The Challenge of Digital Estate Administration for Executors

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Introduction

Most executors, and the professionals who advise them, are aware of the obvious estate assets they must inventory and then distribute or liquidate: the house, the life insurance, the car, and even grandpa's pocket watch. But what about the other, less obvious, assets? Those ephemeral assets that can just disappear because no one accounted for them and do not sit neatly inside the safety deposit box at the bank? Executors and their advisors may assume, because they are ephemeral, that such assets are valueless. Unfortunately, they are wrong.

Consider this: how many physical things does a person, in this day and age, produce in a lifetime? By comparison, how many emails are written? How many digital photographs are downloaded from a camera? How many spreadsheets or word processing documents get created? Now consider this: how many of those photos or spreadsheets, as examples, get printed, thereby converting them into a physical thing? Very few indeed.

Every day, Canadians are creating and acquiring intangible knowledge or data over which they have some right of ownership despite their lack of physical presence. According to a survey conducted by the Canadian Press, and reported by the *Globe and Mail* on December 28, 2010, Canadians:

- enjoy the highest penetration of Internet access, with about 68% of the population online;
- On average, log more time online per month than the residents of any other country;
- consume more YouTube content, per capita than residents of any other country;
- have one of the highest penetration rates on Facebook, with 65.9 per cent of online users having an account with that service;
- constitute the largest bloc of Wikipedia users.[2]

The history of economic development, since at least the advent of the modern computer, has been one of evolution from the control, manufacture, and sale of tangible goods or property to wealth creation from the manipulation of ideas and the legal rights and protections that attach to them.

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[2] Michael Oliveira, "Canadians spend more time online than any others" (2010) *The Globe and Mail*, online: <http://bit.ly/gNvxCJ> (last modified: 28 December 2010).

This is all part of the post-modern condition where the "old principle that the acquisition of knowledge is indissociable from the training of minds, or even of individuals, is becoming obsolete. Knowledge is already ceasing to be an end in itself. It is and will be produced in order to be sold."[3]

However, it not just the explosion of digital content that one must consider. New, highly symbolic forms of economic exchange have emerged without any physical presence. No longer must one barter for the exchange of a physical thing for another or exchange a physical thing for a physical thing of symbolic value such a coin, bank note or cheque, all of which have no value except an assigned external value. With the advent of electronic exchanges of money, the symbolic representation of money is no longer required either. Thus, it is now possible to acquire or exchange digital things, with no physical presence (and therefore having only symbolic value) for a price represented by some symbolic representation of currency.[4]

There are, of course, publically regulated systems of digital financial transaction, such as Interac, which is a non-profit organization consisting of a consortium of financial institutions. Paypal is another online system. These, however, are merely means to transfer or exchange regulated fiat (i.e. state-sponsored) currencies.

The internet has provided opportunities for people to form their own communities, regardless of geography or jurisdiction and such persons are no longer limited to the cumbersome use of multiple fiat currencies. One such community is Bitcoin; it is an online open source peer-to-peer digital currency for instant payment. There are no banks and no governments involved; the network is managed and enforced by the self-created community.[5] Like fiat currencies, bitcoins have a rate of exchange, based on online trading. About 9.2 million bitcoins are in circulation with a value of approximately $55.5 million USD.[6]

Another, even more dramatic example is Second Life, which is an online virtual reality simulacrum that allows people to create an avatar, purchase digital "land" within the system, and create a custom-designed immersive digital life. It too has its own internal currency called linden dollars ($L). One company, VirWox.com, reports that, as of the end of April, 2012, they had traded a total of $L 14,000,000,000 worth about $55 million USD. [7]

Other massively multi player online role-playing games (MMPORPGs) such as World of Warcarft, Final Fantasy, Everquest, and Diablo have the potential to create digital value through participation. Players, in many cases, acquire credits or other benefits through game play and advancement. Yet, many people prefer to short change the system and would rather buy their way to the top of the game and, therefore, these credits have value in the secondary market. These credits have so much value that Chinese prisoners are reputed to have been forced to

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[3] Madan Sarup, An Introductory Guide to Post-Structuralism and Postmodernism (2nd ed; Athens: The University of Georgia Press, 1993) at 133.

[4] Legal tender in Canada consists of coins issued by the Royal Canadian Mint or bills issued by the Bank of Canada. See the *Currency Act,* RSC 1985, c. C-52, s. 7-8.

[5] See http://www.bitcoin.org for an overview of this service. (last accessed: June 14, 2012)

[6] See http://www.bitcoinwatch.org for updated exchange rates (last accessed June 14, 2012).

[7] Information about VirWox is taken from their website at www.virwox.com (date assessed June 14, 2012).

play and their credits converted into fiat currencies by their prison guards.[8] By way of example, Playerauctions.com sells currencies for these and other video games along with other resources such as digital armour, spells, and even clothing for the player's avatar. The company that owns the site reports $4 billion USD in player-to-player trading value. One can purchase about 20,000 units of World of Warcraft gold for about $24 USD.[9]

One might easily assume that video games are merely childish, that bitcoins are a passing fad, and that there is no value in the digital knowledge accumulated by a person over his or her lifetime. This is a mistake. These activities may not be tangible, and they may not be legal tender, at least in the traditional sense, but they are definitely valuable assets, whether monetarily or sentimentally. It is no longer good enough to only rake in the traditional, tangible assets. Modern executors forget this at their peril.

All executors, in complying with their legal and ethical obligations, must, at the very least, consider the implications of digital estate administration. For some estates, digital estate management is inconsequential. For others, such management will take on an overarching significance, particularly for those involved in online commerce, social media service provision, and the production and management of video games. Thus, executors, and those that provide services to executors, must understand:

- What are digital assets; and
- How digital assets should be administered, including:
    - The identification and location of digital assets;
    - The process by which digital assets may be extracted (both legally and technically); and,
    - The process by which digital assets are disposed, whether through direct transfer, valuation and liquation, or destruction.

This paper will examine the nature of digital assets and place them into a theoretical context and, thereafter, consider the practical considerations for proper digital asset management.

What are Digital Assets?

Essentially, a digital legacy is an umbrella term that captures the digital footprint left behind when a person dies. The digital legacy can, then, consist of digital assets, which may have value, or may consist of nothing more than sentimental memories. It can consist of ante-mortem activities and post-mortem memorialisation.

Digital assets are a form of property because, at its most basic, property is a relationship between the controller and the user of the thing which forms the basis of that relationship and draws them together.

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[8] See Danny Vincent, "China used prisoners in lucrative internet gaming work," *The Guardian* < http://www.guardian.co.uk/world/2011/may/25/china-prisoners-internet-gaming-scam> (last modified 25 May 2011).

[9] Information about this site is taken from http://www.playerauctions.com/help/content/itemmania/ (date assessed June 14, 2012).

It is important to remember that property is not a fixed term of art. As C.B. Macpherson once observed, "The meaning of property is not constant. The actual institution and the way people see it, and hence the meaning they give the word, all change over time."[10]

It can mean different things at different times and has various definitions depending on culture and context. Only 200 years ago, for instance, human beings were capable of being owned by other persons. Holding a person as property was only regulated and proscribed in Ontario (then Upper Canada) beginning with the *Act Against Slavery*, 1793[11] and was finally banned, and the practice criminalized throughout the British Empire, by the *Slavery Abolition Act*, 1833[12] and subsequent imperial anti-slavery legislation.

Intangible forms of chattel have been recognized at law for generations and range from incorporeal hereditaments such as hereditary titles of dignity (e.g. an earldom) to choses in action (i.e. the assignable right to sue and recover debt) to more recent common law and statutory creatures such as copyright, patents and other intellectual properties. In all of these cases, a property right has been created for a concept and not a physical thing although the concept may be memorialized on paper.

Under certain circumstances, even confidential information can also have rights or interests attaching, making them a form of property. Justice Lamer, as he was then, noted that intangible confidential information: "*... possesses many of the characteristics of other forms of property: for example, a trade secret, which is a particular kind of confidential information, can be sold, licensed or bequeathed, it can be the subject of a trust or passed to a trustee in bankruptcy. In the commercial field, there are reasons to grant some form of protection to the possessor of confidential information: it is the product of labour, skill and expenditure, and its unauthorized use would undermine productive efforts which ought to be encouraged. "*[13] Furthermore, seismic data is capable of being registered under personal property security legislation[14] and patient files can be used to secure debt and be seized by a creditor.[15]

The law, with respect to digital assets, continues to evolve. For instance, the Ontario Court of Appeal held, in *Tucows.com Co. v. Lojas Renner S.A.*, that a domain name was a form of personal property in Ontario, at least with respect to the *Rules of Civil Procedure*.[16] Judge Hamilton, of the United States District Court for the Northern District of California held, in *Claridge v. Rockyou Inc.*, that personally identifiable information, such as login information, also constituted a form of intangible property.[17]

Digital assets, then, are not necessarily a new form of property but a new way of expressing a particular form of intangible personal property. The term "digital assets", therefore, refers to pre-

[10] C.B. Macpherson, *Property: Mainstream and Critical Positions* (University of Toronto Press, 1978) 1.
[11] S.U.C. 1793, c. 7.
[12] (U.K.), 3&4 Will IV, c. 73.
[13] *R. v. Stewart*, 1988 CarswellOnt 110 (SCC) at para. 23.
[14] *Re Gauntlet Energy Corp.*, 2003 CarswellAlta 1209 (QB).
[15] *Re Axelrod,* 1994 CarswellOnt 319 (Ont. CA).
[16] *Tucows.com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 (CanLII) at 32.
[17] (11 April 2011) C 09-6032 PJH (N.D. Cal.).

existing enforceable incorporeal property interests created, manipulated, stored and accessed electronically in a digital format, often using semiconductor type memory such as ROM or flash memory, and accessible using a computer directly connected to that memory device or remotely via the Internet.

The type of digital asset can vary widely and could have a positive, detrimental, or neutral effect on the estate. They can include electronic representations of tangible personal property, electronic representation of non-physical assets such as bitcoins, intellectual property "inextricably bound in a digital form or recorded and available only in digital form (program code, online business, website, blog, domain name, "secret formula"), and legal, and personal and business records stored in a digital format. Furthermore, they can include digital evidence of indebtedness or electronic records or evidence "that may be damaging or adverse to the interests of the client, testator, or beneficiaries."[18] Occasionally, a third party independent solicitor may be required to identify and manage privileged information and deal with other e-discovery, civil procedure and general litigation matters.

Digital assets change into corporeal assets when printed on paper or otherwise converted into a physical thing using, for example, a 3-D printer.

Digital assets can be further delineated by where they are stored or how they are accessed and each type has important implications for estate planning:

1. Physically Controllable Digital Assets (PCDA)

PCDAs are digital assets stored in a digital memory storage device (such as a hard drive, flash drive, compact disc, etc.), which itself is a corporeal chattel capable of possession and ownership, but care must be taken in distinguishing between ownership of the digital asset and ownership of the storage device.

2. Controlled Access Digital Assets (CADA)

CADAs are digital assets stored online and accessible only through a membership or subscriber-based service using a client identity authentication process such as a username and password. The service may be free or require payment for access or ongoing use. Ownership of the digital asset generally rests with the member/subscriber and usage is governed by terms of service set out in the terms of use agreement or contract promulgated by the service provider. Examples include Flickr, Youtube, Gmail, Twitter, and Facebook.

This form of digital asset is riskier for estate administration purposes because access to the property is governed by the service provider's terms of service, which can change. As a recent article on such services noted:

"We put our data -- our websites, photos, bookmarks, email and more -- on their sites. But they can, and do, change their terms of service at will, doing what they please with what we've put

[18] Jerrard Gaertner, "Digital Legacy a Minefield of Risk." *The Bottom Line* 28:6 (May 2012) 15 at 15.

on their servers. And sometimes they just shut down the services they've been providing. They may do it for good reasons, or absurd ones. It doesn't matter. The point is, they can."[19]

Furthermore, the terms of service may prohibit the transference of account details to any third party such as an heir or executor. This potentially threatens the executor's ability to comply with his or her duty. Facebook, to take an obvious example, states the following in its terms of use (which it calls a "Statement of Rights and Responsibilities"):

"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.
...
You will not share your password, (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account.

You will not transfer your account (including any page or application you administer) to anyone without first getting our written permission."[20]

This creates an unusual situation in that Facebook makes it clear that these Controlled Access Digital Assets stored on their site belong to the author of the asset. However, at the same time, the company assert that, despite that legal ownership, the author does not have a right to convey that ownership to another, after death, when the only access to it, for extraction purposes, is via Facebook's login process.

Facebook's policy is also in potential conflict with Canada's *Copyright Act, which* grants the author of a work explicit right of transfer a digital asset (assuming, of course, that the CADA in question is copyrightable within the meaning of the statute):

"The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent."[21]

Furthermore, the author of such a digital work has "moral rights" in the work, automatically, which serves to protect, *inter alia*, the integrity of the work and the author's right to be associated with the work by name. Moral rights cannot be transferred but can be waived and Facebook, for instance, does not appear to require the waiving of moral rights as a term of service. Moral rights do pass by succession:

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[19]Dan Gilmour, "Another big Web company erodes user trust" (2010) online: *Salon.com* <http://bit.ly/hPZkGJ> (last modified 17 December 2010).

[20] Facebook Inc., "Statement of Rights and Responsibilities" online: Facebook.com <http://www.facebook.com/terms.php> (last modified 4 October 2010).

[21] *Copyright Act*, RSC 1985 c. C-42, s. 13(4).

"Moral rights in respect of a work subsist for the same term as the copyright in the work.

> *The moral rights in respect of a work pass, on the death of its author, to*
> *(a) the person to whom those rights are specifically bequeathed;*
> *(b) where there is no specific bequest of those moral rights and the author dies testate in respect of the copyright in the work, the person to whom that copyright is bequeathed; or*
> *(c) where there is no person described in paragraph (a) or (b), the person entitled to any other property in respect of which the author dies intestate."*[22]

Thus, an argument could be made that Facebook's terms of service may unreasonably infringe on the copyright and moral rights of the author of the created works stored on the author's Facebook page by preventing a lawful executor from gaining access to this property. It may even be arguable that, by refusing access to the digital estate, the service provider is meddling in the estate and thereby becomes an *executor de son tort.* In so doing, the service provider is held to the same standard as an executor and becomes liable to the beneficiaries for the preservation and transference of the digital asset.

An executor de son tort is ""*One who assumes the office of executor, despite the lack of appointment to that position by the deceased or by the court, on the failure of the deceased to make such a selection ... Meddling with the goods of the deceased is sufficient to render one an executor de son tort. An executor* de son tort *'becomes liable to the rightful representatives and other interested persons, to the extent of such assets as he has received less any proper payments he has made'*."[23]

Furthermore, the very nature of these terms of use documents (also known as End User Licence Agreements or "EULAs") is questioned academically. As one commentator put it: "...they fail because contracts cannot cheaply create default rules that bind large and shifting populations...[and] 'Codes of Conduct' which are now often tied to EULAs, create wonderful tort-like rules that cannot be enforced by the people who are armed."[24]

Extending the argument even further, it is possible, by analogy, to argue that these terms of use or EULAs are the digital equivalent of standard form printed documents, which the Ontario Court of Appeal has held may not be enforceable contracts under certain circumstances:

"In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the

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[22] *Ibid., at* s. 14.2.

[23] *Re She (Estate Of)*, 2005 ABQB 772 at para. 12 (Alta. Q.B.).

[24] Joshua A.T. Fairfield, "Anti-Social Contracts: The Contractual Governance of Virtual Worlds (2008) 53 McGill L.J. 427at 432.

absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or non est factum*."*[25]

It is easy to imagine, when people agree to these terms of use in a *pro forma* way without reading or understanding them that courts could find them unenforceable for testamentary purposes, particularly since these terms are often written without considering Canadian law and may unnecessarily infringe upon statutory rights relative to succession and intellectual property.

Inventorying and Extracting Digital Assets

The first priority for any executor is, of course, to determine the assets and then to secure and protect them. However, inventorying digital assets can be a Sisyphean labour depending on its type and location and the extent to which the decedent pre-planned for digital asset disposition.

The inventory process must move forward as quickly as possible, regardless of the type or form of digital asset, because of the risk of fraud and identity theft "through computer security, access and privacy violations and data exfiltration, each of which can provide the perpetrator with the raw material for identity theft, document forgery, personation, obtaining credit under false pretences, making a false claim, as well as extortion, theft, conversion and filing a false tax return."[26]

1. Administering PCDAs

It is very important for the estate to move quickly to identify all computers, including tablets and smart phones, where PCDAs may be lurking as any data on them could be copied or tampered with, thereby exposing the executor to liability. If encrypted or password-protected, the memory storage device may have to be unlocked using a specialised computer forensics service.

A formal digital forensic examination may also be required for the assets where:

- "A legally admissible reference copy of digital evidence is needed;
- Digital legacy data is complex, voluminous or has been obfuscated;
- The content of client or testator hard drives is unknown;
- Data has been password-protected, but passwords are lost or unknown;
- Litigation or statutory matters require a complete catalogue or digital legacy information (i.e. for e-discovery or taxation purposes);
- Activities of various computer/account users must be analyzed to determine who did what and when;
- Personal, medical and social media digital legacy data may impose specific obligations on the data custodian under PIPEDA."[27]

Once the data has been obtained and mirrored for preservation purposes, executors should review all of the data and give consideration to whether ownership of the memory storage

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[25] *Tilden Rent-A-Car Co. v. Clendenning*, 1978 CarswellOnt 125 (C.A.) at para. 33.

[26] Gaernter, *supra*, at 18.

[27] Gaertner, *supra* at 18.

device is separate from the ownership of the digital assets contained therein. The memory storage device may belong to the decedent or to some other person or corporation, such as an employer. Likewise, the contents may belong to the decedent or to some other person or corporation or any combination of such persons or corporations. Even if both the storage device and the contents belong to the decedent, the decedent's instructions could require the executor to divide ownership between several beneficiaries.

Thus, the executor may have to consider any of these possible outcomes:

1) The transfer of the digital memory storage device and its contents to the rightful owner or specified heir, *in toto*; or,

2) The extraction of the digital assets from the digital memory storage device and:
   a) The transfer of the storage device (such as a computer) to the rightful owner or specified heir, and;
   b) The transfer of some or all of the digital assets to the rightful owner or specified heir using,
      i) a new digital memory storage device; or,
      ii) converting the PCDA into a Controlled Access Digital Asset by uploading the digital asset to the web for online transference.

2. Administering CADAs

The administration of CADAs can be the most challenging type of asset to administer. Firstly, the executor is faced with an almost impossible task of finding online assets unless the decedent left an inventory of such services or signed up for a digital asset management service.[28] Executors can, however, retain certain service providers who will trawl the internet looking for account names tied to a particular email account but this is an imperfect solution as different email addresses could be used, some of which might be unknown to the executor.

This is why it is so important for a testator to prepare a digital asset management plan, in advance, with their lawyer that harmonizes with his or her Last Will and Testament. Unfortunately, usernames and passwords must be kept secret and should be changed regularly while online services can be added and deleted all of the time. Testators, unless unusually

[28] Digital asset management services, which vary widely in terms of security and legality, allow a person to inventory all of their digital assets, including online services, along with usernames, passwords and post-mortem instructions. A "digital executor" is named by the person who is provided access to the data upon satisfactory provision of proof of death. The digital executor can then download or delete such assets in accordance with the instructions of the decedent. There are a host of unexamined implications, particularly for such services that do not require a valid Last Will created in conjunction with the service. For example, what if a person named a digital executor that was not the same person as the person's executor named in his Last Will? The digital executor, who has no lawful authority to act, would be provided all of the material necessary to act even if such action conflicts with the duties of the lawfully appointed executor. The digital asset management service would, in effect, be intermeddling with the estate and usurping the role of the executor and, as a result, could find themselves being sued by the estate as an *executor de son tort* if such a transference results in losses to the estate. Users need to be aware that the statements or promises made by such service providers may not conform with the legislative reality established in their place of domicile.

conscientious, will not remember to constantly revise inventories (whether online or in a memorandum) as details change.[29]

A formal forensic examination may be required in order to reconstruct or consolidate transactions created by internet aliases or avatars or where a material asset or liability may exist online but not conducted through a financial institution or mediated by SWIFT.[30]

Secondly, as discussed above, the extraction of CADAs for estate administration purposes is complicated by the online service's terms of use and its inherent conflict with the executor's duties imposed by law.

Ontario's testamentary framework is certainly broad enough to encompass digital assets. According to Ontario's *Succession Law Reform Act*, a "person may by will devise, bequeath or dispose of all property (whether acquired before or after making his or her will) to which at the time of his or her death he or she is entitled either at law or in equity..."[31] For the transfer to be valid, the will must be in writing.[32]

To further underscore the point, Ontario's *Estate Administration Act* states that all property, including, presumably, digital assets, belonging to the decedent pass to the decedent's personal representative:

"*All real and personal property that is vested in a person without a right in any other person to take by survivorship, on the person's death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his or her personal representative from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of the person's debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.* "[33]

The statutory language is certainly clear that digital assets, assuming they are property, are personal property and, therefore, can be transferred by Will or by operation of intestate succession and, as such, are automatically vested in the decedent's executor who is responsible for passing this property to the beneficiaries.

However, the extent to which the executor can "step into the shoes" of the decedent with respect to CADAs, such as email accounts and their contents, has not yet been clarified. The

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[29] It is important to note that Ontario's *Electronic Commerce Act*, S.O. 2000, c. 17, s. 31(1) specifically excludes Wills, codicils and powers of attorney from its provisions. Thus any electronic or digital "Will" is invalid. In addition to a variety of strategies for post-mortem management of digital assets, testators should also consider including language to cover digital assets in their power of attorney for property to give their attorney authority to deal with their digital assets while he or she is alive but unable to manage them.

[30] Gaertner, *supra*, at 18.

[31] R.S.O. 1990, c. S.26, s. 2. Similarly, spouses and next-of-kin take all the property of the decedent when the decedent dies intestate by operation of Part II of the statute. .

[32] *Ibid*., at s. 3.

[33] *Estate Administration Act*, R.S.O. 1990, c. E.22, s. 2 (1).

online service provider's position in prohibiting the use of the account by others and the sharing of usernames and passwords, for example, are reasonable in order to protect against the very real threat of identity theft, fraud or other crimes.[34] Obviously, a compromise between such rules and the role of the estate trustees, to whom all personal property devolves upon death, must be found.

Until such clarity is found, whether provided by statute or judicial decision, executors are left with three possibilities:

- Executors could simply use found or acquired passwords to gain entry to the accounts, regardless of the terms of use, on the theory that it is easier to "ask forgiveness than permission". This can be accomplished using the "forgot my password" function, for example, but is predicated on access to the applicable email account.

- Executors could attempt to contact the online service provider, identify themselves, and provide a death certificate and request a copy of all data. This can be problematic as many such service providers are notoriously difficult to reach by telephone and only provide general email contacts. Furthermore, the service provider could, upon receipt of a proof of death, unilaterally delete or lock the account without providing the data to the executor, despite the risk of finding themselves liable as executors *de son tort*.

- The executor could make an application for directions to a court having jurisdiction over the service provider to force access. By way of example, in 2004, the family of Justin Ellsworth, a deceased soldier, convinced a Michigan probate court to force Yahoo! to release his emails. Rather than granting access to the account, however, the company presented the family with a compact disc containing the contents of the account.[35]

None of these options is particularly ideal and statutory intervention would be welcome. Some American states have already done so to clarify the role of the executor vis-a-vis CADAs.

Valuation and Disposition of Digital Assets

While digital assets, whether a kilobyte or several terabytes, can have value, it is important to note that value does not necessarily mean monetary value. An asset may have no cash value but hold significant and even incalculable emotional or sentimental value as an *aide memoire*. Some digital assets, such as social media profiles, form an important part of the grieving process for friends and family.

Thus, once the inventorying and extraction process has been completed, executors must turn their mind to the unenviable task of deciding what should be done with the digital assets they have located. Depending on the nature of the digital asset, and in the absence of written instructions from the decedent, the range of disposition for executors can include:

[34] See Sara M. Smyth, *Cybercrime in Canadian Criminal Law* (Toronto: Carswell, 2012) at 43-59.

[35] See, for instance, http://on.msnbc.com/t11Swl (date accessed 11/17/2011)

- Transferring the digital asset directly to a beneficiary;
- Appraising and vending the digital asset in the marketplace;
- Preserving or memorializing the digital asset as part of the digital legacy of the decedent to share an important message or assist friends and family during the grieving process; or,
- Destroying the digital asset (and the extent to which the asset should be destroyed).

Some digital assets lend themselves well to an easy decision-making process. Business records, domain names, and intellectual property assets can be sold to generate capital for the estate and its beneficiaries.

For instance, domain names are actively traded in the secondary market with prices ranging to the tens of millions of dollars depending on demand. Shorter domain names are more valuable than longer ones with suffixes (called top level domains or TLDs) such as ".com" being much more valuable than a ".net" TLD. Domain names can be electronically or professionally valued with the higher value ones requiring a more complete "human" analysis. Selling a domain name is generally facilitated by a domain name broker or agent.

Websites and web businesses, on the other hand, are valued much like any other business with an examination of its cash flow, history, and stability of earnings and, like any other "brand" in the marketplace, the sale must be handled carefully to avoid tainting or diminishing the value and goodwill in the business. Executors can retain brokers and specialists to sell internet web properties, websites, and businesses.

More challenging are digital assets with significant sentimental value. The symbolic role of the social media profile as a means for bereaved friends and family to communicate with the decedent must be remembered. Hostility and anger can be directed at the executor who too quickly terminates the social media site account.

In a systematic review of 205,068 comments posted to 1,369 MySpace profiles, the authors of one study found that: *"...sharing memories of the deceased, posting updates from their own lives, and leaving comments that evidence a desire for maintaining connections with the deceased*" were all examples of online memoralization.[36]

The study went on to note that: *"Shortly following the death of a user, friends express shock and grief. Survivors continue to write comments for years after the death of their friends, sharing memories, and personal updates, and connecting to the deceased. Postmortem comments demonstrate attempts by users to continue connecting with the dead, at least on some level, and resemble a variety of other communication practices with the deceased, including Ouija boards, letters, and private journals."*[37]

[36] Jed R. Brubaker and Gillian R. Hayes, "We will never forget you [online]": An Empirical Investigation of Post-mortem MySpace Comments" (Proceedings of the ACM 2011 Conference on Computer Supported Cooperative Work, Hangzhou, China, 19-23 March, 2011) at 7.
[37] Ibid., at 8-9.

Recognising this, Facebook.com provides for a process called memoralization, which, upon receipt of proof of death, results in the Facebook account of the deceased being locked, so that no one can log in and change the profile, but allows friends and family to continue to use the page as a gathering place for posting updates and communicating, metaphorically, with the deceased.

Thus, the executor must carefully consider what to do with online digital assets, particularly social media websites such as Facebook, in the absence of instructions.

Finally, it is also important for the executors to maintain the confidentiality of digital assets that may not be otherwise protected by law such as confidential business information. The Supreme Court of Canada has noted that, while confidential information can be a form of personal property, its confidentiality cannot be taken and, therefore, there is no theft, at least within the meaning of the federal *Criminal Code*.[38]

Conclusion

Some 2000 years ago, Quintus Horatius Flaccus, the Roman poet, declared, "I have executed a memorial longer lasting than bronze". It would be tempting to believe that one's digital legacy has such permanence.[39] And, in some respects, it could be true but there is likely more truth in Shakespeare's observation that virtue, or in this case, digital assets, are written in water.[40]

Water is a useful metaphor for digital assets; they are just as fluid, ever-changing, and dynamic, which presents both challenges and opportunities for executors and those who provide services to them. And, like water, digital assets can simply slip through one's fingers without care.

This is the dawn of the digital legacy management age, as more and more people who have created digital content pass away. The stream, in other words, will grow into a river.

[38] See *R. v. Stewart*, 1988 CarswellOnt 110 (SCC) at para. 35. Lamer J held: "... information per se cannot be the subject of a taking... Confidential information is not of a nature such that it can be converted because if one appropriates confidential information without taking a physical object, for example by memorizing or copying the information or by intercepting a private conversation, the alleged owner is not deprived of the use or possession thereof. Since there is no deprivation, there can be no conversion. The only thing that the victim would be deprived of is the confidentiality of the information."

[39] *Odes*, III.

[40] *Henry VIII*, IV:2.