



In-The-Know Monthly eNewsletter

What Will Happen to My iTunes Account When I Die? Planning for Our Ever-Expanding Digital "Assets"

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After practicing law for over 23 years, there are very few questions that are entirely new. Some are interesting variations on old questions, some flip the original question on their head, but rarely is there a whole new area of law or assets to deal with.

But in the last decade the issue of our digital "assets" has become one of the most important issues facing clients. Some clients have spent thousands of dollars assembling their iTunes library and want to leave it to a child. There are gigabytes and gigabytes of personal photos, family photos, lists, journal entries, unfinished novels and musings kept in the ether (showing my age there, sorry) in the Cloud.

In addition to these assets, much of our personal business is done online. Our bank, brokerage, credit card, mortgage and utilities statements arrive by email. Often some of these regular and recurring expenses are paid automatically based on arrangements made with your bank, or more likely with the programs provided by your bank. You may assemble, review and pay your income taxes without ever printing out a piece of paper.

While these issues have far-reaching implications for estate planning in general, I wanted to offer some guidance, at least as the law exists today.

Typically, digital assets are controlled by the original service's End User License Agreement or EULA. Theoretically, you read and signed this when starting the service. If you are one of the few people who actually read the iTunes or Amazon EULA, then you know there is little or no ownership or control of your digital content. Everything you have purchased from iTunes or through your Kindle is not a "copy" of the content. Instead you are licensing it for your personal use only. Without permission from Apple or Amazon, you cannot hand it down to your beneficiaries.

Some digital content companies are giving half a loaf, hoping that states, or the federal government, will not pass laws making that turn the limited and non-transferrable "licenses" into an actual ownership interest. Facebook has created its "memorialize" feature, and an option to allow you to either permanently delete your account or choose a friend or family member to take control of some aspects of the account after your death, are steps in that direction.

Another example is Google's Inactive Account Manager, which allows you to define what you want done with your data after a certain amount of inactivity. Your choices, deleting it all or transferring the account to a friend or family member, allow you to turn control over to someone after your death or disability. Because Google now includes Gmail, Google Plus, Picasa, and YouTube, that may cover a wide swath of your digital life.

But you still do not own it.

One answer, at least until the law catches up with the reality of how we live and what we own today, is to create a revocable living trust to purchase and own digital assets. Since the trust does not end at your death, by naming yourself (during life) and your children (during your life and after) as trust beneficiaries, you may be able to pass down music, photos and e-books, without violating the EULA in terms of transfers to third parties. This has not been tested by the courts, and the digital asset providers could change their EULA's to require an account holder be "human" rather than a trust.

In terms of the business and personal finances you do on line, states are more likely to be successful in passing effective legislation to allow an executor or agent under a power of attorney to access this information. Many states are working on this legislation, with more and less effective outcomes. One such attempt is through the Uniform Law Commission, which has created the Uniform Fiduciary Access to Digital Assets Act, and is seeking to have it introduced and passed into law through the country. It is imperfect, as written, and every state will seek to add its own tweaks and twists before enacting it. It is unlikely to give us an effective and uniform law, despite its name. But it is a start.

One alternative, until there are effective laws in place, is hiring a service provider to store digital data and release it according to your instructions is an option, your agent or executor would only need to know that you have joined the service to then access the information. One client's answer was to create an encrypted file with a list of all her passwords, and give one half of the complicated password necessary to unencrypt the file to me, and one half to her accountant.

All of our estate planning documents have language that specifically authorizes the agent, executor and trustee to access these "assets" and information. It is important to note that access to digital assets does not necessarily come with the right to access the information. Knowing someone's banking password does not give you the legal right to access their account. Having an effective power of attorney or trust (while the principal is alive) or will or trust (after they die) is an important part of providing legal access to these accounts.

When someone dies who did not plan ahead for digital assets, sleuthing is necessary. Having access to the email account may provide a key to access other digital data ("lost password" tools allow for resetting passwords via email), and as a last (expensive) resort, the fiduciary can hire a data forensics expert to help. However, before accessing someone else's digital assets, it is important to consider who has the right to view and access that data. Having the means to access information (i.e., username and password) is not the same as having the legal right to do so.

Until the Uniform Fiduciary Access to Digital Assets Act is improved and approved throughout the country, your best bet to protect your digital assets, and the digital access to your other assets, is through utilizing a combination of estate planning documents, tools available from the digital companies, and common sense password management.

Marc S. Levine is an NITP presenter and has been practicing with his firm, Handler & Levine, LLC, and its predecessor firms, since 1992. Mr. Levine regularly represents individuals, including Federal government employees, in preparing their estate plans, including wills, revocable living trusts, irrevocable trusts, powers of attorney, health care directives and other estate planning tools; represents Estates and Trustees in regard to decedent's issues, probate and estate tax returns, and represents small and medium size business owners in regard to their estate planning, succession planning and general business issues.

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