



Digital Legacies: For Now and Forever

by Suzana Popovic-Montag

Digital media has become an important platform for all our communications, whether professional in nature, with, for instance, colleagues and clients, or mainly social, with family and friends. From a business perspective, we have developed webpages, created email accounts, joined professional on-line organizations, and bolstered our internet presence. And the influx of social media cannot be ignored – clearly, it is everywhere. Young and old, we blog, we “tweet”, we sell and purchase almost anything and everything online, and we spend hours checking out Facebook, Flickr and YouTube.

Not surprisingly, therefore, one’s online presence is something that we as estate practitioners are increasingly finding that we need to consider when dealing with clients, both from an advance estate planning and subsequent estate administration perspective.

Digital Assets

For the most part, the three main components of a digital presence are websites, Facebook/LinkedIn accounts and email addresses. Websites tend to be created for business or for recreational reasons, and some can have both economic and sentimental value to the creator. Facebook and LinkedIn accounts can be used for social and professional purposes, to interact, to market and to connect with friends and colleagues. And email addresses, such as Hotmail and Gmail accounts, carry high importance for their owners, given that much communication is done through these mediums. Almost all of our clients have at least one of these. The question that arises then is what is the legal status of these “assets” on death? And how does an executor deal with the unique legal, practical and administrative issues that arise as a result of one’s digital presence and the digital footprint they leave behind? As practitioners, these are questions that we are facing more and more frequently, and the answers to them involve both practical and legal considerations.

The Basics

Almost all forms of digital media require acceptance of terms of use (which are rarely, if ever, read and

even less likely to be understood) and a user-generated name and password. Internet banking, PayPal and iTunes accounts, social media platforms, and email accounts all contain confidential personal information and require access to their content in this fashion. Practically speaking, a list of all such media and the associated passwords is a simple first step to managing one’s digital identity.

The next issue then is what is to happen to these assets on death? Some are easy to answer, in that their utility “expires” on death: emails and social media accounts no longer need to be accessed. But what about the content of things like webpages and Facebook accounts? Who owns, for instance, the pictures and the text, and what restrictions are faced by personal representatives when trying to access this content after death?

The Law

From a legal perspective, the primary focus is on the areas of copyright, contract and estate law. Copyright, for instance, prevails over the content that has been created on webpages and YouTube videos and protects it on death. Contract law controls the medium that is used to launch the various applications – that is, the licence agreements and terms that are readily accepted with service providers in order to set up the accounts. And then there is estate law, and the whole question of who has the authority to deal with the digital assets on death, and to what end.

Planning For and Managing a Digital Presence

When we meet with clients who are looking to create estate plans and prepare wills and powers of attorney, exploring their digital presence is becoming as important as determining “who is to get what” in terms of personal property at the end of the day. As practitioners, we are now canvassing the nature and extent of our client’s “digital footprint”, collecting passwords, discussing where they will be stored, and what will be done with (or who will become beneficiaries of) various digital assets once clients become incapable or die.

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We are considering with clients whether they would prefer their attorneys or executors to preserve their internet profiles (by managing and controlling them indefinitely in the future) or perhaps eliminate them altogether. And this, of course, will depend on the particular asset and, in many cases, the rules and regulations of the service provider.

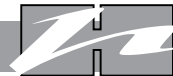
A further consideration, however, is that of jurisdiction and possible conflict of laws issues. Even if we empower attorneys and executors with authority to act in our clients' stead or pursuant to our clients' wishes, we may not be able to control whether that authority is recognized and accepted abroad. In other words, even if an executor were to obtain probate in Canada, there

is no guarantee that an internet service provider based in a foreign jurisdiction would recognize the executor's authority to act or direct as he or she sees fit. This remains a struggle for practitioners, one that we cannot easily overcome.

Conclusion

There is no doubt that we have embarked upon a new and exciting adjunct to our traditional estate planning. Digital assets, and the unique complexities that arise in converting them into digital legacies, will undoubtedly continue to evolve with the proliferation of the internet. The sooner we recognize this, and incorporate it into our daily practice, the better.

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Breakfast Series

Our next Breakfast Series meeting, Thursday, June 23, 2011 will feature a presentation of *The Digital Legacy: Add it to Your Checklist* by Ian M. Hull & Suzana Popovic-Montag.

We invite you to attend in person, or by webcast.

The Breakfast Series meeting is being held at the Ontario Bar Association, 2nd Floor, 20 Toronto Street, Salons 2 & 3, Toronto, Ontario. Breakfast begins at 8:15 a.m. with the Presentation to follow at 8:30 a.m. A fee of \$30.00 (26.55 + 3.45 HST) is payable to Hull & Hull LLP upon registration by cheque, VISA or MasterCard. Materials included.

To register, please contact Diane Labao at (416) 369-1140 (press 0) or by e-mail to dlabao@hullandhull.com

A Compact Disc recording of the Breakfast Series will be available at a fee of \$20.00 (\$17.70 + \$2.30 HST).



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