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INTRODUCTION

On April 20, 2005, Judge Eugene Arthur Moore of the Probate Court of Oakland County, Michigan, ordered Yahoo!, Inc. (Yahoo), an electronic mail (e-mail) service provider, to deliver the contents of any and all e-mail, documents, and photos stored in the account of Justin Ellsworth, a deceased Yahoo user, to his father via CD-ROM and written format.[1] On May 20, 2005, Justin's father, John Ellsworth, reported to the court that he had received a CD-ROM and three bankers boxes of Justin's e-mail.[2] Among the more than 10,000 pages of material sent by Yahoo, Justin's father found correspondence from people he had never even heard of.[3]

When Justin Ellsworth initially established his account with Yahoo, he chose a password to protect his account from unauthorized access.[4] Given the events following his death, it is clear that Justin never shared his password with his father.

Additionally, in order to establish his account, Justin agreed with Yahoo's terms of service, which provide in relevant part:

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1. Order to Produce Information, *In re* Estate of Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. Mar. 4, 2005).

2. Inventory, *In re* Estate of Ellsworth No. 2005-296, 651-DE (Mich. Prob. Ct. May 11, 2005). The inventory does not indicate whether the e-mail was solely from the account inbox, or also contained sent e-mail, drafts of e-mail, or e-mail in a trash folder. E-mail in a trash folder would present an even stronger case for barring access under my analysis in Part IV. *See* Paul Sancya, *Yahoo Will Give Family Slain Marine's E-mail Account*, USA TODAY (Apr. 21, 2005, 12:49 PM), http://usatoday30.usatoday.com/tech/news/2005-04-21-marine-e-mail_x.htm?POE=TECISVA (noting that Yahoo said it would provide both incoming and outgoing messages).

3. Sancya, *supra* note 2.

4. *See Yahoo Terms of Service*, YAHOO!, http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html (last updated Mar. 16, 2012) ("You will receive a password and account designation upon completing the Yahoo Service's registration process. You are responsible for maintaining the confidentiality of the password and account and are fully responsible for all activities that occur under your password or account.").

> *No Right of Survivorship and Non-Transferability*. You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.[5]

Justin died on November 13, 2004,[6] at age twenty,[7] while serving in the armed forces of the United States in Iraq.[8] He was not married and did not have children.[9] He also did not have a valid Last Will and Testament when he died.[10] John Ellsworth, Justin's father, was appointed Personal Representative of Justin's estate[11] and sought access to the contents of his son's e-mail account.[12] Although it was widely reported in the press that he sought access to Justin's e-mail to create a scrapbook,[13] the Petition to Produce Information filed by John Ellsworth does not cite sentimental reasons for access. Instead, the petition states that the e-mail account "may contain information relating to the administration, settlement, and internal affairs of the Estate, including information that may be useful in determining the assets and liabilities of the Estate or for preparing tax returns or other documents for the

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5. *Id.* Because *In re Estate of Ellsworth* does not establish when Justin Ellsworth created his account, the precise wording of the terms he agreed to is unknown. However, Yahoo reserves the right to modify the terms without notice. *Id.*

6. Order of Formal Proceedings, *In re* Estate of Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. Jan. 13, 2005).

7. Petition for Probate and/or Appointment of Personal Representative, *In re* Estate of Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. Dec. 22, 2004).

8. Petition to Produce Information, *In re* Estate of Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. Apr. 20, 2005).

9. Testimony of Interested Persons, *In re* Estate of Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. Dec. 22, 2004).

10. Order of Formal Proceedings, *supra* note 6.

11. *Id.*

12. Petition to Produce Information, *supra* note 8.

13. *See, e.g.*, Ariana Eunjung Cha, *After Death, a Struggle for Their Digital Memories*, WASH. POST, Feb. 3, 2005, http://www.washingtonpost.com/wp-dyn/articles/A58836-2005Feb2.html. For the Ellsworth family-maintained website honoring Justin Ellsworth, see *Justin's Family Fights Yahoo Over Access to His E-mail Account*, http://www.justinellsworth.net/email/yahoofight.htm (last modified Dec. 18, 2006) [hereinafter *Justin's Family Fights Yahoo*] (containing links to more than thirty news articles that highlight sentimental reasons for access, such as creating a scrapbook and knowing what Justin Ellsworth was thinking during his final days). None of the articles mention ease of estate administration as the reason access was sought. *See, e.g.*, *id.*

decedent or the Estate."[14] Yahoo complied with the court order, despite the violation of its terms of service, but stated that it would "continue to uphold [its] privacy commitment to [its] users."[15]

In the nine years following the *Ellsworth* case, no other case regarding access to decedents'[16] e-mail has garnered public attention the way the *Ellsworth* case did;[17] however, there is now substantial national momentum in state legislatures to grant personal representatives access to decedents' e-mail as a part of a larger grant of access to all digital assets.[18] In this Article, I make the case against such a default rule granting access to decedents' e-mail.

In the past nine years, Yahoo has not softened its position towards those who seek access to a Yahoo user's e-mail post mortem.[19] However, the other two largest e-mail service providers have more lenient policies on access to decedents'

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14. Petition to Produce Information, *supra* note 8.

15. *Dead Marine's E-mail Raises Legal Issues*, FOX NEWS.COM (Apr. 22, 2005), http://www.foxnews.com/story/2005/04/22/dead-marine-e-mail-raises-legal-issues/.

16. I use the term "decedent" to refer to a person who dies testate (with a valid Last Will and Testament) or intestate (without a valid Last Will and Testament). I use the term "personal representative" to refer to an executor or administrator of an estate, duly appointed by a probate court. "Access" means electronic copies of account contents; no one is arguing that a personal representative should be able to continue to use the account, although in at least one case, the family of the deceased wanted access to the e-mail address book so that survivors could contact the deceased's friends through their own accounts. *See* Ajemian v. Yahoo!, Inc., 987 N.E.2d 604 (Mass. App. Ct. 2013).

17. *Cf.* Cha, *supra* note 13 (describing similar circumstances regarding two other deceased members of the armed forces, but noting that the resolution of the disputes is unknown).

18. *See* GGTM Law, *Proposed Legislation Would Allow Personal Representatives Access to Online Accounts*, GIELOW, GROOM, TERPSTRA & MCEVOY (May 17, 2013), http://ggtmlaw.com/proposed-legislation-would-allow-personal-representatives-access-to-online-accounts/; KSE FOCUS, *States Examine Laws Governing Digital Accounts After Death*, CONGRESS.ORG (June 13, 2013), http://congress.org/2013/06/13/states-examine-laws-governing-digital-accounts-after-death/; *see also Decedents' Estates,* SACRAMENTO COUNTY PUB. L. LIBR., http://www.saclaw.lib.ca.us/pages/decedents-estates.aspx#encyclopedias (last updated Oct. 2013) (explaining that "decedent" refers to anyone who has died, whether with a will (testate) or without a will (intestate) and "personal representative" is a broad term that includes both executors of testate estates and administrators of intestate estates.).

19. *Yahoo Terms of Service*, *supra* note 4 (showing that the termination-upon-death provision was not modified as of March 16, 2012, and remains in place at the time of this writing).

e-mail.[20] In Part I of this Article, I examine the service providers' perspectives on access to decedents' e-mail.

Commentators are overwhelmingly supportive of access by personal representatives.[21] They typically position Internet service providers, those providers' terms of service, and secret passwords chosen by the deceased as stumbling blocks to efficient estate administration, the preservation of unique and irreplaceable sentimental and historical data, and the transfer of valuable property into the hands of deserving family members.[22] I explore these arguments for access in Part II.

Beginning with Connecticut in 2005, seven states have enacted statutes granting personal representatives some level of access to decedents' digital assets, including e-mail.[23] As of October 2013, about a dozen additional states—including Justin Ellsworth's home state of Michigan—have pending legislation that grants personal representatives access to decedents' e-mail.[24] Additionally, in January 2012, the Uniform Law Commission created a committee to "study the need for a feasibility of state legislation on fiduciary powers and authority

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20. *See My Family Member Died Recently/Is in Coma, What Do I Need to Do?*, MICROSOFT COMMUNITY (Mar. 15, 2012), http://answers.microsoft.com/en-us/outlook_com/forum/oaccount-omyinfo/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6 ("The Microsoft Next of Kin process allows for the release of Outlook.com contents . . . to the next of kin of a deceased or incapacitated account holder and/or closure of the Microsoft account, following a short authentication process."); *Accessing a Deceased Person's Mail*, GOOGLE, https://support.google.com/mail/answer/14300?hl=en (last visited Feb. 15, 2014) ("The application to obtain email content is a lengthy process with multiple waiting periods. If you are the authorized representative of a deceased person and wish to proceed with an application to obtain the contents of a deceased person's Gmail account, please carefully review the following information regarding our two stage process . . . .").

21. *See infra* Part II.

22. *See, e.g.*, Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns a Decedent's E-mails: Inheritable Probate Assets or Property or the Network?*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 281, 291–97 (2007); Charles Herbst, *Death in Cyberspace*, RES GESTAE, Oct. 2009, at 16, 18; Michael Walker & Victoria D. Blachly, *Virtual Assets*, *in* REPRESENTING ESTATE AND TRUST BENEFICIARIES AND FIDUCIARIES 175, 182 (ALI-ABA ed., 2011).

23. See *infra* Part III for discussion, and see reprint of statutes at the end of this Article. The seven states are Connecticut, Idaho, Indiana, Nevada, Oklahoma, Rhode Island, and Virginia.

24. See *infra* Part III for pending legislation.

to access digital information."[25] The committee is now operating with the mission to draft an act that "will vest fiduciaries with at least the authority to manage and distribute digital assets, copy or delete digital assets, and access digital assets,"[26] and has developed a working draft that grants personal representatives access to password-protected e-mail accounts of the deceased (the Draft Uniform Act).[27] I examine the current laws, legislation, and Draft Uniform Act in Part III.

In Part IV, I highlight the problems with, and new issues raised by, the access laws, proposed laws, and the Draft Uniform Act, and explore the problems with the arguments for access to decedents' e-mail.

I then assert that the commentary, statutes, and proposed legislation fail to adequately consider decedents' intent, or probable intent, which is the bedrock of estate jurisprudence. I argue that storing e-mail in a password-protected account, coupled with nondisclosure of that password by the deceased, is an exercise of a decedent's right to destroy his or her own property. Further, I maintain that state law and the Draft Uniform Act granting access to decedents' e-mail inappropriately infringe upon this right. I conclude in Part V with a recommendation for an alternative default rule.

I. PROVIDERS' PERSPECTIVES ON ACCESS TO DECEDENTS' E-MAIL

The issue of access arises in situations where a decedent did not share his or her password, and the decedent's personal representative, heirs, or beneficiaries contact the decedent's e-mail service provider to request access.[28]

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25. UNIF. LAW COMM'N, MIDYEAR MEETING OF THE COMMITTEE ON SCOPE AND PROGRAM MINUTES 5 (2012), *available at* http://www.uniformlaws.org/shared/docs/scope/ScopeMinutes_012012.pdf.

26. *Fiduciary Access to Digital Assets*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets (last visited Feb. 15, 2014).

27. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, FIDUCIARY ACCESS TO DIGITAL ASSETS ACT 6–7 (Proposed Draft Mar. 3, 2014) [hereinafter MARCH 2014 DRAFT UNIFORM ACT], *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014mar_FADA_Mtg%20Draft.pdf.

28. *Dead Marine's E-mail Raises Legal Issues*, *supra* note 15.

Google, Inc., Yahoo, and Microsoft, Inc., are the leading e-mail service providers,[29] and they operate Gmail, Yahoo, and Outlook.com,[30] respectively. While all three service providers disclaim ownership of e-mail account content to some degree in their respective terms of service, the service providers differ in their policies concerning access to e-mail after an account holder's death.

A. CONTENT IS THE PROPERTY OF THE DECEDENT

All three e-mail service providers declare in their respective terms of service that the service provider does not own the content provided by the user—the content belongs to the user.[31] Yahoo simply states, "Yahoo does not claim ownership of Content you submit or make available for inclusion on the Yahoo Services."[32] Outlook.com's terms of service provide: "Except for material that we license to you that may be incorporated into your own content (such as clip art), we do not claim ownership of the content you provide on the services. Your content remains your content, and you are responsible for it."[33] The Gmail terms of service indicate to the user: "You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours."[34]

The Gmail terms of service (perhaps unintentionally) highlight an important point: "e-mail" is really several different kinds of property. When a person sends an e-mail, he retains a copyright in that literary digital transmission.[35] A *copy* of the copyrighted work is generally maintained in the creator's "sent

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29. Mark Brownlow, *E-mail and Webmail Statistics*, E-MAIL MARKETING REP., http://www.e-mail-marketing-reports.com/metrics/e-mail-statistics.htm (last updated Dec. 2012).

30. Hotmail was merged into Outlook.com. *See Hotmail*, MICROSOFT, http://windows.microsoft.com/en-us/hotmail/hotmail-help (last visited Feb. 15, 2014).

31. *See Google Terms of Service*, GOOGLE, http://www.google.com/intl/en/policies/terms/ (last modified Nov. 11, 2013); *Microsoft Services Agreement*, MICROSOFT, http://windows.microsoft.com/en-us/windows-live/microsoft-services-agreement (last updated Aug. 27, 2012); *Yahoo Terms of Service*, *supra* note 4.

32. *Yahoo Terms of Service*, *supra* note 4.

33. *Microsoft Services Agreement*, *supra* note 31.

34. *Google Terms of Service*, *supra* note 31.

35. *See* Darrow & Ferrera, *supra* note 22, at 284–91 (discussing copyright law and e-mail).

e-mail" folder.[36] The recipient of the e-mail then also receives a copy of the copyrighted work in his or her e-mail inbox.[37] Thus, a decedent's "e-mail" consists of copyrighted work, copies of copyrighted work, and copies of others' copyrighted works. It seems clear from the providers' policies above that the *copyright* is indeed retained by the user.[38] After the user's death, the user's estate controls the copyright to any e-mails he or she authored.[39] For instance, a pen pal of Justin Ellsworth could not publish a book that includes e-mail authored by Justin Ellsworth without his estate's permission.[40]

The property right in the *copyright* is discrete from the property right in the *copy* of the copyrighted work.[41] The debate over access to e-mail is not about the copyright held by decedents' estates; it is about the copies.[42] Although it might be more difficult for heirs or beneficiaries to reap financial benefit from the copyright without access to a copy of the e-mail, this is also the case with tangible letters.[43] For example, when I write a letter and send it through the mail, the recipient has the only copy of my copyrighted work, and in order for my family to reap financial benefit from my letter, the recipient must produce the copy.

Looking at the language in the terms of service above, it is unclear whether the providers are acknowledging that the copyright belongs to the user, or that the copyright *and* the copies of the copyrighted works also belong to the user. But even if the providers acknowledge that the copies belong to the user, the providers' policies (in the terms of service contract with the user and elsewhere) limit the right to access those copies after the user's death in different ways.

The three providers approach the death of the user in markedly different policies. Yahoo's terms of service are the most explicitly anti-access. They state:

> *No Right of Survivorship and Non-Transferability*. You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your

36. *Id.* at 289–90.
37. *Id.* at 290.
38. *Id.* at 288.
39. *Id.* at 292–93 (finding that e-mail provider terms of service are unlikely to constitute a copyright transfer from the deceased to the provider).
40. This is an illustrative hypothetical example.
41. Darrow & Ferrera, *supra* note 22, at 298.
42. *Id.* at 293.
43. *Id.* at 294.

> death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.[44]

Microsoft's policy is not contained in its terms of service, but instead in a question and answer forum for users. This policy grants the greatest possibility for access, by a variety of people:

> The Microsoft Next of Kin process allows for the release of Outlook.com contents, including all emails and their attachments, address book, and Messenger contact list, to the next of kin of a deceased or incapacitated account holder and/or closure of the Hotmail account, following a short authentication process. We cannot provide you with the password to the account or change the password on the account, and we cannot transfer ownership of the account to the next of kin. Account contents are released by way of a data DVD which is shipped to you.[45]

The answer continues by explaining that to begin the Next of Kin process, a person seeking access to the contents of an Outlook.com account will need the decedent's death certificate, "a [d]ocument showing that you are the user's next of kin and/or executor or benefactor [sic] of their estate,"[46] photo identification, the approximate date when the account was created and when it was last accessed, and the e-mail address or addresses, the first and last name, date of birth and city, state, and zip code that the account holder used when creating the account.[47] The instructions further note that if the account has been inactive more than thirteen months, the account itself is deleted in most cases and access to content will be impossible.[48] Finally, Microsoft cautions next of kin "that we can only allow a total of three (3) attempts to pass the verification process."[49]

Like Microsoft, Gmail's policy appears in a help forum and does not appear in the terms of service to which users agree.[50] Unlike Microsoft, however, Google indicates that the process is lengthy with "multiple waiting periods" and access to content is not guaranteed.[51] "If you need access to the Gmail account content of an individual who has passed away, in rare cases we

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44. *Yahoo Terms of Service*, *supra* note 4.
45. *My Family Member Died Recently/Is in Coma, What Do I Need to Do?*, *supra* note 20.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *See Accessing a Deceased Person's Mail*, *supra* note 20.
51. *Id.*

may be able to provide the contents of the Gmail account to an authorized representative of the deceased person."[52]

In addition to identifying information, a person must submit a copy of an e-mail (with full header information) that was sent from the decedent's e-mail account to the submitter's e-mail account.[53] Google warns that "[a]fter a review, you will be notified by e-mail and informed whether we will be able to move beyond Part 1 to the next steps of the process. In some cases, this waiting period may take up to a few months."[54] Further, "[i]f we are able to move forward based on our preliminary review, we will send further instructions outlining Part 2. Part 2 will require you to get additional legal documents, including an order from a U.S. court and/or additional materials."[55]

In 2013, Google added an additional feature that Gmail users may access through Gmail settings: inactive account manager.[56] A Gmail user may add up to ten people ("trusted contacts") who are notified after the account is inactive for a certain period of time chosen by the user; if the user chooses to share data with any or all of the trusted contacts, they will be verified and given three months to download the data shared with them.[57]

Thus, while it seems clear that after a user's death, copyright in e-mail written by the user belongs to the user's estate, providers' policies with regard to copies are murky and varied. Yahoo's strict "no access" policy appears in the terms of service agreed to by the user, but Microsoft's and Google's more lenient policies are hidden in online question and answer forums.

B. ACCESS VIOLATES THE PRIVACY OF THE DECEDENT

To justify the limitations on access, Yahoo and others deny access based on a broad concern over the "privacy" of the

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Inactive Account Manager*, GOOGLE, https://www.google.com/settings/account/inactive (lasted visited Jan. 27, 2014).
57. *Id.*

decedent.[58] Although generally a right to privacy does not extend past death, the Internet e-mail providers' reference to "privacy" may be shorthand for the idea that the account holder contracted with the service provider to protect the privacy of the account, and the contract to protect privacy survives the death of the account holder.[59]

In a letter to the chair of the committee working on the draft Fiduciary Access to Digital Assets Act (the Draft Uniform Act),[60] two industry associations[61] more fully describe the providers' concerns with privacy in the context of a critique of the Draft Uniform Act. They cite the Federal Stored Communications Act[62] (part of the Electronic Communications Privacy Act), which strictly limits the ability of e-mail service providers to disclose the content of their users' e-mail. The letter explains:

> It is important to understand that fiduciary access to the contents of electronic communications—as distinct from the contents of paper records—is governed by a federal statute called the Electronic Communications Privacy Act ("ECPA"), which imposes sharp limits on Internet companies' ability to disclose the *contents* of communication. The contents of subscriber communications may not even be disclosed by an Internet company in response to judicial process in civil litigation. While ECPA contains limited exceptions that would allow disclosure of the contents of subscriber communication, whether those exceptions allow fiduciary access is an entirely unsettled area of law.[63]

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58. *See Justin's Family Fights Yahoo, supra* note 13. In the more than thirty articles posted on the family-maintained website, Yahoo is consistently quoted as having concern for its users' privacy. *See id.*

59. Darrow & Ferrera, *supra* note 22, at 314 ("On the other hand, while a common law cause of action for invasion of privacy may cease upon death, general freedom of contract principles suggest that it may still be possible to create a contractual right of privacy which is effective to protect private information of deceased individuals.").

60. Letter from Steve DelBianco et al., Exec. Dir., NetChoice, to Suzanne B. Walsh, Unif. Law Comm'n (July 8, 2013) [hereinafter DelBianco Letter], *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013jul_FADA_NetChoice_Szabo%20et%20al_Comments.pdf. This draft act is discussed in Part III.C.

61. *Id.* ("On behalf of NetChoice, a trade association of leading e-commerce businesses, and the State Privacy & Security Coalition, which is comprised of 20 leading communications, technology and media companies, we submit the following comments . . . .").

62. 18 U.S.C. §§ 2701–2712 (2012).

63. DelBianco Letter, *supra* note 60.

The exceptions referred to above appear in (b)(1) and (b)(3) of § 2702.[64] The first exception allows providers to divulge contents "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient."[65] The providers caution that "there is no statutory language, legislative history or case law interpreting section 2702(b)(1) which clarifies the meaning of 'agent' and whether it would apply to a fiduciary of someone who has died."[66] Significantly, this exception refers only to an agent of the recipient or intended recipient; thus, it does not allow disclosure to an agent of the originator. In other words, even if the personal representative of the decedent is considered an agent of the decedent under this federal statute, it would only be appropriate for the agent to access incoming messages (for which the decedent was the recipient) and not outgoing messages.

The second exception allows for the disclosure of e-mail content "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service."[67] Unlike the previous exception, "lawful consent" would allow access to both incoming and outgoing messages. In the view of these providers, consent should be established only "in a decedent's will or if the decedent expressed a preference to share account information after death in signing up for service."[68]

It is unwise, the providers assert, to "assume away" the ECPA issue by simply declaring that the fiduciary is an agent or acting with consent of the decedent.[69] The providers continue, "[a]s a factual matter, these decedents did not actually consent. What is more, because this is a federal law issue, it is far from clear that a state law enacted years after ECPA will control how a [sic] courts rule on whether consent may be assumed."[70] The providers endorse the format of a state law that allows access to the contents of communications only after a court designates the executor as an agent under the

64. 18 U.S.C. § 2702(b)(1), (3).
65. 18 U.S.C. § 2702(b)(1).
66. DelBianco Letter, *supra* note 60.
67. 18 U.S.C. § 2702(b)(3).
68. DelBianco Letter, *supra* note 60.
69. *Id.*
70. *Id.*

ECPA *and* orders that the estate indemnify the provider for all liability under the order.[71]

II. ARGUMENTS FOR ACCESS TO DECEDENTS' E-MAIL

Access to password-protected e-mail is part of a larger debate[72] about access to all of decedents' digital property.[73] This Article is limited to a discussion of password-protected e-mail, but many of the arguments are the same for other property.[74]

Commentators use a variety of arguments to justify access to decedents' e-mail accounts. The arguments can be grouped together in two main categories: (A) that access will ease the burden of estate administration;[75] and (B) that e-mail is property of the decedent—either sentimental and irreplaceable, or valuable, or both—and the decedent's family has a right to inherit that property.[76]

A. ACCESS REQUIRED TO EASE THE BURDEN OF ESTATE ADMINISTRATION

Estate planning practitioners, weighing in on access, commonly argue that access to decedents' e-mail is necessary for an orderly administration of an estate; in fact, this was the argument that the lawyer for the Ellsworth administrator used in his Petition for Access.[77] In materials prepared for an ALI/ABA continuing legal education seminar, the authors describe security measures on password-protected accounts as creating a "serious dilemma" when the account holder dies.[78] Similarly, a practitioner writing for a publication of the Indiana State Bar Association describes three hypothetical situations where a person could find themselves in a "legal thicket" without access to a decedent's e-mail account.[79]

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71. *Id.*; *see, e.g.*, R.I. GEN. LAWS ANN. § 33-27-3 (West 2011).

72. Also part of the debate is whether trustees, court-appointed conservators or guardians of the property, and/or agents under powers of attorney should be granted access; while many of the arguments are the same, access by other fiduciaries is beyond the scope of this Article.

73. *See, e.g.*, UNIF. LAW COMM'N, *supra* note 25.

74. *See, e.g.*, Darrow & Ferrera, *supra* note 22, at 310–11 (comparing the law of safe deposit boxes).

75. *See* Walker & Blachly, *supra* note 22, at 184–85.

76. *See Dead Marine's E-mail Raises Legal Issues*, *supra* note 15.

77. Petition to Produce Information, *supra* note 8.

78. Walker & Blachly, *supra* note 22, at 182.

79. Herbst, *supra* note 22, at 18.

Another article highlights "the significant disruption that might result if heirs are denied access to accounts."[80]

As I will discuss later, the comments in the Draft Uniform Act indicate that this justification is the focus of the drafting committee.[81]

B. ACCESS REQUIRED BECAUSE E-MAIL IS THE PROPERTY OF THE DECEDENT

The second type of justification for access to decedents' e-mail is rooted in the idea that e-mail is property of the decedent and thus subject to distribution to heirs or beneficiaries.[82] Because the debate over access to e-mail involves the copies of the e-mail and not the copyright,[83] when I refer to "e-mail," "content," or "e-mail content," I am referring to the copies and not to the copyright.

It seems clear that the e-mail is the property of its creator. Despite ambiguous language, the e-mail service providers do not appear to claim to own the e-mail; they merely assert that the terms of service contracts agreed to by users modify those users' rights in that property.[84]

Additionally, at least one federal district court has ordered a personal representative to obtain content from a decedent's e-mail account and justified the order by asserting that the personal representative has control over all of the decedent's property, including e-mail.[85] In a 2013 Massachusetts case, the

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80. Darrow & Ferrera, *supra* note 22, at 308.

81. *See infra* Part III.C.

82. A beneficiary takes the property of a decedent's estate under a Last Will and Testament; an heir takes under the applicable statute of descent and distribution in intestacy. DANAYA C. WRIGHT, THE LAW OF SUCCESSION: WILLS, TRUSTS, AND ESTATES 5 (2013).

83. *See supra* Part II.A.

84. *See, e.g.*, *Yahoo Terms of Service*, *supra* note 4. Under the "Member Conduct" portion of the terms of service, Yahoo states that content transmitted is "the sole responsibility of the person from whom such Content originated. This means that you, and not Yahoo, are entirely responsible for all Content that you upload, post, e-mail, transmit, or otherwise make available via the Yahoo services." *Id.* However, in the section titled "General Practices Regarding Use and Storage," Yahoo does reserve the right to alter the general practices and set limits in regards to the services they offer. *Id.*

85. *See In re* Air Crash, Nos. 09-md-2085, 09-CV-961S, 2011 WL 6370189, at *5–6 (W.D.N.Y. Dec. 20, 2011) (ordering Plaintiff, the decedent's representative, to produce any of the decedent's electronic communications to Defendant). *See generally In re* Air Crash, 798 F. Supp. 2d 481 (W.D.N.Y. 2011) (making choice-of-law determinations to govern the broader airplane crash litigation related to the above Decision and Order).

issue of whether the contents of the e-mail are property of the decedent's estate was remanded to the probate court.[86] Finally, the content of e-mail is likely to be considered property of a decedent for estate tax purposes.[87]

The strongest legal argument is made by Professors Darrow and Ferrera, who argued in 2007 that "e-mail . . . has not been given sufficient legal protection as an inheritable probate asset."[88] To justify access to e-mail, Darrow and Ferrera turn to the law of bailment, comparing e-mail held by an e-mail service provider to goods stored in a warehouse or in a safe deposit box.[89] This analogy works beautifully to establish that the contents of e-mail accounts are the property of the owner of the account and that only possession is being transferred to the e-mail service provider.[90] Darrow and Ferrera then compare an heir without a password to the e-mail account to an heir who cannot locate the warehouse receipt or key to the safe deposit box—in the latter cases, the heirs can compel return of the property.[91]

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86. *See* Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 615–16 (Mass. App. Ct. 2013). As of October 21, 2013, an order has not been issued in the probate and family court. Yahoo argued that the Stored Communications Act prevents disclosure of the contents of e-mail. *Id.* at 615; *see supra* Part I.B.

87. *See* Abigail J. Sykas, *Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?*, 25 VT. L. REV. 911, 926 & n.144 (2001) (mentioning that the IRS taxed an estate when the executor destroyed valuable literary work of the decedent at her request); *see also* Darrow & Ferrera, *supra* note 22, at 311–12 (arguing that e-mail is property that should be accounted for when determining the gross estate). Some argue that digital property may be economically valuable. While this may be true of other digital property such as eBay accounts, frequent flyer miles or points, photographs, or in-game World of Warcraft-type property, the value in e-mail, if any, is in the copyright and not the copies. As a result, this discussion focuses on the argument that e-mail possesses significant non-economic value. *See generally* Daniel Gould, Virtual Property in MMOGs (June 2008) (unpublished manuscript), *available at* http://virtuallyblind.com/files/reading-room/gould_virtual_property.pdf (discussing virtual property in online games).

88. Darrow & Ferrera, *supra* note 22, at 283.

89. *Id.* at 301–12.

90. *Id.* at 312 ("The fact that the e-mail is in the possession of a third party should make no difference, since the gross estate reflects the value of all property 'wherever situated.'" (internal citation omitted)).

91. *Id.* at 307 ("If the heirs are unable to find the key among the decedent's possessions, the bank or storage facility would not likely claim that the heirs have no right to the property.").

III. LEGISLATIVE LANDSCAPE

Seven states have enacted laws to grant some degree of access to personal representatives.[92] While I have identified four distinct generations of statutory language, the statutes have in common that they grant access without identifying whether access is justified by easing the burden of administration or because e-mail is the property of the decedent. Additionally, with the exception of Rhode Island, all the states ignore the issues posed by the Federal Stored Communications Act discussed in Part I.B. The statutes were largely enacted without significant public comment and perhaps without much public notice.[93]

A. CURRENT LAW

Connecticut was the leader in access legislation. Its law, effective in 2005, requires an e-mail service provider to provide "access to or copies of" the contents of the e-mail account to the personal representative upon written request of the personal representative or court order.[94] Rhode Island's law, similarly uses the "access to or copies of" language.[95] In 2007, Indiana instituted a similar statute, adding a provision requiring the custodian to maintain the stored information for at least two years after the request is made by the personal representative or the estate.[96] I refer to "access to or copies of" language as first-generation language.

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92. Connecticut, Idaho, Indiana, Nevada, Oklahoma, Rhode Island, and Virginia have all passed relevant legislation, with several other states considering similar laws. *See State-by-State Digital Estate Planning Laws*, EVERPLANS, https://www.everplans.com/tools-and-resources/state-by-state-digital-estate-planning-laws (last visited Feb. 19, 2014) (citing Virginia as having a "proposed law").

93. *See* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, FIDUCIARY ACCESS TO DIGITAL ASSETS ACT 1 (2013) (proposed draft) [hereinafter DRAFT UNIFORM ACT], *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013nov_FADA_Mtg_Draft.pdf ("Few holders of digital assets and accounts consider the fate of their online presences once they are no longer able to manage their assets."); *see also* Rob Walker, *Cyberspace When You're Dead*, N.Y. TIMES MAG. (Jan. 11, 2011), http://www.nytimes.com/2011/01/09/magazine/09Immortality-t.html?pagewanted=all&_r=0 (discussing the possible reasons why "[n]ot many people" have given these issues any serious thought).

94. CONN. GEN. STAT. ANN. § 45a-334a(b) (West 2013).

95. R.I. GEN. LAWS ANN. § 33-27-3 (West 2011).

96. IND. CODE ANN. § 29-1-13-1.1 (West 2007). "Custodian" means "any person who electronically stores the documents or information of another person." *Id.* § 29-1-13-1.1(a).

In 2010, Oklahoma enacted a statute that allows a personal representative to "take control of, conduct, continue or terminate" an e-mail account of a decedent "where otherwise authorized."[97] While language authorizing a personal representative to "take control" of an account or "continue" an account is significantly broader than the first-generation language that would allow an internet provider to merely provide copies of the contents of the account, Oklahoma added a significant limitation by requiring that access be "otherwise authorized."[98] This language has been interpreted to mean that a donative document must authorize access or a court must issue an order.[99] This is the second-generation language for access legislation.

Idaho led the third-generation of language with its 2011 law that uses the same broad "take control of, conduct, continue or terminate" second-generation language, but instead of the limiting "where otherwise authorized," Idaho does not require court authorization or confirmation.[100] This third-generation language is the broadest, allowing the most access (access cannot be satisfied merely by providing copies as is allowed under first-generation statutes) with the least authorization (does not need to be granted by the decedent or a court, and it is unclear under what circumstances a decedent or court may limit access).

Virginia's 2013 law is limited to the accounts of a deceased minor, but limits access if granting access is deemed contrary to express provisions in a will, trust instrument, power of attorney, or court order.[101] Although Virginia is alone in limiting access to accounts of minor decedents, the language granting access *unless* limited by the decedent or a court constitutes the fourth generation. Nevada's bill was introduced

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97. OKLA. STAT. ANN. tit. 58, § 269 (West 2010).

98. *See id.*

99. See New Jersey's interpretation in the comment at the end of A2943, 215th Leg., 1st Ann. Sess. (N.J. 2012) (statement), stating that "[i]t is the sponsor's intention to clarify that the executor or administrator is authorized to take necessary or permissible steps, which may include obtaining a court order, to access the contents of a decedent's online accounts."

100. *See* IDAHO CODE ANN. § 15-3-715(28) (West 2011); *id.* § 15-5-424(2) (providing such authority to conservators by making clear that a conservator "may act without court authorization or confirmation").

101. *See* VA. CODE ANN. § 64.2-110(A) (West 2013).

as a fourth-generation type of statute,[102] but the version signed into law authorizes only termination of the account by the personal representative.[103]

B. PENDING LEGISLATION

Access legislation is pending in about a dozen other states, and bills use second, third, and fourth-generation language.[104] A Maine bill merely directs the Probate and Trust Law Advisory Committee to conduct a review "of the legal impediments to the disposition of digital assets upon an individual's death or incapacity and develop legislative recommendations based on the review."[105]

New Hampshire and New Jersey use second-generation language like Oklahoma, allowing access "where otherwise authorized."[106] The Statement at the end of the New Jersey bill indicates that "[i]t is the sponsor's intention to clarify that the executor or administrator is authorized to take necessary or permissible steps, which may include obtaining a court order, to access the contents of a decedent's online accounts."[107] Bills in Delaware and Michigan are based on the permissive third-generation "take control of, conduct, continue, or terminate" language, and, like Idaho's statute, they do not require any

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102. S.B. 131, 2013 Leg., 77th Reg. Sess. (as introduced in Nev. on Feb. 18, 2013) ("Subject to such restrictions as may be prescribed in the will of a decedent or by an order of a court of competent jurisdiction, a personal representative has the power to *take control of, conduct, continue, or terminate* any account of the decedent . . . ." (emphasis added)).

103. S.B. 131, 2013 Leg., 77th Reg. Sess. (Nev. 2013) (enacted) ("This bill authorizes a personal representative to direct termination of any account of the decedent . . . .").

104. Jim Lamm, *August 2013 List of State Laws and Proposals Regarding Fiduciary Access to Digital Property During Incapacity or After Death*, DIGITAL PASSING (Aug. 30, 2013), http://www.digitalpassing.com/2013/08/30/august-2013-list-state-laws-proposals-fiduciary-access-digital-property-incapacity-death/ (containing links to legislation and pending legislation as of August 2013). Mr. Lamm notes that California, Colorado, Florida, Missouri, and Ohio have considered or are considering access legislation, but no links are provided, nor were these bills discovered in a Westlaw search. The author wishes to thank Mr. Lamm for links to status reports for pending legislation.

105. Legis. Doc. 850, 126th Leg., 1st Sess. (Me. 2013) (enacted).

106. *See* H.B. 116, 163d Gen. Ct., 2013 Sess. (N.H. 2013); A2943, 215th Leg., 1st Ann. Sess. (N.J. 2012).

107. A2943, 215th Leg., 1st Ann. Sess. (N.J. 2012) (statement).

authorization in a donative document or by the court.[108] Pennsylvania and Oregon are fourth-generation statutes that allow access unless access has been restricted by will or court order.[109]

Three different versions of access legislation were introduced in New York in 2013.[110] Legislation introduced in Massachusetts does not fit squarely within any cohort. Personal representatives can gain "reasonable access" after obtaining a court order, but access can be superseded by provisions in a decedent's will or opt-out options that show clearly that the decedent affirmatively declined to grant access.[111]

It is worth noting that all of the previous bills but one have failed to pass so far. Third-generation type bills in Maryland,[112] North Dakota,[113] and North Carolina[114] were rejected by a committee or the legislature. Additionally, after directing its

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108. *See* H.B. 396, 146th Gen. Assemb., 2d Reg. Sess. (Del. 2012); H.B. 5929, 96th Leg., 2012 Reg. Sess. (Mich. 2012); *see also* S. 293, 96th Leg., 2013 Reg. Sess. (Mich. 2013).

109. *See* S. 54, 77th Legis. Assemb., 2013 Reg. Sess. (Or. 2013) (explaining that a personal representative may administer an estate "except as restricted or otherwise provided by the will of the decedent . . . or by court order"); H.B. 2580, 196th Gen. Assemb., 2012 Reg. Sess. (Pa. 2012) ("A personal representative shall have the power, unless the personal representatives' authority has been restricted by will or by court order . . . .").

110. A823, 200th Leg., 2013 Reg. Sess. (N.Y. 2013); A6034, 200th Leg., 2013 Reg. Sess. (N.Y. 2013); A6729, 200th Leg., 2013 Reg. Sess. (N.Y. 2013).

111. S. 702, 188th Gen. Ct., 2013 Sess. (Mass. 2013) ("This paragraph shall not supersede language in the decedent's will to the contrary.").

112. S.B. 29, 2013 Gen. Assemb., 433d Sess. (Md. 2013); Senate Judicial Proceedings Comm., *Voting Record—2013 Session*, *S.B. 29* (Feb. 14, 2013), *available at* http://mgaleg.maryland.gov/2013RS/votes_comm/sb0029_jpr.pdf (reporting an "unfavorable" vote by the Senate Judicial Proceedings Committee).

113. H.B. 1455, 63d Leg. Assemb., 63d Reg. Sess. (N.D. 2013); *Bill Actions for HB 1455*, N.D. LEGIS., http://www.legis.nd.gov/assembly/63-2013/bill-actions/ba1455.html (last visited Feb. 22, 2014) ("[F]ailed to pass, yeas 20 nays 27.").

114. S. 279, 2013 Gen. Assemb., 2013 Reg. Sess. (N.C. 2013) (enacted). The bill passed, but without previously-included provisions affecting rights to digital assets in probate cases. *Compare id.*, *with* S. 279, 2013 Gen. Assemb., 2013 Reg. Sess. (as introduced in N.C. on Mar. 12, 2013), *available at* http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S279v0.pdf. As introduced, North Carolina's bill used first-generation language but with an important distinction that makes it a third-generation statute: instead of "access to or copies of," which would allow an e-mail service provider to send a CD rather than providing control of the account, North Carolina grants access to, *and* copies of, the contents of the account. *Id.*

Judiciary Committee to conduct a study and provide its findings and recommendations to the legislature or legislative counsel,[115] the Nebraska legislature has "indefinitely postponed"[116] consideration of a fourth-generation-style statute.[117]

C. THE DRAFT UNIFORM ACT

The stated purpose of the draft of the Fiduciary Access to Digital Assets Act (the Draft Uniform Act) is to "vest fiduciaries with the authority to access, manage, distribute, copy or delete digital assets and accounts."[118] It uses fourth-generation language for access by personal representatives and broadens access beyond personal representatives to conservators, agents under powers of attorney, and trustees.[119]

Five versions of the Draft Uniform Act have been posted to the Uniform Law Commission website.[120] The first version, dated November 13, 2012, was drafted as an amendment to the Uniform Probate Code and has been revised in both form and substance.[121] The second version, dated February 7, 2013, was drafted to be a stand-alone act, but has also been largely revised in substance.[122] The May 31, 2013 third version of the draft was released for comment before the July 2013 meeting of the National Conference of the Commissioners on Uniform State Laws.[123]

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115. *See LB783—Change Provisions Relating to Powers of Personal Representatives,* NEB. LEGIS., http://www.nebraskalegislature.gov/bills/view_bill.php?DocumentID=15623 (last visited Feb. 24, 2014) (referring the possible changes to the Judiciary Committee on January 9, 2012).

116. *Id.* (stating that the proposed changes are "indefinitely postponed" as of Apr. 18, 2012).

117. L.B. 783, 102d Leg., 2d Sess. (Neb. 2012) (allowing a personal representative to control a deceased person's account "unless the personal representative's authority has been restricted by will or by court order").

118. DRAFT UNIFORM ACT, *supra* note 93, at 1.

119. *See id.*

120. *See Fiduciary Access to Digital Assets*, *supra* note 26.

121. DRAFT UNIFORM ACT, *supra* note 93, at 1.

122. *See* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, FIDUCIARY ACCESS TO DIGITAL ASSETS ACT PREFATORY NOTE 1 (Proposed Draft Feb. 7, 2013), *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013feb7_FADA_MtgDraft_Styled.pdf ("While an earlier draft focused on amendments to existing uniform laws in this area, this draft is designed to be a stand-alone act.").

123. *See* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (Proposed Draft May 31, 2013) [hereinafter MAY 2013 DRAFT UNIFORM ACT], *available at*

The third version of the Draft Uniform Act began with definitions.[124] Significantly, a bracketed sentence to be considered by the drafting committee appeared after the definition of "digital property": "The term does not include the contents of an electronic communication."[125] This bracketed option was quite important; it demonstrates that the committee was considering the distinction in the Stored Communications Act between customer records and content of communication.[126]

The third version of the Draft Uniform Act also contained two alternative provisions for section 4. In the first (Alternative A), drafted to respond to concerns of Internet service providers,[127] personal representatives were authorized to "exercise control over digital property of the decedent" and gain access to content "to the extent not inconsistent with 18 U.S.C. Section 2702(b)(3)."[128] Like other fourth-generation statutes, access was limited as prohibited by will or unless otherwise prohibited by a court.[129] Because the consent requirement contained in § 2702(b)(3) is the hot button issue for the providers, including "to the extent not inconsistent with" language, and therefore leaving unclear who has authority to determine consistency or inconsistency, meant that Alternative A provided little clarity on the subject of access. In denying access under an Alternative A-style statute, service providers like Yahoo are likely to continue to rely on the fact that decedents do not explicitly consent to access by personal representatives. Alternative B was a more typical fourth-generation provision, which authorizes personal representatives to "access, manage, deactivate and delete the digital property of the decedent," unless otherwise limited by will, court order, or another state law.[130]

The service providers were able to influence the drafting committee to except contents of an electronic communication

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http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013AM_FADA_Draft.pdf.

124. *See id.* at 1–2.

125. *Id.* at 2.

126. *See* 18 U.S.C. § 2702(c) (2012) (defining "customer records" as information pertaining to a subscriber or customer that does not include contents of communication).

127. MAY 2013 DRAFT UNIFORM ACT, *supra* note 123, at 7–8. Information is contained under "Comments for the Committee."

128. *Id.* at 6.

129. *Id.*

130. *Id.* at 7.

from the definition of a digital asset in the fourth version of the Draft Uniform Act, dated October 22, 2013.[131] This fourth draft defines electronic communication[132] and differentiates a personal representative's authority over digital assets, records of electronic communication, and the contents of electronic communication.[133] While personal representatives may obtain digital assets and records of electronic communication,[134] they may only obtain contents of electronic communication "to the extent consistent with" the Stored Communications Act.[135] Once obtained, the personal representative is authorized to "access, manage, deactivate and delete" what is obtained.[136]

Similarly, section 4 of the fifth draft, dated March 3, 2014, allows a personal representative to "access . . . (2) the content of electronic communications . . . if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content."[137] Once a personal representative has satisfied the requirements of the Draft Uniform Act to request access, new language in section 9 directs a custodian to comply with the fiduciary's request for "access," "control," or "a copy"[138] of the asset within sixty days.[139] While the sixty day deadline is new, the language allowing access if it "is permitted" under federal law in the fifth

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131. *See* DRAFT UNIFORM ACT, *supra* note 93. "Digital Asset" under the fourth draft means:

> a) information created, generated, sent, communicated, received, or stored by electronic means on a digital device or system that delivers digital information, and includes a contract right; and b) an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information which the account holder is entitled to access.

Id. at 1.

132. The Act defines "electronic communication" as:

> [A] transfer of a sign, signal, writing, image, sound, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system. The term does not include wire or oral communication; any communication made through a tone-only paging device; or any communication from a tracking device.

Id. at 2.

133. *Id.* at 4.

134. *Id.*

135. *Id.*

136. *Id.*

137. MARCH 2014 DRAFT UNIFORM ACT, *supra* note 27, at 6–7.

138. *Id.* at 14.

139. *Id.* at 15.

draft[140] is not meaningfully different than the language in the fourth draft permitting access "to the extent consistent with" federal law.[141]

Section 8 of the fourth version of the Draft Uniform Act defines the authority that a fiduciary has over digital assets. Paragraph (a)(ii) declares that "[a] fiduciary with authority over digital assets or electronic communications of an account holder under this act . . . has the lawful consent of the account holder."[142] The comment following this section explains that this language is intended to ensure that fiduciaries fall under the "lawful consent" exception to the nondisclosure provisions of the Stored Communications Act discussed above.[143] That same section clarifies that "[t]he rights of the fiduciary exercising the account holder's authority are subject to . . . any applicable and enforceable terms of service agreement."[144] Significantly, the fifth draft altered section 8 to provide that

> any provision in a terms-of-service agreement that limits a fiduciary's access to the digital assets of the account holder under this [act] is void as against the strong public policy of this state, unless the limitations of that provision are signed by the account holder separately from the other provisions of the terms-of-service agreement.[145]

While attempting to eliminate the terms of the service agreement as evidence of a decedent's intent to limit access,[146] it seems likely that the service providers will continue to argue that the assumed consent[147] of the account holder to provide access is a violation of federal law. Thus, the current version of the Draft Uniform Act is not likely to provide greater access to e-mail content for fiduciaries as intended by the drafting committee.

As with the third draft, the fourth version provides little guidance on whether personal representatives will have access

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140. *Id.* at 7.

141. *See* DRAFT UNIFORM ACT, *supra* note 93, at 6.

142. *Id.* at 8.

143. *Id.* at 10.

144. *Id.* at 8.

145. MARCH 2014 DRAFT UNIFORM ACT, *supra* note 27, at 11.

146. Several Internet lawyers who commented on the draft do not believe this language goes far enough in requiring service providers to obtain decedent's intent to limit access. *See, e.g.*, Memorandum from Chris Kunz to Suzy Walsh & Naomi Cahn (Mar. 17, 2014), *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014mar17_FADA_Comments_Kunz.pdf.

147. MARCH 2014 DRAFT UNIFORM ACT, *supra* note 27, at 11.

to e-mail. In clarifying that access is subject to the terms of service agreements, including "to the extent consistent with" federal law language, and assuming consent on the behalf of the decedent, this draft does little more than highlight the murky waters of access to e-mail communication. Because the consent requirement contained in § 2702(b)(3) is the hot button issue for the providers, and they have asserted that assumed consent violates federal law,[148] the fourth version of the Draft Uniform Act will do little to allow greater access to e-mail content in states where it is adopted.

The comment after section 3 of the May 31, 2013 draft of the Uniform Act provided one very valuable point of clarity missing in the current state law and legislation. The comment notes that:

> This section distinguishes the authority of fiduciaries over digital property subject to this act from any other efforts to access the digital property. Family members or friends may seek access to the digital property of others, but such efforts are subject to other laws and are not covered by this act. Moreover, the fiduciary exercises authority only on behalf of the account holder.[149]

Additionally, the comment after section 8 of the most recent draft provides that "[t]he Act does not permit the account holder's fiduciary to override the TOSA [terms of service agreement] in order to make a digital asset or collection of digital assets 'descendible,' although it does preserve the rights of the fiduciary to make the same claims as the account holder."[150] This distinction is very important if it is included to clarify that this access is for ease of administration and not because the digital assets are decedents' property and therefore a part of the estate to be distributed. If access is limited to administrative purposes only, personal representatives and their advisors can avoid the messy choices regarding distribution described in my critique of state laws in Part IV.A.

148. *See supra* Part I.B.
149. MAY 2013 DRAFT UNIFORM ACT, *supra* note 123, at 4.
150. MARCH 2014 DRAFT UNIFORM ACT, *supra* note 27, at 13.

IV. CRITIQUE OF PROVIDERS' POLICIES, ACCESS LAWS, AND PRO-ACCESS ARGUMENTS

A. E-MAIL SERVICE PROVIDERS' POLICIES, STATE LAW, AND PROPOSED LAW

1. E-mail Service Providers' Policies

Assuming that the arguments made by NetChoice[151] and the State Privacy & Security Coalition[152] set out in their July 8, 2013 letter to the chair of the committee working on the Draft Uniform Act[153] accurately represent the industry's position on access to e-mail, Microsoft's Outlook.com policy is the most problematic among the three largest providers, and Google's Gmail inactive account manager is the most appropriate.

As set forth in the letter and discussed in Part I, the industry maintains that the Stored Communications Act prohibits divulging the contents of a communication unless it is with the "lawful consent" of the originator, an addressee, or an intended recipient of the communication.[154] The trade associations suggest that consent should not be assumed away, but should be explicitly granted in the decedent's will or by the user when signing up for service.[155]

Microsoft's Outlook.com policy, which allows the broadest access to a wide range of people, appears in a question and answer forum and not in the terms of service.[156] This is significant because there is no opportunity for consent by the decedent and very little chance the decedent would discover the policy granting access without searching for it. Thus, the user has not agreed to this term, and moreover, most Outlook.com

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151. *About Us*, NETCHOICE, http://netchoice.org/about/ (last visited Feb. 15, 2014) (showing that NetChoice members include Yahoo and AOL).

152. Kate Kaye, *Google, AOL and Others Make State Policy Coalition Official*, CLICKZ (Apr. 14, 2008), http://www.clickz.com/clickz/news/1709575/google-aol-others-make-state-policy-coalition-official. It is worth noting that Microsoft may not be a member of the State Privacy & Security Coalition, but Google and Yahoo are. *See id.*

153. DelBianco Letter, *supra* note 60.

154. 18 U.S.C. § 2702(b)(3) (2012).

155. *See* DelBianco Letter, *supra* note 60 ("Express consent can most likely be established in a decedent's will or if the decedent expressed a preference to share account information after death in signing up for service.").

156. *See generally My Family Member Died Recently/Is in Coma, What Do I Need to Do?*, *supra* note 20 (answering a user question regarding a deceased relative's account and outlining the "short authentication process" that is required).

users are probably completely unaware that all next of kin, executors, and beneficiaries of their estate could receive a CD of the content of their e-mail account within seven days of submitting a request.[157] Additionally, because many people may qualify as next of kin, executor, or beneficiary of an estate, many people could theoretically have access to the contents of a decedent's Outlook account. This may include, in an extreme circumstance, next of kin who have been specifically disinherited by a will, minors, or friends of the decedent.

Yahoo's policy, which provides for account termination upon the user's death,[158] does not allow for any access, even if a decedent's consent to access is clear (for example, when a decedent has included a provision in his or her will granting access).[159] Additionally, Yahoo's apparent operating procedure is to provide access (in the form of digital and paper copies) upon issuance of a court order.[160] The court order in the *Ellsworth* case did not conclude that Justin had consented to access.[161] So if Yahoo believes that it is subject to suit under federal law for "significant statutory damages and attorneys' fees by third parties who communicated with the decedent and whose communications are stored in the decedent's account,"[162] it is acting inconsistently when it complies with such a court order that offers no indemnity for any violation of the Stored Communications Act.[163]

Although Google's Gmail policy does not specify the reasons why an authorized representative may or may not be granted access,[164] the waiting periods and uncertainty may be

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157. *Cf. id.* (explaining Microsoft's next of kin process).

158. *See Yahoo Terms of Service*, *supra* note 4 ("You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death.").

159. *Id.* (explaining that upon receipt of a death certificate, the account may be terminated and all contents deleted).

160. *E.g.*, *Dead Marine's E-mail Raises Legal Issues*, *supra* note 15 (demonstrating Yahoo's compliance upon the issuance of a court order).

161. *See* Order to Produce Information, *supra* note 1 (ordering the production of content within the decedent's account without discussing consent, but documenting that the decedent died intestate).

162. DelBianco Letter, *supra* note 60.

163. *See* 18 U.S.C. §§ 2702(c)(1), 2703 (2012) (offering indemnity to service providers who comply with court orders, but limiting such indemnity to compliance with orders obtained by a government entity).

164. *See Accessing a Deceased Person's Mail*, *supra* note 20 (outlining the initial information required to "move beyond Part 1" of review, but stating that "[p]art 2 will require you to get additional legal documents").

enough to deter an authorized representative from seeking access, especially if access is desired for ease of administration purposes. Access that is granted, however, is almost certainly a violation of the Stored Communications Act for the same reasons discussed above for Outlook.com, i.e., the decedent did not consent and is likely unaware that access is a possibility.

The new "inactive account manager"[165] feature on Gmail is the only policy or process that is consistent with the industry's posture that consent is required by federal law. A user who finds and participates in the Gmail process has clearly indicated the circumstances under which he or she consents to access.[166] While most users are probably unaware of this new feature, among the current options, it is the only effective way to ascertain the intent of the decedent with regard to the contents of that particular account. Still, a number of issues remain. Will Google revise its access policy to require use of the inactive account manager and deny access otherwise? Will third-generation state laws that grant blanket access override a decedent's choice on the inactive account manager?

2. State Law

With the exception of Rhode Island, which requires that the personal representative obtain a court order declaring that the personal representative is the agent for the decedent and ordering the estate to indemnify the provider from all liability in complying with the order,[167] the state statutes ignore the issues raised by federal law.[168] This failure to address the federally-mandated duty of service providers to protect the content of their users' e-mail accounts places those service providers in the untenable position of complying with either

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165. *Inactive Account Manager*, *supra* note 56.

166. *See id.* ("You might want your data to be shared with a trusted friend or family member, or, you might want your account to be deleted entirely . . . . [W]e give you the option of deciding what happens to your data."). On the other hand, I am a Gmail user and do not wish for any trusted contacts to be notified or given access to the contents of my account at any time. The inactive account manager does not allow for an indication that access is not to be granted. *See id.*

167. *See* R.I. GEN. LAWS ANN. § 33-27-3 (West 2011).

168. And, as discussed in Part I.B, under 18 U.S.C. § 2702(b)(1) an agent is only entitled to the recipient's e-mail, so providing copies of e-mail messages that the decedent originated (i.e., the "sent mail" folder) under Rhode Island law is a violation of the Stored Communications Act. *See* 18 U.S.C. § 2702(b)(1) (2012).

federal or state law when access is requested by a personal representative.

Third-generation statutes, which allow personal representatives to "take control of, conduct, continue or terminate" e-mail accounts and do not carve out exceptions for when access may be limited,[169] will result in litigation when access has been limited by the decedent in a will, when signing up for or managing an e-mail account, or through the terms of service agreement. For instance, if a decedent participated in Gmail's inactive account manager feature, provided access to one individual, and was domiciled in a state with a third-generation-style statute, would the personal representative also be entitled to access the Gmail account, even though the decedent had the opportunity to provide access to such person and did not?

Fourth-generation statutes are an improvement because access can be limited in particular ways;[170] however, the means to limit access are too narrow. As technology evolves so quickly, consumers are constantly creating new accounts. To expect a person to revise his or her will each time a new account is created in order to limit access to that account is unrealistic and inefficient. A better statute would allow access to be limited by a user when signing up for the service or in managing his or her account. In the example above where Gmail's inactive account manager was used, the result under a fourth-generation access statute will be the same as under a third-generation access statute state.

Second-generation statutes, that allow for access "where otherwise authorized," do the most to discern whether the decedent consented to access in the way contemplated by the Stored Communications Act. However, even second-generation statutes allow access through a court order without requiring that the court make a finding that the decedent consented to access and include such a finding in the order.[171]

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169. *See, e.g.*, IDAHO CODE ANN. § 15-3-715(28) (West 2011) (establishing the "take control of, conduct, continue or terminate" language typical of third-generation statutes).

170. *See, e.g.*, H.B. 2580, 196th Gen. Assemb., 2012 Reg. Sess. (Pa. 2012) ("A personal representative shall have the power, unless the personal representatives' authority has been restricted by will or by court order . . . .").

171. *See, e.g.*, H.B. 116, 163d Gen. Ct., 2013 Sess. (N.H. 2013), A2943, 215th Leg., 1st Ann. Sess. (N.J. 2012) (noting that access may be authorized through court order, without explicitly requiring a finding of consent).

Providing access to decedents' e-mail without requiring a showing of decedents' intent is a way for legislators to remedy the cries of constituents who want to hear the last words of family members, as John Ellsworth shared in his story to the national media.[172] These stories are incredibly compelling, and often arise after tragic deaths like that of Justin Ellsworth. But in providing for access absent the explicit consent of the decedent (and for some, even in the face of explicit nonconsent), states place service providers between state and federal law with no way to satisfy both.

Additionally, because state statutes do not indicate which access-justifying theory is the basis for their law, it is unclear what personal representatives should do with the e-mail content once access is granted. Should the e-mail be destroyed, or should it be distributed to heirs or beneficiaries? A more detailed discussion of the issues surrounding whether the e-mail is distributed (and to whom) is in Sections B and C.

However awkward a position providers face under state law, this issue is dwarfed by state laws' lack of concern for a foundational (perhaps *the* foundational) principle of law governing transfers at death in this country—honoring decedents' intent.[173] In discussing the Oregon statute, a fourth-generation type, a practitioner in Ohio writes:

> By providing broad definitions, prohibiting destruction of assets, and releasing companies from liability for disclosure of information to an authorized representative who presents appropriate documentation, this proposed law strikes an appropriate balance between allowing a fiduciary the access he or she needs to efficiently administer an estate and addressing the custodian's concerns about protecting client privacy. As the law continues to evolve in this area, the Oregon proposal would be an excellent model for use across the country for legislation that will allow transfer of digital assets in a similar means to transfer of tangible ones.[174]

It is telling that decedents' interest or intent is not mentioned as even being on par with fiduciaries' or providers' interest. I will explore this issue more fully in Section C.

Finally, state laws shift an administrative burden (lack of access to e-mail) to e-mail service providers who must review court orders, requests, and credentials from personal

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172. *See* Cha, *supra* note 13.

173. *See infra* Part IV.B.

174. David Lenz, *Death and Downloads: The Evolving Law of Fiduciary Access to Digital Assets*, 23 PROB. L.J. OHIO 7, 11 (2012).

representatives, and then print e-mail messages, create a digital copy of e-mail messages, and/or provide a means to log on and access the account. Nearly ten years ago, then-dominant e-mail provider AOL told the press that it received "dozens" of requests per day for access to e-mail and had a full-time employee dedicated to handling those requests.[175] At least one commentator has suggested that the estate bear the cost of access, similar to the patient bearing the cost of obtaining a copy of his or her medical records.[176] That makes sense. Additionally, 18 U.S.C. § 2706(a) provides as follows:

> Except as otherwise provided in subsection (c), a governmental entity obtaining the contents of communications, records, or other information under section 2702, 2703, or 2704 of this title shall pay to the person or entity assembling or providing such information a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching for, assembling, reproducing, or otherwise providing such information. Such reimbursable costs shall include any costs due to necessary disruption of normal operations of any electronic communication service or remote computing service in which such information may be stored.[177]

State law should require, similar to a governmental entity's responsibility for the cost of obtaining records, that estates are responsible for the cost of obtaining e-mail records.

B. ACCESS REQUIRED TO EASE THE BURDEN OF ESTATE ADMINISTRATION

There are two problems with justifying access for the purpose of easing the burden of administration. First, access will not effectively ease the burden of administration in most cases.[178] Second, once a personal representative is granted access for administrative reasons, the personal representative will face a difficult decision about what to do with the contents of the e-mail account.[179]

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175. Anick Jesdanun, *Debates Rise over What Happens to E-belongings After Owners Die*, USA TODAY (Dec. 24, 2004, 12:15 AM), http://usatoday30.usatoday.com/tech/news/techpolicy/ethics/2004-12-24-data-after-death_x.htm.

176. Tyler G. Tarney, Note, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 CAP. U. L. REV. 773, 799–800 (2012).

177. 18 U.S.C. § 2706(a) (2012).

178. *See* Walker & Blachly, *supra* note 22, at 182–85 (outlining steps to be considered in administering virtual assets once access has been granted).

179. *See id.* at 184–85 (recognizing some of the technical and sentimental difficulties in dealing with and valuing digital assets).

The difficulties in administration without access to e-mail (and the ease of administration that would result from access to e-mail) are overstated. To reality-test the "serious dilemma"[180] that would occur upon the death of an American adult, I made a chart listing all of my digital assets (I am a good example of a person who conducts most of my business online). I receive my electronic (and paperless) account statements, and my bills are automatically paid from my bank account or by my credit card every month whenever possible. I also manage my family finances using an online application. I have eight e-mail accounts (six personal and two professional), two password-protected personal computers, a smartphone, and remote off-site backup for all those devices, plus music accounts and numerous social media accounts.

In administering my estate after my death, my personal representative will begin by identifying my assets and my debts. Supporters of access would argue that my e-mail contains key information needed to quickly ascertain those assets and debts. However, after reviewing the list of my digital property, it is clear that the most efficient means to a clear picture of my estate is *not* through my e-mail—it is through my wallet. By merely going through my wallet, my personal representative will know where I bank and with whom I have credit. After presenting the bank and the credit card companies with proper authority from the probate court, the bank and credit card companies will provide current and past account statements. Those statements will give my personal representative a nearly full picture of my assets and debts. My personal representative can fill in the remaining gaps by meeting with my employer and reviewing my tax return and supporting documents. In the meantime, assuming my credit cards and bank accounts are closed by my personal representative and, therefore, automatic bill payment is rejected, creditors will begin calling my smartphone, and my personal representative can cancel and transfer accounts at that time.

On the other hand, assuming access to my e-mail is granted by my state of domicile, a personal representative attempting to use my e-mail to ascertain my assets and debts will first need to contact my e-mail service provider with proper authority to gain access to my e-mail account. Upon

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180. *Id.* at 182.

satisfaction of the e-mail service provider, there will be a period of time before the service provider furnishes the personal representative with either physical or digital copies of e-mail messages, the headers of e-mail messages, or control of my e-mail accounts.[181] Upon obtaining access to my e-mail account,[182] my personal representative will have knowledge that other online financial accounts exist, but he or she will not have access to other online accounts (which have separate usernames and passwords that will not be discovered in e-mail messages). At this point my personal representative can either contact each account provider and present credentials for access, or he or she can close my bank account and credit cards as was done in the first scenario with no e-mail access.

The personal representative who relies on the wallet to identify assets and debts is likely to get the job done more quickly than, and just as effectively as, the personal representative who seeks access to e-mail. While commentators could dream up scenarios under which there would be lost opportunities because of a lack of access to a sole proprietor's e-mail account,[183] there is a lack of real-life examples of estate administration where access to e-mail would have made a significant difference in the execution of a personal representative's job. Additionally, the fourth version of the Draft Uniform Act allows a personal representative to access records of electronic communication of the decedent.[184] Because the information useful to a personal representative seeking to marshal assets is likely to be contained in the account records (such as e-mail addresses of the decedents' correspondents), access to content is likely to be irrelevant to a personal representative in a state that adopts this version of the Draft Uniform Act.

Access to e-mail is not a magic bullet that will make estate administration neat and tidy. To the contrary, a more complex administrative question will arise after access is granted. If

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181. *See supra* Part III (explaining that the statutes, legislation, and Draft Uniform Act provide for different types of access).

182. Once my personal representative has access of some nature, he or she may unfortunately discover that my account statements come not to an e-mail account that I use for correspondence, but to a separate e-mail account of which they would be unaware—back to square one. But for purposes of this example, I will assume that my primary e-mail account does in fact receive paperless account statements.

183. For example, an eBay power seller.

184. DRAFT UNIFORM ACT, *supra* note 93, at 4.

access is granted for ease of administration (rather than for the purposes of obtaining the e-mail property of the decedent), what duty does the personal representative have to distribute copies of the contents of the e-mail account to heirs or beneficiaries? Unless the access was granted purely for administrative purposes,[185] the personal representative will be faced with a difficult decision about what to do with the contents of the e-mail account. It is inexpensive to reproduce digital copies of e-mail messages once they are collected by the service provider, and as we know from reading the compelling story of John Ellsworth's quest for access to his son's e-mail, there is quite an emotional incentive to share the decedent's thoughts and words with those who loved him or her. Additionally, the disincentive to share access may appear low since there is no post mortem right to privacy,[186] and the personal representative is the individual who would enforce such a right anyway.

A personal representative who decides to distribute the contents of an e-mail account without guidance from a statute or court is vulnerable to a claim of breach of fiduciary duty or other claims by those who both favor and oppose distribution.[187] For example, in the *Ellsworth* case, the court did not limit the access for administrative purposes only, and, as a result, Justin's father presumably had the burden of distributing Justin's e-mail to all of his heirs.[188] While Justin's inbox may not have contained private e-mail messages from his divorced parents (his heirs), we must admit that many e-mail accounts do contain these sort of messages, and their distribution may upset family harmony. Thus, the personal representative is likely to face substantial pressure to distribute digital copies of e-mail messages to family members

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185. *Cf. id.* ("This section distinguishes the authority of fiduciaries, who exercise authority subject to this act only on behalf of the account holder from any other efforts to access the digital assets and electronic communications. Family members or friends may seek such access, but, unless they are fiduciaries, their efforts are subject to other laws and are not covered by this act.").

186. *See* RESTATEMENT (SECOND) OF TORTS § 652I cmt. b (1977) ("In the absence of statute, the action for invasion of privacy cannot be maintained after the death of the individual whose privacy is invaded.").

187. Those who favor distribution based on the argument that e-mail is property of the decedent will claim that the personal representative has not fully performed his duties if e-mail is not distributed. Those who oppose distribution may argue that their privacy was violated.

188. *See* Order to Produce Information, *supra* note 1.

of the decedent, but he or she also bears the enormous risk of upsetting personal relationships with the distribution of e-mail contents. An advisor to a personal representative in a state with an access law would be wise to instruct the personal representative to seek guidance from the court before either distributing or destroying e-mail.

So, while on first blush it may be assumed that access to a decedent's password-protected e-mail will ease the administrative burden for the personal representative, e-mail is not the most effective means to identify and access assets. Additionally, in allowing access to e-mail for administrative purposes, the personal representative is in a difficult position of determining how far to distribute the contents of the account. If these issues alone are not enough to quash this justification for access, the next Section will address why a desire for ease of administration should never defeat a decedent's intent.

C. ACCESS REQUIRED BECAUSE E-MAIL IS THE PROPERTY OF THE DECEDENT

The argument that e-mail is property of the decedent is very compelling and has been well-established by legal scholars.[189] However, it is a long leap to conclude that, because e-mail is the property of the decedent, heirs are entitled to receive it.

1. Debate Should Focus on Access by Personal Representative—Not by Heirs

Preliminarily, it is worth noting that although the argument made by Darrow and Ferrera (and others) is that access should be given to "heirs,"[190] it is both more efficient and appropriate, if access is granted, that it be granted to the decedent's personal representative. As discussed in Section A, providing access places a large administrative burden on internet service providers. If access is granted to beneficiaries,

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189. *See, e.g.*, Darrow & Ferrera, *supra* note 22, at 313 ("[A]n e-mail message is the creation of its author and, as such, should be considered the author's property.").

190. *See id.* Darrow and Ferrera justify access by "heirs," finding that "heirs should be able to inherit e-mail messages just as they would inherit private letters and other possessions of the deceased." *Id.* However, state laws and legislation, as well as the Draft Uniform Act, grant access to the estate of the deceased via the personal representative(s). *See supra* Part III. The distinction is significant in that a person will only have one estate but may have many heirs, beneficiaries, or next of kin.

heirs, or next of kin—in short, anyone other than the personal representative—the administrative burden increases substantially for the providers. Twenty-year-old Justin Ellsworth's messages from a single e-mail account filled three bankers boxes.[191] An older decedent is likely to have a much larger volume of e-mail.[192]

Access by only the personal representative also makes sense under the law of wills, trusts, and estates—personal property owned by the decedent is gathered and distributed by the personal representative instead of being transferred directly to the beneficiaries or heirs.[193] In an intestate estate, a determination of heirs is completed by the personal representative,[194] and it does not make sense to place that additional burden on e-mail service providers. Where state laws and providers' policies allow access to decedents' e-mail, access should be granted to personal representatives. Personal representatives will then distribute decedents' property to beneficiaries under a valid will, or to heirs as provided by law.

2. Intent of Decedent

While the argument that e-mail is the property of the decedent is strong, commentators almost uniformly focus on the wrong owner (or potential owner), thus weakening the legal argument.[195] Many articles and arguments tug at the heartstrings of a sympathetic public but are rooted in the idea of a beneficiary's "right to inherit."[196] That concept is misplaced in modern American jurisprudence. Consider this excerpt from a student note calling for uniform legislation:

> Like Ellsworth, a Marine named Karl Linn communicated with the outside world solely by sending emails and posting pictures while he was stationed in Iraq. When he was tragically killed, his parents immediately contacted the account service provider to preserve his account. Predictably, the service provider cited its

191. Inventory, *supra* note 2.

192. For example, I am forty-two years old and have eight active e-mail accounts.

193. *See generally* UNIF. PROBATE CODE § 2-103(a)(1) (2010) (providing for transfer to descendants "by representation").

194. *See generally id.* § 2-106 (outlining rules of transfer "by representation").

195. *See, e.g.*, Darrow & Ferrera, *supra* note 22, at 313–14 (focusing on the value of e-mail messages to family members in arguing for relaxation of contract provisions regarding user privacy).

196. *See, e.g., id.* at 294 (arguing for e-mail messages to be inherited in a fashion similar to private letters).

> strict privacy policy and refused to comply with the request. [This] illustrate[s] the value of digital assets to individuals and how drastic the consequences can be in the absence of legislative intervention.[197]

Consider also Professors Darrow and Ferrera's recommendation that a uniform law on access attempt to balance "(1) the privacy and ownership interests of account holders; (2) the interests of heirs in obtaining the property of loved ones; and (3) the interests of e-mail service providers in reducing liability exposure and administrative expenses."[198] They buffer their argument by explaining that where e-mail messages do not represent significant economic value, "they may be time capsules of great personal significance."[199] Professors Darrow and Ferrera further argue that "[d]enying heirs access to the deceased account holder's e-mail account creates uncertainty both for those sending e-mail to that account and for heirs who may be unable to access important communications."[200]

Finally, consider the widespread press attention given to Justin Ellsworth's father's quest to make a scrapbook of correspondence from his son's time in Iraq.[201]

As Professor Wright explains in the first chapter of her *Wills, Trusts, and Estates* textbook, "Everyone pretty much agrees that we all have testamentary freedom . . . ."[202] It is important to distinguish the sound argument that e-mail is the property of the account holder who has the freedom to dispose of it, from the misplaced concern for heirs or beneficiaries' desire to obtain property they consider sentimental. Simply put, there is no right to inherit sentimental property.[203]

Comments in the *Restatement (Third) of Property: Wills and Other Donative Transfers* (the Restatement) describe the supporting rationale for the construction of donative documents as the fundamental idea that a person should control the disposition of his or her property upon his or her death, with

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197. Tarney, *supra* note 176, at 786 (internal citations omitted).

198. Darrow & Ferrera, *supra* note 22, at 317.

199. *Id.* at 283.

200. *Id.* at 296.

201. *See generally Justin's Family Fights Yahoo*, *supra* note 13 (containing links to dozens of articles).

202. WRIGHT, *supra* note 82, at 5.

203. *Cf.* RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmts. a, c (2003) (establishing the importance of the decedents' intentions, and not those of the beneficiaries or heirs).

very limited exceptions.[204] The first general principle for construction is: "The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."[205] Similarly, Part I of the Uniform Probate Code (UPC) specifies that a purpose of the UPC is "to discover and make effective the intent of a decedent in distribution of his property."[206] The rules of construction begin with "*[i]n the absence of a finding of a contrary intention*."[207]

When a decedent leaves no valid will, his or her estate is subject to the rules of intestate succession.[208] Those rules are based on the decedent's probable intent, determined by the choices similarly situated testate decedents make in wills, surveys, and/or empirical research on intent, as codified in statutes of descent and distribution.[209]

Simply put, it is well established that honoring decedents' intent, or likely intent, is a foundational principle of law governing transfers at death. Thus, after establishing that e-mail is the property of the decedent, it is appropriate to focus on the decedent's intent rather than the heirs' interest in that property.

3. When Password Not Shared, Presume Decedent's Intent to Destroy

In the context of password-protected e-mail, many presume that a decedent's intent, when unknown, would have been to

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204. *Id.* ("The organizing principle of the American law of donative transfers is freedom of disposition . . . . American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law.").

205. *Id.* § 10.1.

206. UNIF. PROBATE CODE § 1-102(b)(2) (2010).

207. *Id.* § 2-701 (emphasis added).

208. WRIGHT, *supra* note 82, at 115.

209. *See, e.g.*, UNIF. PROBATE CODE § 2-102 cmt. ("Empirical studies support the increase in the surviving spouse's intestate share, reflected in the revisions of this section. Studies have shown that testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their entire estates to their surviving spouses, even when the couple has children."); *see also id.* § 2-106 cmt. ("[A] recent survey of client preferences, conducted by the Fellows of the American College of Trust and Estate Counsel, suggests that the per-capita-at-each-generation system is preferred by most clients."); *id.* § 2-109 cmt. ("Most inter-vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan.").

allow access.[210] But stronger arguments support the contention that when a decedent's intent to allow post mortem access is not made explicit, we should presume that a decedent did not intend to grant access.

Why would a decedent want to destroy his or her e-mail? Consider what will happen to that decedent's e-mail if it is not destroyed. Once the personal representative has access to e-mail based on this property theory, the personal representative will be responsible for distribution of the property.[211] The personal representative has a duty to distribute such property among the decedent's heirs or beneficiaries; only access that is granted exclusively for efficient estate administration would allow the personal representative to destroy the e-mail when the estate is closed.[212] It cannot be within the personal representative's discretion whether to distribute a decedent's property and to whom.

A well-advised personal representative knows that he or she must act quickly or all electronic mail will be "lost."[213] In fact, a lawyer who does not advise the personal representative to marshal the e-mail with the other assets may face a claim for malpractice, and a personal representative who fails to request access may face a claim for breach of fiduciary duty.[214]

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210. *See supra* Parts II.B, IV.C.2.

211. *See supra* Part IV.B.

212. *See supra* Part II.A.

213. *Yahoo Terms of Service*, *supra* note 4 ("You agree that Yahoo may, *without prior notice*, immediately terminate, limit your access to or suspend your Yahoo account, any associated e-mail address, and access to the Yahoo Services. Cause for such termination, limitation of access or suspension shall include, but not be limited to . . . (e) extended periods of inactivity . . . . Further, you agree that all terminations, limitations of access and suspensions for cause shall be made in Yahoo's sole discretion and that Yahoo shall not be liable to you or any third party for any termination of your account, any associated e-mail address, or access to the Yahoo Services."); *see also Google Terms of Service*, *supra* note 31 ("Google may also stop providing Services to you . . . at any time . . . . If we discontinue a Service, where reasonably possible, we will give you reasonable advance notice and a chance to get information out of that Service."); *Microsoft Services Agreement*, *supra* note 31 ("The Microsoft branded services require that you sign into your Microsoft account periodically, at a minimum every 270 days, to keep the Microsoft branded services portion of the services active, unless provided otherwise in an offer for a paid portion of the services. If you fail to sign in during this period, we may cancel your access to the Microsoft branded services. If the Microsoft branded services are canceled due to your failure to sign in, your data may be permanently deleted from our servers.").

214. *See, e.g.*, WRIGHT, *supra* note 82, at 892–97 (summarizing various states' laws on duties owed by probate attorneys to beneficiaries and others).

Once the personal representative has access—and let's assume that for expense reasons the e-mail service providers give electronic copies and not a garage full of bankers boxes—a large number of people may be entitled to a copy of that electronic data. If the decedent was intestate, and most people die intestate,[215] it will be all of the heirs who are entitled to access. Because very few people have specific bequests concerning virtual assets in their wills,[216] a testate decedent's electronic data would likely pass to the residual beneficiaries, who may or may not be a spouse or descendants.[217]

Thus, granting access to personal representatives is akin to granting access to heirs and beneficiaries, because once the personal representative has the digital copies (or a garage full of bankers boxes), the e-mail is unlikely to ever be destroyed—it will be passed down, perhaps duplicated, and read by who-knows-who. E-mail, unlike Grandma's favorite teapot, may be reproduced an unlimited number of times and is inexpensive to store in digital format.

Once the electronic data is in the hands of heirs or beneficiaries, what will they do with it? Search for their name? ("Had a frustrating conversation with Marsha today. Her marriage is in real trouble.") Keep it? While I do not want to read my father's e-mail messages—much less make a scrapbook out of them—I also cannot imagine making the decision to permanently delete the record of his daily thoughts and activity that his e-mail represents. Will our great-grandchildren be reading our e-mail messages sixty years from now? ("Those e-mails from great-granddad sure are funny—but I wonder what 'bootylicious' means . . . .") Access to e-mail poses a real risk to the fabric of relationships.

The best argument that we should presume decedents' intent to destroy is perhaps the most obvious: the decedent did

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215. Kim Klein, *You Should Have a Will*, APPALACHIAN COMMUNITY FUND, http://www.loosebrown.com/cases/legal-malpractice-cases/legal-malpractice-case-1.html (last visited Feb. 1, 2014) ("[S]even out of ten people don't have a will . . . .").

216. In my decade of experience as an estate planning attorney, I never wrote or saw a donative document that dealt specifically with virtual assets.

217. For example, residual beneficiaries may be siblings, parents, nieces, nephews, friends, and charities. *E.g.*, *Make a Difference to Wildlife in Your Will*, WILDLIFE REHABILITATION CENTER MINN., http://www.wrcmn.org/Planned_Giving.php (last visited Feb. 1, 2014) (suggesting that the reader make the charity Wildlife Rehabilitation Center of Minnesota a residual beneficiary).

not share his or her password. Sharing a password would demonstrate a user's intent to share access to an account. Conversely, keeping a password confidential indicates a desire to keep the account confidential. It is unreasonable to presume that a user who did not want others to access his or her accounts during his or her lifetime would intend for access to be granted at the moment of death. When Justin Ellsworth agreed to Yahoo's terms of service, chose a password, and chose not to share that password, it is reasonable to assume that he did not want the contents of his e-mail account to be accessed after his death for scrapbooking or any other purpose.

If I sent a particular message to my sister, and not to my brother, it stands to reason that I don't want to share those thoughts with my brother. Thus, shouldn't we assume that a decedent has already shared the thoughts contained in e-mail messages with the people who he or she wanted to share them?

To give a third person access to an e-mail message, an account holder can either forward the message to the third party, share the account password with the third party, print the e-mail message (making it tangible personal property), or save the message to a hard drive (making it accessible through tangible personal property). If a decedent chose not to share the e-mail in any of those four ways, it seems reasonable to conclude that the e-mail is either not important, or something the decedent preferred to keep private. Indeed, dying without divulging an e-mail password is akin to ordering destruction of property, or entering into a contract to destroy property upon a certain event (death).

Darrow and Ferrera use bailment as a framework to justify access to e-mail by heirs.[218] Under the law of bailment, the successor in interest to the bailor can recover the property from the bailee even without knowing the secret password.[219] However, an heir without an e-mail password is an entirely different animal from an heir without a safe deposit box key or warehouse receipt, for several reasons. First, we must look at the difference in the property. A warehouse or a safe deposit box holds tangible personal property, likely of some value or significance because the service being paid for by the owner of such property is secure storage of the property. In the case of e-

218. *See supra* note 89 and accompanying text.

219. Darrow & Ferrera, *supra* note 22, at 302 ("Bailed property must be returned to the bailor, or at least disposed of according to her directions." (citations omitted)).

mail, the account owner is primarily engaging the service provider to transmit or receive the property, not to store it. E-mail has by its very nature more than one copy—both the author and the recipient have a copy. There may be a secondary desire to store e-mail, but the difference between the two is significant: there is only one purpose in securing a safe deposit box (safe storage) versus the primary purpose of an e-mail account (transmission).

Second, in the case of a warehouse or a safe deposit box, the heir is dealing with a "lost" key or receipt. It is unreasonable to assume that a deceased person would destroy or hide a warehouse receipt or safe deposit key in order to destroy the tangible property in the warehouse or safe deposit box. To the contrary, most people would reasonably assume that in absence of a key or receipt, ownership could be established in some other way after the death of the property owner. A password, however, is kept secret precisely to keep other people from gaining access; therefore, it stands to reason that if a password cannot be found after a decedent's death, the password was not "lost" but kept secret.

When the owner of an e-mail account dies without printing e-mail, forwarding e-mail, saving e-mail on a computer hard drive, or sharing the password to the e-mail account, it is entirely reasonable to assume that the owner believed the property would be destroyed upon the death of the password holder(s). There are a number of simple ways that an owner of an e-mail account can ensure that others have access to copies of incoming or outgoing e-mails after the owner's death; if an owner chooses not to take any of these actions, it makes sense to assume that the owner did not intend for anyone to have access to the contents of the account after the owner's death.

In the case of Yahoo, additional evidence of the account holders' intent is in the terms of service. The terms of service, provided by the service provider and agreed to by the user, modify the user's property rights by agreement. Specifically, Yahoo's terms of service terminate the rights to the copy (not the copyright) at the death of the user.[220] The fact that this term is contained in a contract to which the decedent agreed adds to the argument that the decedent intended for access to be denied. Darrow and Ferrera address this argument by saying that,

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220. *See supra* text accompanying note 44.

> [a]lthough the explicit and clearly expressed intent of account holders requesting that account content not be transferred to heirs should be respected under general principles of freedom of contract, boilerplate provisions in contracts of adhesion drafted by e-mail service providers should not be allowed to rewrite probate laws such that heirs are unable to inherit what would otherwise be inheritable.[221]

Darrow and Ferrera agree that "explicit instructions" by the account holder should bar access (and that terms of service do not count as explicit instructions), but given how easy it is to give access, I argue that the default rule should be the opposite: without explicit instructions to give access, access should be denied. The presumption should be that the decedent intended e-mail to be destroyed by the service provider in the absence of the decedent's clear consent to access.

4. The Right to Destroy

When it comes to my own e-mail, I am certain that I do not want copies in the hands of heirs and beneficiaries. I want my e-mail to be destroyed at my death. But do I have the right to contract with the e-mail service provider for its destruction?

Testamentary freedom of disposition is limited by overriding rules of law. The Restatement provides the following illustrative list: "those relating to spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations."[222]

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221. Darrow & Ferrera, *supra* note 22, at 314.

222. RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (2003). The comment proceeds:

> American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law. The term "rule of law" is used in a broad sense to include rules and principles derived from the U.S. Constitution, a state constitution, or public policy; rules and principles set forth in federal or state legislation or in municipal ordinances; rules and principles of the common law and of equity; and rules and principles contained in governmental regulations. A rule of law is an overriding rule of law if it is applicable and prohibits or restricts the disposition or purpose that the donor intends.
>
> Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or

An unsettled issue within contemporary will doctrine is whether public policy favoring the most productive use of assets overrides a decedent's right to order destruction of his or her property upon his or her death. If a decedent's intent to destroy is clear, is the public policy interest important enough to override intent? No, it is not, argues one commentator:

> [S]ince courts give effect to the doctrine of public policy only to protect the interests of beneficiaries or the state, it cannot be said to be a solid basis for prohibiting the destruction of property. It is a doctrine that is not clearly grounded in any legal principle except a general sense of equity. Moreover, there are no good public policy reasons to forbid testamentary destruction of inanimate property, outside of a generalized capitalistic instinct focusing on the monetary rather than the personal value of an item.[223]

While courts tend to overlook a right to destroy in cases where the asset to be destroyed is of significant financial value (for instance, a house),[224] scholars have argued that there must be a right to destroy property by the creator of that property.[225] Professor Strahilevitz, in his comprehensive analysis of the right to destroy, concludes that "[t]here are, in short, strong reasons to defer to the destructive wishes of those who have created cultural property, particularly when that property has not been published or publicly displayed. As long as the creator possesses testamentary capacity, deferring to destructive wishes in a will is appropriate."[226] Professor Strahilevitz explains, "empowering owners to destroy their own property can promote important expressive interests, spur creative activity, and enhance social welfare."[227] He specifically mentions e-mail as an example of this phenomenon.[228] This is especially true when the property is of a personal nature. As

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> other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations. The foregoing list is illustrative, not exhaustive.

Id.

223. Sykas, *supra* note 87, at 944.

224. *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 799 (2005) ("In [ ] home destruction cases, a number of third-party interests were invoked to justify restricting a testator's right to destroy . . . .").

225. *Id.* at 784 (describing Joseph Sax's *Playing Darts with a Rembrandt* as excepting the owner-creator from a general rule prohibiting destruction of one's own property).

226. *Id.* at 835.

227. *Id.* at 785.

228. *Id.* at 815 (noting e-mail as an example of an "area in which incentives for the creation of valuable property might depend on the presence of a robust right to destroy").

another commentator explains, "in cases concerning items of highly personal property such as diaries, personal writings, notes, and other items, destruction ought to be permitted. Those items are inseparably linked with their owner/creator's personhood, and as such have no recognizable value to another person."[229]

Advocates for access may argue that irreplaceable cultural and sentimental information is lost to society when decedents are allowed to order destruction of their property upon their death.[230] This concern may be outweighed, however, by our public policy interest in personal freedom and development. Professor Strahilevitz continues:

> While waste prevention is a valid basis for restricting one's right to destroy, an analysis of the case law suggests that courts often fail to appreciate the ways in which protecting the right to destroy can enhance social welfare by protecting privacy, creating open spaces, encouraging innovation and creation, or promoting candor and risk taking.[231]

And another commentator adds:

> If the origins of the public policy doctrine stem from the court's desire to prevent injury to society, then the holdings in most of the cases concerning the destruction of inanimate property are suspect. The decisions in those cases protect the interests of the beneficiary or the value of the estate, only one segment of society, at the expense of the testator's intent. It is the testator's intent that ought to be of paramount importance for two reasons. First, wills have been important since nearly the beginning of time. Subsequently, the feature common to all wills that has remained essentially unchanged, allowing a testator to dispose of his property in a way he sees fit, emphasizes the importance of preserving the testator's control over his property. Secondly, people define themselves and their personhood through ownership of inanimate objects. Consequently, people need to control those objects in order to continue to develop themselves as people, which permits them to contribute value to society as a whole.[232]

Additionally, the danger of losing unique and valuable information is overstated. The idea that the e-mail account of the decedent contains property that is unique and irreplaceable is not compelling. *By design* there are at least two copies of every "sent" e-mail message: one arrives in the recipient's inbox, and one remains in the sender's "sent mail" folder. A person who corresponded with the decedent who wishes to

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229. Sykas, *supra* note 87, at 938 (citation omitted).
230. Strahilevitz, *supra* note 224, at 784–85.
231. *Id.* at 786.
232. Sykas, *supra* note 87, at 943.

share copies of the correspondence with the heirs or beneficiaries of the decedent may do so. If heirs and beneficiaries do not have access to the decedent's e-mail, it is because at least two people (the sender and the recipient) declined to share the e-mail, not because there was no other way to access the decedents' correspondence.

In examining the story of Karl Linn quoted above,[233] what is the real loss? That Karl Linn's parents couldn't see the private communications their son had with other people? Every e-mail message that Karl Linn sent was in the possession of at least one other person. The recipients of those e-mails are free to share them with Mr. Linn's parents, if they feel it is appropriate. Publicly posted photos can be copied or downloaded from the website where they appear. And Mr. Linn's parents were in possession of all correspondence between Mr. Linn and them. To be clear, Karl Linn's death was tragic[234] and his parents are not at moral fault for seeking access; however, commentators grossly exaggerate what is lost when e-mail content cannot be accessed.

It is also important to note that I have access to all the e-mail messages that were sent to me—if I want to remember famous fatherly advice from my own father, Dr. John Godbey, I can look in my own e-mail account. I do not need access to his account to find the e-mail messages he sent to me. And if I want my daughter to have the benefit of this advice, I can print those e-mail messages, download them, forward them, or share the password to my account with her.

V. CONCLUSION AND AN ALTERNATIVE DEFAULT RULE

Justin Ellsworth's death at age twenty was tragic, and his father was certainly motivated by love and grief in seeking access to Justin's e-mail. But while some commentators called John Ellsworth's request for access to his son's e-mail "seemingly innocuous,"[235] it strikes me as surprisingly contrary to the decedent's intent or likely intent. We may never know what argument convinced the judge in the *Ellsworth* case to order Yahoo to give Justin's e-mail to his father,[236] but none of

233. *See supra* text accompanying note 197.

234. *See supra* text accompanying note 197.

235. Darrow & Ferrera, *supra* note 22, at 281.

236. *See supra* text accompanying notes 13–14; *supra* Part II.B (citing efficient estate administration, the media cited sentimental reasons, and most scholars commonly justify access by classifying e-mail as property that should

the justifications cited to grant access are compelling enough to override decedents' intent in a probate matter, or to grant personal representatives default access to decedents' password-protected e-mail by legislation.[237]

While it may not be prudent for a variety of reasons, e-mail is used today as an alternative to the telephone. E-mail is not like your grandparents' love letters tied up in a ribbon and kept in a hope chest in the attic. E-mail is more like notes passed in high school that we would rip into tiny pieces after reading to be certain the words were never read again. As noted in an article in the Washington Post, "[c]omplicating such disputes is the very nature of e-mail, which many consider to be more personal and informal than regular letters; some even use it to correspond anonymously, to hide aspects of their lives they may not want revealed to others."[238]

I am not unique in that regard.[239] In addition to seemingly innocuous messages from my mobile phone provider, credit card company, employer, and our community garden listserv, my e-mail accounts, for example, contain messages from dating services, various people I dated prior to my marriage, highly personal messages to and from my spouse, messages regarding my boss, my spouse's ex-spouse, our child, our parents, and our siblings. It contains e-mail messages to and from friends regarding their marriages, their children, their partners, and our other friends. Those messages sit in my e-mail accounts and have not been deleted because deleting them takes effort—and like most people, I assume that there is minimal danger of leaving them there. After all, I have protected the accounts with passwords, and, with the exception of my husband, I have guarded those passwords with the assumption that when I die, that treasure trove of my and my confidants' correspondence will die with me. If I stop to consider the fact that the subjects of some of those highly personal e-mail messages (who are heirs apparent, beneficiaries, and nominated as personal representative in my Last Will and Testament) may have access, I am faced with some inconvenient alternatives: (i)

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pass to heirs or beneficiaries like other property owned by the decedent); Order to Produce Information, *supra* note 1 (showing no indication as to the reason access was ordered).

237. *See supra* note 16.

238. Cha, *supra* note 13.

239. *Cf.* Strahilevitz, *supra* note 224, at 815 (implying that individuals use e-mails to discuss "controversial" and "sensitive matters").

delete all of my old e-mail messages and e-mail messages as they come in; (ii) leave explicit instructions that the account is to be deleted in my Last Will and Testament and hope that my instructions are carried out;[240] and/or (iii) cease using e-mail for personal communications.

There is an easier way to ensure that my intent is carried out. One sort of proposal, not currently reflected in any of the state laws, is that digital assets, including e-mail accounts, could be transferred under a Last Will and Testament and that access could be denied through a valid will.[241] If an account user name was not mentioned in the will specifically, then access would be denied.[242] While this would clearly convey the decedent's intent for accounts included in the document, from a practical perspective it is not ideal. First of all, the vast majority of Americans die intestate.[243] Indeed, every access-related example discussed in this Article stemmed from an intestate estate.[244] This proposal would not provide further clarity in those situations. Second, people create new e-mail accounts (and other online accounts) frequently.[245] Requiring testators to update their wills every time they create a new account is an unreasonable financial burden.[246]

Instead, I propose the following default rules, which are based on the principle of honoring decedents' intent or likely intent, and which are consistent with federal law. E-mail is the property of the account holder. Access may be authorized (i) in the decedent's Last Will and Testament; (ii) by the decedent opting-in to a provider's program like Gmail's inactive account manager where consent is explicitly given by the decedent; (iii) by a court order after a finding that the decedent consented to

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240. *See supra* Part IV.C.4 (discussing a decedent's right to destroy).

241. *See* Tarney, *supra* note 176, at 795.

242. *Id.* at 797.

243. *See supra* note 215 and accompanying text.

244. *See, e.g.*, *supra* text accompanying note 10.

245. *Cf.* THE RADICATI GROUP, INC., E-MAIL STATISTICS REPORT, 2013–2017, EXECUTIVE SUMMARY 2 (2013), *available at* http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf (noting that the average annual growth rate of e-mail accounts is expected to be six percent over the next four years, from 3.9 billion accounts currently to 4.9 billion accounts by 2017).

246. *See, e.g.*, *What Is a Reasonable Fee to Just Update a Will, Power of Attorney, and Living Will?*, AVVO, http://www.avvo.com/legal-answers/what-is-a-reasonable-fee-to-just-update-a-will—po-339698.html (last visited Feb. 7, 2014) ("It will vary by attorney of course, but it would probably be a couple hundred dollars.").

access by one or more persons; or (iv) if the decedent shared the password. Additionally, a personal representative who distributes the e-mail to the persons selected by the decedent (or to heirs and all living beneficiaries if access is authorized by the decedent but not limited to certain people) has fully discharged his or her duties with regard to e-mail. Finally, the estate of the decedent should bear the cost of any such authorized access.

In the absence of consent to access in one of those four manners, the presumption should be that the decedent intended that the e-mail communication be destroyed upon his or her death, and access should not be granted.

STATE STATUTES REGARDING ACCESS TO DECEDENTS' E-MAIL

As of November 1, 2013

Connecticut[247]

An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his or her death, access to or copies of the contents of the electronic mail account of such deceased person upon receipt by the electronic mail service provider of: (1) A written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor or administrator; or (2) an order of the court of probate that by law has jurisdiction of the estate of such deceased person.

Idaho[248]

Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 15-3-902 of this code, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

. . . .

(28) Take control of, conduct, continue or terminate any accounts of the decedent on any social networking website, any

247. CONN. GEN. STAT. ANN. § 45a-334a(b) (West 2013).
248. IDAHO CODE ANN. § 15-3-715(28) (West 2011).

microblogging or short message service website or any e-mail service website.

Indiana[249]

(b) A custodian shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of any documents or information of the deceased person stored electronically by the custodian upon receipt by the custodian of:

(1) a written request for access or copies made by the personal representative, accompanied by a copy of the death certificate and a certified copy of the personal representative's letters testamentary; or

(2) an order of a court having probate jurisdiction of the deceased person's estate.

(c) A custodian may not destroy or dispose of the electronically stored documents or information of the deceased person for two (2) years after the custodian receives a request or order under subsection (b).

Nevada[250]

Section 1. Chapter 143 of [Nevada Revised Statutes] is hereby amended by adding thereto a new section to read as follows:

1. Except as otherwise provided in subsection 2, subject to such restrictions as may be prescribed in the will of a decedent or by an order of a court of competent jurisdiction, a personal representative has the power to direct the termination of any account of the decedent, including, without limitation:

(a) An account on any:

(1) Social networking Internet website;

(2) Web log service Internet website;

(3) Microblog service Internet website;

(4) Short message service Internet website; or

(5) Electronic mail service Internet website; or

(b) Any similar electronic or digital asset of the decedent.

2. The provisions of subsection 1 do not authorize a personal representative to direct the termination of any

249. IND. CODE ANN. § 29-1-13-1.1(b)–(c) (LexisNexis 2007).

250. S.B. 131, 2013 Leg., 77th Reg. Sess. (Nev. 2013) (enacted).

financial account of the decedent, including, without limitation, a bank account or investment account.

3. The act by a personal representative to direct the termination of any account or asset of a decedent pursuant to subsection 1 does not invalidate or abrogate any conditions, terms of service or contractual obligations the holder of such an account or asset has with the provider or administrator of the account, asset or Internet website.

Oklahoma[251]

The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites.

Rhode Island[252]

An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his or her death, access to or copies of the contents of the electronic mail account of such deceased person upon receipt by the electronic mail service provider of:

(1) A written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor and administrator; and

(2) An order of the court of probate that by law has jurisdiction of the estate of such deceased person, designating such executor or administrator as an agent for the subscriber, as defined in the Electronic Communications Privacy Act, 18 U.S.C. § 2701, on behalf of his/her estate, and ordering that the estate shall first indemnify the electronic mail service provider from all liability in complying with such order.

Virginia[253]

A. A personal representative of a deceased minor who was domiciled in the Commonwealth at the time of his death may assume the deceased minor's terms of service agreement for a

251. OKLA. STAT. ANN. tit. 58, § 269 (West 2010).
252. R.I. GEN. LAWS ANN. § 33-27-3 (West 2011).
253. VA. CODE ANN. § 64.2-110 (West 2013).

digital account with an Internet service provider, communications service provider, or other online account service provider for purposes of consenting to and obtaining the disclosure of the contents of the deceased minor's communications and subscriber records pursuant to 18 U.S.C. § 2702 unless such access is contrary to the express provisions of a will, trust instrument, power of attorney, or court order. Such access shall be subject to the same license, restrictions, or legal obligations of the deceased minor.

B. An Internet service provider, communications service provider, or other online account service provider shall provide to the personal representative access to the deceased minor's communications and subscriber records pursuant to subsection A within 60 days from the receipt of (i) a written request for such access by the personal representative and (ii) a copy of the death certificate of the deceased minor. However, if the Internet service provider, communications service provider, or other online account service provider receives notice of a claim or dispute regarding providing access to the deceased minor's communications and subscriber records pursuant to this subsection, such provider is not required to comply with any written request received pursuant to this subsection until a final nonappealable judgment is rendered by a court of competent jurisdiction determining the rights in or entitlement to any content in the deceased minor's digital account.

C. Nothing in this section shall be construed to require an Internet service provider, communications service provider, or other online account service provider to disclose any information in violation of any applicable state or federal law.

D. No person may maintain a cause of action against an Internet service provider, communications service provider, or other online account service provider for acting in compliance with this section.

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