

The digital afterlife? Your guide to dealing with digital assets



Every day, perhaps without realising it, we are creating an ever larger digital footprint of our personal and financial lives online. What happens to this when someone dies or loses mental capacity?

BY BRYONY COVE AND CAROLINE PEARCE, FARRER & CO LLP

Leaving your treasured vinyl collection to your son or your family photo albums to your grandchildren used to be so easy. In a digital age, property has become increasingly 'intangible' and may be buried beneath layers of cyber security, meaning it can be hard to locate and even harder to administer.

In the past, a paper trail generally revealed the extent and location of someone's assets, with long-established laws governing how they should be administered on death or loss of capacity. Where digital assets are concerned, the legal landscape has failed to keep up with the development of technology itself, leading to multiple difficulties for the unwary.

This article explores these difficulties and offers practical guidance to enable you to best navigate tomorrow's digital landscape. ►

“Most people are under the impression that they own their online content, unaware that they have nothing more than a ‘licence’ to use a website’s services.”



The value of digital assets

Today, an estimated £25 billion of our assets in the UK are held online. Many digital assets are of predominantly sentimental value, for example memories stored on a laptop, in the 'cloud' or uploaded onto social media sites such as Facebook, Instagram or YouTube. Traditional media is now frequently purchased online, with iTunes and Spotify replacing record collections and the sale of e-books also increasing substantially.

Significant revenues are generated online. The highest earning YouTube channel run by PewDiePie reportedly generated an income of US\$7.4 million in 2014 as its 40 million subscribers tuned in. Non-traditional cryptocurrencies such as Bitcoin and online accounts generating reward points or frequent flyer points can also be translated into significant monetary value.

It is important that digital assets can be located and accessed so that their value, both sentimental and financial, can be unlocked for future generations. Unfortunately, the legal position makes this far from easy.

“Today, an estimated £25 billion of our assets in the UK are held online”

The myth of legal ownership

The basic position under English law is that there is no property right in information itself. Most people are under the impression that they own their online content, unaware that they have nothing more than a 'licence' to use a website's services.

This is governed by the Terms of Use which have to be accepted to open the account. The terms vary depending on the service provider, but the licence often terminates on death and is non-transferrable. Service providers cite privacy and confidentiality as the reasons for these conditions. However, this can be directly at odds with an individual's wish to preserve and transfer their digital assets to others including the next generation. Loss of capacity is not even contemplated.

The US has attempted to legislate in this area by attempting to give power to fiduciaries (such as executors or attorneys) to access and manage someone's digital assets and accounts. However, many states (significantly including California) have chosen not to enact the law, opposing the idea that a fiduciary could supplant the original account holder since it conflicts with existing privacy and contractual rights.

In the UK, currently there is no comparable legislation. A grant of probate may not be sufficient to enable executors to obtain legal title to digital assets. As our laws have not been updated to keep up, the only option is to consult the relevant Terms of Use for each service provider to establish the rights to access someone's digital assets on death. When a person loses capacity to deal with their affairs, the law is even less helpful, as it could be argued consent to access digital assets cannot be given by someone who lacks capacity. ►

Terms of Use

These will always be non-negotiable standard terms, seldom allowing digital assets to be transferred on death. For example:



iTunes: the licence to play digital recordings is not transmissible but can be used on up to five computers. However, Apple confirmed that they would be willing to transfer and close an account on presentation of a death certificate and grant of probate.



Facebook: a deceased's account can be deleted or 'memorialised' and preserved online. Since July 2015, account holders have been able to appoint an 'online executor' who can administer the page after their death.



Google/YouTube: an innovative service enables account holders to set up an Inactive Account Manager. Google will notify up to ten chosen 'beneficiaries' after an account has been inactive for a predetermined period of time, who will be granted access to the deceased's account before it is terminated.



Microsoft: on receipt of a death certificate and grant of probate Microsoft will provide a copy of emails on a disc to the next of kin.



Yahoo: accounts are terminated on notification of the death of an account holder.



PayPal: accounts are closed on presentation of a death certificate and grant of probate with a cheque issued for any leftover funds.

“It is important that digital assets can be located and accessed so that their value, both sentimental and financial, can be unlocked for future generations”

Navigating the digital landscape

A simple way to make sure your digital life remains available to the next generation may be to leave an inventory of your accounts and passwords. However, accessing someone else's account without specific authority arguably breaches section 1 of the Computer Misuse Act 1990, and could also contravene the service provider's Terms of Use. It may also breach various Computer Fraud and Abuse Acts in the United States or other local laws, depending on the jurisdiction which governs the account in question.

Complex jurisdictional issues can also arise in relation to copyright, privacy and data protection where the service provider is based outside the UK. However, obtaining advice on the Terms of Use of overseas service providers to establish your rights, for example, may be disproportionately expensive compared to the monetary value of the assets in question. ▼

PRACTICAL TIPS

1 It is possible to draft a clause in your Will that refers specifically to digital assets with only sentimental value. Remember that where you only hold a licence, it may not be transferable on death (depending on the Terms of Use in question). Detailed instructions as to how executors should deal with certain digital assets could be included in a letter of wishes.

2 Digital assets with monetary value and any associated intellectual property rights will need specialist treatment in your Will. There is also scope to appoint a separate 'digital executor' who has the necessary expertise.

3 We recommend creating an inventory of all your digital assets and updating this regularly. It will mean executors and attorneys are able to quickly and easily establish the extent of the assets they are managing. For security reasons, passwords should not be stored alongside this. However, there are digital inheritance accounts, such as Password Box, which could be used. We would not recommend leaving this information in your Will (since a Will becomes a public document on death), but it is helpful if a hard copy of the inventory is stored privately alongside a Will or Lasting Power of Attorney.

4 Where possible, back up any digital assets stored solely in the 'cloud' onto an external hard drive. This will help guard against the risk of the service provider deleting everything and may preserve and protect digital assets after death.

Conclusion

There is no doubt that the protection and preservation of digital assets can be a minefield. Ignoring the need to think about how your digital assets should be handled and shared after your death or on incapacity is simply not an option. **d**