

NSW Government Inquiry into access to digital assets upon death or incapacity

The long term fate of digital assets poses a concern. While other submitters have argued that on a prima facie basis executors should have the power to deal with digital assets, and I agree, this simply does not go far enough. What will happen 20 or 30 or 50 years from now, especially to the electronic social media and other personal accounts held by organisations. Will Qantas or Virgin for example claim that its frequent flyer program has 50 million Australian members, when the population of Australia is only 45 million? Holders of digital assets should be required every 5 years to confirm the existence and/or survival of all account holders, and if individuals are non-responsive their accounts should be deleted. At this time, I expect that various organisations are using the accounts of deceased individuals and inactive accounts to “boost” their numbers, and public/market perceptions of their value.

As I understand airlines are not very helpful when their members die. In relation to Velocity, while status credits will be cancelled automatically on death, points can be used for up to 12 months after passing. Qantas Frequent Flyer, Singapore Airlines’ KrisFlyer and Cathay Pacific’s Asia Miles close accounts once airlines are notified of the death of passengers. This is an inequitable result – digital assets should not be extinguished under any circumstances on death, and should be treated the same as any other asset of a deceased estate.

As a solicitor I’ve dealt with the assets of deceased estates in my capacity as executor. Very often it is difficult to determine what digital assets individuals have, let alone how to deal with them. The Federal Government should develop and maintain a secure register where people can list the digital assets they have, which can be then be made available to an executor on application. The executor should then be able to approach the secretaries/managers of these assets in order to be granted access to the testator’s account, possibly through the issuing of a temporary password. Obviously the privacy of would-be testators would have to be guaranteed if they used such an on-line repository of their digital assets.

The Government should encourage the use of password management software, and should make such software available to all residents.

It is obviously important to ensure that people include digital assets in their estate planning and encourage their dependants to do the same. The Government should undertake an information dissemination campaign encouraging people to do so. Privacy is important, but after death it is less important than the ability of executors to effectively manage an estate. Hence, access to emails, electronic banking and other digital assets/functions should be the presumption rather than the exception.

As an intellectual property lawyer, I also think it is important to note that the fundamental principle that intellectual property rights continue to operate on the internet must continue to be recognised. Personal or business domain names, on-line writing and other intellectual property such as copyrighted material, trademarks and even website coding must continue to be protected even after the author dies.

I am a Sydney based IP lawyer with a PHD in law from UTS, as well as an LLM from Sydney Uni and a B.COM/LLB from UNSW. I have worked in Government (ACMA, ACCC senior investigator), for industry associations (ARIA, PPCA) and in academia (PHD in Law). I have appeared on radio and online. I currently work in commercial law focusing on intellectual property rights enforcement (Trade Marks and Copyright), privacy law (NDB), technology law, contracts, and trade practices law. I am happy for this submission to be published.