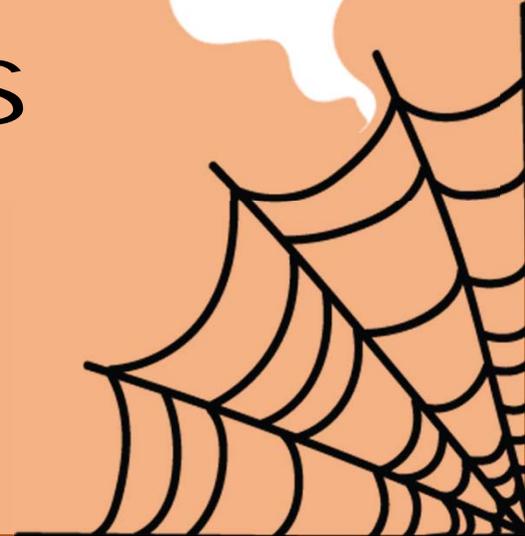


**YOUNG  
CONAWAY**

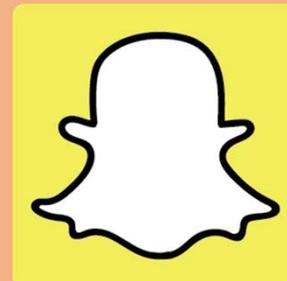
# Social Media Ghosts and Other Online Hauntings

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**Oct. 31, 2018**

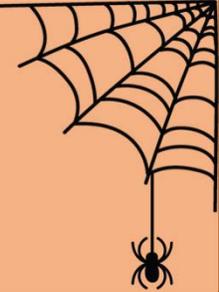


# Let's start with a poll



# Social Media Statistics

- More than 65% of American adults use social networking sites
- 1 billion+ use Facebook
- 1 million+ use Instagram every month
- 336 million use Twitter
- 562 million use LinkedIn
- 191 million use SnapChat
- The average person likely has 25 or more online accounts.





YOUNG  
CONAWAY

# What happens to your social media account after you die?

- Think about what's in your online accounts:
  - Photographs
  - Emails
  - Contacts
  - Secrets?
  - Private thoughts
- Would you want your account to be:
  - accessed by your family?
  - Remain private?
  - Be deleted?

# Contract Terms Tend to Favor Privacy

- The fine print you agree to when you sign up for an account generally:
  - Prohibits transfer of the account
  - May restrict your ability to share the account/passwords
  - Includes privacy terms
  - May have a clause that says which state's law applies
  - May have a clause that says where a dispute can be brought

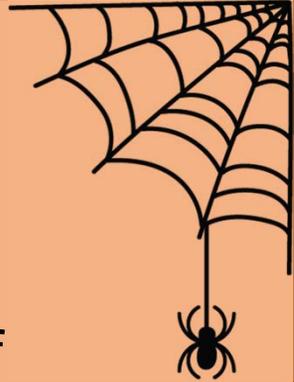


# Social Media Provider May Allow Access

- Google- Inactive Account Manager
  - Select a time period of inactivity (from 3 to 18 months)
  - Account either deleted or shared with a designated person
- Twitter
  - No access but will work to deactivate account upon proof of death
  - Deletes accounts without activity for 6 months
- Facebook
  - Account can be “memorialized” and run by a legacy contact, but limited access

# State Legislation

- High profile stories of families unable to access accounts of deceased lead to legislative changes starting in about 2013
- 20+ states have legislation permitting some access
- In 2014, the Uniform Law Commission proposed the Uniform Fiduciary Access to Digital Assets Act (revised in 2015)
- Delaware is first state to adopt the uniform act
- UFADAA adopted in 40+ states



# UFADAA

- Goal: facilitate fiduciary access and custodian disclosure while respecting the privacy and intent of the account holder (deceased or incapacitated)
- Authorizes four types of fiduciaries to access an account:
  1. Executor of deceased person's estate
  2. Court-appointed guardians
  3. Agents appointed pursuant to a power of attorney
  4. Trustees
- Allows access to “Digital Assets” = digital property and electronic communications



# UFADAA

- Account holder can plan for the management and disposition of her digital assets by appointing a designee or providing directions using an online tool of the account provider or in a will, trust, power of attorney, or similar record.
- If no option exercised, the terms of service of the account provider will control whether a fiduciary may access the digital asset.
- If that doesn't cover it, the UFADAA will apply.
- Without account holder consent, access may be limited.
  - Ex: may be able to receive sender and recipient email addresses, but not content of messages

# Delaware's Statute

- 12 Del. Code § 5001, et seq.
- Adopted 2014
- Fiduciary Access to Digital Assets and Digital Accounts
- Person appointed as account holder's fiduciary can exercise control over digital asset or account
- Law may override contrary provisions in terms of use
- Fiduciary gets same access as account holder upon providing documentation of authority
- Fiduciary can seek a court order compelling compliance if account provider refuses to comply. May also get damages.
- Account provider gets immunity for complying with valid written requests and actions taken in conformance with act.

# Delaware's Statute

- Law does not apply to digital assets or accounts provided by an employer regularly used in course of business
- Applies only to Delaware residents
- Applies only to estate-planning documents governed by Delaware law
- Incorporation status of account provider not significant

# Other Laws

- Fiduciary access subject to fiduciary duties and other applicable laws (like copyright laws)
- Privacy Expectation Afterlife and Choices Act (“PEAC”)
  - Enacted in Virginia
  - Provides more limited disclosure of an online account from the last 18 months of a decedent’s life
  - Court order may be required to obtain more access, but will respect to indicated intent pre-death to keep records private



# Digital Estate Planning Take-aways

- Address it in your traditional estate planning
  - Appoint a digital executor
  - Provide instructions on managing accounts
  - At least, consider including a list of the assets/accounts so they can be shut down
- Store a list of accounts and access credentials
  - Keep in safe, but accessible place
  - Permits access, but privacy issues
- Use the settings available from the account provider
  - Designate a manager
  - Use a “digital estate planning” service

# Case Law

- Generally, right to privacy does not die with you.
- *Ajemian v. Yahoo!, Inc.*, No. SJC-12237 (Mass. Oct. 16, 2017)
  - 43-year-old intestate decedent
  - Siblings, as estate personal representatives, seek access to his email account
  - Yahoo! says no b/c Stored Communications Act and terms of service
  - Court: denied summary judgment for Yahoo! under SCA b/c no federal intent to preempt probate rights, but remanded for whether terms of service were an enforceable contract

# Other Online Hauntings



- Right to be Forgotten / Right to Erasure
  - Concept that one has the right to have deleted online information about oneself
  - The right to privacy versus the right of expression/information
  - The right to be forgotten is fundamental in Europe and now codified in GDPR
  - U.S. tends to favor right to information
  - California law allows right to be forgotten for minors to delete information they posted online
  - Will we see this right expand in the U.S.?



# Don't Become A Social Media Ghost



Live long and plan!

