

# LEGAL MEASURES FOR MANAGING THE DECEASED'S DIGITAL ASSETS IN ONLINE ACCOUNTS\*

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## ABSTRACT

In the Internet Age, the digital media play an increasingly important role in people's lives since a lot of people conduct more and more activities online. For example, they may store their photos in social media sites, write their personal blogs on websites and back up their document files in the cloud storage services. As a result of these activities, the online users have created their digital assets which are stored in their online accounts. These digital assets, undeniably, possess economic or sentimental value, which should be considered as part of their estate after their death and shall be passed on to their heirs in the similar way as other tangible property. In this connection, if the digital assets are qualified as copyright works, the heirs shall continue to have copyrights over such digital assets for a period of fifty years after the death of online users.

This thesis concerns inheritance problems of digital assets which are usually barred by the terms of services (TOS), as set out by the internet service providers (ISP). These TOS generally restrict the right of survivorship and transferability of the digital assets in order to protect the online users' data privacy and to reduce their administrative cost. As a result, these terms inevitably prohibit the succession of digital assets by the online users' heirs who have the legal rights to enjoy the benefits of these digital assets. Moreover, Thai law does not currently recognize nor facilitate the access and management of such digital assets by the heirs.

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In contrast, certain states in the United States have passed laws and regulations to govern the access and management of these digital assets after the death of the online users since 2005 as several internet service providers, e.g. Apple, Facebook, Google, and Yahoo!, are located there. Therefore, it may be more appropriate for us to learn from the United States' development in order to draft the new law to manage the digital assets of the deceased online users.

As such, this thesis explores the legal approaches under the laws of the United States which govern the access and management of digital assets of the deceased users. Pursuant to the study, the writer is of the view that passing a particular law to deal with the access and management of the digital assets after the death of the online users should be an appropriate approach for Thailand. This is because the proposed law can facilitate the digital executor in accessing the digital assets by requiring the internet service providers to disclose online accounts, while respecting the privacy of the online users.

**Keywords:** Digital Asset, Online Account, Succession

#### บทคัดย่อ

ในยุคอินเทอร์เน็ต สื่อดิจิทัลเป็นสิ่งที่มีบทบาทสำคัญต่อการดำเนินชีวิตของผู้คนในสังคมมากขึ้น นับแต่ผู้คนเหล่านั้นมีการดำเนินกิจกรรมทางออนไลน์เพิ่มขึ้น อาทิ การเก็บบันทึกภาพถ่ายไว้บนเว็บไซต์สื่อสังคมออนไลน์ หรือการเขียนบล็อกส่วนตัวลงบนเว็บไซต์ในลักษณะต่างๆ รวมทั้งการเก็บรักษาเพิ่มข้อมูลผ่านทางกรใช้บริการเก็บข้อมูลบนคลาวด์ (cloud storage services) อันจะเห็นได้ว่า ผู้ดำเนินกิจกรรมทางออนไลน์ได้มีการสร้างทรัพย์สินในรูปแบบดิจิทัลขึ้น ซึ่งจะถูกเก็บไว้ในบัญชีออนไลน์ของผู้ใช้แต่ละราย ซึ่งล้วนแล้วแต่มีมูลค่าทั้งทางเศรษฐกิจและทางจิตใจ ด้วยเหตุนี้ทรัพย์สินดิจิทัลเหล่านั้นจึงถูกจัดเป็นทรัพย์สินรคอย่างหนึ่งของผู้ตายซึ่งเป็นเจ้าของบัญชีออนไลน์ดังกล่าว และสามารถตกทอดไปยังทายาทได้ในลักษณะเดียวกันกับทรัพย์สินรคที่มีรูปร่าง ยิ่งไปกว่านั้น หากทรัพย์สินดิจิทัลมีลักษณะเป็นงานอันมีลิขสิทธิ์ด้วยแล้ว ยังเป็นการก่อให้เกิดสิทธิแก่ทายาทในการฟ้องคดีเป็นระยะเวลาห้าสิบปีหลังจากเจ้าของบัญชีออนไลน์เสียชีวิตลง

วิทยานิพนธ์ฉบับนี้ ศึกษาเกี่ยวกับปัญหาการตกทอดทางมรดกของทรัพย์สินดิจิทัล ซึ่งโดยทั่วไปแล้วมักจะถูกจำกัดโดยข้อกำหนดและเงื่อนไขในการใช้บริการ (TOS) ของผู้ให้บริการอินเทอร์เน็ต (ISP) โดยข้อกำหนดและเงื่อนไขในการใช้บริการดังกล่าว มักจะจำกัดสิทธิการเข้าถึงบัญชี

ออนไลน์ของผู้ให้บริการ และห้ามการส่งต่อบัญชีออนไลน์ของผู้ให้บริการให้แก่บุคคลอื่นเพื่อคุ้มครอง  
ความเป็นส่วนตัวทางข้อมูลของผู้ให้บริการ ในขณะที่เดียวกันก็เป็นการลดค่าใช้จ่ายในการดำเนินการของผู้  
ให้บริการอีกทางหนึ่งด้วย ซึ่งแสดงให้เห็นว่าข้อกำหนดและเงื่อนไขเหล่านั้นมีลักษณะเป็นการห้ามการค  
ทอดทางมรดกของทรัพย์สินดิจิทัลไปยังทายาทของผู้ตายซึ่งเป็นเจ้าของบัญชีออนไลน์ ทั้งที่ในความเป็น  
จริงแล้ว ทายาทเหล่านั้นมีสิทธิทางกฎหมายที่จะได้รับและเข้าใช้ประโยชน์ในทรัพย์สินดิจิทัลดังกล่าว ยิ่ง  
ไปกว่านั้น กฎหมายไทยที่เกี่ยวข้องที่มีผลบังคับใช้อยู่ในปัจจุบัน ก็ยังไม่มีทั้งมาตรการรับรองหรืออำนวยความสะดวก  
ความสะดวกให้แก่ทายาทของผู้ตายในการเข้าถึงและจัดการทรัพย์สินดิจิทัลที่ถูกเก็บอยู่ในบัญชีออนไลน์  
ดังกล่าว

ในทางกลับกัน มลรัฐต่าง ๆ ในประเทศสหรัฐอเมริกา ได้มีความพยายามในการผลักดัน  
กฎหมายเพื่อให้สามารถเข้าถึงและจัดการทรัพย์สินดิจิทัลของผู้ตายซึ่งเป็นเจ้าของบัญชีออนไลน์มาตั้งแต่ปี  
ค.ศ. 2005 เนื่องจากผู้ให้บริการอินเทอร์เน็ตส่วนมากมีสำนักงานใหญ่ตั้งอยู่ที่ประเทศสหรัฐอเมริกา  
 อาทิ Apple, Facebook, Google และ Yahoo! ดังนั้น การศึกษาพัฒนาการทางกฎหมายใน  
ประเทศสหรัฐอเมริกา จึงเป็นแนวทางที่เหมาะสมแนวทางหนึ่งที่สามารถนำมาปรับใช้และพัฒนากฎหมาย  
ในประเทศไทยซึ่งเกี่ยวข้องกับการจัดการทรัพย์สินดิจิทัลของผู้ตายบนบัญชีออนไลน์

วิทยานิพนธ์ฉบับนี้มุ่งศึกษาและวิเคราะห์ถึงมาตรการทางกฎหมายของประเทศสหรัฐอเมริกาที่  
นำมาใช้ เพื่อการเข้าถึงและจัดการทรัพย์สินดิจิทัลของผู้ตายบนบัญชีออนไลน์ จากการศึกษาในประเด็น  
ดังกล่าว ผู้เขียนเห็นว่า การตรากฎหมายฉบับใหม่เพื่อการเข้าถึงและจัดการทรัพย์สินดิจิทัลของผู้ตายบน  
บัญชีออนไลน์เป็นมาตรการทางกฎหมายที่เหมาะสมกับประเทศไทย เนื่องจากกฎหมายดังกล่าวจะทำให้  
อำนาจแก่ผู้จัดการมรดกดิจิทัลในการเข้าถึงทรัพย์สินดิจิทัล โดยผู้ให้บริการอินเทอร์เน็ตต้องเปิดเผยบัญชี  
ออนไลน์ของผู้ตายแก่ผู้จัดการมรดกดิจิทัล ประกอบกับมีมาตรการคุ้มครองความเป็นส่วนตัวทางข้อมูล  
ของผู้ตายซึ่งเป็นเจ้าของบัญชีออนไลน์ควบคู่กันไปด้วย

**คำสำคัญ:** ทรัพย์สินดิจิทัล, บัญชีออนไลน์, การทอดทอดทางมรดก

## 1. Introduction

In the digital era, nearly everyone around the world increasingly conducts more and more activities online, e.g. storing their photos in social media sites, writing their personal blogs on websites, and backing up their document files in the cloud storage services, via their smartphones, tablets, and computers with different purposes, e.g. entertainment, education, work, and business purposes. Undeniably, the number of the Internet users is fast growing in Thailand. As a result of the global growth of the Internet users, there has been a rapid and large increase of data and information from such uses. Many online users have created their digital assets. Accordingly, they not only store such assets on their own digital devices, e.g. smartphones, tablets, external hard disks, memory cards, or flash drives, but they also store them<sup>1</sup> via the Internet, also known as cloud services organized by internet service providers (ISP), e.g. email accounts, social media sites, cloud storage services, or blogs with user names and password-protected accounts.

The question arises in aspect of what will happen to the online accounts with the digital assets stored therein in the post-mortem world.<sup>2</sup> The digital assets certainly have the economic value such as computer data,<sup>3</sup> the law articles, the science theories, and the outstanding photos created by the famous photographers in the forms of digital media. To support the value of digital assets, McAfee survey in 2011 found that the average Americans believed his or her digital assets to be worth about \$55,000.<sup>4</sup> Moreover, in a global

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<sup>1</sup> Evan E. Carroll, et al., *Helping Clients Reach Their Great Digital Beyond: Estate Planning for Electronic Assets*, 150 TR. & EST. 66, 66 (2011).

<sup>2</sup> John Conner, *Digital life after death: The issue of planning for a person's digital assets after death*, 3 Est. Plan. & Community Prop. L.J. 301, 303 (2011).

<sup>3</sup> พิณัย ณ นคร, *คำอธิบายกฎหมายลักษณะมรดก*, พิมพ์ครั้งที่ 4 (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2558), น.41. (Pinai Nanakorn, *Commentaries on Succession Law*, 4th ed. (Bangkok: Winyuchon Press, 2015), p.41.)

<sup>4</sup> Katy Steinmetz, *Your Digital Legacy: States Grapple with Protecting Our Data After We Die*, TIME (Nov. 29, 2012), available at <http://techland.time.com/2012/11/29/digital-legacy-law/> (last visited July 17, 2016).

survey, McAfee found that digital assets stored in digital devices are worth more than \$35,000.<sup>5</sup> Surprisingly, the survey shows that personal memories, e.g. photos, videos, are the digital assets women value the most. Therefore, these digital assets, undeniably, possess economic or sentimental value, which should be considered as part of the users' estate after their death and shall be passed on to their heirs in the similar way as other tangible property under the law of succession. In this connection, if the digital assets are qualified as copyright works, the heirs shall continue to have copyrights over such digital assets for a period of fifty years after the death of users.<sup>6</sup>

Nevertheless, inheritance problems of digital assets are usually barred by the terms of services (TOS), as set out by the internet service providers (ISP). These TOS<sup>7</sup> generally restrict the right of survivorship and transferability of the digital assets in order to protect the online users' data privacy and to reduce their administrative cost. Consequently, these terms inevitably prohibit the succession of digital assets by the online users' heirs who have the legal rights to enjoy the benefits of these digital assets. Another problem is whether such contractual terms are considered as unfair or unconscionable clauses under the principle of contract law.

As above mentioned, the users shall have the ownership rights and copyrights over the digital assets, but their rights to bequeath the digital assets to the heirs are restricted by the terms of service agreements. Noticeably, the access and management of digital assets may result in either positive or negative outcomes. In aspect of positive outcome, this provides both sentimental and economic value to the heirs. In terms of negative outcome, it may lead to the access of the users' data privacy and confidentiality such as private photos, contents of communications, and confidential files.

Hence, the users' privacy interest tends to be a key problem that some legal scholars will claim as the drawbacks of such access.

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<sup>5</sup> Robert Siciliano, *How Do Your Digital Assets Compare?*, Consumer Blog (May 14, 2013), available at <https://blogs.mcafee.com/consumer/digital-assets/> (last visited July 17, 2016).

<sup>6</sup> See Section 18 and 19 Thai Copyright Act B.E. 2537

<sup>7</sup> Such terms of service refer to "No Right of Survivorship," "Non Transferability," or similar terms.

However, the good value of digital asset inheritance should outweigh the disadvantage of privacy issue.

It is, therefore, important to find suitable solutions dealing with this issue. To maintain the balance between acquiring economic and sentimental benefits for the heirs, protecting the right to privacy of the deceased and persons whom the deceased responded to, and protecting ISPs from liability in case of disclosure of the deceased's accounts should be a desired goal in this study.

## 2. Digital Assets and Terms of Services Agreements

Definition of digital asset is needed to be broad enough to cope with the rapid growth of technologic development in this digital era, and is required to be sufficiently clear for the best management of the deceased users' digital assets, the protection of ISPs and the general public understanding.<sup>8</sup> Thus, the definition officially provided by the Uniform Law Commission (ULC)<sup>9</sup> is in part: *“Digital Asset means an electronic record in which an individual has a right or interest.”*<sup>10</sup>

Whereas an online account is separate from the digital asset. The online account means *“an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.”*<sup>11</sup> The meaning of online account is a broad range to completely cover any contractual arrangement under a terms-of-service agreement designed by ISPs.

The digital assets, commonly known as intangible property, hold a definable form that enables to be named and transferred to others, for example, sending an email with the photo collections to a

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<sup>8</sup> Samantha D. Haworth, *Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act*, 68 U. Miami L. Rev. 535, 537 (2014).

<sup>9</sup> ULC, also known as the National Conference of Commissioners on Uniform State Laws

<sup>10</sup> See Section 2 Definition of Digital Asset of Revised Uniform Fiduciary Access to Digital Assets Act (2015) (published March 8, 2016).

<sup>11</sup> See Section 2 Definition of Account of Revised Uniform Fiduciary Access to Digital Assets Act (2015) (published March 8, 2016).

friend. There is a variety of digital assets in digital forms, e.g. PDFs files, documents, photographs,<sup>12</sup> and blog posts. Significantly, these digital assets can be transformed into physical forms. For instance, digital assets can be printed out as pictures or document papers. These assets may have economic, sentimental, or cultural value.<sup>13</sup> It is, therefore, required the legal protection for the right of ownership over digital assets, and the digital assets should be considered as part of the deceased users' estate.<sup>14</sup>

Terms of service agreements are relationship between the users and the internet service providers. The ISPs rule all relevant details by their absolute power in the terms and conditions, also known as terms of service (TOS). The users who need to use services must accept them with no choice to negotiate with ISPs by clicking "I agree" or "I accept."<sup>15</sup> The terms of service agreements are commonly referred to clickwrap agreements,<sup>16</sup> and such agreements are typically upheld by the courts.<sup>17</sup>

The terms of service contain all clauses to police the user's rights and obligations. Some clauses have a major impact on the distribution of digital assets, leading to the difficulties of digital asset inheritance. One of the examples is a clause stating that an account is not transferable, or a clause indicating that your password cannot be shared with others, otherwise, you are in breach of the terms of service. Finally, regarding the explicit death clause, it has rarely been found in TOS. At least two worldwide services, i.e. iCloud and

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<sup>12</sup> See Samantha D. Haworth, *supra* note 25, at 538.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 539 to 41.

<sup>15</sup> Alp Toygar, et al., *A New Asset Type: Digital Assets*, 22 *Journal of International Technology and Information Management* 113, 115 (2013).

<sup>16</sup> Robert Lee Dickens, *Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases*, 11 *Marquette Intellectual Property Law Review* 379, 401 (2007).

<sup>17</sup> Gerry W. Beyer, "Cyber Estate Planning and Administration," Lecture, San Antonio, Estate Planners Council, San Antonio Country Club, Texas, May 19, 2015: p.5, available at <http://www.sanantoniopc.org/assets/Councils/SanAntonioTX/library/Cyber%20Estate%20Planning%20and%20Administration%20-%202005.19.15.pdf> (last visited July 18, 2016).

Yahoo! have “No Right of Survivorship” clause in their TOS.<sup>18</sup> Consequently, both services explicitly disclaim any right of survivorship. Therefore, such digital assets in the online accounts cannot be transferred to the heirs and they may be permanently deleted.

### **3. Legislation on the Disposition of Digital Assets on Death in the United States and Thailand**

#### **3.1 The United States (US)**

##### **3.1.1 Legal Aspects of Digital Asset and No Right of Survivorship Clause in Terms of Service (TOS)**

In US property law system, property is broadly defined as legally enforceable rights among people that relate to things of value. In general, property is categorized into two types, i.e. real property and personal property, which consists of tangible and intangible property.<sup>19</sup> The digital assets do not completely fit into any type of property. Regarding the closest form of digital assets, it should be considered intangible property as long as it continues its digital form online or on a computer.<sup>20</sup> Thus, the digital assets are considered intangible property which the users have the ownership right over, and they can be transferred by the users. Furthermore, most of them are qualified as copyright works, because the users have created the digital assets by themselves with their originality. When the users die, such digital assets viewed as intangible property, a part of the deceased’s estate, should be passed on to the heirs in the similar way of distribution of tangible property by the will or the intestate succession.

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<sup>18</sup> Ashley F. Watkins, *Digital Properties And Death: What Will Your Heirs Have Access To After You Die?*, 62 Buff. L. Rev. 193, 217-18 (2014).

<sup>19</sup> John G. Sprankling, et al., *Global Issues in Property Law* 1 (Thomson/West, 2006).

<sup>20</sup> Nathan J. Dosch & Joseph W. Boucher, *E-Legacy: Who Inherits Your Digital Assets?*, State Bar of Wisconsin (2010), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=83&Issue=12&ArticleID=1907> (last visited July 24, 2016).



In general, US copyright law provides a term of protection lasting for the life of the author plus seventy years.<sup>21</sup> Whether it is registered does not affect the condition of copyright protection. Thus, when the user creates a work, the copyright subsists in that work at the moment of creation. For example, emails, “[p]oems, essays, photographs, videos, commentary, and even status updates are all potentially eligible for copyright protection.”<sup>22</sup> Furthermore, the copyright is automatically inheritable.<sup>23</sup> Therefore, the heirs shall continue to have copyrights over the digital assets for a period of seventy years after the death of online users.

Even though the users have the ownership rights and copyrights over the digital assets as well as have the legal right to bequeath these assets to their heirs, the heirs have the difficulties in accessing to the deceased’s accounts due to terms of service agreement (TOS), especially the term of No Right of Survivorship.

According to the doctrine of unconscionability,<sup>24</sup> it becomes a general principle of contract law in the common law system.<sup>25</sup> This doctrine does not only govern the sale of goods contracts, but also extends to other contracts.<sup>26</sup> The doctrine is a key choice against unfair terms in terms of service agreements, known as clickwrap agreements in order to protect a weaker party in bargaining power. This doctrine is one of various defenses for contract law in order to invalidate the enforceable contracts due to unfair clauses. In most jurisdictions, a party must prove procedural and substantive unconscionability to invalidate such unconscionable clauses.<sup>27</sup>

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<sup>21</sup> See 17 U.S.C. § 302(a)

<sup>22</sup> Ashley F. Watkins, *Digital Properties And Death: What Will Your Heirs Have Access To After You Die?*, 62 Buff. L. Rev. 193, 215-216 (2014).

<sup>23</sup> *Id.* at 216; See 17 U.S.C. § 201(d)(1).

<sup>24</sup> Unconscionability Doctrine is codified in the Uniform Commercial Code (the U.C.C.) § 2-302(1).

<sup>25</sup> Gamarello, Thomas, *The Evolving Doctrine of Unconscionability in Modern Electronic Contracting* 6 (2015). Law School Student Scholarship. Paper 647. [http://scholarship.shu.edu/student\\_scholarship/647](http://scholarship.shu.edu/student_scholarship/647) (last visit May 10, 2016).

<sup>26</sup> พิณัย ณ นคร, “กฎหมายว่าด้วยข้อสัญญาที่ไม่เป็นธรรม : แนววิเคราะห์ใหม่เชิงเปรียบเทียบ,” *วารสารนิติศาสตร์*, ปีที่ 30, ฉบับที่ 4, น. 546, 564 (2543). (Pinai Nanakorn, “Unfair Contract Terms Law: Comparative Analysis,” *Thammasat Law Journal*, Vol.30, Iss.4, p. 546, 564 (2000).)

<sup>27</sup> See Gamarello, Thomas, *supra* note 25, at 7-8.

Even though the terms of service agreements are generally valid and enforceable because the agreements have been formed according to the elements of formation of contract, “No Right of Survivorship” clause may be invalid and unable to bind the parties because of its unfairness. The heirs may argue that such “No Right of Survivorship” term is unconscionable or unfair.

### **3.1.2 Legislation on Management of Deceased User’s Digital Asset**

Since 2005, certain states in the United States have passed legislation to govern the access and management of digital assets after the death of online users. Such state statutes allow the executor or administrator of an estate to access and manage digital assets initially in e-mail contents, social networking sites, electronically stored documents, and then extended to digital assets and accounts in 2014.<sup>28</sup> However, this legislation leads to the problem on the privacy of account users and persons whom users have electronically communicated with.

Later, in 2015 Revised Uniform Fiduciary Access to Digital Assets Act (2015), known as Revised UFADAA, resolves all relevant privacy issues, and help compromise between acquiring the economic and sentimental value and protecting users’ privacy interest. Therefore, at least eighteen certain states in The United States, i.e. Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Nebraska, North Carolina, Oregon,

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<sup>28</sup> See Kristina Sherry, *What Happens to Our Facebook Accounts When We Die?: Probate versus Policy and the Fate of Social-Media Assets Postmortem*, 40 Pepp. L. Rev. 185, 216-20 (2012); Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 Fordham L. Rev. 799, 830 (2014); Rachael E. Ferrante, *Relationship between Digital Assets and Their Transference at Death: It’s Complicated*, 15 Loy. J. Pub. Int. L 37, 51-54 (2013); Ashley F. Watkins, *Digital Properties and Death: What Will Your Heirs Have Access to after You Die?*, 62 Buff. L. Rev. 193, 220-23 (2014); Samantha D. Haworth, *Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act*, 68 U. Miami L. Rev. 535, 541-42 (2013-2014).

South Carolina, Tennessee, Washington, Wisconsin, and Wyoming,<sup>29</sup> have passed the legislation by following the Revised UFADAA as the guideline. The Uniform Act is to facilitate any fiduciary access to digital account to manage digital asset, and facilitate any ISP disclosure online account, together with respecting privacy and intent of online users.<sup>30</sup>

Section 4 of this Act is the most important section. It addresses a three-tier priority system<sup>31</sup> which provides ways for users to direct the disposition or deletion of their digital assets after their death, and establishes a priority system in case of conflicting instructions in order to respect the user's intent. Such user's intent could be found in an online tool provided by ISPs in their services, e.g. Legacy Contact (Facebook's online tool), and Inactive Account Manager (Google's online tool), or a traditional estate plan, e.g. a will, other written record. However, if there is no any direction as previously mentioned, TOS will be applied. If such TOS does not address fiduciary access to digital assets, the default rules of Revised UFADAA will be applied. One of the default rules is to make the differences between the term of catalogue of electronic communications, and the term of content of electronic communications, i.e. the body of an electronic message that is not readily accessible to the public. Thus, the fiduciary may never access the content of electronic communications without the user's consent.<sup>32</sup>

The legislation on the access and management of deceased users' digital assets not only has been passed in the United States, but in European Union (EU) there was also Annual Conference and

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<sup>29</sup> Uniform Law Commission, Legislative Tracking, available at [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited July 21, 2016).

<sup>30</sup> See Prefatory Note of Revised UFADAA.

<sup>31</sup> See Revised Uniform Fiduciary Access to Digital Assets Act (2015) (published March 8, 2016).

<sup>32</sup> *Id.* at 6-7 (Comment of Revised UFADAA; See A Summary of UFADAA at 2 (March 2016), available at <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Revised%202015/Revised%20UFADAA%20-%20Summary%20-%20March%202016.pdf> (last visited July 23, 2016).

General Assembly in Vienna, September 2015, which focused on the transfer of property and information at death or incapacity in a digital age<sup>33</sup> held by the European Law Institute (ELI). The ELI and the U.S. Uniform Law Commission (ULC) collaborate on the study of whether this Revised UFADAA can be adapted to European Law.

It can be seen that US, EU, Asia, or even global harmonization is of significance for reducing the gap between law and technology since the Internet becomes a part of human life.<sup>34</sup>

### 3.2 Thailand

#### 3.2.1 Legal Aspects of Digital Asset and No Right of Survivorship Clause in Terms of Service (TOS)

According to section 138 of Thai Civil and Commercial Code (CCC), “Property” includes tangible property as well as intangible property, susceptible of having the value and of being appropriated as required conditions. Intangible property includes rights to business having economic value such as intellectual property rights (IP rights), and right to computer data.<sup>35</sup>

Firstly, the value of property means “Value” not “Price” under section 453 of CCC, the Contract of Sale. The “Value” means the value of itself, “Price” means the market price that both parties need to purchase and sell in the market.<sup>36</sup> By way of illustration, something cannot be traded in the market, but it has its own value. For example, something may have the sentimental value for a person and such person gives the importance to that thing as the high value

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<sup>33</sup> European Law Institute (ELI), “Panel on the Revised Uniform Fiduciary Access to Digital Assets Act (2015),” Annual Conference and General Assembly, Vienna, September 2-4, 2015, available at <http://www.europeanlawinstitute.eu/about-eli/structure/general-assembly/ga-2015/panel-iv-fiduciary-access-to-digital-assets-feasibility-study-with-ulc/> (last visited July 22, 2016).

<sup>34</sup> *Id.*

<sup>35</sup> พิณย์ ณ นคร, คำอธิบายกฎหมายลักษณะมรดก, พิมพ์ครั้งที่ 4 (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2558), น.41. (Pinai Nanakorn, Commentaries on Succession Law, 4th ed. (Bangkok: Winyuchon Press, 2015), p.41.)

<sup>36</sup> เสนีย์ ปราโมช, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ กฎหมายลักษณะทรัพย์ (กรุงเทพมหานคร: โรงพิมพ์อักษรสาส์น, 2521), น.13. (Saneey Pramoch, Commentaries on Property Law (Bangkok: Aksornsansan Press, 1978), p.13.)

thing, while another person thinks that thing has no value at all such as ancestors' bones, a lover's letter. Thus, even though that thing costs the low price, or has no price, it is valuable enough to be property if any person needs it as desirable thing. Importantly, the value under section 138 includes, therefore, either the value of itself (worth value), or the economic value.<sup>37</sup>

Secondly, the ability of “being appropriated” means capability of possessing of the object or claiming for the ownership over that objects. Notably, it does not merely restrict to the level of ownership because there could be various meanings of assertions such as rights of holding the stocks, and rental rights.<sup>38</sup>

In the writer's point of view, according to the definition of property as mentioned, the digital asset should be categorized as the intangible property. It has the value either sentimental value (worth value) depending on subjective view of each individual or economic value. Also, it is able to be appropriated because it is similar to holding the rights over IP rights, or stocks. The examples of digital assets are the family photos uploaded onto websites, the blogs written onto websites, the documents saved on the cloud storage services, and the how-to videos uploaded onto websites.

Thus, the rights to these intangible properties are also the estate of the deceased users, which is able to pass on to the heirs under section 1599 and 1600 of the CCC. In addition, if the digital assets are qualified as copyright works under Thai Copyright Act B.E. 2537, the heirs shall continue to have copyrights over such digital assets for a period of fifty years after the death of online users under section 18 and 19. In this regards, the copyright is automatically inheritable under section 17.

However, the heirs could not access to the deceased' accounts to acquire the digital assets because of terms of service agreement

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<sup>37</sup> สมจิตร ทองศรี, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วยทรัพย์สิน (กรุงเทพมหานคร: สำนักอบรมศึกษากฎหมายแห่งนิติบัณฑิตยสภา, 2557), น.2. (Somjit Thongsri, Commentaries on Thai Civil and Commercial Code: Property Law (Bangkok: Institute of Legal Education of the Thai Bar under the Royal Patronage, 2014), p.2.)

<sup>38</sup> ศรีราชา เจริญพานิช, คำอธิบายกฎหมายว่าด้วยทรัพย์สิน, พิมพ์ครั้งที่ 5 (กรุงเทพมหานคร: สำนักพิมพ์วิญญูชน, 2557), น.24-25. (Sriracha Charoenpanich, Commentaries on Property Law, 5th ed. (Bangkok: Winyuchon Press, 2014), p.24-25.)

(TOS), especially “No Right of Survivorship” clause which inevitably prohibits the users’ right to bequeath the digital assets to their heirs, resulting in the deletion of all digital assets after death.

Pursuant to this problem, “No Right of Survivorship” clause must be taken into account whether it is contrary to public order under section 150 of the CCC or it is unfair to the users under Thai Unfair Contract Terms Act B.E. 2540.

The writer views that the said clause is not contrary to public order as the following reasons:

(1) Subject to the principle of succession law in the light of testate succession, the estate will be distributed as his bequest in a will. For example, the individual can exclude some statutory heirs from their estate, can give his whole estate to others, or even can donate all estate for charity by making the will. It can be seen that the testator has the legal right to disinherit the statutory heirs; the testator’s intent is legally recognized by law even to restrict the right of disposition of the estate on death;

(2) As the matter of public order, it must affect the public interest. In the case of each online user bound by “No Right of Survivorship” clause, it is considered as private interest of the user and his heirs who are disinherited by this contractual term; and

(3) If this clause becomes void (unenforceable by law) as the matter of public order, the writer is of the view that this legal effect seems to take more advantage of ISPs particularly in usage of free services. Possibly, in the sooner future, this may indeed lead to the difficulties of signing up the accounts for Thai users in utilizing online services because the ISPs will be aware of providing services through TOS to Thai users.

Nevertheless, the writer opines that this clause is considered as unfair term to the users who have the right of disposition of property on death under the law of intestacy, because the users have invested time and effort, and also their originality and creativity in creating such digital assets, constituting copyright works. It can be clearly seen that this clause prohibits the users’ right to bequeath the estate to their heirs, together with restricts the heirs’ right to acquire the estate. Therefore, this causes the online users to be obliged to

comply or bear more burden than that which could have been anticipated by a reasonable person in normal circumstances under section 4 and section 10 of Thai Unfair Contract Terms Act B.E. 2540. Whereas, even ISPs offer the base-level free services, they also gain a lot of benefits as remuneration under section 3 of this Act from the paid-for upgraded services for which the online users pay fees, e.g. iCloud storage upgrades.<sup>39</sup> Moreover, the ISPs gain advertising revenue from the advertising companies like e-commerce companies such as advertising fees in the event of the free service. Upon comparison of gaining advantages between the ISPs and the online users under section 4 and section 10, “No Right of Survivorship” term is considered the unfair term. However, this Act does not provide the complete protection to the online users because the interpretation of the unfair contract terms is still debatable since the word ‘fair and reasonable’ depends on the courts’ discretions.

### **3.2.2 Legislation on Management of Deceased User’s Digital Asset**

Compared to the legislation governing the disposition of deceased user’s digital asset in the United States, there has been no the legislation concerning this issue in Thailand. Also, the Thai existing laws are insufficient, because the laws could not facilitate the heirs to access the deceased’s online accounts for managing the digital assets. It is time for Thailand to raise the public awareness of digital asset disposition, and also to develop our Thai legislation to catch up with the technologic development in the Internet age.

## **4. Conclusions and Recommendations**

The digital asset is considered property under the CCC and is qualified as copyright work under Thai Copyright Act B.E. 2537. It shall be passed on to the heirs under the law of succession. Indeed, the users have the ownership right and copyright over this estate and

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<sup>39</sup> See iCloud Terms and Conditions, available at <http://www.apple.com/legal/internet-services/icloud/en/terms.html> (last visited June 27, 2016).

the heirs have the right to receive this legacy. However, there are the difficulties in the disposition of digital assets after death, which barred by TOS explicitly No Right of Survivorship clause, as set out by ISP. These TOS generally restrict the right of survivorship and transferability of the digital assets in order to protect the online users' data privacy and to reduce their administrative cost. As a result, the heirs of deceased users are unable to access to the online accounts to obtain these estate. Such terms shall be considered as unfair terms under Thai Unfair Contract Terms Act B.E. 2540.

The writer would suggest that passing a particular law governing digital assets after death would be the appropriate legal approach so as to better align with the increasing percentage of Thai online users who are conducting transaction online. The proposed law aims to facilitate digital executor access and ISP disclosure, together with respecting both privacy and intent of the online user, also respecting privacy of other persons whom the deceased user digitally responded to. This proposed law would adhere to the traditional approach of succession law with respect to the intent of online user and promotion of the digital executor's ability to administer the online user's property. As lesson learnt from US legislation, the writer would suggest that the Revised UFADAA is the most suitable guidance; therefore, the fundamental concept of this Act should be adopted into the legislation in Thailand.

Firstly, the three-tier priority system should be established because this system resolves the conflict of instructions which could be found in an online tool or a traditional estate plan as the way of respecting the user's intent to direct the disposition or deletion of digital assets after death.

However, if there is no any instruction as previously mentioned and TOS does not address the executor or administrator of an estate access to digital assets, this proposed law should require the appointment of digital executor by statutory heirs after the death of online user. This digital executor should be a technology specialist<sup>40</sup>

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<sup>40</sup> Jill Choate Beier and Susan Porter, *The Digital Asset Dilemma*, NYSBA Trusts and Estates Law Section Newsletter Vol. 46 No. 2, 7 (2013), available at



and liable person. The digital executor may access and manage the deceased user's digital assets but may never access the content of electronic communications without the user's consent.<sup>41</sup>

Secondly, the proposed law should require the internet service provider to grant the digital executor of the deceased person access, take control of, conduct, continue, or terminate any online account, and manage the digital asset.

Thirdly, the proposed law should grant the immunity from liability for ISP's acts or omissions done in good faith when the ISP discloses online account to the digital executor.

Lastly, the proposed law should have the criminal sanction provision for misconduct made by the digital executor. If the digital executor discloses the deceased's confidential information to the public, which are likely to cause the damage to the deceased's family or others, the digital executor shall be liable therefor.

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<sup>41</sup> See A Summary of UFADAA

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