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## Digital Privacy - It Ain't Over til the Dead Person Tweets - Ajemian v. Yahoo, Inc. 84 N.E.3D 766 (Mass. 2017)

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## DIGITAL PRIVACY – IT AIN’T OVER TIL THE DEAD PERSON TWEETS – *AJEMIAN V. YAHOO!, INC.*, 84 N.E.3D 766 (MASS. 2017).

Planning your “digital afterlife” has become a common practice amongst tech-savvy consumers of the internet’s top social media providers.<sup>1</sup> Companies not only implore you to think ahead about your digital footprint, but they have also started implementing afterlife-centric practices.<sup>2</sup> People wanting access to a deceased friends or family member’s photos, memories, and statuses has become common, but determining who has the right to access information after death has invoked privacy concerns.<sup>3</sup> In *Ajemian v. Yahoo!, Inc.*,<sup>4</sup> the Supreme Judicial Court of Massachusetts (“SJC”)

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<sup>1</sup> See Jack Linshi, *Here’s What Happens to Your Facebook Account After You Die*, TIME MAGAZINE (Feb. 12, 2015) (questioning legacy left by dead friends and family members). Facebook even allows you to write a message from the afterlife to friends or family you designate as a “legacy contact.” *Id.* Google has an entire blog post dedicated to planning your digital afterlife. See Andreas Tuerk, *Plan Your Digital Afterlife with Inactive Account Manager*, GOOGLE: PUB. POLICY BLOG (Apr. 11, 2013), <https://publicpolicy.googleblog.com/2013/04/plan-your-digital-afterlife-with.html> (detailing blog-post dedicated to planning one’s digital afterlife).

<sup>2</sup> See Linshi, *supra* note 1 (highlighting article aptly titled “Here’s What Happens To Your Facebook Account After You Die”).

<sup>3</sup> See *id.* (explaining Facebook not just for those still alive). In recent years, Facebook has changed the way it views afterlife privacy:

Facebook announced Thursday a policy that allows you to designate a “legacy contact,” who’ll be allowed to “pin a post on your Timeline” after your death, such as a funeral announcement. The contact won’t be able to log in as you or read your private messages, but will be allowed to respond to new friend requests, update your cover and profile photos, archive your Facebook posts and photos.

Before, the Facebook profiles of the deceased could only be “memorialized,” deleted or left unchanged after friends or family reported the deaths. Memorializing the profile involves freezing the account, which then no longer appears in searches or public notifications like birthdays, and can be viewed only by the user’s friends.

*Id.*

<sup>4</sup> 84 N.E.3d 766, 768 (Mass. 2017) (discussing merits of stored communication and privacy).

A federal law enacted as part of the Electronic Communications Privacy Act of 1986 (18 U.S.C. §§ 2701 to 2712). The SCA protects the privacy of: Wire and electronic communications while in electronic storage (for example, e-mails stored on a server). Electronic information about subscribers and customers to remote computing and electronic communication services (for example, e-mail service subscriber names).

addressed the Stored Communications Act, 18 U.S.C. § 2702(b)'s ("SCA") bar against disclosing stored communications.<sup>5</sup> The SJC vacated a ruling of summary judgment in favor of Yahoo! citing the Fiduciary Access to Digital Assets Act of 2015.<sup>6</sup>

In August 2006, John Ajemian ("Ajemian") died unexpectedly.<sup>7</sup> Four years before his death, Ajemian and his brother, Robert, set up a Yahoo! email account together.<sup>8</sup> Upon Ajemian's death, Robert wanted access to the Yahoo! account.<sup>9</sup> After requesting permission from Yahoo! to access the joint account, Robert was denied.<sup>10</sup>

In their contract, Yahoo! stated when opening email accounts they have the "discretion to reject the personal representatives' request" upon the death of a user.<sup>11</sup> Ajemian did not leave a will or instructions for what to do

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The SCA, among other things, covers: Requirements for federal and state law enforcement to compel the disclosure of stored communications. Circumstances under which service providers may voluntarily disclose customer communications and records.

*Id.*

<sup>5</sup> See 18 U.S.C. § 2702(b) (stating stored communications including email and servers which contain digital information).

<sup>6</sup> See *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\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (explaining purpose of 2015 Fiduciary Act).

A fiduciary is a person appointed to manage the property of another person, subject to strict duties to act in the other person's best interest. Common types of fiduciaries include executors of a decedent's estate, trustees, conservators, and agents under a power of attorney. This act extends the traditional power of a fiduciary to manage tangible property to include management of a person's digital assets. The act allows fiduciaries to manage digital property like computer files, web domains, and virtual currency, but restricts a fiduciary's access to electronic communications such as email, text messages, and social media accounts unless the original user consented in a will, trust, power of attorney, or other record.

*Id.*

<sup>7</sup> See *Ajemian*, 84 N.E.3d at 768 (postulating premise of case). Ajemian succumbed to unexpected injuries after a bicycle accident. However, Ajemian had not prepared or organized any of his social media sites or posts should an accidental death take place. *Id.*

<sup>8</sup> See *id.* at 769 (detailing formation of Yahoo! account). The account was equally shared between the brothers, Robert merely wanted access to what was partially his. *Id.* at 769-70.

<sup>9</sup> See *Ajemian*, 84 N.E.3d at 768 (highlighting premise of case). Ajemian's sister, Marianne, also wanted access to the account and was part of the suit with Robert. *Id.*

<sup>10</sup> See *id.* (expanding on denial of email access by Yahoo!). Yahoo! stated that their denial was based on the Stored Communications Act (SCA), 18 U.S.C. § 2701 citing concerns for customer privacy and customer protection. *Id.*

<sup>11</sup> See *id.* (explaining Yahoo!'s basis for denial). Since Robert was merely the personal representative of Ajemian's estate, the case would have vastly differed had a will or legal instrument been created by Ajemian prior to his death. *Id.*

with his online accounts pursuant to his death.<sup>12</sup> Upon Yahoo!'s denial, Robert and Mariane brought suit in Probate and Family Court for the family to gain access to Ajemian's email account.<sup>13</sup> The judge in the Probate and Family Court ordered summary judgment for Yahoo!.<sup>14</sup> The SJC heard the appeal, vacated the judgment, and remanded the case to Probate and Family Court for further proceedings.<sup>15</sup> The SJC transferred the case on its own motion.<sup>16</sup> In March 2018, the United States Supreme Court ("Supreme Court") denied Yahoo!'s petition for writ of certiorari.<sup>17</sup>

Access to stored communications is strictly limited to those with permitted access.<sup>18</sup> Preparing for digital afterlife may be daunting, but it provides guidance to personal representatives on what to do with active online accounts.<sup>19</sup> If no will or instructions are left, states vary on who may be granted access pursuant to a decedent's death because no court at a higher level has declared a legal standard that should be applied.<sup>20</sup> The SCA has a three-prong analysis for electronic communications.<sup>21</sup> The SCA "prohibits

<sup>12</sup> See *Ajemian*, 84 N.E. at 768 (examining Ajemian wishes which were scarce as his death was unexpected and young).

<sup>13</sup> See *id.* at 769-70 (highlighting travel of case from family court).

<sup>14</sup> See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 606 (2013) (showing prior history of case). After summary judgment was granted for Yahoo!, the appeal in the present case was commenced by the Ajemian siblings. *Id.* at 768.

<sup>15</sup> See *Ajemian*, 84 N.E.3d at 770 (explaining procedural history of prior history of case).

<sup>16</sup> See *id.* (explaining where case originated).

<sup>17</sup> See *id.* at 766 (highlighting travel of case). The Supreme Court of the United States has since cited to Ajemian quoting e-mail accounts are a "form of property often referred to as a 'digital asset.'"; see also *Carpenter v. United States*, 138 S. Ct. 2206, 2270 (2018) (detailing unlawful access to stored communications).

<sup>18</sup> See 18 U.S.C. § § 2701-02 (2018) (providing broad overview of Stored Communications Act).

<sup>19</sup> See Joe Zadeh, *How to Prepare for Your Digital Afterlife*, VICE NEWS (Sept. 4, 2014), [https://www.vice.com/en\\_us/article/9bzgyv/how-to-prepare-for-your-digital-afterlife-joe-zadeh-212](https://www.vice.com/en_us/article/9bzgyv/how-to-prepare-for-your-digital-afterlife-joe-zadeh-212) (discussing how to handle online accounts after death).

Google was the first multinational internet corporation to actually try to tackle the wider problem of ghosts in the machine. Their 'Inactive Account Manager,' a typically prudish and death-denying Western name, is an ambiguous service that focuses on granting your Google account and all its contents to a named inheritor, but doesn't really cater for the way in which most of our lives have supernova'd across at least 20 accounts in the last decade or so. It comes as no surprise that a more direct and focused attempt to service the digital afterlife should come from the death-accepting cultures of the Far East, where cremation simulators are regarded a little like theme park attractions.

*Id.*

<sup>20</sup> See *id.* (examining how different cultures deal with death on the internet).

<sup>21</sup> See *Ajemian*, 84 N.E.3d at 771 (explaining SCA's three-prong test).

To achieve this purpose, the SCA provides a tripartite framework for protecting stored communications managed by electronic service providers. First, subject to certain

entities that provide services to the public from voluntarily disclosing the contents of stored communications unless certain statutory exceptions apply.”<sup>22</sup>

Society has increasingly changed with the advent of the digital space.<sup>23</sup> In Japan, Yahoo! has attempted to counter the issue of death and social media by creating Yahoo!Ending.<sup>24</sup> Society also has to worry about what the effect of granting email access to families without explicit consent from decedent’s might mean for other online institutions such as mobile banking, health care records or online diaries.<sup>25</sup>

Courts have also looked at statutory interpretation as a guiding force for delineating technicalities in the SCA.<sup>26</sup> While a court presumes that Congress’s intentions are stated within the statute, courts will not read a statute to be incongruent with state law.<sup>27</sup> However, an ability to opt out of

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exceptions, it prohibits unauthorized third parties from accessing communications stored by service providers. *See* 18 U.S.C. § 2701. Second, it regulates when service providers voluntarily may disclose stored electronic communications. *See* 18 U.S.C. § 2702. Third, the statute prescribes when and how a government entity may compel a service provider to release stored communications to it. *See* 18 U.S.C. § 2703.

*Id.*

<sup>22</sup> *See id.* (explaining voluntary disclosure of digitally stored communications).

<sup>23</sup> *See* D. Casey Flaherty, *The End of Lawyers, Period.*, AMERICAN BAR JOURNAL (Mar. 3, 2016) [http://www.abajournal.com/legalrebels/article/the\\_end\\_of\\_lawyers\\_period/](http://www.abajournal.com/legalrebels/article/the_end_of_lawyers_period/) (highlighting statistics on impact of internet on legal profession). A survey of American attorney’s in 2015 found only 20% believed that “computers will never replace human practitioners” down 46% when the same survey was conducted in 2011. *Id.*

<sup>24</sup> *See* Anna Fifield, *New ‘Yahoo Ending’ Service lets users in Japan prepare for the inevitable*, THE WASHINGTON POST (July 21, 2014) [https://www.washingtonpost.com/world/asia\\_pacific/a-new-yahoo-ending-service-lets-users-in-japan-prepare-for-the-inevitable/2014/07/20/d5751480-0866-4760-b41b-79aee25ad412\\_story.html?noredirect=on&utm\\_term=.78bcfc15f4e6](https://www.washingtonpost.com/world/asia_pacific/a-new-yahoo-ending-service-lets-users-in-japan-prepare-for-the-inevitable/2014/07/20/d5751480-0866-4760-b41b-79aee25ad412_story.html?noredirect=on&utm_term=.78bcfc15f4e6) (expanding on how Yahoo!Ending works). Yahoo!Ending allows for deactivation of users accounts after their death as well as deleting stored content such as photos, videos and information in Yahoo Wallet. *Id.*

While Google lets users anywhere plan for their afterlives or other periods of dormancy through its “Inactive Account Manager” function, Yahoo Japan goes a step further. In conjunction with Kamakura Shinsho, a funeral services company, it offers advice on how to write a will, plan a funeral and even find a grave.

A basic package offered through Yahoo Japan costs about \$4,500, including the funeral, embalming and cremation, plus a wake for 30 people. Feeding guests at the wake costs an extra \$30 per person, and for an additional \$1,500 you can get a monk to perform the funeral.

*Id.*

<sup>25</sup> *See id.* (discussing technological advances of social media).

<sup>26</sup> *See* *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 191-92 (2004) (showcasing how Congress could not have foreseen expansion of internet when creating SCA).

<sup>27</sup> *See id.* (detailing courts understanding of preemption right under State law).

state law does not save a state law from being preempted.<sup>28</sup> New rules and navigation with the advent of the internet has forced Congress to endure an introspective into what is protected and what is not by the SCA.<sup>29</sup>

The court in *Ajemian v. Yahoo!, Inc.* determined how parties must maintain and store digital communications into the afterlife.<sup>30</sup> The *Ajemian* court agreed with the concept that the world changed with the advent of the internet and the courts must do so as well.<sup>31</sup> The privacy and privilege that corresponds with an email address cannot be whittled down to the discretion of a service contract when the contract is disfavored as a matter of public policy.<sup>32</sup>

The Court undertook a statutory analysis to determine whether the SCA prohibited Yahoo! from disclosing the contents of the decedent's email account.<sup>33</sup> Yahoo! adopted a broad concept and attempted to create a vague rule that protected their interests over the wishes of a decedent's family and friends.<sup>34</sup> While wills and trusts are common nomenclature in American culture, the privacy of creating a document expressing one's wishes upon death is often lost in the minutia.<sup>35</sup> Examining the court's reasoning for disallowing summary judgment:

Yahoo! contends that 18 U.S.C. § 2702(a) prohibits it from disclosing the contents of the e-mail account, while the personal representatives argue that they fall within two of the enumerated exceptions. The first of these, the so-called "agency exception," allows a service provider

<sup>28</sup> See *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001) (discussing how state law presumption works in regards to SCA).

<sup>29</sup> See *id.* at 143-52 (examining preemptive steps taken to thwart issues presented in SCA).

<sup>30</sup> See *Ajemian*, 84 N.E.3d at 771 (re-examining *Ajemian* as compared with privacy and stored digital communication).

<sup>31</sup> See *id.* at 772-74 (explaining court's reasoning).

<sup>32</sup> See *id.* at 771 (narrowing down terms of service between Yahoo! and decedent).

<sup>33</sup> See *id.* (detailing court's analysis of case in chief).

<sup>34</sup> See *id.* at 772 (discussing Yahoo!'s view of SCA and how it should be applied).

<sup>35</sup> See Barbranda Lumpkins Walls, *Haven't Done a Will Yet?*, AARP (2017) <https://www.aarp.org/money/investing/info-2017/half-of-adults-do-not-have-wills.html>, (featuring wills and trusts in American society). "[A] whopping 78 percent of millennials (ages 18-36) and 64 percent of Generation Xers (ages 37-52) do not have a will." *Id.*

Preparing for the end of life is one of those things you know you *should* do — but have you actually sat down and done it? Probably not, according to a new survey from Caring.com, which found that only 4 in 10 American adults have a will or living trust. Happily, older adults appear to lead the pack in readying these important documents. While most U.S. adults age 18 and over have not done the needful, 81 percent of those age 72 or older and 58 percent of boomers (ages 53-71) do, in fact, have estate-planning documents. The study, conducted in January, asked more than 1,000 respondents whether they had estate-planning documents in case of their death.

*Id.* (emphasis in original).

to disclose the contents of stored communications “to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.” 18 U.S.C. § 2702(b)(1). The second, the “lawful consent” exception, allows disclosure “with the lawful consent of the originator or an addressee or intended recipient of such communication, or the [originator] in the case of remote computing service.” 18 U.S.C. § 2702(b)(3).<sup>36</sup>

Yahoo! heavily relied on the service contract between themselves and the decedent but failed to introspectively understand how many people sign away everyday rights without completing a “meeting of the minds.”<sup>37</sup> The *Ajemian* court correctly vacated the trial court’s ruling of summary judgment for Yahoo! in that today’s society “by recognizing that in today’s society, an internet provider or user of services cannot unequivocally have unilateral rights over the contents of the e-mail account.”<sup>38</sup> Society uses the internet and social media as an additional limb, creating a healthy flow between reality and fantasy.<sup>39</sup> The privacy implications of refusing those closest to a decedent access to their innermost information attempts to circumvent an entire sector of the legal field.<sup>40</sup>

Unfortunately, courts have not kept up with the intersection of privacy and technology and have failed families and decedents in protecting both those living and passed.<sup>41</sup> To rectify the system and to become more aligned with the *Ajemian* ruling, other courts should follow suit and examine how best to protect privacy while still allowing family intimacy.<sup>42</sup> No

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<sup>36</sup> See *Ajemian*, 84 N.E.3d at 772 (focusing on Court’s reasoning for disallowing Summary Judgment).

<sup>37</sup> See *id.* (indicating Yahoo!’s contention that it is prohibited from disclosing email contents); see also 17 Am Jur.2d *Contracts* § 18 (1964) (defining meeting of the minds).

<sup>38</sup> See *Ajemian*, 84 N.E.3d at 769 (stating Court’s basis for vacating judgment, remanding to Family and Probate Court).

<sup>39</sup> See Thomas Brewster, *Facebook is Playing Games With Your Privacy and There’s Nothing You Can Do About It*, FORBES, (June 29, 2016) <https://www.forbes.com/sites/thomasbrewster/2016/06/29/facebook-location-tracking-friend-games/> (investigating Facebook’s effect in today’s privacy and social media).

<sup>40</sup> See *id.* (highlighting minimal ability to protect yourself from privacy intrusion on World Wide Web).

<sup>41</sup> See Walls, *supra* note 35 (featuring statistics about adults who do or do not have wills and trusts).

<sup>42</sup> See Mark Scott & Natasha Singer, *How Europe Protects Your Online Data Differently Than the U.S.*, N.Y. TIMES (Jan. 31, 2016) <https://www.nytimes.com/interactive/2016/01/29/technology/data-privacy-policy-us-europe.html> (examining how other countries and entities protect privacy rights better than United States).

In the United States, a variety of laws apply to specific sectors, like health and credit. In the European Union, data protection is considered a fundamental right, which can have far-reaching consequences in all 28 member states. All the talk about data privacy can

solution will come until a uniform consensus across states has been decided and resolved in favor of families and privacy.<sup>43</sup>

The court in *Ajemian* faced a difficult decision in weighing privacy and family rights, but ultimately decided the issue was best left to be resolved at a later date. While there are many opinions to this debate, it is advisable to protect oneself prior to death via a will or trust, in order to allow family members peace of mind and no fear of a tweet from the dead.

*Danielle Kohen*

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get caught up in political wrangling. But the different approaches have practical consequences for people, too.

*Id.*

<sup>43</sup> See *id.* (showcasing more effective ways to manage online privacy).



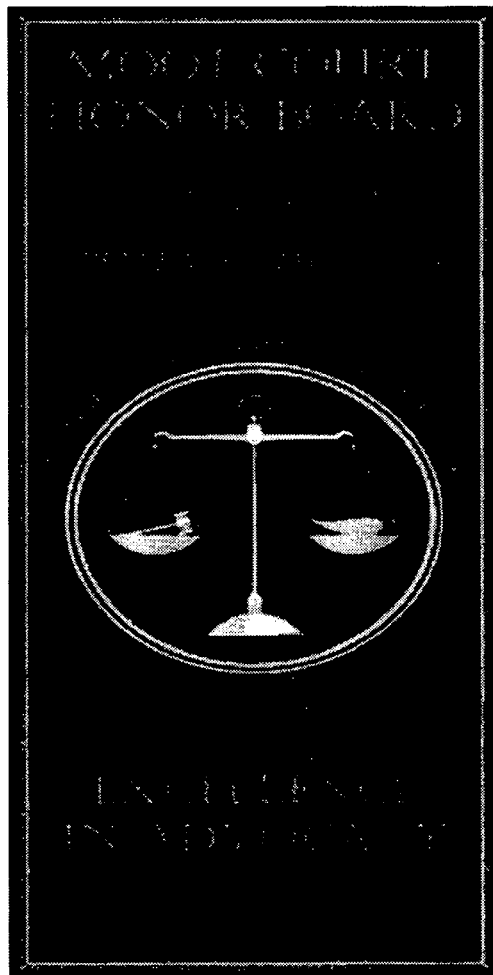
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