

Facebook after death: an evolving policy in a social network

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Abstract

This article examines the current policies and the factors which shaped the policy and procedures that define Facebook after death. Examination of these policy choices helps to place earlier scrutiny of Facebook's deceased user policies in context, while also incorporating more recent developments including case law and legislative proposals that deal with digital remains and legacy. The early impact of internal factors, in particular, pressure from users of the social network, who were bound together by technical and contractual limits, set many of the parameters for later changes. External factors driven by families of the deceased, the media, privacy regulators, the estate planning industry and legislators eventually became more impactful on policy decisions and are analysed. This analysis draws out gaps in Facebook's policies and helps test the impact of proposed legislation. Ultimately, the article looks to the future and makes recommendations which will be useful for social network service providers and legislators with respect to the digital remains of deceased users.

Keywords: social network services; digital death; legacy; succession law; Stored Communications Act; *post-mortem* privacy; fiduciary access; digital assets

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1. Introduction

Facebook with over one billion monthly active users is the world's largest and probably best known social media service provider.¹ Although it was initially developed at Harvard University in February 2004 in order to connect students with each other, it has grown into a worldwide phenomenon and claims an estimated 243.2 million users in Europe alone.²

Being a creation of and for young college students, it is unsurprising that dealing with the death of a network user did not feature in the initial development phase.³ Eventually, however, users began to die and how to deal with their profiles, a user's digital remains, needed to be addressed. Over time what has evolved is a set of policies around the theme of *memorializing* the account of a deceased friend and fellow network user.

This article examines the current policies and the factors which shaped the policy and procedures that define Facebook after death. Examination of these policy choices helps to place earlier scrutiny of Facebook's deceased user policies in context, while also incorporating more recent developments including case law and legislative proposals.⁴ The early impact of internal factors, in particular pressure from users of the social network, who were bound together by technical and contractual limits, set many of the parameters for later changes.

External factors driven by families of the deceased, the media, privacy regulators, the estate planning industry and legislators eventually became more impactful on policy decisions and are analysed. This analysis draws out gaps in Facebook's policies and helps test the impact of proposed legislation. Ultimately, the article looks to the future and makes recommendations which will be useful for social network service providers and legislators with respect to the digital remains of deceased users.

In order to examine and address these issues the article initially introduces Facebook's services and the basic elements of their contractual terms, including current deceased user policies and practices. This is followed by an examination of the evolution of the deceased user policy and the internal and external factors which shaped them. One external factor is not discussed, namely the impact of competitors. This is not because the author

¹ Facebook, *Newsroom, Key Facts* <<https://newsroom.fb.com/Key-Facts>> accessed 31 May 2013, states that during March 2013, Facebook had 1.11 billion monthly active users with an average 655 million daily active users. For a further breakdown of Facebook users by geographic region, see 'Facebook Users in the World by Region – September 2012' <<http://www.internetworldstats.com/facebook.htm>> accessed 7 June 2013.

² *ibid.*

³ James Grimmelmann, 'Saving Facebook' (2009) 94 Iowa Law Review 1137, 1145.

⁴ See eg Kristina Sherry, 'What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets *Postmortem*' (2013) 40 Pepperdine Law Review 1; Lilian Edwards and Edina Harbinja, 'What Happens to My Facebook Profile When I Die? Legal Issues Around Transmission of Digital Assets on Death' in Cristiano Maciel and Vinícius Carvalho Pereira (eds), *Digital Legacy and Interaction: Post-Mortem Issues* (Springer 2013) 115–144; and Jason Mazzone, 'Facebook's Afterlife' (2012) 90 North Carolina Law Review 1643.

believes there was no competitor impact, but rather because no compelling evidence has emerged in research to date on that point. Also, given the current dominance of Facebook in the social network market, significant competitor impact, at least in the short to medium term, on future policy choices would seem unlikely.⁵

2. Facebook: a networking service with rules and related policies

2.1 – *A social network with rules*

Facebook is similar to most other social network services.⁶ It is populated by individuals who upload information, text, images and video to share with others and develop relationships with the network's other members. Individual members first create an account which is built upon a personal profile that includes a photograph and basic personal information, including name, date of birth, contact information and interests.

Facebook makes it very clear that profiles (and timelines) are for individual non-commercial use; they 'represent individual people and must be held under an individual name'.⁷ Individuals may create an account for another person, with permission.⁸ However, profiles created in the name of deceased persons are not allowed.⁹ There is no provision for joint ownership of an account or a profile.¹⁰ Each user profile grows as a timeline as they upload photographs, stories, status updates and other information.

Users can invite, accept or reject 'Friends' to their own personal social network.¹¹ Confirmed friends can also post content or information to

⁵ This is not to discount the possible future impact of the Google Inactive Account Manager service announced on 11 April 2013 <<https://www.google.com/settings/u/0/account/inactive>> accessed 31 May 2013. This feature offers users the ability to identify data from individual Google accounts and services and indicate to whom, if anyone, these data should be shared, or to delete specific data sets, or a combination of these, following a specified period of inactivity on their account.

⁶ Social network services are 'web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system', Dannah Boyd and Nicole Ellison, 'Social Network Sites: Definition, History, and Scholarship' (2007) 13 *Journal of Computer-Mediated Communication* 210–11.

⁷ See Facebook, *Help Centre: Introducing Timeline* <<http://www.facebook.com/help/timeline>> accessed 31 May 2013.

⁸ Section 4.1 of the Facebook, *Statement of Rights and Responsibilities, Responsibilities* (last revised 8 June 2012) <<https://www.facebook.com/legal/terms>> accessed 31 May 2013.

⁹ Facebook, *Help Centre: Deactivating, Deleting & Memorializing Accounts* <<https://www.facebook.com/help/359046244166395/>> accessed 31 May 2013; '[c]reating a timeline in remembrance of an already deceased person is not allowed', however, users may create a page in remembrance of a decedent.

¹⁰ Facebook, *Help Centre: What names Are Allowed on Facebook?* <<http://www.facebook.com/help/112146705538576/>> accessed 31 May 2013.

¹¹ Facebook, *Help Centre: Glossary of Terms* <<http://www.facebook.com/help/219443701509174/>> accessed 31 May 2013, advises that 'Friends' are people you connect and share with on Facebook.

shared space, on a user's timeline, known as a 'wall'.¹² Other forms of interpersonal communication are also supported by Facebook; these include 'messages', 'pokes', 'chat' and 'video calling'.¹³ Individual users can keep abreast of what their Facebook 'Friends' are doing through the 'news feed' and 'notification' features.¹⁴ These two features also provide updates on the 'Pages' or 'Groups' that individual users either follow or are members of.¹⁵

Individual users can also create or join 'Groups'. Groups provide a closed space, within Facebook, for individuals to communicate about shared interests.¹⁶ Groups may be managed by one or more individual users. Facebook also permits users to create 'Pages'. There is a clear recognition that pages can be created for 'a brand, entity (place or organization), or public figure'; in general such Pages are often promotional or commercial in nature.¹⁷ The Pages service operates under special provisions incorporated into the Facebook terms.¹⁸

Commercial Pages may only be created and managed by official representatives.¹⁹ However, a Page must be created by an individual user with a Facebook profile. Once created, Pages can be managed by more than one individual users. Pages and Groups are not separate accounts and are operated by individual users, known as 'admins', under their own individual logins.

Facebook provide numerous other services, too numerous to detail in full here, but Grimmelmann has accurately commented that Facebook's 'pace of innovation is so blisteringly fast that is it not uncommon to log into the site and see that part of the interface has changed overnight to offer a new feature'.²⁰ Built upon the Facebook platform are various products and services which cut across other Internet-based services. These are services which Facebook provide directly, such as 'Social plugins'

¹² Timelines were introduced in 2011. Prior to this individuals shared content and information on a person's 'wall'. The term 'wall' is maintained in the Facebook lexicon and means the space on an individual's timeline for shared content and interactions. See Facebook (n 11).

¹³ Facebook (n 11).

¹⁴ Facebook, *Help Centre: News Feed*, available at <<http://www.facebook.com/help/210346402339221/>> accessed 31 May 2013 and Facebook, *Help Centre: Notifications*, available at <<http://www.facebook.com/help/327994277286267/>> accessed 31 May 2013.

¹⁵ *ibid.*

¹⁶ Facebook, *Help Centre: Group Basics*, available at <<http://www.facebook.com/help/groups>> accessed 31 May 2013.

¹⁷ Facebook, *Facebook Pages Terms*, (last revision 14 May 2013), available at <https://www.facebook.com/page_guidelines.php> accessed 31 May 2013. Facebook make a distinction between pages *about* a particular brand or celebrity that do not officially represent it—known as community pages—and those that do represent a brand or celebrity that may only be created and managed by official representatives.

¹⁸ *ibid.*

¹⁹ Facebook, *Help Centre: How Are Pages Different from Groups? Which One Should I Create?* <<http://www.facebook.com/help/155275634539412/>> accessed 31 May 2013.

²⁰ Grimmelmann (n 4) 1145.

and 'Login with Facebook'. The most common of these is the 'Like' button that is visible on many websites.²¹

Facebook also acts as a gateway in facilitating applications—also known as 'apps'—and other services to run on its platform. Facebook makes available to developers an Application Programming Interface (API) which can be built upon and used to access its services and content.²² Facebook also supports the OAuth 2.0 standard which permits applications to access an individual's account and act on their behalf without the need to store primary login credentials such as the username and password combination.²³

The OAuth 2.0 system works by creating what are best described as shadow credentials that permit the third-party applications limited access to an individual user's account under specified rules. Once authorized by the individual user, the application can carry-out certain functions or actions on behalf of the Facebook user. The scope of these functions is constrained by both Facebook and the specific permissions a user grants to the application. Currently, Facebook permit two particular time-settings for their shadow credentials: 'short-lived' which remain valid for between 1 and 2 hours and 'long-lived' which remain valid for 60 days.²⁴ A user can grant a third-party application permission to access their Facebook account and carry-out certain functions for periods of up to 60 days into the future.

Finally, Facebook acts as a payment intermediary.²⁵ As a basic minimum, users can link a debit or a credit card or a Paypal account to their account. In a few selected regions, namely, the United States, United Kingdom, Canada, France and Germany, users can purchase 'Facebook Gift Cards', which can be redeemed as an 'electronic value balance' in a user's account or channelled directly into games and applications available through the

²¹ Social plugins allow users to see relevant information such as which of their friends have 'Liked' the content of the website. When a logged-in Facebook user visits a website that has a Facebook social plugin, they will be presented with personalized content based on what their 'friends' have 'liked', 'commented' or 'recommended' on that website.

²² An API is a set of programming instructions and standards to allow third parties to develop software that draws information from, or otherwise interacts with, a website, program, or database. Full details of the APIs that Facebook offer are available at <<https://developers.facebook.com/docs/reference/apis/>> accessed 31 May 2013.

²³ OAuth is an authentication protocol that allows users to approve applications to act on their behalf without sharing their password; for more visit <<http://oauth.net/>> accessed 31 May 2013. Facebook users generally login to their account by entering either a username, e-mail address or mobile number, in combination with their password; see Facebook, *Help Centre: Login Basics* <<http://www.facebook.com/help/418876994823287/>> accessed 31 May 2013.

²⁴ Facebook, *Developer Roadmap: Removal of offline_access Permission* (last revised 29 May 2013) <<http://developers.facebook.com/roadmap/offline-access-removal/>> accessed 13 June 2013. In general, access-credentials automatically expire if a user withdraws permission or changes their Facebook password.

²⁵ Their attempt at creating a virtual currency 'Facebook Credits' has been unsuccessful; the virtual currency will cease to be supported beyond 12 September 2013, see Yongyan Liú, 'Local Currency Payments Breaking Change', *Facebook, Developer Blog* (5 June 2013) <<https://developers.facebook.com/blog/post/2013/06/05/local-currency-payments-breaking-change/>> accessed 13 June 2013.

Facebook platform.²⁶ However, these balances cannot be transferred to another user's account.²⁷

Following the death of a user, the digital remains left behind may include the account which is protected from access behind a password and login credentials. The account is further comprised of sub-elements, which include the user's profile (timeline), various types of messages and interactions, the Pages and Groups that the user acted as admin for, and possibly a positive electronic value balance. What happens to these digital remains depends on a number of factors, the first being the contractual relationship between the parties.

2.2 – *The contract: Facebook's terms of service*

Facebook services are primarily offered under their terms and privacy policy, also known respectively as the Statement of Rights and Responsibilities and the Data Use Policy.²⁸ These two documents alone consist of 14,000 words and are supplemented by a number of other specific terms of service, policy documents, guidelines and forms, some of which are broadly incorporated by reference into the terms, that also govern an individual user's use of Facebook.²⁹ The terms are amended regularly. Proposed changes are posted to the Facebook Site Governance Page a minimum of 7 days before the change is effective.³⁰

Facebook offer a standard Statement of Rights and Responsibilities document. They make provision for certain limited variations which are contained in Section 17. For all Facebook users, with the exception of German users, the 'laws of the State of California will govern' the contract; German law applies to German users.³¹ However, the choice of forum, for all disputes is 'exclusively in a state or federal court located in Santa Clara County', California.³²

The terms also clearly state that the agreement—between Facebook and the individual user—'does not confer any third party beneficiary rights'.³³ Users must not transfer their Facebook account, including any 'Page' or 'application' they administer, without first acquiring Facebook's

²⁶ Facebook, *Help Centre: Facebook Gift Cards* <<https://www.facebook.com/help/448687521818523/>> accessed 13 June 2013. See also s 2.6 of the Facebook, *User Payment Terms* (last revised 21 May 2013) <https://www.facebook.com/payments_terms> accessed 31 May 2013.

²⁷ *ibid.*

²⁸ Facebook, *Terms: Statement of Rights and Responsibilities* (last revised 8 June 2012) <<https://www.facebook.com/legal/terms>> accessed 31 May 2013.

²⁹ *ibid* s 19. The word count for the Facebook terms was included in Oliver Smith, 'Facebook Terms and Conditions: Why You Don't Own Your Online Life' *The Telegraph* (4 January 2013). The policies, forms and guidelines that apply to a deceased person's account are discussed in subsection 'Facebook's deceased user policies'.

³⁰ *ibid* s 14. Users must 'Like' the page in order to receive a notification in their timeline.

³¹ *ibid* s 16.1.

³² *ibid.*

³³ *ibid* s 19.9.

written permission.³⁴ Password sharing is prohibited and users are also prohibited from letting anyone else access their account.³⁵ The only exception to third-party access is the ability of applications to access a user's account. However, such access is always granted by users themselves.³⁶

Within the European Union, Facebook must also comply with data protection legislation. Through the contractual terms for users outside the United States, Facebook Ireland Limited are the provider of the services and data controller; therefore, the requirements of Irish data protection laws apply.³⁷

As is clearly evident from this overview, individual users enter a dynamic and complex legal agreement when they operate a Facebook account. Even for a person with reasonable technical and legal skills, negotiating the provisions and policies takes considerable effort. How these primary provisions impact on the fate of the digital remains of which a deceased user's Facebook account consists is further complicated by a number of other policies.

2.3 – Facebook's deceased user policies

There is no provision that expressly terminates the contractual agreement between Facebook and a user who dies. This is not exceptional; Google, for example, do not have such a termination provision in their terms.³⁸ However, Yahoo! have a termination clause and infamously relied on it to try to prevent the Ellsworth family from acquiring the contents of their deceased son's e-mails.³⁹ Despite the Oakland County Probate Court in Michigan ordering Yahoo! to hand over the e-mails in the decedent's account, Yahoo! have not amended their terms.⁴⁰

³⁴ *ibid* s 4.9.

³⁵ *ibid* s 4.8: 'You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account.'

³⁶ *ibid* s 2.3: 'When you use an application, the application may ask for your permission to access your content and information as well as content and information that others have shared with you. . . . your agreement with that application will control how the application can use, store, and transfer that content and information.'

³⁷ Data Protection Act 1988 (as amended).

³⁸ See Google, *Terms of Service* (last revised 1 March 2012) <<http://www.google.com/intl/en/policies/terms/>> accessed 31 May 2013.

³⁹ Evan Carroll and John Romano, *Your Digital Afterlife: When Facebook, Flickr and Twitter Are Your Estate, What's Your Legacy?* (New Riders 2011) 11–14, explain the struggle of John Ellsworth with Yahoo! in order to acquire the contents of his son's e-mail account. This culminated in a probate court order *In re Ellsworth*, No 2005-296,651-DE (Oakland Co. Michigan Probate Court 2005). Recently the application of Yahoo!'s terms of service in probate situations were not upheld in *Ajemian v Yahoo!* 12-P-178 (Massachusetts Ct App, 7 May 2013); 2013 Mass App LEXIS 73; however, the appeals court remitted the specific probate question back to the local probate court for final adjudication.

⁴⁰ Section 28 (United States version) of the Yahoo! *Terms of Service* (last revised 16 March 2013) <<http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html>> accessed 31 May 2013:

No Right of Survivorship and Non-Transferability. You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.

The Statement of Rights and Responsibilities and Data Use Policy contain only one provision relating to a deceased person's account. This deals solely with the Facebook 'memorialization' process and states:

We may memorialize the account of a deceased person. When we memorialize an account, we keep the timeline on Facebook, but limit access and some features. You can report a deceased person's timeline at: https://www.facebook.com/help/contact.php?show_form=deceased We also may close an account if we receive a formal request that satisfies certain criteria.⁴¹

This provision is almost hidden away in the '[s]ome other things you need to know' section of the Data Use Policy and links to a 'Memorialization Request' form.⁴² The provision is extremely vague. It does not require Facebook to act in a particular manner, it merely states that they *may* act to 'memorialize' an account and *may close* an account if certain unspecified criteria are met.⁴³

While there is a link to the 'memorialization request' form in the Data Use Policy, further detail on Facebook's policies and procedures for handling the accounts of deceased persons is found across a series of sections in the online help centre and the various options provided in a number of request and contact forms.⁴⁴ Through the help centre specific advice is provided on:

- What happens when a deceased person's account is memorialized?⁴⁵
- How do I report a deceased person or an account that needs to be memorialized?⁴⁶
- What should I do if a deceased person's account is showing up in People You May Know?⁴⁷
- My personal account is in a special memorialized state.⁴⁸
- How do I request content from the account of a deceased person?⁴⁹

Yahoo! operate different terms of service in different regions. For example, the same termination on death provision is contained in s 24 (not s 28) of their UK and Ireland terms; see Yahoo!, *Terms of Service* (no last revised date) <<http://info.yahoo.com/legal/uk/yahoo/utos/en-gb/details.html>> accessed 31 May 2013.

⁴¹ Section VI of the Facebook, *Data Use Policy* → *Some Other Things You Need to Know* <https://www.facebook.com/full_data_use_policy> accessed 31 May 2013.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ Edwards and Harbinja (n 4), question whether some of these forms and policies are 'merely statements of good practice' rather than binding contractual terms.

⁴⁵ Facebook (n 9).

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ *ibid.*

- How do I submit a special request for a deceased user's account on the site?⁵⁰

The specific forms or contact pages include:

- Memorialization Request;⁵¹
- Special Request for Deceased Person's Account;⁵²
- Requesting Content From a Deceased Person's Account;⁵³ and
- My Personal Account is in a Special Memorialised State.⁵⁴

These help centre pages and forms are often changed without notice to users and no facility is yet in place to review the change history or an archive of such changes or amendments. From piecing the elements together it seems clear that it is Facebook policy to *memorialize* the accounts of all deceased persons.⁵⁵

Unlike some other Internet-based service providers, Facebook have no account inactivity policy.⁵⁶ They rely on other users and non-users through the *memorialization* request forms for notification of the death of a user. Placing the notification process into the hands of the public brings with it the problems of incorrect reports leading to the accounts of living persons being either innocently or possibly maliciously placed in a *memorialized* state.⁵⁷

In June 2013, Facebook removed 'other' from the relationship with the deceased options on the *memorialization request* form.⁵⁸ However, the

⁵⁰ Facebook, *Help Centre: How Do I Submit a Special Request for a Deceased User's Account on the Site?* <<https://www.facebook.com/help/265593773453448>> accessed 31 May 2013.

⁵¹ Facebook, *Memorialization Request* <<https://www.facebook.com/help/contact/305593649477238>> accessed 18 June 2013.

⁵² Facebook, *Special Request for Deceased Person's Account* <<https://www.facebook.com/help/contact/228813257197480>> accessed 31 May 2013.

⁵³ Facebook, *Requesting Content from a Deceased Person's Account* <<https://www.facebook.com/help/contact/398036060275245?rdhrc>> accessed 31 May 2013.

⁵⁴ Facebook, *Help Centre: My Personal Account Is in a Special Memorialised State* <<https://www.facebook.com/help/contact/292558237463098>> accessed 31 May 2013. Please note this form uses memorialisation with an 's', every other form spells memorialisation with a 'z'.

⁵⁵ Sherry (n 4) 229. Although the wording quoted in the article from a Facebook help page has since been amended; the word 'all' is removed.

⁵⁶ Many Internet-based service providers include within their terms of service the option to terminate or deactivate the accounts of inactive subscribers after specified periods of inactivity. It must be acknowledged, however, that mere account inactivity may not mean that the account *owner* is in fact deceased.

⁵⁷ Facebook provide a form to request the reinstatement of an account memorialized in error; see Facebook, *My Personal Account Is in a Special Memorialised State* <<https://www.facebook.com/help/contact/292558237463098>> accessed 31 May 2013. See also Helen Popkin, 'Dead on Facebook: Pranksters Kill Accounts with Fake Death Reports' *NBC News - Technology* (4 January 2013) <<http://www.nbcnews.com/technology/dead-facebook-pranksters-kill-accounts-fake-death-reports-1B7833218>> accessed 31 May 2013.

⁵⁸ Facebook, *Memorialization Request* <<https://www.facebook.com/help/contact/305593649477238>> accessed 18 June 2013. Prior to the June 2013 change, the Memorialization Request form sought those who reported a deceased user to indicate their relationship with the deceased from one of the following categories:

- 'Immediate family (spouse, parent, sibling, child)
- Extended family (grandparent, aunt, uncle, cousin)

'non-family' relationship classification, which expressly includes a friend, colleague or classmate, still remains.⁵⁹ It is unclear whether this change is an attempt to tighten up the process of reporting a deceased user. In any event, given the examples of 'fake death reports', it is not known by what process, if any, Facebook verify the information or the relationships before acting on *memorialization* requests.⁶⁰

The key features of *memorialization* include a block on anyone logging in to the account, even those with previously valid login information and password. Any user can send a private message to a *memorialized* account. Content that the decedent shared, while alive, remains visible to those it was shared with. Depending on the privacy settings confirmed Friends may still post to the decedent's timeline (wall). Accounts (time-lines) which are *memorialized* no longer appear in the 'people you may know' prompt or other suggestions and notifications.⁶¹ Facebook also remove what they term 'sensitive information such as contact information and status updates' in order to protect the deceased person's privacy.⁶²

Memorialization also prevents the tagging of the decedent in future posts, photographs or messages.⁶³ What is termed *un- or de-Friending* a deceased person's *memorialized* account is 'permanent and there is no way for a renewed friend request to be approved'.⁶⁴ There appears to be no way to add a Friend to a *memorialized* account or profile, an issue that is regularly raised by parents of deceased children who may not have added their parents as Friends while alive. However, it is not entirely clear whether Facebook would consider (or more importantly grant) a 'special request' to be added as a Friend if made, for example, by a bereaved parent.⁶⁵

-
- Non-family (friend, colleague, classmate)
 - Other'

If a person making a memorialization request chose 'other' they were then asked to describe the relationship with the deceased in their own words.

⁵⁹ *ibid.*

⁶⁰ For example, the account of Simon Thulbourn who, in 2009, was probably the first person to *fake* his own death on Facebook <http://thulbourn.com/not_dead.html> accessed 31 May 2013.

⁶¹ Facebook, *Help Centre: What happens When a Deceased Person's Account Is Memorialized?* <<https://www.facebook.com/help/103897939701143/>> accessed 3 June 2013.

⁶² Max Kelly, 'Memories of Friends Departed Endure on Facebook' *Facebook Blog* (26 October 2009) <<https://www.facebook.com/blog/blog.php?post=163091042130>> accessed 31 May 2013.

⁶³ Stephanie Buck, 'How 1 Billion People Are Coping with Death and Facebook', *Mashable* (13 February 2013) <<http://mashable.com/2013/02/13/facebook-after-death/>> accessed 31 May 2013. This is a change in the position described by Mazzone (n 40) 1661.

⁶⁴ See Death and Digital Legacy, 'Nebraska is Latest State to Address Digital Legacy' (20 February 2012) <<http://www.deathanddigitallegacy.com/2012/02/20/nebraska-is-latest-state-to-address-digital-legacy/>> accessed 31 May 2013.

⁶⁵ Facebook, *Special Request for Deceased Person's Account* <<https://www.facebook.com/help/contact/228813257197480>> accessed 31 May 2013.

It is not just the immediate family who may lose out on access to the rich information stored in the account. The freezing of accounts in *memorialized* status may eventually mean that entire sub-networks become inaccessible.⁶⁶ It is unclear what, if any, provision Facebook, have or are willing to make in order to permit future access to the network for heritage institutions or researchers. More fundamentally, the question arises as to whether Facebook should have such control over these materials of history?

Despite these criticisms, it must be acknowledged that Pages and Groups have a built-in succession mechanism with multiple admins possible; therefore both can survive following the death of their original creator. It just takes some careful planning. However, Facebook make no reference in their terms, nor associated policy documents, as to what happens within a Group or Page administration hierarchy when an admin's account is *memorialized*.

3. The evolution of Facebook's policy choices

3.1 – *Memorialization a solution to an internal network problem?*

The *memorialization* of a deceased user's account was not an original feature. Mazzone claims 'in the initial period after Facebook began, accounts of deceased users were deleted after thirty days'.⁶⁷ However, a Facebook spokesperson, in 2007, had advised that profiles were 'removed' after 30 days of them becoming aware of a death, in which time friends could still post on the wall (timeline) of the deceased person.⁶⁸ This 30-day window, and associated posts by friends, was what Facebook originally termed *memorialization*.⁶⁹

As with many of Facebook policies, terminology is important, and it would seem that a deceased user's profile was most likely deactivated and no longer available rather than actually permanently deleted. This is borne out by the story of the Fought family, whose son Blake died in March 2007. His profile was removed a month later, in April, but

⁶⁶ This depends, of course, on privacy settings and the access that friends-of-friends may have. However, as those in a group eventually die and accounts fall into a *memorialized* status the ability of those outside this network to access their shared content will become more difficult. It must be noted that this is no different to the analogue world in which information of this nature dissipates across disconnected family and friends over time. The difference in the digital world is that this information is stored and remains, technically, available.

⁶⁷ Mazzone (n 4) 1662.

⁶⁸ Kristina Kelleher, 'Facebook Profiles Become Makeshift Memorials' *The Brown Daily Herald* (22 February 2007) <<http://www.browndailyherald.com/2007/02/22/facebook-profiles-become-makeshift-memorials/>> accessed 31 May 2013.

⁶⁹ Monica Hortobagyi, 'Slain Students' Pages to Stay on Facebook' *USA Today* (9 May 2007) <http://usatoday30.usatoday.com/tech/webguide/internetlife/2007-05-08-facebook-vatech_N.htm?csp=34> accessed 31 May 2013.

restored in May 2007 after a change in Facebook policy.⁷⁰ A spokesperson for Facebook confirmed at the time that:

There is a way to bring back profiles that have been deleted and, certainly, if someone writes to our customer service department, we will evaluate their request on a case-by-case basis.⁷¹

The change in policy, from removal after 30 days *memorialization* to permanent *memorialization* (as it is today) arose from a campaign by college students and others calling on Facebook not to remove the profiles of the students killed in the Virginia Tech shootings which took place in April 2007.⁷² In the period following the calamity, accounts of the victims had become high-profile memorials, with messages of sympathy and support posted on them.

These early examples of deceased users relate primarily to college students and the reactions of either their classmates and friends, or their parents, to the death. This is hardly surprising as, in its early years Facebook was predominantly a network for college students.⁷³ Parents when confronted with a deceased child's profile often turned to external sources such as lawyers for assistance, rather than campaigning for a change in policy on the site itself, as student peers had done following Virginia Tech.

The classmates and friends of a decedent were different from parents in that they also had an active stake in the social network, as they were most likely Facebook users and invested considerable time in constructing their own profiles and a network of Friends. They also had a stake in the co-constructed timelines of their Friends. Facebook timelines 'are not the representation of a person in isolation', they are identities shaped and negotiated between individuals in a group, something to which a timeline gives a tangible, albeit digital, expression.⁷⁴ The loss of even part of this shared and co-constructed digital bond would naturally be resisted. This is a point that Kasket has highlighted when describing how 'discombobulated' she was when a friend temporarily deactivated his account:

I was no longer able to see posts, jokes, and poems I had placed on his timeline, and the removal of his profile meant that comments that he had made on my profile also disappeared, leading to a string of disjointed

⁷⁰ *ibid.* See also the comments of Amy Johnson Fought on the Facebook Group, *Facebook Memorialization Is Misguided: Dead Friends Are Still People* <<https://www.facebook.com/groups/2785485042/>> accessed 31 May 2013. Access to the group requires a Facebook account and login.

⁷¹ Hortobagyi (n 69).

⁷² *ibid.* See also Facebook Group, *Facebook Memorialization Is Misguided: Dead Friends Are Still People* <<https://www.facebook.com/groups/2785485042/>> accessed 31 May 2013.

⁷³ Grimmelmann (n 4) 1145.

⁷⁴ Elaine Kasket, 'Access to the Digital Self in Life and Death: Privacy in the Context of Posthumously Persistent Facebook Profiles' (2013) 10 *SCRIPTed* 7, 10.

remarks that made it look as though I was having a conversation with a voice in my head.⁷⁵

While Kasket accepted this, temporary deactivation, as her friend's right while alive, she questions how differently she might feel if the friend had died and his profile was permanently removed.⁷⁶ This unease at the breaking of that digital bond, of Facebook friendship, following death is also confirmed by Pennington.⁷⁷ Although she deals with a small sample size, her study found that all her college-student research participants had never 'de-friended' a deceased user, although the reasons given for not doing so were inconsistent.⁷⁸

3.2 – *The emergence of external pressures for change*

Parents on the other hand dealt with the deceased Facebook user conundrum from a different perspective. In the early Facebook years bereaved parents were unlikely to be active users and therefore very often did not maintain a status of Facebook Friend with their deceased child. As a result parents sought access to the contents of the account from what could be termed the outside. There can also be little doubt that the highly publicized legal battle between Yahoo! and the Ellsworth family over their deceased son's e-mail account, occurring as it did between 2004 and 2005, framed and defined the digital remains issue firmly in a legal (probate) scenario for most parents, families and lawyers.⁷⁹

Parents are also more likely than college students to have made their own wills or have dealt with the death of a family member which engaged them with estate administration and probate. Furthermore, the death of a minor, or a child of a college going age, would generally involve a tragedy, such as an accident, suicide or murder; therefore parents would often be working with law enforcement officers and coroners and thus the formal

⁷⁵ The quote is from the paper, of the same title by Elaine Kasket, delivered at the Amsterdam Privacy Conference 2012 panel on Death and Post-Mortem Privacy in the Digital which Age. A copy is on file with author.

⁷⁶ *ibid.*

⁷⁷ Natalie Pennington, 'You Don't De-Friend the Dead: An Analysis of Grief Communication by College Students Through Facebook Profiles' (2013) 37 *Death Studies* 617, 625.

⁷⁸ *ibid.*

⁷⁹ *In re Ellsworth*, No 2005-296,651-DE (Oakland Co. Michigan Probate Court, 2005). A website in honour of Justin Ellsworth provides links to 35 local and national media stories which covered the family's 'battle' with Yahoo! These include *Fox News*, the *BBC*, *Washington Post*, *The Wall Street Journal* and many more; see <<http://www.justinellsworth.net/email/yahoofight.htm>> accessed 31 May 2013. The Ellsworth case also featured in a number of academic legal journals and estate planning blogs; see, eg Jonathon Bick, 'Inheriting Deceased's E-mail' *New Jersey Law Journal* (7 March 2005); David Goldman, 'Florida Estate Planning & Digital Assets' *Florida Estate Planning Lawyer Blog* (7 October 2006) <<http://www.floridaestateplanninglawyerblog.com/2006/10/florida-estate-planning-digital-assets.html>> accessed 31 May 2013; Justin Atwater, 'Who Owns E-Mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life?' (2006) 2006 *Utah Law Review* 397 and Jonathon Darrow, and Gerald Ferrera, 'Who Owns a Decedent's E-mails: Inheritable Probate or Property of the Network?' (2006–07) 10 *New York University Journal of Legislation and Public Policy* 281.

legal processes would seem a natural way to progress their requests with Facebook.

Attempts to achieve the same outcome as the Ellsworth family often saw bereaved parents and families make calls through the media for access to the account of a child who died in tragic circumstances. These calls would then be amplified, as they would illicit an emotional response from an audience and therefore receive widespread coverage. A bereaved family in dispute with Facebook often makes a national or international news story.⁸⁰

With the extraordinary growth in Facebook use beyond the student demographic, three further groups became increasingly important in the shaping of policy in relation to deceased users. These are: (i) regulators, who are dealing with complaints from users more aware of data processing and privacy concerns; (ii) the estate planning industry, who are grappling with the new digital environment and with the new digital estate planning services; and (iii) legislators, who are increasingly faced with constituents who cannot equate the technical and contractual approach of Facebook to traditional succession and inheritance norms.

3.3 – *Dealing with external access requests*

The first time this issue of external access to the Facebook account of a deceased user appears to have been raised through the courts was when the mother of Loren Williams, who was 22 years old when killed in a motorbike accident in 2005, sought access to her son's account.⁸¹ Following his death and upon learning that her son had a profile on the social network, Karen, Loren's mother contacted Facebook asking them not to delete her son's account.

Separately, she obtained his password through a friend of her son; however, shortly after she began logging-in the password was changed (possibly deactivated) by Facebook and she was locked out of the account.⁸² Following a period of negotiations through her lawyer, an agreement was reached with Facebook and a court order was obtained from Multnomah County Circuit Court, Oregon, in 2007, giving effect to the agreement and permitting Karen Williams access to the account but only for a period of 10 months.⁸³

⁸⁰ These include, for example, the families of: Loren Williams who died in a motorbike accident in Arizona, in 2005; Sahar Daftary who died in a fall from an apartment balcony in Manchester, England in 2008; Janna Moore Morin who was killed in Nebraska in 2009 after being hit by a snow plough; Benjamin Stassen who took his own life in 2010; Eric Rash a 15-year-old from Virginia who took his own life in 2011; and Juliana Ribeiro Campos a Brazilian journalist who died in 2012.

⁸¹ James Pitkin, 'Access Denied: A Beaverton Woman's Fight for Her Dead Son's Website Ends in a First-of-a-kind Lawsuit Against Facebook.com' *Willamette Week* (18 April 2007) <http://www.wweek.com/portland/article-6889-access_denied.html> accessed 31 May 2013.

⁸² *ibid* and 'Karen Williams' Facebook Saga Raises Question Of Whether Users' Profiles Are Part of "Digital Estates"' *HuffPost Tech* (15 March 2012) <http://www.huffingtonpost.com/2012/03/15/karen-williams-facebook_n_1349128.html> accessed 19 May 2013.

⁸³ *ibid*.

However, permitting a family member access to the account, as opposed to copies of the contents of the account, even for a limited period, came to an end. When or why Facebook altered this position is unclear, but it is most likely linked to fears that doing so might breach the Stored Communications Act, a United States federal law which prohibits the disclosure of electronic communications to third parties, except in limited circumstances.⁸⁴ The full extent of the impact of the Stored Communications Act in relation to access to the content of a deceased user's account was highlighted in the case involving the family of Sahar Daftary.⁸⁵

Sahar died following a fall from a 12th story balcony of an apartment in Manchester, England in December 2008. Her surviving family members, Anisa Daftary (mother) and Jawed Karim (relative), sought disclosure of the contents of her account covering the 20 day period prior to her death. The application was made under a United States federal law which permits foreign litigants to seek a court order to compel the production of documents for use in foreign proceedings.⁸⁶ The family believed that her account would contain 'critical evidence showing her actual state of mind in the days leading up to her death', and intended to make those contents available to the Coroner's Inquest in the United Kingdom.⁸⁷

Facebook opposed the application. There was agreement between the parties that the Stored Communications Act applied to the contents of the communications in the account.⁸⁸ The family relied upon the federal law (28 USC section 1782) to compel disclosure. In opposing Facebook the family also argued that as Anisa Daftary was the administrator of Sahar's estate she was entitled to consent to the disclosure of the contents of the account and therefore fall within one of the exceptions of the Stored Communications Act.⁸⁹ Facebook claimed that it was settled law that no exception under the Act could compel them to disclose the electronic communications sought, even when sought pursuant to 28 USC section 1782.⁹⁰

On the question of whether the lawful consent of the administrator of the decedent's estate was sufficient, Facebook argued that, given the number of

⁸⁴ Stored Communications Act 18 USC ss 2701–12. The Act appears to have been raised in relation to the Loren Williams account but it seems Facebook understood that a court order would be sufficient to meet the exceptions under the Act.

⁸⁵ *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*, Case No C 12-80171 LHK (PSG) (N.D. California, 20 September 2012).

⁸⁶ 28 USC s 1782: Assistance to foreign and international tribunals and to litigants before such tribunals. No dispute was raised by Facebook as to the applicability of this law to an Inquest before a Coroner's Court.

⁸⁷ *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*, Case No C 12-80171 LHK (PSG) (N.D. California, 20 September 2012) 1. For further detail on the family's ongoing investigations into her death see <<http://www.sahardaftary.org/>> accessed 31 May 2013.

⁸⁸ For a detailed discussion on the applicability of the Act to Facebook, see Allen Hankins, 'Compelling Disclosure of Facebook Content under the Stored Communications Act' (2012) 17 Suffolk Journal of Trial and Appellate Advocacy 295.

⁸⁹ Stored Communications Act 18 USC s 2702(b)(3) provides that where the electronic service provider has obtained lawful consent they may voluntarily disclose the contents otherwise protected by the Act.

⁹⁰ *Facebook Inc.'s Motion to Quash in a Civil Case*, Case No C 12-80171 LHK (PSG) (N.D. California) filed 6 August 2012, 3–5.

jurisdictions their users span, it would ‘be far too burdensome’ to require them to review the law of each jurisdiction in order to confirm the extent of the powers vested in administrators and confirm if they included the power to consent in such a situation.⁹¹ Even assuming that Anisa’s consent satisfied the ‘lawful consent’ requirement of the Act, Facebook argued that disclosure by the provider is voluntary and not mandatory: the court could not compel Facebook to release the contents.⁹²

Facebook did however provide an alternative, if the court wished to help the family. They asked the court to consider:

(1) holding that as a matter of law that Anisa Daftary, as the administrator of Sahar Daftary’s estate, may provide lawful disclosure of communications in Sahar’s Facebook account under § 2702(b) of the [Stored Communications Act] and (2) ordering Facebook to disclose the records Applicants seek (provided they are reasonably accessible to Facebook)⁹³

In his judgment Grewal J, held that ‘case law confirms that civil subpoenas may not compel production of records from providers like Facebook’ as to do so would be contrary to the Stored Communications Act.⁹⁴ The court did not have jurisdiction to deal with the issue of lawful consent by an administrator of an estate.⁹⁵ However, his judgment concluded with the *obiter* comment that:

Of course, nothing prevents Facebook from concluding on its own that Applicants have standing to consent on Sahar’s behalf and providing the requested materials voluntarily.⁹⁶

Lamm, an estate planning lawyer and advocate for Fiduciary Access to Digital Assets, claims that this *obiter* statement should give comfort to Facebook (and other providers) to voluntarily disclose the contents of a deceased user’s account. He states:⁹⁷

... this sentence is ultimately beneficial because it strongly suggests (to me [James Lamm]) that this court would not oppose the executor of a

⁹¹ *ibid* 6–7. Facebook also emphasised the serious penalties which attach to wrongful disclosure, under s 2707 of the Stored Communications Act.

⁹² *ibid* 3.

⁹³ *ibid* 7.

⁹⁴ *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*, Case No C 12-80171 LHK (PSG) (N.D. California, 20 September 2012) 2.

⁹⁵ *ibid* 3. ‘Having agreed with Facebook that the Section 1782 subpoena should be quashed, the court lacks jurisdiction to address whether the Applicants may offer consent on Sahar’s behalf so that Facebook may disclose the records voluntarily.’

⁹⁶ *ibid*.

⁹⁷ Lamm, together with his law partner Gene Hennig (Minnesota Commissioner, Uniform Law Commission, ULC), made the initial proposal to the ULC regarding a law to provide for Fiduciary Access to Digital Assets in May 2011; see <<http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets>> accessed 31 May 2013.

deceased user's estate providing "lawful consent" under § 2702 of the Stored Communications Act.⁹⁸

Lamm also highlights the importance of the location of the court, being in the Northern District of California. Santa Clara being within the Northern Districts boundaries is the chosen jurisdiction under the terms of many providers including Facebook.⁹⁹ However, the recent litigation in *Ajemian v Yahoo!* suggests that such forum selection clauses may not apply to third parties, including administrators of a decedent's estate, who are not privy to the terms of service agreement between the provider and the decedent.¹⁰⁰

Furthermore, the court in *Ajemian v Yahoo!* clearly adopts the principle that where the service provider disclaims any ownership in the contents of the account, as Facebook do under their terms, the more appropriate forum to settle a probate action would be where the decedent was normally resident while alive or where the administrators are resident.¹⁰¹

Despite Lamm's optimism, the *obiter* statement must be treated with caution. It is merely restating the points made in written submissions to the court by Facebook with respect to the Stored Communications Act. It fails to acknowledge Facebook's fear of wrongly concluding that an administrator or executor has the power to consent in such circumstances. It also ignores the reality that even if such consent is lawful, Facebook are under no obligation to release those communications.¹⁰² The Stored Communications Act clearly grants to the provider a discretionary power of whether or not to disclose the contents of the communications.

Therefore the second element of the order that Facebook proposed to the court, namely, ordering them to disclose the requested contents the family sought, raises the possibility that Facebook would, by default, be unwilling to voluntarily disclose such communications even where an administrator provided lawful consent. This unwillingness may only apply to the *Daftary* application. The current Help Centre pages and forms, set out below, seem to confirm that even after obtaining such a court order

⁹⁸ James Lamm, 'Facebook Blocks Demand for Contents of Deceased User's Account', *Digital Passing* (11 October 2012) <<http://www.digitalpassing.com/2012/10/11/facebook-blocks-demand-contents-deceased-users-account/>> accessed 31 May 2013.

⁹⁹ *ibid.* See discussion at section 'The contract: Facebook's terms of service' on Facebook jurisdiction.

¹⁰⁰ *Ajemian v Yahoo!* 12-P-178 (Massachusetts Ct App, 7 May 2013); 2013 Mass App LEXIS 73 *92.

¹⁰¹ *ibid.* *25–27. Although it must be noted that the appeals court remitted the question of whether the contents of the e-mail account are probate property back to the local probate court for adjudication.

¹⁰² The story of the family of Benjamin Stassen, who committed suicide in 2010, provides such an example. Despite the family acquiring a court order declaring that they 'are the heirs to their son's estate and are entitled... the contents of his Facebook account', Facebook initially failed to comply. See Jessica Hopper, 'Digital Afterlife: What Happens to Your Online Accounts When You Die?' *RockCentre NBC News* (1 June 2012) <http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite> accessed 31 May 2013. However following lengthy negotiations Facebook 'finally agreed to give the Stassens their son's content—so long as they agreed never to disclose the information in the account to third parties', they agreed and received a copy of the content. See Simone Foxman, 'When the Next Ernest Hemingway Dies, Who Will Own His Facebook Account?' *qz.com* <<http://qz.com/113576/when-the-next-ernest-hemingway-dies-who-will-own-his-facebook-account-2/>> accessed 17 August 2013.

Facebook will not guarantee that they will provide access to the contents of the account.

For example, the help page titled 'How do I request content from the account of a deceased person?', states:

We are only able to consider requests for account contents of a deceased person from an authorized representative. The application to obtain account content is a lengthy process and will require you to obtain a court order.

Keep in mind, sending a request or filing the required documentation does not guarantee that we will be able to provide you with the content of the deceased person's account.¹⁰³

This help page then links to a request form.¹⁰⁴ The form asks a series of questions which when answered prompts the requester for certain information. The first point to make is that unless the requester is an 'authorised representative' the request will not even be considered.¹⁰⁵ If the requester is an 'authorised representative' Facebook ask for a certified copy of 'a will, durable power of attorney or other document executed by the deceased person establishing that the deceased person wished to specifically release their electronic communications' to the representative or another person.¹⁰⁶ They also seek 'a court order referencing disclosure of electronic communication' as otherwise they will not continue to evaluate the request.¹⁰⁷

Even after submitting these items the requester must confirm with a *box tick* that they 'understand that sending a request or filing the required documentation does not guarantee that Facebook will be able to provide . . . the content of the deceased person's account.'¹⁰⁸ Facebook further state that if they determine that they 'cannot provide the content, [they] will not be able to share further details about the account or [even] discuss [the] decision'.¹⁰⁹ It appears that the ultimate discretion to grant access is strongly protected by Facebook, yet no criteria or other information is made available in order to assess how this discretion is to be exercised.

One further point, Facebook distinguish between requests for the content of an account of a minor, as opposed to an adult user.¹¹⁰ The details,

¹⁰³ Facebook, *Help Centre: How Do I Request Content from the Account of a Deceased Person?* <<https://www.facebook.com/help/123355624495297/>> accessed 31 May 2013.

¹⁰⁴ Facebook, *Requesting Content from a Deceased Person's Account* <<https://www.facebook.com/help/contact/398036060275245?rdhrc>> accessed 31 May 2013.

¹⁰⁵ *ibid.* If a requester responds that they are not an authorised representative the form returns the following statement: 'We are only able to consider requests to provide the contents of a deceased person's account from an authorized representative.'

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

described above, all relate to deceased adult users. A possible reason for this differentiation is that in most jurisdictions a minor does not have testamentary capacity and therefore they cannot make a legally enforceable will.¹¹¹ Therefore no valid will can be relied upon to establish with whom, if anyone, a minor wishes to share the contents of their account following death. Where the request for the content relates to an account of a minor, Facebook direct the requester to seek a court order and a model order is provided.¹¹² The same qualifications apply, even if the court order is granted, with the result that Facebook ultimately retain discretion and may not disclose the contents of the account.

It might be somewhat surprising that a United States federal privacy law could have such a profound *post-mortem* impact. It begs the question about the impact of Europe's Data Protection legislation on the accounts of deceased Facebook users. While the Data Protection Directive 95/46/EC, provides data subjects with certain rights to protect *inter alia* their privacy, it also includes the right to access personal data processed by data controllers such as Facebook.¹¹³ The Data Protection Directive is silent on whether it applies to deceased persons. The definition of 'data subject' is limited to what are termed 'natural persons'.¹¹⁴

In transposing the Data Protection Directive into national law, twelve European Union member states have extended some limited rights to deceased data subjects.¹¹⁵ However, in recent German litigation, Facebook successfully claimed that as they are headquartered in Ireland, Irish data protection law applied to all their European Union users.¹¹⁶ Therefore, the express limitation of 'data subject' in Irish legislation to

¹¹¹ For example in Ireland, s 77(1)(a) of the Succession Act 1965, requires that a testator must be eighteen years or over. In the United States succession and probate law is legislated for at a State level but in most States there is also a requirement to be eighteen years and over in order to make a valid will.

¹¹² The model court order is available at <https://fbcdn-dragon-a.akamaihd.net/cfs-ak-prn1/676396/216/512705875429842_1226690395.pdf> accessed 31 May 2013 and reads as follows:

IT IS ORDERED:

1. [Name of petitioner], as the [Personal Representative/Administrator/Executor/ Conservator] of the Estate of [Name of decedent] has authority to provide lawful consent under the Stored Communications Act, 18 U.S.C. Sec. 2701, et. seq., for the disclosure of the stored content of communications associated with [Name of decedent]'s account with any electronic communications service or remote computing service, including Facebook, Inc.

2. [Name of petitioner] shall not disclose or cause to be disclosed, either directly or indirectly any communications obtained through this Order to any third party unless otherwise directed by the Court.

¹¹³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

¹¹⁴ *ibid* art 2(a).

¹¹⁵ For a general discussion on the application and scope of the Data Protection Directive to deceased persons, see Damien McCallig, 'The Deceased as Data Subjects in the European Union' (Society of Legal Scholars' Conference, Bristol, September 2012).

¹¹⁶ *Facebook Ireland Limited gegen ULD*, Az. 4 MB10/13, 8 B 60/12 (Beschwerdebegründung ULD) and *Facebook Inc. gegen ULD*, Az. 4 MB 11/13, 8 B 61/12 (Beschwerdebegründung ULD).

a 'living individual' means that the access rights under data protection law do not survive the death of European Union Facebook users.¹¹⁷

This also means that the data protection obligations placed upon Facebook, as the data controller, no longer apply to the data of a deceased data subject. Of course, the contractual obligations relating to privacy and information sharing contained in the Statement of Rights and Responsibilities remain in place as there is no clause terminating this agreement upon death of the user.

However, it is unfair to be overly critical of Facebook's policy. They are merely protecting what they believe to be the expectation of their users in relation to their privacy settings and choices and extending those choices *post mortem*. In this respect, Facebook are just seeking evidence to establish that 'the deceased person wished to specifically release' the account contents to the representative or other person.¹¹⁸

The weakness in their position is that they do not specifically or actively permit a user to indicate, within the Facebook platform while alive, how account contents are to be dealt with following death. Therefore the *post-mortem* privacy choice, which Facebook seem to apply and seek a requester to rebut, is not really a choice at all but is merely a technical and contractual default. Even the *memorialization* of an account is not something that a user can opt-in or opt-out of; it is also merely a contractual default.

3.4 – *The impact of privacy regulators*

This lack of user consent to *memorialization* was among a number of issues taken up in a wide ranging review by the Office of the Canadian Privacy Commissioner, in 2009.¹¹⁹ Three specific issues were raised, by the Canadian Internet Policy and Public Interest Clinic (CIPPIC), in their complaints in relation to the accounts of deceased Facebook users:

- a clear opportunity to opt-out of posthumous displays (*memorialization*) of their profiles should be given to users;
- clear information should be contained in both the terms of service and privacy policy relating to the process of *memorialization*; and
- a procedure should be provided for relatives of a deceased user to request the removal of a user's profile.¹²⁰

¹¹⁷ Data Protection Act 1988, s 1 (as amended).

¹¹⁸ Facebook, *Requesting Content From a Deceased Person's Account* <<https://www.facebook.com/help/contact/398036060275245?rdhrc>> accessed 31 May 2013.

¹¹⁹ Office of the Canadian Privacy Commissioner, 'Report of Findings into the Complaint Filed by the Canadian Internet Policy and Public Interest Clinic (CIPPIC) against Facebook Inc., under the Personal Information Protection and Electronic Documents Act' (16 July 2009).

¹²⁰ *ibid* 65.

The Commissioner was of the view that most 'typical' Facebook users welcome the prospect of being posthumously remembered and honoured, through *memorialization*, by their friends, and that this is 'an important part of the Facebook experience'.¹²¹ The Commissioner was therefore satisfied that the practice of account *memorialization* meets the reasonable expectations of users and that an opt-out mechanism was not warranted.¹²²

In her preliminary report the Commissioner had recommended that Facebook 'provide, and notify users of, a means whereby they may opt out of Facebook's intended use of their personal information for the purpose of memorializing accounts'.¹²³ However, Facebook rejected this recommendation claiming that 'users are perfectly capable of using other means to express their wishes ... [and] it would be inappropriate to create a standard for handling information ... that would be at variance with existing legal norms for the disposition of estate property'.¹²⁴ The Commissioner further thought it was important to record that Facebook 'notes that services around access to digital assets in the event of death are carried out by private vendors'.¹²⁵

It seems reasonable to infer that Facebook saw the emergence of what are termed 'digital estate planning services' as a likely solution to this issue and questions regarding access to or removal of content could be outsourced to third party providers. While these services are briefly discussed below (section 'The emergence of Digital Estate Planning services'), why Facebook thought that providing a user with the option to opt-out of *memorialization* would be at variance with legal norms associated with disposing a decedent's estate raises an interesting point.

Of course, it must be recognized that there is no universally accepted norm to deal with the disposition of property after death. Legal, cultural, social and religious values and principles play a significant part in how different jurisdictions choose to deal with such matters.¹²⁶ Such complexity obviously creates difficulties; should Facebook follow a common law, civil law or a religious based legal tradition in providing a solution? In response, Facebook merely permits the individual user to decide: if you shared with someone while alive, by default, you continue to share with them in death.

Viewed through the norms of the pre-digital world this stance seems correct; to do otherwise would grant a decedent the ability to reach out from the grave and take back a tangible object such as a letter or photograph which was freely shared while alive. If such a policy was to be followed, a surviving

¹²¹ *ibid* 68.

¹²² *ibid* 69.

¹²³ *ibid*.

¹²⁴ *ibid*.

¹²⁵ *ibid*.

¹²⁶ A thorough analysis of these values and principles and a comparative analysis of their impact on succession law are beyond the scope of this article.

friend would not only be robbed of the living relationship but also the physical artefacts that represented in a tangible form the bond of friendship.

Transposing this to the digital realm, where the continued existence of these shared non-rivalrous artefacts, within the network, depends upon both the putative *owner* of the information not clicking delete and the existence of an intermediary such as Facebook to maintain the service, is problematic. The debates around the proposed right to be forgotten have also drawn out Facebook's position further. Their Director of EU affairs clearly accepts that users who post personal information online have a right to later delete that information.¹²⁷ Indeed, this is something that Facebook currently offers users, while alive. However they highlight that this may need to be balanced with the rights of other users who 'may wish to retain on their account information posted by others'.¹²⁸

The crux of the issue is how to balance the accepted right of the *owner* of information (the person who originally posted it) to control its existence on the network with the rights of others who believe that this shared information is *owned* (possibly jointly) by them. This is also where Facebook's complex terms, forms and help pages contradict each other. As seen from Kasket's example, information may be removed from your timeline by another, yet when Facebook define your information this includes items others have posted to your timeline.

This joint ownership anomaly comes to the surface at the death of a user. Default *memorialization*, with no opt-out, solves the problem of maintaining the information on the network. Regulatory acceptance of the *memorialization* feature without the need for user consent copper-fastened this default position. The Canadian Commissioner was satisfied that due to her conclusion on the reasonable expectations of users regarding the process of *memorialization*, that Facebook could rely on what she termed users 'continuing implied consent to the practice'.¹²⁹

However, this was predicated on Facebook providing a meaningful description of the *memorialization* process in its Privacy Policy.¹³⁰ The Commissioner therefore recommended and insisted that Facebook 'include in its Privacy Policy, in the context of all intended uses of personal information, an explanation of the intended use of personal information for the purpose of memorializing the accounts of deceased users'.¹³¹ Despite initial reservations, this recommendation was accepted by Facebook. Nonetheless, it must remain questionable whether a typical user actually understands in a meaningful way the intended uses of their information following death,

¹²⁷ Erika Mann, Comments from Facebook on the European Commission's Proposal for a Regulation (25 April 2012) 5 <<https://github.com/lobbyplag/lobbyplag-data/raw/master/raw/lobby-documents/Facebook.pdf>> accessed 31 May 2013.

¹²⁸ *ibid* 6.

¹²⁹ Office of the Canadian Privacy Commissioner (n 119) 68.

¹³⁰ *ibid* 69.

¹³¹ *ibid*.

especially given the intricacies of the process described across numerous forms and help pages.

Facebook's position regarding the third issue raised in the complaint to the Canadian Commissioner—a call for a procedure for relatives to seek the removal of a deceased user's profile—is probably the most puzzling. By the time of her report Facebook confirmed that such a procedure was already in place. Facebook advised that they 'honor requests from close family members to close the account completely' and that their 'policy leaves the choice of whether or not a profile is 'memorialized' or retained indefinitely, to the next of kin'.¹³² So, while Facebook denied the user themselves the option of deciding whether or not information could continue to exist on the network, following death, a family member or next of kin were deemed suitable to make such a decision.¹³³

This policy has evolved since then. The current mechanism has removed references to next of kin and replaced them with 'verified immediate family member or executor'.¹³⁴ Those seeking to remove a 'loved one's account' are directed to the relevant form, where they are required to indicate and verify their relationship to the decedent.¹³⁵ Relationship category options provided are the same as those on the *memorialization* request form and in order to verify the relationship, requesters are required to upload documentation 'like a death certificate, the deceased person's birth certificate or proof of authority'.¹³⁶ Facebook state that requests will not be processed if they are unable to verify the requester's relationship with the deceased.¹³⁷

The removal request if granted 'will completely remove the timeline and all associated content'.¹³⁸ However, it is not clear how Facebook verifies the *bona fides* of the family member or executor; nor is it clear what criteria are used in deciding whether removal is the appropriate option.¹³⁹ How Facebook would adjudicate between immediate family members, who differ on whether to *memorialize* or remove the profile of a deceased relative, remains in doubt. Do they operate some form of hierarchy within the subset

¹³² *ibid* 66.

¹³³ *ibid*. Facebook also stated that 'the legal next of kin is the proper person to make a decision as to whether the deceased would have wanted the site to stay up for their friends'.

¹³⁴ Facebook, *Help Centre: How Do I Submit a Special Request for a Deceased User's Account on the Site?* <<https://www.facebook.com/help/265593773453448>> accessed 31 May 2013.

¹³⁵ *ibid*. It must be noted that this form deals with all special requests in relation to a deceased user's account. The categories of requester identified on the form are:

- 'Immediate family (spouse, parent, sibling, child)
- Extended family (grandparent, aunt, uncle, cousin)
- Non-family (friend, colleague, classmate).'

¹³⁶ Facebook, *Special Request for Deceased Person's Account* <<https://www.facebook.com/help/contact/228813257197480>> accessed 31 May 2013.

¹³⁷ Facebook, *Help Centre: How Do I Submit a Special Request for a Deceased User's Account on the Site?* <<https://www.facebook.com/help/265593773453448>> accessed 31 May 2013.

¹³⁸ *ibid*.

¹³⁹ Mazzone (n 4) 1661–2.

of immediate family members? No details on these aspects of the removal policy are apparent.

Even where no inter-familial dispute exists, the removal of a profile, upon request, does not appear straightforward. This is exemplified by the mother of Juliana Ribeiro Campos, who is reported to have sought and obtained two court orders, in Brazil, requiring the removal of her daughter's Facebook account.¹⁴⁰ Even the Irish Data Protection Commissioner in his recent audit of the social network does nothing to lessen the uncertainty.¹⁴¹ In this instance a French user sought the removal of her deceased father's profile. According to the Irish Commissioner the request was acted upon once the requester provided 'verification of the death of her father'.¹⁴² The Irish Commissioner did not investigate this issue further so no assessment of the criteria or processes was undertaken.¹⁴³

It seems incongruous that Facebook should allow a family member this power over a deceased user's profile. The terms of service are quite clear that no third-party rights are created or conferred.¹⁴⁴ Trolling—posting derogatory messages—on a deceased user's timeline, can happen.¹⁴⁵ Families rightly need some action to be taken in those circumstances. However, such behaviour can be addressed through removal of the Friend link to the decedent's account, as no one other than a Friend can post to the timeline of a deceased users account that is *memorialized*. Alternatively, the derogatory poster could be removed from the network, in line with Facebook's standards on bullying or harassment.¹⁴⁶ Removing the profile entirely from the network due to the behaviour of a troll seems a highly disproportionate response given the other options available.

It is also probable that the widespread impact of the removal of a profile, across a wide group of friends on the network, may not necessarily be

¹⁴⁰ Jefferson Puff, 'Brazil Judge Orders Facebook Memorial Page Removed' *BBC News* (24 April 2013) <<http://www.bbc.co.uk/news/world-latin-america-22286569>> accessed 31 May 2013. Other relatives have encountered difficulties when seeking the removal of a decedent's accounts; see eg Ben Poken, 'Update: Facebook Agrees to Take Down Dead Relative's Page' *The Consumerist* (21 February 2009) <<http://consumerist.com/2009/02/21/update-facebook-agrees-to-take-down-dead-relatives-page/>> accessed 31 May 2013.

¹⁴¹ Office of the Irish Data Protection Commissioner, *Report of Audit: Facebook Ireland Limited* (21 December 2011) 27.

¹⁴² *ibid.*

¹⁴³ *ibid.* It is uncertain what data protection interest the Irish Commissioner was investigating with respect to the deceased users, as Irish data protection law is restricted to living individuals. His powers under Irish Data Protection law may therefore have curtailed his ability to investigate this issue further; however no challenge to the Commissioner's jurisdiction on this item seems to have been made.

¹⁴⁴ Section 19.9 of the Facebook Terms: Statement of Rights and Responsibilities (last revised 8 June 2012) <<http://www.facebook.com/legal/terms>> accessed 31 May 2013.

¹⁴⁵ For an example of Facebook trolling of a decedent's profile see, 'Sean Duffy Case Highlights Murky World of Trolling' *BBC News* (13 September 2011) <<http://www.bbc.co.uk/news/uk-england-berkshire-14897948>> accessed 31 May 2013. For a general discussion on the emergence of organised trolling of memorial pages on Facebook, see Whitney Phillips, 'LOLing at Tragedy: Facebook Trolls, Memorial Pages and Resistance to Grief Online' (2011) 16 *First Monday* <<http://firstmonday.org/ojs/index.php/fm/article/view/3168/3115>> accessed 31 May 2013.

¹⁴⁶ Facebook, *Community Standards* <<https://www.facebook.com/communitystandards>> accessed 31 May 2013.

apparent to a bereaved family member in the wake of a relative's death. Therefore, some form of cooling off period or change of mind period would at least permit time to consider options more carefully, although it remains unclear whether the removal of a deceased user's account actually leads to its complete deletion from Facebook's servers.¹⁴⁷

3.5 – *Future access to the materials of history*

Given the paucity of detail on the removal process, another aspect needs to be considered. Is there an appropriate time frame within which such requests should be made? Should a removal request issued 20, 30 or 50 years following a user's death be acted upon? Although this point may not appear to be of immediate concern, as Facebook is not yet even 10 years old, it does force a wider policy consideration, one that is linked to the use and access to, potentially, hundreds of millions of *memorialized* profiles in the future. Is there a point where the public interest should dictate that such information is of such historical or social importance that its removal (possibly even permanent deletion) should not be based *merely* on a private choice?

Legislators thinking of entering into this area should give this issue careful consideration. As pointed out by Zimmerman, our understanding of who we are is largely informed by the continuity of our access to the ephemera that capture the essence of earlier times and places.¹⁴⁸ These sentiments are echoed by Desai when he highlights the importance to society as a whole of preservation and access to digital artefacts stored by third-party intermediaries.¹⁴⁹ The potential public interest in creating preservation and access rules or defaults to facilitate the intergenerational transfer of digital remains must not be ignored.

4. The emergence of Digital Estate Planning services

Despite the option to request contents from an account, some families want more. They seek the ability to access the account in the same manner as the decedent could while alive. Requests of this type are refused. Facebook do not provide anyone with passwords and user access to the account of a deceased person.¹⁵⁰ This appears to be a fundamental policy issue which they do not seem willing to change.

¹⁴⁷ Mazzone (n 4) 1679.

¹⁴⁸ Diane Zimmerman, 'Can Our Culture Be Saved? The Future of Digital Archiving' (2006–7) 91 Minnesota Law Review 989, 989.

¹⁴⁹ Deven Desai, 'Property, Persona, and Preservation' (2008) 81 Temple Law Review 67, 89–93.

¹⁵⁰ Facebook, *Special Request for Deceased Person's Account* <<https://www.facebook.com/help/contact/228813257197480>> accessed 31 May 2013. The story of the family of Eric Rash, who was 15 when he committed

To solve this problem, digital estate planning services have emerged. Despite the grand title, digital estate planning services are often little more than password sharing schemes.¹⁵¹ Services such as those provided by LegacyLocker.com¹⁵² and SecureSafe¹⁵³ may offer further features above and beyond the passing of login credentials to a chosen beneficiary but they ultimately depend on a user maintaining a list of their online accounts and associated passwords.¹⁵⁴

More rudimentary forms of password sharing also exist. A user may share their password with friends or family members while alive (see the example of Loren Williams above) or they may leave passwords in a will or codicil. As highlighted earlier, sharing passwords or allowing another person other than the account holder access to an account is strictly prohibited by Facebook.¹⁵⁵ The process of *memorialization* of an account, which can be activated by anyone, also prevents future logins even by those with valid password details.

Furthermore, it has been identified that such password sharing schemes may fall foul of United States federal and state laws regarding unauthorized access to computer systems. In particular, the concern in the United States relates to the possibility that merely breaching the access rules of the terms of service may be a criminal offence under the Computer Fraud and Abuse Act.¹⁵⁶ Regardless of whether a criminal prosecution is possible, Facebook's ability to deactivate account login credentials limits the

suicide, exemplifies this point. The family sought their child's password from Facebook but this was denied. However, the family were provided with a CD containing all Eric's correspondence prior to his death. See Tracy Sears, 'Facebook Sends Family Information About Son's Page Before His Suicide' *WTVR.com*, (updated 19 April 2012) <<http://wtvr.com/2011/11/04/facebook-sends-family-information-about-sons-page-before-his-suicide/>> accessed 31 May 2013.

¹⁵¹ Roy extends his definition of digital estate planning services to include posthumous messaging services which upon proof of death send e-mail or platform specific messages to designated recipients identified by the decedent while alive; see, Michael Roy, 'Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?' (2011) 24 *Quinnipiac Probate Law Journal* 376, 377–8 and 387–92.

¹⁵² Legacylocker.com <<http://legacylocker.com/>> accessed 31 May 2013.

¹⁵³ SecureSafe <<http://www.securesafe.com/en/partners/entrustet-faq.html>> accessed 31 May 2013.

¹⁵⁴ SecureSafe does provide a range of services including the deletion of accounts where no beneficiary is designated; see SecureSafe, *Frequently Asked Questions: What Happens to Those Documents and Passwords Which I Have Not Assigned to Anyone, When the Data Inheritance is Performed?* <<http://www.securesafe.com/en/faq/>> accessed 31 May 2013. Each of these services works by storing a list of online accounts, passwords with prescribed beneficiaries or actions, or both (eg share password or delete account). A user nominates trusted persons with whom he shares a code. Upon death the trusted persons contact the digital estate planning service notifying them of the death by providing the relevant code. In general this triggers attempts by the digital estate planning service to contact the user, and if the user fails to respond within a defined period the beneficiaries are contacted and actions undertaken.

¹⁵⁵ Section 4.8 of the Facebook, *Terms: Statement of Rights and Responsibilities* (last revised 8 June 2012) <<https://www.facebook.com/legal/terms>> accessed 31 May 2013.

¹⁵⁶ James Lamm, 'Digital Death: What to Do When Your Client is Six Feet Under But His Data is in the Cloud', paper presented at the 47th Annual Heckerling Institute on Estate Planning, Orlando Florida (17 January 2013) 9–10. Although, this might not apply in all jurisdictions, in an Irish context whether the use of a password belonging to a decedent to merely access a Facebook account is a criminal offence would depend on whether the person believed they had 'lawful excuse' to do so. See ss 5(1) and 6(2) of the Criminal Damage Act 1991.

effectiveness of password sharing as the solution to account access or as the basis of other posthumous services.

However, more recently a number of applications (apps) have become available that may overcome these password sharing problems. Instead of depending on up to date passwords, these services rely on the OAuth protocol and APIs. Services available to Facebook users currently include Ifidie and Perpetu.¹⁵⁷ While both offer posthumous messaging, Perpetu also facilitates the downloading of a deceased user's photos, timeline or private messages, or combinations of these from their Facebook account for distribution to chosen beneficiaries.¹⁵⁸

Applications using the OAuth protocol do not breach the password sharing clauses in Facebook's terms. However they are limited in that the access tokens upon which the services rely expire after 60 days. Therefore these services need to maintain valid long-lived access tokens and hope that they are notified of a death and conclude their verification and distribution services within this time-window.

For example, Perpetu must be notified of the death. They then have a 30-day period within which they wait for the person reported dead to make contact. If no contact is made, it is at this point that they download and distribute the photos, timeline and messages.¹⁵⁹ All this must be completed with 60 days of the last time a user verified the access token.¹⁶⁰ Therefore a delay in the notification of death or a gap between the last access token verification by the user and death, or both, places the distribution process in jeopardy. Furthermore, Facebook do not permit OAuth access after an account is *memorialized*; therefore the prompt reporting of a death to Facebook may frustrate a Perpetu bequest.¹⁶¹

It remains unclear whether Facebook merely tolerate these services or whether they will actively engage with them in shaping *post-mortem* solutions. Facebook could, for example, through APIs, permit a user to request the *memorialization* of their own account, the deletion of specific classes of data, or many other options. Perpetu confirm that the other providers on which

¹⁵⁷ Ifidie.net is a posthumous messaging service which permits a person to publish text or video messages on a Facebook timeline after their death see <<http://ifidie.net/>> accessed 31 May 2013. Perpetu offers both a posthumous messaging service—a final wall (timeline) post as well as more 'traditional' estate planning services such as distributing the estate of the deceased see <<https://perpetu.co/en>> accessed 31 May 2013.

¹⁵⁸ Perpetu are not permitted by Facebook APIs to 'delete any timeline posts, photos or private messages, or to decide whether the account should become a memorial or be closed.' See Perpetu, 'Even the Dead Are Useful to Facebook?' *Perpetu's Blog* (26 April 2013) <<http://blog.perpetu.co/post/48913226337/even-the-dead-are-useful-to-facebook>> accessed 31 May 2013.

¹⁵⁹ Details regarding the process and trusted notifiers are only available when you are registered with Perpetu.co.

¹⁶⁰ Perpetu have confirmed, in an e-mail from Perpetu to Author (24 June 2013), that they 'intend to extend the validity [access tokens] by asking our users to login regularly to Perpetu using Facebook, or to relink their Facebook token with a click, both of which would extend the validity of the token for a further 60 days'.

¹⁶¹ See response by a Facebook API development engineer 'Igy' to a question on 'API management of 'memorialized' profiles' *stackoverflow* (7 April 2012) <<http://stackoverflow.com/questions/10038219/api-management-of-memorialized-profiles>> accessed 24 June 2013.

they offer services, such as Gmail, Twitter and Dropbox, ‘allow deletion of data via API’.¹⁶² Of course, Facebook could kill-off these embryonic services by a simple change in their API developer terms to prohibit such *post-mortem* apps.

5. Legislative solutions

5.1 – *Individual states take action*

The emergence of barriers to accessing the digital remains of a decedent, such as providers’ terms of service, privacy laws and possible criminal sanctions, has ensured that legislative action is seen as justified in order to bring clarity and certainty to the emerging issue of dealing with the digital remains of a deceased person. A number of states in the United States have begun legislating for digital remains. Beyer and Chan have usefully classified these legislative efforts into three generations.¹⁶³

The first generation of legislation only deals with e-mail accounts.¹⁶⁴ The second generation, including Indiana, takes a broader view by adding a section with respect to ‘electronically stored documents’, in order to deal with their probate collection and management.¹⁶⁵ Unlike the e-mail specific legislation, the breadth of the Indiana law could make it applicable to Facebook. The third generation includes the states of Oklahoma and Idaho who amended their probate laws in order to permit *inter alia* personal representatives of a deceased person to ‘take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website’ of a decedent.¹⁶⁶

Earlier this year, Virginia passed an amendment to its probate laws in order to permit the personal representative of a deceased minor access to their digital accounts.¹⁶⁷ The new law is effective from 1 July 2013 and provides that a personal representative of a deceased minor assumes the

¹⁶² e-mail from Perpetu.co to Author (24 June 2013).

¹⁶³ Gerry Beyer and Naomi Cahn, ‘Digital Planning: The Future of Elder Law’ (2013) 9(1) *National Academy of Elder Law Attorneys’ Journal* 137, 142–8. The generations are not distinct in time but relates to the types of digital services the legislation purports to deal with.

¹⁶⁴ *ibid.* Connecticut General Statute s 45a-334a(b) (2005); Connecticut Public Act No. 05-136: An Act Concerning Access to Decedents’ Electronic Mail Accounts and State of Rhode Island General Laws ss 33-27-1–33-27-5 (2007); Access to Decedents’ Electronic Mail Accounts Act.

¹⁶⁵ Indiana Code s 29-1-13-1.1 (2007); as added by P.L. 12-2007, SEC.1.

¹⁶⁶ Oklahoma Statutes s 58-269 (2010), which includes the websites reference, and Idaho Code s 15-3-715 (28) (2011) and s 15-5-424(3)(z) (2011), which uses the term ‘website’ (singular).

¹⁶⁷ Virginia House Bill no 1752: A Bill to amend the Code of Virginia by adding in Chapter 1 of Title 64.2 an article numbered 3, consisting of sections numbered 64.2-109 and 64.2-110, relating to personal representative access to digital accounts. The term ‘*digital account*’ is defined as ‘an electronic account maintained, managed, controlled, or operated by a minor in accordance with a terms of service agreement’ and excludes specific account ‘to which a financial institution, financial institution holding company, or affiliate or subsidiary of a financial institution is a party’. The bill was a direct response from the state legislature to the difficulties of the family of Eric Rash to access their son’s Facebook account.

terms of service agreement for the decedent's digital accounts for the purposes of consenting or obtaining disclosure of the content of the account, unless specific provisions apply, such as a court order prohibiting such access.¹⁶⁸

More recently, Nevada passed a Bill to authorise a personal representative to direct the termination of any account of a decedent, including an account on any social network, blog, microblog or electronic mail service.¹⁶⁹ The new law is effective from 1 October 2013. A further 16 states are currently identified as considering introducing legislation to deal with digital remains.¹⁷⁰ Many of these states also cite bereaved families as the catalyst to their legislative efforts.¹⁷¹ Despite these legislative efforts none of the state laws currently enacted clarifies the authority of personal representatives to access a decedent's digital remains 'without fear of penalties under federal or state criminal laws ... or under privacy laws'.¹⁷²

For example State Representative Mr Ryan Kiesel, who co-authored the Oklahoma Bill, is aware that the law may be contrary to some website terms of service, but he says that 'the purpose of the law was to raise awareness and give users piece of mind'.¹⁷³ Other states' laws contain specific provisions confirming that nothing in the respective acts shall require a service provider to disclose any information in violation of applicable federal or state law.¹⁷⁴

5.2 – *Towards uniform legislation*

However, these gaps have not gone unnoticed. Following a proposal, made in May 2011, the Uniform Law Commission, a group which promotes uniformity in state laws across the United States, accepted that the law regarding

¹⁶⁸ *ibid* s 64.2-110 A.

¹⁶⁹ Nevada Senate Bill no. 131 amends Chapter 143 of the Nevada Revised Statutes which deals with the Powers and Duties of Personal Representatives.

¹⁷⁰ A list of legislation in process is available and updated on the Digital Passing Blog; see, James Lamm, 'February 2013 List of State Laws and Proposals Regarding Fiduciary Access to Digital Property During Incapacity or After Death', *Digital Passing Blog* (last updated 1 April 2013) <<http://www.digitalpassing.com/2013/02/13/list-state-laws-proposals-fiduciary-access-digital-property-incapacity-death/>> accessed 31 May 2013. The current list of states is: California, Colorado, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, and Pennsylvania.

¹⁷¹ For example, the Nebraska legislation (Legislative Bill 753) builds on requests from the family of Janna Moore Morin, see 'Living Online After Death Faces Nebraska Legal Battle' *BBC News* (31 January 2012) <<http://www.bbc.co.uk/news/magazine-16801154>> accessed 31 May 2013.

¹⁷² Lamm (n 156) 26.

¹⁷³ Nathan Lustig, 'Oklahoma Passes Law to Grant Executors Ability to Access, Delete or Administer Online Accounts', *Entrusted Blog* (2 December 2010). The hyperlink to this blog is no longer available.

¹⁷⁴ Indiana Code s 29-1-13-1.1 (d); State of Rhode Island General Laws ss 33-27-3 - 33-27-4; and Virginia: A Bill to amend the Code of Virginia by adding in Chapter 1 of Title 64.2 an article numbered 3, consisting of sections numbered 64.2-109 and 64.2-110, relating to personal representative access to digital accounts at s 64.2-110 C.

the powers of fiduciaries to manage and distribute, copy or delete and even access digital assets warranted further consideration.¹⁷⁵ A Study Committee was appointed in January 2012 and, following their recommendation, a Drafting Committee was appointed in July 2012.¹⁷⁶

The Drafting Committee focused initially on possible amendments to existing uniform laws in this area, for example the Uniform Probate Code. However, the most recent working draft proposes a stand alone Fiduciary Access to Digital Assets Act.¹⁷⁷ The primary aims of the project are to address the uncertainty with respect to access to a decedent's digital accounts, in particular in relation to possible criminal sanctions and breaches of privacy laws.¹⁷⁸ Uniformity, or at least the work of the Committee, is also seen as important to service providers, a fact borne out by the presence of three Facebook staff, listed as observers on the Committee Roster.¹⁷⁹

The current draft for discussion proposes that a personal representative of a decedent's estate shall be granted the same authority over 'digital property' as the account holder had while alive.¹⁸⁰ The personal representative is also deemed to have the 'lawful consent' of the account holder and can operate as an 'authorized user'.¹⁸¹ These two provisions ensure that a personal representative can step into the shoes of a decedent without fear of criminal sanction under the Stored Communications Act or the Computer Fraud and Abuse Act.¹⁸²

The scope of the powers of the personal representative are further defined in Section 4. The Drafting Committee however has proposed two alternatives. One alternative provides for a default position that the personal

¹⁷⁵ Details of the Uniform Law Commission, Committee on Fiduciary Access to Digital Assets are available at <<http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets>> accessed 13 June 2013.

¹⁷⁶ *ibid*.

¹⁷⁷ Uniform Law Commission, Draft for discussion only: Fiduciary Access to Digital Assets Act (31 May 2013) <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013AM_FADA_Draft.pdf> accessed 23 June 2013. This working draft was prepared for consideration by the National Conference of Commissioners on Uniform State Laws at their annual meeting in Boston, 6–13 July 2013. It is important to note that the Committee are considering granting powers not only to personal representatives of a decedent's estate but also to court appointed conservators (s 5), an agent under power of attorney (s 6) and trustees (s 7). This paper focuses solely on personal representatives.

¹⁷⁸ *ibid* 1, 4–5 and 7–8. The draft for discussion includes prefatory notes and comments.

¹⁷⁹ Uniform Law Commission, Committee Roster: Drafting Committee on Fiduciary Access to Digital Assets (13 February 2013).

¹⁸⁰ Uniform Law Commission, Draft for discussion only: Fiduciary Access to Digital Assets Act (31 May 2013) at s 3(b). Section 2 contains the definitions and *Digital Property* 'means the lawful ownership and management of and rights related to a digital account and digital asset'. Depending on which alternative is chosen by the committee, this may or may not 'include the contents of an electronic communication'; *Digital Account* 'means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information to which the account holder has access'; and *Digital Asset* 'means information created, generated, sent, communicated, received, or stored by electronic means on a digital device or system that delivers digital information. The term includes a contract right.'

¹⁸¹ *ibid* s 3(c).

¹⁸² *ibid* 4–6.

representative may ‘access, manage, deactivate, and delete the digital property of the decedent’ unless prohibited by the will of the decedent, a court order or another applicable state law.¹⁸³ The second option provides a similar default position, unless contradicted by a will of the decedent or a court order, but clearly distinguishes and carves out communications protected by the Stored Communications Act.¹⁸⁴ Where lawful consent for disclosure is mandated by the Stored Communications Act, the proposed Act does not grant a fiduciary default access.¹⁸⁵

Section 8 sets out the procedures for the recovery of the ‘digital property’ from the service provider and the formalities required. Under the current proposal a service provider shall comply with the request of a personal representative within 60 days, and failing this, the personal representative may apply to the court for an order directing compliance.¹⁸⁶ It must be noted that the wording of Section 3(b), and the comments in the working draft, seem to imply that the personal representative could use a valid password if it became available to him following the account holder’s death. However, the sharing of a Facebook password by the account holder, while alive, would violate Facebook’s terms and they could therefore still terminate (deactivate) the password. A personal representative would be best advised to use the provisions under Section 8 to formally gain access to the account.

Of benefit to Facebook is the proposed Section 9 which confirms in law that a service provider is ‘immune from liability for any action done in compliance’ with the Act. This at the very least provides certainty that dealing with a personal representative is lawful without the fear of legal sanction.

These changes would have a significant impact on Facebook. The empowerment of personal representatives, by default, to access, manage, deactivate or delete an account or its contents, or both, would significantly shift control over a deceased user’s account away from Facebook. Difficulties could also arise where a personal representative gains admin access to Pages or Groups. Given the underlying commercial purpose of Pages, the possibility of a personal representative acquiring such powers needs to be addressed.

The most disappointing aspect is that the Act, as currently proposed, will do little to assist in the development of an internal (in-service) option for an account holder regarding account *memorialization*, disposition or removal following their death. It makes no provision to promote or recognize the in-service recording of a user’s choice.

¹⁸³ *ibid* s 4 (alternative B).

¹⁸⁴ *ibid* s 4 (alternative A).

¹⁸⁵ *ibid*. See in particular the discussion ‘comments for the committee’ on 7–8.

¹⁸⁶ *ibid* ss 8(c)(1) and 8(d).

Even if Facebook's terms were changed to expressly prohibit the transfer of the account and its contents following death, this would be negated by the Act.¹⁸⁷ A Facebook user will be forced, by statute, to make a will in order to rebut fiduciary access. This difficulty is more acute for a minor as the option of making a valid will is in general unavailable. Regardless of their wishes a fiduciary could be permitted to access a minor's account and its contents.

Of course, the Fiduciary Access to Digital Assets Act would only be applicable to those states which enact it. However, if accepted on a widespread basis, it is possible that Facebook, rather than implement a state by state response, would take a universal approach in adapting their deceased user policies.¹⁸⁸

6. Conclusion

Facebook's relationship with users and the Friend relationships created and maintained between users on the network are primarily controlled by the legal (contractual) and technical boundaries that Facebook set. The death of network members disrupts this *status quo*. While Facebook's first response was to remove the digital remains of deceased users, soon the practice of *memorialization* emerged as a means to maintain information sharing and to enable the continuation of the digital bonds of friendship and co-constructed profiles, beyond death. This change was internally driven by other users.

The rapid growth of the Facebook network altered the drivers of change. They could no longer merely listen to users seeking to maintain or improve their network experience. External factors had to be considered. The families of deceased users, despite being outside the network, began to exert their power. Significantly, Facebook yielded some ground over who could propose whether a deceased user's profile remained in existence on the network but this was yielded not to the user or the network Friends but to the bereaved family.

Audits by privacy regulators failed to make any significant policy impact other than requiring that a description of the *memorialization* policy be provided for users to understand. Of course, their powers in protecting privacy

¹⁸⁷ *ibid* s 3(b).

¹⁸⁸ Calls for legislative action are not confined to the United States; for example, reports from South Korea suggest that legislators there are working on a law to empower family members to access or control digital assets, see Choi Joon-ho and Seo Ji-eun 'And to My Dear Son, I Leave My Blog' *JoongAng Daily* (24 August 2010) <<http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2925027>> accessed 13 June 2013. In Israel, blogger and campaigner on the digital legacy issue, Vered Shavit, has met and briefed the Israeli Law, Information and Technology Authority in the Ministry of Justice, see Vered Shavit, 'Heading Towards a Change in Israeli Legislation?' *Digital Dust Blog* (30 May 2013) <<http://digital-era-death-eng.blogspot.ie/2013/05/heading-towards-change-in-israeli.html>> accessed 13 June 2013. The author has also presented a paper on this topic to the Irish Law Reform Commission, 27 February 2013.

interests of deceased persons are generally limited. In contrast, estate planners and lawyers have had a significant impact. The framing of the digital remains debate in terms of probate property provided an opening for legislators to enter this policy area. However, legislative change is generally slow and into the gap have come new solutions, such as digital estate planning services, which exploit access to Facebook through login credentials or APIs.

While problematic, these services also provide something that Facebook does not; they empower the user themselves to make choices, while alive, which may dictate the fate of their digital remains following death. While these services often run contrary to the Facebook terms, they currently seem to be tolerated rather than facing outright opposition from Facebook.

The most dramatic change to Facebook's deceased user policies is likely to be at the hands of legislators. Current proposals in the United States would appear to endorse an estate planning stance; accounts and contents are merely to be seen as digital assets to be marshalled by personal representatives following death. Sadly such a solution misses two fundamental elements of the digital remains issue, namely the right of a user to easily direct how their digital remains are to be dealt with following death and the public interest in promoting the longer-term preservation and access to these materials of history.

The promotion of active testamentary choices should be available to users rather than establishing default access for personal representatives. At a minimum, the default access rule in the proposed fiduciary access law should be set aside when the user of a service opt-ins to a digital remains disposition scheme. The disposition scheme can be provided as an in-service feature, or outsourced to approved digital estate planning services. Users should be prompted to review their choices regularly. Such options must not, however, be merely a waiver added to terms of service.

Legislative intervention should also identify and promote research and heritage institution access to deceased users' accounts. Obviously, users must choose to opt-in to such a scheme and choices should be made available regarding earliest access dates following death. Options could include the ability to make an account available a fixed number of years after death or, in particular for social media sites, accounts could be made available to access after the death of all a decedent's network Friends. Other granular choices such as the type of institution or research could also be offered to users.

Children warrant special attention. While every effort should be made to promote similar choices for children, limits may be required. The limiting of beneficiaries entitled to receive a child's digital remains to family members, unless a parent or guardian consents otherwise, would help to provide choice within a known family network. However, the promotion of digital preservation and future access schemes should be aimed at both adults and children.

Finally, in the absence of effective legislation, Facebook should implement such policy changes on their network. Empowering users in this way will not only benefit the user, surviving families and heirs, by granting them certainty in relation to digital remains following death but also by promoting preservation and heritage institution access. Even after death everyone can be a *Friend* to the future.