I'LL BE BACK? THE COMPLICATIONS HEIRS FACE WHEN TERMINATING A DECEASED AUTHOR'S ONLINE COPYRIGHT LICENSES

I. THE RIGHT OF TERMINATION AND THE INTERNET: AN INTRODUCTION TO THE COMPLICATIONS FACED BY HEIRS OF ONLINE AUTHORS

In the 1930s, two high school students created a character with superhuman strength and abilities.[1] In their youth and naivety, these two students exchanged Superman and all of their rights to the character to a corporation in return for $130.[2]

In 2004, the Superman franchise was worth over one billion dollars.[3] When Siegel and Shuster died, they were broke and alienated from the fortune generated by their character.[4]

Thanks to copyright law reforms, however, the two authors' heirs possess the legal ability to terminate a portion of those grants.[5] The heirs have "another bite of the apple," so to speak.[6] "In the spirit of Siegel and Shuster's character Superman," the heirs exercised this right of termination in 1999 and "have persevered to regain the copyright granted in 1938."[7]

Fast forward to today. In a new digital world, naive authors and artists transfer their rights by millions through email, blogs, and social media networks like Facebook and Instagram.[8] Not unlike the naive Jerry Siegel and Joe Shuster, who granted the rights to Superman to Time Warner (then Warner Communications) in 1933, millions of everyday citizens who lack bargaining power and legal finesse lose their valuable copyrights to online giants.[9] However, the Siegels and Shusters of the digital world are not the only victims.[10] The authors of online copyrighted material and their estate

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1. Siegel v. Warner Bros. Entm't Inc., 658 F. Supp. 2d 1036, 1042 (C.D. Cal. 2009).
2. *Id.*
3. Elliot Feldman, *Who Owns Superman? The Sad Story of Superman Creators Jerry Siegel and Joe Shuster*, YAHOO! VOICES (July 2, 2007), http://voices.yahoo.com/who-owns-superman-sad-story-superman-creators-414453.html?cat=49.
4. Katrina Klatka, *Superman's Heirs Successfully Terminate Assignment of Copyright with DC Comics*, HAHN LOESER & PARKS LLP 1 (2008), http://www.hahnloeser.com/references/755.pdf.
5. *Id.*
6. Betty Wheeler, *A Second Bite of the (Copyright) Apple for Songwriters, Recording Artists and Other Creators*, INT'L BLUEGRASS MUSIC ASS'N, https://ibma.org/node/125 (last visited May 14, 2013).
7. Klatka, *supra* note 4, at 2.
8. *See* Wheeler, *supra* note 6.
9. *Id.*
10. *See* Richard A. Magnone, *Probate and Estate Planning Law and Virtual or Digital Assets*, ILLINOISATTORNEYBLOG (Nov. 5, 2010, 11:12 PM) http://illinoisattorneyblog.blogspot.com/2010/11/probate-and-estate-planning-law-and.html.

planners face complexities when planning digital estates, often leaving a superhuman challenge for an heir seeking to recapture the author's work.[11]

Many heirs are unaware that they possess such a right at all, not only because of complex user agreements or user naivety, but also because the very nature of certain online technologies, such as email, is still under debate.[12] The Internet presents wide opportunities for exposure, allowing a previously unknown artist to create incredible contributions to the literary, visual arts, or musical industries and become discovered, much like Siegel and Shuster.[13] Like Siegel and Shuster, many authors unknowingly agree to the terms of service prior to publishing such works online—terms of service that usually include provisions that grant or license to the website a user's intellectual property rights, prohibit transfer or inheritance of accounts, or destroy the right to terminate the grant or license.[14] Most people do not actually read the terms of service when they agree to use an online service.[15]

This comment is divided into six parts. Part II explains the relevant federal copyright laws.[16] This section explains what is subject to copyright protection, defines the right of termination, and explains how copyright law distinguishes between works created before and after January 1, 1978, and those works granted before and after the same date.[17] Part II further explains which copyright-appropriate works are ineligible for reversion to the author or the author's heirs.[18] Part III examines the property law-copyright law dichotomy on the Internet.[19] Part IV discusses the relevant terms of service that popular social media websites and email providers require in a user agreement.[20] Part V explains why preserving the property rights of digital assets in turn preserves the intellectual property interests in the content.[21] Part VI discusses state, international, and federal attempts (or lack thereof) to adjust law to technology's rapid evolution.[22] Part VII discusses how cybercrime statutes complicate legal and layman

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11. *Id.*

12. *See* Richard A. Magnone, *A New Breed of Assets for Planners*, ILLINOISATTORNEYBLOG (Nov. 8, 2010, 11:42 AM) http://illinoisattorneyblog.blogspot.com/2010/11/new-breed-of-assets-for-planners.html.

13. Melena Ryzik, *Web Sites Illuminate Unknown Artists*, N.Y. TIMES, June 18, 2012, at C1, *available at* http://www.nytimes.com/2012/06/18/arts/design/Web-site-gives-artists-fame-in-times-square.html?_r=0.

14. *About*, TERMS OF SERVICE; DIDN'T READ, http://tosdr.org/about.html (last visited Apr. 1, 2013).

15. *Id.*

16. *See infra* Part II.

17. *See infra* Part II.

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

22. *See infra* Part VI.

understanding of copyright law on the Internet.[23] Finally, Part VIII explains why addressing these issues is important.[24]

II. AMERICAN COPYRIGHT LAW

A. Copyright Law Generally

To qualify for copyright protection, a work must be an author's original work, "fixed in [a] tangible medium of expression."[25] The owner of a copyrighted work has the exclusive right to adapt, distribute, reproduce, and publicly display and perform that work.[26] Copyright protection is not immortal; the duration of copyright protection depends on the original date of copyright of the work, with the most noticeable statutory shift applying to works created before and after January 1, 1978.[27] Only certain categories of work are subject to a copyright: literary, musical, dramatic, pantomime and choreographic, pictorial, graphic, sculptural, audiovisual, sound recordings, and architectural.[28]

When an author creates photographs, poems, songs, or other creative items, those items are immediately copyrighted upon creation.[29] When a user publishes works of art through a social media or online publishing tool, that work is also immediately copyrighted.[30] Neither the author nor the website needs to register or pay a fee for the copyright to take effect; however, to enforce the copyright, the owner must register it with the United States Copyright Office.[31]

Copyright protection originally spanned fourteen years, with a renewal term of an additional fourteen years available.[32] Congress expanded the terms to twenty-eight years in 1909 for protection duration of fifty-six years.[33] From 1976 to 1998, Congress continued to alter the durations of the original copyright protection term and renewal term.[34] Finally, in 1998, Congress passed the Sonny Bono Term Extension Act, which added yet

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23. *See infra* Part VII.
24. *See infra* Part VIII.
25. STEPHEN M. MCJOHN, INTELLECTUAL PROPERTY 15 (4th ed. 2012).
26. *Id.*
27. 17 U.S.C. § 302(a) (2006).
28. MCJOHN, *supra* note 25, at 48.
29. *Id.* at 9.
30. *See id.*
31. HOWARD C. ANAWALT, IP STRATEGY COMPLETE INTELLECTUAL PROPERTY PLANNING ACCESS AND PROTECTION 109 (2012).
32. Stephen K. Rush, *A Map Through the Maze of Copyright Termination: Authors or Their Heirs Can Recapture Their Valuable Copyrights*, PRIMERUS BUS. L. INST. E-NEWSL. (Mar. 2011), http://www.primerus.com/business-law-articles/a-map-through-the-maze-of-copyright-termination-authors-or-their-heirs-can-recapture-their-valuable-copyrights-11232010.htm.
33. *Id.*
34. *Id.*

another termination period opportunity that differentiated between works created before and after January 1, 1978.[35] This distinction is particularly relevant when analyzing the right of termination.[36]

B. Copyright Protection Applies to Copyrighted Material and Not Material Objects

Copyright protection applies only to the intellectual property, not the "material object in which the work is embodied."[37] For example, when an artist creates a painting, he or she owns the material item itself and the copyright to the art.[38] If the artist sells the painting, he or she retains the copyright to that work, even if he or she sells the tangible item.[39] The purchaser of the painting only buys the property rights to the material asset, but the artist can sell all or part of the copyright interests as well, either to the purchaser of the painting or to a separate party.[40] Intellectual property rights and property rights are distinct, and the laws that govern copyrights and property rights are likewise distinct.[41]

C. Right of Termination

The owner of a copyright has the exclusive right to give away his or her copyright interests.[42] The transfer of copyright ownership is effective only when the owner's or owners' agent signs a written record of the transfer.[43] The "execution of grant" is said to take place when the transfer actually takes place, or in cases when the rights are transferred but the work is not complete, the transfer takes place when that work is created.[44] Similarly, an author can give to a third party a license that allows the author to retain the ownership of the copyright but provides the licensee certain privileges and rights to the copyright.[45] A right of termination is the copyright author's or author's heirs' ability to terminate such a grant or license and recover full copyright ownership of the work.[46] Congress saw

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35. *Id.*
36. *See id.*
37. 17 U.S.C. § 202 (2006).
38. MCJOHN, *supra* note 25, at 126.
39. *Id.*
40. *Id.*
41. *Id.*
42. ANAWALT, *supra* note 31, at 106.
43. *Id.*
44. Adam Holofcener, *The Right to Terminate: a Musicians' Guide to Copyright Reversion*, FUTURE MUSIC COALITION (Feb. 16, 2012), http://futureofmusic.org/article/fact-sheet/right-terminate-musicians%E2%80%99-guide-copyright-reversion.
45. David Buschell, *Understanding Copyright and Licenses*, SMASHING MAGAZINE (June 14, 2011), http://www.smashingmagazine.com/2011/06/14/understanding-copyright-and-licenses/.
46. Holofcener, *supra* note 44.

the need to protect authors like Siegel and Shuster—authors who usually possess less bargaining power and business finesse than the parties to whom they sell their copyrights.[47]

The Copyright Act of 1976 addressed whether and how an author and his or her heirs could terminate that grant and recover the full copyright to that work.[48] This Act also differentiated between works granted before and after 1978.[49] If an author or his or her heirs granted the copyright to a work to another party on or before December 31, 1977, then not only does the author possess the right to recapture the copyright, but also the author's heirs, administrator, and executor possess the right of recapture.[50] The 1976 Act gave pre-1978 works an automatic renewal term that extended for another nineteen years for a total copyright protection period of seventy-five years (the Copyright Renewal Act of 1992 later replaced this renewal and provided all pre-1978 works a continuous 75-year protection term).[51]

Unlike those works granted before 1978, however, works granted on or after January 1, 1978, can only be recaptured if the author granted the work to another party.[52] If an author's heirs, administrator, or executor granted or licensed the rights of a work on or after 1978, then the right of termination is unavailable.[53] The Act provided these post-1978 works copyright protection for the duration of the author's life plus an additional fifty years.[54] The transfer may be terminated:

> [A]t any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.[55]

The evolution of the right of termination did not stop in 1976. Congress's 1998 Sonny Bono Term Extension Act, or CTEA, further extended the duration of copyright protection for yet another twenty years.[56] Coupled with the regulations set forth in the Copyright Act of 1976, works created on or before December 31, 1977, hold a copyright protection duration of ninety-five years from the creation of the work, and works

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47. Rush, *supra* note 32.

48. Lloyd J. Jassin, *Copyright Termination: How Authors (and Their Heirs) Can Recapture Their Pre-1978 Copyrights*, COPYLAW (2012), http://www.copylaw.com/new_articles/copyterm.html.

49. *Id.*

50. *Id.*

51. *Id.*

52. 17 U.S.C. § 203(a)(1–5) (2006).

53. *Id.*

54. *Id.*

55. § 203(a)(3).

56. 17 U.S.C. § 302(a), (e) (2006).

created on or after January 1, 1978, possess copyright protection for the life of the author plus seventy years.[57]

These dates are important when addressing the right of termination.[58] If an author granted his or her copyright rights to another before January 1, 1978, then volume 17, section 304(c) and (d) of the United States Code applies.[59] In layman's terms, this means that if an author or the author's heirs, executor, or administrator granted or licensed to another party his or her rights in a copyrighted work before January 1, 1978, then that grant or license may be terminated and the rights returned to the author (or the author's heirs, executor, or administrator) within a five-year window beginning at the latter of either fifty-six years (the duration of the original term), or January 1, 1978.[60] Thus, this five-year window occurs between fifty-six and sixty-one years after the copyright "vested."[61]

However, if an author granted his or her copyright rights to another after January 1, 1978, then volume 17, section 203 of the United States Code applies.[62] The grant can be terminated thirty-five years after the execution of the grant, so long as notice of termination is served between two and ten years from the effective date of termination.[63] This means that as early as twenty-five years after granting a copyright, the author or author's heirs can issue a notice of termination of that grant.[64]

The right of termination does not apply to works for hire (works created within the scope of the author's employment or created by an independent contractor).[65] Most social media websites, such as Facebook and WordPress, do not publish user material in this capacity; therefore, this exception does not affect the scope of this comment.[66]

D. The Importance of the Right of Termination

Congress recognized the lack of bargaining power unproven authors hold in relation to corporations and publishers, and in response, implemented the renewal term in the 1909 Act.[67] Corporations would circumvent that intention by requiring the authors to grant the renewal term as well as the original term so in the 1976 Act, Congress provided the right

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57. *Id.*
58. Rush, *supra* note 32.
59. *See* § 302(a). *See also* 17 U.S.C. § 304 (c)–(d).
60. *See* § 302(a). *See also* § 304 (c)–(d).
61. *See* § 302(a). *See also* § 304 (c)–(d).
62. § 302(a).
63. *Id.*
64. *Id.*
65. Buschell, *supra* note 45.
66. *See Statement of Rights and Responsibilities*, FACEBOOK (June 8, 2012), http://www.facebook.com/legal/terms [hereinafter *Facebook Statement of Rights*]; *Terms of Service*, WORDPRESS (Apr. 6, 2012), http://en.wordpress.com/tos/ [hereinafter *WordPress Terms of Service*].
67. *See Facebook Statement of Rights*, *supra* note 66; *WordPress Terms of Service*, *supra* note 66.

of termination, which gives authors the ability to reclaim what they may have lost through naive transactions and lack of bargaining power.[68]

The complicated nature of copyright laws may seem disconnected from the lives of social media users. However, most online web services require users to accept their terms of use agreements, and many of these use agreements include stipulations that require users to surrender certain (and sometimes very substantial) intellectual property rights upon registration.[69]

While it may be a user's responsibility to read a contract before agreeing to it, doing so is impractical—the average person would need 250 hours, or thirty workdays, to read all of the privacy policies to which he or she is annually exposed.[70] This does not include terms of service provisions, which are typically even longer.[71]

III. PROPERTY RIGHTS AND INTELLECTUAL PROPERTY RIGHTS IN CYBERSPACE

On November 13, 2004, Justin Ellsworth was killed in the Al Anbar Governorate in Iraq while serving as a United States Marine.[72] His actions saved the lives of eleven of his fellow Marines.[73] Justin used email to document his story so he could eventually create a historical collection for future generations.[74] Moved by the courage of his son, Justin's father, John Ellsworth, sought access to Justin's emails so he could complete the scrapbook.[75] Yahoo!, Justin's email service provider, repeatedly denied John's requests for access, and Justin's email account—and all of the content within it—faced deletion.[76] John took his case to a Michigan probate court in an attempt to gain access.[77] The probate court held that the contents of Justin's Yahoo! email account belonged to Justin and was

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68. *See* § 302(a).

69. *See Facebook Statement of Rights*, *supra* note 66; *Google Terms of Service*, GOOGLE (Mar. 1, 2012), http://www.google.com/intl/en/policies/terms [hereinafter *Google Terms of Service*]; *Twitter Terms of Service*, Twitter (Sept. 28, 2012), https://twitter.com/tos [hereinafter *Twitter Terms of Service*]; *WordPress Terms of Service*, *supra* note 66.

70. Mike Masinck, *To Read All of the Privacy Policies You Encounter, You'd Need to Take a Month Off From Work Each Year*, TECHDIRT (Apr. 23, 2012, 7:04 AM), http://www.techdirt.com/articles/20120420/10560418585/to-read-all-privacy-policies-you-encounter-youd-need-to-take-month-off-work-each-year.shtml.

71. *Why Most Consumers Don't Read Terms of Service*, ZONEALARM (May 29, 2012), http://www.zonealarm.com/blog/index.php/2012/05/why-most-consumers-dont-read-terms-of-service. For example, the iTunes terms of service agreement is roughly fifty-five pages long. *Id.*

72. Jennifer Chambers, *Bronze Star for Fallen Marine Stirs Proud Dad*, DETROIT NEWS (Mar. 1, 2005), *available at* http://www.justinellsworth.net/articles/detroit%20news%201mar05.htm [hereinafter Chambers, *Proud Dad*].

73. *Id.*

74. *Who Owns Your Emails?,* BBC NEWS (Jan. 11, 2005, 2:29 PM), http://news.bbc.co.uk/2/hi/uk_news/magazine/4164669.stm.

75. Chambers, *Proud Dad*, *supra* note 72.

76. *Id.*

77. *Id.*

therefore subject to probate as his personal property.[78] The holding in this case does not set a legal precedent, however.[79] Yahoo! abided by the court orders and allowed access to the emails, but Ellsworth's lawyer, Brian Dailey, said that the decision will not require Yahoo! to change its current policies.[80]

John Ellsworth's struggle illuminates the importance of digital asset estate planning and introduced important questions regarding online property ownership.[81] However, property rights and intellectual property rights are governed by different laws.[82] The photographs, stories, and other creations contained within Justin's email account are not unlike an inherited painting in that the items have separate property ownership interests and copyright interests.[83] In Justin's case, he owned both the property rights and the copyright rights to his creations.[84] The litigation focused solely on the property rights and not the copyright interests.[85]

A. How Terms of Service Differentiate Between Property Rights and Intellectual Property Rights

Many social media, blogging services, and email services require the user to license the copyrights of users' content to the web service provider upon registering for the service.[86] The author licenses the copyrights to his or her work to the web provider in these instances by agreeing to the terms of use upon registration.[87] These licenses are subject to the right of termination under volume 17, section 203 of the United States Code.[88]

These online services also contain terms of service provisions that typically prohibit the transfer of accounts, deny rights of survivorship, or forbid password sharing.[89] These provisions challenge heirs because if an heir is disallowed access to the property rights within the account, he or she cannot access the copyrights to the material.[90]

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78. *Id.*

79. Jennifer Chambers, *Family Gets GI's Email*, DETROIT NEWS (Apr. 21, 2005), *available at* http://www.justinellsworth.net/email/detnewsapr.htm.

80. *Id.*

81. *Id.*

82. McJohn, *supra* note 25, at 126.

83. *Id.*

84. *See Who Owns Your E-Mails?*, *supra* note 74.

85. Richard A. Magnone, *The Ellsworth Case with Yahoo!*, ILLINOISATTORNEYBLOG (Nov. 9. 2010 at 6:14 PM), http://illinoisattorneyblog.blogspot.com/2010/11/ellsworth-case-with-yahoo.html [hereinafter Magnone, *Ellsworth Case*].

86. *See* discussion *supra* Part II.D.

87. *See* sources cited *supra* note 69.

88. *See* 17 U.S.C. § 203 (2006).

89. *See Facebook Statement of Rights*, *supra* note 66. *See also Google Terms of Service*, *supra* note 69; *Terms of Service*, TWITPIC (May 10, 2011), http://twitpic.com/terms.do [hereinafter *Twitpic Terms of Service*]; *WordPress Terms of Service*, *supra* note 66.

90. Magnone, *Ellsworth Case*, *supra* note 85.

Digital asset inheritance is a relatively new concept in estate planning law (after all, the Internet is only twenty-three years old), but the property law aspect of the dialogue is alive.[91] This dialogue addresses the property aspect of digital assets—whether an heir can access an email or social media account, or claim the contents within these accounts.[92] This property aspect was the focus in Justin Ellsworth's case.[93] Inheriting the copyrights to that same content is an entirely different matter; terms of service often complicate an heir's access to intellectual property rights by claiming that the deceased user retains the copyrights (and thus preserving an heir's copyright interests) while preventing the heir from accessing those copyrights.[94] Therefore, the property law aspect of digital asset inheritance is crucial to the successful inheritance of the copyright interests in the same material.[95]

IV. PRIVACY POLICIES AND TERMS OF USE AGREEMENTS FOR ONLINE WEBSITES AND SOCIAL MEDIA SERVICES

The World Wide Web was invented in 1990.[96] Therefore, the Copyright Act of 1976's statutory update regarding grants of copyrights after 1978 will therefore apply to all copyrights originating on the Web and granted or licensed to online publishing and social media sites.[97] The rules in section 203, and not 302(a), govern the right of termination for online content.[98]

A. Facebook

When a user creates a Facebook account, he or she must agree to Facebook's Statement of Rights and Responsibilities.[99] In this agreement, a Facebook user agrees to give to Facebook intellectual property rights through a non-exclusive intellectual property license.[100] When the Facebook user posts photographs, videos, or written material or sends such

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91. David Green, *Estate Law in a Digital Age*, DOCSTOC (Jan. 5, 2012), http://premium.docstoc.com/article/81272384/Estate-Law-In-A-Digital-Age.

92. Michael A. Magnone, *A New Breed of Assets for Planners*, ILLINOISATTORNEYBLOG (Nov. 8, 2010, 11:42 AM), http://illinoisattorneyblog.blog.spot.com/2010/11/new-breed-of-assets-for-planners.html [hereinafter Magnone, *New Breed*].

93. Magnone, *Ellsworth Case*, *supra* note 85.

94. Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns A Descendent's Emails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 281 (2007).

95. *See* Green, *supra* note 91.

96. *WWWFaqs: Who Invented the World Wide Web?*, BOUTELL.COM (2012), http://www.boutell.com/newfaq/history/inventedWeb.html.

97. *See* 17 U.S.C. § 203 (2006).

98. *Compare* § 203 (referring to termination in statute title), *with* 17 U.S.C. § 302(a) (2006).

99. *Facebook Statement of Rights*, *supra* note 66.

100. *See id.*

information to another Facebook user via Facebook's messaging system, he or she effectively licenses to Facebook the rights to use the work and even transfer the license.[101] A Facebook user does not technically grant the copyright to Facebook, but the license Facebook acquires gives Facebook many of the same rights—Facebook can use or give away a user's work without notifying the user, who is also the legal copyright owner.[102] Even if a user terminates his or her Facebook account, which terminates the license granted to Facebook, the works that he or she posted could still be used by third parties to whom Facebook granted a license.[103] Furthermore, Facebook clearly explains that it can change its policies at any time, and by continuing to use the online service, a user accepts these changes.[104]

Facebook's terms of service specify that users will not transfer any "rights or obligations under [the] Statement to anyone else without our consent."[105] The terms also prohibit a user from sharing the account password or letting others access the account.[106]

If a Facebook user dies, the social media giant memorializes the user's page, allowing Facebook friends the chance to view the deceased user's page and leave posts.[107] Once Facebook memorializes an account, the account ceases to be accessible through the username and password.[108] Therefore, Facebook messages and photo albums that are closed because of privacy settings will be inaccessible.[109]

B. Google Gmail

When a user signs up for Gmail, he or she must agree to Google's terms of service.[110] Google's intellectual property statement explains:

> When you upload or otherwise submit content to our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works (such as those resulting from translations, adaptations or other changes we make so that your content works better with our Services), communicate, publish, publicly perform, publicly display and distribute such content. The rights you grant in this

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101. *See id.*

102. *Who Owns Photos and Videos Posted on Facebook or Twitter?*, L. OFFS. CRAIG DELSACK, LLC (2012), http://www.nyccounsel.com/business-blogs-Websites/who-owns-photos-and-videos-posted-on-facebook-or-twitter/.

103. *Id.*

104. *Facebook Statement of Rights*, *supra* note 66.

105. *Id.*

106. *Id.*

107. *Deactivating, Deleting, and Memorializing Accounts*, FACEBOOK (2012), http://www.facebook.com/help/?page=185698814812082.

108. *Id.*

109. *Id.*

110. *Google Terms of Service*, *supra* note 69.

> license are for the limited purpose of operating, promoting, and improving our Services, and to develop new ones. This license continues even if you stop using our Services.[111]

Like Facebook, a user licenses all copyrights to Google when he or she signs up for and uses Gmail.[112] Unlike Facebook, Google promises that it will attempt to provide the content of a Gmail account to "an authorized representative of the deceased person."[113] However, this attempt is not a guarantee.[114]

Google also differentiates between the Gmail account itself and the content within the account.[115] The account itself is a non-transferable service.[116] Therefore, it cannot be inherited.[117] Furthermore, when a Gmail account is not accessed for nine months, and an authorized representative of the user does not request the content, Google deletes the Gmail account.[118]

C. Twitter

Like most social media websites, Twitter requires users to agree to its terms of service.[119] Twitter attempts a licensing relationship with the user; the terms explain that the user will "retain . . . rights to any Content you submit, post or display" but that Twitter will also possess full license to the same material.[120] Upon the death of a Twitter user, a "person authorized to act on behalf of the estate" or someone whom Twitter determines is a "verified immediate family member" can request access to the Twitter

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111. *Id.*

112. *Id.*

113. *Accessing a Deceased Person's Mail*, GOOGLE (Mar. 22, 2012, 11:27 AM), http://support.google.com/mail/bin/answer.py?hl=en&answer=14300.

114. *Id.*

115. Backupify, *What Happens to My Gmail Account When I Die?*, LIFEHACKER (Mar. 6, 2012, 2:00 PM), http://lifehacker.com/5890672/what-happens-to-my-gmail-account-when-i-die.

116. *Id.*

117. *See* Zachary Knight, *What Happens To All That Digital Goodness You Have Purchased After You Die?*, TECHDIRT (Aug. 30. 2012, 8:31 AM), http://www.techdirt.com/articles/20120828/16191120192/what-happens-to-all-that-digital-goodness-you-have-purchased-after-you-die.shtml (explaining that "[i]f you cannot transfer your digital files to another person then you cannot technically bequeath them to an heir. However, you can still leave your entire account to someone else, but even that might hit some issues if the terms of service don't allow it"). *See also* Mike Masnick, *Appeals Court Destroys First Sale; You Don't Own Your Software Anymore*, TECHDIRT (Sept. 13, 2010, 7:31 AM), http://www.techdirt.com/articles/20100912/12212110968.html.

118. *See* Backupify, *supra* note 115.

119. *Twitter Terms of Service*, *supra* note 69.

120. *Id.*

account.[121] Twitter's help center does not explain if or how that person can recover the material or the licensing.[122]

Twitter differs from other social media and publishing websites because the posts, or tweets, are restricted to 140 characters.[123] Copyright law does not protect "short phrases or expressions."[124] Tweets are merely "short phrases or expressions" and are therefore not eligible for copyright protection, but certain services like Twitpic allow users to post material subject to copyright—photographs—to Twitter.[125] Therefore, some content posted to Twitter is subject to the right of termination.[126]

D. Twitpic

Noah Everett founded Twitpic in 2008, and so volume 17, section 203 of the United States Code applies to the copyrighted works posted through the online service.[127] Twitpic is a sharing service that lets users post photos and videos to their Twitter accounts "as they happen."[128] Unlike Tweets, the photos and videos posted to Twitpic are undeniably subject to copyright law.[129] Twitpic explains in its terms that while the user retains ownership over the copyrights, Twitpic acquires an extensive license to "use, reproduce, distribute, prepare derivative works of, display, and perform" the works without notification to the user and even for commercial purposes.[130] This license gives Twitpic all of the rights associated with copyright ownership under copyright law,[131] but according to its policy, the author and his or her heirs do not possess the right of termination.[132] Twitpic makes it clear that its license and all of the rights associated with it are "perpetual and irrevocable."[133]

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121. *How to Contact Twitter About a Deceased User*, TWITTER (Sept. 28, 2012, 11:39 AM), https://support.twitter.com/articles/87894-how-to-contact-twitter-about-a-deceased-user.

122. *Something's Not Working*, TWITTER (Jan. 19, 2013, 11:43 AM), https://support.twitter.com/groups/32-something-s-not-working.

123. *About Twitter*, TWITTER (2012), https://twitter.com/about (explaining that Tweets are "small bursts of information" restricted to 140 characters).

124. *Copyright Protection Not Available for Names, Titles, or Short Phrases*, U.S. COPYRIGHT OFF. (Jan. 2012), http://www.copyright.gov/circs/circ34.pdf.

125. Kyle-Beth Hilfer, *Tweet Tweet: Can I Copyright That?*, L. TECH. NEWS (Jan. 19, 2010, 11:44 AM), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202438916120.

126. *See* 17 U.S.C. § 302(a) (2006). *See also* 17 U.S.C. § 304 (c), (d) (2006).

127. John Spenceley, *How Twitpic's Founder Built on Twitter's Success*, SPROUTER BLOG (May 16, 2012), http://sprouter.com/blog/how-twitpics-founder-built-on-twitters-success/.

128. TWITPIC, http://twitpic.com/ (last visited May 14, 2013).

129. *Twitpic Terms of Service*, *supra* note 89.

130. *Id.*

131. *See* 17 U.S.C. § 106 (2006).

132. *Twitpic Terms of Service*, *supra* note 89.

133. *Id.*

E. WordPress

The popular blogging website WordPress requires its users to agree to terms of service, but it does not have a formal explanation for what happens to an account or the contents of the account if the account holder dies.[134] A member on the WordPress forum explains that an interested party must recover the account's logon information and unsubscribe the deceased WordPress user's account.[135]

A user's blog post is not the only work subject to copyright protection.[136] Many blogs encourage feedback and commenting, and whether copyright protection extends to these posts is up for debate.[137] Like the original blogs themselves, WordPress does not address posts by deceased users except through its user-contributed forum.[138]

WordPress's terms of service explain that a user gives Automattic (the company behind WordPress) "a world-wide, royalty-free, and non-exclusive license to reproduce, modify, adapt and publish the Content solely for the purpose of displaying, distributing and promoting your blog."[139]

F. Instagram

Kevin Systrom and Mike Krieger developed the Instagram photo sharing application in March 2010.[140] Users can quickly upload, transform, and share photos through Instagram or by posting to other social media sites such as Facebook and Twitter.[141] Like most other social media websites, Instagram also "does not claim ownership of any Content that you post on or through [Instagram]."[142] Instagram makes it quite clear that it has a very broad license over user content, stating that, "you hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the Service, subject to the Service's Privacy Policy."[143] Furthermore,

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134. *WordPress Terms of Service*, *supra* note 66.

135. Macmanx*, Comment to Deceased Follower*, WORDPRESS (June 18, 2012, 12:19 AM), http://en.forums.wordpress.com/topic/deceased-follower.

136. *Legal Guide for Bloggers*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/bloggers/legal/liability/IP (last visited May 14, 2013).

137. *Id.*

138. *See WordPress Terms of Service*, *supra* note 66.

139. *Id.*

140. *Instagram*, CRUNCHBASE (Apr. 2, 2013, 11:58 AM), http://www.crunchbase.com/company/instagram.

141. *Meet Instagram*, INSTAGRAM (Apr. 2, 2013, 11:58 AM), http://instagram.com.

142. *Terms of Use*, INSTAGRAM (2013), http://instagram.com/about/legal/terms/ [hereinafter *Instagram Terms of Use*].

143. *Id.*

Instagram can sublicense user content to third parties.[144] The terms of service explain that Instagram's use of user content can be used in advertising, even advertising that is not identifiable as a paid service.[145]

V. WHY TECHNOLOGICAL ADVANCES COMPLICATE AND CONFUSE COPYRIGHT AND PROPERTY LAW

These samples—Facebook, Google, Twitter, Twitpic, WordPress, and Instagram—possess a greater bargaining power than their users. Just as Siegel and Shuster did not know how successful their Superman character would become, a user may create a truly significant work and inadvertently give or license rights to their copyrighted works to these websites.[146] Additionally, many businesses and artists keenly interested in their copyrights (for example, musicians and photographers) use social media tools to promote their products and services.[147] An unsuspecting artist using Instagram as a method of showcasing his or her artwork may be unpleasantly surprised to find that Instagram used the artwork in an advertisement, and this use fell entirely in accordance with Instagram's terms of service.[148]

A. Property Law Affects Copyright Law in Cyberspace

Property law and copyright law are two separate systems.[149] Imagine that instead of digital assets, Justin Ellsworth created paintings. Suppose he granted a license to the copyrights of those paintings to a third party, but he retained the property rights. Upon his death, his estate inherited all of his personal property according to probate law.[150] However, say Justin's father knew of the paintings but he did not know how many Justin created or what they looked like. Justin's father would still rightfully inherit the paintings under probate law, and he would still inherit the copyrights and the right of

144. *Id*.

145. Craig Kanalley, *Instagram's New Terms of Service: 5 Things You Need to Know*, HUFFINGTON POST (Dec. 18, 2012 at 4:38 PM), http://www.huffingtonpost.com/2012/12/17/instagrams-terms-of-service_n_2317402.html.

146. *See* TERMS OF SERVICE; DIDN'T READ, *supra* note 14.

147. *See* Betty Arnold, *How Emerging Music Artists Use Social Media*, SOCIAL MEDIA TODAY (May 22, 2011), http://socialmediatoday.com/beaverbetty/298446/how-emerging-music-artists-use-social-media. *See also* Stephanie Mlot, *Social Media Boosts the Arts, But at What Cost?*, PCMAG.COM (Jan. 4, 2013, 8:30 AM), http://www.pcmag.com/article2/0,2817,2413832,00.asp.

148. *Instagram Terms of Use, supra* note 142. *See* TERMS OF SERVICE; DIDN'T READ, *supra* note 14.

149. MCJOHN, *supra* note 25.

150. *See* Magnone, *New Breed*, *supra* note 92.

termination of the licenses to the copyrights of those paintings.[151] Because Justin Ellsworth retained the property interest in his paintings, his estate would seamlessly inherit them.[152] If the third party to whom Justin granted the copyrights to his paintings did not allow his estate to rightfully take property ownership of those paintings, his estate would undoubtedly have a claim.[153] If this third party promised to destroy the paintings in ninety days unless accessed, then the right of termination that the estate inherited could not be exercised because the paintings would be destroyed.[154]

Digital assets are just like paintings in the sense that they have property interests and also copyright interests.[155] When a web service destroys the property interest (for example, by deleting the contents of an account) or blocks an heir from the inherited content, the web service interferes with the heir's personal property rights (for example, the right of enjoyment, control, and possession.)[156] Unfortunately, when an online service denies heirs the access to or destroys the content of the digital assets within a deceased user's account it not only destroys the property interest but also denies the heir the ability to exercise his or her copyright rights, including the right of termination.[157]

B. Illustrating the Property-Copyright Interest Dichotomy

The policies belonging to Facebook, Google, Twitpic, and WordPress, among other online websites offering similar services explain that they do not own the copyrights to user content.[158] In Justin Ellison's situation, Yahoo! explicitly admitted that it did not own the copyright to Ellsworth's email contents.[159] Therefore, the intellectual property rights should rightfully pass to the heirs.[160] However, as Ellsworth's case reveals, this is deceiving because without access to the property interests, the heir cannot realize the copyright interests.[161]

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151. Adam Holofcener, *The Right to Terminate: A Musicians' Guide to Copyright Reversion*, FUTURE MUSIC COALITION (Feb. 16, 2012), http://futureofmusic.org/article/fact-sheet/right-terminate-musicians%E2%80%99-guide-copyright-reversion.

152. Magnone, *New Breed*, *supra* note 92.

153. *Id.*

154. *Id.*

155. *See* Green, *supra* note 91.

156. *Bundle of Rights*, INVESTOPEDIA US (Apr. 2, 2013, 12:10 PM), http://www.investopedia.com/terms/b/bundle-of-rights.asp#axzz2J0t4BBVX.

157. *See* Magnone, *Ellsworth Case*, *supra* note 85.

158. *See Facebook Statement of Rights, supra* note 66; *Google Terms of Service*, *supra* note 69; *Twitpic Terms of Service*, *supra* note 89; *WordPress Terms of Service*, *supra* note 66; *Instagram Terms of Use*, *supra* note 142.

159. Green, *supra* note 91.

160. *Id.*

161. *See* Magnone, *Ellsworth Case*, *supra* note 85.

Even if a web service provider rejects a claim of exclusive ownership over the copyrights of content, it could still block access to the account because the property rights and intellectual property rights are separate legal arenas.[162] However, even though property law and intellectual property law are separate, governed primarily by state and federal law respectively, the two interests are closely linked.[163] Justin's father, John Ellsworth, would retain the property rights under probate law and he could access Justin's work as a property owner; he could also publish Justin's work as the heir to the copyrights.[164] However, if the Michigan probate court did not require Yahoo! to provide John Ellsworth the contents of his son's email, he would not be able to exercise his inherited intellectual property rights that were not under dispute.[165] Justin wanted to compile his emails into a book, but if the Michigan probate court denied John access, then he could not realize his son's dream, much less capitalize from the copyrights that he rightfully inherited.[166] Denying access effectively destroys the copyright interests that the heirs have in the online content, including (and often, especially) the right of termination.[167] Just as an heir cannot enjoy the copyright interests in a painting if he or she is denied access to a storage unit in which a painting is stored, an heir cannot enjoy the copyright interests in online material if he or she cannot access the decedent's email or social media account.[168]

If an heir cannot access the inherited copyrights, what kind of interest has he or she inherited? It is a smoke-and-mirrors approach unsuspectingly embedded in the terms of service of email and social media services. When an online service is reluctant to release content to heirs, deactivates a deceased user's account, or prevents access to the copyrighted material because the account has been memorialized, it inhibits the rights of the deceased user's heirs under section 204.[169]

C. Effect on the Right of Termination

Considering the distinction between intellectual property and physical property, policies describing how websites deal with a deceased user's account may not allow for the required thirty-five year grant or license to reach a point when a surviving spouse or child who holds the right of

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162. *Id.*
163. *See id.*
164. *See id.*
165. *Id.*
166. *Id.*
167. *See generally id.*
168. *See id.*
169. *See* 17 U.S.C. § 204 (2006).

termination under section 204 can exercise that right.[170] Meanwhile, these web service providers would retain the license to the copyrighted content.[171]

In essence, these online service providers have access to an incredible amount of photography, literary works, videos, and other copyrightable arts. When terms of service disallow access and heirs cannot exercise the right of termination, the service providers can use the deceased's copyrighted work indefinitely.

VI. STATUTORY SOLUTIONS: WHY CAN'T WE ALL JUST GET ALONG?

Federal law governs copyright law.[172] However, state laws addressing the property issues of digital asset inheritance and international copyright treaties have a significant impact on what happens when an email or social media user dies.[173] The Internet is widely used on all six inhabited continents.[174] This creates an unsettled jurisdictional problem in domestic and foreign courts addressing cyberspace issues.[175]

A. State Solutions to Digital Asset Access

Some states have attempted to create legislation that better protects heirs' rights over digital assets.[176] These statutes were not designed with copyrights in mind.[177] But, as previously discussed, providing heirs access to the content itself in a property law perspective allows the heirs to access the intellectual property rights in that content.[178] Therefore, these state laws are relevant when considering their impact on how easily an heir can access copyrighted content. The legislative intent behind these statutes focuses on family law and estate planning, but the direction in which digital asset inheritance legislation is moving towards may make it easier for heirs to realize inherited online intellectual property rights.[179]

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170. *Id.*

171. *Who Owns Photos and Videos Posted on Facebook, Instagram or Twitter?* L. OFFS. CRAIG DELSACK, LLC (Dec. 21, 2012), http://www.nyccounsel.com/business-blogs-Websites/who-owns-photos-and-videos-posted-on-facebook-or-twitter/.

172. *See* Copyright Act of 1976, 17 U.S.C. §§ 101–810 (1976).

173. *See supra* Part V.

174. *See Internet World Stats*, MINIWATTS MARKETING GROUP (June 30, 3012), http://www.internetworldstats.com/stats.htm.

175. Darrel C. Menthe, *Jurisdiction In Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. & TECH. L. REV. 69, 70–71 (1998), *available at* http://www.mttlr.org/volfour/menthe.html.

176. *See Law*, DIGITAL EST. RESOURCE, http://www.digitalestateresource.com/law (last visited May 15, 2013).

177. *See id.*

178. *See supra* Part V.

179. Magnone, *Ellsworth Case*, *supra* note 85.

1. Oklahoma

Oklahoma paved the way in post-mortem digital asset inheritance legislation. The Oklahoma Legislature addressed digital asset inheritance in 2012, stating, "The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites."[180]

This statute is vague in how it uses the terms "social networking website," "microblogging" website, and "short message service website."[181] The statute does not define these terms or clarify criteria for what constitutes a web service within the statute.[182]

This statute considers websites in the context of digital assets alone and does not address the copyright aspects.[183] Federal law supersedes state law, thus the statute's avoidance of copyright issues is not unfounded.[184] For example, if an heir inherits a painting, he or she inherits the painting as a tangible asset but does not inherit the copyright (assuming the deceased did not own the copyright to the painting).[185] The heir inherits the ownership rights of the painting as a material asset and can do whatever he or she wishes with that material object—he or she can sell it, destroy it, or even turn it into a tabletop.[186] The Oklahoma statute addresses websites from a digital asset perspective alone by allowing the executor or administrator to control or destroy the online content as he or she likes in the same manner that the heir of a painting can destroy or alter that painting.[187]

2. Connecticut

The Connecticut Legislature passed a statute that requires email service providers to release to the executor or administrator the contents of a deceased person's email account.[188] The executor or administrator must provide a copy of the death certificate, proof of appointment as the estate

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180. OKLA. STAT. ANN. 58, § 269 (West 2012).

181. *See id.*

182. *See id.*

183. *See id.*

184. Freida Gordon, *A Walk on the Wild Side: Little Known Intellectual Property Rights Can Make for a Malpractice Minefield*, COOPER-GORDON, LLP, http://www.cooper-gordon.com/CM/Articles/WALK-ON-THE-WILD-SIDE-LITTLE.asp (last visited May 15, 2013) ("Federal copyright law . . . supersedes all states' rights.").

185. MCJOHN, *supra* note 25, at 126.

186. *Id.*

187. *See* § 269.

188. CONN. GEN. STAT. ANN. § 45a-334a (West 2012).

executor or administrator, and an order from the probate court.[189] The Connecticut statute seems to narrow the property ownership right to only the digital assets held within the email account compared to the broader Oklahoma statute that allows access and control over not only email, but also other social media accounts.[190] The Connecticut statute, like the Oklahoma statute, only addresses the digital assets within the account—letters and photographs, for example—and not copyright issues.[191]

The Connecticut statute concludes by explaining that email providers, such as Google, are not required under the statute to violate "any applicable federal law."[192]

B. International Access, American Websites

The United States is a signatory to several international copyright and intellectual property treaties, including Berne, Universal Copyright Conventions of Geneva and France, Agreement on Trade-Related Aspects of Intellectual Property Rights, and the World Intellectual Property Organization's Copyright Treaty.[193]

In 1886, the Berne Convention for the Protection of Literary and Artistic Works originated as a way to provide mutual protection of copyrighted works across the national borders of the treaty's signatory countries.[194] An author in one signatory country can rest assured that his or her work will be given "national treatment," meaning that his or her work will be given protection equal to that of other works in the foreign signatory nation.[195] For example, France would not give a work originating in the

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189. § 45a-334a(b).

190. Minna Vallentine, *Digital Assets—Few Laws Legislate Access to Them After Death*, DIESMART (Jan. 27, 2012), http://diesmart.com/estate-planning/digital-assets-%E2%80%93-few-laws-legislate-access-to-them-after-death.

191. *Id.*

192. § 45a–334a.

193. *See International Copyright Relations of the United States*, U.S. COPYRIGHT OFF. (Nov. 2010), *available at* http://www.copyright.gov/circs/circ38a.pdf*; Contracting Parties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf (last updated January 15, 2013); *Universal Copyright Convention, with Appendix Declaration Relating to Articles XVII and Resolution Concerning Article XI 1952*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, http://portal.unesco.org/en/ev.php-URL_ID=15381&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited May 20, 2013); *Universal Copyright Convention as Revised at Paris on 24 July 1971, with Appendix Declaration Relating to Article XVII and Resolution Concerning Article XI*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., http://portal.unesco.org/en/ev.php-URL_ID=15241&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited May 20, 2013); *Members and Observers*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last updated Mar. 2, 2013); *Wipo-Administered Treaties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=1 (last visited May 20, 2013).

194. *A Brief History of Copyright*, INTELL. PROP. RTS. OFF. (2006), http://www.iprightsoffice.org/copyright_history.

195. SHELDON W. HALPERN, COPYRIGHT LAW: PROTECTION OF ORIGINAL EXPRESSION 18 (Carolina Academic Press, 2nd ed. 2010).

United States lesser protection than it would provide a native French work.[196] The United States did not become a signatory to the treaty until October 31, 1988, through a congressional act called The Berne Convention Implementation Act.[197] Congress passed the 1976 Act partially in preparation for this accession.[198]

1. The Right of Termination Was Not Invited to the International Party

The Berne Convention sets forth three basic principles for copyright protection across nations.[199] The first and second principles explain that the work of a foreign signatory nation must be given the same protections that the nation would give works created within its borders without discrimination, and such protection is automatically recognized without any process or formality on behalf of the author.[200] The third principle explains that the protection granted in a foreign signatory country is independent from the copyright protection that work would enjoy in its country of origin.[201] The Convention also sets forth "minimum protection to be granted" to works across borders.[202] The rights of translation, reproduction, and creation of derivative works are all examples of minimum protection, but the right of termination is not included.[203]

The right of termination provided by the 1976 Act is a unique right that is only enforceable in the United States.[204] Most countries do not offer similar reclaiming statutes.[205] Because the third principle explains that the protection granted by a foreign signatory nation is independent of the protection offered by the work's country of origin, this right of termination is not available in nations that do not offer similar protection.[206] Exercising the right of termination would not prohibit the grantee (historically, a music producer or a book publisher) from exercising the granted rights in other countries, unless the original transfer or license agreement never gave the grantee worldwide rights.[207]

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196. *Id.*

197. *Id.*

198. *Id.*

199. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited May 20, 2013).

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. Lesley Chuang, *Copyright Termination Rights: The Looming Battle for Music Industry*, ENT., ARTS & SPORTS L. BLOG (Oct. 4, 2011, 1:52 PM), http://nysbar.com/blogs/EASL/2011/10/copyright_termination_rights_t.html.

205. Holofcener, *supra* note 44.

206. *See Summary of the Berne Convention for the Protection of Literary and Artistic Works*, *supra* note 199.

207. Chuang, *supra* note 204.

2. Why the International Treaties Matter

By its very nature, the Internet is a global system.[208] Facebook alone boasts over one billion users, with 82% of those users residing outside of the United States and Canada.[209] The terms of agreement for the previously discussed online services do not restrict the licensing of the copyrights to United States soil, so the assignment is effective worldwide.[210] Therefore, even if the right of termination for online licensing and transferring could be resolved on a national level, the international dilemma remains problematic.

Of course, musicians, book authors, and other copyright owners have the same problem, but the inherent worldwide nature of the Internet creates a bigger problem for those authoring to it; the book industry, for example, only recently expanded its worldwide market, and it was through the Internet that it accomplished this.[211] Regardless, books and music written and published in the United States and offered to a worldwide market, either through online stores or book fronts, would be hard pressed to match Facebook's 82% non-United States and Canada audience.

C. Federal Law and the Internet

Web services are not exempt from the blame of all of this confusion. Many web service terms of agreement explain that once a user grants or licenses his or her copyrighted material to the web service, they can never be recovered (hence waiving the right of termination).[212] Twitpic is just one example of a service that claims to have an "irrevocable" license in a user's content.[213] Federal law simply does not allow this, for "[a]n agreement cannot stand if it acts contrary to termination, whether it arises after the grant in question, before it, or simultaneously in time."[214] Termination rights cannot be contracted away; therefore, the terms of service of many social media services blatantly violate federal copyright law.[215]

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208. *Internet World Stats*, *supra* note 174.

209. *Key Facts*, FACEBOOK, http://newsroom.fb.com/Key-Facts (last visited May 20, 2013).

210. *See Facebook Statement of Rights*, *supra* note 66; *Google Terms of Service*, *supra* note 69; *Twitpic Terms of Service*, *supra* note 89; *WordPress Terms of Service*, *supra* note 66.

211. Steve Wasserman, *The Amazon Effect*, NATION (May 29, 2012), http://www.thenation.com/article/168125/amazon-effect.

212. *See generally Twitpic Terms of Service*, *supra* note 89.

213. *Id.*

214. Peter S. Menell and David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 799, 833 (2009), *available at* http://scholarship.law.berkeley.edu/facpubs/1229.

215. *Termination Rights—Explained*, ASS'N INDEP. MUSIC PUBLISHERS (Feb. 13, 2011), http://www.aimp.org/copyrightCorner/2/Termination_Rights_-_Explained.

D. The Three Blind Mice: Federal, State, and International Laws and Online Copyright Inheritance

As previously discussed, if a website provides an heir with access to a deceased user's digital assets, or a court mandates that the Website provides that access, then the heir can realize the copyright interests that he or she inherited.[216] Without that access, the copyright interests are useless to the heir, even though the heir technically inherited those copyrights.[217]

Only five states have statutes addressing digital asset inheritance.[218] Needless to say, most Americans cannot rest assured that their state has a law in place that statutorily allows them to access inherited digital assets.[219] Without this access, section 203 of the Copyright Act, which provides the right of termination, is a dead letter as far as inherited digital assets are concerned.[220]

Because the World Wide Web is an international portal, even if the heir retrieves the online content and exercises his or her right of termination after thirty-five years, the grantee website against which he or she exercised that right could still have the same license internationally.[221] For example, if the deceased user licensed a photograph to Facebook and an heir exercised the right of termination, then Facebook would still be able to use that photograph in its on-site advertising to over 80% of its non-American users.[222] The Berne Convention, though it promises minimum protection for works across borders, is silent as to whether the right of termination would be included in that minimum protection in other signatory nations.[223] Due to the third Berne principle, a United States work will not have that same right in a foreign signatory nation.[224] This ambiguity will grow increasingly important as we become more globalized as a society.

VII. STATUTORY CONFUSIONS: HOW CYBERLAWS COMPLICATE THE SITUATION

The triage of state, federal, and international statutes are not alone in complicating an heir's right of termination. Cybercrime laws and efforts to protect copyrights often create more problems than they solve.

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216. *See supra* Part V.

217. *See supra* Part V.

218. *Law*, *supra* note 176. The five states that have digital asset and estate planning provisions include Connecticut, Rhode Island, Indiana, Oklahoma, and Idaho. *Id.*

219. *See generally id.*

220. *See generally supra* Part V.

221. *Internet World Stats*, *supra* note 174.

222. *See Key Facts*, *supra* note 209.

223. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, *supra* note 199.

224. *See generally id.*

A. Computer Fraud and Abuse Act

Congress passed the Computer Fraud and Abuse Act (CFAA) in 1986 to criminalize hacking into government computers.[225] Congress broadened its scope in 1994, extending the statute to private actions.[226] Congress again broadened the scope in 1996 to cover computers used in interstate or foreign commerce or communications.[227] In 2002 and 2008, Congress again broadened the scope of the CFAA to allow federal officers "more leeway when it [comes] to monitoring and prosecuting suspected cyber criminals" and also to punish those merely conspiring to commit cybercrimes.[228] Needless to say, Congress has a pattern of broadening the scope of the CFAA.[229]

The CFAA criminalizes unauthorized access of a protected computer, or access that exceeds authorized access.[230] A protected computer in interstate or foreign commerce or communications is interpreted to mean, essentially, any computer with an Internet connection.[231] The CFAA also prohibits password trafficking, computer extortion, computer fraud, and the theft of financial information.[232]

Circuit courts have not agreed on whether the CFAA should be interpreted to include violations of website terms of service.[233] The Ninth Circuit Court of Appeals wanted to exclude such an interpretation from the CFAA's anti-hacking provisions; Judge Alex Kozinski explained, in the majority opinion, that "[u]nder the government's proposed interpretation of the CFAA, posting for sale an item prohibited by Craigslist's policy, or describing yourself as 'tall, dark and handsome,' when you are actually short and homely, will earn you a handsome orange jumpsuit."[234]

Unfortunately, the United States government did not appeal the Ninth Circuit's decision, so the Supreme Court did not have the opportunity to

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225. *The United States Computer Fraud and Abuse Act of 1984 Summary*, KELLEY / WARNER, http://www.aaronkellylaw.com/computer-fraud-and-abuse-act-us-summary (last visited May 20, 2013); *Computer Fraud and Abuse Act Reform*, ELECTRONIC FRONTIER FOUND. (2013), https://www.eff.org/issues/cfaa (last visited May 20, 2013).

226. 18 U.S.C. § 1030(g) (2006).

227. § 1030(a)(6)–(7).

228. *The United States Computer Fraud and Abuse Act of 1984 Summary*, *supra* note 225.

229. *See generally id.*

230. Marcia Hofmann, *In the Wake of Aaron Swartz's Death, Let's Fix Draconian Computer Crime Law*, ELECTRONIC FRONTIER FOUND. (Jan. 14, 2013), https://www.eff.org/deeplinks/2013/01/aaron-swartz-fix-draconian-computer-crime-law.

231. *Who's Responsible? Computer Crime Laws*, PBS http://www.pbs.org/wgbh/pages/frontline/shows/hackers/blame/crimelaws.html (last visited May 20, 2013).

232. *Id.*

233. *See* David Kravets, *Feds Charge Activist with 13 Felonies for Rogue Downloading of Academic Articles*, WIRED.COM (Sept. 18, 2012, 6:30 AM), http://www.wired.com/threatlevel/2012/09/aaron-swartz-felony/all/ [hereinafter Kravets, *Feds Charge*].

234. David Kravets, *DOJ Won't Ask Supreme Court to Review Hacking Case*, WIRED.COM (Aug. 10, 2012, 2:10 PM), http://www.wired.com/threatlevel/2012/08/computer-fraud-supreme-court.

reach the same conclusion.[235] Therefore, no precedent clarifies whether violating the terms of service of an online website is a criminal violation under the CFAA.[236] The need for a precedent is strong—at least three other circuit courts of appeal conflict with the Ninth Circuit's limitation.[237]

B. When Is a Copyright Claim a Copyright Claim?

In 1985, the Supreme Court declared that copyright infringement is not theft, fraud, or conversion.[238] Even if the infringer causes an economic loss to the copyright holder by infringing, it is not appropriation and (allegedly) does not deprive the copyright holder from using or controlling the copyrighted material.[239] Furthermore, only federal courts have jurisdiction over copyright claims, so the theft of a copyright cannot be heard in a state court.[240]

The case in which the Supreme Court illustrated this principle involved circumstances unlike that of online digital assets.[241] The case *Dowling v. United States* addressed whether bootlegged phonorecords constituted stolen property.[242] The infringers did not destroy the original phonorecords and did not prohibit the copyright holder from accessing or further using the copyrighted material.[243] In sum, the Court stated the fact that "information can be replicated without destroying an original is an old observation[] and a cornerstone of intellectual property law."[244]

Twenty years later, in July 2011, Internet activist and computer programmer Aaron Swartz was indicted on thirteen felony charges.[245] Swartz ran a "scraping" program against JSTOR, an online collection of academic documents, through the Massachusetts Institute of Technology network system.[246] He allegedly intended to release these documents at no cost to the public (JSTOR charges users for access to its documents).[247] Swartz potentially faced a thirty-five year sentence for charges that included unauthorized computer access, wire fraud, computer fraud, and unlawfully

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235. *Id.*

236. *See id.*

237. *Id.*

238. *Copyright Infringement Is Theft*, SECURE COPYRIGHT SERVICES, INC US/UK http://secure copyright.us/copyright-infringement-is-theft/ (last visited May 20, 2013).

239. *Id.*

240. *Remedies for Small Copyright Claims*, U.S. COPYRIGHT OFF. (Mar. 22, 2007), http://www. copyright.gov/docs/regstat032906.html (citing 17 U.S.C. § 1338 (2006)).

241. *See* Dowling v. United States, 473 U.S. 207, 207–33 (1985).

242. *Copyright Infringement Is Theft*, *supra* note 238 (citing *Dowling*, 473 U.S. at 217–18).

243. *Id.*

244. *Id.*

245. Kravets, *Feds Charge*, *supra* note 233.

246. *Id. See also* Hartley Brody, *I Don't Need No Stinking API: Web Scraping For Fun and Profit* (Dec. 8, 2012, 11:48 PM), http://blog.hartleybrody.com/Web-scraping (defining "scraping").

247. Kravets, *Feds Charge*, *supra* note 233.

obtaining information from a protected computer.[248] These charges fall under anti-hacking provisions in the 1984 CFAA.[249]

The Department of Justice could not charge Swartz for theft by *Dowling* principles and could not charge for infringement under copyright law because most of the documents that he scraped were already in the public domain.[250] Most were inaccessible outside of JSTOR, but he was still permitted access to JSTOR on the MIT campus; Swartz was not indicted for wrongful access to the documents but for taking too many and in a method that went against terms of use.[251] Therefore, without the CFAA, prosecuting Swartz would not be very effective because his conduct could not be addressed in property law or copyright law.

These two cases illustrate how difficult it is to determine under what circumstances can raise an intellectual property claim. In *Dowling*, the Court determined that copying and reproducing intellectual property such as phonorecords is not theft.[252] Similarly, Swartz copied documents with the intent to reproduce and distribute.[253] However, the federal prosecutor in Swartz's case, Carmen M. Ortiz, refused to drop Swartz's charges by explaining that "[s]tealing is stealing whether you use a computer command or a crowbar, and whether you take documents, data or dollars."[254] Swartz's case did not reach a judicial conclusion (he committed suicide in response to his charges), but the prosecutorial atmosphere surrounding his case conflicts with *Dowling*'s "intellectual property is not theft" holding.[255] Attempting to determine what belongs to property law, what belongs to intellectual property law, and what belongs to neither property nor intellectual property law is creating problems of understanding in the legal arena.

While the staunch segregation between physical or real property and intellectual property may make sense, the distinction grows increasingly problematic as technology continues advancing. The law has yet to catch up with this problem.

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248. *Id.*; Ryan Singel, *Feds Charge Activist as Hacker for Downloading Millions of Academic Articles*, WIRED.COM (July 9, 2011, 2:55 PM), http://www.wired.com/threatlevel/2011/07/swartz-arrest/.

249. *See* Kravets, *Feds Charge*, *supra* note 233.

250. *See id.*

251. *Id.*

252. *Copyright Infringement Is Theft*, *supra* note 238.

253. *See* Kravets, *Feds Charge*, *supra* note 233.

254. Press Release, U.S. Attorney's Office, Dist. of Mass., Alleged Hacker Charged with Stealing Over Four Million Documents from MIT Network (July 19, 2011), http://www.justice.gov/usao/ma/news/2011/July/SwartzAaronPR.html.

255. *See id.*

C. Effect on Digital Estate Planning and the Right of Termination

The circumstances leading to *Dowling* and Swartz's indictment—reproduction and distribution (or alleged conspired distribution) of intellectual property—did not deny the copyright owners access because the acts of copying and downloading did not destroy or remove the original works from the copyright owners' possession.[256] However, when an Internet service either destroys the contents of a deceased user's email or social media account or prevents an heir from acquiring access to those contents, the outcome unravels much differently for the heirs than what resulted for the copyright holders in *Dowling*.[257] An heir battling for a deceased user's online content may or may not know what is included in such content, so the heir is prohibited from enjoying the heir's copyright interests in ways that are markedly different from the damages suffered by JSTOR and the copyright holders in *Dowling*.[258]

Digital estate planners will often encourage their clients to compile a list of all online services, the respective user names and passwords to these sites, and designation of who will administer the digital estate.[259] While practical, this ignores the actual issue—a lack of statutory guidelines for copyright and digital asset inheritance in cyberspace. Because digital estate planning is relatively new territory, many estate planners are unsure about how to approach digital assets, which could lead to liability for the estate or missed economic opportunities for heirs.[260]

Meanwhile, technology continues to evolve, and the law struggles to keep up. When users leave their heirs passwords to online accounts, they collectively put a band-aid over the real issue. This action is a temporary—and possibly illegal—work-around for a lack of quality laws.

The non-transferable stipulation found in most online terms of service could make the simple act of leaving the password to the decedent's email or social media account to an heir illegal under the CFAA.[261] As ridiculous as this may sound, the circuit courts have not agreed on whether this statute should be interpreted to include violations of website terms of service.[262]

The Ninth Circuit determined that the CFAA, under which Swartz was indicted, does not extend to criminalizing terms of service violations in

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256. *See supra* Part VII.B.

257. *See* Dowling v. United States, 473 U.S. 207, 230–33 (1985).

258. *See supra* Part VII.B.

259. Patrick Marshall, *Digital Estate Planning Often Forgotten*, SEATTLE TIMES (Jan. 7, 2012), *available at* http://seattletimes.com/html/businesstechnology/2017171847_pfdigitalestates08.html.

260. *Id.*

261. *See* Kravets, *Feds Charge*, *supra* note 233.

262. *See id.*

United States v. Drew.[263] Lori Drew created a fake MySpace account as a sixteen-year-old boy ("Josh Evans") and sent messages to a teenage girl convincing the girl that she and Josh were involved in a romance; after four weeks, Drew (still posing as Josh) sent a message to the girl stating "the world would be a better place without [you]" and ended correspondence.[264] The girl committed suicide about an hour after receiving the message.[265] Drew was convicted in a lower court under the CFAA for violating MySpace's terms of service, which contained provisions that prohibited users from using fraudulent information during registration, obtaining information about a minor, and harassing others through the MySpace service.[266]

If the Ninth Circuit decision does not become precedent, social media and email services that deny a right of survivorship or prohibit users from transferring accounts, sharing passwords, or allowing others to access accounts could prosecute heirs under the CFAA in other circuits.[267] While most online services are not likely to examine whether or not users are engaging in this behavior, the statute encourages prosecutorial discretion and provides a criminal charge that can be readily used against even the most unsuspecting Internet user.[268] In Drew's case, state prosecutors could not find a charge, so federal prosecutors applied the CFAA to ensure that Drew did not escape criminal liability.[269] This is the same prosecutorial approach that resulted in Swartz's indictment.[270]

Jennifer Granick, civil liberties director at the Electronic Frontier Foundation, illustrated this concern when she explained that "[u]nder the government's theory, anyone who disregards—or doesn't read—the terms of service on any website could face computer crime charges."[271] According to U.S. District Judge George Wu, this could mean that "a multitude of otherwise innocent Internet users" would become criminals.[272]

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263. Kim Zetter, *Prosecutors Drop Plans to Appeal Lori Drew Case*, WIRED.COM (Nov. 20, 2009, 5:53 PM), http://www.wired.com/threatlevel/2009/11/lori-drew-appeal [hereinafter Zetter, *Prosecutors Drop*].

264. Ashley Surdin, *Woman Found Guilty of Three Misdemeanors for MySpace Hoax That Led to Suicide*, WASH. POST (Nov. 27, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/11/26/AR2008112600629.html.

265. *Id.*

266. *Id.*

267. *See generally id.* ("[A] felony conviction could mean that millions of people who violate terms . . . could become criminally liable.").

268. *See id.*

269. *See* Zetter, *Prosecutors Drop*, *supra* note 263.

270. *See* Kravets, *Feds Charge*, *supra* note 233.

271. Kim Zetter, *Is Breaking CAPTCHA a Crime?*, WIRED.COM (July 7, 2010, 3:37 PM), http://www.wired.com/threatlevel/2010/07/ticketmaster.

272. Zetter, *Prosecutors Drop*, *supra* note 263.

VIII. WHO CARES?

The thirty-five year requirement for the right of termination to take effect begins in 2013.[273] After December 31, 2013, heirs and authors can finally start exercising their right of termination for works assigned in 1978.[274] The claims that will undoubtedly follow will be cases of first impression, and the resulting court decisions will shape the direction of termination of online grants and licenses when that content becomes eligible for the exercise of termination rights.

Because the Internet came into being in 1990, no grants or licenses of authorship works would be eligible for termination rights until at least after the end of 2025, fulfilling the thirty-five year requirement.[275] Any licenses that users granted to web services are thus very far from termination eligibility. However, authors and heirs can send notices of termination as early as 2015.[276]

The heirs of deceased users of online social media and email services are in an unfortunate position. Heirs are first challenged with an access issue.[277] Unless the web service gives the heir access to the account or the contents in the account either through its policies or by state law, the heir cannot log in without potentially violating the CFAA.[278] If the heir accomplishes access and control over the material aspects of the content, then the heir can enjoy the copyright interests in the content, except for the right of termination.[279] Next, the heir faces a second challenge—recovering the full copyright interests that the deceased author licensed to the website.[280] The website may have provisions denying the right of termination; if the heir successfully exercises the right, the global license granted by the deceased user will prevent the heir from recovering the license and terminating the use outside of U.S. borders.[281] Because many social media services contain provisions giving the website sublicensing privileges, the heir could face a third challenge of tracking down all sublicenses granted by the website.[282] The ease of duplicating and transmitting documents online would create a wild goose chase; any email user exposed to chain mail could attest to the ease and speed of online

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273. *Termination Rights—Explained*, ASS'N INDEP. MUSIC PUBLISHERS (Feb. 13, 2011), http://www.aimp.org/copyrightCorner/2/Termination_Rights_-_Explained.

274. *Id.*

275. *See id.* (explaining the thirty-five years for termination rights to arise for works published post-1978).

276. *See generally supra* Part II.C (explaining that notice of termination can be issued as early as twenty-five years after granting copyright).

277. *See supra* Part VII.C.

278. *See supra* Part VII.C.

279. *See supra* Part V.

280. *See supra* Part V.

281. *See supra* Part VI.B.

282. *See supra* Part IV.F.

documents going viral. Identifying every sublicense, every sublicense granted by that sublicense grantee, and so on, could prove to be a fruitless endeavor.

Congress created the right of termination to protect naive artists and authors who unwittingly give away their copyrights to large, corporate producers or publishers.[283] Thirty-five years seems like a long time to wait for termination rights to come into effect, to be sure. However, today's Internet users only read terms of services and similar agreements a mere 1.4% of the time.[284] Today's Internet users—the ones agreeing to social media and email terms of service and freely providing these providers with an inexhaustible supply of photographs, videos, and literary works—are today's naive Siegels and Shusters. Just as Siegel and Shuster did not expect their Superman to become an American icon with great economic worth, many social media users undervalue their copyrighted works.

The challenges introduced by statutory treatment of the Internet undermine the purpose and effectiveness of the 1976 Act's right of termination. Ignoring the problem until the right of termination for online content becomes effective will only create confusion, heartache, and superhuman problems for the heirs of deceased online authors.

by Andrea Farkas

283. *See* Rush, *supra* note 32.

284. James Temple, *Why Privacy Policies Don't Work—And What Might*, SFGATE (Jan. 29, 2012, 4:00 AM), http://www.sfgate.com/business/article/Why-privacy-policies-don-t-work-and-what-might-2786252.php.