Santa Clara High Technology Law Journal

Volume 29 | Issue 4 Article 5

5-23-2013

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Recommended Citation

Claudine Wong, *Can Bruce Willis Leave His iTunes Collection to His Children?: Inheritability of Digital Media in the Face of EULAs*, 29 Santa Clara High Tech. L.J. 703 (2012).
Available at: http://digitalcommons.law.scu.edu/chtlj/vol29/iss4/5

CAN BRUCE WILLIS LEAVE HIS ITUNES COLLECTION TO HIS CHILDREN?: INHERITABILITY OF DIGITAL MEDIA IN THE FACE OF EULAS

Claudine Wong†

Abstract

In early September, 2012, multiple news agencies reported that actor Bruce Willis was going to sue Apple for the right to pass his iTunes collection to his children upon his death. While the story ultimately proved to be false, it begs the question: Can Mr. Willis actually pass his iTunes songs, legally purchased but subject to a license agreement, to his daughters? We are increasingly acquiring digital music and e-books, copyrighted digital content with legally well-understood physical equivalents. As users pass away, their families are left to wonder if or how they can gain access to the deceased person's digital assets, a problem they do not have with old fashioned physical assets.

In their traditional, print media format, music and books are protected by the first sale doctrine: when the owner passes away, his or her children can inherit that content; the children can then sell, give away, or discard the content. The publisher of the content cannot interfere with either the inheritance or the children's ultimate disposal. The purchase of digital media, however, is universally governed by an "end user license agreement" or EULA. The purchase also universally requires creating an account with the content provider, an account also governed by a EULA. How do these EULAs restrict Mr. Willis's ability to pass on his digital content? Can his children simply take control of his accounts, and thus have access to the content just as he did? Does the first sale doctrine apply to the digital content, thus allowing Mr. Willis to pass on his digital content,

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and his daughters to do with it as they like? We will conduct a careful examination of the EULAs for the most popular providers of digital music and e-books in attempt to answer the first two questions. The third question has, for the time being, been answered by Capitol Records, LLC v. ReDigi, Inc.*: No, the first sale doctrine does not apply to digital media, it only applies to material objects.*

A bare handful of states have passed legislation, in an attempt to deal with digital assets at depth, but these laws are too narrow to cover Mr. Willis's situation. Thus it is left to the consumers to form digital estate plans. It is also left to the content providers to address the death of their users, either in their EULAs or in some other system.

Upon conclusion of this analysis, this paper will attempt to answer: Can Bruce Willis, in fact, pass his iTunes collection to his children?

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I. INTRODUCTION

In early September, 2012, several news outlets erroneously reported that actor Bruce Willis intended to sue Apple, Inc., for the right to will his iTunes collection to his children.[1] The Willis family immediately denied the rumor,[2] but this story left the technology and legal communities with a question: Can Mr. Willis actually leave his iTunes collection to his children?

There is a great deal of confusion and misinformation about this question. For instance, one often repeated assumption is that an iTunes consumer does not own the songs he or she buys;[3] a careful reading of the license agreement indicates that this is not the case.[4] The confusion stems in part from uncertainty in the law, which has not kept pace as copyrighted material has moved from well-understood, printed formats into the digital realm.[5] The confusion is also caused by consumers not understanding, or—far more likely—not having even read the "end user license agreement" (EULA) that he or she agreed to when registering for a service such as iTunes.[6] The uncertainty is exacerbated by lack of clarity in the EULAs themselves. The majority do not even address the death of the consumer who agreed to it.[7]

Why do the EULAs even matter? After all, in Western culture

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1. The story probably originated with John Harlow & Robin Henry, *It's iHard as Willis Fights Apple*, THE SUNDAY TIMES (Sept. 2, 2012), www.thesundaytimes.co.uk/sto/news/uk_news/Tech/article1117103.ece, but it was immediately repeated by more distinguished news agencies. *See, e.g.*, Tim Worstall, *Bruce Willis Might Sue Apple over iTunes*, FORBES (Sept. 3, 2012, 10:13 AM), http://www.forbes.com/sites/timworstall/2012/09/03/bruce-willis-to-sue-apple-over-itunes/.

2. As is the case with news these days, the denial came within hours, in the form of tweets from Willis's wife, Emma Heming-Willis. Frederic Lardinois, *Bruce Willis Isn't Suing Apple over iTunes Music Ownership Rights*, TECHCRUNCH (Sept. 3, 2012), http://techcrunch.com/2012/09/03/bruce-willis-itunes-music-library/.

3. *See, e.g.*, Jess Collen, *Apple, Bruce Willis and Internet Immortality*, FORBES (Sept. 5, 2012, 1:32 PM), http://www.forbes.com/sites/jesscollen/2012/09/05/apple-bruce-willis-and-internet-immortality/ ("You don't actually buy the tunes from Apple—you license them, personally . . . .").

4. *See infra* Part III.A.1.

5. *See infra* Part IV.B.

6. *See, e.g.*, Collen, *supra* note 3 ("[W]hen is the last time you read a click-through license agreement? Honestly. Did you read the whole contract to download that free app? Or did you automatically (I'd love to see current statistics on this, which I've not been able to find) put a mark in the "yeah, contract, Blah-Blah-Blah" box so you could finish the download and use or enjoy the product? Even IP lawyers have been known to use the "which box do I have to click" technique of acquiring content.").

7. *See infra* Part III.A.

individuals have had the ability to purchase printed or inscribed words for thousands of years.[8] Though sound recordings were only granted federal copyright protection since 1972,[9] consumers have been able to purchase them for over a century.[10] Thanks to this long history, consumers have an expectation when they purchase books and music CDs: once purchased, the consumer owns the book or CD, free from any contractual obligations. Yet the inverse is true for digital music and e-books: the purchase of digital content is universally governed by EULAs. The EULAs may impose restrictions on a person's ability to pass his or her digital music and e-books at death, restrictions that do not exist for traditional media books and music.[11] In addition, a close reading of the EULAs for what are today some of the most popular providers of digital music and e-books—the Apple iTunes Store, Amazon.com's Kindle e-books and MP3 Store, Barnes & Noble's NOOK e-books, and Google Play Store's music service—reveals that, unlike traditional printed books and CDs, cassettes, or vinyl LPs, the consumer may not in fact, actually own what he or she has purchased.[12]

Another key difference between traditional, print media and digital media is that a consumer can only purchase digital content by establishing an account with the content provider.[13] The account itself is also governed by a EULA, typically a different document than the one governing the purchase of the content, and thus having distinct issues. The most important of these issues is that access to the account

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8. LEILA AVRIN, SCRIBES, SCRIPT AND BOOKS: THE BOOK ARTS FROM ANTIQUITY TO THE RENAISSANCE 153 (1991) ("The Greek book buyer had more to choose from than did any other literate person of the ancient world."); *id.* at 171 ("In Cicero's day, the first century B.C.E., bookstores were located in the Roman Forum.").

9. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 301(c), 90 Stat. 2541, 2572 (1976) (codified as amended at 17 U.S.C. (2011)); *see also* H.R. Rep. No. 94-1476, at 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5669 ("Enactment of Public Law 92-140 in 1971 [amending the Copyright Act] marked the first recognition in American copyright law of sound recordings as copyrightable works."); U.S. COPYRIGHT OFFICE, ANNOUNCEMENT ML 83: REGISTRATION FOR FOREIGN SOUND RECORDINGS (Mar. 5, 1972) ("Public Law 92-140 amends the United States Copyright Law to provide for the protection of sound recordings against their unauthorized reproduction and distribution to the public. It pertains to sound recordings fixed and published on or after February 15, 1972.").

10. Thomas Edison invented the first machine capable of recording and reproducing sounds, the phonograph, in 1887. *See* GREG MILNER, PERFECTING SOUND FOREVER: AN AURAL HISTORY OF RECORDED MUSIC ix-x (2009). Commercially available recordings first appeared in 1901. *Id.* at 37.

11. *See infra* Part IV.B.

12. *See infra* Part III.

13. *See infra* Part III.

generally gives access to the digital content purchased through the account. Thus it is important to know: can the consumer pass on the account itself, or at least pass on control of the account, to his or her heirs at death? Of course, once purchased, the consumer typically (and legally) transfers the digital music or e-book onto a device such as an iPod or Kindle e-reader, and thereafter the consumer generally does not have to log into the account again. But the content provider—which typically supplies the device and restricts consumers of its services to using only its devices or software—still has access to the content, and can remove the content at will, like Amazon infamously did in 2009.[14] Though Amazon cannot prevent a Kindle from being passed on when the original owner dies,[15] it can, however, decide that neither the account nor the content can transfer, and simply remove both from the device. Amazon might not make such a determination, but what if the device itself stops working? At that point, the heirs of the original purchaser lose the digital content just as if the books had been destroyed by water or fire.

Families may have little recourse when it comes to taking possession of the account of a deceased relative,[16] but with at least some digital music and e-books, any restrictions on their transfer may not be enforceable.[17] A seller of print books and music CDs cannot restrict transfer of the books and CDs by the buyer because both are subject to the first sale doctrine, codified in the Copyright Act of 1976, 17 U.S.C. § 109(a). According to § 109(a), "the owner of a particular copy . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of . . . that copy." Over one hundred years ago the Supreme Court held that § 109(a) means that a copyright holder's control over a copy is limited: the copyright holder can only control the first sale of a book, and none thereafter.[18] A district court in New York was asked to interpret § 109 as it applies to

14. Brad Stone, *Amazon Erases Orwell Books from Kindle*, N.Y. TIMES (July 17, 2009), http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?_r=0 ("In a move that angered customers and generated waves of online pique, Amazon remotely deleted some digital editions of the books from the Kindle devices of readers who had bought them."). The company who added the books to the Kindle store did not have to rights to the books, but Amazon.com acknowledged that deleting the books was a bad idea. *Id.*

15. Physical property qualifies as an asset of the estate of the deceased. *See infra* Part II.A.

16. Whether the first sale doctrine applies may depend on whether the consumer owns, or merely licenses, the content. *See infra* Part III.A.

17. *See infra* Part IV.B.1.

18. *See* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350-51 (1908).

digital books and music.[19] On cross motions for summary judgment, the court concluded that no, there is no first sale right in digital content.[20]

Mr. Willis's fictional problem relates specifically to digital music and e-books, which will be the focus of this paper. Digital music and e-books, however, are just two types of "digital assets," which include any and all data in digital form, both online and stored locally, as well as online accounts and digital devices.[21] Cases dealing with other digital assets, such as e-mail and social media accounts, illustrate the issues faced with passing e-books and digital music at death. These cases also illustrate the lack of clear laws or binding precedent in this area.[22]

With aging baby boomers spending billions on iTunes songs,[23] Kindle e-books,[24] and other digital content, legislators, consumers, and content providers need to act. Some states have attempted to pass legislation to deal with the uncertain state of digital assets at death, but these laws tend to be too narrowly focused to cover Mr. Willis's situation.[25] The Uniform Law Commission is also attempting to draft model legislation,[26] but such legislation takes year to draft and adopt, should states decide to adopt it at all. Faced with legal uncertainty, estate planners recommend that all consumers have a "digital estate plan" that provides the deceased's estate with some authority to administer the person's digital accounts and data.[27] Content provider's EULAs should also provide for the death of the user, though the majority does not.[28] Content providers are in the best position to provide clarity and good policies for passing digital content at death. Google has been the first to put in place a system by which its users can control the disposition of the content of their accounts, but it is an opt-in system, and not built into the EULA.[29] This paper will

19. Capitol Records, LLC v. ReDigi Inc., No. 1:12-cv-00095-RJS, 2013 WL 1286134 (S.D.N.Y. Mar. 30, 2013). *See also infra* Part IV.B.1.

20. *See infra* Part IV.B.1.

21. *See infra* Part II.A.

22. *See infra* Part II.B.

23. *See infra* Part III.A.1.

24. *See infra* Part III.A.2.

25. *See infra* Part V.A.

26. *See infra* Part V.A.

27. *See infra* Part V.B.

28. *See infra* Part V.C.

29. *See Plan Your Digital Afterlife with Inactive Account Manager*, GOOGLE PUB. POLICY BLOG (Apr. 11, 2013, 12:05 PM), http://googlepublicpolicy.blogspot.com/2013/04/plan-

conclude with a look at the policies of Google and other content providers, and conclude with recommendations for what content providers should do.

At the close of this analysis, we hope to answer: Can Bruce Willis, in fact, leave his iTunes collection to his children?

II. DIGITAL ASSETS AND DEATH OF THE CONSUMER

iTunes songs and Kindle eBooks are categories of what are often referred to as "digital assets." Digital assets include a wide variety of data, and for purposes of this paper we will focus only on copyrighted content created by an author[30] and offered for sale in digital formats. That is the fictional question posed by Mr. Willis, and because digital music and e-books have traditional media equivalents, there is a ready framework for analysis. An overview of digital assets, however, and questions raised when families of the deceased attempted to acquire those assets, presents a background for this analysis.

A. What Are Digital Assets?

The term "digital assets" has been around since the 1990s, when it referred to corporate trade secrets and intellectual property in digital form.[31] The decades since the 1990s, however, have seen massive growth of the Internet and adoption by ordinary consumers of Internet services.[32] Thus, the term "digital assets" is now readily used to describe "Web sites, domain names, photos, electronic accounts, and other assets that exist only in digital form."[33] While corporations can, theoretically, live forever,[34] the ordinary consumer will not; thus

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your-digital-afterlife-with.html. *See also infra* Part V.C.

30. "Author" in the context of copyright law means "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884). "Authors" thus includes musicians who produce sound recordings.

31. *See, e.g.*, John T. Soma & Charles P. Henderson, *Encryption, Key Recovery, and Commercial Trade Secret Assets: A Proposed Legislative Model*, 25 RUTGERS COMPUTER & TECH. L.J. 97, 97 (1999).

32. In 1997, 22.1% of individuals over the age of 18 surveyed by the U.S. Census Bureau reported using the Internet. U.S. CENSUS BUREAU, PUB. P20-522, COMPUTER USE IN THE UNITED STATES: POPULATION CHARACTERISTICS 6 (1999), *available at* http://www.census.gov/prod/99pubs/p20-522.pdf. In 2010, that number was around 75%. *See Computer and Internet Use in the United States: 2010*, U.S. CENSUS BUREAU (July 2012), http://www.census.gov/hhes/computer/publications/2010.html.

33. Joseph M. Mentrek, *Estate Planning in a Digital World*, 19 OHIO PROB. L.J. 195, 195 (2009).

34. LINDA O. SMIDDY & LAWRENCE A. CUNNINGHAM, CORPORATIONS AND OTHER

digital assets have become a topic of intense concern for estate planners,[35] with a corresponding proliferation of information on the Internet.

The website Digital Estate Resource[36] goes further, distinguishing the contents of the account from the account itself. It defines "digital assets" as "files, including but not limited to, emails, documents, images, audio, video, and similar digital files."[37] The definition provided by Digital Estate Resource also includes physical devices that could store digital data, including but not limited to "desktop[] [computers], laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device."[38] This website has a separate definition for "digital accounts," which includes "email accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service

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BUSINESS ORGANIZATIONS 228 (7th ed. 2010) ("A corporation is an entity that consists of an intangible structure for the conduct of the entity's affairs and operations, the essence of which is created by the state, and that possesses the rights and obligations given or allowed it by the state, which rights and obligations more or less parallel those of natural persons."). While corporations can cease to exist—for instance, by dissolution, *see generally id.* at 405-39,—absent any condition requiring a corporation to close, it can outlive its human owners. Caswell-Massey, a privately held purveyor of luxury personal care products, is possibly the oldest continuously operating company in the United States, having been founded in 1752. *See* Jeanette Mulvey, *Founded When? The Oldest Companies in America*, BUS. NEWS DAILY (Feb. 2, 2012, 4:48 AM), http://www.businessnewsdaily.com/1978-america-oldest-companies.html.

35. There are numerous law journal articles and websites devoted to the topic. A sample of the more widely cited articles includes Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns a Decedent's E-Mails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 281 (2007) and Justin Atwater, Note, *Who Owns E-Mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life?*, 2006 UTAH L. REV. 397 (2006). A sample of Internet resources includes The Digital Beyond, self-described as "the go-to source for archival, cultural, legal and technical insights to help you predict and plan for the future of your online content," *About*, THE DIGITAL BEYOND, http://www.thedigitalbeyond.com/about/ (last visited May 13, 2013) and Digital Passing, which is "a blog covering the intersection between estate planning (planning for a person's incapacity and death) and the digital world (passwords, online accounts, intellectual property, and other digital property)," *About*, DIGITAL PASSING, http://www.digitalpassing.com/about/ (last visited May 13, 2013).

36. "Digital Estate Resource is an online repository for estate lawyers who need to learn about how to incorporate digital assets into estate planning." *About*, DIGITAL ESTATE RES., http://www.digitalestateresource.com/about/ (last visited May 13, 2013). Its contributors include current and former estate attorneys, technologists, and bloggers. *Id.*

37. Evan Carroll, *Digital Assets: A Clearer Definition*, DIGITAL ESTATE RES. (Jan. 30, 2012), http://www.digitalestateresource.com/2012/01/digital-assets-a-clearer-definition/. Other sources provide similar definitions, and this is perhaps the most concise.

38. *Id*.

accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, [and] other online accounts."[39]

Though not necessarily universally accepted, the Digital Estate Resource definition segregates digital assets into content, devices that contain the content, and accounts by which one gains access to content. This division provides a cogent framework for analysis: when a person passes away, his or her digital "property" consists of the content generated by the person, such as e-mail, photos, video, and social media postings; any physical devices that the person owned and that contained digital content, such as laptops, smartphones, e-book readers, and MP3 players; and the online accounts the person may have used to access the content, such as e-mail, Facebook, and Twitter accounts. Setting aside physical devices—which, due to being physical objects, will pass to the original owner's descendants without any question[40]—the digital content and online accounts are subject to one or more EULAs. Generally, the EULA for the account defines the account as only a license to use the provided service;[41] what, then, happens to the account when the user dies? In the majority of cases, the account is not transferable;[42] and thus it is not really possible for the family of the deceased user to acquire the account.

What about the content inside the account? Yahoo!, for instance, expressly provides that it "does not claim ownership of Content you [the user] submit or make available for inclusion on the Yahoo! Services,"[43] and thus it appears that Yahoo! intends for the user to own all e-mail, photos, etc. that the user generated and uploaded to

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39. *Id.* This distinction is not used by all commentators; some lump both digital content and online accounts under the term "digital assets," especially in less legally technical discussions.

40. *See, e.g.*, CAL. PROB. CODE § 62 (West 2012) ("'Property' means anything that may be the subject of ownership and includes both real and personal property and any interest therein."); CAL. CIV. CODE § 654 (West 2012) ("The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others."); *id.* § 663 ("Every kind of property that is not real is personal."); CAL. PROB. CODE §§ 240-241 (passing "personal property" by intestate succession); *id.* §§ 245-247 (passing "personal property" under a will or trust).

41. *See, e.g.*, *Yahoo! Global Communications Additional Terms of Service for Yahoo! Mail and Yahoo! Messenger* cl. 4, YAHOO!, http://info.yahoo.com/legal/us/yahoo/mail/en-us/ (last visited May 13, 2013) (stating with regard to e-mail accounts: "You agree Yahoo! provides you only with the right to access your account . . . .").

42. *Yahoo! Terms of Service* cl. 27, YAHOO!, http://info.yahoo.com/legal/us/yahoo/utos/terms/ (last updated Mar. 16, 2012). *See also infra* note 60.

43. *Id.* cl. 9.

the service.[44] As another example, Facebook is more explicit: "You own all of the content and information you post on Facebook . . . ."[45] If it is clear that the deceased user owned the content of his or her account, why does that content not simply become part of the person's probate estate, and pass to the person's descendants? Upon being informed that a user has died, Facebook will "memorialize" the account, leaving it online but locking out any ability to make changes.[46] The deceased user's information is thus still available, but only the public information; all private information, such as private messages between the user and others, are not accessible.[47] Yahoo!, on being informed that a user has died, will delete the account and its contents.[48]

Should families of the deceased never be able to see the contents of these online accounts, the way they would be able to see the deceased's letters, journals, and print photographs? Faced with this question and non-cooperation by service providers, families have turned to the arbiter of such things: the courts.

B. Death of the Consumer

Yahoo! and Facebook, along with Google, have both landed in court over their handling of a deceased user's data. This section highlights several well-publicized cases to illustrate some of the issues that arise when a user dies.

On November 13, 2004, a roadside bomb killed Marine Justin Ellsworth in Fallujah, Iraq.[49] In the weeks following, his father John

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44. Excluding content that the user does not own. *See id.* cl. 6(e).

45. *Statement of Rights and Responsibilities*, FACEBOOK (Dec. 11, 2012), http://www.facebook.com/legal/terms.

46. *How Do I Report a Deceased Person or an Account That Needs to Be Memorialized?*, FACEBOOK, https://www.facebook.com/help/150486848354038 (last visited May 13, 2013). Family members can also request an account be removed entirely. *Id*; *see also What Happens When a Deceased Person's Account is Memorialized?*, FACEBOOK, http://www.facebook.com/help/103897939701143 (last visited May 13, 2013).

47. Jessica Hopper, *Digital Afterlife: What Happens to Your Online Accounts When You Die?*, NBC NEWS ROCK CTR. (June 1, 2012, 10:53 AM), http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die.

48. *Yahoo! Terms of Service*, *supra* note 42, cl. 27.

49. Jennifer Chambers, *Family Gets GI's E-Mail*, THE DETROIT NEWS, Apr. 21, 2005, at A1. This article is archived with other related publications at a website dedicated to the memory of Lance Corporal Ellsworth. *See Justin's Family Fights Yahoo! over Access to His E-Mail Account*, LANCE CORPORAL JUSTIN MARK ELLSWORTH, http://www.justinellsworth.net/email/detnewsapr.htm (last visited May 13, 2013).

Ellsworth, seeking to preserve the memory of his son, asked Yahoo! for access to Justin's e-mail account.[50] Yahoo! cited its policy of treating e-mail as a private, confidential communication and its policy of not giving passwords to anyone but the account holder, and repeatedly denied the request.[51] Yahoo! was willing to "turn over the account to family members only after they go through the courts to verify their identity and relationship with the deceased."[52] Thus in April, 2005, the Ellsworths went to a local Michigan probate court.[53] Their attorney equated an e-mail account with a safe deposit box,[54] which, according to Michigan law, may be opened and the contents removed when the lessee has died.[55] Alternatively, John Ellsworth could have argued that because Justin died intestate and without a wife or children, the account should pass to John as Justin's next-of-kin.[56] Yahoo! maintained that "Yahoo! accounts and any contents therein are nontransferable, including when the account holder passes on . . . ."[57] The probate court ordered Yahoo! to release the contents of the account, but upheld the "no right of survivorship" and "non-transferability" clauses of Yahoo!'s EULA, and denied the family the right to access the account.[58] The probate court's opinion was not published and did not establish binding precedent,[59] but supplies an

50. Chambers, *supra* note 49.

51. *Id.*

52. Jim Hu, *Yahoo Denies Family Access to Dead Marine's E-Mail*, CNET (Dec. 21, 2004, 2:49 PM), http://news.cnet.com/Yahoo-denies-family-access-to-dead-marines-e-mail/2100-1038_3-5500057.html.

53. Chambers, *supra* note 49.

54. Tresa Baldas, *Slain Soldier's E-Mail Spurs Legal Debate*, NAT'L L.J., May 2, 2005.

55. MICH. COMP. LAWS § 700.2517(2)(b) (2012) ("In the estate of a decedent who dies after September 30, 1993, . . . [t]he safe deposit box of an individual who is an individual or joint lessee and for whom a fiduciary was appointed may be opened by that fiduciary and its contents removed.").

56. *Id.* § 700.2103.

> Any part of the intestate estate that does not pass to the decedent's surviving spouse . . . , or the entire intestate estate if there is no surviving spouse, passes in the following order to the following individuals who survive the decedent:
>
> (a) The decedent's descendants by representation.
>
> (b) If there is no surviving descendant, the decedent's parents equally if both survive or to the surviving parent.

Id.

57. Jennifer Chambers, *Family Fights to See Soldier's Last Words*, THE DETROIT NEWS, Dec. 21, 2004, at A1, *available at* http://www.justinellsworth.net/email/yaho.htm (internal quotation marks omitted) (quoting Yahoo! spokeswoman Karen Mahon).

58. Chambers, *supra*, note 49.

59. *See* Michigan Court Rules 7.215(C)(1) (2012), *available at*

indication of how courts may view the ownership of e-mail accounts and their contents: the Ellsworths received the contents of Justin's account, but Yahoo! was not required to, and in fact did not, change its policy.[60]

In December, 2010 Helen and Jay Stassen's 21-year-old son, Benjamin, committed suicide without leaving a note.[61] Shocked and searching for answers, the Stassens sought access to their son's Facebook and Gmail accounts.[62] Both Facebook and Google took the conservative approach: through their EULAs with Benjamin, they had agreed to protect his privacy, and would not grant anyone, even his family, access to the accounts.[63] Thus, like the Ellsworths, the Stassens turned to the local probate court in Wisconsin.[64] Google complied with a September 2011 order to release information from Benjamin's account to his parents, but to date Facebook has not complied with a similar order issued in April, 2012.[65] The order said that "the Stassens are the heirs to their son's estate and are entitled to any of his assets, possessions or records, including the contents of his Facebook account."[66] Thus the court was willing to recognize the contents of the account as an inheritable possession; but this decision was also not published, and also does not establish binding precedent.

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http://courts.michigan.gov/Courts/MichiganSupremeCourt/CurrentCourtRules/1Chapter7AppellateRules.pdf ("An unpublished opinion is not precedentially binding under the rule of stare decisis."). Additionally, state court decisions from one state do not dictate precedent in courts of other states. *See* WILLIAM L. REYNOLDS, JUDICIAL PROCESS 6 (3rd ed. 2003) ("An inferior Maryland state court has no obligation to follow a decision of the California Supreme Court, or even to follow a decision of the Supreme Court of the United States—unless the decision of the latter is on a constitutional question or an interpretation of applicable federal law."). Federal circuit courts, in the absence of applicable federal law, apply the statutory and decisional law of the state in which they are located. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

60. Yahoo!'s Terms of Service were last updated on March 16, 2012, and the relevant clause remains unchanged:

> *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.

See Yahoo Terms of Service, *supra* note 42.

61. Hopper, *supra* note 47.

62. *Id.*

63. *Id.*

64. Jeremy Olson, *Parents Ask: Who Owns Their Son's Facebook History?*, STAR TRIBUNE (June 2, 2012, 6:37 AM), http://www.startribune.com/printarticle/?id=156545715.

65. *Id.*

66. Hopper, *supra* note 47.

In December 2008, 23-year-old Sahar Daftary, a former Face of Asia winner, fell to her death from her estranged husband's twelfth-floor flat in Salford Quays, Manchester, England.[67] Authorities did not find Sahar's death suspicious, but her family did not feel police had properly investigated the incident.[68] They sought more information to support their charge against the police and thus wanted access to Sahar's Facebook account. Sahar died in England and thus state probate court was not an option, so instead the family turned to federal district court in California, where Facebook is located. The family filed an ex parte order in July, 2012, under 28 U.S.C. § 1782[69] to force Facebook to disclose the contents of Sahar's account.[70] In September 2012, however, the court granted Facebook's order to quash.[71] Citing the 18 U.S.C. 2702 of the Stored Communications Act, the court determined that "[u]nder the plain language of Section 2702, while consent may *permit* production by a provider, it may not *require* such a production."[72] The court, however, determined that it lacked jurisdiction to decide if the family could consent on Sahar's behalf, stating that "[a]ny such ruling would amount to nothing less than an impermissible advisory opinion."[73] The order does leave Facebook free to "conclud[e] on its own that [the Daftarys] have standing to consent on Sahar's behalf and provid[e] the requested materials voluntarily."[74] Though only dicta, this statement indicates that this court believed Facebook's policies should govern whether it releases the contents of a deceased user's account. Given the

67. *Sahar Daftary Inquest: Coroner Records Open Verdict*, BBC NEWS UK (July 27, 2012, 2:47 PM), http://www.bbc.co.uk/news/uk-england-manchester-19017848.

68. *Id.*

69. 28 U.S.C. § 1782 (2012) authorizes federal courts to grant discovery to assist litigants in foreign or international tribunals. *See* 56 A.L.R. Fed.2d 307 (2011) (discussing construction and application of § 1782).

70. *In re* Request for Order Requiring Facebook, Inc. to Produce Documents and Things, No. C 12-80171 LHK (PSG), 2012 WL 7071331 (N.D. Cal. Sept. 20, 2102). *See also* Venkat Balasubramani, *Stored Communications Act Bars Disclosure of Facebook Records to Surviving Family Members in the UK*, ERIC GOLDMAN: TECH. & MKTG. LAW BLOG (Sept. 25, 2012), http://blog.ericgoldman.org/archives/2012/09/stored_communic_1.htm.

71. Balasubramani, *supra* note 70.

72. *In re* Facebook, Inc., 2012 WL 7071331, at *1.

73. *Id.* Generally, the personal representative or executor of the deceased's estate acts in the place of the deceased, to wind down the deceased's affairs. *See, e.g.*, CAL. PROB. CODE §§ 9600-9606 (2012). The personal representative or executor is appointed by a state probate court. *See, e.g.*, *id.* §§ 8400, 8420. Thus a federal court, faced with an individual that died outside the United States, could not make a determination about who could consent for the deceased and have that determination have any effect.

74. *In re* Facebook, Inc., 2012 WL 7071331, at *1.

company's refusal to grant the Stassens access to Benjamin's data, it is not likely that it will do so for the Daftarys.

Apple, Amazon, Barnes & Noble, and Google have not yet been called to court to contest the ownership of digital books and music and the associated accounts. We can speculate why: The Ellsworths desired their son's e-mails for its emotional and sentimental value; perhaps his music collection would not have the same power (though being able to listen to what Justin listened to could certainly be a means of bringing the Ellsworths closer to their son). The Stassens and the Daftary's were seeking whatever information they could find in their children's Facebook and e-mail accounts; perhaps Benjamin and Sahar's book collection would not provide any of the information they sought (though that is very debatable, since one's particular choices in music and books says a great deal about oneself). Or perhaps, because copies of digital music and books more often than not reside on a physical device—ownership and transferability of which seem incontestable—it has never occurred to the family of the deceased that there may be restrictions on what they can do with the books and songs.

The most likely reason that these companies have not yet been sued is that the "right" person has not died yet. Bruce Willis supposedly "has spent thousands of dollars downloading music."[75] If this is really the case, then his a digital music collection does not necessarily have only sentimental or informative value: it has value in real dollars. It seems incongruous that a thing to which one can assign a substantial dollar value cannot be transferred at death, or even during life. Yet these songs and books were purchased subject to a EULA; thus, the starting point for determining the ownership and transferability of these assets begins with examining what exactly the buyer agreed to.

III. WHAT DO YOU OWN?

When a consumer buys a book or a music CD from a brick-and-mortar store, he or she does not make the purchase subject to a license agreement;[76] the primary restrictions on what the consumer can do

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75. Brandon Griggs, *Can Bruce Willis Leave His iTunes Music to His Kids?*, CNN TECH (Sept. 4, 2012, 5:34 a.m.), http://www.cnn.com/2012/09/03/tech/web/bruce-willis-itunes/.

76. Attaching a license agreement to a book has been tried and failed. The first sale doctrine, codified at 17 U.S.C. § 109(a), bars attaching licenses to books. *See* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350-51 (1908) (publisher printed notice in a book announcing that any retailer who sold the book for less than one dollar was committing copyright infringement; the

with the book or CD are those imposed by copyright law. This is true even where the CD has digital rights management (DRM) software: the consumer's use of the CD is restricted by technological means instead of by contract, and bypassing the DRM is a violation of copyright law.[77]

When a consumer purchases a digital book or song, however, he or she can only do so under the following conditions: the consumer must create an account with the online retailer, and agree to some terms and conditions to which the purchased items will be subject. In the following section we will examine terms and conditions (a more user-friendly name for the EULA) for what are currently the most popular retailers of digital books and music. From this examination we will attempt to determine what rights the consumer has as to both the account and the books and music he or she purchased through the account.

A. The License Agreements

This section examines the license agreements for four of the most popular providers of digital books and music.[78] The examination is focused on three questions: first, what rights does the licensee have with regard to his or her account with the service provider? Second, what rights do the agreements grant with regard to the content that the user buys? Third, what restrictions, if any do the license agreement place on the purchased content? Answers to these questions will determine what the user can do with the content and the account when the user passes away.

We will also compare and contrast how easy it is for a user to find the pertinent sections of the EULA, how well organized they are, and how intelligible. Generally, a user who simply "clicks through" the acceptance button when presented with an online license agreement is deemed to have read and understood the agreement,

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Supreme Court held that the exclusive distribution right only applied to first sales of copies of a work, and invalidated the notice). *See also infra* Part IV.B.1.

77. *See* 17 U.S.C. § 1201 (2012).

78. *See* John C. Abell, *And the Most Popular Way to Read an E-Book Is . . .*, WIRED (Nov. 8, 2010, 11:54 AM), http://www.wired.com/business/2010/11/and-the-most-popular-way-to-read-an-e-book-is/; Jasmine France, *Online Music Store Guide*, CNET (Mar. 3, 2008, 5:14 PM), http://reviews.cnet.com/2719-11297_7-284-2.html. *See also The 100 Top Companies in the Digital Content Industry: The 2011-2012 EContent 100*, ECONTENT (Nov. 29, 2011), http://www.econtentmag.com/Articles/ArticleReader.aspx?ArticleID=79073 (more up-to-date statistics).

even if, in reality, he or she did not read it at all.[79] Contract formation may nevertheless fail, however, if "the writing does not appear to be a contract and the terms are not called to the attention of the recipient."[80] Thus the service providers are in danger of their license agreements being voided if the agreements are neither clear nor accessible.

1. Apple: Music and E-Books

Apple, Inc. is based in Cupertino, California, and was established in 1977 by Steve Jobs and Steve Wozniak as a maker of home computers.[81] In 2001 Apple entered the portable digital music player market with the release of its first iPod.[82] In the same year, Apple released its iTunes software, which allowed users to encode and listen to digital music.[83] In 2003, Apple unveiled the iTunes Music Store, through which users with the iTunes software could purchase individual songs for $0.99.[84] In the second quarter of 2012 iTunes Store (rebranded in 2006)[85] accounted for 64% share of the

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79. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) ("A vendor, as master of the offer, may invite acceptance by conduct . . . . A buyer may accept by performing the acts the vendor proposes to treat as acceptance."). *See also* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30 (2d Cir. 2002) (stating that under California law "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing" (alteration in original) (quoting Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc., 89 Cal. App. 4th 1042, 1049 (Ct. App. 2001)) (internal quotation marks omitted)); U.C.C. § 2-204(1) (2012) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.").

80. *Specht*, 306 F.3d at 30 (quoting *Marin Storage & Trucking, Inc.*, 89 Cal. App. 4th at 1049) (internal quotation marks omitted).

81. *Company History: 1976-1981*, APPLE-HISTORY, http://apple-history.com/h1 (last visited May 14, 2013).

82. *Apple Presents iPod*, APPLE PRESS INFO (Oct. 23, 2001), https://www.apple.com/pr/library/2001/10/23Apple-Presents-iPod.html.

83. *Apple Unveils New iMacs with CD-RW Drives & iTunes Software*, APPLE PRESS INFO (Feb. 22, 2001), https://www.apple.com/pr/library/2001/02/22Apple-Unveils-New-iMacs-With-CD-RW-Drives-iTunes-Software.html.

84. *Apple Launches the iTunes Music Store*, APPLE PRESS INFO (Apr. 28, 2003), https://www.apple.com/pr/library/2003/04/28Apple-Launches-the-iTunes-Music-Store.html.

85. There is no official press release announcing this change. An August, 2006 press release calls the service iTunes Music Store, and a September, 2006 press release calls it simply iTunes Store. Every subsequent press release uses the latter name. *See Linkin Park Catalog, Exclusive Bonus Tracks & Digital Booklets Now Available on the iTunes Music Store*, APPLE PRESS INFO (Aug. 29, 2006), https://www.apple.com/pr/library/2006/08/29Linkin-Park-Catalog-Exclusive-Bonus-Tracks-Digital-Booklets-Now-Available-on-the-iTunes-Music-Store.html; *NFL & Apple Offer 2006 NFL Highlights on the iTunes Store*, APPLE PRESS INFO (Sept. 12, 2006), https://www.apple.com/pr/library/2006/09/12NFL-Apple-Offer-2006-NFL-Highlights-on-the-iTunes-Store.html. *See generally Press Releases*, APPLE PRESS INFO,

digital music market and 29% share of all retail music sold.[86] In Apple's 2011 fiscal year, iTunes accounted for $6.3 billion in net sales.[87] iTunes offers digital music, e-books, videos, and apps for Apple's hand-held products.[88]

A link to the iTunes Store's "Terms of Use" can be found at the very bottom of every webpage of the site.[89] The user is not, however, presented with the terms of service and an "I Accept" link when creating an account with Apple.[90] An account, called an "Apple ID", is required to use any of Apple's services, except for merely browsing the site.[91] The "Terms of Use" link takes the user to the "Web Site Terms and Conditions of Use,"[92] and additional links, placed in a sidebar, to the approximately fifty legal documents applicable to users of Apple's various services.[93] These links remain present when navigating to any of the legal documents that they link to. Though not labeled as such, the "Web Site Terms of and Conditions of Use" apparently governs the user's account with Apple.[94]

Two clauses in the "Web Site Terms and Conditions of Use" are

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https://www.apple.com/pr/library/2006 (last visited May 14, 2013) (archive of press releases for 2006). Probably the name change is associated with iTunes beginning to offer video content.

86. *iTunes Continues to Dominate Music Retailing, But Nearly 60 Percent of iTunes Music Buyers Also Use Pandora*, NPD GROUP (Sept. 18, 2012), https://www.npd.com/wps/portal/npd/us/news/press-releases/itunes-continues-to-dominate-music-retailing-but-nearly-60-percent-of-itunes-music-buyers-also-use-pandora/.

87. Including sales of all digital content. Eric Jackson, *Apple's Forgotten $8 Billion Business: iTunes*, BUS. INSIDER (Mar. 15, 2012), http://articles.businessinsider.com/2012-03-15/tech/31195494_1_itunes-ios-smart-phones.

88. *All the Music, Movies, TV Shows, and Apps You've Got*, ITUNES, http://www.apple.com/itunes/whats-on/ (last visited May 14, 2013).

89. *See, e.g.*, APPLE STORE, http://store.apple.com/us (last visited May 14, 2013).

90. Verified by author, Nov. 17, 2012. Many web sites have adopted "browser wrap" polices, where the user is deemed to have read and accepted the user agreement through some act other than clicking a button. *See* Specht v. Netscape Commc'ns Corp., 306 F.3d 17 (2d Cir. 2002).

91. This is not explicitly stated by any of Apple's Support pages, but is heavily implied. *See Frequently Asked Questions about Apple ID*, APPLE, http http://support.apple.com/kb/HT5622?viewlocale=en_US (last visited Nov. 17, 2012) ("What is an Apple ID"). In addition, the user cannot complete a purchase with Apple without first creating an account.

92. *Legal Information & Notices*, APPLE (Nov. 20, 2009), http://www.apple.com/legal/terms/site.html [hereinafter *Apple Terms of Use*]. The page itself has a different title than the link, and neither title is descriptive of what the document applies to.

93. *See* sidebar, *Legal Information*, APPLE, http://www.apple.com/legal/ (last visited Nov. 17, 2012).

94. "Read the terms that govern your use of Apple's Web sites. . . ." *Apple Terms of Service*, APPLE, http://www.apple.com/legal/terms/ (last visited Nov. 17, 2012).

especially relevant to the user's rights to his or her account. The first states: "As long as you comply with these Terms of Use, Apple grants you a personal, non-exclusive, non-transferable, limited privilege to enter and use the Site."[95] Though this clause does not use the word "license" the sum total of the language indicates the account is only a license to use Apple's services, that is personal to the user, and that, importantly, is not transferrable.[96]

Another clause states:

> You may not use anyone else's Apple ID, password or account at any time without the express permission and consent of the holder of that Apple ID, password or account. Apple cannot and will not be liable for any loss or damage arising from your failure to comply with these obligations.[97]

This clause probably contemplates unauthorized access to the user's account by a malicious third-party, but it is also applicable if the user gives his or her password to either an heir or an executor: the heir or executor would have the user's consent to access the account, and thus could do so without violating the user's EULA with Apple. This clause also provides a back door to avoid the non-transferability of the account: an heir or executor could simply change the e-mail address and name associated with the Apple ID, thus effectively transferring the account. Absent rigorous policing, Apple would not be the wiser. If, however, the user died without giving express consent, Apple could shut down the account, should it find out that the user's descendants are using the account.

In the sidebar of links present on every page of Apple's legal pages, there are no fewer than four links to the page that links to EULAs for the iTunes Store.[98] No doubt this is intended to ensure that

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95. *Apple Terms of Use*, *supra*, note 92.

96. There is no case that has interpreted the terms "personal" and "non-transferable" as applied to the terms of use of an online account. By analogy, in patent law, "[a] patent license has been characterized as 'a naked license to make and sell the patented improvement as a part of [the] business, which . . . [is] a mere personal one, and not transferable . . . .'" Harris v. Emus Records Corp., 734 F.2d 1329, 1333 (9th Cir. 1984) (quoting Hapgood v. Hewitt, 119 U.S. 226, 233 (1886)). *See also* Unarco Indus., Inc. v. Kelley Co., 465 F.2d 1303 (7th Cir. 1972) ("The long standing federal rule of law with respect to the assignability of patent license agreements provides that these agreements are personal to the licensee and not assignable unless expressly made so in the agreement."). In copyright law, the Ninth Circuit has held that a copyright licensee does not have the right to resell or sublicense without express authorization to do so. *Harris*, 734 F.2d at 1333. No circuit court has disagreed with this conclusion.

97. *Apple Terms of Use*, *supra*, note 92.

98. *See Legal Information*, APPLE, http://www.apple.com/legal/ (last visited Nov. 17,

the user reaches the right page, no matter what particular question the user has. The "iTunes Store Terms and Conditions" page has links to pages directed to specific countries, translated to the local language and probably adjusted for local laws.[99] For the United States, there are five links, three of which jump to specific parts of the same document, the actual "Terms and Conditions" that govern use of the iTunes Store.[100]

The iTunes Store EULA is notoriously long.[101] Apple is justified in needing to cover all the bases, but it can be difficult for the lay reader to find what he or she is looking for, and what exactly the pertinent clauses mean. In addition, the reader may focus on only the section that answers a particular question, not understanding that it is a single agreement: one common rule of contract interpretation is that a contract must be read as a whole, and that different parts can give meaning to each other.[102]

The most important clauses in the iTunes Store EULA are those that define what the user has purchased. Comparing the clauses applicable to music and the clauses for apps and books shows that purchases of music are, in fact purchases, and not licenses. Part B. of the EULA, titled, "iTunes Store Terms and Conditions," broadly discusses all content purchased through the iTunes service. It contains the following clause:

> THE ITUNES STORE SERVICE
>
> Apple is the provider of the iTunes Service, which permits you to *purchase or rent* digital content ("iTunes Products") for end user use only under the terms and conditions set forth in this Agreement.[103]

2012). There is also a link in the body of the page itself, for a total of five links.

99. *iTunes Store Terms and Conditions*, APPLE (May 28, 2012), http://www.apple.com/legal/itunes/ww/ [hereinafter *iTunes Store Terms*].

100. *Id.*

101. Umika Pidaparthy, *What You Should Know about iTunes' 56-Page Legal Terms*, CNN TECH (May 6, 2011, 7:08 AM), http://www.cnn.com/2011/TECH/web/05/06/itunes.terms/index.html.

102. *See, e.g.*, CAL. CIV. CODE § 1641 (West 2012) ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL: CIVIL RESOURCE MANUAL tit. 4, § 72 (2013), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title4/civ00072.htm ("In construing the terms of a contract, the parties' intent must be gathered from the instrument as a whole in an attempt to glean the meaning of terms within the contract's intended context.").

103. *iTunes Store Terms*, *supra* note 99 (emphasis added).

In isolation, this clause appears to unequivocally state that all items purchased through the iTunes service are, in fact, full and unrestricted purchase (further language applies "rent" only to video products). Part C., however, titled "Mac App Store, App Store, and iBookstore Terms and Conditions," applies specifically to software apps and e-books. It contains this clause:

> THE MAC APP STORE, APP STORE AND IBOOKSTORE SERVICES
>
> Apple is the provider of the App and Book Services that permit you to *license software products and digital content* (the "App and Book Products") for end user use only under the terms and conditions set forth in this Agreement.[104]

A later clause in the same section states:

> LICENSE OF MAC APP STORE AND APP STORE PRODUCTS
>
> The software products made available through the Mac App Store and App Store (collectively, the "App Store Products") *are licensed, not sold, to you*.[105]

What these latter two clauses show is that the drafters of the iTunes Store EULA know how, and chose to employ, the necessary language to create a license. Here, it is abundantly obvious that software apps purchased through the iTunes service are only licensed. It is also clear that this EULA does not include any similar, clear statement applicable to music. Therefore, this EULA does not intend purchases of music to be only a license to the music, but an outright purchase. The status of e-books is slightly less clear. The latter clause only refers to apps, and there is no similar clause for e-books. The former clause, however, clearly includes "Book Products" in its definition of "digital content" that is licensed.[106] Thus a lack of similar "licensed, not sold" language does not mean that purchases of e-books default to just, that, purchases and not licenses.

But is it really so clear that the music purchase are not subject to a license? Part B of this EULA, the broad terms, contains the following usage limitations:

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104. *Id.* (emphasis added).

105. *Id.* (emphasis added).

106. The "License of Mac App Store and App Store Products" clause precedes additional clauses applicable only to apps, as well as a section that describes the exact license that applies to apps. This section makes one brief mention of the Mac App Store, App Store and iBookstore Terms and Conditions but otherwise does not involve e-books.

> USAGE RULES
>
> . . .
>
> (ii) You shall be authorized to use iTunes Products on five iTunes-authorized devices at any time, except for Content Rentals (see below).
>
> (iii) You shall be able to store iTunes Products from up to five different Accounts at a time on compatible devices, provided that each iPhone may sync tone iTunes Products with only a single iTunes-authorized device at a time, and syncing an iPhone with a different iTunes-authorized device will cause tone iTunes Products stored on that iPhone to be erased.
>
> (iv) You shall be authorized to burn an audio playlist up to seven times.
>
> (v) You shall not be entitled to burn video iTunes Products or tone iTunes Products.
>
> (vi) iTunes Plus Products do not contain security technology that limits your usage of such products, and Usage Rules (ii)-(v) do not apply to iTunes Plus Products. You may copy, store, and burn iTunes Plus Products as reasonably necessary for personal, noncommercial use.[107]

The EULA also contains usage rules for apps, and nearly identical usage rules for e-books. There are additional clauses restricting the user's ability to download content:

> As an accommodation to you, subsequent to acquiring iTunes Auto-Delivery Content, purchased (i.e. not rented) movies iTunes Products and TV show iTunes Products (each, "iTunes Eligible Content"), you may download certain of such previously-purchased iTunes Eligible Content onto any Associated Device . . .
>
> Association of Associated Devices is subject to the following terms:
>
> (i) You may auto-download iTunes Auto-Delivery Content or download previously-purchased iTunes Eligible Content from an Account on up to 10 Associated Devices, provided no more than 5 are iTunes-authorized computers.
>
> (ii) An Associated Device can be associated with only one Account at any given time.
>
> (iii) You may switch an Associated Device to a different Account only once every 90 days.

107. *iTunes Store Terms*, *supra* note 99.

> (iv) You may download previously-purchased free content onto an unlimited number of devices while it is free on the iTunes Service, but on no more than 5 iTunes-authorized computers.[108]

These clauses are probably meant to prevent unrestricted copying, and the possibility that the original consumer distributes those copies to other persons. Any restriction on how the consumer can use the digital content makes it seem that the consumer has not bought the music outright. But these clauses restrict activity that is not allowed anyway: copyright law allows the consumer to dispose of a particular copy; it does not allow the consumer to make more copies.[109] Hence these clauses are actually permissive, rather than restrictive, and outline authorized copying that Apple and the copyright holders probably agreed to.These clauses do not otherwise restrict what the consumer can do with the music, and do not appear to create a license.

The final clause of interest to our analysis is the following:

> Gift Certificates, iTunes Cards, Content Codes, and Allowances, in addition to unused balances, are not redeemable for cash and cannot be returned for a cash refund (except as required by law); exchanged; resold; used to purchase Gifts, Gift Certificates, or iTunes Cards; used to provide Allowances; used for purchases on the Apple Online Store; or used in Apple Retail Stores. Unused balances are not transferable.[110]

This clause presents a problem for heirs of the account holder: if the heirs lose access to the account, the value of the gift cards and unused balances will be lost. Even if the heirs have access to the account, technically neither the account[111] nor these balances are transferable, though there is then little to stop the heirs for spending the balances.

In summary, Apple gets the highest marks, among the companies examined, for organization: though it has quite a few agreements, they are centrally located and navigation between them is simple. The EULA that governs the user's account defines the account as only a license to use Apple's services, and does not grant any ownership

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108. *Id.*

109. 17 U.S.C. § 109(a) (2012) grants the owner of "a particular copy" to dispose of "that copy." *See also* Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1242 (D. Colo. 2006) ("[The first sale] doctrine protects the purchaser in any use of the authorized copy acquired but does not permit the making of additional copies.").

110. *iTunes Store Terms*, *supra* note 99.

111. *Apple Terms of Use*, *supra* note 92.

rights. The EULA for the iTunes Store has the feel of multiple agreements strung together: it is somewhat redundant, and does only an adequate job of differentiating which clauses apply to what type of content. As it relates to digital music, this EULA apparently tries to have it both ways: it says music is purchased, but subject to usage restrictions. E-books, on the other hand, are apparently only licensed to the user.

2. Amazon.com: Music and E-Books

Amazon.com was established in 1994 as an online retailer of traditional paper books.[112] Over the years, the Seattle, Washington-based company expanded into practically every other retail market, "selling everything from tubas and golf carts to dishwashers and diapers."[113] In October, 2012 Amazon.com reported $13.81 billion in total sales, and according to at least one source, is the top online retailer for 2012.[114] In 2007 Amazon.com introduce the Kindle e-reader and Kindle Store, thus entering the e-book market.[115] In 2007 Amazon.com also launched Amazon MP3, its digital music store.[116]

A link to Amazon.com's "Conditions of Use" appears on every page of the site. The link is also presented to the user when the user creates an account, though the user is not required to click on anything to accept the terms.[117] Simplicity, however, ends there. Amazon.com offers many services, and this agreement states quite clearly that each service is subject to its own terms.[118] Amazon.com does not present the user with links to the agreements for the company's other services, and it is not clear from this page what those

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112. *History & Timeline*, AMAZON.COM, http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-corporateTimeline (last updated Mar. 2013). *See also* Kayla Webley, *A Brief History of Online Shopping*, TIME.COM (July 16, 2010), http://www.time.com/time/business/article/0,8599,2004089,00.html.

113. Webley, *supra* note 112.

114. *Top 500 Winners and Losers*, INTERNET RETAILER (May 7, 2012, 12:27 PM), http://www.internetretailer.com/2012/05/07/top-500-winners-and-losers. *See also Amazon Keeps Spending—And Growing*, INTERNET RETAILER (Apr. 30, 2013, 12:09 PM), http://www.internetretailer.com/2013/04/30/amazon-keeps-spendingand-growing.

115. *Introducing Amazon Kindle*, Press Release, AMAZON.COM (Nov. 19, 2007), http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1079388&highlight=.

116. *History & Timeline*, *supra* note 112.

117. Verified by author, Nov. 17, 2012. *See also supra* note 90.

118. *Conditions of Use*, AMAZON.COM (Dec. 5, 2012), http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088.

services are. In fact, locating the terms of use for the Kindle e-book reader required executing a search.

The "Conditions of Use" govern the user's account with Amazon.com. The first sentences under the section titled "License and Access" states:

> Subject to your compliance with these Conditions of Use and your payment of any applicable fees, Amazon or its content providers grant you a limited, non-exclusive, non-transferable, non-sublicensable license to access and make personal and non-commercial use of the Amazon Services.[119]

Thus it is clear that a user's account with Amazon.com is only a license to use Amazon.com's services. Amazon.com reserves the right to terminate the user's account, which it will do if the user does not comply with the terms of the agreement.[120] Amazon.com further requires the user to maintain the confidentiality of his or her password; and admonishes that "you agree to accept responsibility for all activities that occur under your account or password." The agreement contains no other clauses related to termination, and contains no language applicable upon the death of the user.

Amazon.com has a myriad of agreements applicable to the Kindle,[121] and as noted before, finding the page that links to all those agreements is not straightforward.[122] Most of these agreements relate to services available through a Kindle device; this analysis is primarily concerned with the "Kindle Store Terms of Use."[123] This relatively brief EULA includes this definition:

> "Kindle Content" means digitized electronic content obtained through the Kindle Store, such as books, newspapers, magazines, journals, blogs, RSS feeds, games, and other static and interactive electronic content.[124]

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119. *Id.*

120. *Id.* ("The licenses granted by Amazon terminate if you do not comply with these Conditions of Use or any Service Terms.").

121. *Kindle Terms*, AMAZON.COM, http://www.amazon.com/gp/help/customer/display.html?nodeId=200699130 (last visited May 14, 2013).

122. In fact, the author only found this page by assuming it existed; a lay user would not necessarily make such an assumption.

123. *Amazon Kindle Store Terms of Use*, AMAZON.COM (Sept. 6, 2012), http://www.amazon.com/gp/help/customer/display.html/ref=hp_200699130_storeTOU1?nodeId=201014950.

124. *Id.*

The agreement then provides:

> 1. Kindle Content
>
> Use of Kindle Content. Upon your download of Kindle Content and payment of any applicable fees (including applicable taxes), the Content Provider grants you a non-exclusive right to view, use, and display such Kindle Content an unlimited number of times, *solely on the Kindle or a Reading Application* or as otherwise permitted as part of the Service, solely on the number of Kindles or Supported Devices specified in the Kindle Store, and solely for your personal, non-commercial use. *Kindle Content is licensed, not sold, to you by the Content Provider.*[125]

This clause thus unambiguously states two things: first, that when the user purchases a Kindle e-book, the user has only purchased a license to the book, and not a copy of the book itself; second, that the user's use of an e-book is restricted to Kindle devices and applications. The agreement further provides:

> Limitations. Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, *or otherwise assign any rights to the Kindle Content or any portion of it to any third party*, and you may not remove or modify any proprietary notices or labels on the Kindle Content. In addition, you may not bypass, modify, defeat, or circumvent security features that protect the Kindle Content.[126]

Thus the user's license to his or her Kindle e-books is not transferable. A user can gift Kindle e-books to anyone with an e-mail address, but this only applies to newly purchased e-books.[127]

The EULA for the Amazon MP3 Store are similarly difficult to locate, but is also relatively short. The Amazon MP3 Store only "offers downloads of digitized versions of audio recordings, artwork and information relating to such audio recordings, and other content (collectively, 'Music Content')" as stated in the agreement.[128] The following two clauses outline what the user has purchased:

> 2.1 Rights Granted. Upon payment for Music Content, we grant

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125. *Id.* (emphasis added).

126. *Id.* (emphasis added).

127. *Giving and Receiving Kindle Book Gifts*, AMAZON.COM, http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_sib?ie=UTF8&nodeId=200555070 (last visited May 14, 2013).

128. *Amazon MP3 Store: Terms of Use*, AMAZON.COM (Jan. 10, 2013), http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_cn?ie=UTF8&nodeId=200154280.

> you a non-exclusive, *non-transferable right to use* the Music Content only for your personal, non-commercial, entertainment use, subject to the Agreement.
>
> 2.2 Restrictions. You must comply with all applicable copyright and other laws in your use of the Music Content. Except as set forth in Section 2.1 above, you may not redistribute, transmit, assign, sell, broadcast, rent, share, lend, modify, adapt, edit, *license or otherwise transfer* or use the Music Content. We do not grant you any synchronization, public performance, promotional use, commercial sale, resale, reproduction or distribution rights for the Music Content.[129]

From these clauses it is evident that Amazon.com intends to only license songs it sells, by granting only a right to use, and restricting all other rights that come with ownership. The terms are relatively straightforward and unambiguous. A user's account with Amazon.com is only a license to use Amazon.com's services, and Amazon.com has no provisions should the user pass away. Kindle e-books and MP3s are both licensed and not purchased.

3. Barnes & Noble: E-Books

William Barnes and G. Clifford Noble established the first Barnes & Noble book store in Manhattan in 1917.[130] In the 1970s Leonard Riggio acquired the business and began the modern era for the company,[131] which remains headquartered in New York City, New York.[132] In July, 2009 Barnes & Noble launched its online bookstore, and in October of that year the company released its e-book reader, the NOOK.[133] Unlike the other companies surveyed for this paper, Barnes & Noble does not sell digital music.[134]

Barnes & Noble has by far the simplest user agreement, consisting of a single, thorough but not excessively long, document

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129. *Id.* (emphasis added).

130. Bob Goldsborough, *Barnes & Noble Closes Wheaton Store*, CHI. TRIB. (Jan. 1, 2010), http://articles.chicagotribune.com/2010-01-01/news/0912310688_1_barnes-son-wheaton-college-first-store.

131. *Barnes & Noble History*, BARNES & NOBLE BOOKSELLERS, http://www.barnesandnobleinc.com/our_company/history/bn_history.html (last visited May 14, 2013).

132. *Frequently Asked Questions*, BARNES & NOBLE BOOKSELLERS, http://www.barnesandnobleinc.com/misc/faq.html (last visited May 14, 2013).

133. *Barnes & Noble History*, *supra* note 131.

134. *About Book, DVD & Music Formats*, BARNES & NOBLE.COM, http://www.barnesandnoble.com/help/cds2.asp?PID=8158 (last visited May 14, 2013).

accessible from a "Terms of Use" link at the bottom of every page of the web site. This is probably due to Barnes & Noble's far more limited offerings: hardcopy books, CDs, DVDs, and NOOK e-books. The user, however, is not presented with a link to this agreement when creating an account and is not required to click an "I Accept" link before creating an account.[135]

The first clause in the agreement outlines the user's rights to his or her account:

> I. LICENSES AND RESTRICTIONS
>
> Barnes & Noble.com grants the User *a limited, nonexclusive, revocable license* to access and make personal, non-commercial use (unless User has a business relationship with Barnes & Noble.com) of the contents of the Barnes & Noble.com Site, which includes the Digital Content, as defined in Section XII, ("Content").[136]

The agreement also states:

> IX. TERMINATION OF USAGE
>
> Barnes & Noble.com may issue a warning, temporarily suspend, indefinitely suspend or terminate any User's right to use or access all or any part of the Barnes & Noble.com Site including any account thereon, *without notice*, *for any reason* in Barnes & Noble.com's sole discretion . . . .[137]

Thus the agreement unambiguously states that the user's account is only a license to use the Barnes & Noble website, which exists solely at the discretion of the company.

The agreement has a clause directed specifically at digital content. This clause covers, by way of example, "eBooks, digital magazines, digital newspapers, digital journals and other periodicals, blogs, applications."[138] This clause further states that "Barnes & Noble.com grants you *a limited, nonexclusive, revocable license to access* and make personal, non-commercial use of the Digital Content in accordance with these Terms of Use."[139] This clause also has usage restrictions:

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135. Verified by author, Nov. 17, 2012. *See also supra* note 90.

136. *Terms and Conditions of Use*, BARNES & NOBLE.COM, http://www.barnesandnoble.com/include/terms_of_use.asp (last visited May 14, 2013) (emphasis added).

137. *Id.* (emphasis added).

138. *Id.*

139. *Id.* (emphasis added).

> Your purchased Digital Content will be stored in, or accessible from, your NOOK Library on the Barnes & Noble.com Site. You can access your NOOK Library by signing into your Barnes & Noble.com account. You may also transfer the Digital Content *from your NOOK Library to no more than a total of six (6) other electronic devices that you own*. You may not transfer the Digital Content from one electronic reading device to another without maintaining the applicable digital rights management solution for that Digital Content. You may not bypass, modify, defeat or circumvent any of the security features, special rules or other applications that protect the Digital Content.[140]

Interestingly, users can lend NOOK e-books to other users, though during the lending period the user cannot access the e-book him- or herself.[141]

This clause further has a rather extensive list of restrictions, among which is the ability to transfer purchased content to "no more than six (6) other electronic devices" owned by the purchaser.[142] The purchaser, however, cannot transfer any digital content to a third party.[143]

In summary, the Barnes & Noble EULA receives the highest marks for simplicity, by virtue of it being a single document. The EULA states that the user's account with the Barnes & Noble website is only a license to use the services offered by the site, and does not grant any ownership rights. It also states that NOOK e-books purchased through the site are only licensed, are non-transferable, and may be copied to different devices a limited number of times. The EULA does not include terms to deal with the death of the user.

4. Google: Music and E-Books

Larry Page and Sergey Brin founded Google as a search engine company in 1998, funded by Sun Microsystems co-founder Andy Bechtolsheim.[144] Google has used its considerable success as a search

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140. *Id.* (emphasis added).

141. This is accomplished by allowing access to the e-book on the borrower's NOOK, and disabling access to the e-book on the lender's NOOK. The lending period can be up to fourteen days. *See Id.*

142. *Id.*

143. *Id.*

144. *Google's Mission is to Organize the World's Information and Make it Universally Accessible and Useful*, GOOGLE, https://www.google.com/intl/en/about/company/ (last visited May 14, 2013).

engine to expand into many other markets.[145] In 2009 Google began selling e-books,[146] and 2011 Google opened a digital music store to compete with both Apple and Amazon.com.[147] Today, Google sells music, videos, books, magazines, and apps through its online store, Google Play.[148]

In January, 2012 Google attempted to simplify its privacy and user agreements by eliminating multiple documents in favor of a single, unified document for each.[149] The Google Terms of Service, however, still direct the user to additional terms applicable to specific Google services.[150] This is sensible, because it would be very difficult for a single document to cover all the myriad services offered by Google. This document, however, provides very little specific language about the user's rights in his or her account, and says nothing about the user's death. Moreover, the Google's "Policies" pages do not link directly to the additional terms applicable to Google services.

We are, however, primarily interested in products sold by Google Play, Google's online store. A link to the "Terms of Service" for Google Play appears at the bottom of each page of the site.[151] With regard to the user's rights to products purchase through the site, the agreement first states general terms:

> License to Use Products. Following payment of the applicable fees for a Product, you will have *the non-exclusive right*, for the period selected by you in the case of a purchase for a rental period, and in other cases for as long as Google and the applicable copyright holder have rights to provide you that Product, to download or stream, in each case, *solely as expressly permitted by Google* via the Play user interface and subject to the restrictions set forth in

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145. *Products*, GOOGLE, https://www.google.com/intl/en/about/products/ (last visited May 14, 2013) (a complete catalog of Google's product offerings).

146. Motoko Rich, *Preparing to Sell E-Books, Google Takes on Amazon*, N.Y. TIMES (May 31, 2009), http://www.nytimes.com/2009/06/01/technology/internet/01google.html.

147. Leila Macor, *Google Sells Digital Music in iTunes Challenge*, GOOGLE, (Nov. 16, 2011), http://www.google.com/hostednews/afp/article/ALeqM5gv7UYaduoz2Nb1UkAI69XTCZ8-2A?docId=CNG.717fbd3085dec0f7a58ce3994af5db34.c1.

148. GOOGLE PLAY, https://play.google.com/store (last visited May 14, 2013).

149. Changes to Google Privacy Policy and Terms of Service, Email from Google, Inc. to Google users (Jan. 27, 2012, 8:52 PM) (on file with author). *See also Policies & Principles*, GOOGLE, https://www.google.com/intl/en/policies/ (last visited May 14, 2013).

150. *Google Terms of Service*, GOOGLE (Mar. 1, 2012), http://www.google.com/policies/terms/.

151. *See, e.g.*, GOOGLE PLAY, *supra* note 148.

> these Terms and associated policies, copies of the applicable Product to your Devices, and to view, use, and display the Product on your Devices or as otherwise authorized by Google as part of the Service for your personal, non-commercial use only.[152]

The agreement also presents these restrictions:

> Sale, Distribution or Assignment to Third Parties. You may not sell, rent, lease, redistribute, broadcast, transmit, communicate, modify, sublicense or transfer or assign your rights to Products to any third party without authorization, including with regard to any downloads of Products that you may obtain through Google Play.[153]

The agreement then presents sections applicable to each of the different types of content the user can purchase through the Google Play site: music, books, movies and TV shows, and magazines. These sections do not contain additional grants or restrictions, thus the above clauses govern all purchases.

In summary, Google's attempt to simplify its EULA did result in a simple and easy to locate document; but the document leaves the user's rights in his or her account somewhat vague. The agreement governing the Google Play store, however, is not ambiguous: all content is purchased subject to a license, not purchased outright. Moreover, this content is not transferable.

B. Conclusions

How well have we answered the three questions posed at the beginning of this section? First, accounts with each of the four providers examined are only restricted, non-transferable licenses to use the provider's services; the accounts do not vest any sort of ownership in the user. Furthermore, Apple expressly allows a user to consent to letting other persons access his or her account, but none of the other providers' EULAs have a similar provision. Second, Apple's EULA contemplates an outright purchase of music, while Amazon.com and Google only provide a license. In all cases, the providers only license e-books to the consumer, and do not sell them. Third, all the licensed content has, of course restrictions; Apple's non-licensed digital music is also subject to "usage rules," but these rules

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152. *Google Play Terms of Service*, GOOGLE PLAY, https://play.google.com/intl/en_us/about/play-terms.html (last visited May 14, 2013) (emphasis added).

153. *Id.*

are actually permission to make a limited number of copies, rather than a restriction on use.

Why license the content, and not sell it outright? Given the furor over Digital Rights Management (DRM), it is evident that consumers dislike not having full control over content, just as they would with print media.[154] No doubt these restrictions are born out of publishers' concern that digital content is so easily copied and shared. Publishers have had to tolerate some amount of personal copying even before *Sony Corp. of Amer. v. Universal Studios, Inc.*[155] held that consumers' use of the Betamax home video cassette recorder would not significantly impact the market for broadcast television. But making a copy of a copy on magnetic tape always resulted in some loss of quality;[156] with the advent of digital technology, one can now make an exact copy of a video or song without any loss of quality at all.[157] And where copying an entire print book may once have been very tedious, a digital book can be copied in fractions of a second. At the same time, however, technology is providing publishers, through the content providers, means to control copying: Amazon.com can, and has, deleted a person's entire e-book library.[158] Though it is meant to be a security feature, Apple is also able to erase all the data on any registered device.[159]

Perhaps copyright law provides a way to bypass the limitations of a EULA. We will explore that possibility in the next section.

IV. WHAT CAN YOU DO WITH YOUR DIGITAL CONTENT?

In order for Bruce Willis's children to acquire his digital music, our analysis so far shows that his executors will have to overcome

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154. *See, e.g., Amazon's Kindle Swindle*, DEFECTIVEBYDESIGN.ORG, http://www.defectivebydesign.org/amazon-kindle-swindle (last visited May 14, 2013).

155. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

156. A phenomenon known as "generation loss." S*ee Meaning of Generation Loss*, HYPER DICTIONARY, http://www.hyperdictionary.com/video/generation+loss (last visited May 14, 2013) ("When an analog master videotape is duplicated, the second-generation copy is usually inferior in some way to the master. . . . Limited frequency response of audio/video magnetic tape and imperfections in electronic circuitry are the main causes of generation loss.").

157. *Id.* ("Digital formats make generation loss negligible because each copy is essentially an exact duplicate of the original.").

158. Dominique Mosbergen, *Amazon Allegedly Deletes Customer's Kindle; Incident Triggers Discussion about Ebooks, DRM*, HUFFINGTON POST (Oct. 23, 2012, 6:11 PM), http://www.huffingtonpost.com/2012/10/22/amazon-kindle-deleted-remotely-ebooks-drm_n_2001952.html.

159. *See iCloud: Erase Your Device Remotely*, APPLE, http://support.apple.com/kb/PH2701 (last visited May 17, 2013).

several hurdles. The first is access to his iTunes account: without access to the account and the ability to use the account as Mr. Willis himself, his family will not be able to download the content that is stored in the account.[160] This hurdle is perhaps overcome because Mr. Willis's children will have the iPods he owned (though these devices may not contain his entire song collection), but even then the family faces another hurdle: restrictions on the digital content imposed by the EULA Mr. Willis accepted as a condition of using the iTunes service, and restrictions imposed by copyright law. If unable to overcome these hurdles, Mr. Willis's daughters will only be able to listen to their father's music by using his iPods, until the devices themselves fail and the music is lost.

As previously discussed, what happens to a person's property when the person dies is determined by state-specific wills and probate law and general property law.[161] That is why the Ellsworths' and the Stassens' primary recourse for gaining access to digital content was their local probate court.[162] These laws, however, only apply to a person's property; if the person does not own the property, he or she cannot pass it on at death.[163] As the previous section shows, what an iTunes or Amazon.com consumer owns is determined by the service's EULA, and thus examining the EULA is the starting point.

A. The Account Itself

As the Ellsworth, Stassen, and Daftary cases illustrate, there are two separate but related aspects to a deceased user's account: access to the content in the account, and ownership rights to the account itself. By "ownership rights" we mean that a survivor be named the registered user of the account; as we determined in the previous section, in most cases the deceased user did not own the account at all, and the account only represented a license to use a service.[164] As

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160. *See supra* Part III.A.1.

161. JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 38-39 (8th ed. 2009).

162. *See supra* Part II.B.

163. *See supra* note 40 and accompanying text; *see also* Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314-18 (S.D.N.Y. 2007) ("Descendible postmortem publicity rights were not recognized, in New York, California, or Indiana at the time of Ms. Monroe's death in 1962. . . . Thus, at the time of her death in 1962 Ms. Monroe did not have any postmortem right of publicity under the law of any relevant state. . . . [A] testator is presumed, as a matter of law, to know that he cannot dispose of property over which he has no testamentary power, including property he does not own at the time of his death.").

164. *See supra* Part III.A.

the registered user of a deceased user's account, the user's descendents would have no issues accessing the contents of the account. But to become the registered user might be impossible; thus the descendants' only recourse might be to gain access only to the contents of the account, which itself might be difficult to impossible.

The ideal scenario would be as follows: the deceased has, in a will or other suitably testamentary document, expressed the desire that his or her iTunes or Amazon.com account should pass to the person's friends or family. The person has ensured that his or her executors have all the necessary passwords. Yet for a person's survivors to access his or her account, and essentially take ownership of the account, is to transfer the account. As we have seen, transfers do not appear to be permissible for iTunes and Amazon.com accounts. The best the family can argue is that they have clear intent by the user to pass on his or her accounts, but they would have to make this argument in a probate court. The Stassen and Ellsworth probate judges both upheld non-transferability clauses, and though these opinions did not establish binding precedent, they are nevertheless an indication of which way a challenge might fall. The Stassens and the Ellsworths also did not have any clear indication that their children consented to having their parents access to their accounts; the Daftary case, which also does not establish precedent, indicates that probably the legitimate executors of the deceased's estate may not be able to grant consent.

Perhaps, however, the friends and family of the deceased can at least get access to the account. By way of example, Apple's EULA provides that "[y]ou may not use anyone else's Apple ID, password or account without the express permission and consent of the holder of that Apple ID."[165] Thus if a family member has an Apple ID, and the deceased's testamentary document is sufficient to grant consent to access the deceased's Apple account, then the family member can access the deceased account. The family member would not be violating either his or her own EULA with Apple, nor would he or she be violating the deceased's EULA.

But what if consent from the deceased is lacking? The polar extreme from the previous scenario is that the person has died leaving neither his or her passwords, nor any indication—or perhaps some indication, but nothing that rises to testamentary—that the user desired his or her family to have access to the accounts. The logical

165. *Apple Terms of Use, supra* note 92.

first step for the user's family would be to request that the service provider reset the deceased user's password; but the majority of service providers will not reset a password at anyone but the user's direction. It is already too easy for a malicious person to fool a service provider into resetting a password,[166] thus it is entirely reasonable for a service provider to disbelieve anyone claiming to be a user's executor or next of kin. In addition, the service provider had an agreement with the deceased person to protect the person's privacy; absent any indication of consent by the deceased, the service provider has no reason to believe the person would have wanted his or her family to have access.

The next step the family could take is to present the service provider with a death certificate, or obtain a court order requiring the service provider to turn over the contents of the account. Some service providers, such as Yahoo! will respond to a court order.[167] Others, such as Facebook, will not provide the content of an account even with faced with a court order, and will simply lock up the account.[168]

While lacking a testamentary document, the family of a deceased person may already have the person's passwords, or could attempt to guess the passwords. The family might then run into a different problem: If the EULA for the provider prohibits the deceased user from allowing someone else to access the account, the family members might be violating state or federal criminal law. Writes one commentator:

> All fifty states[[169]] and the federal government[[170]] have enacted criminal laws penalizing unauthorized access to computer systems and types of private or protected personal data. These laws

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166. Web services have increasingly been suffering from "social hacking", whereby a hacker gains access to a user's account by, for instance, using the "Reset Password" feature of the site and, with publically available information about the person, answering the security questions. *See* Mat Honan, *Cosmo, the Hacker "God" Who Fell to Earth*, WIRED (Sept. 11, 2012, 6:00 AM), http://www.wired.com/gadgetlab/2012/09/cosmo-the-god-who-fell-to-earth/all/.

167. *Yahoo! Terms of Service*, *supra* note 42.

168. *How Do I Report a Deceased Person*, *supra* note 46.

169. *See, e.g.*, CAL. PEN. CODE § 502(c) (West 2012) ("[A]ny person who commits any of the following acts is guilty of a public offense: . . . Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.").

170. The Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2011).

> generally provide consumer protection against fraud and identity theft, but these criminal laws may also have a chilling effect on fiduciaries trying to carry out their duties of gathering a deceased person's assets, paying debts and expenses, and distributing the remaining assets.[171]

Furthermore, Richard Downing, Deputy Chief of the Department of Justice's (DOJ's) Computer Crime and Intellectual Property Section, Criminal Division, testified that 18 U.S.C. § 1030(a)(2) of the Computer Fraud and Abuse Act (CFAA) is sufficiently broad to permit the government to charge a person with a crime under CFAA when that person "exceeds authorized access" by violating a website's terms of service or use policies.[172] In the same testimony, Mr. Downing also testified: "Let me be very clear that DOJ is in no way interested in bringing cases against people who lie about their age on a dating site or anything of the sort. We don't have time or resources to do that."[173]

Apparently not all states' attorneys feel the same way. In 2011 Leon Walker was criminally charged for accessing his wife's Google e-mail.[174] The Michigan Court of Appeals held that "the prosecutor presented sufficient evidence of each element of unauthorized access of a computer, MCL 752.795, to support the district court's decision to bind defendant over for trial."[175] Charges against Mr. Walker were eventually dropped, because his wife had been viewing his text messages without his permission.[176]

While the DOJ may not be interested in prosecuting person such as Mr. Walker, families of deceased users might still have some relief

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171. Jim Lamm, *Planning Ahead for Access to Contents of a Decedent's Online Accounts*, DIGITAL PASSING (Feb. 9, 2012), http://www.digitalpassing.com/2012/02/09/planning-ahead-access-contents-decedent-online-accounts/ (footnotes added).

172. *See Cyber Security: Protecting America's New Frontier: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 14-16 (2011) (statement of Deputy Chief Richard W. Downing, Computer Crime and Intellectual Property Section, Criminal Div., U.S. Dep't of Justice).

173. *Id.* at 69.

174. Ann Zaniewski, *Rochester Hills Man Charged for Snooping on His Then-Wife's Email Weighs Options after Losing Appellate Bid*, THE OAKLAND PRESS (Dec. 28, 2011), http://www.theoaklandpress.com/articles/2011/12/28/news/cops_and_courts/doc4efb34fe5c6d8380118031.txt?viewmode=fullstory.

175. *Id.* (quoting the opinion of the Michigan Court of Appeals).

176. Dave Phillips, *All Charges Dropped Against Rochester Hills Man Accused of Reading Wife's Email Without Permission*, THE OAKLAND PRESS (July 19, 2012), http://www.theoaklandpress.com/articles/2012/07/19/news/local_news/doc50083a5e5471b291951955.txt?viewmode=fullstory.

from § 1030(a)(2)'s broad language. In April, 2012 an *en banc* panel of the Ninth Circuit Court of Appeals decided *United States v. Nosal*.[177] David Nosal was a former employee of Korn/Ferry.[178] He convinced current Korn/Ferry employees, who were authorized to access the company database, to use their access to obtain information that allowed Mr. Nosal to start a competing business.[179] Disclosing this confidential information, of course, violated Korn/Ferry's company policies.[180] Because the company's policy was violated, Mr. Nosal was charged with "exceeding authorized access."[181] The Ninth Circuit held:

> We need not decide today whether Congress *could* base criminal liability on violations of a company or website's computer use restrictions. Instead, we hold that the phrase "exceeds authorized access" in the CFAA does not extend to violations of use restrictions.[182]

Note that the key phrase in that quote is "use restrictions." The Ninth Circuit concluded: "Therefore, we hold that 'exceeds authorized access' in the CFAA is limited to violations of restrictions on *access* to information, and not restrictions on its *use*."[183] Thus while the current Korn/Ferry employees were potentially in violation of the CFAA for their access of the company' confidential information, Mr. Nosal himself was not in violation for his mere use of that information. Thus the court dismissed the criminal charge of "exceeding authorized access"[184] leveled against Mr. Nosal.

This decision did not resolve the question of whether access by a deceased person's survivors of the person's accounts is a crime, but in dicta the court discussed the impact of applying the CFAA to that case.[185] The Court noted that Facebook's terms of service do not allow anyone other than the user to access his or her account, and that it was not uncommon for "people to let close friends and relatives check their email or access their online accounts."[186] The court

177. United States v. Nosal, 676 F.3d 854 (9th Cir. 2012) (en banc).
178. *Id.* at 856.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 863.
183. *Id*. at 863-64.
184. *Id.*
185. *Id.* at 861.
186. *Id.*

acknowledged that the friends and relatives are probably aware that they are doing something that Facebook does not allow, but also pointed out that "few imagine they might be marched off to federal prison for doing so."[187] The Court also criticized the vagueness and difficulty in finding the terms of service, and that service providers reserved the right to change the terms at any time and without notice.[188] Said the court: "[B]ehavior that wasn't criminal yesterday can become criminal today without an act of Congress, and without any notice whatsoever."[189]

For now, whether the descendents of a deceased user are able to gain access to the user's account, either by becoming the registered user of the account or by lawfully using the user's password, remains unresolved. Unlike Facebook and e-mail accounts, however, with digital music and e-books the family of the user in almost all cases.[190] still has access to the content, because copies of the content reside on iPods or Kindle e-readers. The deceased person's EULA with iTunes or Amazon.com basically determines what the user's family can do with this content. All of this content, however, is also copyrighted; hence copyright law may also restrict—or perhaps remove restrictions from—what the families can do with the content.

B. The Digital Content: Two Wrinkles

Digital music and e-books have "old media" equivalents: books printed on paper and music burned onto CDs, or magnetically fixed to cassette tapes, or scratched onto vinyl records. Copyright law originated with the publication of books and similarly printed matter,[191] and thus books have a long and well-established legal history. Sound recordings, such as CDs, have only received copyright

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187. *Id.*

188. *Id.* at 862.

189. *Id.*

190. Amazon.com and Google provide "cloud" (meaning "online") storage for user's digital music, so that the user can listen to his or her music from any device that has an internet connection. As wireless Internet capabilities and access improves, use of cloud storage for music is increasing. *See* Jagdish Rebello, *Subscriptions to Cloud Storage Services to Reach Half-Billion Level This Year*, ISUPPLI (Sept. 6, 2012), http://www.isuppli.com/mobile-and-wireless-communications/news/pages/subscriptions-to-cloud-storage-services-to-reach-half-billion-level-this-year.aspx. Thus there may come a day when the deceased user does not leave behind a physical device with copies of his or her music.

191. CRAIG JOYCE, MARSHALL LEAFFER, PETER JASZI & TYLER OCHOA, COPYRIGHT LAW 2 (8th ed. 2010) ("From the first English copyright act, the Statute of Anne in 1710, the law of 'copyright' has protected the exclusive right of authors to reproduce copies of their books and, by extension, other writings.").

protection since 1972,[192] but nevertheless now have been subjected to thirty years of jurisprudence. So, how do digital songs and e-books fit into this established legal framework? And can copyright law help us answer if and how digital content can be passed at death?

The Copyright Act, 17 U.S.C. § 106 grants to the owner of a copyrighted work six exclusive rights. As relevant here, these include the right to reproduce the work (i.e. make copies); the right to distribute copies of the work to the public; and, in the case of sound recordings, to digitally transmit the work.[193] These are rights of exclusion, thus the owner of the copyright may do these things;[194] a person who purchases a printed book, photocopies the entire book, and gives away that photocopy has committed copyright infringement. The exclusive rights granted by § 106, however, are limited by §§ 107-122. Relevant here are § 107,[195] which defines "fair use", and § 109(a), which states that "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." This is known as the "first sale doctrine."

A person, therefore, who has purchased a paper book or CD, or a

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192. *See* U.S. COPYRIGHT OFFICE, *supra* note 9.

193. The remaining rights are:

> (2) to prepare derivative works based upon the copyrighted work;
>
> . . .
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> [and]
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly . . .

17 U.S.C. § 106 (2011).

194. The owner of the copyright may not be the author; copyrights are property, and they "may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession." *Id.* § 201(d)(1).

195. Section 107 provides:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

Id. § 107.

person authorized by the owner of the object—such as an executor, or, by default, a probate judge—can transfer the person's copy of the book or CD to the person's heirs or beneficiaries without violating copyright law. The heirs and beneficiaries themselves can choose to keep the book or CD, or sell it or otherwise dispose of it also without violating copyright law—first sale applies as well to transfer by gift, and does not require a sale.[196] Note, however, that § 109(a) allows the owner of "a *particular* copy . . . lawfully made under this title" to transfer "that copy"; the owner of a copy cannot reproduce his or her copy.[197]

1. The First Wrinkle: First Sale of Digital Content?

The application of the first sale doctrine to digital music is the key issue in *Capitol Records, LLC v. ReDigi, Inc.*[198]

ReDigi claims to be "the world's first online marketplace for used digital music."[199] The company's business model is to provide an online service for "users to sell their legally acquired digital music files, and buy used digital music from others at a fraction of the price currently available on iTunes."[200] ReDigi claims that its technology ensures that an eligible[201] digital music file is transferred from one

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196. UMG Recordings, Inc. v. Augusto, 558 F. Supp. 2d 1055, 1059 (C.D. Cal. 2008), *aff'd*, 628 F.3d 1175 (9th Cir. 2011).

> Although this statutory limitation is commonly referred to as the first sale doctrine, its protection does not require a "sale." The doctrine applies after the "first authorized disposition by which title passes." 2 *Nimmer* § 8.12[B][1][a]. This passing of title may occur through a transfer by gift. *See* 4 William F. Patry, *Patry on Copyright* § 13:15 ("Since the principle [of the first sale doctrine] applies when copies are given away or are otherwise permanently transferred without the accoutrements of a sale, 'exhaustion' is the better description."); 2 Paul Goldstein, *Goldstein on Copyright* § 7.6.1 n. 4 (3d ed.) ("[A] gift of copies or phonorecords will qualify as a 'first sale' to the same extent as an actual sale for consideration.").

Id. (alterations in original).

197. *See* 17 U.S.C. § 106 (2011) (emphasis added); *supra* note 109 and accompanying text. Copying may be protected fair use, *see infra* note 237, and, under certain circumstances, a person can also make backup copies for personal use, *see* Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc., 641 F. Supp. 2d 913, 942-43 (N.D. Cal. 2009).

198. Capitol Records, LLC v. ReDigi Inc., No. 1:12-cv-00095-RJS, 2013 WL 1286134 (S.D.N.Y. Mar. 30, 2013).

199. *ReDigi, The World's First Online Marketplace for USED Digital Music Set to Launch*, REDIGI NEWSROOM (Oct. 11, 2011), http://newsroom.redigi.com/redigi-the-worlds-first-online-marketplace-for-used-digital-music-set-to-launch/.

200. *Id.*

201. *Id.* ("ReDigi's forensic Verification Engine analyzes each music file uploaded for sale into the ReDigi marketplace to verify that it is eligible for resale, accepting only previously,

user to another "without allowing multiple copies to exist at that same time."[202] ReDigi's position is that the copying necessary for uploading a file to its online storage is protected fair use,[203] and that the sale of those files is protected by the first sale doctrine.[204]

The ReDigi website went live in mid-October, 2011, and in a matter of weeks it received a cease and desist letter from the Recording Industry Associate of America (RIAA).[205] ReDigi, of course, did not cease nor desist, and so at the beginning of January Capitol Records, a subsidiary of music giant EMI,[206] sued the company in the Southern District of New York. Capitol Records alleged that ReDigi was engaged in unauthorized reproduction and distribution of sound recordings to which Capitol Records held the copyrights.[207] On cross motions for summary judgment, Judge Richard Sullivan ultimately agreed with Capitol Records, and ruled against ReDigi on all infringement claims.[208]

ReDigi is not the first company to attempt to create a marketplace for "used" digital music. A company called Bopaboo also intended to provide "an eBay-like marketplace for 'used' digital music files."[209] In Bopaboo's case, however, it appears that the user-seller retained a copy of the file after uploading a copy to site,

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legally downloaded tracks (excludes songs ripped from CD's).").

202. *Id.*

203. Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction at 9-13, *Capitol Records, LLC,* 2013 WL 1286134 (S.D.N.Y. Jan. 27, 2012).

204. *Id.* at 17-21.

205. Ben Sisario, *Site to Resell Music Files Has Critics*, N.Y. TIMES (Nov. 14, 2011), http://www.nytimes.com/2011/11/15/business/media/reselling-of-music-files-is-contested.html?_r=0.

206. Lucy Holmes Plovnick, *Will the U.S. First Sale Doctrine Go Digital?*, INTELL. PROP. MAG., Mar. 2012, at 43, *available at* http://msk2.inherent.com/images/cms/file/LHP%20ReDigi%20article-March_2012.pdf ("On 6 January 2012, Capitol Records, a subsidiary of EMI Music, filed a copyright infringement suit against ReDigi, the purveyor of an online music resale service.").

207. Complaint at 11, *Capitol Records, LLC*, 2013 WL 1286134 (S.D.N.Y. Jan. 1, 2012). Capitol Records also alleged that, by providing thirty-second clips of the sound recordings, ReDigi also infringed the public performance right in the recordings. Capitol Records also alleged infringement of its copyrights in the album covers, which it said infringed the public display rights in those covers. Capitol Records further accused ReDigi of secondary liability, by providing a means by which users could conduct unauthorized copying and reproduction. *Id.* at 10-17.

208. *Capitol Records, LLC,* 2013 WL 1286134 (S.D.N.Y. Mar. 30, 2013).

209. Sam Diaz, *Bopaboo May Feel Like eBay but Will End up Looking Like Original Napster*, ZDNET (Dec. 11, 2008, 1:28 PM), http://www.zdnet.com/blog/btl/bopaboo-may-feel-like-ebay-but-will-end-up-looking-like-original-napster/11202.

Bopaboo retained a copy of the file even after selling the file, and the user-buyer would also have his or her own copy of the file.[210] First sale doctrine requires that there be no copying,[211] thus besides the user-seller's original, purchased copy, none of the remaining copies would be protected by first sale. Bopaboo attempted to negotiate with the music publishers, offering them a cut of the sales.[212] Apparently, and not surprisingly, this attempt failed: the site never went live, the last entry for the site's blog is dated December 16, 2008, and the company last paid developers in 2009.[213]

The next company to attempt to create a means to allow users to sell digital music was by Lexink. Lexink's plan was to let customers resell all sorts of "used" digital property, including MP3s, videos, and e-books.[214] Lexink apparently did not intend to establish a marketplace, but instead intended to work with existing services, such as Amazon.com and iTunes.[215] Lexink claimed that its propriety software, UNLODER, could use the DRM metadata embedded in digital files to track when the file was resold, and at that time Amazon.com or iTunes could delete the user-seller's copy from the user-seller's computer.[216] The obvious flaw in this plan is that a resourceful user—who is willing to violate the Digital Millennium Copyright Act (DMCA)[217]—could simply crack the DRM before selling the digital content, and thus retain a copy.[218] Lexink, the company, is still in existence but there is no evidence that it ever managed to sell or license its software to any online service.

In the meantime, a working group of the Institute of Electrical and Electronics Engineers (IEEE) in 2010 "began trying to create a standard to allow the use of specialized DRM to create 'Digital

210. Chris Meadows, *Digital Media and the Resale Market*, TELEREAD (Dec. 19, 2008, 9:48 PM), http://www.teleread.com/copy-right/digital-media-and-the-resale-market/.

211. *See supra* note 109.

212. Meadows, *supra* note 210.

213. Chris Meadows, *Lexink Wants To Allow Resale of "Used" Digital Media*, TELEREAD (June 11, 2010, 10:15 AM), http://www.teleread.com/ebooks/lexink-wants-to-allow-resale-of-used-digital-media/.

214. *Id.*

215. *Id.*

216. *Id.*

217. Pub. L. 105-304, 112 Stat. 2860 (1998) (relevant sections codified in 17 U.S.C. § 1201-1205 (2011)). Section 1201(a)(1)(A) provides: "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." Sections 1203 and 1204 provide civil and criminal remedies, respectively.

218. Meadows, *supra* note 213.

Personal Property', electronic files that could be resold just like 'real' property."[219] According to the IEEE, when a vendor sells a user a digital content file, and truly intends that the users owns the content, the file will contain "give" and "take" buttons.[220] The "give" button creates a new copy of the content and delivers it to whomever the user chooses; subsequent recipients can also "give" the content to others.[221] The first recipient to press the "take" button, however, renders all other copies inaccessible.[222] The IEEE believes that this system protects revenue streams for businesses while at the same time preserving "the features that consumers associate with personal ownership, including the ability to share, to lend, to give, or to resell what they have bought."[223] While laudable, there are some problems with this approach, such as potentially dozens of recipients suddenly finding content they believe they owned rendered useless, accompanied by severe irritation with the person who pressed the "take" button. So far, however, the IEEE's efforts have made little progress; according to the web page for this working group, they have held four meetings and the page itself has not been updated since February, 2011.[224]

ReDigi believed it had resolved the questions that Bopaboo, Lexink, and the IEEE had already wrestled with, and it firmly believed that the services it provided were legal.[225]

Central to the dispute was the mechanism by which ReDigi operated. ReDigi provided a "Cloud Locker" to each user, into which the user could upload digital music files.[226] In isolation, this process is no different than if the user had uploaded the file to, say, Google's "My Drive", the cloud storage service provided by Google.[227] ReDigi,

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219. Chris Meadows, *Digital Déjà Vu: ReDigi Pledges to Allow Resale of "Used" MP3s*, TELEREAD (Feb. 27, 2011, 6:29 PM), http://www.teleread.com/copy-right/digital-dj-vu-redigi-pledges-to-allow-resale-of-used-mp3s/.

220. *IEEE P1817 Standard for Consumer-Ownable Digital Personal Property*, IEEE STANDARDS ASS'N, http://grouper.ieee.org/groups/1817/ (last modified Feb. 25, 2011).

221. *Id.*

222. *Id.* Whether all persons to whom a copy was "given" can use the copy up until one person presses the "take" button, and if the content can only be used once "taken", is not clear.

223. *Id.*

224. *Id.*

225. Sisario, *supra* note 205 ("ReDigi is a marketplace that gives users tools to be in compliance with copyright law." (quoting John Ossenmacher, CEO of ReDigi) (internal quotation marks omitted)).

226. Defendant's Memorandum, *supra* note 203, at 2-3.

227. *About "My Drive,"* GOOGLE, https://support.google.com/drive/bin/answer.py?hl=en&answer=2375043&topic=2375186&ctx

however, asserted that its Cloud Locker was different than other cloud storage, in that "ReDigi's proprietary technology [took] the additional step of searching for and removing, or causing to be removed, any other instances of the file which may be found on the drive from which the file [was] removed."[228] ReDigi admitted that uploading a file to the Cloud Locker was copying, at least in a colloquial sense;[229] but if only one copy of the file ever existed, there was no reproduction of that file.[230]

ReDigi also asserted that no copying occurred during the sale of a song, and thus this exchange also required no reproduction.[231] When a user-buyer purchased a song from a user-seller, ReDigi changed the file's association from the user-seller's Cloud Locker to the user-buyer's Cloud Locker, which required no copying: no bits were moved from any sector of a hard drive to another.[232] The user-buyer could then either listen to the songs online,[233] or download the file to his or her own computer or other device.[234]

The problem was that the upload and download of the song each resulted in the bits representing the song residing on a different hard drive than the one from which the song originated. Meaning: each step produced a copy. Moreover, in between, the file changed ownership. The question was thus whether ReDigi had, in fact, avoided infringing the reproduction and distribution rights, given that Capitol Records did not consent to the making of those copies. ReDigi contended that, because a file did not exist in two places at once,[235] that there was no reproduction, but conceded that the sale step constituted distribution.[236] ReDigi thus raised two defenses. The

=topic (last visited May 14, 2013) ("'My Drive' is a section of Google Drive on the web . . . ."). *See also Overview of Google Drive*, GOOGLE, https://support.google.com/drive/bin/answer.py?hl=en&answer=2424384&ctx=cb&src=cb&cbid=-enasuzxs6nzn (last visited May 14, 2013) ("Google Drive lets you store and access your files anywhere—on the web, on your hard drive, or on the go.").

228. Defendant's Memorandum, *supra* note 203, at 12.

229. Additional Statement of Material Facts Pursuant to Local Civil Rule 56.1(b) at 9, Capitol Records, LLC v. ReDigi Inc., No. 1:12-cv-00095-RJS, 2013 WL 1286134 (S.D.N.Y. Aug. 14, 2012).

230. Defendant's Memorandum, *supra* note 203, at 9.

231. *Id.* at 14.

232. *Id.* at 2-3.

233. *Id.* at 7.

234. *Id.* at 9.

235. Capitol Records, LLC v. ReDigi Inc., No. 1:12-cv-00095-RJS, 2013 WL 1286134, at *1 (S.D.N.Y. Mar. 30, 2013).

236. Defendant's Memorandum, *supra* note 203, at 8.

first was that the upload and download copying were non-infringing fair use: so long as the copying is for personal, non-commercial use,[237] copying even an entire work was protected. ReDigi cited *Sony Corporation of America v. Universal Studios, Inc.*,[238] which held that copying for purposes of time-shifting was protected fair use, and *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*,[239] which held that copying for space-shifting was also protected fair use. *Cartoon Network LP v. CSC Holdings, Inc.*,[240] also lent support. It held that allowing users to store complete copies of a work in the cloud did not directly infringe the copyright in those works. ReDigi concluded that because no copying occurred during the actual sale, the sale did not infringe Capitol Records' distribution right.[241]

That the upload and download copying was only personal and non-commercial is difficult to swallow, given that the purpose for both is to buy and sell the songs. So, in the alternative ReDigi claimed that its activities were protected by the first sale doctrine.[242] A user who has purchased a song from iTunes owns a legal copy of that song, thus ReDigi argued that its activity fell under 17 U.S.C. § 109(a): The user may lawfully dispose of that copy, including by reselling it.[243] ReDigi claimed that its software was able to detect the difference between a song that was legally purchased versus a song that was digitized from a CD or downloaded from a file sharing

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237. The Copyright Act provides:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2011).

238. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

239. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072 (9th Cir. 1999).

240. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008).

241. Defendant's Memorandum, *supra* note 203, at 14.

242. *Id.* at 17.

243. *Id*. at 17-19.

site.[244] ReDigi also claimed it was able to distinguish a song that was purchased with full ownership rights, such as with iTunes, versus a song that was only licensed, such as with Amazon MP3.[245]

Judge Sullivan disagreed with both of ReDigi's affirmative defenses. He first dispensed with ReDigi's contention that the upload and download process did not constitute reproduction.[246] He noted that "the unauthorized transfer of a digital music file over the Internet—where only one file exists before and after the transfer" was a matter of first impression.[247] He then rejected ReDigi's argument as not supported by the statutory language: "[T]he plain text of the Copyright Act makes clear that reproduction occurs when a copyrighted work is fixed in a new *material object*."[248] Since "[i]t is simply impossible [for] the same 'material object' [to] be transferred over the Internet,"[249] a reproduction necessarily occurs when a ReDigi user uploads to, or downloads from, the Cloud Locker. Judge Sullivan thus held that "the right 'to reproduce the copyrighted work in . . . phonorecords' is implicated whenever a sound recording is fixed in a new material object, regardless of whether the sound recording remains fixed in the original material object."[250]

ReDigi argued that this conclusion would lead to "irrational" results, rendering illegal "any movement of copyrighted files on a hard drive, including relocating files between directories and defragmenting."[251] Capitol Records, however, had conceded that "such reproduction [was] almost certainly protected under other doctrines or defenses."[252] Judge Sullivan agreed with Capitol Records, and found the argument irrelevant.[253]

Judge Sullivan then addressed ReDigi's affirmative defenses. He first readily dismissed ReDigi's fair use argument,[254] finding that it failed all four of the statutory factors.[255] First, the verbatim upload,

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244. *Id.* at 19.

245. Defendant's Memorandum, *supra* note 203 at 19.

246. Capitol Records, LLC v. ReDigi Inc., No. 1:12-cv-00095-RJS, 2013 WL 1286134, at *4-6 (S.D.N.Y. Mar. 30, 2013).

247. *Id.* at *4.

248. *Id.*

249. *Id.* at *5.

250. *Id.* (quoting 17 U.S.C. § 101 (2011)).

251. *Id.* at *6.

252. *Id.*

253. *Id.*

254. *Id.* at *8-9.

255. *See supra* note 237.

sale, and download of the digital music files did not "transform" the work into "something new, with a further purpose or different character."[256] Also within the first factor, ReDigi's use was "undoubtedly commercial[:] ReDigi and the uploading user directly profit from the sale of a digital music file, and the downloading user saves significantly on the price of the song in the primary market."[257] Second, "creative works like sound recordings are 'close to the core of the intended copyright protection' and 'far removed from the . . . factual or descriptive work more amenable to fair use.'"[258] Third, "ReDigi transmits the works in their entirety, 'negating any claim of fair use.'"[259] Finally, "ReDigi's sales are likely to undercut the 'market for or value of the copyrighted work.'"[260]

Judge Sullivan then turned to ReDigi's contention that the sale of the sound recordings by one user to another user was protected under the first sale doctrine. He first emphasized that 17 U.S.C. § 109 applies to the distribution right only.[261] Judge Sullivan then proceeded to dismantle ReDigi's argument in two steps. First, he pointed out that the first sale doctrine only applied to works "lawfully made under this title" and, since the music files sold on ReDigi were unlawful reproductions, first sale could not apply.[262] Next, he again relied on the statutory language, and held that "the first sale defense is limited to material items."[263] This is so because the user who originally purchased the song could only sell his or her "particular" copy; that copy resided on the user's hard disk or iPod, and what the user sold on ReDigi was necessarily a different copy.[264] In this Judge Sullivan agreed with the Copyright Office,[265] which has officially stated that first sale rights do not apply to digital media.[266]

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256. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-79 (1994).

257. *Capitol Records, LLC*, 2013 WL 1286134 at *8 (S.D.N.Y. Mar. 30, 2013).

258. *Id.* at *9 (alteration in original) (quoting UMG Recordings, Inc. v. MP3.Com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000)).

259. *Id.* (quoting *UMG Recordings, Inc*, 92 F. Supp. 2d at 352).

260. *Id.* (quoting 17 U.S.C. § 107 (2011)).

261. *Id.* at *10.

262. *Id.* (quoting 17 U.S.C. § 109).

263. *Id.*

264. *Id.*

265. *Id.* at *11.

266. *See* U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 79-80 (2001) ("[W]hen the owner of a lawful copy of a copyrighted work digitally transmits that work in a way that exercises the reproduction right without authorization, [the first sale doctrine] does not provide a defense to infringement.").

ReDigi attempted to argue that technology had rendered the literal terms of § 109 ambiguous.[267] The court should thus interpret the statute "in light of [its] basic purpose": to promote and support the distribution of art.[268] Judge Sullivan, however, found § 109's reference to a "particular" copy or phonorecord perfectly clear, and roundly rejected ReDigi's argument as improper judicial legislation.[269]

This case has generated quite a bit of interest for its implications for cloud storage services. Cloud storage is gaining popularity, and reportedly constituted a $41 billion dollar global market in 2010.[270] If the uploading of a file—containing copyrighted content—to cloud storage is an unauthorized reproduction, then cloud storage providers could be subject to secondary liability for providing a means for others (the users) to be directly infringing. Thus the question is: are services such as Google's cloud storage more like the digital video recording devices in *Cartoon Network*,[271] which did not constitute secondary infringement? Or is it more like the services provided by Napster[272] and Grokster,[273] which did not pass muster? Judge Sullivan found that ReDigi's service fell on the Napster and Grokster side of the line, because it was a service "where *only* copyrighted work could be sold."[274] Thus the question, as applied to cloud storage providers, remains open.

This may not be the end for ReDigi, however. The company will

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267. *Capitol Records, LLC*, 2013 WL 1286134 at *10 (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984)).

268. *Id.* (alteration in original) (quoting *Sony Corp. of Am.*, 464 U.S. at 432).

269. *Id.*

270. Letter from Kathryn J. Fritz, Fenwick & West LLP, attorneys for Google, Inc., to Hon. Richard J. Sullivan (Feb. 1, 2012) (on file with author).

271. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008). The finding of no secondary liability in *Cartoon Network* hinged on the fact that Cablevision merely provided a passive system, and that it was Cablevision's customers who actually caused recordings to be made.

272. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). Napster provided peer-to-peer file sharing services that allowed users to make files on their computers available for copying by others on who were registered with the service. Napster was found secondarily liable based on its knowledge that users were transferring copyrighted files.

273. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005). Grokster's also offered a peer-to-peer service, but unlike Napster, it did not have a central server through which all file transfers traveled; instead, Grokster distributed software to each peer-to-peer user, and transfers occurred over the normal Internet. Grokster was held secondarily liable based on its promotion of its software as a means for accessing copyrighted music.

274. Capitol Records, LLC v. ReDigi Inc., No. 1:12-cv-00095-RJS, 2013 WL 1286134, at *12 (S.D.N.Y. Mar. 30, 2013).

likely appeal, because the alternative would probably mean shutting down the service. Even if ReDigi can afford to pay even a fraction of the $150,000-per-song damages Capitol Records demanded,[275] it is not likely that it will be able to work out a licensing contract with the recording company. That was the approach Bopaboo attempted, and it did not succeed.[276]

ReDigi's implications for passing digital media at death are also not positive. Lacking a digital first sale defense, Bruce Willis's children cannot copy his songs off of his iPods and redistribute them; they can only sell the iPod itself. Otherwise, they would need access to their father's iTunes account, and as we discussed above, getting that access depends entirely on Apple's EULAs.[277]

2. The Second Wrinkle: Digital Rights Management

Digital Rights Management (DRM) refers generally to "any scheme that controls access to copyrighted material using technological means."[278] "DRM removes usage control from the person in possession of digital content and puts it in the hands of a computer program."[279] Thus a music CD that has DRM software on it could prevent the owner from digitally copying it, or an e-book with DRM can prevent the owner from copying or printing it.[280] Removing DRM from digital content is a violation of the DMCA,[281] and punishable either as a civil[282] or even criminal infraction.[283]

Apple sells songs either with DRM, with stricter usage rules, and

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275. Complaint, *supra* note 207, at 18.

276. Meadows, *supra* note 210.

277. Redigi is not the only company that thinks a digital resale market is possible. In January 2013, Amazon received a patent to set up an exchange for digital material. David Streitfeld, *Imagining a Swap Meet for E-Books and Music*, N.Y. TIMES (Mar. 7, 2013), http://www.nytimes.com/2013/03/08/technology/revolution-in-the-resale-of-digital-books-and-music.html?pagewanted=all&_r=0. *See also* U.S. Patent No. 8,364,595 (filed May 5, 2009). In March, 2013, "the United State Patent and Trademark Office published Apple's application for its own patent for a digital marketplace." Streitfeld, *supra*. *See also* U.S. Patent Application No. 20130060616 (filed June 22, 2012).

278. Julia Layton, *How Digital Rights Management Works*, HOW STUFF WORKS, http://computer.howstuffworks.com/drm1.htm (last visited May 14, 2013).

279. *Id.*

280. *Id.*

281. 17 U.S.C. § 1201(a)(1)(A) (2011) ("No person shall circumvent a technological measure that effectively controls access to a work protected under this title.").

282. *Id.* § 1203.

283. *Id.* § 1204.

without (the latter are called "iTunes Plus Products").[284] In 2009, however, Apple announced that it would no longer sell any music with DRM attached.[285] Initially, all Amazon.com Kindle e-books came with DRM,[286] but at the beginning of 2010 Amazon.com subtly, and without making an announcement, changed its system to make it easier for publishers to opt to release their books DRM-free.[287] When Amazon.com's MP3 Store launched, it offered "over 2 million songs" DRM-free.[288] Barnes & Noble NOOK books still come with DRM.[289] Google's MP3s have also always come without DRM,[290] and it also gives book publishers the option of applying DRM to each individual book.[291]

This begs the question: is DRM still relevant? Generally, the answer is yes: a deceased user, especially one that has been an iTunes or Kindle user since the inception of these services, is likely to have content with and without DRM. Even if courts determine that the user's survivors are free to copy and resell the user's digital music and e-book collection, DRM may nevertheless prevent them from doing so.[292] Given that removing the DRM could be a federal crime, the user's family will likely be unable to use the content in any manner other than on the device it resides on if, in fact, it resides on any device at all.

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284. *See iTunes Store Terms*, *supra* note 99.

285. Peter Cohen, *iTunes Store Goes DRM-Free*, MACWORLD (Jan. 6, 2009, 10:40 AM), http://www.macworld.com/article/1137946/itunestore.html.

286. *Amazon's Kindle Swindle*, *supra* note 154.

287. Joshua Benton, *Amazon Gives Publishers Easier Control over DRM in Kindle E-Books*, NIEMAN JOURNALISM LAB (Jan. 21, 2010, 10:38 AM), http://www.niemanlab.org/2010/01/amazon-quietly-lets-publishers-remove-drm-from-kindle-ebooks/.

288. Cory Doctorow, *Amazon Creates Gigantic DRM-Free Music Store!*, BOINGBOING.NET (Sept. 25, 2007, 8:04 AM), http://boingboing.net/2007/09/25/amazon-creates-gigan.html (quoting an Amazon.com's press release).

289. *Terms and Conditions of Use*, *supra* note 136.

290. David Ruddock, *Google Announces Launch of Google Music—MP3 Store, Free Cloud Storage, Music Sharing, and Artist Hub*, ANDROID POLICE (Nov. 16, 2011), http://www.androidpolice.com/2011/11/16/google-announces-launch-of-google-music-mp3-store-free-cloud-storage-music-sharing/.

291. *DRM Options for Downloads of Books on Google Play*, GOOGLE, http://support.google.com/books/partner/bin/answer.py?hl=en&answer=170424 (last visited May 14, 2013).

292. Layton, *supra* note 278.

V. WHERE DO WE GO FROM HERE?

With all this uncertainty, what should be done, and by whom? Legislators, and those who advise legislators, have accomplished little so far. While legislation and court decisions are the final word on the ability to pass digital content at death, individuals can nonetheless act by providing their survivors with some clarity as to their desires. Service providers, however, are in the best position to provide clarity, and should also act both to inform their users of the issues and also to provide a clear path for transfer (or alternatively to clearly prevent transfer) of a deceased user's digital content.

A. State Legislation and the Uniform Law Commission

Cases such as that of the Ellsworths and the Stassens have brought the broader issue of passing on of digital assets to the attention of state legislators. Yet only six states have passed estate laws that mention digital assets: Connecticut,[293] Idaho,[294] Indiana,[295] Oklahoma,[296] Rhode Island,[297] and Virginia.[298] Among these states, the Connecticut and Rhode Island laws only address e-mail, requiring service provide give access to or copies of the contents of an e-mail account.[299] The Idaho and Oklahoma laws only address social networking, e-mail, microblogging, and short message service websites, allowing an executor or administrator of an estate to "take

293. 2005 Conn. Legis. Serv., Pub. Act No. 05-136 (West), *available at* http://www.cga.ct.gov/2005/act/Pa/2005PA-00136-R00SB-00262-PA.htm (codified at CONN. GEN. STAT. § 45a-334a (West 2012)).

294. 2011 Idaho Sess. Laws, S.B. 1044, *available at* http://legislature.idaho.gov/legislation/2011/S1044E1.pdf (enacted July 1, 2011) (codified at IDAHO CODE ANN. §§ 15-3-715, 15-5-424 (West 2012)).

295. IND. CODE ANN. § 29-1-13-1.1 (West 2012), *available at* http://www.in.gov/legislative/ic/2010/title29/ar1/ch13.html.

296. 2010 Okla. Sess. Law Serv. 181, H.B. 2800 (West), *available at* http://webserver1.lsb.state.ok.us/2009-10bills/HB/hb2800_enr.rtf (enacted Nov. 1, 2010) (codified at OKLA. STAT. ANN. tit. 58, § 269 (2012)).

297. 2007 R.I. Gen. Laws Adv. Legis. Serv. 07-172, H.B. 5647, *available at* http://webserver.rilin.state.ri.us/BillText/BillText07/HouseText07/H5647.pdf (codified as amended at R.I. GEN. LAWS ANN. §§ 33-27-1 to 33-27-5 (West 2012)).

298. H.B. 1752, Va. Gen. Assemb. (2013), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?ses=131&typ=bil&val=hb1752&submit=GO (to be codified at VA. CODE ANN. §§ 64-2-109, 64-2-110 (West 2012)).

299. Connecticut Public Act is titled "An Act Concerning Access to Decedents' Electronic Mail Accounts." 2005 Conn. Legis. Serv., Pub. Act No. 05-136. Rhode Island's law is titled "Access to Decedents' Electronic Mail Accounts Act." 2007 R.I. Gen. Laws Adv. Legis. Serv. 07-172, H.B. 5647.

control of, conduct, continue, or terminate" the accounts.[300] The Virginia law takes a different approach; Virginia allows the personal representative of a deceased minor to assume the minor's terms of service agreement for basically all online accounts.[301] While broad enough to include iTunes and Amazon.com accounts, it only applies if the deceased person has not yet reached the age of majority. Only the Indiana law is written broadly enough to include iTunes and Amazon.com accounts, providing "access to or copies of any documents or information of the deceased person stored electronically"[302] to the persons' personal representative. Without judicial interpretation, however, it is not clear if this law would cover digital music files.

The Uniform Law Commission (ULC) in 2011 formed a committee to draft model legislation that "will vest fiduciaries with at least the authority to manage and distribute digital assets, copy or delete digital assets, and access digital assets."[303] The committee intends to draft model laws that would allow a fiduciary—an attorney-in-fact acting on behalf of a living person, a guardian or conservator acting on behalf of a living person, or a personal representative acting on behalf of a deceased person—to "exercise the same powers and exercise the same rights that the individual held in online accounts, electronic devices and electronic data."[304]The committee also seeks to bypass state laws that criminalize unauthorized access to a person's digital data, by drafting laws that grant fiduciaries "clear authority to access an individual's private or protected data."[305] The committee proposes updating various of its

300. OKLA. STAT. ANN. tit. 58, § 269 (2012); *see also* IDAHO CODE ANN. §§ 15-3-715(28) (West 2012).

301. H.B.1752, Va. Gen. Assemb. (2013). The Virginia law was championed by Ricky Rash, whose son Eric committed suicide in 2011. Ricky Rash attempted and failed to gain access to his son's Facebook account. *PBS NewsHour: Law Lags Behind in Defining Posthumous Protocol for Online Accounts* (PBS television broadcast, Mar. 11, 2013), *available at* http://www.pbs.org/newshour/bb/science/jan-june13/digitalassets_03-11.html. It is yet to be seen if this law would grant someone in Mr. Rash's position the access he sought.

302. IND. CODE ANN. § 29-1-13-1.1(b) (West 2012).

303. *See Committees: Fiduciary Access to Digital Assets*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20 Assets (last visited May 15, 2013).

304. Letter from Gene H. Hennig, Minnesota Commissioner, Uniform Law Commission, to Harriet Lansing, Chair, Committee on Scope and Program, Uniform Law Commission (May 31, 2011) ("Re: Project Proposal: Fiduciary Powers and Authority to Access Online Accounts and Digital Property During Incapacity and After Death.").

305. *Id.*

uniform codes to accomplish these goals.

The ULC's proposals would provide clarity and resolution for the uncertainty that families such as the Stassens, Ellsworths, and Daftarys faced, but the ULC's goals are, at best, aspirational. The ULC committee held its first meeting on November 30, 2012, and it could take years for it to draft new rules. Once the ULC drafts model rules, these rules must also be adopted by the states,[306] which could also take years, if each state even chooses to adopt the rules. Moreover, a state may adopt only part of the model rules, or may modify a rule to suit the state's needs, resulting in a lack of uniformity from state to state.[307] The ULC has had some notable success since its inception in 1892 in promulgating widely accepted rules, having drafted, for instance, the Uniform Commercial Code and the Uniform Probate Code. But of the two hunder-some-odd uniform laws drafted by the ULC, only half have been adopted by at least one state.[308]

Even if the ULC's future proposed laws gain widespread acceptance, these laws would not necessarily resolve the fictional problem faced by the Willis family: what can they do with dad's old digital music? The open questions of fair use and first sale of digital content could be resolved by amending the now thirty-year-old Copyright Act, which was written at a time when the microprocessor was, arguably, only five years old.[309] But the Copyright Office itself does not think § 109 needs to be amended.[310] Moreover, the last update of the Copyright Act took thirty years to draft,[311] and given the

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306. *Uniform Commercial Code Locator*, CORNELL UNIV. LAW SCH.: LEGAL INFO. INST., http://www.law.cornell.edu/uniform/ (last visited May 14, 2013) ("Upon approval by the National Conference a Uniform Law is not law anywhere in the United States. It is simply a legislative proposal addressed to fifty state legislatures.").

307. *Id.*

308. *Id.*

309. Michael R. Betker, John S. Fernando & Shaun P. Whalen, *The History of the Microprocessor*, 2 BELL LABS TECH. J. no. 4, at 29, 30 (1997) ("The history of the microprocessor begins with the birth of the Intel 4004 . . . . The first fully functional 4004 parts were available in March 1971, with the first public announcement in November, 1971."). The the current Copyright Act was passed in 1976. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. (2011)).

310. *See* U.S. COPYRIGHT OFFICE, *supra* note 266.

311. H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660 ("[T]he United States participated in the development of the new Universal Copyright Convention, becoming a party in 1955. . . . There followed a period of study which produced 35 published monographs on most of the major substantive issues in copyright revision, and culminated in 1961 in the 'Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law.'"). Numerous bills were introduced and amended until the proposed Act was passed in 1976.

current divisiveness of Congress, the considerable influence of lobbyists, and more pressing—or popular—issues that Congress must focus on, any amendment to the Copyright Act could take a very long time.[312]

In the interim, there are things that private persons and content providers can do to untangle the mess of uncertainty.

B. What Every Person Should Do

Consumers do not have to wait for state legislatures to update their probate laws. Every consumer can, and should have a "digital estate plan," in addition to a traditional estate plan. Estate attorneys have been talking about it with increasing frequency in the last few years,[313] and the American Bar Association has recommended to its attorneys that they talk to clients about digital asset planning.[314] Even the federal government thinks every person should have a digital state plan, and said so in the U.S. government's official blog.[315]

An individual creates a digital estate plan much in the same way that a person forms a traditional estate plan. An individual must first appoint a "digital executor," who will "act objectively on your behalf after you are gone. Your digital executor will distribute or delete your digital assets according to your wishes."[316] The caveat is that digital

312. It took Congress seven years to pass a patent reform act, Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011). *See* Zach Carter, *Patent Reform Bill Signed into Law after Years of Debate*, HUFFINGTON POST (Sept. 16, 2011, 12:06 PM), http://www.huffingtonpost.com/2011/09/16/patent-reform-obama_n_966136.html. The changes this act made were rather minor. *See* Timothy B. Lee, *Mostly Pointless Patent Reform Bill Goes to Obama for Signature*, ARS TECHNICA (Sept. 8, 2011, 2:48 PM), http://arstechnica.com/tech-policy/2011/09/mostly-pointless-patent-reform-bill-goes-to-obama-for-signature/.

313. *See Reading*, DIGITAL ESTATE RES., http://www.digitalestateresource.com/reading/ (last visited May 15, 2013) (listing journal articles, books, and blogs on the topic). Attorney Jim Lamm's blog went online in June, 2010. *See Monthly Archives: June 2010*, DIGITAL PASSING, http://www.digitalpassing.com/2010/06/ (last visited May 15, 2013). The Digital Beyond went online in 2009. *See About*, THE DIGITAL BEYOND, http://www.thedigitalbeyond.com/about/ (last visited May 15, 2013). Adele McAlear's first blog post dates to August 2009. *See SXSW 2010: Panel Voting*, DEATHANDDIGITALLEGACY.COM (Aug. 17, 2009), http://www.deathanddigitallegacy.com/2009/08/17/sxsw-2010-panel-voting/. Professor Gerry Beyer first blogged on the subject in September 2007. *See Digital Property after Death*, WILLS, TRUSTS & ESTATES PROF BLOG (Sept. 11, 2007), http://lawprofessors.typepad.com/trusts_estates_prof/2007/09/digital-propert.html.

314. Dennis Kennedy, *Of Sound Mind: Make Plans for Your Digital Estate*, ABA J. (Aug. 1, 2012, 1:50 AM), http://www.abajournal.com/magazine/article/of_sound_mind_make_plans_for_your_digital_estate/.

315. *How and Why You Should Write a Social Media Will*, USA.GOV (May 2, 2012), http://blog.usa.gov/post/22261234875/how-and-why-you-should-write-a-social-media-will.

316. EVAN CARROLL & JOHN ROMANO, YOUR DIGITAL AFTERLIFE: WHEN FACEBOOK,

executors are not currently recognized by law.[317] Hence, a person should assign the role to one's legal executor, or make the digital executor a co-executor of the person's estate.[318] The digital executor should also be technologically savvy, since he or she must deal with digital accounts.[319]

The second step is to identify all digital assets,[320] including the digital data on a person's computer, e-mail accounts, online financial accounts, social media profiles, blogging accounts, and so on. For each account, the person should list his or her username and password, and give this list to the digital executor.[321] Alternatively, a person can sign up with a service that provides secure storage and will release the stored information upon one's death.[322] Each individual should also review the policies of each service provider[323]: What does the service provider require in order to act on a deceased user's account? Will the provider release the content of the account upon receipt of a death certificate? Will the provider memorialize or delete the account?

The third step in the digital estate plan is for an individual to state how he or she would like each online account to be handled.[324] In some cases the person may want to completely delete the account, while in other cases the person may want to transfer the contents of the account to a family member. An intermediate option is to freeze the account as a memorial to the deceased.[325]

Finally, a person's digital estate plan should stipulate that the digital executor be provided a copy of the person's death certificate. Most service providers require a death certificate as proof that the user has passed away.[326]

A successful actor with a wife and children, Bruce Willis probably has an estate plan. After the controversy over his supposed lawsuit with Apple, Mr. Willis might have spoken with his estate

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FLICKR AND TWITTER ARE YOUR ESTATE, WHAT'S YOUR LEGACY? 100 (2010).

317. *Id.*

318. *Id.*

319. Kennedy, *supra* note 314.

320. *See generally* CARROLL & ROMANO, *supra* note 316, at 108-56.

321. *Id.*

322. *Id.* at 159-60.

323. Kennedy, *supra* note 314.

324. *See generally* CARROLL & ROMANO, *supra* note 316, at 108-56.

325. *See, e.g.*, *How Do I Report a Deceased Person*, *supra* note 46.

326. *See, e.g.*, *Yahoo! Terms of Service*, *supra* note 42.

attorney about including his digital assets in his estate plan. While his iTunes collection might pass to his children as probate assets, what about content that he has only licensed, such as Kindle e-books and music purchased from Amazon MP3? The EULAs for these companies bar assignment of the content,[327] but an anti-assignment provision might be ineffective if the provision is subject to the Uniform Commercial Code, or may be found unenforceable by courts that are hostile to them.[328] Mr. Willis should nevertheless include his e-books in his digital estate. Mr. Willis's estate plan is an expression of what he desires should happen after his death, and knowing what he wanted provides his family with compelling arguments against the service providers

Digital estate plans, however, suffer from the same problems that traditional estate plans do: changing conditions, such as closing and opening new accounts, changing passwords, and changes in the desires of the person, accompanied by procrastination by the person in updating his or her digital estate plan. At the very least, however, a digital estate plan expresses some clear desire on the part of the person who makes the plan, so it is, nevertheless, a valuable thing to create.

Digital estate plans have an even more pervasive problem: almost half of all adult Americans die without any estate plan.[329] Thus perhaps the better solution lies with the service providers themselves.

C. What Every Content Provider Should Do

Very few content providers have considered what should happen when a user dies, and thus their user agreements do not address the issue. Not many have a stated policy. Of those few that have a policy, the majority will close and delete the account when informed—usually with a death certificate—of the user's death. A few will "memorialize" the account, leaving it accessible to the public but not accessible for purposes of making changes. A bare few will transfer the data in the account to another, and very few will allow someone

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327. *See, e.g.*, *Amazon Kindle Store Terms of Use*, *supra* note 123, cl. 1; *Amazon MP3 Store: Terms of Use*, *supra* note 128, cl. 2.2; *Google Play Terms of Service*, *supra* note 152, cl. 6. The other agreements surveyed do not address assignment.

328. TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 170-71 (2007).

329. *In a New Era of Estate Planning Rocket Lawyer Survey Shows That Only Half of Adults Have a Will*, ROCKET LAWYER (Mar. 28, 2012), http://www.rocketlawyer.com/news/article-Make-a-Will-Month-2012.aspx.

else to access the account itself.

Given that more and more of our lives are now online and that more and more of the dead are leaving behind substantial digital assets, this situation is untenable. Content providers—and lawyers drafting the user agreements for these content providers—all should have terms in their user agreements that deal with the death of the user. In addition, and probably more importantly, the content providers should institute measures to make their users express what they desire should happen to their accounts when they pass away.

In April 2013, Google became the first to implement a solution external to its EULA.[330] Google initiated a featured it called the "Inactive Account Manager," activated through the user's account configuration.[331] As the name indicates, the Inactive Account Manager activated after the user's account was "inactive"[332] after a period of three, six, nine or twelve months, as selected by the user.[333] The user could also select in advance what will happen to his or her data: delete it, or have some or all of it sent to selected trusted contacts.[334] When the end of the inactivity period would approach, Google will notify the user by text or email.[335]

The Inactive Account Manager was a good attempt by Google to put users in control of their data post-death, but it nevertheless has some problems. A good aspect was that it required positive input from the user, and thus could be testamentary evidence of the user's intent. But that was also potentially its failing: if the user does not activate the feature, what happens? Logically, the terms of the user's EULA will apply in the default. Google did not directly notify users of this new feature, and it does not activate without the user's input.[336] Hence, unless or until Google broadcasts an announcement, it is likely that very few users will take advantage of the Inactive Account Manager.

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330. *See Plan Your Digital Afterlife with Inactive Account Manager*, GOOGLE PUB. POLICY BLOG (Apr. 11, 2013, 12:05 PM), http://googlepublicpolicy.blogspot.com/2013/04/plan-your-digital-afterlife-with.html.

331. *Id.*

332. *Id.* Neither Google's Public Policy Blog nor the help information for the Inactive Account Manager define what it means for an account to be "inactive," but presumably it means that the user has not logged in on any device for the specified amount of time.

333. *Id.*

334. *Id.*

335. *Id.*

336. Verified by author, Apr. 11, 2013.

Thus it remains important for EULAs to have an express policy for dealing with the death of the user. A good starting point is the policy followed by sites such as Flickr,[337] Gmail,[338] Yahoo![339] and others. These sites will act once they receive a death certificate, indicating that a user has passed on. LinkedIn takes a further step, by providing a form that the estate of the deceased can submit. This is a necessary, minimal step that every content provider should follow, in order to avoid being fooled into believing a user has died. The policies of the aforementioned companies, however, are to close and delete the account; instead, the companies should freeze the account, disallowing any access, and wait for further instructions from the estate of the user. The service provider should not be required to wait forever; if it does not receive instructions within 90 days to a year, the service provider should close and archive the account. After some number of years, the service provider should be free to delete the archive.

Service providers generally will not transfer the contents of a deceased user's account to another person. MSN Hotmail, for instance, indicates that it will transfer the data to the family of the deceased,[340] and Gmail says that it might.[341] Service providers should, at a minimum, recognize digital executors, and transfer at least the contents of an account to a digital executor, if that is the desire of the deceased user, as is required by the new Indiana law.[342]

Terms in the user agreement, however, should only be a default. Rather than guess at what the user wants, the service provider should make a concerted effort to ascertain what the user wants. Just as some financial accounts require the account holder to designate beneficiaries, users should be required to specify what they want to have happen to their accounts when they pass away. To do this, service providers should contact each user and ask the user what should happen to his or her account. The service provider can

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337. *See Yahoo! Terms of Service*, *supra* note 42, cl. 27. Flickr is owned by Yahoo!.

338. *See Accessing a Deceased Person's Mail*, GOOGLE, http://support.google.com/mail/bin/answer.py?hl=en&answer=14300 (last visited May 15, 2013).

339. *See Yahoo! Terms of Service*, *supra* note 42, cl. 27.

340. *See Microsoft Account, Hotmail, Skydrive*, Answer, MICROSOFT CMTY. (Mar. 15, 2012), http://answers.microsoft.com/en-us/windowslive/forum/hotmail-profile/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6.

341. *Accessing a Deceased Person's Mail*, *supra* note 338.

342. *See* IND. CODE ANN. § 29-1-13-1.1 (West 2012), *available at* http://www.in.gov/legislative/ic/2010/title29/ar1/ch13.html.

accomplish this with an automated system that either sends e-mail to the user or prompts the user when the user logs in. The user should be allowed to either: (1) designate a person who can access the account if the user has passed away; (2) allow access to the contents of the account, if not access to the account itself; (3) require that the account be memorialized; or (4) required that the account be deleted. If the user chooses to ignore the message or prompt, it should also inform the user, in bold and difficult to ignore text, what will happen to the account by default. The service provider should ask the user again every year, or every so many years. While this measure may seem a nuisance to some users, most will likely appreciate being asked.

The above polices would help to clarify the current state of uncertainty when it comes to online accounts and a user's passing. Service providers are in the best position to act, because they determine the contents of the user agreements, and are in control of the account. Being prepared for users' death is also good for public relations, because it avoids the bad publicity that results from suits by persons such as the Ellsworths and Stassens. Finally, since so many users die intestate, these policies also will provide some clarity about each user's desires. These policies also provide some balance between protecting the user's privacy and the desires of the families to retain some memories of their loved ones.

VI. CONCLUSION

Can we, at this point, answer the question: Will Bruce Willis be able to leave his iTunes collection to his children? The answer, so far as the current state of the law is concerned, is yes and no. With regard to digital music and e-books, we have defined two distinct digital assets: the account itself, with a service provider such as iTunes or Amazon.com, and the digital content that users purchase through those providers.

iTunes, Amazon.com, Barnes & Noble, and Google accounts are governed by EULAs that render the accounts not transferable to another user. Control of these accounts, if not full access, might be possible, however, if the services allows a user to consent to letting another use the account. In addition if state laws change and allow digital executors to access the accounts, then the digital executor can dispose of the contents of the accounts according to the desires of the deceased. Thanks to the efforts of the ULC, in the future we may even see uniform laws to address control of deceased users' accounts, but that possibility is quite a few years away.

Digital content is transferable to a deceased user's survivors if legal copies of that content are located on physical devices, such as iPods or Kindle e-readers. So far there is no dispute that the devices, and the works fixed to them, can be passed on. It was an open question, however, whether the digital content itself was covered by the first sale doctrine, thus allowing the deceased's survivors to redistribute the content. The District Court in *Capitol Records, LLC v. ReDigi, Inc.* answered that question in the negative: absent an act of Congress, there is no first sale right in digital content. Thus, for the time being the survivors can only enjoy the digital content on the devices onto which the copies were originally place.

Yet even so, it behooves every individual to create a digital estate plan. By forming a digital estate plan, the individual both articulates what he or she wants to have happen with his or her accounts at death, and also designates a digital executor who can carry out those desires.

Content providers also should act, and should include terms in their user agreements that outline what will happen to the user's account when the user passes away. These provisions should only be a default however, and the service providers should put in place measures to determine the desires of each user.

Technology has changed our lives drastically in the last half century, but also left us with much uncertainty. We can wait and see how some of these questions will be resolved, but we should also act.