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### Facebooking from the Great Beyond: The Push to Amend Indiana's Statute for Obtaining Access to Digital Assets

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## Notes

### FACEBOOKING FROM THE GREAT BEYOND: THE PUSH TO AMEND INDIANA'S STATUTE FOR OBTAINING ACCESS TO DIGITAL ASSETS

#### I. INTRODUCTION

Among the many social media sites used today, Facebook is the leader in the social media market with 1.55 billion users worldwide.<sup>1</sup> Ashley, like many other teens her age, was very active on social media, regularly updating her status and posting pictures.<sup>2</sup> In December of 2010, Ashley unexpectedly died in a car accident, leaving her single mom, Barbara, devastated. Reeling from the loss of her only child, Barbara took comfort in accessing Ashley's Facebook—first by reading Ashley's old messages and viewing pictures. Later, Barbara began removing comments from Ashley's profile page, updating Ashley's status, changing her profile pictures, and most egregiously, messaging and posting on people's profiles. Seemingly, Barbara assumed Ashley's identity. Facebook viewed Barbara's actions as a breach of Ashley's privacy. In response,

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<sup>1</sup> See *Leading Social Networks Worldwide as of January 2016, Ranked by Number of Active Users*, STATISTA (2016), <http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> [<https://perma.cc/JZP8-5FWF>] (providing that Facebook is the leader in social media focused on constant interaction between friends and family through its ability to post statuses and pictures).

<sup>2</sup> This is a hypothetical situation inspired by a news article about Becky Palmer, who died of brain tumor at the age of nineteen. Alison Smith, *Facebook Banned Me from My Dead Daughter's Page to Protect Her Privacy: Mother's Anguish after Teenager Dies of Brain Tumour*, DAILY MAIL (Mar. 4, 2012), <http://www.dailymail.co.uk/news/article-2110019/Facebook-banned-dead-daughters-page-Mothers-anguish-locked-brain-tumour-teenagers-site-web-giant.html> [<https://perma.cc/7S4Z-W7JM>] [hereinafter A. Smith]. Louise Palmer, Becky's mother, began to login to Becky's account to gain comfort in the recent weeks after her daughter's death. *Id.* Louise would login to the account and read messages her daughter had sent before her death, and Louise would update Becky's profile picture. *Id.* Facebook later found out, through notifications from Becky's Facebook friends, about Louise accessing the Facebook account, and changed the password, prohibiting access, as well as memorializing the account. *Id.* Another example to consider is that of Mac Tonnies. Rob Walker, *Cyberspace When You're Dead*, N.Y. TIMES MAG. (Jan. 5, 2011), [http://www.nytimes.com/2011/01/09/magazine/09Immortality-t.html?\\_r=2](http://www.nytimes.com/2011/01/09/magazine/09Immortality-t.html?_r=2) [<https://perma.cc/UG77-NZR2>]. Tonnies was an avid blogger who, on October 18, 2009, died of a heart condition after posting his final blog posts, tweets, and private messages from Twitter. *Id.* Tonnies lived most of his life online through his blog, which allowed him to make contacts and friends virtually. *Id.* Tonnies left behind his parents, who did not have any idea of or contact with his digital life. *Id.*

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Facebook changed Ashley's login password and memorialized the account so Barbara could no longer access it. Like many other millennials, Ashley did not have a will in place or a plan for what would happen to her social media accounts after her death, thus, there was no way to determine if Ashley consented to her mother's actions.<sup>3</sup> Indiana allows personal representatives of the deceased's estate to contact the custodian of the social media site to petition for access to the social media account.<sup>4</sup> For Ashley's mother, who lived in Indiana, the statute allowed Barbara to petition Facebook to delete or memorialize the profile.<sup>5</sup>

Currently, Indiana Code section 29-1-13-1.1 allows a third party to intercede into the contractual relationship between the social media account holder and the social media site.<sup>6</sup> Allowing access to electronically stored information under the Indiana statute ignores contract law and allows third parties to gain access to social media accounts of deceased users.<sup>7</sup> The accounts are contracts between two

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<sup>3</sup> See 15 *Economic Facts About Millennials*, COUNCIL OF ECON. ADVISORS (Oct. 2014), [https://www.whitehouse.gov/sites/default/files/docs/millennials\\_report.pdf](https://www.whitehouse.gov/sites/default/files/docs/millennials_report.pdf) [<https://perma.cc/9W6G-7MRJ>] (defining millennials as individuals born between 1980 and mid-2000). Millennials, who make up at least one-third of the population, are the largest generation within the United States today. *Id.*

<sup>4</sup> See IND. CODE § 29-1-13-1.1(b) (2016) (stating that an individual's estate, so long as the individual lived in Indiana at the time of his or her death, would be permitted to contact the social media site to gain access to the deceased's account).

<sup>5</sup> See *id.* (reiterating that the Indiana statute to access electronically stored information applies only to individuals who are domiciled in Indiana at the time of their death; therefore, the personal representative of the estate of the deceased is able to contact the social media site for access).

<sup>6</sup> See *id.* (introducing the Indiana statute allowing for the personal representative to access the electronically stored information or documents, which current legislation is defining, of a deceased individual). The Indiana statute's current language is:

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 the court having probate jurisdiction of the deceased person's estate.

*Id.*

<sup>7</sup> See *id.* (asserting that the Indiana statute allows access to a social media account without respecting the contractual agreement between the social media site and the deceased user); see also 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) (illustrating Indiana is not the only state that has enacted a statute of this kind; there are five other states that have enacted statutes that allow a personal representative of a deceased's estate to request, from a custodian, electronically stored documents or information: Connecticut, Rhode Island, Oklahoma, Idaho, and Delaware); Gerry W. Beyer, *Florida Passes Digital Account Access Bill*,

parties, and the representative of the estate should not be permitted to petition for access because it would be a violation of the user's privacy and the contractual relationship.<sup>8</sup>

To prevent access by the decedent's estate to social media accounts, this Note proposes an amendment to the current Indiana statute excluding access to electronically stored information, particularly social media.<sup>9</sup> First, Part II establishes an understanding of social media, lists how social media accounts create a contractual relationship, and highlights case law to evidence this finding.<sup>10</sup> Second, Part III examines the importance of distinguishing how social media accounts create a contractual relationship that terminates upon the death of the user and how this understanding aligns with federal and state law.<sup>11</sup> Third, Part IV introduces an amendment to the Indiana statute and suggests the Indiana legislature implement the proposed amendment to disallow access to a personal

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WILLS, TR. & EST. PROF. BLOG (Feb. 25, 2016), [http://lawprofessors.typepad.com/trusts\\_estates\\_prof/2016/02/florida-passes-digital-account-access-bill.html](http://lawprofessors.typepad.com/trusts_estates_prof/2016/02/florida-passes-digital-account-access-bill.html) [<https://perma.cc/Q3FN-CY3P>] (lending that Florida is taking steps to create a statute like the current six states to allow access to deceased individual's digital assets); Gerry W. Beyer, *Wisconsin Latest State to Consider Digital Account Access Legislation*, WILLS, TR. & EST. PROF. BLOG (Feb. 27, 2016), [http://lawprofessors.typepad.com/trusts\\_estates\\_prof/2016/02/wisconsin-latest-state-to-consider-digital-account-access-legislation.html](http://lawprofessors.typepad.com/trusts_estates_prof/2016/02/wisconsin-latest-state-to-consider-digital-account-access-legislation.html) [<https://perma.cc/P234-FZU8>] (finding that Wisconsin is the latest state to consider legislation to allow access to digital assets after the user's death).

<sup>8</sup> See *infra* Part III (exploring the issues with giving the personal representative of a deceased's estate access under the current statute to electronically stored information or documents in the context of contract law, probate law, and the applicable federal and state law); see also Tracy Sears, *Family Lawmakers Push for Facebook Changes Following Son's Suicide*, WTVR (Jan. 9, 2013), <http://wtvr.com/2013/01/08/legislation-introduced-for-access-to-deceased-persons-digital-property/> [<https://perma.cc/GBQ5-AUE2>] (citing the privacy policy that does not allow access to anyone who is not the account holder, even if it is for the access to a deceased minor's account).

<sup>9</sup> See *infra* Part IV (introducing a proposed amendment to the Indiana statute in which access to electronically stored information or documents would be removed from the statute and not allowed under Indiana Code § 29-1-13-1.1).

<sup>10</sup> See *infra* Part II (detailing the context of social media as a digital asset, common law contract law, specifically adhesion contracts, and the federal and state law that govern social media accounts and potential access to social media accounts).

<sup>11</sup> See *infra* Part III (establishing that a social media account is an adhesion contract and not personal property of the social media account holder); see also *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 838 (S.D.N.Y. 2012) (prompting that Facebook, a social media site, is a contract of adhesion that was formed through a combination of a click-wrap agreement and browse-wrap agreement). *Fteja* was a Facebook account holder who alleged Facebook disabled his account because of his religion and ethnicity. *Fteja*, 841 F. Supp. 2d at 831. Facebook disabled *Fteja*'s account without his knowledge or notice. *Id.* The claim in *Fteja* is based on a litigation clause in which the forum had been preselected in the Terms of Service of Facebook. *Id.* at 833. The case discusses the way in which the contract between Facebook and *Fteja* was created, what type of contract was created, as well as if the contract was valid. *Id.*

representative.<sup>12</sup> Finally, Part V concludes that the proposed amendment will allow social media accounts to die with the account holder, preventing access by a third party and ensuring that the sanctity of contracting is maintained.<sup>13</sup>

## II. BACKGROUND

With seventy-four percent of adults on the Internet using social media, social media is quickly becoming the preferred communication method, with worldwide users reaching almost two billion in 2015.<sup>14</sup> Determining what should happen to social media accounts after the death of the user is difficult because there is little, if any, legal precedent that specifically addresses this issue.<sup>15</sup> Additionally, discussing post-mortem distribution plans is an uncomfortable topic to discuss, which historically

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<sup>12</sup> See *infra* Part IV (providing the proposed amendment to Indiana Code § 29-1-13-1.1, which will not allow social media to be accessed by a personal representative of a deceased's estate).

<sup>13</sup> See *infra* Part V (concluding this Note by reiterating social media is a contractual relationship between the social media user and the social media account custodian, and there should be a statutory amendment to prevent third party interference); see also John Conner, Comment, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets after Death*, 3 EST. PLAN. & COMM. PROP. L.J. 301, 303 (2011) (establishing digital assets have befuddled legal scholars for years as a concept and how to apply digital assets to an individual's estate plan when digital communication and storage has become increasingly popular and widespread); Matthew T. McClintock, *Digital Assets: Why They Need to Be Part of Your Estate Plan*, EST. PLANNING.COM (Jan. 22, 2015), <http://www.estateplanning.com/Digital-Assets-Why-They-Need-to-Be-Part-of-Your-Estate-Plan/> [<https://perma.cc/T2PH-4DTF>] (highlighting when there is no definite standard for the inheritability of digital assets, social media in particular, the accounts are at a high risk for being lost when the account owner dies).

<sup>14</sup> See *Social Networking Fact Sheet*, PEW RES. CTR., <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> [<https://perma.cc/VJ3Y-WAB4>] [hereinafter *Fact Sheet*] (indicating the percentages of adult users of social media, with a breakdown of users based on gender, age, education, and salary); see also Rachel Pinch, *Protecting Digital Assets after Death: Issues to Consider in Planning for Your Digital Estate*, 60 WAYNE L. REV. 545, 546 (2014) (giving the statistics of users on social media sites, such as Facebook, Twitter, and Instagram); *Percentage of U.S. Population with a Social Network Profile from 2008 to 2016*, STATISTA (2016), <http://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/> [<https://perma.cc/6WKD-XVDC>] (noting that social media usage is continuing to grow both in the United States and worldwide, with an estimated 2.5 billion users by 2018). Facebook is the leader in social networking sites used worldwide, and it is the first social media platform to have more than one billion users. *Percentage of U.S. Population with a Social Network Profile from 2008 to 2016*, *supra* note 14.

<sup>15</sup> See Naomi Cahn, *Postmortem Life On-line*, 25 PROB. & PROP. 36, 36 (2011) (posing there is little law on inheritability of digital assets, such as social media). Cahn made the comparison of digital assets to copyrights because copyrights, like digital assets currently, were seen as a question mark in determining whether they could be inherited or passed on through wills and will substitutes. *Id.* at 37. However, copyrights are the property of the copyright holder and not subject to Terms of Service or use of a social media site. *Id.*

prevents Internet users from addressing estate planning issues, including this unique aspect.<sup>16</sup> Nevertheless, intestate and permissible estate planning distribution for personal and real property is clear and concise within Indiana law.<sup>17</sup> However, it is not legally clear who, if anyone, should inherit the rights to access the deceased user's social media accounts.<sup>18</sup>

Moreover, digital assets and their place in the law continue to stump legal scholars and cause estate planners to assume incorrectly that digital assets are a form of personal property accessed after the user's death.<sup>19</sup> The uncertainty has caused estate planners to incorrectly allow access to digital assets after the user's death.<sup>20</sup> Allowing access to a social media account, as if it is the personal property of the account holder, is not a compelling reason because a social media account is created through a

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<sup>16</sup> See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 63 (9th ed. 2013) (highlighting that a large number of the United States population does not plan for the future of their property after their death, with this number not including the number of people not planning for the future of their digital assets). A large number of estate planning attorneys are now requesting information about their clients' online life, and what digital assets they have, if any. Cahn, *supra* note 15, at 36. An attorney can then advise their clients that because many digital assets take the form of license agreements, they can be placed in a trust. *Id.* at 38. Once placed in the trust, the digital asset is controlled by a trustee, who then manages the digital assets within the trust, just like a piece of real or personal property. *Id.*

<sup>17</sup> See DUKEMINIER & SITKOFF, *supra* note 16, at 1 (applying the law of succession to give a clear understanding of how property is descended from the owner to the heirs or descendants); *but see* Cahn, *supra* note 15, at 37 (distinguishing that unlike the succession of tangible property, like a bank account, digital asset succession under this model would encounter issues, such as the access the personal representative is to collect).

<sup>18</sup> See Cahn, *supra* note 15, at 36 (concluding that the issue of what to do with social media accounts, along with other digital assets, has just begun to develop, and a concrete answer has yet to be found to apply to estate planning and intestacy laws); *see also* Maeve Duggan, *The Demographics of Social Media Users*, PEW RES. CTR. (Aug. 19, 2015), <http://www.pewinternet.org/2015/08/19/the-demographics-of-social-media-users/> [<https://perma.cc/7WUQ-R92T>] (providing statistics of social media usage as a whole and for daily use of social media for all major outlets). Where seventy percent of Facebook users log into their accounts daily, upwards of forty-three percent of people log into Facebook multiple times a day. Duggan, *supra* note 18.

<sup>19</sup> See, e.g., Conner, *supra* note 13, at 303 (establishing the idea that applying digital assets to an individual's estate plan, when digital communication and storage has become increasingly popular and widespread, has befuddled legal scholars for years as a concept); *see also* McClintock, *supra* note 13 (finding that ownership of digital assets is at risk when no clear standard for inheritability exists).

<sup>20</sup> See Conner, *supra* note 13, at 303 (confronting the issue that there is no set determination of the legal standing of digital assets as personal property or a contract, and whether or not the determination relies on the specific digital asset alone for a definition to be determined); *see also* Cahn, *supra* note 15, at 38 (noting that a general issue that is faced is that online social media sites can claim they have the ability to control any potential transfer of the account through the Terms of Use or Service).

contract.<sup>21</sup> This Part explores social media, social media accounts as contracts, and federal and state law that governs social media and inheritability, or lack thereof.<sup>22</sup> First, Part II.A studies social media as a digital asset.<sup>23</sup> Second, Part II.B discusses social media accounts as contracts of adhesion, specifically as click-wrap and browse-wrap agreements.<sup>24</sup> Finally, Part II.C illustrates the applicable federal and state law, which applies to a personal representative's inability to access the social media account after the user's death.<sup>25</sup>

#### A. Social Media and Its Formation

With approximately seventy-one percent of adults on social media using Facebook, it is the most popular form of social media.<sup>26</sup> Individuals use social media to create and maintain social ties and relationships with friends and family, some of which may have not been able to be sustained if not for social media.<sup>27</sup> Most users check their social media accounts at

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<sup>21</sup> See *infra* Part II.B (determining that social media is a contract created by the user agreeing to the terms for the particular social media site without having the ability to bargain for the best terms for each party).

<sup>22</sup> See *infra* Part II (exploring how it is determined that social media accounts should not be allowed to be accessed by the personal representative of the deceased user's estate because social media accounts are contracts that should end upon the death of the user).

<sup>23</sup> See *infra* Part II.A (establishing that social media is a term that is unique in its creation through contract and that the social media outlet is distinct in its Terms of Use that create the contract).

<sup>24</sup> See *infra* Part II.B (expressing that social media is created through a contract that is agreed to by both parties when the new user clicks "I agree" when signing up for the social media site, and this type of agreement is a particular type of contract, an adhesion contract, which can be broken down again into two types of agreements, click-wrap and browse-wrap agreements).

<sup>25</sup> See *infra* Part II.C (focusing on the applicable federal and state law that applies to social media accounts as a digital asset to show that these accounts should cease upon the death of the user).

<sup>26</sup> See *Fact Sheet*, *supra* note 14 (drawing that Facebook is the most popular form of social media, followed by Twitter with twenty-three percent of adults using that form of social media); see also *Percentage of U.S. Population with a Social Network Profile from 2008 to 2016*, *supra* note 14 (pointing out that North America currently has the highest number of social media users in the world with fifty-nine percent).

<sup>27</sup> See Aaron Smith, *Why Americans Use Social Media*, PEW RES. CTR. (Nov. 15, 2011), <http://www.pewinternet.org/2011/11/15/why-americans-use-social-media/> [<https://perma.cc/S4PQ-H4ZP>] (finding that the major force behind people becoming social media users is the ability to keep in touch with new and old friends, friends that the user has fallen out of touch with, and long-distance family members); see also Emily M. Janoski-Haehlen, *The Courts Are All a 'Twitter': The Implications of Social Media Use in the Courts*, 46 VAL. U. L. REV. 43, 43 (2011) (explaining that Facebook, Twitter, LinkedIn, and YouTube are some of the social media sites that allow for a user to connect with others locally and around the world). These social media sites are used to connect one individual to the rest of the world. Janoski-Haehlen, *supra* note 27, at 43. Not only does the user communicate with

least seventeen times per day, which on average means at least once every hour of the day.<sup>28</sup> Aside from its tremendous social utility, social media accounts are classified as digital assets along with other online accounts, such as Amazon accounts, online banking accounts, and email accounts.<sup>29</sup> Scholars define digital assets as “any file on your computer in a storage drive or website and any online account or membership.”<sup>30</sup> This definition allows items such as Microsoft Word documents, digital pictures and videos, and iTunes music to be considered a digital asset of the individual who created or bought it.<sup>31</sup>

Unlike the aforementioned assets, social media accounts are unique because they have their own terms and conditions which users must follow.<sup>32</sup> For instance, Facebook’s Terms of Service explicitly state that the

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loved ones near and far, but also people they have never met before the use of social media.  
*Id.*

<sup>28</sup> See Lulu Chang, *Americans Spend an Alarming Amount of Time Checking Social Media on Their Phones*, DIGITAL TRENDS (June 13, 2015), <http://www.digitaltrends.com/mobile/informate-report-social-media-smartphone-use/> [https://perma.cc/8SJP-TY74] (demonstrating the vast amount of time that Americans check their phones to either monitor or update their social media accounts); see also *Percentage of U.S. Population with a Social Network Profile from 2008 to 2016*, *supra* note 14 (rendering that while the current number of people in the United States using social media in 2016 is about 185 million people, the future number is estimated to be over 200 million people by 2020).

<sup>29</sup> See Margaret Van Houten, *Assets to Assets, Dust to Dust: What to Do with a Decedent’s Digital Identity*, 30 A.L.I. A.B.A. 581, 586 (2013) (giving a broad definition of what creates the digital asset category); see also Cahn, *supra* note 15, at 36 (highlighting that there are different types and categories of digital assets: personal, social media, financial, and business).

<sup>30</sup> See Conner, *supra* note 13, at 303 (noting that there is currently not a definition of digital assets in the legal dictionary, which leads to legal scholars and practitioners lacking an understanding of what a digital asset is and allowing them to come up with their own definition); see also Van Houten, *supra* note 29, at 586 (defining digital assets); see also Cahn, *supra* note 15, at 36 (reiterating that digital assets are thought of through different categories, such as personal assets, social media, financial assets, and business assets).

<sup>31</sup> See Van Houten, *supra* note 29, at 586–87 (illustrating that digital assets take on many forms, some of which are documents created by individuals who have passed); see also Lumturije Akiti, *Facebook off Limits? Protecting Teachers’ Private Speech on Social Networking Sites*, 47 VAL. U. L. REV. 119, 121–22 (2012) (exposing that social media has revolutionized the way in which communication over the Internet, and in general, is conducted). Facebook and other social media sites are becoming a substitute for communication from regular phone calls and even texts. Akiti, *supra* note 31, at 121–22. The growth of Facebook, from being open to college students to the world, shows how much of an integral part of communication social media has become. *Id.*

<sup>32</sup> See, e.g., *Terms of Service*, FACEBOOK (Jan. 30, 2015), <https://www.facebook.com/legal/terms> [https://perma.cc/VS2P-NGWC] [hereinafter FACEBOOK] (canvassing the terms required to use Facebook and post on the site, which each new user must agree to before using the social media site); see also *Terms of Use*, INSTAGRAM (Jan. 19, 2013), <https://instagram.com/about/legal/terms/> [https://perma.cc/A7JN-FJRA] [hereinafter INSTAGRAM] (setting out the Terms of Use when signing up to the Instagram social media account); *Terms of Service*, TWITTER (May 18, 2015), <https://twitter.com/tos?lang=en>



terms in the document bind the user's presence on Facebook.<sup>33</sup> Facebook defines how to use the account and set up the account to ensure privacy for the user, while maintaining a license over the content posted on the site.<sup>34</sup> The terms bind the Facebook user with no opportunity to negotiate.<sup>35</sup> Only the individual who signs up for Facebook is deemed able to access and use the profile, unless the user and Facebook expressly grant permission otherwise.<sup>36</sup> The user agrees to any terms the social media site deems fit to establish, no matter if one disagrees or later finds issue with the terms.<sup>37</sup>

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[<https://perma.cc/VLC9-NR42>] [hereinafter TWITTER] (outlining the Terms of Service for potential Twitter users).

<sup>33</sup> See, e.g., FACEBOOK, *supra* note 32 (clarifying that the Terms of Service of Facebook should be taken seriously by the user and treated as a binding contract). The specific language of the beginning of the Terms of Service are:

This Statement of Rights and Responsibilities ("Statement," "Terms," or "SSR") derives from the Facebook Principles and is our terms of service that governs our relationship with users and others who interact with Facebook brands, products and services, which we call the "Facebook Services" or "Services." By using or accessing the Facebook Services, you agree to this Statement, as updated from time to time in accordance with Section 13 below. Additionally, you will find resources at the end of this document that help you understand how Facebook works.

*Id.*

<sup>34</sup> See *id.* ("you [,the user,] specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license . . . to content that you post on or in connection with Facebook."); see also *What is My Profile*, FACEBOOK, <https://www.facebook.com/help/133986550032744> [<https://perma.cc/X85F-UJHY>] (issuing that a profile on Facebook is the individual's collection of pictures, stories, and events that tell the user's life story on Facebook); *What Is a Facebook Page?*, FACEBOOK, <https://www.facebook.com/help/174987089221178> [<https://perma.cc/4UR3-A3ME>] (detailing that Facebook pages are used in connection with businesses, organizations, and brands to share pictures, posts, and events with people who like their page).

<sup>35</sup> See FACEBOOK, *supra* note 32 (construing that the Terms of Service are binding when the user signs up and begins to use Facebook for the social networking use for which it was designed); see also *About Facebook*, FACEBOOK, <https://www.facebook.com/facebook/info/?tab=pageinfo> [<https://perma.cc/4A6T-GNPY>] (promoting that Facebook was founded on February 4, 2004, and provides general information on Facebook, such as the description and the mission statement of Facebook).

<sup>36</sup> See FACEBOOK, *supra* note 32 (outlining a term of Facebook that allows only the Facebook profile user to access the individual profile in the individual's name). This particular term of service specifically states, "You will not transfer your account (including any Page or application you administer) to anyone without first getting our [, Facebook's,] written permission." *Id.*

<sup>37</sup> See *id.* (drawing that the terms create a binding contract and once the user assents to them, the user is bound to abide by the terms as they are stated in the Terms of Service); see also Nicholas Carlson, *At Last – The Full Story of How Facebook Was Founded*, BUS. INSIDER (Mar. 5, 2010), <http://www.businessinsider.com/how-facebook-was-founded-2010-3>

Like Facebook, both Twitter and Instagram's Terms of Use govern the user's actions on the social media sites.<sup>38</sup> Twitter's terms state the site has the right to regulate the user's access and information posted to the account.<sup>39</sup> These terms bind the user's usage on the social media site.<sup>40</sup> The Terms of Service require that the terms are considered a contract to use the service and advise one not enter into the contract unless one is fully capable and ready to abide by the terms.<sup>41</sup> Additionally, Instagram's policies are similar to the previous two social media sites.<sup>42</sup> When using

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[<https://perma.cc/4NAM-NWBZ>] (detailing the controversy surrounding the creation of Facebook and its founder, Mark Zuckerberg).

<sup>38</sup> See TWITTER, *supra* note 32 (reflecting on Twitter's Terms of Service governing a user's ability to use the social media site and what is posted on the social media site); *see also* INSTAGRAM, *supra* note 32 (noting that the Terms of Use for Instagram allow for Instagram to regulate what is posted on its social media site and its ability to use the pictures posted for its own use).

<sup>39</sup> See INSTAGRAM, *supra* note 32 (outlining what is to be agreed to by a new user, in which the terms are similar in nature to those of other social media sites); *see also* TWITTER, *supra* note 32 (construing that Twitter governs the users on its site and makes this known to new users through the Terms of Service). Twitter construes this to its new users by stating:

These Terms of Service ("Terms") govern your access to and use of our Services, including our various websites, SMS, APIs, email notifications, applications, buttons, widgets, ads, commerce services (the "Twitter Services"), and our other covered services that link to these Terms (collectively, the "Services"), and any information, text, graphics, photos or other materials uploaded, downloaded or appearing on the Services (collectively referred to as "Content"). Your access to and use of the Services are conditioned on your acceptance of and compliance with these Terms. By accessing or using the Services you agree to be bound by these Terms.

*Id.*

<sup>40</sup> See TWITTER, *supra* note 32 (confirming that by signing up and using the social media site, the user agrees to the Terms of Service as they are outlined in the Terms of Service hyperlink, which must be clicked on to view the terms); *see also* *New User FAQs*, INSTAGRAM (2016), <https://support.twitter.com/articles/13920> [<https://perma.cc/DFY6-8RET>] (offering that Instagram is a way to share lifetime moments with friends and family, as well as the public).

<sup>41</sup> See TWITTER, *supra* note 32 (confronting that the Terms of Service are a binding contract that should only be entered into if the party is willing to accept and abide by the terms as they are stated by Twitter); *see also* Nicholas Carlson, *The Real History of Twitter*, BUS. INSIDER (Apr. 13, 2011), <http://www.businessinsider.com/how-twitter-was-founded-2011-4> [<https://perma.cc/DZ4S-V8M6>] (explaining the real story behind how Twitter started, through some ex-Googlers and a failed company that later brought the idea of Twitter to the masses).

<sup>42</sup> See INSTAGRAM, *supra* note 32 (outlining what is to be agreed to by a new user, which are terms similar in nature to those of other social media sites); *see also* Nicole Coccozza, *Instagram Sets a Precedent by an "Insta" Change in Social Media Contracts & Users' Ignorance of Instagram's Terms of Use May Lead to Acceptance by a Simple "Snap,"* 15 J. HIGH TECH. L. 363, 364 (2014) (elaborating that users tend to ignore the Terms of Use that the social media service offers for its new users to explore and read prior to agreeing to the service); *FAQ*, INSTAGRAM (2016), <https://www.instagram.com/about/faq/> [<https://perma.cc/M8ML-Y7LP>]

Instagram, one is agreeing to the terms of Instagram.<sup>43</sup> The terms require a person to meet a certain age to use Instagram, not post pictures that depict violence or nudity, and assume responsibility for any activity that may occur under a profile name or handle.<sup>44</sup>

Because the concept of inheriting social media accounts is so modern, little to no case law exists directly addressing digital assets.<sup>45</sup> However, the case law that does exist uses contract law to decipher the results of the contract after death to understand inheritability.<sup>46</sup> Scholars contend that Facebook is the primary social media outlet battling conflict when it comes to accessing the social media site after the user dies.<sup>47</sup> For instance, in *Fteja*

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[hereinafter FAQ] (remarking that Instagram is a way to share pictures with friends and family by taking a picture with a cell phone then posting it on Instagram). Another feature of Instagram is that the user is allowed to pick a filter for the picture prior to posting it on Instagram. FAQ, *supra* note 42.

<sup>43</sup> See INSTAGRAM, *supra* note 32 (urging that the Terms of Use of Instagram are and should be construed to be a binding contract by the new user with Instagram for its social media or networking service); see also Lim Yung-Hui, *Inspiring Insights by Instagram CEO Kevin Systrom, The Man Who Built a \$1 Billion Startup*, FORBES (Apr. 9, 2012), <http://www.forbes.com/sites/limyunghui/2012/04/09/inspiring-insights-by-instagram-ceo-kevin-systrom-the-man-who-built-a-1-billion-startup/#761452c25f0f> [<https://perma.cc/TRU6-ZSWE>] (elaborating on Instagram's beginning success, and stating that recently, Facebook bought Instagram for \$1 billion).

<sup>44</sup> See INSTAGRAM, *supra* note 32 (providing that a user must be of an age to be aware of the terms the user is agreeing to when signing up and using the Instagram social media and networking service); see also Yung-Hui, *supra* note 43 (expanding on the story of how Instagram started, how it got its name, and how long it took for the creators to develop Instagram before it launched).

<sup>45</sup> See Cahn, *supra* note 15, at 36 (reporting that little has been decided in reference to social media, as well as digital assets as a whole category, and its ability to be inherited or devised within a will or through intestacy statutes); see also Coccozza, *supra* note 42, at 366 (asserting that courts have struggled to define social media contracts and the Terms of Service or Use within the scope of traditional principles of contract law).

<sup>46</sup> See *infra* Part II.C (rendering that contract law in relation to its use in forming a contract for the social media site and the terms within the contract will render the decision if social media can be inherited through probate and intestacy statutes).

<sup>47</sup> See, e.g., Louise Boyle, *Grieving Parents Battle Facebook for Access to 15-year-old Son's Profile after He Committed Suicide*, DAILY MAIL (Feb. 19, 2013), <http://www.dailymail.co.uk/news/article-2280800/Facebook-bans-parents-accessing-sons-profile-committed-suicide.html> [<https://perma.cc/5ED2-DKJ4>] (discussing the battle Eric Rash's parents faced in trying to obtain access to their son's Facebook profile for possible answers after he committed suicide); see also Alyssa Bereznak, *Delaware Agrees to Let Families Inherit the Social Media Accounts of the Deceased*, YAHOO! (Aug. 19, 2014), <https://www.yahoo.com/tech/delaware-agrees-to-let-families-inherit-the-social-95209129124.html>

[<https://perma.cc/3UZS-P5BJ>] (drawing on the story of Amanda Todd and how her family was unable to delete the negative comments, or her Facebook account in general, because they did not have access and the legacy option was not available at the time); Ryan Grenoble, *Amanda Todd: Bullied Canadian Teen Commits Suicide after Prolonged Battle Online and in School*, HUFFINGTON POST (Oct. 12, 2012), [http://www.huffingtonpost.com/2012/10/11/amanda-todd-suicide-bullying\\_n\\_1959909.html](http://www.huffingtonpost.com/2012/10/11/amanda-todd-suicide-bullying_n_1959909.html) [<https://perma.cc/ZC24-XRND>] (telling the story of

*v. Facebook*, the court held that Facebook's agreement created a valid contract using contract of adhesion devices – click-wrap and browse-wrap agreements.<sup>48</sup> Facebook's terms do not present the potential user with the Terms of Use before requiring a click of consent to the terms.<sup>49</sup> Placing the link on the welcome page and having people click through creates a binding contract whether or not the user of the social media site reads the terms.<sup>50</sup> As such, by using the site, the user expressly agrees to the terms of the site.<sup>51</sup> However, it is unclear what would occur to the Facebook account after the user dies.<sup>52</sup> In *Ajemian v. Yahoo!*, a personal representative of an estate requested access to a Yahoo! account because he stated he was a co-user of the account.<sup>53</sup> The Massachusetts Court of Appeals found that administrators are not entitled to access the account

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Amanda Todd, a teenage girl who committed suicide after being bullied on Facebook, which prompted Facebook to create a memorialization page after her death).

<sup>48</sup> See 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (conceding that the agreement Facebook has in place is not a true form of a click-wrap agreement, rather it is a hybrid of a click-wrap and browse-wrap). A click-wrap agreement is one that requires a click of agreement by the user to the terms. *Id.* A browse-wrap agreement is where the terms are located in a hyperlink, which must be clicked to be viewed before agreement to the terms. *Id.*

<sup>49</sup> See *id.* (providing the terms in a separate link, like Facebook does, is the foundational element a browse-wrap agreement); see also Anne Flaherty, *What Happens to Your Online Accounts When You Die?*, DENVER POST (July 18, 2014), [http://www.denverpost.com/business/ci\\_26175560/what-happens-your-online-accounts-when-you-die](http://www.denverpost.com/business/ci_26175560/what-happens-your-online-accounts-when-you-die) [<https://perma.cc/62VE-7Q2P>] (offering that most Terms of Service agreements do not allow anyone who is not the account holder to access the social media site).

<sup>50</sup> See *Fteja*, 841 F. Supp. 2d at 837 (visiting Facebook and continuing to use the site is the assertion of agreement, which is a browse-wrap agreement); see also Coccozza, *supra* note 42, at 371 (expressing that the rise in social media sites and the contracts that form the social media accounts have challenged traditional principles of contract law).

<sup>51</sup> Compare *Fteja*, 841 F. Supp. 2d at 837 (agreeing to the terms is essential to continued use of the website); with *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29–30 (2d Cir. 2002) (proposing that a click of assent is not consent, unless the site makes it explicitly clear to the user the terms he or she is agreeing to before continuing).

<sup>52</sup> See *Ajemian v. Yahoo! Inc.*, 987 N.E.2d 604, 606 (Mass. App. Ct. 2013) (pointing out that there is no clear rule to indicate if a digital asset of a deceased individual should be accessed by the personal representative of the estate); see also Tamara Castagna, *Twitter: Chatter and Substance*, 21 AUSTL. L. LIBR. 90, 94 (2013) (contrasting the issue of social media from a business perspective and how the policies within the social media platform will determine how companies use the social media to further their business online).

<sup>53</sup> See 987 N.E.2d at 607 (claiming that one was a part of the contract is not enough, it must be documented on the contract who is a party to the contract and who is authorized to access the email account); see also Hayley Tsukayama, *Facebook Will Now Let You Manage What Happens to Your Account after You Die*, WASH. POST (Feb. 12, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/02/12/facebook-will-now-let-you-manage-what-happens-to-your-account-after-you-die/> [<https://perma.cc/V36R-8X9H>] (detailing the recent addition to Facebook, in which the social media site granted users the ability to choose what would happen to their Facebook profile after they die: the profile can be deleted or the profile can be memorialized).

of the deceased individual they are administrating, even if the administrator is a relative.<sup>54</sup> To prevent a personal representative or the administrator of an estate access to social media accounts, the formation of these accounts as a contract of adhesion evidences the need to prevent access.<sup>55</sup>

B. *Social Media Accounts as Contracts of Adhesion*

Contracts of adhesion are contracts that are standardized, imposed, and drafted by the party with the greater bargaining power, requiring the party seeking the service to either accept or reject the contract.<sup>56</sup> Social media accounts are created by contracts of adhesion formed by click-wrap agreements, browse-wrap agreements, or a combination of both.<sup>57</sup> Another view of social media, not readily provided by scholars, is that a

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<sup>54</sup> See *Ajemian*, 987 N.E.2d at 614 (establishing the rule that even though a relative wants access to the digital asset of a deceased loved one, being the personal representative of the estate does not establish a valid position to be allowed access); see also *Castagna*, *supra* note 52, at 93 (presenting that with the use of social media, such as Twitter, confidentiality issues stem from the amount of information that the user posts online).

<sup>55</sup> See *infra* Part II.B (detailing that the creation of social media accounts as contracts of adhesion furthers the argument that access by a third party representative of the deceased's estate should not be permitted).

<sup>56</sup> See *Bradberry v. T-Mobile USA, Inc.*, No. C06-6567 CW, 2007 WL 1241936, at \*4 (N.D. Cal. Apr. 27, 2007) (defining a contract of adhesion in a cellphone plan as a take it or leave it contract with only the opportunity to accept or reject the contract); see also *Fiederlein v. Boutselis*, 952 N.E.2d 847, 856 (Ind. Ct. App. 2011) (finding that a contract requires offer, acceptance, consideration, and a meeting of the minds between the parties to properly form a contract). When a contract is formed in the traditional way, there is no disparity in bargaining power between the two parties. *Fiederlein*, 952 N.E.2d at 856. Each party to the contract has the opportunity to bargain and make counteroffers. *Id.* This is the basic formation of a contract, but social media accounts are not created in this way. *Id.* Social media accounts are created through contracts, which are different in formation and in bargaining power; parties are still required to assent to the terms, but fewer seem to be required. *Id.* There is no need for offer, acceptance, and consideration because a potential new user must agree to the Terms of Service as they are for everyone who chooses to use the social media site. *Id.* See also *Houston v. Hyatt Regency Indianapolis*, 997 F. Supp. 2d 914, 922 (S.D. Ind. 2014) (showing that the basic building blocks of a contract "include offer, acceptance, consideration, and a meeting of the minds" between the parties forming the contract); cf. *Econ. Leasing Co., Ltd. v. Wood*, 427 N.E.2d 483, 487 (Ind. Ct. App. 1981) (stating that a meeting of the minds was not required to find a breach of contract); *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971) (noting that a traditional contract is formed as a result of bargaining among the parties to the contract when both have equal bargaining power, or when no one party has more power over the other).

<sup>57</sup> See *Ajemian*, 987 N.E.2d at 614 (comprehending that contracts can be formed differently, using both agreements in an adhesion contract, to create a binding contractual relationship between the site and the non-user); see also *Adhesion Contract*, BLACK'S LAW DICTIONARY (3d ed. 2006) (defining "adhesion contract" as "[a] standard-form contract prepared by one party, to be signed by another party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms").

social media account is a contractual relationship between the user and the social media parent site.<sup>58</sup> Moreover, in *Schlobohm v. Spa Petite*, the Supreme Court of Minnesota held that the contract to become a member of a spa and gym was an adhesion contract.<sup>59</sup> The contract for the gym service was comprised of a printed form, which was consistent with other gym contracts and was the same contract every member was required to sign before joining the gym.<sup>60</sup> The court reasoned there was no disparity between the bargaining powers of the parties.<sup>61</sup>

In addition, contracts of adhesion are found in two forms – click-wrap and browse-wrap agreements.<sup>62</sup> Click-wrap agreements are contracts which require a user to click an “I agree” box when signing up for a service.<sup>63</sup> Within the social media context, a user must consent to the terms

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<sup>58</sup> Compare *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (pointing out that Facebook is a contract that is created when the new user agrees to the terms before setting up a profile), with *Fiederlein*, 952 N.E.2d at 856 (admitting that there is a distinction between traditional contract formation and contracts that are created through adhesion, in particular the meeting of the minds and bargaining relationship associated with creating the contract). It is the view in *Fteja* that many scholars do not give credit to. Rather, scholars view social media and posts on social media as the personal property of the individual, which allows for social media to be considered a portion of the estate of the deceased individual.

<sup>59</sup> See 326 N.W.2d 920, 924 (Minn. 1982) (issuing that the contract was a form contract, which the gym created for all potential new members to agree to and sign before beginning working out at Spa Petite); see also *Cocozza*, *supra* note 42, at 376 (identifying that the American Bar Association (“ABA”) has a set of rules for electronic contracting to avoid issues, which are: (1) the user must have notice that terms exist; (2) the user has an opportunity to review the terms; (3) the user has notice that taking an optional action is assent; and (4) the user must have taken the optional action). Click-wrap agreements are agreements that fully satisfy each of these rules set out by the ABA. *Cocozza*, *supra* note 42, at 376.

<sup>60</sup> See *Schlobohm*, 326 N.W.2d at 921 (expressing that the contract *Schlobohm* signed, consisting of four pages outlining the terms and conditions of the gym, which were all on the first page so the new member would see them); see also James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1149 (2009) (relying that with the contract comes privacy issues because of the amount of information required to set-up a complete social media profile).

<sup>61</sup> See *Schlobohm*, 326 N.W.2d at 925 (holding that the contract for the Spa Petite gym service was an adhesion contract drafted by Spa Petite); see also *Cocozza*, *supra* note 42, at 375 (providing an example of one online adhesion contract, a browse-wrap contract, which requires a user to click on a link with the Terms of Use at the bottom of the page).

<sup>62</sup> See *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) (determining that there are different types of Internet agreements that are important to know and note for a better understanding of social media contracting); see also *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–76 (9th Cir. 2014) (detailing that contracts on the Internet take two forms, click-wrap and browse-wrap agreements, and detailing that Barnes & Noble’s terms and conditions, which constituted a browse-wrap agreement, must be agreed to before purchasing a product online).

<sup>63</sup> See *Feldman*, 513 F. Supp. 2d at 236 (claiming that the agreement with Google required the new user to manifest his or her intent by clicking the “I agree” button on the page to

of the social media site before proceeding through the process and participating in the social media site.<sup>64</sup> For example, Facebook, Twitter, and Instagram all have elements that are examples of click-wrap agreements because they require the user to click “agree” before allowing the user to proceed with creating an account or profile.<sup>65</sup>

More specifically, on Facebook, to agree and continue to create a Facebook profile, the potential new user must click the “Sign Up” button before proceeding through the process to create a profile.<sup>66</sup> The click of “Sign Up” is the assent element for a click-wrap agreement.<sup>67</sup> However, Facebook does not provide the presentation of the actual Terms of Use for the potential new user in the true click-wrap agreement.<sup>68</sup> Thus, Facebook

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make the Terms of Use or service binding on the parties to the contract); *see also* Coccozza, *supra* note 42, at 376 (inferring that the click-wrap agreement requires the potential user to fully scroll through the terms to prevent any potential notice issues a user may claim, which is the problem with browse-wrap agreements).

<sup>64</sup> *See Feldman*, 513 F. Supp. 2d at 236 (requiring a user to agree to the terms before proceeding through the sign up process makes the user read and agree to the terms to which the user must abide); *see also* Banta, *supra* note 7, at 821 (ordering that a user must click on the dialogue box to agree to the agreement or contract, or be unable to continue setting up the social media profile).

<sup>65</sup> *See, e.g., Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004) (describing that a click-wrap agreement “presents the potential licensee with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon”)); *see also* *Zaltz v. JDate*, 952 F. Supp. 2d 439, 451 (E.D.N.Y. 2013) (following that the user of the online dating site must click agree before proceeding through to set up the user’s online dating profile). In order to sign up for JDate, Zaltz had to repeatedly click on boxes agreeing to certain terms of the online dating site. *Zaltz*, 952 F. Supp. 2d at 451. Zaltz’s inability to recall agreeing to these terms was unpersuasive to the court to negate and invalidate the browse-wrap and click-wrap combination adhesion contract. *Id.* The agreement in this particular case is analogous to the agreement in *Fteja*, which the court in this case heavily relied upon to come to its decision. *Id.*

<sup>66</sup> *See Fteja*, 841 F. Supp. 2d at 837 (stating that the user must agree to the terms by clicking the agree button to create a Facebook profile and use the social media service the site provides); *see also* FACEBOOK, *supra* note 32 (outlining the terms and conditions a user agrees to when he or she signs up for a Facebook profile).

<sup>67</sup> *See Fteja*, 841 F. Supp. 2d at 837 (asserting that clicking agree is the electronic equivalent of a signature on a traditional contract); *see also* *Zaltz*, 952 F. Supp. 2d at 452 (rendering that the Second Circuit has found that assent to the contractual terms not only requires agreement, but the Terms of Use or Service must be given to the user in clear notice of the terms).

<sup>68</sup> *See Zaltz*, 952 F. Supp. 2d at 452 (describing that a true click-wrap agreement presents the terms and conditions to be agreed to on the same page as the agree button, not in a separate link or page that the user has to visit to read the terms); *see also* Robert V. Hale II, *Recent Developments in Online Consumer Contracts*, 71 BUS. LAW. 353, 357–58 (Winter 2015–2016) (commenting that the correct standard to follow in regards to a user agreeing to the terms is that of the reasonable person standard, or the consumer must know what he or she is assenting to).

falls short on being purely a click-wrap agreement.<sup>69</sup> In *Fteja*, the court held that Facebook's agreement did not meet the true meaning and definition of a click-wrap agreement.<sup>70</sup> Facebook did not present the potential user with the Terms of Use before requiring a click of assent to the terms.<sup>71</sup> Rather, the court held that Facebook utilized a combination of a click-wrap and browse-wrap agreements.<sup>72</sup>

Under a true browse-wrap agreement, a user does not see the Terms of Use before clicking sign up or continuing to use the social media site.<sup>73</sup> This foundation that a browse-wrap agreement is built on means the user does not view any terms before continuing on the website.<sup>74</sup> Placing the link on the welcome page and having people physically click through the terms creates a binding contract, regardless of whether the user of the

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<sup>69</sup> See *Fteja*, 841 F. Supp. 2d at 837–38 (cautioning that Facebook is not true form of a click-wrap agreement because Facebook fails to provide the terms on the same webpage where the agree button is located); see also Hale, *supra* note 68, at 357 (declining to follow the precedent set out in *Fteja* because the case mischaracterized the importance of the reasonable person standard to notice that clicking agree is assenting to the terms of the social media site).

<sup>70</sup> See *Fteja*, 841 F. Supp. 2d at 837 (conceding that the agreement Facebook has in place is not a true form of a click-wrap agreement, rather it is a hybrid of a click-wrap and browse-wrap); see also Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 466–67 (2013) (admitting that a classic browse-wrap agreement may be thought of as a “pay now, terms later transaction,” where the terms are hyperlinked on the home page of the website); Cheryl B. Preston, “Please Note: You Have Waived Everything”: Can Notice Redeem Online Contracts?, 64 AM. U. L. REV. 535, 547 (2015) (pointing out that scholars and courts have been unsure as to the distinction that may or may not be made between click-wrap and browse-wrap agreements).

<sup>71</sup> See *Fteja*, 841 F. Supp. 2d at 837 (providing the terms in a separate link, like Facebook does, is the foundational element of a browse-wrap agreement); see also Moringiello & Reynolds, *supra* note 70, at 468 (deciding that courts are favoring the approach of determining the conscionability of the contract rather than basing the decision of enforceability on whether the contract is a click-wrap or browse-wrap agreement).

<sup>72</sup> See *Fteja*, 841 F. Supp. 2d at 838 (reasoning that Facebook is a combination because the terms and conditions are available via a link, which is the browse-wrap element, but agreement to the terms is required by clicking agree, which is the click-wrap element); see also Moringiello & Reynolds, *supra* note 70, at 469 (presenting that the actual focus of discussion should be on the presentation of the terms and not on the distinction between click-wrap and browse-wrap agreements).

<sup>73</sup> See *Fteja*, 841 F. Supp. 2d at 837 (accessing the terms via a link is the classic form of a browse-wrap agreement). When *Fteja* signed up for the service, he had a duty to click the link to read the terms before clicking agree to continue signing up for Facebook. *Id.* Hyperlinking the terms is how a browse-wrap agreement creates a binding agreement, which is many times overlooked by the potential new user. *Id.*

<sup>74</sup> See *id.* (manifesting a browse-wrap agreement by continuing to use the site whether or not the new user read the terms in the hyperlink for the website); see also Preston, *supra* note 70, at 547 (confirming that a large and increasing number of courts are continuing to uphold and enforce browse-wrap agreements, which the user does not see the terms of the contract before using the website).



social media site reads the terms.<sup>75</sup> Facebook and other similar sites put on their websites that when using the site for social networking, the user is consenting to the site's Terms of Use.<sup>76</sup> Thus, when a user posts any picture or statement, the user is manifesting his or her agreement to all of the terms of the browse-wrap, click-wrap combination contract of adhesion.<sup>77</sup>

Browse-wrap agreements are seen on sites where one purchases an item or browses a website for its content because the terms are generally listed on the webpage.<sup>78</sup> For example, in *Nguyen v. Barnes & Noble*, the plaintiff's suit focused on a portion of the Terms of Use of the website that the plaintiff agreed to when placing his order online.<sup>79</sup> The court found the Terms of Use was a browse-wrap agreement because the terms were implied when visiting the Barnes & Noble website to place an order, and the terms were located in a hyperlink at the bottom of the webpage.<sup>80</sup> The

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<sup>75</sup> See *Fteja*, 841 F. Supp. 2d at 837 (visiting Facebook and continuing to use the site is the assertion of an agreement which is one component of a browse-wrap agreement); see also Preston, *supra* note 70, at 561 (providing an example of a browse-wrap agreement in that the binding mechanism is when "you visit or shop at Amazon.com") (emphasis in original).

<sup>76</sup> See, e.g., FACEBOOK, *supra* note 32 (discussing the terms a new user agrees to when signing up for Facebook); see also Helen Glaberson, *Who Gets Your Facebook When You Die?*, GOOD HOUSEKEEPING (July 31, 2015), <http://www.goodhousekeeping.com/life/a33700/facebook-legacy-feature/> [https://perma.cc/7JDU-LGQS] (introducing that in February 2015, Facebook established a new feature in its Terms of Service that allows a user to choose who can manage the account after the user dies). By manage, Facebook does not mean that the individual the user chooses has full access to the profile like the user had when alive, but rather the individual has the ability to tell Facebook to memorialize the account or delete it. Glaberson, *supra* note 76. Nowhere within this new addition to its policy does Facebook give the third party the ability to take on the account as his or her own account, like Ashley's mother did in Part I of this Note. *Id.*

<sup>77</sup> See *Fteja*, 841 F. Supp. 2d at 838 (reiterating that Facebook, as an adhesion contract, is a combination of click-wrap and browse-wrap agreements); see also John Bonazzo, *Do You Need to Control Your Online Identity after Your Death?*, OBSERVER (Feb. 22, 2016), <http://observer.com/2016/02/how-to-control-your-online-life-after-you-die/> [https://perma.cc/9LKK-TP2N] (asserting that access must be given to the third party before the original user's death or else there will criminal liability).

<sup>78</sup> See *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014) (stating browse-wrap agreements are in pure form when a website states that by using the site you are manifesting agreement to the Terms of Use or service of that particular site). Barnes & Noble, which is the website in the case, is an example of this type of agreement in that the user agrees to the terms by browsing the website for books or other goods sold online. *Id.*

<sup>79</sup> See *id.* (finding that the issue with the Barnes & Noble adhesion contract was that there was no actual notice to the customer, which courts have consistently required with browse-wrap agreements to be held valid and not unconscionable). The plaintiff ordered a tablet off of the Barnes & Noble website and was later notified his purchase had been cancelled because the order could not be filled due to the tablet being sold out. *Id.*

<sup>80</sup> See *id.* (indicating the type of agreement Barnes & Noble had on its website would bind its customers to its terms, but lacked the notice required for the agreement to be legally sound and binding for the customer); see also Cahn, *supra* note 15, at 38 (allowing another individual

Ninth Circuit Court of Appeals held there must be something more than a hyperlink placed on the page to let the user know that the terms exist and that the user is agreeing to them by visiting the site.<sup>81</sup>

Nevertheless, contracts of adhesion carry a stigma of being unconscionable because of the disparity in the bargaining power between the parties.<sup>82</sup> For any contract to be unconscionable, there must be a presence of both procedural and substantive unconscionability.<sup>83</sup> Procedural unconscionability “focuses on the manner in which the contract was negotiated and the circumstances of the parties.”<sup>84</sup>

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to access a social media account, or more broadly a digital asset account, would violate the social media agreement); *but cf.* Tsukayama, *supra* note 53 (declaring that Facebook now has an option for its users to name who they would like to have control over their Facebook account after they die for a short amount of time, only to determine if the account should be deleted or memorialized).

<sup>81</sup> See *Nguyen*, 763 F.3d at 1178–79 (stating knowledge that the terms are located on the page or through a hyperlink is required to bind the user to the Terms of Use or Service of the social media site). The court specifically stated in its holding:

[W]e therefore hold that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take an affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice. While failure to read a contract before agreeing to its terms does not relieve party of its obligations under the contract . . . the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers.

*Id.*

<sup>82</sup> See *Bradberry v. T-Mobile USA, Inc.*, No. C06-6567 CW, 2007 WL 1241936, at \*4 (N.D. Cal. Apr. 27, 2007) (providing that a contract of adhesion comes with the battle to prove that the contract is conscionable and therefore enforceable); see also *Unconscionability*, BLACK’S LAW DICTIONARY (3d ed. 2006) (defining “unconscionability” as “[t]he principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, esp[ecially] terms that are unreasonably favorable to one party while precluding meaningful choice for the other party”).

<sup>83</sup> See *Bradberry*, 2007 WL 1241936, at \*4 (issuing that a finding of unconscionability in an adhesion contract for a service must include both procedural and substantive unconscionability; however, if one is more present than the other, the court may hold the contract unconscionable if the court determines it to be substantial). In *Bradberry*, *Bradberry* argued that T-Mobile reuses cellphone numbers after charging the subscriptions of the previous owner of that cell phone number. *Id.* at \*1. The contract for the phone service was a contract that was the same for each customer, and to overcome and invalidate the adhesion contract, *Bradberry* claimed the contract was unconscionable. *Id.*

<sup>84</sup> See *id.* at \*4 (illustrating the meaning of the requirement of procedural unconscionability in order to determine that a contract is void); see also *Procedural Unconscionability*, BLACK’S LAW DICTIONARY (3d ed. 2006) (defining “procedural unconscionability” as “[u]nconscionability resulting from improprieties in contract formation (such as oral misrepresentations or disparities in bargaining position) rather than from the terms of the contract itself”).

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Substantive unconscionability refers to the contractual language.<sup>85</sup> In addition to the procedural and substantive requirements, another factor used by the courts is to look at the service provided.<sup>86</sup> If the service is a public service or an essential service, the service is necessary.<sup>87</sup> If the service is not a necessity, it generally means that the service can be found somewhere else.<sup>88</sup> Services that are commonly categorized as public necessities are hospitals and consulting a doctor or lawyer.<sup>89</sup>

While social media accounts are created through a valid, conscionable contract, many scholars and estate planning attorneys incorrectly categorize social media as personal property.<sup>90</sup> The court in *Nelson v. La*

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<sup>85</sup> See *Bradberry*, 2007 WL 1241936, at \*4 (declaring the focus on what is required for substantive unconscionability); see also *Substantive Unconscionability*, BLACK'S LAW DICTIONARY (3d ed. 2006) (defining "substantive unconscionability" as "[u]nconscionability resulting from contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances").

<sup>86</sup> See *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 924 (Minn. 1982) (illustrating that providing a gym membership and exercise training is not an essential service); see also *Moringiello & Reynolds*, *supra* note 70, at 469 (advocating that procedural unconscionability alone is not enough to find a contract unconscionable; there must be some finding of substantive unconscionability, even if it is not as great as procedural).

<sup>87</sup> See *Schlobohm*, 326 N.W.2d at 925 (reasoning that if a service is essential and there is unequal bargaining power and the terms of the contract strongly favor one party, the court will tend to find unconscionability and the contract will be voidable); see also *Preston*, *supra* note 70, at 584 (speculating that if social media sites and other online services were to allow users to partially negotiate the terms, then the issue of awareness and notice of the terms would be alleviated and potential users would be given some bargaining power, which would then alleviate potential unconscionability).

<sup>88</sup> See *Schlobohm*, 326 N.W.2d at 925 (finding that the service Spa Petite provides to the customer is not an essential service, rather it is a service that could be received at another gym); see also *Anderson v. McOskar Enterprises, Inc.*, 712 N.W.2d 796, 802 (Minn. Ct. App. 2006) (reiterating that a gym service is not service that is a public necessity).

<sup>89</sup> See *Schlobohm*, 326 N.W.2d at 925 (demonstrating that services that are necessities are generally those that are regulated by the government in some capacity or another, such as police and fire departments; gym memberships are not a service regulated by the government); see also Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts – A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I)*, 62 CLEV. ST. L. REV. 373, 383 (2014) (admitting that some jurisdictions have different elements for what constitutes an adhesion contract, and one example is in Maryland, which states that contracts of adhesion are generally those whose nature is essential to society).

<sup>90</sup> See *Pinch*, *supra* note 14, at 547–48 (grouping digital assets as property will allow for a clearer understanding for estate planning attorneys and their clients in planning for the future of their digital assets and life on social media). However, Facebook provides several options that allow an individual user or a user's estate executor the ability to choose what will happen after the user's death, such as having the account deleted or memorialized. *What Would Happen to My Account if I Pass*, FACEBOOK (Feb. 2015), <https://www.facebook.com/help/103897939701143> [<https://perma.cc/SSP4-XGNR>]. Deleting an account is possible through a setting in the privacy section on Facebook. *Id.* Memorializing an account for a deceased individual is done through a request submitted to Facebook by a family member

*Tourette*, where a subcontract agreement was created to deliver mail from one town to another numerous times, held that the contract was not personal property.<sup>91</sup> The court reasoned that personal property is something where value is determined and the owner has interest in the property ownership.<sup>92</sup>

Conversely, a contract is not regarded as personal property even though a contract may hold value to the parties involved; personal property is the value in the thing itself.<sup>93</sup> In *Meek v. State*, the court held that personal property generally means the valuable right in the item itself or in the value of the interest in the item.<sup>94</sup> The court stated that property

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or friend. *Memorialization Request*, FACEBOOK (2016), <https://www.facebook.com/help/contact/1605213279719667> [<https://perma.cc/3MJ3-57QW>].

<sup>91</sup> See 178 N.E.2d 67, 68 (Ind. Ct. App. 1961) (qualifying that the contract was for a personal service contracted for by a woman when she moved from one town to another in Indiana). Here, the contract for a personal service is a subset of personal property while the contract is still valid and in use by both parties. *Id.* Once one of the two parties to the contract dies, the contract is no longer in use or enforceable, and can no longer be considered personal property. *Id.* Here, the contract ceased when the woman passed away, and there was no need for the mail to be delivered from one location to the next. *Id.*

<sup>92</sup> See *id.* (proving that a contract is not personal property because once a party to the contract dies, there is no longer any value in the contract to be considered personal property); see also *Personal Property*, BLACK'S LAW DICTIONARY (3d ed. 2006) (defining "personal property" as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property").

<sup>93</sup> See *Nelson*, 178 N.E.2d at 68 (holding that a contract is not an item of personal property, but can be subject to an item of personal property belonging to an individual). *But see* IND. CODE § 32-17-14-3(11) (2016) (establishing that property is "any present or future interest in real property, intangible personal property, or tangible personal property"); § 32-17-14-3(4) (defining intangible personal property as "incorporeal property, such as money, credits, shares of stock, bonds, notes, other evidences of indebtedness, and other evidence of property interests"). These definitions provide that personal property is something that is movable in nature at the time of sale. § 32-17-14-3(4). See also *Meek v. State*, 185 N.E. 899, 901 (Ind. 1933) (stating when it is possible for a contract to be personal property based on the value of the contract); *How Do I Save a Photo to My Phone or Computer*, FACEBOOK, <https://www.facebook.com/help/155361567863444> [<https://perma.cc/LARZ-9LG8>] (declaring that Facebook provides a way for users or loved ones to save pictures without obtaining access to the profile).

<sup>94</sup> See 185 N.E. at 901 (defining how to determine if an item is personal property based on the ability to assign a value to the item). The Indiana Supreme Court found that there was a dispute over what was to be considered personal property of an individual and decided that the decision came down to the control over the object. *Id.* In *Meek*, the court held that a widow had control over her husband's deceased body after it was stolen from its grave. *Id.* See also *Browning v. Walters*, 616 N.E.2d 1040, 1047 (Ind. Ct. App. 1993) ("personal property includes not only the property itself but all of the owner's rights and interests in that property"); *Wolf v. Wolf*, 259 N.E.2d 89, 90 (Ind. Ct. App. 1970) (demonstrating that a U.S. Savings Bond purchased jointly with the deceased ex-husband was the personal property of the wife and the ex-husband jointly).

rights in some objects may be more limited than others depending on the interest in the object of the owner.<sup>95</sup>

Furthermore, property is classified as something which is not movable, a house or land, or something of a physical nature, a car or livestock.<sup>96</sup> In *Low v. LinkedIn*, the account holder challenged the personal property right, claiming the browsing history within the social media site was the personal property of the account holder.<sup>97</sup> Account holders argued their search history was valuable and identifiable to their particular account and it constituted a property ownership right.<sup>98</sup> The court did not agree and held that Low failed to show that LinkedIn took control and interest in the browse history, which led to the browse history

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<sup>95</sup> See *Meek*, 185 N.E. at 901 (giving the exception to the control rule to determine the ownership of property and if the object is property overall); see also IND. CODE § 32-17-14-3(11) (defining personal property, and among the types listed in the statute, social media cannot fall into any of the categories of personal property).

<sup>96</sup> See *Nelson*, 178 N.E.2d at 68 (listing items which are considered property based on some characteristics associated with property, such as it being physical and non-movable); see also *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1017-18 (N.D. Cal. 2012) (providing that in *Low*, the traditional idea of what constituted personal property was proposed to be altered to include the browse history of a social media account into the category of personal property of an individual); cf. *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 864 (N.D. Cal. 2011) (expressing that when an asset is the personal property of the individual, the loss of that property will result in loss of complete control over the property, not just the loss of value of the property). In *Claridge*, the plaintiff claimed he had lost property value in his personal information when the RockYou software he used was hacked into and lost. 785 F. Supp. 2d at 858. The RockYou software required the plaintiff to provide email and social media account passwords when purchasing the software, and the plaintiff claimed that this constituted ownership, making the software the personal property of the plaintiff. *Id.*

<sup>97</sup> See 900 F. Supp. 2d at 1018 (proposing that a social media outlet may constitute personal property through the user typing in individual names in the search history); cf. Jaweed Kaleem, *Death on Facebook Now Common as "Dead Profiles" Create Vast Virtual Cemetery*, HUFFINGTON POST (Dec. 17, 2012), [http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles\\_n\\_2245397.html](http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles_n_2245397.html) [<https://perma.cc/XHL2-2QF9>] (providing that dead Facebook profiles are being compared to a virtual cemetery because of Facebook's new policy of memorializing accounts of deceased users). Allowing social media to be accessed, like the property of the individual, will make Facebook more susceptible to becoming an Internet graveyard to the profiles of the deceased. *Id.* See also Stav Dimitropoulos, *Digital Immortality: The Social Media Sites for Dead People*, GLOBAL COMMENT (Oct. 6, 2015), <http://globalcomment.com/digital-immortality-the-social-media-sites-for-dead-people/#> [<https://perma.cc/5SW5-JH2N>] (reiterating that Facebook is becoming a sort of Internet graveyard to social media accounts of the dead through memorialization).

<sup>98</sup> See *Low*, 900 F. Supp. 2d at 1018 (propositioning that the value in searching for something through one's own ability constitutes the personal property of the user, giving the search value solely to the user). For Low's view of ownership of the browse history to hold true, the court determined that the plaintiff must show that with the invasion and use of the browse history on the LinkedIn profiles, there was injury suffered and loss of property as a result. *Id.* If there is not a showing of injury, the browse history could not be the personal property of the LinkedIn account holder. *Id.*

not being the personal property of the account holder.<sup>99</sup> Providing that there is no personal value in contracts of adhesion evidences the need to understand the applicable state and federal law.<sup>100</sup>

C. *Indiana Probate Law and Applicable Federal Law*

Everyone has the freedom to choose the disposition of their property after their death.<sup>101</sup> As such, individuals may create a will or trust to provide for their heirs or descendants after their death.<sup>102</sup> After death, an individual's possessions are divided into two categories: probate and non-probate property.<sup>103</sup> Contracts tend to fall within the non-probate category, passing outside of probate through a will substitute.<sup>104</sup> Typical contracts under the non-probate category are those that have monetary value associated with them, such as life insurance, pay-on-death accounts,

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<sup>99</sup> See *id.* at 1028 (reasoning that the court found that Low needed to show more to prove she had personal value in the browse or search history to lead the court to find that it was the personal property of Low). Personal value in the product is not an element to prove that something is property, rather it is the value of the object itself. *Id.*

<sup>100</sup> See *infra* Part II.C (introducing that the applicable Indiana probate law and the federal law provides an argument for why contracts of adhesion should not be able to be accessed after the death of a contracting party).

<sup>101</sup> See DUKEMINIER & SITKOFF, *supra* note 16, at 3 (expressing the American system of succession allows an individual to choose what to do with one's property after death). A traditional probate term and rule, the dead hand control rule, is fundamental to the American probate system. *Id.* at 1. Dead hand control allows for the deceased individual to govern what is to be done with his or her estate through a will or will substitute. *Id.* See also Cahn, *supra* note 15, at 37 (determining what happens to social media accounts after a user dies is a question that has many scholars talking). Because of this, technology companies are taking steps to ensure they and their users are covered and have directives to determine what will happen to the accounts after a user dies. Cahn, *supra* note 15, at 37. Twitter will deactivate an account after being notified by the personal representative that the user is dead. *Id.* This is different from Facebook, which provides two options to a user, one in which the account is deleted, and second in which the account is memorialized. *Id.*

<sup>102</sup> See DUKEMINIER & SITKOFF, *supra* note 16, at 1 (stating that the freedom to dispose of an individual's property is done mainly through the means of a will or a trust instrument); see also Will, BLACK'S LAW DICTIONARY (3d ed. 2006) (defining "will" as "[a] document by which a person directs his or her estate to be distributed upon death"); Trust, BLACK'S LAW DICTIONARY (3d ed. 2006) (providing that a "trust" is "[t]he right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title").

<sup>103</sup> See DUKEMINIER & SITKOFF, *supra* note 16, at 41 (instructing that property is divided into two categories, which will determine how the property is to be divided after the testator's death according to the will or will substitute the decedent leaves behind); see also Probate Estate, BLACK'S LAW DICTIONARY (3d ed. 2006) (defining "probate estate" as "[a] decedent's property subject to administration by a personal representative").

<sup>104</sup> See DUKEMINIER & SITKOFF, *supra* note 16, at 42 (establishing that contracts fall within the non-probate, will substitute category); see also Nonprobate, BLACK'S LAW DICTIONARY (3d ed. 2006) (quoting the definition of "nonprobate" as "[o]f or relating to some method of transmitting property at death other than by a gift by will").

inter vivos trusts, and joint tenancies.<sup>105</sup> On the other hand, contracts that have yet to be completed by the deceased at the time of death forward the obligation to the personal representative to continue and perform the contract to its fulfillment.<sup>106</sup> However, the law is not clear if social media contracts pass under non-probate or are contracts that bring an obligation upon the personal representative of the an estate to fulfill the contracted terms.<sup>107</sup>

Accessing social media accounts is not only governed by the law of the state where the deceased individual died, but also the Stored Communications Act (“SCA”) and the Uniform Fiduciary Access to Digital Accounts Act (“UFADAA”), both federal acts.<sup>108</sup> The SCA provides criminal liability for unauthorized access to stored electronic information or communications systems.<sup>109</sup> Criminal liability will arise when there is intentional access without authorization, or if the individual “intentionally exceeds an authorization to access that facility.”<sup>110</sup> The SCA

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<sup>105</sup> See DUKEMINIER & SITKOFF, *supra* note 16, at 42 (introducing examples of non-probate contracts that are will substitutes). All of these will substitutes are created through a contract, but the contract created is a traditional contract, not a contract of adhesion, like social media accounts. *Id.*

<sup>106</sup> See IND. CODE § 29-1-13-13 (2016) (instructing the personal representative that if at the time of the deceased’s death he or she was under a contractual obligation, the personal representative must carry out the terms of the contract to its fulfillment); see also Michael J. Milazzo, *Facebook, Privacy, and Reasonable Notice: The Public Policy Problems with Facebook’s Current Sign-Up Process and How to Remedy the Legal Issues*, 23 CORNELL J.L. & PUB. POL’Y 661, 682 (2014) (depending on if the contract is completed or terminated, the outcome of the contract is determined if the parties complete the contract or terminate it for whatever reason).

<sup>107</sup> See DUKEMINIER & SITKOFF, *supra* note 16, at 42 (expressing that there are certain contracts that fall within the non-probate category and do not pass through probate); see also § 29-1-13-13 (proving that there is time when a contract is to be carried out by a personal representative of a deceased’s estate, that time being if there is a remaining obligation to the other party in the contract which had yet to be fully completed at the time of death of the deceased).

<sup>108</sup> See 18 U.S.C. § 2701 (2012) (explaining the offense, which is punishable if a fiduciary unlawfully accesses the deceased individual’s account without properly obtaining permission from the court or through other means); see also Uniform Fiduciary Access to Digital Assets Act (“UFADAA”), UNIF. LAW COMM’N (2014), [http://www.uniformlaws.org/1/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014\\_UFADAA\\_Final.pdf](http://www.uniformlaws.org/1/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf) [<https://perma.cc/9XY9-CLLC>] (expressing that the purpose of the Act is to give the fiduciary access to the electronically stored information of the deceased without violating the privacy or the Terms of Service provided by the social media site).

<sup>109</sup> See § 2701 (providing criminal consequences to personal representatives who try to obtain or do obtain access to the electronic information without proceeding through the proper channels to gain lawful permission to access the social media account).

<sup>110</sup> See *id.* (issuing that for criminal liability to be found, an individual must intentionally access or exceed the access to the facility without authorization). In addition, the access must result in obtaining, altering, or preventing access to the communication service and the

provides an exception to criminal liability for persons or entities who provide “wire or electronic communications services.”<sup>111</sup> It is through the SCA that intentional, disallowed access to a social media account by a personal representative not only breaches privacy, but also potentially imposes criminal liability.<sup>112</sup>

However, the SCA does not specifically mention social media accounts, but the UFADAA does reference digital assets, which is the category that social media falls under.<sup>113</sup> Section four of the UFADAA gives the default power of the deceased’s digital asset to the personal representative and determines the distinction between the digital assets that are governed under the UFADAA and the electronic communications that are governed under the SCA.<sup>114</sup> Section four has three subsections

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electronic storage devices. *Id.* See also Bonazzo, *supra* note 77 (indicating that access could be given, but it must be done prior to the death of the user or the personal representative, the third party, will face criminal liability).

<sup>111</sup> See § 2701 (differentiating that there are examples as to when access under the Stored Communications Act (“SCA”) is lawful and will not result in criminal liability). Other examples of lawful access would be conduct by the user of that service, or access provided within sections 2703, 2704, or 2518. *Id.* See also Dan Bates, *The Facebook WILL: Social Network Adds Feature That Lets a Dedicated ‘Legacy Contact’ Edit Your Page After You Die*, DAILY MAIL (Feb. 12, 2015), <http://www.dailymail.co.uk/sciencetech/article-2950806/The-Facebook-Social-network-adds-feature-lets-dedicated-Legacy-Contact-edit-page-die.html> [<https://perma.cc/PD7S-VX8Z>] (providing a lawful way for an individual to access the account after the death of the original user). The legacy feature on Facebook acts as a will for an individual’s Facebook account. *Id.* The Legacy Contact will make the decision as to whether to leave the account as it is, delete it, or memorialize the account. *Id.* The major risk with leaving the account as it is, with the access, would be allowing people to believe the deceased user is in fact alive. *Id.*

<sup>112</sup> See § 2701 (indicating that there are other, more serious potential consequences than a deceased user’s privacy being violated); see also Milazzo, *supra* note 106, at 662 (defining privacy as “the freedom from unauthorized intrusion”).

<sup>113</sup> See § 2702 (providing the guidelines for disclosing electronically stored information either with the permission of the user or without the permission of the user); see also Jeehyeon (Jenny) Lee, *Death and Live Feeds: Privacy Protection in Fiduciary Access to Digital Assets*, 2015 COLUM. BUS. L. REV. 654, 665 (2015) (expressing that public communication providers are prohibited from giving out the electronic communications that are stored within them, unless one of the specific exemptions within § 2702(b) applies); Uniform Fiduciary Access to Digital Assets Act § 4, UNIF. LAW COMM’N (2014), [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014\\_UFADAA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf) [<https://perma.cc/9XY9-CLLC>] (outlining that the personal representative of the decedent’s estate is permitted access to the electronically stored information that is disclosed in 18 U.S.C. § 2702(b) through a court order or by authorization through the decedent’s will). This section of the UFADAA is subject to § 8(b), which provides limits to the fiduciary’s access to the digital asset. Uniform Fiduciary Access to Digital Assets Act § 4.

<sup>114</sup> See 18 U.S.C. § 2702 (2012) (establishing that there are certain guidelines that a personal representative must abide by if trying to gain access to a digital asset); see also Glaberson, *supra* note 76 (clarifying that Facebook has certain procedures in place for the Legacy Contact to be established, such as once the user nominates the Legacy Contact, a message will be sent to the nominated individual and he or she must agree to be the Legacy Contact).



that break the covered content into the content protected under 18 U.S.C. § 2702(b): any electronically stored information received or sent by the deceased and any other digital asset of the deceased.<sup>115</sup> The digital asset content and the electronically stored information is then limited by the Terms of Service agreement that the user agrees to when signing up for the service.<sup>116</sup>

Additionally, Indiana is one of six states that currently have a statute facilitating a procedure for the deceased's personal representatives to access electronically stored documents and information, including any digital assets that are stored online.<sup>117</sup> The personal representative may submit a written request to the parent site along with letters testamentary to gain access to the document and information.<sup>118</sup> Further, the personal representative may have to go through the court in the jurisdiction where the deceased died to request access from the parent site for the documents or information sought.<sup>119</sup> Currently, the Indiana Legislature has a definition that would define electronically stored information and documents, which would further allow the personal representative to access the electronically stored information without the access requested by the social media parent site.<sup>120</sup> At the state level, this statute governs

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<sup>115</sup> See Uniform Fiduciary Access to Digital Assets Act § 4 (verifying that the content protected by the UFADAA is "(1) the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended]; (2) any catalogue of electronic communications sent or received by the decedent; and (3) any other digital asset in which at death the decedent had a right or interest").

<sup>116</sup> See *id.* (detailing that the Terms of Service are among several governing terms that can limit the access a fiduciary is allowed). The two other listed limiting factors in this section of the UFADAA are copyright law and any other applicable law that would limit the fiduciary's power to access the account. *Id.*

<sup>117</sup> See IND. CODE § 29-1-13-1.1 (2016) (providing the Indiana statute that allows for access to electronically stored information); see also Banta, *supra* note 7, at 830 (providing that the five other states that have similar statutes are: Connecticut, Rhode Island, Oklahoma, Idaho, and Delaware).

<sup>118</sup> See § 29-1-13-1.1(b) (establishing the required materials that must be submitted to the custodian of the digital asset sought according to the statute discussed through this Note); see also James Rogers, *Widow Wins Battle with Apple over Deceased Husband's Password*, FOX NEWS (Jan. 20, 2016), <http://www.foxnews.com/tech/2016/01/20/widow-wins-battle-with-apple-over-deceased-husbands-password.html> [<https://perma.cc/96MJ-PQHF>] (providing an example from Canada where a wife was required by Apple to submit proof of her inheriting everything belonging to her deceased husband, as well as a court order dictating to Apple that it was to release the password to her deceased husband's iTunes account).

<sup>119</sup> See § 29-1-13-1.1(b) (contrasting the two ways a personal representative may access the electronically stored information or documents, one through a court order and the other through letters testamentary, along with the request to the custodian site).

<sup>120</sup> See S. 119-253, 2nd Sess., at 2-3 (Ind. 2016) (amending the statute discussed in this Note, IND. CODE § 29-1-13-1.1, to define electronic communications and digital assets). The

how a personal representative may gain access to digital assets, but federal law must be consulted before a personal representative may have access.<sup>121</sup> At this moment, the Indiana statute allows for access without regard to the contract.<sup>122</sup> However, the statute must consider relevant contract and federal law to determine that personal representative access under the current Indiana statute would be in violation of the law.<sup>123</sup>

### III. ANALYSIS

Social media has been in existence since 1997, and in 2016, the term “social media,” as applied to estate succession, was yet to be cogently and cohesively defined by Indiana law.<sup>124</sup> Determining the inheritability of social media accounts is the new legal frontier, because currently a personal representative is permitted to improperly and unlawfully gain

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amended statute is effective as of July 1, 2016, and allows access to the electronic communication or digital assets of the deceased individual. *Id.* The exact language of the amended statute reads:

IC 32-39-2-4 and IC 32-39-2-5 apply to the right of a personal representative who is acting on behalf of the estate of a deceased person to access: (1) the content of an electronic communication (as defined in IC 32-39-1-6); (2) a catalogue of electronic communications (as defined in IC 32-39-1-5); or (3) any other digital asset (as defined in IC 32-39-1-10); of the deceased person.

*Id.*

<sup>121</sup> See § 29-1-13-1.1(b) (indicating that throughout the Indiana statute, there are certain steps required for a personal representative to take prior to gaining access to an electronically stored document or information of the deceased); *cf.* Ind. S. 253 at 2-3 (Ind. 2016) (providing that the amended statute no longer outlines the procedures a personal representative must follow to gain access to the electronic communication or the digital assets). In the amended statute, access is allowed to the personal representative “who is acting on behalf” of the deceased’s estate, with no particular extra steps needed before access is granted. Ind. S. 253 at 2-3.

<sup>122</sup> See *infra* Part III.A (urging that through contract law, it can be determined that social media access by a personal representative will be in violation of the law and the contract created).

<sup>123</sup> See *infra* Part III.B (finding that to effectively comply with the contract, both common law and federal law must be implemented in tangent with the state statute to prohibit access to the personal representative).

<sup>124</sup> See § 29-1-13-1.1 (showing that there is no definition of stored electronic communications that are applicable under this statute); see also Digital Trends Staff, *The History of Social Networking*, DIGITAL TRENDS (May 14, 2016), <http://www.digitaltrends.com/features/the-history-of-social-networking/> [<https://perma.cc/UV2H-GRH7>] (providing that social media began in 1997 with the site SixDegrees.com, but it was not until 2002 that social media truly took off and became what it is today with Friendster); *cf.* Ind. S. 253 at 2-3 (distinguishing that Indiana has proposed a definition to allow digital assets to include social media according to Indiana Code § 32-39-1-10).

access to the deceased's social media accounts.<sup>125</sup> The Indiana statute currently, but incorrectly, permits access to social media accounts without consideration to the contract that created the electronically stored information or documents.<sup>126</sup> To remedy this issue, the statute must be amended to exclude any language that allows for any access by the personal representative.<sup>127</sup> First, Part III.A analyzes why Indiana common law and contract law governs the current Indiana law to gain access to electronically stored information and documents.<sup>128</sup> Then, Part III.B explains why under the applicable federal and state law, the current

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<sup>125</sup> See *supra* Part II.C (focusing that the law and its scholars have not come to a consensus as to a definition for digital assets or a category for digital assets, and because of the proceeding two, whether or not digital assets are inheritable based on Indiana law); see also § 29-1-13-1.1 (outlining the statute at issue within this Note that allows for a personal representative to be allowed access if approved by the custodian after providing the correct information). To gain access to a social media account as the law stands today, a personal representative of a deceased's estate must have correct documentation from the court stating that the representative may be allowed access and a death certificate of the account holder. § 29-1-13-1.1. Once the personal representative has the correct documentation, then the individual may contact the social media site to request access to the account of the deceased. *Id.* This is the process directed by the statute, but a social media site in another state may not have to adhere to this standard because of jurisdictional issues. However, this is not a route that will be discussed in this Note. The statute reads:

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.

*Id.*

<sup>126</sup> See *supra* Part II.C (clarifying that the Indiana statute for electronically stored documents or information does not define specifically what is meant by electronically stored information, which allows for a wide range of interpretations).

<sup>127</sup> See *infra* Part IV (rendering that social media is created through a contract between two people for a limited time, a service that is only to last for the lifetime of the profile holder, and that the statute should be amended to exclude access because of the contractual makeup of the social media account); see also *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837-38 (S.D.N.Y. 2012) (establishing that social media is created through an adhesion contract that takes the form of a click-wrap agreement, browse-wrap agreement, or a combination of both agreements to bind the user to the terms of condition or service for the particular social media site).

<sup>128</sup> See *infra* Part III.A (discussing social media accounts as contracts of adhesion which can be labeled as a cross of click-wrap and browse-wrap agreements, and how the contractual formation should disallow the access to the personal representative).

Indiana statute allowing access to the personal representative is unlawful.<sup>129</sup>

A. *Contract Law Governs to Exclude Access under the Indiana Statute*

Unlike traditional contracts, social media contracts are not inheritable.<sup>130</sup> A social media contract is limited to the time the user is on the social media service or until the user dies.<sup>131</sup> Social media contracts are valid, enforceable contracts upon clicking “I agree” on the social media site because the formation is like a click-wrap or browse-wrap agreement.<sup>132</sup> As such, these contracts are made between two parties and are not to be inherited once the social media user is deceased.<sup>133</sup> Social media contracts are click-wrap agreements because the contract requires the user to click “I agree” before proceeding with the setup of the profile or account.<sup>134</sup> However, social media contracts do not follow every element of a true click-wrap agreement.<sup>135</sup> For example, social media sites do not list their Terms of Use or service on the same page where the agreement button is located.<sup>136</sup> The Terms of Use or service are usually on another webpage accessible through a hyperlink near the agreement

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<sup>129</sup> See *infra* Part III.B (addressing that the current state of the statute, which defines social media as a digital asset, an electronically stored information or document, does not comply with federal and state law that governs the contract and the ability to access that contract).

<sup>130</sup> See *Nelson v. La Tourette*, 178 N.E.2d 67, 68 (1961) (providing that a contract for a service terminated at the death of one of the parties to the contract). While the contract in *Nelson* was for a delivery service, a comparison may be drawn, because the service was not for an essential service, rather one for convenience. *Id.* Like the contract in *Nelson*, social media is not an essential service. *Id.*

<sup>131</sup> See *supra* Part II.B (concluding the contract of adhesion for social media will terminate after the death of the user who contracted for the service, such as Facebook).

<sup>132</sup> See *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (detailing that once a user clicks “I agree” there is a binding contract between the user and the social media site, and courts routinely uphold adhesion contracts as valid and not unconscionable).

<sup>133</sup> See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 614 (Mass. App. Ct. 2013) (establishing that even when a personal representative had a part in creating the contract to the digital asset, here an email account, access to that email account after the sole user’s death was not allowed by the court).

<sup>134</sup> See *Fteja*, 841 F. Supp. 2d at 835 (stating that the assenting Facebook user must click “Sign Up” to agree to the terms Facebook provides, but are not provided the Terms of Service directly on the page). Facebook provides the Terms of Use on another page that is hyperlinked on the agreement page, which a new user can click to review before agreeing, but it is not required. *Id.*

<sup>135</sup> See *id.* (expressing that Facebook is a combination of the two agreements, click-wrap and browse-wrap, and thus, form a valid adhesion contract that is not unconscionable because the user has the ability to go to another social media site to get the same service).

<sup>136</sup> See *id.* (detailing the particular way social media creates a binding contract through the contract of adhesion and the agreements within this type of contract). The Terms of Use of Facebook are hyperlinked to a different page on Facebook’s website. *Id.*

button, which must be clicked to agree to the contract for the social media site.<sup>137</sup> The social media site assumes a new user will click the hyperlink to the Terms of Use or service before clicking agree, but that is not what everyone does.<sup>138</sup> Many times the individual clicks the agreement button without reading the terms.<sup>139</sup> However, failing to read the terms does not make the contract between the two parties null and void; rather, the agreement button is the digital signature and thus, binding.<sup>140</sup>

Moreover, Facebook does not follow the true legal definition of a click-wrap agreement; however, this fact does not take away the legal significance it provides for the social media site and the user.<sup>141</sup> What sets Facebook's agreement apart and allows it to be considered a partial click-wrap agreement is that the social media site provides the Terms of Use in a link near or below the "Click to Agree" button.<sup>142</sup> Creating a link to the Terms of Use is Facebook applying another form of contracting on the Internet, the browse-wrap agreement.<sup>143</sup>

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<sup>137</sup> See *Fteja*, 841 F. Supp. 2d at 837 (describing the location of the hyperlink in relation to the agree button to ensure the combination of the click-wrap and browse-wrap agreements will be held valid). The hyperlink would provide proper notice to the user of the Terms of Use or Service that must be agreed to before using, as well as what terms the user will be held to when using the social media site for its social networking capabilities. *Id.*

<sup>138</sup> See *id.* (placing that where the terms of conditions are located provides adequate notice to the user, and whether the user actually reads the hyperlinked terms does not negate the validity of the contract).

<sup>139</sup> See *id.* (clicking agree without reading does not invalidate the agreement or the adhesion contract for the contracted service).

<sup>140</sup> See *id.* (accepting the terms by clicking agree means the terms of the contract have been accepted by the new user). The Terms of Service for Facebook can be accessed anytime once a user signs up for the social media service, even if the user does not read the terms prior to signing up with the social media site. *Id.*

<sup>141</sup> See *Fteja*, 841 F. Supp. 2d at 837 (establishing that Facebook in particular does not form the traditional click-wrap or browse-wrap agreement, but that does not take away from the validity and enforceability); see also Banta, *supra* note 7, at 823 (drawing that many states are viewing social media contracts as a form of a digital asset and as personal property, which has a right to be inherited). In fact, social media account contracts are some of the first contracts to prohibit transfer of the personal property, rather than to promote social media as a form of personal property which can be transferred to another owner. Banta, *supra* note 7, at 823.

<sup>142</sup> See *Fteja*, 841 F. Supp. 2d at 837 (marking the unique set up of Facebook's agreement with its users is a combination of both click-wrap and browse-wrap agreements and is binding to hold the users to the terms within the agreement); see also FACEBOOK, *supra* note 32 (focusing on the terms that are linked on Facebook's website and are available anytime a user wishes to re-read and re-learn the terms he or she had previously agreed to when signing up for Facebook).

<sup>143</sup> See *Fteja*, 841 F. Supp. 2d at 837 (demonstrating the way Facebook uses its Terms of Service to bind its users through the placement in a link to the corresponding Terms of Service page). This process Facebook uses is correct and binds its users to its terms even though the users may not fully read the terms before clicking "I agree" to proceed through

Social media accounts are contracts, like the contract in *Schlobohm*, and are standardized contracts drafted by the networking site wanting to impose the contract on the other party.<sup>144</sup> Social media sites, like Facebook, allow the potential new user wanting the service to either accept or reject the contract; this is referred to as a take it or leave it contract.<sup>145</sup> If the potential new user rejects the Terms of Use, the potential new user chooses not to participate in the social networking site.<sup>146</sup> However, with social media accounts created through contracts of adhesion, challenges arise because of the formation of the contract, such as unconscionability.<sup>147</sup>

The limitations that social media contracts place on the new user may seem harsh, limiting, or even unconscionable.<sup>148</sup> The Terms of Use of the social media site are not too unjust or unreasonable to create substantive unconscionability because the terms are the same terms and conditions that every member must agree to before registering for the service.<sup>149</sup> For the social media contract to be procedurally unconscionable, first the user would have to show that the agreement outlined in the Terms of Use of

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the setup process. See also FACEBOOK, *supra* note 32 (providing the exact terms that the user agrees to when signing up for Facebook).

<sup>144</sup> See *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 925–26 (Minn. 1982) (cautioning that there is no bargaining in social media contracts, with the social media site holding the power over the new potential user, the weaker party). The gym membership in *Schlobohm* was a valid contract of adhesion with no disparity of bargaining power, and the gym membership was not an essential service for the public. *Id.* See also *Tender Loving Care Mgmt., Inc. v. Shers*, 14 N.E.3d 67, 74 (Ind. Ct. App. 2014) (following the definition of an adhesion contract based on the decision in *Sandford v. Castleton Health Care Center, LLC*; *Sandford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 417 (Ind. Ct. App. 2004) (determining that a contract of adhesion is valid so long as it is not unconscionable).

<sup>145</sup> See, e.g., *Schlobohm*, 326 N.W.2d at 925 (stating that the gym membership was a contract of adhesion because it was a take it or leave it contract where the potential member either signs and accepts the terms or does not sign the contract, leaving that individual to find another gym); see also *Sandford*, 813 N.E.2d at 417 (expressing that the nursing home contract was a take it or leave it contract, leaving the client's family to find another suitable nursing home if the family chose to do so).

<sup>146</sup> See *Schlobohm*, 326 N.W.2d at 926 (finding that the contract was for a non-essential service and was seen by the court as a take it or leave it contract).

<sup>147</sup> See *id.* at 924–25 (introducing the challenges that may arise through the contract of adhesion social media contracts are created from).

<sup>148</sup> See *Bradberry v. T-Mobile USA, Inc.*, No. C06-6567 CW, 2007 WL 1241936, at \*4 (N.D. Cal. Apr. 27, 2007) (detailing that for an adhesion contract to be unconscionable, the contract requires procedural, in the negotiation of the contract, and substantive, in the terms of the contract itself, unconscionability).

<sup>149</sup> See *id.* (directing that for a contract to be unconscionable, there must be (1) procedural unconscionability and (2) substantive unconscionability). Both procedural and substantive unconscionability are not required for a finding by a court that a contract of adhesion is unconscionable. *Id.* Rather, unconscionability is found on a sliding scale between procedural and substantive unconscionability. *Id.*

the social networking site were unjust and unreasonable and that it was not freely negotiated.<sup>150</sup> The individual user does not have to use the service that the site provides.<sup>151</sup> In regards to the ability to negotiate freely between the parties, the same argument can be made to the adhesion contract being unjust or unreasonable, that if the party does not like the Terms of Use of the social media site, the user can freely go to another social media site and use its service.<sup>152</sup>

Additionally, social media is not an essential service that is required to be provided to each individual in society, proving further that social media account contracts are conscionable.<sup>153</sup> Social media is something people choose to be a part of, and it is a service that can be obtained from an alternative in a similar capacity.<sup>154</sup> As such, social media networks are not essential to everyone because the individual seeks them out.<sup>155</sup> Social

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<sup>150</sup> See *id.* (providing how to determine if a contract of adhesion is unconscionable); see also *Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 49 (Ind. Ct. App. 2005) (discussing the elements that must be found for a contract to be unconscionable, whether it is a traditionally formed contract or a contract of adhesion); cf. *Anderson v. McOskar Enters., Inc.*, 712 N.W.2d 796, 802 (Minn. Ct. App. 2006) (holding that the contract for the gym that Anderson entered into did not include a disparity in bargaining power, and the contract was for an unnecessary service that was not important to be required and provided for public welfare).

<sup>151</sup> See *Schlobohm*, 326 N.W.2d at 926 (stating that the gym membership was a non-necessary service and the customer had the choice to walk away or sign the contract with the gym for its service).

<sup>152</sup> See *id.* at 924 (addressing that because the contract for the non-necessary service is a take it or leave it contract, if a party wants to negotiate and the terms are final, then the customer will have to go to find another gym).

<sup>153</sup> See *id.* at 926 (determining that the contract for the gym membership at Spa Petite was an adhesion contract for a non-essential service, which does not need to be subject to regulation because the service is one that is valuable, but does not need to be provided by the public if someone cannot afford to gain access to it); see also *Anderson*, 712 N.W.2d at 802 (holding that the contract between Anderson and Curves was an adhesion contract for a non-essential service, a gym membership, and that it was valid and conscionable because while there may have been a disparity in the bargaining power on the part of Anderson, she had an option to leave Curves and go to another gym to get the same services she could receive at Curves). Social media can be compared to a gym membership, like in *Schlobohm* and *Anderson*, where the Supreme Court of Minnesota found that a gym membership is not an essential service to the public and that it is not so essential that the public should regulate it. *Anderson*, 712 N.W.2d at 802.

<sup>154</sup> See *Anderson*, 712 N.W.2d at 802 (stating that in both *Schlobohm* and *Anderson*, a gym service was determined to not be an essential service that both *Schlobohm* and *Anderson* could have obtained from another gym); see also *Schlobohm*, 326 N.W.2d at 926 (issuing that the gym membership was a conscionable adhesion contract like the one in *Anderson*, which modeled its decision after *Schlobohm*).

<sup>155</sup> See *Schlobohm*, 326 N.W.2d at 925 (highlighting that essential services are services such as: visiting doctors, hospitals, and public works or utilities). Social media is not an essential service that must be provided to each individual to live a healthy and socially acceptable life. *Id.*

media is not so essential that the public regulates it.<sup>156</sup> While social media is a service desired by most individuals, it is a service with reasonable alternatives; there is not just one social media site.<sup>157</sup> The lack of bargaining power on behalf of the potential new user to the social media site may seem like the contract is being imposed on the party; that the take it or leave it nature of the contract is too harsh for a communication service.<sup>158</sup> The harsh enforcement and lack of alternatives creates the notion that the agreement is unconscionable, but the lack of exact alternatives does not create unconscionability.<sup>159</sup>

However, as illustrated in *Anderson*, social media may be an essential service that everyone should have an opportunity to participate in, and thereby, contracts of adhesion would be unconscionable.<sup>160</sup> The take it or leave it nature of social media agreements is too harsh for a service that is essential to all people.<sup>161</sup> With the heavy reliance on social media today, it can be readily seen that this view has the proper support to be true.<sup>162</sup> But, what it lacks is the essential nature to be regulated, which is a factor necessary to be an essential service.<sup>163</sup> There is not a committee or public

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<sup>156</sup> See *id.* at 926 (comparing social media to the gym service in *Schlobohm* to illustrate that while a social media service may be nice to have, it is not required for a person as a member of society, just like a gym membership).

<sup>157</sup> See, e.g., *Anderson*, 712 N.W.2d at 802 (remarking that a gym membership is a service desired by many people, but it is not one essential to the public welfare that would lead to an unconscionable contract of adhesion).

<sup>158</sup> See *Bradberry v. T-Mobile USA, Inc.*, No. C06-6567 CW, 2007 WL 1241936, at \*4 (N.D. Cal. Apr. 27, 2007) (exacting that there are certain aspects of the contract that may be considered unreasonable because they are being imposed on the user, and this imposing nature will result in the contract of adhesion being unconscionable); see also *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 146 (1971) (providing an illustration of an unconscionable adhesion contract, one that is not for social media service, but is a valid example of how to determine if the social media contract is unconscionable based on the imposing nature of the contract).

<sup>159</sup> See *Schlobohm*, 326 N.W.2d at 926 (illustrating that bargaining power and the disparity in the bargaining power may create unconscionability, but there needs to be more).

<sup>160</sup> See *Anderson*, 712 N.W.2d at 802 (examining that social media is not a service that must be provided and the lack of exact alternatives is acceptable because it is not an essential service through showing examples, which are essential services).

<sup>161</sup> *But see id.* (finding that *Anderson* did not present to the court any evidence that would lead the court to find that there was disparity in bargaining power).

<sup>162</sup> *But see Schlobohm*, 326 N.W.2d at 926 (determining that some people may find that social media may be an essential service because it provides a way to communicate with people and that may be the only way to communicate with some friends or family who do not live near them).

<sup>163</sup> See *id.* (regulating a service is a required factor in determining that a service is in fact an essential service).



official that regulates what is posted on these social media sites.<sup>164</sup> The social media site regulates what is posted on the site itself.<sup>165</sup>

Pictures and posts on social media are not the personal, intangible property of the user.<sup>166</sup> Because social media is not something that has present or future value or is moveable at the time of sale or contracting, it is not personal property.<sup>167</sup> Social media also has no monetary value to associate or label with it.<sup>168</sup> Because social media does not have any present or future tangible value, and value cannot be interpreted through emotional or sentimental value, it cannot be classified as personal property.<sup>169</sup> To the everyday social media user, there is no tangible value in the pictures, posts, or tweets released on social media by the user.<sup>170</sup> Not only is tangible value important to personal property, for social media to be considered personal property, there must be rights within the contract that allow the account holder to take ownership.<sup>171</sup> The personal,

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<sup>164</sup> See *id.* (taking that for a service to be essential it must be regulated, and social media is not regulated like public works, thus proving it is not essential).

<sup>165</sup> See *id.* (indicating that contracts that are for the public good have the ability to be regulated by an outside source, but social media does not fall within this category because social media is a not a contracted service that is for the public good or a necessity); see also *Anderson*, 712 N.W.2d at 802 (inferring that regulating is not done by an outside source, but by the social media site itself through the terms and conditions the user agrees to prior to using the social media service).

<sup>166</sup> See *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1028 (N.D. Cal. 2012) (providing that browse history of a social media site, LinkedIn, was not the personal property of the user). The inference can be made that if the browse history is not the personal property of the user, then the social media site profile of the user is not the personal property of the user. *Id.*

<sup>167</sup> See IND. CODE § 32-17-14-3(11) (2016) (providing the definition of the term property). The direct language from the statute states “[p]roperty means any present or future interest in real property, intangible personal property, or tangible personal property. The term includes . . . (C) a right to receive performance remaining due under a contract . . .” *Id.* See also *Lowrance v. Lowrance*, 182 N.E. 273, 277 (Ind. Ct. App. 1932) (defining personal property as “property of a personal or movable nature as opposed to property of a local or immovable character”).

<sup>168</sup> See *Meek v. State*, 185 N.E. 899, 901 (Ind. 1933) (verifying that for an object or item to be personal property, there must be some monetary value to the item, and social media for the everyday individual does not have monetary value).

<sup>169</sup> See *id.* (determining that value cannot be the emotional value, such as the pictures and posts on Facebook or any other social media site; the value must be monetary and calculable).

<sup>170</sup> See § 32-17-14-3(11) (defining personal property, and among the types listed in the statute, social media cannot fall into any of those categories to be considered personal property). The actual language of the statute defining personal property indicates “[i]ntangible personal property means incorporeal property, such as money, deposits, credits, shares of stock, bonds, notes, other evidences of indebtedness, and other evidences of property interests.” *Id.*

<sup>171</sup> See *Meek*, 185 N.E. at 901 (finding that where there is control over an inanimate object, there is a property right in the object); see also *Browning v. Walters*, 616 N.E.2d 1040, 1047 (Ind. Ct. App. 1993) (holding that personal property includes the owner’s rights in the property, as well as the value).

emotional value in the pictures, posts, and tweets to the individual social media user would make the argument difficult.<sup>172</sup> Personal, emotional value does not create a property right that is statutorily needed to create a property right.<sup>173</sup> The idea is hard to sell because personal property is not statutorily defined using emotion, even though property can often be more than just physical.<sup>174</sup>

Nevertheless, a valid contract can be considered the personal property of the parties to the contract, but this is not the case for social media account contracts.<sup>175</sup> Under this rationale, each post, picture, or tweet from social media should be protected by the contract and considered personal property.<sup>176</sup> A valid adhesion contract makes everything posted the personal property of the user, because the subject matter of the contract is regarded as personal property.<sup>177</sup> Defining contracts, as subject matter to personal property, would lead to social media accounts being inheritable once the account holder dies.<sup>178</sup> The Indiana statute, under this

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<sup>172</sup> See *Meek*, 185 N.E. at 901 (stating that the definition of personal property does not include the emotional value of pictures or posts that could be saved to someone's computer if they choose to do so); see also § 32-17-14-3(11) (providing the statutory definition as to what constitutes personal property of an individual in Indiana).

<sup>173</sup> See *Meek*, 185 N.E. at 901 (reiterating that value is found in the property itself, not in the value the owner gives the object or piece of property).

<sup>174</sup> See § 32-17-14-3(11) (providing the statutory definition of personal property and intangible property to understand that contracts may fit within the definition but it takes a particular contract to do so, one that is for a tangible item); see, e.g., *Dept. of Fin. Insts. v. Holt*, 108 N.E.2d 629, 634 (Ind. 1952) (finding that property is more than the physical objects people own, which includes valid contracts).

<sup>175</sup> See *Meek*, 185 N.E. at 901 (inferring the possibility that a contract may be personal property); see also *Wolf v. Wolf*, 259 N.E.2d 89, 91 (Ind. Ct. App. 1970) (asserting that a contract is personal property when it is used as the subject to a property relationship); *Nelson v. La Tourrette*, 178 N.E.2d 67, 68 (Ind. Ct. App. 1961) (holding that a contract is only a form of property when it is an item as a subject to a personal property relationship).

<sup>176</sup> See, e.g., *Wolf*, 259 N.E.2d at 91 (considering that the Terms of Use of a social media site include the pictures and posts of the user, so the pictures and posts would be considered property).

<sup>177</sup> See *supra* Part II.B (examining the possibility that the adhesion contract created through signing up for social media may create a property right in itself); see also *Wolf*, 259 N.E.2d at 92 (validating the contract allows all the posts, pictures, or verbal language to be considered personal property of the user because the terms and conditions of the social media site regulate the posts and pictures, which are permitted to be posted on the social media site).

<sup>178</sup> See *Meek*, 185 N.E. at 901 (concluding that there are certain ways in which the contract of an individual may be the personal property of the parties to the contract); but see *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1018 (N.D. Cal. 2012) (differentiating that the browse history for a social media site was not the personal property of the user).

idea, would be effective in allowing social media accounts to be accessed by a personal representative of the deceased.<sup>179</sup>

Contracts do not create a property right in themselves because the social media account does not have a property right in the contract, which leads to the social media account not being the personal property of the deceased.<sup>180</sup> However, personal property is established through contracts by making the contract the subject matter to the personal property.<sup>181</sup> Using this interpretation, social media accounts could be considered personal property of the user or owner.<sup>182</sup> The user enters into a contract for social networking purposes, and when the profile descends or is inherited by an heir, it is the account the heir is inheriting, not the contract for the account.<sup>183</sup> According to *Wolf*, social media accounts could be considered personal property of the user and owner of the account, which would allow the owner to pass the account to a future heir, but this is not the correct view.<sup>184</sup> Social media is not defined as personal property or as a contract.<sup>185</sup> However, it has yet to be determined if personal property is the appropriate category for social media, a subset of digital assets, which

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<sup>179</sup> See, e.g., § 29-1-13-1.1 (establishing what the statute currently states in regards to inheriting and the personal representative gaining access to digital assets after an account holder's death).

<sup>180</sup> See *Low*, 900 F. Supp. 2d at 1029 (conceding that a contract does not by itself create a valuable right in itself that would allow for the contract to be considered personal property); see also *Wolf*, 259 N.E.2d at 91 (presenting that social media is a contract that does not create a property right in itself).

<sup>181</sup> See § 29-1-13-13 (considering how to make a contract the personal property of the contracted parties, and if one party dies, how the contract can be passed to the personal representative to fulfill the contract); see, e.g., *Wolf*, 259 N.E.2d 91-92 (observing that a contract can have property rights in it by making the contract the term to a property right).

<sup>182</sup> See *supra* Part II.B (detailing that there are two options on how to view social media, as a contract or as a personal property interest); see also *Wolf*, 259 N.E.2d at 91-92 (inferring that through seeing a social media contract as property, it is by making the contract itself the term of the property, the social media profile becomes the property of the user; everything posted on the profile would, too, become the property of the owner).

<sup>183</sup> See *Meek*, 185 N.E. at 901 (drawing the counterview to this Note, which would make social media an item of personal property that is descendible); see also *Wolf*, 259 N.E.2d at 92 (noting that the contract entered by the individual for the social media service should be considered the subject matter to define the personal property, the profile and everything posted or said on the social media profile).

<sup>184</sup> See *Wolf*, 259 N.E.2d at 92 (modeling social media contracts as property by using the contracts for bonds to be the model and guide). This is the favored view of social media as personal property. It is through this view that allowing a personal representative to access the accounts after the user's death would not conflict with the common law of the state.

<sup>185</sup> See § 29-1-13-1.1 (validating that there is no definition that applies to digital assets within the statute that would indicate social media's status as a contract or as the personal property of the user). Once again, this statute has current legislation that amends and provides a definition of digital assets to the current language to define electronically stored information. *Id.*

many scholars today define social media as, and allows for access.<sup>186</sup> The Indiana statute, Section 29-1-13-1.1, improperly allows personal representatives to access social media, which does not comply with federal and state law.<sup>187</sup>

B. *Federal and State Law*

Social media's purpose is for the *living generation* to communicate freely with the user's friends and family, both near and far, not for a personal representative to access and keep up as his or her own.<sup>188</sup> By requiring agreement to the terms before proceeding onto the social media site, Facebook creates a contract between itself and the new user before the user can use the social media service.<sup>189</sup> Although the deceased's contract can occasionally be fulfilled by a personal representative if the service or purpose of the contract has yet to be fully satisfied, this is not possible with social media contracts.<sup>190</sup> Here, the contract violated by a third party is a contract of adhesion.<sup>191</sup> Fundamentally, contracts of adhesion are different in nature than those of traditionally conceived contracts, because contracts of adhesion force the user to agree to the terms of the site, which is exactly what social media has done.<sup>192</sup> For instance, Facebook has terms in its service agreement prohibiting the user from

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<sup>186</sup> See Pinch, *supra* note 14, at 547 (providing that the status of digital assets as property is unknown and undefined). While many scholars have taken the route in deciding that social media is the personal property of the user, there has been little to substantiate that definition. *Id.*

<sup>187</sup> See § 29-1-13-1.1 (expressing that if the appropriate federal and state law was applied to the statute, access to personal representatives to social media accounts of the deceased user would not be allowed, and the contract would terminate at the death of the user).

<sup>188</sup> See *supra* Part II.A (detailing the purpose of social media, that it is for those who are alive to communicate and keep in contact with loved ones, both near and far, and to connect with people they may not have had a chance to communicate with across the world).

<sup>189</sup> See *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837–38 (S.D.N.Y. 2012) (confirming that social media is a contract, how the contract is formed, and what type of contract it is); see also *Zaltz v. JDate*, 952 F. Supp. 2d 439, 452 (E.D.N.Y. 2013) (qualifying that the contract must be agreed upon and how to agree to the contract).

<sup>190</sup> See § 29-1-13-13 (identifying that there is a way for contracts to be taken over by the personal representative and what these types of contracts are for).

<sup>191</sup> See *Fteja*, 841 F. Supp. 2d at 835 (applying that Facebook creates a contract of adhesion through combining two different forms of Internet adhesion contracts, click-wrap and browse-wrap, to create the binding agreement for the social media site). It is through the Terms of Service agreement for Facebook that the user must agree to, which creates the adhesion contract that binds the user to Facebook. *Id.*

<sup>192</sup> See *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 924 (Minn. 1982) (reiterating that social media contracts are not traditionally formed with elements of offer, acceptance, and consideration). Social media is created through a contract like the one in *Schlobohm* for a gym service. *Id.* While the service being contracted for is different, the lack of ability to bargain is the foundation for both contracts. *Id.*

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allowing another individual to transfer the account to anyone else to monitor and post from without Facebook's explicit consent.<sup>193</sup>

The Terms of Service is "dead hand control" over the social media site, maintaining the user's wishes to be the sole user of the account with the right to post pictures or statuses based on the agreement to the Terms of Service.<sup>194</sup> Dead hand control goes to the foundation on which our probate system is based and furthers the understanding for social media contracts' control over the account of a deceased user.<sup>195</sup> If the deceased does not leave instructions with his or her permission to access the social media account after his or her death, the Terms of Service should be dead hand control over the social media site because it was a term agreed to by the deceased user.<sup>196</sup> No one, including the personal representative, should be allowed access to the social media profile on the basis that the Terms of Service govern and disallow the personal representative access to the account.<sup>197</sup> Facebook, and other social media sites, is in the business of providing a platform for communication among the living generation; it is not an ancestry site.<sup>198</sup>

Like traditional contracts, social media accounts create a contractual relationship between the user and the social media site, but unlike traditional contracts, social media contracts impose the Terms of Use on the party seeking the service.<sup>199</sup> Terms of adhesion contracts tend to favor

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<sup>193</sup> See FACEBOOK, *supra* note 32 (pointing out a term within the Facebook Terms of Use prohibiting the user from transferring the profile to another without explicit consent from Facebook).

<sup>194</sup> See DUKEMINIER & SITKOFF, *supra* note 16, at 1 (applying a traditional probate term and rule to a modern issue that would allow the social media site to prevent the personal representative from accessing the profile). With this rule, the social media account belonging to a deceased user will cease after the user dies, unless the user has in place a legacy user prior to death. *Id.*

<sup>195</sup> See *id.* (reiterating that this is a foundational term and school of thought that is constantly upheld by courts and academics alike because it is fundamental to the succession of deceased estates).

<sup>196</sup> See *id.* (pointing out the need to fulfill the wishes of the deceased should always be at the forefront of society's decisions).

<sup>197</sup> See Uniform Fiduciary Access to Digital Assets Act § 8(b), UNIF. LAW COMM'N (2014), [http://www.uniformlaws.org/1/shared/docs/Fiduciary%20Access%C2to%C20Digital%Ässets/2014\\_UFADAA\\_Final.pdf](http://www.uniformlaws.org/1/shared/docs/Fiduciary%20Access%C2to%C20Digital%Ässets/2014_UFADAA_Final.pdf) [<https://perma.cc/9XY9-CLLC>] (providing that access to the deceased user's account should be prohibited to anyone who was not given access by the deceased). Access should be denied based on the federal and state common law that governs personal representative access to social media account contracts. *Id.*

<sup>198</sup> See Smith, *supra* note 27 (following that social media sites and accounts are for the living generation for communication, and allowing access to a personal representative goes against what Facebook is in the business of providing to its users).

<sup>199</sup> See *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012) (reviewing the way that social media contracts are formed, through the adhesion contract, and how this type of contract is similar and different from traditionally formed contracts); see also *Ajemian v.*

the social media site, which imposes the terms on the weaker party, the new user.<sup>200</sup> Each social media site has its own Terms of Service or use, and the terms are imposed on a new user, which then forms an adhesion contract.<sup>201</sup>

*Fteja* affirms that social media contracts create a contract of adhesion.<sup>202</sup> It is within the terms of the social media site that outline what a user can or cannot do with the account.<sup>203</sup> The Facebook Terms of Service detail the user is the only individual who is authorized to use the account and no one else should be given access to the individual's account.<sup>204</sup> The terms also state an account will not be transferred to another individual, unless Facebook gives explicit permission to the account holder, not a third party.<sup>205</sup> Facebook's Terms of Service are binding on the personal representative because of the power the UFADAA gives to the Terms of Service of each social media site.<sup>206</sup> Section

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Yahoo!, Inc., 987 N.E.2d 604, 614 (Mass. App. Ct. 2013) (concluding that Internet transactions, such as signing up for a Facebook account, which although may be a new variation on contracting, it is in fact still a contractual relationship between the user and Facebook.); *Bradberry v. T-Mobile USA, Inc.*, No. C06-6567CW, 2007 WL 1241936, at \*4 (N.D. Cal. Apr. 27, 2007) (defining a contract of adhesion in a cellphone plan as a take it or leave it contract with only the opportunity to accept or reject the contract); FACEBOOK, *supra* note 32 (detailing the social media contract for Facebook and the Terms of Use that the site imposes on the new user);

<sup>200</sup> See *Fteja*, 841 F. Supp. 2d at 835 (showing that the terms of conditions for Facebook are imposed upon the new user, and the new user does not have an opportunity to negotiate the terms because they are the same terms each user must agree to before using Facebook).

<sup>201</sup> See, e.g., TWITTER, *supra* note 32 (outlining the Terms of Service for potential Twitter users); cf. FACEBOOK, *supra* note 32 (canvassing the terms to use Facebook and post on the site, which each new user must agree to before using the social media site); INSTAGRAM, *supra* note 32 (setting out the Terms of Use when signing up to Instagram).

<sup>202</sup> See *Fteja*, 841 F. Supp. 2d at 835 (inferring that with the terms being provided to the user and not allowing the user to negotiate the terms of the contract forms a contract of adhesion that favors Facebook in its creation because the terms must simply be agreed to prior to using the social media site).

<sup>203</sup> See, e.g., TWITTER, *supra* note 32 (outlining the terms for potential Twitter users that each must abide by); cf. FACEBOOK, *supra* note 32 (issuing the Terms of Use for Facebook which each new user must agree to before using the social media site); INSTAGRAM, *supra* note 32 (setting out the Terms of Use when signing up to use the site).

<sup>204</sup> See, e.g., FACEBOOK, *supra* note 32 (determining that an individual user is the only one who is able to access the account). The particular term states that, "[y]ou will not share your password . . . , let anyone else access your account, or do anything else that might jeopardize the security of your account." *Id.*

<sup>205</sup> See, e.g., *id.* (detailing that the individual user is the only one who is able to contact Facebook to request someone else be able to access the Facebook account). The exact term of the Facebook Terms of Service that applies is, "[y]ou will not transfer your account . . . to anyone without first getting our [Facebook's] written permission." *Id.*

<sup>206</sup> See Uniform Fiduciary Access to Digital Assets Act § 8, UNIF. LAW COMM'N (2014), [http://www.uniformlaws.org/1/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014\\_UFADAA\\_Final.pdf](http://www.uniformlaws.org/1/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf) [<https://perma.cc/9XY9-CLLC>] (supplying that the

eight of the UFADAA gives the social media site the ability to govern over the fiduciary's ability to access the digital asset, which would be social media, or not allow access based on the Terms of Service of the particular social media site.<sup>207</sup> The power this section gives to the social media site in creating its Terms of Service to ensure the social media site has the ability to determine if the personal representative of the deceased is allowed access is exponential.<sup>208</sup> Providing the social media site the power to decide prevents a parent from gaining access to his or her son's or daughter's Facebook profile and continuing to post pictures or statuses after the child's death.<sup>209</sup>

In the Indiana Code section 29-1-13-1.1, social media is incorrectly classified as electronically stored information and documents.<sup>210</sup> Not allowing the personal representative to access the electronically stored document(s) or information of the account holder after his or her death is imperative to respecting both federal and common law.<sup>211</sup> Allowing the personal representative to access the account is a violation of the user's privacy.<sup>212</sup> While there is a system to ensure the personal representative does his or her duties, the system does not check to ensure the personal representative does not take on the identity of the deceased on social media.<sup>213</sup> Furthermore, allowing the personal representative access is a

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UFADAA will govern to allow the Terms of Service of the social media site to limit the fiduciary's access to the deceased's social media profile).

<sup>207</sup> See *id.* (providing the section that explicitly states what the social media Terms of Use and other law will limit the fiduciary's access to social media and other digital assets).

<sup>208</sup> See *id.* (noting the power the UFADAA gives to the social media sites to limit the fiduciary in gaining access to the social media profile).

<sup>209</sup> See *id.* (providing an example of why it is important to limit the access to a deceased individual's social media account). While the UFADAA does not explicitly say access should be denied, it relies on the Terms of Service or use of the social media account to determine how to gain access and who must agree to allow access to the social media site. *Id.*

<sup>210</sup> See IND. CODE § 29-1-13-1.1 (2016) (highlighting the terms used within the Indiana statute that currently allow social media to be accessed by the personal representative).

<sup>211</sup> See *supra* Part II.C (detailing the issues that may arise out of the legislation and law that currently allows a personal representative the ability to request access to the social media account of the deceased individual).

<sup>212</sup> See Uniform Fiduciary Access to Digital Assets Act § 8, UNIF. LAW COMM'N (2014), [http://www.uniformlaws.org/1/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014\\_UFADAA\\_Final.pdf](http://www.uniformlaws.org/1/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf) [<https://perma.cc/9XY9-CLLC>] (endorsing that the UFADAA argues to further the privacy of the social media account holder and the social media parent site by relying on the Terms of Service as a contract that the user agrees).

<sup>213</sup> See *supra* Part II.A (reiterating the hazards of allowing a third party to access the information of a contract when the Terms of Use the deceased user agreed upon when signing up for the social media service did not allow it); see also Uniform Fiduciary Access to Digital Assets Act § 4 (providing that the UFADAA points to the Terms of Service of the social media site to alleviate the potential violation of an unverified third party from accessing the social media profile of a deceased user).

form of identity theft and a breach of the contract.<sup>214</sup> By allowing access, the law is disregarding the privacy of the user, which is essential to the formation of the social media contract.<sup>215</sup> Additionally, access to social media sites provides extra challenges to the social media parent site to ensure personal representatives are not abusing their access privileges and the access does not correctly promote respecting human dignity and the finality of death of a social media user.<sup>216</sup>

Where the language of the statute is clear, it gives too much power to the personal representative to gain access.<sup>217</sup> While a situation where the personal representative takes on the account and operates it as his or her own may be unlikely, it should not be disregarded as a possibility.<sup>218</sup> The current Indiana statute makes this outcome possible; therefore, the statute needs to be amended to prevent access by a personal representative to social media sites of the deceased user.<sup>219</sup>

#### IV. CONTRIBUTION

Defining social media as a contractual relationship, void of property rights, would bring the Indiana statute, Indiana Code section 29-1-13-1.1, current with terms of social media contracts themselves.<sup>220</sup> Social media contracts prohibit someone other than the account holder from requesting access to the social media account or any documents or information stored

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<sup>214</sup> See *supra* Part II.C (admitting the potential pitfalls of the Indiana statute allowing a third party the ability to access a deceased's social media).

<sup>215</sup> See Uniform Fiduciary Access to Digital Assets Act § 8 (examining that the Terms of Service are essential to the understanding of how a third party may lawfully gain access to the social media account); see also *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837–38 (S.D.N.Y. 2012) (acknowledging that the social media contract is a contract of adhesion created through the combination of click-wrap and browse-wrap agreements).

<sup>216</sup> See *supra* Part II.C (lending an understanding of Indiana law and the relevant federal law that lends to the lack of understanding for what a digital asset is and how it is to be handled after the user dies).

<sup>217</sup> See IND. CODE § 29-1-13-1.1 (2016) (judging that the current language of the statute gives the ability of too much access to the third party if the personal representative follows the instructions provided in the current statute).

<sup>218</sup> See A. Smith, *supra* note 2 (expressing that a third party gaining access to a deceased user's account is possible and the third party did take on using the Facebook profile as her own when it belonged to her deceased daughter).

<sup>219</sup> See *infra* Part IV (asserting that the current statute should be amended to exclude access to the personal representatives of the deceased user's estate, which would lead to the contract created being respected).

<sup>220</sup> See *supra* Part III.B (arguing that the proposed amendment outlined in Part IV would provide a clear understanding to the Indiana statute and exclude access to electronically stored information and documents by the personal representative).



on the social media site.<sup>221</sup> By not defining social media accounts as digital assets that apply to the category of electronically stored documents or information, the Indiana statute will correctly apply fundamental principles of contract law, as well as follow what the Terms of Use of the social media site set out.<sup>222</sup> The current confusion, leading to the improper use of the statute, exists because the statute does not define the term “electronically stored documents or information,” and as such, the term is ambiguous and open to rogue interpretation.<sup>223</sup> Therefore, the Indiana legislature must amend the statute to exclude access to electronically stored documents or information to the personal representative of the deceased’s estate.<sup>224</sup> To begin, Part IV.A proposes an amendment to remove any part of the statute that allows access in violation of contract law.<sup>225</sup> Then, Part IV.B provides commentary on the proposed amendment and responds to anticipated counterarguments.<sup>226</sup>

A. *Proposed Amendment*

The Indiana Congress should codify the following proposed statute:

**Ind. Code § 29-1-13-1.1 Electronically stored documents or information defined; custodians; providing access or copies to personal representatives**

(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~~

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<sup>221</sup> See, e.g., FACEBOOK, *supra* note 32 (exploring the power the Terms of Use or Service of a social media site gives to the deceased).

<sup>222</sup> See *supra* Part III.A (supporting that social media is created through a contract between two parties, not to be interfered by a third party, when the social media Terms of Use do not permit this interference, unless it has been requested by the account holder in particular).

<sup>223</sup> See *supra* Part III (excluding access to the personal representative is needed to bring the statute to a place where it would be able to be applied to case law, if needed).

<sup>224</sup> See *infra* Part IV.A (proposing an amendment to IND. CODE § 29-1-13-1.1, which would exclude access of the personal representative of the deceased’s estate to the user’s electronically stored information and documents).

<sup>225</sup> See *infra* Part IV.A (providing detail about the proposed amendment to IND. CODE § 29-1-13-1.1).

<sup>226</sup> See *infra* Part IV.B (giving the commentary to the proposed amendment, as well as the critic’s views on the proposed amendment to IND. CODE § 29-1-13-1.1).

~~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.~~

~~(e) A custodian may not destroy or dispose of the electronically stored documents or information of the deceased person for two (2) years after the custodian receives a request or order under subsection (c).~~

~~(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 in the ordinary court of business by the custodian.<sup>227</sup>~~

#### B. Commentary

The proposed amendment prevents access to social media, which currently allows anything stored electronically or online to be accessed by a personal representative of a deceased social media user's estate.<sup>228</sup> By removing access to the personal representative in the statute, the personal representative would be denied access that is currently allowed under the statute.<sup>229</sup> First, the amendment removes the ability of the personal representative to petition for access to a social media account.<sup>230</sup> By removing access to social media accounts, the amendment allows the contract between the deceased user and the social media site to be

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<sup>227</sup> This Note proposes an amendment to IND. CODE § 29-1-13-1.1 prior to the amended language effective July 1, 2016. The normal font is the language of the original statute. The language with a strike through is the language the author wishes to strike from the original statute.

<sup>228</sup> See *infra* Part IV.B (indicating the potential hole in the statute, which would be the lack of a full explanation of electronically stored information or documents, and lack of certainty which digital assets apply to this definition within this statute).

<sup>229</sup> See *supra* Part IV.A (introducing an amendment to exclude access to electronically stored documents and information by the personal representative of the deceased user's estate, as IND. CODE § 29-1-13-1.1 currently allows the personal representative to do just that).

<sup>230</sup> See *supra* Part IV.A (giving the advantage of amending the statute to remove the ability to petition for access to the social media account of the deceased user).

respected.<sup>231</sup> Second, the amendment gives the social media platform the ability to continue to enforce its terms after the user's death.<sup>232</sup>

Amending section 29-1-13-1.1 will provide a clearer understanding of the statute in regards to contract law and how the statute should be applied.<sup>233</sup> The statute is currently not being used or applied because practitioners and scholars are unable to understand its proper application to estate planning and which digital assets apply to the statute. The proposed amendment would allow for a social media site, like Facebook, to control the outcome of a user's social media profile, unless the user has previously stated what he or she wants to occur to his or her profile after death.<sup>234</sup> Additionally, the proposed amendment strengthens the contractual relationship between the social media site and the user.<sup>235</sup> By not allowing a third party to access the account after the primary user's death, the contract between the two parties is respected and upheld to the terms provided in the Terms of Use or Service.<sup>236</sup> The amendment also determines social media accounts are not inheritable or descendible because an estate of the deceased cannot access them.<sup>237</sup>

Critics may view the proposed amended statute as limiting social media from being labeled or classified as personal property.<sup>238</sup> Their argument is likely shrouded by the idea that a social media account is

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<sup>231</sup> See *supra* Part IV.A (reflecting that the amendment will provide clarity to practitioners and scholars on the subject of digital assets and social media in particular, and determining if this class has the ability to be inherited or accessed by a personal representative).

<sup>232</sup> See *supra* Part III.A (providing why the Indiana statute should not apply to social media because social media profiles, like Facebook, are formed temporarily and do not have specific documents that belong on the profile, which cannot be gained through other means).

<sup>233</sup> See *supra* Part III (outlining that a definition of social media being considered a contractual relationship, not personal property, would clear up the misunderstanding and ambiguity of the current state of the Indiana statute at issue in this Note).

<sup>234</sup> See *supra* Part IV.A (detailing the proposed amendment, and specifically stating the amendment would provide that the contract created by the user and the social media site would be controlling after the death of the user); see IND. CODE § 29-1-13-1.1 (2016) (describing that the statute is to be used to allow a representative of the estate to contact a custodian of the electronically stored information or documents to request access to the deceased's information or documents in its possession).

<sup>235</sup> See *supra* Part III.B (stating social media accounts are contracts between two parties).

<sup>236</sup> See *supra* Part III.A (issuing that the Terms of Use of the social media site create a contract and terms that must be followed by the user after assent to the contract when proceeding to create the social media profile).

<sup>237</sup> See *supra* Part III.A (finding that social media accounts are not the personal property of the account holder because the account holder does not hold any valuable interest in the account that can be then passed on to someone after the account holder's death).

<sup>238</sup> See *supra* Part II.B (describing how personal property is defined and how it could possibly be applied to social media, but in this Part of the Note, it is construed that social media is not personal property); see also § 32-17-14-3(4) (determining that the personal property definition provided by this Indiana statute does not include social media as the personal property of an individual).

personal property because of the videos, pictures, or words that are posted on the social media site.<sup>239</sup> This argument may be entertained under the false notion that the value of these digital items, if printed or made into a physical memento, would hold value and interest to the owner of the physical item.<sup>240</sup> In the digital form on the social media account, the pictures, videos, and posts do not hold the same value. However, this view of transforming digital assets into a physical asset that is personal property is not correct. The form of asset being discussed is the digital form, the social media site itself, not the form that may be created after taking an item off of the social media site. The proposed amendment would reiterate to individuals reading and applying the statute that there is no value or interest in the pictures, posts, and words that are posted on Facebook, Instagram, and Twitter.<sup>241</sup> If the representative of the deceased person's estate wished to have the pictures or posts from the account, by going to the account and printing off the pictures, that creates a different type of asset. Printing off the pictures creates tangible, personal property assets, which may or may not have value.

## V. CONCLUSION

Under the proposed amendment to the Indiana statute, Barbara would no longer be able to access Ashley's Facebook and other social media accounts. While it is difficult to deny a parent of a deceased child access to the account, upholding the contractual relationship between Ashley and the social media site follows with the relevant federal and state probate law associated with digital assets. The danger with allowing Barbara access is the social media profile or account will no longer be

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<sup>239</sup> See *supra* Part II.B (drawing a comparison that digital assets of videos, pictures, and word documents available through social media may be compared and determined to be personal property of the account holder before making them a physical asset). However, this comparison is neither accurate nor made within this Note.

<sup>240</sup> See *supra* Part II.B (arguing that social media is a contract between the user and the social media parent site, not the personal property of the social media user); see also *How Do I Save a Photo to My Phone or Computer*, *supra* note 93 (providing a way for a user or user's loved one to save the pictures on a profile without obtaining access to the social media account).

<sup>241</sup> See *supra* Part IV.A (detailing the proposed amendment to the Indiana statute that would prevent access to a personal representative of a deceased user to the user's electronically store information or documents); see also TWITTER, *supra* note 32 (outlining the terms Twitter users must abide by); cf. FACEBOOK, *supra* note 32 (issuing the Terms of Use for Facebook that each new user must agree to before using the social media site); INSTAGRAM, *supra* note 32 (setting out the Terms of Use when signing up to use the site). By posting pictures to each of these websites, the user is relinquishing some right and interest in them, whether or not they were the personal property of the individual initially. You, the user, are giving the public, who views your pictures, the right to look and even claim them for themselves if they choose to do so.

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associated with the deceased user because a third party will be operating the profile. There is no ownership in the account on behalf of the user, Ashley, so the social media account or profile is not the personal property of the user. The account cannot be descendible or inheritable by the deceased's estate.

The interest the user has in the social media account terminates at death. Although there might be good intentions with allowing a personal representative to access a deceased individual's social media account, the legal sense in doing so overrules any good intentions. Facebook, for example, does not allow transfer of account holders by a third party; only the original account holder may request transfer with the permission of Facebook. Through the proposed amendment to the Indiana statute, the contractual relationship between the two parties is respected and upheld.

Catherine Cates\*

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\* J.D. Candidate, Valparaiso University Law School (2017); B.A., Criminal Justice and Sociology, Indiana University (2014). I would like to first thank my parents, Peter and Sandra Cates, for their unconditional love and support through the Note writing process and my law school experience. Thank you for bringing me back down to Earth during one of the most stressful times in my law school career. I could not have written this Note without your faith and belief. Second, I want to express my appreciation to the Volume 50 Executive Board for all of your help and guidance. I also want to specifically thank my mentor, Cecelia Harper, because without her, my Note would not be what it is today, so I cannot thank her enough. I also want to thank my faculty advisor, Professor Natalie Banta, for guiding me through a topic that is very new to the law and helping me find a new stance to take on such an important issue. A huge thank you must also go to my friends here at Valparaiso. You all were a huge morale boost during the times when the notewriting process was at its most difficult. This Note would not be possible without each and every one of the individuals mentioned here and those I did not mention, so thank you!