

**The Revised Uniform Fiduciary Access to Digital Assets  
Act: Striking a Balance Between Privacy Expectations and the Need for Fiduciary Access to  
Digital Assets**

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## I. Introduction<sup>1</sup>

In the past, fiduciaries responsible for managing people's assets could easily marshal, collect, and manage these assets. Often, the biggest nuisance was convincing a recalcitrant financial institution to honor a power of attorney, and personal representatives and conservators, armed with court decrees, encountered few problems. That landscape has changed with the advent and popularity of digital assets and accounts.

According to a 2010 Pew Research Center survey, 81 percent of nondisabled adults and 54 percent of adults living with a disability use the internet.<sup>2</sup> In 2013, another Pew survey found that 59 percent of Americans age 65 and older use the internet, almost half have a high-speed broadband connection at home, and more than three-quarters have a cell phone.<sup>3</sup> Despite this, few online account custodians offer customers online tools that allow them to provide for access to, or disposition of, any property held in such accounts or even access to the records associated with the accounts. In addition, only a few state probate codes provide rules that apply in the absence of any planning. Delaware enacted a comprehensive access law in 2014.<sup>4</sup> Earlier state access laws, however, are much more limited.<sup>5</sup>

This article discusses the importance of fiduciary access to digital assets when an account holder becomes incapacitated or dies. It then discusses impediments to fiduciary access to digital assets, including the federal and state laws that protect these assets. Finally, the article describes the proposed statutory solution to access issues and suggests planning options to ensure fiduciary access to the digital assets of incapacitated or deceased individuals.

## II. Lack of Access to Digital Assets

Digital assets are treated the same as nondigital assets in the majority of state probate statutes. This has proven unworkable, however, because the custodians of many online accounts have refused to recognize fiduciaries' authority over digital assets.<sup>6</sup>

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<sup>1</sup> This article is based on an article co-authored by Suzanne Brown Walsh — *Digital Assets and Fiduciaries*, by Naomi Cahn, Christina L. Kunz, and Suzanne Brown Walsh (Research Handbook on Electronic Commerce Law (John A. Rothchild ed., Edward Elger 2016), <http://ssrn.com/author=2394675>). We are also deeply indebted to attorney James Lamm of Minneapolis and to Benjamin Orzeske of the Uniform Law Commission for their continuing work on the Uniform Fiduciary Access to Digital Assets Act (UFADAA), the Revised UFADAA, and the issues discussed in this article.

<sup>2</sup> Susannah Fox, *Americans Living With Disability and Their Technology Profile*, PewResearchCenter, <http://www.pewinternet.org/2011/01/21/americans-living-with-disability-and-their-technology-profile> (Jan. 21, 2011).

<sup>3</sup> Aaron Smith, *Older Adults and Technology Use*, PewResearchCenter, <http://www.pewinternet.org/2014/04/03/older-adults-and-technology-use> (Apr. 3, 2014).

<sup>4</sup> Del. H. 345, 147th Gen. Assembly, [http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/HB%20345/\\$file/legis.html](http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/HB%20345/$file/legis.html) (accessed June 1, 2016).

<sup>5</sup> Jim Lamm, *Delaware Enacts Fiduciary Access to Digital Assets Act*, Digital Passing, <http://www.digitalpassing.com/2014/08/27/delaware-enacts-fiduciary-access-digital-assets-act> (Aug. 27, 2014). This article also describes some state laws enacted before the Delaware law.

<sup>6</sup> See e.g. *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 614 (Mass. App. 2013).

The Connecticut Revised Uniform Fiduciary Access to Digital Assets Act (hereafter, “Revised UFADAA”),<sup>7</sup> gives fiduciaries limited, but much needed, access to digital assets, while taking into account the privacy and contractual rights of account holders and compliance with federal and state privacy laws.

### III. Why Digital Access Is Important

Fiduciaries are responsible for handling an individual’s finances. They have to inventory the person’s assets and may need to manage or close the person’s financial accounts or business; pay the person’s debts, taxes, and expenses; and distribute the person’s assets after death. Fiduciaries need access to the individual’s digital assets to discharge their duties. Guardians for the incapable, in particular, may need to monitor social media and other online accounts for inappropriate posts and activity and prevent scam artists and cyber thieves from finding new prey.<sup>8</sup>

It is much more difficult to order prints of photographs, contact distant friends and family, collect travel rewards, book travel, or sort through financial records without access to email accounts. Most creditors and banks encourage customers to “go green” and receive bills and statements electronically. As medical providers transition to electronic medical records, pharmacy and medical records and histories are increasingly available to patients and caregivers via online systems. Elderly clients, similar to younger ones, often use online rental sites to rent their underused or unused vacation property to offset carrying costs.

Admittedly, younger people are more likely to own digital assets with significant monetary value. Digital currencies exist, such as Bitcoin.<sup>9</sup> Domain names continue to garner seven- and eight-figure sales prices. The highest price ever paid for a domain name was \$36.5 million for Insurance.com in 2010.<sup>10</sup> Perhaps the most unusual valuable digital asset sold was a \$635,000 virtual casino in Entropia Universe, an online gaming platform.<sup>11</sup>

#### A. Preventing Identity Theft

In 2014, \$16 billion was stolen from 12.7 million identity fraud victims in the United States.<sup>12</sup> When an individual is unable to continue to monitor his or her online accounts because of incapacity or death, it becomes easier for criminals to hack these accounts, open new credit card accounts,

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<sup>7</sup> Connecticut Public Act 16-145; Natl. Conf. of Commrs. on Unif. St. Laws, Revised Uniform Fiduciary Access to Digital Assets Act (2015), <http://tinyurl.com/outk2ma> (Sept. 25, 2015) [hereinafter Revised UFADAA].

<sup>8</sup> See *Victims of Identity Theft*, Bureau of J. Statistics, 2014, [http://www.bjs.gov/content/pub/pdf/vit14\\_sum.pdf](http://www.bjs.gov/content/pub/pdf/vit14_sum.pdf) (Sept. 2015).

<sup>9</sup> See Bitcoin, <https://bitcoin.org/en>, <https://en.bitcoin.it/wiki/Introduction> (accessed June 1, 2016); Joseph Wright, *Bitcoin Is Creating New Headaches for Estate Planners, Though It May Someday Cure Them*, Bloomberg BNA Elec. Com. & L. Rpt. (May 14, 2014); Denis T. Rice, *The Past and Future of Bitcoins in Worldwide Commerce*, Bus. L. Today (Nov. 2013).

<sup>10</sup> Michael Berkens, *A New Domain Name Record? Quinstreet Acquisition of Insurance.com: \$36.5 Million Dollars*, The Domains, <http://www.thedomains.com/2010/08/09/a-new-domain-name-record-insurance-com-36-5-million-dollars> (Aug. 9, 2010).

<sup>11</sup> See Oliver Chiang, *Meet the Man Who Just Made a Half Million From the Sale of Virtual Property*, Forbes, <http://tinyurl.com/jylpsqn> (Nov. 13, 2010).

<sup>12</sup> Ins. Info. Inst., *Identity Theft and Cybercrime*, <http://www.iii.org/fact-statistic/identity-theft-and-cybercrime> (accessed June 1, 2016).

apply for jobs, and even obtain state identification cards. Fiduciaries need to monitor and protect (perhaps by termination) online accounts.<sup>13</sup>

### B. *Consoling the Living*

Stories abound of grieving family members and friends searching for answers, comfort, and support in the social media accounts, voicemails,<sup>14</sup> and other digital assets of their deceased friends and relatives. Although the monetary value of social media accounts is generally small, access to these accounts may be priceless to family and friends.<sup>15</sup>

### C. *Marshaling Assets*

Marshaling assets is a critical fiduciary duty, and it is impossible to manage a person's assets or estate until the assets are identified and collected. Marshaling traditional assets can be challenging. Fiduciaries acting on behalf of disorganized individuals who fail to plan, or simply keep poor records, have a difficult time identifying and collecting assets. However, when marshaling assets in digital accounts, such failures on the part of disorganized individuals can completely prevent, or at least delay, access to critical information and assets.

## IV. **Impediments to Fiduciary Access to Digital Assets**

Fiduciaries trying to access, collect, or manage digital assets face unique impediments that do not exist when dealing with traditional assets.

### A. *Passwords and Encryption*

Most online accounts are password protected, and the passwords can generally be reset only with access to the account holder's email account (if the accounts can be reset or recovered at all). Moreover, access to a computer does not automatically grant the fiduciary access to the data stored on the computer's hard drive if the passwords and the data on the computer are encrypted, or when a software feature protects the data.

For example, Apple designed its iPhone iOS9 operating system with an auto-erase feature that, if enabled, prevents passcode-guessing. After 10 incorrect passcodes, the phone permanently destroys the data in the phone needed to decrypt the phone. As a result, the FBI reportedly paid over \$1.0 million to a computer expert to access the San Bernardino shooter's iPhone 5C, after its auto erase passcode protection feature was enabled, encrypting its locally stored data.<sup>16</sup> As was widely reported at the time, before the FBI identified and paid its consultant that princely sum to hack into the phone, Apple was contesting a federal court order requiring that it assist the FBI in neutralizing this feature of its software.

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<sup>13</sup> See Gerry W. Beyer & Naomi Cahn, *When You Pass On Don't Leave the Passwords Behind: Planning for Digital Assets*, 26 Prob. & Prop. 40 (2012).

<sup>14</sup> Beth Teitell, *Preserving Voicemails Helps Modern Grieving Process*, Boston Globe, <http://tinyurl.com/l4tvbxa> (Nov. 20, 2013).

<sup>15</sup> Tracy Sears, *Family, Lawmakers Push for Facebook Changes Following Son's Suicide*, CBS 6 (WTVR-TV, Richmond, VA), <http://wtvr.com/2013/01/08/legislation-introduced-for-access-to-deceased-persons-digital-property> (updated Jan. 9, 2013).

<sup>16</sup> Julia Edwards, *FBI paid more than \$1.3 million to break into San Bernardino iPhone*, Reuters, <http://www.reuters.com/article/us-apple-encryption-fbi-idUSKCN0X12IB>, (accessed July 19, 2016).

The Apple encryption dispute in the San Bernardino case did not involve the Fourth Amendment or any federal privacy law (discussed in Sections C and D, below). Before it sought the court order against Apple, the federal government had obtained a search warrant, supported by probable cause. In addition, the phone was owned by the shooter's employer, which had consented to the FBI accessing the phone.<sup>17</sup> The problem of data inaccessibility was caused by the phone's software encryption features.

Regardless of where the public policy line is drawn in the law enforcement versus individual privacy debate, the privacy arguments seem to be driving technology companies, such as Apple, to increase their use of encryption to protect customers' phones and online accounts.<sup>18</sup> Reportedly, Apple has considered enhanced iCloud security features, which would encrypt users' data with the passcodes of their devices, so that even Apple could not access user data or hand over the encryption keys to the government if it requested them. This could make it more difficult for Apple to help Apple customers retrieve data if they have forgotten the passcode, so it could backfire and alienate its customers.<sup>19</sup>

For this reason, it is vitally important to mention the importance of passcodes to clients with Apple devices and iCloud accounts. Clients who need to access a decedent's or incapable person's iPhone and do not know the owner's passcode may be able to obtain it without Apple's or even a computer expert's assistance. The iPhone data could be stored in different places, each with different retrieval options. The first, and easiest, way to retrieve the data is from a computer, if the phone's owner connected it to that computer to back up its data using iTunes. Unfortunately, iTunes back up was probably more common before music streaming services became popular, but if it was used, it may be the easiest way to access the data. No password is needed for access unless the user affirmatively selected the "Encrypt Backup" feature in iTunes.<sup>20</sup> If that was done, the data may be lost, as Apple cannot supply the password. Fortunately, Apple's default setting for this feature does not encrypt the data.<sup>21</sup>

Second, they may be able to retrieve the data from the iPhone, itself. Depending on the model of the iPhone, the version of iOS the iPhone was running, and certain preferences (e.g., whether it was set to delete all data after a certain number of incorrect passcode attempts), a computer expert might be able to guess the passcode to unlock the iPhone itself.

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<sup>17</sup> Jeff Kosseff, *In The Apple Encryption Debate, Can We Just Have The Facts Please?*, <https://techcrunch.com/2016/02/25/in-the-apple-encryption-debate-can-we-just-have-the-facts-please/> (accessed July 19, 2016).

<sup>18</sup> Benjamin Mayo, *Apple Working on Stronger iCloud backup encryption and iPhone security to counter FBI unlock requests*, <http://9to5mac.com/2016/02/25/apple-working-on-stronger-icloud-backup-encryption-and-iphone-security-to-counter-fbi-unlock-requests/> (accessed July 19, 2016).

<sup>19</sup> *Id.*

<sup>20</sup> If the backup encryption option is enabled, the data cannot be recovered without the passcode. <https://support.apple.com/en-us/HT205220> accessed October 2, 2016).

<sup>21</sup> *Id.*

Third, if the user backed up the iPhone to his or her iCloud storage account, the user's fiduciary or agent can ask Apple (which may or may not respond favorably) to grant the fiduciary or agent access to the Apple account where the phone's data is stored.<sup>22</sup>

Finally, there are also software tools that clients can use to try to recover data, messages, files, etc. from a locked or damaged phone.

## B. *Terms-of-Service Agreements*

Even if the fiduciary can find a password, the account provider's terms-of-service agreement (TOSA) might forbid account access by anyone except the account holder<sup>23</sup>—implicitly barring a fiduciary from access. Online TOSAs are frequently silent about postmortem options and often simply prohibit postmortem transfer.<sup>24</sup>

Fiduciaries have been forced to challenge TOSAs. The Massachusetts appellate court refused to enforce a California forum designation provision in a Yahoo TOSA. When John Ajemian was killed in a car accident, his brother and sister, as co-executors of his estate, sought access to John's Yahoo account to console grievers and to collect estate assets.<sup>25</sup> Yahoo refused access to the account even though the surviving brother had opened and originally shared access to it; he had, however, subsequently forgotten the password.<sup>26</sup> Yahoo attempted to dismiss the Massachusetts declaratory action based on the California forum designation provision; it also claimed that the emails were not property of the Massachusetts estate. The appellate court held that Yahoo was required to show that the TOSA was reasonably communicated to and then accepted by the account holder. In its opinion, the court discussed the differences between "clickwrap" agreements (which require users to click an "I agree" box) and "browsewrap" agreements (to which users impliedly agree to the posted terms by accessing the website or page or by some other action but need not expressly agree to the terms).<sup>27</sup> The court concluded that without evidence that the account holder had agreed to the TOSA, it was not enforceable. It also concluded that the estate's co-administrators were not parties to the TOSA and thus could not be bound by it. Nonetheless, the appellate court did not order Yahoo to provide access to the account; instead, it remanded the case to the probate court to determine whether the emails were an asset of the estate and whether federal laws permitted Yahoo to disclose them.<sup>28</sup> Therefore, even though restrictive TOSAs will not necessarily preclude fiduciary access, fiduciary access cannot be presumed.

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<sup>22</sup> Benjamin Mayo, *Digital property after death issues continue as Apple requires court order for widow to get late husband's Apple ID password*, <https://tinyurl.com/j282m4m> (accessed March 14, 2017).

<sup>23</sup> Yahoo!, *Yahoo Terms of Service*, <http://info.yahoo.com/legal/us/yahoo/utos/terms> (updated Mar. 16, 2012). "Yahoo grants you a personal, non-transferable and non-exclusive right and license to use the object code of its Software on a single computer ... ."

<sup>24</sup> The TOSAs of various companies appear at Mylennium Digital Executor Servs., *Domain Information Resources*, <https://www.mylennium.com/domaininfo> (accessed June 1, 2016).

<sup>25</sup> *Ajemian*, 987 N.E.2d at 614.

<sup>26</sup> *Id.*

<sup>27</sup> See generally Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 Bus. Law. 279, 291 (2003); see also Cahn et al., *supra* n. 1.

<sup>28</sup> The probate court ultimately held the emails were estate property, but that the SCA barred their disclosure. *Infra*, notes 75-76.

### C. *Federal and State Computer Fraud and Abuse Acts*

The Federal Computer Fraud and Abuse Act (CFAA) criminalizes the unauthorized access of computer hardware and devices and the data stored thereon:

(a) Whoever— ... (2) *intentionally accesses a computer without authorization or exceeds authorized access*, and thereby obtains— ... (C) information from any protected computer ... shall be punished as provided in subsection (c) of this section.<sup>29</sup>

This criminalizes two kinds of computer trespass: accessing a computer “without authorization” and access that “exceeds authorized access”. The CFAA defines the term “exceeds authorized access” as “to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.”<sup>30</sup> A related provision of the statute criminalizes the same acts, but additionally requires knowledge and intent to defraud.<sup>31</sup>

Unauthorized use includes “obtain[ing] ... information” (such as by accessing emails or internet accounts) from a “protected computer,” which is defined as any computer connected to a government or financial institution as well as one “used in or affecting interstate or foreign commerce or communication.”<sup>32</sup> Because most internet servers are not located in the same state as a website’s users, internet use almost always involves obtaining information from a protected computer and therefore implicates the CFAA.<sup>33</sup> The term “computer” includes desktop computers, laptops, notepads, tablets, and smartphones.<sup>34</sup>

Every state has an analogous statute, which varies in coverage, but typically prohibits unauthorized access to computers.<sup>35</sup>

Even though a fiduciary is authorized by the account holder or state law to use a computer or to act on behalf of an account holder, the fiduciary is not necessarily exempt from CFAA prosecution.<sup>36</sup> There is no question that a fiduciary is authorized, in the normal sense of the word, to access an account holder’s computer or system that the fiduciary lawfully possesses, controls, or owns by virtue of the proscribed authority of a fiduciary. The analogy is that a fiduciary using, or even hacking into, a computer is no more illegal than a fiduciary using a locksmith (or crowbar) to get into a building owned by an incapacitated person, principal, or decedent. However, accessing a hard drive is technically different from accessing the account holder’s digital accounts or assets, which are stored on the provider’s server, not the user’s. If the fiduciary is violating the account provider’s TOSA

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<sup>29</sup> 18 U.S.C. § 1030(a)(2)(C)(2012) (emphasis added).

<sup>30</sup> *Id.* at § 1030(e)(6).

<sup>31</sup> *Id.* at § 1030(a)(4); this is the “second prong” of the CFAA.

<sup>32</sup> *Id.* at § 1030(e)(2).

<sup>33</sup> See *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121, 1127 (W.D. Wash. 2000).

<sup>34</sup> *U.S. v. Mitra*, 405 F.3d 492, 495–496 (7th Cir. 2005).

<sup>35</sup> Natl. Conf. of St. Legislatures, *Computer Crime Statutes*, <http://tinyurl.com/7pdkdhj> (as of May 12, 2016).

<sup>36</sup> See James D. Lamm et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries From Managing Digital Property*, 68 U. Miami L. Rev. 385, 399–401 (2014).

by accessing the account holder's digital accounts or assets online, the fiduciary may be violating the CFAA.<sup>37</sup>

As we know, few people read TOSAs. Most of us open accounts and click our agreement to the TOSAs without even a cursory glance. Almost no one reads TOSA's when setting up their online accounts, according to a 2016 research study. UConn researchers added provisions to a fake website's TOSA disclosing that a user's data would be shared with the NSA and indicating that the user's firstborn child would be taken as payment for using the site. Ninety eight percent of the 543 unknowing users agreed.<sup>38</sup>

Because the CFAA defines a "protected computer" as one affected by or involved in interstate commerce — effectively all computers with internet access — a prosecutor's broad interpretation of "exceeds authorized access" would make every violation of a TOSA a federal crime. Put differently, criminalizing a simple TOSA violation would make criminals out of virtually everyone who uses any internet-enabled device, because:

"The Internet is a means for communicating via computers: Whenever we access a web page, commence a download, post a message on somebody's Facebook wall, shop on Amazon, bid on eBay, publish a blog, rate a movie on IMDb, read www.NYT.com, watch YouTube and do the thousands of other things we routinely do online, we are using one computer to send commands to other computers at remote locations. Our access to those remote computers is governed by a series of private agreements and policies that most people are only dimly aware of and virtually no one reads or understands."<sup>39</sup>

The problem is that (some would say) overzealous federal prosecutors are using the CFAA to prosecute defendants based solely on violations of a website's TOSA.<sup>40</sup> While they have not prosecuted any fiduciaries, friends, or spouses for password sharing done without any intent to violate a TOSA or employer policy, there is nothing in the statute, if it is interpreted expansively, that prohibits the government from doing so.<sup>41</sup>

The United States Court of Appeals for the Ninth Circuit has decided several cases involving the scope of the "unauthorized access" that is criminalized under the CFAA, and the legal rationales for the decisions are not entirely consistent. The first is commonly known as *Nosal I*, involving an employee (Nosal) of an executive search firm who left the firm to start a competing business. He thereafter convinced his former coworkers to use their account credentials to download information for him from a confidential database on the former employer's computer system. The coworkers were

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<sup>37</sup> Cahn, *supra* n. 1, at 10.

<sup>38</sup> <http://today.uconn.edu/2016/08/privacy-paradox/>

<sup>39</sup> 676 F.3d at 861.

<sup>40</sup> See *United States v. Nosal*, D.C. No. 3:08-cr-00237-EMC-1, 9th Circuit Court of Appeals, July 5, 2016; See also Andrea Peterson, *The Law Used to Prosecute Aaron Swartz Remains Unchanged a Year After His Death*, Washington Post, <https://www.washingtonpost.com/news/the-switch/wp/2014/01/11/the-law-used-to-prosecute-aaron-swartz-remains-unchanged-a-year-after-his-death> (Jan. 11, 2014).

<sup>41</sup> See Justice Reinhardt's dissenting opinion in *Nosal II*, *supra* n. 37.

authorized to access the former employer's database, but company policy forbade disclosure of confidential information.<sup>42</sup>

The government initially charged Nosal with violating the second prong of the CFAA<sup>43</sup> and aiding and abetting his former coworkers (who exceeded [their] authorized access with intent to defraud) when they violated the employer's terms of use by accessing the employer's network for non-work purposes. Nosal filed a motion to dismiss the indictment, arguing that the CFAA targeted hacking, not misuse of information obtained with permission.<sup>44</sup> The Ninth Circuit agreed with him, and ruled that simply violating the TOSA did not and should not "exceed authorized access" under the CFAA.<sup>45</sup>

Sitting *en banc*, the court narrowly construed the CFAA to avoid criminalizing technical TOSA violations: "[W]e hold that the phrase 'exceeds authorized access' in the CFAA does not extend to violations of use restrictions. If Congress wants to incorporate misappropriation liability into the CFAA, it must speak more clearly."<sup>46</sup> Thus, employees do not "exceed authorized access" if they access a company computer in a manner that violates the company's computer use policies, as long as they are authorized to access the computer.<sup>47</sup>

Unfortunately, subsequent decisions more broadly construed the CFAA,<sup>48</sup> and the CFAA decisions among the various circuits conflict.<sup>49</sup> In the Ninth Circuit, the government ultimately reindicted Nosal, using a new theory. This time, the prosecution argued that after Nosal and his colleagues left the company, they had no underlying legal right to access the company's computer network at all. Because they lacked any legal rights to access the network, their use of a sympathetic current employee's login credentials violated the first (and broader) prong<sup>50</sup> of the CFAA's ban on "access without authorization."<sup>51</sup> This theory worked, and Nosal was convicted for accessing a protected computer "without authorization" under the first prong of the CFAA, and thereafter a divided panel of the Ninth Circuit upheld (by a 2-1 vote) his conviction in *Nosal II*.<sup>52</sup> The majority decided that Nosal could be convicted for accessing his former employer's computer

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<sup>42</sup> *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012)(en banc).

<sup>43</sup> 18 U.S.C. §1030(a)(4).

<sup>44</sup> See "Statutory Interpretation — Computer Fraud And Abuse Act — Ninth Circuit Holds That Employees' Un-Authorized Use of Accessible Information Did Not Violate the CFAA." *United States v. Nosal*, 676 F. 3d 854 (9th Cir. 2012)(en banc).

<sup>45</sup> *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012)(en banc); see also *United States v. Valle*, 807 F.3d 508 (2nd Cir. 2015), reaching a similar result.

<sup>46</sup> *United States v. Nosal*, 676 F.3d 854 (9th Cir.2012) (en banc).

<sup>47</sup> *Id.* at 863.

<sup>48</sup> Andrew Trombly, *Right for the Wrong Reasons: The Ninth Circuit Excludes Misappropriation from the CFAA's Ambit in United States v. Nosal*, 54 B.C. L. Rev. (2013), <http://lawdigitalcommons.bc.edu/bclr/vol54/iss6/11>(visited Aug. 4, 2016).

<sup>49</sup> Compare e.g., *United States v. John*, 597 F.3d 263 (5th Cir. 2010), *United States v. Rodriguez*, 628 F.3d 577(11th Cir. 2010), finding that a use violation itself was not a crime under the CFAA, and *Nosal I*, 676 F.3d 854 and *United States v. Valle*, 807 F.3d 508 (2nd Cir. 2015) in which the Ninth and Second Circuits held that it was not.

<sup>50</sup> 18 U.S.C. Section 1030(a)(2).

<sup>51</sup> *United States v Nosal*, 828 F.3d 865 (9th Cir. 2016), reh'g denied and amended by 2016 WL 7190670 (9th Cir. Dec. 8, 2016).

<sup>52</sup> *Id.*

“without authorization” because the employer had revoked his credentials, and he nevertheless used the system through and with the permission of a sympathetic, still credentialed co-worker.

This is not a comforting rationale, because TOSA’s routinely prohibit password sharing and other third-party access.<sup>53</sup> It can also be difficult to know when access that is technologically possible is not authorized by a TOSA.

Soon after *Nosal II*, the Ninth Circuit issued an en banc decision that indicated that violating a TOSA alone would not violate the CFAA, but that doing so after being expressly and directly told not to do so by its owner *would* violate the CFAA.<sup>54</sup> In that case, known as “Power Ventures,” the court held that after Facebook sent a company called Power Ventures<sup>55</sup> a cease and desist letter demanding it stop accessing Facebook’s service and violating its TOSA by doing so, the company violated the CFAA by continuing to access Facebook’s service.<sup>56</sup> The decision suggests that a visitor must be told by its owner to stay off the website and the owner’s servers before the visitor violates the CFAA by visiting it anyhow. The problem with that reasoning is that there is very little difference between visiting an online account with the account holder’s permission and password, knowing that the company’s policy or TOSA prohibits that manner of access (which the court said is permitted), and visiting the site after the company directly tells the visitor not to do so (which it held violated the CFAA).<sup>57</sup> Perhaps the court should have distinguished between permissible and impermissible access based on the outside user’s status.<sup>58</sup> “Outsiders who have never been affirmatively denied authorization by the system owner should be able to rely on the authorization of subordinate users. But an outsider who has been banned from the system cannot circumvent that ban by getting a valid password from an individual user.”<sup>59</sup>

As a result, it is not at all clear whether or not a simple password sharing violation of an online account TOSA is a crime under the CFAA.<sup>60</sup> Until Congress amends and clarifies the CFAA, the scope and breadth of the CFAA’s reach will remain unclear, including its impact on fiduciaries trying to perform their statutory duties. That lack of clarity will continue to have a chilling effect on fiduciaries as they attempt to deal with the digital assets of account holders.

#### D. *The Stored Communications Act*

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<sup>53</sup> See amicus brief filed by the Electronic Frontier Foundation for a good synopsis of the policy arguments against broadly construing the CFAA in this manner, <https://www.eff.org/document/eff-amicus-brief-2014> (accessed July 22, 2016).

<sup>54</sup> *Facebook v. Vachani*, No. 13-17102, D.C. No.5:08-cv-05780-LHK, 9th Circuit Court of Appeals, July 12, 2016.

<sup>55</sup> NPR produced an interested piece about Power Ventures and the case: Aarti Shahani, “The Man Who Stood Up To Facebook”, October 13, 2016, <http://tinyurl.com/hstlkry>.

<sup>56</sup> *Id.*

<sup>57</sup> Orin Kerr, *9th Circuit: It’s a federal crime to visit a website after being told not to visit it*, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/12/9th-circuit-its-a-federal-crime-to-visit-a-website-after-being-told-not-to-visit-it/> (July 12, 2016).

<sup>58</sup> *United States v. Nosal (Nosal II)*, Ninth Circuit Affirms Conviction of a Former Employee Who Used Another Employee’s Password., 130 Harvard Law Review 126 (2017), <http://harvardlawreview.org/2017/02/united-states-v-nosal-nosal-ii/> (last visited Mar 14, 2017).

<sup>59</sup> *Id.*

<sup>60</sup> The Ninth Circuit declined to rehear the *Nosal* case, but slightly amended its opinion in doing so. *United States v Nosal*, 828 F.3d 865 (9th Cir. 2016), reh’g denied and amended by 2016 WL 7190670 (9th Cir. Dec. 8, 2016)

The Fourth Amendment to the U.S. Constitution provides citizens with a strong expectation of privacy in their homes. As a result, the government usually cannot search our homes without first showing probable cause and obtaining a warrant authorizing a search.

When we use a computer network, we may have the same expectation of privacy; however, because the network is not physically located or even being accessed in our computers or in our homes, it is outside the coverage of the Fourth Amendment.<sup>61</sup> To fill that gap, in 1986 Congress enacted the Stored Communications Act (SCA) as a part of the Electronic Communications Privacy Act (ECPA)<sup>62</sup> to respond to concerns that internet privacy poses new dilemmas with respect to application of the Fourth Amendment's privacy protections. The SCA prohibits certain providers of *public* electronic communications services from disclosing the *content* of its users' communications to a government or nongovernment entity (different rules apply to each) except under limited circumstances that are akin to the warrant required under the Fourth Amendment.<sup>63</sup> The SCA regulates the relationship between the government, internet service providers (ISPs), and users in two distinct ways.

First, the SCA establishes limits on the government's ability to require ISPs to disclose information concerning their subscribers. An ISP may not disclose to the government any records concerning an account holder or the content of any electronic communications in the absence of an applicable exception, such as consent by the account holder.<sup>64</sup>

Providers are permitted, but not required, to divulge non-content, such as the user's name, address, connection records, IP address, and account information to a nongovernmental entity.<sup>65</sup> The subject line of an email has been held to be content protected by the SCA.<sup>66</sup>

Second, the SCA establishes limits on the provider's ability to voluntarily disclose to the government or any other person or entity the content of communications.<sup>67</sup> All private social media account content (e.g., photos, videos, posts) is protected by the SCA.<sup>68</sup>

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<sup>61</sup> See generally Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208 (2004).

<sup>62</sup> Pub. L. No. 99-508, 100 Stat. 1848 (1986). The ECPA is codified at 18 U.S.C. §§ 2510–2522. The SCA is codified at 18 U.S.C. §§ 2701-2711.

<sup>63</sup> See generally Kerr, *supra* n. 58, at 1214.

<sup>64</sup> 18 U.S.C. § 2702(a)(1) prohibits voluntary disclosure of the content of an electronic communication to anyone, whereas 18 U.S.C. § 2702(a)(3) prevents the voluntary disclosure of records to the government (although not to others). Depending on the nature of the data, the government must obtain either a subpoena or a warrant, although some exceptions exist in the case of an emergency. 18 U.S.C. § 2702(b).

<sup>65</sup> *Id.* at § 2702(c)(6).

<sup>66</sup> *Optiver Austral. Pty. Ltd. v. Tibra Trading Pty. Ltd.*, Case No. C 12-80242 EJD (PSG), 2013 U.S. Dist. Lexis 9287 (N.D. Cal. Jan. 23, 2013).

<sup>67</sup> See Kerr, *supra* n. 58, at 1212–1213 (“The statute creates a set of Fourth Amendment-like privacy protections”). The 2013 revelations of Edward Snowden provide another angle on the SCA and providers' willingness to disclose. The providers did not want to disclose some information, and the National Security Agency either coerced them to disclose the information or simply took the information without their knowledge. See e.g. Ryan Lizza, *The Metadata Program in Eleven Documents*, *New Yorker*, <http://perma.cc/8R7Y-GBAE> (Dec. 31, 2013); Ryan Lizza, *State of Deception: Why Won't the President Rein in the Intelligence Community?* *New Yorker*, <http://perma.cc/F4KK-FVXG> (Dec. 16, 2013); Laura W. Murphy, *The NSA's Winter of Discontent*, *Huffington Post*, <http://perma.cc/3V8U-6X6W> (updated Feb. 11, 2014).

<sup>68</sup> See Rudolph J. Burshnic, *Applying the Stored Communications Act to the Civil Discovery of Social Networking Sites*, 69 Wash. &

A provider of public electronic communications services can *voluntarily* disclose the content of communications, but only if an *exception* to the SCA's blanket prohibition against disclosure applies.<sup>69</sup> The relevant exception for fiduciaries permits a provider to disclose communication content if the provider has the "lawful consent" of "the originator," an addressee or intended recipient of the communications, or the subscriber.<sup>70</sup> There is evidence that Congress intended authorized agents to be able to authorize disclosure of the contents of electronic communications.<sup>71</sup> The lack of direct reference to fiduciaries in the SCA is why Facebook, in its motion to quash a civil subpoena for content in a deceased user's profile and account, essentially asked one court to alternatively hold that the fiduciary had lawful consent and to order Facebook to disclose the requested content.<sup>72</sup> The court granted Facebook's motion to quash the subpoena but refused to address whether Facebook could voluntarily disclose the content.<sup>73</sup> As a result, some providers refuse to give executors access to the content of decedents' email accounts without the added assurance of a court order stating that the executor has the user's lawful consent.<sup>74</sup>

The Massachusetts Supreme Judicial Court heard oral arguments recently in one such case involving fiduciary access to a decedent's email account.<sup>75</sup> The probate court's order being appealed by the fiduciaries held that the e-mails were the property of the estate, but that the SCA prevented their disclosure to the fiduciaries.<sup>76</sup> The Harvard CyberLaw Center filed an excellent Amicus Brief on behalf of Naomi Cahn, James Lamm, Michael Overing and the author, arguing that interpreting the SCA as prohibiting fiduciary access condemns "to purgatory the data of all those who die without expressing their post-mortem preferences [and] runs against the important public policy of preserving the property and value of a deceased's estate for the benefit of the living."<sup>77</sup>

While not as troubling as the possibility of criminal prosecution, fiduciaries who violate TOSA's, even by using a password with permission, could still face civil fines under the SCA. A federal jury in Massachusetts awarded a plaintiff significant monetary damages in a civil action brought under the SCA. The defendant had been given the plaintiff's email account password so she could access it to read consultation reports when the two parties practiced medicine together. When the defendant left the practice and a business dispute arose, she used the plaintiff's unchanged password to access the account for reasons connected to the business dispute. The plaintiff sued, alleging her later access to his email account was unauthorized (i.e., she used the password for a reason her former partner had

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Lee L. Rev. 1259, 1267–1278 (2012).

<sup>69</sup> 18 U.S.C. § 2702(b).

<sup>70</sup> *Id.* at § 2702(b)(3).

<sup>71</sup> Senate Report No. 99-541 on ECPA, at page 37, which says: "Either the sender or the receiver can directly or through authorized agents authorize further disclosures of the contents of their electronic communication."

<sup>72</sup> *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*, Order Granting Facebook, Inc.'s Motion to Quash, (N.D. Cal. Sept. 20, 2012) (No. C 1280171 LHK (PSG)).

<sup>73</sup> *Id.*

<sup>74</sup> Google and Facebook will both require such orders; *infra* note 83.

<sup>75</sup> [http://www.ma-appellatecourts.org/display\\_docket.php?src=party&dno=SJC-12237](http://www.ma-appellatecourts.org/display_docket.php?src=party&dno=SJC-12237).

<sup>76</sup> *Ajemian v. Yahoo! Inc.*, NO-09E-0079, at 10 (Mass. Probate and Family Ct. March 10, 2016)

<sup>77</sup> Brief of Amici Curiae Naomi Cahn, James D. Lamm, Michael Overing and the author, at 2, <http://clinic.cyber.harvard.edu/files/2017/02/Ajemian-Amicus-2017-02-20-FINAL.pdf>.

not authorized) under the SCA<sup>78</sup>. Despite very thin (or nonexistent) testimony to support the damage claim, the jury awarded the plaintiff \$450,000 for the unauthorized intrusion.<sup>79</sup>

Recently, however, after a Florida jury decided *against* a damages award for a similar violation, a Florida federal appeals court held that statutory damages under the SCA may not be awarded absent evidence of actual damages.<sup>80</sup>

### E. *Heightened Privacy Concerns*

Electronic communications and accounts are unlike traditional communications and accounts in several ways. Unlike paper communications, lost and even deleted emails might be easily located and retrieved from an email service provider. Access to a decedent's emails might be important, perhaps for sentimental value, but more likely because the decedent's email account contains the information necessary to continue a business or collect other assets. A decedent or incapable person might have opened an online account (e.g., to access embarrassing content or a dating service such as Ashley Madison) with the expectation that the account would remain private and undiscoverable by anyone, including a fiduciary. Without evidence of the account holder's intent, it is impossible to show that the user intended the account to be accessible to others and not private.

## V. **Online Tools**

It's likely that the founders of most social media and other technology companies were worried about getting their platforms up and running and paying their rent, not their customers' death and incapacity. Had company founders had the luxury of contemplating incapacity and death when they created their products and services, they presumably would have created online tools and account settings to address those eventualities.

In April 2013, Google was the first major technology firm to offer such an online tool, which it calls Inactive Account Manager.<sup>81</sup> This tool allows users to determine (within preset options) what will happen to their Google accounts after a predetermined period of inactivity. A user can set the period of inactivity that triggers a Google notification, and Google will alert the user by text and email 1 month before deleting the user's account. A user can direct Google to notify up to 10 "beneficiaries" that the account will be deleted. After these beneficiaries are notified, they can download the user's Google content (e.g., Gmail, photos, videos, blogs).<sup>82</sup> Alternatively, the user can simply instruct Google to delete all account content.<sup>83</sup> This feature will not assist with postmortem account access if the account holder did not use it or if a designated beneficiary is unavailable, incapable, dead, or declines to share information with the fiduciary.<sup>84</sup>

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<sup>78</sup> See 18 U.S.C.A. Sec. 2701(a)(2).

<sup>79</sup> Jury Verdict Form at 1–3, *Cheng v. Romo*, No. 11-cv-10007-DJC, 2013 WL 2245312 (D. Mass. Apr. 29, 2013); *Cheng v. Romo*, 2012 WL 6021369, at \*1–3 (D. Mass. Nov. 28, 2012).

<sup>80</sup> *Vista Marketing, LLC v Burkett*, 812 F.3d 954, 975 (11th Cir. 2016).

<sup>81</sup> Google, *About Inactive Account Manager*, <https://support.google.com/accounts/answer/3036546?hl=en> (accessed June 1, 2016).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

To address these deficiencies, in August 2015, Google updated its support policy on postmortem access.<sup>85</sup> The updated policy now indicates that “immediate family members and representatives” seeking to obtain content from an account may provide the name of the deceased user and other information to Google for review.<sup>86</sup> Such persons will have to upload proof, such as a death certificate, to obtain the content.<sup>87</sup> They will be required to obtain a court order *using language supplied by Google*, and they not be given access to the account itself.<sup>88</sup> Google’s new policy on postmortem access to accounts of users who did not use its online tool is similar to Facebook’s.

In early 2015, Facebook updated its policy on postmortem account use and access, providing for the designation of a “legacy contact.”<sup>89</sup> Previously, once a deceased user’s account was “memorialized,”<sup>90</sup> Facebook would not allow anyone except the user (who presumably would have to prove that he or she did not actually die) to log into it. It did, however, allow verified family members to request that the account be removed from Facebook.<sup>91</sup> The new Legacy Contact feature provides that after an account is memorialized, the designated legacy contact can write a pinned post<sup>92</sup> for the user’s profile, respond to new friend requests, and update the user’s profile picture and cover photo.<sup>93</sup> The legacy contact *cannot* log into the account; remove or change previous posts, photos, or other things shared on a timeline; read messages sent to other friends; or remove any friends.<sup>94</sup> However, Facebook may allow an authorized representative (e.g., a family member) to obtain content “in response to a valid will or other legal consent document expressing clear consent.”<sup>95</sup> It may still allow an authorized representative to obtain content with a court order via a special request.<sup>96</sup>

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<sup>85</sup> Google, *Submit a Request Regarding a Deceased User’s Account*, <https://support.google.com/accounts/contact/deceased?hl=en> (accessed June 2, 2016).

<sup>86</sup> *Id.*

<sup>87</sup> [https://support.google.com/accounts/troubleshooter/6357590?visit\\_id=1-636251073434521680-2520517967&hl=en&rd=1#ts=6357650](https://support.google.com/accounts/troubleshooter/6357590?visit_id=1-636251073434521680-2520517967&hl=en&rd=1#ts=6357650) (last accessed, March 14, 2017)

<sup>88</sup> *Id.*

<sup>89</sup> Facebook Help Ctr., *What Is a Legacy Contact?* <https://www.facebook.com/help/1568013990080948> (accessed June 2, 2016).

<sup>90</sup> When a user account has been memorialized, sensitive information (e.g., phone numbers) is removed and the account will no longer generate reminders of the deceased user’s birthday. The deceased user’s profile will no longer be visible to anyone except a confirmed friend; non friends will no longer be able to find the profile in search queries either. Confirmed friends of the deceased user can continue to leave “wall” posts in remembrance on the user’s timeline. Facebook Help Ctr., *What Will Happen to My Account If I Pass Away?* <https://www.facebook.com/help/103897939701143> (accessed June 2, 2016); Caroline McCarthy, *With ‘Memorialized’ Profiles, Facebook Sees Dead People*, CNET, <http://www.cnet.com/news/with-memorialized-profiles-facebook-sees-dead-people> (Oct. 26, 2009).

<sup>91</sup> *Id.*

<sup>92</sup> <https://www.facebook.com/help/311466395722275?helpref=related> (last accessed March 14, 2017).

<sup>93</sup> Facebook Help Ctr., *supra* n. 76. The authority to change photos stems from a case where the user was killed by her boyfriend, and her profile photo was of them both, according to a Facebook attorney in a presentation given on March 11, 2017. .

<sup>94</sup> Facebook Help Ctr., *supra* n. 76.

<sup>95</sup> Facebook Help Ctr., *What Data Can a Legacy Contact Download?* <https://www.facebook.com/help/408044339354739> (accessed June 2, 2016).

<sup>96</sup> Facebook Help Ctr., *How Do I Request Content From the Account of a Deceased Person?* <https://www.facebook.com/help/123355624495297?helpref=related> (accessed March 17, 2017); *Special Request for Deceased Person’s Account*, <https://www.facebook.com/help/contact/228813257197480> (accessed March 17, 2017).

## VI. Revised UFADAA

To ensure that fiduciaries can access digital assets, the Uniform Law Commission (“ULC”) drafted the original Uniform Fiduciary Access to Digital Assets Act, or “UFADAA”, which it approved in July 2014.<sup>97</sup> Its premise was that asset neutrality was needed to ensure that fiduciaries could access digital assets to the same extent and as easily as other intangible assets and tangible assets. The original UFADAA sought to place the fiduciary into the shoes of the account holder through a variety of provisions, resolving as many of the impediments to fiduciary access to digital assets as possible by default.

Although the original UFADAA was drafted with the assistance of participating observers from Facebook, Google, Yahoo, NetChoice, Microsoft, and representatives from the gaming industry, technology industry opposition remained. The technology industry’s primary objection to fiduciary access was the account holder’s loss of privacy.<sup>98</sup> For example, Yahoo raised the following arguments against the proposed uniform legislation:

First, it does not ensure the privacy of sensitive or confidential information shared by the decedent or third parties. Second, [it] is based on the faulty presumption that the decedent would have wanted the trustee to have access to his or her communications.<sup>99</sup>

Internet industry representatives also argued, and continue to argue to this day, that the SCA requires the account holder’s *express* consent to disclosure and that the account holder’s consent that is constructive or implied is insufficient.<sup>100</sup> That position is supported in the civil discovery context, which involves living, capable users who are litigants.<sup>101</sup> The original UFADAA was premised on the notion that the fiduciary has the account holder’s implied consent and does not need actual consent, which proved to be a substantial obstacle during enactment efforts.<sup>102</sup> The technology companies also objected to UFADAA’s override of their TOSAs and the administrative burdens it would impose on them. Finally, they cited consumer demand for private, encrypted, anonymous services.<sup>103</sup> Privately, they expressed concern that offering postmortem access options during sign-up would scare away new customers.<sup>104</sup>

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<sup>97</sup> Unif. L. Comm’n., *Uniform Fiduciary Access to Digital Assets Act* (2014).

<sup>98</sup> Ltr. from AOL, et al. to Del. Gov. Jack Markell, *RE: Veto Request of HB 345, An Act to Amend Title 12 of the Delaware Code Relating to Fiduciary Access to Digital Assets and Digital Accounts* (July 8, 2014), <http://netchoice.org/wp-content/uploads/Industry-Veto-Request-of-DE-HB-345-Signed.pdf>.

<sup>99</sup> Bill Ashworth, *Your Digital Will: Your Choice* Yahoo! Global Public Policy, <http://yahoopolicy.tumblr.com/post/97570901633/your-digital-will-your-choice> (Sept. 15, 2014).

<sup>100</sup> See, e.g., Brief of Amici Curiae Netchoice and the Internet Association, at 17; file:///C:/Users/swalsh/Downloads/SJC-12237\_08\_Amicus\_NetChoice\_Brief%20(1).pdf, last accessed March 17, 2017.

<sup>101</sup> See, e.g., *Negro v. Super. Ct.*, 230 Cal.App. 4th 879, 889 (2014).

<sup>102</sup> If the Ajemians win their appeal, the common law of Massachusetts will likely align with original and not Revised UFADAA. *supra*, note 68.

<sup>103</sup> Sen. Jud. Comm., *Regarding SB 518, An Act to Amend Title 20 Fiduciary Access to Digital Assets*, 114th Cong. (June 16, 2015), <https://netchoice.org/wp-content/uploads/Joint-testimony-PA-SB-518-and-PEAC.pdf> (joint testimony of William Ashworth, Yahoo; Daniel Sachs, Facebook; and Steve DelBianco, NetChoice).

<sup>104</sup> Industry representatives Andrea Fitzpatrick of Facebook and Einat Clarke of Google both reiterated this concern on March 11, 2017, at a meeting of the ACTEC Digital Property Task Force in Scottsdale, AZ.

During the first legislative sessions after the original UFADAA was approved, industry opposition to each state bill grew louder and opposing lobbyists became more numerous. After 9 months of increasingly difficult legislative battles, the ULC and technology industry representatives met and negotiated a compromise — the Revised UFADAA, which reorganized the original act and revised almost all of its provisions. While it retains the original UFADAA’s comprehensive scope and applies to personal representatives, conservators, agents, and trustees, the Revised UFADAA also contains some of the provisions of the restrictive industry bill known as the Privacy Expectation Afterlife and Choices Act (PEAC).<sup>105</sup> As a result, Facebook and Google support the revised act, as do the American Civil Liberties Union and the Center for Democracy & Technology.<sup>106</sup> The online company and business companies’ trade association NetChoice has some excellent materials which endorse Revised UFADAA on its website as well.<sup>107</sup> As of July 26, 2016, Revised UFADAA had been enacted in Connecticut and 18 other states, and was pending in several others.<sup>108</sup>

#### A. *Key Concepts and Definitions*

Connecticut’s Revised UFADAA<sup>109</sup> covers personal representatives, conservators, agents acting under powers of attorney, and trustees.<sup>110</sup> It defines “online tool” as an electronic service that allows a user, in an agreement distinct from the TOSA, to provide directions for the disclosure or nondisclosure of digital assets to a third person.<sup>111</sup> That third person can be a fiduciary or a “designated recipient” who need not be a fiduciary. A “digital asset” is defined as “an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.”<sup>112</sup> This includes both the catalog, or log, of electronic communications and the content of the communications but not securities or traditional currency.<sup>113</sup> For example, neither a security held in street name nor money in a bank is considered a digital asset. Revised UFADAA simply addresses the fiduciary’s right to access all relevant electronic communications and the online account that provides evidence of ownership.

#### B. *Disclosure*

The original UFADAA<sup>114</sup> provided most fiduciaries with default authority over access to information protected by federal privacy laws.<sup>115</sup> Revised UFADAA Section 4<sup>116</sup> instead provides that

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<sup>105</sup> NetChoice, *Privacy Expectation Afterlife and Choices Act (PEAC)*, <https://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/> (accessed July 26, 2016).

<sup>106</sup> Facebook and Google’s endorsements are part of an enactment kit available for download. <https://tinyurl.com/jaqb2ya> (accessed March 14, 2017). Click on “Download an Enactment Kit” under “Legislation Information Kit”

<sup>107</sup> NetChoice, *supra* n. 86.

<sup>108</sup> Unif. L. Commn., *Fiduciary Access to Digital Assets Act, Revised (2015)*. <https://tinyurl.com/jaqb2ya>

<sup>109</sup> Connecticut Public Act 16-145, effective October 1, 2016.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at §§ 2(16), 4.

<sup>112</sup> *Id.* at § 2(10).

<sup>113</sup> *Id.* at § 2, cmts.

<sup>114</sup> Unif. L. Commn., *Fiduciary Access to Digital Assets Act (2014)*, <https://tinyurl.com/c9vajs2>

users, either in an online tool or in a record (i.e., a will, power of attorney, or trust instrument), may consent to disclosure of protected electronic communications content. Such express consent overrides a TOSA's boilerplate prohibition against access or disclosure. Without express consent, Revised UFADAA does not require custodians to disclose user content.<sup>117</sup>

The Revised UFADAA's hierarchy<sup>118</sup> for determining disclosure is as follows:

1. Online tool directions, if an online tool is offered and modifiable<sup>119</sup>
2. Directions in a will, trust, power of attorney, or other record<sup>120</sup>
3. TOSA provisions (which govern access to accounts of users who did not plan for third-party access to their online accounts and digital assets)<sup>121</sup>.

Revised UFADAA Section 5 expressly preserves the custodian's TOSA except as necessary to effectuate a user's express consent to disclosure under Section 4.<sup>122</sup>

Revised UFADAA Section 6<sup>123</sup> allows the custodian to determine whether to grant the fiduciary full access to an account, or partial access sufficient to perform the fiduciary's duties, or to provide a "data dump" in digital or paper form of whatever assets the user could have accessed. Deleted assets are not included, and the custodian may charge a reasonable fee for the access or disclosure.<sup>124</sup> Revised UFADAA also contains provisions protecting custodians from unduly burdensome requests.<sup>125</sup>

### C. Access by Various Parties

#### 1. Personal Representatives

Revised UFADAA Section 7 gives a personal representative limited access to a decedent's digital assets.<sup>126</sup> The personal representative must demonstrate that the decedent expressly consented to the disclosure of protected content, or the court can direct disclosure if the personal representative provides a written request, a death certificate, a certified copy of the letter of

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<sup>115</sup> *Id.* at §§ 3 and 6.

<sup>116</sup> Revised UFADAA, *supra* note 106, §4.

<sup>117</sup> *Id.* at §§ 7, 9, 12 and 14.

<sup>118</sup> *Id.* at §4.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at §5.

<sup>123</sup> *Id.* at §6.

<sup>124</sup> *Id.* at §6(b) and (c).

<sup>125</sup> *Id.* at §6(d).

<sup>126</sup> *Id.* at §7.

appointment, and evidence of the disclosure consent.<sup>127</sup> The personal representative must also provide, on request, information that identifies the account and links the decedent to it, which may include a court order.<sup>128</sup> Revised UFADAA Section 8 requires disclosure of all other digital assets, unless prohibited by the decedent or directed by the court, once the personal representative provides the requisite verifications.<sup>129</sup> Thus, Section 8 is intended to give personal representatives default access to the catalog of electronic communications and other digital assets not protected by federal privacy laws.<sup>130</sup>

## 2. Conservators

Conservator authority over assets in online accounts is quite limited under Revised UFADAA. Section 14(b) provides that the custodian may be required to disclose the “envelope” surrounding the protected person’s electronic communications, but not their content, and then only after the conservator first obtains a court order and provides the necessary verifications.<sup>131</sup> Section 14 does not permit a conservator to request that a custodian disclose a protected person’s electronic communications content simply by virtue of the conservator’s appointment. Section 14(c) permits a conservator with plenary authority to ask the custodian to suspend or terminate the protected person’s account, for good cause.<sup>132</sup> This allows a guardian or conservator who becomes concerned about an incapable person’s online behavior to request suspension or termination of a social media account. However, Section 14 will not allow the conservator or guardian, even with a court order, to monitor the account for signs of trouble. The fiduciary’s only option is to threaten account termination or suspension to persuade the incapable person to allow the fiduciary to access and monitor the account.

## 3. Agents Acting Under Powers of Attorney

Similar to the original UFADAA, Section 9 of Revised UFADAA provides that an agent has authority over a principal’s electronic communications content only if the principal expressly grants that authority.<sup>133</sup> Thus, access to electronic communications content by an agent is a “hot” power (i.e., it has to be specifically granted by the principal). Section 10 requires disclosure of all other digital assets to an agent with specific digital asset authority or general authority, with the requisite verifications that protect against disclosure of another person’s account content.<sup>134</sup>

## 4. Trustees

Revised UFADAA Section 11, comment states, “Section 11 provides that trustees who are original account holders can access all digital assets held in the trust. There should be no question

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at §8.

<sup>130</sup> *Id.* at §8, cmts.

<sup>131</sup> *Id.* at §14(b).

<sup>132</sup> *Id.* at §14(c).

<sup>133</sup> *Id.* at §9.

<sup>134</sup> *Id.* at §10.

that a trustee who is the original account holder will have full access to all digital assets.”<sup>135</sup> The Section 12 comment then states, “For accounts that are transferred into a trust by the settlor or in another manner, a trustee is not the original account holder of the account, and the trustee’s authority is qualified. Thus, Section 12, governing disclosure of content of electronic communications from those accounts, requires the account holder’s consent.”<sup>136</sup> Section 13, governing disclosure of all other digital assets held in trust, does not require consent.<sup>137</sup> Access and transfer of the digital assets into a trust would be accomplished by the settlor (while capable), the settlor’s agent, or a personal representative.

Underlying trust documents or default trust law generally supplies the allocation of responsibilities among trustees. Therefore, drafters should consider access to digital assets when drafting trustee power provisions.

#### *D. Fiduciary Duty and Authority*

Revised UFADAA Section 15 specifies the nature, extent, and limitations of the fiduciary’s authority over digital assets.<sup>138</sup> Subsection (a) imposes fiduciary duties such as care, loyalty, and confidentiality.<sup>139</sup> Subsection (b) subjects a fiduciary’s authority over digital assets to the TOSA, except to the extent the TOSA is overridden by an action taken pursuant to Section 4, and it reinforces the applicability of copyright and fiduciary duties. Finally, subsection (b) prohibits a fiduciary’s authority from being used to impersonate a user.<sup>140</sup> Section 15(c) permits the fiduciary to access all digital assets not in an account or subject to a TOSA.<sup>141</sup> Section 15(d) further specifies that the fiduciary is an authorized user under any applicable law on unauthorized computer access.<sup>142</sup> Section 15(e) clarifies that the fiduciary is authorized to access digital assets stored on devices, such as computers and smartphones, without violating state or federal laws on unauthorized computer access.<sup>143</sup>

Section 15(f) gives the fiduciary the option of requesting that an account be terminated, if termination would not violate a fiduciary duty.<sup>144</sup> Therefore, if the fiduciary wanted to terminate an online storage account because it held valuable photographs that embarrassed the fiduciary, but the fiduciary knew that the account holder wanted to maintain the photographs, termination could violate the fiduciary duties of loyalty and good faith.

#### *E. Custodian Compliance and Immunity*

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<sup>135</sup> *Id.* at §11, cmt.

<sup>136</sup> *Id.* at §12, comment.

<sup>137</sup> *Id.* at §13.

<sup>138</sup> *Id.* at §15.

<sup>139</sup> *Id.* at §15(a).

<sup>140</sup> *Id.* at §15(b).

<sup>141</sup> *Id.* at §15(c).

<sup>142</sup> *Id.* at §15(d).

<sup>143</sup> *Id.* at §15(e).

<sup>144</sup> *Id.* at §15(f).

If a fiduciary has access under Revised UFADAA and properly substantiates his or her authority, a custodian must comply with the fiduciary's request for asset disclosure or account termination within 60 days of receipt of all required documentation.<sup>145</sup> If the custodian does not comply, the fiduciary may apply for a court order directing compliance, which must contain requisite findings of fact.<sup>146</sup> Section 16(c) gives a custodian the right to notify a user that the fiduciary has requested disclosure or termination, and Section 16(d) allows the custodian to deny the request if the custodian is aware of lawful access to the account after the request was made.<sup>147</sup> Custodians insisted on this to protect joint account holders and businesses against denial of access to joint accounts.<sup>148</sup> Finally, Section 16(e) gives custodians the right to obtain or to require fiduciaries to obtain court orders that make factual findings relevant to the request.<sup>149</sup> The latter provision was negotiated in response to industry insistence that agents and trustees *always* be required to obtain court orders, which was not acceptable to the drafting committee.<sup>150</sup> In exchange, Section 16(f) immunizes a custodian who complies with a request under the Act.<sup>151</sup>

Currently, both Facebook and Google representatives have indicated that they will always insist that fiduciaries who are otherwise authorized to receive account information and content obtain probate court orders using language specified by the company.<sup>152</sup> Their position is, at least partially, based on legitimate concerns over the breadth and extent of their user's consent to disclosure of protected communications content. That means that until a state, and preferably, a federal, court holds that fiduciaries can lawfully consent for account holders under the SCA<sup>153</sup>, planners should counsel clients accordingly. That means using available online tools for disclosure, and clearly indicating in estate planning documents which accounts and communications may be disclosed to fiduciaries.

Section 3(b) provides that the Act does not apply to digital assets of an employer used by an employee in the ordinary course of the employer's business.<sup>154</sup> This precludes fiduciary access to employer-provided email systems and data. By implication, it allows fiduciaries to access employees' personal accounts that are not used for business. For example, a Google employee's fiduciary would not have access to the employee's business email or other business accounts but could access the employee's personal Gmail account.

## VII. The Importance of Planning

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<sup>145</sup> *Id.* at §16(a).

<sup>146</sup> *Id.* at §16(b).

<sup>147</sup> *Id.* at §§16(c) and (d).

<sup>148</sup> Based on notes of the Uniform Law Commission May 2015 meeting with industry representatives (on file with the author).

<sup>149</sup> *Id.* at §16(e).

<sup>150</sup> Based on the author and committee member Turney P. Berry's conversations with Daniel Sachs, the technology industry's point person during negotiations (notes on file with author).

<sup>151</sup> *Id.* at §16(f).

<sup>152</sup> Based on notes of the March 11, 2017 ACTEC Digital Property Task Force presentation by Andrea Fitzpatrick and Einat Clarke (on file with the author).

<sup>153</sup> As the Massachusetts SJC has been asked to do by Marianne and Robert Ajemian. *Supra*, note 98.

<sup>154</sup> *Id.* at §3(c).

Revised UFADAA's limited default authority over electronic communications content will penalize those who fail to plan for third-party access to their online accounts and digital assets. Likewise, advisors who fail to discuss digital assets and access with their clients will be hard-pressed to explain that oversight. At a minimum, practitioners should ask clients about email accounts and digital assets and ensure that fiduciaries are given appropriate and express powers in all wills, trusts, and powers of attorney. Further, when drafting fiduciary power provisions, successors and the application of the authority over digital accounts to successors should be considered. The client may be comfortable with the first named fiduciary having access to accounts but may not want co-fiduciaries or successors to have the same access. Finally, assuming that more companies eventually offer online tools, it will become important to coordinate the designations made in those tools with the provisions of the client's estate plan (just as beneficiary designations are coordinated with the client's estate plan).

## **VIII. Conclusion**

One of the consequences of our clients' need for data protection and their desire for privacy is the potential for economic loss during incapacity or the potential for economic loss to their beneficiaries after death. In the case of digital assets, ineffective or inadequate planning can cause irreparable economic harm because fiduciaries and family members may be denied access—at least to protected electronic communications content. Even though Revised UFADAA will allow some fiduciary access, it will not and cannot serve as a substitute for thoughtful planning.