SUCCESSION IN THE INTERNET AGE: DISSECTING THE AMBIGUITIES OF DIGITAL INHERITANCE*

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ABSTRACT

The question of susceptibility to inheritance of digital assets is clouded by different issues ranging from privacy concerns, reluctance of internet service providers to acknowledge the right of heirs to the digital properties uploaded in their domain, and the lack of clear statutes governing assets in the digital realm. The article takes the stand that digital assets should form part of a decedent's estate and should pass onto one's heirs. To support its claim, the paper dichotomized digital assets into account and content. Then, the authors established that these contents are in fact owned by the decedent during his lifetime. The authors argue that the heirs should have successional rights over the contents by virtue of existing international and domestic intellectual property laws. Then, the article discussed available options on how a person may plan the disposition of his properties online upon death. Finally, the paper offered possible remedies on how the heirs would be able to exercise their rights over these properties.

I. INTRODUCTION

A. The Issue of Digital Inheritance

The internet is becoming less of a stranger to the law, the latter advancing into the former's realm as the Philippine Congress passed laws concerning the online domain. R.A. No. 10175 or the Cybercrime Prevention

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* *Cite as* Daysheelyn Anne Brillo & Nadine Anne Escalona, *Succession in the Internet Age: Dissecting the Ambiguities of Digital Inheritance*, 89 PHIL. L.J. 835, [page cited] (2015).

The authors would like to extend their gratitude to Prof. Solomon F. Lumba for his guidance during the theoretical conceptualization of this paper.

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Act,[1] which penalizes felonies committed via the internet, was enacted last September 12, 2012 yet online crime is just one of the issues that concern the internet landscape. Most of its aspects remain to be understood, nay touched on, by legislation.

Eric Schmidt of Google, in his last presentation as Chief Technology Officer of Sun Microsystems, lamented the lack of understanding of the internet, calling it "the first thing that humanity has built that humanity doesn't understand, the largest experiment in anarchy we've ever had."[2] The wide subscription to online services and the staggering amount of information uploaded by people online show a demand for clarity as to such information's proper classification and ownership. Whether heirs may demand a decedent's digital content from online service providers, given their contractual impositions and the issues of privacy, is an ambiguity that international or domestic laws do not wholly address.

The prevailing practice is to respect the contracts which users entered into with online service providers—most of which restrict against third party access—or to spend for litigation to secure court orders compelling said companies to hand over the users' content. The authors believe that digital assets, as a person's intellectual and intangible personal property, should be part of a person's estate and should redound to the heirs upon his death without need for legal action. This paper thus aims to: (1) argue for heirs' successional rights over their decedents' digital assets; (2) provide heirs with a range of remedies should they be denied access to a decedent's digital property; and (3) offer options for estate planners with respect to planning the posthumous disposition of their digital assets.

The scope of this article is limited to digital assets within the internet domain as opposed to those stored in electronic devices but not uploaded online. It is also limited to discussing digital assets owned by natural persons as opposed to digital assets of juridical entities.

The authors believe that the user's, and subsequently the heirs', interests in the digital property should consist in full ownership rights, which include possession, recovery, use, disposal, and the earned and expected revenue and fruits from their intellectual property uploaded online.

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[1] Rep. Act No. 10175 (2012). Cybercrime Prevention Act of 2012.

[2] Jerome Taylor, *Google Chief: My Fears for Generation Facebook*, INDEPENDENT (U.K.), Aug. 18, 2010, *available at* http://www.independent.co.uk/life-style/gadgets-and-tech/news/google-chief-my-fears-for-generation-facebook-2055390.html.

The objectives behind seeking such claim of ownership and successional rights are to: (1) avoid misuse of digital assets (such as hacking, trolling[3] in accounts, intellectual property theft, and other intellectual property rights violations); (2) terminate the unfair situation wherein online service providers are given unrestricted power to construct the terms and conditions governing the content which users have created and uploaded; and (3) allow the transfer of the economic and social value of digital assets to heirs and avoid the tragedy of *anticommons*.[4]

B. The Concept of "Digital Assets"

A digital asset is "any form of content and/or media that has been formatted into a binary source which includes the rights usage."[5] It includes "an individual's valuable media purchased in electronic format such as movies, television shows, music, and books."[6] That such assets are owned by any individual who has used internet services or owned digital hardware is unquestioned. The concept, however, is not yet within the contemplation of Philippine law. There is no express legal provision on what happens to them after their owner's death. Compared to physical assets, digital assets are more ephemeral, easily altered, increased, decreased, or deleted by the owner with just a touch of the finger. Thus they are more difficult to appropriate or assign, if indeed assignable.

The differing user policies of email service providers, social networking sites, and other websites, added to the fact that an average person keeps multiple online media accounts, complicate the digital inheritance issue. It is an unsettled issue whether one's privacy interests preclude the transmission of his online content to his heirs. For example, in the United States, heirs had to resort to a local probate court to compel website companies to grant them access to a decedent's digital assets.[7]

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[3] To post inflammatory or inappropriate messages or comments on (the Internet, especially a message board) for the purpose of upsetting other users and provoking a response. *Troll*, DICTIONARY.COM, *at* http://dictionary.reference.com/browse/troll?s=t.

[4] In the tragedy of the commons, overlapping use rights in property create incentives to overuse and deplete the resource owned in common. In the tragedy of the anticommons, overlapping rights to exclude permit rights-holders to block each other from making productive use of the resource. Joshua Fairfield, *Virtual Property*, 85 B.U. L. REV. 1048, 1069 (2005).

[5] Albert van Niekerk, *Strategic Management of Media Assets for Optimizing Market Communication Strategies, Obtaining a Sustainable Competitive Advantage and Maximizing Return on Investment: An Empirical Study*, 3 J. DIGITAL ASSET MGMT. 89, 90 (2007).

[6] Natalie Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799, 801 (2014).

[7] Jessica Hopper, *Digital Afterlife: What Happens to Your Online Accounts When You Die?*, NBC NEWS, June 1, 2012, *at* http://rockcenter.nbcnews.com/_news/2012/06/01/11995859

II. THE AMBIGUITIES OF DIGITAL INHERITANCE

A. The Jam-Mich Case

A dispute between an artist's heirs and his collaborator may fill the anticipated lacuna in jurisprudence on digital assets succession in the Philippines. The artistic collaboration was popularly called "Jamich", a combination of the artists' names Jam Vhille "Jam" Sebastian and Paolinne Michelle "Mich" Liggayu (. They are so-called "YouTube sensations" or internet celebrities popularized by the website YouTube, where they uploaded short films they starred in. As their following increased, they put up Facebook and Twitter accounts to connect with their fans. These accounts generated income from YouTube views and Facebook advertisements and promoted their shows and merchandise.

Upon Jam's death due to lung cancer, Michelle maintained control of all their online accounts and income from these sites. Jam's family contends that they should be granted access to the Jamich Facebook, Twitter, and YouTube pages along with the income therefrom as his successors.[8] Their YouTube channel, Jamich TV, has a total of around 130 million views and at least 600,000 subscribers.[9] Their potential earnings from their YouTube channel alone is estimated at around USD 300,000.[10]

Under Section 178.2 of the Intellectual Property Code of the Philippines (hereinafter "IP Code"),[11] works of joint authorship are governed by the rules on co-ownership, unless the author of each part may be identified in which case such author owns the copyright in the part he has created. Since the collaborations involve both authors and their authorship cannot be

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-digital-afterlife-what-happens-to-your-online-accounts-when-you-die. No similar case has been filed in the Philippines.

[8] Jam Sebastian's Mom Reveals Details of Conflict with Mich Liggayu, RAPPLER.COM, Apr. 18, 2015, *available at* http://www.rappler.com/entertainment/news/90330-jam-sebastian-mom-maricar-mich-liggayu-jamich-conflict-details.

[9] The JamichTV website is accessible at https://www.youtube.com/user/JamichTV/about.

[10] *JamichTV Youtube channel statistics - StatSheep*, STATSHEEP WEBSITE, *available at* http://www.statsheep.com/JamichTV (last visited Dec. 1, 2015).

[11] Rep. Act No. 8293 (1998), *amended by* Rep. Act No. 10372 (2013). Intellectual Property Code of the Philippines [hereinafter "IP Code"]. Section 178.2 of the IP Code reads: "In the case of works of joint authorship, the co-authors shall be the original owners of the copyright and in the absence of agreement, their rights shall be governed by the rules on co-ownership. If, however, a work of joint authorship consists of parts that can be used separately and the author of each part can be identified, the author of each part shall be the original owner of the copyright in the part that he has created[.]"

segregated, Jam and Mich co-own the property. The death of a co-owner does not terminate the co-ownership. Rather, his ideal share, as well as the fruits and benefits therefrom, pass on to his heirs.

To date, the heirs of Jam have yet to take legal action to enforce their rights over the Jamich accounts. If the heirs decide to sue, a number of legal questions arise. Do the heirs have a right of succession with respect to their decedent's online works and copyright? May such successional rights, if any, be effectively enforced in the Philippines? May Michelle or the social network service providers be compelled by a court order to transmit Jam's share in the enterprise to his heirs? Can a court order against online service providers, if obtained in local courts, be enforced given that they are located in the United States? Will such court orders, given most service providers' policy against third-party disclosure, violate the principle of non-impairment of contracts?

B. Illustrative Examples in Foreign Jurisdictions

Similar ambiguities in the treatment of digital assets exist in foreign jurisdictions. No clear precedent up to now has established the posthumous fate of a person's digital assets. The following are news stories of families in the United States who sought access to a deceased relative's online accounts:

1. The Case of Benjamin Stassen

In 2010, Benjamin Stassen, a 21-year-old student of Wisconsin University, committed suicide without leaving a note. His parents, wanting to know the circumstances which led to their son's death and suspecting that his online accounts may provide an answer, demanded access to his Facebook and Google accounts. However, Facebook and Google refused their request explaining that they cannot do so for privacy reasons. The Stassens then sought relief from a local probate court in Wisconsin which subsequently ordered Facebook and Google to give them access to their son's digital content. While Google readily complied, Facebook was adamant in observing its privacy policy which prohibits giving out its user's data to third parties. [12] Facebook later yielded to the order on threat of contempt but its compliance was on the condition that Ben's parents must not disclose any content to third parties. In effect, the Stassens were precluded to enjoy the economic benefits of whatever creative work Benjamin might have kept in his account.[13]

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[12] Hopper, *supra* note 8.

[13] Simone Foxman, *When the Next Ernest Hemingway Dies, Who Will Own His Facebook Account*, QUARTZ WEBSITE, Aug. 13, 2013, *at* http://qz.com/113576/when-the-next-ernest-hemingway-dies-who-will-own-his-facebook-account-2.

2. The Case of Karl Linn

Karl Linn, a marine corps reservist, used his email and his personal website to connect with his homeland and keep an account of his experiences while stationed in Iraq. When he was killed in combat, his family requested Mailbank.com to access data from Linn's accounts and preserve it. However, they were refused to turn over the accounts in accordance with their company's privacy policies.[14]

C. Effect of Ambiguities

The absence of clear laws on digital inheritance may result in leaving the decision to online service providers as to what happens to data uploaded in their domains once users die. While most users readily agree to their terms of service upon signing up (usually by clicking on a box next to "I Agree," succeeding lengthy paragraphs of contractual provisions), such agreements are arguably contracts of adhesion. Users would not have contemplated the effects of such agreement on their ownership rights over their uploaded content upon their death. These agreements subsist in the absence of a specific law that would remove confusion as to what happens to digital assets once their owner dies.

The legal lacuna on inheritance of digital property makes it difficult for heirs to acquire their dead loved one's creative works, mementos, and other property uploaded online. One scholar surmised of the possible misfortune had such restriction existed over some well-loved posthumous publications—Chaucer's Canterbury Tales, Jonathan Larson's *Rent*, Stieg Larsson's *The Girl with the Dragon Tattoo*, Janis Joplin's *Pearl*—which "may not have seen daylight" if written or stored by the authors in the internet domain.[15] Aside from a decedent's creative work, heirs may be interested in reaping the economic and social value of other autobiographical material—drafts, letters, scribbles, and other mementos—which, if not in digital form, would have undoubtedly formed part of the deceased's estate.

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[14] Ariana Eunjung Cha, *After Death, A Struggle for their Digital Memories*, WASHINGTON POST, Feb. 3, 2005, *available at* http://www.washingtonpost.com/wp-dyn/articles/A58836-2005Feb2.html.

[15] Matt Borden, *Covering Your Digital Assets: Why the Stored Communications Act Stands in the Way of Digital Inheritance*, 75 OHIO ST. L.J. 405, 430 (2014).

D. Are "Digital Assets" Property?

The primary question is whether these "digital assets" may be considered "property" under Philippine law. Article 414 of the Civil Code defines property as "all things which are or may be the object of appropriation" and goes on to classify them into personal and real property. Personal property or chattels, under Article 416 and 417 of the same Code, may be tangible or intangible. It is the authors' position that digital assets uploaded online are personal property of the person who created and uploaded them, over which they are free to exercise ownership rights[16] and over which their heirs have successional rights upon the creator's death.

Likewise, contents of a digital device and content uploaded to online social networking site accounts are considered "property" which are protected against illegal searches and seizures under the 1987 Constitution, particularly Section 2, Article III, and the US Constitution's Fourth Amendment.[17]

The recognition and inclusion of digital assets in property inventories and estate administration should be encouraged. Cash flows from advertisements, website-provided valuations, and royalties should be included in tax returns and estate plans.

E. Law Governing Digital Assets

1. The Nature of Website User Agreements

In 2005, the Ellsworth family brought an action before a Michigan probate court to allow them to access their deceased son's email account. They equated an email account with a safety deposit box to argue that its contents must redound to the heirs upon its owner's death.[18] A safety deposit box, considered a special kind of deposit under the General Banking Law,[19]

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[16] CIVIL CODE, art. 428.

[17] *See, e.g.,* Riley v. California, 134 S. Ct. 2473 (2014); Vivares v. St. Theresa's College, G.R. No. 202666, 737 SCRA 92, Sept. 29, 2014.

[18] 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, 713 (2012), *citing* Jennifer Chambers, *Family Gets GI's Email,* THE DETROIT NEWS, Apr. 21, 2005, *available at* http://www.justinellsworth.net/email/ detnewsapr.htm.

[19] Rep. Act No. 8791 (2000), § 53. Other banking services – In addition to the operations specifically authorized in this Act, a bank may perform he following services:

> xxx
>
> 53.5 Rent out safety deposit boxes.
>
> The bank shall perform the services permitted under Subsections 53.1, 53.2, 53.3 and 53.4 as *depositary* or as an agent. xxx (Emphasis supplied.)

is governed by the provisions of the Civil Code on Deposit.[20] In a contract of deposit, ownership of a thing deposited remains with the depositor. As owner, he may demand return of the thing deposited at any time.[21]

While this classification is plausible, it will not hold true for the social networking site Facebook which reserves the right to use the account holders' uploaded content under its intellectual property license clause.

Article 1978 of the Civil Code on Deposit states that "[w]hen the depository has permission to use the thing deposited, the contract loses the concept of a deposit and becomes a loan or commodatum, except where safekeeping is still the principal purpose of the contract. Permission shall not be presumed and its existence must be proved."[22]

With respect to a Facebook account, the relationship between the user and the online service provider may be described as a loan or commodatum. Under Article 1935 of the Civil Code, a commodatum is where a party acquires the use of a thing loaned for free but not its fruits. Use is granted to the bailee (the one loaned to) but the ownership remains with the bailor (the lender). Characterizing the relationship as one of commodatum may harmonize the respective rights of the user and the online service provider that hosts the user's account. It maintains the ownership in the creator or uploader while recognizing the service provider's provisions for right to use.

2. Validity of the "Choice-of-Law" Stipulation Clause

Most of the world's busiest websites and technology companies are situated in Silicon Valley, California.[23] It is only natural that most of them include a choice of law stipulation which provide that the laws of California are applicable to legal disputes arising from the use of their services. The terms of use of Twitter,[24] Facebook,[25] Yahoo!,[26] and Google[27] contain a clause

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[20] CIVIL CODE, bk. IV, tit. XII.

[21] CIVIL CODE, art. 1988.

[22] CIVIL CODE, art. 1978.

[23] Internet Corp. for Assigned Names and Numbers, *About Silicon Valley*, *at* http://archive.icann.org/en/meetings/siliconvalley2011/about.html (last visited Dec. 1, 2015).

[24] Twitter, *Terms of Service*, ¶ 12, *at* https://twitter.com/tos?lang=en (last visited Dec. 1, 2015).

[25] Facebook, *Statement of Rights and Responsibilities*, ¶ 15, *at* https://www.facebook.com/legal/terms (last visited Dec. 1, 2015).

[26] Yahoo, *Yahoo Terms of Service*, ¶ 28, *at* https://policies.yahoo.com/us/en/yahoo/terms/utos/index.htm (last visited Dec. 1, 2015).

[27] Google, *Google Terms of Service*, *at* http://www.google.com/policies/terms/ (last visited Dec. 1, 2015).

which states that the laws of the State of California will govern without regard to its conflict of law provisions.

A choice of law stipulation pertains to the application of the substantive law of a particular legal system to determine the merits of a case. Enforcing this clause effectively removes the application of Philippine substantive laws to legal issues arising from the services provided by these websites.

Parties may validly stipulate the applicable law that will govern in construing the contract. Choice of law stipulations should be upheld by the courts as valid unless there are "cogent reasons for not doing so" such as when it runs "contrary to the fundamental policy of the forum."[28] To be valid, the choice of law clause must also be reasonably communicated to the other party.[29]

3. Governing Law When There is No Valid Choice of Law Clause

Article 16 of the Civil Code provides that "[r]eal property as well as personal property is subject to the law of the country where it is situated." This follows the rule of *lex situs* or the actual location of the property.

Under Facebook's Statement of Rights and Responsibilities, a non-American user agrees to have his uploaded content transferred to and processed in the United States:

> The following provisions apply to users and non-users who interact with Facebook outside the United States:
> 1. You consent to having your personal data *transferred to and processed in the United States.*[30]

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[28] JORGE R. COQUIA & ELIZABETH AGUILING-PANGALANGAN, CONFLICT OF LAWS 425-426 (1995 ed.).

[29] Ajemian v. Yahool, Inc., 987 N.E.2d 604, 612 (Mass. App. Ct. 2013). The Appeals Court of Massachusetts held: "We see no reason to apply different legal principles simply because a forum selection or limitations clause is contained in an online contract [...] Yahoo! had the burden of establishing, on the undisputed facts, that the provisions of the [terms of service] were reasonably communicated and accepted."

[30] Facebook, *Statement of Rights and Responsibilities*, § 16, *at* https://www.facebook.com/legal/terms (last visited Dec. 1, 2015). (Emphasis supplied.)

Cloud storage is more complicated as it transmits data to multiple servers that may be located in different areas.[31] The authors propose that governing rules on copyright intellectual property rights should apply. Under the Berne Convention for the Protection of Literary and Artistic Works (hereinafter, "Berne Convention"), a multilateral treaty governing copyright, a work becomes protected as long as the author is a national of any state member of the Berne Union.[32] An author's rights under the Berne Convention includes the "moral rights" to claim authorship of a work and object to any modification which would be prejudicial to his honor or reputation. Such moral rights are retained even after the author's death.[33]

Under Article 9 of the Berne Convention, the author keeps the exclusive right of authorizing the reproduction of his works in any manner or form. The Agreed Statements of the World Intellectual Property Organization (WIPO) Copyright Treaty provide that "the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."[34]

F. Who Owns Digital Assets During the Author's Lifetime?

For purposes of this paper, digital assets shall be classified into two groups—content and accounts—which are governed by different contractual stipulations and legal provisions. Thus their susceptibility to succession also differs.

1. Content

An individual's online content may be one of two categories: (1) uploaded content, which are data that the individual has created and uploaded from his personal files into the internet, or (2) downloaded content, which are data that he has either purchased or acquired for free from the online domain. In other words, while the former comes from the individual and published on the internet, the latter is sourced from the internet and acquired by the individual, which he may keep in his electronic devices exclusively or saved online.

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[31] Jonathan Strickland, *How Cloud Storage Works*, HOWSTUFFWORKS WEBSITE, Apr. 30, 2008, *at* http://computer.howstuffworks.com/cloud-computing/cloud-storage.htm.

[32] Berne Convention for the Protection of Literary and Artistic Works [hereinafter "Berne Convention"], art. 3, Feb. 28, 1980, 1161 U.N.T.S. 30.

[33] Berne Convention, art. 6.

[34] Agreed Statements Concerning the WIPO Copyright Treaty, Concerning Article 1(4), TRT/WCT/002 (Dec. 20, 1996).

i. Content Created and Uploaded by the User

A user owns any content that he has created and uploaded. The media or platforms on which they are created and/or saved do not gain ownership rights over them simply because they have been uploaded to their domains. The intellectual property rights of a creator-uploader are protected by law, primarily by the Berne Convention, the WIPO Copyright Treaty, and the IP Code.

a. Rights of Authors under the Berne Convention

The Berne Convention sets the minimum standards of protection to intellectual property rights of authors to their work. Under this treaty, copyright is automatically granted to a person's works without the formality of registration.[35] The Convention also gives right to an author to enforce his intellectual property rights in other member countries of the Berne Union.[36]

Under Article 2(1) of the Berne Convention, one's protected works include "every production in the literary, scientific, and artistic domain, whatever the mode or form of its expression[.]" A person's work which he uploads to the internet is unquestionably a protected work under the Convention and is thus subject to copyright. Furthermore, all works protected under the Berne Convention shall be copyrighted for at least fifty years after the creator's death,[37] except for cinematographic works which shall be copyrighted for fifty years after such works are available to the public.[38] With respect to photographic works, the term of protection shall last for at least twenty-five years from their creation.[39] State parties may also provide for longer terms of protection.[40]

The Berne Convention grants two general types of rights to the author: (1) economic rights, which pertain to the right of the creator or his successors-in-interest to derive profit from the work, and (2) moral rights, which cover the creator's right of paternity and the right of integrity. The right of paternity refers to the author's right to claim that he is the creator of the work.[41] Meanwhile, the right of integrity gives the author the right to object to any "distortion, mutilation, deformation or other modification of, or other

[35] Berne Convention, art. 5(2).
[36] Art. 5(1).
[37] Art. 7(1).
[38] Art. 7(2).
[39] Art. 7(4).
[40] Art. 7(6).
[41] Art. 6bis(1).

derogatory action in relation to, the said work, which would be prejudicial to the [author's] honor or reputation."[42] The author is given moral rights, which are independent of the author's economic rights, exercised even after a valid transfer of the economic rights of the author.[43]

b. Expansion of Berne Convention Rights under the WIPO Copyright Treaty

More than a century after the advent of the Berne Convention, the WIPO Copyright Treaty was adopted to expand the protection granted by the Berne Convention to an author's rights in a digital environment.[44] It brought into the realm of copyright protection two new subject matters: computer programs[45] and databases.[46]

It also provided economic rights, apart from those recognized under the Berne Convention, which include the right of distribution, the right of rental, a right of communication to the public. The right of communication to the public by wire or wireless covers "interactive communication through the Internet."[47]

Under the Agreed Statements Concerning the WIPO Copyright Treaty, "the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."[48] Both the Philippines and the United States are state parties to the WIPO Copyright Treaty.[49]

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[42] Art. 6bis(1).

[43] Art. 6bis(1).

[44] World Intellectual Property Organization [hereinafter "WIPO"], *Summary of the WIPO Copyright Treaty*, WIPO WEBSITE, *at* http://www.wipo.int/treaties/en/ip/wct/summary_wct.html (last visited Dec. 1, 2015).

[45] WIPO Copyright Treaty, art. 4, TRT/WCT/001, Dec. 20, 1996. Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

[46] Art. 5. Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained the compilation.

[47] *Supra* note 45.

[48] Agreed Statements concerning the WIPO Copyright Treaty, Concerning Article 1(4), TRT/WCT/002 (Dec. 20, 1996).

[49] WIPO, *Contracting Parties to the WIPO Copyright Treaty*, WIPO WEBSITE, *available at* http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/wct.pdf.

c. Rights of the Author under the IP Code

The IP Code recognizes conventions, treaties, and agreements relating to intellectual property entered into by the Philippines and provides that intellectual property right owners shall be entitled to benefits provided under them, in addition to those provided by the Code.[50] The Code also enshrines the principle of automatic protection in Section 172.2, which states that "[w]orks are protected by the sole fact of their creation, irrespective of their mode or form of expression, as well as of their content, quality and purpose."

The IP Code adopted the same duration of protection for economic rights under the Berne Convention i.e. the lifetime of the author and fifty years after his death.[51] Originally, the IP Code grants the same duration for moral rights. However, R.A. No. 10372 extended the author's right of paternity[52] in perpetuity after the death of the author.[53] The duration for the right of integrity was retained at fifty years.[54]

d. Content Ownership Indicated in End User License Agreements

Most website companies' user agreements specify that content uploaded into their domains remain under the ownership of the user or uploader. For example, Yahoo! and Facebook specify the user's ownership rights over their content. The Yahoo! Terms of Service state that "Yahoo does

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[50] IP Code, § 3. Any person who is a national or who is domiciled or has a real and effective industrial establishment in a country which is a party to any convention, treaty or agreement relating to intellectual property rights or the repression of unfair competition, to which the Philippines is also a party, or extends reciprocal rights to nationals of the Philippines by law, shall be entitled to benefits to the extent necessary to give effect to any provision of such convention, treaty or reciprocal law, in addition to the rights to which any owner of an intellectual property right is otherwise entitled by this Act.

[51] IP Code, § 213.1. Subject to the provisions of Subsections 213.2 to 213.5, the copyright in works under Sections 172 and 173 shall be protected during the life of the author and for fifty (50) years after his death. This rule also applies to posthumous works.

[52] IP Code, § 193. Scope of Moral Rights. — The author of a work shall, independently of the economic rights in Section 177 or the grant of an assignment or license with respect to such right, have the right:

193.1. To require that the authorship of the works be attributed to him, in particular, the right that his name, as far as practicable, be indicated in a prominent way on the copies, and in connection with the public use of his work[.]

[53] IP Code, § 198.1. The right of an author under Section 193.1. shall last *during the lifetime of the author and in perpetuity after his death* while the rights under Sections 193.2, 193.3 and 193.4 shall be coterminous with the economic rights, the moral rights shall not be assignable or subject to license[.] (Emphasis supplied.)

[54] IP Code, § 198.1.

not claim ownership of Content you submit or make available for inclusion on the Yahoo! Services."[55] The Facebook's terms provide: "You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings."[56]

Under these terms, the ownership over online content clearly lies in the person who uploaded them. It follows therefore that such digital assets form part of the person's estate upon his death and should transfer by succession in favor of his heirs.

Facebook, however, laid down an intellectual property license clause which provides:

> For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a *non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License).* This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.[57]

In this regard, Facebook can be described to have been granted a mere usufruct[58] over a user's uploaded content which subsists while the account is active and the content exists in its domain, or while a user's "Facebook friends," to whom such content has been shared, have not deleted them. However, upon the uploader's death, the usufruct is deemed extinguished[59] and the ownership must thus redound to the owner's estate.

Facebook's terms also provide that uploaded content whose privacy is set to "Public" is subject to access and use of all individuals:

> When you publish content or information using the Public setting, it means that you are allowing everyone, including people

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[55] Yahoo, *Yahoo Terms of Service*, ¶ 9, *at* https://policies.yahoo.com/us/en/yahoo/terms/utos/index.htm (last visited Dec. 1, 2015).

[56] Facebook, *Statement of Rights and Responsibilities*, ¶ 2, *at* https://www.facebook.com/terms (last visited Dec. 1, 2015).

[57] *Id.* (Emphasis supplied.)

[58] CIVIL CODE, art. 562. Usufruct gives a right to enjoy the property of another with the obligation of preserving its form and substance, unless the title constituting it or the law otherwise provides.

[59] CIVIL CODE, art. 603(1). Usufruct is extinguished by death of the usufructuary, unless a contrary intention clearly appears.

> off of Facebook, *to access and use* that information, and to associate it with you (i.e., your name and profile picture).[60]

In fact, setting the privacy of uploaded content to "Public" may preclude the grant of a petition for habeas data, considering that the uploader is deemed to have shed his "reasonable expectation of privacy" over said content as held in *Vivares v. St. Theresa's College*.[61]

Since third persons and Facebook itself are usufructuaries with respect to an individual's uploaded content, the ownership remains with the uploader. Thus the above stipulations, while they may grant right of access and use to other persons, do not deprive the uploader of his right of ownership or his heirs' successional rights. There is nothing in the above terms that precludes the inclusion of content uploaded to Facebook in an individual's probate proceedings.

e. Content Ownership in Cloud Storage

Cloud storage pertains to services where a person stores his data in an off-site storage system maintained by a hosting company, instead of storing it in his own hard drive. It also allows users to collaborate and share files easily.[62]

Information uploaded by the user in the cloud is covered by copyright laws and belongs to the author.[63] The user does not waive his right to his work uploaded to the cloud storage. For example, the terms of use of Dropbox, a cloud storage company, state that:

> [w]hen you use our Services, you provide us with things like your files, content, email messages, contacts and so on ("Your Stuff"). Your Stuff is yours. These Terms don't give us any rights to Your

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[60] *Supra* note 56. (Emphasis supplied.)

[61] *Vivares*, 737 SCRA 92. The Supreme Court held: "Before one can have an expectation of privacy in his or her [online social networking] activity, it is first necessary that said user [...] manifest the intention to keep certain posts private, through the employment of measures to prevent access thereto or limit its visibility [...] In other words, utilization of these privacy tools is the manifestation, in cyber world, of the user's invocation of his or her right to informational privacy." (Citations omitted.)

[62] Jonathan Strickland, *How Cloud Storage Works*, HOWSTUFFWORKS WEBSITE, Apr. 30, 2008, *at* http://computer.howstuffworks.com/cloud-computing/cloud-storage.htm (last visited Dec. 1, 2015).

[63] Chris Reed, *Information 'Ownership' in the Cloud*, QUEEN MARY SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER NO. 45/2010, Mar. 2, 2010.

> Stuff except for the limited rights that enable us to offer the Services.[64]

Most cloud storage service providers do not assert any form of ownership or intellectual property rights over the files or works uploaded by the user.[65] However, the service provider usually stipulates a limited license to "republish some or all of the customer's data for provision of service,"[66] which may be considered a usufruct similar to that granted to Facebook.

As to the collaborators in a shared folder, the mere fact of uploading a file on a shared folder does not grant the other users an intellectual property right over the work uploaded. At best, there is only a right to access. However, if the creation is the result of actual collaboration between users, then they may be considered as co-authors and the rules of co-ownership will apply.[67]

ii. Content Downloaded or Bought by the User

Purchases of media which are not in digital format are covered by the "first sale doctrine," which is interpreted by the US Supreme Court to mean that the copyright holder can only control the first sale of his or her work, and none thereafter.[68] Once he passes away, his heirs may inherit said property and the publisher cannot impede their inheritability.

With respect to digital media purchased online, however, ownership rights over them are limited by terms contained in clickwrap contracts called End User License Agreements ("EULAs") entered into by consumers with the software companies through which they make the purchase. The confusion as to whether such agreements may hinder succession of heirs to their decedents' online purchases is exacerbated by the fact that different companies provide for different terms under their respective EULAs. Those

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[64] Dropbox, *Dropbox Terms of Service*, *at* https://www.dropbox.com/privacy#terms (last visited Dec. 1, 2015).

[65] Alan Cunningham & Chris Reed, *Caveat Consumer? – Consumer Protection and Cloud Computing Part 2 – The Application of Ex Ante and Ex Post Consumer Protection Law in the Cloud*, QUEEN MARY SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER NO. 133/2013, Feb. 5, 2013.

[66] *Id.*

[67] IP Code, § 178.2. In case of works of joint authorship, the co-authors shall be the original owners of the copyright and in the absence of agreement, their rights shall be governed by the rules on co-ownership. If, however, a work of joint authorship consists of parts that can be used separate and the author of each part can be identified, the author of each part shall be the original owner of the copyright in the part that he has created[.]

[68] Wong, *supra* note 19, at 707, *citing* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350-351 (1908).

of Amazon, Kindle, and Google, for example, expressly provide that what the buyer gains upon his purchase is a mere license to use the media and not the media itself. These include both e-books and music files.[69] Thus no ownership is purportedly transferred to the owner upon his purchase—a deviation from the doctrine governing non-digital media. That of Apple, however, permits an outright purchase of the music itself via iTunes. Consequently, ownership is transferred to the buyer upon purchase[70] and the first sale doctrine may apply.

The authors believe that the terms provided by Apple on the purchase of music would be a sound policy to govern downloaded content. EULAs holding back the ownership of media even after their purchase are contrary to sales and property laws. Constraining successional rights may also impair the legal effect of wills, should the decedent provide for inheritability of his downloaded content. Said EULAs, like website user agreements, must not restrict the successional rights of heirs over their decedents' property.

iii. Messages and Private Communications

Emails, messages in social networking sites, and other communications that are intended for specific receivers or audiences add another dimension to the question of data ownership. Unlike content uploaded by the user alone, messages include at least two parties interacting together.

In analyzing the question of ownership of emails, the authors submit that the laws and jurisprudence associated with letters should be applied analogously to emails and private messages.

Article 723 of the Civil Code provides:

> Letters and other private communications in writing are owned by the person to whom they are addressed and delivered, but they cannot be published or disseminated without the consent of the writer or his heirs. However, the court may authorize their publication or dissemination if the public good or the interest of justice so requires.[71]

Tolentino, a Civil Law jurist, explained that the author retains intellectual property rights over the contents of the letter and the right to publish it.[72] The ownership on the part of the addressee is limited to the

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[69] *Id.* at 706.

[70] *Id.* at 722-725.

[71] CIVIL CODE, art. 723.

[72] II ARTURO TOLENTINO, CIVIL CODE OF THE PHILIPPINES 502 (2004 ed.).

"material and physical thing."[73] Tolentino's view is that "[i]n the absence of some special limitation imposed by the subject matter of a letter of the circumstances under which it is sent, the right of the receiver thereof is that of unqualified title in the material on which it is written."[74] The authors, therefore, submit that an email or message sent to another is still owned by the sender.

With regard to the privacy of the recipient, the US Stored Communications Act provides consent as an exception for disclosure of information. Therefore, the heirs must first secure the consent of the recipient before the information may be validly disclosed to them.

2. Account

Under EULAs governing downloaded content, a user only has rights to access and use an online account, but such accounts remain under the control and ownership of the online service provider. For the user, therefore, these are merely representations of a right to use or a license to use an online service.[75] However, this should not to be a concern in the pursuit of successional rights over digital assets, given that accounts are separable from the uploaded and downloaded content. Thus heirs may seek a court order to gain access to their deceased kin's downloaded content, regardless of whether the website's EULA or terms prohibit access to online accounts themselves. Users may be presumed to have agreed to the exclusive control of their accounts and to the termination of their use after their death. Besides, these accounts are personal and purchases through them may be made only on the account of the user. After the user's death, no more purchases may be made in his name.

However, if the deceased user has specifically provided for the grant of continued access to his heirs in a testamentary document or has recorded a repository of his passwords to such accounts intended to be passed on to his heirs, EULAs should not be permitted to restrict the terms of these wills and the inheritability of the user's account as part of his digital assets. With respect to accounts wherein the user has uploaded content, it may be favorable for the heirs to have continued access to them especially to those which rake in income such as YouTube and Facebook.

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[73] *Id.*

[74] *Id.*

[75] Wong, *supra* note 19, at 734.

G. Who Owns the Digital Assets After the Death of the Owner?

1. Right of the Heirs in General

i. Transmissibility of Assets as a General Rule

As a general rule, the heirs step into the shoes of the decedent and inherit "all the property, rights and obligations of a person which are not extinguished by his death."[76] The heirs of a decedent inherit all kinds of properties and assets owned by the latter. These properties range from real property to personal property including those created or owned through intellectual creation. However, the law allows parties to stipulate that certain rights which are the subject of an agreement are non-transmissible.[77] For a stipulation prohibiting transmissibility to be valid, it should be "expressly established, or at the very least, clearly inferable from the provision of the contract itself, and the text of the agreements sued upon nowhere indicate that they are non-transferable."[78]

ii. Rights of Heirs over the Content Uploaded by the Decedent

a. Right of Heirs under the Berne Convention and the WIPO Copyright Treaty

The Berne Convention extends the economic and moral rights to the heirs fifty years after the death of the author.[79] This is the minimum term which Members of the Berne Union are required to observe in enacting local intellectual property laws.[80] The duration seeks to cover the average lifetime of an author and his direct descendants.[81]

After the death of the author, the Berne Convention extends both moral and economic rights to the heirs of the decedent. To be precise, the

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[76] CIVIL CODE, art. 776.

[77] CIVIL CODE, art. 1311. Contracts take effect only between the parties, their assigns and heirs, except in case where the rights and obligations arising from the contract are *not transmissible* by their nature, or *by stipulation* or by provision of law. (Emphases supplied.)

[78] Estate of K.H. Hemady v. Luzon Surety Co., Inc., G.R. No. 8437, 100 Phil. 388, 395, Nov. 28, 1956.

[79] Berne Convention, art. 7(1).

[80] WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works*, WIPO Publication No. 615(E), at 45 (1978).

[81] *Id.* at 46.

Berne Convention does not use the term "heir" but provides that it should be "exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed."[82] This allows state parties to apply their national laws in determining the heirs or successors-in-interest of the decedent.

The rights of heirs were extended by the WIPO Copyright Treaty to include the right of communication to the public "by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."[83] The said provision covers interactive communication through the Internet.[84] As mentioned, "the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."[85]

It is on this premise that the heirs have an exclusive right to "communicate to the public" the contents uploaded by the decedent. They, not the online service providers, have the economic right to profit from these such content.

b. Right of Heirs under the IP Code

The IP Code adopted the same duration of protection for economic rights under the Berne Convention, which is the author's lifetime and fifty years after his death.[86] Originally, the IP Code granted the same duration for moral rights. However, R.A. No. 10372 extended the right of the author to assert attribution to him or the right of paternity[87] in perpetuity after his death. The duration for the right to integrity was retained at fifty years.[88] Violation of the economic rights during the protected term entitles the heirs of the author to payment of actual damages and profits that may have been incurred if not for the infringement.[89] Violation of moral rights, on the other hand, entitles the heirs to damages provided in the Civil Code.[90]

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[82] Berne Convention, art. 6bis(2).

[83] Art. 8.

[84] WIPO, *Summary of the WIPO Copyright Treaty*, WIPO WEBSITE, *at* http://www.wipo.int/treaties/en/ip/wct/summary_wct.html (last visited Dec. 1, 2015).

[85] Agreed Statements Concerning the WIPO Copyright Treaty, Concerning Article 1(4), TRT/WCT/002 (Dec. 20, 1996).

[86] IP Code, § 213.1.

[87] § 193.1.

[88] § 198.1.

[89] § 216.1(b).

[90] § 199.

iii. Right of Heirs to the Content Bought by the Descendant

a. Application of the First Sale Doctrine to Digital Media

When a person has acquired printed and electronic books, he can transfer ownership of the printed books to his heirs, who may retain, dispose or sell the collection.[91] This is the concept of the first sale doctrine which allows the owner to bequeath, sell, dispose or transfer his copies of a media that he has purchased. Under this principle, the publisher may not prohibit the owner or his heirs from selling or disposing of their purchased copies.[92]

It is clear that the first sale doctrine applies to traditional print media. But as to the electronic books purchased by the individual, the terms and conditions of Barnes and Noble, for example, grant only a non-transferable license[93] which means that the heirs do not inherit the person's purchases. Is such stipulation valid? The question of whether the first sale doctrine extends to digital media is much debated. American courts took the stand that it does not apply to digital media. In contrast, the Court of Justice of the European Union ruled that it does, notwithstanding a contractual stipulation prohibiting transfer.

b. European Union Court of Justice: First Sale Doctrine Extends to Digital Media

In *UsedSoft GmbH v. Oracle International Corp.*,[94] the Court of Justice of the European Union (CJEU) ruled that right of an owner to dispose of his copy of a software may not be overruled by a contractual stipulation. Furthermore, it held that "[t]he online transmission method is the functional equivalent of the supply of a material medium." In a press release of the CJEU on the *UsedSoft* judgment, it was stated that "even if the licence agreement prohibits a further transfer, the right-holder can no longer oppose the resale of that copy."[95] However, this right to dispose comes with caveats that the license agreement purchased should be for an unlimited period and that the original owner should make the copy on his own computer unusable at the time of resale.

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[91] Wong, *supra* note 19, at 740-741.

[92] *Id.* at 707.

[93] *Id.* at 730.

[94] Case C-128/11, UsedSoft GmbH v. Oracle Int'l Corp., 2012.

[95] Court of Justice of the European Union Press Release No. 94/12 (July 3, 2012), *available at* http://europa.eu/rapid/press-release_CJE-12-94_en.htm.

Oracle, in this case, raised the argument that the transaction between the parties cannot be considered a sale, but a mere license. The CJEU disagreed with this contention by ruling that "the transfer by the copyright holder to a customer of a copy of a computer program, accompanied by the conclusion between the same parties of a user licence agreement, constitutes a 'first sale ... of a copy of a program[.]'"[96] Thus there was a transfer of ownership between the parties with regard to that particular copy. The CJEU agreed with the argument that allowing the sellers to characterize the transaction as a mere "license" rather than a "sale" would allow the sellers to circumvent the first sale doctrine.

c. American Courts: First Sale Doctrine Limited to Tangible Medium

In *Capitol Records LLC v. ReDigi, Inc.*,[97] the New York District Court refused to extend the coverage of the first sale doctrine to digital media "because the user who originally purchased a 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 [the platform] was necessarily a different copy."[98]

d. The First Sale Doctrine and the Right of the Heirs to Inherit Content Bought by the User

Although both *Capitol Records* and *UsedSoft* discussed the validity of a *sale* vis-à-vis a non-transferability clause, the discussion of the first sale doctrine may be applied by analogy to other kinds of transfers of ownership such as succession. The reasoning by the CJEU in *UsedSoft*, for example, may be used by heirs as a defense that a purchased copy of a digital media may be inherited *notwithstanding the stipulations prohibiting such transfer.* However, this decision cannot be used as legal authority outside of the European Union for apparent reasons.

2. The Stored Communications Act and Restrictive Service Provider Policies

Despite clear attributions of ownership, most online service providers restrict the transferability of digital assets by adopting a strict policy that an online account is personal and non-transferable even upon the death of the

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[96] Case C-128/11, UsedSoft GmbH v. Oracle Int'l Corp., 2012.

[97] 934 F.Supp.2d 640 (2013).

[98] Wong, *supra* note 19, at 748, *citing Capitol Records*, 934 F.Supp.2d 640.

account owner. Yahoo!, for example, has adopted the following clear stance that it will not grant account access to the heirs of the account owner:

> 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.[99]

Yahoo! only allows heirs to request that the account and its contents be permanently deleted and billing services be suspended.[100]

In the online service provider's defense, such restrictive policies are designed to comply with the United States Stored Communications Act (SCA)[101] which provides for liabilities upon disclosure of personal stored information to third parties. For fear of liability, online service providers have adopted strict policies against disclosing information to third parties or persons other than the account owner himself. Thus most websites stipulate that the account is strictly personal and non-transferable after death.

It should be noted, however, that the Stored Communications Act was a response to advances in technology which the Wiretap Act was unable to address. The Wiretap Act was adopted by the US Congress to reinforce the decision of the U.S. Supreme Court in *Katz v. United States*,[102] which admonished violations of the right against illegal searches and seizures via unconsented interception. While digital inheritance was not a consideration in the drafting of the SCA, such law had the unintended effect of unduly infringing on the rights of the heirs to digital assets.[103]

The SCA provides for two exceptions to the rule against third-party disclosure: the consent exception[104] and the court order exception.[105] Notwithstanding these exceptions, the SCA still serves as a barrier to the enforcement of heirs' rights to claim a decedent's digital assets as part of the deceased's estate. Requiring a court order every time the heirs wish to access

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[99] Yahoo, *Yahoo Terms of Service*, § 28, *at* https://policies.yahoo.com/us/en/yahoo/terms/utos/index.htm (last visited Dec. 1, 2015).

[100] Yahoo, *Options Available when a Yahoo Account Owner Passes Away*, *at* https://help.yahoo.com/kb/SLN9112.html (last visited Dec. 1, 2015).

[101] 18 U.S.C. §§ 2701-2712 (2012).

[102] 389 U.S. 347 (1967).

[103] Borden, *supra* note 16, at 408.

[104] Stored Communications Act, 18 U.S.C. § 2702(b)(3).

[105] § 2703(c)(1)(B).

their decedent's online property would undoubtedly require litigation expenses and attorney's fees which may significantly reduce the resources of the estate and discourage families from enforcing their rights at all. The consent exception, on the other hand, contemplates a situation where the decedent had been planning his estate well before his death and does not answer the question as to how a person's digital assets can be dealt with if his death was unexpected and his estate unplanned.[106]

Online service providers should not be allowed to use the SCA to justify their prohibition against the transfer of digital assets. According to one author, the exceptions provided in the law itself "are broad enough to allow the transfer of assets to a decedent's estate."[107]

3. Validity of the Non-Survivorship Clause

i. Question of Validity Remains Open for Judicial Determination

The question of whether non-transferability clauses may trump successional rights has not yet reached the Philippine Supreme Court. Meanwhile, the decisions of local probate courts in the US., although not published and have no precedential value, have upheld the right of the heirs to the contents of an online account. A probate court in Michigan recognized the rights of the Ellsworth family to their deceased son's email account but upheld the email provider's terms on non-transferability clause effectively disallowing the family to access the account.[108] In the case of Benjamin Stassen mentioned above, a probate court in Wisconsin also declared that the contents of the deceased person's Facebook account are part of his estate.[109]

ii. Unjust Enrichment

When a person keeps a blog[110] and the terms and conditions of the website provider includes a non-transferability clause over the blog's content and earnings, the blog would continue to provide web traffic and income to

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[106] Borden, *supra* note 16, at 422.

[107] Banta, *supra* note 7, at 842.

[108] Wong, *supra* note 19, at 713, *citing* Jennifer Chambers, *Family Gets GI's Email*, THE DETROIT NEWS, Apr. 21, 2005, *available at* http://www.justinellsworth.net/email/detnews apr.htm.

[109] Hopper, *supra* note 8.

[110] A Web site on which someone writes about personal opinions, activities, and experiences. *Blog*, MERRIAM-WEBSTER.COM, *at* http://www.merriam-webster.com/dictionary /blog (last visited Dec. 1, 2015).

the website upon his death but the heirs would be deprived of their economic and exclusive reproduction rights under the Berne Convention.

There is unjust enrichment even if the online service provider adopts a policy that it only has the right to destroy the contents upon the death of the user. A corollary to the right to destroy would be the right not to destroy, thus allowing the online service provider to the enjoy income and web traffic from the deceased's website. Allowing this situation effectively deprives the heirs of their rights under local succession law and the Berne Convention.

iii. Void by virtue of Public Policy

Should the issue of whether non-transferability clauses may trump successional rights arise in Philippine courts, the authors believe that it should be decided in the negative. Contractual stipulations cannot deprive heirs of their successional rights over a decedent's property. Under Article 1306 of the Civil Code, contracting parties "may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy." To sanction stipulations that impair the vested rights of heirs over their decedents' property is to allow parties to contract their away their compliance with the law, an act proscribed by above provision in the Civil Code.

One author has argued that contractual provisions, such as non-transferability clauses, are "altering succession law on an ad hoc basis" and basically puts successional rights at the whim of the corporate service providers.[111] Furthermore, in situations where it is unclear whether the decedent wants his heirs to inherit his digital assets, the law should focus on the desires of his beneficiaries.[112]

iv. Privacy

Privacy is an important issue to address in determining whether digital assets should be transmitted. Not all internet users would want their family to have access to their online accounts. It is clear that heirs inherit letters or diaries owned by a decedent upon his death and this rule should likewise apply to messages sent via the internet. As an author argued, "[t]here is no reason why our private digital assets should receive greater protection than our private tangible assets."[113]

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[111] Banta, *supra* note 7, at 853.

[112] *Id.* at 853.

[113] *Id.* at 839.

Should the intention of the decedent be unclear, it should not be subject to the caprices of the online service provider. As aptly put by one scholar: "Service providers are not the appropriate arbiters of privacy. Such an important decision should be made by an account holder or, if an account holder has not made his wishes known, by the legislature through intestacy laws [...] If testators are concerned about the privacy of their physical material, they ought to destroy it before they die or name a trusted executor who will fulfill their wishes."[114] In case the decedent has not clearly expressed her intention, the rights of the beneficiaries should prevail over terms and policies established by online service providers since the former will benefit more from the digital assets of their decedents than the latter who will end up deleting the accounts.

III. RECOMMENDATIONS

A. Estate Planning of Digital Assets

1. Inclusion of Digital Assets in the Testator's Will

It is advisable for a person to have his digital assets covered in a will, especially those that are of considerable value. The US government has encouraged its citizens to prepare one.[115] However, it is not a panacea to all problems that may be encountered by heirs in administering a decedent's estate.

Even with the presence of a will disposing of a person's digital assets, the rights of the heirs would still be limited by the restrictive policies between the decedent and the online service provider. As mentioned, most of these sites have a strict policy against the disclosure and transferability of the account and the information therein.

It should also be considered that the demographics of social networking sites, emails, and other online services' users are mostly young people who may not have even considered preparing a will. In most cases where the family seeks access to digital assets, the account involved is that of a family member who has unexpectedly died.

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[114] *Id.* at 838-839.

[115] *How and Why You Should Write a Social Media Will*, HUFFINGTON POST WEBSITE, *at* http://www.huffingtonpost.com/usagov/social-media-will_b_1477580 (last visited Dec. 1, 2015).

2. Explore Existing Options Offered by Online Websites

Google has launched its *Inactive Account Manager* which gives its user the option to delete all the contents of their Google accounts or forward it to a third person nominated by the account owner.[116] Facebook, on the other hand, offers their users the option to direct the memorialization of their accounts in case of their death. It allows the user's Facebook content to remain "visible to the audience it was shared with."[117] Account users may avail of these options, limited as they are, if their intent is to preclude or limit access to their accounts after their death.

3. Third Party Password Repository

As another alternative, the testator may opt to deposit his passwords and accounts with a third party. But a person should exercise caution in using these options. Handing out passwords to online bank accounts, for example, may put the account owner at risk of theft. Online service providers often encourage their users to change passwords to ensure the safety of their account so deposited passwords may no longer be functional upon the user's death.

B. Legal Remedies Available to the Heirs in Appropriating Digital Assets

1. Remedy against Co-heirs

Heirs are advised to include their decedent's digital assets in the probate proceedings and/or the partition of the estate, subject to the contingency that companies which own the websites or the domains in which they are kept will not contest their ownership rights over the content.

Some online service providers have started to recognize the successional rights over their users' content and have provided for convenient ways for heirs to gain access to their decedent's digital assets. Google-run program AdSense,[118] for example, will make payments of any unearned profits

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[116] Will Oremus, *Have You Written Your Google Will?*, Apr. 11, 2013, *at* http://www.slate.com/blogs/future_tense/2013/04/11/google_death_inactive_account_manager_lets_you_plan_digital_afterlife.html (last visited Dec. 1, 2015).

[117] Facebook, *What will happen to my account if I pass away?*, *at* https://www.facebook.com/com/help/103897939701143 (last visited Dec. 1, 2015).

[118] AdSense is a program launched by Google that enables website publishers to serve ads precisely targeted to the specific content of their individual webpages. Google, *Google Expands Advertising Monetization Program for Websites*, June 18, 2003, *at* http://googlepress.blogspot.com/2003/06/google-expands-advertising-monetization.html.

to one's heirs upon request. The Google Help page on AdSense unpaid earnings provides thus:

> Because the AdSense system doesn't know that an account owner is deceased, the system will automatically continue to make payments using the payment settings in the AdSense account. If you are the rightful heir and need payment of accrued earnings to be redirected, please upload the requested documentation electronically here or fax or mail your request and appropriate legal documentation[.][119]

2. Remedy against Online Service Providers

The forum stipulation determines the capacity of a court to decide and adjudicate a case. Online service providers adopt contractual stipulations governing venue of future legal disputes in the same way that they include choice of law clauses as part of their terms of use. Facebook, for example, has included the following stipulation in its terms and conditions:

> You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims.[120]

The exclusive venue or forum set by these stipulations puts a legal hurdle on the heirs of a decedent outside the United States. To be valid against the end-user, the Massachusetts Court of Appeals stated in *Ajemian v. Yahoo!, Inc.*[121] that a forum selection clause should be reasonably communicated to the user by the service provider. Without such proof, the Massachusetts court refused to enforce said forum stipulation clause. The court differentiated the efficacy of "clickwrap" agreements compared to "browsewrap" agreements:

> Although forum selection clauses contained in online contracts have been enforced, courts have done so only where the record established that the terms of the agreement were displayed, at least in part, on the user's computer screen and the user was required to signify his or her assent by clicking "I accept." [...] This is known

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[119] Google, *AdSense Help*, *at* https://support.google.com/adsense/answer/165678? (last visited Dec. 1, 2015).

[120] Facebook, *Statement of Rights and Responsibilities*, ¶ 15, *at* https://www.facebook.com/terms (last visited Dec. 1, 2015).

[121] Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 612 (Mass. App. Ct. 2013).

> as a "clickwrap" agreement [...] By contrast, a "browsewrap" agreement is one "where website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen." [...] Although forum selection clauses have almost uniformly been enforced in clickwrap agreements, we have found no case where such a clause has been enforced in a browsewrap agreement.[122]

In sum, for a forum stipulation clause to be valid, the online service provider must demonstrate that it reasonably communicated its terms and conditions to the user and that the said user has accepted that agreement through a positive act such as clicking "I accept."

Upon the contingency that the online service provider would refuse access or the transfer of property to heirs by invoking its terms of service, heirs may sue in compliance with the forum stipulation clause. This is in view of a possible enforceability problem should the claim be filed only in Philippine courts. Court orders issued by Philippine courts, even if favorable, may be snubbed by US companies for lack of jurisdiction. An order issued by a court in the corporation's domicile would then be binding consistent with the forum stipulation clause, which was inserted in the terms of use by the online service provider itself.[] It should be noted that while the SCA may be used by online service providers to refuse access to the deceased user's content, said law does not altogether proscribe third party access to stored digital data. A court order is merely required for the online service provider to be allowed to give such access without incurring liability.

At this juncture, it is significant to note that twelve states in the US have enacted laws that supersede most online service providers' terms of use by allowing heirs to access their decedent's digital assets, in recognition of their successional rights.[123]

IV. CONCLUSION

Stipulations under an online service provider's terms of use must not be permitted to undermine a person's ownership rights and copyright over his downloaded and uploaded content. Neither must they be allowed to hinder heirs from asserting successional rights over the decedent's digital assets.

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[122] *Id.* at 613.

[123] Marine Wealth Advisors, *Make Digital Assets Part of Your Estate Planning*, MARINE WEALTH ADVISORS WEBSITE, *at* http://www.marinerwealthadvisors.com/uploads/MWA-Digital%20Assets_022415.pdf (last visited Dec. 1, 2015).

Inheritability of digital property may depend on the classification of the assets sought to be recovered i.e. whether it is the content, the account itself, or messages sent to a specified audience or receiver. While online content is owned by the creator or uploader and part of his estate, the account itself is considered, under most EULAs, as mere representation of a license to use the account, the ownership of which does not pass to the user.

With regard to forum stipulations under user agreements, heirs should not be precluded from including a decedent's digital assets in the settlement of his estate. Online service providers must recognize the user's ownership rights and the heirs' successional rights over digital assets under the provisions of the Berne Convention, to which the Philippines and the United States (the place of residence of most online service providers), are state parties. Should enforceability problems arise, heirs may have to sue in the appropriate forum required by the terms of use, unless they are able to establish that these stipulations were not reasonably communicated and that the digital assets sought to be claimed are situated in the Philippines.

Legislation which settles the legal status of a person's digital assets after his death should clear the ambiguities of digital inheritance and limit the unbridled power of online service providers to create stipulations that govern their users' content.

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