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## Probate Law Meets the Digital Age

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# Probate Law Meets the Digital Age

Naomi Cahn\*

*This Article explores the impact of federal law on a state fiduciary's management of digital assets. It focuses on the lessons from the Stored Communications Act ("SCA"), initially enacted in 1986 as one part of the Electronic Communications Privacy Act. Although Congress designed the SCA to respond to concerns that Internet privacy posed new dilemmas with respect to application of the Fourth Amendment's privacy protections, the drafters did not explicitly consider how the SCA might affect property management and distribution. The resulting uncertainty affects anyone with an email account.*

*While existing trusts and estates laws could legitimately be interpreted to encompass the new technologies, and while the laws applicable to these new technologies could be interpreted to account for wealth transfer, we are currently in a transition period. To fulfill their obligations, however, fiduciaries need certainty and uniformity. The article suggests reform to existing state and federal laws to ensure that nonprobate-focused federal laws ultimately effectuate the decedent's intent. The lessons learned from examining the intersection of federal law focused on digital assets and of state fiduciary law extend more broadly to show the unintended consequences of other nonprobate-focused federal laws.*

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## I. INTRODUCTION

At the most basic level, state wealth-transfer law is designed to effectuate the donor's intent.<sup>1</sup> Default rules, including intestacy and elective share statutes, foster these fundamental policies. Probate administration regimes facilitate collection of the decedent's assets and protect the rights of the beneficiaries designated by the testator or those whom the state assumes would have been chosen. Developments in state trust law, respect for nonprobate transfers, and fiduciary obligations similarly effectuate the donor's intent. These intent-effectuating policies are at the core of the trusts and estates canon.<sup>2</sup> To be sure, there are countervailing state policies, including anti-discrimination laws, taxation, and override rules such as the elective share protecting the state fisc,<sup>3</sup> but these are recognized as exceptions to the basic principle of promoting the donor's intent. States have adopted and adapted laws, ranging from revocation-on-divorce statutes to intestacy systems, to reflect local variations in presumptions concerning what the decedent actually prefers.

Federal law, by contrast, is typically a blunter instrument. The potential intersection between the two systems of law occurs both when Congress initially enacts the legislation and then when courts interpret its applicability to trusts and estates issues. In the trusts

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1. See, e.g., John H. Langbein, *Destructive Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665, 1670 (2014) (“[T]he dominant policy of American wealth transfer law . . . is to give effect to the intention of the transferor.”).

2. See, e.g., Naomi Cahn & Amy Zietlow, “*Making Things Fair*”: *An Empirical Study of How People Actually Approach the Wealth Transmission Process*, ELDER L.J. (forthcoming 2015).

3. The elective share (while it incorporates other goals) serves as an example of an override policy that protects the state budget from the claims of impoverished surviving spouses. See also Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 44 (2007) (discussing the privatization of partner dependence).

and estates field, federal law might play one of a variety of roles along a continuum: at one end, federal law might explicitly preempt state law, while at the other end, federal law might be irrelevant to state trusts and estates law (as is most often true). Between these two points, federal law can either work in tandem with or hamper state law.

Indeed, the federal government sometimes does recognize the potential impact of federalism principles on state inheritance law and may explicitly defer to state wealth-transfer law both substantively and jurisdictionally. The probate exception embodies such deference;<sup>4</sup> in addition, various federal statutes explicitly incorporate a state's postdeath wealth distribution system.<sup>5</sup> In other situations, Congress may explicitly seek to control the wealth-transfer system, for example, through estate and gift taxes.<sup>6</sup>

But many federal statutes are not so finely tuned.<sup>7</sup> They are generally designed to further goals that, at least initially, have little or nothing to do with wealth transfer; they often do not even refer to the possibility of compatible—or incompatible—state laws. Even when

4. See James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533 (2014).

5. For example, in *Astrue v. Capato*, 132 S. Ct. 2021, 2023–24 (2012), the Supreme Court construed the Social Security Act's provision:

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

42 U.S.C. § 416(h)(2) (2012). The provision refers to “State” three times. See SUSAN GARY, JEROME BORISON, NAOMI CAHN & PAULA MONOPOLI, *CONTEMPORARY TRUSTS AND ESTATES* (2d ed. 2014).

6. Even within that system, the Supreme Court has staked a role for state law. See *supra* note 5.

7. See Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*, 67 VAND. L. REV. 1395, 1639–44 (discussing federal pension law and the Supreme Court's opinions in *Egelhoff* and *Hillman*). In explaining its decision, the *Hillman* Court noted:

One can imagine plausible reasons to favor a different policy . . . a legislature could have thought that a default rule providing that insurance proceeds accrue to a widow or widower, and not a named beneficiary, would be more likely to align with most people's intentions. . . . But that is not the judgment Congress made.

*Hillman v. Maretta*, 133 S. Ct. 1943, 1952 (2013).

Congress regulates nonprobate transfers<sup>8</sup> and explicitly addresses federalism issues, state trusts and estates law is not an explicit focus.<sup>9</sup>

This Article explores the impact of federal law that is not specifically enacted to deal with wealth transfer on the executor's marshaling and subsequent distribution of digital assets. (I label these laws "nonprobate-focused federal laws.") In doing so, this Article focuses on the lessons from one such law: the Stored Communications Act ("SCA"), initially enacted in 1986 as one part of the Electronic Communications Privacy Act ("ECPA").<sup>10</sup> Congress designed the SCA to respond to concerns that Internet privacy posed new dilemmas with respect to application of the Fourth Amendment's privacy protections. It regulates the relationship between the government, Internet service providers ("ISPs"), and users in two distinct ways.

First, the statute establishes limits on the government's ability to require ISPs to disclose information concerning their subscribers. An ISP may not disclose to the government any records concerning an account holder, nor the contents of any electronic communications, in the absence of an applicable exception, such as consent by the account holder.<sup>11</sup>

Second, the statute establishes limits on the providers' ability to disclose information voluntarily to the government or any other person or entity.<sup>12</sup> Although the drafters tried to cover future

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8. See Waggoner, *supra* note 7, at 1651 (indicating that some nonprobate transfers are "authorized or regulated by federal law").

9. One such example is the broad supersession clauses in ERISA the Employee Retirement Income Security Act ("ERISA") and the Federal Employees' Group Life Insurance Act ("FEGILIA"). 29 U.S.C. § 1144(a); see Langbein, *supra* note 1, at 1671 ("[F]ederal law does not concern itself with the recurrent constructional complications that arise in the wealth transfer process . . ."). FEGILIA was initially enacted in 1954, fifteen years before the Uniform Probate Code's revocation upon divorce provision for wills, and more than three decades before that was extended to nonprobate transfers. See Waggoner, *supra* note 7, at 1640, 1643. Not surprisingly, FEGILIA's preemption provision addresses only state regulation of group life insurance without any explicit reference to wills. 5 U.S.C. § 8709(d)(1).

10. 18 U.S.C. §§ 2701–2712. See generally Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004) (discussing the goals, structure, and text of the Stored Communications Act).

11. 18 U.S.C. § 2702(a)(1) prohibits voluntary disclosure to anyone of the contents of an electronic communication, while 18 U.S.C. § 2702(a)(3) prevents the voluntary disclosure of records to the government (although not to others). Depending on the nature of the data, the government must obtain either a subpoena or a warrant, although there are some exceptions in the case of an emergency. 18 U.S.C. § 2702(b).

12. See Kerr, *supra* note 10, at 1212–13 ("The statute creates a set of Fourth Amendment-like privacy protections by statute"). The 2013 revelations of Edward Snowden provide another angle on the Stored Communications Act and providers' willingness to disclose. The providers didn't want to disclose some information and the NSA either coerced them or simply took it without their knowledge. See, e.g., Ryan Lizza, *The Metadata Program in Eleven Documents*, THE NEW YORKER (Dec. 31, 2013), <http://www.newyorker.com/online/blogs/comment/2013/12/a->

developments, at the time of the SCA's enactment, the development of Facebook was still almost two decades away, the founding of Google was more than a decade in the future, and even the large-scale use of email was still a few years distant.<sup>13</sup> The drafters were focused on privacy, not on how the SCA might affect fiduciary property management and distribution,<sup>14</sup> and the SCA has not been amended since its original enactment. (Of course, few people recognized the potentially transformative potential of the Internet on trusts and estates practice at that point.) The resulting uncertainty affects anyone with an email account. It hampers fiduciaries, including personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees who want to obtain access to any type of electronic communication, although it does not affect the ability of a fiduciary to distribute the assets held in the underlying account—once the fiduciary has been able to identify it.

This Article argues that, as trusts and estates law and practice adjust to new technologies and their corresponding privacy protections, the process requires accommodation and adjustment. That is, while existing trusts and estates laws could legitimately be interpreted to encompass the new technologies with no need for revision, and while the laws applicable to these new technologies could be interpreted to account for wealth transfer, the common law process is typically not so seamless.<sup>15</sup> The result, instead, is a transition period, with the expectation that existing legal structures will gradually absorb the new technology.

Indeed, it is possible to interpret the SCA so that it does not bar access by a legally recognized fiduciary to the contents of an

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history-of-the-metadata-program-in-eleven-documents.html#slide\_ss\_0=1, *archived at* <http://perma.cc/8R7Y-GBAE>; Ryan Lizza, *State of Deception*, THE NEW YORKER (Dec. 16, 2013), [http://www.newyorker.com/reporting/2013/12/16/131216fa\\_fact\\_lizza](http://www.newyorker.com/reporting/2013/12/16/131216fa_fact_lizza), *archived at* <http://perma.cc/F4KK-FVXG>; Laura W. Murphy, *The NSA's Winter of Discontent*, HUFFINGTON POST (Dec. 12, 2013, 5:59 AM), [http://www.huffingtonpost.com/laura-w-murphy/the-nsas-winter-of-discon\\_b\\_4434455.html](http://www.huffingtonpost.com/laura-w-murphy/the-nsas-winter-of-discon_b_4434455.html), *archived at* <http://perma.cc/3V8U-6X6W>.

13. Ian Peter, *The History of Email*, NETHISTORY, <http://www.nethistory.info/History%20of%20the%20Internet/email.html>, *archived at* <http://perma.cc/EP9X-9JQA> (last visited Sept. 8, 2014); see William Jeremy Robison, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 GEO. L.J. 1195, 1198 (2010) ("It was on the cusp of this phase, with computer networking in its infancy, that Congress adopted the Stored Communications Act in 1986."); Michael Helft & Claire Cain Miller, *1986 Privacy Law is Outrun by the Web*, N.Y. TIMES, Jan. 9, 2011, <http://www.nytimes.com/2011/01/10/technology/10privacy.html?pagewanted=all&r=0>, *archived at* <http://perma.cc/4-2HL4>.

14. There was only one reported federal case concerning the relationship between the SCA and probate at the time of promulgation of the Uniform Fiduciary Access to Digital Assets Act in July 2014. *In re Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

15. See, e.g., Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077 (2003) (discussing the development of adoption law).

account holder's communications. The existing SCA should be interpreted as permitting fiduciaries to access otherwise-protected content pursuant to state fiduciary law (a fiduciary stands in the shoes of the original account holder) or through exceptions to prohibited disclosures. Nonetheless, achieving this result is neither automatic nor guaranteed and may require some movement in each area of law. Instead, potential congressional amendments to the SCA, along with supporting state legislative enactments, could clarify this interpretation by defining "consent" by an electronic subscriber to include disclosure of the contents of email communication. Certainty and uniformity in this context could support fiduciaries seeking to fulfill their obligations. Such uniformity could be mandated if federal law were amended to include its own definitions of terms,<sup>16</sup> to which states could refer to facilitate the probate process, or by uniform statutes adopted by all states. Each of these, of course, presents its own practical and political problems, but the underlying goals of promoting consistency and certainty in trusts and estates law show that federal law can play a constructive role in promoting state policies. The lessons learned from examining the intersection of federal law focused on digital assets and of state fiduciary law extend more broadly to show the unintended consequences of other nonprobate-focused federal laws.<sup>17</sup>

In Part II, I discuss some of the complexities surrounding the inheritance of digital assets under state law. In Part III, I turn to the relevant federal statutes that have an impact on the transfer of digital assets. Part IV addresses the role of federal law, arguing that the federal statutes should be interpreted in light of relevant state law on inheritance addressed earlier. This final section suggests reform to existing state and federal laws to ensure that nonprobate-focused federal laws ultimately effectuate the decedent's intent.

## II. DIGITAL ASSETS AND INHERITANCE

Trusts and estates law focuses on the disposition of various forms of assets.<sup>18</sup> Over the centuries, the types of assets have changed

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16. A federal definition of "child" that considered posthumous birth would have mooted *Astrue*, for example. 132 S. Ct. at 2023.

17. This may suggest a parochialism—"states know best"—with respect to probate law; while others may make that argument, I am more concerned about laws with unintended consequences.

18. Trusts and estates law is not just for wealthy individuals, even though it is also called "wealth transfer" law. See Naomi Cahn & Amy Zietlow, "Making Things Fair." An Empirical Study of How People Actually Approach the Wealth Transmission Process (2014) (unpublished manuscript) (on file with authors). The nonprobate revolution means that almost all workers

and expanded. In particular, new technologies pose new conundrums for trusts and estates law. With every change in forms of wealth, technology, or entertainment, trusts and estates law has had to adapt correspondingly, with doctrines pressured to expand beyond real property to stocks, bonds, copyrights—and now, digital assets. Digital assets present the same problems as other forms of new property; they are also problematic because federal law regulates some aspects of their existence. Privacy concerns, the reason for the federal laws themselves, pose a third complicating factor.<sup>19</sup> A fourth distinguishing characteristic is their form of ownership, in which an account holder enters into a terms-of-service agreement that sets out the conditions of access.

Digital assets are not the first intangible assets that estate planning attorneys have faced. Copyrights, for example, are assets regulated by federal law and capable of probate and nonprobate transfer.<sup>20</sup> But unlike digital assets, which are subject to terms-of-service agreements with another party, copyrights clearly belong to the holder. In addition, although copyrights raise piracy concerns, they do not raise privacy issues. Like traditional letters, digital communications raise privacy concerns for both sender and recipient.

This combination of novelty, federalism, privacy, and ownership issues has caused some of the difficulties in handling digital assets. Digital assets are a modern manifestation of the changing nature of assets and, in turn, the need for trusts and estates law to adapt. Of course, in many ways, digital assets could fit into existing paradigms.<sup>21</sup> If one analogizes digital assets to tangible assets

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have signed some type of beneficiary designation form. See Stewart Sterk & Melanie Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 169 (2014). Moreover, even people with no financial assets almost certainly have some digital assets and may have emotional mementos of value to them or to others.

19. See generally Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403, 405 (2013) (contrasting predigital searches of pockets versus smartphones).

20. 17 U.S.C. § 201(d)(1) (2012) provides: “The ownership of a copyright . . . may be bequeathed by will or pass as personal property by the applicable laws of intestate succession”; see Devan R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 264 (“Intergenerational equity . . . may show that society’s claim is greater than an author’s lineal descendants.”); Andrea Farkas, Comment, *I’ll be Back? The Complications Heirs Face When Terminating a Deceased Author’s Online Copyright Licenses*, 5 EST. PLAN. & CMTY. PROP. L.J. 411, 413 (2013) (“Many heirs are unaware that they possess such a right at all . . .”).

21. They do not, for example, present the possibility for a “revolution.” See John Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108–09 (1984) (discussing how probate avoidance and changes in the nature of wealth lead to a “nonprobate revolution”); Sterk & Leslie, *supra* note 18, at 176–77 (“This [current] framework generates significant advantages.”).



or real property, then few problems should arise when the executor or personal representative seeks to collect estate assets.

Yet the particular role of federal law as a source of regulation, with its overarching goal protecting privacy in a world where freedom from surveillance,<sup>22</sup> has assumed new meanings (note that this goal is inherently compatible with fiduciary law, given the stringent duties of state fiduciaries). While this Article focuses on only one aspect of the need to coordinate state and federal law, separate state law issues relating to ownership of digital assets may also require federal resolution. For example, subscribers typically acquire digital assets via a terms-of-service agreement that sets out the ownership or licensing of those assets, and the global reach of these agreements might appropriately be a concern of federal law.

An initial question requires determining just what constitutes a digital asset. The Uniform Law Commission's Uniform Fiduciary Access to Digital Assets Act ("UFADAA") defines a digital asset as "a record that is electronic."<sup>23</sup> As such, it includes any information that is stored on the Internet or on a digital device (such as a computer or smartphone), including music, photos, social media profiles, websites, bitcoins,<sup>24</sup> emails, and electronic documents governing the underlying accounts through which other property may be accessed.<sup>25</sup>

Individuals have differing legal relationships to these assets. For most sites, a user enters into some kind of a terms-of-service

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22. See Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905 (2013) ("Privacy therefore is an indispensable structural feature of liberal democratic political systems."); Daniel Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1880 (2013) ("The goal of this bundle of rights is to provide people with control over their personal data . . .").

23. UFADAA § 3(9) (2014), available at [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014jul31\\_UFADAA%20as%20approved%20July%202014%20before%20styling%20and%20without%20comments.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014jul31_UFADAA%20as%20approved%20July%202014%20before%20styling%20and%20without%20comments.pdf), archived at <http://perma.cc/YK4W-7V2N>. "Electronic" and "record" are both defined in the Act.

24. BITCOIN, <http://bitcoin.org/en/>, archived at <http://perma.cc/H5DE-WZ84> (last visited Sept. 8, 2014). Bitcoins are a virtual currency that are not government sponsored, although an increasing number of businesses, ranging from sports stores to travel destinations to porn sites, accept payment in bitcoins. *Id.*; *Shopping with Bitcoin in United States*, SPENDBITCOINS, [https://www.spendbitcoins.com/places/?place\\_type=shopping](https://www.spendbitcoins.com/places/?place_type=shopping), archived at <http://perma.cc/7RNN-LBWZ> (last visited Sept. 8, 2014).

25. See, e.g., Gerry W. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 NAELA J. 135, 137–38 (2013) (classifying digital assets as "personal assets," "social media assets," "financial accounts," and "business accounts"); Lilian Edwards & Edina Harbinja, *Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World*, 32 CARD. ARTS & ENT. L.J. 101, 104–05 (2013) (broadly defining "digital assets"); Jamie P. Hopkins, *Afterlife in the Cloud: Managing a Digital Estate*, 5 HASTINGS SCI. & TECH. J. 209, 211 (2013) (broadly defining "digital assets").

agreement,<sup>26</sup> clicking through a series of statements. While early terms-of-use agreements set out terms on a separate site, they have evolved towards a requirement that users click “I agree” before being bound.<sup>27</sup> Depending on the type of agreement, a user may own, outright, an asset that is itself capable of sale or gift during life or upon death, or the user may simply hold a license that expires when the account holder does.<sup>28</sup> For fiduciaries, the first step is learning about and, where necessary, accessing these assets. Then, if permitted by the terms-of-service agreement and the account holder’s intent, the fiduciary’s second step would be to distribute these assets appropriately.<sup>29</sup> Access, however, is the critical step; it provides information about the scope of the account holder’s assets (including both digital and nondigital assets), which then facilitates the disposition of those assets. Emails can serve as the source for fiduciaries to marshal both known and unknown assets, revealing the digital equivalent of the money under the mattress or the locked box stored underground.

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26. The American Law Institute has even completed a project in this area, focusing on what are often called “end user license agreements” (“EULAs”). PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS 101–44 (2010); see Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 241–50 (2013) (finding pro-seller EULAs have increased as well as their enforceability); *Contracts: Click Wrap Licenses*, INTERNET LAW TREATISE, [https://ilt.eff.org/index.php/Contracts:Click\\_Wrap\\_Licenses](https://ilt.eff.org/index.php/Contracts:Click_Wrap_Licenses), archived at <http://perma.cc/VR5R-QE8R> (last modified Oct. 7, 2011, 2:59 PM) (providing information on websites where a user must agree to the terms before access).

27. Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1099–1102 (2012); see *Ajemian v. Yahoo!*, 987 N.E.2d 604, 612–15 (Mass. App. Ct. 2013) (refusing to enforce choice of law coercive TOS provisions). Thousands of customers of Gamestation, a British game site, “sold their souls” to the site when they clicked through their sign-up agreements. Catharine Smith, *7,500 Online Shoppers Accidentally Sold Their Souls to Gamestation*, HUFFINGTON POST, (May 25, 2011, 5:10 PM), [http://www.huffingtonpost.com/2010/04/17/gamestation-grabs-souls-o\\_n\\_541549.html](http://www.huffingtonpost.com/2010/04/17/gamestation-grabs-souls-o_n_541549.html), archived at <http://perma.cc/XVA5-HKQLQ>; *Selling Your Soul, and Other Fine Print*, FOX & MATTSON, P.C. (Dec. 30, 2013), <http://galaw.com/selling-your-soul-and-other-fine-print/>, archived at <http://perma.cc/WR3C-WHJK>.

28. See Jamie Patrick Hopkins & Ilya Alexander Lipin, *Viable Solutions to the Digital Estate Planning Dilemma*, 99 IOWA L. REV. BULL. 61, 65–67 (2014) (discussing difficulties surrounding digital asset ownership); David Horton, *Indescendibility*, 102 CAL. L. REV. 543, 565–67, 569–70 (2014) (discussing issues related to indescendibility by contract, when companies limit consumers’ conveyance rights); Rustad & Onufrio, *supra* note 27, at 1092 (stating that companies use EULAs to prohibit transfers and assignments of property). Professor Horton provides examples of specific types of agreements.

29. See Horton, *supra* note 28 (noting the unresolved issue of indescendibility by contract in the Fiduciary Access to Digital Assets Act). Distribution of assets upon death is, of course, typically the concern of state law.

## III. DIGITAL ASSETS AND FEDERAL LAW

Like ERISA, the federal laws affecting digital assets were enacted without consideration of state trusts and estates law. The Computer Fraud and Abuse Act, for example, is an antihacking law;<sup>30</sup> presumably, the type of trespass that it prevents does not include access to digital assets and computers by a state-authorized fiduciary.<sup>31</sup> The SCA, part of the Electronic Communications Privacy Act of 1986, governs the privacy of communications and remotely stored information on the Internet. It covers entities that provide electronic communication services, including storage, to the public.<sup>32</sup>

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30. 18 U.S.C. § 1030 (2012). See Note, *The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation*, 127 HARV. L. REV. 751, 751 (2013) (“The Computer Fraud and Abuse Act of 1986 (CFAA) was enacted with the primary purpose of combating computer hacking.”).

31. When a fiduciary accesses the decedent’s property and uses a key to enter the home and sift through an estate as part of complying with her responsibilities to marshal estate assets, there is a strong argument that this is comparable to use of a username and password to access an account or an electronic device. Unlike access to the decedent’s house, however, access to a digital account is presumably governed by a terms-of-service agreement that may prohibit third-party access; consequently, the fiduciary may still be violating the CFAA by exceeding access authorized by the terms-of-service agreement. See James D. Lamm, Christina L. Kunz, Damien A. Riehl & Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. MIAMI L. REV. 385, 400–01 (2014) (discussing how a terms-of-service agreement may prevent third-party access, and therefore, while a digital asset owner may consent to fiduciary access, a TOS may expressly prohibit it); cf. *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078 (9th Cir. 2004) (“Individuals other than the computer’s owner may be proximately harmed by unauthorized access, particularly if they have rights to data stored on it.”).

32. See Suzanne B. Walsh, *Coming Soon to a Legislature Near You: Comprehensive State Law Governing Fiduciary Access to Digital Assets*, 8 CHARLESTON L. REV. 429, 433–34 (2014) (noting restrictions on providers subject to the SCA); Suzanne Brown Walsh & Conrad Teitell, *An Eye Towards the Future: Looking Through a Google Glass Brightly—Paul’s Email to the Corinthians*, 153 TR. & EST. 32, 32–39 (2014), available at <http://wealthmanagement.com/estate-planning/protecting-clients-digital-assets>, archived at <http://perma.cc/ZUC-5NXZ> (discussing how the SCA affects providers); Kerr, *supra* note 10, at 1213–14 (SCA protects information given to two types of network providers: electronic communication service (ECS) and remote computing service (RCS)). Commercial systems available to the public, such as Gmail or Yahoo, are covered, while private systems, such as those used and established by an employer with access limited to a specified group, are not covered. The term “electronic storage” covers two (potentially overlapping) categories: “(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.” § 2510(17) (definitions additionally given same meaning in § 2711(1)). Courts have held that subsection (A) covers email messages stored on the provider’s server pending delivery to the recipient. See *In re DoubleClick Privacy Litig.*, 154 F.Supp.2d 497, 512 (S.D.N.Y. 2001) (indicating § 2510(17)(A) covers email messages); *Fraser v. Nationwide Mut. Ins. Co.*, 135 F.Supp.2d 623, 636 (E.D. Pa. 2001) (holding the Stored Communications Act does not cover post-transmission interception but covers interceptions while an email is transmitted), *aff’d in part*, 352 F.3d 107 (3d Cir. 2003). See generally UNITED STATES ATTORNEYS’ MANUAL ch. 9-48.000

This includes email systems.<sup>33</sup> Violations of the SCA provisions can result in civil and criminal penalties.<sup>34</sup>

The SCA addresses access alone, rather than ownership and disposition of assets. While access is the first step in disposition,<sup>35</sup> the SCA is concerned only with protecting the privacy of the account holder rather than with ownership of the communications or of the underlying account. It may, at least temporarily, present difficulties for authorized fiduciaries who seek access to certain types of material directly from an ISP.

Although the SCA applies to a wide variety of Internet activities, portions of the law are widely recognized as outdated and in need of adaptation to technological advances that have occurred since it was passed.<sup>36</sup> Concerns over the SCA's revision are far broader than those relevant to trusts and estates practitioners, most generally relating to the need to protect privacy. Despite such sweeping concerns, the framework put in place by the SCA remains the basis from which courts decide Internet privacy cases.

Most fundamentally, the Act regulates the disclosure of communications and other information in the possession of ISPs. It sets out the process that the government must follow to compel disclosure from an ISP<sup>37</sup> and details the procedures for voluntary disclosure of such information along with penalties for unauthorized disclosures.<sup>38</sup> The Act applies to both providers of electronic communication services ("ECS") and providers of remote computing

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(1997), [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/48mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/48mcrm.htm), archived at <http://perma.cc/MW5Q-329E> (discussing government's interpretation of the SCA).

33. *DoubleClick*, 154 F.Supp.2d at 512; *Fraser*, 135 F.Supp.2d at 636.

34. § 2701(b); § 2707(b); e.g., *Cheng v. Romo*, No. 11-10007-DJC, 2014 U.S. Dist. LEXIS 28374, at \*4-7 (D.C. Mass. March 6, 2014).

35. See *Horton*, *supra* note 28, at 569-70 (critiquing state laws for not addressing issues involving the disposition of digital assets).

36. See generally Lindsay S. Feuer, Note, *Who Is Poking Around Your Facebook Profile?: The Need to Reform the Stored Communications Act to Reflect a Lack of Privacy on Social Networking Websites*, 40 HOFSTRA L. REV. 473, 475-76, 502-03, 511-15 (2011) (arguing the SCA needs reform due to social media and technology); Achal Oza, Note, *Amend the ECPA: Fourth Amendment Protection Erodes as E-Mails Get Dusty*, 88 B.U. L. REV. 1043, 1046, 1072-73 (2008) (recommending changes to the ECPA to extend constitutionally owed privacy to email users); Kerr, *supra* note 10, at 30-41 (explaining that while the SCA is effective, it is outdated in some respects).

37. § 2703.

38. *Id.* § 2702. For a discussion of penalties, see CHARLES DOYLE, CONG. RESEARCH SERV., R41733, PRIVACY: AN OVERVIEW OF THE ELECTRONIC PRIVACY COMMUNICATIONS ACT, 1, 45-46 (2012), available at <https://www.fas.org/sgp/crs/misc/R41733.pdf>, archived at <http://perma.cc/C9JR-9NWR>.

services (“RCS”).<sup>39</sup> In its most basic form, as understood in 1986, this distinction hinges on whether the service provider is providing a communications service, rendering it an ECS provider, or a storage service, rendering it an RCS provider.<sup>40</sup> An ISP can perform both functions at once. So long as its services are available to the public, it falls within the purview of the SCA’s privacy regulations.<sup>41</sup> The

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39. *E.g.*, § 2702. Note that the SCA does not apply to private email service providers. *See* § 2702(a)(2) (specifying the prohibition applies to services provided to the public); Lamm et al., *supra* note 31, at 404 (stating the SCA excludes private email providers).

40. § 2711(2) (definition of remote computing service). The differences relate to the immediate sending as opposed to storage: an ECS enables users to send and receive wire or electronic communications (acting more as a conduit), while an RCS provides computer storage or processing services by means of an electronic communications system.

The problem now is that modern service providers no longer fall neatly into the categories. However, the categorization remains important because it affects the context in which a service provider may knowingly divulge the contents of a communication. . . .

Essentially, a provider classified as an ECS is always prohibited from disclosing communications in electronic storage. On the other hand, an RCS is only prohibited from disclosing communications if the transmission was maintained solely for storage or computer processing purposes and if the provider is not authorized to access the contents of the communication for any purpose other than providing the services.

Meera Unnithan Sossamon, Comment, *Subpoenas and Social Networks: Fixing the Stored Communications Act in a Civil Litigation*, 57 LOY. L. REV. 619, 625–26 (2011). The distinction between the two different types of providers arose in part due to businesses outsourcing their data processing and data storage needs. A provider can be both an ECS and RCS when it comes to the same communication. The ISP is an ECS at the point when an email is sent and awaits the recipient’s retrieval. Once the recipient retrieves the email, the provider becomes an RCS if the recipient keeps the email on the provider’s server. For a brief history of the precise technology regulated at the time, see Robison, *supra* note 13, at 1205–06 (explaining how providers transmitted emails and how Congress responded to the new technology). Moreover, the same entity may be an RCS or ECS as well as a non-SCA-covered entity; the legislative history indicates that communications must be analyzed separately to determine whether they are protected (just because an entity has some communications that may be covered, that does not extend to all of them). H.R. REP. NO. 99-647, at 65 (1986), *available at* [http://www.justice.gov/jmd/ls/legislative\\_histories/pl99-508/house-rept-99-647-1986.pdf](http://www.justice.gov/jmd/ls/legislative_histories/pl99-508/house-rept-99-647-1986.pdf), *archived at* <http://perma.cc/G28P-CPPJ>; Hankins, *infra* note 42 (discussing public and private Facebook messages).

41. Kerr, *supra* note 10, at 1216–17. Two separate privacy protections are contained in 18 U.S.C. § 2702(a). They protect the contents of electronic communications: (1) that are in electronic storage by an entity that provides an electronic communication service to the public, 18 U.S.C. § 2702(a)(1); and (2) that are carried or maintained by an entity that provides a remote computing service to the public, 18 U.S.C. § 2702(a)(2). By contrast, the content of an electronic communication that is readily accessible to the public is not protected. *See* 18 U.S.C. § 2511(2)(g)(i).

Court cases have reached differing conclusions on just when an email is in electronic storage and subject to the act’s protections. *E.g.*, *Cheng v. Romo*, No. 11-10007-DJC, 2013 U.S. Dist. LEXIS 179727, at \*5 (D. Mass. Dec. 20, 2013) (email is in electronic storage). *Compare, e.g.*, *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9th Cir. 2004) (finding emails were in electronic storage), *with* *United States v. Weaver*, 636 F. Supp. 2d 769, 770–73 (C.D. Ill. 2009) (finding, in the context of a criminal subpoena, that “[p]reviously opened emails stored by Microsoft for Hotmail [email system] users are not in electronic storage”), *and* *United States v.*

precise scope of coverage of specific ISPs is still not entirely clear, although it appears, for example, that Facebook and other social media sites are within the SCA's ambit when it comes to limited-access (not publicly available) materials.<sup>42</sup>

The SCA also distinguishes between “content” information, meaning what is contained within communications generally, and “noncontent” information, defined as “record[s] or other information pertaining to a subscriber or customer” of the provider’s service.<sup>43</sup> These classifications are applicable only to the SCA’s exceptions—those circumstances in which a provider is allowed to disclose information in its possession.<sup>44</sup> An ISP may not only disclose noncontent material to any person other than a governmental entity (a group that would presumably include most fiduciaries) but also to any governmental entity with the account holder’s “lawful consent.” Noncontent information includes material about any communication sent, such as the addressee, sender, date/time, and other subscriber

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Warshak, 631 F.3d 266, 291 (6th Cir. 2010) (same). Precise resolution of this issue does not, however, affect the analysis in this Article.

42. See *In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1205–06 (N.D. Cal. 2012) (holding Facebook does not have to produce records of a user’s account due to SCA protection, although not opining on whether an executor’s consent would be legally adequate to permit Facebook to disclose); Allen D. Hankins, Note, *Compelling Disclosure of Facebook Content Under the Stored Communications Act*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 295, 309–11 (2012) (private Facebook messages are afforded protection). The SCA only protects electronic communications that, while provided by a public server, are still restricted. See Jim Lamm, *Thoughts on the Stored Communications Act, Federal Preemption and Supremacy, and State Laws on Fiduciary Access to Digital Property*, DIGITAL PASSING (Nov. 4, 2013), <http://www.digitalpassing.com/author/admin/>, archived at <http://perma.cc/Q2BT-A784> [hereinafter Lamm, *Thoughts on the SCA*]; Jim Lamm, *Facebook Blocks Demands for Access to Deceased User’s Account*, DIGITAL PASSING (Oct. 11, 2012), <http://www.digitalpassing.com/2012/10/11/facebook-blocks-demand-contents-deceased-users-account/>, archived at <http://perma.cc/84QU-2D9B> [hereinafter Lamm, *Facebook Blocks Demands*]. Thus, content available to anyone through your Facebook account is not covered, but content that only your “friends” can see is apparently covered. See *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 665–66 (D.N.J. 2013) (holding nonpublic Facebook posts are covered by SCA); Catherine Crane, *Social Networking v. the Employment-at-Will Doctrine: A Potential Defense for Employees Fired for Facebooking, Terminated for Twittering, Booted for Blogging, and Sacked for Social Networking*, 89 WASH. U.L. REV. 639, 668 (2012) (SCA protects private Facebook messages).

43. See § 2702(b), (c); § 2510(8); H.R. REP. NO. 99-647, at 34; Kerr, *supra* note 10, at 1228 (noncontent information includes “logs of account usage, mail header information minus the subject line, lists of outgoing e-mail addresses sent from an account and basic subscriber information all count as noncontent information”); Matthew J. Tokson, *The Content/Envelope Distinction in Internet Law*, 50 WM. & MARY L. REV. 2105, 2121–23 (2009) (noting the SCA allows certain disclosures of noncontent information). At the time of the SCA’s enactment, pen registers, which record the phone numbers called from a particular telephone line, were held not to be content. H.R. REP. NO. 99-647, at 34.

44. For records, as opposed to content, the ISP can voluntarily disclose with the customer’s lawful consent as well as to any entity other than the government. § 2702(c).

data.<sup>45</sup> For content-based communications, by contrast, voluntary disclosure is only permitted for seven reasons. Most significantly, an ISP may divulge content information “with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of a remote computing service.”<sup>46</sup> Interpreting this lawful consent exception is at the core of the problem for fiduciaries.

Beyond the issue of lawful consent, additional legal rationales support fiduciary access to SCA-protected information. For example, if a fiduciary takes on the legal status of the account holder, then the fiduciary’s own lawful consent is itself enough to satisfy the SCA, and any possible provider liability pursuant to the SCA becomes irrelevant. In addition, it is worth pondering whether the SCA, as written, creates privacy protections that survive death, although it does apply when the account holder is incapacitated.<sup>47</sup>

#### A. Lawful Consent by Whom?

The SCA’s limitations on disclosure of information have significant implications for estate administration<sup>48</sup> even though—or perhaps because—the provision does not explicitly address whether a fiduciary has lawful consent to access a decedent’s digital assets.

While the authors of the SCA in the mid-1980s understood that technology would continue to evolve and develop, they surely never contemplated such dynamic changes in electronic communications and storage, as Congress defined them at the time. As such, the unauthorized access that Congress feared—from a potentially unknown third party with the intent to do harm to the subscriber or communicator or to benefit from the subscriber’s information—is fundamentally different from the access at issue when a court-appointed fiduciary (or one authorized by the original account holder) is seeking access.

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45. § 2703.

46. § 2702(b). It may be, as one state court found, that “court-ordered consent would be effective to satisfy the Act.” *Negro v. Superior Court*, No. H040146, 2014 WL 5341926, at \*11 (Cal. Ct. App. Oct. 21, 2014).

47. See generally *Horton*, *supra* note 28, at 559–61 (discussing survivability of defamation and publicity rights lawsuits); 569–70 (noting that it is arguable the SCA “forbid[s] personal representatives from taking control of a decedent’s email . . . a result that would make all information therein indescendible”).

48. See Kristina Sherry, *What Happens to Our Facebook Accounts When We Die?: Probate vs. Policy and the Fate of Social Media Assets Post-Mortem*, 40 PEPP. L. REV. 185, 193–04 (2012) (defining and discussing classes of “digital assets”).

The stated and applied purposes of the SCA, its drafters' emphasis on the validity of implied consent as a means of lawful consent, and the traditionally understood role of an executor or administrator should most strongly inform an analysis of the intended meaning of the lawful consent exception. All three factors support the view that, in the absence of testamentary language to the contrary, a decedent gives lawful consent to the personal representative of her estate to access not only her tangible assets but also her digital ones. Of course, when a testamentary instrument includes explicit consent, then a fiduciary's access should pose no problem under the SCA.

### *B. The Purposes of the SCA*

“When the Framers of the Constitution acted to guard against the arbitrary use of government power to maintain surveillance over citizens, there were limited methods of intrusion into the ‘houses, papers and effects’ protected by the Fourth Amendment,” the House Committee Report on the SCA reads. “During the intervening 200 years, development of new methods of communication and devices for surveillance has expanded dramatically the opportunity for such intrusions.”<sup>49</sup>

The evil that Congress intended to guard against in enacting the SCA was clear. In extending Fourth Amendment–type protections to digital communications and information, the SCA would perform a balancing function: by “protecting privacy interests in personal information stored in computerized systems, while also protecting the Government’s legitimate law enforcement needs, the Privacy Act [would create] a zone of privacy to protect Internet subscribers from having their personal information *wrongfully used and publicly disclosed* by ‘unauthorized private parties.’”<sup>50</sup> In practice, the Act functions with the twin aims of limiting the government’s power to compel ISPs to provide information and limiting the circumstances under which such providers can voluntarily disclose information to other third parties.<sup>51</sup>

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49. H.R. REP. NO. 99-647, at 16 (1986).

50. S. REP. NO. 99-541, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557, 1986 WL 31929 (emphasis added). In introducing the bill, Senator Leahy explained, “There may have been a day when good locks on the door and physical control of your own papers guaranteed a certain degree of privacy. But the new information technologies have changed all that.” 131 CONG. REC. 24, 366 (1985), (statement of Sen. Leahy), *available at* [http://www.justice.gov/jmd/lis/legislative\\_histories/pl99-508/cr-24365-71-1985.pdf](http://www.justice.gov/jmd/lis/legislative_histories/pl99-508/cr-24365-71-1985.pdf), *archived at* <http://perma.cc/424U-2G23>. As discussed *infra*, the role of a fiduciary frequently involves access to just such papers.

51. Kerr, *supra* note 10, at 1212–13.



The theme of Fourth Amendment–like trespass is consistent throughout the SCA’s legislative history, and subsequent courts have used this analogy to define the scope of the Act.<sup>52</sup> In its SCA report, the Senate Committee gave insight into the types of privacy violations within Congress’s contemplation at the time of the law’s passage. With respect to RCS data, the Committee was primarily concerned with the vulnerable state of personal information, such as medical and business records, stored in offsite data banks. “For the person or business whose records are involved,” the Senate report states,

the privacy or proprietary interest in [the stored] information should not change. Nevertheless, because it is subject to control by a third-party computer operator, the information may be subject to no constitutional privacy protection . . . Thus, the information may be open to possible wrongful use and public disclosure by law enforcement authorities as well as unauthorized private parties. The provider of these services can do little under current law to resist unauthorized access to [it].<sup>53</sup>

This example suggests the Committee’s focus was on several general types of unauthorized access by “unauthorized” individuals and the government. Possible misuses included potential harm to a subscriber (e.g., disclosing information about his medical condition) and procuring a benefit for the unauthorized actor (e.g., gaining a business advantage by accessing the subscriber’s financial records).

As mentioned earlier, the SCA distinguishes between two types of materials subject to federal protection. Because ISPs can voluntarily disclose noncontent material, this presents fewer problems for fiduciaries. It is the content-based material, the letter itself rather than the envelope, which may have the most useful information to fiduciaries and which is subject to more stringent protection. Under the SCA, the relevant issue is who is seeking disclosure. If an “addressee or intended recipient . . . or an agent of such addressee or intended recipient” is seeking disclosure, then the ISP can disclose the content to that individual.<sup>54</sup> When a third party is seeking disclosure, an ISP may only disclose content-based material under certain limited circumstances, including—most critically for fiduciaries—with the lawful consent of the originator, the addressee, or the intended recipient.<sup>55</sup>

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52. See *Theofel v. Farey-Jones*, 359 F.3d 1066, 1072–73 (9th Cir. 2004) (“Permission to access a stored communication does not constitute valid authorization if it would not defeat a trespass claim in analogous circumstances.”). See *generally* *Cornerstone Consultants, Inc. v. Prod. Input Solutions, L.L.C.*, 789 F.Supp.2d 1029, 1042 (N.D. Iowa 2011) (noting some courts have used common-law trespass claims as an analogy).

53. S.REP. NO. 99-541, at 3.

54. § 2702(b)(1).

55. § 2702(b)(3).

With this background in mind, it is not surprising that the Act treats potential hackers as “computer trespassers.”<sup>56</sup> Some courts have explicitly adopted this language in their analyses of potential SCA violations, analogizing the unauthorized access of electronic communications or subscriber information to the tort of trespass.<sup>57</sup> Thus, a husband’s unauthorized reading of his wife’s email messages could violate the SCA.<sup>58</sup>

On the other hand, in enacting the SCA, Congress sought to protect privacy against unwarranted government snooping, rather than against the garden variety marshaling of assets engaged in by executors and other fiduciaries.<sup>59</sup> Nonetheless, this concept of lawful consent does create a potential obstacle to providing SCA-protected information to an individual empowered by law not only to access the assets of, but also to administer the estate of, the account holder.<sup>60</sup> However, the purposes of the SCA, as stated and in practice, belie the argument that a fiduciary commits the type of trespass that the SCA seeks to prevent.

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56. See § 2510(21) (defining a computer trespasser as someone who “accesses a protected computer without authorization. . . . [This] does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator [to access it.]”).

57. See, e.g., *Theofel*, 359 F.3d at 1073 (analyzing the statute with basic trespass principles in mind); *Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 208 n.4 (4th Cir. 2009) (acknowledging a court’s use of trespass as an analogy but declining to use it in this case as the court found it unnecessary to resolve the question).

58. *Bailey v. Bailey*, No. 07-11672, 2008 WL 324156, at \*6 (E.D. Mich. Feb. 6, 2008) (rejecting husband’s claim for summary judgment that he did not violate the SCA when he read wife’s emails).

59. Some decedents would prefer that their intimate correspondence never be disclosed to anyone—even their executor. Such an issue is not, of course, unique to the digital world. See, e.g., Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante versus Ex Post Justifications*, 82 *FORDHAM L. REV.* 1125, 1175 (2013) (exploring economic costs of restricting the right to destroy property post death); John H. Langbein, *Burn the Rembrandt? Trust Law’s Limits on the Settlor’s Power to Direct Investments*, 90 *B.U. L. REV.* 375, 378 (2010) (discussing the rule against capricious purposes); Lior Jacob Strahilevitz, *The Right to Destroy*, 114 *YALE L.J.* 781, 852–54 (2005) (critiquing and explaining restrictions on trust law preventing some destruction of the testator’s property); see also Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 *STAN. L. REV.* 299, 330 (1991) (reporting on requests by famous authors, including Beckett and Kafka, to destroy their works).

60. This need not create an obstacle; indeed, as the federal court in the Facebook litigation noted, nothing precluded Facebook from deciding to release the material on its own (the court held it had no power to compel Facebook to do so). *In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1205 (N.D. Cal. 2012).

*C. Explicit and Implicit Consent*

The SCA's limitations on disclosure of information have significant implications for the administration of digital assets<sup>61</sup> even though—or perhaps because—the Act does not explicitly address whether a fiduciary has such lawful consent to legally access a decedent's digital assets.

In its short discussion of the lawful consent exception, the SCA House Committee Report emphasized that such consent need not be explicit. It listed various types of acceptable implied consent, consistent with the need to protect against “digital trespassing” and public disclosure of the protected information. These acceptable forms include “a grant of consent electronically”; consent “inferred . . . from a course of dealing between the service provider and the customer or subscriber”; “a user having had a reasonable basis for knowing that disclosure or use may be made with respect to a communication, and having taken action that evidences acquiescence to such disclosure or use”; “the very nature of the electronic transaction” (i.e., one that is inherently public); and the terms and conditions of the provider's site.<sup>62</sup>

While this list does not appear to be exhaustive, it does serve as an indicator of the types of implied consent that Congress contemplated at the time of the SCA's passage. All of these examples complement the legislative purposes of the Act. If one uses legislative history to interpret the meaning of lawful consent,<sup>63</sup> then there seems to be no question that state-recognized fiduciaries should be included within the lawful consent exception.

Not surprisingly, litigation dealing with the issue of “lawful consent” for information from an RCS has often concerned ISPs' disclosure of an account holder's browsing behavior and comparable identifying information to third-party advertisers.<sup>64</sup> In analyzing

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61. See Kristina Sherry, *supra* note 48 (defining and discussing classes of “digital assets”).

62. H.R. REP. NO. 99-647, at 66 (1986), available at [http://www.justice.gov/jmd/lis/legislative\\_histories/pl99-508/house-rept-99-647-1986.pdf](http://www.justice.gov/jmd/lis/legislative_histories/pl99-508/house-rept-99-647-1986.pdf), archived at <http://perma.cc/G28P-CPPJ>.

63. There is, of course, a massive literature on the persuasive value of legislative history in interpreting statutes. *E.g.*, WILLIAM N. ESKRIDGE JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 221–30 (2d ed. 2006); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005); Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 315–65 (2013).

64. See generally 4 IAN BALLON, E-COMMERCE & INTERNET LAW: TREATISE WITH FORMS § 50.06[4][C][iii] (2d ed. & Supp. 2012–2013) (discussing litigation surrounding implied consent and disclosure of information to third parties).

whether valid lawful consent was given in these cases, courts have examined ISPs' terms-of-use and privacy policies, and consumer conduct indicating possible acquiescence to disclosure.<sup>65</sup> These situations are prime examples of one type of "trespassing" and "disclosure" that the SCA intended to prevent in the absence of authorization. By exchanging information about subscribers and their online preferences, ISPs and third-party advertising agencies benefit financially, possibly at the expense of account holders. While Congress did not expressly envision this type of monetary benefit in the mid-1980s, examples of contemplated implied consent given in the SCA's legislative history provide ample guidance for courts to interpret and rule on such situations, even with the comparatively advanced state of technology today.

By contrast, in the executor's quest to access a decedent's digital assets, there is no obvious direct reference in the SCA's legislative history concerning implied consent. At the time that the SCA was passed, legislatures feared disclosure risks concerning government searches and seizures, as well as the unknown entities who stood to benefit from accessing digital assets. Thus, the provisions were relevant to trespass generally and to ad agencies specifically. The SCA does not address this information as a personal asset—that is, as an intrinsically valuable possession that would provide useful information to a fiduciary.

While the SCA's creators did foresee the evolution of then-current technology to more sophisticated systems, they remained concerned with protecting people's online security from unauthorized, unknown entities desiring to harm them by publicizing or exploiting their information. Lawmakers did not view these advances as we see them today—as a set of assets capable of inheritance or facilitating access to other assets—and thus did not link the provision of lawful consent to the role of an estate executor or administrator. This silence and the differences between lawmakers' stated fears and estate administration scenarios provide some evidence that Congress did not intend the SCA to preclude a decedent from passing on access to digital assets along with the physical assets composing his estate.

Furthermore, the SCA's emphasis on implied consent suggests that the circumstances of such consent should be evaluated when deciding who has been given access to a subscriber's digital information. Consequently, the fiduciary's traditional role supports permitting access to a decedent's information, since a fiduciary must faithfully represent the interests of the decedent.

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65. *Id.*

Executors and administrators have lawful authority to administer the estate of the decedent, providing for the distribution and care of assets. They are often related to the decedent and, unlike anonymous hackers, are chosen by either the testator or the courts. This selection endows them with the responsibility of either carrying out the decedent's will or following those procedures established by law to administer the estate. An executor or administrator is hardly the sort of trespasser envisioned by the SCA, someone who accesses a decedent's information without authorization, intending to benefit from such information or to do harm to the decedent. While there is always the potential that even an executor or administrator could misappropriate SCA-protected information, this risk is present in the administration of tangible assets as well as digital ones, and state fiduciary law is designed to guard against just such misuse.

The fiduciary obligations of personal representatives to administer an estate in the best interests of the beneficiaries, of conservators to administer the protected person's property in accordance with her interests, of trustees to act with loyalty to the beneficiaries of a trust, and of agents to act with loyalty to a principal<sup>66</sup> are frustrated by the denial of their access to digital assets. The responsibilities of these fiduciaries underscore the importance of acknowledging that they have the lawful consent of the decedent, protected person, settlor, or principal to access digital assets. For example, personal representatives need to administer the estate as quickly and effectively as possible, to prevent the potential identity theft that may occur if the decedent's accounts are left to languish, to prevent losses to the estate, and to preserve the decedent's story to the extent possible.<sup>67</sup> The drafters of the SCA surely did not intend for their limits on disclosure of digital information to frustrate this process in the electronic world. Their aim was to provide Fourth Amendment-style protection against invasions of privacy, a very different issue from the concerns involved when appointing a fiduciary. Indeed, some invasion of privacy is inherent in the process of administering any estate or acting on behalf of a protected person; the goal of such invasion is, however, to act in the individual's best interests.

Consequently, the SCA's stated and applied purposes, its emphasis on implied consent to disclosure of a communicator's or subscriber's digital information, and the traditional role of an estate

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66. See, e.g., UNIF. PROB. CODE § 3-703 (2010); UNIF. TRUST CODE §§ 801-04 (2010).

67. Beyer & Cahn, *supra* note 25, at 137-41. Each of the other fiduciaries has comparable responsibilities.

executor or administrator can support a court holding that upon death, a decedent's digital assets pass along with his tangible ones, to be handled by an estate administrator. That is, even without any amendment to existing law or passage of new laws, a court could reasonably interpret the SCA to permit a fiduciary to access digital assets. Moreover, to the extent the fiduciary steps into the shoes of the account holder, there is an argument that the lawful consent requirement is irrelevant.

#### *D. So What About Fiduciaries—In Actions?*

Federal courts have paid little attention to the intersection between the SCA and trusts and estates fiduciaries. The earliest—and so far the only—recorded case concerned the estate of model Sahar Daftary. Daftary, at one time a personal shopper and a Face of Asia model, died after she fell from the twelfth floor of the apartment building in which her former boyfriend lived.<sup>68</sup> The executors of her estate sought access to the contents of her Facebook account as part of a coroner's inquest to determine whether her death was a suicide. Facebook objected to a subpoena, noting that it could not be compelled to disclose pursuant to a voluntary subpoena. In its filing, Facebook requested the federal court to issue an order specifying that the estate executors could provide lawful consent under the SCA. Facebook pointed out that the SCA itself does not clearly authorize personal representatives to provide the requisite consent and that Facebook could be subject to penalties for a release in violation of the statute.<sup>69</sup> The court agreed that Daftary's executors could not obtain the material through a subpoena, but it then ducked the issue of whether the executors could provide lawful consent for Facebook to release the material voluntarily. The court stated that it:

lacks jurisdiction to address whether the Applicants may offer consent on Sahar's behalf so that Facebook may disclose the records voluntarily. . . . Of course, nothing prevents Facebook from concluding on its own that Applicants have standing to consent on Sahar's behalf and providing the requested materials voluntarily.<sup>70</sup>

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68. Nazia Parveen, *Beauty Queen Who Died After Plunging 150 Ft Discovered Two Escorts at Her Ex-lover's Apartment an Hour Before Her Death*, MAIL ONLINE (July 24, 2012, 3:02 PM), <http://www.dailymail.co.uk/news/article-2178451/Sahar-Daftary-death-Beauty-queen-died-falling150ft-discovered-escorts-exs-apartment-hour-death.html>; *Sahar Daftary Inquest: Model's Ultimatum to Husband*, BBC NEWS (July 25, 2012, 1:07 PM), <http://www.bbc.co.uk/news/uk-england-manchester-18988374>, archived at <http://perma.cc/PG2N-QDPM>.

69. Facebook Inc.'s Motion to Quash Subpoena in a Civil Case at 6–7, *In re Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012) (No. 5:12-mc-80171-LHK (PSG)), 2012 WL 8505651.

70. *Facebook*, 923 F. Supp. 2d at 1206.

By refusing to resolve the ambiguity surrounding lawful consent, the court left Facebook and the executors—and others looking for precedent—in legal limbo. ISPs have, in other circumstances, disclosed protected material pursuant to a civil court order, although in the absence of a court's explicit finding of lawful consent or that the executor is an agent, such disclosure appears to place ISPs at risk of violating the SCA.<sup>71</sup>

### *E. But Is Federal Law Really a Problem?*

Violations of the SCA subject various entities to both civil and criminal liability, permitting an “aggrieved individual”<sup>72</sup> to sue for declaratory relief, injunctive relief, damages, and reasonable attorneys' fees. SCA cases so far have typically involved interception of electronic communications by an allegedly unauthorized third party. Of course, access to communications by a fiduciary presents a different situation. It is possible, however, that email recipients or civil liberties groups may claim aggrieved status under the SCA. In these situations, the fiduciary faces potential liability.

## IV. CHANGES

The increasing relevance of federal law to state probate laws is a cause for examination and, in some cases, concern.<sup>73</sup> When it affects

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71. Stefanie Olsen, *Yahoo Releases E-mail of Deceased Marine*, ZD NET, (April 21, 2005, 7:39 PM), <http://www.zdnet.com/news/yahoo-releases-e-mail-of-deceased-marine/142440>, archived at <http://perma.cc/ZL6P-U4T8>. Yahoo may only, however, have released the emails Ellsworth received. Jennifer Chambers, *Family Gets GI's E-Mail*, THE DETROIT NEWS, (April 28, 2005, 8:01 PM), <http://www.justinellsworth.net/email/detnewsapr.htm>, archived at <http://perma.cc/GUQ8-T9RV>. Such an outcome fits within the SCA exception of releasing content to an addressee but does not address the question of whether the family members could provide lawful consent. 18 U.S.C. § 2702(b)(1), (3) (2012).

72. § 2510(11) (defining “aggrieved person” under ECPA as one “who was a party to any intercepted wire, oral, or electronic communication or against whom an interception was directed”); § 2520(a) (“[A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.”); § 2707(a):

Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

73. See, e.g., John H. Langbein & Lawrence Waggoner, American College of Trust and Estate Counsel Joseph Trachtman Memorial Lecture (March 2012), in 38 ACTEC L.J. 1 (2012). Two decades ago, I explored how the Domestic Relations Exception may actually show a lack of

state inheritance law, federal law can either work in tandem with state law or hamper state law. In some instances, federal law can—and should—play a productive role in state trusts and estates law. At the least, in areas where state actions do not threaten federal policies, the federal government should leave space for states to continue in their traditional roles in this area. “Stale”<sup>74</sup> federal laws do (at least arguably<sup>75</sup>) affect fiduciaries in probate law. Existing laws—the SCA, the Computer Fraud and Abuse Act, and state fiduciary laws—could be interpreted to permit fiduciary access without any further action. Nonetheless, taking actions to update federal law, or to develop uniformity among the states, could ensure certainty and predictability.

### A. Amending Federal Law

The most straightforward approach to clarifying any ambiguities surrounding fiduciary access would be adding explicit authorization for such access directly into federal law. The SCA’s exceptions allowing an ISP to voluntarily disclose could be amended to allow for disclosure to the agent of a communication’s originator or for an agent to give lawful consent to disclosure.<sup>76</sup> The legislative fix would be simple: add “or state-recognized fiduciary” to the list of those who can provide lawful consent for disclosure. Of course, this amendment would still not compel ISPs to disclose, but presumably they would, in good faith, comply with a fiduciary’s request.

On the other hand, the simplest solution of amending the SCA is difficult politically. Legislators and commentators have repeatedly advocated reforms to the SCA, advancing a variety of different bases and multiple reasons, with no resulting change.<sup>77</sup> As in many areas of

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respect for its subject. Naomi Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1111–15 (1994).

74. See Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 611–13 (2009) (discussing the issue of a “stale will,” when courts have to decide to interpret the text “statically or dynamically”).

75. As noted earlier, if the fiduciary is presumed to take on the legal status of the account holder, which is the assumption under state laws, then the fiduciary’s consent is sufficient to allow for release of content-based information. Fiduciaries assume their authority under state law, and in the absence of the presumption that they have the same powers as the original account holder, federal law could be used to prevent their access.

76. § 2702(b)(1), (3); see Lamm et al., *supra* note 31, at 413–14 (proposing similar solution and including draft language). The authors are more skeptical than I am about the viability of “a clear and comprehensive solution at common law.” *Id.* at 412.

77. See, e.g., Patrick Leahy, *Leahy, Lee Introduce Legislation To Update Electronic Communications Privacy Act*, PATRICK LEAHY, (March 19, 2013), <http://www.leahy.senate.gov/press/leahy-lee-introduce-legislatio-to-update-electronic-communications-privacy-act>, archived at



law, it can be difficult to prompt Congress to take action, and the SCA deals with sensitive issues of privacy and national security.

In the absence of such explicit authorization, state and federal courts might simply interpret the statute to permit fiduciary access. The *Daftary* court order left open this possibility and arguably even suggested that Facebook might reasonably conclude that Daftary's executors could provide lawful consent. More formally, courts could develop a federal common law that recognizes fiduciary control.<sup>78</sup> The factors that support development of federal common law—"unique federal interests at stake, a need for uniformity, and the impropriety of relying on state law"<sup>79</sup>—are present here. Moreover, common-law recognition of fiduciary control would facilitate the implementation of the SCA and the ECPA,<sup>80</sup> forestalling the potential for an increasing number of conflicts as fiduciaries manage digital assets. On the other hand, the power of federal courts to make federal common law in this area is subject to debate.<sup>81</sup>

### *B. Uniformity Among the States*

While the question of whether lawful consent includes state-designated fiduciaries requires interpreting federal law, states can play several different roles. First, in the absence of federal legislation, states can enact laws that define lawful consent in the hope that federal courts will defer to their definition. Second, they can develop laws defining the scope of access, clarifying whether digital assets

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<http://perma.cc/WZN9-7VWQ> (advocating for an update to the ECPA); Matt Sledge, *ECPA Amendment Passes, As Senate Judiciary Votes To Require Warrant For Email Snooping*, HUFFINGTON POST (Nov. 29, 2012, 1:10 PM), [http://www.huffingtonpost.com/2012/11/29/ecpa-electronic-communications-privacy-act\\_n\\_2211889.html](http://www.huffingtonpost.com/2012/11/29/ecpa-electronic-communications-privacy-act_n_2211889.html), archived at <http://perma.cc/DD83-VR2W> (reporting the Senate Judiciary Committee's vote to amend part of the ECPA); Kerr, *supra* note 10, at 32–36 (explaining why and how the ECPA should be amended); Oza, *supra* note 36, at 1068–71 (suggesting amendments to the ECPA).

78. As John Langbein notes, this solution still does not ensure uniformity: "unless and until the Supreme Court (or Congress) does the federalizing, disagreements can form among the federal courts." Langbein, *supra* note 1, at 1692.

79. Gillian Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1297 (2012).

80. See Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781, 804–05 (2008) ("[T]he judicial role in preemption matters can be understood as falling within the power of the federal courts to create federal common law that helps implement federal statutes.").

81. See Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 826–27 (2005):

Legal scholars have propounded several theories that attempt to justify the existence and scope of federal common law [with some arguing (1) that] federal courts have inherent power to make federal common law in certain circumstances; and (2) [others arguing] that federal courts have power to make federal common law only if Congress has delegated power to them to do so.

should—or should not—be treated in the same manner as other assets handled by fiduciaries.<sup>82</sup>

Indeed, a growing number of states are considering, or have already enacted, legislation seeking to authorize personal representatives to access digital assets. Existing state legislation provides differing levels of access for fiduciaries over differing types of digital assets.<sup>83</sup> Many state laws have not addressed federal communications privacy law.<sup>84</sup>

The Uniform Law Commission's Uniform Fiduciary Access to Digital Assets ("UFADA") Drafting Committee developed a model state law that vests fiduciaries with the authority to access, manage, copy, or delete digital assets and accounts.<sup>85</sup> Unlike existing state laws, the model law goes beyond personal representatives to cover other fiduciaries as well: trustees, agents acting pursuant to a power of attorney, and conservators. The Committee's goal was to support digital access by those whom the original account holder or a court had legally authorized to act on the account holder's behalf. Like existing state laws in this area, the model law does not address

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82. Many ISPs are concerned about privacy issues raised by fiduciary access to digital assets. *See, e.g.*, Letter from Carl Szabo, Policy Counsel, NetChoice, to Rep. Peter C. Schwartzkopf, Speaker, Del. House of Representatives (June 12, 2014), <http://netchoice.org/wp-content/uploads/NetChoice-Opposition-to-DE-HB-345-House-of-Representatives.pdf>, *archived at* <http://perma.cc/WNB4-3WBE> (opposing fiduciary access because it "allows fiduciaries to read private and/or confidential communications such as spousal communications or a deceased doctor's communications with their patients").

83. *See* Chelsea Ray, Note, *'Til Death Do Us Part: A Proposal for Handling Digital Assets After Death*, 47 REAL PROP. TR. & EST. L.J. 583, 601–04 (2013) (examining existing state law regarding digital assets); Maeve Duggan, *Proposed Law Would Clarify Who Gets Access to a Deceased Person's Digital Accounts*, PEW RESEARCH CENTER, (May 6, 2014), <http://www.pewresearch.org/fact-tank/2014/05/06/proposed-law-would-clarify-who-gets-access-to-a-deceased-persons-digital-accounts/>, *archived at* <http://perma.cc/WU54-VL7R> (including a table depicting various states' digital assets laws); Beyer & Cahn, *supra* note 25, at 142–45 (identifying three generations of state laws based on coverage and access).

84. Moreover, state laws in this area are concerned with fiduciary access rather than asset distribution and allow existing terms-of-service agreements to control ownership issues. Pending Massachusetts legislation would allow for state law on access to trump contrary terms-of-service agreements. H.B. 4243, 188th Gen. Court (Mass. 2014); *see also* Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 614 (Mass. App. Ct. 2013) (fiduciary ability to challenge terms-of-service agreement). Access is a federal law issue to the extent it concerns electronic communications subject to the SCA. Otherwise, because there are few other relevant federal laws, distribution of assets is almost always subject to state probate and nonprobate law. *See* Horton, *supra* note 28, at 570 (gently critiquing UFADAA: "what is likely to be the most comprehensive revision to this area would not prevent firms from eliminating descendibility through the simple expedient of text on a page").

85. UFADAA (2014). The Committee has observers from the trusts and estates bar and the elder law bar, as well as representatives from various types of Internet service and content providers.

distribution of digital assets, on the assumption that it supplements existing state law in this area.

UFADA sets out two different categories of digital assets: those subject to the SCA and all others.<sup>86</sup> The uniform act seeks to provide fiduciaries with access to digital accounts and assets not covered by federal law in the same manner as fiduciaries may access other types of property historically subject to their authority.

For electronic communications addressed in federal law, UFADA adopts a similar distinction to that already in the SCA; it distinguishes between noncontent material—that is, subscriber information that ISPs can voluntarily release without lawful consent to any entity other than the government—and content-based communication. A fiduciary can only access the content-based communication with specific authority to do so. For personal representatives, this means a will or, where the will is silent or the decedent died intestate, a court order; for conservators, a court order; and for trustees and agents, the underlying trust document or power of attorney. Where the account holder has affirmatively indicated that it does not wish a fiduciary to access these materials, the fiduciary is without authority to do so.<sup>87</sup>

UFADA seeks to place the fiduciary into the shoes of the account holder through a variety of provisions: (1) it specifies that the fiduciary should be deemed to have the account holder's lawful consent, to establish that releasing the contents of electronic communications complies with the SCA; (2) it clarifies that if any digital material was illegally obtained by the decedent, then the fiduciary's attempt to take control of it will not “launder” it to pass clean title to the heirs; and (3) it sidesteps contentious issues about whether a fiduciary can challenge restrictive terms of service precluding transfer or specifying choice of law.<sup>88</sup> The Act does include

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86. *Id.* §§ 4–7.

87. *Id.* § 7(b).

88. In general, a fiduciary can assert whatever rights could be asserted by the account holder, subject to recognition of the inalienability of certain types of claims. *See, e.g., Ajemian*, 987 N.E.2d at 614 (allowing coadministrators of the decedent's estate to challenge a forum selection clause in a TOS agreement); Horton, *supra* note 28, at 570 (“The [UFADAA] would give personal representatives nearly the same dominion over virtual assets that they enjoy over chattels and real estate.”). One concern at drafting committee meetings was fiduciaries' efforts to access and then possibly transfer illegally obtained property, such as pirated material. There are potentially interesting analogies to digital property in the gun area (that the author is just beginning to explore). *See also* Lee-Ford Tritt, *Dispatches from the Trenches of America's Great Gun Trust Wars*, 108 NW. U. L. REV. 154, 175 (2013) (discussing the utility of gun trusts in the federal law context of firearm regulation); Nathan G. Rawling, Note, *A Testamentary Gift of Felony: Avoiding Criminal Penalties from Estate Firearms*, 23 QUINNIPIAC PROB. L.J. 286, 287–90 (2010) (noting the interplay of federal and state law in firearm ownership).

one right for the fiduciary that goes beyond the rights of the account holder: if the SCA permits the ISP to disclose, then the UFADA requires the ISP to do so in order to ensure fiduciary access and ease of administration, so that the fiduciary has the same knowledge base as the account holder.<sup>89</sup>

In the absence of specific federal law authorizing or precluding fiduciary access, and without more specific definitions of lawful consent from either Congress or federal courts, this becomes a federalism issue: What happens when a state enacts legislation in a field potentially governed by a federal statute?<sup>90</sup> Can state law establish who satisfies the lawful consent requirement of federal law and then mandate that content providers disclose material? Under the Supremacy Clause, of course, state laws cannot override federal laws. However, even though states cannot require federal courts to interpret federal statutes in a specific way, federal courts may look to state law for help in interpretation in certain contexts. Consent is a standard state law issue present, for example, in tort and contract cases. On the other hand, lawful consent may have a specific meaning within the SCA. Existing state laws and the UFADA expressly allow fiduciary access and define lawful consent, causing a potential conflict with federal law.

Under basic principles of federalism, state law may be explicitly preempted when Congress entirely and explicitly displaces state legislation.<sup>91</sup> That is, a statute may specifically delineate its preemptive consequences.<sup>92</sup> While the SCA is not explicitly preemptive, state law can also be preempted without such a direct statement. Implied preemption comes in two flavors: field preemption

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89. UNIF. LAW. COMM'N, FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 9 (2014). This has been a particularly contentious provision.

90. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867 (2000). See RICHARD H. FALLON, ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 644 (6th ed. 2009) (noting that "a federal statutory term [may sometimes be] interpreted as embodying a state law definition"). See generally Richard Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 NW. U.L. REV. 551, 553 (2008) ("On matters of federal-state regulation, the basic presumption is one against preemption, subject to some key exceptions."). For general commentary on federalism, preemption, *Erie*, and related issues, see CHARLES ALAN WRIGHT & ARTHUR MILLER, 19 FED. PRAC. & PROC. §§ 4514–20 (2d ed. 1996 & Supp. 2014)

91. See Ernest A. Young, "The Ordinary Diet of the Law": *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 270 (2012) (noting "some statutes have express preemption provisions"). Even the *Egelhoff* court noted, "There is indeed a presumption against pre-emption in areas of traditional state regulation such as family law," although it continued: "But that presumption can be overcome where, as here, Congress has made clear its desire for pre-emption." *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001).

92. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalism*, 53 UCLA L. REV. 1353, 1366 n.40 (2006).

and conflict preemption.<sup>93</sup> Field preemption occurs when the “statute is written in such a way that it provides no room for the operation of state law on the subject,” while “[c]onflict preemption is a narrower doctrine, recognizing state law to be preempted when it directly conflicts with existing federal law, or when state regulations interfere with or frustrate the implementation of congressional objectives.”<sup>94</sup> Of course, these categories are complex and overlap more in practice than jurisprudential, categorical descriptions may suggest.<sup>95</sup>

Preemption must be affirmatively shown. Indeed, as Professor Daniel Meltzer notes, “a number of canons of construction instruct courts to interpret federal statutes in a fashion designed to minimize conflict with state policy and state law.”<sup>96</sup> That is, the presumption against preemption requires a showing of congressional intent to supersede state law.<sup>97</sup> Courts must decide whether “a statute is sufficiently clear to trigger preemption and when it is so ambiguous as to leave state law undisturbed.”<sup>98</sup>

Particularly if federal law affects a field historically subject to state regulation, the anti-preemption presumption seems

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93. See *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 239 (2d Cir. 2006) (discussing the two categories of implied preemption); FALLON ET AL., *supra* note 90, at 646 (distinguishing conflict and field preemption); see also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (“If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.”).

As the *Madeira* court noted, federal law will not preempt state law under obstacle preemption analysis unless “the repugnance conflict is so ‘direct and positive’ that the two acts cannot ‘be reconciled or consistently stand together.’” *Madeira*, 469 F.3d at 241 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 544 (1977)).

94. Issacharoff & Sharkey, *supra* note 92.

95. See, e.g., Catherine M. Sharkey, *Against Categorical Preemption: Vaccines and the Compensation Piece of the Preemption Puzzle*, 61 DEPAUL L. REV. 643, 643–44 (2012) (explaining the line between preemption categories is not always clear).

96. Daniel Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 49 (2013); see also Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1529–52 (2006) (analyzing state court approaches to the interpretation of federal statutes from 1789 to 1820); Abbe Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 942 (2013) (“There are three basic iterations of the federalism-enforcing canons, and we inquired about all of them. Two function as presumptions: the eponymous ‘federalism canon,’ which counsels courts to interpret ambiguous federal statutes so as not to intrude on traditional state functions, and the ‘presumption against preemption,’ the default principle that courts should not interpret ambiguous federal statutes to preempt state law.”).

97. Bradford R. Clark, *Process-Based Preemption*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION 192, 193 (William W. Buzbee ed., 2009).

98. *Id.* at 205.

appropriate.<sup>99</sup> In the trusts and estates area, the Supreme Court repeatedly refers and defers to state law, particularly in the transfer tax area.<sup>100</sup> As the Court noted in 1942, “Grantees under deeds, wills and trusts, alike, take according to the rule of the state law. The power to transfer or distribute assets of a trust is essentially a matter of local law.”<sup>101</sup> Consistent with federalism principles, then, a federal court might reasonably validate a state law granting a fiduciary access to digital assets pursuant to lawful consent.<sup>102</sup>

Moreover, although the state has no power to compel an ISP to take an action that is contrary to federal law, where federal law permits the action and a state then compels it, the two laws can be interpreted as in harmony.<sup>103</sup> That is, ISPs can comply with state-law mandates without violating the SCA.

An interesting option for testing these federalism principles would involve one state enacting the UFADA, with the expectation of a test case challenging it, in order to resolve what constitutes lawful consent.<sup>104</sup> This is a risky strategy that might encourage states to delay enactment of the UFADA and could lead to more uncertainty if federal courts make conflicting decisions. Pragmatically, state legislatures do not necessarily coordinate their sessions and enactments in this manner, so states might not wait for the test case. Yet, states need to take some action to deal with the increasing number of estates with digital assets. Following a decision in the test

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99. *Arizona v. Inter-Tribal Council of Ariz. Inc.*, 133 S. Ct. 2247, 2256 (2013); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); Clark, *supra* note 97 at 199. Professor Clark observes that, notwithstanding its rhetorical adherence to the presumption, the Court does not always apply it. *Id.*

100. See Mitchell Gans, *Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance?*, 48 EMORY L.J. 871, 872 (1999) (noting that in the “transfer-tax context,” state law plays a large role, often being “determinative”); Jeffrey Schoenblum, *Strange Bedfellows: The Federal Constitution, Out-of-State Nongrantor Accumulation Trusts, and the Complete Avoidance of State Income Taxation*, 67 VAND. L. REV. 1945 (2014); Langbein, *supra* note 1 (discussing wealth transfer choice of law issues post *Egelhoff*).

101. *Helvering v. Stuart*, 317 U.S. 154, 161 (1962).

102. See Lamm, *Thoughts on the SCA*, *supra* note 42 (“I believe that a court would conclude that state fiduciary laws . . . are *not* in conflict with and are *not* preempted by the [SCA].”).

103. See *Negro v. Superior Court*, No. H040146, 2014 WL 5341926, at \*15 (Cal. Ct. App. Oct. 21, 2014) (“Insofar as the Act permits a given disclosure, it permits a court to compel that disclosure under state law. It follows that when a user has expressly consented to disclosure, the Act does not prevent enforcement of a subpoena seeking materials in conformity with the consent given.”).

104. See John Gregory, *Fiduciaries’ Access to Digital Assets*, SLAW (Jan. 9, 2014), <http://www.slw.ca/2014/01/09/fiduciaries-access-to-digital-assets/>, archived at <http://perma.cc/CEF5-NWW3> (noting this would not be a “speedy strategy”). This is an issue that appears rarely in existing state legislative efforts, and thus it merits further attention.

case, states could simply amend their statutes to establish the appropriate procedures for ensuring fiduciary access.

### C. Private Actions

In addition to, and regardless of, changes in applicable state and federal laws, the ISPs themselves might address the lawful consent issue. And estate planners have already begun to do so as they counsel clients. While these efforts do not resolve potential federalism issues directly, they provide alternative means for account holders to articulate their preferences.

Assuming the enforceability of the terms-of-service agreements, ISPs can add provisions that authorize legally designated fiduciaries to access electronic communications. The SCA House Report explicitly notes that this step might be acceptable.<sup>105</sup> Or, ISPs might establish an opt-in provision, allowing the subscriber to lawfully consent to fiduciary access.<sup>106</sup> Given the SCA's deference to the subscriber, an individual's affirmative indication of lawful consent—either through a terms-of-service agreement or in a separate document (such as a trust or will)<sup>107</sup>—should satisfy the SCA. Such an option also allows the subscriber not just to provide consent but also to affirmatively withhold consent and thereby preclude fiduciary access.

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105. H.R. REP. NO. 99-647, at 66 (1986), available at [http://www.justice.gov/jmd/l/legislative\\_histories/pl99-508/houerept-99-647-1986.pdf](http://www.justice.gov/jmd/l/legislative_histories/pl99-508/houerept-99-647-1986.pdf), archived at <http://perma.cc/AA5V-Y3B3> (“If conditions governing disclosure or use are spelled out in the rules of an electronic communication service, and those rules are available to users or in contracts for the provision of such services, it would be appropriate to imply consent on the part of the user to disclosures. . .”).

Of course, this is not spelled out in the statute itself. See also Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848–61 (1992) (discussing why legislative history should be used in statutory interpretation); Gluck & Bressman, *supra* note 96, at 964–90 (examining the use of legislative history in statutory interpretation); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640–66 (1990) (analyzing the new textualism approach to statutory interpretation).

106. Google, for example, has set up an option that allows users to share data from their account with a trusted contact after a certain period of inactivity. *About Inactive Account Manager*, GOOGLE, <https://support.google.com/accounts/answer/3036546?hl=en> (last visited Oct. 5, 2014). While not targeted to legally-appointed fiduciaries, it could be used to permit fiduciary access.

107. For suggested language, see, for example, Lamm et al., *supra* note 31, at 416–18. UFADAA allows an account holder to make an affirmative choice in a terms-of-service agreement that would limit a fiduciary's access rights, providing that such a choice would supersede a contrary provision in a governing instrument. UFADAA § 8(b) (2014).

## V. CONCLUSION

Other areas of federal and state law inevitably affect the trusts and estates field. Because those laws focus on different goals, they do not always assess and specify their impact on wealth-transfer law. In an ideal world, the trusts and estates implications would be foremost (or at least critically important) in legislators' minds.

Given the number of laws without such explicit recognition of trusts and estates law, the question is how to proceed. State legislators, for a variety of reasons, will probably be more responsive than Congress to such concerns. On the other hand, in the absence of federal mandates, achieving state uniformity can be difficult.<sup>108</sup> Slight variations between states lead to undesirable uncertainty for fiduciaries and for ISPs. Given the difficulty of developing uniformity and in light of the uncertain applicability of federal law, amendments to federal legislation would be helpful. This approach ensures both uniformity and respect for existing and future state law in this area. It is also preferable to the alternative common law approach, which is a piecemeal process—even though it should ultimately reach the same result. Sorting out how digital assets are the same, and how they differ, from other assets is truly a work in progress.

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108. State law may, however, be “even *more* uniform than federal statutory law that depends on varied state implementation,” as exemplified by “Uniform Laws.” Abbe Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2022 (2014). As states enact uniform laws, however, local practice may result in variation in the language. Delaware, for example, which became the first state to enact UFADAA, based its legislation on an earlier version of the Act. See H.B. 345, 147th Gen. Assemb., Reg. Sess. (Del. 2014).



