

## Insight on the Issues

# Challenges and Opportunities in Managing Digital Estates

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### INTRODUCTION

Advances in technology and the increasing spread of digital connectivity are bringing about big changes in how people live. The Internet provides a new level of connectivity that is fueling a wave of applications and services that promise to meet people's needs with exceptional convenience and efficiency. As of 2015, 84 percent of adult Americans connect to the Internet, with 81 percent of those ages 50–64 and 58 percent ages 65+ connecting.<sup>1</sup>

In today's Internet-connected world, people accrue vast amounts of digital assets. These include digital files (e.g., e-mails, photos, videos, and documents), as well as digital accounts (e.g., financial, business, social media, e-mail, retail shopping, and cloud storage).

Based on an AARP Public Policy Institute study of digital readiness, over half (57 percent) of Internet users ages 18 and older have between 1 and 10 online accounts, while over a third (38 percent) have more than 10 online accounts. The digital assets left behind when an Internet user dies, or is no longer capable of managing his or her digital estate, forms the person's digital legacy.

Despite the increasing number of digital assets Internet users are

accumulating, many have not thought about managing their digital legacy. This lack of action can result in heirs losing access to their loved one's digital assets.

Managing one's digital legacy is a key issue because digital assets can have both monetary and sentimental value. Further, in many states, laws pertaining to the disposition of assets do not address the treatment of digital content after the owner dies or is unable to manage his or her digital content due to illness. As such, state governments and service providers<sup>2</sup> are in a position to update various laws and practices.

This report examines the current landscape concerning Internet users' digital legacy—that is,

### EXAMPLES OF DIGITAL ASSETS

**Financial Accounts:** banking, brokerage, bill paying

**Virtual Property Accounts:** virtual currencies, air miles

**Online Business Accounts:** eBay, Amazon, Etsy

**E-mail Accounts:** Gmail, Outlook, Yahoo

**Social Networking Accounts:** Facebook, Twitter, Instagram

**Online Storage Accounts:** Google Drive, iCloud, Dropbox

**Application Accounts:** Netflix, Kindle, Apple TV

**Websites, Blogs, Videos:** YouTube, WordPress



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relevant laws and regulations, the shortcomings of such policy in keeping up with the evolving digital age, and the role of Internet service providers, among other variables. To understand how American Internet users are using their connectivity and to what extent they have thought about and taken action to prepare their digital legacy, AARP conducted a nationally representative survey of Internet users ages 18 and older (survey methodology provided in appendix). The survey data, which include information on current Internet usage by demographic, provide context for the accompanying, ever-evolving issues.

### **SURVEY BASICS: HOW ADULTS ARE USING THE INTERNET**

Survey results indicate that the frequency of Internet usage for communication varies by age. Almost 8 in 10 (79 percent) Internet users under the age of 50 send text messages daily, compared with 45 percent of those ages 50 and older. Similarly, half (50 percent) of those under the age of 50 use social media at least once a day, compared with 35 percent of online users ages 50 and older.

The non-communication-related Internet activities of adults also vary by age. Younger Internet users post photos or other content online more often than older users. However, the majority of adult Internet

users of all ages are using the Internet to make purchases and for financial transactions (table 1).

The implications concerning the increasing use of the Internet for financial purposes—one of the most sensitive online functions—are significant. As such, users of all ages need to consider their digital legacy to prevent loss of digital content of both a financial nature and sentimental value.

When asked at what locations they access the Internet, adult Internet users indicated that home is the most common location (figure 1).

### **THE IMPORTANCE OF PRESERVING DIGITAL ASSETS**

Failing to plan for one's digital legacy can leave family members with a complex and difficult landscape to navigate. Without a detailed inventory of an individual's digital assets, family members may have difficulty identifying what assets exist and how to locate and access them.

Creating a detailed inventory of digital assets, however, can be difficult for Internet users because they often do not have an accurate understanding of the extent of their digital content.<sup>3</sup> Further, most have not prepared a list of digital assets for their estate, nor have they documented their wishes for how they want their digital assets addressed. This is not surprising given a recent survey found that 64 percent of Americans have not prepared a will.<sup>4</sup>

**TABLE 1**  
**Online Activities within the Past 12 Months**

Online Activity	General Population n=2,042	18-49 n=960	50-64 n=661	65-74 n=306	75+ n=209
<b>Make a purchase online</b>	80%	82%	81%	74%	64%
<b>Perform a banking or financial transaction</b>	69%	71%	69%	61%	54%
<b>Post photos, videos, or other content online</b>	61%	70%	54%	46%	29%
<b>Store or back up important content with online services</b>	38%	46%	30%	21%	19%
<b>Sell something</b>	24%	29%	21%	14%	6%

Q8. "Within the past 12 months, have you used the internet to...? Check yes or no for each item."

Source: AARP Public Policy Institute study of Internet users.

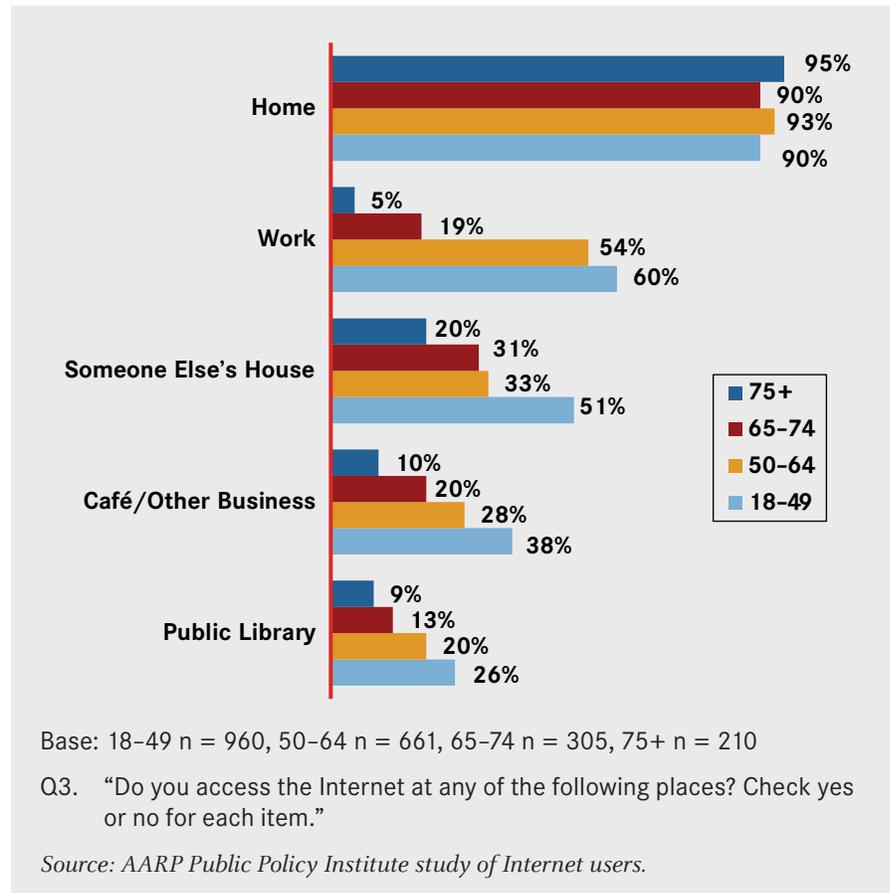
This lack of planning can lead to lengthy legal battles over access to digital assets and the loss of digital assets after a person’s death or incapacitation. Passwords and encryption can prevent access to digital accounts and make it difficult to retrieve digital content. In addition to technological challenges, existing privacy and security laws may also prevent access to digital content. This complicates the task for the fiduciary<sup>5</sup> responsible for an estate that includes digital assets. A fiduciary is a trusted person with the legal authority to manage another’s property and the duty to act in that person’s best interest.

Digital assets of monetary value are usually of greatest concern because loss of these assets can result in loved ones being unable to recover valuable property.<sup>6</sup> However, it is not always clear which assets have monetary value. While digital financial accounts, virtual property accounts, and online business accounts are obvious sources of potential wealth, other digital assets may also have value. For example, e-mail accounts, photos, videos, websites, and blogs can be of monetary value or contain business-related information and other assets of financial value.

**MOST ADULT INTERNET USERS HAVE NOT THOUGHT ABOUT THEIR DIGITAL LEGACY**

Our survey finds more than half (58 percent) of adult Internet users have not thought about what will happen to their digital content when they die or become incapacitated. African American and Hispanic adult Internet users are more likely<sup>7</sup> to say they have not thought about their digital legacy compared with White adult Internet users (figure 2). Of adult Internet users, 16 percent have taken some kind of action to manage their digital legacy. Older

**FIGURE 1**  
**Home Is the Most Common Location for Accessing the Internet for All Age Groups**



Internet users are more likely to have taken action, with 29 percent of those ages 65 and older saying they have taken action, compared with 18 percent of those ages 50–64 and 12 percent of Internet users ages 18–49.

Of those who have taken action to manage their digital legacy, few documented their wishes using a written will or online account settings (figure 3).

The majority of adult Internet users who have taken action to manage their digital legacy made a list of account passwords that is available to a trusted person (56 percent), and/or discussed their wishes with a trusted person (62 percent). While these strategies can help provide access to digital content for the trusted person, they do not necessarily grant the trusted person legal authority to access and manipulate the accounts.

A small number of online service providers offer account settings that allow subscribers to set their preferences regarding the treatment of digital content in the event of death or incapacitation. However, these account settings apply only to the digital content associated with that account.

Overall, more than one-third of adult Internet users (35 percent) said they are concerned about what will happen to their digital assets in the event of their death or incapacitation. African Americans (35 percent) and Hispanics (40 percent) are more likely than Whites (30 percent) to say they are concerned about what will happen to their digital content. Less than half of adult Internet users said they were likely to look for more information on preparing their digital legacy in the next 12 months. Forty-six percent of Hispanic Internet users and 37 percent of African American Internet users said they are likely to look for more information, compared with 29 percent of White Internet users.

Despite their apparent lack of concern for their own digital legacy, 46 percent of adult Internet users believe their loved ones will want access to their digital content in the event of their death (figure 4).

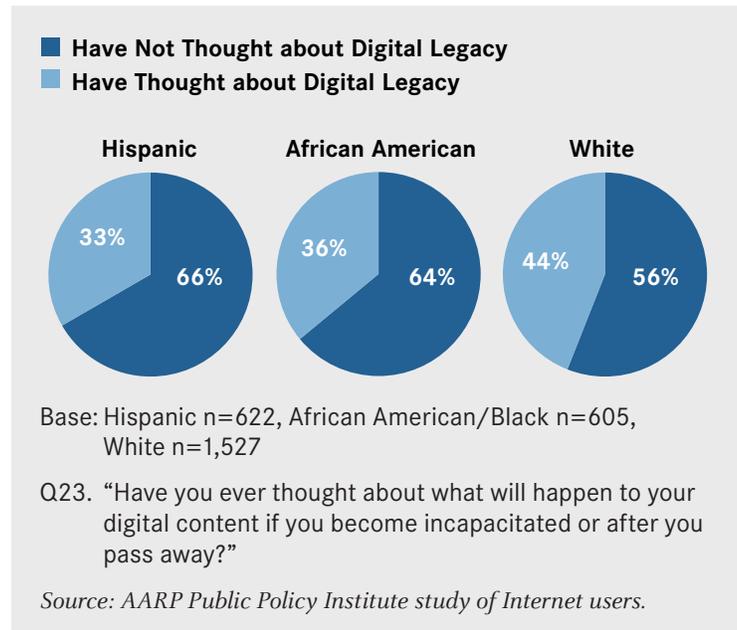
Similarly, 41 percent of adult Internet users said they would want access to their loved one’s digital content in the event of the loved one’s death. This suggests that many Internet users do see value in being able to access digital content after the death of loved ones.

**BARRIERS TO ACCESSING DIGITAL ASSETS OF DECEASED OR INCAPACITATED INDIVIDUALS**

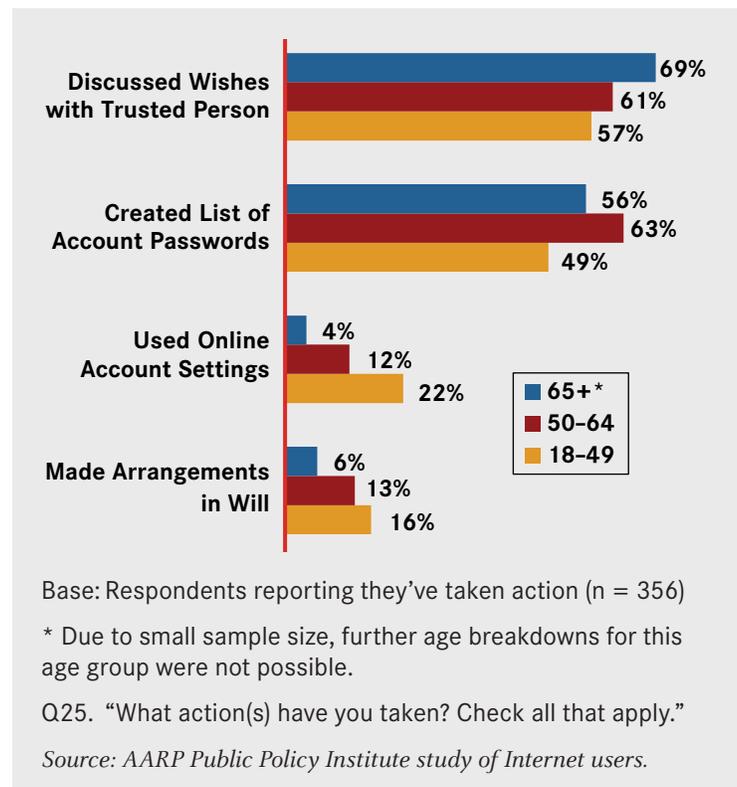
There are a number of potential barriers facing those seeking to access the digital assets of a deceased or incapacitated loved one.

Because people often open new accounts and close or abandon older accounts, keeping track of online accounts is

**FIGURE 2**  
**Most Adult Internet Users Have Not Thought about Their Digital Legacy**



**FIGURE 3**  
**Actions Taken by Adult Internet Users to Prepare Their Digital Legacy**



challenging. And with each account comes another username and password those wanting to access the account will need to know. Further, many online music, video, and book services<sup>8</sup> do not sell content to the user, but instead sell an individual user's license granting the subscriber access to the content. Generally, these licensing agreements prohibit the transfer of the license should the subscriber die. As a result, many online music, video, and book libraries may not be part of the deceased's digital property. To determine legal ownership of such content, it will be necessary to review each relevant licensing agreement.

Beyond these complications, current laws and service provider agreements can limit access to the digital content of a deceased or incapacitated individual.

#### Federal Law

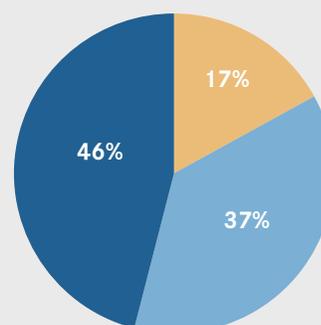
Federal law does not specifically address access to a deceased or incapacitated individual's digital content. However, federal privacy laws designed to protect against unauthorized access to computers and electronic files can limit what information service providers can disclose to third parties. The key federal law is the Electronic Communications Privacy Act (ECPA),<sup>9</sup> which governs what types of information a service provider can disclose and under what circumstances. This statute limits the disclosure of digital content to others unless the account holder has explicitly given consent.

In addition, under the Computer Fraud and Abuse Act (CFAA),<sup>10</sup> it is illegal to access a computer or computer network without authorization or in excess of authorization. The intention of the CFAA is to penalize criminals engaging in instances of malicious hacking; however, civil actions can occur under the statute. This means that fiduciaries attempting to gain access to a deceased or incapacitated person's computer devices without proper authorization could be liable for violating the CFAA.

In response to these laws, service providers often operate under terms of service limiting access to digital content to prevent unauthorized access. Frequently, the terms of service permit only the account owner to access content. Some terms of service explicitly state these rights are

**FIGURE 4**  
**Almost Half of Adult Internet Users Think Loved Ones Will Want Access to Their Digital Content Should They Pass Away**

■ Would not Want Access  
■ Don't Know  
■ Would Want Access



Base: n = 2,042

Q27. "Do you think your loved ones would want access to your digital content after you pass away?"

Source: AARP Public Policy Institute study of Internet users.

nontransferable.<sup>11</sup> As a result, service providers may refuse to release information in the absence of a will or other legal documentation consenting to the disclosure of a deceased or incapacitated individual's digital content.

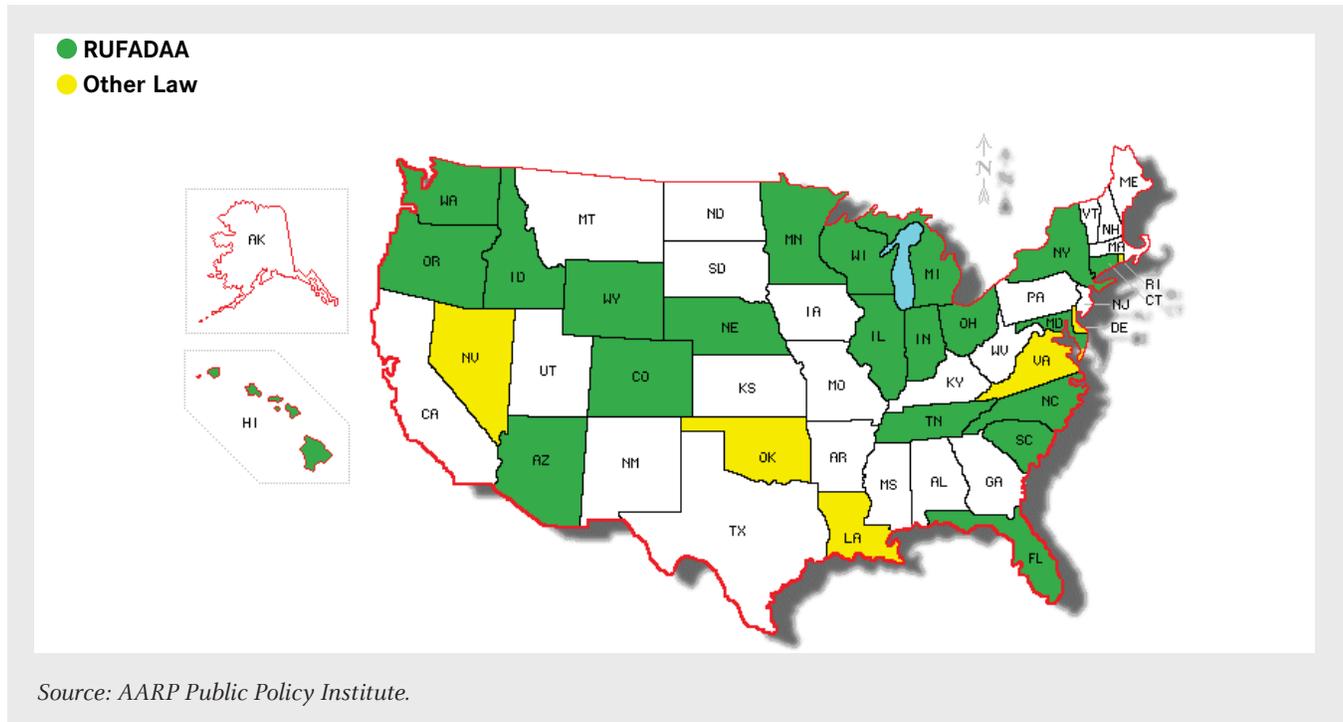
#### State Law

Given the uncertainty of access to digital content under existing federal laws, states are moving to help make digital content available to fiduciaries. To date, 27 states have enacted laws addressing access to digital assets of a deceased or incapacitated person (figure 5).

The utility of these state laws varies. For example, Nevada law provides only for the termination of the deceased's social media accounts and does not grant access to digital content. Rhode Island law requires service providers to grant executors access to contents of e-mails, but not other digital content.

More recently passed laws seek to provide much broader access to digital content, giving a fiduciary authority to manage or distribute the digital

**FIGURE 5**  
**States with Laws Related to Accessing Digital Content of Decedents (as of January, 2017)**



property as appropriate. Through January 2017, 21 states<sup>12</sup> enacted legislation designed by the Uniform Law Commission that addresses access to digital assets based on the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) of 2015.<sup>13</sup> The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) researches, drafts, and promotes enactment of uniform acts in areas of state law where uniformity is desirable and practical.

The goal of RUFADAA is to provide legal authority for fiduciaries to manage digital assets in the same manner as they manage tangible assets. RUFADAA works in conjunction with existing federal laws, thereby removing barriers that prevent fiduciaries from managing digital content. Importantly, the act allows the owner of the digital content to specify how to handle his or her digital assets by identifying what content should be preserved, distributed to heirs, or destroyed.<sup>14</sup>

Under RUFADAA, using online account settings to designate a person to manage that account in the event of the account holder's death or incapacitation

is legally enforceable. If the account owner has not provided direction through account settings or a traditional estate plan (such as a will, power of attorney, or other written record), then the provider's terms of service will determine access to the digital content. If the terms of service fail to address fiduciary access, the default rules of RUFADAA will apply.

#### **Service Provider Agreements**

In the absence of laws or legal documentation such as a will addressing digital assets, the service provider agreement determines the rules applying to the access of an individual's digital assets. Unfortunately, many of these agreements do not specifically address the question of what happens to digital content belonging to a deceased or incapacitated account holder. If the service provider's terms of service do not make specific provisions for fiduciary access to digital assets, these assets may not be recoverable.

A small number of service providers do provide online account settings to address this issue.<sup>15</sup> For example, some services allow account holders to use

account settings to select what they want done with their account. The account holder can elect to have the account deleted, or access given to an individual he or she specifies.

Other services such as password managers consolidate username and password information into a single account<sup>16</sup> that the account holder can elect to share with loved ones. While this may provide loved ones with access to accounts, it does not address the legality of having someone other than the account owner access or manipulate the accounts. Some argue that many service provider agreements prohibit this type of access due to concerns about privacy laws such as the federal ECPA.<sup>17</sup>

### CONCLUSION AND RECOMMENDATIONS

Managing one's digital assets is an important issue for those connecting to the Internet. The survey found that 6 out of 10 adult Internet users have not considered how they want to address their digital legacy. Few adult Internet users said they had taken any action to prepare for the management of their digital legacy. More important, two-thirds indicated they were not concerned about addressing the issue of their digital legacy, and would not look for further information on this topic. Consequently, people managing the estates of those who die or become incapacitated will face challenges identifying, recovering, and accessing the person's digital assets. In many cases, the digital assets will be lost.

The legal landscape can make it challenging for fiduciaries seeking access to an individual's digital assets. Many service providers do not include provisions in their terms of service granting access to accounts of deceased or incapacitated individuals. In the absence of legal documentation such as a will or power of attorney specifically addressing the digital assets, this content may not be accessible. A number of states have recently enacted laws regarding access to digital assets that seek to help overcome this problem.

As digital assets increasingly form a larger part of the estates of Internet users, addressing issues associated with providing access to digital content after death or incapacitation will grow in importance. To help address these issues, the appropriate stakeholders should take the following steps:

#### **Informed Stakeholders Should Educate Internet**

**Users** – Many Internet users have not thought about or taken any action to prepare their digital legacy. For this reason, consumer groups, financial planners, estate planners, and service providers should educate Internet users about the importance of managing their digital legacy to ensure that their digital assets of monetary and sentimental value are not lost.

#### **Service Providers Should Provide Options to Manage Digital Assets**

– Service providers should provide users with account settings that allow account holders to indicate their preferences for the treatment of their digital content in the event of death or incapacitation.

#### **Service Providers Should Address Fiduciary Access in Their Service Provider Agreements**

– Service providers should include specific provisions allowing access to the digital content of deceased or incapacitated account holders.

#### **State Laws Should Provide for Fiduciary Access to Digital Assets and:**

- Be applicable to all digital assets and not just specific types of accounts.
- Treat digital content in the same manner as tangible property. For example, laws should allow a fiduciary to manage digital currencies<sup>18</sup> (such as bitcoin) in the same way as they manage traditional financial assets such as bank accounts.
- Protect the privacy of account holders by allowing them to specify what digital content they want to make available and who should have access to it.
- Not conflict with federal laws related to digital privacy and security, or conflict with existing state laws related to probate, guardianship, trusts, and powers of attorney.

#### **Consumers Should Plan Their Digital Legacy**

– Consumers should create an inventory of important online accounts and usernames to ensure their digital content is accessible should they no longer be able to manage the content. They should also document their digital legacy wishes and coordinate with an estate planner or loved ones to ensure the documents comply with relevant laws relating to digital legacy.

## APPENDIX. SURVEY METHODOLOGY

The research utilized GfK's KnowledgePanel® nationally representative online panel. Respondents were screened to ensure that they use the Internet for reasons other than taking KnowledgePanel® surveys.

For this study, a total of 2,998 qualified interviews were secured from the nationally representative KnowledgePanel® sample of Internet users from September 14-28, 2015. The overall sample was weighted by age, gender, race/ethnicity, education, Census region, metropolitan status, and household income (and primary language for Hispanics) to be nationally representative of Internet users ages 18+. In addition, due to the oversampling of certain groups (see descriptions below) and weighting, the survey also yielded samples of adults ages 50–64, adults ages 65+, non-Hispanic African Americans/Blacks, Hispanic/Latinos, and non-Hispanic Whites that were designed to be nationally representative of Internet users in each of those groups.

The general population sample included a representative sample of 2,042 respondents ages

18+ from different race/ethnicities and age groups. However, in order to make comparisons by race/ethnicity and by age, additional interviews (“oversamples”) were completed among three groups, African American/Blacks (n=443), Hispanic/Latinos (n=419), and Americans ages 65 or older (n=94), in order to secure an adequate number of respondents in each of these groups for analysis. Ultimately, a total of 605 interviews were completed among African Americans, 622 interviews were completed among Hispanics, and 515 interviews were completed among respondents ages 65 or older. Therefore, in the report, when making comparisons by race/ethnicity or age, the sample sizes of Hispanics/Latinos, African Americans, and adults ages 65+ are based on the total number of interviews completed for each group, which included respondents from the general population sample, as well as those from the oversamples. However, the results shown for the general population are based only on the nationally representative sample of 2,042, which excludes the oversamples.

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- 1 Andrew Perrin and Maeve Duggan, *Americans' Internet Access: 2000–2015* Pew Research Center, (June 2015).
  - 2 Service providers are companies that provide subscribers with access to Internet services.
  - 3 Evan Powers, *Estate Planning: Don't Forget Your Digital Assets!* Seeking Alpha, (April 10, 2016).
  - 4 Rocket Lawyer, *Digital Limbo: Rocket Lawyer Uncovers How Americans Are (or Aren't) Protecting Their Digital Legacies* Rocket Lawyer, (April 21, 2015).
  - 5 Fiduciaries include executors/personal representatives of an estate, conservators for the protected person, agents serving under a power of attorney, and trustees.
  - 6 Samantha D. Haworth, “Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act,” *University of Miami Law Review* 66 (Winter 2014).
  - 7 Unless otherwise noted, differences are statistically significant at the 5 percent risk level.
  - 8 This includes services such as iTunes, Kindle, and Amazon.
  - 9 18 U.S.C. § 2510 et seq
  - 10 18 U.S.C. § 1030.
  - 11 William Bissett and David Kauffman, “Understanding Proposed Legislation for Digital Assets,” *Journal of Financial Planning* (April 1, 2014).
  - 12 The states are Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Maryland, Michigan, Minnesota, Nebraska, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Washington, Wisconsin, and Wyoming.
  - 13 Details of the act are available at Uniform Law Commission (<http://www.uniformlaws.org>).

- 14 Uniform Law Commission, *Why Your State Should Adopt the Revised Uniform Fiduciary Access to Digital Assets Act (2015)* (May 2015).
- 15 For example, Gmail allows users to designate an “inactive account manager” to receive an e-mail alert that the account has been dormant for a certain period, while Facebook allows family members to memorialize the deceased/incapacitated person’s Facebook page.
- 16 Such accounts allow users to use one username and password to gain access to all their accounts.
- 17 Craig Dickson, “The Digital Legacy Conundrum: Who Really Owns What?” *New Zealand Law Journal* 275 (2015).
- 18 Digital currencies are Internet-based forms of currency that exhibit properties similar to physical currencies but allow for instantaneous transactions and borderless transfer of ownership.

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