Contractual Indescendibility

David Horton*

Testation is supposed to be comprehensive: when we die, we pass everything we own to our friends and family. However, a growing number of valuable things defy this principle. From frequent flyer miles to virtual property to e-mail and social media accounts, some assets expressly state that they cannot be transmitted by will, trust, or intestacy. This invited contribution to the Hastings Law Journal *Symposium in honor of Charles L. Knapp analyzes this trend, which I call "contractual indescendibility." It shows that consumers who challenge noninheritability provisions face three obstacles. First, they have to prove an ownership interest in the item. Second, they need to invalidate the indescendibility clause under contract law. And third, they must navigate the gauntlet of federal legislation that governs this area. Despite these hurdles, I conclude that companies should not have carte blanche to delete this cherished stick from the bundle of rights.*

* Professor of Law, University of California, Davis, School of Law (King Hall).

TABLE OF CONTENTS

INTRODUCTION 1048
I. CONTRACTUAL INDESCENDIBILITY 1051
A. FREQUENT FLYER MILES AND LOYALTY POINTS 1052
B. VIRTUAL ASSETS 1055
C. E-MAILS AND SOCIAL MEDIA 1057
II. CHALLENGING CONTRACTUAL INDESCENDIBILITY 1059
A. OWNERSHIP 1059
B. VALIDITY 1065
1. *Lack of Assent* 1065
2. *Unconscionability* 1068
3. *Violation of Implied Covenant of Good Faith and Fair Dealing* 1072
C. FEDERAL LAW 1072
1. *The Airline Deregulation Act* 1073
2. *The Stored Communications Act* 1077
CONCLUSION 1081

INTRODUCTION

Like many professionals, Ken Means, an engineer from Texas, spends too much time on the road.[1] He has accumulated 650,000 frequent flyer miles and hotel rewards points.[2] Thus, when Ken made a will, he treated his loyalty credits like everything else that belonged to him, and left them to his wife.[3] Yet Ken probably attempted to exercise a property right that does not exist. Buried in the terms and conditions of Ken's memberships is likely a clause that makes his points indescendible—nontransferable by will, trust, or intestacy.

This phenomenon, which I call "contractual indescendibility," is quietly becoming a flashpoint in the adhesion contract war.[4] It is the product of several different trends. The first is the rise of assets that straddle the border between contract and property. Americans place an increasing amount of pecuniary and psychological value on frequent flyer

1. *See* Gary Stoller, *What Happens to Frequent-Flier Miles If You Die?*, U.S.A. TODAY (Sept. 1, 2013, 6:03 AM), http://www.usatoday.com/story/travel/flights/2013/09/01/deceased-travelers-frequent-flyer-points/2749761.

2. *See id.*

3. *See id.* For an anecdotal account of an estate planner who directs clients to address frequent flyer miles in their wills, see Susan Stellin, *The Afterlife of Your Frequent Flier Miles*, N.Y. TIMES (Nov. 21, 2012), http://www.nytimes.com/2012/11/25/travel/the-afterlife-of-your-frequent-flier-miles.html.

4. I briefly address contractual indescendibility in David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 565–70, 597–99 (2014). This Article expands on my analysis there. In addition, for a similar piece that appeared while this Article was in the editing stage, see generally Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799 (2014).

miles, video game winnings, e-mails, and uploads to social media accounts.[5] For example, a 2011 survey of the United States found over two billion rewards program members holding $48 billion in points.[6] Similarly, security software vendor McAfee recently estimated that consumers have amassed an average of $55,000 in digital assets,[7] and the gross domestic product of virtual universe Second Life is roughly $600 million, which places it among the top twenty-five nations in the world.[8] The companies that create this newest of "new property" are taking pains to liberate themselves from the cost and hassle of complying with their customers' testamentary wishes.[9]

Contractual indescendibility also reflects the creeping privatization of inheritance. Once, estate planning meant executing a will, a single instrument that passed through probate and disposed of all of a decedent's possessions. Today, most middle and upper class individuals attempt to avoid court-based succession by using contract-like devices. Indeed, they hold vast reservoirs of wealth in pensions, life insurance,

---

5. The ascent of frequent flyer miles and their ilk is a minor part of much larger changes in the nature of the economy. Land, once the fount of social power, has been eclipsed by paper assets such as stocks, bonds, and mutual funds. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1119 (1984).

6. *See* Tim Winship, *Airline Frequent Flyer Miles, 30 Years Later*, ABC NEWS (May 25, 2011), http://abcnews.go.com/Travel/airline-frequent-flyer-miles-30- years/story?id=13616082.

7. *McAfee Reveals Average Internet User Has More than $37,000 in Unprotected 'Digital Assets'*, MCAFEE (Sept. 27, 2011), http://www.mcafee.com/us/about/news/2011/q3/20110927-01.aspx. McAfee, which sells security software to protect these supposedly cherished digital assets, stands to gain from making this figure as high as possible. *Id.*

8. *See* Peter Diamandis, *Second Life: How a Virtual World Became a Reality*, HUFFINGTON POST (Mar. 7, 2013, 3:42 PM), http://www.huffingtonpost.com/peter-diamandis/second-life-how-a-virtual_b_2831270.html; *see also GDP (Current U.S. $)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD (last visited May 10, 2015).

9. Sports franchises also make season tickets partially indescendibile: transferable only to certain people, or for a fee. *See, e.g.*, Horton, *supra* note 4, at 566; Rachael Rustmann, *It's a Brand New Ballgame: How to Bequest Season Tickets for Your Favorite Sports Team's Games*, 4 EST. PLAN. & COMMUNITY PROP. L.J. 369, 373–75 (2012). For instance, the Green Bay Packers have an elaborate scheme of preapproved relatives who can inherit season tickets:

> We will honor a request for transfer as follows:
>
> a) Upon death of ticket holder
>
> 1) To surviving spouse; or if no spouse, the surviving children of a deceased ticket holder without authorization. (If children do not agree—no transfer.)
>
> 2) If direction by deceased under will or specific writing to family devisees defined in (b) but not to devisees who are not defined in (b), even with direction.
>
> b) To family, defined as, spouse and "blood" relatives who are not more than first cousins, on direction of ticket holder in writing during his or her life-time. (Excludes, for example, transfer to friends.)

Season Tickets, GREEN BAY PACKERS, http://www.packers.com/tickets/season-tickets.html (last visited May 10, 2015); *see also* Associated Press, *Brother Sues Brother Over Packers Tickets*, MILWAUKEE-WIS. J. SENTINEL (May 27, 2009), http://www.jsonline.com/news/wisconsin/46286532.html (describing one father's ill-fated attempt to pass the right to sell his Packers season tickets to his sons). In the interest of brevity, I will not discuss personal seat licenses in this Article.

and pay-on-death accounts.[10] These nonprobate mechanisms allow owners to name beneficiaries by filling out a form. Contractual indescendibility is the inverse of this movement, the recognition that, just as private agreement can facilitate testation, it can deny the right to engage in testation altogether.

Finally, contractual indescendibility reflects the insatiable ambition of fine print—a fact that makes it a suitable topic for this invited symposium contribution to the *Hastings Law Journal* in honor of Charles L. Knapp's fiftieth year of teaching. During his storied career, Chuck has chronicled how large companies have used adhesive terms to disclaim warranties, limit their liability, and shunt consumers' and employees' claims into distant forums or binding arbitration (or both).[11] Of course, the case law and commentary on contractual indescendibility will never reach the epic proportions of the debates to which Chuck has added his resonant voice. Yet the boilerplate contract that deletes the right to bequeath or transmit through intestacy is a symptom of the same pathology. As Chuck has lucidly explained, modern contract law rewards drafters and privileges an instrument's text.[12] In light of these incentives, it is not surprising that firms are testing the waters with novel self-serving schemes.

Admittedly, contractual indescendibility will seem unproblematic to some readers. For starters, loyalty points, virtual property, and digital media may not even belong to consumers. Unlike land or chattels, these things exist only because an airline, hotel, rental car agency, credit card issuer, video game developer, or internet service provider ("ISP") has constructed them. Arguably, drafters should be free to exclude particular stalks from their artificial bouquets of rights. Moreover, the market may constrain firms. For instance, Yahoo! does not allow the contents of e-mail accounts to be inherited,[13] but Google will sometimes accommodate a decedent's wishes.[14] If consumers care about bequeathing their electronic

---

10. *See, e.g.*, John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 12 (2012) (noting the prevalence of "financially intermediated account forms that invite nonprobate transfer").

11. *See, e.g.*, Charles L. Knapp, *Cases and Controversies: Some Things to Do with Contracts Cases*, 88 WASH. L. REV. 1357, 1393 (2013); Charles L. Knapp, *Contract Law Walks the Plank:* Carnival Cruise Lines, Inc. v. Shute, 12 NEV. L.J. 553, 561 (2012); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 766 (2002); Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95, 110 (2006) [hereinafter Knapp, *Opting Out or Copping Out?*]; Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 627 (2009).

12. *See, e.g.*, Knapp, *Opting Out or Copping Out?*, *supra* note 11, at 100–03.

13. *See Yahoo! Terms of Service*, YAHOO!, https://info.yahoo.com/legal/us/yahoo/utos/terms/ (last visited May 10, 2015) ("You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death.").

14. *See Submit a Request Regarding a Deceased User's Account*, GOOGLE, https://support.google.com/accounts/answer/2842525?hl=en&ref_topic=3075532 (last visited May 10, 2015) (setting forth a procedure for authorized representatives of a deceased user to obtain contents of a deceased user's account).

correspondence, perhaps they will vote with their feet and patronize pro-descendibility firms. Finally, some businesses can claim that Congress has given its imprimatur to their indescendibility policies. The Airline Deregulation Act ("ADA") grants carriers broad leeway to structure their affairs without interference from state consumer protection efforts.[15] Similarly, the Stored Communications Act ("SCA") bars ISPs from disclosing a customer's private digital communications without her consent.[16] Although the SCA's precise effect on inheritance issues remains hazy,[17] some ISPs have argued that it prevents them from allowing a fiduciary to marshal a decedent's online assets.[18] These are all plausible arguments that indescendibility clauses should be enforceable.

Nevertheless, I am more skeptical about these provisions. First, I explain why consumers should not need to prove that rewards points, avatars, and e-mails are their "property" for all purposes. Instead, the benchmark ought to be the narrower issue of whether these things are *descendible*. Judges can answer this question by examining whether a company has given its customers reason to believe that their rights are transferable. Second, not every indescendibility clause should be valid as a matter of black-letter contract law. For one, some firms will be unable to prove that consumers manifested assent to the fine print. In addition, courts may strike down noninheritability provisions under either the unconscionability doctrine or the implied covenant of good faith and fair dealing. Third, although the ADA is a formidable obstacle for frequent flyers who wish to challenge indescendibility clauses, the SCA leaves room for pro-consumer state regulation.

This Article contains two Parts. Part I provides a brief overview of the rising number of assets that purport to be indescendible. Part II examines the tripartite legal showing that a consumer must make to overcome a noninheritability provision: that (1) she has an ownership interest in the item, (2) the indescendibility clause is not enforceable, and (3) federal law does not shield the provision.

I. Contractual Indescendibility

Two ideas about inheritance are rarely questioned. The first is that to acquire something is also to enjoy the privilege to convey it after death. Indeed, "[i]t is hard for most Americans to imagine a system of private property that doesn't include a right to control what happens to their

15. *See* 49 U.S.C. § 41713 (2015) (barring states from regulating certain aspects of air travel).

16. 18 U.S.C. § 2701 (2015).

17. *Compare* Naomi Cahn, *Probate Law Meets the Digital Age*, 67 Vand. L. Rev. 1697, 1716–17 (2014) (arguing that courts can construe the SCA not to preclude fiduciary access to digital assets), *with* David Horton, *The Stored Communications Act and Digital Assets*, 67 Vand. L. Rev. 1729, 1735–36 (2014) (reading the SCA to permit access only if a user has taken affirmative steps during life to authorize disclosure).

18. *See infra* Part II.C.2.

property after death."[19] The second is that succession is all-encompassing.[20] Professionally drafted wills and trusts have a residuary clause, which transmits any item not specifically mentioned to particular beneficiaries. And even if a decedent omits an asset from her estate plan, the intestacy scheme will shepherd it to her heirs. Thus, when someone dies, all that is hers—"every jewel and bauble, every bank account, all stocks and bonds, the cars and houses, corn futures or gold bullion, all books, CD's, pictures, and carpets—everything will pass on to somebody or something else."[21]

But as this Part demonstrates, some valuable things defy these basic propositions.[22] Indeed, companies often exploit their dominion over the fine print to make items indescendible.

A. Frequent Flyer Miles and Loyalty Points

In 1922, Roscoe Pound noted that paper assets like stocks were becoming the centerpiece of the economy by declaring that "[w]ealth, in a commercial age, is made up largely of promises."[23] Today, one might jest that wealth consists mainly of frequent flyer miles. This Subpart reveals that the wild popularity of rewards points has spurred many firms to make them noninheritable.

The first loyalty programs were relatively simple. In the 1970s, banks had enjoyed success with gimmicks such as giving toasters to their best clients.[24] In May 1981, American Airlines borrowed that model with its AAdvantage initiative.[25] The carrier informed its 190,000 most active flyers that they were entitled to discounted tickets and seat upgrades.[26] Only six days later, cutthroat competitor United Airlines unveiled a similar plan, Mileage Plus.[27] Within a few years, primitive loyalty programs had sprung up throughout the transportation industry.[28] Yet despite their

---

19. Ray D. Madoff, Immortality and the Law 57–58 (2010).

20. Adam J. Hirsch, *Incomplete Wills*, 111 Mich. L. Rev. 1423, 1424 (2013) ("One way or another, everything previously owned by a deceased person is going to pass into someone else's hands.").

21. Lawrence M. Friedman, Dead Hands: A Social History of Wills, Trusts, and Inheritance Law 3 (2009).

22. Another species of indescendibility might be thought of as "pure indescendibility," things that are impervious to posthumous transfer even though no contract covers them. *See* Horton, *supra* note 4, at 548–65 (discussing noble titles, body parts, and certain causes of action).

23. Roscoe Pound, An Introduction to the Philosophy of Law 225 (1922).

24. *See, e.g.*, *The Big 2-5—Celebrating 25 Years of Frequent Flyer Programs*, InsideFlyer, http://www.insideflyer.com/articles/article.php?key=2926 (last visited May 10, 2015) [hereinafter *The Big 2-5*].

25. *See, e.g.*, *History of AMR Corporation and American Airlines*, American Airlines, https://www.aa.com/i18n/amrcorp/corporateInformation/facts/history.jsp (last visited May 10, 2015).

26. *See, e.g.*, *The Big 2-5*, *supra* note 24.

27. *See id.*

28. *See, e.g.*, *History of Loyalty Programs*, FrequentFlier.com, http://www.frequentflier.com/programs/history-of-loyalty-programs (last visited May 10, 2015) (noting that Delta and TWA christened frequent flyer programs in 1981, Holiday Inn and Marriott adopted rewards policies in 1983, and National Rental Car joined the fray in 1987).

ubiquity, rewards points were little more than glorified coupons. Customers earned miles and their ilk by travelling, booking a hotel room, or renting a car.[29] They could only redeem credits in similar transactions with the same firm, and they could not transfer points under any circumstances.[30]

But as the decades passed, rewards points mutated into a shadowy form of wealth. Airlines, hotels, and car rental agencies forged alliances with non-travel-related entities, such as credit card issuers and phone companies.[31] Thus, points became the valuable residue of engaging in commercial activity—a kind of interest that accrues from structuring one's finances the right way. Indeed, roughly half of the 14 trillion frequent flyer miles in circulation[32] have been earned without setting foot on a plane.[33] The most vociferous consumer of Delta SkyMiles is American Express, which uses them to incentivize its own products.[34] Likewise, American Airlines sells AAdvantage points to over a thousand other corporations, meaning that consumers "earn miles for everything from home mortgages to Lasik surgery to buying Gap jeans online."[35] In addition, the purchasing power of points expanded dramatically. Rather than merely being able to trade credits for a companion ticket or an extra day at a destination, members began to enjoy the power to donate to charities and buy steaks, electronics, and tickets to Broadway shows.[36] For these reasons, a 2002 article in *The Economist* proclaimed that rewards points were the world's second largest currency, behind only the dollar.[37] As one commentator quipped, "[a]irlines don't exist" because they have been replaced by "loyalty compan[ies]."[38]

To capitalize on the points craze, some firms have abandoned their nontransferability policies. Alaska, American, Delta, Continental, Northwest, U.S. Airways, and United allow their frequent flyers to

---

29. *See, e.g.*, *The Big 2-5*, *supra* note 24.

30. *See id.*

31. *See, e.g.*, *Northwest Joins with MCI in Frequent-Flier Venture*, ASSOCIATED PRESS, June 14, 1988, *available at* http://www.apnewsarchive.com/1988/Northwest-Joins-With-MCI-In-Frequent-Flyer-Venture/id-95c07f6776a7ace810589a97c25bb01b.

32. *See* Andrew Clark, *Frequent Flyer Miles Soar Above Sterling*, GUARDIAN (Jan. 7, 2005, 10:51 PM), http://www.theguardian.com/money/2005/jan/08/business.theairlineindustry.

33. *Airline Miles: Frequent-Flyer Economics*, ECONOMIST (May 2, 2002), http://www.economist.com/node/1109840.

34. *See* Ron Lieber, *Now May Be a Good Time to Bail Out of Frequent-Flier Programs*, N.Y. TIMES (Feb. 28, 2014), http://www.nytimes.com/2014/03/01/your-money/credit-and-debit-cards/now-may-be-a-good-time-to-bail-out-of-frequent-flier-programs.html.

35. *See* Winship, *supra* note 6. In 2013, airlines sold nearly $20 billion in miles to "program partners." Christopher Elliott, *Don't Panic, But There Are No More Airlines*, LINKEDIN (Jan. 19, 2014), https://www.linkedin.com/today/post/article/20140119192325-332179-don-t-panic-but-there-are-no-more-airlines.

36. *See* Brief for California et al. as Amici Curiae Supporting Respondents at 18, Nw., Inc. v. Ginsberg, 134 S. Ct. 1422 (2014) (No. 12-462).

37. *See Airline Miles: Frequent-Flyer Economics*, *supra* note 33.

38. Elliott, *supra* note 35.

convey miles to each other for a fee.[39] Similarly, on websites such as Points.com, members can exchange points for PayPal credits and then convert them into cash.[40] In fact, as technology evolves, members may soon be able to pay with points "anywhere they can use a credit card."[41]

Yet despite the porous boundary between miles and money, many companies deny customers the ability to convey their earnings after death.[42] For instance, Alaska and United declare in their program terms and conditions that points are not a member's "property."[43] Although this language does not expressly make points noninheritable, it achieves that goal indirectly: decedents cannot transfer what they do not own.[44] Other companies are more forthright. For example, JetBlue states that miles "are non-transferable . . . upon death."[45] Similarly, Hyatt covers both bases by providing that "[a]ccrued points do not constitute property of the [m]ember . . . and are not transferable to another person for any reason including . . . inheritance."[46] And Delta recently made headlines by changing its descendibility policy. Previously, the carrier allowed

---

39. *See* Ed Perkins, *Can I Transfer My Frequent Flyer Miles?*, SMARTERTRAVEL (Oct. 13, 2008), http://www.smartertravel.com/travel-advice/can-transfer-my-frequent-flyer-miles.html?id=2678619.

40. Jane Genova, *Frequent Flyer Miles: Perils of Unregulated Currencies*, PAYMENT WEEK (Apr. 21, 2014), http://paymentweek.com/2014-4-21-frequent-flyer-miles-perils-unregulated-currencies-33185.

41. *Miles as Money*, INSIDEFLYER, http://www.insideflyer.com/articles/article.php?key=8246 (last visited May 10, 2015).

42. Some firms prohibit both lifetime and posthumous transfer. *See, e.g.*, *Terms and Conditions*, SW. AIRLINES, http://www.southwest.com/html/customerservice/faqs.html?topic=rapid_rewards_program_terms_and_conditions (last visited May 10, 2015).

43. *See Conditions of Membership*, ALASKA AIRLINES, http://www.alaskaair.com/content/mileage-plan/benefits/conditions-of-membership.aspx#transfers (last visited May 10, 2015); *MileagePlus Rules*, UNITED AIRLINES, http://www.united.com/web/en-US/content/mileageplus/rules/default.aspx (last visited May 10, 2015). These "not property" provisions are also common among companies that do not permit members to transfer points during life. *See, e.g.*, *About Membership Rewards*, AM. EXPRESS, https://catalogue.membershiprewards.com.sg/aboutTerms.mtw (last visited May 10, 2015); *HHonors Terms & Conditions*, HILTON, http://hhonors3.hilton.com/en/terms/index.html (last visited May 10, 2015).

44. As I discuss in greater depth in Horton, *supra* note 4, at 576–81, this "not property" rationale also looms large in the context of pure indescendibility. For instance, courts have made cadaveric organs indescendible by deeming them not to be a decedent's property. *See, e.g.*, Estate of Jimenez, 65 Cal. Rptr. 2d 710, 714 (Ct. App. 1997). On the flip side, many jurisdictions deem the right of publicity to be inheritable because it is a "species of intangible personal property." State *ex rel.* Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1987).

45. *TrueBlue Terms and Conditions*, JETBLUE, https://trueblue.jetblue.com/web/trueblue/terms-and-conditions (last visited May 10, 2015).

46. *Hyatt Gold Passport Terms & Conditions*, HYATT, http://www.hyatt.com/hyatt/customer-service/gp-terms-conditions.jsp (last visited May 10, 2015). American Airlines' terms are similar, but also grant the carrier the ability to make exceptions to its general stance of noninheritability:

> Neither accrued mileage, nor award tickets, nor upgrades are transferable by the member (i) upon death . . . . However, American Airlines, in its sole discretion, may credit accrued mileage to persons specifically identified in court approved . . . wills upon receipt of documentation satisfactory to American Airlines and upon payment of any applicable fees.

General AAdvantage Program Conditions, AM. AIRLINES, http://www.aa.com/i18n/AAdvantage/programInformation/termsConditions.jsp (last visited May 10, 2015).

SkyMiles to be inherited or willed.[47] But in March 2013, Delta added the following clause to the litany of reasons it can delete an account: "A member is deceased."[48]

In sum, loyalty points have evolved from publicity stunts to possessions that are "worth real money."[49] Along the way, they have become freely transferable and yet increasingly noninheritable. And as I discuss next, a similar pattern is emerging in the area of electronic possessions.

B. Virtual Assets

Another nascent form of wealth comes in the form of items won, built, or purchased in video games. Massively multiplayer online role-playing games ("MMORPG") and virtual worlds are popular, in part, because they offer participants "incremental rewards" to make them feel as if "they are progressing and becoming more capable."[50] To climb this ladder, players compete for items, coins, or powers. Again, though, many of these scarce resources are indescendible.

The MMORPG World of Warcraft ("WoW") illustrates the property-like traits of virtual possessions.[51] Players build up their avatars—a process known as "leveling"—by "questing" (finishing tasks, such as killing a boss or finding a hidden item) and "grinding" (defeating as many enemies as possible).[52] Accordingly, a seasoned avatar is a substantial investment: it takes roughly nineteen days of uninterrupted play to "level" a WoW character from one to sixty.[53] Likewise, WoW features a "robust, eBay-like in-game auction house system" in which

---

47. Scott McCartney, *When You Expire, So Do Your Delta Miles*, Wall St. J. (Apr. 17, 2013, 10:00 AM), http://blogs.wsj.com/middleseat/2013/04/17/delta-air-lines-skymiles-when-you-expire-so-do-your-miles.

48. *SkyMiles Rules & Conditions*, Delta Airlines, http://www.delta.com/content/www/en_US/skymiles/about-skymiles/program-rules-conditions.html (last visited May 10, 2015). Delta also clarified that SkyMiles "are not the property of any member" and "may not be . . . pledged, or transferred under any circumstances, including, without limitation, by operation of law, upon death, or in connection with any domestic relations dispute and/or legal proceeding." *Id.*

49. Stoller, *supra* note 1.

50. Seth Schiesel, *Conquering the Burning Crusade*, N.Y. Times (Jan. 31, 2007), http://www.nytimes.com/ref/arts/warcraft-journal.html.

51. WoW boasts over 100 million accounts worldwide. *See* Olivia Grace, *100,000,000 World of Warcraft Accounts Infographic*, WoW Insider (Jan. 28, 2014, 2:00 PM), http://wow.joystiq.com/2014/01/28/100-000-000-world-of-warcraft-accounts-infographic. Other popular MMORPGs include EverQuest, Final Fantasy, Legend of Mir, and Lineage. *See generally* Tyler T. Ochoa, *Who Owns an Avatar? Copyright, Creativity, and Virtual Worlds*, 14 Vand. J. Ent. & Tech. L. 959, 960 (2012) (noting that MMORPGs earned $2.7 billion in North America and Europe in 2010).

52. *See* Brett Burns, Comment, *Level 85 Rogue: When Virtual Theft Merits Criminal Penalties*, 80 UMKC L. Rev. 831, 832 n.11 (2012).

53. *See* Jennifer Miller, Comment, *The Battle Over "Bots": Anti-Circumvention, the DMCA, and "Cheating" at World of Warcraft*, 80 U. Cin. L. Rev. 653, 654 (2011). An avatar's "level" refers to her "overall effectiveness, power, usefulness, [and] strength . . . ." *Level*, WowWiki, http://www.wowwiki.com/Level (last visited May 10, 2015).

players can trade gold for combat gear, medicine, and other tools.[54] Outside of the game, WoW's creator, Blizzard Entertainment, strictly forbids trade in virtual goods.[55] However, there is a thriving black market.[56] For instance, a level seventy character reportedly sold for $10,000.[57] Similarly, Chinese jail guards reportedly forced prisoners to engage in virtual manual labor by "gold farming" within WoW, performing repetitive tasks to earn virtual currency.[58] Nevertheless, despite the blurred line between digital and real money, Blizzard extends its anti-transfer policy to decedents, dictating that players "have no ownership or other property interest in any account."[59]

Unscripted simulations such as the City of Heroes, Entropia Universe, The Sims, and Second Life feature an even starker example of contractual indescendibility. Unlike WoW, where buying gold or weapons is an illicit shortcut in a "hero's journey,"[60] these virtual worlds follow no predetermined plot and therefore have no need to bar out-of-game sales. To the contrary, they encourage players to invest real money in digital goods. For example, Second Life permits users to design, construct, and sell a range of items, including clothes, avatar skins, and "sex beds."[61] Linden Labs, which runs Second Life, has adopted its own currency (the Linden) and created an exchange (the LindeX) where consumers can swap tangible dollars for their electronic counterpart (or vice versa).[62] Players engage in over a million transactions per day, and have transferred a total of $3.2 billion in virtual assets.[63] In fact, some people actually

54. Schiesel, *supra* note 50.

55. *World of Warcraft Terms of Use*, BLIZZARD ENTM'T, http://us.blizzard.com/en-us/company/legal/wow_tou.html (last updated Aug. 22, 2012).

56. This is true of MMORPGs generally. *See* Theodore J. Westbrook, *Owned: Finding a Place for Virtual World Property Rights*, 2006 MICH. ST. L. REV. 779, 786 (2006).

57. *See* Charles Phelps, *More Inheritable Rights for Digital Assets*, 41 RUTGERS L. REC. 131, 137 (2014).

58. *See* Paul Tassi, *Chinese Prisoners Forced to Farm World of Warcraft Gold*, FORBES (June 2, 2011, 9:06 AM), http://www.forbes.com/sites/insertcoin/2011/06/02/chinese-prisoners-forced-to-farm-world-of-warcraft-gold.

59. *World of Warcraft Terms of Use*, *supra* note 55.

60. *See* Leandra Lederman, *"Stranger Than Fiction": Taxing Virtual Worlds*, 82 N.Y.U. L. REV. 1620, 1628 (2007).

61. Juliet M. Moringiello, *What Virtual Worlds Can Do for Property Law*, 62 FLA. L. REV. 159, 165 (2010).

62. *See Buying and Selling Linden Dollars*, SECOND LIFE, http://community.secondlife.com/t5/English-Knowledge-Base/Buying-and-selling-Linden-dollars/ta-p/700107 (last updated Aug. 6, 2012). Linden also trumpets the fact that it "grant[s] its users intellectual property rights over all items and structures created by them." Ben Quarmby, *Pirates Among the Second Life Islands—Why You Should Monitor the Misuse of Your Intellectual Property in Online Virtual Worlds*, 26 CARDOZO ARTS & ENT. L.J. 667, 670 (2009).

63. *See* Jef Reahard, *Second Life Readies for 10th Anniversary, Celebrates a Million Active Users Per Month*, MASSIVELY BY JOYSTIQ (June 20, 2013, 4:30 PM), http://massively.joystiq.com/2013/06/20/second-life-readies-for-10th-anniversary-celebrates-a-million-a.

"supplement their incomes . . . by working within [the] virtual world[]."[64] Linden Lab's CEO, Philip Rosedale, has compared Second Life to a "developing nation" and stated that, "[i]f people cannot own property, the wheels of western capitalism can't turn from the bottom."[65] But despite this bold analogy, Linden is only willing to go so far. Its end user license agreement makes players' electronic belongings indescendible.[66]

Accordingly, in the gaming realm, the line between virtual and real property has worn paper-thin. Nevertheless, noninheritability is the norm. And as I explain in Part I.C., a series of recent news items has cast a spotlight on decedents' inability to transmit the contents of their e-mail and social media accounts.

C. E-mails and Social Media

Electronic information is a hallmark of our wired society. Without access to a decedent's e-mail account, a personal representative often cannot marshal the estate's assets and pay its debts.[67] Similarly, social media has blossomed into a kind of living museum that continuously archives the present. However, many of these online assets die with their owners.

Most e-mail service providers prohibit decedents from conveying the contents of their accounts. This fact came into sharp relief in 2004, when Justin Ellsworth, a twenty-year-old Marine, was killed by a roadside bomb in Iraq.[68] Apparently, Justin had expressed a desire to make a scrapbook of the correspondence he had sent and received while overseas.[69] However, Yahoo! refused to grant his father access to his account, citing

---

64. Miriam A. Cherry, *The Global Dimensions of Virtual Work*, 54 St. Louis U. L.J. 471, 472 (2010); *see* Quarmby, *supra* note 62, at 673 ("[U]sers have already made judicious use of their time in Second Life to become highly successful in-world entrepreneurs.").

65. Steven J. Horowitz, *Competing Lockean Claims to Virtual Property*, 20 Harv. J.L. & Tech. 443, 448 (2007).

66. *See Terms of Service*, Linden Lab, http://lindenlab.com/tos (last visited May 10, 2015) ("[Users] have no property, proprietary, intellectual property, ownership, economic, or monetary interest in [their] Account, [or] Linden Dollars . . . ."). Similarly, Eve Online, a space adventure game, boasts "a fully functioning economy, with regular trade of in-game currency and real money . . . ." Erik Kain, *Massive "EVE Online" Battle Could Cost $300,000 In Real Money [Update]*, Forbes (Jan. 29, 2014, 4:55 PM), http://www.forbes.com/sites/erikkain/2014/01/29/massive-eve-online-battle-could-cost-500000-in-real-money. In one battle alone, players lost several hundred thousand dollars of virtual property. *See id.* Again, however, the game's Terms of Service ("TOS") make those assets indescendible. *EVE End User License Agreement*, EveOnline.com, http://community.eveonline.com/support/policies/eve-eula/ (last visited May 10, 2015) ("You have no interest in the value of your time spent playing the Game, for example, by the building up of the experience level of your character and the items your character accumulates during your time playing the Game.").

67. *See* Gerry W. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 NAELA J. 135, 139–40 (2013) (discussing the importance of planning for the disposition of digital assets upon death).

68. *See* Justin Atwater, *Who Owns E-Mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life?*, 2006 Utah L. Rev. 397, 400.

69. *Id.*

its terms of service ("TOS"), which declares that consumers have "[n]o [r]ight of [s]urvivorship" in their accounts, which "terminate upon . . . death."[70] Although a Michigan probate court ordered Yahoo! to disclose Justin's e-mails, the ISP grudgingly complied while "promis[ing] to defend its commitment to treat user e-mails as private and confidential."[71] Likewise, AOL, GMX, and Microsoft seem to mandate indescendibility, although their TOS are less clear.[72]

In a small step in the opposite direction, Google recently introduced an Inactive Accounts Manager.[73] This feature allows a user to name a "trusted contact" who will receive notice if the user has not logged on for a certain period of time.[74] If the user chooses, the trusted contact can access the user's messaging, blogging, Picasa, and YouTube accounts.[75] At the same time, though, Google admonishes individuals other than the trusted contact that only "in rare cases" will they be able to access a deceased user's content.[76]

Finally, Facebook's descendibility practices have also sparked controversy.[77] To commemorate its tenth anniversary, the Internet titan made special "look back" videos for its users consisting of images they had uploaded over the years.[78] In a widely reported story from February 2014,

---

70. *Id.* at 400–01; *Terms of Service*, YAHOO!, https://info.yahoo.com/legal/us/yahoo/utos/terms (last updated Mar. 16, 2012) ("You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.").

71. Atwater, *supra* note 68, at 401.

72. *See, e.g.*, *Terms of Service*, AOL, http://legal.aol.com/terms-of-service/full-terms (last updated Sept. 15, 2014) ("Your username and account may be terminated if you do not sign on to a Service with your username at least once every 90 days. . . . After we terminate or deactivate your account for inactivity or any other reason, we have no obligation to retain, store, or provide you with any data, information, e-mail, or other content that you uploaded, stored, transferred, sent, mailed, received, forwarded, posted or otherwise provide to us . . . ."); *General Terms and Conditions*, GMX, http://www.gmx.com/company/terms/#.1559512-footer-nav1-3 (last visited May 10, 2015) ("GMX hereby grants, and you hereby accept, a nontransferable, revocable, non-sublicensable, and non-exclusive license to use the GMX Software and all related documentation for your own personal or business use during the term of this Agreement."); *Microsoft Services Agreement*, MICROSOFT WINDOWS, http://windows.microsoft.com/en-us/windows/microsoft-services-agreement (last updated June 11, 2014) ("Microsoft doesn't permit users to transfer their Microsoft accounts [and] . . . . [y]ou may not assign this Agreement or transfer any rights to use the Services.").

73. *See About Inactive Account Manager*, GOOGLE, https://support.google.com/accounts/answer/3036546?hl=en (last visited May 10, 2015).

74. *See id.*

75. *See id.*

76. *Accessing a Deceased Person's Email*, GOOGLE, https://support.google.com/mail/answer/14300?hl=en (last visited May 10, 2015).

77. *See generally* Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643 (2012) (discussing Facebook's inheritability policies); Kristina Sherry, Comment, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185 (2012) (same).

78. *See A Look Back*, FACEBOOK, https://www.facebook.com/help/206982576163229 (last visited May 10, 2015).

a Missouri teenager named Jesse Berlin died unexpectedly, and his father, John, became fixated on seeing Jesse's "look back" movie.[79] When John was unable to access Jesse's account, he shrewdly decided to fight social media with social media and uploaded a tearful plea on YouTube begging Mark Zuckerberg to release Jesse's video.[80] John's YouTube submission went viral, and Facebook soon announced that they would honor his request.[81] Yet the company also made clear that they had created a special movie just for John—fashioned from publicly available content on Jesse's page—and that they would not necessarily do the same thing for the families of other deceased consumers.[82]

To summarize, the last two decades have seen the rise of electronic assets that occupy a hazy way station between property and contract. These parcels of fine print have real economic, social, and sentimental significance. Increasingly, though, they purport to be indescendible. In the next Part, I argue that courts should sometimes look beyond this label.

II. Challenging Contractual Indescendibility

A consumer[83] who wishes to transmit a contractually indescendible item must do three things. First, she has to prove that she has an ownership interest in the asset. Second, she needs to invalidate the noninheritability provision. And third, she will be forced to contend with federal law. This Part examines each step in this process.

A. Ownership

Decedents can only transfer what they own. It is unclear whether consumers possess this requisite interest in loyalty points and electronic assets. But in this Subpart, I argue that courts need not grapple with the

79. *See* Keith Wagstaff, *Father "In Shock" Over Response to Facebook Plea*, NBC News (Feb. 7, 2014, 10:43 AM), http://www.nbcnews.com/tech/social-media/father-shock-over-response-facebook-plea-n24531.

80. *See id.*

81. *See* Brandon Griggs, *Facebook Answers Grieving Dad's Emotional Plea*, CNN (Feb. 10, 2014, 10:41 AM), http://www.cnn.com/2014/02/06/tech/social-media/facebook-dad-video-appeal.

82. *See* Paresh Dave, *Grieving Dad Gets 'Look Back' Video for Dead Son From Facebook*, L.A. Times (Feb. 7, 2014), http://articles.latimes.com/2014/feb/07/nation/la-na-nn-facebook-dead-son-20140207. In the wake of the incident, Facebook announced that it was changing its "memorialization" policy. Previously, the company only allowed "friends" of a deceased user to view her account. *See Facebook Changes Account Memorialization Policy*, Fox News (Feb. 24, 2014, 7:39 AM), http://www.myfoxphilly.com/story/24804786/facebook-changes-account-memorialization-policy. Now Facebook permits anyone to view a decedent's publically shared information. *See id.*

83. Of course, many disputes over contractual indescendibility may arise after the customer has passed away. In that context, the consumer's personal representative will step into her shoes and assert her rights. *See, e.g.*, Horton, *supra* note 4, at 557–58 (noting that contract-based claims generally survive the death of the plaintiff). As this Article was going to press, Facebook announced that it had amended its policies yet again, and would permit users to designate a "legacy contact" who would be able to manage a deceased user's account. *See What Is a Legacy Contact?*, Facebook Help Center, https://www.facebook.com/help/1568013990080948 (last visited May 10, 2015).

blunt and binary matter of whether something is property. Instead, they should ask a narrower question: is an item descendible? The answer should revolve around whether customers have reason to believe that they enjoy the privilege of posthumous conveyance.

The status of an item as either "property" or "not property" has been a tempting shortcut for courts and lawmakers grappling with "pure" descendibility issues.[84] For instance, in the 1950s, states began to recognize publicity rights, which protect individuals from the unauthorized use of their name, voice, or image.[85] At first, publicity rights were seen as an offshoot of privacy rights, but gradually they came to be understood as a species of property.[86] This conceptual shift had an important doctrinal corollary; as courts soon recognized, if publicity rights were property rights, then they were inheritable.[87] In addition, this "property syllogism"[88] can cut the other way. For instance, human body parts boast tremendous financial value.[89] Despite the facts that there is a dire kidney shortage[90] and that blood, hair, sperm, and eggs are freely alienable during life,[91] cadaveric tissue is indescendible.[92] This result stems, in part, from the fact that judges have decreed that organic material "forms no part of the property of [the] estate."[93]

Similar issues are now swirling around contractual indescendibility. This discussion has taken place in the shadow of F. Gregory Lastowka and Dan Hunter's forward-looking 2004 article, *The Law of the Virtual*

---

84. *See id.* at 556–57, 561–62.

85. *See, e.g.*, Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

86. *See* David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 81–89 (2005).

87. *See id.* at 84–89.

88. *Id.* at 74 (coining the phrase "property syllogism").

89. *See* MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 178 (2006) (estimating that the average human body is worth over $220,000).

90. *See* Michele Goodwin, *Private Ordering and Intimate Spaces: Why the Ability to Negotiate is Non-Negotiable*, 105 MICH. L. REV. 1367, 1370 (2007).

91. *See* Elizabeth E. Appel Blue, *Redefining Stewardship Over Body Parts*, 21 J.L. & HEALTH 75, 79 (2008).

92. *See* Horton, *supra* note 4, at 552–57.

93. Estate of Jimenez, 65 Cal. Rptr. 2d 710, 714 (Ct. App. 1997) (quoting O'Donnell v. Slack, 55 P. 906, 907 (Cal. 1899)); *cf.* Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 880 (Colo. 1994) ("Clearly, there can be no property right in a dead body . . . ."). In addition, a second (albeit less prominent) reason for making cadaveric tissue indescendible is to avoid the commodification of the human body. *See* Horton, *supra* note 4, at 554–57. This rationale is the driving force behind the related rule that organs are market inalienable. *See* National Organ Transplant Act, 42 U.S.C. § 274e(a) (2015) (forbidding the acquisition or transfer of "any human organ for valuable consideration"); *National Organ Transplant Act: Hearing on H.R. 4080 Before the Subcomm. on Health of the H. Comm. on Ways & Means*, 98th Cong. 26 (1984) (statement of Rep. Henry A. Waxman) ("Human organs should not be treated like fenders in an auto junkyard."); UNIF. ANATOMICAL GIFT ACT § 16, 8A U.L.A. 156 (2006) (criminalizing the sale of human tissues); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1879–81 (1987).

Worlds.[94] Lastowka and Hunter began by noting that some virtual assets mimic brick-and-mortar possessions by being rivalrous, persistent, and valuable.[95] For instance, purchasing a plot of "land" in the Sims Online entitles a player to develop it, exclude others, and sell it.[96] Lastowka and Hunter then examined whether recognizing virtual ownership would dovetail with three leading normative accounts of property rights. First, Lastowka and Hunter analyzed utilitarianism, which they described as the idea that "we should grant private property interests if doing so would increase . . . social welfare."[97] They argued that the fact that "millions of people labor to create objects of value in virtual worlds," revealed that the benefits of acknowledging digital property outweighed the costs.[98] Second, Lastowka and Hunter examined John Locke's labor-desert thesis. Locke famously posited that "[w]hatsoever [man] removes out of the state that nature hath provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property."[99] Here, too, Lastowka and Hunter found that the scales tipped toward carving out virtual rights, noting that users sink monumental amounts of time and energy into earning online items.[100] Finally, Lastowka and Hunter viewed electronic possessions through the prism of Hegelian personality theory.[101] As amplified by contemporary writers like Margaret Jane (Peggy) Radin, this strand of the private law canon suggests that the law should protect cherished things such as a longtime home or a wedding ring.[102] Noting that people often feel as though their avatar is an extension of their self, Lastowka and Hunter again concluded that there should be no distinction between virtual property and its real-world counterpart.[103]

Although Lastowka and Hunter broke new ground, I have reservations about their approach. For one, it can be indeterminate. Consider the question of whether frequent flyers own their miles. Lastowka

---

94. F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1 (2004). In roughly similar fashion, intellectual property scholars have discussed the normative implications of honoring contractual provisions deeming transfers of software to be licenses (rather than sales). *See, e.g.*, John P. Uetz, *The Same Song and Dance:* F.B.T. Productions, LLC v. Aftermath Records *and the Role of Licenses in the Digital Age of Copyright Law*, 57 VILL. L. REV. 177, 191 (2012).

95. *See* Lastowka & Hunter, *supra* note 94, at 30.

96. *See id.* at 30–31. In an influential article published a year later, Joshua Fairfield amplified this point with respect to a broader range of digital assets, including "internet resources" such as "URLs, domain names, [and] email accounts." Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1052 (2005).

97. Lastowka & Hunter, *supra* note 94, at 44.

98. *See id.* at 45.

99. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 17 (Thomas P. Peardon ed. 1952) (1690).

100. Lastowka & Hunter, *supra* note 94, at 46.

101. *See id.* at 48–49.

102. *See id.*; *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) ("Most people possess certain objects they feel are almost part of themselves.").

103. *See* Lastowka & Hunter, *supra* note 94, at 48.

and Hunter would start with utilitarianism, by asking whether society would be better off if loyalty points belonged to customers. However, it is unclear how a court or a legislature would make that decision. Lastowka and Hunter imply that a pivotal factor should be whether an item is popular, noting that a "societal good is composed simply of aggregate individual goods."[104] But this is a logical leap. The fact that many consumers derive pleasure from an asset does not mean that broadening their control over it would maximize their collective satisfaction. To the contrary, giving customers an equity stake might decrease production. Indeed, firms would be less likely to create rewards schemes if they were thrust into the role of custodian for millions of accountholders.[105] Compounding this uncertainty, different panels in the Lastowka and Hunter triptych can point in opposite directions. For example, if the utilitarian score for frequent flyer miles was high, the personality rating of such a fungible asset might be much lower.

Even the most intuitive aspect of Lastowka and Hunter's framework—Lockean labor-desert—proves difficult to apply. To be sure, there is a visceral appeal to tying ownership to the tedium of hours spent at 30,000 feet or the brain flash of the Second Life entrepreneur. However, it is not clear why these individuals' Lockean claim would trump the sponsoring company's rival Lockean claim. For instance, in the context of video games, Stephen Horowitz has argued that Lastowka and Hunter give short shrift to developers:

> In most worlds, users do not "produce" the products they claim as property; they earn them through battles with virtual beasts or purchase them through trade with virtual shopkeepers. Such goods are created through the labor of the operators before users take control of them. When operators labor to produce virtual products, the operators have a greater initial labor-based claim to ownership of such products.[106]

And in any event, labor-desert is an especially poor fit for inheritance law. Locke's signature insight might explain why the first person who generates an asset through hard work acquires the right to bequeath it or transmit it via intestacy. But it cannot explain why the next generation—people who may have never earned a loyalty point or clutched a joystick—also deserve the same courtesy.[107]

---

104. *Id.* at 45.

105. *See* Christopher J. Cifrino, *Virtual Property, Virtual Rights: Why Contract Law, Not Property Law, Must Be the Governing Paradigm in the Law of Virtual Worlds*, 55 B.C. L. REV. 235, 257–58 (2014).

106. Horowitz, *supra* note 65, at 453; *see also* Westbrook, *supra* note 56, at 793–94 ("[T]here is a clear outlay of labor, time and money on the part of both parties.").

107. *See* STEPHEN R. MUNZER, A THEORY OF PROPERTY 396 (1990) ("[T]he labor-desert principle can support at most a one-time power of gift or bequest."). *But see* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 7 n.22 (1992) (asking whether "by creating property through labor, the owner has a natural right not only to bequeath to her beneficiary but also to bequeath *the power to bequeath*").

Finally, giving customers industrial strength property rights would raise ponderous questions. Would firms need to compensate their clientele every time they amended their rewards programs, or their servers crashed, or they abandoned a virtual world?[108] Could creditors attach a frequent flyer's account or a gamer's avatar? What about jilted spouses in divorce proceedings? These dilemmas illustrate why it is counterproductive to force courts and lawmakers to make the black-and-white choice between "property" and "not property."

A better solution would examine each arrow in the quiver of property rights individually. For the purposes of this Article, the critical inquiry is whether customers reasonably think that they have the right to control an asset after death. Of course, one might respond that no consumer could hold such a belief about an asset that is marked "not property" or "indescendible." But to my mind, that objection puts the trailer before the tractor. The fine print (and a customer's potential knowledge of it) relates to the next issue—whether the rights-stripping clause is valid—and not the threshold matter of whether an asset is descendible. Instead, at this preliminary stage, where we are merely trying to allocate the badges of ownership, it makes more sense to focus on extra-contractual factors, such as the drafter's conduct. For instance, the fact that a company allowed an item to be transferred during life could be evidence that it should be descendible. The basic idea here is that subject to some exceptions, "inheritability and alienability . . . 'go hand in hand.'"[109] Thus, a frequent flyer, gamer, or Internet user could justifiably assume that she possesses the power of posthumous transmission over an asset she can sell or give away.

Seen through this lens, many of the items I have discussed would be descendible. Electronic assets in worlds like Second Life would be a particularly easy case. Indeed, Linden has encouraged real world sales of virtual products and proclaimed that players hold "property rights" in their inventions.[110] Similarly, users can freely share e-mails and social media uploads. Because these things practically belong to an individual during life, there is no reason to exclude them from her estate.

Rewards points would be slightly more fraught. As noted, many airlines, hotels, and car rental agencies allow customers to trade miles or their equivalent.[111] However, they also charge fees and impose limits on these transactions.[112] Moreover, miles can expire, which seems inconsistent

108. *Cf.* Cifrino, *supra* note 105, at 257–58 (listing various ways in which developers could face liability if lawmakers carved out virtual property rights for gamers).

109. Horton, *supra* note 4, at 576 (quoting Micheletti v. Moidel, 32 P.2d 266, 267 (Colo. 1934)).

110. *See supra* text accompanying notes 61–65.

111. *See supra* text accompanying notes 37–39.

112. *See Transferring Miles and Points*, INSIDEFLYER, http://www.insideflyer.com/articles/article.php?key=6373 (last visited May 10, 2015).

with the idea that they truly belong to travelers.[113] Given these restrictions, perhaps it would not be plausible for members to think that their points are descendible.

But then again, more than any other intangible asset, points have blossomed into a quasi-currency. Consumers can earn them and redeem them almost like cash.[114] In addition, members perceive their points to be a form of wealth. As one commentator remarked, "[e]arning frequent flyer miles in the minds of most people is akin to earning money and the idea that your miles . . . would simply disappear when you die strikes a profoundly disturbing note."[115] Similarly, in some circumstances, the receipt of loyalty credits triggers the dark side of ownership: taxation. In August 2014, the Tax Court held in *Shankar v. Commissioner* that the petitioner should have reported the 500 Citibank "thank you" points he collected for opening his account and used to purchase an airline ticket.[116] The court characterized the credits as "something given in exchange for the use (deposit) of [petitioner's] money; i.e., something in the nature of interest."[117] Thus, customers could easily think that miles—the functional equivalent of "money" and "interest"—are descendible.

A final set of complications arise from companies that impose strict nontransferability policies only to ignore them. A prime example is Blizzard, which has endured years of criticism for tolerating under-the-table sales of WoW goods.[118] Although there is a paucity of authority, at least one decision suggests that a company's actual practices are more probative than its stance on paper. In *In re Platt*, a bankruptcy case, the Boston Red Sox argued that a nonconveyance clause in a subscription agreement elucidated that season tickets were not the debtor's property.[119] The judge disagreed, citing the franchise's "pattern of arbitrarily and even capriciously permitting transfers" to find that the debtor held "property right[s]" in the seats.[120] Courts should reach the same conclusion when asked to declare that a firm's sporadic enforcement of its nontransferability provision justifies a consumer's impressions that an item is inheritable.

---

113. *See, e.g.*, *Airline Miles Expiration Policies Roundup*, POINTS GUY (Apr. 17, 2013), http://thepointsguy.com/2013/04/airline-miles-expiration-policies-roundup.

114. *See supra* text accompanying notes 37–39.

115. *Delta Skymiles Now Die When You Do*, FLYNAIJA (Mar. 27, 2013), http://www.flynaija.com/delta-skymiles-now-die-when-you-do.

116. 143 T.C. No. 5 (2014).

117. *Id.* at 13. On the other hand, the IRS has promised not to assert that frequent flyer miles are taxable if they are "attributable to the taxpayer's business or official travel." Kelly Phillips Erb, *Tax Court Sides With IRS In Tax Treatment Of Frequent Flyer Miles Issued By Citibank*, FORBES (Aug. 28, 2014, 8:35 AM), http://www.forbes.com/sites/kellyphillipserb/2014/08/28/tax-court-sides-with-irs-in-tax-treatment-of-frequent-flyer-miles-issued-by-citibank.

118. *See supra* text accompanying notes 56–59. Similarly, carriers such as Virgin purport to ban the transfer of miles, but make exceptions on a "case-by-case basis." Stoller, *supra* note 1.

119. 292 B.R. 12, 17 (Bankr. D. Mass. 2003).

120. *Id.*

Accordingly, judges need not begin their contractual indescendibility analysis with the cartoonish question of whether an item is a consumer's property. Instead, they should ask whether a firm has led customers to believe that an asset is descendible. But as I discuss next, even if a consumer prevails on this issue, she must also convince the court not to enforce the noninheritability clause.

B. Validity

Customers may challenge indescendibility provisions on three grounds. First, they may argue that they never assented to the clause. Second, they can invoke the unconscionability defense. And third, if a drafter adds an indescendibility provision to an existing contract, customers might claim that the unilateral revision violates the implied covenant of good faith and fair dealing. This Subpart evaluates these theories.

1. *Lack of Assent*

Because virtually all indescendibility provisions appear in agreements that are consummated online, they occupy an unsettled area of contract law. Courts once decided whether users assented to Internet agreements by applying a formalistic rubric that divided those contracts into two camps. On the one hand, there were clickwraps, boxes full of text that prompt a user to select "I agree."[121] Judges favored this species of e-agreement, reasoning that the customer's click was the digital equivalent of a signature or a handshake.[122] On the other hand, courts were less sanguine about browsewraps, in which drafters simply posted provisions on a website and declared that visitors had accepted them.[123] Browsewraps were valid only if the user had actual or constructive notice of the terms.[124]

Beginning about three years ago, judges began to recognize a third kind of online deal, "modified clickwrap" (or "multi-wrap").[125] These web pages feature a hyperlink to the TOS near the button that a user must press to complete the transaction. Thus, like browsewraps, the contract's provisions are not immediately apparent; however, as with clickwraps,

---

121. *See, e.g.*, United States v. Drew, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009).

122. *See, e.g.*, Segal v. Amazon.com, Inc., 763 F. Supp. 2d 1367, 1369 (S.D. Fla. 2011); TradeComet.com LLC v. Google, Inc., 693 F. Supp. 2d 370, 377–78 (S.D.N.Y. 2010); Feldman v. Google, Inc., 513 F. Supp. 2d 229, 237 (E.D. Pa. 2007); Person v. Google Inc., 456 F. Supp. 2d 488, 496–97 (S.D.N.Y. 2006); Novak v. Overture Servs., Inc., 309 F. Supp. 2d 446, 451 (E.D.N.Y. 2004); Mark A. Lemley, *Terms of Use*, 91 Minn. L. Rev. 459, 466 (2006).

123. *See, e.g.*, Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009).

124. *See, e.g.*, Specht v. Netscape Comms. Corp., 306 F.3d 17, 31 (2d Cir. 2002); Zaltz v. JDATE, 952 F. Supp. 2d 439, 452 (E.D.N.Y. 2013); Motise v. America Online, Inc., 346 F. Supp. 2d 563, 564–65 (S.D.N.Y. 2004).

125. *See* Swift v. Zynga Game Network, Inc., 805 F. Supp. 2d 904, 911 (N.D. Cal. 2011) (using the phrase "modified clickwrap"); Nancy S. Kim, Wrap Contracts: Foundations And Ramifications 63–64 (2013) (referring both to "modified clickwrap[s]" and "multi-wraps").

the consumer must actually do something—press, "I agree"—to indicate her assent.[126]

For instance, in *Fteja v. Facebook, Inc.*,[127] the Southern District of New York struggled with whether to enforce a forum-selection clause in Facebook's TOS.[128] To open an account, customers must click a button that says "Sign Up," which appears next to a hyperlink to the TOS.[129] The court noted that this arrangement was like a browsewrap in the way that the TOS were not visible, but also like a clickwrap because it tasked the user with actively indicating assent.[130] Relying on the fact that the plaintiff was Internet savvy, the court held that he had agreed to the TOS:

> The mechanics of the internet surely remain unfamiliar, even obtuse to many people. But it is not too much to expect that an internet user whose social networking was so prolific that losing Facebook access allegedly caused him mental anguish would understand that the hyperlinked phrase "Terms of Use" is really a sign that says "Click Here for Terms of Use." . . . Here, [the plaintiff] was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough.[131]

Two similar cases have gone the other way, however. In *Nguyen v. Barnes & Noble Inc.*,[132] the Ninth Circuit declined to enforce an online retailer's arbitration clause.[133] Barnes & Noble's TOS is accessible through a hyperlink that appears near the button that a shopper must push to complete a purchase.[134] Nevertheless, the appellate panel held that the plaintiff had neither actual nor constructive notice of the provisions:

> [W]here a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice. . . . Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out

126. *See, e.g.*, Vernon v. Qwest Comms. Int'l, Inc., 857 F. Supp. 2d 1135, 1149–50 (D. Colo. 2012) *aff'd*, 925 F. Supp. 2d 1185 (D. Colo. 2013) (describing these "hybrid arrangements").

127. 841 F. Supp. 2d 829 (S.D.N.Y. 2012).

128. *See id.* at 835–38.

129. *See id.* at 834–35.

130. *See id.* at 836–37.

131. *Id.* at 839–40; *see also Swift*, 805 F. Supp. 2d at 912 (deeming a consumer to be bound because she "was provided with an opportunity to review the terms of service in the form of a hyperlink immediately under the 'I accept' button").

132. 763 F.3d 1171 (9th Cir. 2014).

133. *See id.* at 1177–78.

134. *See id.* at 1177. Admittedly, the appellate panel characterized the TOS as browsewrap, and never employed the phrases "modified clickwrap" or "multi-wrap." *See id.* at 1176. Yet from the court's own description, it is clear that the Barnes & Noble TOS possess the hallmarks of such an agreement, a "'Terms of Use' link [that] appears either directly below the relevant button a user must click on to proceed in the checkout process or just a few inches away." *Id.* at 1178.

> hyperlinks to terms and conditions to which they have no reason to suspect they will be bound.[135]

Even more to the point, in *Ajemian v. Yahoo!, Inc.*,[136] a Massachusetts appellate court refused to honor a forum-selection clause in a dispute over the descendibility of an e-mail account.[137] The plaintiffs, co-administrators for their deceased brother John's estate, sought a declaratory judgment that John's electronic correspondence belonged to his estate.[138] A probate judge invoked the portion of Yahoo!'s TOS that requires customers to pursue claims in California.[139] When the plaintiffs appealed, Yahoo! defended the order below by asserting that John could not have created his account without "expressly manifest[ing] assent" to the TOS (presumably by pressing a button to create his account).[140] The reviewing court reversed, reasoning that Yahoo! had failed to prove that John (or other plaintiffs) had either seen the TOS or agreed to them by "clicking 'I accept' or by taking some similar action."[141]

Notably, many contractual indescendibility clauses appear in modified clickwraps. For instance, to become an AAdvantage[142] or SkyMiles[143] member, to partake in WoW[144] or Second Life,[145] or to open a Yahoo![146]

---

135. *Id.* at 1178–79.

136. 987 N.E.2d 604 (Mass. App. Ct. 2013).

137. *See id.* at 612–13.

138. *See id.* at 609.

139. *See id.* at 610.

140. Brief for Defendant-Appellee Yahoo! Inc. at 28, *Ajemian*, 987 N.E.2d 604 (No. 2012-P-0178). I say "presumably" because Yahoo's briefs were a little coy about what exactly John needed to do to christen the service. *Compare id.* at 3 (asserting without further explanation that "[i]n order to create the account, John Ajemian (like all Yahoo! users) agreed to Yahoo!'s Terms of Service"), *with id.* at 28 (claiming that "[t]he account could not have been successfully created if the user had not agreed to accept the terms prior to submitting the registration data to Yahoo!"). As I discuss *infra* note 146, Yahoo's current TOS is a modified clickwrap.

141. *Ajemian*, 987 N.E.2d at 612–13.

142. To join AAdvantage, a traveler must check a box that says, "I agree to the Terms and Conditions of the AAdvantage program." *Join AAdvantage Program*, AM. AIRLINES, https://www.aa.com/AAdvantage/quickEnroll.do (last visited May 10, 2015). The phrase "Terms and Conditions" is in underlined blue text, indicating that it is a hyperlink to the actual contract. *Id.* Similarly, every time members log in to their account, they must press a button marked "Login" that appears just below the phrase "[b]y logging into my AAdvantage account, I hereby accept the Terms and Conditions of the AAdvantage program." *AAdvantage*, AM. AIRLINES, https://www.aa.com/AAdvantage/aadvantageHomeAccess.do (last visited May 10, 2015). Again, "Terms and Conditions" is a hyperlink. *Id.* Nevertheless, the website never forces the user to trudge through the actual contract.

143. Similarly, Delta's SkyMiles membership application requires users to click "I agree to the terms and conditions," but confusingly has a hyperlink to "membership guide & program rules." *SkyMiles*, DELTA, https://www.delta.com/profile/enrolllanding.action (last visited May 10, 2015).

144. *See Sign Up*, WORLD OF WARCRAFT, https://us.battle.net/account/creation/wow/signup (last visited May 10, 2015).

145. *See* Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 603 (E.D. Pa. 2007).

146. *See Sign Up*, YAHOO!, https://edit.yahoo.com/registration?_done=http%3A%2F%2Fmail.yahoo.com&fsredirect=1&fs=x4wNmgeHafCyitdC_YmaQ5qn3e07XVj8yY9EKt5KHoc8Yc2ei2QYqF9iOcTi5738q2S1Xhio (last visited May 10, 2015).

or Google account,[147] one must check a box next to a statement that announces one's acquiescence to the TOS. Yet to find the actual meat of the contract, one must migrate to a different webpage via a hyperlink.[148] To be sure, as in *Fteja*, a drafter might be able bridge this gap between apparent and actual agreement by proving that a consumer was sophisticated. Then again, that may be a tough row to hoe in the indescendibility context, where the star witness will often be deceased. Thus, at least until companies redesign their websites, their indescendibility provisions may not be binding.[149]

2. *Unconscionability*

Consumers can also claim that noninheritability provisions are unconscionable.[150] Over the past two decades, this notoriously amorphous rule has become the weapon of choice against unfair terms in adhesion contracts.[151] First, the term must be procedurally unconscionable, which usually means that it has been offered on a take-it-or-leave-it basis by a party with superior bargaining muscle, or buried in fine print.[152] Most noninheritability clauses fit both criteria. Indeed, they are created by powerful firms as part of a standardized template and secreted on web pages that most users will never see.[153] For example, in *Bragg v. Linden Research, Inc.*,[154] a Pennsylvania district court applying California law considered whether to enforce an arbitration clause in Second Life's TOS.[155] The plaintiff had sued Linden for "unlawfully confiscat[ing] his virtual property and den[ying] him access to their virtual world."[156] Despite the fact that the plaintiff was an attorney and an avid gamer, the

147. *Create Your Google Account*, GOOGLE, https://accounts.google.com/SignUp (last visited May 10, 2015).

148. *See supra* notes 135–140.

149. Admittedly, some firms will not have this problem. For example, United Airlines' MileagePlus site is a standard clickwrap that displays the text of the TOS above the "I agree" button. *See MileagePlus Enrollment*, UNITED AIRLINES, http://www.united.com/web/en-US/apps/account/enroll.aspx (last visited May 10, 2015).

150. Complicating matters, some of these agreements also contain choice-of-law clauses. *See, e.g.*, *General AAdvantage Terms and Conditions*, AM. AIRLINES, http://www.aa.com/i18n/AAdvantage/programInformation/termsConditions.jsp#general-aadvantage-program-conditions (last visited May 10, 2015) ("These terms and conditions are governed by and to be interpreted in accordance with the laws of the State of Texas."). As a result, there may be preliminary skirmish over whether the chosen state's law violates a strong public policy of the jurisdiction where the consumer has sued. *See, e.g.*, David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1236–37 (2013) (discussing similar litigation in the context of challenges to the validity of arbitration clauses).

151. *See generally* Arthur Allen Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (articulating the now well-known two-part test for unconscionability).

152. Courts sometimes refer to the drafter's market power as "oppression" and the term's physical appearance as "surprise." *See, e.g.*, A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 120 (Ct. App. 1982).

153. *See supra* notes 146–152.

154. 487 F. Supp. 2d 593 (E.D. Pa. 2007).

155. *See id.* at 606–07.

156. *Id.* at 595.

court held that the dispute resolution provision was procedurally unconscionable because it was nonnegotiable and inconspicuous.[157]

Some cases also predicate procedural unconscionability on an adherent showing that she lacked "a meaningful choice of reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable."[158] This additional "market alternatives" element is a crude attempt to implement the insights of the law and economics movement of the 1970s and 1980s. Scholars such as Alan Schwartz, Louis Wilde, and George Priest argued that companies in competitive industries must pass their savings from "unfair" provisions back to consumers.[159] If this is true, then "one-sided" terms may not be "one-sided" at all. Indeed, it is entirely possible that adherents would rather surrender certain liberties and pay less for an item than retain their rights and spend more.[160] In theory, the market alternatives rule identifies sectors in which the lockstep use of a particular clause makes it impossible for consumers to shop for their preferred combination of term "harshness" and price.[161]

Nevertheless, this extra doctrinal component will probably not save indescendibility provisions from being procedurally unconscionable. As noted above, frequent fliers, gamers, and social media users have little choice but to accept such a clause.[162] Moreover, there is no true parallel for distinctive universes such as WoW or services such as Facebook. Perhaps the one niche in which consumers have a choice is e-mail. As noted, indescendibility is the norm, with the exception of Google.[163] But even Google has stopped short of recognizing unfettered inheritability. Although trusted contacts can obtain the contents of a user's account,

---

157. *Id.* at 606–07.

158. Morris v. Redwood Empire Bancorp, 27 Cal. Rptr. 3d 797, 807 (Ct. App. 2005). *But see* Gatton v. T-Mobile USA, Inc., 61 Cal. Rptr. 3d 344, 355–56 (Ct. App. 2007) (rejecting the additional "market alternatives" requirement).

159. *See* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387 (1983); Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053 (1977); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981).

160. *See* Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, *supra* note 159, at 1072 & n.38.

161. One flaw with the market alternatives rule is that the widespread use of a particular term can actually cut the other way. Indeed, the fact that most drafters in a competitive market employ a provision suggests that the provision strikes the ideal balance between "harshness" and price. *See, e.g.*, David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 476 (2014) (book review). In addition, as Russell Korobkin has argued, consumers will only be able to exert pressure on drafters to offer efficient "salient" terms. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1234–39 (2003).

162. *See supra* text accompanying notes 43–48, 61–75.

163. *See supra* text accompanying notes 76–79.

other individuals, including a decedent's personal representative, may not be so lucky.[164] Accordingly, even in the eyes of judges who insist on market alternatives, most indescendibility clauses will probably be procedurally unconscionable.

Unfortunately, substantive unconscionability is harder to predict. Contract provisions are substantively unconscionable if they are unfair, one-sided, or "unreasonably favorable" to the drafter.[165] Is it "harsh" to eliminate the power to bequeath an item or pass it through intestacy? The bulk of the substantive unconscionability case law deals with arbitration clauses,[166] which are difficult to analogize to indescendibility provisions. However, the importance of the right surrendered bolsters the case for undue unfairness. People feel very strongly about their ability to transmit property to their loved ones after they die.[167] After all, it "has been part of the Anglo-American legal system since feudal times."[168] Being stripped of that prerogative is no small thing.

Another aspect of the substantive unconscionability calculus is whether a suspect term has a "reasonable justification . . . based on 'business realities.'"[169] As I have discussed elsewhere, one rationale for "pure" indescendibility is avoiding administrative costs.[170] The idea here is that not all property transitions seamlessly from the dead to the living. For example, if body parts were inheritable, personal representatives would need to spend time and money preserving the decedent's tissues.[171] Some companies' explanations for their indescendibility policies are roughly similar. For instance, airlines claim that they have limited frequent flyer rights so that they "no longer ha[ve] to devote resources to the transfer process."[172] Yet this is a transparent fig leaf. As noted, many carriers allow members to swap miles while alive.[173] The firms that do permit the posthumous conveyance of intangible assets only require a photocopy of the decedent's death certificate and a letter from her personal representative.[174] These burdens are no worse than opening or

---

164. *See supra* text accompanying notes 77–80; *see also Submit a Request Regarding a Deceased User's Account*, GOOGLE, https://support.google.com/accounts/answer/2842525?hl=en&ref_topic=3075532 (last visited May 10, 2015) ("Any decision to [provide the contents of a deceased user's account] will be made only after a careful review.").

165. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

166. *See* David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387 (2012).

167. *See* LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 21 (1955) ("[T]he desire to dispose of property by will is very general, and very strong.").

168. Hodel v. Irving, 481 U.S. 704, 716 (1987).

169. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 692 (Cal. 2000).

170. *See* Horton, *supra* note 4, at 586–88, 594–96.

171. *See id.* at 586–88.

172. *Delta Skymiles Now Die When You Do*, *supra* note 115.

173. *See supra* notes 39–41.

174. *See* Chelsea Emery, *Don't Let Frequent Flyer Miles Die With You*, REUTERS, Mar. 1, 2013, *available at* http://www.reuters.com/article/2013/03/01/us-inheritance-airmiles-idUSBRE9200I420130301.

closing an account. Accordingly, when noninheritability provisions seem like little more than a raw exercise of drafting power, they should be substantively unconscionable.

Alternatively, in the e-mail and social media context, some ISPs and commentators have claimed that indescendibility protects customers' privacy.[175] In this era of online banking, perhaps deeming a decedent's logon information or password to be inheritable would raise the specter of identity theft.[176] In addition, permitting personal representatives to rummage through a decedent's online accounts might create a risk of embarrassing content falling into the wrong hands. Justin Atwater lucidly describes this concern:

> Imagine a typical teenager who shares the most intimate details of her life with her closest friends through instant and text messaging. If she dies intestate, should her parents be allowed to view the details of her personal text messages on the basis that the messages should pass through intestacy in the same manner as other property? What if, instead, she married and later died testate, devising the residue of her estate to her spouse without mentioning the e-mail account. Should her spouse be granted access to the intimate details of her life before they were married on the basis that the messages are part of her residual estate?[177]

Yet the privacy argument is not fully compelling. For one, it does not apply to decedents who have expressly attempted to bequeath their digital assets. Indeed, those individuals have decided for themselves that the advantages of descendibility outweigh the dangers. Moreover, I doubt that noninheritability is the appropriate default even for people who died intestate or with estate plans that do not mention their online accounts. The specter of embezzlement or discovery of salacious information is not unique to the Internet. To the contrary, it exists any time a personal representative steps into a decedent's shoes and begins sorting through her diaries, old letters, and safe deposit boxes.[178] Thus, it is not clear that ISPs should be able to justify noninheritability provisions on this ground.[179]

But see Banta, *supra* note 4, at 835–36 (proposing that companies recoup the expense of complying with decedents' or beneficiaries' wishes by imposing transfer fees).

175. *See, e.g.*, Rebecca G. Cummings, *The Case Against Access to Decedents' E-Mail: Password Protection As an Exercise of the Right to Destroy*, 15 MINN. J.L. SCI. & TECH. 897, 906–07 (2014); Lilian Edwards & Edina Harbinja, *Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in A Digital World*, 32 CARDOZO ARTS & ENT. L.J. 83, 85–87 (2013).

176. *See, e.g.*, Molly Wilkens, Note, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037, 1048–52 (2011).

177. Atwater, *supra* note 68, at 404.

178. *See* Cahn, *supra* note 17, at 1716 ("While there is always the potential that even an executor or administrator could misappropriate [online] information, this risk is present in the administration of tangible assets as well as digital ones, and state fiduciary law is designed to guard against just such misuse.").

179. For another jaundiced take on the privacy rationale, see Banta, *supra* note 4, at 837–40 (noting that some of the same IPS that claim to be safeguarding privacy are facing lawsuits for sharing

3. *Violation of Implied Covenant of Good Faith and Fair Dealing*

Finally, a company's attempt to add an indescendibility clause to existing agreements may violate the implied covenant of good faith and fair dealing. Contracts often contain change-of-terms provisions, which empower drafters to modify their arrangements with consumers.[180] In the seminal case of *Badie v. Bank of America*,[181] a commercial lender sent "bill-stuffers" to its checking and credit card customers informing them that the terms of the contract had changed and they were now obligated to arbitrate any dispute.[182] A California appellate court held that the bank's gambit was in bad faith.[183] As the judges explained, because the initial agreements said nothing about dispute resolution, the bank improperly sought to inject "an entirely new term which ha[d] no bearing on any subject, issue, right, or obligation addressed in the original contract."[184] Similar maneuvers with indescendiblity provisions may meet the same fate. Delta's efforts are illustrative. To be sure, the airline "reserve[s] the right to change program rules, benefits, [and] regulations, . . . at any time without notice."[185] Yet nothing in the carrier's previous SkyMiles agreement speaks to the issue of inheritability. Although its contract prohibits "[s]ale or [b]arter," these sections relate to exchanges for consideration, not gratuitous transfers.[186] Arguably, because the original deal does not address bequests and intestacy, the new indescendibility clause is too jarring a departure to be valid.

Accordingly, there are strong arguments that noninheritability provisions should not be binding. Nevertheless, as I explain next, companies do not create rewards points and digital assets on a blank slate. Instead, a maze of federal regulation governs this area.

C. Federal Law

This Subpart discusses the federal dimensions of contractual indescendibility. It shows that the ADA may preclude frequent flyers from striking down noninheritability clauses. It then evaluates whether the SCA precludes ISPs from releasing a decedent's electronic assets to her personal representative.

---

customer data); Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns A Decedent's E-Mails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. Legis. & Pub. Pol'y 281, 313–14 (2007) (noting that most privacy-related claims expire upon death).

180. *See, e.g.*, David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. Rev. 605, 608–09 (2010).

181. 79 Cal. Rptr. 2d 273 (Ct. App. 1992).

182. *See id.* at 276–77.

183. *See id.* at 283–84.

184. *Id.* at 284.

185. *Delta Membership Guide & Program Rules*, Delta, http://www.delta.com/content/www/en_US/skymiles/about-skymiles/program-rules-conditions.html (last updated Mar. 1, 2015).

186. *Id.*

1. *The Airline Deregulation Act*

Congress passed the ADA in 1978 to promote "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive market forces."[187] The statute provides that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . ."[188] In a trilogy of cases, the Supreme Court determined that the ADA preempts an array of state law claims.

First, in *Morales v. Trans World Airlines, Inc.*,[189] the National Association of Attorneys General had issued Air Travel Industry Enforcement Guidelines ("NAAG Guidelines").[190] This phalanx of rules, made obligatory through state consumer protection statutes, required carriers to be forthright about any restrictions in their advertising and frequent flyer program solicitations.[191] The Court first examined the scope of the ADA preemption clause, which bars state regulation "*related to*" an airline "price, route, or services."[192] The Court determined that this phrase sweeps broadly, and means "having a connection with or reference to" airline operations.[193] Gauged by this yardstick, the Court found that the fare advertising portions of the NAAG Guidelines were impermissibly entangled with airline "rates." For one, they "establish[ed] binding requirements as to how tickets may be marketed if they are to be sold at given prices."[194] In addition, because there is a tight link between marketing practices and costs in an industry, "state restrictions on fare advertising have the forbidden significant effect upon fares."[195] Thus, the Court held that the ADA eclipsed the NAAG Guidelines.

Two years later, in *American Airlines v. Wolens*, the Court offered a more fine-grained reading of the statute.[196] A class of AAdvantage members asserted that the carrier's retroactive changes to its frequent flyer policies violated the Illinois Consumer Fraud Act and constituted a breach of contract.[197] The Court began by parsing the text of the ADA's preemption clause. The Court noted that this provision contains two elements: it forbids states from (1) affecting "rates, routes, or services" by (2) "enact[ing] or enforc[ing] any law."[198] The Court explained that

187. 49 U.S.C. § 40101(a)(6), (a)(12)(A) (2015).
188. *Id.* § 41713(b)(1).
189. 504 U.S. 374 (1992).
190. *Id.* at 379–80.
191. *Id.* at 387–88.
192. 49 U.S.C. § 41713(b)(1) (emphasis added).
193. *Morales*, 504 U.S. at 383–84.
194. *Id.* at 388.
195. *Id.*
196. 513 U.S. 219 (1995).
197. *Id.* at 224–25.
198. *Id.* at 226.

both the consumer protection and breach of contract claims met the first component: they pertained to "'rates,' i.e., American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' i.e., access to flights and class-of-service upgrades."[199] However, the Court found the second prong more complicated. According to the Court, the Consumer Fraud Act was undoubtedly an example of a state "enact[ing] or enforc[ing]" law: after all, it was an Illinois statute.[200] Yet the same could not be said for the breach of contract allegations. Indeed, the Court reasoned, the breach of contract claims did not arise from an external mandate imposed by the jurisdiction, but rather sought redress for "the airline's alleged breach of its own, self-imposed undertakings."[201] Therefore, the ADA only preempted the consumer protection claims.

This distinction between state-mandated and voluntarily assumed duties was front and center in the Court's 2014 decision in *Northwest, Inc. v. Ginsberg*.[202] Northwest's WorldPerks terms and conditions gave it sole discretion to disqualify customers for abusing the program.[203] Northwest had used this dominion to revoke the membership of Minnesota resident Rabbi S. Binyomin Ginsberg, who then sued, alleging that the carrier had breached the implied covenant of good faith and fair dealing.[204] Specifically, Ginsberg alleged that Northwest had terminated his account in an attempt to cut costs by slashing its WorldPerks roster.[205] It was unclear how to classify this claim under *Wolens*. On the one hand, the implied covenant vindicates extrinsic state policies by superimposing "community standards of decency, fairness or reasonableness."[206] Thus, it would seem to be preempted. On the other hand, the doctrine merely enforces the true terms of the contract. Because it forbids self-serving conduct to effectuate the parties' "justified expectations,"[207] it also seemed analogous to the non-preempted breach of contract claim in *Wolens*.

Nevertheless, the Court unanimously held that Minnesota's version of the implied covenant was "a state-imposed obligation," in contravention of the ADA.[208] The Court reached this conclusion for one reason in particular: because "under Minnesota law parties cannot contract out of the covenant."[209] The Court opined that the mandatory nature of the rule

199. *Id.*
200. *Id.* at 227–28.
201. *Id.* at 228.
202. 134 S. Ct. 1422 (2014).
203. Ginsberg v. Nw., Inc., 653 F.3d 1033, 1035 (9th Cir. 2011).
204. *Ginsberg*, 134 S. Ct. at 1426.
205. Opposition to Motion to Dismiss, and Memorandum of Points and Authorities in Support Thereof at *7, Ginsberg v. Nw., Inc., No. 09-CV-28 JLS NLS, 2009 WL 9523735 (S.D. Cal. Nov. 13, 2009).
206. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).
207. *Id.*
208. *Ginsberg*, 134 S. Ct. at 1432.
209. *Id.*

confirmed that it was a creation of the state rather than "an attempt to vindicate the parties' implicit understanding of the contract."[210] Yet the Court stressed the limited scope of its ruling, highlighting that the ADA does not eclipse all implied covenant claims:

> [P]etitioners exhort us to go further and hold that all such claims, no matter the content of the law of the relevant jurisdiction, are pre-empted. If pre-emption depends on state law, petitioners warn, airlines will be faced with a baffling patchwork of rules, and the deregulatory aim of the ADA will be frustrated. But the airlines have means to avoid such a result. A State's implied covenant rules will escape pre-emption only if the law of the relevant State permits an airline to contract around those rules in its frequent flyer program agreement, and if an airline's agreement is governed by the law of such a State, the airline can specify that the agreement does not incorporate the covenant.[211]

But this is faux modesty. *Ginsberg*'s supposed limiting principle—that the ADA does not eclipse versions of the implied covenant that parties can "contract around"—might as well exempt unicorns or flying pigs. I am not aware of any state that permits parties to expressly sanction bad faith conduct.[212] Thus, the decision encourages airlines to mimic Delta and unilaterally amend their frequent flyer terms to make miles indescendible. Moreover, *Ginsberg* sounds the death knell for unconscionability challenges to indescendibility provisions in frequent flyer agreements. Although the opinion does not mention the doctrine, the case's briefing and oral argument cast unconscionability as a boogeyman, the paradigmatic example of a state law that "seek[s] to

---

210. *Id.* As an alternative basis for his holding, Justice Alito also noted that Minnesota did not read the covenant into all contracts, but rather exempted employment contracts for "policy reasons." *Id.* Accordingly, he observed that "the decision not to exempt other types of contracts must be based on a policy determination, namely, that the 'policy reasons' that support the rule for employment contracts do not apply (at least with the same force) in other contexts." *Id.*

211. *Id.* at 1433.

212. Of course, drafters can displace the implied covenant by spelling out their performance obligations in detail rather than using open-ended terms such as "sole discretion." Thus, some cases have referred to the covenant as a "gap-filling default rule," rather than a mandatory principle, because it "comes into play when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards." Speedway SuperAmerica, LLC v. Tropic Enters., Inc., 966 So. 2d 1, 3 (Fla. Dist. Ct. App. 2007) (internal quotation marks omitted). Yet the Court's requirement that the covenant be "waivable" demands that a state enforce a provision that says something like "the implied covenant shall not apply to this agreement." Indeed, during oral argument, Justice Alito, who wrote the opinion, conceptualized the issue that way:

> JUSTICE ALITO: Well, let me ask you this. Suppose you have in Minnesota or one of the States where you say the covenant is simply a way of effectuating the intent of the parties, you have a contract between two very tough and nasty businessmen. And they write right in their contract, you know, we're going to comply with the literal terms of this contract, but we do not promise each other that we're going to proceed in good faith or that we are going to deal with each other fairly. We are going to take every advantage we can under the literal terms of the contract. Now, would that get rid of the covenant under Minnesota law?

Transcript of Oral Argument at 32, *Ginsberg*, 134 S. Ct. 1422 (No. 12-462).

enlarge the parties' bargain" to effectuate policies "external to the agreement."[213] Thus, the ADA seems to deny frequent flyers the two most potent means to attack noninheritability provisions.

There are three caveats to this gloomy conclusion. First, as noted above, some airlines may not be able to prove that frequent flyers have assented to their TOS.[214] The Court strongly implied that Ginsberg's complaint would not have been preempted if it was rooted in a state rule that sought "to effectuate the intentions of parties or to protect their reasonable expectations."[215] Principles of offer and acceptance do precisely that: they determine the existence and scope of "obligation[s] . . . that the parties voluntarily undertook."[216] Thus, the ADA should not prevent courts from finding that a consumer never agreed to an indescendibility provision.

A second slender ray of light stems from the evolution of loyalty points. As I have discussed, members now earn most of their miles through tie-ins and credit card purchases rather than travel.[217] Because the ADA only preempts state law that impacts "a price, route, or service,"[218] a plaintiff who has earned her credits on the ground might be able escape the statute's gravitational pull. In fact, *Ginsberg* left the door ajar for such a case, noting that the plaintiff "did not assert that he earned his miles from any activity but taking flights or that he attempted to redeem miles for anything but tickets and upgrades."[219] And once a case falls outside of the ADA's ambit, nothing prevents a court from deeming an indescendibility provision to be unconscionable or a bad faith unilateral amendment.

A third potential limit flows from untangling various strands of the implied covenant. Recall that Ginsberg faulted Northwest for exercising its discretionary right to terminate his SkyMiles membership for the purpose of reducing its overhead.[220] The gravamen of such a claim is that the airline did something it had the express right to do for an improper reason. As such, it could easily be conceptualized as seeking to enforce a free-floating, policy-driven obligation to perform contractual duties fairly.

---

213. Reply Brief for Petitioners at 11, *Ginsberg*, 134 S. Ct. 1422 (No. 12-462); *see also* Brief for Steven J. Burton, Professor of Law, as Amicus Curiae in Support of Respondent at 13, *Ginsberg*, 134 S. Ct. 1422 (No. 12-462) (containing an entire section entitled "The Implied Covenant is Not Like the Unconscionability Doctrine"); Transcript of Oral Argument, *supra* note 212, at 21 ("MR. YELLIN: . . . [D]octrines [like] unconscionability . . . impose extracontractual limitations on the parties' choices.").

214. *See supra* text accompanying notes 146–152.

215. *Ginsberg*, 134 S. Ct. at 1431 (quoting Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 371 (1980)).

216. *Id.*

217. *See supra* text accompanying notes 35–36.

218. 49 U.S.C. § 41713(b)(1) (2015).

219. *Ginsberg*, 134 S. Ct. at 1431.

220. *See supra* text accompanying notes 208–209.

Conversely, a *Badie*-style challenge to a unilateral amendment bears specifically on the question of *what* the parties' bargain *is*.[221] Indeed, it attempts to stop the drafter from expanding the contract beyond its original scope. Thus, rather than merely trying to stamp out self-serving conduct, a consumer who seeks to overturn a carrier's ex post addition of an indescendibility provision is arguing "I did not agree to that." Perhaps this difference could prompt a future court to distinguish *Ginsberg*.

Nevertheless, in many contexts, the ADA creates a force field around indecendibility provisions in frequent flyer agreements. And as I explain next, ISPs have made a similar argument with respect to the inheritability of e-mails and other digital media.

2. *The Stored Communications Act*

In 1986, Congress passed the SCA to extend privacy protections to information stored on computer servers.[222] ISPs claim that this antediluvian federal statute prevents them from sharing a decedent's electronic communications with her personal representative. In this Subpart, I critique that argument. In addition, because several jurisdictions and the Uniform Law Commission have recently approved legislation that covers similar terrain, I briefly discuss the uncharted issue of SCA preemption.

Some firms contend that the SCA bars them from releasing a decedent's online accounts. They cite § 2702 of the statute, which imposes civil penalties upon ISPs that offer services to the public[223] and "knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service."[224] This prohibition is not absolute, § 2702 exempts users who have given their "lawful consent" to disclosure.[225] Yet it is unclear what "lawful consent"

---

221. *See* Badie v. Bank of America, 79 Cal. Rptr. 2d 273 (Ct. App. 1998); *see also supra* text accompanying notes 185–190.

222. *See* Electronic Communications Privacy Act of 1986, H.R. 4952, 99th Cong. (1986); Orin S. Kerr, *A User's Guide to the Stored Communications Act, and A Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1213 (2004). For specific discussions of the relationship between federal and state law in this area, see Cahn, *supra* note 17, at 1706–18; James D. Lamm et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries From Managing Digital Property*, 68 U. MIAMI L. REV. 385, 403–06 (2014); Sandi S. Varnado, *Your Digital Footprint Left Behind at Death: An Illustration of Technology Leaving the Law Behind*, 74 LA. L. REV. 719, 750 (2014); Matt Borden, Comment, *Covering Your Digital Assets: Why the Stored Communications Act Stands in the Way of Digital Inheritance*, 75 OHIO ST. L.J. 405, 411–17 (2014).

223. 18 U.S.C. § 2702(a)(1)–(2) (2015); *see also* Andersen Consulting LLP v. UOP, 991 F. Supp. 1041, 1042–43 (N.D. Ill. 1998). This limitation means that most work-related or educational e-mail accounts do not fall within § 2702. *See, e.g.*, Horton, *supra* note 17, at 1734 n.33.

224. 18 U.S.C. § 2702(a)(1); *see also id.* § 2707 (listing the damages for violation of the statute). In addition to § 2702, trustees, executors, and administrators must contend with § 2701 of the SCA and the Computer Fraud and Abuse Act of 1984 (CFAA). *Id.* § 1030. These provisions forbid unauthorized access to e-mail accounts. For reasons that I have articulated elsewhere, and will not repeat here, I do not believe that these statutes apply to fiduciaries. *See* Horton, *supra* note 17, at 1732–34.

225. 18 U.S.C. § 2702(b)(3).

means. Moreover, even when the "lawful consent" exception has been met, the SCA merely *allows* but does not *require* ISPs to allow access to a decedent's accounts.[226] Thus, Facebook has opposed a personal representative's request for a decedent's files on the twin grounds that "[i]t is unclear whether an administrator may lawfully consent to disclosure of a deceased user's communications" and that "disclosures under the SCA are voluntary, not mandatory."[227] Likewise, Yahoo! has argued that "there is no exception to the SCA's prohibition on disclosure of 'contents' for an administrator."[228]

These arguments are only partially persuasive. Upon close inspection, the scope of the SCA depends more on an ISP's TOS than any other factor. Consider decedents who either die intestate or do not mention digital assets in their will or trust. The statute's legislative history reveals that these individuals can give "lawful consent" by signing up with an ISP that authorizes disclosure:

> If conditions governing disclosure or use are spelled out in the rules of an electronic communication service, and those rules are available to users or in contracts for the provision of such services, it would be appropriate to imply consent on the part of a user to disclosures or uses consistent with those rules.[229]

The fact that TOS can serve as the springboard for "lawful consent" belies ISPs' claims that they are constrained by § 2702. If they truly wanted to make their customers' electronic media inheritable, they could easily accomplish that goal.

Similarly, TOS loom large even when a decedent addresses digital assets in her estate plan. Suppose someone creates a will or a trust that attempts to devise the contents of her online accounts, but her ISP's TOS contains an indescendibility provision. Arguably, the testator or settlor's directive is not "lawful consent" under § 2702. To be sure, she has "consented" to release her data. But because her conduct defies the fine print, it may not be "lawful."[230] And in any event, throwing off the shackles of § 2702 only goes so far. As mentioned, the statute is a one-way street, if it governs, ISPs cannot disclose, but if it does not govern,

---

226. If a user satisfies the "lawful consent" element, the ISP "*may* divulge the contents of a communication." *Id.* § 2702(b)(3) (emphasis added).

227. Facebook, Inc.'s Motion to Quash Subpoena in a Civil Case at 6:4, 3:14–15, *In re* Request for Order Requiring Facebook, Inc. to Produce Documents and Things, 923 F. Supp. 2d 1204 (N.D. Cal. 2012) (No. 5:12-mc-80171-LHK (PSG)).

228. Brief for Defendant-Appellee Yahoo! Inc. at 41 n.18, Ajemian v. Yahoo! Inc., 987 N.E.2d 604 (Mass. App. Ct. 2012) (No. 2012-P-0178).

229. H.R. Rep. No. 99-647, at 66 (1986).

230. *Compare* Benderson Dev. Co. v. U.S. Postal Serv., 998 F.2d 959, 962 (Fed. Cir. 1993) ("To breach a contract is not unlawful; the breach only begets a remedy in law or in equity."), *with* Coats v. Dish Network, L.L.C., 303 P.3d 147, 150 (Colo. App. 2013) ("The plain and ordinary meaning of 'lawful' is that which is 'permitted by law.'" (citation omitted)).

ISPs can still choose not to disclose.[231] Once again, the company's descendibility policy is king.

The SCA's impact on digital inheritance has led to a flurry of state level reforms. Delaware,[232] Connecticut,[233] Indiana,[234] Oklahoma,[235] and Rhode Island[236] have all sought to regulate this nexus between technology and death. Some of these statutes clarify that decedents "lawful[ly] consent" to have their personal representative handle their digital assets,[237] although others are more equivocal.[238] In addition, they create a process by which personal representatives who are entitled to obtain the contents of a decedent's electronic accounts can send a written demand to the ISP along with a death certificate, a probate court order, or a testamentary instrument.[239] And finally, they require ISPs to comply with such a request.[240]

In addition to these state laws, in July 2014, the Uniform Law Commission approved the Uniform Fiduciary Access to Digital Assets Act ("UFADAA").[241] This draft statute allows fiduciaries to access the contents of a decedent's e-mail account "if the [ISP] is permitted to

---

231. *See supra* text accompanying note 204.

232. *See* DEL. CODE tit. 12, § 5005(a)–(b) (2015).

233. CONN. GEN. STAT. § 45a-334a (2015).

234. IND. CODE § 29-1-13-1.1 (2015).

235. OKLA. STAT. tit. 58, § 269 (2015).

236. R.I. GEN. LAWS § 33-27-3 (2015).

237. *See, e.g.*, DEL. CODE tit. 12, § 5005(a); *cf.* OKLA. STAT. tit. 58, § 269 ("The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites.").

238. Two states' laws declare that they do not "require [an ISP] to disclose any information . . . in violation of any applicable federal law." IND. CODE § 29-1-13-1.1(d)(1); *see also* CONN. GEN. STAT. § 45a-334a(c) ("Nothing in this section shall be construed to require an electronic mail service provider to disclose any information in violation of any applicable federal law."). By making themselves subservient to the SCA, these statutes cannot be an independent grounds for finding "lawful consent"; rather, they merely apply whenever § 2702 does not apply. There are also a few idiosyncratic state laws. For instance, Nevada only allows personal representatives to "direct the termination of any account of the decedent," not to transmit an account in accordance with the decedent's wishes. NEV. REV. STAT. ANN. § 143.188 (West 2015). Likewise, Virginia has a detailed law governing digital inheritance, but it only covers "deceased minors." VA. CODE § 64.2-110 (2015).

239. *See* DEL. CODE tit. 12, § 5005(c)–(d); CONN. GEN. STAT. § 45a-334a(b); IND. CODE § 29-1-13-1.1(b); R.I. GEN. LAWS § 33-27-3(1)–(2).

240. *See supra* note 239. Several of these statutes contain cryptic references that could be construed to allow a will, trust, or TOS to prohibit disclosure. For example, Delaware mandates release of the contents of a decedent's account "[u]nless otherwise provided by a *governing instrument*," whatever that means. DEL. CODE tit. 12, § 5005(b) (emphasis added). Similarly, Oklahoma's statute applies only if disclosure is "otherwise authorized." OKLA. STAT. tit. 58, § 269.

241. Press Release, Uniform Law Commission, Uniform Fiduciary Access to Digital Assets Act Approved (July 16, 2014), *available at* http://www.uniformlaws.org/NewsDetail.aspx?title=Uniform%20Fiduciary%20Access%20to%20Digital%20Assets%20Act%20Approved.

disclose" those materials under § 2702.[242] Thus, unlike the SCA's regime of permissive release, the UFADAA requires ISPs to divulge stored data when a fiduciary has the decedent's blessing.[243] Finally, the UFADAA also contains a safety valve for privacy-conscious testators by allowing them to declare in their wills that they want to prohibit access to their electronic possessions.[244]

These new and budding laws raise thorny federalism issues. To be sure, the SCA neither contains an express preemption provision nor evidences lawmakers' intent to occupy the field.[245] However, implied preemption may be a different story. As is well-known, state legislation must yield if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[246] Unfortunately, there is tension between some state digital asset statutes and the SCA's chief goals. As noted, the SCA aims to preserve the privacy of electronic communications.[247] This is not an idle concern: many people would shudder at the thought of others rummaging through their online correspondence.[248] For this reason, the SCA embraces a default rule of nondisclosure. Indeed, when both the user and an ISP's TOS are silent, § 2702 kicks in.[249] Conversely, some jurisdictions make e-mails presumptively descendible.[250] Because this approach has the potential to

---

242. *See* UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 4 (2014), *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf [hereinafter UFADAA].

243. *See id.* § 8.

244. *See id.* § 4 (giving fiduciaries authority over digital property "[u]nless otherwise provided . . . in the will of a decedent").

245. The SCA contains language that seems, at first blush, to expressly preempt state law. Section 2708 states that "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." 18 U.S.C. § 2708 (2015). Thus, in *Quon v. Arch Wireless Operating Co., Inc.*, 445 F. Supp. 2d 1116, 1138 (C.D. Cal. 2006), *rev'd on other grounds*, 529 F.3d 892 (9th Cir 2008), *rev'd sub. nom.* City of Ontario v. Quon, 560 U.S. 746 (2010), a California district court relied on this passage to hold that the SCA preempted state law invasion of privacy claims against a police department for disclosing text messages. However, subsequent courts have interpreted § 2708 not to be a preemption provision, but simply to clarify that the SCA does not contain a Fourth Amendment-style exclusionary rule that can be invoked against the government. *See* Bansal v. Russ, 513 F. Supp. 2d 264, 282 (E.D. Pa. 2007); In re Nat'l Sec. Agency Telecom. Records Litig., 483 F. Supp. 2d 934, 939 (N.D. Cal. 2007). In any event, the question of whether the SCA precludes plaintiffs from asserting claims under state invasion of privacy laws has little bearing on whether the statute forbids states from regulating the posthumous transmission of digital assets.

246. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

247. *See supra* text accompanying note 200.

248. *See, e.g.*, Horton, *supra* note 17, at 1738; Edwards & Harbinja, *supra* note 175, at 117 ("More than ever before, 'ordinary people,' leave digital relics which may be highly personal and intimate, and are increasingly preserved and accessible in large volume after death.").

249. *See supra* text accompanying notes 236–238.

250. *See, e.g.*, DEL. CODE tit. 12, § 5005(c)–(d) (2015); R.I. GEN. LAWS ANN. § 33-27-3(1)–(2) (2015). Other state laws (and the UFADAA) go out of their way to avoid a conflict with the SCA. *See supra* note 245 and text accompanying note 249.

expose decedents to unwanted publicity, it is especially vulnerable to implied obstacle preemption.

On the other hand, there is one context in which courts should recognize that local law can trump the federal statute. Recall that the SCA privileges an ISP's indescendibility provision over a decedent's unambiguous attempt to convey her digital assets in her estate plan.[251] This aspect of the statute does not further Congress's ambition of shielding consumers from prying eyes. To the contrary, honoring the noninheritability clause thwarts the decedent's wish to share her electronic media with her friends and family. Because this component of the SCA is not necessary to effectuate the core congressional blueprint, state legislatures should have the power to override it. And indeed, as noted above, some have done so by deeming a bequest of digital assets to be "lawful consent" to disclosure under § 2702.[252] In addition, statutes such as the UFADAA, which have been carefully tailored to avoid contradicting the SCA, can go further. They can elevate a decedent's express command in her testamentary instruments to where it belongs: above the sheer boilerplate that is a noninheritability provision.

CONCLUSION

Fine print has a new trick. Companies are encumbering property-esque entitlements such as frequent flier miles and virtual assets with indescendibility provisions. I have argued that courts should not always defer to these contractually mandated life estates. First, some consumers may reasonably believe that they have the right to convey these things to their loved ones after death. Second, noninheritability clauses can lack assent or violate principles of unconscionability or good faith and fair dealing. And third, although federal law does create safe harbor for some such terms, it does not immunize them all. We should not allow fine print to swallow what the Supreme Court has called "one of the most essential sticks in the bundle of rights."[253]

---

251. *See supra* text accompanying notes 237–238.

252. *See, e.g.*, DEL. CODE tit. 12, § 5005(a); OKLA. STAT. tit. 58, § 269 (2015); R.I. GEN. LAWS § 33-27-3(1)–(2).

253. Hodel v. Irving, 481 U.S. 704, 716 (1987) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

***