

RETURN OF THE UFADAA: HOW TEXAS AND OTHER STATES' ADOPTION OF THE RUFADAA CAN CHANGE THE INTERNET

Comment

*by Jared Walker**

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I. INTRODUCTION

With the creation of the first public internet network in 1991, the world has never been the same.¹ With people tweeting, swiping, snapping, and posting constantly, the fact that Facebook users post on average more than 350 million new photos each day should not impress anyone.² Digital assets have three characteristics that make proscribing personal property law to their inheritance difficult: (1) they are a recently new invention; (2) they are intangible; and (3) they have differing contractual rights based on state and federal law.³ Recently, state legislatures have been trying to propose legislation modeled after the Uniform Fiduciary Access to Digital Assets Act (UFADAA), the Privacy Expectations Afterlife and Choices Act (PEAC), and Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which regulate the rights of the company and a beneficiary to a deceased's digital assets.⁴ Currently, a minority of states have adopted a strategy but most are actively debating the adoption of a fiduciary access to digital assets law.⁵

II. HYPOTHETICAL

Dawn, a girl from a small mid-western town, is starting her second year at Texas Tech University.⁶ Dawn, being overly social not only has a Facebook and Twitter account, but also a MySpace account, which she did not delete when she stopped using it five years ago.⁷ Recently, she decided she needed to branch out on her dating, so she joined Tinder and uploaded

1. Martin Bryant, *20 Years Ago Today, the World Wide Web Opened to the Public*, TNW, <http://thenextweb.com/insider/2011/08/06/20-years-ago-today-the-world-wide-web-opened-to-the-public/> [https://perma.cc/WJ23-2P29] (last visited Feb. 25, 2016).

2. Cooper Smith, *Facebook Users Are Uploading 350 Million New Photos Each Day*, BUS. INSIDER (Sept. 18, 2013), <http://www.businessinsider.com/facebook-350-million-photos-each-day-2013-9> [https://perma.cc/JS25-YXBH].

3. See Sasha A. Klein & Mark R. Parthemer, *Where Are Our Family Photos?!? Planning for a Digital Legacy*, 32 No. 3 GPSOLO 76, 76 (2015).

4. See *State-by-State Digital Estate Planning Laws*, EVERPLANS (2015), <https://www.everplans.com/articles/state-by-state-digital-estate-planning-laws> [https://perma.cc/H6CC-B62M].

5. *Id.*

6. The author created this hypothetical.

7. See *infra* Part VIII.

some photos that if her mother saw she would die of shock.⁸ Moreover, Dawn uploads at least three new Snapchats a day to maintain her social butterfly status.⁹ While in class, she developed a habit of multitasking by checking and sending e-mails, managing her online bank account, and uploading new photos to one of her many apps, all in an effort to save time for messaging her friends and family outside of class.¹⁰ On Friday nights, she always invites her friend over to watch a movie, which she buys from Amazon.¹¹

The other day on her way home to visit her family, Dawn took a curve too fast and rolled her vehicle. First responders arrived on the scene fast enough to maintain her vitals, but she remained unconscious for three weeks before she passed. After the accident removal from the road, but before Dawn's passing, her mother receives the personal effects from Dawn's dorm room and car, which included Dawn's cellphone and laptop.

While Dawn is unconscious, there is one major issue: Does she have a power of attorney (POA)?¹² If she did, does the POA grant the rights to access her digital assets?¹³ After her passing, a similar issue arises: Did she have a will?¹⁴ If she died intestate, who has the legal right to control her digital assets? Is it her next of kin, the company that owns the website and maintains the digital assets, or are the assets destroyed per Dawn's instructions?¹⁵

This comment addresses benefits and issues arising from the adoption of state legislated digital asset law.¹⁶ First, a discussion on the chronological history of digital rights from terms of service (TOS) agreements to the current proposed RUFADAA. This section will be presented in order to lay a foundation for the defining, importance, and rapid development of the rights to digital assets.¹⁷ The next section provides an in-depth comparison using the digital media from the hypothetical to show the differences between the UFADAA, the PEAC, and the RUFADAA and their individual effects on

8. See *infra* Part VIII.

9. See *infra* Part VIII.

10. See *infra* Part VIII.

11. See *infra* Part VIII.

12. See *infra* Part VII.

13. See Ken Paxton, Attorney General of Texas, *Estate & Advance Care Planning*, TEX. ATT'Y GEN., <https://www.texasattorneygeneral.gov/seniors/estate-advance-care-planning> [https://perma.cc/W7CX-RBXR] (last visited Mar. 20, 2016) (defining the difference in a medical and durable power of attorney).

14. See TEX. EST. CODE ANN. § 22.034 (West 2015) (defining a will as "(1) a codicil; and (2) a testamentary instrument that merely: (A) appoints an executor or guardian; (B) directs how property may not be disposed of; or (C) revokes another will."). *Id.*

15. See *infra* Parts VIII, XI.

16. See *infra* Part III.

17. See *infra* Parts IV–VIII.

digital assets.¹⁸ Then, this comment addresses the current draft version of the Texas Digital Asset Act.¹⁹ Afterwards, using the hypothetical situation, the current draft of the Texas Digital Asset Act will be evaluated.²⁰ Finally, this comment addresses the needs of adapting the RUFADAA for a federal law.²¹ This comment briefly addresses some of the federal pre-emptive issues possibly involved with the enactment of the RUFADAA.²² This comment's overall purpose is to evaluate Texas's need for a fiduciary digital asset statute and provide direction in planning for digital assets.²³

III. DIGITAL ASSETS—AN OVERVIEW

Digital assets are a matter of federal and state law.²⁴ Traditionally, states pass laws that define and control the distribution of digital assets upon death.²⁵ However, Congress directly limited the states in accessing digital assets by passing two laws in 1986; the Stored Communications Act (SCA) and the Computer Fraud and Abuse Act (CFAA).²⁶ Further, Congress protected digital assets by limiting the transferability and access through the Digital Millennium Copyright Act (DMCA) and the American Invent's Act (AIA).²⁷ This section discusses differing definitions of digital assets and explains the possible value of a digital asset.²⁸

A. What Is a Digital Asset?

According to the UFADAA, a "[d]igital asset" means a record that is electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic."²⁹ Conversely, the RUFADAA defines a "[d]igital asset" as an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record."³⁰

18. See *infra* Parts VI–VII.

19. See *infra* Part X.

20. See *infra* Part XI.

21. See *infra* Part XIII.

22. See *infra* Parts III, IX.

23. See *infra* Parts III, XII, XIII.A.

24. Klein, *supra* note 3, at 76.

25. *Id.*

26. *Id.*

27. See Holly K. Towle, *Estate Planning in a Digital Age Letter No. 289*, GUIDE TO COMPUT. L., 2012 WL 3760389 (Nov. 18, 2005).

28. See *infra* Part III.A–B.

29. *Uniform Fiduciary Access to Digital Assets Act*, NAT'L CONF. OF COMM'RS ON UNIF. ST. L. (2014), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf [https://perma.cc/Z7XU-NSKQ].

30. *Revised Uniform Fiduciary Access to Digital Assets Act*, NAT'L CONF. OF COMM'RS ON UNIF. ST. L. (2015), <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20>

In an attempt to explain what digital assets entail, commentators divided digital assets into three broad groups: (1) textual content, (2) images, and (3) multimedia.³¹ The difference between the three groups is that multimedia includes sound and moving images (e.g., movies or music downloaded from Amazon); whereas images only include still graphics (e.g., photos); and textual content includes any other type of formatted binary data.³²

B. *Do Digital Assets Have Value?*

There are two types of value associated with property: sentimental value and actual value.³³ In evaluating the worth of Dawn's digital properties, such as a picture of her, the picture might have no monetary value, but may have sentimental value to her family.³⁴ However, the object is calculated under a reasonable person standard, and the priceless evaluation of Dawn's social media accounts' photos and comments may be the result of their sentimental value to her family.³⁵ Yet her photos, banking information, online auctions, digital books, digital movies, and digital music may have actual value.³⁶ However, the value depends on the TOS in the contract between the decedent and the company.³⁷ In the case of Dawn's digital movie collection, purchased through Amazon, the evaluation, using the TOS, would be nothing because Amazon only grants a license for the life of the purchaser, not of the product.³⁸

IV. THE OLD WAYS—COMPANY MENACE

Before the states became involved with the distribution of digital assets upon death, TOS of various companies traditionally claimed ownership to all digital property uploaded or downloaded from their site.³⁹ TOS, End-User License Agreements (EULAs), and privacy policies define the legal relationship between users and the company.⁴⁰ Without any negotiations, the companies use the unequal bargaining power of these contracts to limit the ability of the user to sell, trade, or bequeath digital assets to another person.⁴¹

Assets/2015AM_RevFiduciaryAccessDigitalAssets_VBS.pdf [https://perma.cc/LBS5-6JM6].

31. Klein & Parthemer, *supra* note 3, at 76.

32. *Id.*

33. Towle, *supra* note 27.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *See id.*

39. *See* Alexander Elliot, *Death and Social Media Implications for the Young and Will-Less*, 55 JURIMETRICS J. 381, 382–85 (Spring, 2015).

40. *See id.*

41. *See id.*

As long as there are limitations on what people view as theirs by right, there will always be those who are willing to do illegal activities to preserve those rights.⁴² There are two common illegal approaches used in circumventing companies' TOS, EULAs, and Privacy Policies: (1) illegal software and (2) hacking.⁴³ Both approaches allow for access to digital assets by undoing companies' firewalls.⁴⁴

A. *Illegal Software*

Three types of software created during this period allowed illegal removal of digital assets: (1) LimeWire; (2) Silk Road; and (3) Bitcoin.⁴⁵ LimeWire, an innovative file sharing system, allowed for the access and transferability of digital media, such as books, movies, and music, from the original buyer to anyone else who downloaded the software.⁴⁶ The dark web creation of Silk Road and the establishment of the digital currency Bitcoin, caused a digital revolution of untraceable marketing of items working against government and company regulations.⁴⁷ Originally used for hitmen, weapons, and drugs Silk Road quickly grew to include the untraceable sale of digital media.⁴⁸ Currently, only Bitcoin has survived, but the debate still rages on whether it is an illegally minted currency and whether it induces copyright infringement.⁴⁹ Thus, Bitcoin is still considered a legal digital asset.⁵⁰

B. *Hacking*

Hackers are computer programmers that break through a computer code, such as firewalls, to steal data.⁵¹ Hiring a hacker to retrieve specific

42. See generally Owen Davis, *Bitcoin Rules Divide Wall Street's Digital Currency Community*, INT'L BUS. TIMES (May 28, 2015), <http://www.ibtimes.com/bitcoin-rules-divide-wall-streets-digital-currency-community-1940771> [<https://perma.cc/9T34-48XF>] (defining Bitcoin as cyber currency that has stock and bond like tendencies that is unregulated by any country or bank).

43. See *infra* Part IV.A–B.

44. See *infra* Part IV.A–B; *Safety and Security Center: What is a Firewall?*, MICROSOFT, <https://www.microsoft.com/security/pc-security/firewalls-what-is.aspx> [<https://perma.cc/3B4K-RNTB>] (last visited Feb. 25 2016) (defining a firewall as a program or hardware used to prevent the accessing of a computer by hacker, viruses, and worms).

45. See Natasha Green, *The LimeWire Party Is Over - But We're Still Not Going to Pay for Music*, THE TELEGRAPH (OCT. 29, 2010), <http://www.telegraph.co.uk/comment/personal-view/8097020/The-LimeWire-party-is-over-but-were-still-not-going-to-pay-for-music.html> [<https://perma.cc/5V9M-XS9X>]; Davis, *supra* note 42.

46. See Green, *supra* note 45.

47. See Davis, *supra* note 42.

48. See *id.*

49. See Green, *supra* note 45.

50. See *supra* Part III.

51. See Fahmida Y. Rashid, *Yes, You Can Afford a Hacker*, THE DAILY BEAST (Feb. 18, 2015),

information is as simple as posting an ad to a public forum stating the individual is in need of a hacker.”⁵² Moreover, paying with Bitcoin makes the whole transaction practically untraceable.⁵³ For example, if Dawn’s mother wanted to see e-mails sent from her daughter but lacked the username and password, she could simply post an ad on Craigslist and hire a personal hacker to retrieve either the username and password, or the emails.⁵⁴ Dawn’s mother illegally obtained the emails, and could be subject to criminal and civil punishment.⁵⁵

V. RISE OF THE STATE LEGISLATION

Since the creation of digital assets, states experienced mixed reactions to the need for the adoption of a fiduciary access to digital property law.⁵⁶ The purpose of this section is to illustrate the history of state’s involvement in the regulation of digital assets and their concerns with privacy rights.⁵⁷ Starting with the first generation of fiduciary access to digital assets acts, state legislatures broadened the scope of the definition of digital assets while limiting the fiduciary access out of privacy concerns.⁵⁸

A. Past State Adoption of Fiduciary Access to Digital Assets

The first generation of fiduciary access to digital assets legislation was passed in California.⁵⁹ In 2002, this act provided for the email host to retain a customer’s email for 20 days, unless permitted by other law or contract.⁶⁰ In 2007, Indiana passed a second-generation statute that expanded beyond just email to include anything “stored electronically.”⁶¹ Moreover, in 2010, four states passed fourth-generation statutes that “expand[ed] the definition of digital asset to include social media and micro blogging.”⁶²

<http://www.thedailybeast.com/articles/2015/02/18/yes-you-can-afford-a-hacker.html> [https://perma.cc/M8MM-9QQC].

52. *Id.*

53. *Id.*

54. *See supra* Parts II–III.

55. *See* Rashid, *supra* note 51.

56. *See infra* Parts V.A–B, VI–VII, X.

57. *See infra* Part IV.

58. *See infra* Parts IV–V.

59. Gerry W. Beyer, *Cyber Estate Planning and Administration*, SAN ANTONIO EST. PLANNERS COUNCIL (May 19, 2015) <http://www.sanantonioepc.org/assets/Councils/SanAntonio-TX/library/Cyber%20Estate%20Planning%20and%20Administration%20-%202005.19.15.pdf> [https://perma.cc/ZGG3-FD3G].

60. *Id.*

61. *Id.*

62. *Id.*

B. *The UFADAA Being Considered, Accepted, or Rejected by the States*

Recently, several state legislature's attempts at adopting a fiduciary access to digital assets act inspired the formation of acts attempting to cause a consistent result from state to state on digital assets.⁶³ Legislatures modified the UFADAA to address consistency issues in state law.⁶⁴ This section focuses on the creation, modification, adoption, and rejection of the UFADAA.⁶⁵

C. *UFADAA*

The UFADAA was the first attempt by the National Conference of Commissioners on Uniform State Law (NCCUSL) to address the issue of a fiduciary's rights to digital assets.⁶⁶ The goal of the act was to address the rights and responsibilities of a fiduciary in accessing digital assets while maintaining the privacy and intent of the decedent, but not the transferability of the digital asset.⁶⁷ The UFADAA focused on removing limitations to fiduciary access to digital assets by declaring any blanket provision that limited fiduciary access to be against public policy and void.⁶⁸

D. *Adoption of the UFADAA*

The NCCUSL vigorously promoted the benefits to the states for adopting the UFADAA.⁶⁹ Chief among these arguments was the protection of citizens from large financial losses caused by large corporations keeping all digital assets.⁷⁰ Delaware is the only state to adopt a modified form UFADAA called the Fiduciary Access to Digital Assets and Digital Account

63. See *infra* Parts V.B.1, VI.B, VII.

64. See *infra* Part V.B.1–4.

65. See *infra* Part V.B.1–4.

66. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Uniform*, *supra* note 29.

67. See *id.*

68. *Comparison of the Uniform Fiduciary Access to Digital Assets Act (Original UFADAA), the Privacy Expectations Afterlife and Choices Act (PEAC Act), and the Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA)*, NAT'L CONF. OF COMM'RS ON UNIF. ST. L. (2015), <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Comparison%20of%20UFADAA%20PEAC%20and%20Revised%20UFADAA.pdf> [<https://perma.cc/CG2F-4VX3>]. See Abbey L. Cohen, Comment, *Damage Control: The Adoption of the Uniform Fiduciary Access to Digital Assets Act in Texas*, 8 EST. PLAN. & COMM. PROP. L. J. 317 (2016); William D. Pargaman, [Insert Catchy Title Here], 2015 TEX. EST. & TR. LEGIS. (updated on July 28, 2015), <http://utcle.org/elibrary/download/af/61186/p/1> [<https://perma.cc/MLX7-MVK8>].

69. See *Why Your State Should Adopt the Uniform Fiduciary Access to Digital Assets Act*, NAT'L CONF. OF COMM'RS ON UNIF. ST. L., <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/UFADAA%20-%20Why%20Your%20State%20Should%20Adopt%20-%20August%202014.pdf> [<https://perma.cc/M9WR-V5XQ>] (last visited Feb. 25, 2016).

70. See *id.*; Cohen, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

Act (FADADAA), which is nearly identical except for the broadening of the term digital asset.⁷¹

E. Rejection and Postponement of the UFADAA by Texas

In March 2015, on a motion by Representative Jeff Leach, the UFADAA was considered for adoption in Texas.⁷² However, the Texas House of Representatives Committee on Judiciary and Civil Jurisprudence tabled the adoption until 2017 based on a recommendation by the Real Estate, Probate, and Trust Law (REPTL) Section of the State Bar of Texas.⁷³ REPTL recommended further study of the UFADAA because of the limited amount of research caused by time restraints.⁷⁴

F. Possible Reasoning for the Rejection by the Majority of States

Across the country, the majority of states rejected the UFADAA with little more than a tabling and dropping of the resolution.⁷⁵ Speculation into the reasoning behind the lack of adoption has generated three main theories: (1) technology companies' lobbyist influenced the representatives; (2) civil liberty organization's lobbyist influenced the representatives; and (3) states were not happy with the longevity, scope, and power of the UFADAA.⁷⁶

VI. CORPORATIONS RESPONSE TO GOVERNMENTAL INVOLVEMENT

To combat governmental regulation, companies implement strategies to keep their consumers happy by changing internal policies to meet public demands.⁷⁷ The purpose of this section is to illustrate the importance of digital asset regulation of internet-based companies and their continued goal to be self-regulating.⁷⁸ Leaders in social media websites have implemented a strategy of using a product tool (online tool) to allow users to designate fiduciaries to gain access, and in some cases transfer digital assets according to the user's wishes.⁷⁹

71. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

72. See Pargaman, *supra* note 68.

73. *Id.*

74. See *id.*

75. See *id.*; Jeffrey R. Gottlieb, *ULC Rewrites 'Uniform Fiduciary Access to Digital Assets Act'*, LAW OFFS. OF JEFFREY R. GOTTLIEB, LLC (July 20, 2015), <http://www.illinoisestateplan.com/ulc-rewrites-uniform-fiduciary-access-to-digital-assets-act/#sthash.6ZJs28wb.dpuf> [https://perma.cc/KJ48-9UML].

76. See Gottlieb, *supra* note 75; NAT'L CONF. OF COMM'RS ON ST. L., *Why*, *supra* note 69.

77. See *infra* Part VI.A.

78. See *infra* Part VI.A–B.

79. See *infra* Part VI.A.

A. Companies Are Changing Their Policies

In 2009, Facebook started allowing a profile to be “memorialized,” but did not allow a designated person to be in control of the account.⁸⁰ In response to the UFADAA, in February 2015, Facebook enacted a plan to allow users after memorialization to decide if they wanted to name a “legacy contact,” and determined the amount of access that contact would have over their account.⁸¹ Thus, through its own policy, Facebook created a way for users to designate a beneficiary, or to prevent access to their accounts by beneficiaries through the option of deletion upon death.⁸²

Yet, Facebook is still using a user’s digitally copyrighted assets.⁸³ The current version of Facebook’s TOS grants Facebook a temporary license to all posted material rather than a license for an indefinite amount of time.⁸⁴

Also in 2013, Google created the Inactive Account Manager tool.⁸⁵ The tool allowed users to set preferences on the deletion or downloading of their data by either marking the select data, such as photos, documents, or email for deletion upon inactivity, or designating a trusted contact by phone number whom upon inactivity would receive notification and access to download the selected data.⁸⁶

B. The PEAC Act

The PEAC Act affects digital assets, but does not directly define the term.⁸⁷ The act requires a probate court to order access to digital assets before a company releases any information, and indemnifies the companies from civil suit due to loss of the property.⁸⁸ The funding for the lobbyists that proposed the PEAC Act supposedly came from the large technology corporations, such as Google, Facebook, and Twitter, all in an effort to

80. Sophie Curtis, *Beyond The Grave: Have You Planned Your Digital Legacy?*, THE TELEGRAPH (Mar. 18, 2015), <http://www.telegraph.co.uk/technology/news/11475906/Beyond-The-grave-have-you-planned-our-digital-legacy.html> [https://perma.cc/HNX7-VEUB].

81. See Daniel Lenz, *Afterlife on the Cloud: Creating A Heavenly Plan for Digital Assets*, SW037 ALI-CLE 511 (June 21-26, 2015).

82. See *What Is a Legacy Contact?*, FACEBOOK, <https://www.facebook.com/help/1568013990080948?sr=5&query=contract&sid=2NVznMBRaBGwI9GFN> [https://perma.cc/AS9D-F5MZ] (last visited Mar. 17, 2016).

83. See *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> [https://perma.cc/D6SJ-YN3R] (last updated Jan. 30, 2015).

84. *Id.*

85. See *Accounts Help: About Inactive Account Manager*, GOOGLE, <https://support.google.com/accounts/answer/30365546?hl=en> [https://perma.cc/SZ7Q-Z3PK] (last visited Mar. 17, 2016).

86. *Id.*

87. See *Privacy Expectation Afterlife and Choices Act (PEAC)*, NETCHOICE, <http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/> [https://perma.cc/GH4E-6T2Z] (last visited Feb. 25, 2016).

88. See *id.*

prevent the passing of a bill which would grant powerful user's rights.⁸⁹ In 2015, Vermont became the first and only state to adopt the PEAC.⁹⁰ Vermont's version of the act neither grants nor creates any rights to digital assets for fiduciaries and the process of obtaining rights is a lengthy judicial process.⁹¹ In contrast, the UFADAA grants the automatic access to digital assets for a fiduciary, and is less concerned with privacy.⁹² The PEAC Act also requires a court order declaring that the release is proper and does not violate privacy laws.⁹³

VII. A NEW HOPE: RUFADAA

This section focuses on the changes made to the UFADAA. In the summer of 2015, the NCCUSL set out to correct the errors discovered in the UFADAA and completely rewrote the act; now called the RUFADAA.⁹⁴ The RUFADAA created a three step process for accessing digital assets, requiring the user's consent before disclosure, and reducing the powers of TOS agreements.⁹⁵ First, the process looks to an online tool to declare the user's wishes.⁹⁶ Second, if an online tool is not used, the process enforces the user's wishes, which are declared a legal document over TOS.⁹⁷ Finally, when the user's wishes are unknown because the user has not declared them using a legal document, the TOS agreement controls.⁹⁸ Further, the RUFADAA delegates different approaches for differing kinds of fiduciaries, such as a conservator desiring access to an email account must be able to show the custodian express consent of the user, but the conservator may request suspension or termination without accessing the account for good cause.⁹⁹

89. *See Bill Aims to Preserve Online Privacy After People Pass Away*, KUTV NEWS (Sep. 09, 2015), <http://www.ktvu.com/news/18320860-story> [<https://perma.cc/SF6S-ZE73>].

90. *See* VA. CODE ANN. § 64.2 (West 2015).

91. *See id.*

92. *See supra* Part V.B.

93. *See* NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

94. *See supra* Part V.B.

95. Alethea Lange, *State Lawmakers Have Options to Protect Your Digital Legacy*, (Oct. 5, 2015), <https://cdt.org/blog/state-lawmakers-have-options-to-protect-your-digital-legacy/> [<https://perma.cc/YQL7-VCCF>].

96. *See* NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

97. *See* NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

98. *See* NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

99. *See* NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

VIII. HOW WOULD EACH ACT AFFECT DAWN'S DIGITAL ASSETS?

This section compares the differences between the RUFADAA, the UFADAA, and the PEAC.¹⁰⁰ A person representing Dawn's interest could access her Facebook, Twitter, Tinder, and MySpace accounts only if they knew Dawn's usernames and passwords.¹⁰¹ Social media is a complex digital asset because it contains elements of many types of individual assets, e.g., music, photos, instant messages, and email.¹⁰² In the case of Dawn being in a coma and having a guardian placed over her, under the UFADAA, the guardian would only have default access subject to Dawn's previous objection, a court order, or Dawn waking up.¹⁰³ Under the RUFADAA, her guardian's access to the accounts would depend on if she: (1) used an online tool which can be used to designate a particular heir, or that she would rather have the account deleted; (2) left instructions in her will for handling her accounts; or (3) nothing, in which case the TOS would control.¹⁰⁴ The PEAC Act would not have addressed this issue.¹⁰⁵

In the event that Dawn died, then under the UFADAA the representative of her will would have default access.¹⁰⁶ The PEAC Act would require a court order to gain access to her account(s), and would be limited to the specific account requested.¹⁰⁷ The RUFADAA requires Dawn to take an active step towards granting access.¹⁰⁸

Dawn's SnapChat account is different from other social media accounts such as Twitter and Facebook because it has a built-in algorithm that permanently destroys any message sent after a designated time limit.¹⁰⁹ While the UFADAA did not address deleted information, the PEAC Act and RUFADAA do address the issue by not requiring the custodian to disclose deleted data.¹¹⁰

100. See *infra* Part VIII.

101. See *infra* Part VIII.

102. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

103. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

104. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

105. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

106. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

107. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

108. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

109. See *Privacy Policy*, SNAPCHAT (Oct. 25, 2015), <https://www.snapchat.com/privacy> [<https://perma.cc/2QML-DEBF>].

110. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF

As to Dawn's movie collection purchased through Amazon, if she had a guardian, the PEAC Act would not address the issue.¹¹¹ The UFADAA would allow access to the account, as long as the court authorized it, or Dawn expressly authorized it.¹¹² Finally, the RUFADAA would allow access if approved by Dawn, and the guardian had the specific link and account information.¹¹³ If Dawn has passed, then none of the three acts will allow access to the account because it no longer exists.¹¹⁴ The movie collection TOS between Dawn and Amazon is a license agreement, which does not transfer upon death.¹¹⁵ Hypothetically, if the UFADAA and the RUFADAA allowed access to a terminated licensed digital asset this would be a violation of federal law, e.g., commerce clause, and the DMCA, and the acts would be pre-empted upon challenge.¹¹⁶

IX. HOW DO THE ACTS AFFECT CUSTODIANS?

This section focuses on the duties created by the acts.¹¹⁷ Each act creates duties that the custodian must perform when handling an incapacitated or deceased user's data, but does so in a different way.¹¹⁸ The PEAC Act approaches the issue as a privacy concern.¹¹⁹ The RUFADAA approaches the issue as a default grant of access to the fiduciary against the custodian.¹²⁰ The intent of the RUFADAA is to balance granting access and maintaining privacy.¹²¹ The three most important concerns in being a fiduciary are: (1) liability, (2) timeliness, and (3) access.¹²²

COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

111. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

112. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

113. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

114. See *supra* Part III.B.

115. See *supra* Part III.B.

116. See *supra* Part III.

117. See *infra* Part IX.

118. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

119. See *supra* Part VI.B.

120. See *supra* Part V.B.

121. See *supra* Parts VII–VIII.

122. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

A. Liability

All three acts provide for some immunity from liability when managing digital assets as long as the custodian acts in good faith.¹²³ Further, the RUFADAA preserves the TOS, which typically reduces a custodian's liability, so long as doing so does not go against the user's wishes.¹²⁴ Thus, the RUFADAA only grants the fiduciary the same rights held by the user under the TOS.¹²⁵

B. Timeliness

The UFADAA and the RUFADAA both require access be granted to the fiduciary within 60 days, or the fiduciary may request a court order compelling access.¹²⁶ However, the RUFADAA goes a step further than the UFADAA by requiring compliance with the SCA, which is technically unnecessary but a reminder of federal power.¹²⁷ The PEAC Act has no requirements for timeliness, as the Act does not encourage neither privacy nor promptness.¹²⁸

C. Access

Finally, what does it mean to have access to a digital asset?¹²⁹ The UFADAA does not define access, which commentators have argued implied complete access to the user's account, most likely through requiring the custodian to issue the fiduciary a password and username to the account.¹³⁰ The PEAC Act does not create a duty for the custodian to give control to a requesting fiduciary of the decedent's account.¹³¹ The RUFADAA provides

123. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

124. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

125. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

126. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

127. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

128. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

129. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

130. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

131. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

the custodian with three options for granting fiduciaries access.¹³² First, the custodian could grant the fiduciary complete access to the account.¹³³ Second, the custodian could grant the fiduciary's request for partial access for a necessary task, e.g., to pay bills through online banking.¹³⁴ Third, the custodian could deliver a complete "data dump" of the account's digital assets, e.g., contents of emails, without access to the account on a disk, flash drive, or paper.¹³⁵

X. REPTL'S PROPOSED ALTERATIONS TO THE RUFADAA FOR TEXAS

Because the RUFADAA was introduced within a year of the creation of the UFADAA, REPTL's recommendations on the UFADAA were redirected to researching the RUFADAA.¹³⁶ This section addresses the recommended changes to the RUFADAA made in the January 16, 2016 Draft of Texas Revised Fiduciary Access to Digital Assets Act (Draft).¹³⁷ Among the changes to the RUFADAA were insertions of terminology consistent with Texas law and the citation to the defining statutes, which will allow for consistent application of Texas estate laws, e.g., the change of the word conservator to guardian and defining it by reference to section 1002.012 of the Texas Estates Code.¹³⁸ Further, the Draft clarifies an agent as being limited to property management agents and that POAs, trusts, and guardianships are limited to guardians of an estate, thus excluding medical or personal guardianships from being able to access digital assets.¹³⁹ The Draft also extends "content of electronic communication" to include sent, received, uploaded, and downloaded communications; thus including sent and received emails, saved emails on a hard drive (downloaded), and emails saved to a third party cloud storage (uploaded) within the definition.¹⁴⁰ In

132. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

133. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

134. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69.

135. See NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Comparison*, *supra* note 68; NAT'L CONF. OF COMM'RS ON UNIF. ST. L., *Why*, *supra* note 69; *data dump*, Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/data-dump [https://perma.cc/5FL5-22TH] (last visited Feb. 25, 2016) (defining data dump as a "large amount of data transferred from one system or location to another.").

136. See *supra* Part V.B.3–4.

137. E-mail from Gerry W. Beyer, Chairman of the Digital Assets Committee, REPTL to Digital Assets Committee Members, REPTL (Jan. 16, 2016, 02:58 P.M. CST) (on file with author).

138. *Id.* See Draft of Texas Revised Fiduciary Access to Digital Assets Act § 351.402(6) (Jan. 16, 2016) (on file with author).

139. See E-mail from Gerry W. Beyer, *supra* note 137; Draft of Texas Revised Fiduciary Access to Digital Assets Act § 351.402(2), (5), (19), (25).

140. E-mail from Gerry W. Beyer, *supra* note 137.

addition, the Draft would add references to itself in other locations in the Texas Estates Code providing efficient dissemination of the Draft's location and benefits to fiduciaries.¹⁴¹ Section 351.405 of the Draft clearly addresses three nuanced points from the RUFADAA: (1) the Draft does not extend to the fiduciary any rights beyond that of the user; (2) the Draft does not grant the ability to transfer the digital asset; and (3) the Draft does not displace TOS agreements unless the user has followed the procedure as laid out in the RUFADAA.¹⁴²

XI. HOW WOULD THE REPTL'S DRAFT AFFECT DAWN'S DIGITAL ASSETS?

In Texas, Dawn's fiduciary could access her Facebook, Twitter, Tinder, and MySpace accounts if they only knew the usernames and passwords.¹⁴³ In the case of Dawn being in a coma and having a guardian, the access to her accounts would depend on the type of guardianship and if Dawn used an online tool to state her wishes.¹⁴⁴ If the guardian was a personal or medical guardian, then under the Draft the guardian would have no right to access Dawn's digital assets.¹⁴⁵ If the guardian was a durable POA and Dawn had not used an online tool, then the durable POA would have the right to access her digital assets in a good faith effort to uphold her wishes.¹⁴⁶ If she had named a property management agent, that individual would also have the ability to access her digital assets within the extent of the agency relationship, but a medical decision agent could not have access to her digital accounts.¹⁴⁷ If Dawn dies, then under the Draft, the representative of her estate would have default access to her digital assets unless she used an online tool.¹⁴⁸

If Dawn is incapacitated or dead, her Snapchat, which has a built-in algorithm that permanently destroys any message sent after the designated time limit, the Draft, like the RUFADAA, addresses the issue by not requiring the custodian to disclose the deleted data.¹⁴⁹ As to Dawn's movie collection purchased through Amazon, were she incapacitated, the Draft would allow access by her estate agent or guardian for the sole use by Dawn, but would require either a court order or approval from Dawn.¹⁵⁰ However, if Dawn has passed, then the Draft, like the previous acts, will not allow

141. *Id.* See also Draft of Texas Revised Fiduciary Access to Digital Assets Act §§ 352–5.

142. *Id.* § 351.40. See *supra* Part VII.

143. See Draft of Texas Revised Fiduciary Access to Digital Assets Act §§ 351.405, § 351.415(e).

144. See *supra* Part X.

145. See *supra* note 12 and accompanying text.

146. See *supra* Part X.

147. See *supra* Part X.

148. See *supra* Part X.

149. Draft of Texas Revised Fiduciary Access to Digital Assets Act § 351.406(c).

150. *Id.* § 351.414.

access to the account because it no longer exists.¹⁵¹ The movie collection TOS between Dawn and Amazon is a license agreement, which does not transfer upon death.¹⁵²

XII. MAKING PLANS FOR YOUR DIGITAL ASSETS

A. *How to Currently Plan for Digital Assets*

With differences between states on the version and adoption of privacy and fiduciary access law, estate planning for digital assets can be confusing.¹⁵³ In this section, the attention will be on ways to help clients plan for their digital estates.¹⁵⁴ Professor Gerry W. Beyer suggests eight approaches for planning for digital assets:

- (1) use the company's online tool;
- (2) back-up user names, passwords, and account information onto an encrypted tangible storage device;
- (3) keep a comprehensive list of digital assets in a ledger;
- (4) give access to your digital estate to someone now;
- (5) grant an agent the ability to access your digital assets in certain situations on your behalf;
- (6) create a digital asset trust;
- (7) write a will leaving your digital assets to someone else;
- (8) use an on-line afterlife company.¹⁵⁵

The first approach explains how the PEAC Act, the UFADAA, or the RUFADAA apply, for all three allow the custodian to grant some level of access to digital assets without court approval.¹⁵⁶ A custodian's use of an online tool becomes part of the TOS agreement, which creates a default that grants access to the fiduciary of the account.¹⁵⁷ The second and third approaches must safeguard against identity theft because using tangible storage devices allows easier access to the information.¹⁵⁸ With the second approach, an encrypted storage device stored in a secure location will reduce

151. *See supra* Part III.B.

152. *See supra* Part III.B.

153. *See supra* Parts V–XII.

154. *See* Beyer, *supra* note 59, at 7.

155. *Id.* at 7–11.

156. *See supra* Parts V–VII.

157. *See supra* Part VI.A.

158. *Keeping Passwords Safe is Key to Preventing Identity Theft*, IDENTITY GUARD (Mar. 4, 2015), <http://www.identityguard.com/identity-theft-resources/articles/keeping-passwords-safe-is-key-to-preventing-identity-theft/> [https://perma.cc/Z7GV-UYLF].

the risk of identity theft.¹⁵⁹ The third approach suggests a lock box or safety security box and to never travel with your account information in your wallet.¹⁶⁰ While the fourth approach sounds nice, most company's TOS prevent the sharing of a single account, and the client could violate SCA and CFAA.¹⁶¹ The UFADAA and RUFADAA recognize the fifth approach, as an option the PEAC Act does not address.¹⁶² The sixth approach allows the trust to purchase digital assets, which stalls the termination upon death clause in licensing agreements because the trust owns the digital asset.¹⁶³ All three acts recognize the seventh approach of leaving digital assets in a will but possibly could still require legal action to enforce the will on a company.¹⁶⁴ The eighth approach of using an online afterlife company that stores your account information and delivers it to a designated party upon death requires due diligence in researching the longevity of the company.¹⁶⁵

B. Federal Obstacles to Planning

The DMCA, the AIA, the SCA, and the CFAA form barriers to estate planning.¹⁶⁶ This section addresses the conflict and resolution between federal law and estate planning for digital assets.¹⁶⁷ The SCA and the CFAA enable TOS agreements to limit access to digital assets to the user and make the account or asset nontransferable.¹⁶⁸ Both acts allow for an exception when a user expressly consents for the custodian to grant access of the digital asset to an individual.¹⁶⁹ The UFADAA and RUFADAA use the exception to the SCA and CFAA to define the fiduciary access as the user's right of access.¹⁷⁰ The DMCA establishes the exclusive right of publication, which makes it illegal to give to another any copyrighted material, except for a reselling of the copyrighted material after purchase from the copyright owner.¹⁷¹ The DMCA, coupled with a TOS agreement backed by the CFAA

159. *Id.*

160. *Id.*

161. *See* Beyer, *supra* note 59.

162. *See supra* Parts VII, X.; E-mail from Gerry W. Beyer, *supra* note 137 (noting under the Draft that the agent would have to be an agent of the estate).

163. Brian Sweigman, *What Happens to Your Digital Assets When You Die?*, HUFF POST BUS. CANADA: THE BLOG (Apr. 6, 2013, 5:12 AM EDT), http://www.huffingtonpost.ca/brian-sweigman/digital-assets_b_2606822.html [<https://perma.cc/73WX-K86V>].

164. *See supra* Part VII.

165. *See* Beyer, *supra* note 59, at 10.

166. *See* William Bissett & David Kauffman, *Understanding Proposed Legislation for Digital Assets*, FIN. PLAN. ASSOC.: J. FIN. PLAN. (Apr. 2015), <https://www.onefpa.org/journal/pages/apr14-understanding-proposed-legislation-for-digital-assets.aspx> [<https://perma.cc/D4A4-VSQS>].

167. *See infra* Part XIV.

168. *See* Bissett & Kaufman, *supra* note 166.

169. *Id.*

170. *Id.*

171. *See* 17 U.S.C. §§ 106, 109 (2012).

and the SCA, prevent the resale of digitally copyrighted material.¹⁷² Patent law grants the right to exclude others from the marketplace.¹⁷³ Unlike a copyright that protects the visual or auditory aspect of a digital asset, a patent would protect the software code.¹⁷⁴

XIII. THE NEXT SYSTEM

This section focuses on the shortcomings of the RUFADAA and fiduciary access to digital asset laws, and suggests a solution for the next generation of digital asset laws.¹⁷⁵ A lack of conformity will cause interstate commerce issues because no two states will adopt the same fiduciary access to digital assets laws and there is a spectrum of options from the UFADAA to the PEAC Act.¹⁷⁶

A. Issues With Non-Conformity

Currently, if a citizen in Delaware, which has a version of the UFADAA, creates an account with a company in Vermont, which adopted the PEAC Act, whose law controls?¹⁷⁷ Was the contract made in Vermont or Delaware, or are non-negotiated TOS “choice of law” clauses controlling?¹⁷⁸ What if the situation was reversed?¹⁷⁹ Will the Vermont citizen sue in Delaware under diversity jurisdiction to take advantage of the UFADAA’s pro-fiduciary nature, thus increasing forum shopping?¹⁸⁰

B. Suggested Solution

The RUFADAA should become federal law, yet remain general enough to allow for community property states and non-community property states to coexist.¹⁸¹ A federal law will prevent state jurisdictional confusion, and

172. Jeff Roberts, *Should You Have a Right to Sell Your Ebooks and Digital Music?*, GIGAOM (June 6, 2014), <https://gigaom.com/2014/06/06/should-you-have-a-right-to-sell-your-ebooks-and-digital-music/> [https://perma.cc/VVM6-WV9E].

173. See generally *General Information Concerning Patents*, USPTO (Oct. 2014), <http://www.uspto.gov/patents-getting-started/general-information-concerning-patents> [https://perma.cc/U6MQ-8ATG] (concerning how a patent functions).

174. See *id.*; Martin Goetz, *Lifting the Fog on ‘Software Patents’ – Eliminate that Meaningless Term*, IPWATCHDOG (Aug. 5, 2015), <http://www.ipwatchdog.com/2015/08/05/lifting-the-fog-on-software-patents-eliminate-that-meaningless-term/id=60312/> [https://perma.cc/MVA3-D4MT] (explaining that software patents are portion of a larger claim and not a claim in itself).

175. See *supra* Part XI.A–B.

176. See *supra* Parts V.A, B.2, VI.B, VII, X.

177. See *supra* Parts V.B, VI.B.

178. See *supra* Parts V–VI.

179. See *supra* Part V.

180. See *supra* Parts V.B, VI.

181. See *supra* Part XIII.A.

companies from claiming they purchased the product in another state, thus preventing issues with long-arm statutes.¹⁸² Next by forcing, not encouraging companies to have the digital beneficiary established at sign-up, will take the law a step further.¹⁸³ Additionally, the law should require users to make an initial disclosure of a fiduciary and secondary fiduciary at sign-up, or the user cannot create the account.¹⁸⁴ Yet the law must require the companies to link disclosure of the accounts existence to a beneficiary's e-mail account, telephone number, or mailing address to ensure that the fiduciary is aware of the duties and responsibilities and allow them to opt-out of acting as the fiduciary of the account.¹⁸⁵ Finally, to encourage compliance from companies who manage digital assets, the Federal Communication Commission and the Internal Revenue Service should jointly regulate the compliance with repercussions ranging from a fine to the loss of the company's URL.¹⁸⁶

C. Dream Solution

The RUFADAA and the UFADAA are only a portion of the rights and goals that citizens want to have with digital assets.¹⁸⁷ The ability to access and transfer digital assets is the goal.¹⁸⁸ The DMCA, the SCA, the CFAA, and the AIA limit the states' ability to create a transferability statute.¹⁸⁹ Reforming several laws will create a federal equivalent property and digital users right statute to create equal value in the digital assets and the real assets; for example, amending the DMCA to include the exclusive right to license a limitation that the time period on digital assets must be for approximately the same length in time as an equivalent physical asset is one possibility.¹⁹⁰ That would make the life span of a digital movie equal to the project lifespan of a DVD and allow for the sale of the digital copy on the open market like the DVD copy of the same movie.¹⁹¹ Thus, a federal act is necessary to allow citizens the right to transfer in life or death any of their digital assets and to

182. See *supra* Part XIII.A; *What is the Difference Between Minimum Contacts and Long Arm Statutes?*, USLAWESSENTIALS (Oct. 1, 2015), <http://www.uslawessentials.com/blog/2015/10/1/what-is-the-difference-between-minimum-contacts-and-long-arm-statutes> [https://perma.cc/XLK9-5GP7] (explaining the differences and extent of the states' long-arm statutes); Draft of Texas Revised Fiduciary Access to Digital Assets Act § 351.403(b).

183. See *supra* Part VII.

184. See *supra* Part VI.A.

185. See *supra* Parts IX–X.

186. See *supra* Part VI.A.

187. See *supra* Parts VI.A, IX.C.

188. See *supra* Parts III.B, IV.

189. See *supra* Part III.B.

190. See *supra* Part III.B.

191. See *supra* Part III.B.

have an equal value in the market place.¹⁹² Implementing this approach would not require the same level of enforcement as the previous approach for two reasons: (1) the companies would no longer have a financial stake in the digital asset and (2) the same agency that regulates the equivalent real property will enforce the digital asset.¹⁹³

XIV. CONCLUSION

If the states and federal government do not adapt to the ever-changing law of digital assets it could potentially ruin the digital market.¹⁹⁴ Concerns for privacy, access, and transferability of digital assets are some of the foremost issues facing the nation in the coming years.¹⁹⁵ As a result, lawyers will have to find innovative solutions to prevent clients from violating federal law.¹⁹⁶ Professor Beyer summarizes the current state of fiduciary access to digital assets law as follows: “[t]here’s legislation being proposed in dozens of states to assist with this problem [accessing a deceased person’s digital assets without violating federal law]—things are getting better very slowly, but very few states have laws in place on this issue.”¹⁹⁷ Implementing a federal law requiring companies to establish an online tool for fiduciary’s access to digital assets will most likely increase the interstate commerce between companies and citizens of different states while reduce user reluctance to purchase digital assets, thus improving the state of the economy and driving innovation in the digital world.¹⁹⁸ Implementing the second proposal, which grants equal federal rights between digital and real property, and the grant of the right to transfer digital assets through amending several federal statutes, could produce a secondary market in the resell of digital assets.¹⁹⁹ “In this world, you get what you pay for.”²⁰⁰

192. *See supra* Part XI.B.

193. *See supra* Part XIII.B.

194. Gerry W. Beyer & Naomi Cahn, Digital Planning: The Future of Elder L., 9 NAELA J. 135 (Spring 2013), <https://www.naela.org/NAELADocs/PDF/Library%20Tab/NJSpring2013.pdf> [<https://perma.cc/Y8QW-8B8Y>].

195. *See supra* Part III.

196. *See supra* Part XII.

197. James Roger, *Widow Wins Battle with Apple Over Deceased Husband's Password*, FOXNEWS (Jan. 20, 2016), <http://www.foxnews.com/tech/2016/01/20/widow-wins-battle-with-apple-over-deceased-husbands-password.html> [<https://perma.cc/8D7R-ECQF>] (quoting Professor Gerry W. Beyer).

198. *See supra* Part XIII.B.

199. *See supra* Part XIII.C.

200. KURT VONNEGUT, CAT’S CRADLE 128 (1963).