Law
LPPJ	Legislation and Public Policy Journal
MLR	Michigan Law Review
NAELAJ	National Academy of Elder Law Attorneys Journal
NCJLT	North Carolina Journal of Law and Technology Blog

NCLR	North Carolina Law Review
NJTIP	Northwestern Journal of Technology and Intellectual Property
NYUJLPP	New York University Journal of Legislation and Public Policy
PAIA	Promoting Access to Information Act
PER/PELJ	Potchefstroomse Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal
PLR	Pepperdine Law Review
POPI	Protection of Personal Information Act
RUFADA	Revised Uniform Fiduciary Access to Digital Assets Act
SALJ	South African Law Journal
SHLR	Seton Hall Law Review
SLR	Savanna Law Review
TECLF	Tulane European and Civil Law Forum
TLR	Temple Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law
TOS	Terms of Service
WLR	Wayne Law Review
QPLJ	Quinnipiac Probate Law Journal
UFADA	Uniform Fiduciary Access to Digital Assets Act

CHAPTER 1: INTRODUCTION

1.1 The Complexities of a Digital Death

1.1.1 Background

When considering estate planning, we are first directed to think of our physical and financial assets, but we live in a society where online accounts, social media websites and web-based email accounts form part of our daily lives.[1] With the growth of the internet, and what Hopkins[2] so adequately describes as the development of digital lifestyles, we are seeing our assets becoming digitalised at an astounding rate. Our digital lifestyle can be seen to include various forms of intellectual expression recorded in digital format, such as eBooks, songs, videos, movies and applications.[3] These digital formats are then distributed to users by means of service providers such as Amazon.com (Amazon) and Apple,[4] who act as intermediary platforms and effectively control the digital assets.[5] While these service providers grant access to users during their lifetime, there are new legal questions emerging. For example, what will happen to these digital assets upon the user's death? Do they form part of the user's estate and can they then pass on to his[6] heirs? The first question that arises could simply be: why would a testator want to bequest his digital assets?

Answers to these questions can begin to be formulated when one considers that digital assets, such as an eBay account, may have economic value.[7] These assets can be seen to carry value as there might be money or an ongoing auction connected with such an account. Other digital assets potentially have no economic value at all. Non-economic assets are often more sentimental and include digital or online photo albums

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1 Connor *Digital life after death* 2-3.

2 Hopkins 2013 *HSTLJ* 210.

3 Hopkins 2013 *HSTLJ* 210, Kaleem 2012 http://www.huffingtonpost.co.za/entry/death-facebook-dead-profiles_n_2245397, Bellamy *et al Death and the internet* 1, Connor *Digital life after death* 2-3, Wright 2014 http://firstmonday.org/ojs/index.php/fm/article/view/4998/4088#2a and McCarthy 2015 *BUJSTL* 387.

4 Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/.

5 Edwards and Harbinja "What happens to my Facebook profile when I die?" 1-3 and Desai 2008 *TLR* 67.

6 Although reference is made to masculine terminology, it should be accepted that feminine terminology is included in this reference.

7 Ratiba 2013 *JJS* 30 and Desai 2008 *TLR* 67.

such as Flickr or email accounts such as Gmail.[8] Another aspect that must be taken into account is the interests of family members and heirs in the legacy of the deceased. While these digital assets might have sentimental value to those close to the deceased, there is an increasing trend towards seeing their potential for historic, scholarly and marketable value in terms of collections.[9] In all of these instances there are also several legal issues that arise concerning access, control, ownership and the transferability of digital assets.[10]

These issues are complicated even more, as the phrase "digital asset" has not been comprehensively defined in the literature.[11] Most scholars do accept that our online accounts and data contained on hard storage devices are included in this concept.[12] However, they are still debating how to approach a more precise definition of digital assets. What is more, the South African legislator has yet to attempt a classification of what would comprise digital assets and as a result, the concept of a digital estate that can be bequeathed is also undeveloped in South African law.[13]

In recent years some online service providers have put in place their own policy initiatives to try and regulate what happens to a user's digital assets upon death.[14] Google, for example, has begun to define their policies with regards to the right to access a deceased's online account. Consequently, a request can be made to allow access to immediate family members or representatives of the deceased in order to

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8 Ratiba 2013 *JJS* 30 and Desai 2008 *TLR* 67, Wright 2014 http://firstmonday.org/ojs/index.php/fm/article/view/4998/4088#2, Carroll and Romano *Your digital afterlife: When Facebook, Flickr and Twitter are your estate, what's your legacy?* Chapter 2, par 1 and Jones 2014 http://www.smh.com.au/money/planning/what-do-you-really-own-in-the-digital-world-20140127-31jbd.html.

9 Desai 2008 *TLR* 67 also states that a marketable value might be added to accounts owned by celebrities or other public figures. Also see Beyer and Cahn 2013 *NEALAJ* 140.

10 Edwards and Harbinja "What happens to my Facebook profile when I die?" 1-2.

11 Ratiba 2013 *JJS* 29, Mach 2011 http://www.ncjolt.org/staff/volume-12/stefanie-mach, Wright 2014 http://firstmonday.org/ojs/index.php/fm/article/view/4998/4088#2 and Eklund 2011 *Visual Resources Association Bulletin* 3, where Eklund attempts a definition by stating that: "A digital asset is any form of content and/or media that has been formatted into a binary source that includes the right to use it."

12 Liebenberg 2014 http://www.phinc.co.za/NewsResources/NewsArticle.aspx?ArticleID=1245#.WgBqJohx3cs.

13 Liebenberg 2014 http://www.phinc.co.za/NewsResources/NewsArticle.aspx?ArticleID=1245#.WgBqJohx3cs.

14 Ratiba 2013 *JJS* 32-33. See Yahoo 2017 https://policies.yahoo.com/us/en/yahoo/terms/utos/, Google 2017 https://www.google.com/intl/en/policies/terms/ and Skelton 2012 http://mashable.com/2012/01/26/digital-assets-after-death/#pSXzeQlEzEqE.

gain access to a Gmail account. Such a request will be reviewed and decided upon by Google.[15] However, in instances where access was requested, service providers such as Yahoo made it clear that their first aim is to protect the privacy of its user, even after death. Accordingly, access has been denied by service providers citing privacy concerns as their reason.[16]

The granting of access to an account is but one approach that has been developed in relation to the policies of online service providers. With this approach, service providers mainly make provision for the transfer of the contents of an account or offer the beneficiaries limited access to an account upon the user's death. They are, however, subject to the privacy policies and contractual limitations that the user had agreed to upon opening the account.[17] Another approach adopted by service providers is where there is no provision made for the transfer of accounts upon death. These companies have terms of service agreements (TOS) which clearly indicate that beneficiaries have no right to access the deceased's accounts. Amazon is a company that makes use of such an approach and accordingly their TOS stipulate that the account cannot be transferred and will ultimately end with the user.[18]

Regardless of the approach chosen by a service provider, there are inherent problems in the regulation of the relationship between the service provider and the user. Firstly, service providers require the user to accept a pre-drafted end-user licence agreement (EULA)[19] before an account is created. This agreement entails that the user enters into an unduly influenced (or unconscionable) contract, which places him in an unequal bargaining position. Secondly, the requirement of a username and password to gain

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15 Google 2017 https://support.google.com/accounts/troubleshooter/6357590?hl=en.

16 See *In Re Ellsworth No*. 2005-296, 651-DE Mich Prob Ct 2005 as discussed in paragraph 3.2.2.1.

17 Facebook 2015 http://www.facebook.com/terms.php?ref=pf and Apple 2016 https:// www.apple.com /legal/ internet-services/itunes/us/terms.html.

18 Amazon 2017 https://www.amazon.com/gp/help/customer/display.html?nodeId=508088 under the heading LICENSE AND ACCESS states that: "…Amazon or its content providers grant you a limited, non-exclusive, non-transferable, non-sublicensable license to access and make personal and non-commercial use of the Amazon Services." Yahoo 2017 https://policies.yahoo.com /us/en/yahoo/terms/utos/ is another example of a service provider which follows such an approach, see clause 18 of Yahoo's TOS.

19 Erlank *Property in Virtual Worlds* 98-102 explains the EULA as the agreement that determines the rights and obligations of the user, while the TOS agreement sets out the guidelines as to how the user can behave within the contractual limits. Also see Miller 2003 *The Review of Litigation* 435-447 and Denapolis 2005 http://ssrn.com/abstract=1154234 10.

access to an account[20] could result in a lack of access or even a lack of knowledge that the account exists.[21] In the event that the username and password are known by the heirs, accessing the account could be a violation of the EULA.[22]

Lastly, we find that some service providers such as Facebook, while they do not assert ownership of the user's content, afford themselves wide discretion in using the user's content by way of these agreements.[23] In addition they maintain that the account is not transferable[24] and therefore prohibit the online account and its content from being inherited.[25] This means that even with a username and password,[26] and acting with the power of attorney subject to testamentary disposition, the content of the online account will not be transferable to the deceased user's heirs. As a result, there could be real monetary loss, along with the disappearance of potentially significant and valuable intellectual property.[27]

It can therefore be said that users are in an unfair position in relation to the service provider. Without clear guidance for the administration of digital assets upon the user's death, the rights of users and their heirs are limited, with the result that digital assets could be lost. Factors such as the ownership of the digital assets or the nature of the rights granted in terms of these agreements need to be considered, since a user who agrees to the EULA of an online service provider without due regard for the consequences of that agreement may well be limited in his freedom to bequeath his digital assets.

1.2 Research Questions

The current South African legal framework needs to be evaluated in order to determine whether or not a testator can bequest his digital property. The following research

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20 Jones 2014 http://www.smh.com.au/money/planning/what-do-you-really-own-in-the-digital-world-20140127-31jbd.html.

21 Ratiba 2013 *JJS* 34-36, Connor *Digital life after death* 7-8 and Denapolis 2005 http://ssrn.com/abstract=1154234 10.

22 Lopez 2016 *SLR* 81.

23 Facebook 2015 http://www.facebook.com/terms.php?ref=pf see clause 2: Sharing Your Content and Information.

24 Apple 2016 https://www.apple.com/legal/internet-services/itunes/us/terms.html.

25 Ratiba 2013 *JJS* 34-36 and Connor *Digital life after death* 13.

26 Lopez 2016 *SLR 81*.

27 Ratiba 2013 *JJS* 34-36 and Bellamy *et al Death and the internet* 1.

question can be formulated in response to the above discussion: To what extent, if any, do the privacy policies and TOS regarding digital assets impact on a user's freedom of testation?

1.3 Research Objectives

The following objectives are formulated in an attempt to answer the research question:

1.3.1 Main objectives

There are two main objectives. The first is to define digital assets in order to identify them as assets that could form part of a user's estate. The second objective is to determine if ownership and the right to bequeath such assets are being prohibited in terms of a contractual agreement to a EULA containing a TOS agreement or a privacy policy.

1.3.2 Secondary objectives

As mentioned above, there is currently no widely accepted definition of what comprises a digital asset and accordingly it is difficult to determine how it should be dealt with in an estate.[28] What is more, ownership and transferability are not regulated by legislation. Accordingly, these aspects are dealt with in terms of TOS agreements and privacy policies which are not uniformly approached amongst service providers.[29] Therefore, the main objectives in paragraph 1.3.1 above can be achieved by attaining the following secondary objectives:

i. Establish if digital assets comprise a unique classification of property in an estate or are included in the traditional definitions of property. This discussion will be take place in chapter 2.
ii. Investigate what rights users obtain when they agree to the TOS or privacy policies of a service provider. This discussion will be also take place in chapter 3.

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28 Ratiba 2013 *JJS* 29, 32-34.
29 Austin 2016 *EPCPLJ* 85-109.

iii. After digital assets have been defined and the rights assigned to them identified, a user's right to bequeath the said assets will be discussed in terms of his freedom of testation. The application of the right to freedom of testation with regards to digital assets will be analysed in terms of current legislation such as the *Copyright Act*[30] and the *Administration of Estates Act.*[31] Other legislation such as the *Promoting Access to Information Act*[32] (PAIA) and *Protection of Personal Information Act*[33] (POPI),[34] which deals with privacy and potentially with the inheritance of digital property will also be considered.[35] The effectiveness of current legislation pertaining to the inheritability of digital assets will be examined in chapter 4.

iv. Possible recommendations or suggestions regarding the most suitable approach to dealing with digital assets upon the user's death will be made in chapter 5.

1.4 Research Methodology

This study is based mainly on a literature review of relevant textbooks, case law, law journals, legislation and internet sources dealing with digital assets and Estate law.

1.5 Chapter Outline

An outline of the chapters in this dissertation and a short overview of their contents are given below.

CHAPTER 2

Defining digital assets

An attempt will be made to define the term "digital asset". The complexities of finding a working definition will also be addressed as different approaches have been suggested in academic writing. For example, American states have attempted

30 98 of 1978 as referred to by Ratiba 2013 *JJS* 39.
31 66 of 1965.
32 2 of 2000.
33 4 of 2013.
34 Rajpal 2016(2) *Without Prejudice* 52-53.
35 Baldwin and Korell 2010 *EPCPLJ* 393-420 and Chu 2015 *NJTIP* 255-276.

definitions that are at best too diffuse and that would be unable to accommodate the ever-changing nature of this term.[36]

CHAPTER 3

The impact of the policies you agreed to

In this chapter, the implication of a TOS agreement and a privacy policy will be discussed. The discussion will focus on the effect that these policies have on the ownership of, access to and the control of digital assets.

CHAPTER 4

Freedom of testation and South African legislation's efficiency in dealing with digital assets after death

Here the scope of a testator's freedom to bequeath assets will be discussed. This freedom of testation will be compared with the rights a user has in digital assets as defined and identified in chapters 2 and 3. A look at current South African legislation and how it makes provision for the disposition of digital assets in a deceased estate will also be examined.

CHAPTER 5

Conclusion and recommendation

Recommendations or suggestions regarding the most suitable approach to dealing with digital assets upon the death of the user are made. This includes suggestions as to how a definition of digital assets should be approached as well as how South African legislation could be adapted or new legislation introduced to make provision for the transfer of digital assets in a deceased user's estate.

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36 Pinch 2014 *WLR* 548 and Eichler 2016 *HBTLJ* 210-211.

CHAPTER 2: DEFINING DIGITAL ASSETS

2.1 Introduction

As stated in chapter 1, the phrase "digital asset" has not yet been comprehensively defined. According to Eichler[37] this stems from the difficulty in conceptualising what digital assets actually encompass as well as from the continuous evolution and development of the digital world.[38] The absence of a clear definition is the first obstacle to inheriting digital assets, as one needs to be able to identify assets in order to be able to bequeath them and ultimately manage them in a deceased estate.[39] Many definitions have been proposed in academic writing but none accepted,[40] so the first step is to find a clear definition that will be widely accepted.[41]

As stated by Ratiba,[42] the various definitions put forth normally vary according to the aspect of digital assets that is being emphasised at that particular point in time. However, in its broadest interpretation the term "digital assets" has widely been accepted as including information stored in a binary format on computer-related technology.[43] This information comes with the right to use the information[44] and is accessed through tangible pieces of property such as a computer, a hard drive, a smart phone, or third-party servers.[45] Within this wide definition, digital assets can be seen to include but are not limited to files, electronic mail, digital documents, audible content, motion pictures, and "relevant digital files currently in use or that will be stored on tangible appliances".[46] Ratiba[47] tries his hand at sorting through this extensive list of digital assets by placing them into three classes, namely: assets relating to a "user's online engagement"; stored files; and lastly, what he calls

37 Eichler 2016 *HBTLJ* 212.
38 Pinch 2014 *WLR* 548.
39 Eichler 2016 *HBTLJ* 212.
40 Ratiba 2013 *JJS* 29 and Banta 2016 *NCLR* 929.
41 Connor *Digital life after death* 1-2 and Ratiba 2013 *JJS* 34-36.
42 Ratiba 2013 *JJS* 29.
43 Sherry 2012 *PLR* 194, Hopkins 2013 *HSTLJ* 387 and Van Niekerk "A strategic management of media assets" 5.
44 Van Niekerk "A strategic management of media assets" 5.
45 Hopkins 2013 *HSTLJ* 387.
46 Genders and Steen 2017 *Financial Planning Research Journal* 76. See also McCarthy 2015 *BUJSTL* 385-387.
47 Ratiba 2013 *JJS* 30-31.

purpose-oriented digital assets. Here Ratiba[48] places items such as social media sites, email accounts, photo-sharing sites and blogs, as those items relating to a "user's online engagements". The second class identified by Ratiba[49] relates to the storing of digital files such as business or personal documents on a user's computer or an online server such as that provided by Dropbox.[50] For the last class of digital assets instead of grouping certain types of assets together, Ratiba[51] adopts a definitional approach, referring to various proposed definitions that address diverse topics being discussed for a particular purpose. Ratiba[52] does state, however, that at the very least it can be accepted that any electronically stored documents relating to an individual will fall within the scope of this class.

Whereas Ratiba[53] sorts digital assets into classes, other writers have extended his third class by categorising digital assets according to the purpose foregrounded at a particular point in time. Sherry,[54] Ferrante,[55] Carrol and Romano[56] have all proposed their categories, and it would seem that the categories identified by Beyer[57] and Cahn[58] are accepted by a number of academic writers.[59] Beyer[60] and Cahn's[61] categories include personal assets, social media assets, financial assets and business assets.

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48 Ratiba 2013 *JJS* 30-31.

49 Ratiba 2013 *JJS* 30.

50 Sherry 2012 *PLR* 11 and Carroll and Romano *Your digital afterlife* 11-14 also refers to these two sub-categories, i.e. digital assets stored locally on tangible electronic devices and those stored elsewhere on devices accessed by contract with the device owner, for example "cloud-based" services, where content is stored on a third party's server.

51 Ratiba 2013 *JJS* 30-31.

52 Ratiba 2013 *JJS* 30-31.

53 Ratiba 2013 *JJS* 30.

54 Sherry 2012 *PLR* 185-250.

55 Ferrante 2013 *LJPIL* 44, here Ferrante points out that assets that hold monetary value are seen as personal property, just as assets that hold sentimental value, such a picture in a frame, can be inherited and as such are also classified as personal property. He then asks why their online counterparts are not being treated as personal property.

56 Carroll and Romano *Your Digital Afterlife* 11-14.

57 Beyer 2015 2015 *NAEPC Journal of Estate and Tax Planning* 28-29 and Beyer and Cahn 2013 *NAELAJ* 138.

58 Cahn 2011 *Probate and Property Magazine* 36-37 and Beyer and Cahn 2013 *NAELAJ* 138.

59 Pinch 2014 *WLR* 550, Perrone 2012 *Commlaw Conspectus* 188-189, Beyer 2015 *NAEPC Journal of Estate and Tax Planning* 28-30, Cohen 2015 *EPCPLJ* 319-320, Ferrante 2013 *LJPIL* 43-44, Lee 2015 *Columbia Business Law Review* 660, McCarthy 2015 *BUJSTL* 406-407 and Sherry 2012 *PLR* footnote 59.

60 Beyer 2015 2015 *NAEPC Journal of Estate and Tax Planning* 28-29 and Beyer and Cahn 2013 *NAELAJ* 138.

61 Cahn 2011 *Probate and Property Magazine* 36-37 and Beyer and Cahn 2013 *NAELAJ* 138.

While there are similarities among the categories proposed by all of these writers, for the purpose of this discussion attention will be paid to those proposed by Beyer[62] and Cahn.[63]

2.2 Categorising Digital Assets

2.2.1 Personal assets

Beyer[64] and Cahn[65] identify personal digital assets as information that includes personal photos, videos or playlists stored on an electronic device or uploaded to a website hosting an online account. These assets pertain to information that a user would traditionally have stored in hard copy[66] format as keepsakes or as any other information relating to the user himself.

Beyer and Cahn[67] go further to state that despite the various ways through which this information can be accessed, the access is usually through a platform that requires some sort of authenticating function. This is usually by means of a username and password - whether it is to access the online account, the operating system or even individual files stored on a computer.[68]

2.2.2 Social media assets

Social media assets are another category of digital assets that require an authenticating function such as logging in to the user account. However, where personal assets could relate to keepsakes traditionally stored in your home, social media assets are replacing the means of interaction between individuals. These assets

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62 Beyer 2015 2015 *NAEPC Journal of Estate and Tax Planning* 28-29 and Beyer and Cahn 2013 *NAELAJ* 138.

63 Cahn 2011 *Probate and Property Magazine* 36-37 and Beyer and Cahn 2013 *NAELAJ* 138.

64 Beyer 2015 2015 *NAEPC Journal of Estate and Tax Planning* 28-29 and Beyer and Cahn 2013 *NAELAJ* 138.

65 Cahn 2011 *Probate and Property Magazine* 36-37 and Beyer and Cahn 2013 *NAELAJ* 138.

66 The *US Federal Standard* 1037C defines a "hard copy" as: "a permanent reproduction, on any media suitable for direct use by a person, of displayed or transmitted data". It also defines a "soft copy" as: "a non-permanent display image, for example, a cathode ray tube display" although the Collins English Dictionary at https://www.collinsdictionary.com/dictionary/english/soft-copy more simply defines a "soft copy" as "information that can be viewed on a computer screen rather than that which is printed on paper."

67 Beyer and Cahn 2013 *NAELAJ* 138.

68 Beyer and Cahn 2013 *NAELAJ* 138.

include websites used to communicate with or interact with other users online. These would typically include sites such as Facebook, Twitter or Gmail.

Austin[69] notes that an online email account could be used to describe both personal and social media assets. He states that by opening up this leap between categories, Beyer and Cahn[70] have produced another difficulty in the attempt to define digital assets since they can transcend different categories. This can be seen to be indicative of the "fluid nature" of digital assets[71] and means that a digital asset may fit multiple definitions.[72] Beyer and Cahn[73] suggest that digital assets could then be identified or defined in terms of their use in a particular instance. This deliberate approach at defining assets relating to their use in a particular instance is in contrast to the concerns expressed by Ratiba[74] who showed that the different definitions one finds in academic writing is due to the adoption of such an approach.

2.2.3 Financial assets

Austin[75] shows how times have changed by stating that where we once used wallets and bank vaults to store our wealth, we are now increasingly storing our wealth in a digital format. This means that our wealth takes the form of ones and zeros on a variety of platforms. These platforms are progressively being used to facilitate our commonplace financial activity such as paying bills, purchasing items or subscribing to media providers such as online magazines. Accordingly, Cahn[76] refers to financial assets as those assets that do not only relate to online bank accounts but also include shopping sites such as Amazon, PayPal or eBay.[77]

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69 Beyer and Cahn 2013 *NAELAJ* 138.
70 Beyer and Cahn 2013 *NAELAJ* 138.
71 Beyer and Cahn 2013 *NAELAJ* 138.
72 Austin 2016 *EPCPLJ* 101.
73 Beyer and Cahn 2013 *NAELAJ* 138.
74 Beyer and Cahn 2013 *NAELAJ* 138.
75 Austin 2016 *EPCPLJ* 101.
76 Cahn 2011 *Probate and Property Magazine* 36-37.
77 Ratiba 2013 *JJS* sorts sites such as eBay and PayPal under a "user's online engagements".

2.2.4 Business assets

Cahn[78] identifies a final category of digital assets, namely business assets. These assets again use a combination of the above-mentioned categories and include: websites such as eBay which can be used to trade in goods; online storage sites such as Dropbox that can be used to store business-related documents; and blogs and domain names, which can become valuable commodities capable of generating an income.[79] All of these examples can also be used to interact with other individuals and possess aspects of a person's persona.[80] They are commonly accessed via an authenticating action and relate to a user's account that has an established and trusted presence and reputation.[81]

Beyer and Cahn's categories do an adequate job of sorting out the wide definitions already put forward. However, Austin[82] makes the observation that while some American States use these categories to define digital assets, they are slow to include definitions in their statutes.

2.3 Legislative Attempts at a Definition

Ratiba[83] supports Austin's[84] opinion that lawmakers are approaching definitions for digital assets in terms of the purpose being discussed at a particular point in time. It would seem that the attempts at a definition in American legislation have resulted in either very narrow or too expansive definitions. An example of a narrow definition can be found in the Rhode Island[85] and Connecticut[86] statutes, where the definition is limited to email accounts, or the 2007 Indiana[87] statute, which is limited to

78 Cahn 2011 *Probate and Property Magazine* 36-37.
79 Cahn 2011 *Probate and Property Magazine* 36-37.
80 Rajpal 2016(1) *Without Prejudice* 41. Desai 2008 *TLR* 73-74 refers to author Zadie Smith 2007 http://faculty.sunydutchess.edu/oneill/failbetter.htm to explain a person's "persona" especially in relation to eBay and email accounts. She writes: "(a) writer's personality is his manner of being in the world: his writing style is the unavoidable trace of that manner…(S)tyle (is) a personal necessity … the only possible expression of a particular human consciousness."
81 Austin 2016 *EPCPLJ* 101.
82 Austin 2016 *EPCPLJ* 102.
83 Ratiba 2013 *JJS* 30.
84 Austin 2016 *EPCPLJ* 102.
85 *Rhode Island Code* §30-1-13-1.1.
86 *Connecticut Public Act* No 5-136 §46a-334a.
87 *Indiana Code* SB 0212, 2007 §29-1-13-1.1.

electronically stored documents. Other state legislation, such as a 2010 Oklahoma[88] statute, is broader and includes social networking, micro blogging and email accounts. Austin[89] notes that some states, such as Tennessee, are also reviewing their existing acts and proposing new definitions to allow for digital assets. However, they are splitting the definition into "digital assets" and "digital accounts". This is, once again, a deviation from the existing trend that lumps together all information stored in a binary format on computer-related technology.[90] Austin[91] refers to the definition proposed in the *Tennessee House Bill,*[92] which splits digital information into these two categories:

> 'Digital accounts' means any electronic or online account, including email accounts, Internet-based or cloud-based accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, and affiliate programs; 'Digital assets' means any electronic content or files stored on digital devices regardless of the ownership of the physical devices upon which the digital asset is stored; 'Digital assets' includes emails, documents, images, still photographs, blogs, video blogs, podcasts, instant and text messages, audio files, and videos; 'Digital devices' means any devices that use electronic signals to create, transmit, store, or receive information; 'Digital devices' includes desktops, laptops, tablets, peripherals, storage devices, mobile telephones, and smartphones.

Austin[93] states that this proposed definition, while not offering an exhaustive list of digital assets or accounts, is sufficiently broad enough to be able to include other digital assets not explicitly mentioned. Another approach that is appearing in American legislation is to include digital assets into the traditional definition of property. An example can be found in the *Texas Property Code,* which expanded its existing definition of property to include digital assets as a subset of personal property.[94] Nevertheless, Austin[95] points out that simply stating that "property held in any digital

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88 *Oklahoma Title* 58 §269.
89 Austin 2016 *EPCPLJ* 94.
90 Sherry 2012 *PLR* 194, Hopkins 2013 *HSTLJ* 387 and Van Niekerk "A strategic management of media assets" 5.
91 Austin 2016 *EPCPLJ* 94.
92 HB 1945, 108th Gen Assemb, 2d Sess Tenn 2013.
93 Austin 2016 *EPCPLJ* 93-95.
94 *Texas Property Code* 2013 SB 648, 83d Leg, Reg Sess.
95 Austin 2016 *EPCPLJ* 101-103.

or electronic medium"[96] falls under personal property, does not answer the question as to what comprises a digital asset. Here we are again taken back to the categories suggested by writers such as Cahn,[97] but other writers such as Erlank[98] have also adopted the argument that digital assets should be viewed as traditional property.

2.4 Digital Assets Defined as Traditional Property

2.4.1 Introduction

As stated in paragraph 1.1.2, digital assets may have either sentimental or economic[99] value attached to them.[100] Ferrante[101] makes the argument that because digital assets could possess economic value they may be more easily classified as property in a traditional sense.[102] In an 1841 Massachusetts case, Judge William Story found[103] that monetary value may be assigned to an individual's persona and that such monetary value extend to items such as personal correspondence, which may be seen as one's personal property. While this argument was in relation to the personal letters of President George Washington, Tarney[104] states that it could easily be applied to a modern version of facets of an individual's persona such as social media, email accounts and other online "belongings".

This does not, however, eliminate those assets that have only sentimental value,[105] such as the personal assets identified by Cahn.[106] Williams[107] goes so far as to compare digital sentimental assets such as online pictures with actual pictures stored in one's

96 *Texas Property Code* 2013 SB 648, 83d Leg, Reg Sess.
97 Beyer and Cahn 2013 *NAELAJ* 138 and Cahn 2011 *Probate and Property Magazine* 36-37.
98 Erlank 2013 *EPLJ* 194-212.
99 Ratiba 2013 *JJS* 29 also attempts to define digital assets in terms of value or commercial viability, exploitation or the protection attached thereto.
100 Ratiba 2013 *JJS* 30.
101 Ferrante 2013 *LJPIL* 42.
102 Ferrante 2013 *LJPIL* 42.
103 Citing *Folsom v. Marsh*, 9 F Cas 342, 345 CCD Mass 1841.
104 Tarney 2012 *CULR* 773-774.
105 Ferrante *LJPIL* 43. Also see Van der Merwe CG and De Waal MJ *The Law of Things and Servitudes* 15 and Radin 1982 *Stanford Law Review* 959-960, Erlank *Property in Virtual Worlds* 97 refers to the latter two authors and comes to the conclusion that sentimental value could be enough to warrant ascribing property rights to virtual assets.
106 Cahn 2011 *Probate and Property Magazine* 36-37.
107 Ferrante *LJPIL* 43.

home. Williams[108] effectively states that such items would indeed fall within the scope of one's personal property.

Other writers, including Ratiba,[109] accept the argument raised by Mach[110] that if digital assets are considered as actual property, a proper definition of such assets could lead to the assignment of rights and obligations in terms of property and contract law.[111] Erlank[112] confirms that digital assets have been considered in terms of contract law as well as intellectual property law. All of these arguments have had one thing in common; that is, that we are assigning real world attributes to these virtual items.

2.4.2 Assigning real world attributes

Just like Austin,[113] Erlank[114] confirms the observation that attributes of traditional property are assigned to digital assets. He states that even though the digital format of a book (that is an eBook) does not entail the expense of actually printing the book in hard copy, the pricing of the product in the two formats often seems little different.[115] Thus, the impression is that one pays for the enjoyment of the book's content and not the format. The eBook industry also strives to replicate the experience of reading a hard copy book by providing a digital display that reads like real ink and paper. An eBook is also linked to a user and his profile, and while this was considered an element that marked the difference between the two formats, it has since become moot. Today we find that eBooks are "lendable" to third parties and even libraries are able to "lend" eBooks to the public.[116]

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108 Williams 2012 http://www.huffingtonpost.com/2012/03/15/karen-williams-facebook_n_1349128.html.

109 Ratiba 2013 *JJS* 29.

110 Mach 2011 http://www.ncjolt.org/staff/volume-12/stefanie-mach, writing for *NCJLT Blog.* and as referred to by Ratiba 2013 *JJS* 29, Mach refers to a digital asset as "a type of asset with which everyone is rich and continues to grow more prosperous: virtual wealth." Also see Strutin 2011 https://www.llrx.com/2011/08/ghost-in-the-machine-managing-the-information-afterlife/.

111 Ratiba 2013 *JJS* 29.

112 Erlank 2015 *PELJ* 1773-1775.

113 Austin 2016 *EPCPLJ* 101.

114 Erlank 2013 *EPLJ* 207.

115 Erlank 2013 *EPLJ* 207. Also see Perzanowski and Schultz *The End of Ownership* 1-4.

116 Erlank 2013 *EPLJ* 206 does, however, point out that the ability to lend eBooks depends on the publisher or rights-holder's permission on a book-by-book basis.

Erlank[117] furthers this discussion by stating that past technological advances, such as an old analogue audio tape developing into a digital DVD, did not impact the ownership of the item. He goes further to state that this new "packaging" did not infringe on the intellectual property contained in the content itself, but the evolution to the digital format has, somewhere along the line, stripped virtual assets of the competencies of ownership associated with other, older media types. With this, Erlank[118] effectively argues that digital assets should be regarded as intangible things to which the same property rights may be attached as to their tangible counterparts. He states that the current view that these assets have only intellectual property rights attached to them with limited licences of use is not sufficient in today's technological environment. Erlank's[119] argument becomes circular when he states that the attempts to make digital assets seem akin to their tangible counterparts have encouraged the perception that the purchaser enjoys the same rights in terms of both formats. Unfortunately, this is not the case, as the purchaser of a digital asset is left with weak personal rights based on contract.[120] It is these contractual rights that will be discussed in chapter 3 below.

2.5 Conclusion

The question remains, at this stage, whether or not a wide definition of digital assets should be accepted and accompanied by categories to streamline the identification of assets in a deceased estate.[121] If not, then Erlank's approach could be adopted to define digital assets as a new form of traditional property.[122] In paragraph 2.3 a quick overview was given of the American legislature's attempts at a definition of "digital assets", but the proposed definitions were still diffuse, involved a variety of terms, and the terms themselves were undefined. Ultimately, a concrete definition is needed in order to determine how digital assets are to be dealt with upon the death of the user. As stated in paragraph 2.4.2, even once digital assets have been satisfactorily defined, the rights assigned to those assets will partly determine how they are treated in a

117 Erlank 2013 *EPLJ* 194-195.
118 Erlank 2013 *EPLJ* 194-195.
119 Erlank 2013 *EPLJ* 194-195.
120 Erlank 2013 *EPLJ* 194-195.
121 Cahn 2011 *Probate and Property Magazine* 36-39.
122 Erlank 2013 *EPLJ* 194-212.

deceased estate. The rights assigned to a user of digital assets will be discussed in chapter 3.

CHAPTER 3: THE IMPACT OF THE POLICIES USERS AGREE TO

3.1 Introduction

> On Friday July 14, 2009, as users of the Kindle, the Amazon.com (Amazon) e-book reader, powered up their devices, something startling happened. Purchased copies of George Orwell's *1984* and *Animal Farm* disappeared from Kindle e-book libraries. Amazon had discovered that MobileReference.com, the company selling the Orwell books on the Kindle Store website, did not have rights to sell the works. Reacting as any conscientious, law-abiding corporation would, Amazon immediately removed the unlicensed content from the Kindle Store. Unfortunately, it also went one step further. In the hopes of fending off any possible liability, Amazon reached into users' Kindle devices and deleted the e-books directly from the Kindles of all who had purchased them.[123]

While Belanger's[124] description of what he calls "Amazon.com's Orwellian Gaffe" itself reads as a novel, this event underlines the perception of ownership and privacy created by service provers such as Amazon. Belanger[125] describes the outraged reaction of users who insisted that they had "bought" the eBook and accordingly believed that they "owned" it.[126]

Cohn[127] states that these perceived instances of ownership are the result of service providers creating the illusion of a typical retail experience where a person purchases digital assets in much the same way as one would buy a traditional item.[128] This conviction of ownership is represented in the reactions of users who characterized Amazon's action as being that of an electronic burglar who stole something the users

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123 Belanger 2011 *SHLR* 362.

124 Belanger 2011 *SHLR* 362 and Stone 2009 http://www.nytimes.com/2009/07/18/technology /companies/18amazon.html.

125 Belanger 2011 *SHLR* 362 as well as Erlank 2013 *EPLJ* 200-201.

126 Belanger 2011 *SHLR* 362, Eichler 2016 *HBTLJ* 210, Perzanowski and Schultz *The End of Ownership* 6 and Johnson 2009 http://www.guardian.co.uk/technology/2009/jul/22/kindle-amazon-digital-rights.

127 As referred to by Belanger 2011 *SHLR* 390 and Johnson 2009 http://www. guardian.co.uk /technology/2009/jul/22/kindle-amazon-digital-rights.

128 Johnson 2009 http://www. guardian.co.uk/technology/2009/jul/22/kindle-amazon-digital-rights. Erlank 2013 *EPLJ* 196-200 also places emphasis on the actions of online service providers that mimic the selling of a traditional item. Perzanowski and Schultz *The End of Ownership* 99 discusses a study where the phrase "Buy now" was replaced with "Licence no". This study showed that users better understood the rights assigned to the digital item, but it additionally showed that users value traditional ownership rights as they were willing to pay more for the digital copy that assigned such rights, for instance the right to resell the digital copy.

had in their "possession".[129] Others stated that this event made them aware of how limited their rights are, in that they now realised that they cannot lend the eBook to anyone; that they cannot resell it after they are done with it; and apparently they cannot "count on still having (their) e-books tomorrow."[130]

While Belanger[131] and Cohn[132] attribute this illusion of ownership to the actions of service providers, Eichler and Jones[133] point to the consumer's own actions, as few are likely to take the time to read through the lengthy TOS before clicking on the "agree" button. In fact, during an empirical investigation conducted by Obar and Oeldorf-Hirsch[134] at the University of Connecticut, it was found that 74% of the participants did not read the TOS or privacy policy before joining a fictitious social networking site. It further showed that those who did take the time to read the TOS spent an average of 73 seconds to read the privacy policy while spending only 51 seconds on the TOS. 98% of the participants missed the obvious catch in the TOS agreement, the "gotcha clauses" about sharing the data with the National Security Agency, as well as the provision about providing their first-born child as payment for the service.[135]

This lack of interest in what users are agreeing to has been shown to stem from users' perceiving these policies as overly complicated and lengthy.[136] Users also see them as a nuisance, getting in the way of their digital productivity.[137] Regardless of whether

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129 Belanger 2011 *SHLR* 632, Cashmore 2009 http://mashable.com/2009/07/17/amazon-kindle-1984/, Erlank 2013 *EPLJ* 201-202 and Groskopf 2016 https://qz.com/766535/terms-of-service-agreements-are-destroying-the-concept-of-ownership-for-digital-goods/, who states that while Amazon remotely deleted these items, if they had not been able to do so they would have had to enter a user's home, which would have been a criminal activity. However, according to Amazon's TOS their actions were completely legal. Also see Stone 2009 http://www.nytimes.com/2009/07/18 /technology/companies/18amazon.html.

130 Stone 2009 http://www.nytimes.com/2009/07/18/technology /companies/18amazon.html.

131 Belanger 2011 *SHLR* 632.

132 As referred to by Belanger 2011 *SHLR* 632.

133 Eichler 2016 *HBTLJ* 210 and Jones 2014 http://www.smh.com.au/money/planning/what-do-you-really-own-in-the-digital-world-20140127-31jbd.html. Also see Beyer and Cahn 2013 *NAELAJ* 140-142.

134 Obar and Oeldorf-Hirsch "The biggest lie on the internet" 2.

135 Obar and Oeldorf-Hirsch "The biggest lie on the internet" 2. A study conducted by Hillman 2006 *MLR* 104 also found that only 4% of online consumers actually read the TOS agreements. Herbst 2009 *RES GESTÆ* 16 and Groskopf 2016 https://qz.com/766535/terms-of-service-agreements-are-destroying-the-concept-of-ownership-for-digital-goods/.

136 Chu 2015 *NJTIP* 260-261 states that it would take a person 200-250 hours to read just the privacy policies they encounter in a year.

137 Jones 2014 http://www.smh.com.au/money/planning/what-do-you-really-own-in-the-digital-world-20140127-31jbd.html, Eichler 2016 *HBTLJ* 210 and Singer 2014

the issue lies with the way in which companies present digital assets or in the users' indifference or ignorance as to what they are consenting to,[138] this chapter will examine the legality of these policies and their enforceability. In addition, the chapter will focus on identifying the ownership of digital assets, as well as on the role of access and control in the inheritability of digital assets. The chapter begins with a consideration of the legality of these contracts.

3.2 Binding Users to Terms of Service or Privacy Policies

3.2.1 Creation of a legal contract

The first sentence in Apple's TOS clearly states that by clicking the "agree" button a legal contract is created between the user and the service provider.[139] However, simply saying something does not necessarily make it so. In order to explore the validity and enforceability of these contracts this chapter will discuss the literature as well as court cases.

As there is a dearth of South African court cases scrutinising these online contracts, the focus is now shifted to another jurisdiction, the United States of America (hereafter the USA), where such cases have been heard. In *ProCD Inc v Zeidenberg*[140] the court held that online contracts are in fact ordinary contracts and as such will be enforceable. Other cases went deeper into what makes such a contact valid. In *Ajemian v Yahoo!, Inc.,*[141] the court held that in order for an online contract to be valid, the terms and conditions must be reasonably communicated to a user, where after the user must manifestly consent to them.[142] In order for the user to indicate

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https://mobile.nytimes.com/blogs/bits/2014/04/28/didnt-read-those-terms-of-service-heres-what-you-agreed-to-give-up/?_php=trueand_type=blogsand_r=0.

138 Powers 2015 https://www.pactsafe.com/blog/terms-of-service-enforceable/ and Chu 2015 *NJTIP* 261.

139 Griggs 2012 http://edition.cnn.com/2012/09/03/tech/web/bruce-willis-itunes/index.html and Beyer 2013 *Estate Planning in the Digital Age* 6.

140 86 F 3d 1447 7th Cir 1996.

141 *Ajemian v Yahoo!, Inc*., 987 NE 2d 604, 611 Mass App Ct 2013.

142 Banta 2014 *FLR* 821 referring to cases such as *Specht v. Netscape Commc'ns Corp.,* 306 F3d 17, 28–30 2d Cir 2002; *TracFone Wireless, Inc. v. Pak China Grp. Co. Ltd.,* 843 F Supp 2d 1284 SD Fla 2012; *Caspi v. Microsoft Network, LLC,* 732 A2d 528, 532 NJ Super Ct App Div 1999; *Barnett v. Network Solutions, Inc.*, 38 SW3d 200, 204 Tex Ct App 2001 and *Molnar v 1-800-Flowers.com,* No CV 08-0542 CAS JCx, 2008 WL 4772125 CD Cal Sept 29, 2008; *Sw Airlines v Boardfirst, LLC*,

consent, a service provider could make use of one of two methods: (1) the click-wrap agreement;[143] or (2) the browse-wrap agreement.[144]

The click-wrap agreement requires the user to open a dialog box wherein consent is indicated. If such consent is not given the user cannot continue opening an account or using the service.[145] The browse-wrap agreement, on the other hand, does not require the user to perform an action to indicate consent. It merely displays the agreement to the user and indicates that the use of the site legally binds them to these terms and conditions.[146] In fact, these agreements are frequently displayed as a hyperlink on the user's screen, which requires the user to click it in order to access the TOS. Accessing the agreement is not a requirement to use the service.[147]

Banta[148] shows that there is consensus among the USA's courts that both the click-wrap and the browse-wrap methods produce a valid contract. However, they are more willing to enforce click-wrap agreements, as it is thought that this method communicates the agreement reasonably to the user and requires an action to indicate the acceptance thereof.[149] In contrast thereto, service-providers using browse-wrap agreements need to show that the user has actual knowledge of the content of the agreement before it is likely to be enforced.[150] This knowledge of the content is usually

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No 3:06-CV-0891-B, 2007 WL 4823761 ND Tex Sept 12, 2007; *Pollstar v. Gigmania Ltd.*, 170 F Supp. 2d 974, 982 ED Cal. 2000.

143 De Beer *et al* 2017 *Business Horizons* 210 explains that click-wrap agreements are derived from the licensing practice associated with software and media sold in plastic shrink-wrap, where it is accepted that consumers are contractually bound to the printing on the package when they open it.

144 Pistorius 2004 *SA Mercantile Law Journal* 560 and 570 and Chu 2015 *NJTIP* 260.

145 Das 2002 *Washington Law Review* 482 and Banta 2014 *FLR* 821-822.

146 De Beer *et al* 2017 *Business Horizons* 210 and Das 2002 *Washington Law Review* 482.

147 Das 2002 *Washington Law Review* 482.

148 Banta 2014 *FLR* 821-822.

149 Kim 2017 *The Business Lawyer* refers to more recent cases such as *Berson v Gogo* 97 F Supp. 3d 359 EDNY 2015 and *Nguyen v Barnes and Noble, Inc.*, 763 F3d 1171 9th Cir 2014. Ayres and Schwartz 2014 *Stanford Law Review* 548 are also of the opinion that click-wrap agreements are more likely to be accepted as complying with all the requirements of a valid contact.

150 Banta 2014 *FLR* 822 in the American court case *Ajemian v Yahoo!, Inc.*, 987 NE2d 604, 611 Mass. App. Ct 2013 it was found that a browse-wrap agreement did not in this instance prove that the TOS had been adequately displayed, as user had not performed any action that would indicate acceptance of the agreement, such as clicking "I accept".

proven when users continue to use the website after receiving notice that TOS are applied to their activity on the website.[151]

In recent court cases, it would seem that the courts in the USA are shifting their focus to how the contracts are communicated to the user. In *Handy v LogMeIn, Inc.*[152] it was determined that by posting the TOS to its website, the service provider did offer "notice" of its agreement. In a later case between the same two parties, the court noted that while the case did not deal with the formation of a valid contract, there was a requirement of a higher standard of "notice" that would be sufficient to establish consent.[153] Kim[154] is of the opinion that the language used by the court indicated that LogMeIn's mere posting of its TOS on its website would not be sufficient to conclude a contract.[155]

What is more, the courts are considering which specific terms the user consented to.[156] In *Dillion v BMO Harris Bank, N.A.*[157] the USA court found that clicking the consent button does not equal a signature on a tangible document that cannot be altered thereafter, and consequently the service provider must prove which version of the agreement the user consented to.[158] This case also highlighted users' misperceptions that they own digital assets just as they own traditional items, as recent court cases

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151 Kim 2017 *The Business Lawyer* 243.

152 No 1:14-cv-01355-JTL, 2015 WL 4508669 ED *Curator ad litem*. 24, 2015.

153 Kim 2017 *The Business Lawyer* 246-247. See Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 112-115 for a discussion of consent in terms of the European Union's data protection laws.

154 Kim 2017 *The Business Lawyer* 246-247.

155 Kim 2017 *The Business Lawyer* 247 goes further to discuss the *Resorb Networks, Inc v YouNow.com* 30 NYS3d 506 Sup. Ct. 2016 and *Long v Provide Commerce, Inc.* 200 Curator ad litem. Rptr. 3d 117 Ct. App. 2016 where the court examined how notice was given to the user.

156 Kim 2017 *The Business Lawyer* 244-246 who reverences the court case *Dillion v BMO Harris Bank,* NA No 1:13-CV-897, 2016 WL 1175193 MDNC Mar. 23, 2016, appeal docketed, No. 16-1373 4th Cir. Apr. 5, 2016. Appel 2017 https://www.apple.com/legal/internet-services/itunes/us/terms.html, under the topic "CONTRACT CHANGES", reserves the right to: "at any time modify (its) Agreement and to add new or additional terms or conditions on (the) use of the Services. Such modifications and additional TOS will be affected immediately and incorporated into this Agreement. Your continued use of the Services will be deemed acceptance thereof."

157 No 1:13-CV-879, 2016 WL 1175193 MDNC Mar. 23, 2016 appeal docketed, No. 16-1373 4th Cir. Apr. 5, 2016.

158 Kim 2017 *The Business Lawyer* 244-246, 248, it was also noted that in *Resorb Networks, Inc. v YouNow.com* 30 NYS 3d 506 Sup. Ct. 2016 the court looked to see if the email requesting users to adhere to the TOS did in fact refer to the same terms of use document on the hyperlink presented to users when accessing the service provider's website. Tasker and Pakcyk 2009 *ALJST* 97-98 also argue that service providers need to inform users adequately as to how and when TOS have been altered.

have indicated that users do not view online contracts as being as enforceable as traditional paper-based contracts.[159] Again it can be asked whether the service provider's standard of notice is to blame, or users' disinterest in the significance of what they are consenting to. Nevertheless, the USA courts seem to find online contracts such as Apple's EULA legally binding.[160]

Snail,[161] a South African author, also states that there seems to be no reason why such agreements should not be enforceable as users are aware of the terms before agreeing to them.[162] Koornhof[163] and Erlank[164] are two more authors who agree with the validity and enforceability of these agreements. Koornhof[165] states that irrespective of whether the click-wrap or browse-wrap method is used, they would most likely be valid in terms of the *Electronic Communications and Transactions Act*.[166] The aspect that might affect the validity is once again the notice that is given to the user. Koornhof[167] states that a lack of due care on the part of the service provider might give the user a way out of the agreement in terms of the *Consumer Protection Act,*[168] although in *S v De Blom*[169] the court held that under traditional contract law parties cannot avoid contractual obligations due to their own neglect to read the terms thereof. This then places an obligation on the user to spend adequate time on reading and understanding the TOS before agreeing to them or using the service.[170]

While it can be concluded that online contracts are valid and can be binding, another question that needs to be answered is what exactly users are consenting to. The

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159 Kim 2017 *The Business Lawyer* 246-247 pointa to recent case law such as *Handy v LogMeIn, Inc.* No. 1:14-cv-01355-JTL, 2015 WL4508669 ED Cal. July 24, 2015. In this case the service provider was able to produce the TOS that the user consented to, which stipulated that they could "modify or discontinue" any of their products.

160 Ayres and Schwartz 2014 *Stanford Law Review* 549 and 558.

161 Snail 2007 *The Quarterly Law Review for People in Business* 40-46.

162 Tasker and Pakcyk 2009 *ALJST* 87.

163 Koornhof 2012 *Speculum Juris* 41.

164 Erlank *Property in Virtual Worlds* 100.

165 Koornhof 2012 *Speculum Juris* 41.

166 Act 25 of 2002, section 24(1) states that unilateral statements made by means of data messages in online agreements are valid.

167 Koornhof 2012 *Speculum Juris* 41.

168 Act 68 of 2008, as amended. Koornhof 2012 *Speculum Juris* 41.

169 1977 3 SA 513 (A).

170 Nonetheless authors such as Klopper *et al Law of Intellectual Property in SA* 198 have pointed out that there are jurisdictions that do not find online contracts enforceable.

impact of these agreements on aspects such as ownership, access and control will be examined in the next paragraph.

3.2.2 Legal issues pertaining to ownership, access and control

While some service providers, such as Facebook[171] and YouTube,[172] have adapted their TOS agreements to explicitly state that the content and information posted by the user is also owned by the user, others state that all content belongs to the service provider.[173] This is the case with service providers such as Amazon,[174] Google[175] and Apple,[176] especially in relation to digital assets such as eBooks and digital music, where the terms state that users agree to a licence of use and not ownership.[177] Subsequently a licence agreement is created and no property rights can vest in the user, as ownership is not transferred and no transferrable rights are created for the user.[178] Jooste[179] reinforces this concept by explaining that it is unnecessary for service providers to claim ownership of the content. This is due to the fact that a contract for the provision of services and not a contract for the sale of goods is created.

While it would seem as if service providers not only dictate where ownership lies, they also take it one step further by granting themselves a broad spectrum of rights.[180]

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171 Facebook 2015 http://www.facebook.com/terms.php?ref=pf.

172 YouTube 2010 http://www.youtube.com/t/terms.

173 McDavitt 2016 http://www.nlrg.com/trusts-estates-wills-and-tax-law-legal-research-copy/estates-the-inheritability-of-digital-music-files.

174 Amazon 2017 https://www.amazon.com/gp/help/customer/display.html?nodeId=508088.

175 Google 2017 https://www.google.com/intl/en_ca/policies/terms/regional.html.

176 Apple 2017 https://www.apple.com/legal/internet-services/terms/site.html, this service provider states in their TOS that: "…Apple grants you a personal, non-exclusive, non-transferable, limited privilege to enter and use the Site."

177 Griggs 2012 http://edition.cnn.com/2012/09/03/tech/web/bruce-willis-itunes/index.html and *Beyer 2013 Estate Planning in the Digital Age 6.* Author such as McDavitt 2016 http://www.nlrg.com/trusts-estates-wills-and-tax-law-legal-research-copy/estates-the-inheritability-of-digital-music-files have also found that some service providers assert ownership of the content.

178 Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/.

179 Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/.

180 Such as those seen in Apple's Terms of Service dated 2017 https://www.apple.com/legal/internet-services/icloud/en/terms.html stating that: "... Apple does not claim ownership of the materials and/or content you submit or make available on the Service. However, by submitting or posting such Content on areas of the Service that are accessible by the public or other users with whom you consent to share such Content, you grant Apple a worldwide, royalty-free, non-exclusive license to use, distribute, reproduce, modify, adapt, publish, translate, publicly perform and

Most of these rights aim to exploit the content posted by users through giving themselves the right to transfer, sub-licence or use the content royalty free and worldwide.[181] Others also impose terms that prohibit the user from transferring digital assets.[182] Banta[183] builds on these rights imposed by service providers and raises an argument that differs from that of Jooste.[184] Banta[185] argues that ownership rights can be possessed by the user, and that by limiting such rights, service providers are in fact confirming just that.[186] He states that by imposing terms such as those prohibiting the right to transfer digital assets, service providers are changing the nature of those ownership rights. It is reasoned that by imposing a licence on digital assets, service providers limit the rights normally associated with ownership.[187] While the use and enjoyment obtained by these licences may be similar to those obtained in traditional items, there some rights are lost along the way.[188] As stated by Erlank,[189] simple pleasures such as the right to lend or resell a digital asset are removed from what is traditionally encompassed in the right or competency of use and enjoyment. This again illustrates the complexities surrounding digital assets. It becomes clear that just as a definition of "digital assets" has yet to be determined, their status as "property" also remains unclear.[190]

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publicly display such Content on the Service solely for the purpose for which such Content was submitted or made available, without any compensation or obligation to you."

181 Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/ and Facebook 2017 https://web.facebook.com/legal/terms.

182 Griggs 2012 http://edition.cnn.com/2012/09/03/tech/web/bruce-willis-itunes/index.html and Beyer 2013 *Estate Planning in the Digital Age* 6 and Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/, states that express prohibition of the transfer of digital assets is unnecessary as the contract is for services rendered to a specific user and not for the sale of goods.

183 Banta 2014 *FLR* 825.

184 Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/.

185 Banta 2014 *FLR* 825.

186 Banta 2017 *Cardozo Law Review* 1014-1016.

187 Banta 2014 *FLR* 825.

188 Erlank 2013 *EPLJ* 205, uses traditional books versus eBooks, where the use and enjoyment of both mediums revolves around the content and not so much the format.

189 Erlank 2013 *EPLJ* 205.

190 Edwards and Harbinja "What happens to my Facebook profile when I die?" 2, Tarney 2012 *CULR* 775-776 and Darrow and Ferrera 2007 *NYULPP* 282.

Several authors[191] use emails to demonstrate an important point with regard to the ownership rights of digital assets and their status as property. A distinction is drawn between emails themselves (as files that can be stored) and access to those emails (or the ability to continue sending and receiving new emails).[192] This content versus access distinction is easily extended to digitally downloaded music and eBooks. Therefore, each of these asset types will be discussed in order to facilitate the discussion on the ownership, access, control and transference of digital assets.

3.2.2.1 Emails

Pen and paper letters do not need to be registered in order for copyright to subsist in them.[193] Darrow and Ferrera[194] argue that even though emails are more informal than traditional letters, they can most certainly be considered original works and accordingly have copyright allocated to them.[195] What is more, the requirement that a work must be materialised in order for it to qualify for copyright[196] is also met, as emails can be perceived, reproduced or otherwise communicated.[197] However an English court took an interesting approach to determining ownership in terms of traditional copyright law. In *Fairstar Heavy Transport N.V. v Adkins*[198] the court found that emails could not be considered as property. Justice Edwards-Stuart examined the logical impracticalities of applying ownership rights to emails. He determined that there are two main options for where ownership would lie. The first is that ownership would remain with the creator, while the second option would be that ownership transfers to the recipient of the email (an analogy for the transfer of property in a letter when it is sent to the recipient).[199] The impracticalities for option one is that the creator could require any one of the recipients, however many there might be, to delete it. Justice Edwards-Stuart goes further to state that if the creator of the work

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191 Sherry 2012 *PLR* 198-199, Edwards and Harbinja "What happens to my Facebook profile when I die?" 5-9 and Darrow and Ferrera 2007 *NYULPP* 287-292.
192 Sherry 2012 *PLR* 198.
193 Klopper *et al Law of Intellectual Property in South Africa* 161-162.
194 Darrow and Ferrera 2007 *NYULPP* 289.
195 Section 3 of the *Copyright Act* 98 of 1978.
196 Klopper *et al Law of Intellectual Property in South Africa* 161-162.
197 Darrow and Ferrera 2007 *NYULPP* 288.
198 2012 EWHC 2952 TCC.
199 *Fairstar Heavy Transport N.V. v Adkins* 2012 EWHC 2952 TCC Par 61.

did not have this basic right, what use would he have for such a proprietary right.[200] The second option has its own impracticalities as it takes ownership away from the creator and places it with the recipients, irrespective of how many there might be.[201]

The approach in the USA seems more in line with that of Darrow and Ferrera,[202] as is illustrated by the *In Re Ellsworth*[203] court case. Here Yahoo, the service provider, refused to give the family of a United States marine who was killed in action the login rights to his email account.[204] The family wanted access to the emails sent to them and others, as well as the emails received by the deceased.[205] Edwards and Harbinja[206] argue that it could be seen that Yahoo has ownership of the emails themselves or more precisely of the copies stored on their server. The court also acknowledged the obligation of Yahoo to protect the privacy of the user by not allowing the family to gain access to the account. However, it did order Yahoo to provide the family with copies of the emails on a CD. Edwards and Harbinja[207] relate this judgment to the traditional division of rights in letters, where Yahoo owned the emails themselves but the deceased, or the creator thereof, owned the copyright, which transferred to his heirs. Darrow and Ferrera[208] also considered this case and stated that while it does not provide clarity as to whether or not emails are property, it does provide a potential interpretation of where property rights could lie. Thus, while the service provider could hold ownership over the emails, the laws in the USA as well as emerging service provider practices[209] seem to favour the user and his heirs as holder(s) of copyright in the content. Accordingly, this right could supersede the terms of the agreement. The

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200 *Fairstar Heavy Transport N.V. v Adkins* 2012 EWHC 2952 TCC Par 65.
201 *Fairstar Heavy Transport N.V. v Adkins* 2012 EWHC 2952 TCC Par 66.
202 Darrow and Ferrera 2007 *NYULPP* 280-282.
203 No. 2005-296, 651-DE Mich Prob Ct 2005.
204 Yahoo 2017 https://policies.yahoo.com/us/en/yahoo/terms/utos/ provides the company with full authority to delete an account on the death of a user, regardless of the effect that it may have on the estate of the deceased user. Also see Calem 2010 https://www.techlicious.com/how-to/what-happens-to-your-online-accounts-when-you-die/.
205 Edwards and Harbinja "What happens to my Facebook profile when I die?" 5. Also see Baldas 2005 *National Law Journal* 10.
206 Edwards and Harbinja "What happens to my Facebook profile when I die?" 7.
207 Edwards and Harbinja "What happens to my Facebook profile when I die?" 5.
208 Darrow and Ferrera 2007 *NYULPP* 308.
209 Google gives users of the email service Gmail the option to appoint a successor to their account in order to obtain the content that would be important to them. Google 2017 https://support.google.com/accounts/answer/3036546?hl=en.

latter authors conclude that service providers cannot simply claim ownership of the emails, but they do control access to those messages,[210] as will be discussed in paragraph 3.2.2.3.

3.2.2.2 Digital music and eBooks

While the ownership of emails raises many issues to debate, other assets such as digital music and eBooks are less complicated. Here, it is common practice for intellectual property rights to be licensed and not sold to the user.[211] However, as stated in paragraph 3.1, the practical implication of this transaction seems to be lost on the user.[212] Again the used could be blamed for not reading the TOS agreement, but the misunderstanding could also be due to the service providers promoting and handling the digital asset as akin to its traditional counterpart. Edwards and Harbinja[213] rather plainly state that the problem with transferring the ownership of these types of digital assets is that users would then be able to sub-license those assets and take the profits away from the original rights holder. It is this aspect that service providers aim to protect with clauses explicitly stating that users obtain a non-exclusive right to the content and not the ownership thereof.[214]

This licensing of digital assets makes the question of inheritance rather simple, in that a personal right is created.[215] Accordingly, no property rights ever vest in the user, and any rights the user have will end with the death of the user who obtained the licence from the service provider.[216] Nevertheless, people's relationship with digital assets is changing, and as was argued in paragraph 2.4 ownership rights should pass to the

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210 Darrow and Ferrera 2007 *NYULPP* 308 and also Atwater 2006 *Utah Law Review* at 399 note that Yahoo did not appeal the order but agreed to hand over the emails without prejudice to their position as owner of the email account.

211 Edwards and Harbinja "What happens to my Facebook profile when I die?" 9.

212 Belanger 2011 *SHLR* 388.

213 Edwards and Harbinja "What happens to my Facebook profile when I die?" 9.

214 Google 2017 https://www.google.com/intl/en/policies/terms/.

215 Connor *Digital life after death* 8, Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/ and McDavitt 2016 http://www.nlrg.com/trusts-estates-wills-and-tax-law-legal-research-copy/estates-the-inheritability-of-digital-music-files.

216 Connor *Digital life after death* 8 and Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/.

user, as we are assigning these assets the same characteristics as their traditional counterparts.

McDavitt[217] draws attention to an interesting argument to counter such an approach by stating that there is one inherent difference between digital assets and their traditional counterparts. This is the non-perishability of such digital assets. In the USA court case *Capitol Records, LCC v ReDigi Inc.*[218] the court observed that the "first sale"[219] doctrine should not apply to digital audio files, as such files could not physically degrade like traditional music media. This stems from the manner in which these digital assets are accessed and enjoyed. While a CD contains a recording of a particular song that can be owned and sold via the "first sale" doctrine, digital music is necessarily "copied" each time it is accessed from the service provider. Such access is structured in accordance with the TOS as a personal, non-transferable licence to access such "copies" during the duration of the contract. Applying the "first sale" doctrine to digital music would entail the transfer of the copyright-protected computer code, which is prohibited in terms of the licence agreement.[220]

Whichever way the argument goes, at the moment ownership is governed by the TOS agreements and accordingly resorts in the service provider.[221] With so many service providers taking a different approach to ownership rights, Hopkins and Lipin[222] state that in order to determine a user's property rights one needs to look at each service provider independently.[223]

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217 McDavitt 2016 http://www.nlrg.com/trusts-estates-wills-and-tax-law-legal-research-copy/estates-the-inheritability-of-digital-music-files.

218 934 F Supp. 2d 640 SDNY 2013.

219 Klinefelter 2001 *Carolina Law Scholarship Repository* 45 explains the "first sale" doctrine as the right of an owner of a physical copy of work to legally resell the same copy of work without the permission of the copyright owner.

220 McDavitt 2016 http://www.nlrg.com/trusts-estates-wills-and-tax-law-legal-research-copy/estates-the-inheritability-of-digital-music-files.

221 Hopkins and Lipin 2014 *ILRB* 66. It will be interesting to see how South African courts approach this aspect as the debate relates to the contract that the user consented to (which can be argued in terms of *S v Blom*) and the misleading rights promoted by the service provider, which could come under debate in terms of the *Consumer Protection Act* 68 of 2008.

222 Hopkins and Lipin 2014 *ILRB* 66.

223 Chu 2015 *NJTIP* 262 supports this opinion.

3.2.2.3 Login details influencing access and control

Sherry,[224] advances the argument that users think they own both the content and the online account itself.[225] Hopkins and Lipin[226] point out that it is in fact the service provider that owns the account,[227] since the user obtains only a licence of use.[228] This brings the aspect of access and control into the picture. Despite the fact that there is a new tendency that advises users to leave their login details and password to their descendants,[229] the transfer of login details is often governed by service providers, who explicitly prohibit such disclosure.[230] Darrow and Ferrera[231] also pronounce on this aspect by stating: "if the heirs are not in possession of [the deceased's] log-in information, the … service provider is in fact in exclusive control of the account content". While some service providers such as Google and Facebook do prohibit the transfer of an account as well as the sharing of a user's password,[232] they have addressed access and control to some extent.[233]

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224 Sherry 2012 *PLR* 210.

225 This view is also supported by Lamm 2012 http://www.digitalpassing.com/2012/09/04/apple-itunes-music-videos-ebooks-die/.

226 Hopkins and Lipin 2014 *ILRB* 66.

227 Hopkins and Lipin 2014 *ILRB* 66.

228 Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/.

229 Ratiba 2013 *JJS* 33-34, Caroll 2017 http://www.thedigitalbeyond.com/, Chu 2015 *NJTIP* 262 and Roy 2011 *QPLJ* 377-379. McCarthy 2015 *BUJSTL* 408 discusses Digital Estate Planning Services (DEP services). These services usually store and deliver information to preselected persons upon proof of the user's death. McCarthy describes how these services fall outside any existing legislation dealing with deceased estates. She goes further to state that DEP services see digital assets as mere information that does not form part of a deceased estate. Harbinja 2017 *IRLCT* 34-35 states that the *Revised Uniform Fiduciary Access to Digital Assets Act* (RUFADA Act) has developed to recognise technological solutions such as Google's Inactive Account Manager and Facebook's Legacy Contract.

230 Yahoo 2017 https://policies.yahoo.com/us/en/yahoo/terms/utos/, Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 102. Facebook 2017 https://www.facebook.com/legal/copyright.php (Facebook requires that "you will not share your password, let anyone else access your account, or … transfer your account (including any page or application you administer) to anyone without first getting our written permission"), Lamm *et al*, *University of Miami Law Review* 399, Sy 2016 *Touro Law Review* 653-654, Consilium Legal 2015 http://consiliumlegal.co.za/law-bites.html and Chu 2015 *NJTIP* 261-262.

231 Darrow and Ferrera 2007 *NYULPP* 305.

232 Facebook 2017 https://www.facebook.com/legal/copyright.php and Google 2017 https://www.google.com/intl/en/policies/terms/.

233 Google 2017 https://support.google.com/accounts/answer/3036546?hl=en and Facebook 2017 https://web.facebook.com/help/991335594313139/?helpref=hc_fnavand_rdc=1and_rdr.

For instance, Google's email service, Gmail, has provided the user with a chance to give a trusted person access to the content of the account.[234] Google does this through the provision of its "Inactive Account Manager". Here a user can select to either have his account deleted upon inactivity or to share his data with a trusted person.[235] On the other hand, Facebook offers its users a "Legacy Contact" that can be activated upon notice of death. This gives the user an option to either delete his account upon death, or to have a memorial page created by selecting a family member or friend to administer such page. This option does not give the user or the administrator the option of offering or gaining access to the deceased user's account, but it does provide the user with some control as to what should happen to the account.[236] While these are some of the options provided by service providers, it would also seem as if the courts, especially those in the USA,[237] confirm that access and control stays with the service provider after the death of the user. As was discussed in paragraph 3.2.2.1, the court in *In Re Ellsworth*[238] still denied access to the account itself. Nevertheless, Yahoo had to provide the family of the deceased with the content of the account.[239] Recently a regional court in Berlin, Germany took a different approach.[240] The court allowed the parents of a deceased minor child full access to and control of the account.[241]

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234 Google 2017 https://myaccount.google.com/inactive?pli=1.

235 Google 2017 https://myaccount.google.com/inactive?pli=1.

236 Facebook 2017 https://web.facebook.com/help/991335594313139/?helpref=hc_fnavand_rdc=and_rdr and Chu 2015 *NJTIP* 262.

237 *Theofel v Farley-Jones*, 359 F3d 1066, 1074 9th Cir. 2004, *Crispin v. Christian Audigier*, Inc., 717 F Supp 2d 965, 980 CD Cal 2010; see also *In Re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*, No C 12-80171 LHK PSG ND Cal Sept. 20, 2012, available at Justia Dockets and Filings 2017 https://dockets.justia.com/docket/california/candce/5:2012mc80171/257305.

238 No 2005-296, 651-DE Mich Prob Ct 2005.

239 Facebook has noticed this trend to want to gain access to the content of a deceased user's account and accordingly has adapted its TOS to allow a personal representative or family member the ability to obtain such access through a court order via "Special Request". See https://www.facebook.com/help/265593773453448 as referred to by Blachly 2015 *Probate and Property Magazine* accessed through The American Bar Association 2017 https://www.americanbar.org/publications/probate_property_magazine_2012/2015/july_august_2015/2015_aba_rpte_pp_v29_3_article_blachly_uniform_fiduciary_access_to_digital_assets_act.html.

240 *In re Facebook Ireland Ltd,* Landgericht Berlin, No 20 O 172/15.

241 Bhatti 2016 https://www.bna.com/german-parents-inherit-n57982070358/ referring to *In re Facebook Ireland Ltd*, Landgericht Berlin, No 20 O 172/15, Facebook has appealed this verdict. However, a date has not yet been set.

Facebook has appealed this verdict by stating that it is trying to find a solution between helping the family and protecting the privacy of third parties who may be affected. When Facebook raised this argument during proceedings the court turned to traditional assets such as confidential letters as an analogy.[242] The court stated that when heirs read a confidential letter, they do not interfere with the rights of third parties.[243] The Berlin court reasoned that there is no need to apply different rules to digital assets.[244] Interestingly, this differs from the approach followed by the English court in *Fairstar Heavy Transport N.V. v Adkins;*[245] as discussed in paragraph 3.2.2.3, where the court found it would be illogical to compare digital and traditional assets. In addition, the Berlin court supported its decision to grant the parents of the deceased child access to the Facebook account. German law gives parents the right not just to inherit the legal contract, but also to protect the privacy rights of their minor children.[246]

This success for the family was short-lived. The Appeal court[247] found that the right to private telecommunication extended to electronic communication that was intended to be accessed by certain people. The court further found that the right to private telecommunication outweighed the right to inherit, and that the right to privacy expired upon death.[248] Sy[249] states that it is clear that the courts are creating disparity in their handling of access to and the control of digital accounts. She even goes as far as to state that it appears as if each case depends on whether or not the court wants to uphold the TOS or not. For example, in the USA,[250] where Facebook enacts its jurisdiction in the event of any dispute,[251] the court in one instance gave a grieving

242 Bhatti 2016 https://www.bna.com/german-parents-inherit-n57982070358/.
243 Connolly 2017 https://www.theguardian.com/technology/2017/may/31/parents-lose-appeal-access-dead-girl-facebook-account-berlin.
244 Bhatti 2016 https://www.bna.com/german-parents-inherit-n57982070358/.
245 2012 EWHC 2952 TCC.
246 Bhatti 2016 https://www.bna.com/german-parents-inherit-n57982070358/ and Reuters 2017 https://www.reuters.com/article/us-germany-facebook-privacy-idUSKBN18R1PI.
247 *In re Facebook Ireland Ltd*, Kammergericht, No 21 U 9/16.
248 Reuters 2017 https://www.reuters.com/article/us-germany-facebook-privacy/parents-have-no-right-to-dead-childs-facebook-account-german-court-says-idUSKBN18R1PI.
249 Sy 2016 *Touro Law Review* 656-657.
250 Sy 2016 *Touro Law Review* 656-657, Darrow and Ferrera 2007 *NYULPP* 280-282.
251 Facebook 2015 http://www.facebook.com/terms.php?ref=pf.

mother temporary access to her deceased son's Facebook account,[252] while in another case it denied it.[253] Of course it is more likely that the relevant legislation at the time plays a role in these arguments and thus in the decisions reached. In terms of access to a minor child's account, Facebook's selected jurisdiction places it under the control of the *Children's Online Privacy Protection Act*.[254] This Act aims to protect the privacy rights of minors,[255] but it protects only children younger than 13.[256] In the English court case *In Re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*,[257] the court imposed the terms of the USA's *Stored Communications Act,* [258] which prohibited the transfer of digital assets to beneficiaries.[259] In order to consolidate the treatment of digital assets in the USA, the Uniform Law Commission[260] was entrusted to draft legislation. This resulted in the drafting of the *Uniform Fiduciary Access to Digital Assets Act* (UFADA Act).[261] This Act aimed to provide fiduciaries with the ability to "access, manage, copy, or delete digital assets and accounts".[262] It was in turn viewed as too invasive, when considering the user's right to privacy. This invasion was envisaged in terms of email accounts, for example, where fiduciaries would have access to a multi-year history of the user and not just the latest drafts.[263] This perceived invasion of privacy led to the drafting of another Act called the *Privacy*

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252 Harbinja "Post-mortem social media" 178-179 and Lonich 2015 http://www.lonichandpatton.com/blog/2015/have-you-heard-of-digital-estate-planning/.

253 *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*, 923 F. Supp. 2d 1204, 1205 ND Cal 2012. See also Banta 2014 *FLR* 841-842.

254 Of 1998 15 USC, §§ 6501–6506 PubL 105–277, 112 Stat. 2681-728. See also Gadbaw 2016 *Children's Legal Rights Journal* 228-232 and Savitt 2002 *St. John's Journal of Legal Commentary* 631-640.

255 Sengupta 2011 http://www.nytimes.com/2011/09/16/technology/ftc-proposes-updates-to-law-on-childrens-online-privacy.html?_r=0.

256 Fowler 2015 http://www.swlaw.com/blog/data-security/2015/03/12/why-you-need-a-privacy-policy-part-2-avoiding-three-common-fumbles/ and The Federal Trade Commission 2015 https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#Privacy%20Policies%20and.

257 923 F Supp 2d 1204, 1205 ND Cal 2012.

258 Of 1986 18 USC Chapter 121 §§ 2701–2712.

259 Banta 2014 *FLR* 841-842.

260 This is a non-profit organisation that provides the states with un-biased and well drafted legislation in the area of state statutory law. Also see Uniform Law Commission 2017 http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC.

261 Uniform Law Commission 2017 http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets.

262 Sy 2016 *Touro Law Review* 648-649 and see Pew Research Center 2015 http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/.

263 Sy 2016 *Touro Law Review* 670-671.

Expectation After-life Choice Act.[264] This Act provided fiduciaries with selected access to online accounts, such as the "To" and "From" lines in email accounts, in order that they might identify other contracts.[265] The Uniform Law Commission ultimately decided to adapt the UFADA Act. This revision became known as the *Revised Uniform Fiduciary Access to Digital Assets Act* (RUFADA Act).[266]

While the revised Act has not yet been accepted in all of the USA's states, it has been well received[267] and used as a guideline for other jurisdictions enacting their own digital estate legislation.[268] This Act aims firstly to give fiduciaries the legal authority to manage digital assets like their traditional counterparts, or as far as it is possible. It aims secondly to give the service providers the authority to deal with the fiduciaries of their users, while respecting the reasonable privacy expectations.[269] Again using emails as an example, this Act gives fiduciaries only as much access as the user consented to prior to death. Alternatively, it still provides the fiduciary[270] with the list of emails as previously provided for under the *Privacy Expectation After-life Choice Act.* It further protects the deceased user's privacy by requiring the fiduciary to petition the court with an explanation as to why access to the digital assets is required in order to settle the estate.[271] Yet it again places the ultimate decision in terms of the access granted to the fiduciary with the service provider. Section 6 of this Act provides that the service provider has three options: (1) to give the fiduciary access to the user's account; (2) to allow partial access to the user's account to perform the necessary

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264 HB 2647.

265 Sy 2016 *Touro Law Review* 649.

266 Uniform Law Commission 2017 http://www.uniformlaws.org/.

267 Sy 2016 *Touro Law Review* 670. Esterbauer 2017 https://hullandhull.com/2017/04/jurisdictions-facilitate-access-digital-assets/ states that in 2016 the RUFADA Act has already been accepted by 13 states.

268 The Uniform Law Conference of Canada has for instance introduced the *Uniform Access to Digital Assets by Fiduciaries Act* (UFADA Act).

269 Uniform Law Commission 2017 http://www.uniformlaws.org/ and Sy 2016 *Touro Law Review* 669-670.

270 "Fiduciary" in terms of S2(14) the RUFADA Act is defined as "an original, additional, or successor personal representative, (conservator), agent, or trustee." A "personal representative" is also defined to mean: "an executor, administrator, special administrator…"

271 Sy 2016 *Touro Law Review* 674 and the RUFADA Act.

task; or (3) to provide the fiduciary with a "data dump"[272] of all the digital assets held in the account.[273]

Esterbauer[274] adds to the criticism of the shortcomings of this act by stating that it leaves some confusion as to whether a fiduciary, "authorised to administer tangible property, also has the authority to manage digital assets without legislation and/or terms of (a) Power of Attorney or Will explicitly extending (such) authority". Nonetheless, this act will provide some jurisdictions with the ability to grant access to a deceased user's account, even if that access is still limited. Interestingly, the act has been endorsed by service providers such as Google and Facebook.[275] Sy[276] adds that the approach taken in the act gives first priority to online tools such as those provided by these two service providers. This might give an incentive to other service providers to follow suit. However, without clear direction as how to deal with a deceased's digital estate it is ultimately the TOS agreements that dictate how digital assets will devolve.[277] As many TOS agreements stand today, it is clear that managing digital estates is not a priority for service providers. [278]

3.3 Conclusion

From this discussion as well as the opinion of Hopkins,[279] it is clear that in the matter of determining the ownership rights of a digital asset, it is ultimately the service provider that dictates what property rights a user has. This stems from the service provider's being in the position of not just storing the digital asset, but also of managing and protecting it. In addition, Banta[280] points out that throughout the development of online services and platforms, the issue of how users wanted their

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272 English Oxford Living Dictionaries 2017 https://en.oxforddictionaries.com/definition/data_dump defines a "data dump" as "a large amount of data transferred from one system or location to another".

273 Sy 2016 *Touro Law Review* 675 and the RUFADA Act.

274 Esterbauer 2017 https://hullandhull.com/2017/04/jurisdictions-facilitate-access-digital-assets/.

275 Esterbauer 2017 https://hullandhull.com/2017/04/jurisdictions-facilitate-access-digital-assets/ and Sy 2016 *Touro Law Review* 672-673.

276 Sy 2016 *Touro Law Review* 672-673.

277 Sy 2016 *Touro Law Review* 672-673 and Coventry 2016 http://www.pasternakfidis.com/revised-uniform-fiduciary-access-to-digital-assets-act-rufadaa-online-tools/.

278 Banta 2016 *NCLR* 927.

279 Hopkins 2013 *HSTLJ* 210.

280 Banta 2016 *NCLR* 927.

digitals assets handled after death was probably not a priority.[281] Today, users expect to be able to pass along their online legacy in much the same manner as they would a traditional item.[282] However, it is still unclear as to whether or not a service provider has any duty at all to preserve a user's digital assets for the benefit of the estate's beneficiaries.[283] No family member or executor currently has automatic access to and control of the historical content, data or social media networks of the deceased. Further, it is deemed to be "legally and ethically incorrect for a service provider to… allow access to and control of a deceased person's digital assets", simply due to the fact that they are related to the deceased or acting as executor of their estate.[284]

Nonetheless, it is ultimately up to the user to indicate what action he would want to have taken after his demise. How a fiduciary would be able to enforce such wishes seemingly depends on the type of digital asset and the TOS that govern such an asset. While Google and Facebook have given the user the option to indicate how his digital assets should be handled after his demise, the service provider is still the party that ultimately has the final say in how the digital asset will devolve.[285]

The next chapter will examine the user's freedom to bequeath his digital assets in line with the restrictive conditions placed upon him by the service provider.

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281 Groskopf 2016 https://qz.com/766535/terms-of-service-agreements-are-destroying-the-concept-of-ownership-for-digital-goods/ states that the first EULA developed as a result of service providers protecting their business models. Instead of waiting for legislation to step in and protect the instantaneous copying of their software, they decided to license their product instead of selling it. By licensing their products, service providers were capable of controlling what users did with their products.

282 Banta 2016 *NCLR* 927.

283 Hopkins 2013 *HSTLJ* 210.

284 Consilium Legal 2015 http://consiliumlegal.co.za/law-bites.html.

285 Chu 2015 *NJTIP* 261-262.

CHAPTER 4: FREEDOM OF TESTATION AND SOUTH AFRICAN LEGISLATION'S EFFICIENCY IN DEALING WITH DIGITAL ASSETS AFTER DEATH

4.1 Introduction

Where a person dies without leaving behind a valid will, the *Intestate Succession Act*[286] takes effect and determines how the assets in his estate will devolve upon his heirs.[287] In contrast, if a valid will[288] does exist, the law of testate succession is applicable. While the law of testate succession is governed by the *Wills Act*,[289] it is simultaneously directed by South Africa's common law principles.[290] These common law principles have been illustrated by writers such as Voet,[291] who stated that the interest of the testator as well as public interest demands that effect be given to a testator's last wishes. Schoeman-Malan,[292] referring to De Waal,[293] states that the purpose of providing the freedom to bequeath one's property is to provide a smooth transfer of property while also facilitating continuity and preventing heirs from helping themselves to assets in the deceased estate. Looking at this and South Africa's common law heritage, it can be recognised that a testator has an almost unrestricted right to leave his property to anyone or any cause he chooses,[294] irrespective of the interest of his heirs.[295] Corbett[296] makes the later statement and refers to the testator's freedom to

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286 81 of 1987.

287 See McCarthy 2015 *BUJSTL* 384-412 for a discussion on digital assets and intestacy.

288 Loggen *Does freedom of testation supersede the powers of the Trustee Board of Trustees* 16 states that a will or testament is: "...a legal declaration by which a person, the testator, names one or more persons to manage his estate and provides for the transfer of his property at death."

289 7 of 1953, as amended by the *Law of Succession Amendment* Act 43 of 1992.

290 Corbett *et al Succession* 33-34 and De Waal and Schoeman-Malan *Law of Succession* 35.

291 Voet 35.1.12 as referred to in the *Bydawell v Chapman* 1935 3 SA 514 (A) 531 court case. This case also referred to D 29.3.5, which states that the Roman-Dutch law recognises freedom of testation as a matter of public interest that transcends the private interest of the beneficiaries under a will. This principle has also been established in the works of philosophers such as John Stuart Mill, John Locke, Immanuel Kant and Jeremy Bentham. Harbinja 2017 *IRLCT* 30-32 also states that philosophers such as Blackstone described "'testamentary freedom' (as) a principle of liberty.'"

292 Schoeman-Malan 2015 *THRHR* 606.

293 De Waal and Schoeman *Law of succession* 39.

294 Wills Act 7 of 1953, Du Toit 2001 *Stellenbosch Law Review* 224 and Kerr 2006 *Speculum Juris* 13. According to Pace and van der Westhuizen *Wills and Trusts* section 4.3.3.1 the principle of freedom of testation is also recognised by foreign jurisdictions such as English law jurisdictions and the USA. The same *contra bones mores* limitations also apply here.

295 Corbett *et al Succession* 2.

296 Corbett *et al Succession* 2.

dispose of his property as he wishes, irrespective of the interest of intestate heirs. Schoeman-Malan[297] also addressed this freedom to disinherit heirs in terms of testate succession by stating that freedom of testation includes the freedom to be "unfair, unwise or harsh with or in respect of one's property." Schoeman-Malan[298] also refers to *Tobin v Ezekiel*[299] and concludes that if a testator can identify persons, he can decide to exclude them as beneficiaries in his will.

Du Toit[300] draws this discretion of the testator back to the law of property by stating that the right to freedom of testation is a basic principle in property law and that the freedom to dispose of one's property is extended by this right after death. According to South African case law, such as *Bydawell v Chapman*,[301] this right is seen to include such a wide freedom in terms of a person's property as it also forms a basic principle of the law of succession. Other authors, such as Schoeman-Malan,[302] as well as case law such as *Minister of Education v Syfrets Trust;*[303] extend the principle of freedom of testation to include section 25 of the *Constitution of the Republic of South Africa*.[304] This section provides that:[305]

> …(n)o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

This section has been discussed to some extent by authors and case law dealing with freedom of testation.[306] One such discussion is that of Du Toit,[307] who refers to *Ex Parte: BoE Trust Ltd NO;*[308] and states that this section can be seen to include the right

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297 Schoeman-Malan 2015 *THRHR* 619.
298 Schoeman-Malan 2015 *THRHR* 619.
299 *Estate of Lily Ezekiel* 2011 (NSWSC) 81.
300 Du Toit 2001 *Stellenbosch Law Review* 224.
301 1953 3 SA 514 (A) par 531.
302 Schoeman-Malan 2007 *PELJ* 114, Wood-Brodley 2007 *South African Law Journal* 687-702 and Jamneck *et al The Law of Succession in South Africa* 8.
303 2006 4 SA 205 (C) par 18-21 hereafter referred to as *Syfrets Trust.*
304 *Constitution of the Republic of South Africa*, 1996 hereafter "the Constitution".
305 S25(1) of the *Constitution.*
306 See for example Corbett *et al Succession* 46-48, De Waal and Schoeman-Malan *Law of Succession* 4, Schoeman-Malan 2007 *PELJ* 8, Muller 2015 *Without Prejudice* 21-25, De Waal 2010 *Annual Survey of SA Law* 1194-1197 referring to *Curators, Emma Smith Educational Fund v University of Kwa-Zulu-Natal and Others* 2010 (6) SA 518 (SCA), Modiri 2013 *PELJ* 589-590 referring to *Ex Parte: BoE Trust Ltd NO* 2013 3 SA 236 (SCA) hereafter referred to as *BoE Trust Ltd.*
307 Du Toit 2012 *TECLF* 112. Modiri 2013 *PELJ* 589-590.
308 *BoE Trust Ltd* par 9.

to dispose of one's property freely,[309] and thus to provide protection for a testator to dispose of his assets as he wishes upon death.[310] The court in *Syfrets Trust*[311] went so far as to state, albeit *obiter,* that freedom of testation forms a fundamental part of a testator's property right and must be protected in terms of section 25 of the *Constitution*.[312]

Nevertheless, this right is not unrestricted and accordingly there are some limitations and restrictions. These limitations can firstly be found in the common law, as it is accepted that the provisions in a will must be enforceable,[313] and must not be illegal or in conflict with public policy (or *contra bonos mores*).[314] In addition to these common law limitations, the *Constitution* also gives scope to limit the freedom of testation.[315] In terms of section 36 of the *Constitution*:

> …(t)he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...

This section provides the basis for further limitations on an individual's freedom of testation, as laws of general application can provide statutory limitations.[316] Examples of such statutory limitations are the *Maintenance of Surviving Spouses Act,*[317] which disallows a complete disinheritance of the surviving spouse if there is a valid claim for maintenance under the Act.[318] In terms of the *Matrimonial Property Act,*[319] where the spouses are married out of community of property with the accrual, the estate of the

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309 Schoeman-Malan 2007 *PELJ* 114, Modiri 2013 *PELJ* 587-588 and *BoE Trust Ltd* par 26.

310 Modiri 2013 *PELJ* 587 and *BoE Trust Ltd* par 26.

311 *Syfrets Trust* par 18.

312 Authors such as De Waal and Schoeman-Malan *Law of Succession* 4 also confirm the importance of the common law principle of freedom of testation within the context of the South African law.

313 Sedutla Jan/Feb 2013 *DR* 55.

314 Corbett *et al Succession* 46-48 and De Waal and Schoeman-Malan *Law of Succession* 4, who state that economic and social considerations influence these public policy limitations. For conditions which could be deemed against public policy see De Waal *The Law of Succession and the Bill of Rights* 3G12(d).

315 Schoeman-Malan 2007 *PELJ* 178.

316 Schoeman-Malan 2007 *PELJ* 178 and Kerr 2006 *Speculum Juris* 13.

317 27 of 1990.

318 S2 of the *Maintenance of Surviving Spouse Act* and De Waal and Schoeman-Malan *Law of Succession* 4. Another research aspect, which will not be touched upon in this dissertation, could be how digital assets are to be treated if they are indeed a source of income upon which a deceased user's dependents rely for maintenance.

319 88 of 1984.

surviving spouse or the deceased estate might have a claim in terms of the accrual.[320] Here, the smaller estate has a claim for half of the difference between the accruals in the two estates. This places an obligation on the larger estate, which the testator has to account for when considering his will.[321] For marriages in community of property, the *Estate Duty Act*[322] provides that the provisio "property of which the deceased was immediately prior to his death competent to dispose" does not include the share of the surviving spouse, which is held in the joint estate.[323] Section 37C of the *Pension Fund Act*[324] provides that certain assets are excluded from the estate of a deceased person if such benefits are payable by a fund as contemplated in terms of that act. According to this section the trustees of a fund must determine who the deceased's dependents are and therefore the wishes of the deceased are simply guidelines as to who should inherit.[325] The *Immovable Property (Removal or Modification of Restrictions) Act*[326] empowers the courts to alter or amend restrictions placed on immovable property,[327] while the *Trust Property Control Act*[328] gives the courts the power to amend the provisions of a trust or even to terminate the trust itself.[329]

The *Constitution* provides further barriers to freedom of testation by determining that any clause in a will that contradicts "the spirit, purport and objects of the

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320 S3(1) of the *Matrimonial Property Act.*

321 See Ratiba 2013 *JJS* 27-46 for a discussion on how digital assets could be treated in terms of this Act. S4(2) of this Act provides that: "The accrual of the estate of a deceased spouse is determined before effect is given to any testamentary disposition…"

322 45 of 1955.

323 S3(5)(d) of the *Estate Duty Act*.

324 24 of 1956.

325 Loggen *Does freedom of testation supersede the powers of the Trustee Board of Trustees* 17-18.

326 94 of 1965.

327 The *Subdivision of Agricultural Land Act* 70 of 1970, is another limitation on the freedom of testation in terms of immovable property.

328 57 of 1988.

329 Section 13 determines that: "...(i)f a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which: (a) hampers the achievement of the objects of the founder; or (b) prejudices the interests of beneficiaries; or (c) is in conflict with the public interest, the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust." De Waal and Schoeman-Malan *Law of Succession* 4 and Jamneck "Freedom of Testation" 117.

Constitution"[330] will be invalid.[331] An example of such a limitation can be seen in *Syfrets Trust,*[332] where the court determined that a charitable trust that awarded bursaries to '"deserving students with limited or no means' at the University of Cape Town and who are of 'European descent', *not* of Jewish descent, and *not* female", was unfairly discriminating in terms of section 9(3) of the *Constitution*. The court found that these eligibility criteria unfairly discriminated in terms of listed grounds such as discrimination based on race, colour, religion and gender.[333] The court ordered that the offending words be removed from the trust deed in order for it to function properly under the *Constitution*.[334]

Another court case dealing with freedom of testation and its workings within the *Constitution* is *BoE Trust Ltd.*[335] While this case again centred on limiting freedom of testation when it involves unfair discrimination, Erasmus AJA added that the testator's right to dignity[336] must also be considered.[337] Erasmus AJA stated that the right to dignity not only provides for the living, but also for the dying, in order for them to have the peace of mind that their last wishes will be respected after they have passed on. Erasmus AJA went further to state that a determination must be made as to what the intention of the testator was before determining whether or not a rule of law prevented such an intention from being effected.[338] Erasmus AJA determined that such a consideration would give effect to the right to property and dignity.[339]

However, there are also limitations in terms of property, as the maxim *nemo plus iuris transferre potest quam ipse habet* applies in South African law. This maxim translates

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330 Wood-Bodley 2007 *SALJ* 688, referencing Griesel J in *Syfrets Trust* par 16.

331 See *Syfrets Trust* par 16, *Curators Emma Smith Educational Fund v University of Kwa-Zulu Natal and Others* 2010 6 SA 518 (SCA) and *Board of Executors v Benjamin Godlieb Heydenrych Testamentary Trust and Others* 2012 4 SA 103 (WCC).

332 2006 4 SA 205 (C).

333 *Syfrets Trust* par 27, 33-34 and 48.

334 *Minister of Education v Syefets Trust* 2006 4 SA 205 (C) par 33. The court relied on the decision of the *Holomisa v Argus Newspaper* 1996 2 SA 588 (W) case to support its decision. In this case the court determined that the values whose protection is more clearly indicative of the constitutional scheme are those that need to be protected.

335 *Ex Parte: BoE Trust Ltd NO* 2013 3 SA 236 (SCA).

336 Section 10 of the *Constitution* reads: "...Everyone has inherent dignity and the right to have their dignity respected and protected."

337 *BoE Trust Ltd* par 27.

338 *BoE Trust Ltd* par 29.

339 *BoE Trust Ltd* par 26-27, 29. Also see Modiri 2013 *PELJ* 582-614.

into the common law rule that no one may transfer more rights to another person than he himself possesses.[340] As determined in paragraph 3.2.2.1 and following the argument of Darrow and Ferrera,[341] it can be said that at least some digital assets, such as emails, might be included in the estate of a deceased user. According to Ratiba,[342] current South African legislation such as the *Copyright Act*[343] and the *Administration of Estates Act*[344] both seem to support the inclusion of digital assets in a deceased user's estate to some extent. Both of these Acts could be used to argue that digital assets, or at least certain types of digital assets, should be included in the estate of a deceased user and thus these Acts might be helpful in determining how digital assets should be dealt with in the deceased estate.

While it was shown above that the *BoE Trust Ltd* case extended dignity beyond death and was used to argue the protection of freedom of testation,[345] authors such as Chu[346] and Harbinja[347] have identified a nexus between privacy and dignity. Chu for example declares that "privacy" is "about the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life." The question that arises here is whether or not such privacy rights can then also be extended after death? The importance of this nexus between privacy and dignity is that service providers often hide behind privacy concerns to deny access to a deceased user's accounts.[348] It can be argued that when service providers do this they are limiting the rights of heirs to access digital assets. Another question that has recently been asked with regard to digital assets, especially in the USA,[349] is whether or not service

340 Badenhorst, Pienaar and Mostert *Silberberg's Property* 241 footnote 7.
341 Darrow and Ferrera *NYULPP* 308.
342 Ratiba 2013 *JJS* 39.
343 98 of 1978.
344 66 of 1965.
345 *BoE Trust Ltd* par 29.
346 Chu 2015 *NJTIP* 272.
347 Harbinja 2017 *IRLCT* 30-32.
348 This aspect was briefly discussed in paragraph 3.2.2.1 with reference to cases such as *In Re Ellsworth*. Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 7 point out that in this case the judgment allowed the service provider to abide by its privacy policy by denying the transfer of the deceased user's login and password. However, the court ordered the service provider to supply the applicants with copies of the account content.
349 Refer to paragraph 3.2.2.3 for a discussion of access to a deceased user's account.

providers should have the power to deny access even if the testator has granted such access to his heirs.

In this context and given the strong emphasis South African law places on freedom of testation, this chapter will aim to examine the workings of the right to property and dignity. The chapter will give an overview of some South African legislation that could be seen to influence how digital assets devolve upon a user's death. Another aspect that will be discussed is how the right to privacy after death interacts with the right to dignity and how it plays a role in the inheritance of digital assets. Lastly, as briefly discussed in paragraph 3.2.2.3, the RUFADA Act from the USA will be discussed, as it is seemingly the best solution, or at least the most advanced solution at present, to dealing with digital assets in a deceased estate. Therefore, the last part of this chapter examines this Act and its attempt at solving the digital asset dilemma.

4.2 Current Legislation Influencing Digital Assets in a Deceased Estate

While Ratiba,[350] states that there is existing South African legislation that could address the position of digital assets in a deceased estate, he also notes three challenges. Firstly, as determined in chapter 2, digital assets are not yet comprehensively defined and accordingly it is unclear whether they will be included in concepts such as "assets", "property" and/or "estate".[351] Secondly, the current practical application of legislation shows a lack of knowledge as to how it is to be applied to digital assets. Lastly, as discussed in paragraph 3.2.2.3, accessing digital assets remains challenging.[352] It is especially the inclusion of digital assets under the definition of "property" that needs to be addressed, as unless digital assets are classified as property a user has no rights to pass on to his heirs.[353] To address this issue in terms of South African legislation, and stemming from the discussion in paragraph 3.2.2, a quick overview of how the

350 Ratiba 2013 *JJS* 39.

351 Ratiba 2013 *JJS* 39. Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 3 also voice their concern as to the ability of current legislation to deal with digital assets, as the question can also be asked whether digital assets fit within the definition of "property" in terms of English law.

352 Ratiba 2013 *JJS* 39.

353 Mach 2011 http://www.ncjolt.org/staff/volume-12/stefanie-mach as referred to by Ratiba 2013 *JJS* 29.

Copyright Act[354] affects the inclusion of digital assets as property in a deceased estate will be given. Thereafter the *Administration of Estates Act*[355] and how it interprets property in a deceased estate will be discussed.

4.4.1 The Copyright Act

The *Copyright Act* makes provision for the protection of various forms of intellectual expression including literary and artistic works, as long as it satisfies the conditions set out in the Act. This copyright vests in the author and accordingly can be inherited by his heirs. As stated in paragraph 3.2.2.1, digital assets such as emails can be seen to fulfil these requirements, and consequently they can be copyright-protected creations of the user.[356] However, as pointed out by Darrow and Ferrera,[357] the property rights in the copyright are different from the property rights granted in the copy of the email itself. They again use traditional letters to show the distinction between copyright and copies. They state that the author of a letter retains the copyright in the letter, but the recipient has the only copy of the copyrighted work. In order to gain access to the copyrighted work, the recipient must produce the copy. Building on this, Darrow and Ferrera[358] argue that the debate regarding access to emails is often not about who owns the copyright, but rather about access to the copies of the emails. Cummings[359] states that is it unclear whether or not service providers acknowledge that the copyright[360] and the rights to the copies are indeed the property of the deceased. He goes further and confirms Darrow and Ferrera's[361] argument, by stating that even if the service providers did acknowledge these rights, it is still the aspect of accessing these digital assets that remains challenging. As

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354 98 of 1978.

355 66 of 1965.

356 In fact, as stated in paragraph 3.2.2, Facebook also acknowledges that copyrights exist in the original postings of its users, and protects this in terms of its TOS.

357 Darrow and Ferrera 2007 *NYUJLPP* 289.

358 Darrow and Ferrera 2007 *NYUJLPP* 289.

359 Cummings 2014 *MJLST* 903-905.

360 Yahoo 2017 Yahoo 2017 https://policies.yahoo.com/us/en/yahoo/terms/utos/ states that: "Yahoo does not claim ownership of Content you submit or make available for inclusion on the Yahoo Services." Google 2017 https://www.google.com/intl/en/policies/terms/ states that: "Some of our Services allow you to upload, submit, store, send or receive content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours."

361 Darrow and Ferrera 2007 *NYUJLPP* 289.

discussed in paragraph 3.2.2.3, access to these intangible assets ultimately lies with the service provider[362] and its TOS agreements. While the *Copyright Act* might help to address the aspect of ownership in digital assets, Ratiba[363] argues that the *Administration of Estates Act* could provide the appropriate means of accessing digital assets.

4.4.2 Administration of Estates Act

The *Administration of Estates Act* provides the process for the administration of a deceased estate, and amongst its provisions there are some aspects that could be helpful in administrating digital assets. Ratiba[364] identifies the definition of "property" in terms of the Act, as well as section 9(1), 9(2)(a) and 11, as providing a gateway for the inheritance of digital assets in a deceased estate. Firstly, it can be noted that "property" in terms of the Act refers to "any contingent interest in property".[365] As this is a very broad definition it can be deduced that digital assets could be included under its sphere. However, as stated by Ratiba, it is still up to the legislator to determine what is included in the definition of a digital asset.[366] In addition, as determined in chapter 3, it is currently the service provider that dictates the rights of access and ownership a user has in a particular digital asset.[367]

Another aspect that could derail the usefulness of the Act is section 9(1), where it is stated that under certain circumstances an inventory of all of the deceased's property within South Africa is necessary. The question here is how this would impact on digital assets which may be owned in South Africa but which are hosted by a service provider

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362 Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 3-4 also point to this as a key complication in the inheritability of digital assets.

363 Ratiba 2013 *JJS* 41-43.

364 Ratiba 2013 *JJS* 41-43.

365 It is interesting to note that the definition of "property" in terms of the *Estate Duty Act* 45 of 1955 is very broad: "'Property' means any right in or to property, movable or immovable, corporeal or incorporeal."

366 Ratiba 2013 *JJS* 41.

367 See the discussion under paragraph 3.2.2 as to how service providers approach different types of digital assets such as emails versus digital music and eBooks. As stated by authors such as Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 3 and Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/, digital music and eBooks are generally "sold" in terms of a licence agreement which expires upon the death of the user. Therefore such digital assets cannot form part of the deceased estate.

in another country. On the other hand, subsection 2(a) again widens the scope as it refers to an inventory of "all property known", which then could be seen to include digital assets, even those situated outside of the Republic. Lastly, section 11 deals with the temporary custody of property in a deceased estate. This section provides that any person in possession or custody of any property or document which belonged to the deceased at the time of his death shall: report the particulars of such property …or documents; or retain possession or custody thereof; or shall surrender it into the custody or control of the executor, curator or person responsible for administrating the deceased estate.[368]

Ratiba's[369] first question here is whether or not this section can be interpreted in such a way as to give the Master, the executor or the courts the power to force a service provider to submit access to digital assets in order to administer a deceased estate. He answers this question positively by stating that a *prima face* interpretation of this section would support this conclusion. He states that this section may well give access to a deceased user's account, as this action would be inclusive in the normal rights associated with an executor.[370] Nevertheless, there is no current South African case law that has tested this approach, and an executor will most certainly have to approach a court for such an order, subject to the rights reserved in the section.[371] Furthermore, under certain circumstances such proceedings might have to be instituted in a foreign court.[372] This is a problem in other jurisdictions as well, as pointed out by Edwards and Harbinja,[373] and as illustrated by cases such as *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*[374]

368 S11 of the *Administration of Estates Act.*
369 Ratiba 2013 *JJS* 42-43.
370 Ratiba 2013 *JJS* 42-43.
371 Ratiba 2013 *JJS* 42-43. S11 of the *Administration of Estates Act* provides that such a reservation of rights includes that the provisions of this section shall not take effect if it: "affects the right of any person to remain in possession of any such property, book or document under any contract, right or retention or attachment."
372 Ratiba 2013 *JJS* 42-43. This argument is supported by authors such as Rajpal 2016(2) *Without Prejudice* 52 and Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 3.
373 Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 3.
374 C 12-80171 LHK PSG N.D. Cal.; Sept. 20, 2012.

where the user lived and died in England, but the case was determined in terms of the USA jurisdiction.[375]

Ratiba,[376] closes his discussion by suggesting that the South African legislator should attempt to include digital assets in its existing codification or attempt a dedicated codification to deal with digital assets. He further suggests that such a codification should not just include an approach as to how to deal with digital assets, but also give express rights to an executor to deal with such assets in a deceased estate. In doing so the legislator should also deal with the ownership of digital assets, to indicate which digital assets are included in the estate and the extent of the rights assigned to them.[377] Of course, without such clear legislative guidelines the fate of digital assets still remains with the service provider who, as seen in paragraph 3.2.2, often hides behind privacy policies in order to deny access to a deceased user's account.

4.3 Privacy After Death

Neethling[378] states that the concept of privacy is deeply ingrained in our consciousness, but in terms of the common law it does not extend beyond death.[379] Yet authors such as Sherry[380] state that the concept of privacy has evolved. Privacy is now seen to include "limited access to the self," "secrecy" and "control over personal information."[381] All of these concepts intend to protect dignity, individuality and autonomy.[382] While Sherry[383] is referring to USA legislation such as the *Electronic*

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375 Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 3 and *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*, C 12-80171 LHK PSG N.D. Cal.; Sept. 20, 2012 where both parties relied on USA legislation such as the *Stored Communications Act* 18 USC § 2701, which deals with unlawful access to stored communication, and *Judiciary and Judicial Procedure* 28 USCA § 1782, which provides assistance to foreign and international tribunals and to other litigants before such tribunals. See Section E of Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 16-18 for a further discussion of foreign jurisdictions.

376 Ratiba 2013 *JJS* 42-43.

377 It should be noted that Ratiba 2013 *JJS* and Rajpal 2016(1) and (2) *Without Prejudice* focus on emails and social media accounts as assets in a deceased estate and have not ventured to include eBooks or digital music as assets in a deceased estate. See paragraph 3.2.2.1 and 3.2.2.2 for a discussion on the different interpretations of ownership rights assigned to these types of digital assets.

378 Neethling 2005 *The Comparative and International Law Journal of Southern Africa* 210-245.

379 Rajpal 2016(2) *Without Prejudice* 52.

380 Sherry 2012 *PLR* 210.

381 Sherry 2012 *PLR* 210 referring to Solove 2002 *California Law Review* 1102-09,1116,1121.

382 Sherry 2012 *PLR* 210 referring to Solove 2002 *California Law Review* 1102-09,1116,1121.

383 Sherry 2012 *PLR* 210.

Communication Privacy Act[384] and the *Stored Communications Act*,[385] she notes that the international field of internet law has developed to prohibit the disclosure of private information. She goes further to state that this area of the law has essentially developed to prohibit unauthorised access to stored electronic communication.[386] This makes access to a deceased's account difficult and seems to have spurred service providers to err on the side of caution when privacy, even after death, is concerned.[387]

Edwards and Harbinja[388] note that another concept has evolved from the development of privacy concerns after death, namely "post-mortem privacy". This concept is defined as the "right of a person to preserve and control what becomes of his or her reputation, dignity, integrity, secrets or memory after death", and the authors argue that such rights should be protected.[389] Harbinja[390] builds on this argument and states that a user's personality and privacy is closely related to his digital assets. Considering Edwards and Harbinja's[391] inclusion of the right to dignity in post-mortem privacy, this discussion can be taken back to South African law. As stated in paragraph 4.1, the *BoE Trust Ltd*[392] case confirmed that the right to dignity can be connected to a testator's freedom of testation, and thus extends beyond death.[393]

Rajpal[394] also connects dignity and privacy after death by referring to South African legislation such as provincial by-laws that require the disposal of a deceased's body to

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384 Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.: 18 U.S.C. §§2510, 2522, 2701-10, 2711 (2006)).

385 *See* 18 U.S.C. § 2701(a).

386 Sherry 2012 *PLR* 210.

387 Sherry 2012 *PLR* 210-211. Also see paragraph 3.2.2.1 with the discussion of the *In Re Ellsworth* No. 2005-296, 651-DE Mich Prob Ct 2005 court case, and Edwards and Harbinja "What happens to my Facebook profile when I die?" 7.

388 Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 32. Also see Buitelaar 2017 *Ethics and Information Technology* 129-142.

389 Also see Sherry 2012 *PLR* 185-250, Lopez 2016 *SLR* 77-90 and Harbinja 2017 *IRLCT* 26-42.

390 Harbinja 2017 *IRLCT* 26-28.

391 Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 32. Also see Buitelaar 2017 *Ethics and Information Technology* 129-142.

392 2013 3 SA 236 (SCA).

393 Chu 2015 *NJTIP* 272. Chu also connects dignity and privacy and refers to N. A. Moreham, "Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort", in *LAW, LIBERTY, LEGISLATION* 231–248, who defines "privacy" as dealing with "the protection of human autonomy" while "dignity" is "the right to control the dissemination of information about one's private life".

394 Rajpal 2016(2) *Without Prejudice* 52.

be carried out in a dignified manner. She also refers to section 14 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act,*[395] which prohibits acts of necrophilia. She argues that this opens a door for the protection of privacy rights after death in South Africa.[396] However, how the courts are dealing with privacy after death makes this area of the law uncertain. As briefly stated in paragraph 3.2.2.1, with reference to the USA case *In Re Ellsworth,*[397] the consideration of privacy, even after death, is becoming a dominant factor as to how we are dealing with a deceased's digital assets. While the court did eventually order the service provider to hand over copies of the deceased user's emails to his family,[398] other cases such as *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*[399] saw the court denying access to an account. The English court here stated that: "to rule otherwise would run afoul of the specific (privacy) interest" that the law seeks to protect.[400] With a lack of South African case law to examine in this regard, authors such as Rajpal,[401] confirm that the concept of privacy rights for the deceased is undeveloped in South Africa.

While case law might be lacking, how South African legislation treats privacy after death is more directly addressed by legislation such as the *Promotion of Access to Information Act*[402] (PAIA)[403] and the *Protection of Personal Information Act*[404] (POPI).[405] In terms of section 34 and 63 of PAIA:

> a private/public body must refuse a request for access to a record of the body if its disclosure would indicate the unreasonable disclosure of personal information about a third party, including a deceased individual.

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395 32 of 2007.
396 Rajpal 2016(2) *Without Prejudice* 52.
397 No. 2005-296, 651-DE Mich Prob Ct 2005.
398 McMahon 2017 http://nebraskadigitalassets.com/the-curious-case-of-justin-ellsworth/, states that the deceased user's family admitted that amongst the emails they received, there was correspondence with people they had no idea were in their son's life.
399 C 12-80171 LHK PSG N.D. Cal.; Sept. 20, 2012.
400 Neethling 2005 *Comparative and International Law Journal of Southern Africa* 210-245.
401 Rajpal 2016(1) *Without Prejudice* 41-42 and Rajpal 2016(2) *Without Prejudice* 52-53.
402 2 of 2000.
403 Rajpal 2016(1) *Without Prejudice* 41.
404 4 of 2013.
405 Rajpal 2016(2) *Without Prejudice* 52.

Authors such as Lisinski[406] take this as indicative that post-mortem privacy might be afforded to a deceased user. The POPI Act, however, defines "personal information" *inter alia* as "information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person…"[407] While this legislation aims to provide a user with control over the processing of his personal information[408] it does not extend this protection after death.[409] Lisinski[410] argues that this exclusion of privacy rights after death would make it easier to leave a digital asset in terms of a will. She states that as privacy is not extended to a deceased user, service providers have no privacy rights to protect. Such an argument is countered by Rajpal,[411] as this Act is largely superimposed from the European Union's (EU) data protection laws.[412] Ratiba[413] notes that some EU states have been known to afford more than the minimum protection required to its nationals. In some instances[414] the right to privacy was extended, even if just for a limited period after death, to deceased users through the EU's data protection laws.[415]

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406 Lisinski 2016 http://www.fluxmans.com/is-a-social-media-account-an-asset-that-can-be-inherited-sold-or-assigned-by-ryszard-lisinski/.

407 Rajpal 2016(1) *Without Prejudice* 41-42 and Rajpal 2016(2) *Without Prejudice* 52-53.

408 *Protection of Personal Information Act* 4 of 2013.

409 Rajpal 2016(1) *Without Prejudice* 41 and Lisinski 2016 http://www.fluxmans.com/is-a-social-media-account-an-asset-that-can-be-inherited-sold-or-assigned-by-ryszard-lisinski/.

410 Lisinski 2016 http://www.fluxmans.com/is-a-social-media-account-an-asset-that-can-be-inherited-sold-or-assigned-by-ryszard-lisinski/.

411 Rajpal 2016(2) *Without Prejudice* 52-53.

412 Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 112-113 state that the current EU Data Protection law is founded in terms of Article 8 of the *European Convention on Human Rights,* which protects the private life of an individual.

413 Ratiba 2013 *JJS* 27-46.

414 See Case C-101/01, *Criminal Proceedings Against Lindqvist*, 2003 E.C.R. I-12971, I-13027 European Court of Justice decision deferring to the national court's resolution of the issue: "On the other hand, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included within the scope thereof, provided that no other provision of Community law precludes it." Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 113-114 also refer to Bulgaria's *Personal Data Protection Act*, Jan. 1, 2002 State Gazette [SG] No. 1/4.01.2002, at Art. 28(3), as amended (Bulg.), available at http://legislationline.org/topics/country/39/topic/3 and Estonia's *Personal Data Protection Act*, Oct. 1, 2003, Riigi Teataja [RT] I 2003, 26, 158, amended by RT I 2004, 30, 208 Est., available at http://www.legaltext.ee/text/en/X70030.html, then again the Sweden's *Personal Data Protection Act* SFS 1998:204 §3 Swed., available at http://www.sweden.gov.se/content/1/c6/01/55/42/b451922d and the United Kingdom's *Data Protection Act* 1998, c. 29, Part I §(1)€ UK explicitly limits privacy rights to the living.

415 Ratiba 2013 *JJS* 27-46 and Edwards and Harbinja 2013 *Cardozo Arts and Entertainment Law Journal* 113.

Still, as illustrated by Lisinski,[416] current legislation leaves room for interpretations both for and against privacy rights after death. Thus, with a lack of clear-cut legislation to govern this aspect, it is again in the hands of the service providers to provide a solution. Cummings[417] states that they are protecting the privacy rights of their deceased users not by extending "privacy" after death but rather by placing emphasis on the idea that the user contracted with the service provider to protect his privacy, and that this contract to protect the user's privacy is what remains after death. While service providers are standing their ground with regards to the protection of privacy, Sherry[418] states that with no legislation to the contrary, service providers have the unilateral task of deciding how their user's privacy is to be treated in terms of their TOS.[419]

As stated in paragraph 3.2.2.1, service providers such as Facebook and Google have provided some relief for their users. Google especially provides users with the option to decide how much access their trusted contacts should obtain.[420] This again leads to the question of whether or not service providers shouldn't place the responsibility on the user to decide how much access to his account should be afforded to a third party after the user has passed on. If a user was given the option to decide how his privacy should be treated after he has passed on, service providers might be less inclined to unilaterally alter their privacy policies.[421] This would also provide heirs with a clear answer as to what their rights are and conversely also provide service providers with a means to compel heirs and family to respect a deceased user's privacy.[422] Nevertheless, Sherry[423] states that this solution would again be governed by the service providers, who would most certainly default to their own rules.

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416 Lisinski 2016 http://www.fluxmans.com/is-a-social-media-account-an-asset-that-can-be-inherited-sold-or-assigned-by-ryszard-lisinski/.
417 Cummings 2014 *MJLST* 906-908.
418 Sherry 2012 *PLR* 248.
419 Chu 2017 *NJTIP* 261.
420 Google 2017 https://myaccount.google.com/inactive?pli=1.
421 Apple 2017 https://www.apple.com/legal/privacy/en-ww/. This privacy policy states that: "Apple may update its Privacy Policy from time to time. When we change the policy in a material way, a notice will be posted on our website along with the updated Privacy Policy."
422 Sherry 2012 *PLR* 248.
423 Sherry 2012 *PLR* 246.

While service providers frequently argue the protection of a deceased user's privacy rights and thus dignity after death to deny heirs access to a deceased user's account, another aspect that inhibits the inheritability of digital assets is non-transferability clauses. Such a clause effectively means that there is no account to access or control after death, as the personal right or licence was afforded to the user and not his heirs.[424] This aspect was discussed in paragraph 3.2.2.2, as service providers use a non-transferable licence to "sell" digital assets to users. This ultimately means that any rights in the licence ends with the user, and therefore there is no asset to bequeath.

4.4 Non-transferability Clauses

While the courts, albeit in foreign jurisdiction,[425] have heard and consented to email's being considered the property of a deceased user, other forms of digital assets have more clear-cut limitations when it comes to inheritance. As stated in paragraph 3.2.2.2, and with reference to Jooste,[426] Perzanowski and Schultz,[427] users do not actually own the content of their online accounts.[428] Digital assets such as eBooks and digital music are licensed and not sold to a user,[429] which concludes a personal right that ends with the user.[430] What is more, and as already alluded to in paragraph 4.4, the rights users obtain during the term of this licence are dictated by means of TOS which are unilaterally set up by the service provider.[431] This means that service providers can insert clauses such as:[432]

> …you understand and agree that the owner of the iTunes account to which an iBook store product is assigned will become the owner of that product

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424 Perzanowski and Schultz *The End of Ownership* 2. Also see Apple 2016 https://www.apple.com/legal/internet-services/itunes/us/terms.html.

425 See the discussion under paragraph 3.2.2.1 with reference to Darrow and Ferrera 2007 *NYULPP* 281-320.

426 Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/.

427 Perzanowski and Schultz *The End of Ownership* 1-4.

428 See for example *In Re Ellsworth* No. 2005-296, 651-DE Mich Prob Ct 2005.

429 Perzanowski and Schultz *The End of Ownership* 2. Apple 2017 https://www.apple.com/legal/internet-services/itunes/us/terms.html state that content is "licensed, not sold, to you".

430 Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/.

431 Perzanowski and Schultz *The End of Ownership* 4-6.

432 Apple 2017 https://www.apple.com/legal/internet-services/itunes/us/terms.html.

> and shall be entitled to all associated rights, subject to the terms. Such products are non-transferable.

While Apple, in this instance supposedly gives the user ownership of the content of his account, after stating that it is a licence the user has obtained,[433] the service provider places another obstacle in the way, namely the non-transferability clause that prohibits the transfer of the content of such an account.[434] Technically this clause imposes a duty on the service provider to delete the content of a digital account upon the user's death.[435]

Perzanowski and Schultz[436] state that controlling digital assets though a licence results in there being is a stark contrast with the rules assigned to traditional assets. As stated in paragraph 2.4 and with reference to authors such as Erlank,[437] since we are assigning real-world attributes to digital assets we should assign traditional rights to them as well. McDavitt[438] states that while service providers may control access to digital accounts, the question should be asked whether or not it is still justifiable to keep licensing certain types of digital assets such as eBooks and digital music. Harbinja[439] argues that the freedom a testator has over his traditional assets should translate to his digital assets. He argues that the user should be able to decide what happens to his assets and privacy after death.

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433 Apple 2017 https://www.apple.com/legal/internet-services/itunes/us/terms.html which states that Apple grants users: "…a nontransferable license to use".

434 Apple 2017 https://www.apple.com/legal/internet-services/itunes/volume/us/terms.html states that: "...SUCH LICENSES OR PRODUCTS ARE NON-TRANSFERABLE". Even though it is not the subject of this dissertation it might be interesting to examine whether or not TOS, which are a contract, do not fall within the realm of a *pactum successorium.* A *pactum successorium* is an agreement that purports to regulate the process of succession, as could be argued is the case with the TOS's non-transferability clause. Rautenbach *Die pactum successorium in die Suid-Afrikaanse reg* (LLM-dissertation University of KwaZulu-Natal 1988) engages in a discussion regarding the impact of the strict application of the *Borman en De Vos v Potgietersrusse Tabakkorporasie* 1976 3 SA 488 (A) case, that according to Rautenbach could result in ordinary commercial contracts such as pension funds, life insurance, *inter vivos* trusts and partnership agreements being classified as *pactum successoria.* Could this include TOS agreements?

435 McDavitt 2016 http://www.nlrg.com/trusts-estates-wills-and-tax-law-legal-research-copy/estates-the-inheritability-of-digital-music-files.

436 Perzanowski and Schultz *The End of Ownership* 4-6.

437 See Erlank 2013 *PELJ* 194-212.

438 McDavitt 2016 http://www.nlrg.com/trusts-estates-wills-and-tax-law-legal-research-copy/estates-the-inheritability-of-digital-music-files.

439 Harbinja 2017 *IRLCT* 31-32.

While the fate of digital assets such as eBooks and digital music is still being discussed in academic circles, other digital assets such as emails have found some relief in the form of the RUFADA Act. As stated in paragraphs 3.2.2.3 and 4.3, this Act seems to reflect the most advanced or comprehensive approach to dealing with digital assets, albeit for limited forms of digital assets and for the limited purpose of administering digital assets in a deceased estate. What is especially important for this dissertation is how this Act treats the hierarchy of TOS's and a user's last will and testament. Consequently, this Act and its usefulness to South African users will be touched upon.

4.5 Revised Uniform Fiduciary Access to Digital Assets Act

The RUFADA Act, from the USA, is described as pioneering legislation to address the rights of users in terms of their digital assets.[440] This Act has already been discussed to some extent in paragraph 3.2.2.3, and therefore its influence on South African law will be only briefly discussed now. Dahl and Nel[441] state that the ultimate goal of the RUFADA Act is to override privacy laws and TOS that prohibit fiduciary[442] access to digital assets.[443] The RUFADA Act does not grant the fiduciary the authority to transfer the title, nor does it mean that ownership vests in the fiduciary. The Act is simply a means of gaining access to a deceased user's digital assets in order to settle the estate.[444] As previously stated, this Act establishes a hierarchy to determine how access to digital assets will be dealt with. In terms of section 4 of the Act, the first consideration will be given to any online tool provided by a service provider that directs how access to the user's account should be dealt with. This online tool will override any direction in a will. Secondly, if no online tool was used, the user may direct in his will what access can be obtained and by whom. Lastly, if the user made no provision for access after death, the default provisions of the TOS will apply.[445] Section 5 also states that the fiduciary cannot take any action that the user could not have taken

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440 See for example Sy 2016 *Touro Law Review* 647-677.

441 Dahl and Nel 2017 http://walkers.co.za/virtual-assets-in-your-digital-estate/.

442 As stated under footnote 268 a "fiduciary" in terms of the RUFADA Act is defined as "an original, additional, or successor personal representative, (conservator), agent, or trustee." A "personal representative" is also defined to mean: "an executor, administrator, special administrator…"

443 Dahl and Nel 2017 http://walkers.co.za/virtual-assets-in-your-digital-estate/.

444 Uniform Law Commission "National Conference of Commissioners on Uniform State Laws" 6-8.

445 Section 4 of the RUFADA Act.

legally, therefore the fiduciary would not be able to pass the digital assets on to the user's heirs. What is more, the scope of this Act is limited by its definition of "digital assets" as it defines these assets as:[446]

> …an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

Ultimately, even with its limited scope as to the type of digital asset as well as the powers that vest in the fiduciary, it is still viewed as the best solution with regard to the inheritance of electronic records.[447]

The question that must now be asked is whether or not South African citizens could rely on this legislation to find relief or if they could fall back on South African law to protect their rights. As International Private Law is not the focus of this dissertation, only brief reference will be made to how South African citizens could find relief in instances where cross-border contracts such as TOS have been concluded. TOS can be seen as cross-border contracts as most service providers such as Facebook and Google make use of jurisdictional clauses that dictate the legal jurisdiction that will apply in the event of a dispute, irrespective of where the user is domiciled.

Section 39(1)(b)(c) of the *Constitution* provides for the consideration of foreign law and international law. Rautenbach[448] points out that the wording of the *Constitution* implies a different approach to these two forms of law in that foreign law *may* be considered while international law *must* be considered. This provides South African courts with the opportunity to consider the RUFADA Act. What is more, jurisdictional clauses cannot remove the jurisdiction of South African courts to offer relief to South African users and their families. In *Foize Africa (Pty) Ltd v Foize Beheer BV*[449] the Supreme Court of Appeal (SCA) considered a dispute that originated from an agreement containing a foreign jurisdiction and arbitration clause. The question before the court was whether or not such a clause removed the jurisdiction of South African

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446 S2(10) RUADA Act.

447 Uniform Law Commission "National Conference of Commissioners on Uniform State Laws" 8, Harbinja 2017 *IRLCT* 27-28 and Sy 2016 *Touro Law Review* 649-650.

448 Rautenbach 2015 *PELJ* 1547.

449 2012 (SASCA) 123.

courts. Here the SCA determined that the parties to the agreement were not at liberty to remove the jurisdiction of the South African courts through the use of a simple contractual clause. In fact, the parties could merely stay any proceedings that might be implemented in a South African court after the court was in a position to make an informed decision as to whether or not a foreign jurisdiction clause should be enforced. Such action requires the use of a dilatory plea.[450] Consequently, a user in South Africa could make use of foreign law or fall back on South African law if that would provide more relevant relief. In order to apply South African law the user or his heirs would have to show that the South African court had jurisdiction, and therefore the necessary power vested in the court to adjudicate upon, determine and dispose of the matter.[451] As the heirs and executor of the deceased user's estate would be situated in South Africa, it seems reasonable for action to be taken in a South African court considering the RUFADA Act in order to obtain access to a deceased user's digital assets.

4.6 Conclusion

As illustrated above, it is generally accepted that a person has the right to dispose of his assets,[452] subject to certain common law and statutory limitations. It has been shown that this autonomy is not freely recognised with regard to our digital assets. However, authors such as Harbinja[453] state that a user's personality and privacy is closely related to his digital assets, and testamentary freedom should therefore be extended to digital assets.

As stated in paragraph 4.4, the most telling argument against this extension of testamentary freedom is firstly that the user's rights in the digital assets terminates upon death.[454] This is due to the fact that a licence for use was given to the user, and not ownership. The second argument against the extension of testamentary freedom has to do with the right to privacy. As stated by Lisinski,[455] if privacy rights are not

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450 *Foize Africa (Pty) Ltd v Foize Beheer BV* 2012 (SASCA) 123 par 21. Also see Snail 2017 https://www.lawsoc.co.za/default.asp?sl=andid=1888.

451 Snail 2017 https://www.lawsoc.co.za/default.asp?sl=andid=1888.

452 Harbinja 2017 *IRLCT* 37-38.

453 Harbinja 2017 *IRLCT* 37-38.

454 Harbinja 2017 *IRLCT* 31-32.

455 Lisinski 2016 http://www.fluxmans.com/is-a-social-media-account-an-asset-that-can-be-inherited-sold-or-assigned-by-ryszard-lisinski/.

extended beyond death, then service providers have no need to extend their privacy policies beyond the user's death. However, as stated by Harbinja,[456] digital assets are closely linked to the personality of the user and accordingly privacy rights should be extended beyond death as the digital assets are an extension of the user's personality. It has been shown that the EU has been willing in the past to extend privacy after death, and this falls neatly into place with the opinion of Edwards and Harbinja.[457] These authors argue that the approach followed by service providers is that users are entitled to shape their image and protect their dignity during life, and that this right should be extended after death. Such an argument also falls neatly in with arguments advocating the freedom of testation in relation to digital assets, as a deceased user's wishes should be respected. Nevertheless, this dissertation has shown, through a consideration of the *Ellsworth* case in particular, that the strict protection of privacy rights can interfere with the wishes and needs of the heirs. What is more, and as stated in paragraph 1.1, digital assets of historic value might be lost as records are kept hidden behind privacy rights. Accordingly, two opposing interests are at the heart of this discussion. Whose interest takes precedence? Is it interest of the living, who might require access to a deceased user's account in order to conclude the estate,[458] or is it the interest of the deceased user, who might have intentionally chosen to leave no indication that access to his account is to be granted? [459] Ultimately, if a user is provided with a clear-cut method to provide access to his digital assets after death but neglects to use it, it can at least be argued that the user intended that his privacy should remain intact after death.

As stated above, it would seem as if the RUFADA Act offers the best solution thus far, as it would indeed allow fiduciary access to a deceased account. Dahl and Nel[460] state that the USA Law Commission recommends that States adopt the Act in order to protect digital assets as well as to regulate access to such assets upon the user's death. They further state that the Act aims to provide fiduciaries with the same access

456 Harbinja 2017 *IRLCT* 31-34.

457 Edwards and Harbinja "What happens to my Facebook profile when I die?" 21.

458 The conclusion of a deceased estate in this instance does not just refer to the process of administering the estate, but also to the sentimental value heirs might wish to obtain or which the user might have wanted his heirs to inherit.

459 Harbinja 2017 *IRLCT* 35.

460 Dahl and Nel 2017 http://walkers.co.za/virtual-assets-in-your-digital-estate/.

to digital assets as an executor would have with regard to traditional assets.[461] However, the Act is limited to electronic communication and therefore still leaves other categories of digital assets vulnerable. It also keeps service providers in control of how digital assets are to be treated in a deceased estate, as the hierarchy of the Act places the online tools of service providers above the wishes dictated in a user's will.

While neither the South African legislator, nor the South African Courts have considered how digital assets are to be treated in a deceased estate, it is clear that guidance is needed. Drafting a will to regulate digital assets has little effect in the absence of local legislation that could compel service providers to co-operate. It is concluded that without a clear legislative framework to regulate digital assets and to compel service providers to co-operate with the user's testamentary wishes, and which can be enforced in local courts, the inheritability of digital assets in South Africa will remain problematic.[462]

461 Dahl and Nel 2017 http://walkers.co.za/virtual-assets-in-your-digital-estate/.

462 Dahl and Nel 2017 http://walkers.co.za/virtual-assets-in-your-digital-estate/ and Ratiba 2013 *JJS* 43.

CHAPTER 5: CONCLUSION AND RECOMMENDATION

5.1 Introduction

Since February 2016 this dissertation has been saved as an editable document on Google Drive, it has been emailed to two lecturers at the North-West University using a Gmail account, and it could have been accompanied by eBooks "bought" on an Amazon account and complemented by a playlist compiled on an Apple iTunes account. This would implicate the writer in no fewer than three different TOS agreements[463] and privacy policies[464] which the writer hereof, the North-West University or the writer's estate would need to consider in relation to this dissertation. If the dissertation, along with the eBooks and iTunes playlist, were to end up in a deceased estate, the question that would need to be asked would be to what extent, if any, do the TOS and privacy policies impact the relevant parties? For example, the University in this instance retains copyright in the dissertation,[465] but would the University be able to access its copyrighted material via the writer's personal Google Drive account? In addition, the author might wish to leave the eBooks to her lecturers and give her family access to the playlist. Would these TOS agreements and privacy policies allow for these wishes to be fulfilled? These were the questions broadly asked in chapter 1, and in this final chapter this hypothetical estate will be used to review the theory discussed in the different chapters, and the theory will be used to offer suggestions as to how digital assets could be treated in a deceased estate.

In chapters 1 and 2 it was acknowledged that the first step in determining how the dissertation, eBooks and playlist should be handled in a deceased estate would be to

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463 See Google 2017 https://www.google.com/intl/en/policies/terms/, Apple 2016 https://www.apple.com/legal/internet-services/itunes/us/terms.html and Amazon 2017 https://www.amazon.com/gp/help/customer/display.html?nodeId= 508088.

464 See Google 2017 https://www.google.com/intl/en/policies/terms/, which states that: "Google's privacy policies explain how we treat your personal data and protect your privacy when you use our Services. By using our Services, you agree that Google can use such data in accordance with our privacy policies." Apple 2016 https://www.apple.com/legal/internet-services/itunes/us/terms.html states that: "Apple takes the security of your personal information very seriously. Apple online services such as the Apple Online Store and iTunes Store protect your personal information…" and Amazon 2017 https://www.amazon.com/gp/help/customer/display.html/ref=footer_privacy?ie=UTF8&nodeId=468496 states that: "We work to protect the security of your information…"

465 In terms of clause 4.4.8.1 of the North-West University's General Academic Rules the University asserts ownership over all intellectual property that may have been created in the course of study.

identity them as relevant digital assets. In chapter 2 it was found that some academic writers chose to define digital assets in terms of classes[466] or categories.[467] These classes and categories sort digital assets in terms of the diverse topics being discussed at a particular point in time. In terms of legislative attempts at a definition, the USA has offered definitions that are often either too narrow or overly expansive. In some instances, these definitions refer to only a single or limited type of digital asset.[468] Alternatively, the definition is left open to interpretation, with some definitions situating digital assets within the traditional definition of property.[469]

The *Tennessee House Bill's*[470] approach to a definition seems to best address the problem of access to and the control of digital assets as it splits digital information into two categories, namely digital accounts[471] and digital assets.[472] As was noted in paragraph 2.3, Austin[473] is of the opinion that while this definition does not offer an exhaustive list of digital assets or digital accounts, it does provide a broad definition that could include a wider range of assets. As was discussed in chapter 3, this later approach could be appropriate in defining certain types of digital assets such as the writer's Gmail and Google Drive account, as it is often not ownership of the content that limits the transfer of digital assets but rather gaining access to the account itself. The difficulty in gaining access to these digital assets was discussed in paragraph 3.2.2. Here it was found that, in the case of digital assets such as electronic communication or electronic documents, the user (or creator) retains copyright in the

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466 Referring to Ratiba 2013 *JJS* 30-31, where he identifies thee classes of digital assets, namely: assets relating to a "user's online engagement"; stored files; and lastly what he calls *purpose-oriented* digital assets. See paragraph 2.1 for a discussion of the different classes.

467 Referring to Beyer 2015 2015 *NAEPC Journal of Estate and Tax Planning* 28-29, Beyer and Cahn 2013 *NAELAJ* 138 and Cahn 2011 *Probate and Property Magazine* 36-37, where Beyer and Cahn identify four categories of digital assets, namely: personal assets; social media assets; financial assets; and business assets. See paragraph 2.2 for a discussion of the different categories.

468 See *Rhode Island Code* §30-1-13-1.1 *Connecticut Public Act* No 5-136 §46a-334a, *Indiana Code* SB 0212, 2007 §29-1-13-1.1 and *Oklahoma Title* 58 §269 as discussed in paragraph 2.3.

469 See *Texas Property Code* 2013 SB 648, 83d Leg, Reg Sess as discussed in paragraph 2.3.

470 HB 1945, 108th Gen Assemb, 2d Sess Tenn 2013.

471 The Bill defines "Digital accounts" as: "…any electronic or online accounts, including email accounts, Internet-based or cloud-based accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, and affiliate programs."

472 The Bill defines "Digital assets as: "...any electronic content or files stored on digital devices regardless of the ownership of the physical devices upon which the digital asset is stored."

473 Austin 2016 *EPCPLJ* 93-95.

work, but the service provider remains in possession of the copy and also controls access to the account by which such copy is accessed. Under the discussion in paragraph 3.2.2.1 it was noted that service providers deny access due to their contractual obligation to preserve the user's privacy. This matter was discussed again in paragraph 4.3 as a factor that prevents the user from bequeathing his digital assets. Here it was determined that while privacy is not automatically extended after death there have been instances where it could remain intact and thus support the argument of the service provider. What is more, service providers are seeing the post-mortem protection of privacy as a contractual obligation that lives on after the user has died. On the other hand, authors such as Lisinski[474] argue that as there is no privacy to protect after death, it should be possible to bequeath digital assets. Nevertheless, as there is no legislation to the contrary, service providers have the unfettered authority to decide how their users' privacy is to be treated.[475]

In paragraphs 2.4, 3.2.2.2 and 4.4 it was determined that other digital assets such as the writer's eBooks and playlist relate better to their traditional counterparts. Through the research stage of this dissertation it became evident that it was especially these types of digital assets that have been assigned the properties normally found in traditional assets. This can be illustrated by noting instances where service providers use language such as "buy" and "purchase" when referring to these digital assets, while in reality they are only giving the user a licence of use. As Jooste[476] points out, this license lapses at death and accordingly there are no assets to consider in the deceased estate. The way in which especially these types of digital assets are promoted has led users to conclude that they do in fact own them. In chapter 3 the divide between what service providers are offering and what users perceive they have obtained was illustrated. This was done by way of reference to the Amazon.com incident where the service provider unilaterally removed eBooks from user's collections.[477] This invasion of the rights users thought they had obtained seems to

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474 Lisinski 2016 http://www.fluxmans.com/is-a-social-media-account-an-asset-that-can-be-inherited-sold-or-assigned-by-ryszard-lisinski/.

475 Chu 2017 *NJTIP* 261.

476 Jooste 2012 http://blogs.sun.ac.za/iplaw/2012/09/25/ip-heirlooms-testamentary-assignment-of-digital-content/.

477 Belanger 2011 *SHLR* 362 and Stone 2009 http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html.

be linked to the lack of attention users pay to what they are consenting to. Referring to an empirical investigation conducted by Obar and Oeldorf-Hirsch[478] at the University of Connecticut, it was determined that users spend little to no time considering the implications of such agreements. In certain instance it was also determined that users do not consider these online agreements to be as enforceable as traditional paper-based contracts.[479] It was concluded, however, that these online agreements are binding and enforceable.

After an attempt to define digital assets and after reviewing the rights assigned to them, a user's right to bequeath the said assets was discussed in terms of his freedom of testation. In *Syfrets Trust*[480] it was determined that the right to freedom of testation forms a fundamental part of a testator's property right, which must be protected.[481] While South African legislation such as the *Copyright Act* and the *Administration of Estates Act* was discussed as a means to determine the ownership of digital assets and how they might devolve in a deceased estate, it was found that these acts do not address the issue of digital assets effectively. As a result, foreign law was considered, and the RUFADA Act from the USA was used to illustrate a possible solution to the digital assets dilemma, even if only for electronic communication such as the dissertation stored on the writer's Google Drive account and the emails contained on the Gmail account. It was also determined that South African courts could consider this legislation if the right to access digital assets should ever be deliberated.

Following this research and referring to the hypothetical case of the deceased estate containing this dissertation, it can be determined that digital assets such as eBooks and playlists would not be included in the estate, while the electronic document and emails could be accessed either in terms of the user's agreement with the service provider or in terms of legislation such as the RUFADA Act. The following paragraphs

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478 Obar and Oeldorf-Hirsch "The biggest lie on the internet" 2.

479 Kim 2017 *The Business Lawyer* 246-247 point to recent case law such as *Handy v LogMeIn, Inc.* No. 1:14-cv-01355-JTL, 2015 WL4508669 ED Cal. July 24, 2015. In this case the service provider was able to produce the TOS that the user consented to, which stipulated thatit can "modify of discontinue" any of its products.

480 *Syfrets Trust* par 18.

481 Authors such as De Waal and Schoeman-Malan *Law of Succession* 4 also confirm the importance of the common law principle of freedom of testation within the context of South African law.

will offer recommendations or suggestions regarding the most suitable approaches for South Africa to adopt in dealing with digital assets upon the user's death. This includes suggestions as to how to define digital assets, as well as how South African legislation could be adapted or new legislation introduced to make provision for the transfer of digital assets in a deceased user's estate.

5.2 Recommendations and Suggestions for South Africa

In paragraph 1.3.1 it was suggested that in attempting to answer the research question two main objectives would need to be attained. The first was to define digital assets in order to be able to identify them as assets that could form part of the user's estate. The second objective was to determine where ownership and the right to bequeath such assets are being prohibited. It was determined that service providers dictate ownership and the rights assigned to users, therefore the second objective will be addressed in terms of possible legislative solutions. Firstly, a recommendation as to a definition of digital assets will be made.

5.2.1 A definition of digital assets

As mentioned above, there are different approaches to framing a definition for digital assets. Since there is such a wide array of digital assets, and a digital world that is still developing, it seems sensible to follow the approach used by authors such as Beyer[482] and Cahn.[483] These authors chose to define digital assets according to their use in a particular instance, and as such digital assets, or a particular type of digital asset, can be identified under different categories. Using emails as an example, it was shown in paragraph 2.2 that emails are able to take the form of personal, social, financial and business assets. The RUFADA Act elected to see the use of electronic communications as a tool to administer a deceased estate. If this approach is adopted, and access-focused rights are assigned in the administration of digital assets in a deceased estate, it is possible to frame an appropriate definition. The Act applies only to electronic records in which the deceased had an interest or property rights (for example

[482] Beyer 2015 2015 *NAEPC Journal of Estate and Tax Planning* 28-29 and Beyer and Cahn 2013 *NAELAJ* 138.

[483] Cahn 2011 *Probate and Property Magazine* 36-37 and Beyer and Cahn 2013 *NAELAJ* 138.

copyright in the content) immediately prior to death. This definition is limited further, as it deals with electronic records only, and not with the underlying assets or liabilities contained in the account. Authors such as Ratiba[484] recommend that care should be taken to avoid formulating a definition that cannot accommodate the development of the digital world. Therefore keeping the definition focused on a particular goal and leaving that definition as a wide reference to a goal-oriented digital asset could be an adequate solution. The same approach is recommended for other types of digital assets, such as eBooks and playlists. These fall into a category of digital assets with the unique characteristic of first being assigned the characteristics of traditional assets, and then being stripped of the normal rights assigned to such assets. Accordingly, it is suggested that they would be better given a unique classification rather than being included in the traditional definitions of property. This statement will be discussed further in paragraph 5.2.2.2 below, when legislative approaches to dealing with digital assets in a deceased estate are recommended.

5.2.2 Adapting legislation to function in an increasingly digital world

It was stated in chapter 1, neither the South African legislator nor the South African Courts have had to consider how digital assets are to be treated in a deceased estate. However, following the findings in chapters 3 and 4 it is clear that guidance is needed firstly to limit or to control the unilateral exercise of power by service providers and secondly to regulate how digital assets are to be transferred or treated after death. It was shown in chapter 4 that simply drafting a will to regulate digital assets will have little effect in the absence of local legislation that could compel service providers to co-operate. It was concluded that without a clear legislative framework: (1) to regulate digital assets; (2) to compel service providers to co-operate with the user's testamentary wishes; and (3) which can be enforced in local courts, the inheritability of digital assets in South Africa will remain problematic.[485] As with paragraph 3.2.2, it would make sense to differentiate between different asset types such as emails,

484 Ratiba 2013 *JJS* 43.

485 Dahl and Nel 2017 http://walkers.co.za/virtual-assets-in-your-digital-estate/ and Ratiba 2013 *JJS* 43.

eBooks and digital music. Therefore, the recommendations made below will be divided into legislative approaches for: (1) emails; and (2) eBooks and digital music.

5.2.2.1 Emails

Reference to the RUFADA Act was made thought-out this dissertation, and as it embodies a focussed approach to dealing with digital assets required for the administration of a deceased estate, it is recommended that the South African legislator look to this Act as a guideline. It would seem that this specifically focussed Act can offer users peace of mind with regard to access to their digital assets. What is more, the Act provides a hierarchy. It gives the user the ability to use the online tools provided by the service providers, such as Google's Inactive Account Manager. It also provides the user with the ability to use his testamentary freedom to grant access to his accounts, and lastly in the event where he has not made use of either of these options, it could be used to set a rebuttable presumption in South African law that the user intended that no access should be granted. This ability to grant access to a deceased user's account and the user's being in a position to dictate who can gain access and the extent of such access would result in the executor, trustees or Master having access to the documentation needed to settle the estate. In addition, family members would have access to sentimental items without overstepping the privacy rights of the deceased, whether such rights are acknowledged or not.[486]

5.2.2.2 eBooks and digital music

As alluded to in paragraph 5.1, assets such as eBooks and digital music fall into a difficult category of digital assets. These assets display the characteristics of traditional assets yet they are stripped of the normal rights assigned to their traditional counterparts. At present these assets and any rights a user has in them end at death and therefore cannot be carried forward. It has been argued throughout this dissertation that they should maintain the rights of their traditional counterparts. This

[486] See especially Sy 2016 *Touro Law Review* 647-677 and Uniform Law Commission "National Conference of Commissioners on Uniform State Laws" for a detailed discussion and critique of the RUFADA Act.

argument was countered in paragraph 3.2.2.2 by authors such as McDavitt,[487] who point to the non-perishability of digital assets. McDavitt states that this characteristic of eBooks and digital music is what complicates the inheritability or transfer of these items. The approach to dealing with these types of digital assets in the same manner as traditional assets was also examined by Cobb.[488] She refers to an attempt made by the United States Congress to allow for the transfer or resale of digital assets. The Benefit Authors Without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003 aimed to facilitate this. It tried to establish a process whereby an eBook or digital music could be transferred in the event that the owner did not retain a copy or access to a copy of the digital assets. It also stated that if a TOS or other contract limited this right, the clause stipulating the limitation would be unenforceable. This Act was rejected, however, as the practicalities of regulating the deletion of the digital assets before transfer was affected were unclear.

Cobb[489] suggests a possible solution to the non-perishability of digital assets. She states that because a "used" digital asset is no different from a "new" one, a possible resale royalty scheme could be useful. She suggests that such a scheme could provide an adequate solution to protecting the rights of copyright holders in a unique market filled with non-perishable formats. It is recommended that such a royalty scheme should form part of any legislation adopted by the South African legislator with regards to these types of digital assets. Although the BALANCE Act was rejected in the USA it seems as if its approach is the best suited to dealing with these types of digital assets. It again adopted a focussed approach specifically aimed at a certain type of digital asset. As with emails, this focussed approach, which would require wide definitions as to what such assets would comprise, is recommended as a way of dealing with digital assets in a deceased estate. Opening this right to the transfer of these digital assets would satisfy the fundamental right to freedom of testation granted to the user by South African law.

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487 McDavitt 2016 http://www.nlrg.com/trusts-estates-wills-and-tax-law-legal-research-copy/estates-the-inheritability-of-digital-music-files.

488 Cobb 2014 *Duke Journal of Comparative and International Law* 552-553.

489 Cobb 2014 *Duke Journal of Comparative and International Law* 552-553.

5.3 Conclusion

Throughout this dissertation it has been stated that access to digital assets such as email, and the ability to transfer other digital assets such as eBooks and digital music are at the heart of the inability to bequeath a digital estate. Through research it became clear that in the case of emails, or items where the user obtains rights in the content such as copyrights, the only obstacle is to provide access to the relevant account needed to access copies of such work. It is again stated that the approach adopted by the USA in the RUFADA Act seems to be the best fit as it does not try to limit the entire scope of digital assets but rather focusses its definition of and approach to digital assets on a specific goal: that is, the administration of a deceased estate. It furthermore acknowledges the rights of users to bequeath their digital assets in terms of a will.

When considering eBooks and digital music, digital assets which display the characteristics of traditional assets, the position is both simple and complex. The simplicity comes from the licence agreement, which explicitly limits the user in his rights and ends any rights assigned to the user upon death. On the other hand, as argued by Erlank,[490] the actions of service providers seem to mirror those of the sellers of traditional assets and as a result should be assigned real world rights. Writers such as Groskopf[491] argue against this by stating that trying to assign traditional property rights to these digital assets would be complex and pose significant technical, economic, and political challenges. He also states that a significant part of the global economy is based on licensing intangible things and that unwinding this current position could take decades. Ultimately, until the South African legislator adopts an approach to dealing with digital assets in a deceased estate, a user is limited in his ability to bequeath digital assets by means of a will, either by way of limited access to the digital assets or as a result of licensing agreements imposed on him by way of TOS and privacy policies.

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490 See paragraph 2.4.2.

491 Groskopf 2016 https://qz.com/766535/terms-of-service-agreements-are-destroying-the-concept-of-ownership-for-digital-goods/.

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