



THE UNIVERSITY OF
NEWCASTLE
AUSTRALIA

THE UNIVERSITY OF NEWCASTLE LEGAL CENTRE
Newcastle Law School

Level 5, New Space
409 Hunter Street (Cnr Auckland St)
NEWCASTLE NSW 2300
Telephone: + 61 2 49218666
Email: legalcentre@newcastle.edu.au

NSW Law Reform Commission

Digital Estate After Death

Authors: Gerard Bush (law student UNLC), Emily Gagliardi (law student UNLC), Jenayah Heath (law student UNLC) and Shaun McCarthy (Director UNLC)

This submission is in response to the call for submissions made by the NSW Law Reform Commission in regard to the issue of digital assets upon death and incapacity.

The University of Newcastle Legal Centre ('UNLC') is a community legal centre which provides free legal advice and assistance to members of the community, with a focus on disadvantaged clients. The UNLC provides a deep learning experience for students giving opportunities to reflect on the need for law reform where there is a gap in the law. The UNLC assists the community with a diverse range of legal issues, often handling matters involving wills and probate, family law, intellectual property and criminal law.

The UNLC is interested in seeing development in the area of digital law reform, particularly as it relates to our clients and their needs as well as for teaching and learning purposes. Many of our clients have digital assets, including photos on social media accounts, digital movies and dealing with cryptocurrencies. Being able to properly advise the community on their ability to gift or transfer these assets after their passing will empower individuals in their succession decision making.

It is our view that new legislation, similar to laws enacted in the United States of America and Canada, should be introduced in New South Wales so that fiduciaries and executors can have access to the digital assets of the deceased person.

Recommendation 1: A definition of digital asset

The research that has been undertaken for this submission has shown that there is not a universally accepted definition of digital assets. It is difficult to create an encompassing definition of a digital asset. The difficulty comes in ensuring a definition is not too broad or too narrow.

Both the United States of America and Canada have attempted to create a definition of digital asset as a digital record.¹ While the UNLC accepts that these definitions have merit, we consider that these definitions have their limitations. To that purpose, the UNLC recommends that a definition of digital assets should have its own section, where examples and exclusions of a digital asset are provided.

The UNLC recommends a definition such as:

“A digital asset means an electronic record to which an individual has a right of access. Digital assets may include:

- a) Social media accounts,
- b) Photo or video storage accounts,
- c) Cloud services,
- d) Email accounts,
- e) Medical records, and
- f) Cryptocurrencies.”

Recommendation 2: Proposed law reform should empower executors to demand the content of social media accounts

Today, social media reaches into almost everyone’s lives, with websites such as Facebook announcing that it reached 2.2 billion active users in March 2018.² More people rely on social media as a photo and video database or as a source of revenue. While many collections may not have significant monetary value, they contain considerable emotional or sentimental value. As such, family members have expressed wishes in recovering these collections and have faced difficulty in achieving access. The UNLC has had several clients express their wish to provide access to their photos from social media sites when they pass and their desire for their families to have access to these photos. Social media providers often dispute requests for access from surviving family members and friends on the basis that such requests are a violation of the users’ terms and conditions agreement. Despite this, courts have been known to order that account contents be handed over. In the United States a family took Yahoo! to court to gain access to a deceased father’s emails.³ Yahoo! argued that providing access was contrary to the account’s terms and conditions. The US court found that it could not order Yahoo! to provide account details but ordered that Yahoo! hand over content related to the account. Some social media providers already provide avenues for accessing content of an account after the user dies. Facebook, for example, allows family members to request that a loved one’s account be memorialised.⁴ It is our view that the proposed law reform should empower executors in certain circumstances to be able to demand access to the contents of social media accounts.

¹ *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* (USA).

<http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf>; *Uniform Access to Digital Assets by Fiduciaries Act (2016)* (CAN)
<http://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0006.pdf>.

² Facebook Newsroom, ‘Stats’, <<https://newsroom.fb.com/company-info/>> accessed 14 May 2018.

³ See *In re Ellsworth*, No 2005-296,651-DE (Oakland Co. Michigan Probate Court 2005).

⁴ Facebook Help Centre, ‘Managing a Deceased Person’s Account,’

<https://www.facebook.com/help/123355624495297?helpref=uf_permalink> accessed 28 May 2018.

Recommendation 3: Legislative reform is needed to ensure digital asset service providers inquire as to the users' wishes as to how their assets are to be dealt with upon their death

Innovative solutions are imperative in this area. An example of an innovative solution in this space is the Legacy Network developed in France.⁵ The Legacy Network proposes that a blockchain base be developed whereby users upload their various digital assets into 'capsules' which are then assigned digitally to certain chosen individuals and are passed upon death. What this proposal highlights is that planning for the future regarding an individual's digital assets can assist in ensuring that such assets are dealt with in accordance with the person's wishes and preferences.

It is the UNLC's submission that digital asset service providers such as Facebook, Instagram and Twitter should be required to ensure that users advise, before being granted permission or access to an account, what they wish to happen to their digital assets upon death.

With an ever-evolving digital realm in which we live it is imperative that we enable users to decide how their affairs are dealt with in all forms. Empowering users and their personal representatives ensures more fair and equitable decisions regarding their digital assets upon death.

⁵ Legacy, 'White Paper' (2017) <<https://legacy.network/#faq>> accessed 28 May 2018.