



# **Access to Digital Assets upon Death or Incapacity**

Submission by the Australian Communications Consumer Action Network to the New South Wales Law Reform Commission

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## **About ACCAN**

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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# 1. Introduction

ACCAN thanks the New South Wales Law Reform Commission (NSWLRC) for the opportunity to contribute to the Access to Digital Assets upon Death or Incapacity review.

The creation of digital accounts, use of digital media and services is common practice amongst different groups of Australians. There are a variety of social media and cloud-based accounts, personal blogs, websites, emails, messaging apps, and other digital services used. Despite the broad array of ways Australian consumers engage with digital media and online services, there are inadequate legal protections for them or their digital assets after death. This raises questions about the digital legacy deceased Australians leave behind and what should be done to manage it. These questions are not only important to the deceased individual, but the deceased's family members, friends and fiduciaries who may want to have access to the deceased's digital presence, especially as so many Australians' lives (from photographs and other memories, to cryptocurrencies and funds) is stored in cyberspace.

We encourage the NSWLRC to consider the updated *Death and the Internet 2017* report commissioned by the ACCAN Grants Scheme.<sup>1</sup>

An interdisciplinary team of researchers at the University of Melbourne have updated their research on the fate of online accounts, financial assets and personal profiles when a user passes away. The team investigated licencing policies, terms of use agreements and copyright law, and interviewed a range of people, including funeral directors, religious workers, internet content and service providers, as well as estate planning lawyers. ACCAN encourages the NSWLRC to take the opportunity to review the contents of the *Death and the Internet 2017* report at <http://accan.org.au/our-work/research/1457-death-and-the-internet-2017>.

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<sup>1</sup> E. van der Nagel, M. Arnold, B. Nansen, M. Gibbs, T. Kohn, C. Bellamy, and N. Clark (2017) *Death and the Internet: Consumer issues for planning and managing digital legacies*, 2nd edn, Australian Communications Consumer Action Network, Sydney.

## 2. Responses to the terms of reference on digital assets after death or incapacity

### 2.1. Relevant laws

#### 2.1.1. Contract law

Ownership of digital media and any rights attached to online accounts (and subsequently data) tends to depend on the terms of service agreements found on digital media and online services websites, which are usually entered into when the deceased signed up for an online account or service while alive. Some of these terms of service agreements are enforceable under principles of contract law. Moreover, since many terms of service agreements are entered into by a plethora of users from various countries, these agreements are covered by principles of private international law – which often do not grant family members, friends and fiduciaries access to a deceased user’s digital assets. This is often the case with many United States (‘US’) based social media and online services platforms terms of service agreements, which many Australians are entering into, without realising that these agreements often trump any privacy protections under Australian law.

#### 2.1.2. Property law

The principles governing the location, valuation and transferring of physical property are well defined by existing common and statute law, but for digital property are not. Most digital media and services platforms terms of service agreements do not allow accounts to be transferred on to others that are not the deceased, which means that sometimes a lifetime’s worth of media uploaded to a digital platform may be lost forever if posthumous access to it is not permitted. Under the *Succession Act 2006* (NSW), a user is permitted to organise arrangements for their property after their death, although an issue arises as to whether digital assets are classed as “property” for the purposes of NSW succession law.<sup>2</sup> Moreover, access to digital assets is often dependent upon the terms of service agreements.

Intellectual property law poses similar issues in that terms of service agreements also impact upon any rights, such as intellectual property rights, which a user may have or give away to their successors. The *Copyright Act 1968* (Cth) recognises a copyright interest in unpublished works, photographs, and recordings (i.e. sound and film) for 70 years after the original creator’s death.<sup>3</sup> Despite the interests afforded by the *Copyright Act*, the terms of service agreements interfere with the rights of users and their successors because they tend to limit intellectual property rights and any entitlements belonging to users and their successors.

#### 2.1.3. Estate administration and criminal law

A practical solution to the limitations of contract and property law may be for individuals to write up private details related to their digital media accounts, such as usernames and passwords,

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<sup>2</sup> s 4.

<sup>3</sup> ss 33, 35, 85 and 86.

accompanied by instructions on what their family members, friends and fiduciaries should do with those accounts once they are deceased. However, this would expose individuals to legal implications. Indeed, the law governing the administration of estates, such as the *Probate and Administration Act 1898* (NSW), imposes legal obligations on executors and administrators to identify, gather and share a deceased person's assets. This means that executors and administrators require access to the deceased person's digital assets regardless of whether they are not heritable under a will or the rules of intestacy. The problem this creates is that this practice tends to be in contravention of most terms of service agreements; people that are not the user are forbidden to access the user's account.

In Australia, some service providers like iiNet, Optus, and Telstra permit executors and administrators to access someone else's account, provided they have permission by the account owner – but this also poses verification issues related to the identification of the person using the username and password. Indeed, under both Commonwealth and NSW criminal law, “unauthorised access” to restricted data held in a computer is prohibited (Criminal Code 1995 (Cth) s 478.1; Crimes Act 1900 (NSW) s 308H). This criminal offence has a wide scope, which means that the intention of the person gaining “unauthorised access” is not considered and there is no defence available. The criminal implications are unlikely to be a problem if appropriate authorised access is granted to an individual, i.e. under a will. Moreover, in the event of a person's death it is likely that the Supreme or Federal Courts will grant access to certain persons or at least provide a process to enable access to digital assets, which highlights that it may be best to vest control with the Court and continue to give them the relatively broad discretion they have had in the past. However, an individual acting in good faith should not be sanctioned by the law by seeking to comply with obligations imposed on them.

#### 2.1.4. Privacy law

Privacy law is another area that impacts access to a deceased individual's accounts as Australian privacy law does not adequately protect the personal information contained in digital assets once a person dies. Australian privacy law focuses more on regulating how personal and/or health information is handled by public sector agencies, rather than focusing on individuals or corporations.<sup>4</sup> Moreover, Australian privacy law does not extend rights to deceased persons.<sup>5</sup> In addition, large e-mail providers such as Gmail and Hotmail do not allow access to any email accounts associated with a deceased user's account. As a result, Gmail and Hotmail accounts will be rendered inaccessible and destroyed, unless the deceased user made a provision for preservation before their death.

## 2.2. Policies and terms of service agreements of social media companies and other digital service providers

Below is a list of the policies and terms of service agreements related to digital assets of various social media platforms and other digital service providers.

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<sup>4</sup> *Privacy and Personal Information Protection Act 1998* (NSW).

<sup>5</sup> *Privacy Act 1988* (Cth) s 6(1).

- **Facebook** allows users to download a copy of their Facebook data. Facebook also provides users other options such as allowing them to view cookies, logins, and logouts for example. More on this can be found at <https://www.facebook.com/help/131112897028467/>. As for account management after death, current Facebook users can nominate a legacy contact to manage their Facebook profile after their death. After the death of a Facebook user, the deceased person's family member or friend has the option to submit a request for the deceased person's profile to be memorialised. The memorialisation form is available at [https://www.facebook.com/help/150486848354038?helpref=faq\\_content](https://www.facebook.com/help/150486848354038?helpref=faq_content). Family members and friends are also given the option to request for the removal of a Facebook account at <https://www.facebook.com/help/contact/228813257197480>.<sup>6</sup>
- **Twitter** allows users to download their entire Twitter archive at <https://support.twitter.com/articles/20170160>. Executors are unable to access the Twitter account of the deceased person, but they may have the deceased's account deactivated by submitting a form with information about the deceased person, including the death certificate. The form is accessible at Twitter's Privacy Form page under the option, "I want to request the deactivation of a deceased or incapacitated person's account" at <https://help.twitter.com/forms/privacy>. The same form can be used by executors to request that Twitter remove imagery of deceased persons, although Twitter claims it "considers public interest factors such as the newsworthiness of the content and may not be able to honour every request".<sup>7</sup>
- **Google** allows users to access and download their data from Google products such as Gmail, Google Drive, and Google Photos at <https://support.google.com/accounts/answer/3024190?hl=en>. Google's Inactive Account Manager allows Google account holders to add up to 10 trusted contacts who will receive an email if their account is left unattended for between three and 18 months. Users can instruct their trusted contacts as to what they would like done with their Google account. These instructions may be included in the email, along with links to download data from Google accounts including Gmail, Google Drive, Blogger, and YouTube (<https://support.google.com/accounts/answer/3036546?hl=en>). If no instructions were left by the deceased person when living, then close family members, friends and fiduciaries can make a request to Google to have the deceased person's account closed. They will not be able to access files or data associated with the deceased person if the deceased person left no instructions while still alive.
- **Outlook** allows users to download and archive an email account via a software application such as Thunderbird: <https://www.mozilla.org/en-US/thunderbird/>. Once emails have been downloaded, a user has the option to export them in different formats and in folders.<sup>8</sup>
- **Hotmail** also allows users to download and archive an email account via a software application such as Thunderbird: <https://www.mozilla.org/en-US/thunderbird/>. Once emails have been downloaded, a user has the option to export them in different formats and in folders.<sup>9</sup>

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<sup>6</sup> van der Nagel, above n 1, 8.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

- **Microsoft, including Outlook and Hotmail:** A user can request data from and close Microsoft accounts by contacting the Microsoft Custodian of Records at [msrecord@microsoft.com](mailto:msrecord@microsoft.com).<sup>10</sup>
- **Instagram** does not offer a direct way of downloading all images and videos uploaded to the app, but images and videos uploaded to an Instagram account are able to be downloaded via third-party sites such as Instaport. Instagram is owned by Facebook, so there is an option to memorialise deceased Instagram users. Once memorialised, nobody can login to the account, the account cannot be changed, and the posts will stay visible to the audience they were set to be shared with. The memorialisation feature ensures that memorialised accounts on Instagram don't appear in public feeds, such as the Explore section of the Instagram. To memorialise an account, anyone can provide a link to an obituary or a news article reporting the death. To remove the account, an immediate family member must contact Instagram and provide the deceased person's birth and death certificates, and proof of authority under local law that the executor is the lawful representative of the deceased person. Instructions for memorialising and removing Instagram accounts can be found at <https://help.instagram.com/264154560391256/>.<sup>11</sup>
- **Snapchat** allows users to delete their account through the Snapchat website at <https://support.snapchat.com/en-US/article/delete-my-account1>. Snapchat also allows users to download their account data by submitting a request once on the Snapchat website at <https://support.snapchat.com/en-US/article/download-my-data>. There is no reference to deleting the account of a deceased person, but family members and friends can contact Snapchat at the 'Contact Us' page of their website.
- **Dropbox:** For an executor to gain access to the deceased person's Dropbox files, an executor will need to produce documentation that the person is deceased and that they as the executor have a legal right to access the person's files. This document and proof must be provided by postal mail, and Dropbox will follow up by email. Details of this process are available at <https://www.dropbox.com/en/help/security/access-account-of-someone-who-passed-away>.<sup>12</sup>
- **iTunes:** Music files cannot be bequeathed because they are licenced, rather than owned. To transfer an Apple account to a different user, executors can contact Apple Support with the deceased person's Apple ID, email address, password, and death certificate at <https://getsupport.apple.com/?caller=cups>.<sup>13</sup>
- **LinkedIn:** Executors, colleagues, and friends of the deceased person can notify LinkedIn they have passed away so their account can be closed and profile removed. To close the account and remove the profile, executors, colleagues and friends of the deceased will need to provide the deceased person's name, LinkedIn profile URL, email address, the date they passed away, link to their obituary, and company where they most recently worked. The form is at <https://www.linkedin.com/help/linkedin/ask/ts-rdmlp>.<sup>14</sup>
- **PayPal** permits an account owner to close their account, but if the account owner is deceased, a representative can fax legal documentation to PayPal and have a cheque posted

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<sup>10</sup> van der Nagel, above n 1, 8.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid 8-9.

<sup>13</sup> Ibid 9.

<sup>14</sup> Ibid.

to them with any remaining balance of the PayPal account (<https://www.paypal.com/us/selfhelp/article/How-do-I-close-the-PayPal-account-of-a-relative-FAQ1694>).<sup>15</sup>

- **eBay** has no official policy regarding closing the account of a deceased account owner, but people can contact eBay via their website for help closing or transferring the account of a deceased eBay user.

### 2.3. Relevant jurisdictional issues, including the application of NSW laws, Commonwealth laws and the laws of other jurisdictions

Most online social media platforms and service providers do not have adequate procedures in place to cater for the death of a user. Where arrangements are in place there is also inconsistency between the arrangements that different social media platforms and digital service providers offer upon death; the arrangements are often made on an ad-hoc basis. This creates privacy concerns for the account owners and unnecessary complications for their family members, friends and fiduciaries who may wish to manage the digital assets of their loved one after death.

The inconsistency between social media platforms' and digital service providers' terms of service agreements can be ambiguous for consumers and consequently consumers are often not appropriately informed of what will happen to their digital assets after death. In addition, off-shore data hosting adds to the inconsistency and ambiguity as data may be protected under another country's jurisdiction but not Australia's.

### 2.4. Appropriate privacy protections for the electronic communications after a person dies or becomes incapacitated

Australian privacy law does not extend privacy protections to a deceased person. The *Privacy Act* s 6(1) definition of an "individual" means a "natural person", which typically does not include a deceased person. The only time when there can be privacy protections attached to a deceased person is if information related to a deceased person has the potential to impinge upon the privacy of a living person, i.e. medical conditions.

The lack of privacy protections for deceased persons means that when a person dies and a living person accesses their digital assets, there will be no breach of privacy. This can have consequences when family members, friends and fiduciaries of the deceased person download all the deceased person's data; once private information can be released to another individual as well as funds (i.e. cryptocurrency profits) potentially being released to another person with no one to object. A solution to these consequences is to bring in a digital register that can accompany a will.

Digital assets may be preserved by including them in a digital register that may accompany a will. A digital register could include a list of accounts associated with the creator of the will, accompanied by passwords and instructions related to the use and management of these accounts. Just like a will, a digital register may be prepared by an individual or with the assistance of a lawyer. A digital

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<sup>15</sup> van der Nagel, above n 1, 9.

register should accompany a will because including the digital register within the will poses access issues – wills can become public information, hence can expose digital accounts to the public.<sup>16</sup> Currently, information and guidance related to the creation and management of a digital register is limited, which is why there needs to be clear legal guidelines on digital assets after death. Indeed, clear legal guidelines will help outline what the protocols and limitations are regarding family members, friends and fiduciaries accessing a deceased person’s digital assets. For a digital register to be operate safely, it would need to be highly secure and protect consumers’ information, given that the digital register would easily allow for identity theft.

Another problem is that any privacy protections currently given to Australian citizens under Australian law are often surpassed by major international social media and online service platforms’ terms of service agreements that Australians consent to when signing up to use. It is important that the protections given to deceased Australians under any new legal guidelines are adequate to protect Australians domestically at the very least, even if they have entered into terms of service agreements by international social media platforms and online services.

## 2.5. The Uniform Law Conference of Canada’s Uniform Access to Digital Assets by Fiduciaries Act (2016) and the American Uniform Law Commission’s Revised Uniform Fiduciary Access to Digital Assets Act (2015)

### 2.5.1. Canada: Uniform Access to Digital Assets by Fiduciaries Act (2016)

The *Uniform Access to Digital Assets by Fiduciaries Act (2016)* (‘UADAF’) allows any fiduciary of an account owner the default right of access to the digital assets of the account holder.<sup>17</sup> Under s 1 of the Act, “digital assets” includes any form of electronically stored information, such as content held on a device or uploaded to a website. The Act does not permit a fiduciary to own the asset or engage in transactions with the asset. If a provision in a terms of service agreement seeks to limit access contrary to the UADAF, then the provision in the terms of service agreement will be unenforceable. Moreover, the most recent instruction to a fiduciary takes priority over any earlier instrument, thus a person who has a will, but then nominates a family member or other to access their social media after their death, limits their executor’s rights under the will.

### 2.5.2. US: Uniform Law Commission’s Revised Uniform Fiduciary Access to Digital Assets Act (2015)

Under the US *Fiduciary Access to Digital Assets Act (Revised 2015)*, which has been enacted by most states in the US, rights are granted to people to allow them to plan for the management of their digital assets after death. Under s 2 of the Uniform Law, digital assets are defined to include electronic records in which a person has a property right or interest. The Uniform Law restricts access to social media, texts and email messages unless specifically granted, bringing significant

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<sup>16</sup> van der Nagel, above n 1, 4-5.

<sup>17</sup> s 3.

clarity and control back into those planning estates or facing periods of lessened ability. Nonetheless, if a person has given instructions to their executors, the Uniform Law gives priority to the person's instructions over the terms of service agreements. If the person has not given any instructions, then the terms of service agreement will apply, however if there is no reference to fiduciary access in the terms of service agreement, then the default rules of the Act will apply. This information and legislation can be tracked via the Uniform Law Commission.

### 3. Consumer education

Once the review is completed by the NSWLRC, an online central repository for consumer education on digital assets after death or incapacitation should be created. The central repository for consumer education should be on the Federal Attorney-General's website at <https://www.ag.gov.au/RightsAndProtections/Pages/default.aspx>. In the interim perhaps it could be located at <http://www.justice.nsw.gov.au/life-events>. Australian government agencies should coordinate and prioritise building consumer awareness about of what options they have when deciding what they want to happen to their digital assets, or what will happen to their digital assets after their death.

The creation of an online central repository for consumer education on digital assets after death or incapacitation will ensure that consumers have an authoritative point of reference that is convenient and accessible. When consumers are aware of their options it enables them to be empowered and make informed decisions regarding how to manage their digital assets after death or incapacitation.

Currently, there are other webpages that provide some consumer education on digital assets, such as Choice at <https://www.choice.com.au/electronics-and-technology/internet/using-online-services/articles/digital-estate-planning> and ACCAN at <http://accan.org.au/hot-issues/1247-managing-your-digital-legacy?highlight=WyJsZWdhY3kiLCInbGVnYWVWN5IIO=>. The *Death and the Internet 2017* report also provides consumer education guidance.<sup>18</sup>

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<sup>18</sup> van der Nagel, above n 1.

## 4. Recommendations

**Recommendation 1: ACCAN recommends that there should be greater emphasis and efforts made to educate consumers about their digital legacies and the significance of them from a consumer and privacy point of view.**

Australian government agencies should co-ordinate and prioritise building consumer awareness about their options regarding how to manage their digital assets after death or incapacitation. Consumers need to be made aware of the significance of the terms of service agreements when accessing digital media and services, so that they can be informed as to what they can do while they are alive to ensure their digital assets are managed appropriately after their death.

**Recommendation 2: ACCAN recommends that consumers should be given more control under terms of service agreements and legislation with regard to how their personal digital assets should be handled after death.**

Consumers should come first when it comes to handling digital assets after death or incapacitation. Consumers should have more control over what they wish to do with their digital assets after death, i.e. the terms of service agreements and legislation should adequately protect consumers' decisions regarding their digital legacy.

**Recommendation 3: ACCAN recommends that privacy legislation should address how the deceased person's family members, friends and fiduciaries are to access or manage the digital assets of the deceased person in the future.**

Deceased persons are not covered by the Australian *Privacy Act*. Privacy legislation should extend privacy rights to deceased persons. This could be done by extending the s 6 definition of an "individual" to a deceased person. A new definition could have a wide scope, not limited by time periods, or a narrow scope, limiting privacy rights to deceased persons to, for example, a 30 year period like NSW health legislation limits it to. Indeed, under Commonwealth law, the records of a deceased person are available for public access after the records are 30 years old and enter the public access period (*Archives Act 1983* (Cth)). It would also be good practice for Australian legislation to make reference to managing or maintaining the privacy of deceased persons' assets once it is in the possession of the deceased person's family members, friends and fiduciaries.

**Recommendation 4: ACCAN recommends that nominated digital executors should have the technical skills to locate, access, and manage the deceased person's digital assets.**

When nominating a digital executor, or in other words, a person who is going to manage the deceased person's digital assets upon death, care should be taken. A digital executor can be nominated when creating a will, but it would be good practice to ensure that the nominated digital executor is an individual who has the technical skills to locate and access the deceased person's digital assets and understand instructions of what to do with the deceased person's digital assets.