"OWNING" WHAT YOU "BUY": HOW ITUNES USES FEDERAL COPYRIGHT LAW TO LIMIT INHERITABILITY OF CONTENT, AND THE NEED TO EXPAND THE FIRST SALE DOCTRINE TO INCLUDE DIGITAL ASSETS

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I. INTRODUCTION

Imagine a loved one in the later years of their life. They do the responsible thing, and contact an estate-planning attorney to ensure protection of all of their assets after they leave this world. They can now rest easy knowing that everything they own will be in the hands of the people they love, and the people they chose to receive certain items. Except they have not done what they set out to, and it is not their fault. Even if their estate-planning attorney recommended a provision covering digital assets, which is rare, those assets are stuck in a limbo of legal confusion and uncertainty of property rights. Do they actually "own" their digital assets? The unanswered questions in these situations is whether a person "owns" their digital assets, and whether these assets may be passed to a person's beneficiaries or heirs when they die.

Since its inception, the number of people with access to the internet has grown dramatically. Between the years 2000 and 2015, the world saw a 832.5% increase in internet usage.[1] With the expansion of the internet comes an increasing amount of digital assets. Tim Cook, CEO of technology giant Apple, recently announced that the company has registered nearly 800 Million iTunes accounts.[2] Considering the sheer number of accounts active with Apple's iTunes, there are tens of thousands, even millions of people who have "purchased" their share of the 26 million songs, 700,000 apps, 190,000 television shows, and 45,000 movies available in the iTunes Store.[3] In the grand scheme of digital assets, digital media purchased from an online provider

1. Miniwatts Mktg. Grp., *Internet Usage Statistics: The Internet Big Picture*, INTERNET WORD STATS, http://www.internetworldstats.com/stats.htm (last visited Feb. 28, 2016).

2. Nina Ulloa, *iTunes has 800 Million Accounts. . . .and 800 Million Credit Card Numbers. . . .*, DIGITAL MUSIC NEWS (Apr. 24, 2014), http://www.digitalmusicnews.com/2014/04/24/itunes800m/.

3. Press Release, Apple, Apple Unveils New iTunes (Sept. 12, 2012), https://www.apple.com/pr/library/2012/09/12Apple-Unveils-New-iTunes.html.

has been dominated by Apple.[4] From a business perspective, no digital asset provider to date surpasses Apple's genius. From an estate planning perspective; however, Apple has created a monster. Most people probably assume that when they "purchase" a song on iTunes, they "own" it. Of the roughly 800 Million iTunes accounts, it is likely that very few consumers actually took the time to sit down and read the daunting and lengthy Terms & Conditions that they agree to with the click of a button.[5] This agreement, however, states that they do not actually own anything they pay for via iTunes.[6] To the contrary, they have been granted a limited license to access the digital asset only on their account, and only on a limited number of devices linked to the account.[7] Further, the limited license granted by the User Agreement is non-transferrable in nature.[8]

When placed within the contours of the First Sale Doctrine—that is, the restriction on reproduction of digital content but the right to sell it in tangible form exactly once—current law on digital media rights begins to appear hopelessly outdated.[9] Currently, federal courts do not extend the First Sale Doctrine to include digital media and digital assets.[10] This causes problems for families grieving over the loss of a loved one as they attempt to access or control the decedent's digital assets and are swiftly denied by various digital asset providers.[11] There are several states that have introduced versions of the Uniform Fiduciary Access to Digital Accounts Act ("UFADAA") to their respective legislatures, which is a step forward with respect to certain

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4. James D. Lamm, *A Tangled Web: Tax and Estate Planning for Digital Property*, 40 (June 15, 2015) (unpublished manuscript) (on file with author).

5. Ullua, *supra* note 2.

6. Emily Stutts, *Will your Digital Music and e-book Libraries "Die Hard" with you?: Transferring Digital Music and e-books Upon Death*, 16 SMU SCI. & TECH. L. REV. 371, 372–73 (2013). *But see* Adrienne Clare Barbour, *Used iTunes: The Legality of Redigi's Model for A Second-Hand Digital Music Store*, 15 TUL. J. TECH. & INTELL. PROP. 165, 195 (2012) (contending that because iTunes' Terms of Sale do not use language indicating that the purchaser is obtaining a license in the section regarding music downloads, that users do, in fact own their copy of the downloaded music file.).

7. Terms and Conditions of iTunes, APPLE, http://www.apple.com/legal/internet-services/itunes/us/terms.html (last visited Feb. 28, 2016) (Under the Licensed Application End User License Agreement, App Store Products "are licensed, not sold, to you. . . . You shall be authorized to use iTunes Products on five iTunes-authorized devices at any time . . . .").

8. *Id.* (This license granted to you . . . is limited to a nontransferable license . . . [and] does not allow you to use . . . [iTunes] on any Apple Device that you do not own or control . . . .").

9. See *infra* Part V for a deeper discussion of the First Sale Doctrine.

10. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

11. *Decedent*, BLACK'S LAW DICTIONARY, (10th ed. 2014) ("A dead person, esp[ecially] one who has died recently.").

digital assets.[12] While this is a good start, it cannot reach the iTunes User Agreement because of the Agreement's classification of assets as a limited-license "property."[13] This property is governed by federal law, specifically by the Copyright Act of 1976.[14]

This article will first discuss the background and history of digital assets, the question of inheritability, and the inherent problems with the iTunes user agreement. Next, this article poses an argument that the iTunes user agreement is an adhesion contract leaving the consumer no choice but to accept, and further that the agreement leads to an unconscionable result that robs people of property rights that they likely (and reasonably) believed they had. Then it will discuss the First Sale Doctrine's applicability to assets generally and how federal copyright law needs to be amended and expanded so that the First Sale Doctrine also encompasses digital assets. Finally, this article includes a proposal for a federal solution to the problem of digital assets, and urges each state to adopt the Uniform Fiduciary Access to Digital Assets Act as a progressive step towards modernizing our antiquated laws on this subject.

II. BACKGROUND & HISTORY

A. *Nature of Digital Assets*

According to at least one source, a digital asset, in essence, is anything that is stored in a binary format and comes with the right to use it; digital assets are classified as images, multimedia, and textual content files.[15] The term includes, but is not limited to, files, electronic mail, digital documents, audible content, motion pictures, and relevant digital files that are currently in circulation or will be stored on digital appliances such as phones, computers, or tablets.[16] One of the first problems, however, is

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12. Nat'l Conference of Comm'rs on Unif. State Laws, *Fiduciary Access to Digital Assets Act, Revised (2015)*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)(last visited Feb. 28, 2016).

13. Terms and Conditions of iTunes, *supra* note 7.

14. 17 U.S.C. § 106 (West 2012).

15. Albert van Niekerk, *Strategic management of media assets for optimizing market communication strategies, obtaining a sustainable competitive advantage and maximizing return on investment: An empirical* study, 3 J. DIG. ASSET MGMT. 89, 90 (2007).

16. Naomi Cahn & Melinda Dudley, *The Virtual Estate Part 1: Planning for a Client's Digital Assets*, 25 NO. 1 ELDER L. REV. 1, 1 (2013).

that there is no universally accepted definition of digital assets.[17] This is largely because of how difficult it is to conceptualize what a digital asset actually encompasses. Currently, there is no proper definition of a digital asset or a digital estate provided in either *Webster's* or *Black's Law Dictionary*.[18] With no guiding beacon, many estate planning attorneys either neglect digital assets altogether or guess as to what property a testator owns that qualifies as a digital asset when assisting a client with their estate planning needs.

B. *Inheritability Problem*

Most people, aside from some lawyers and those in the music industry (namely, iTunes), think that when they "buy"[19] a song on iTunes, they actually "own" it.[20] This is not the case. The truth is that a consumer is no more buying those products than they are buying a book from the library.[21] In most cases, the seller (iTunes) retains the right to take what they "bought" away at death.[22] This is due to the current state of federal copyright law. An examination of that area as it pertains to digital assets reveals the following issues: (1) a private company retains the right to take away a consumer's rights in an asset; (2) inheritability is governed by state law, which is trumped by federal law with respect to the Copyright Act and its applicability to digital assets; and (3) public expectations of rights in digital assets such as iTunes media are at odds with reality, given the current state of federal copyright law.

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17. John Romano, *A Working Definition of Digital Assets.*, THE DIGITAL BEYOND (Sept. 1, 2011), http://www.thedigitalbeyond.com/2011/09/a-working-definition-of-digital-assets/comment-page-1/.

18. John Conner, *Digital Life After Death: The Issue of Planning for A Person's Digital Assets After Death*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 301, 303 (2011) (recognizing the absence of a definition from both Webster's Dictionary and Black's Law Dictionary.).

19. *Buy*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 306 (1986) (defining "buy" as "to acquire ownership, right, or title to (anything) by paying or agreeing to pay money.").

20. *Own*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("To rightfully have or possess as property; to have legal title to.").

21. Kyle K. Courtney, *Think You 'Own' What you 'Buy' on the Internet? Think Again*, POLITICO MAGAZINE (Jan. 11, 2015), http://www.politico.com/magazine/story/2015/01/you-bought-it-but-dont-own-it-and-thats-wrong-114163.html#.VSgvGVxH3dQ.

22. Terms and Conditions of iTunes, *supra* note 7.

C. *The Question of Inheritability*

1. What is Inheritability?[23]

This is the simple part of this very complex problem. It just means that something is capable of being inherited, or passed on from person to person, usually at death.[24] There are essentially three ways that a person can dispose of their property: wills, will substitutes, and through intestacy[25] laws.[26] The process by which a person's property is administered after death is called "probate"[27] with the property being passed called "probate estate."[28]

> If a person dies owning property that is subject to administration in the probate court, there is a "probate estate." The assets constituting the probate estate are listed in an "inventory" prepared by the personal representative and filed in the probate court. The "net probate estate" consists of the assets, if any, remaining after payment of funeral expenses, expenses of administering the estate, claims allowed against the estate, and death taxes.[29]

When addressing digital assets, however, estate planning attorneys are left with very few choices. Estate planners may attempt to account for digital assets by including user names and passwords in wills or will substitutes (most of the time unsuccessfully), or simply stick with the boilerplate language of a will or will substitute, leaving out any mention of digital assets. One problem that may arise here is that even if a testator includes user names, passwords, and all other pertinent information in their will, they may inadvertently forget to update their will when they change passwords, switch accounts, or

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23. This article's author would like to extend a special thank you to Mr. Steve Katten & Ms. Monica Benson for their assistance in understanding probate and estate planning laws.

24. *Heritable*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("(Of property) capable of being inherited.").

25. *Intestacy*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The quality, state, or condition of a person's having died without a valid will.").

26. JESSE DUKEMINIER et al., WILLS TRUSTS, AND ESTATES 62 (7th ed. 2005) ("Basically, a will-substitute is the functional equivalent of a will executed during life. For example, revocable inter vivos trusts, contracts, life insurance, pension plans, and joint accounts are all will-substitutes.").

27. *Probate*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("To admit (a will) to proof; To administer (a decedent's estate).").

28. ROBERT J. LYNN & GRAYSON M.P. MCCOUCH, INTRODUCTION TO ESTATE PLANNING IN A NUTSHELL 25 (Thomson West 5th ed. 2004).

29. *Id.*

change email addresses.[30] "Provisions regarding digital assets may be outdated quickly, as the asset disappears or takes a new form."[31] Moreover, "wills are generally unsuitable . . . as repositories for passwords or other information that is critical to accessing on-line assets."[32] Not only might the information change between the time the testator includes it in a will and probates the will, wills become public information.[33] "A will might instead reference a separate document containing detailed account information; such a reference would be better than placing this information in the will itself."[34]

Further, "it is unclear whether service providers will respect the terms of wills to transfer ownership of digital assets."[35] This would leave the heirs or beneficiaries of a decedent empty-handed when they attempt to gain access to digital accounts. In spite of the lack of clear guidance with respect to digital assets in the law, estate planners should still include questionnaires about digital assets, at a minimum, in order to attempt to account for digital accounts and assets after a person's passing.

However, even when a testator includes the information necessary to access accounts, certain clauses in user agreements may limit what they can or cannot do with digital assets once they gain access, if ever.

2. How the iTunes EULA Limits Inheritability Using The Copyright Act of 1976

The iTunes user agreement reads, in part, "(a) Scope of License: This license granted to you for the Licensed Application by Licensor is limited to a nontransferable license to use the Licensed Application on any Apple-branded products running iOS . . . ."[36] It goes on to say:

> This license does not allow you to use the Licensed Application on any Apple Device that you do not own or control, and except as provided in the Usage Rules, you may not distribute or make the Licensed Application available over a network where it could

30. *Testator*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Someone who has made a will; esp., a person who dies leaving a will.").

31. Gerry W. Beyer & Naomi Cahn, *When You Pass On, Don't Leave the Passwords Behind: Planning for Digital Assets*, 26 NO. 1 REAL PROP. TR. & EST. L., Jan.–Feb. 2012, http://www.americanbar.org/publications/probate_property_magazine_2012/2012/january_february_2012/article_beyer_cahn_planning_for_digital_assets.html.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Terms and Conditions of iTunes, *supra* note 7.

> be used by multiple devices at the same time. You may not rent, lease, lend, sell, transfer redistribute, or sublicense the Licensed Application and, if you sell your Apple Device to a third party, you must remove the Licensed Application from the Apple Device before doing so.[37]

The problem with the limitation imposed here is that most Americans with iTunes accounts do not read their user agreements, so they do not know that they are merely being granted a non-transferrable license rather than actual ownership of digital property.[38] The section that expressly grants Apple the ability to take away a consumer's "property" at any time it deems necessary is under the Content Availability section.[39] Specifically, it states, "Apple and its licensors reserve the right to change, suspend, remove, or disable access to any iTunes Products, content, or other materials comprising a part of the iTunes Service at any time *without notice*."[40] It is through this section that Apple exploits the Copyright Act of 1976, to the detriment of the consumer, and it does so in a way that most people probably do not know is possible. If Apple were a government actor, this would essentially be a "taking" in that it can remove a consumer's "property" from their account without notice or just cancel the account altogether. Apple's ability, through the Copyright Act, to strip someone of their account at any time, specifically at death, leads to an unconscionable result. It follows that the license-granting section of the iTunes User Agreement should be struck down as unenforceable. The problem is that current copyright law allows Apple to conduct its business in this manner without any recourse for the American consumer.

In the next section, this article will discuss the various ways in which the User Agreement is unenforceable, specifically, that it is an adhesion contract leading to an unconscionable result.

III. UNCONSCIONABILITY OF THE ITUNES USER AGREEMENT

The argument against the iTunes User Agreement as it stands is that it is an adhesion contract, leaving consumers no choice but to accept. Given the consumer's inherent lack of bargaining power, the provision classifying a consumer's rights in a digital asset as a license leads to the unconscionable result of

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37. *Id.*

38. Umika Pidaparthy, *What You Should Know About iTunes' 56-Page Legal Terms*, CNN (May 6, 2011, 7:08 AM), http://www.cnn.com/2011/TECH/web/05/06/itunes.terms/.

39. Terms and Conditions of iTunes, *supra* note 7.

40. *Id.* (emphasis added).

denying consumers the ability to leave what they have purchased to their loved ones when they pass away.

A. *Adhesion Contracts and Unconscionability Defined.*

An adhesion contract is defined as a "standard-form contract prepared by one party, to be signed by another party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms."[41] "Overreaching," in connection with contractual agreements, "refers to one party's unfair exploitation of its overwhelming bargaining power or influence over the other party."[42] "The mere existence of inequality between the two parties, however, is not enough to render an agreement unenforceable."[43]

Unconscionability has no precise legal definition because it is not a concept but a determination to be made in light of a variety of factors.[44] "Unconscionability is an equitable principle, and whether a provision is unconscionable is for the court to decide."[45] The Uniform Commercial Code, adopted by most states in some form,[46] states the following:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.[47]

There are two components that comprise unconscionability that a court will look to: procedural and substantive.[48] Substantive unconscionability refers to the fairness of a provision itself, and procedural unconscionability relates to the making or inducement of the contract, focusing on the facts surrounding the bargaining process.[49] "In assessing a claim of unconscionability of

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41. *Adhesion Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014).

42. Gonzalez-Morales v. UBS Bank USA, 63 F. Supp. 3d 191, 197 (D.P.R. 2014) (citation omitted).

43. *Id.* (citation omitted).

44. Sw. Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 498 (Tex. 1991).

45. Appalachian Leasing, Inc. v. Mack Trucks, Inc., 765 S.E.2d 223, 231 (W. Va. 2014) (citation omitted).

46. J. MICHAEL GOODSON LAW LIBRARY DUKE UNIV. SCH. LAW, *UNIFORM COMMERCIAL CODE (UCC)* 1, https://law.duke.edu/sites/default/files/lib/ucc.pdf.

47. U.C.C. § 2–302 (AM. LAW INST. & UNIF. LAW COMM'N 2003).

48. TMI, Inc. v. Brooks, 225 S.W.3d 783, 792 (Tex. App. 2007).

49. *Id.*

a contract, . . . courts consider both procedural and substantive unconscionability."[50] Although both forms are relevant, some courts require only substantive unconscionability.[51] However, the prevailing view is that courts require both procedural and substantive unconscionability in order to render a contract unenforceable.[52]

> In determining whether a contract is unconscionable, the trier of fact must examine (1) the "entire atmosphere" in which the agreement was made; (2) the alternatives, if any, available to the parties at the time the contract was made; (3) the "non-bargaining ability" of one party; (4) whether the contract was illegal or against public policy; and (5) whether the contract is oppressive or unreasonable. The totality of circumstances must be assessed as of the time the contract was formed. The grounds for substantive abuse must be sufficiently shocking or gross to compel the court to intercede, and the same is true for procedural abuse—the circumstances surrounding the negotiations must be shocking . . . .[53]

B. *The iTunes EULA*

After about half a minute of scrolling, a consumer would finally get to the section of the iTunes user agreement where their "ownership" rights are spelled out. Given its length, most consumers probably just click "accept" rather than take the time to read through this entire agreement. At the beginning, it is apparent that the User Agreement is an adhesion contract: the consumer must accept the terms as they are, or they cannot use iTunes. However, this alone does not make the contract unconscionable.

As mentioned above, the unconscionable portions of this contract are, specifically, the first paragraph under the Licensed Application End User License Agreement, as well as subsection (a), which specifically state that the consumer does not "own"

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50. Chalk v. T-Mobile USA, Inc., 560 F.3d 1087, 1093 (9th Cir. 2009) (citation omitted) (stating that Oregon courts need only find substantive unconscionability to void a contract.).

51. *Id.*

52. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) ("The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability."). *See also* American Stone Diamond, Inc. v. Lloyds of London, 934 F. Supp. 839, 844 (S.D. Tex. 1996).

53. Delfingen US-Texas, L.P. v. Valenzuela, 407 S.W.3d 791, 798 (Tex. App. 2013).

anything that is "sold" to them.[54] Given this condition, the content on iTunes falls under the Federal Copyright Act of 1976 § 106, which states, in pertinent part, that "the owner of copyright under this title has the exclusive rights to do and to authorize the following: . . . distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[55] An iTunes song, as a licensed material, falls under this definition because, when purchased through iTunes, the song is necessarily a copy of the original work, and the "buyer" cannot sell or transfer the material once they "buy" it.

Unconscionability arises here because of the lack of ownership of content after a consumer "buys" the movies, music, or television shows that are available through the iTunes Store. Aside from the lengthy User Agreement, iTunes gives consumers no indication that they are being granted a limited license. As a consumer begins setting up his or her iTunes account as an average user, it immediately becomes clear that it is a contract of adhesion. The consumer must either scroll through more than 56 pages of legal jargon or simply click "accept." There is no room for negotiation on the consumer's end. Given the nature of the "agreement," it is clear, at least to the legal mind, that there is an extremely unequal bargaining power between iTunes and the consumer.

The instance that brought this issue to light, at least recently, was a rumor that Bruce Willis was suing Apple over the right to leave his iTunes account to his daughters in his will.[56] Although it turned out to be just that, a rumor, it brought up the very topic of discussion in this Article. There are several instances of consumers "owning" hundreds, if not thousands, of dollars of content on iTunes. On July 7, 2013, Huffington Post wrote an article about seven-year-old twins spending as much as $3,000.00 on in-app purchases for the game "Clash of Clans."[57] Another report suggested that iTunes users, on average, spend at the rate of $40 per year.[58] Considering the 800 Million iTunes

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54. Terms and Conditions of iTunes, *supra* note 7.

55. 17 U.S.C. § 106 (West 2002).

56. Frederic Lardinois, *Bruce Willis Isn't Suing Apple Over iTunes Music Ownership Rights*, TECH CRUNCH (Sept. 3, 2012), http://techcrunch.com/2012/09/03/bruce-willis-itunes-music-library/ (dispelling the rumor that Bruce Willis was suing Apple over ownership rights to music in his iTunes account).

57. Catherine Taibi, *7-Year-Old Twins Rack Up $3,000 iTunes Bill Playing 'Clash of Clans,'* HUFFINGTON POST (July 23, 2013, 4:33 PM), http://www.huffingtonpost.com/2013/07/23/3000-itunes-bill_n_3640842.html?.

58. Horace Dediu, *iTunes Users spending at the rate of $40/yr.*, ASYMPCO (May 12, 2013, 4:51 PM), http://www.asymco.com/2013/05/12/user-spend-on-itunes/.

accounts across the world, we can be certain that consumers pay iTunes a massive sum of money on an annual basis.[59] As of 2015, the California-based technology juggernaut was valued at roughly $750 billion.[60]

Unconscionability, however, is a high bar, and courts do not often find it. One court found that the "take-it-or-leave-it" nature of a contract, although reflective of unequal bargaining power was, itself, insufficient to render a contract procedurally unconscionable.[61] Other courts have found that adhesion contracts are procedurally unconscionable, and weigh "surprise. . . [to] the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms."[62] Given the length of the iTunes User Agreement alone, there seems to be room for argument that the licensing provisions in the contract are, at least somewhat, hidden from consumers.

However, there is an argument on Apple's behalf that the consumer is charged with constructive knowledge of the terms, since they technically had the opportunity to read and review before accepting.[63]

The Second Circuit Court of Appeals held that, "a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear that clicking on the download button would signify assent to those terms."[64] The court went on to state, "Where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms."[65] At least from this court's perspective, the clicking of "I accept" when the actual agreement is on a separate page is inadequate to charge a consumer with constructive knowledge of licensing terms tossed in to the middle of the "agreement."

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59. Ulloa, *supra* note 2.

60. Lauren Gensler, *5 Reasons Why Apple's $750 Billion Market Cap Could Get Even Bigger*, FORBES (Feb. 19, 2015, 1:22 PM), http://www.forbes.com/sites/laurengensler/2015/02/19/5-reasons-why-apples-750-billion-market-cap-could-get-even-bigger/.

61. Chalk v. T-Mobile USA, Inc., 560 F.3d 1087, 1094 (9th Cir. 2009) ("The take-it-or-leave-it nature of T–Mobile's agreement is insufficient to render it unenforceable.").

62. *E.g.*, Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 605–06 (E.D. Pa. 2007) (citation omitted).

63. Terms and Conditions of iTunes, *supra* note 7.

64. IT Strategies Grp., Inc. v. Allday Consulting Grp., L.L.C., 975 F. Supp. 2d 1267, 1280 (S.D. Fla. 2013) (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29–30 (2d Cir. 2002)).

65. *Specht*, 306 F.3d at 32.

At worst, the iTunes User Agreement is a contract of adhesion, leaving consumers with no bargaining power and no choice but to accept the terms. At best, the iTunes User Agreement undermines consumer expectations with its lengthy, often unread terms and conditions.

The next section of this article will discuss the state and federal laws governing digital assets and copyrights, as well as the problems associated with the various laws discussed.

IV. GOVERNING LAW: PRIVATE, FEDERAL AND STATE LAWS GOVERNING DIGITAL ASSETS

Currently, federal law does not allow for the transfer of digital media.[66] The problem with this is that many who use iTunes are under the illusion that when they click "buy this song" or "buy this movie," that they own the product and can dispose of it as they please.[67] As mentioned, this is not the case.[68] The reality is that federal law is at odds with people's expectations of what they can do with their digital property at death.

A. *Private Ordering: Service Agreements*

iTunes, Amazon (Kindle), and various other digital content providers are essentially granted permission to limit ownership of content in a way that, in addition to being entirely contradictory to public expectation, is designed to keep consumers unaware: lengthy service agreements.[69]

In 1996, the Seventh Circuit found that a private ordering agreement (such as the iTunes EULA) was not preempted by copyright law, "noting that generally private contracts are not affected by preemption."[70] The Court acknowledged that its reasoning for this holding was based in contract analysis rather than copyright law.[71] The court here noted,

> A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create "exclusive rights." Someone who found a copy of

66. 17 U.S.C. § 106 (West 2012).

67. Lamm, *supra* note 4, at 43.

68. *See supra* Part I.

69. *See, e.g.*, Terms and Conditions of iTunes, *supra* note 7.

70. Jenny Lynn Sheridan, *Does the Rise of Property Rights Theory Defeat Copyright's First Sale Doctrine?*, 52 SANTA CLARA L. REV. 297, 319–20 (2012) (citing ProCD v. Zeidenberg, 86 F.3d 1447, 1453–54 (7th Cir. 1996).

71. *Id.*

> SelectPhone (trademark) on the street would not be affected by the shrink-wrap license—though the federal copyright laws of their own force would limit the finder's ability to copy or transmit the application program.[72]
>
> Despite the Seventh Circuit's famous claim that its decision grounded in contract was not a claim against the world, the effect of its reasoning, conflating contract analysis with copyright analysis, was to lay the groundwork and basis for just that—a contract, called a EULA, operating as a right against the world, against every anonymous retailer, and consumer purchasing a software product with a EULA . . . affixed to it.[73]

The following sections will discuss the federal law that allows providers to limit transferability without breaking any laws.

B. *Federal law*

1. Copyright Act of 1976

When a consumer purchases a compact disc, commonly known as a CD, they do not own legal title to the music—they own legal title to a "phonorecord" (in copyright law terminology), which is the physical CD itself.[74] Therefore, when Average Joe consumer walks into Best Buy, or any other store that sells CD's, purchases a CD, and walks out, he owns that CD outright and can dispose of it as he pleases. He can leave it in a will, it can pass through intestacy laws of his state, or he can sell it to a used CD retailer, if he so chooses. The owner of the copyright has the exclusive rights to the music on the CD (including rights to reproduce the music, distribute copies of the music, and perform/display the music publicly).[75] By purchasing a CD, the consumer can listen to the music for their own personal use, but they cannot make a copy of the CD and give it to someone else; they would be in violation of the "reproduction right" of the Copyright Act of 1976.[76] The problem that courts face with respect to digital transfers is that,

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72. ProCD v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996).

73. Sheridan, *supra* note 71, at 322.

74. Email Interview with James Lamm, Attorney, Gray Plant Mooty's Trust, Estate & Charitable Planning Group (March 2015) (on file with author) [hereinafter Email Interview].

75. *Id.*

76. 17 U.S.C. § 106 (West 2012).

> In order to transfer a digital file, the Random Access Memory (RAM) of the recipient's computer must create a copy of the transferred file.[77] The RAM copy then remains on the recipient's computer, while the original file remains intact on the transferor's computer.[78] The making of such a copy arguably infringes the copyright owner's reproduction right, and the transfer of the copy may infringe the copyright owner's distribution right.[79]

The consumer can, however, sell or give away a CD or tangible copy of digital media. This is covered by what is known as the First Sale Doctrine of copyright law. [80]

2. First Sale Doctrine

The First Sale Doctrine was first codified in § 27 of the 1909 Copyright Act.[81] Since its inception, Congress has recodified the First Sale Doctrine in § 109 of the Copyright Act of 1976.[82] In their traditional format, the First Sale Doctrine protects printed media, music, and books.[83] When the owner of these types of content passes away, his or her children can inherit that content free of legal encumbrances.[84] The decedent's children can then sell, give away, or dispose of the inherited property how they see fit.[85] Under the First Sale Doctrine, "the right of a producer to control distribution of its trademarked product does not extend beyond the first sale of the product. Resale by the first purchaser of the original article under the producer's trademark is neither trademark infringement nor unfair competition."[86]

In other words, the original seller of products in a tangible medium, like books or CD's, cannot claim any rights in those physical products after selling them. Additionally, the original buyer has no fear of legal ramifications for later selling or bequeathing those products to heirs or beneficiaries.

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77. Stutts, *supra* note 6, at 382.

78. *Id.*

79. *Id.*

80. Curtis v. Shinsachi Pharm. Inc., 45 F. Supp. 3d 1190, 1202 (C.D. Cal. 2014) (citing Prestonettes, Inc., v. Coty, 264 U.S. 359, 368 (1924)).

81. Stutts, *supra* note 6, at 384; Eric Matthew Hinkes, *Access Controls in the Digital Era and the Fair Use/First Sale Doctrines*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 685, 687 (2007).

82. 17 U.S.C. § 109 (West 2012).

83. *See Curtis*, 45 F. Supp. 3d at 1202–03.

84. Lamm, *supra* note 4, at 39.

85. *Id.* at 39–40.

86. Sebastian Int'l, Inc. v. Longs Drug Stores Corp., 53 F.3d 1073, 1074 (9th Cir. 1995).

With respect to digital music, movies, audio books, and eBooks, the key issue is whether the First Sale Doctrine applies to copyrighted digital media, which does not natively exist in a physical form.[87] At least one case so far, *Capitol Records v. ReDigi*, has said that it does not.

ReDigi, launching on October 13, 2011, was marketing itself as the "world's first and only online marketplace for used digital music."[88]

> ReDigi's website invited users to "sell their legally acquired digital music files, and buy used digital music from others at a fraction of the price currently available on iTunes."[89] Thus, much like used record stores, ReDigi permit[ted] its users to recoup value on their unwanted music.[90] Unlike used record stores, however, ReDigi's sales t[ook] place entirely in the digital domain.[91]

This case essentially addressed the desires of a company to resell digital music that was purchased, which a user no longer had the desire to own, but wanted to part with it in an economically advantageous way. While the holding states that the First Sale Doctrine did not apply to digital music in the context of resale, this case neglected to address the possibility of transferring a user's digital asset through probate (i.e. wills, will substitutes, or intestacy laws).[92] The court stated that,

> the [First Sale Doctrine] protects only distribution by "the owner of a particular copy or phonorecord . . . of that copy or phonorecord." Here, a ReDigi user owns the phonorecord that was created when she purchased and downloaded a song from iTunes to her hard disk. But to sell that song on ReDigi, she must produce a new phonorecord on the ReDigi server. Because it is therefore impossible for the user to sell her "particular" phonorecord on ReDigi, the [First Sale Doctrine] cannot provide a defense.[93]

This case is inapplicable to inheritance in that a testator is not attempting to sell or redistribute property, or create a new copy. Rather, a testator may simply desire to pass their digital property to their family, as they may with any other tangible

87. Email Interview, *supra* note 74.
88. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 645 (S.D.N.Y. 2013).
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 655.
93. *Id.* (citations omitted).

property. There are ways that an heir or beneficiary could receive the digital property without making a copy of the asset. For example, if federal copyright law allowed, perhaps iTunes could simply switch the property from one account to the other so that the second account now "owns" the same copy as the decedent. This would likely require a court order, but many things, including transfers of property after death, require a court order to achieve anyway. Another way to achieve this result would be to simply delete the original copy after the transfer, so that only one "copy" of the asset exists. In the case of a decedent, quite literally, a dead person cannot keep the original copy, so, again, this exception is distinct from the Court's analysis in *ReDigi*.

This article will now address how states are trying to remedy this problem, why state law is inadequate, and what should be done to fix the problem of limiting inheritability of digital assets.

C. *State Law: How Some States are Attempting to Remedy Problems with Digital Assets*

There are currently nine states that have laws governing a fiduciary's access to digital assets: Connecticut, Indiana, Rhode Island, Oklahoma, Idaho, Virginia, Nevada, Louisiana, and Delaware.[94] As a preview, this Article starts with Delaware's statute and its origins.

On January 1, 2015, Delaware Code Title 12, Chapter 50 became effective, granting "access and authorization for digital assets to personal representatives, guardians, agents under a durable personal power of attorney, and trustees (and an adviser with authority to direct the trustees)."[95] Delaware, as well as the majority of the other states with similar laws, adopted a version of the Uniform Fiduciary Access to Digital Assets Act (UFADAA).[96]

1. Universal Definitions

As mentioned above, one of the first problems is lack of universal definitions of digital assets and digital estates. Moreover, inaction by many states in this area is cause for great concern, given the huge strides our society has made in the

94. CONN. GEN. STAT. ANN. § 45a–334a (West 2005); IND. CODE ANN. § 29-1-13-1.1 (West 2007); RI GEN. LAWS 33-27-1 *et seq.* (West 2007); 58 OKLA. ST. AN. § 269 (West 2010); IDAHO CODE ANN. § 15-3-715 (28) (West 2011); VA. CODE ANN. § 64.2-110 (West 2015); NEV. REV. STAT. ANN. § 143.188 (West 2013); LA. CODE CIV. PROC. ANN. art. 3191 (West 2014); DEL. CODE ANN. tit. 12, §§ 5000-07 (West 2015).

95. Lamm, *supra* note 4, at 25; DEL. CODE ANN. tit. 12, § 5001 (West 2015).

96. Lamm, *supra* note 4, at 25.

technological arena in the last decade alone. American society is essentially left with fantastic new technology, but outdated laws.

Currently, most states do not have a statute that governs fiduciary[97] access to a decedent's accounts after their passing.[98] As of the date this publication was written, at least twenty-three states had introduced legislation to their respective legislatures proposing to adopt the 2015 Revised UFADAA.[99] The UFADAA modernizes fiduciary law for the internet age, accounting for the fact that nearly everyone today has digital assets.[100] The UFADAA attempts to solve the problem of limited access by fiduciaries by ensuring that legally appointed fiduciaries can access, delete, preserve, and pass along digital assets *as appropriate*.[101] The States that have introduced the UFADAA bills to their State legislature have not yet adopted their respective Bills, but citizens in every state should urge their respective legislatures to do so, given America's firm stance on protecting property rights. Adopting the UFADAA would be a significant stride towards protecting people's digital property after death.

As mentioned, many other states are considering legislation to address fiduciary powers and authority to access online accounts, electronically stored information, and other digital property during a person's lifetime and after a person's death.[102] While adopting the UFADAA would be a good start in terms of modernizing laws with respect to digital assets, a deeper problem remains.

2. The Problem with State Laws Governing Digital Assets

Although Delaware Code Title 12 Chapter 50 and its mirrors in various states are a good step toward resolving *some* digital asset issues, they are inadequate to address issues such as the transfer of iTunes property, which is governed by the Copyright Act of 1976, due to how the User Agreement classifies its content. The only viable remedy for this injustice is to amend federal copyright law to extend the First Sale Doctrine to include digital

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97. *Fiduciary*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure. . . . Someone who must exercise a high standard of care in managing another's money or property.").

98. Lamm, *supra* note 4, at 26.

99. Uniform Law Commission, *supra* note 12.

100. *Id.*

101. *Id.*

102. Lamm, *supra* note 4, at 25–26.

assets. However, more than one area of federal law must change in order for this to happen.

V. PROPOSED STATE LAW & AMENDMENTS TO FEDERAL LAW

Recently, states have been enacting legislation to address a fiduciary's access to certain digital accounts upon the passing of a decedent. While this is a good step towards certainty with respect to control of digital assets at death, these laws are incapable of reaching certain types of digital assets. Federal copyright law generally governs iTunes and other digital asset providers' content. What needs to be done in order to ensure access to *these* types of accounts is to either have an official congressional interpretation of the First Sale Doctrine to encompass digital assets, or to have amendments to federal copyright law to provide an exception for inheritances.

A. *State Law*

As mentioned above, in the last year, many states have finally taken steps towards remedying the problem of fiduciary access to digital accounts. For example, in Texas, H.B. 2183, introduced in the 84th Legislature, is a bill that recommends that Texas finally adopt a version of the UFADAA.[103] This bill defines "digital assets" as "electronic records."[104] So, in essence, it would allow a fiduciary of an estate to access:

> (1) Content of an electronic communication sent or received by the decedent only if the electronic-communication service or remote-computing service is permitted to disclose the content under 18 U.S.C. Section 2701(b); (2) a catalogue of electronic communications sent or received and; (3) any other digital asset in which the decedent at death had a right or interest.[105]

H.B. 2183 also grants access to a guardian of the estate[106] and to an authorized agent under a durable power of attorney.[107]

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103. H.B. 2183, 2015 Leg., 84th Sess. (Tex. 2015), http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=84R&Bill=HB2183.

104. *Id.*

105. *Id. See also* 18 U.S.C. § 2701(b) (West 2012) (making access without authorization a criminal offense).

106. *Guardian of the Estate*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A guardian responsible for taking care of the property of someone who is incapable of caring for his or her own property because of infancy, incapacity, or disability.").

107. H.B. 2183.

Although this is a step in the right direction, state law cannot usurp federal copyright law, as per the Supremacy Clause of the United States Constitution.[108] H.B. 2183 would not authorize the passing of one's digital assets through probate or intestacy law; rather, it would grant access to *certain* accounts under limited circumstances.[109]

With respect to state law, Texas should adopt the UFADAA in order to protect the wishes of a decedent, as well as to ease the minds of those left behind that are already in the process of grieving, and do not want to jump through hoops to gain closure.

This article will now discuss the better solution—that is, to amend federal law to account for changes in modern technology in society.

B. *The Better Solution: Federal Amendments Needed*

This article's author contacted a leading expert on digital assets in estate planning, Mr. James Lamm, in March of 2015.[110] The problem, as pointed out by Mr. Lamm, is that federal law needs to be amended in order to remedy the issue this article discusses.[111] Mr. Lamm opined that the best remedy for the problem of digital inheritance with respect to copyrighted digital material is to amend federal law.[112] State law cannot change federal copyright law, so, although H.B. 2183 in Texas and its mirrors across the country are a good start in terms of helping heirs of a decedent access digital accounts, a state law will do nothing to remedy the problem of the non-transferability of licensed materials. To address this, there must be a discussion of amending the Copyright Act of 1976 so that the First Sale Doctrine also encompasses digital assets. To do this, the Stored Communications Act should also be amended so that companies such as iTunes cannot be sanctioned for allowing access to consumers other than the original user.

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108. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

109. H.B. 2183.

110. Email Interview, *supra* note 74.

111. *Id.*

112. *Id.*

1. Amend The Copyright Act of 1976 to Explicitly Extend the "First Sale Doctrine" to Digital Media

Capitol Records v. ReDigi made it clear that the First Sale Doctrine does not include digital assets when a company is attempting to purchase and resell them on a digital domain.[113] However, the case makes no mention of the Doctrine's applicability to digital assets with respect to the laws of inheritability.[114] While the court properly found that the First Sale Doctrine should not apply in the case of *ReDigi*, there should be an exception made when dealing with probate and intestacy. Specifically, the United States Congress should interpret the Copyright Act of 1976 to include an exception for digital assets only when they are being passed through a will or will substitute. In order to achieve this, a court or legislature needs to create an absolute definition of digital assets, and make it very clear that the exception to the Copyright Act extends only to those who are receiving digital assets by way of a will or will substitute. This would protect the wishes of testators, the rights of beneficiaries, and the copyrights held by musicians and artists in the digital media industry. Moreover, it would end in an equitable result such that consumer expectations would be level with the realities of the laws governing digital assets.

2. Amend the Stored Communications Act

As mentioned, the Stored Communications Act also needs to be amended so that digital asset providers such as iTunes would not be subject to criminal penalties for allowing the transfer of such assets to new users. The next section will discuss the Stored Communications Act, and the changes that should be made to allow for the passing of digital assets through intestacy and probate.

3. Stored Communications Act

a. Brief History

This section should apply to both federal and state laws. The Stored Communications Act ("SCA") is a subsection of the Electronic Communications Privacy Act ("ECPA").[115] In the ECPA, Congress, for the first time, considered the expansive use

113. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

114. *Id.*

115. Electronic Communications Privacy Act of 1986, Pub. L. No. 99–508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

of computer communications.[116] Title 18 of the ECPA, the SCA, prohibits the unauthorized access or disclosure of stored electronics communications.[117] Specifically, § 2702 of the SCA prohibits electronic service providers and remote computing services from disclosing account content to unauthorized individuals.[118]

Currently, the SCA has two exceptions related to digital inheritances. The first exception applies only if a user consents to someone else accessing and using accounts or content.[119] The second, as expected, is when a court grants an order requiring a digital asset provider to allow access to someone other than the original consumer.[120]

b. Suggested Changes and Public Expectations

Under the two exceptions mentioned above, the digital asset provider would not be held criminally liable under the SCA. Neither of these exceptions applies to the case of inheriting digital assets. "In the case of the SCA's court order exception, the cost of court orders and the time required to obtain a court order may complicate estate administration, especially for accounts that may be deleted in rapid time frames."[121]

As for consent of the user, it would be very difficult to attain a person's approval to access their accounts when they are no longer living. The only way around that would be if the estate planning attorney drafted provisions accounting for digital assets, which is rare—at least for now. Most testators have a residuary clause that state something to the effect of "I leave all of my property, personal and real, tangible and intangible, wherever located, to my beloved wife." Likely, the average consumer reasonably believes–that this means everything they own will go to their beloved wife. Why would someone think that they need to include a provision specifically dealing with digital assets when they have already said "all my property, personal or real, tangible or intangible?" The average person can be expected to reasonably believe that this provision includes any digital accounts or assets.

It is for this reason that Congress should interpret the SCA to include another exception allowing access and transfer of

116. Matt Borden, *Covering your Digital Assets: Why the Stored Communications Act Stands in the Way of Digital Inheritance*, 75 OHIO ST. L.J. 405, 413 (2014).

117. 18 U.S.C. §§ 2701–2702 (West 2012).

118. § 2702(a)–(b).

119. *Id.*

120. *Id.*

121. Borden, *supra* note 116, at 422.

digital assets to a person, whether a fiduciary or a beneficiary, when dealing with a decedent's digital assets.

VI. CONCLUSION

Imagine if you will, being able to transfer all of your property, tangible or digital, to your loved ones as you see fit. It seem like that should already be the case, right? Well, as discussed, it is not, and several things need to happen in order to remedy the current state of the law.

The first step toward remedying the problems with the law is to create universal definitions of digital assets and digital estates in a legal medium.[122] The lack of a proper definition hinders attempts at guidance by the courts.[123] With a proper definition estate planning attorneys would be able to account for their client's digital assets just as they currently handle tangible assets. When this is done, America can move on to the next step of the problem, which is either invalidating the licensing portion of iTunes' User Agreement or amending laws to prevent companies from using agreements that result in a prohibition on transferring digital assets in a will or will substitute.

It is apparent on its face that the iTunes user agreement is an adhesion contract in that it leaves consumers no bargaining power or ability to negotiate terms.[124] That alone, however, is not enough to invalidate an agreement. There should be both substantive and procedural unconscionability found by the trier of fact.[125] This article argues that unconscionability arises in the user agreement because of the lack of ownership that a consumer can exercise over "property" after they "buy" it.[126] Apple may argue that consumers have constructive knowledge of the terms they agree to, but at least one court has held that a consumer's clicking on a button does not communicate assent to contractual terms if the offer did not make clear that clicking the download button would signify assent to those terms.[127]

As it stands, federal law does not provide for the transfer of digital assets.[128] Moreover, at least one court has held that

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122. John Conner, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 3 EST. PLAN. & CMTY. PROP. L.J. 301, 303 (2011).

123. *Id.* at 322.

124. Terms and Conditions of iTunes, *supra* note 7.

125. TMI, Inc. v. Brooks, 225 S.W.3d 783, 792 (Tex. App. 2007).

126. *See supra* Section III.

127. IT Strategies Grp., Inc. v. Allday Consulting Grp., L.L.C., 975 F. Supp. 2d 1267, 1280 (S.D. Fla. 2013) (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29–30 (2nd Cir. 2002)).

128. 17 U.S.C. § 106 (West 2012).

private ordering agreements are not preempted by Copyright law, allowing courts to generally uphold the "Terms & Conditions."[129] Although several states passed versions of the UFADAA, the Act cannot reach the iTunes user agreement which falls under federal copyright law given the granting of a license in the digital assets rather than actual ownership.[130] The solution to this problem may be found under federal law.

One of two things must happen in order to remedy this apparent injustice: 1) Congress must interpret the First Sale Doctrine in an expansive manner to *include* digital assets, which are currently being excluded by courts such as the one in *ReDigi* or; 2) the Copyright Act should be amended to allow for the transfer of digital assets *specifically* in an estate planning context.

In addition to either one of these possible solutions, the SCA should also be amended so that providers, such as iTunes, cannot be held criminally liable for allowing access to a non-user. If these events occur, the law as it stands will finally be level with consumer expectations in the context of digital assets and inheritability.

Without these changes, consumers will be left in the dark regarding their digital assets, and the purpose of probate and inheritability laws will remain frustrated.

129. Sheridan, *supra* note 70.

130. Email Interview, *supra* note 74.