The Difficulties of Managing Online Estates

Info 205 – Information Law and Policy
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For a project in our Mixing and Remixing class at the School of Information, Ben Cohen, Nat Wharton and I created the beginnings of a website called Thanatosensitive.com.[1] The goal of the site was to aid executors with the handling of a testator's online assets, but in our quest to solve some of the problems that this scenario creates, we have encountered many more difficulties and complexities than we could have possibly expected at the outset. These problem range from the mundane, such as how to securely give passwords to your executor, to the convoluted, such as how to intelligently give executors the requisite power to do their duties, but only after the testator's death. The solutions to these problems are complex, and involve both regulatory and industry response.

At the root of all of these issues are three important stakeholders: the Internet Service Providers (ISPs), the users of the online systems, and the regulatory bodies. The issues for each of these parties are most succinctly illustrated by briefly reviewing a 2004 dispute between the family of a soldier that died in Iraq named Justin Ellsworth

1 In Greek mythology, Thánatos was the god of death, and the study of death and dying is known as thanatology. Hence, thanatosensitive would "describe an approach that actively integrates the facts of mortality, dying, and death." Michael Massimi and Andrea Charise, "Dying, Death, and Morality: Towards Thanatosensitivity," in (presented at the CHI 2009, Boston, MA, 2009), 1.

and his ISP, Yahoo, Inc. Before being deployed to Iraq, Ellsworth created an account with Yahoo, and used it to communicate with his family and friends. After his death, his family was the executor of his estate, and attempted to work with Yahoo to retrieve what they believed to be valuable emails. In response, Yahoo stated their desire to release the emails to the family, but Yahoo worried that they would be in conflict with their privacy policy if they were to do so. As a result, they denied the family's request, stating that, "it is important to uphold the preferences that are part of the agreement we have with our users regarding their privacy."[2] In the end, Yahoo believed the best solution would be for the dispute to go to court, and for the court to rule on the matter. When that eventually happened, at issue in the case was the question of whether the family's rights to the digital goods held by Yahoo took precedence over Yahoo's contractual obligations that had been formed when Justin Ellsworth agreed to their privacy policy. Ultimately, the court found that Yahoo must give the family the records, and they promptly did,[3] but until the case had been resolved, it was uncertain how Yahoo could fulfill both sides of the law.

A further problem that this case highlights is the difficulty for consumers to determine the policies of the many ISPs with which they interact on a regular basis. In the case of Yahoo, the family was fortunate to have quickly learned that there was no

2 Jim Hu, "Yahoo denies family access to dead marine's e-mail," *cnet news*, December 21, 2004, http://news.cnet.com/Yahoo-denies-family-access-to-dead-marines-e-mail/2100-1038_3-5500057.html.

3 Stefanie Olsen, "Yahoo opens up dead Marine's email," *ZDNet.co.uk*, August 22, 2005, http://news.zdnet.co.uk/internet/0,1000000097,39195962,00.htm.

policy put in place to be used in the event of a user's death, for they also learned that Yahoo had a policy of closing and deleting accounts after 90 days of inactivity. What is not mentioned in the article though is that Justin Ellsworth may have had accounts with dozens or hundreds of different ISPs,[4] and that the family likely had significant hurdles to overcome if they chose to work with each of them. The first step in such a process would be to determine which services Justin had used before his death, but there are few easy ways to do this. It might have been possible for the family to inspect a password manager, bookmarks, or web history on Justin's computer in order to see what other sites he used on a regular basis, but since he was deployed in Iraq, this option seems unlikely. Even if the family were able to make such a list of sites, their next step would necessarily be to investigate each of the policies of each of the service providers, and to determine which of them would summarily delete the account of a deceased user. After that, a polite request could be made to each of the service providers, as was done with Yahoo, and if any of them denied the request, or did not have a policy in place, the final step would be to go to court to let a regulator make a decision. This is an untenable situation for families to have to go through following a death. With the proliferation of cloud computing,[5] and the increasing use

4 Though as a technologist, I may be a biased sample, in my own browser, I count approximately 350 sites with which I have saved passwords.

5 Daryl Plummer, David Cearley, and David Mitchell Smith, "Cloud Computing Confusion Leads to Opportunity" (Gartner, June 19, 2008), http://www.gartner.com/DisplayDocument?doc_cd=159034&ref=g_sitelink&ref=g_SiteLink.

of the web in our everyday lives,[6] such a task is only increasing in difficulty, to the point where it is likely to be a fool's errand for many users.

Another problem that needs to be resolved is the inability of users to securely and conveniently address these problems, should they choose to do so before their death. This is because at present, very few Internet service providers have made any attempt to create solutions to this problem. Since so few sites have any useful interface for assigning an executor or beneficiary, the only solution to this problem is for each user to create a solution him- or herself. Such solutions could take many forms, but at a minimum would require a written statement assigning an executor to their digital goods, and some sort of list providing login credentials for each ISP with which the testator is affiliated. Such a system would be relatively simple to create, but having such a list is a security problem for a single individual, and is even worse when looked at from the macro view. Clearly, each Internet user should not be required to maintain a list that would place them in such a position of vulnerability should it be lost or stolen.

In a few cases, ISPs such as online banking and life insurance companies have indeed created ways for users to assign executors or beneficiaries, but it is important to note that even these solutions do not accomplish the goal of transferring your online estate after your death. While it is true that the money from a life insurance

6 Maryanne Feldman, "The Internet revolution and the geography of innovation," *International Social Science Journal* 54, no. 171 (2002): 47-56.

policy or a bank is quite possibly the most valuable asset that is held by these ISPs, they may also hold other digital information such as transaction histories, and this information should also be considered and transferred to the next of kin. Such information goods may previously have been difficult to transfer to next of kin but with the Internet revolution it is now theoretically possible to do so easily, should ISPs decide to make it a priority.

A final issue that is raised following a death is the fact that this is not an instance of "The Law of the Horse," as it was defined by Judge Easterbrook during a conference on cyberlaw.[7] In that conference, as Lawrence Lessig explains, Easterbrook claimed that "there was no more a 'law of cyberspace' than there was a 'Law of the Horse,'"[8] by which he meant that the laws that applied in the United States generally, apply equally well to horses, as they do to the online, digital world. This, however, is a time when a need for new interpretations of existing laws and policies simply will not work. Existing laws provide mechanisms for people to designate executors, but for the reasons above (among others), they do not provide the means for executors to take the requisite action on a testator's behalf, nor do they require in any way that ISPs take any action to make this transaction feasible. For example, while existing laws may make it clear that a person's online digital assets are a part of their estate, this clarity does little to address the fact that people may have hundreds of ISPs, each with a

7 Lawrence Lessig, "Law of the Horse: What Cyber Law Might Teach, The," *Harvard Law Review* 113 (1999): 501.

8 Ibid., 501.

piece of the estate that is hard for executors to obtain. This is a case where new policies are needed, for if they are not created, many, if not all, of the digital assets that we create will be lost at the time of our death.

The creation of such policies may take many forms, and indeed are already being formed by such cases as the one above, which has now set the precedent indicating that privacy policies do not hold sway over the estate rights of the next of kin. Additional regulation is necessary to clearly indicate what requirements ISPs must consider, and to aid next of kin in obtaining the information necessary to complete their task without having to take ISPs to court on unsettled legal issues.

An additional area where more work almost certainly needs to be completed is in doing what has been termed a "thanatosensitive analysis of system design."[9] Such a design would be completed by ISPs, and could include mechanisms for users to assign executors before their death, and for executors to gain access to account information following a testator's death.

This however, does not address the issue of how executors can identify the hundreds of ISPs which a testator uses, nor how an executor can access the information in all of them. For this, a more centralized approach may be necessary from the industry, however the security concerns of creating such a list in a centralized location cannot easily be dismissed. Another solution could be a distributed system

9 Massimi and Charise, "Dying, Death, and Morality: Towards Thanatosensitivity," 9.

similar to what is used in peer to peer file sharing since in such a system, no ISP would need to know the entire list of ISPs that a user is affiliated with, but together a list could be created. This in turn would provoke another set of privacy concerns, since ISPs are often competitors, and may not have incentives to be good actors in such a system. These, however, are not insurmountable problems, but are merely examples of technological problems that can be solved if minds and resources are dedicated to this goal.

As it presently stands, more and more of the average user's personal information is slowly moving online. As this happens, less and less of it can be obtained by the next of kin, creating a problem that needs to be urgently solved, with input from industry, policymakers and regulatory bodies. Because of the vast use of Internet services, it will neither be sufficient to create only legal boundaries nor only technological solutions to this problem – a solution involving both is needed.