



UFADAA and Privacy

Background. In the Internet age, the nature of property and our methods of communication have changed dramatically. A generation ago, a human being delivered our mail, photos were kept in albums, documents were filed in file cabinets, and money was deposited at the corner bank. For most people today, at least some of their property and communications are stored as data on a computer server and accessed via the Internet.

Collectively, a person's digital property and electronic communications are referred to as "digital assets" and the companies that store those assets on their servers are called "custodians." Access to digital assets is usually password-protected and governed by a restrictive terms-of-service agreement provided by the custodian. This can create problems when account holders die or otherwise lose the ability to manage their own digital assets.

A fiduciary is a trusted person with the legal authority to manage another's property, subject to a set of strict fiduciary duties. The Uniform Fiduciary Access to Digital Assets Act (UFADAA) concerns four common types of fiduciaries:

1. Executors or administrators of deceased persons' estates;
2. Court-appointed guardians or conservators of protected persons' estates;
3. Agents appointed under powers of attorney; and
4. Trustees.

The private nature of property. What exactly do we mean when we say property is *private*? The Merriam-Webster dictionary says "private" means "intended for or restricted to the use of a particular person, group, or class." In other words, the issue boils down to control: private property is controlled by its owner(s), who may or may not choose to share it with others.

Controlling access to tangible private property such as a house, car, or book is relatively simple. But what about intangible assets, like ideas and information? In this context, does "private" mean not for publication? Limited to a group of insiders? Only known to close family and friends? For your personal knowledge only? Obviously there are different kinds of private information and the appropriate level of privacy depends on the circumstances. For example, information from the financial records of a privately held business can be appropriately shared with all qualifying shareholders, but not with competitors or the public. Information contained in a patient's medical records can be appropriately shared with all of the professionals who provide treatment, but not with a treating physician's spouse or friends. The contents of a love letter might be inappropriate to share with anyone except the sender and the recipient.

As with tangible private property, the real issue with private information boils down to control. The person who has private information decides whether to share it, and with whom, subject to any applicable contract rights or relevant laws (such as copyright law).

The digital revolution. When our property was mostly in tangible form there was little question of ownership and control. It is obvious that you control the files in your file cabinet, the photos in your albums, and the mail the post office delivers to your door. With digital assets, the issues of ownership and control are more complex. If you upload files to an Internet-based storage provider, the custodian that provides the digital storage might also have some rights in those files. Your rights are usually spelled out in a terms-of-service agreement that you click on to indicate that you agree to its terms.

Usually, your digital assets are password protected. Only you, or someone to whom you give your password, may access your account. However, the custodian of your digital assets may be able to override or reset your password under certain conditions.

Fiduciary law. For as long as the law has recognized private property, the law has also recognized that property owners can die or otherwise become unable to manage their property, requiring a court to appoint a trusted fiduciary. Property owners might also appoint a fiduciary voluntarily by setting up a trust or signing a power of attorney. In any case, a fiduciary appointed to manage property for the benefit of the owner or the owner's estate is subject to a set of strict fiduciary duties. Fiduciaries have a duty of care, which means they must take care of the owner's property as least as well as a prudent person would care for their own property. They have a duty of loyalty, which means fiduciaries must always act for the benefit of the owner rather than for themselves. Finally, fiduciaries have a duty of confidentiality, meaning they must keep private information private, or face liability under our privacy laws. This system has worked very well for hundreds of years.

In our society, businesses and other organizations simply must deal with fiduciaries. When someone dies, becomes incapacitated, or appoints an agent or trustee, that fiduciary may have to close bank accounts, cancel subscriptions, forward mail, pay bills, sell property, and start or stop benefit payments from the Social Security Administration. Banks, hospitals, magazine publishers, insurance companies, investment firms, credit card issuers, the post office, the IRS, the Social Security office, and millions of other entities deal with fiduciaries every day. There is no good reason why Internet-based entities should not be subject to the same rules of law.

UFADAA restores your control. Your private assets are yours alone, whether digital or tangible. Only you can determine who else (if anyone) should have access. It would be absurd to allow your bank to decide who gets your money when you die. Yet under today's law, some custodians want the right to keep or delete your digital assets, which may have real monetary or sentimental value. UFADAA allows you to decide who may access your digital assets.

Of course, you should also be able to keep your digital assets private if you wish. UFADAA allows anonymous accounts and permits you to direct a custodian to destroy your assets if you die. Your directions are legally enforceable, just like any other provision in a will, trust, or power of attorney. The key issue is control: *you* decide, not the custodian of your assets.

A simple solution. When you sign up for a retirement account, you are asked to name a beneficiary to receive funds in the event of your death. It would be just as simple to name a person to receive access to your email account, your cloud-based document storage service, or your social media account. Why don't the internet-based companies that provide those accounts offer you the same option?

One major firm has recently taken a step in that direction. Google’s “Inactive Account Manager” feature allows you to tell Google how to handle your digital assets in the event your account is inactive for a period of time (you choose how long). You can direct Google to delete your assets, or to grant access to a trusted person for whom you provide a phone number and email address. You can provide different instructions for different assets. For example, you might allow your sister to download all of your photos and YouTube videos, allow your business partner to access document files stored in the cloud, and order Google to delete all of your gmail messages. And you can change your mind and provide new instructions at any time.

UFADAA does not require custodians to provide a service like Google’s Inactive Account Manager, but it provides an incentive. UFADAA requires the custodian to follow the account holder’s directions for granting access to fiduciaries, whether those directions are made in a will, trust, power of attorney, or using an online service similar to Google’s. Companies with millions of account holders will find it much simpler and less costly to ask their customers to provide instructions for fiduciary access online, like Google is already doing, rather than reviewing millions of estate planning documents. If UFADAA is widely enacted, other companies are likely to follow Google’s lead and provide a similar option.

Conclusion. UFADAA does not break new legal ground; it simply applies the tried and true laws governing fiduciaries to the digital assets that are widely used today. Account holders will have control of their digital assets just as they have always had control over their tangible property – they are free to pass on their assets to loved ones, or to permanently delete them as they see fit.

Under current laws, consumers have very little control. Instead, custodian companies control access to digital assets using click-through terms-of-service agreements that studies confirm most account holders do not read. The terms vary widely and are often changed unilaterally by the companies that provide internet-based services.

UFADAA restores control to account holders and the fiduciaries who carry out the account holders’ plans when they cannot do so for themselves. It is an essential update for the digital age and should be enacted in every state as soon as possible.