

SUCCESSION PLANNING IN CYBER SPACE – HAVE YOU THOUGHT ABOUT YOUR DIGITAL ASSETS?



Whilst cyber space has become an increasingly accessible and common platform of communication used in our business and personal lives, many people have yet to turn their minds to what happens to all of their cyber data when they die.

Those terms and conditions that we signed up to when we first got our iPad or made an Internet purchase are not as easy to either penetrate or pass on to your successors as you might think.

Your digital estate

New Zealand does not yet have specific legislation for managing the digital assets of a deceased person. It is important to turn your mind to how you want to deal with these assets after your death.

We refer to digital assets here in the sense of all of your electronically stored data, whether that be on a storage device such as a memory stick or hard drive, on the Internet or in the Cloud. Practical difficulties immediately arise for your trustees or estate administrators if those people do not have the relevant passwords and usernames to access your information. Businesses can grind to a halt if your surviving business partners are unable to access your emails or customer management systems. What's more, any delay in gaining access to this information may jeopardize revenue derived from and ownership of those assets.

What kind of assets do we need to think about?

What's on your computer? Do you have a precedent system, records of your financial information such as your debtors, contractual arrangements and correspondence recording the basis upon which you have entered into a business relationship?

Passing on the actual computer or storage device under your will can be done in the same way as you might pass on any other specific asset. It is the electronic keys to these devices that are more problematic. If access passwords and usernames are included in a will you potentially breach the terms and conditions of confidentiality that you signed up for when you bought the device, and you leave yourself vulnerable to the possibility of identity theft. Eventually that information will become part of the public record.

Your Apple device The license for your Apple Mac Book or iPad does not specifically address what happens in the event of your death and the license is described as *'a nontransferable license to use the Licensed Application on any Apple-branded products running iOS... or Mac OS X...that you own or control and as permitted by the usage rules...'*



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Apple users:

- Cannot dispose of their licensing rights through contractual arrangements
- Cannot rent, lease, sell, transfer, redistribute or sublicense the Licensed Application – if you sell your Apple device you must remove the Licensed Application before you do.
- Are bound to keep their Apple ID and password confidential.

Writing your username and password down in an estate planning list is likely to immediately breach your Apple contract.

Your Kindle Under your Kindle license, the content of your Kindle *'is licensed, not sold, to you by the Content Provider. ... Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the Kindle Content or any portion of it to any third party...'*

Potentially disposing of your Kindle under your will would breach these terms.

Cloud storage

Cloud storage has become a convenient and frequently used alternative to hard copy file storage. Challenges for executors and administrators include:

- They may be legally or practically barred from accessing the data that the deceased stored in the Cloud.
- They may not be aware that the deceased used a Cloud storage facility.
- They may not have the user name and password to access any Cloud facility.
- The deceased may have agreed to take on a non-transferable account, e.g. Dropbox; and that company may make it difficult for the executors/administrators to retrieve information.

Whilst it is possible to pass on a device and its username and password, the latter part of this process may be in breach of the agreed terms of use. Organizations have dealt with this issue in a variety of ways. For example:

- Facebook users can appoint an online executor (a 'legacy contact') who can manage parts of the deceased person's account. This will not give unrestricted access but can give permission to download photos and profile information shared on Facebook. If there is no legacy contact, friends and family of the Facebook user can request that the account be memorialized or removed from Facebook.
- Google users can appoint an inactive account manager or choose to have their account deleted. The status of content purchased from Google Playstore is not clear.
- Dropbox accounts are not transferable but will be deleted after 12 months of inactivity.
- Yahoo takes the position that relatives and friends cannot access the deceased's account.



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Why do you need to address disposal of digital assets?

Without specifically turning your mind to the disposal of digital assets, it may be that executors and administrators:

- overlook valuable assets
- expose the deceased estate to the possibility of identity theft
- will be unable to assist business partners who require access to digital assets managed by the deceased.

Apart from the impact on assets with financial value, failure to provide for the disposal of personal digital assets can mean that access to information and assets with sentimental or historical value may be lost.

What steps can you take?

It seems that the law has yet to provide a completely satisfactory solution to the disposal of your digital assets.

Rather than leaving it to chance, specifically turn your mind to your digital assets when you are planning your will. Think about what you would like to have happen to them and keep and update an inventory of these assets. Talk to your trusted adviser and make sure you have made the best provision that you can for the disposal of those assets when you are no longer here to control them.

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