

**Is Access Enough?: Addressing Inheritability
of Digital Assets Using the Three-Tier System
Under the Revised Uniform Fiduciary Access
to Digital Assets Act**

By Joseph Ronderos

TABLE OF CONTENTS

I. INTRODUCTION 1032

II. THE RUFADAA: ISSUES OF ACCESS AND INHERITABILITY 1036

A. The Development of the RUFADAA 1036

B. The Three Tier System under the RUFADAA..... 1038

C. Accessibility Under the RUFADAA Does Not Go Far Enough..... 1040

D. Inheritability: Expansion of the First Sale Doctrine under Federal Copyright Law
 1041

III. THE RIGHT TO TRANSFER PROPERTY AT DEATH 1042

A. A Fundamental (or at least, a sacrosanct) Right 1043

B. Wills Overriding Contracts Outside the Digital Context 1044

IV. INHERITABILITY OF DIGITAL ASSETS 1047

A. Lack of Clarity—The Development of a Definition for Digital Assets..... 1047

 1. General Definitions 1047

 2. Comparing Digital Assets to Traditional Assets 1049

B. Enforceability of TOS Agreements..... 1050

V. PROPOSED LEGISLATION: APPLYING THE THREE-TIER SYSTEM FOR INHERITABILITY 1057

A. Balance Between the Right to Transfer Property at Death and the Right to Contract 1057

B. Limitations on Proposed Legislation..... 1060

 1. Transfers At Death..... 1060

 2. Limited by the Definition of a Digital Asset..... 1060

 3. Does Not Solve the Whole Problem: Expansion of the First Sale
 Doctrine to Digital Assets..... 1061

C. <i>Foreseeable Consequences to Online Service Providers</i>	1062
VI. CONCLUSION	1064

I. INTRODUCTION

Adam considers himself a connoisseur of music. Recently, Adam's favorite album store closed, and finding his loyalty to disc albums lost, he decides to purchase digital songs from iTunes. In a short amount of time, Adam builds a collection of ten thousand songs. Then, the birth of his daughter, Bailey, gives Adam a sense of his legacy. So, Adam executes a will that includes a gift of his iTunes collection to Bailey, hoping that she may enjoy his music someday. As fate would have it, Adam dies shortly after executing his will. The executor of Adam's estate attempts to access his iTunes account only to find that Apple has terminated it, citing its terms and conditions that grants purchasers only a non-transferable license in the music.¹ Like many individuals, Adam was unaware of his limited rights to his iTunes account.² Because Apple is within its rights to terminate Adam's music

¹ See, e.g., *Apple Media Services Terms and Conditions*, APPLE.COM, <http://www.apple.com/legal/internet-services/itunes/us/terms.html> (last visited Dec. 12, 2016) ("Licensor grants to you a nontransferable license to use the Licensed Application on any Apple-branded products that you own or control and as permitted by the Usage Rules."); *World of Warcraft Terms of Use*, BLIZZARD ENTERTAINMENT, http://us.blizzard.com/en-us/company/legal/wow_tou.html (last visited Dec. 12, 2016) ("Blizzard does not recognize the transfer of World of Warcraft Accounts . . . You may not purchase, sell, gift or trade any Account, or offer to purchase, sell, gift or trade any Account, and any such attempt shall be null and void. Blizzard owns, has licensed, or otherwise has rights to all of the content that appears in the Game.").

² See EUROPEAN COMM'N, *STUDY ON CONSUMERS' ATTITUDES TOWARDS TERMS AND CONDITIONS (T&Cs)* 10 (2016), http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/terms_and_conditions_final_report_en.pdf (last visited Dec. 12, 2016). Interestingly, PayPal's term of service agreement has a higher word count (36,275) than Shakespeare's *Hamlet* (30,066), and the iTunes term of service agreement has a higher word count (19,972) than *Macbeth* (18,110). *Id.* at 14.

upon his death, Bailey will not receive any of her father's music collection.³

An average person in the United States values his or her digital assets at \$55,000,⁴ but as illustrated above, there are questions of how many digital assets an individual actually owns.⁵ To determine ownership rights in digital assets, consumers must read their terms of service ("TOS") agreements, which are most notable for: "By clicking [here], you agree to our Terms. . . ."⁶ Most consumers will find that they have a non-transferable license agreement with the online service provider (e.g., Facebook, Apple, etc.), and that what they think they "own" cannot be traded, sold, gifted, or transferred by will.⁷

In 2015, the Uniform Law Commission ("ULC") addressed the practical concern regarding executors, trustees, administrators, or conservators accessing a deceased individual's email, online bank account, or even Facebook account by issuing the Revised Uniform Fiduciary Access to Digital Assets Act (the "RUFADAA").⁸ Generally,

³ See *generally* Berkson v. Gogo LLC, 97 F. Supp. 3d 359 (E.D. N.Y. 2015); i.Lan Systems, Inc. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328 (D. Mass. 2002).

⁴ EVERPLANS, <https://www.everplans.com/articles/the-value-of-digital-assets-and-how-to-keep-track-of-them-all> (last visited Dec. 12, 2016). In a 2011 study, McAfee estimated that worldwide, an average individual owns approximately \$37,000 in digital assets. *Id.*

⁵ See David Horton, *Indescendibility*, 102 CAL. L. REV. 543, 567 (2014).

⁶ FACEBOOK, <https://www.facebook.com/?stype=lo&jlou=AfdJWewvMR2l-T8j9vCqbp62cYcKemKBumaIxmV8dwG4L0KcRNN968pYFTdlHAW3H8lGNSYERSZm6P5-DgLxKF-&smuh=43332&lh=Ac-BPE-1-DLTRhJl> (last visited Dec. 14, 2016); see, e.g., *Apple Media Services Terms and Conditions*, *supra* note 1. ("To confirm your understanding and acceptance of the Agreement, click 'Agree.'").

⁷ See, e.g., Olivia Y. Truong, *Virtual Inheritance: Assigning More Virtual Property Rights*, 21 SYRACUSE SCI. & TECH. L. REP. 57, 73-74 (2009) (detailing the TOS agreement granting a license to use a virtual gaming world).

⁸ REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT prefatory note (UNIF. LAW COMM'N 2015), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf.

the RUFADAA authorizes personal representatives of decedents' estates to access digital assets as though they were tangible assets⁹ so that executors may accurately conduct inventory, accounting, and pay debts.¹⁰ In doing so, the ULC addressed the growing criminal and civil liability concerns arising out of federal privacy law for personal representatives accessing a decedent's online account.¹¹ For instance, a personal representative may have exposed him- or herself to criminal liability for using a password of the decedent, who is oftentimes a family member, to login to the decedent's email account.¹²

While access to decedents' digital assets is important, the RUFADAA fails to address a more complex and significant issue:¹³ the transfer of digital assets at death.¹⁴ Inheritability addresses whether an individual can transfer an asset at death by will, contract, or intestacy.¹⁵

⁹ *Id.* (stating that the act allows fiduciaries to have the "legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts . . . [.]").

¹⁰ *See, e.g.*, TENN. CODE ANN. § 30-2-302 (1932) (presenting inventory to the court); TENN. CODE ANN. § 30-2-404 (2007) (providing that executors may pay debts out of real property of the estate once personal property is exhausted).

¹¹ *See, e.g.*, 18 U.S.C.A. § 1030(a) (West 2008) (providing that an individual may not access the online account of another individual without authorization); *see also* 18 U.S.C.A. § 2701 (West 2002) (providing a fine and imprisonment for unauthorized access to an electronic communication). *See generally* David Horton, *The Stored Communications Act and Digital Assets*, 67 VAND. L. REV. 1729 (2014).

¹² *See* 18 U.S.C.A. § 1030(c) (West 2008) (imposing criminal sentences and fines).

¹³ UNIF. LAW COMM'N, 2014 ANNUAL MEETING ISSUES MEMO 2 (2014), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014am_ufadaa_issues%20memo.pdf ("It governs only access to digital assets. It defers to other law to determine the ownership of the assets."); *see* UNIF. LAW COMM'N, 2013 ANNUAL MEETING ISSUES MEMO 2 (2013), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013AM_FADA_IssuesMemo.pdf.

¹⁴ *See* Horton, *supra* note 5, at 567; Anthony C. Eichler, "Owning" What You "Buy": How iTunes Uses Federal Copyright Law to Limit Inheritability of Content, and the Need to Expand the First Sale Doctrine to Include Digital Assets, 16 HOUS. BUS. & TAX L.J. 208, 226–28 (2016).

¹⁵ *See* Eichler, *supra* note 14, at 213.

Online service providers, however, prevent the inheritability of digital assets by only granting consumers a non-transferable license in the product.¹⁶ Thus, state legislatures should encourage online service providers and consumers to use private agreements to dispose of digital assets at death; otherwise, states should promote consumer protection over the enforceability of TOS agreements by allowing consumers to transfer digital property via will.¹⁷ After all, allowing consumers to dispose of digital assets at death would protect consumers by granting them an ownership right typically associated with traditional assets, which would otherwise be obviated by lengthy contracts of adhesion that are rarely read.¹⁸

Part II of this paper analyzes the development of the RUFADAA and the issues of access versus inheritability.¹⁹ Part III summarizes the literature on the right to transfer at death and the law of wills overriding contracts.²⁰ Following the general background of the relationship between wills and contracts, Part IV explores the definition of, and rights in, digital assets and, specifically, the enforceability of TOS agreements.²¹ Lastly, Part V proposes that state legislatures should adopt the three-tier system of the RUFADAA for the purpose of inheritability.²² Specifically, Part V proposes that an individual may designate a beneficiary of a digital asset by private agreement with the online service provider which is separate from a standard TOS

¹⁶ Kristina Sherry, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185, 204 (2012).

¹⁷ See Horton, *supra* note 5, at 547; see also *infra* Part V, section A and accompanying notes.

¹⁸ See *infra* Part V, section A and accompanying notes.

¹⁹ See *infra* Part II.

²⁰ See *infra* Part III.

²¹ See *infra* Part IV.

²² See *infra* Part V.

agreement; otherwise, individuals may designate a beneficiary by will, overriding any contrary provision in a standard TOS agreement.²³

II. THE RUFADAA: ISSUES OF ACCESS AND INHERITABILITY

For estate planning, accessibility²⁴ and inheritability²⁵ are the most significant issues regarding digital asset ownership. As demonstrated in this section, the RUFADAA resolves many of the issues of accessibility, but it does not address the more important issue of inheritability.²⁶

A. *The Development of the RUFADAA*

In 2013, the ULC's Fiduciary Access to Digital Assets Committee outlined the potential issues regarding fiduciary (e.g., executor, personal representative) authority to access digital assets.²⁷ The most relevant issues for fiduciary access were: (1) privacy for decedents and (2) preventing liability for personal representatives when they access a decedent's online account.²⁸ Specifically, without state law providing authority for a fiduciary to access online accounts, a fiduciary may need a court order to gain access.²⁹ Furthermore, if a fiduciary accessed a decedent's digital account without authorization, the fiduciary may be subject to criminal and civil liability under the Stored Communications

²³ See *infra* Part V.

²⁴ See 2013 ISSUES MEMO, *supra* note 13, at 1–3.

²⁵ See generally Horton, *supra* note 5.

²⁶ Eichler, *supra* note 14, at 225–26.

²⁷ See 2013 ISSUES MEMO, *supra* note 13, at 1–3.

²⁸ See *id.*

²⁹ See Horton, *The Stored Communications Act and Digital Assets*, *supra* note 11, at 1732.

Act,³⁰ the Electronic Computer Privacy Act,³¹ and the Consumer Fraud and Abuse Act.³²

Accordingly, in 2014, the ULC issued the Uniform Fiduciary Access to Digital Assets Act (UFADAA), which proposed to give personal representatives implicit authority to access a decedent's online accounts.³³ In other words, the UFADAA presumed that the decedent would have wanted the personal representative to access and manage his or her online accounts.³⁴ Naturally, online service providers feared that this presumption of authorization would undermine a decedent's privacy after death because the decedent does not have to authorize the access of electronic communications (e.g., emails, social media accounts, etc.).³⁵

In 2015, the ULC reacted to online service providers' opposition to the UFADAA by issuing the RUFADAA.³⁶ In a compromise, the ULC drafted the RUFADAA to provide that if users consented to disclosure of electronic communications, then the online service

³⁰ 18 U.S.C.A. § 2701 (West 2002) (providing a fine and imprisonment for unauthorized access to an electronic communication).

³¹ 18 U.S.C.A. § 2510 (West 2002) (allowing civil damages against an interceptor of electronic communications).

³² See 18 U.S.C.A. § 1030(a)–(c) (West 2008) (imposing criminal sentences and fines for unauthorized access to digital account of another).

³³ See UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 3 (UNIF. LAW COMM'N 2014), <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/UFADAA%202014%20Post-approval%20Pre-style.pdf>.

³⁴ See *id.*

³⁵ See UNIF. LAW COMM'N, 2015 ANNUAL MEETING ISSUES MEMO 1 (2015), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/UFADAA_Explanation%20of%20proposed%20amendments_2015AM.pdf (“The 2015 bills were blocked by a coalition of internet-based businesses and privacy advocates that opposed certain provisions of UFADAA[.]”).

³⁶ See *id.*

provider would disclose that information to a personal representative.³⁷ Without this consent of the decedent, personal representatives can only receive a catalogue of the electronic communications of a deceased user.³⁸ As a result of this compromise, twenty states have enacted the RUFADAA,³⁹ and another twelve states have introduced it.⁴⁰

B. The Three Tier System under the RUFADAA

The RUFADAA created a three-tier system for a decedent to authorize an executor to access his or her online accounts.⁴¹ Specifically, a decedent may authorize a fiduciary to access the online accounts via an online tool agreement, which overrides any will or TOS agreement. Otherwise, a decedent may authorize an executor to access the accounts under a will, thereby overriding a TOS agreement.⁴² Absent authorization by an online tool agreement or will, the TOS agreement controls access to the online account.⁴³

The language of the three-tier system is as follows:

- (a) A user may use an online tool to direct the custodian to disclose to a designated

³⁷ REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 7 (UNIF. LAW COMM'N 2015), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf.

³⁸ *Id.* at § 8.

³⁹ *Fiduciary Access to Digital Assets Act, Revised (2015)*, UNIF. LAW COMM'N, [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited Dec. 12, 2016). The following states have enacted the RUFADAA: Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Maryland, Michigan, Minnesota, Nebraska, New York, North Carolina, Oregon, South Carolina, Tennessee, Washington, Wisconsin, Wyoming. *Id.*

⁴⁰ *Id.* The following states have introduced the RUFADAA: Alabama, Iowa, Louisiana, Maine, Mississippi, Missouri, New Jersey, Ohio, Pennsylvania, Rhode Island, Utah, and West Virginia. *Id.*

⁴¹ REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 4(a)–(c); *see also infra* Part II, section B and accompanying notes.

⁴² REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 4(a)–(b).

⁴³ *See id.* at § 4(c).

recipient or not to disclose some or all of the user's digital assets, [A] direction regarding disclosure using an online tool *overrides* a contrary direction by the user in a will, trust, power of attorney, or other dispositive or nominative instrument.

(b) If a user has not used an online tool to give direction under subsection (a) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(c) A user's direction under subsection (a) or (b) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.⁴⁴

Under the RUFADAA, an online tool is “an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person[.]”⁴⁵ Thus, a TOS agreement is distinct from an online tool agreement under the RUFADAA because an online tool only controls the designation of an individual that may access a person's account at death, unlike a TOS agreement which “controls the relationship between a user and a custodian.”⁴⁶ For example, Facebook, a social media

⁴⁴ *Id.* at § 4(a)–(c); *see also* TENN. CODE ANN. § 35-51-104 (2016).

⁴⁵ REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 2(16).

⁴⁶ *Id.* at § 2(24).

platform, provides a legacy contact agreement (i.e., an online tool) that allows a user to designate an individual to manage the user's account upon his or her death.⁴⁷

C. Accessibility Under the RUFADAA Does Not Go Far Enough

With the RUFADAA, the ULC responded to the privacy and liability concerns of personal representatives accessing the online accounts of deceased individuals.⁴⁸ However, if a TOS agreement provides that a user owns no interest in the account upon death, then the personal representative can access the account but cannot retrieve any value from that account.⁴⁹ Simply put, the significance of accessing a decedent's online account is severely diminished if there is no value in that account.

For example, if Adam transfers \$200,000 of cash to Bailey under his will, but this cash is in Adam's online bank account, Adam's executor can access this account when acting under the authority of Adam's will.⁵⁰ However, if Adam designates that Bailey will receive his iTunes account, Apple may prevent Bailey from using the songs on her father's account because the TOS agreement provides that the music is non-transferable.⁵¹ Evidently, the RUFADAA alleviated many issues with access, but this paper focuses on the more pertinent issue: the inheritability of digital assets.

⁴⁷ FACEBOOK, <https://www.facebook.com/settings?tab=security§ion=memorialization&view> (last visited on Mar. 5, 2017).

⁴⁸ See 2015 ISSUES MEMO, *supra* note 35, at 1–2 (“The 2015 bills were blocked by a coalition of internet-based businesses and privacy advocates that opposed certain provisions of UFADAA[.]”).

⁴⁹ See 2014 ISSUES MEMO, *supra* note 13, at 2 (providing that fiduciaries ‘step into the shoes of’ decedent).

⁵⁰ See Gerry M. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 NAELA J. 135, 141 (2013).

⁵¹ See 2014 ISSUES MEMO, *supra* note 13, at 2 (“[RUFADAA] governs only access to digital assets. It

defers to other law to determine the ownership of the assets.”).

D. Inheritability: Expansion of the First Sale Doctrine under Federal Copyright Law

Only one commentator has argued that the RUFADAA is insufficient because it does not address the issue of inheritability.⁵² Specifically, Anthony Eichler argued that the first sale doctrine under copyright law must apply to digital assets because federal copyright law preempts any meaningful reform under state law.⁵³ Generally, the first sale doctrine provides that “the right of producer to control distribution of its [copyrighted] product does not extend beyond the first sale of the product.”⁵⁴ In other words, once the copyright owner sells the copyrighted item, the copyright owner cannot also limit the resale of that item.⁵⁵ Consequently, the transfer of a digital asset at death would not result in copyright infringement.⁵⁶

Eichler relied on the recent case of *Capitol Records v. ReDigi* to establish that digital assets are not subject to the first sale doctrine.⁵⁷ *ReDigi* involved a record company bringing a copyright infringement claim against an online marketplace that bought and sold used, digital music.⁵⁸ In *ReDigi*, the court held that the online marketplace violated the Copyright Act because “the first sale defense is limited to material items, like records, that the copyright owner put into the stream of

⁵² Eichler, *supra* note 14, at 225–26.

⁵³ *Id.* at 226–28; see also Elizabeth Horan, *Die Hard (And Pass On Your Digital Media): How the Pieces Have Come Together to Revolutionize Copyright Law for the Digital Era*, 64 CASE W. RES. L. REV. 1829, 1863 (2014) (stating that “[a]n amendment must explicitly state that the protections of the First Sale Doctrine apply to digital and downloaded works when those works are able to be transmitted in a way that does not produce copies.”).

⁵⁴ 17 U.S.C. § 109(a) (2008).

⁵⁵ See *id.*; *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 654–55 (S.D. N.Y. 2013).

⁵⁶ See Eichler, *supra* note 14, at 228–31.

⁵⁷ See *id.* at 223.

⁵⁸ *ReDigi*, 934 F. Supp. 2d at 645–46.

commerce.”⁵⁹ The court reasoned that to sell a used mp3 song entails producing a new file (i.e., a recopy) on a different server, and thus, it is impossible to resell this particular digital asset without infringement.⁶⁰ As Eichler has illustrated, the first sale doctrine does not apply to digital assets.⁶¹ If this doctrine is expanded and TOS agreements are deemed unconscionable, Eichler concluded that decedents may transfer their digital assets at death.⁶²

However, Eichler dismissed state law reform too quickly because state law governs the contractual rights of TOS agreements.⁶³ For example, if the first sale doctrine applied to Adam’s iTunes account but no state law prioritized Adam’s will over Apple’s TOS agreement, then Apple could still deny Bailey’s use of her father’s iTunes music under the authority of the TOS even though Apple would not have grounds under copyright law.⁶⁴ Consequently, state law and federal copyright reform are both necessary to protect consumers in an increasingly digital age.⁶⁵

Unlike Eichler, this paper focuses on the reforms that state legislatures could implement to allow inheritability of digital assets and protection of consumers. To begin a discussion of state law allowing inheritability of digital assets, it is necessary to explore the pertinent legal doctrines implicated under state law: the right to transfer property at death and the right to contract.

III. THE RIGHT TO TRANSFER PROPERTY AT DEATH

Generally, two of the most significant and respected aspects of American law are the right to dispose of property at death⁶⁶ and the right

⁵⁹ *Id.* at 655.

⁶⁰ *Id.*

⁶¹ Eichler, *supra* note 14, at 223.

⁶² *Id.* at 230–31.

⁶³ See Sherry, *supra* note 16, at 204.

⁶⁴ *Contra* Eichler, *supra* note 14, at 223–28.

⁶⁵ See *id.*

⁶⁶ See *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

to contract.⁶⁷ However, these two principles conflict when evaluating the inheritability of digital assets given that TOS agreements generally provide that digital assets cannot be transferred at death.⁶⁸ Resolving this conflict requires examining the development of the right to transfer at death and the traditional circumstances under which wills can override contracts.

A. A Fundamental (or at least, a sacrosanct) Right

The Supreme Court of the United States in *Hodel v. Irving* stated that the “right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times.”⁶⁹ Further, the United States, a party to the action, conceded that “the total abrogation of the right to pass property is unprecedented and likely unconstitutional.”⁷⁰ Traditionally, the support for this right as sacrosanct includes the following rationales: (1) the right to transfer property at death is natural law; (2) it encourages wealth accumulation and discourages waste; (3) it produces happiness by strengthening families; and (4) it is the most administratively efficient means to dispose of property at death.⁷¹ On the other hand, some commentators have questioned whether the right to transfer property at death is fundamental by arguing that *Hodel* applies mainly to state regulations that effect a taking of property.⁷² In other words, as long as a state does not abrogate

⁶⁷ See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594–95 (1991) (enforcing cruise liner’s contract of adhesion, and specifically, forum selection clause as reasonable because the cruise liner could make potential litigation more predictable, thus, less costly, reducing costs for future consumers).

⁶⁸ See Horton, *supra* note 5, at 597–600.

⁶⁹ *Hodel*, 481 U.S. at 716; see also *In re Estate of Felhofer*, 843 N.W.2d 57, 66 (Wis. Ct. App. 2013) (affirming that Wisconsin recognizes the right to transfer property at death as a fundamental right).

⁷⁰ *Id.*

⁷¹ Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77, 85 (2015).

⁷² Ronald Chester, *Essay: Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving*, 24 SW. UNIV. L. REV. 1195, 1212 (1995).

the entire inheritance of an individual, a regulation should be upheld as constitutional.⁷³

Regardless of whether the right is fundamental, most commentators cannot deny the Supreme Court's acknowledgment that the right to transfer at death is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."⁷⁴ In turn, several scholars have relied on *Hodel* in arguing for the inheritability of digital assets.⁷⁵ One commentator in particular draws upon the authority of *Hodel* to propose that consumers should have a choice as to whether their digital assets are transferable at death.⁷⁶

B. Wills Overriding Contracts Outside the Digital Context

Given the sacrosanct nature of the right to dispose of assets at death, many courts have held that provisions in a will override contractual provisions under certain circumstances.⁷⁷ For example, in most jurisdictions, testators may override a beneficiary designation in a life insurance contract by designating another beneficiary of the policy by will so long as the testator attempted to change the beneficiary using the protocol described in the policy agreement but failed to complete the

⁷³ *Id.* at 1211–12.

⁷⁴ *Hodel*, 481 U.S. at 716.

⁷⁵ Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 *FORDHAM L. REV.* 799, 801 (2014) (The right to devise is one of the most significant property rights in American law."). Specifically, Banta argued that:

Americans expect to have decision-making control over how their belongings are distributed at their death, and until recently, contracts have regularly been used to effectuate the intention of a decedent. But this expectation is coming into stark conflict with emerging contracts, most clearly demonstrated by contracts governing digital assets.

Id. at 801.

⁷⁶ Tyler G. Tarney, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 *CAP. L. REV.* 773, 800 (2012).

⁷⁷ See, e.g., *Estate of Trigoboff*, 669 N.Y.S.2d 185, 186 (N.Y. Sup. Ct. 1998) (holding that a will overrides terms of beneficiary designation of an IRA when the will specifically bequeaths IRA to beneficiary).

change due to unforeseen circumstances.⁷⁸ On the other hand, some jurisdictions hold that if the life insurance policy designates a manner for changing a beneficiary, an insured can only effectuate a change in a beneficiary designation by following the procedure under the policy's terms.⁷⁹

For example, the decedent in *Cook* handwrote a will stating, "[I] leave my Worldly posessions (sic) to my Wife and son, [including] my Insurance policys (sic),"⁸⁰ but the decedent's life insurance policy

⁷⁸ See, e.g., *Cook v. Equitable Life Assurance Soc'y of U. S.*, 428 N.E.2d 110, 115 (Ind. Ct. App. 1981) (holding that decedent could not change the beneficiary because the decedent did not attempt to follow the procedures of the policy); *Metro. Life Ins. Co. v. Bryant*, 191 S.W.2d 449, 450 (Tenn. Ct. App. 1946) (holding that the plaintiff's intention to change the life insurance beneficiary is insufficient when not complying with the mode of changing a beneficiary by the life insurance policy).

⁷⁹ See, e.g., *Cook*, 428 N.E.2d at 115.

⁸⁰ *Id.* at 112. The relevant portions of the decedent's will are as follows:

Last Will & Testimint [sic]

I Douglas D. Cook

Being of sound mind do Hereby leave all my Worldly posessions [sic] to my Wife and son, Margaret A. Cook & Daniel Joseph Cook. being my Bank Accounts at Irwin Union Bank & trust to their Welfair [sic] my Insurance policys [sic] with Common Welth of Ky. and Equitable Life. all my machinecal [sic] tools to be left to my son if He is Interested in Working with them If not to be sold and money used for their welfair [sic] all my Gun Collection Kept as long as they, my Wife & Son [sic] and then sold and money used for their welfair [sic].

I sign [sic] this

required that a beneficiary change is effective only upon written notice to the life insurance company and approval by the company.⁸¹ The Indiana Court of Appeals held that the transfer of the decedent's policy by will did not override the beneficiary designation in the decedent's life insurance policy because all the parties to the policy—the insured, the insurer, and the beneficiary—should be able to rely on the contract with certainty.⁸² The court emphasized that if the decision were otherwise, insurance companies would struggle to administer the proceeds of the life insurance policy because insureds could change a beneficiary of a policy without giving notice to the insurer of the change.⁸³ For example, the insurer would claim that the beneficiary is one individual while the executor may claim that the beneficiary is another, resulting in a dispute.⁸⁴

Id.

⁸¹ *Id.* at 111. The relevant provision of the decedent's life insurance policy is as follows:

BENEFICIARY. The Owner may change the beneficiary from time to time prior to the death of the Insured, by written notice to the Society, but any such change shall be effective only if it is endorsed on this policy by the Society, and, if there is a written assignment of this policy in force and on file with the Society (other than an assignment to the Society as security for an advance), such a change may be made only with the written consent of the assignee.

Id.

⁸² *Id.* at 116.

⁸³ *Id.* at 115 (“Clearly it is in the interest of insurance companies to require and to follow certain specified procedures in the change of beneficiaries of its policies so that they may pay over benefits to persons properly entitled to them without subjection to claims by others of whose rights they had no notice or knowledge.”).

⁸⁴ *Id.* (contending that “Certainly it is also in the interest of beneficiaries themselves to be entitled to prompt payment of benefits by insurance companies which do not withhold payment until the will has been probated in the fear of later litigation which might result from having paid the wrong party.”).

Evidently, a legal precedent exists for wills and other testamentary instruments overriding contracts.⁸⁵

IV. INHERITABILITY OF DIGITAL ASSETS

For digital assets, the issue is whether digital assets are inheritable—more specifically, whether an individual has rights in the digital asset similar to that of traditional property rights and characteristics.⁸⁶ As a threshold consideration, a clear definition of a digital asset is necessary to determine the rights in a digital asset.⁸⁷ Without a clear definition of the property rights in a digital asset, online service providers have more control over digital assets if their TOS agreements are enforceable.⁸⁸

A. *Lack of Clarity—The Development of a Definition for Digital Assets*

1. General Definitions

Black's Law Dictionary does not define digital asset,⁸⁹ which may be because the definition of a digital asset is still a legal question.⁹⁰ For the purposes of estate planning, one of the broader definitions includes:

“[A]ny file on your computer in a storage drive or website and any online account or membership.” Under this definition, digital assets include Microsoft Office documents, digital photos, music on iTunes, as well as online memberships such as e-mail accounts, profiles on social-networking sites, online banking

⁸⁵ See *supra* Part III, Section B and accompanying notes.

⁸⁶ See *infra* Part IV, Section A(ii) and accompanying notes.

⁸⁷ See Horton, *supra* note 5, 567–68.

⁸⁸ See *id.*

⁸⁹ See *Asset*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁹⁰ Eichler, *supra* note 14, at 211–12.

and credit card accounts, and website or domain names owned by a person.⁹¹

A narrower definition includes emails, documents, audio and video files, and images stored on desktop devices, computers, tablets, or mobile devices.⁹² One commentator stated that a digital estate may include the following: “videos, text documents, photographs, music, emails, online subscriptions, cell phone applications, video games, online personal social media accounts, and other similar items.”⁹³

In comparison, the RUFADAA has a broad, inclusive definition of a digital asset with regard to accessing a digital asset;⁹⁴ however, the RUFADAA’s definition of a digital asset for inheritability is limited to a decedent’s rights as defined by state law, which under a TOS agreement would entail the right to a non-transferable license (i.e., noninheritable asset).⁹⁵ Specifically, the RUFADAA defines a digital asset as “an electronic record in which an individual has a right or interest[,]” which “does not include an underlying asset or liability unless the asset or liability is itself an electronic record[.]”⁹⁶

Given the lack of clarity in defining a digital asset and the insufficiency of the RUFADAA’s definition for inheritability, state legislatures must reevaluate the definition of a digital asset under this

⁹¹ Matthew D. Glennon, *A Call to Action: Why the Connecticut Legislature Should Solve the Digital Asset Dilemma*, 28 QUINNIPIAC PROB. L.J. 48, 53 (2011); see also Jamie P. Hopkins, *Afterlife in the Cloud: Managing a Digital Estate*, 5 HASTINGS SCI. & TECH. L.J. 209, 211 (2014) (“Essentially, digital assets include any electronically stored information.”).

⁹² Glennon, *supra* note 91, at 53.

⁹³ Jaime Patrick Hopkins & Ilya Alexander Lipin, *Viable Solutions to the Digital Estate Planning Dilemma*, 99 IOWA L. REV. BULL. 61, 64 (2013).

⁹⁴ See 2014 ISSUES MEMO 2, *supra* note 13, at 2 (“It governs only access to digital assets. It defers to other law to determine the ownership of the assets.”).

⁹⁵ See *id.* (providing that fiduciaries “step into the shoes of” the decedent).

⁹⁶ REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 2(10) (UNIF. LAW COMM’N 2015), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_

[RUFADAA_Final%20Act_2016mar8.pdf](#). The definition of a digital asset “includes any type of electronically-stored information, such as: 1) information stored on a user’s computer and other digital devices; 2) content uploaded onto websites; and 3) rights in digital property.” *Id.* at § 2 cmt. at 6.

proposal. As demonstrated below, some scholars have already touched upon this issue and may offer some guidelines for reevaluating the definition.

2. Comparing Digital Assets to Traditional Assets

For the purpose of inheritability, scholars define a digital asset based on whether it has the traditional components of a tangible asset: namely, whether the digital asset is an asset instead of a service, and whether that asset has actual value. First, some commentators draw the distinction between an asset and a service.⁹⁷ Simply put, these commentators distinguish ownership based on online content versus an online account.⁹⁸ Specifically, an online platform is a service, while individual's contents on that platform may be an inheritable asset.⁹⁹ For example, if Adam leaves control of his social media accounts to Bailey via his will, Bailey cannot use his Facebook account under this definition, but she can retrieve copies of her father's photographs, communications, and other information on his account.¹⁰⁰

For a comparison of this test to traditional assets, Black's Law Dictionary provides the following definition for a service:

Labor performed in the interest or under the direction of others; specif[ically], the performance of some useful act or series of acts for the benefit of another, usu[ally] for a fee In this sense, service denotes an *intangible* commodity in the form of human effort, such as labor, skill, or advice.¹⁰¹

⁹⁷ Michael D. Roy, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINNIPIAC PROB. L.J. 376, 384 (2011).

⁹⁸ *Id.* at 384–86.

⁹⁹ *Id.* at 384.

¹⁰⁰ *Id.* at 386–87.

¹⁰¹ *Service*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added).

Notably, services are distinguishable from assets in that services are intangible, and thus, a service cannot exist in a tangible medium.¹⁰² A service contract, likewise, is canceled upon the death of a party—it is not inheritable.¹⁰³ However, given the somewhat ethereal nature of digital assets, determining whether a digital asset is intangible or tangible may be troublesome. For instance, a digital copy of a song can exist on a disc, but a social media platform cannot exist as a tangible counterpart. Furthermore, a collection of television shows can exist in the form of a subscription to an online television provider (i.e., a service) or in the form of a disc collection (i.e., an asset).

Secondly, some commentators have argued that rights in a digital asset should be determined based on whether an online account has “purely sentimental value” or “actual monetary value.”¹⁰⁴ From here, one must determine whether the beneficiary of a digital asset is entitled to continued use of the account or just merely access to the account to derive the value in it—the “asset-versus-service” test.¹⁰⁵ For example, Adam’s Facebook profile may have sentimental value, but his photographs may be the only content that have monetary value. Therefore, Bailey would be entitled to download the photographs from her father’s Facebook account but would not have the power to use the profile as her own.

Even though there is an appeal in defining digital assets in the context of traditional property rights, TOS agreements still are the main authority governing an individual’s rights to transfer property at death.¹⁰⁶

B. Enforceability of TOS Agreements

Ultimately, the question of inheritability turns on whether an individual has property rights in the asset after death.¹⁰⁷ In other words, the question is whether an individual owns the asset as defined by

¹⁰² *See id.*

¹⁰³ Roy, *supra* note 97, at 384.

¹⁰⁴ Sherry, *supra* note 16, at 210; *see also* Hopkins & Lipin, *supra* note 93, at 64 (emphasizing digital assets that have been more traditionally valued, such as customer lists).

¹⁰⁵ Sherry, *supra* note 16, at 210.

¹⁰⁶ *See infra* Part IV, section B and accompanying notes.

¹⁰⁷ Horton, *supra* note 5, at 567.

contract.¹⁰⁸ Some commentators argue that online service providers circumvent inheritability by designating in the contract that an individual does not own a digital asset; therefore, the individual cannot dispose of the asset at death.¹⁰⁹ For example, if Adam owns one-hundred thousand frequent-flier miles and the contract states that these miles “do not constitute property,”¹¹⁰ then Adam cannot give these airline miles to Bailey upon his death.¹¹¹

Evidently, the terms of the contract determine an individual’s property rights in the digital asset,¹¹² and each of these contracts are construed under state law.¹¹³ Thus, each state’s enforceability of a TOS agreement would determine whether a digital asset can pass through probate via a will.¹¹⁴ Enforceability of a TOS agreement has traditionally been centered on whether the agreement is procedurally or substantively unconscionable.¹¹⁵ In other words, enforceability of TOS agreements revolve around whether the agreement is a contract of adhesion and contains unfair terms to the purchaser.

In addressing procedural unconscionability, it is necessary to review the two general forms of TOS agreements: (1) clickwrap agreements and (2) browsewrap agreements. Clickwrap agreements are typically enforceable because they require the user to scroll through the

¹⁰⁸ *Id.* at 568.

¹⁰⁹ Glennon, *supra* note 91, at 57.

¹¹⁰ *Terms and Conditions*, AMERICAN AIRLINES, <https://www.aa.com/i18n/aadvantage-program/terms-and-conditions.jsp> (last visited Dec. 12, 2016).

¹¹¹ *See also* Horton, *supra* note 5, at 565–67 (stating the proposition that a provision stating that frequent flier miles are not property circumvents any inheritability).

¹¹² Roy, *supra* note 97, at 384.

¹¹³ *See id.*

¹¹⁴ *See* Banta, *supra* note 75, at 831 (“Contracts that attempt to bypass these state laws are illegal and against public policy favoring the freedom of disposition.”).

¹¹⁵ *See* David Horton, *Contractual Indescendibility*, 66 HASTINGS L.J. 1047, 1068–71 (2015).

terms and agree to them before using the website's services.¹¹⁶ Browsewrap agreements, on the other hand, are typically unenforceable because the terms are either inconspicuously placed on a webpage or require opening a hyperlink to access.¹¹⁷

The "clickwrap" and "browsewrap" names come from earlier form of contracts—namely, "shrinkwrap" agreements, which typically came in a package delivered to the consumer's doorstep.¹¹⁸ Courts held that shrinkwrap agreements are enforceable and, based on that precedent, held that clickwrap agreements are likewise enforceable.¹¹⁹ Specifically, the rationale for enforcing shrinkwrap agreements is that "when the purchaser receives [his or her product], sees the license agreement [in the package], and does not return [the product]," there is

¹¹⁶ Alison S. Brehm & Cathy D. Lee, *From the Chair: "Click Here to Accept the Terms of Service"*, 31 COMM'NS LAWYER 1 (Am. Bar Ass'n), Jan. 2015, [http://www.americanbar.org/publications/communications_lawyer/2015/january/click_%](http://www.americanbar.org/publications/communications_lawyer/2015/january/click_%20here.html)

[20here.html](http://www.americanbar.org/publications/communications_lawyer/2015/january/click_%20here.html).

¹¹⁷ See e.g., *Specht v. Netscape Commc'ns. Corp.*, 306 F.3d 17, 32 (2d Cir. 2002).

¹¹⁸ *Rogers v. Dell Computer Corp.*, 138 P.3d 826, 829 n.3 (Okla. 2005).

¹¹⁹ *i.Lan Systems, Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002). Specifically, the court stated the following:

If *ProCD* was correct to enforce a shrinkwrap license agreement, where any assent is implicit, then it must also be correct to enforce a clickwrap license agreement, where the assent is explicit. To be sure, shrinkwrap and clickwrap license agreements share the defect of any standardized contract—they are susceptible to the inclusion of terms that border on the unconscionable—but that is not the issue in this case. The only issue before the Court is whether clickwrap license agreements are an appropriate way to form contracts, and the Court holds they are. In short, i.LAN explicitly accepted the clickwrap license agreement when it clicked on the box stating "I agree."

mutual assent to the agreement.¹²⁰ Courts described this as “money now, terms later.”¹²¹ In the context of a digital asset, the court in *i.Lan Systems, Inc. v. Netscout Service Level Corp.* admitted that these agreements may be susceptible to unconscionable provisions, but like “money now, terms later,” clicking “I agree” is sufficient for mutual assent to the terms and conditions.¹²²

In 2002, Sonia Sotomayor, then writing for the Second Circuit Court of Appeals, distinguished a browsewrap agreement from a clickwrap agreement in *Specht v. Netscape Communications Corp.*¹²³ Specifically, the Second Circuit held that an inconspicuous reference to the terms and conditions of a license agreement is insufficient to constitute mutual assent.¹²⁴ In fact, the court noted that Netscape, a free-service, hid the acceptance of the terms and conditions of the license agreement.¹²⁵ Therefore, regardless of the general rule of not allowing a party to avoid a contract by not reading its terms,¹²⁶ a user is not expected to search for the terms and conditions when using a free service because this transaction does not compare to “the paper world of arm’s-length bargaining.”¹²⁷

Recently, *Berkson v. Gogo LLC* illustrated the more prevalent form of a click-wrap agreement: a scrollwrap agreement, which allows the user to scroll through the terms and conditions before clicking to accept.¹²⁸ Affirming that scrollwrap agreements are generally enforceable, the *Berkson* court synthesized the following principles for assenting to TOS agreements: (1) “[TOS agreements] will not be enforced when there is no

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Specht*, 306 F.3d at 32.

¹²⁴ *Id.*

¹²⁵ *Id.* at 35.

¹²⁶ *Id.* at 30.

¹²⁷ *Id.* at 32.

¹²⁸ *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 398 (E.D. N.Y. 2015).

evidence that the [user] had notice of the agreement”; (2) “[TOS agreements] will be enforced when a user is encouraged by the design . . . of the website . . . to examine the terms . . . through hyper[links]”; and (3) “[TOS agreements] will not be enforced where . . . terms [are] buried at the bottom of a webpage or tucked away.”¹²⁹

Thus, TOS agreements are generally enforceable contracts of adhesion if the parties have constructive notice of the terms and make an affirmative act to agree to them—by clicking “I agree.”¹³⁰ Conversely, TOS agreements are generally unenforceable contracts of adhesion if the terms are inconspicuous given that a user must click a hyperlink to view the terms and does not have to view these terms to use the service.¹³¹ From a policy perspective, TOS agreements generally survive a challenge based on a contract of adhesion because standardized form contracts reduce administrative costs for online service providers.¹³² Specifically, allowing individuals to transfer assets at death, absent a uniform restriction of the use of digital assets, would dramatically increase the costs to online service providers in managing user accounts because the providers would have to manage each transfer on an case by case basis.¹³³

Furthermore, for substantive unconscionability, the issue with TOS agreements goes beyond mutual assent, and courts must determine if the terms are unfair to one party.¹³⁴ For example, in *Feldman v. Google*, the plaintiff challenged Google’s Adwords agreement that provided: “Carefully read the following terms and conditions. If you agree with these terms, indicate your assent below.”¹³⁵ At the bottom of the page, the agreement read, “Yes, I agree to the above terms and conditions,”

¹²⁹ *Id.* at 401–02.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 402; *see also* Horton, *supra* note 5, at 547 (contending that “barring posthumous transfer can prevent . . . ‘administrability’ problems.”).

¹³³ *See* Horton, *supra* note 5, at 585–600.

¹³⁴ *See* Horton, *supra* note 115, at 1069–71.

¹³⁵ *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 233 (E.D. Pa. 2007).

which was above the box that the advertiser could click.¹³⁶ Accordingly, the agreement gave sufficient notice to the plaintiff, but the forum selection clause provided that disputes would take place in California where Google was located.¹³⁷ Accordingly, the plaintiff argued that the Adwords agreement was not only procedurally unconscionable as a contract of adhesion but also substantively unconscionable because the forum selection clause unreasonably favored the sophisticated party, Google.¹³⁸ The court rejected both arguments by construing this contract as a valid and enforceable contract of adhesion and forum selection clause outside the digital context.¹³⁹ In contrast, the *Berkson* court held that a TOS agreement was unenforceable because the forum selection clause would “materially alter the substantive default rights [of] ordinary consumers who are unlikely to be aware of them.”¹⁴⁰

Despite the general enforceability of TOS agreements, many scholars are still skeptical of these agreements given that they are lengthy contracts of adhesion that are rarely read.¹⁴¹ Furthermore, commentators have advocated for making TOS agreements unenforceable because the excessive length discourages individuals from reading these agreements.¹⁴² In fact, recent statistics have indicated that users rarely read these agreements, affirming the common knowledge notion that not

¹³⁶ *Id.*

¹³⁷ *Id.* at 242–43.

¹³⁸ *Id.* at 243.

¹³⁹ *Id.* at 240–43.

¹⁴⁰ *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 404 (E.D. N.Y. 2015).

¹⁴¹ *See, e.g.*, Eichler, *supra* note 14, at 215–16 (arguing that TOS agreements are unconscionable and keep consumers from transferring what they think they own at death); Horton, *supra* note 5, at 1068–69 (contending that consumers can claim that TOS agreements are unconscionable due to lack of mutual assent and unfair terms).

¹⁴² Sherry, *supra* note 16, at 204.

many users read before they click.¹⁴³ Accordingly, mutual assent is not apparent in lengthy contracts of adhesion that are rarely read.

Coupled with the disincentive to read a TOS agreement are provisions that unfairly surprise consumers, such as having a non-transferable license.¹⁴⁴ For example, in *Ajemian v. Yahoo*, the executors of the deceased's estate brought a declaratory judgment action to declare that the deceased's electronic messages from his Yahoo! email account were property of the estate.¹⁴⁵ The original TOS agreement that the decedent agreed to contained no provision discussing non-transferability at death; however, Yahoo! updated its TOS to include such provision but did not notify its users.¹⁴⁶ The Massachusetts Court of Appeals held that the TOS was unenforceable because the decedent did not assent to the terms, considering that Yahoo! did not establish that the change in the TOS agreement was prominently displayed to the decedent to provide him notice of the change.¹⁴⁷

Most notably, Natalie Banta has argued that TOS agreements are undermining succession law and keeping a new class of property, digital assets, from being inheritable.¹⁴⁸ However, she also argued that private contracts, not wills, are the most efficient manner to transfer property at death.¹⁴⁹ Simply put, individuals could transfer digital assets at death under a private agreement between the online service provider and user.¹⁵⁰

¹⁴³ See STUDY ON CONSUMERS' ATTITUDES, *supra* note 2, at 96–97. In a recent study, only nine percent of users read the TOS agreement when having to open the agreement to view the terms. Only twenty-two percent of users read the TOS agreement when forced to scroll through the terms. See *id.*

¹⁴⁴ See Eichler, *supra* note 14, at 211 (“[TOS] agreement[s] lead[] to an unconscionable result that robs people of property rights that they likely (and reasonably) believed they had.”).

¹⁴⁵ *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 606 (Mass. Ct. App. 2013).

¹⁴⁶ *Id.* at 607–08.

¹⁴⁷ See *id.* at 611–12.

¹⁴⁸ Banta, *supra* note 75, at 853.

¹⁴⁹ *Id.* at 845–46.

¹⁵⁰ *Id.* at 853.

V. PROPOSED LEGISLATION: APPLYING THE THREE-TIER SYSTEM FOR INHERITABILITY

To protect consumers' rights to transfer digital assets at death, state legislatures should adopt the RUFADAA's three-tier system for the purpose of inheritability.¹⁵¹ As a result, consumers would have the opportunity to designate a beneficiary of a digital asset using an online tool agreement.¹⁵² Alternatively, a consumer may designate a beneficiary for a digital asset via a will or other testamentary instrument, overriding any contrary provision in a TOS agreement.¹⁵³ Because this proposal allows for the transfer of digital assets at death and provides that a beneficiary designation may be made under a private agreement between the online service provider and consumer, adopting this proposal would balance the right to dispose of property at death and the right to contract while also protecting consumers from unknowingly purchasing a digital asset subject to a non-transferable license.

A. Balance Between the Right to Transfer Property at Death and the Right to Contract

State legislatures should adopt the RUFADAA's three-tier system for the purpose of inheritability of digital assets.¹⁵⁴ After all, this system would give a private contract between the online service provider and decedent (i.e., an online tool) priority for the disposition of a digital asset at death.¹⁵⁵ In other words, an individual would be able to transfer a digital asset at death outside of probate via a contract with the online service provider.¹⁵⁶ If there is no online tool agreement offered or, if the

¹⁵¹ See *supra* Part II, section B and accompanying notes.

¹⁵² See *supra* Part II, section B and accompanying notes.

¹⁵³ See *supra* Part II, section B and accompanying notes.

¹⁵⁴ See *supra* Part II, section B and accompanying notes.

¹⁵⁵ See REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 4(a) (UNIF. LAW COMM'N 2015), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf.

¹⁵⁶ See Banta, *supra* note 75, 845–48.

individual does not agree to an online tool agreement, an individual may designate a beneficiary by will or other testamentary instrument.¹⁵⁷ Without a designation made in either an online tool agreement or will, the TOS agreement governs the right to transfer at death.¹⁵⁸

To accomplish the inheritability of digital assets at death, a revision of the language of the RUFADAA may look like the following:

(a) A user may use an online tool to direct the custodian to transfer to a designated recipient or not to disclose some or all of the user's digital assets, . . . [A] transfer using an online tool *overrides* a contrary direction by the user in a will, trust, power of attorney, or other dispositive or nominative instrument.

(b) If a user has not used an online tool to give direction under subsection or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, to transfer some or all of the user's digital assets.

(c) A user's direction under subsection (a) or (b) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.¹⁵⁹

With this proposal, state legislatures would prioritize the right to transfer at death, either by contract or will, over enforcing TOS agreements that are lengthy contracts of adhesion. At the same time, this proposal would offer more protection to consumers by fulfilling the common belief that

¹⁵⁷ See REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 4(b).

¹⁵⁸ See *id.* at § 4(c).

¹⁵⁹ *Id.* at § 4(a)–(c).

purchasing a digital asset gives the individual more property rights in the asset than a non-transferable license.¹⁶⁰ For example, if Adam unknowingly purchased a non-transferable license of an iTunes collection under Apple's standard TOS agreement, then Adam would have two options to designate Bailey as his beneficiary: (1) Adam could designate Bailey as his beneficiary using Apple's online tool agreement, or (2) Adam could give Bailey his song collection through his will.

Unlike many commentator's arguments to make TOS agreements unenforceable,¹⁶¹ this proposed legislation only prioritizes the designation of a beneficiary by will over a TOS agreement; it does not invalidate the TOS agreement. For instance, if Adam died without either making a will or designating a beneficiary using an online tool, Bailey would not inherit Adam's music collection under the terms of the still enforceable TOS agreement. After all, TOS agreements should not generally be deemed unenforceable because these agreements lower costs for online service providers and allow them to operate more freely using standardized forms. Accordingly, this proposal, like the RUFADAA, does not give an implicit authority of the decedent to transfer property. Instead, it gives priority to a testator's explicit instructions at death.

Furthermore, to promote more administrability for online service providers, this proposed legislation would require written notice to the service provider upon the designation of a beneficiary by will. For instance, a testator generally needs to give written notice to an insurance company when overriding a beneficiary designation in his or her policy by will.¹⁶² After all, requiring notice prevents the insurance company from expending more administrative costs when informed of a beneficiary change after the insured's death.¹⁶³ Similarly, if an owner of a digital asset designates a beneficiary of a digital asset by will, the owner under this proposal would be required to give written notice to the

¹⁶⁰ See Horton, *supra* note 5, at 548.

¹⁶¹ See Eichler, *supra* note 14, at 215.

¹⁶² See *Cook v. Equitable Life Assurance Soc'y of U. S.*, 428 N.E.2d 110, 115 (Ind. Ct. App. 1981).

¹⁶³ See *id.*; see also Horton, *supra* note 5, at 547.

online service provider of such change. Overall, informing the online service provider would prevent subsequent disputes and allow for the companies to easily designate a particular individual as succeeding to a digital asset.

B. Limitations on Proposed Legislation

1. Transfers At Death

First, this proposed legislation would only address the right to transfer an asset upon death, not during life. If a digital asset was transferable *inter vivos*, consumers may transfer use of an asset while retaining a copy (or recopying) during life.¹⁶⁴ Therefore, this proposal does not implicate an issue with recopying a digital asset for the use of another;¹⁶⁵ rather, a beneficiary of a digital asset need only access a decedent's online account and have the right to use that account. For example, Bailey would only need her father's Apple username and password to succeed to Adam's collection of music. Because Adam is deceased, Apple would presumably be less concerned with him retaining copies of his music.

2. Limited by the Definition of a Digital Asset

The main purpose of this proposal is to confirm the beliefs of consumers—that they actually own a digital asset. Because of this purpose, the definition of a digital asset under this proposal is limited to digital assets that have a tangible counterpart or characteristics.¹⁶⁶ For example, a song may exist in the form of an mp3 or a disc; thus, this legislation would cover an mp3 song. In contrast, this legislation would not cover the use of an online platform, such as Facebook, Netflix, etc., but would entitle individuals to transfer their own content from these platforms, such as photographs.¹⁶⁷ Thus, this proposal seeks to give

¹⁶⁴ See *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 654–55 (S.D. N.Y. 2013).

¹⁶⁵ See *id.*

¹⁶⁶ See Roy, *supra* note 97, at 384; Sherry, *supra* note 16, at 210; see also Hopkins & Lipin, *supra* note 93, at 64 (emphasizing digital assets that have been more traditionally valued, such as customer lists).

¹⁶⁷ See *supra* Part IV, section A (ii).

digital assets the same rights as their counterparts in a tangible, or traditional, form. Given the lack of clarity for the definition of a digital asset,¹⁶⁸ this proposal will not go further.

3. Does Not Solve the Whole Problem: Expansion of the First Sale Doctrine to Digital Assets

An objection to this proposal would be that it conflicts with the distribution right under copyright law.¹⁶⁹ Anthony Eichler has correctly argued that the first sale doctrine needs to be expanded to allow licensed, digital assets to be transferred at death because state law cannot override federal copyright law.¹⁷⁰ Otherwise, if digital assets are transferred, even if allowed under state law, the copyright owner would have a cause of action for copyright infringement.¹⁷¹

While Eichler's argument is sound, he dismissed state law reforms too quickly because state contract law may prevent inheritability even if the first sale doctrine is expanded to include digital assets. After all, federal copyright law does not preempt state law governing contractual rights between parties.¹⁷² In other words, the expansion of the first sale doctrine would not prevent an online service provider from licensing a digital asset; it would only prevent them from having a copyright action against the purchaser who transferred it.¹⁷³ Therefore, even if copyright law allows the transfer of a digital asset, the online service provider's TOS agreement would prevent the inheritability of a digital asset if it only grants a non-transferable license. Although the first sale doctrine must be expanded to provide that a copyright claim does not result from the disposition of digital assets at death, states must also

¹⁶⁸ See *supra* Part IV, section A and accompanying notes.

¹⁶⁹ See generally Eichler, *supra* note 14, at 210.

¹⁷⁰ *Id.* at 226–28; see *supra* Part II, Section D and accompanying notes.

¹⁷¹ Eichler, *supra* note 14, at 223–28.

¹⁷² See *e.g.*, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996).

¹⁷³ See Sherry, *supra* note 16, at 204.

prevent online service providers from having a contract cause of action for breaching their license agreements.¹⁷⁴

Taken together, if Congress expands the first sale doctrine to include digital assets and individuals are allowed to designate beneficiaries by an online tool or will under state law, beneficiaries of the deceased purchaser's estate may inherit digital assets.

C. Foreseeable Consequences to Online Service Providers

As a practical matter, purchasers may forego any online tool agreement if they believe the terms are unfavorable.¹⁷⁵ Accordingly, purchasers would designate a beneficiary by will, overriding a TOS agreement.¹⁷⁶ For example, if Adam read the legacy contract of iTunes that provides "all mp3 files will go to the named beneficiary under this agreement," but Adam wants to leave half his music to Bailey and half his music to Charlie, his brother, Adam could designate this transfer by will, which would override the non-transferable license that is the TOS agreement.

Consequently, online service providers would likely curb the formal requirement for a separate agreement by providing an option to rent or purchase the digital asset from the outset. After all, the purpose of an online tool agreement is to provide the online service provider and the consumer an opportunity to designate a beneficiary of a digital asset by agreement. An option to rent or buy is appealing because it would satisfy the purpose of an online tool and would possibly be less costly to the provider. Accordingly, if these transactions result from the adoption of this proposal, then state legislatures or courts would probably characterize these transactions as online tool agreements.

¹⁷⁴ *Contra* Eichler, *supra* note 14, at 220–21 (arguing that federal copyright law preempts state reform for inheritability).

¹⁷⁵ See REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 4(b) (UNIF. LAW COMM'N 2015), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf.

(providing that if a user does not use an online tool agreement, a user may make the designation using a will).

¹⁷⁶ *See id.*

From there, online service providers would adjust the price of a digital asset to account for the transfer of the asset at death because consumers prefer the benefits of inheritability over a license.¹⁷⁷ Consequently, if the original price of a digital asset (i.e., the license) is similar to the tangible form of that asset, then online providers may have to discount the price of a licensed digital asset because of its restricted use.

For example, Amazon currently prices the Red Hot Chili Peppers (“Chili Peppers”) new album, *The Getaway*, at \$11.88 for a CD version of the album, but an mp3 version of the album costs \$11.49.¹⁷⁸ Furthermore, the disc album includes a free mp3 version of the album, so the nominally higher price for the tangible version does not seem to reflect the limited use of its digital version.¹⁷⁹ In comparison, Amazon prices the Chili Peppers *Greatest Hits* album at \$9.99 for the disc, but at \$12.49 for the mp3 version.¹⁸⁰ Given the similarity between prices of many assets in digital form to their tangible counterparts,¹⁸¹ online service providers may discount digital assets to reflect the restricted use of the asset under a non-transferable, license agreement. As a result, Adam would have the option to purchase *The Getaway* with the power to designate Bailey as the beneficiary of the album upon his death or rent it at a lower price.

¹⁷⁷ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (“ProCD offers software and data for two prices: one for personal use, a higher price for commercial use. Zeidenberg wants to use the data without paying the seller’s price[.]”).

¹⁷⁸ *The Getaway*, AMAZON, https://www.amazon.com/Getaway-Red-Hot-Chili-Peppers/dp/B01F3REDMU/ref=ntt_m.us_dp_dpt_1 (last visited Oct. 30, 2016).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Compare *iTunes Preview*, APPLE, <https://itunes.apple.com/us/album/confessions/id386153476> (last visited Dec. 12, 2016) (pricing Usher’s *Confessions* mp3 album at \$10.99), with BEST BUY, <http://www.bestbuy.com/site/confessions-special-edition-cd/6845088.p?skuId=6845088> (last visited Dec. 12, 2016) (pricing Usher’s *Confessions* CD album at \$5.99).

VI. CONCLUSION

The RUFADAA dispelled with the issue of access to digital assets, but it did not address the more pertinent issue: inheritability. With the growth of the digital ownership, there is an increased need to promote the inheritability of digital assets. Put simply, as digital ownership becomes more of the norm, there is an increased need to treat digital assets as their tangible counterparts. Currently, online service providers prevent consumers from designating a beneficiary to inherit a digital asset under TOS agreements. Although there is a general skepticism of TOS agreements as enforceable, online service providers need these types of agreements to lower administrative costs. Therefore, to accomplish inheritability, this proposal balances the right to transfer property at death with the right to contract, prioritizing separate agreements and testamentary instruments over TOS agreements. Specifically, state legislatures should allow online service providers to contract with a consumer to designate a beneficiary for their digital assets. Otherwise, individuals may designate a beneficiary under their will, which would override any contrary provision in a TOS agreement.

The greatest impediment to this proposal is that the first sale doctrine does not apply to digital assets. Consequently, if a state legislature adopted this proposal, a transfer of a digital asset would result in a copyright infringement. However, this proposal would complement any expansion of the first sale doctrine because it would prevent online service providers from still licensing digital assets under state law.

Ultimately, state legislatures should reevaluate the law governing digital assets with consumer protection in mind since many individuals unknowingly purchase a non-transferable license in a digital asset. The adoption of this proposal would help bring estate planning into the twenty-first century by providing a precedent for treating digital assets with traditional property rights in an increasingly digital world.