WHO OWNS A DECEDENT’S E-MAILS: INHERITABLE PROBATE ASSETS OR PROPERTY OF THE NETWORK?

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“E-mail is ‘comparable in principle to sending a first class letter . . .’.”

—People v. Lipsitz1

I. INTRODUCTION

In early 2005, military dad John Ellsworth made national news through his seemingly innocuous request to be allowed access to his deceased son’s e-mail account.2 His twenty-year-old marine son, Justin, was killed in Fallujah on November 13, 2004, by a roadside bomb.3 Mr. Ellsworth wanted to collect e-mails that his son wrote and received while in Iraq to create a memorial in his son’s honor.4 Were his e-mails similar to “sending a first-class letter,” with all of the attendant implications for ownership and inheritability, or is the comparison mentioned in Lipsitz inaccurate?

Yahoo!, Justin’s e-mail service provider, complied with Mr. Ellsworth’s request, but only after receiving an order from a Michigan probate court.5 Yahoo! stated that, in the absence of a court order, **

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4. See Cha, supra note 2.

such disclosure to a third party would violate its privacy policy.\textsuperscript{6} Yahoo!, which in a recent year had thirty-nine million free e-mail account holders,\textsuperscript{7} requires that users “agree and consent to . . . the Yahoo! Terms of Service and Privacy Policy” during the sign-up process.\textsuperscript{8} The Terms of Service indicate that survivors have no rights to access the e-mail accounts of the deceased; under a section entitled “No Right of Survivorship and Non-Transferability,” account holders must agree that the “contents within [their] account[s] terminate upon . . . death.”\textsuperscript{9}

Although the status of e-mail as property has been questioned for over a decade,\textsuperscript{10} there are as yet few statutes or decisions providing guidance on the matter.\textsuperscript{11} Indeed, considerable uncertainty surrounds the ownership and property status of e-mail,\textsuperscript{12} which is a matter of immediate and significant relevance.\textsuperscript{13} It has been estimated that 548 billion e-mail messages were transmitted in the United States in 2003, a number that is certain to have grown.\textsuperscript{14} While the vast majority of

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  \item \textsuperscript{7} Derek E. Bambauer, \textit{Solving the Inbox Paradox: An Information-Based Policy Approach to Unsolicited E-Mail Advertising}, 10 \textsc{Va. J.L. & Tech.} \textit{\# 56} (2005).
  \item \textsuperscript{8} Yahoo! Registration, \textit{https://edit.yahoo.com/config/eval_register} (last visited June 17, 2007).
  \item \textsuperscript{10} \textit{See}, e.g., Joe Panepinto, \textit{Who Owns Your E-Mail?}, 12 \textsc{Telematics & Informatics} 125, 127 (1995); \textsc{Anne Wells Branscomb}, \textit{Who Owns Information? From Privacy to Public Access} 92–105 (1994) (devoting an entire chapter to question “Who Owns Your Electronic Messages?”).
  \item \textsuperscript{11} One exception is Connecticut, which has statutorily provided for access by executors to the e-mails of decedents. \textit{See} \textsc{Conn. Gen. Stat. Ann.} \textit{§ 45a-334a(b)} (West 2006).
  \item \textsuperscript{12} \textit{See} Cha, \textit{supra} note 2 (quoting statement of Cindy Cohn, attorney, Electronic Frontier Foundation, that “[w]e might wish that our Web-based e-mail accounts were like our books and diaries, but they certainly aren’t for most legal purposes.”); Baldas, \textit{supra} note 5 (quoting opinion of Michael Overing, professor of Internet law, University of Southern California, that “people who use e-mail [don’t] realize that an electronic document is the same as a paper document.”); \textit{Should Family Members Have Access to Your Email Accounts After You’re Gone? Informational Hearing: Email as Personal Property vs. Private Communication: Hearing Before the Cal. S. Select Comm. on the Legal, Soc. & Ethical Consequences of Emerging Techs.} (2005), \textit{available at} \textit{http://www.senate.ca.gov/ftp/sen/committee/select/LEGAL_SOCIAL_TEC/_home/HearingsAgendas/HearingBackgrounder5-13-05.htm} (discussing current uncertainty in law with respect to e-mail ownership and disposition upon death, and identifying unresolved issues).
  \item \textsuperscript{13} Joshua A.T. Fairfield, \textit{Virtual Property}, 85 \textsc{B.U. L. Rev.} 1047, 1056 (2005).
  \item \textsuperscript{14} Daniel B. Garrie & Matthew J. Armstrong, Note, \textit{Electronic Discovery and the Challenge Posed by the Sarbanes-Oxley Act}, 9 \textsc{UCLA J.L. & Tech.} \textit{\# 3} (2005), \textit{http://www.lawtechjournal.com/articles/2005/02_050530_garrie_armstrong.pdf}. \textit{World-
these messages may be unremarkable communications or even unsolicited commercial e-mail (commonly known as “spam”), some e-mail messages may have significant value. The personal letters of presidents, actors, sports figures, and others may command large sums of money. These personal letters of presidents, actors, sports figures, and others may command large sums of money. Where messages do not possess economic significance, they may be time capsules of great personal significance. E-mail can now be used for the transmission not only of personal messages, but also of photographs. The intangible value of these communications to those who have a connection to them may be analogous to the value of yesterday’s personal letters and Polaroid pictures. What happens if the only copy left in existence is maintained by Yahoo!, which denies access to the would-be heirs and declares that even its copy will be destroyed within a matter of time, according to its privacy policy and terms of use?

This Article is divided into six parts: Part II outlines some copyright basics and addresses the copyright status of e-mail messages as well as the current de facto control of e-mail by service providers independent of copyright implications. Part III suggests bailment law as an appropriate framework for the analysis of the legal status of e-mail held by a third party, and also offers comparisons to warehouse law and the law of safe deposit boxes. Part IV summarizes the current legal status of e-mail, explains why privacy arguments may be inapposite in the case of a decedent’s e-mail, and sets the stage for the recommendations in Part V. Finally, in Part VI, the Article concludes with a comparison of e-mail to paper and pen (first class) letters and their attendant ownership and intellectual property interests. The article suggests that e-mail, as a unique kind of property, has not been given sufficient legal protection as an inheritable probate asset.

15. For example, shortly after the birth of the nation Congress purchased the private letters of George Washington for $25,000, an impressive price at that time. Folsom v. Marsh, 9 F. Cas. 342, 347 (C.C.D. Mass. 1841) (No. 4901). More recently, a four-page letter by George Washington was reportedly sold for $2.5 million. Dick Kagan, Hail to the Chiefs, ART & ANTIQUES, Nov. 2004, at 52, 54. Such “private letters” of today’s presidents may be comprised largely of e-mail communications. The private letters of famous authors may similarly possess significant economic value. In the case of Salinger v. Random House, Inc., the Second Circuit granted a preliminary injunction to prevent the publication by Random House of a biography of J.D. Salinger which closely paraphrased a number of Salinger’s personal letters. 811 F.2d 90, 93, 100 (2d Cir. 1987). The then-current value of the letters was estimated at over $500,000. Id. at 99.
that legislative action could provide some much needed certainty in this developing area of law.

II. COPYRIGHT LAW AND EMAIL

A. Basics of Copyright

1. Subject-Matter

Appropriate subject-matter for copyright protection includes a vast array of original works of authorship, including literary, musical, dramatic, and choreographic works, pantomimes, pictorial, graphic, or sculptural works, and motion pictures or other audiovisual works. The Digital Performance Right in Sound Recordings Act of 1995 amended the Copyright Act by adding the definition of “digital transmission”: “a transmission in whole or in part in a digital or other non-analog format.” An e-mail message is a literary digital transmission and therefore copyrightable subject-matter.

2. Ideas and Facts Not Copyrightable

A significant limitation on the rights of copyright holders is found within what is sometimes referred to as the “idea/expression dichotomy.” As with all works of authorship, the copyright owner secures protection only for the expressive content of the work, not the ideas or facts contained therein.

18. See, e.g., Crown Awards Inc. v. Trophy Depot, 2003 WL 22208409, at *16 (E.D.N.Y. Sept. 3, 2003) (considering, in context of copyright infringement action, whether one e-mail advertisement was substantially similar to another e-mail advertisement); Prospect Planet LLC v. Paychecks for Life.com, 2003 WL 751023, at *1 (D.N.D. Jan. 16, 2003) (noting that defendant “copyrights [its] e-mail templates”). But see Toms v. Pizzo, 4 F. Supp. 2d 178, 185 n.3 (W.D.N.Y. 1998) (declining to opine whether particular e-mail communications in question would be subject to any copyright protection as a matter of law).
19. See, e.g., T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 114 n.8 (1st Cir. 2006).
20. Salinger v. Random House, Inc., 811 F.2d 90, 95 (2d Cir. 1987). In Salinger, the Second Circuit noted that Salinger’s biography was written using letters authored by him but no longer in his possession. These letters had been obtained from three university libraries to which they had been donated by their recipients. Id. at 93. The biography contained around two hundred words that had been quoted from the letters, and fifty-nine instances of either quoting or close paraphrasing of the letters. Id. In issuing the injunction to prevent publication of the biography, the court noted that it was not disputed that Salinger was entitled to a copyright in the letters, as with any other work of literary authorship. Id. at 92–94. Furthermore, the court reiterated that “[t]he copyright owner owns the literary property rights, including the right to com-
e-mail recipient, or someone viewing the e-mails possessed by the recipient, to prepare a work incorporating the facts contained in the e-mail messages without violating copyright laws, as long as the particular expression of those facts was not copied.

3. Copyright and the Fair Use Doctrine

Copyright laws provide the copyright holder the exclusive right to reproduce the work, prepare derivative works based upon the original work, distribute or rent copies of the work to the public, perform the work, or display the work. Unlike the nearly absolute right of patent holders to exclude others from practicing their inventions, the exclusive rights provided to copyright holders are subject to the significant exception of “fair use.” The fair use exception “affords considerable ‘latitude for scholarship and comment,’” permitting the reproduction of copyrighted material for such purposes as criticism, news reporting, teaching, and research. In determining whether the use made of a copyrighted work constitutes fair use, courts must do more than merely categorize the use as criticism, teaching, etc. Instead, they must consider four statutorily prescribed factors: “(1) the purpose and character of the use . . .; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used . . .; and (4) the effect of the use upon the potential market for . . . the copyrighted work.” Under the first factor, a use which is commercial rather than nonprofit is less likely to be considered fair use. Conversely, under the second factor, the use of a work that is primarily plain of infringing copying, while the recipient of the letter retains ownership of ‘the tangible physical property of the letter itself.’” Id. at 94–95 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.04 (1986)). Thus, there had been no copyright violation by the donation of the letters to the university libraries.

22. 17 U.S.C. § 107; see Katherine Machan, Bending Over Backwards for Copyright Protection: Bikram Yoga and the Quest for Federal Copyright Protection of an Asana Sequence, 12 UCLA ENT. L. REV. 29, 53 (2004) (“Whereas the owner of a patent obtains the right to exclude others from using the patented invention, copyright protection does not give the author the right to prevent others from using the copyrighted work.”).
25. Id. For an early formulation of the factors now codified in the fair use doctrine, see Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (“[W]e must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”).
fact-based (as opposed to creative) would favor fair use.\textsuperscript{27} The third factor suggests that the smaller the portion of the copyrighted material used, the greater the likelihood that the use will be fair.\textsuperscript{28} Finally, the fourth factor indicates that where the use increases or does not affect the market for the copyrighted work, the use is more likely to be considered fair.\textsuperscript{29}

These four factors form the basis of a flexible framework for the analysis of potential copyright violations. The United States Supreme Court has indicated that the list is “not intended to be exclusive.”\textsuperscript{30} Moreover, no one factor is dispositive.\textsuperscript{31}

4. Transfer of Copyright

In order to effectuate a transfer of copyright ownership (for example, from the e-mail account holder to the service provider) there must be a writing evincing intent to transfer the copyright ownership.\textsuperscript{32} Importantly, this writing requirement does not apply when the transfer is made “by operation of law,” such as by probate transfer.\textsuperscript{33} Federal law provides that the intellectual property component of copyrightable works may also be passed to heirs, either “by will or . . . by

\textsuperscript{27} See id. at 1016.
\textsuperscript{28} See id.

\textsuperscript{29} Note that reproducing copyrighted material can in some cases increase demand for the copyrighted work. For example, news reporting that uses copyrighted material from a feature film may increase the demand for the film, even if the comments are negative or critical. See generally David Kirkpatrick, \textit{Bad Publicity? What’s That?}, FORTUNE, June 9, 1997, at 136 (“Sometimes a bad brand name is better than no brand name at all.”); \textit{The Bad Publicity Factor}, PSYCHOL. TODAY, Mar./Apr. 1995, at 22 (“[E]ven bad publicity is better than no publicity at all . . . .”)


\textsuperscript{31} See id.

\textsuperscript{32} 17 U.S.C. § 204(a) (2006); 3 \textsc{Melville B. Nimmer \& David Nimmer, Nimmer on Copyright} § 10.03[A][1]–[2] (2006). Furthermore, it is generally “unlikely that the writer of a letter will intend to give his letter’s recipient a license to publish or otherwise exploit the letter’s contents.” 1 \textsc{Paul Goldstein, Goldstein on Copyright} § 4.2.1.3 (2d ed. Supp. 2005). “Unless it is clear from the letter or other circumstances that the writer intended to waive his rights in the letter’s content, or to convey these rights to the recipient of the letter, the recipient will own only the paper and ink with which the letter was written and will have neither exclusive nor co-ownership rights in the content of the letter.” \textit{Id.}

\textsuperscript{33} 3 \textsc{Nimmer \& Nimmer, supra} note 32, § 10.03[A][6]. Also excepted from the writing requirement is the vesting of copyright in employers, although technically this is not a “transfer” of copyright ownership, since the copyright initially vests in the employer. \textit{Id.; see} 17 U.S.C. § 201(b) (“In the case of a work made for hire, the employer . . . is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise [in writing], owns all of the rights comprised in the copyright.”).
the applicable laws of intestate succession.” 34 When the author of a letter dies without a testamentary provision for the disposition of the copyright, the copyright passes to her estate, even though the letter itself remains the property of the recipient. 35 In the case of In re McCormick’s Estate, a military serviceman, who was later killed in action, sent a letter to his minor children. 36 The economic value of the letter became apparent when a motion picture company and a music publishing company contracted for the rights to use the letter. 37 The court held that proceeds from these contracts (presumably based on copyright license) should be shared by the mother and the children, but that the proceeds from the sale of the physical letters, should that occur in the future, would belong to the children alone. 38 Thus, the property right in the copies was vested in the letter’s recipients (the children), while the property right in the copyright remained with the sender, and then passed on according to his will (if he had one) or the laws of intestacy.

B. “You’ve Got [Copyrighted] Mail!”

“Copyright protection subsists. . . in original works of authorship fixed in any tangible medium of expression, now known or later developed. . . .” 39 Just as senders of private pen-and-paper letters are unlikely to register the letter with the Copyright Office prior to dropping off the letter at the post office, senders of e-mail messages are unlikely to register their messages with the Copyright Office prior to hitting “send.” Nevertheless, registration is not a requirement for copyright protection: the copyright “subsists” in the work at the moment of creation. 40

37. Id. at 414.
38. Id. at 417.
40. 17 U.S.C. § 102(a); see also Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1160 (1st Cir. 1994) (“Although copyright protection attaches the day original expression is fixed in a tangible medium . . . and thus an infringer may be liable for infringement from that day forward . . . registration of the copyright is a prerequisite to suit under the Copyright Act . . . .”); Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345, 1349 (8th Cir. 1994) (“While registration is required under section 411 of the Copyright Act in order to bring a suit for infringement, infringement itself is not conditioned upon registration of the copyright.”). Further benefits of federal copyright registration include the availability of statutory damages in lieu of actual damages, 17 U.S.C. § 412, and a presumption of the validity of the copyright, 17 U.S.C. § 410(c).
Is an e-mail message an “original work of authorship”? It may be true that letter writing is a lost art, and e-mail messages tend to be even less formal and further removed from the average person’s conception of “literary work” than are private letters. Nevertheless, even if few private letters—and even fewer e-mail messages—are “literary” in the colloquial sense, neither literary merit nor qualitative value are requirements for copyright. Courts have consistently held that private letters can be “original work[s] of authorship” and thus are copyrightable. Similarly, even a hastily-drafted e-mail sent to a colleague regarding the merits (or lack thereof) of the new employee espresso machine would almost certainly be considered an “original work of authorship.”

One might ask whether e-mail messages are “fixed in a tangible medium of expression” within the meaning of the Copyright Act. Again, the answer is yes. The Copyright Act provides that “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” E-mail messages stored on an e-mail service provider’s server or other computer hard drive clearly meet the fixation requirement. These electronic messages can be stored for years, a far longer period than “transitory duration.”


42. H.R. REP. NO. 94-1476, at 54 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5667 (“The term ‘literary works’ does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories, and similar factual, reference, or instructional works and compilations of data.”); Wright v. Warner Books, Inc., 953 F.2d 731, 735 (2d Cir. 1991) (“Letters, like other literary works, are entitled to copyright protection . . . .”).

43. See, e.g., Salinger v. Random House, Inc., 811 F.2d 90, 94 (2d Cir. 1987) (“The author of letters is entitled to a copyright in the letters, as with any other work of literary authorship.”); Grigsby v. Breckinridge, 65 Ky. (2 Bush) 480, 484 (1867) (concluding that private letters are entitled to same protection as literary manuscripts under common law); see generally 1 GOLDSTEIN, supra note 32, § 4.2.1.3 (“Courts universally hold that letters are copyrightable and that the author of a letter has exclusive rights in it . . . .”).

44. Even computer software, which may seem far less “literary” even than e-mail, is copyrightable as a literary work. Higher Gear Group, Inc. v. Rockenbach Chevrolet Sales, Inc., 223 F. Supp. 2d 953, 957 (N.D. Ill. 2002) (“It is well established that computer software is . . . within the subject matter of copyright.”).


46. Even the loading of software into much more transitory Random Access Memory (RAM) has been held to meet the fixation requirement. MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993) (holding that software that is
language of the Copyright Act itself is designed to accommodate advances in technology: tangible media of expression include those that are "now known or later developed."\textsuperscript{47} Like private letters written on a piece of paper, e-mails stored on a computer hard drive are "fixed" for the purposes of the Copyright Act.

In short, when it comes to copyright analysis, the quotation from \textit{People v. Lipsitz} provided at the beginning of this Article is accurate: "E-mail is 'comparable in principle to sending a first class letter . . . .'"\textsuperscript{48}

Given that e-mail is copyrightable, does it necessarily follow that transmission of e-mail to a third party is necessarily a violation of copyright laws? That is, is it an infringement of intellectual property rights to forward an e-mail to a third party or send a reply in which the original message is reproduced? The simple act of forwarding an e-mail could constitute a \textit{prima facie} case of infringement as follows:\textsuperscript{49} A copyright subsists in the e-mail upon its creation. When the e-mail is forwarded to and received by a third party, a copy is created on the

\textsuperscript{47} 17 U.S.C. § 102(a). The legislative history of the Copyright Amendments Act of 1990 demonstrates a clear intention that digital media support fixation, stating \textit{inter alia} that "a work of architecture may be embodied . . . in 'any tangible medium of expression,' such as a blueprint or computer disk." H.R. REP. NO. 101-735, at 19 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6950.


recipient’s computer. Creation of such a copy is one of the acts to which the copyright holder has an exclusive right.\textsuperscript{50}

However, the forwarder may be able to claim that the act of forwarding the e-mail does not constitute an act of infringement under the doctrine of fair use.\textsuperscript{51} When claiming protection under the fair use doctrine, the burden of proof is on the defendant, who must establish that her use was consistent with the balancing test embodied in Section 107.\textsuperscript{52} Because the forwarding of e-mail is generally not for profitable gain, if the e-mail is more factual than creative, and the value of the e-mail is not diminished as a result of its reproduction, the defense of fair use may very well apply. Conversely, if the author’s work in the e-mail is creative and has potential economic value that is diminished by its unauthorized reproduction, the defendant may not have the benefit of the fair use defense.

Consider the instance where a colleague receives a copyrighted e-mail and forwards the entire document to another with accompanying commentary that “adds value” to the received e-mail. This could be a “transformative use” or “productive use” of the e-mail and the basis of a claim of fair use.\textsuperscript{53} The average quotidian e-mail message may have no market value at all. Therefore, in many cases the forwarding of the e-mail could not negatively affect the potential market for the work (since there is no market to begin with). Provided that the use of the e-mail received is not-for-profit and is considered “transformative,” that the e-mail exhibits little creativity, and that the economic value of the original e-mail is not diminished by the comments in the for-

\textsuperscript{50} 17 U.S.C. § 106. Miriam Yakobson, Copyright Liability of Online Service Providers After the Adoption of the E.C. Electronic Commerce Directive: A Comparison to U.S. Law, 11 Ent. L.R. 144, 146 (2000) (“A copy of the work is . . . made every time one views a website . . . or . . . forwards email.”).

\textsuperscript{51} Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (“[F]air use is an affirmative defense . . . ”); but see Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1995) (“Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement . . . . [I]t is logical to view fair use as a right.”).

\textsuperscript{52} 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.”); Chi. Bd. of Educ. v. Substacte, Inc., 354 F.3d 624, 629 (7th Cir. 2003) (“The burden of proof is on the copier because fair use is an affirmative defense . . . . ”).

warder’s e-mail, the use should be considered fair notwithstanding the fact that the entire e-mail message was reproduced.54

On the other hand, where an e-mail message has potential market value, the forwarding of that e-mail could affect its value.55 Imagine, for example, an author who composes an original, unpublished short story as an e-mail message and forwards it to a colleague for comment. Some years later, the author is in negotiations to license the story to a publisher. Obviously, the market value of the license is dependent, at least in part, on the newness of the story: if the original recipient of the e-mail message had forwarded the e-mail containing the story to a large number of recipients, the market value of the story might be significantly diminished. If the original recipient had redistributed the e-mail as part of a commercial enterprise, perhaps as a part of a “Short Story of the Week Mailing List,” the claim of fair use would have much less merit.

C. E-Mail Service Providers Enter the Game: The Effect of Contractual Provisions on E-Mail Ownership

The default ownership rules provided by statute or common law may in some cases be modified via private contract. In the context of e-mail ownership, these contractual provisions are typically contained within an e-mail service provider’s terms of service agreement and may potentially modify ownership both of the copyright in the e-mail messages and of the electronic copies of the messages stored by the service provider. Provisions addressing the disposition of an e-mail account holder’s account contents upon termination of service are particularly relevant in the case of death, where a service provider’s account inactivity policy may be triggered, resulting in account termination and subsequent content deletion. Recognizing the significance of account termination to the rights of account holders, states

54. See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (holding that manifestly commercial nature of defendant’s use was not dispositive of fair use claim). The Acuff-Rose Court noted that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” Id. at 579.

55. Of course, forwarding an e-mail that contains the copyrighted article of a third party (either as an attachment or in the body of the e-mail itself) could reduce demand for the article. Bev Butula, Don’t Be a Copycat: Reproducing Copyrighted Works, WIS. L. W., Apr. 2005, at 26, 30 (“[Copying an article into an e-mail message and forwarding it to someone else] may not cause a copyright owner too much concern. But if that email subsequently gets forwarded numerous times, the copyrighted article then has been reproduced several times. This widespread distribution without the owner’s permission may be an infringement.”).
have begun to promulgate legislation clarifying these rights as between account holders (or their heirs) and e-mail service providers.

1. Modification of Copyright

Current copyright law provides protection for the life of the author plus seventy years. If the e-mail of a given individual is valuable, such lengthy copyright protection could conceivably provide a stream of royalty income for multiple generations of the copyright holder’s heirs. This presupposes, of course, that the copyright in the e-mail is a probate asset inheritable upon death. That proposition is uncertain, especially given the contractual provisions promulgated by certain internet service providers. For example, in a paragraph entitled “No Right of Survivorship and Non-Transferability,” the Yahoo! Terms of Service agreement affirmatively states that “any rights to . . . contents within your [e-mail] account terminate upon your death.”

This provision makes no distinction between the copy of the e-mail messages and the copyright in the work itself. It is therefore somewhat unclear whether the legal status of the copyright is affected when the rights to the account contents are terminated. Normally, a copyright owner’s exclusive rights do not include preventing the destruction of a copy lawfully obtained. Conversely, the destruction of the copy does not destroy the copyright in the work.

57. See infra Part III.D.
58. Contract provisions can sometimes trump the default copyright laws. See, e.g., 17 U.S.C. § 108(f)(4) (providing that section 108’s allowances for certain library and archival uses do not supersede contractual obligations library undertakes in obtaining copy of copyrighted work); Maureen A. O’Rourke, Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms, 45 DUKE L.J. 479, 479–80 (1995) (“The Act grants the copyright owner certain exclusive rights. Parties negotiate over the allocation of those rights, and the result of that negotiation is reflected in their contract.”). However, the ability to modify default copyright rules is not necessarily without limits. See id. at 479. (“Courts have not clearly stated whether the [Copyright] Act [of 1976] preempts contracts between authors and users of copyrighted works that purport to vary the rights and obligations set forth in the Act.”).
59. Yahoo! Terms of Service, supra note 9, § 27.
61. Imagine the legal ramifications if this were not the case: one would be able to terminate a copyright holder’s rights by, for example, burning a book. If an entire library burned downed, tens of thousands of works might lose their copyrights, an absurd result.
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E-mail service providers may argue that the deceased has contractually limited her rights either in the copy, or in the copyright, or in both by agreeing to the terms of service. Nevertheless, it seems unlikely that either party would intend or expect a copyright transfer from the account holder to the e-mail service provider merely from the terms of use; at least one e-mail service provider expressly disclaims ownership of the intellectual property component of account content. Although no particular language is required to effect transfer of copyright ownership, the case law suggests that in order to effect a transfer of copyright, the writing required by 17 U.S.C. § 204(a) must do more than make a general statement that “rights and interests” in the work will be transferred. It is of course possible for the terms of use drafted by e-mail service providers to include language clearly indicating the intent to transfer copyright ownership. Absent such language, however, a court may be reluctant to read into a contract of adhesion the intent to transfer intellectual property rights where such intent is not clearly expressed.

2. Ownership of the Copy Itself

In contrast, a terms of service agreement providing that “any rights to . . . contents within your [e-mail] account terminate upon your death” could fairly be read to terminate rights to the copy itself, as distinct from rights to the copyright. Parties are generally free to contract to whatever terms they wish, as long as those terms are not

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64. E.g., Lyric Studios, Inc. v. Big Idea Prods., Inc., 420 F.3d 388, 392 (5th Cir. 2005); Armento v. Laser Image, Inc., 950 F. Supp. 719, 733 (W.D.N.C. 1996) (ruling that the word “copyright” does not need to be included in written agreement in order to effect copyright transfer), aff’d per curiam, 134 F.3d 362 (4th Cir. 1998).

65. See, e.g., Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 560 (2nd Cir. 1995) (holding that a legend agreement stating, “‘payee acknowledges payment in full for the assignment to Playboy Enterprises, Inc. of all right, title and interest in and to the following items: [a description of a painting followed]”’ was insufficient to transfer copyright ownership under § 204(a)) (alteration in original).

66. Yahoo! Terms of Service, supra note 9, § 27.

67. See infra Part II.D.
unlawful or contrary to public policy.68 One state appears to believe that it is in the public interest for heirs to have access to the e-mail accounts of the deceased. Breaking new ground, Connecticut recently passed legislation commanding electronic mail service providers to “provide, to the executor or administrator of the estate of a deceased person. . . access to or copies of the contents of the electronic mail account of such deceased person,” provided certain documentation is presented.69

This is a sensible approach. It would seem to be a small burden to require an e-mail service provider to retain the contents of the deceased’s account for a specified period of time, during which time heirs of the deceased would have the opportunity to present documentation in order to obtain access to the account. Transmission of information will allow heirs to effectively manage the affairs of the deceased (such as paying bills received via e-mail) and provide written records of significant sentimental value. Moreover, providing for the inheritability of e-mail messages (at least incoming messages) is consistent with the inheritability of private letters, which may pass to heirs through the normal probate process.70

Some e-mail service providers have voluntarily implemented policies to facilitate the transmission of e-mail account content to heirs. Despite their privacy policies and contractual limits on account holder ownership of account content,71 Hotmail, Gmail, and America Online

68. E.g., Willard Packing Co. v. Javier, 899 A.2d 940, 947 (Md. Ct. Spec. App. 2006) (“Under the principles of freedom of contract, parties have a broad right to construct the terms of contracts they enter into as they wish, providing the contract is neither illegal nor contrary to public policy.”); State v. Pleva, 456 N.W.2d 359, 362 (Wis. 1990) (“This court will protect parties’ freedom to contract as long as the terms of the contract are not contrary to public policy.”).
69. CONN. GEN. STAT. ANN. § 45a-334a(b) (West Supp. 2006).
70. See infra note 163 and accompanying text.
71. Those who register for a Hotmail account must acknowledge that “Microsoft may terminate this Agreement . . . at any time . . . . Upon such termination . . . your right to use the MSN Web Sites will immediately cease. UPON SUCH TERMINATION . . . ANY INFORMATION YOU HAVE STORED ON THE MSN WEB SITES MAY NOT BE RETRIEVED LATER.” MSN WEBSITE TERMS OF USE AND NOTICES, § 12, http://privacy2.msn.com/tou/default.aspx (last visited July 4, 2007). The Gmail terms of use similarly imply that account holders do not possess any property interest in their accounts. Gmail Terms of Use, supra note 63, § 11, http://mail.google.com/mail/help/terms_of_use.html (last visited Mar. 6, 2007) (“Google may at any time and for any reason . . . terminate your account. In the event of termination, your account will be disabled and you may not be granted access to your account or any files or other content contained in your account although residual copies of information may remain in our system.”). However, Google explicitly disclaims ownership of any intellectual property rights arising from its account holders’ communications. Id. at § 5 (“Google[’s] intellectual property] Rights do not in-
allow heirs to obtain access to decedent’s e-mail account content upon the presentation of certain documentation.  

3. Account Termination

In the absence of legislation, e-mail service providers have the upper hand in disputes with account holders or the heirs of deceased account holders. For example, in a highly publicized Canadian case, an e-mail service provider, Inter.net, suspended e-mail access by an account holder, Nancy Carter, due to a billing dispute. However, Inter.net failed to notify either those sending messages to the account or the account holder herself that the account was still receiving messages. One of the messages not timely received by the account holder was allegedly a job offer, which she was unable to accept because she could not access her account to read the message. Although the parties settled prior to a Canadian Federal Court decision, the Canadian Privacy Commissioner who considered the case issued a statement expressing concern at the e-mail service provider’s actions. He noted that “[t]he practice [of allowing electronic messages to be delivered
without notice to either sender or recipient] falsely leads the sender to believe that the message has gone through unimpeded.’’ 76

Certainly e-mail service providers have a legitimate interest in collecting accrued fees from users, but a remedy of the type employed by Inter.net seems far out of proportion to the type of injury that would normally be suffered by the e-mail service provider (unpaid account fees). Denying account holder access creates uncertainty for senders and recipients alike,77 and potentially upsets business and personal communications on a grand scale. Furthermore, there may be less severe alternatives available to e-mail service providers, ranging from requiring prepayment by account holders to blocking an account holder’s ability to send (but not to receive) e-mail messages.

Although the Nancy Carter case did not involve the restriction of access to a decedent’s e-mail account, the principles are analogous. Denying heirs access to the deceased account holder’s e-mail account creates uncertainty both for those sending e-mail to that account and for heirs who may be unable to access important communications. Furthermore, less disruptive alternatives may be available, such as providing a time period during which heirs can access a decedent’s accounts upon the presentation of a death certificate and other information.

4. Regulation of Account Termination

California has recently attempted to regulate e-mail account termination by mandating a thirty-day notice period prior to the termination of e-mail service.78 This rule reasonably balances the rights of account holders and those of e-mail service providers. For account holders, the legislation guarantees a minimum notice period and pre-

77. See Hamilton, supra note 73 (noting disruption of sender’s “reasonable expectation that their e-mail is either delivered or returned,” given that sender “cannot be expected to know the terms of service” of the recipient).
78. CAL. BUS. & PROF. CODE § 17538.35(a) (West Supp. 2007) (“Unless otherwise permitted by law or contract, any provider of electronic mail service shall provide each customer with notice at least 30 days before permanently terminating the customer’s electronic mail address.”). A corollary issue is presented in the case of the bankruptcy of the e-mail service provider, where it may be desirable to require the bankrupt company to provide notice and a certain period of time during which account holders can download e-mail accounts to their computers in order to avoid loss of the account’s contents. See generally 8A AM. JUR. 2D Bailments §§ 201–03 (1997) (discussing termination of bailments).
vents service providers from shortening this period by contract. For e-mail service providers, the legislation leaves open the possibility that service may be terminated with less than thirty days notice if the account holder has given “cause,” such as engaging in conduct that violates the service provider’s acceptable use policy.

While the California statute is a good first step, it does not resolve all or even most of the uncertainty regarding the legal status of e-mail. For example, it is not clear that the provision would assist someone in the position of Nancy Carter, given that the circumstances underlying the billing dispute may have constituted a violation of the service agreement. Nor does it clarify the rights of heirs who seek to obtain access to a deceased’s e-mail account. Although the California law may give heirs a thirty-day window during which to take action, the e-mail service provider is in de facto control of the account and has the ability to delete the account contents—at least after the thirty day notice period—according to the terms of the service agreement.

Moreover, because notification will likely be given to account holders via e-mail, such notice will be ineffective as to heirs who do not already have access to the account.

79. CAL. BUS. & PROF. CODE § 17538.35(b) (“No contract for electronic mail service may permit termination of service without cause with less than a 30–day notice.”).

80. Id. Equally commendable, the foresighted drafters of this provision contemplated that the provision may eventually be superseded by federal legislation and provides that “[t]his section shall become inoperative on the date that a federal law or regulation is enacted that regulates notice requirements in the event of termination of electronic mail service.” Id. § 17538.35(f).

81. Id. § 17538.35(b). Note also that state laws requiring the transfer of e-mail present jurisdictional concerns. If the laws apply based on the domicile of the decedent—as is the case with the Connecticut statute referred to supra, note 69, CONN. GEN. STAT. ANN. § 45a-334a(b) (West Supp. 2006)—e-mail service providers who have clients in multiple states could be subject to myriad different systems of compliance. Enforcement against foreign e-mail service providers may also prove difficult, and compliance of foreign e-mail service providers may even violate the laws (e.g., privacy laws) of the foreign country. Jurisdiction issues relevant to e-mails are especially difficult to resolve because they are often accompanied by contract provisions found in the terms of use or the privacy policy of the e-mail service provider. A court could rule the contract provisions in the terms of use prohibiting distribution of the subscriber’s e-mails to another violates the public policy of the state that has enacted legislation allowing access to the deceased e-mail author’s account.
D. “Two Sticks in the Bundle of Property Rights”: Ownership of Copies and Copyrights as Discrete Rights

The prevailing view regarding ownership of property is that ownership is not a discrete right, but rather a “bundle of rights.”\textsuperscript{82} For example, “ownership” of a piece of land may include the distinct rights to occupy the land, to build a permanent structure on the land, and to exclude others from trespassing on the land. The aggregate concept of ownership is the “bundle,” whereas the discrete rights of which it is comprised are the “sticks.” It is possible to disaggregate the bundle such that one or more of the rights which could be included in the concept of ownership are not. For example, with respect to the example just provided, zoning or environmental laws may prohibit landowners from building on the land, and contractual or statutory easements may exist such that the owner cannot exclude the easement holder from exercising her limited right to use the land.

The ownership of e-mail messages can be conceived of in the same way. For the purposes of this analysis, the two most important “sticks” are the right to a particular copy of the e-mail, and the right to a copyright in the e-mail.\textsuperscript{83} Copyright law distinguishes between owning the copyright in the contents of an e-mail and owning a copy of the e-mail itself.\textsuperscript{84} This distinction can easily be understood by considering the purchase of a copy of a book: the purchaser acquires rights to the copy of the book, but does not acquire rights to the copyright subsisting in the book’s contents. Although the purchaser may

\textsuperscript{82} See, e.g., Charles E. Steward Mach. Co. v. Davis, 301 U.S. 548, 581 (1937) (“Indeed, ownership itself, as we had occasion to point out the other day, is only a bundle of rights and privileges invested with a single name.” (citing Heneford v. Silas Mason Co., 300 U.S. 577 (1937))); J.E. Penner, The “Bundle of Rights” Picture of Property, 43 UCLA L. Rev. 711, 712 (1996) (“The currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy is that property is best understood as a “bundle of rights.””).

\textsuperscript{83} In reality each of these “sticks” is itself comprised of several smaller sticks. Section 106 of the Copyright Act specifically provides the author the distinct rights (“sticks”) to reproduce the work, display the work, etc. See supra Part II.A. Similarly, the right to the copy of the e-mail may include the constituent rights to possess the e-mail, to exclude others from possessing the e-mail, to re-transmit the e-mail, etc.

\textsuperscript{84} See 17 U.S.C. § 202 (2006) (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.”).
WHO OWNS A DECEDENT’S E-MAILS?

resell the book, she cannot make or sell additional copies, rent or lease the work, or perform any of the other acts to which the copyright holder has an exclusive right under § 106.

1. Inheriting E-Mail, Copy In Possession of Heirs

In light of the distinction between ownership of a copy of an e-mail and ownership of the underlying copyright in the e-mail’s contents, if the deceased leaves behind a computer hard drive containing copies of e-mail messages, these messages would pass to the next of kin just as would a shoebox full of old letters. Heirs might similarly inherit previously printed copies of e-mail messages. However, the copyright in these messages would pass separately and independently to the heirs either via a will or by the applicable laws of intestate succession.

2. Compelling Third-Party Possessor to Return Copy to Recipient’s Heirs

What good is the author’s retained copyright in her e-mail messages if the only copy in existence is no longer in her possession? Can she compel the recipient to return the e-mail to her? In Grigsby v. Breckenridge, the surviving husband of Virginia Hart, sought the return of letters he had written to Hart, but that were given to Grigsby by Hart on Hart’s deathbed. The court stated that the recipient has the right “to keep the letter or to destroy it” though the author retains the right to publish the letter if it still exists. Once letters have been sent, the author cannot compel the recipient to return them, except possibly on a temporary basis for the purpose of publi-

85. Pursuant to the first sale doctrine, a copyright holder may not prevent a person in lawful possession of a copy of that work from selling, renting, lending, or otherwise disposing of that copy of the work. Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1997), construing 17 U.S.C. § 109.

86. See supra note 21 and accompanying text.

87. See supra note 62.


90. Id. at 486.

91. Id. at 484 (“By sending them, the authors parted with their right to the possession, control, or reclamation of them without her consent, and gave her the exclusive right to read and keep them for their enduring memories and sentiments.”). Id. at 489 (“‘There is no right to possession, present or future, in the writer. The only right to be enforced against the holder is a right to prevent publication, not to require the manuscript from the holder in order to a publication by himself.’”) (emphasis added) (quoting Joel Parker, 1 Am. L. REG. 450, 458 (1853)).
The author retains the “right to publish if he keep or can procure a copy. But the recipient is not bound to keep the original for his transcription, inspection, or other use.”

Likewise, the relevant case law suggests that senders of e-mail retain ownership of the copyrights in the sent messages, but not of the copies themselves (for example, if stored on the recipient’s hard drive). Where the only copy in existence is stored on the recipient’s computer, the author will be able to prevent the further reproduction, distribution, or display of the e-mail, but probably will not be able to compel the recipient to preserve her copy or return it to the author.

At this point there arises a significant divergence between the typical fact pattern surrounding the ownership of a private letter and that surrounding the ownership of e-mail. Whereas it is uncommon for senders of paper-and-pen letters to keep copies of the letters, senders of e-mail do so routinely (often automatically). These copies are often stored not by the account holder, but by the e-mail service provider. The issue then becomes whether the account holder, or the account holder’s heirs, can compel the e-mail service provider to return the e-mail messages. This issue is explored further in Part III, infra.

92. See Baker v. Libbie, 97 N.E. 109, 111–12 (Mass. 1912) (suggesting author’s right to publish includes the right to obtain copies from recipient, but conceding that in most instances it would be an unreasonable burden to impose a duty of preservation on the recipient) (emphasis added). Although the suggestion in Baker is to a great extent contradicted by the earlier Grigsby case, supra note 89, allowing the author to either compel a temporary return of the work or (more reasonably) to obtain copies of the work gives meaning to the distinction between the ownership of the copy by the recipient and of the copyright by the sender. Goals of copyright include “assuring contributors to the store of knowledge a fair return for their labors,” Harper & Row Publishers v. Nation Enterprises, Inc., 471 U.S. 539, 546 (1985), and promoting the “general benefits derived by the public from the labors of authors.” Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). Where the only remaining copy of a valuable letter is in the possession of the recipient, preventing access by the author frustrates both of these purposes. The author will be deprived of any economic value of his copyright, and the public will be deprived of the benefits of his labors. The conclusion in Grigsby may therefore be sub-optimal in some cases.

93. Grigsby, 65 Ky. at 488. The Grigsby court drew a sharp distinction between the author’s right to enjoin publication by the recipient and the author’s right to compel the surrender of private letters by the recipient, finding that the author’s rights included the former but not the latter. Id. at 494.

94. See, e.g., Baker, 97 N.E. at 112 (“Although the particular form of the expression of the thought remains the property of the writer, the substance and material on which this thought has been expressed have passed to the recipient of the letter.”); Wright v. Warner Books, Inc., 953 F.2d 731, 737 (2d Cir. 1991) (“[T]he recipient of the letters . . . was entitled to keep them.”); Ipswich Mills v. Dillon, 157 N.E. 604, 607 (Mass. 1927) (“[L]etters addressed to the defendants . . . are the sole property of the defendants . . . .”).

III.
THE LEGAL STATUS OF E-MAIL: USEFUL ANALOGIES

The law of bailment is an appropriate framework for explicating the ownership of e-mail messages as between authors and e-mail service providers. After the law of bailment is introduced and applied in the context of e-mail, rules drawn from special bailment categories—warehouses and safe deposit boxes—are considered. The section concludes with a discussion of the implications of the bailment analogy to the probate of e-mail messages.

A. Bailment Law

When paper-and-pen letters are sent through the mail, copies of these letters may be distributed over wide geographic areas. Over time, the letters may become lost, destroyed, discarded, or forgotten, making retrieval difficult or impossible.

Due to the ease and low cost with which e-mail can be sent around the world, recipients of a given sender’s e-mail messages may be even more numerous and widely distributed. However, the task of locating e-mail messages may be vastly simplified due to a characteristic of modern e-mail communications: an account holder’s sent e-mails are frequently stored by the e-mail service provider, thus centralizing storage of all sent messages. Similarly, messages received by an account holder may be stored not by the recipient, but by the service provider. Once a message has been received in the account holder’s inbox, it cannot accidentally slip behind the desk and become lost as can an ordinary letter. Moreover, because of the low cost of storage space and ease of electronic organization, e-mail messages may languish in an account for years without being discarded. This significant difference between electronic messages and paper-and-pen messages—namely, possession by a third party (the service provider) who is neither the sender nor the recipient of the message—motivates a new paradigm for the analysis of e-mail ownership: bailment.

A bailment is created when personal property is delivered and accepted by a bailee.  


97. One court has more precisely defined bailment as “the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed, and the property returned or duly accounted for when the special purpose is accomplished, or kept until the bailor reclaims it.” Little, Brown & Co. v. Am. Paper Recycling Corp., 824 F. Supp.
of transaction in modern society.” For example, a bailment relationship is established when an automobile is dropped off by its owner at a service center for vehicle maintenance, when a box of jewelry is left at the front desk of a hotel for delivery to a guest, or at the checkpoint at an airport where luggage is temporarily relinquished for inspection. Even the delivery of a zygote to a medical facility in the context of an in vitro fertilization procedure has been held to create a bailment.

The law of bailments is largely defined by state law, and the precise wording of its definition varies somewhat from jurisdiction to jurisdiction. The Ninth Circuit, for example, has stated that “[a] relationship of bailor-bailee arises when the owner, while retaining general title, delivers personal property to another for some particular purpose upon an express or implied contract to redeliver the goods when the purpose has been fulfilled, or to otherwise deal with the goods according to the bailor’s directions.” Similarly, a Texas appeals court has defined the basic elements of a bailment to be “(1) the delivery of personal property by one person to another in trust for a specific purpose; (2) acceptance of such delivery; (3) an express or implied contract that the trust will be carried out; and (4) an understanding under the terms of the contract that the property will be returned to the transferor or dealt with as the transferor directs.”

Despite the various phrasings, certain elements of bailment seem to be fairly consistent. Bailed property must be returned to the bailor, or at least disposed of according to her directions. The

11, 15 (D. Mass. 1993); see also Hadfield v. Gilchrist, 538 S.E.2d 268, 272 (S.C. Ct. App. 2000) (“A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust.”).

103. Maulding v. United States, 257 F.2d 56, 60 (9th Cir. 1958).
105. Schenley Affiliated Brands Corp. v. Limbach, 543 N.E.2d 1177, 1182 (Ohio 1989); York v. Jones, 717 F. Supp. at 425 (“The obligation to return the property is implied from the fact of lawful possession of the personal property of another.”) (citation omitted).
106. Home Indemnity Co. v. Harleysville Mut. Ins. Co., 166 S.E.2d 819, 824 (S.C. 1969) (“After the purpose [of the bailment] has been fulfilled, then the chattel shall
bailor retains title to the bailed property while the bailee takes possession.107 Neither the intent to create a bailment relationship nor a formal contract is required for a bailment to exist.108 Whether exclusive control of the bailed property by the bailee is necessary to form a bailment is less clear. New York courts have held that whether a bailment relationship exists “turns on whether there is a relinquishment of exclusive possession, control and dominion over the property.”109 Michigan and Ohio have similarly required exclusive control by the bailee.110 In contrast, Massachusetts has adopted the more liberal position that a bailment relationship “by definition, arises only upon delivery of possession of the property sought to be bailed, and at least be redelivered to the bailor, or otherwise dealt with according to his directions.”); Don-Lin Jewelry Co., 877 A.2d at 624 (“[T]he object of a] bailment . . . shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclains it, as the case may be.” (quoting Gallo v. American Egg Co., 72 A.2d 166, 169 (1950))); Sgro v. Getty Petroleum Corp., 854 F. Supp. 1164, 1175 (D.N.J. 1994); Gates v. Powell, 252 P. 377, 379 (Mont. 1926) (“An essential feature of a bailment is the general agreement to return the subject-matter of the bailment, either on demand or at the agreed time, or, if not returned, to account for the property to him from whom the bailee has received it.”) (citation omitted). On the other hand, the absence of an agreement to return the property could prevent the formation of a bailment relationship in the first instance. See, e.g., Richardson v. DSW, Inc., No. 05 C 4599, 2005 WL 2978755, at *4 (N.D. Ill. Nov. 3, 2005) (bailment claim dismissed where consumer alleged that credit card information used to purchase shoes from defendant was bailed property; consumer did not allege that defendant agreed to return credit card information, precluding a bailment under Illinois law).


108. York v. Jones, 717 F. Supp. at 425 (“While the parties in this case expressed no intent to create a bailment, under Virginia law, no formal contract or actual meeting of the minds is necessary.”).


110. See, e.g., Beggs v. Disc. Jewelry Ctrs., Inc., No. 256653, 2006 WL 234878, at *1 (Mich. Ct. App. Jan. 31, 2006) (“In order to constitute a sufficient delivery of the subject of the bailment, there must be a full transfer to the bailee so as to exclude the possession of the owner and all other persons and to give to the bailee the sole custody and control thereof.”) (emphasis added); Ellington v. Gray Barrel & Drum, Inc., No. 75724, 1999 WL 462353, at *1 (Ohio Ct. App. July 1, 1999) (Where putative bailor was the only person with a key to the toolbox, and bailment relationship did not exist because “[t]he bailee must have sole custody and control of the property.”); see also 8A AM. JUR. 2d Bailments § 169 (“[O]rdinarily . . . exclusive possession and control of the bailed property is a characteristic, if not a requisite, of bailment . . . .”); Wilson v. Burch Farms, Inc., 627 S.E.2d 249, 258 (N.C. Ct. App. 2006) (“The possession of the property by the bailee must be such that it is to the exclusion of the owner and all other persons, and that the bailee has complete control of the property.”).
some degree of control over that property, to the putative bailee.\textsuperscript{111} Other states have similarly left open the possibility that exclusive control is not required for bailment.\textsuperscript{112}

1. The Bailment of E-Mail

In a sense, e-mail messages are similar to private letters in that there generally has been transfer of possession and that they may contain personal or confidential information.\textsuperscript{113} Although there has been litigation over the rights of authors of private and business letters for well over two centuries,\textsuperscript{114} e-mail accounts present a different scenario because the e-mail service provider, in addition to the recipient, is in possession of the e-mail. It is not surprising that internet (or e-mail) service providers have been described as bailees of the e-mail messages they transmit.\textsuperscript{115} Just as a sender of a package through the United States mail intends to transfer possession, but not ownership, of the package to the post office,\textsuperscript{116} a sender of e-mail does not intend to transfer ownership of or title to her messages to the e-mail service

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\item See, e.g., Dahl v. St. Paul Fire & Marine Ins. Co., 153 N.W.2d 624, 626 (Wis. 1967) (“We need not determine whether a bailment must exclude all control of the owner. We can conceive of situations where a bailment might be created which by its terms would recognize some control of the subject matter of the bailment by the bailor . . . .”); see also Manor Enters. v. Vivid, Inc., 596 N.W.2d 828, 838 (Wis. Ct. App. 1999) (Roggensack, J., dissenting) (“[T]he bailee is not required to have complete possession of the property to the exclusion of the bailor . . . .”); Cornia v. Wilcox, 898 P.2d 1379, 1384 (Utah 1995) (agreement under which plaintiff retained right to enter defendant’s land to vaccinate and brand plaintiff’s cattle did not preclude bailment relationship); Ferrick Excavating & Grading Co. v. Senger Trucking Co., 484 A.2d 744, 748 (Pa. 1984) (“[T]he bailee’s exclusive control is not a necessary element of a bailment . . . .”).
\item Baker v. Libbie, 210 Mass. 599, 601 (1912) (recognizing, nearly a century ago, that “[t]he rights of the authors of letters of a private or business nature have been the subject of judicial determination in courts in England and this country for a period of at least 170 years”).
\item Postal officers and private carriers have been considered bailees with respect to the letters or packages they deliver. U.S. Fid. & Guar. Co. v. United States, 246 F. 433, 435 (1917) (“It is well settled that the United States is a bailee for hire of registered packages and their contents . . . .”); United States v. Am. Sur. Co. of N.Y., 161 F. 149, 151 (C.C.D. Md. 1908) (“The government in the operation of the post office department is in law regarded as a bailee of the mail matter intrusted to it for transmission.”), rev’d on other grounds, 163 F. 228 (4th Cir. 1908); see also Patricia L. Barrett, Casenote, Larakoli, Inc. v. Pan American World Airways, 783 F.2d 33 (2d Cir.
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provider. The bailed e-mail messages are normally disposed of according to the instructions of the account holder, such as by storage, delivery to their recipients, or deletion. The fact that the disposition of the bailed property is automated and requires no intervention by a human agent of the service provider is irrelevant. Bailment requires only "delivery," not hand delivery. Moreover, to require that instructions (as to the disposition of bailed property) be transmitted to a person rather than allowing them to be executed automatically by computer would cause the law to lag unnecessarily behind technological progress.

In the case of e-mail, exclusive control has generally not been transferred to the e-mail service provider, since the account holder retains login and password information allowing at least some degree of control over the account content. In addition, the recipient of an e-mail authored by the decedent may have kept a copy of the work, suggesting a lack of exclusive control by the e-mail service provider over the intellectual property component of the e-mail message. In those states not requiring exclusive control, the possible lack of control presumably would not preclude the formation of a bailment relationship with respect to e-mail messages. Even where exclusive control is required, this requirement can be met in the case of a decedent’s e-mail account. If the heirs are not in possession of login information, the e-mail service provider is in fact in exclusive control of the account content. Moreover, the exclusive control requirements have been applied in different contexts—namely, in actions either for damage to bailed property while in the custody of the bailee, or for


118. It is certainly possible, and indeed likely, that copies of at least some of decedent’s “sent” e-mails may have been retained by their recipients. Similarly, it is likely that copies of at least some of decedent’s “received” e-mails may have been retained by their senders. In this sense, the e-mail service provider is not literally in exclusive control of the work (since there exist copies not within the e-mail service provider’s control). However, the service provider would still be in exclusive control of its copy of the work. Moreover, without access to the e-mail account, heirs would in most cases have no way of identifying either the recipients of the sent e-mails or the senders of the received e-mails. Therefore, the only practical way to access these e-mail messages would be to procure them from the service provider.

injury to third parties due to the negligent acts of the bailee. Where the relevant inquiry is whether heirs have ownership rights over the copies of e-mail messages stored on an e-mail service provider’s servers, the “exclusive control” requirement may well be inapplicable.

2. Bailment of Intangible Property

Even the intangible information contained in an email may be bailed. It is “fairly well settled that intangible property. . . may be held in bailment.” Specifically, the information in a letter has been held to be the subject of a bailment: Liddle v. Salem School District involved a letter mailed by Monmouth College to Liddle, a student and high school basketball player attending Salem High School (Salem), in care of Salem’s basketball coach. The letter allegedly contained an offer of a basketball scholarship at Monmouth College and was not delivered to Liddle by Salem until seven months after Salem received it. Noting that “[b]oth tangible and intangible property may be the subject of a bailment” and that “information may constitute intangible personal property,” the court held that information of the type contained in the letter was bailable property.

3. Return of Property (E-Mail) by Bailee (E-Mail Service Provider)

Ordinarily, a bailee has a duty to return the bailed property. However, e-mail stored by an e-mail service provider presents some
distinguishing circumstances not normally present in the bailor-bailee relationship. Most important among these differences is that the bailor (in this case the e-mail account holder) normally has access to the bailed property. That is, return of the property (e-mail) is under her control, as she is free to download it to her home computer. This may mitigate the bailee service provider’s obligation to return the property.128

Nonetheless, a legal dispute with respect to a decedent’s e-mail is most likely to arise where those the decedent leaves behind are not in possession of login and password information and therefore cannot access the e-mail messages. Thus, the service provider as bailee may be under a duty either to return the e-mail to the decedent’s heirs or executors, or to provide account access.129 By analogy, imagine a scenario where a decedent leaves behind stored private property in a safe deposit box or other storage facility.130 If the heirs are unable to find the key among the decedent’s possessions, the bank or storage facility would not likely claim that the heirs have no right to the property.131

4. Contractual Modification of the Bailment Relationship

Although a bailee is ordinarily under an obligation to return bailed property, the contract between the e-mail service provider and the account holder must be considered. Absent a controlling statute or contrary public policy, or where a controlling statute allows for private

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128. See supra notes 105–112 and accompanying text. On the other hand, software design may make it impractical to download the gigabytes of e-mail that may be stored on the e-mail service provider’s server. A possible solution from the e-mail service provider’s perspective is to design software in such a way as to allow for download of all messages at the click of a button. This would obviate the need to transfer messages to a disk and then mail them to the heirs of a deceased account holder, which was the cumbersome solution adopted by Yahoo! pursuant to the court’s order in Ellsworth. Stephanie Olsen, Yahoo! Opens Up Dead Marine’s Email, CNET NEWS, Apr. 22, 2005, http://news.zdnet.co.uk/internet/0,39020369,39195962,00.htm.

129. It can be argued that providing a “key” to access the bailed property is, at least in some cases, equivalent in law to returning the bailed property. C.f. Burnham v. Martin, 90 Ill. 438, 438 (1878) (concluding that, by retaining the key to a house, the renter had constructive possession of the house and was obligated to pay rent); Chadrow v. Kellman, 106 A.2d 594, 598 (Pa. 1954) (“[I]n order to make a valid inter vivos gift of the contents of a safe deposit box there must be an actual delivery of the contents, or the delivery of a key to the box . . . .”); see also Nudd v. Montanye, 38 Wis. 511, 512 (1875).

130. For a more detailed treatment of this analogy, see infra Parts III.B–C.

131. See Hurt v. Bank One, 718 N.E.2d 485, 486 (Ohio Ct. App. 1998) (regarding bank that drilled open a safety deposit box on behalf of an heir who had lost her key); In re Estate of Mecello, 633 N.W.2d 892, 906 (Neb. 2001) (involving facts similar to those of Hurt).
modification, the parties are free to contract as to the ownership and exercise of property rights.\textsuperscript{132} This is true with respect to bailments, where duties as to the bailed property may be modified by contract.\textsuperscript{133} Does it then follow that the parties are free to contract such that the e-mail messages need not be returned under certain circumstances, such as in the case of death?

Although there have been no reported cases squarely addressing the matter, a clear and unequivocal statute such as Connecticut and others’ that mandates the transfer of e-mail messages to an account holder’s heirs would probably override a contractual provision to the contrary.\textsuperscript{134} Even in the absence of such a statute, public policy considerations might allow a court to reach the same result, rendering boilerplate termination clauses ineffective in the face of society’s increasing dependence on electronic communication and the significant disruption that might result if heirs are denied access to accounts.

\section*{B. Warehouse Law}

The law of warehouses lends further support to the proposition that, as a general rule, e-mail service providers should be obligated to transfer e-mail messages to heirs. A warehouse operator is a special type of bailee who accepts goods for storage.\textsuperscript{135} Because e-mail ser-

\begin{itemize}
\item \textsuperscript{132} See supra note 68 and accompanying text.
\item \textsuperscript{133} Umentum v. Arendt, 66 N.W. 2d 192, 195 (1954) (parties may by contract modify general rule that failure of bailee to redeliver property at end of term permits bailor to construe bailement as renewed); Hall v. Gardens Services, Inc., 332 S.E.2d 3, 4 (Ga. Ct. App. 1985) (“Generally, except for statutes and public policy, the bailment contract governs the rights, duties, and liabilities of a bailor and bailee as between themselves.”); 8A AM. JUR. 2D Bailments § 29 (1997) (“[T]he bailment contract is governed by the same rules of law that govern other contracts. Thus . . . an express agreement will prevail against general principles of law . . . .”). Thus, absent a controlling statute, it appears that e-mail service providers and account holders are legally able to include in the service contract a provision that the account contents be destroyed upon the death of the account holder. If such a provision truly reflects the intent of both parties, it is unlikely that public policy would prevent this result.
\item \textsuperscript{134} See, e.g., Denham v. Bedford, 287 N.W.2d 168, 168–169 (Mich. 1980) (where pre-judgment interest is mandated by law, insurer cannot escape payment by inclusion of contractual provision purportedly limiting such payment).
\item \textsuperscript{135} See, e.g., Brace v. Salem Cold Storage, Inc., 118 S.E.2d 799, 804 (W. Va. 1961) (“It is well settled that when goods are stored in a warehouse, the relation of bailor and bailee . . . is created between the depositor or owner of the goods and the warehouseman. The warehouseman is a bailee for hire.” (quoting 56 AM. JUR. Warehouses § 21) (internal quotations omitted)); Dahl v. St. Paul Fire & Marine Ins. Co., 153 N.W.2d 624, 625–26 (Wis. 1967) (“As a general rule the warehouseman who offers to store goods for a price is a bailee for hire and when the goods are accepted and stored in the warehouse, the relationship of bailor and bailee is created.”); Ry. Express Agency v. Schoen, 216 P.2d 420, 422 (Ariz. 1950) (“A warehouseman . . . is a bailee for hire.”).
\end{itemize}
vice providers store e-mail messages on behalf of account holders (in addition to facilitating e-mail transmission), the law of warehouses is a useful analogy.

Article 7 of the Uniform Commercial Code (U.C.C.) governs warehouse law and places restrictions on the terms of the warehouse receipt.\textsuperscript{136} A warehouse receipt is a type of contract between the bailor and the bailee (also known as the “warehouseman”);\textsuperscript{137} thus, the law governing warehouse receipts is instructive with respect to the interplay of statutes and contracts for bailment. The U.C.C. prohibits a warehouseman from inserting in the warehouse receipt a provision impairing her obligation of delivery to the bailor.\textsuperscript{138} To some extent, a warehouse may contractually limit its liability for the loss of or damage to the bailed property.\textsuperscript{139} If a warehouseman seeks to terminate storage, she must provide at least thirty days notice to the person on whose account the goods are held.\textsuperscript{140} Furthermore, if the warehouse receipt has been lost, a court may order delivery of the goods to the bailor.\textsuperscript{141}

By analogy, e-mail service providers could be prohibited from inserting into the service agreement a provision impairing their obligation to deliver the e-mail to the account holder or the holder’s heirs.\textsuperscript{142} If the account must be closed, e-mail service providers could be re-

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137. Providence Warehouse Co. v. Providence & W.R. Co., 34 A. 739, 740 (R.I. 1896) (“It is true, in general, that a warehouse receipt is a contract . . . .”).

138. U.C.C. § 7-202(3) (2005) (“A warehouse may insert in its receipt any other terms which are not contrary to the provisions of this Act and do not impair his obligation of delivery. . . . Any contrary provision is ineffective.”).


140. U.C.C. § 7-206(1) (2005) (“A warehouseman may on notifying the person on whose account the goods are held . . . . require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period not less than thirty days after the notification.”).


142. This is not to suggest that the account holder should be prohibited from affirmatively requesting that the account contents be deleted in the case of death. However, where account termination provisions are contained in contracts of adhesion, the optimum default rule is to return the property to its owner. This is partly because the value to the owner of the e-mail messages may be far greater than the market value (or “exchange value”) of the property, and existing legal rules by and large fail to account
quired to provide thirty days notice (or some other reasonable period) prior to the termination of the account. Finally, if the login information (analogous to the warehouse receipt) is lost or not passed to heirs, a court could order the transfer of the e-mail to the account holder or the account holder’s heirs.143

C. Law of Safe Deposit Boxes

Another useful comparison can be made between storing e-mail on an e-mail service provider’s server and storing possessions in a bank’s safe deposit box. This is particularly enlightening in the context of bailment, because in both cases the bailee may retain access to the property either by means of a physical key or by means of a login name and password.144 Although the depositor has access to the contents of the safe deposit box by use of the key, the fact that the bank does not have exclusive control of the safe deposit box does not preclude the formation of a bailment.145 Similarly, lack of exclusive con-


143. Warehouse law also provides an analogy to the legitimate interests of e-mail service providers in not releasing account information except on the presentation of adequate documentation. See U.C.C. § 7-601(2) (2005) (“A bailee who without court order delivers goods to a person claiming under a missing negotiable document is liable to any person injured thereby, and if the delivery is not in good faith becomes liable for conversion.”). For a discussion of warehouse liability in the case of a missing warehouse receipt, see Kershen, supra note 136, at 767–70.

144. In some cases a safety deposit box (or similar device) may be accessible only by the simultaneous use of both the bailee’s and bailor’s keys. See, e.g., Oppenheimer v. Morton Hotel Corp., 210 F. Supp. 609, 615–16 (W.D. Mich. 1962); City Sav. Bank & Trust Co. v. Pluchel, 175 N.E. 213, 215 (Ohio Ct. App. 1931).

145. See Morgan v. Citizens’ Bank of Spring Hope, 129 S.E. 585, 587 (N.C. 1925) (“The decided weight of authority is to the effect that the relationship between a bank and its customer, resulting from the rental by the former to the latter of a safety deposit box, with respect to the contents of said box . . . is that of bailor and bailee . . . .”); Schaefer v. Washington Safety Deposit Co., 117 N.E. 781, 783 (Ill. 1917) (“The relation between the plaintiff [depositor] and defendant [Safety Deposit Co.] was one of bailment, and the defendant, without any special contract to such effect, was bound to use ordinary care in keeping the deposit although the plaintiff, who rented the box, kept the key.”); see also 11 Am. Jur. 2d Banks and Financial Institutions § 1013 (1997) (“The prevailing rule appears to be that where a safe-deposit company leases a safe-deposit box or safe and the lessee takes possession of the box or safe and places therein his securities or other valuables, the relation of bailee and bailor is created between the parties to the transaction as to such securities or other valuables. . . . That access to the contents of the safe-deposit box can be had only by the use of a key retained by the lessee (whether it is the sole key or one to be used in connection with one retained by the lessor) does not operate to alter the foregoing rule.”). But see Wells v. Cole, 260 N.W. 520, 521 (Minn. 1935) (where bank cannot open safety deposit box without depositor’s key, the relationship is that of lessor and lessee rather than bailor and bailee); Farmers Bank of Greenwood v. Perry, 787
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trol by the e-mail service provider should not preclude the formation of a bailment. Furthermore, states may provide by statute that contents of a safe deposit box may pass to “executors, administrators or legal representatives of [a] decedent, or to the survivor or survivors.”146 States could provide analogous rules for e-mail transmission upon death. When transferring the contents of a safe deposit box to the next-of-kin, banks are held to a reasonable standard of care in ensuring that contents are delivered to the rightful possessors: “On the death of a depositor, a safe-deposit company is bound to deliver the contents of the box only to the person or persons on whom the law casts the title with the right to possession. . . .”147 A bank may be liable for negligently permitting unauthorized access to the contents of the safe deposit box despite purported contractual limitations on such liability.148 Similarly, e-mail service providers should be obligated (absent a contrary and clearly expressed intent) to deliver the contents of a decedent’s e-mail account to the rightful heirs, and should be under a legal duty to take reasonable care in identifying these heirs. As with safe deposit boxes, considerations of public policy should place reasonable limits on the ability of e-mail service providers to disclaim liability for all negligence by contract.

D. E-Mail as a Probate Asset

For the purposes of federal tax law, “[p]robate assets are those assets of the decedent, includible in the gross estate under IRC § 2033, that were held in his or her name at [the] time of death.”149 The Inter-

S.W.2d 645, 651 (Ark. 1990) (Hays, J. dissenting) (“Unlike bailments generally, a safety deposit box holder has access to the contents of the box which is at least equal to, and probably greater than, that of the bank.”).

146. People ex rel. Glynn v. Mercantile Safe Deposit Co., 159 A.D. 98, 100 (N.Y. App. Div. 1913); Nat’l Safe Deposit Co. v. Stead, 232 U.S. 58, 69 (1914) (“[T]he [s]tate could provide for the appointment of administrators, for the distribution to heirs or legatees of all the property of the deceased and . . . could . . . legislate as to . . . the time when the administrator or executor could take possession [of the safe deposit box’s contents].”).

147. 11 AM. JUR. 2D Banks and Financial Institutions § 1024 (1997).


149. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 5.5.7.5 (2005), available at http://www.irs.gov/irm/part5/ch05s07.html#d0e59316. State case law may also define probate assets. See, e.g., In re Estate of Lamparella, 109 P.3d 959, 961 n.1 (Ariz. Ct. App. 2005) (“Probate assets are those transferred by testate or intestate succession; non-probate assets are those transferred outside of probate, such
nal Revenue Code defines the “gross estate” as “the value at the time of [decedent’s] death of all property, real or personal, tangible or intangible, wherever situated.” Assuming that the author’s ownership rights in e-mail messages have not been contractually extinguished, it seems clear that these messages should be considered probate assets that would therefore be subject to the same inheritability rules as other probate assets. The fact that the e-mail is in the possession of a third party should make no difference, since the gross estate reflects the value of all property “wherever situated.” Nor does the classification of e-mail as either tangible or intangible matter, since “all property . . . [whether] tangible or intangible” is considered when determining the gross estate.

To illustrate the point, suppose that the deceased had stored all of her household items at a commercial storage facility prior to her death. The storage facility could not claim that it has the right to keep or destroy all of the stored possessions (although the storage facility may be entitled to fees accrued after the death, and there may be a reasonable time limit imposed on the collection of the items).

as jointly owned property, life insurance proceeds, payable-on-death accounts or other revocable dispositions made by a divorced spouse to a former spouse before the dissolution.); Horwitz v. Ritholz, 465 N.E.2d 642, 645 n.4 (Ill. App. Ct. 1984) (“Estate assets (sometimes called ‘probate assets’) are those which are subject to the control of the probate court. . . . Generally, estate (or probate) assets are those which are solely owned by the [testator]. They also include his share of property held as a tenant in common with one or more others, and life insurance and other property payable to the estate. All other assets and property rights of the [testator] are included in the term ‘non-probate assets.’” (quoting R.S. HUNTER, ESTATE PLANNING AND ADMINISTRATION IN ILLINOIS 47 (2d ed. 1981)).

150. I.R.C. § 2031(a) (2006). Furthermore, “[t]he value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.” I.R.C. § 2033 (2006). Presumably, this would only be a significant consideration for famous individuals whose e-mails may command a market value, or for those individuals who have created valuable literary works that have not been published or stored elsewhere. The personal representative of an estate may employ an appraiser to ascertain the value of an e-mail account. UNIF. PROBATE CODE § 3-707, 8 U.L.A. 154 (1998) (“The personal representative may employ a qualified and disinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent’s death of any asset the value of which may be subject to reasonable doubt.”).

151. An exception may be e-mail accounts jointly held, for example, by husband and wife, in which case the contents of the account would seem to pass as a non-probate asset. See INTERNAL REVENUE SERV., supra note 149, § 5.5.7.6 (defining non-probate assets as including joint interests).


153. Id.

IV.
ANALYSIS: THE LEGAL STATUS OF DECEDENTS’ E-MAIL

A. E-Mail Ownership Remains with the Account Holder

As described above, an e-mail message is the creation of its author and, as such, should be considered the author’s property.155 As a general rule, the author’s rights in her e-mail should be equivalent to her rights in her private letters.156 That is, the author retains a copyright in messages authored by her, and retains ownership of the copies (as distinct from the copyrights) of the messages received by her.157 Where such sent or received messages are placed in the possession of a third party (such as an e-mail service provider) for safekeeping, a bailment relationship is created by which the e-mail service provider acquires possession of the e-mail messages while the account holder retains ownership of those messages.158 In the case of death, heirs should be able to inherit e-mail messages just as they would inherit private letters and other possessions of the deceased.159 Recent state laws, court decisions, and the policies of e-mail service providers themselves (all of which have increasingly favored account holder rights, as described above) support these conclusions.160 Nevertheless, because privacy is sometimes asserted as a factor disfavoring transmission to heirs, the issue must be addressed.

B. The Misplaced Privacy Argument

When the parents of deceased Marine Corps reservist Karl Linn contacted the company that hosted their son’s e-mail account, they were told that protecting customers’ privacy was top priority and that no information about the account could be provided.161 However, while the privacy of the account holder is often cited as a factor weighing against disclosure, privacy rights are generally considered to cease upon death.162 Moreover, private letters, diaries, and photographs can be inherited,163 and may contain equally private information.

155. See supra notes 39–48 and accompanying text.
156. See id.
157. See supra Part II.D.
158. See supra Part III.A.
159. See supra Part III.D.
160. See supra Parts I & II.C.
161. Cha, supra note 2.
162. See RESTATEMENT (SECOND) OF TORTS § 652I (1977); Bick, supra note 62.
On the other hand, while a common law cause of action for invasion of privacy may cease upon death, general freedom of contract principles suggest that it may still be possible to create a contractual right of privacy which is effective to protect private information of deceased individuals.164 Furthermore, e-mail service providers have a legitimate interest in protecting the privacy rights of living account holders, and may be concerned about fraudulent claims.165 Finally, the contents of an e-mail account may contain private information of third parties, though here again, this is not a new legal issue since private letters have always potentially contained private information of third parties.

Thus, the privacy argument asserted by those opposing the inheritance of e-mail is largely misplaced. Although the explicit and clearly expressed intent of account holders requesting that account content not be transferred to heirs should be respected under general principles of freedom of contract, boilerplate provisions in contracts of adhesion drafted by e-mail service providers should not be allowed to rewrite probate laws such that heirs are unable to inherit what would otherwise be inheritable.

V.
RECOMMENDATIONS
A. Recommendations for Account Holders, Heirs, and E-Mail Service Providers

Given the current state of affairs regarding e-mail ownership and transfer rights, e-mail users can take different actions depending on whether they seek to promote or prevent posthumous transfer of the contents of their e-mail accounts. Those seeking to promote transfer can provide password and login identification information to loved ones, allowing them to retrieve e-mail in the case of death. They can also save copies of important e-mail messages to hard drives or create hardcopy files that will pass along with other papers and effects.

Although this Article has focused on the recommended default rule for enabling the transfer of e-mail at the time of death, some e-mail account holders may prefer that their e-mail messages not be passed to heirs. Given the principles of freedom of contract described


164. See supra note 68 and accompanying text.

165. See supra notes 71 & 142 and accompanying text.
above, a default law facilitating e-mail transfer to heirs should allow for account holders to make alternate arrangements. For example, one commentator has suggested that those seeking to maintain confidentiality could instruct their executor to delete sensitive files after death. It has similarly been suggested that it would be possible to bequeath e-mail to a trustee who is instructed to destroy it. This estate planning technique allows the creator of the trust and the planner to select an independent trustee with detailed instructions under the trust (e.g., they may include a specific distribution of the e-mails to a designated person).

However, a great deal of forethought and planning are required for such measures, and simpler methods may be just as effective. One obvious but unappealing solution is to not send sensitive information via e-mail, but this would sharply limit the utility of e-mail. A second option would be to follow the lead of some corporations and purge e-mail accounts of private messages on a regular basis. A third option is to use a separate (and perhaps anonymous) e-mail account for sensitive information. If heirs are unaware of the existence of an account, they will not be able to request access to it and the

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166. See supra Parts II.C.1–2.


168. Leach, supra note 6. Some might argue that this is essentially what has been done by contract between e-mail service providers such as Yahoo! and account holders; i.e., it has been agreed that the service provider will destroy the account contents upon the death of the account holder. See supra note 9 and accompanying text.

169. Recent surveys have found that fewer than half of American adults have wills. See, e.g., Kathy Chu, Fewer Estates Exercise Will Power, WALL ST. J., June 10, 2004, at D2 (noting that “in 2004, only about 42% of adults had a will, down from 47% in 2000”); Press Release, Findlaw, Most Americans Still Don’t Have a Will, Says New Survey by Findlaw (Aug. 19, 2002), available at http://company.findlaw.com/pr/2002/081902.will.html (noting the results of a one thousand-person national survey in which only 44% of American adults reported having a will). Not surprisingly, the percentage of people with a will generally increases with age. AARP, WHERE THERE IS A WILL . . . : LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY, 2 fig.1 (2000), available at http://assets.aarp.org/rgcenter/econ/will.pdf (noting percentage of Americans that report having a will by age category: 50-54 (44%); 55-59 (55%); 60-64 (55%); 65-69 (65%); 70-74 (75%); 75-79 (71%); 80+ (85%)). By contrast, the percentage of people using the internet generally decreases with age. PEW INTERNET AND AM. LIFE PROJECT, DATA MEMO: INTERNET PENETRATION AND IMPACT 4 (2006), http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf (noting the percent of individuals using the internet by age category: 12-17 (87%), 18-29 (88%), 30-49 (84%), 50-64 (71%), 65 and older (32%)).

contents may be erased pursuant to the e-mail service provider’s account inactivity policy.\textsuperscript{171}

Assuming it is not against the wishes of the deceased, the best option for heirs seeking to obtain e-mail account content is to follow (where available) the procedures established by e-mail service providers such as Microsoft or Google, which release account information upon the submission of certain documentation.\textsuperscript{172} If the e-mail service provider does not have such a policy, heirs may be able to rely on state law commanding such transfer, or failing that, on a court order as in the Ellsworth case.

E-mail service providers, for their part, can enable users to opt in to certain policies upon the creation of e-mail accounts (e.g., “I hereby request e-mail service provider to destroy the contents of my e-mail account in the case of my death” or, “I hereby request e-mail service provider to release the contents of my e-mail account to the following individual(s) in the case of my death.”). This type of measure will clarify intent and help give effect to the account holder’s wishes.

Because e-mail is now widely available to United States military personnel serving overseas,\textsuperscript{173} special provisions should be afforded to

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\textsuperscript{171}See, e.g., Harvard Medical School Email Account Policy, http://www.hms.harvard.edu/it/email/email_account_policy.html (last visited Mar. 21, 2007) (“Any email account which has not been accessed in 1 year (365 days) will be inactivated.”); Gmail Program Policies, http://www.google.com/mail/help/program_policies.html (last visited Mar. 21, 2007) (“Google will terminate your account in accordance with Section 9 of the Terms of Use if you fail to login to your account for a period of nine months.”); About AOL, AOL Network Registered User Terms of Service, http://about.aol.com/aolnetwork/terms_use (last visited Mar. 21, 2007) (“We reserve the right to cancel any free e-mail account that is inactive for more than 30 days, and any data on a deactivated account may not be retrieved later. You are solely responsible for backing up and archiving any important email.”); Yahoo! Terms of Service, supra note 9, § 12 (“You acknowledge that Yahoo! may establish general practices and limits concerning . . . the maximum number of days that email messages . . . will be retained . . . . Yahoo! reserves the right to modify these general practices and limits from time to time.”).

\textsuperscript{172}See supra note 72.

them in their estate plans.174 Their “last documents” should make provisions for the distribution or disposal of their e-mails upon their demise.

B. Policy Recommendations

In the long run it is probably desirable to have uniform laws addressing e-mail ownership and transfer.175 These laws should balance: (1) the privacy and ownership interests of account holders; (2) the interests of heirs in obtaining the property of loved ones; and (3) the interests of e-mail service providers in reducing liability exposure and administrative expenses. The creation of uniform laws, even if only achieving a non-optimal balancing of these interests, will benefit society by allowing all parties concerned to adjust their behavior to achieve these goals.176 The suggested uniform laws should take the form of state laws that adopt a uniform policy as found in the Uniform

174. Those serving in the military are encouraged (but not required) to execute wills. Kevin P. Flood, Estate Planning for the Military, GPSOLO, at 1, http://www.abanet.org/genpractice/legalface/pdf/flood.pdf (last visited Mar. 21, 2007) (noting that “more than 550,000 wills were prepared for active duty and reserve service members during the Desert Storm mobilizations”); see also Theresa A. Bruno, The Deployment Will, 47 A.F. L. Rev. 211, 212 (1999) (noting that although “Air Force legal offices are required to assist in the preparation of . . . wills,” not all airmen take advantage of these services).

175. The National Conference of Commissioners has drafted more than 200 uniform laws since its inception in 1892. The National Conference of Commissioners on Uniform State Laws, http://www.nccusl.org/ (follow “About NCCUSL” hyperlink; then follow “Introduction to the Organization” hyperlink). Included among them are the Uniform Probate Code, the Uniform Child Custody Jurisdiction Act, the Uniform Partnership Act, the Uniform Anatomical Gift Act, the Uniform Limited Partnership Act, and the Uniform Commercial Code (the latter in partnership with the American Law Institute). Id. The Uniform Commercial Code is the most well-known and successful among these. Lawrence J. Bugge, Commercial Law, Federalism, and the Future, 17 Del. J. Corp. L. 11, 13 (1992).

176. It is now widely known that employee e-mails are readable by the employer and discoverable in litigation. See, e.g., Mosaid Techs. Inc. v. Samsung Elecs. Co., No. Civ.A.01-CV-4340, 2004 WL 2550306, at *3 (D.N.J. July 7, 2004) (“[Defendants] knew, or should have known, that e-mails were discoverable, given their heavy reliance on e-mails obtained from plaintiff during discovery, not to mention the obvious realities of modern litigation.”) (emphasis added); Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652 (“[I]t is a well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable.”). Because of this clear rule of discoverability, businesses and individuals have been able to modify their behavior in order to maintain reasonable privacy levels. See, e.g., Ira Genberg, Litigation’s Domain Covers All Email, ENGINEERING NEWS-REC., May 9, 2005, at 47 (advocating that business owners implement electronic document management and retention policies even before litigation is threatened or pending). Similarly, having clear rules regarding the inheritability of private e-mails will allow users to adjust their behavior accordingly.
Commercial Code rather than federal laws. Because cyberlaw is a developing and rapidly changing field, states should initially be allowed to experiment with different approaches to defining the legal boundaries of the ownership of e-mail. Over time, those approaches that work best would emerge with greater clarity. Although federal legislation could be expected to produce uniformity more quickly and immediately produce greater certainty, the risk is that in passing such legislation without a complete understanding of the implications, a sub-optimal standard might be too quickly adopted.177 Additionally, it has been suggested that proposed laws such as those promulgated by the National Conference of Commissioners on Uniform State Laws are “consistently higher” in quality than federal legislation.178

It is not difficult to understand the significance of e-mail messages to the loved ones the deceased leaves behind. In addition, practical motivations exist for the transfer of e-mail to heirs. As online bill paying becomes more common, e-mail billing statements may be the only manner in which an executor can become aware of unpaid bills. As one heir reported, regarding his deceased father’s internet business, “I couldn’t access his accounts or pay suppliers. . . . People run their lives through [the Microsoft] Outlook [e-mail application], but I couldn’t access that either, so I couldn’t reach his customers to inform them that he’d died.”179 To prevent such problems, state probate laws should provide for the transfer of e-mail messages to family members or other heirs upon death, as has been done in Connecticut.180 Such laws would provide notice to account holders and would allow them to arrange their affairs accordingly, thereby mitigating privacy concerns.181

179. Reeves, supra note 167.
180. See supra note 69 and accompanying text.
181. These laws should clarify that internet service providers may charge a reasonable fee if, for example, account content is shipped by compact disk, and that monthly account fees may continue to accrue until the account is closed (such monthly fees would not apply in the case of free e-mail accounts). Furthermore, since it is perhaps unreasonable to require e-mail service providers to maintain account contents indefinitely, a reasonable time limit should be imposed during which heirs can present proper documentation. For small estates, these suggestions could be accomplished by modifying section 3-1201 of the Uniform Probate Code to clarify that e-mail service providers must provide access to the e-mail account of the decedent upon the presen-
More generally, the Uniform Probate Code could be modified in several ways. Section 2-203, for example, could clarify whether e-mail is considered personal property: e.g., “E-mail stored in an account of the decedent, regardless of the physical location of the storage device on which the contents of the account are stored, shall be considered inheritable personal property.” Similarly, section 3-706 could specify that property includes e-mail accounts. Section 3-709 could be modified to provide that personal representatives may obtain the contents of e-mail accounts. Section 3-711 could specify that personal representatives may access private e-mail accounts of the deceased. Finally, section 3-814 could be amended to provide that personal representatives may pay e-mail service provider account fees as necessary to obtain the contents of a deceased’s e-mail account.

VI.

CONCLUSION

As technology develops, so too must the law. The ownership and intellectual property interests authors have in their electronically stored e-mail accounts are no less legitimate than are such interests in messages created with paper and pen. Though there may be additional considerations, there is no need to formulate a completely new paradigm of law to protect the interests of all involved. At the same time,
the uncertainty surrounding the legal status of e-mail cannot be ignored. Countless e-mail messages are sent annually by employees and individuals. The use of wireless devices to send e-mails will certainly add to the equation. Many of these e-mail messages will have potential economic value to the author and her heirs. A financial planner and estate planner should consider their value as part of the owner’s net worth and estate value. The status of the author would be relevant; e-mails from a celebrity, for example, might take on a special value.187

Because personal e-mail messages are the property of the author, an ethical question arises relative to the author’s intent as to their distribution upon death. Are the author’s interests compromised by a standard privacy policy that applies to millions of e-mail users? So long as there are other providers with more favorable policies readily available,188 one could argue the author had a choice to subscribe to the provider allowing the next of kin to access the e-mails upon her death. Authors should be held to a reasonable standard of responsibility in seeking out the most suitable service provider.

Ultimately, one must ask whether the laissez-faire system currently in effect with respect to e-mail ownership provides sufficient certainty and structure for the smooth functioning of what has become the predominant mode of communication. If the experiences of Nancy Carter and Justin Ellsworth are any indication, the answer is no. The importance, volume, and ubiquity of e-mail in the modern world make the topic worthy of immediate legislative attention. The reality of the enormous global use of e-mail messages with real or potential value demands a clear legal policy regarding ownership—both during and after the author’s life.

187. The word “celebrity” here is used in a broad sense. Just as Tom Brokaw might have examined the letters of ordinary soldiers as he prepared to write his book, “The Greatest Generation,” future authors may very well be examining e-mails from ordinary citizens rather than their paper and pen letters. See Tom Brokaw, The Greatest Generation (1998) (telling stories of ordinary American soldiers who came of age during the 1930’s and 1940’s).
188. See supra note 71 and accompanying text.