

Death in cyberspace

In how many states do you own property? You own your home in Indiana, and your car is titled there. But what about your Web site? Is it hosted in Arizona?¹ California?² Or maybe British Columbia?³ And where is your e-mail stored? California?⁴ Or maybe Washington?⁵ And if so, who's property laws apply if you die or become disabled? A quiet revolution is quickly coming to the probate and estate planning world.

The *Random House Dictionary* dates the origin of the word "cyberspace" to around the end of the 1980s.⁶ Back in the early 1980s, our computers were DOS-based and essentially stand-alone word processors. Modern e-mail, the World Wide Web, eBay, YouTube, Facebook, LinkedIn, Second Life and Twitter were all at least a decade or more away.

Although I had seen a program in the mid-'80s called "MS Windows," I wasn't sure what good it was and didn't expect to be using it. But, ever so gradually, my computer evolved into an Internet portal, which slowly became my primary means of interacting with the outside world. With VoIP,⁷ even telephone service is transmitted over the Internet and becomes part of cyberspace. So, in the 21st century, more than a few of us find ourselves genuinely living in cyberspace. (Some of us, of course, more than others.) The transformation has been so gradual that we don't even realize what has happened until the electricity goes out!

In general, it was the younger generations that embraced the personal computer and the Internet. The

expiring oldest generation often had little or no involvement with computers or cyberspace. But now those younger generations are getting older and confronting mortality and serious illness. Probate has arrived in cyberspace, and its citizens are now in need of an undertaker.

Death and disability in cyberspace is a novel issue for most of us. It presents some interesting challenges that we really haven't come to grips with yet as a society. In this article, I'll first illustrate the problems we face with three brief scenarios. Next, I'll discuss these problems and the environment in which we confront them. Finally, although the area is evolving, I'll offer my suggestions on how we might address these challenges.

Ole and Selma After 55 years of marriage to Ole, Selma is now widowed and living in Jeffersonville. Selma is Ole's executor and is trying to put his affairs in order. Ole had a computer, and he used it to pay the couple's utility bills. In addition, Ole used it to correspond with a few friends, including many of the relatives in Sweden. Ole stored all the couple's pictures of the grandchildren online at what Selma calls "the Barney Googler."⁸ Selma can't type. Moreover she has an aversion to putting her hand on anything that is gray and called a "mouse." Selma doesn't know Ole's passwords, but she would like to read the Swedish correspondence and to be able to see the pictures of her grandchildren.

John and Mary John and Mary are both in their 50s, living in Fort Wayne. They have done basic estate planning: Both of them have wills and powers of attorney for health care and property. They have named each other as power of attorney and personal representa-

tive. Last week, John had a massive stroke and is convalescing in the hospital.

John spent a lot of time at the computer. In addition to using it to pay bills and do several miscellaneous chores, he also used it to correspond with his mistress, "Lily Belle." John is fond of visiting an adult-oriented chat room, where, in addition to meeting Lily Belle, he has made a lot of friends. These cyber friends have noted John's absence and are wondering what has happened to "Loverboy Johnny."

Mary, knowing that bills had to be paid, uses John's computer and is aghast as she reads the cooing e-mails from Lily Belle.

Brian Brian lived in Silicon Valley and was a computer wizard. In addition to being a software consultant in great demand, Brian has been a successful eBay⁹ Power Seller¹⁰ for more than five years. He also manages a financially successful virtual business in Second Life.¹¹ Brian has a popular blog, which is read widely by other consultants in the software industry. Collectively, his cyber businesses earn about \$100,000 per year. Last week, Brian was run over and killed by a car in California. Brian was single, 30, and survived by his parents in Indianapolis. Brian's parents have e-mail accounts and are generally familiar with the Internet, but are not savvy about running an Internet business. They have no idea what to do first, but know that, like any business, time is of the essence in protecting Brian's franchise.

Key issues

Like real life, lives in cyberspace vary, and each case is going to present different problems and opportunities for the surrogate¹² and the surrogate's professional



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advisors. As the three examples illustrate, when someone is no longer capable of managing his affairs in cyberspace, there are four basic problems:

Finding accounts and gaining access

The surrogate must determine what accounts a user has. Many users have multiple e-mail addresses, each representing a different cache of e-mail. Often these are stored on remote computers. For example, although John may have e-mail stored on his computer from his primary account, John could well have used an account with Yahoo! or another service to partially shield his real-life identity from his cyber friends. There might have been no clue on John's computer as to the additional account's existence.

Files other than e-mail are frequently stored remotely. Ole used Google to store family pictures. Although one can purchase additional storage space, users generally are given a certain amount of "free space" to store their pictures. Ole could have easily used Flickr¹³ or another service to store additional photographs. It is unlikely that Selma would appreciate the distinction, and there may be no evidence on Ole's computer as to whether such additional accounts exist.

Once the user's accounts have been identified, the surrogate will need to gain access to each of the accounts. The computer, being inanimate, cannot make a rational judgment as to whether a user should have access to the privilege being requested, whether it is to read or manipulate data. So, cyberspace security revolves around the password. Without a human to monitor the transaction, the assumption is made that if the user has the password, the user is the person who he or she claims to be

(or has been at least authorized by the user.)¹⁴

In some cases, although a probate estate may not have been otherwise required, it might be necessary to establish one in order to give the personal representative access to cyber property.

To assist in accessing the accounts of decedents, I.C. §29-

1-13-1.1¹⁵ was added to the Indiana Code in 2007. This section provides that a personal representative may obtain access to electronically stored information owned by the deceased.¹⁶

In our example, unless Selma can find Ole's password by other

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means, she is going to have to contact Google and send them appropriate documentation of Ole's demise:

For Selma to get access to Ole's account, Google, according to its Web site,¹⁷ will require Selma's full name and contact address, including a verifiable e-mail address for Selma. She will also need Ole's Gmail address. Selma will need the full header from an e-mail message that Selma received at her e-mail address "from the Gmail address in question."(!) She will also need the entire contents of that message. Selma is also to send proof of Ole's death and proof of authority under local law that she was Ole's lawful representative of his estate. Finally, Google states that it will need 30 days to process and validate the documents that Selma provides.

Google notes that its "ability to comply with these requests varies according to applicable law."¹⁸ Google's Terms of Service¹⁹ make

clear that California law, not Indiana law, governs Ole's contract with Google. While Google employees might want to help Selma, and, in this case, California law would hardly preclude Google's compliance with Selma's request, it should be clear that the Indiana statute, although well intentioned, hardly begins to help Selma or anyone in her predicament.

Selma's not finished. Ole paid the utility bills online. She is still going to have to contact each of the utility providers and ask them to send her paper bills. And yet, Selma is lucky. Imagine if Ole had dozens of cyber accounts with different providers, each in a different jurisdiction!

Mary's situation is even more complex because John is disabled, rather than deceased. Indiana's statute assists only a personal representative, and power-of-attorney law may be less clear, particularly beyond the borders of the Hoosier

State. Assuming, alternatively, that Mary did not have John's password, and that John's e-mails actually contained vital information, Mary could easily find herself in a legal thicket, trying to get access to his accounts.

Updating online content

Brian's blog is widely read and has several commercial sponsors. As such, its continuation is valuable. Simply because Brian's column is in cyberspace doesn't mean the franchise should end with his passing. For example, for many years, newspaper readers have avidly read "Dear Abby," a syndicated column started in 1956 by Pauline Phillips, a/k/a Abigail Van Buren. Pauline now suffers from Alzheimer's disease and has passed the column on to her daughter, Jeanne.

Alternatively, assume that Brian's blog was a social discussion. Brian's parents might want to update the blog with additional information after his tragic death. Rather than deleting the entire account, survivors often want to revise a posting. This can be difficult if the blog host "freezes" the contents of the posts.

For example, upon learning of the passing of a user, Facebook "memorializes" the user's account. This memorializing precludes adding or revising information about the deceased. Facebook notes that "in order to protect the privacy of the deceased user, [Facebook] cannot provide login information for the account to anyone."²⁰ Facebook's Terms of Service recite that California law, not Indiana Law, applies.²¹ While someone could conceivably host a private Web site or use a more cooperative service, this may not be a practical possibility.

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Social and obituary notices

We usually think of online chat as anonymous and ephemeral, but often, semi-permanent communities form online. John's friends are genuinely concerned about him. They have no idea where he lives or what his real name is. In an increasingly bygone era, if you know John's last name and lived locally, you could look him up in a Fort Wayne telephone directory. If you suspected that he died, you would check the obituaries in the *Journal Gazette*. But in cyberspace, your chat friends can just as easily be in India as Indiana. Although there are online directories that can help, there really is no convenient source of information about "Lovember Johnny" and his illness (or even his passing).

Alternately, instead of sex chat, the chat room could easily have

centered on fishing or hunting. Mary might have wanted to contact his friends. There is really no way to determine who John's friends are or to get a message to someone known only as "Hairy Terry." Mary might visit the chat room, sign on as "Mrs. Lovember Johnny," and try to relay the message, but this would be a hit-or-miss proposition at best.

Digital property management

Cyberspace is full of intellectual property, much of it valuable. Game players whose online characters have reached certain proficiency and skill (and resultant game privileges) have sold their characters for thousands of dollars. Millions of dollars (and hours) have been invested in developing personal Web sites. Avatars regularly conduct profitable businesses in Second Life. And many eBay sellers

jealously guard their hard-earned status as reputable merchants.

Unfortunately, the concept of a "going concern" is often foreign to the cyberspace service provider. For example, if Brian's parents were to contact eBay for assistance, Brian's account as an eBay Power Seller could end, and the goodwill of his business would be lost.

Should the rules governing business succession be different in cyberspace than other venues? Henry Ford built a successful car manufacturing company, the Ford Motor Company. No one expected the Ford Motor Company to liquidate upon its founder's passing. Rather, Ford arranged for his family to control the company permanently. In that respect, selling cars on eBay is not much different than selling them on a car lot.

Some cyberspace service providers have taken a more proactive approach. Linden Labs, the owner of Second Life, states that a user may will an avatar to a natural person.²² Generally you may not transfer the account to another person, but Linden Labs will not “unreasonably” withhold consent to transfer by operation of a will.²³ Their site is silent as to whether an avatar’s ownership can devolve by intestate succession.

In addition to getting access to someone’s cyber property, it’s often important to be able to actively manage any business the user had been operating. For example, Brian’s parents had never visited Second Life; they would be lost trying to run his operation. Because time is often of the essence, care should be taken to provide a business succession plan. This will require a manager who is technically competent at the computer application, trustworthy and savvy enough to effectively run the underlying business. It can be difficult to find this type of individual on short notice.

The cyberspace environment

Things are a little different in cyberspace. Even some of the most run-of-the-mill situations can quickly become complex. Time moves fast in the electronic world. Things we didn’t imagine three years ago are now commonplace.

Privacy

One of the major tensions in accommodating the request of a surrogate is concern for the user’s privacy. Privacy laws vary widely throughout the world, and cyberspace is no exception. Notions of privacy can be very different in Canada, the European Union and Switzerland, and the balance between privacy and access might be very different in these jurisdictions than what an Indiana practi-

tioner or surrogate might expect. Obviously, the provider would be much more likely to follow its local laws and customs, should there be a conflict between the jurisdictions.

One of the classic Internet privacy cases was *In re Ellsworth*.²⁴ Ellsworth was a 20-year-old Marine killed in Fallujah by a roadside bomb. His father wanted to collect the e-mails that his son wrote to create a memorial. Yahoo! initially refused the father’s request, citing concerns for the deceased’s privacy. The Yahoo! Terms of Service provided that survivors have no right to access the e-mail of the deceased. Moreover, users must agree that the contents of their files are to be terminated upon their death. After an order of the Michigan probate court, Yahoo! ultimately complied with the father’s request.

While the actions of Yahoo! initially might seem mean spirited, the example of John and Mary is illustrative. A user might maintain multiple e-mail accounts and not want his survivors to read his correspondence. John could have used

one account to pay bills and another account for his philandering. Assuming John were deceased and not merely disabled, I.C. §29-1-13-1.1 might have frustrated John’s desire to keep his affairs private. I.C. §29-1-13-1.1 does not contain an opt-out provision. An argument could be made that a user specifically contracted with Yahoo! to keep his account private and not share it with survivors.²⁵ Moreover, the Yahoo! Terms of Service state that California law – not Indiana law – shall govern the agreement.²⁶ Had John wanted his e-mail given to his heirs, he might have opted for a Gmail account instead.²⁷

Cultural conflict

Although the computer industry is maturing, it often marches to the beat of a different drummer than the probate court. While probate is generally local, cyberspace is international. Cyberspace providers often disdain the trappings of ordinary businesses and often take great pains to hide their addresses, telephone numbers and sometimes

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even e-mail addresses in order to reduce the number of inquiries and the company's overhead. Often, one must navigate elaborate Web sites and artificial intelligence systems before reaching a human being. This can often present a problem for a surrogate who is trying to find the provider's business office.

A multiplicity of jurisdictions

Probate is based upon a model in which the deceased's property will generally be found in a single county in a single state. While ancillary probate is not a new concept, estate planners generally try to avoid multiple probate proceedings because of the added expense. In addition, the estate's lawyer often is not licensed in the ancillary jurisdiction, and it requires hiring an additional attorney.

Cyberspace antiquates this notion. In addition to having a cyberspace provider in California or another state, in cyberspace it's increasingly likely that a user would have an account in a foreign country. For example, Ole might well have used a Swedish-language site in Sweden. Flickr, an extremely popular photo-storing site, originally started in Canada before being acquired by Yahoo! In settling Brian's cyber estate, his parents potentially could be subjected to a dizzying array of ancillary proceedings throughout the world!²⁸

Coping with cyber probate

What should we lawyers advise our clients?²⁹ Simply leaving cyber property in a will is often going to be inadequate. We need to focus on practicality and how to meet our client's real life objectives. We can start by telling them that good planning helps.

Passwords are everything

We have all been told to develop increasingly complex passwords, memorize them, maintain unique passwords for each application, and to change them frequently. This advice, while well-intentioned, is becoming counterproductive and impractical. Having more than 20 passwords is not uncommon. Suggesting these be memorized is ludicrous. Clearly, each user needs a system to manage passwords.

I suggest writing down a list of accounts, user names and passwords, and treating them the same as a set of keys. Just as locks can be changed, compromised or potentially compromised, passwords can be changed as well.

Sometimes, due to glitches, passwords go bad, or a user needs to speak to a live person. Also, many Web sites have established a link to deal with lost passwords. Generally speaking, these sites use

"challenge questions" such as your high school mascot, the name of your dog, etc. A surrogate would find a list of these expected answers handy.

Password maintenance requires effort, but that effort will be rewarded when an inevitably lost user name or password must be recovered.³⁰ If Selma had Ole's passwords handy, the teenager next door could have helped Selma recover her family photographs and correspondence with ease.

Some users share their passwords with trusted third parties. This solution has several flaws. Electronic providers are constantly changing their account and password specifications, resulting in a password list that has to be updated frequently. Also, if a relationship sours, a spiteful former confidant could wreak havoc on a user's cyber

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life. A better solution would be to keep a current list and be sure that a surrogate would have access to the needed passwords.

Electronic service providers will loudly complain that passwords are nontransferable and that writing down or otherwise transferring them to third parties is a violation of their terms of service. Admittedly, it is deceitful for Selma's neighbor to fool Google's computers into believing that Ole (rather than the teenager next door) is accessing an account. It is difficult, however, to see any harm coming to Google or others from this approach. The pictures and correspondence are Ole's property, or that of his estate.^{31, 32} If the electronic provider finds this possession-of-password approach obnoxious, I believe that the burden should be on the provider to provide a commercially reasonable

means for Selma to acquire these files.

The urgency of Brian's situation – the need for uninterrupted continuation of his cyber businesses – further demonstrates the absurdity of marshalling several dozen accounts and waiting months to have access to vital business information.

Perhaps password possession should be regarded the same as having a formal power of attorney. If a user were in possession of a password, he would be treated as having explicit authority from the password creator to use it. A password can be canceled if it's abused or if the owner has a change of heart. But until an electronic provider receives cancellation instructions, the provider would treat the password holder the same as he would the principal. An electronic password is typically much

easier to cancel than revoking a formal power of attorney, and receipt of the cancellation is much more easily confirmed.

Different accounts may require different strategies

As discussed earlier, John could have segregated his electronic activities into separate accounts: one for those that he would want Mary to take over and another for those that he would prefer she would not discover. This may be difficult to suggest to clients, but could be asked in this way: "Which electronic accounts would you like your surrogate to have immediate access to?" Obviously, one would exclude any secret accounts and their passwords from any list for the surrogate's use.

Maybe the ultimate solution is an international cyber probate clearinghouse. Once a surrogate's authority was established, the surrogate would be free to transact necessary business electronically on behalf of the user or the user's estate. Cyberspace also needs a forum for posting information about a deceased or disabled member.

As the grim reaper visits cyberspace more often, we will continue to see new strategies for dealing with this issue. Let's hope these solutions simplify, rather than burden the lives of survivors and surrogates. ☞

1. Go Daddy, one of the most popular Web-hosting services, is located in Scottsdale, Ariz.
2. Yahoo! is headquartered in California.
3. Bravenet, another popular provider, often used by the author, is located in Vancouver, B.C.
4. Google, the owner of Gmail, a popular e-mail provider, is located in Mountain View, Calif.
5. Hotmail is owned by Microsoft, located in Redmond, Wash.
6. cyberspace. Dictionary.com. *Dictionary.com Unabridged (v 1.1)*. Random House, Inc., <http://dictionary.classic.reference.com/browse/cyberspace> (accessed: Oct. 5, 2009).
7. Voice over Internet Protocol.
8. Barney Google was a comic strip character created in 1919 by Billy De Beck. It has often

- been stated that the comic strip was not an inspiration for the name of the Google search engine.
9. eBay is a popular online auction service located in San Jose, Calif.
 10. An eBay Power Seller is one who maintains a designated volume of sales and has a 98-percent positive feedback rating. This designation tells a would-be buyer that the seller has a solid reputation.
 11. Second Life is a virtual world owned and operated by Linden Labs that is accessible on the Internet. Users interact with each other through avatars, which are animated characters. For example, the author's avatar is named Karl Cyberstar. One can explore, socialize or even conduct business in this environment. Other than gambling, the only limits are those of the imagination.
 12. In the case of a decedent, the personal representative, or in the case of a disabled person, the power of attorney.
 13. Flickr, a photo-storing site, is currently owned by Yahoo!
 14. Of course, passwords can be compromised, stolen or hacked, but this is beyond the scope of this discussion.
 15. I.C. §29-1-13-1.1 Electronically stored documents of deceased
 - Sec. 1.1. (a) As used in this section, "custodian" means any person who electronically stores the documents or information of another person.
 - (b) A custodian shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of any documents or information of the deceased person stored electronically by the custodian upon receipt by the custodian of:
 - (1) a written request for access or copies made by the personal representative, accompanied by a copy of the death certificate and a certified copy of the personal representative's letters testamentary; or
 - (2) an order of a court having probate jurisdiction of the deceased person's estate.
 - (c) A custodian may not destroy or dispose of the electronically stored documents or information of the deceased person for two years after the custodian receives a request or order under subsection (b).
 - (d) Nothing in this section shall be construed to require a custodian to disclose any information:
 - (1) in violation of any applicable federal law; or
 - (2) to which the deceased person would not have been permitted access in the ordinary course of business by the custodian.
 16. A few other states have passed similar laws. See, e.g., Conn. Gen. Stat. §45a-334a(b).
 17. <http://mail.google.com/support/bin/answer.py?hl=en&answer=14300> (accessed: Oct. 5, 2009).
 18. *Id.*
 19. 20.7 The Terms, and your relationship with Google under the Terms, shall be governed by the laws of the state of California without regard to its conflict of laws provisions. You and Google agree to submit to the exclusive jurisdiction of the courts located within the county of Santa Clara, Calif., to resolve any legal matter arising from the Terms. <http://www.google.com/accounts/TOS> (accessed: Oct. 5, 2009).
 20. <http://www.facebook.com/help/search.php?hq=deceased&ref=hq> (accessed: Oct. 5, 2009).
 21. <http://www.facebook.com/terms.php?ref=pf> (accessed: Oct. 5, 2009).
 22. <https://support.secondlife.com/ics/support/default.asp?deptID=4417> (accessed: Oct. 5, 2009).
 23. Second Life Terms of Service. <https://support.secondlife.com/ics/support/default.asp?deptID=4417> (accessed: Oct. 5, 2009).
 24. No. 2005-296, 651-DE (Mich. Prob. Ct. 2005).
 25. Yahoo's current Terms of Service provide: No Right of Survivorship and Non-Transferability. You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted. <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (accessed: Oct. 5, 2009).
 26. *Id.*
 27. As noted earlier, in contrast to Yahoo!, Google provides a method for survivors to obtain account data.
 28. For example, the author maintains accounts in British Columbia, Ontario, Victoria and several U.S. jurisdictions. Someone with Brian's background could be expected to have even more far-flung connections.
 29. Of course, lawyers should take their own advice and make sure their own cyber affairs (personal as well as professional) are in order.
 30. The author remembers having to nearly stand on his head while squinting to retrieve an E-Z Pass transponder number in order to make changes in his account.
 31. For a lengthy discussion of this issue, see Jonathan J. Darrow and Gerald R. Ferrera, "Who Owns A Decedent's E-Mails: Inheritable Probate Assets or Property of the Network?" 10 *N.Y.U. J. Legis. & Pub. Pol'y*, 281 (2006-2007).
 32. Indiana's statute makes the General Assembly's intent clear: The electronically stored files belong to the estate.

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