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Litigating Intangible Rights: Reputation, Digital Assets, and Endorsement Rights of Influencers

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Litigating Intangible Rights: Reputation, Digital Assets, and Endorsement Rights of Influencers

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Introduction[1]

Rapid growths in technology can catalyze changes to the law[2]. But what happens when growth in technology outpaces developments in the law?

This paper examines the disruptive effects that recent breakthroughs in technology has had on the field of estate litigation. In Part I of this paper, we address the arrival of the age of digital assets. Specifically, we distinguish between currency-based digital assets in Part I.I (digital fiat currency alternatives, cryptocurrency, non-fungible tokens), and platform-based digital assets in Part I.II (social media accounts, media libraries). We end in Part I.III with an examination of the problems of access and discoverability regarding both types of digital assets.

In Part II, we deal with intangible rights created by the rapid adoption of AI-based technologies in the entertainment industry. In Part II.I, we examine endorsement rights of the "living" (synthespians, mixed-media virtual influencers), and in Part II.II, we dive into the world of reputational rights of the "deceased" (resurrected celebrities). Part II.III ends with an examination of Ontario's common law tort of misappropriation of personality right.

Finally, we discuss the need for proactive legislation in Part III. We unpack three guiding principles from Kyushu, Kaal, and Vermeulen's 2017 paper "Regulation Tomorrow: What Happens when Technology is Faster than the Law" for proactive regulators seeking to stay ahead of technological innovations. We then suggest how these principles might be implemented to regulate estate litigation in the future.

Part I – The Age of Digital Assets

"Participation in the age of digital assets is not an option, it is inevitable"[3]. This was the conclusion of a major 2021 global study performed by Deloitte, where 76% of respondents (major financial institutions and industry executives) believed that digital assets will serve as a strong alternative to, or outright replacement of, fiat currencies within the next five to ten years.

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[1] This paper was co-authored by Justin de Vries and Tyler Lin of de VRIES LITIGATION LLP.

[2] For instance, in estate and family law, the legal determination of parentage (a key component of determining support obligations) was originally reliant on the use of rebuttable legal presumptions. However, since the advent of DNA testing, courts have increasingly favoured the ordering of paternity tests to settle this type of matter. DNA testing is superior to rebuttable legal presumptions because they are objectively, highly accurate, non-invasive, cost-effective, and makes efficient use of judicial resources. In fact, in *W v. K*, 2018 ONSC 7765 at para. 37, Trousdale J. commented that such a test could have the effect of averting the necessity of trial entirely – Tyler Lin, "The Father of My Children: Court-Ordered Paternity Testing" (2 November 2020), de VRIES LITIGATION LLP (blog), online: https://devrieslitigation.com/court-ordered-paternity-testing/.

[3] "Banks Warned That Crypto Could Replace Dollar Within Five Years", *Futurism*, online: https://futurism.com/banks-crypto-replace-dollar.

"Digital asset" is fast becoming a ubiquitous term in the world of estate law. Canada's model legislation, the *Uniform Access to Digital Assets by Fiduciaries Act (2016)* defines digital assets as: "a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means"[4].

This definition is broad. It can capture anything from non-fungible tokens ("**NFTs**") and cryptocurrencies to state-backed digital alternatives of fiat currency. However, as digital assets continue to diversify and proliferate, it is important to maintain logical rigour and distinguish between the different meanings couched within this ambiguous term. Different legal and practical approaches are warranted when dealing with different types of digital assets.

I.I – Currency-based Digital Assets

Digital fiat currencies[5] or Central Bank Digital Currencies ("**CBDCs**") are the digital form of a country's fiat currency issued by that country's central bank[6]. Like their traditional counterpart, value is dependent on the strength of a country's economy, not tied to the valuation of specific commodities[7]. Unlike their traditional counterpart, they are immune to wear and tear, do not require physical materials to produce, can be easily traced between transactions, and have lower transactional costs[8]. These traits allow countries with CBDCs to impose monetary policy quickly and seamlessly[9].

With the advent of digital banking, many countries including Canada are already on their way in transforming from physical currencies to digital-based currencies. However, most countries still have varying degrees of reliance on physical money.

As of 2021, five countries in the world have launched fully operational digital currencies (with the Bahamian Sand Dollar being the first)[10]. Over eighty-one countries are now exploring fully digital

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[4] Uniform Law Conference of Canada, "Uniform Access to Digital Assets By Fiduciaries Act (2016)", online: https://www.step.org/system/files/2020-04/uniform_access_to_digital_assets_by_fiduciaries_act_uniformact_gh012.pdf [ULCC], s 1, "digital asset".

[5] *Merriam-Webster Dictionary*, "fiat", online: https://www.merriam-webster.com/dictionary/fiat#:~:text=History%20and%20Etymology%20for%20fiat,be%20done%20%E2%80%94%20more%20at%20be - the term "fiat" derives from the Latin word "fieiri" meaning to become or be done.

[6] "Central Bank Digital Currency Tracker", *Atlantic Council*, online: https://www.atlanticcouncil.org/cbdctracker/.

[7] Nik Martin, "Cryptocurrencies and Fiat Money – What's the Difference?", *Deutsche Welle* (6 February 2021), online: https://www.dw.com/en/cryptocurrencies-and-fiat-money-whats-the-difference/a-57749545.

[8] "Central Bank Digital Currency Tracker", *supra* note 6.

[9] *Ibid.*

[10] *Ibid.*

CBDCs[11]. Of nations with sizable economies, China is leading the pack[12]. It expects to fully launch its electronic yuan by the 2022 Winter Olympics ("**eCNY**")[13].

Unlike CBCDCs, cryptocurrencies (or "**crypto**") are decentralized and are not backed by any government or central bank[14]. This software-based currency relies on independent "miners" of such currencies to authenticate transactions using blockchain technology. These miners are then rewarded with the chance to solve a complex math problem in exchange for cryptocurrencies[15].

The value of crypto is not tied to any country's economy, nor any commodity. This is seen as a pro by some, and as a con by others. Some commentators believe such assets have no productive value (unlike commodities such as oil or lumber)[16], and are essentially a "limited supply of nothing"[17]. Despite these views, cryptocurrencies have become extremely popular in recent years. However, they remain volatile[18]. Being decentralized, blockchain technology is notoriously difficult to compromise[19].

Unlike the near unanimous embrace of CBDCs[20], the adoption of cryptocurrency has been sharply divided between countries. Some countries have banned crypto, viewing them as a threat to the

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[11] *Ibid.*

[12] Sudhanva Shetty, "What is China's Digital Yuan Cryptocurrency? How Does the Chinese Digital Currency Work?", *Transfin* (14 April 2021), online: https://transfin.in/amp/what-is-china-digital-yuan-cryptocurrency-how-does-the-chinese-digital-currency-work - China has been developing its eCNY since 2014, and in 2020, began sandbox testing this currency through the form of a lottery. Citizens were chosen at random in major cities such as Beijing and Shanghai and gifted $200.00 worth of the currency. Those amounts were traced and tracked, and data was gathered in order to provide feedback. Commentators have queried the potential combined effect of China's social credit system (a system that allows citizens to be ranked according to their behaviour, and which rewards and punishes good or bad behaviour with gifts or the limitation of rights, such as to purchase plane tickets) with the eCNY. It would become possible for citizens misbehaving to be cut off from access to their own money.

[13] GT Staff Reporters, "China Takes Lead in Race to Launch Digital Currencies Thanks to Broad Mobile Coverage, Early Innovations", *Global Times* (8 April 2021), online: https://www.globaltimes.cn/page/202104/1220590.shtml.

[14] Jake Frankenfield, "Bitcoin" *Investopedia* (31 May 2021), online: https://www.investopedia.com/terms/b/bitcoin.asp.

[15] Kate Ashford & John Schmidt, "What is Cryptocurrency?", *Forbes* (18 December 2020), online: https://www.forbes.com/advisor/investing/what-is-cryptocurrency/.

[16] Jessica Bursztynsky, "Warren Buffett: Cryptocurrency 'has no value' – 'I don't own any and never will'", *CNBC* (24 February 2020), online: https://www.cnbc.com/2020/02/24/warren-buffett-cryptocurrency-has-no-value.html.

[17] Ethan Wu, "A Billionaire Investor Who Called the 2008 Crash Says Crypto is a Bubble That Will 'Go to Zero' and Tells Investors Buy Gold", *Business Insider* (30 August 2021), online: https://markets.businessinsider.com/news/currencies/john-paulson-crypto-bitcoin-gold-2008-crash-hedge-fund-inflation-2021-08#:~:text=firm%20%2420%20billion.-,He%20described%20crypto%20as%20a%20%22limited%20supply%20of%20nothing%2C%22,eventually%20prove%20to%20be%20worthless.

[18] CoinDesk, "Bitcoin", online: https://www.coindesk.com/price/bitcoin/.

[19] "How Secure Is the Bitcoin Blockchain, and Is Your Cryptocurrency Safe?", *Gadgets360* (23 August 2021), online: https://gadgets.ndtv.com/cryptocurrency/features/how-secure-is-bitcoin-blockchain-cryptocurrency-technology-2516405#:~:text=Blockchain%20technology%20is%20secure%20as,system%20cannot%20affect%20other%20parts.

[20] "Central Bank Digital Currency Tracker", *supra* note 6 - 81 countries representing over 90% of global GDP are now exploring the development of their own CBDCs.

status quo[21], while others, such as El Salvador, have legalized them in hopes of reaping the associated economic rewards[22]. In the wake of massive backlash from the citizens of El Salvador, the International Monetary Fund has stated that cryptocurrencies are unsuitable as an alternative to national currencies[23].

Since March of 2019, the Canadian Securities Administrators ("**CSA**") and the Investment Industry Regulatory Organization of Canada ("**IIROC**") have recognized cryptocurrencies as regulatable assets[24]. In March of 2021, the Ontario Securities Commission ("**OSC**") has issued a notification recognizing cryptocurrencies as an asset and has since asserted its own jurisdiction to regulate its dealers, where purchasers of these assets reside in Ontario[25].

Non-fungible tokens (defined above as NFTs) are yet another type of digital asset. Recently, a collage from the artist Mike Winkelman, better known as Beeple, was sold for an astounding $69 million dollars[26]. However, what was sold was not the art itself, which can be viewed for free by anyone[27]. What was sold was a digital certificate of ownership attached to the work, powered by the same block-chain technology that empowers cryptocurrencies[28].

NFTs can attach to any type of digital posting, such as a social media post, video, artwork or even your genome[29]. It is an authenticated document that turns the fungible (such as any identical copy of a piece of work in any medium), into the non-fungible (the holder of the first copy of that work).

Unlike crypto, the rarity of NFTs is a product of fabricated scarcity. For example, Bitcoin has a hard limit of twenty-one million coins. No more can be created after that. However, anyone can

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[21] Chloe Orji, "Bitcoin Ban: These are the Countries Where Crypto is Restricted or Illegal", *EuroNews* (19 September 2021), online: https://www.euronews.com/next/amp/2021/08/30/bitcoin-ban-these-are-the-countries-where-crypto-is-restricted-or-illegal2.

[22] "Bitcoin Protests in El Salvador Against Cryptocurrency as Legal Tender", *BBC News*, online: https://www.bbc.com/news/world-latin-america-58579415 - as of September 2021, El Salvador became the first country to use cryptocurrency as legal tender.

[23] Kevin Helms, "IMF: Bitcoin Is Privately Issued Crypto With Substantial Risks, Inadvisable as Legal Tender", *Bitcoin.com* (29 August 2021), online: https://news.bitcoin.com/imf-bitcoin-privately-issued-crypto-substantial-risks-inadvisable-legal-tender/.

[24] *CSA Staff Notice 21-327 – Guidance on the Application of Securities Legislation to Entities Facilitating the Trading of Crypto Assets*, OSC CSA Notice (16 January 2020), online: https://www.osc.ca/sites/default/files/pdfs/irps/csa_20200116_21-327_trading-crypto-assets.pdf.

[25] Ontario Securities Commission, News Release, "OSC Working to Ensure Crypto Asset Trading Platforms Comply With Securities Law" (29 March 2021), online: https://www.osc.ca/en/news-events/news/osc-working-ensure-crypto-asset-trading-platforms-comply-securities-law.

[26] Elena Debre & Aaron Mak, "How in the World did a 'Digital Artwork' Sell for $69 Million at Christie's?", *Slate* (11 March 2021), online: https://slate.com/technology/2021/03/beeple-auction-christies-nft-69-million-explained-why-why-why.html.

[27] Christie's, "Beeple – The First 5000 Days", Online Auction 20447, online: https://onlineonly.christies.com/s/beeple-first-5000-days/beeple-b-1981-1/112924.

[28] Tyler Lin, "Cautionary Tales on Digital Estate Asset Planning" (15 March 2021), de VRIES LITIGATION LLP (blog), online: https://devrieslitigation.com/cautionary-tales-digital-estate-asset-planning/ [Lin, "Cautionary Tales"].

[29] Aishani Aatresh, "So You Want to Sell Your Genome as an NFT? Read This First", *SynBioBeta* (2 June 2021), online: https://synbiobeta.com/so-you-want-to-sell-your-genome-as-an-nft-read-this-first/.

create an unlimited number of NFTs. Recently, 12-year-old prodigy created and sold nearly $400 thousand dollars worth of NFT by creating digital pictures of whales[30].

Like crypto, NFTs are experiencing a boom. Overall, consumers have reportedly spent $174 million dollars on these assets since November of 2017[31]. From August to September of 2021, the State Hermitage Museum in St. Petersburg, Russia, has teamed up with Binance NFT Marketplace (an NFT trading platform) to mint and offer NFTs of world-renowned artists such as Van Gogh, Monet, and da Vinci[32].

The idea behind NFTs is the same as behind the collection and trading of other assets without productive value (e.g., rare books, stamps, figurines). The internet is a recent invention in human history. Like owning copies of the first books to ever be printed by a printing press, collectors are excited about the prospect of owning a part of digital history. Even better than a physical collectible, the digital nature of these tokens makes them perfect for trading and collecting, as they are immune to physical wear and tear.

I.II – Platform-based Digital Assets

Digital assets do not only include electronic property analogous to currency (with financial value). They can include one's personal information stored with a private third-party platform (e.g., Facebook, Amazon, or Google), the right to access digital content, such as stream-to-watch services (e.g., Netflix) or pay to play gaming libraries (e.g., Steam, a popular game retailer), and even access to loyalty rewards points (e.g., Air Miles).

In 2011, the result of a global study showed that consumers owned an average of $37 thousand dollars in digital assets across different digital devices. In the U.S., this value is $55 thousand

[30] Charlie Moloney, "Boy, 12, Makes £290,000 in Non-Fungible Tokens With Digital Whale Art", *The Guardian* (27 August 2021), online: https://amp.theguardian.com/technology/2021/aug/27/boy-12-makes-29000-in-non-fungible-tokens-with-digital-whale-art.
[31] Robyn Conti & John Schmidt, "What You Need To Know About Non-Fungible Tokens (NFTs)" , *Forbes* (14 May 2021), online: https://www.forbes.com/advisor/investing/nft-non-fungible-token/#:~:text=A%20staggering%20%24174%20million%20has,and%20have%20unique%20identifying%20codes.
[32] Jamie Redman, "The Largest Art Museum in the World Partners with Binance to Auction Leonardo Da Vinci, Claude Monet NFTs", *Bitcoin.com* (30 August 2021), online: https://news.bitcoin.com/the-largest-art-museum-in-the-world-partners-with-binance-to-auction-leonardo-da-vinci-claude-monet-nfts/.

dollars[33]. In 2020, the average value of a Steam gaming account was nearly $2,000 dollars, with the average user possessing 120 unique games[34].

While it is difficult to quantify the financial value of one's account or profile on social network platforms, as of 2021, Facebook has 2.85 billion unique users[35]. Respectively, Amazon[36] and Google have 197 million and 4 billion users[37].

The common problem shared by these platforms is the prohibition of access and discovery by fiduciaries. Ownership differs from the right to access. Users do not actually own their social media profiles, or the rewards, games and movies accessible on them. Unlike physical assets (i.e., the diary, house, or car of a deceased) which are readily discoverable and accessible by estate trustees, each platform has its own unique terms of service agreement regarding access[38]. They must also comply with privacy laws of all applicable jurisdictions.

When it comes to loyalty reward points, terms of service agreements are key. Some programs, such as Aeroplan, Air Miles, and American Express will allow a transfer of points to another account with proof of death and a letter from the estate trustee. Others, such as PC Optimum, and Canadian Tire Triangle Rewards, are non-transferable and expire upon death[39].

In October of 2020, Carol Noble of Toronto gained media attention in her four-year legal battle with Apple over online materials which she already legally owns but was denied access to[40]. Noble's husband Don had spent the final six months of his life confined to a bed, battling cancer. He spent hours chronicling the progression of his battle on his Apple device. His final wish was for Carol to posthumously organize and publish his battle into a book.

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[33] "McAfee Reveals Average Internet User Has More Than $37,000 in Underprotected 'Digital Assets'", *Business Wire* (27 September 2011), online: https://www.businesswire.com/news/home/20110927005661/en/McAfee-Reveals-Average-Internet-User-Has-More-Than-37000-in-Underprotected-%E2%80%98Digital-Assets%E2%80%99.

[34] Ross James "'How Much Is My Steam Account Worth?': How to Figure Out How Expensive Your Game Library Is, and How Much Time You've Spent Playing", *Business Insider Australia* (7 November 2019), online: https://www.businessinsider.com.au/how-much-is-my-steam-account-worth-2019-11.

[35] "Leading Countries Based on Facebook Audience Size as of July 2021", *Statista* (10 September 2021), online: https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/#:~:text=With%20more%20than%202.85%20billion,revenue%20is%20generated%20through%20advertising.

[36] Emily Dayton, "Amazon Statistics You Should Know: Opportunities to Make the Most of America's Top Online Marketplace", *BigCommerce* (blog), online: https://www.bigcommerce.com/blog/amazon-statistics/#:~:text=In%20the%2025%20years%20since,devices%20and%20visit%20Amazon.com.

[37] Joseph Johnson, "Google – Statistics & Facts", *Statista* (3 September 2021), online: https://www.statista.com/topics/1001/google/.

[38] For example, while owners of hard copies of games can simply bequeath their media library on death, Steam's terms of conditions prohibit another person from inheriting a game library without the express consent from parent company Valve. - Chris Bratt, "What Happens to Your Steam Account When You Die?", *EuroGamer* (6 October 2017), online: https://www.eurogamer.net/articles/2017-10-06-what-happens-to-your-steam-account-when-you-die#:~:text=In%20the%20simplest%20terms%2C%20this,hold%20up%20upon%20your%20death.

[39] Jackie Dunham, "What Happens to Your Loyalty Program Rewards When You Die?", *CTV News* (20 June 2019), online: https://www.ctvnews.ca/canada/what-happens-to-your-loyalty-program-rewards-when-you-die-1.4474850.

[40] Lin, "Cautionary Tales", *supra* note 28.

As estate trustee, Carol was authorized access to her husband's assets. However, she did not have the password to the device, and Apple refused to provide it for fear of contravening the US *Electronic Communications Privacy Act*[41]. Carol was forced to retain a lawyer. As of February 11, 2021, her four-year long legal battle with Apple came to an end as a negotiated agreement was reached. She was finally able to have access to a device that she was legally entitled to access as both trustee and beneficiary[42].

A grieving mother in Germany has had a similar, protracted legal battle with Facebook. In 2012, a teen was killed by a train at a station in Berlin. The parents of the deceased teen did not have the password to their daughter's Facebook account. When they went to log-in to search for clues as to whether the death was accidental, they discovered that the profile was inaccessible as it was put into memorialize mode.

Citing the same privacy concerns as Apple, Facebook refused to allow the parents to access their daughter's profile. Finally, in 2018, Germany's highest court for civil and criminal law issued a ground-breaking ruling allowing parents to inherit the contract between their child and a social media platform (analogous to inheriting a child's physical diary), solving the problem of access[43].

I.III – Access and Discoverability: the challenges of digital assets in estate litigation

The above scenarios are not outliers. They illustrate the consequence of technological developments outpacing legal ones in Canada and worldwide. Moving forward, more and more assets will be held in digital form. Without legislative guidance, estate representatives will be forced to find creative solutions such as expensive test-case litigation and lawyer-assisted negotiations.

For currency-based digital assets, the problems of access and discovery are both practical and legal. A significant legal drawback of crypto is the inability to designate a beneficiary to the digital "wallets" which holds these coins on cryptocurrency exchanges. Practically, owners of crypto have a private password, which, once lost, likely renders the coins permanently inaccessible.

In 2018, the Wall Street Journal estimated that 20% of *all* Bitcoin (the most popular crypto) are permanently lost due to misplacement or death of the password holder[44]. Notable examples include

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[41] *Electronic Communications Privacy Act of 1986 (ECPA)*, 18 U.S.C. §2510-2523, online: https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1285.

[42] Rosa Marchitelli, "Apple Blocks Widow From Honouring Husband's Dying Wish" *CBC* (19 October 2020), online: https://www.cbc.ca/news/business/widow-apple-denied-last-words-1.5761926.

[43] "Facebook Ruling: German Court Grants Parents Rights to Dead Daughter's Account", *BBC News* (12 July 2018), online: https://www.bbc.com/news/world-europe-44804599.

[44] Elliott Krause, "A Fifth of All Bitcoin is Missing. These Crypto Hunters Can Help", *The Wall Street Journal* (5 July 2018), online: https://www.wsj.com/articles/a-fifth-of-all-bitcoin-is-missing-these-crypto-hunters-can-help-1530798731.

billionaire Mathew Mellon, heir to the Mellon Bank fortune, who died without leaving access to $500 million dollars in cryptocurrency[45], and Gerald Coten, 30-year-old founder of the Canadian Cryptocurrency Exchange who passed away unexpectedly, taking the whereabouts of $180 million dollars worth of crypto with him[46].

Even if this practical problem can be resolved, there is an equally insurmountable legal problem.

As the legal representatives of an estate, estate trustees (with or without a will) and estate trustees during litigation ("**ETDLs**")[47] are responsible for the administration of an estate[48]. Where there is litigation, ETDLs are responsible for realizing the assets of a deceased[49]. Currently in Canada (with a minor, narrow exception in the laws of Alberta[50]), fiduciaries such as ETDLs do not have the requisite statutorily granted legal power to discover or access *any* type of digital asset[51].

As a result, even with an Ontario court order, there is no guarantee that trustees can access or discover the platform-based assets mentioned above[52].

The U.S. is a leader in the development and regulation of fiduciary rights concerning digital assets of an estate or an incapable person. In 2015, the U.S. created the model *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* ("**RUFADAA**"), which has since been adopted in over 40 states[53].

Influenced by RUFADAA, the Canadian Uniform Law Commission proposed similar model legislation in 2016. The *Uniform Access to Digital Assets by Fiduciaries Act (2016)* ("**UADAFA**") aims to empower estate representatives, court-appointed guardians, and attorneys operating under a Power of Attorney by extending the usual powers exercised by these fiduciaries over physical

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[45] Marco Cavicchioli, "The Matthew Mellon Ripple Treasure Disappeared into Thin Air", *The Cryptonomist* (30 May 2018), online: https://en.cryptonomist.ch/2018/05/30/matthew-mellon-ripple/.

[46] Jessica Murphy, "Quadriga: The Cryptocurrency Exchange That Lost $135M", *BBC News* (17 February 2019), online: https://www.bbc.com/news/world-us-canada-47203706.

[47] As appointed under the jurisdiction of the Ontario Superior Court of Justice, with all the rights and powers of a general administrator other than a right of distribution of the estate's residue. – see CED 4th (online), *Executors and Administrators* (Ont), "Grant of Probate or Letters of Administration: Administrator Pendente Lite" (II.8).

[48] Howard S. Black, *Wills and Estates: Cases, Text, and Materials,* 3rd ed (Toronto: Emond Publishing, 2017) ch 15 at 359.

[49] *Ibid*, ch 15 at 359.

[50] Alberta's *Estate Administration Act* is the only legislation which makes references to platform-based digital assets. Specifically, section 57(1) allows estate trustees to realize an estate's assets including "online accounts". Notably, other forms of cryptocurrency are not included in this legislation - *Estate Administration Act*, SA 2014, c E-12.5, s 57(1).

[51] ULCC, *supra* note 4.

[52] As demonstrated in cases such as *Henry v. Bell Mobility*, 2017 ONSC 6070, where even a Canadian/Ontarian court order, requiring the disclosure of all data and details of her son's mobile and social media data to a grieving mother, was unable to persuade corporate giants Bell Mobility, Apple Canada, Facebook and Google Canada to make these disclosures. These corporations simply refused to comply.

[53] Uniform Law Commission, "Fiduciary Access to Digital Assets Act, Revised" (2015), online: https://www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22

assets, to digital assets[54]. This model act aims to adhere to the traditional approach of trusts and estates law, which respects the intention of the testator, and promotes a fiduciary's abilities to administer an estate in accordance with legally binding fiduciary duties[55].

As of September 2021, no province has adopted UADAFA. It remains to be seen whether it will ultimately be adopted, and whether its final, in-force iteration will be effective in solving the problem of access and discovery.

Unlike currency-based digital assets, access to and discovery of platform-based digital assets are governed by privacy legislation. The current governing legislation is the *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**")[56]. It is problematic for fiduciaries, as it contains numerous limitations on an organization's ability to use and disclose the personal information of an individual which it has collected[57].

Pursuant to Part I of PIPEDA, corporations are generally unable to disclose an individual's private information, even to their estate representative, without consent[58]. After death or loss of capacity, it obviously becomes difficult if not impossible for this consent to be granted. Although there are limited exceptions found in section 7(3) of Part I, none are applicable to an estate's administration. For instance, the general timeframe for the administration of an estate of average complexity is one year. The disclosure exception under section 7(3)(d)(h)(ii) allows for that disclosure twenty years after the death of the deceased[59].

As of November 2020, the government of Canada proposed new legislation which would overhaul existing privacy laws and fill in significant policy gaps left by PIPEDA[60]. The new *Digital Charter Implementation Act, 2020* ("**DCIA**") would replace Part I of PIPEDA and aims to "significantly increase protection to Canadians' personal information by giving [them] more control and greater transparency when companies handle their personal information"[61].

However, it is unclear whether or when DCIA will come into force. The efficacy of its final form is yet to be seen. Even if DCIA were in force, multi-national corporations may still wish to have court orders from their home jurisdiction for comfort before disclosing personal information to a

[54] ULCC, *supra* note 4, s 2(1)
[55] *Ibid* at 1.
[56] SC 2000, c 5.
[57] *Ibid.*
[58] *Ibid*, s 7.
[59] *Ibid*, s 7.
[60] Office of the Privacy Commissioner of Canada, "The *Personal Information Protection and Electronic Documents Act* (PIPEDA)", online: https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/.
[61] Government of Canada, "Fact Sheet: Digital Charter Implementation Act, 2020" (17 November 2020), online: https://www.ic.gc.ca/eic/site/062.nsf/eng/00119.html.

trustee[62]. Further, it is unclear how the DCIA will interact with the limitations imposed by the terms of service agreements of each platform.

While beneficiaries and dependants can battle over the digital assets of an estate, without an effective means of discovering, accessing, and clawing those assets into the disputed estate, court orders become expensive symbols of a pyrrhic victory.

ETDLs are appointed and empowered by the court. Where these fiduciaries are rendered powerless (e.g., through the practical inability to locate lost crypto keys, or the flat-out refusal of corporations to abide by terms of an Ontario court order), limits are drawn on the power of our courts by proxy.

Part II – Litigating Intangible Rights

Stardom and influence have long existed before digital technology. However, it is technology that truly allow celebrities to be immortalized. In 2014, Michael Jackson's hologram performed "Slave to the Rhythm", five years after his death. In 2016, Sir Peter Cushing reprised his role as Grand Moff Tarkin in Star Wars Rogue One, twelve years after his death. Last year, the voice of Frank Sinatra was brought back to life to cover Britney Spears' hit song, "Toxic". ABBA recently announced an upcoming "hologram" concert in London.

These creations have been coined as "synthespians": a portmanteau of the words "synthetic" and "thespian". They are computer-generated actors who are often created by "resurrecting" the likeness of deceased celebrities[63].

Even if legislations such as UAFADA and DCIA are adopted and brought into force, their narrow scope is a limit on their ultimate effectiveness. Specifically, UAFADA is inherently limited by its definition of digital assets as: "a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means"[64].

This definition does not include different digital assets (e.g., synthespians and associated endorsement rights) created by the unique blend of celebrity and AI-powered technology. Rights associated with these new digital assets are currently unclear. As synthespians proliferate in entertainment, even proposed legislation will leave a sizable gap[65].

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[62] Demetre Vasilounis, "New Privacy Legislation Aims to Address Digital Assets in Estate Administration" (26 March 2021), *All About Estates* (blog), online: https://www.allaboutestates.ca/new-privacy-legislation-aims-to-address-digital-assets-in-estate-administration/.

[63] Tyler Lin, "Bot v. Bot v. Bot: Personality Rights and New Frontiers in Estate Litigation" *Ontario Bar Association* (22 December 2020), online: https://www.oba.org/Sections/Trusts-and-Estates-Law/Articles/Articles-2020/December-2020/Bot-v-Bot-v-Bot-Personality-Rights-and-New-Fron.

[64] ULCC, *supra* note 4, s 1, "digital asset".

[65] This gap in legislation is covered in Quebec, where its *Civil Code* declares that personality rights are inalienable and transmissible upon death, allowing heirs to claim compensation on behalf of the estate of the deceased. - *Civil Code of Québec*, CQLR c CCQ-1991, s 3.

II.I – Endorsement Rights of the "Living"

Digital influencers are defined as people who can generate interest in a subject matter (such as a consumer product) by creating social media content on popular online platforms (e.g., Instagram, YouTube, Snapchat)[66]. Their name derives from their ability to influence the buying habits or quantifiable actions of their fan base. Often, influencer marketing takes the form of testimonial advertising. In this way, they can be seen as celebrities who achieve fame outside of mainstream media sources[67].

In the last few years, advances in CGI have allowed for the creation of "virtual influencers". These are fictional, computer generated "people" who have realistic characteristics, physical features, and the personalities of humans[68]. In fact, virtual influencers such as South Korea's Rozy Oh[69] have become nearly indistinguishable from their human counterparts. Rozy Oh exemplifies the popularity of virtual influencers. As of September 2021, she has amassed more than 100 sponsorships ranging from fashion brands to Chevrolet[70].

For humans, youth and beauty are transient. In the world of advertising and entertainment, these qualities are tangible, quantifiable assets which can propel actors and models to wealth and stardom.

Virtual influencers never age. Lil Miquela is another example of a virtual influencer who amassed millions of followers on Instagram before modeling for luxury brands such as Calvin Klein and Prada, then branching out into music[71]. She has traveled back in time to pose with Courtney Love, Prince Charles, and the Olsen Twins. She accomplished all this without aging a day past 19.

The proliferation of AI-based technologies has even allowed actors to infiltrate official meetings of the European Union[72]. Teenagers worldwide have been finding entertainment through a

[66] *Merriam-Webster Dictionary*, "influencer", online: https://www.merriam-webster.com/dictionary/influencer.
[67] Paris Martineau, "The WIRED Guide to Influencers", *WIRED* (6 December 2019), online: https://www.wired.com/story/what-is-an-influencer/.
[68] Megan Mosley, "Virtual Influencers: What Are They & How Do They Work?' (22 September 2021), *Influencer Matchmaker* (blog), online: https://influencermatchmaker.co.uk/blog/virtual-influencers-what-are-they-how-do-they-work.
[69] A play on words, the phrase "Oh Rozy" means 'one and only' in Korean.
[70] "This CGI Influencer Is Shilling For More Than 100 Brands", *Futurism,* online: https://futurism.com/the-byte/cgi-influencer-100-brands.
[71] "Lil Miquela Poses With Courtney Love, Prince Charles and the Olsen Twins", *Garage Magazine* (7 September 2018), online: https://garage.vice.com/en_us/article/gy3mmb/lil-miquela-paparazzi.
[72] "Russia Accused of Using Deepfakes to Imitate Political Rivals", *Futurism,* online: https://futurism.com/the-byte/russia-accused-using-deepfakes-imitate-political-rivals.

deepfake app which can create short video clips with the faces of their favourite celebrities superimposed over their own[73].

II.II – Reputational Rights of the "Deceased"

Digital influencing is a recent phenomenon. As a result, most influencers are still alive (and relatively young). Virtual influencers and deepfake videos have never been biologically "alive", and therefore cannot die. Deceased celebrities on the other hand, were once living persons. What happens when they are "resurrected" with technology?

In the recent film, "Roadrunner", director Morgan Neville crafted a documentary about the life and death of culinary personality Anthony Bourdain. The film was crafted by splicing thousands of hours of footage and audio. However, for three particular lines heard in the film, the director commissioned a software company to make an AI generated version of Bourdain's voice. Even though these lines were written by Bourdain, they were never spoken by him. This use of AI has caused controversy[74].

In his life, Bourdain was often considered a champion of authenticity. Many fans believe he would never have consented to this AI-generated voice. Others have questioned the ethics of doing so without his, or his estate's express consent[75].

On authenticity versus "selling out", fans are outraged at the recent trend of resurrected celebrity Instagram accounts. These accounts are verified by Instagram (which is the platform's stamp of authenticity) and serve no purpose other than blatant product advertisement. Celebrities who have passed away while Instagram was invented have had the option of having their accounts memorialized. Those celebrities from prior generations do not seem to be given the same courtesy.

Elvis Presley can be found selling wine he has never tasted, Tupac Shakur and Jimi Hendrix have been selling branded masks during the COVID-19 pandemic, and Marilyn Monroe has been promoting a line of jewellery sixty years after her death.

Unlike virtual influencers, corporations resurrecting celebrities do not need to also manufacture the associated clout and fame. The biggest selling point of a Tupac hologram is not the hologram

[73] "New Deepfake Tool Turns Livestreamers into Someone Else in Real Time", *Futurism,* online: https://futurism.com/the-byte/deepfake-livestreamers-real-time.
[74] Helen Rosner, "The Ethics of a Deepfake Anthony Bourdain Voice", *The New Yorker* (17 July 2021), online: https://www.newyorker.com/culture/annals-of-gastronomy/the-ethics-of-a-deepfake-anthony-bourdain-voice?utm_source=pocket-newtab.
[75] *Ibid.*

technology itself. It is Tupac's celebrity persona. The rights associated with this persona are governed by the law of personality rights.

In the United States, federal legislation exists to protect a celebrity's personality rights. The *Lanham Act*[76] is the primary federal trademark statute which governs trademark infringement, dilution, and false advertising[77]. Section 43(a) of this Act governs false endorsement claims, and section 2(a) governs trademarks that suggest a connection to a deceased person[78].

Under U.S. law, a celebrity's "persona" is a protectable "symbol" under section 43(a)[79]. This right is treated as a "trademark-like property interest" under the Act and is becoming increasingly recognized by U.S. courts as both alienable and descendible. Accordingly, those who inherit or purchase a deceased celebrity's personality rights can stand in that celebrity's shoes and assert false endorsement claims against other unauthorized posthumous users of the persona[80].

Notably, the respective executors of both Michael Jackson[81] and Bruce Lee's[82] estates, have successfully brought false endorsement claims against personality right infringers. While those executors were descendants, there is no requirement that the bringer of a false endorsement claim should be a family member or executor[83].

For instance, in *Estate of Marilyn Monroe LLC v. AVELA*[84], the court allowed a false endorsement claim by an entity that had complete ownership over Monroe's intellectual property, but had zero personal connection to the late actress. This is because Monroe's Will devised 75% of the residue of her estate (which included her intellectual property rights) to acting teacher Lee Strasberg. Those rights were then passed to Strasberg's wife upon his death. The remaining 25% went to Monroe's psychiatrist, who in turn passed her portions to the Anna Freud Center on death. Ms. Strasberg and the Anna Freud Center then transferred these rights to a newly-formed company, Marilyn Monroe LLP. The controlling interest of this corporation was subsequently purchased by Authentic Brands Group[85].

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[76] 15 U.S.C. §§ 1051, online: https://www.law.cornell.edu/uscode/text/15/chapter-22.
[77] Legal Information Institute, "Lanham Act", online: https://www.law.cornell.edu/wex/Lanham_Act.
[78] Under section 2(a), a trademark may not be federally registered if it comprises a matter which may "falsely suggest a connection with persons, living or dead". This false connection prohibition is used by the US Patent and Trademark Office to deny trademark applications by third parties, or to oppose and cancel a trademark registration post-issuance. The U.S. Federal Circuit has observed that this position evolved out of the concepts of the rights of privacy and publicity. Therefore, even though section 2(a) does not explicitly protect the endorsement rights of a deceased celebrity's estate, it does give rightful successors a "substantial leg up" over third parties in establishing control over posthumous endorsements - Andrew Gilden, "Endorsing After Death" (2021) 63 William & Mary L Rev at page 23
[79] Gilden, *supra* note 78 at 17.
[80] *Ibid* at 18.
[81] *Ferrer v. Maychick*, 69 F Supp 2d 495 (SDNY 1999).
[82] *Bruce Lee Enterprises, LLC v. AVELA Inc.*, 2013 WL 822173, at 2 (SDNY 2013).
[83] Gilden, *supra* note 78 at 19.
[84] 364 F Supp 3d 291 (SDNY 2019).
[85] Gilden, *supra* note 78 at 19.

While it is controversial for Marilyn to be promoting jewelry which she never wore in her lifetime, the presiding court saw no problems in its judgment favouring Authentic Brands Group. The reason? There has been an unbroken chain of ownership over Monroe's personality rights from beneficiaries to the corporation[86]. This analysis respects the testator's decision to bequeath her rights to her acting teacher and psychiatrist, so that they can benefit from such rights through a sale[87].

U.S. legislation on the protection of personality rights is imperfect. While section 43(a) covers a plaintiff's personality rights, this is also a legal concept that is covered by state laws regarding rights of publicity[88]. In many states, most notably New York, there is no post-mortem right of publicity. This would mean that for deceased celebrities based in New York, the chain of title would extinguish on death[89].

Protection over rights of publicity (which substantially covers the same ground as personality rights) are governed by state legislation. California is a prime example of a state with proactive legislation. Being the center of the entertainment industry in North America, and arguably the world, its state legislature has pioneered protection for a deceased celebrity's right of publicity in its *Civil Code*[90]. This protection exists over and on top of protection provided by the federal *Lantham Act*.

In 2019, legislation was even passed to prohibit AI-generated "deepfakes" of both celebrities and politicians. California's protection of personality rights is so robust that its statutory limitation is extended to 70 years post-death. Further, regardless of where a celebrity or estate resides, any litigant, including a Canadian one, has standing to bring an action under this celebrity-favoured jurisdiction as long as some aspect of the violation of the statute occurred in California.

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[86] Gilden, *supra* note 78 at 19.

[87] Although it is unlikely that Monroe, or anyone, would have predicted the advent of technologies which now enabled such rights to be so profitable.

[88] A right of publicity is the right of a natural person to control the commercial exploitation of their identity and to prevent its commercial appropriation by others without permission. Protected aspects can include one's personality, including name and likeness. – *Thomson Reuters Practical Law*, "Right of Publicity", online: https://ca.practicallaw.thomsonreuters.com/Cosi/SignOn?redirectTo=%2f8-512-2969%3ftransitionType%3dDefault%26contextData%3d(sc.Default)%26firstPage%3dtrue#:~:text=The%20right%20of%20publicity%20is,Likeness.

[89] Gilden, *supra* note 79 at 19.

[90] See Rule 3344 of California's *Civil Code* which protects the "publicity rights" of living celebrities, and Rule 3344.1 which grants statutory protection to the estate of a deceased celebrity regarding "personality rights". The right to one's own image is generally divided into these two types. "Publicity rights" are aimed at keeping one's image from being commercially exploited without permission during one's life. "Personality rights" deals with the same, post-death. The latter right would also cover the right for one's estate to profit from the celebrity-power of the deceased generally (e.g., through AI), as opposed to copyright law, which narrowly covers specific creative works.

II.III – The Common Law Tort of Appropriation of Personality: the challenges of digital rights in estate litigation

In contrast to the U.S., Canadian jurisprudence on personality rights is in a state of infancy. Unlike California, Ontario does not have legislation which directly addresses a deceased celebrity's right to publicity or personality rights. Canadian litigants must seek recourse under a patchwork of different statutes and common law doctrines, none of which directly addresses the personality rights and digital resurrection.

Federally, Canada lacks an equivalent to the *Lantham Act*. Our *Copyright Act*[91] provides little protection to the estate of deceased actors. The reason: copyright protects the *work* of an actor, whereas personality rights protect their persona. A synthespian is essentially a virtual influencer based on a deceased celebrity. They are the product of the marketing and CGI companies which have created them.

Provincially, Quebec law offers he strongest statutory protection in Canada. The *Quebec Civil Code* declares that personality rights are inalienable and are transmissible upon death[92]. This allows heirs of those rights to claim compensation on behalf of the deceased's estate for actions that took place after death.

In the rest of Canada, litigants must rely on the protection of a decades-old tort named "misappropriation of personality." This tort was developed in the 1973 case of *Krouse v. Chrysler Canada*[93], where for the first time, the Ontario Court of Appeal recognized the need for protecting the commercial value of one's personality and star power. To make out this tort, there must be "an invasion of [one's] right to exploit his personality by the use of his image, voice or otherwise, with damage to the plaintiff"[94].

More guidance on this tort comes from *Gould Estate*[95], where the Ontario Superior Court of Justice noted in obiter that the right of one's publicity does not end on death, and it is indeed an asset capable of being passed to one's heirs. However, the most recent consideration of this doctrine in

[91] RSC 1985, c C-42.
[92] *Civil Code of Québec*, CQLR c CCQ-1991, s 3.
[93] *Krouse v. Chrysler Canada Ltd et al.* (1973), 1 OR (2d) 225, 1973 CanLII 574 (ON CA).
[94] *Ibid* at para. 43.
[95] *Gould Estate v. Stoddart Publishing Co.* (1996), 30 OR (3d) 520, 1996 CanLII 8209 (ON SC).

Wiseau v. Harper[96] has actually limited its application[97]. As recognized in that case, this doctrine is rarely used and as a result, far from developed[98].

Part III – Proactive Legislation and the Future of Estate Litigation

In eras past, the popularity of deceased celebrities naturally waned with time as new generations of icons and audiences are born. The commercial value of personality rights would typically follow suit. However, the widespread adoption of new technologies has changed the status quo.

Deceased celebrities such as Tupac are preserved at their prime forever, and are able to generate massive followings. Heirs are now able to benefit indefinitely from the estate of digitally immortalized icons.

Ontario's current reliance on the common law tort of misappropriation of personality is one of necessity. Legislative frameworks such as the *Succession Law Reform Act*[99] and the *Estates Act*[100] were not created at a time when actors could be digitally resurrected from the dead[101]. Disruptive technologies have raised a whole new host of legal issues which were never contemplated before. Where these issues are not contemplated by legislature, the common law is forced to extend its reach.

III.I – Three Guiding Principles on Effective Legislation

The 21st century is marked by a proliferation of disruptive technological innovations. In the age of globalization, the adoption and dissemination of technologies are occurring at an increasing rate. As a result, regulators can often struggle to keep up[102]. However, efforts to reform, update and

[96] This interesting case is about the enigmatic Tommy Wiseau, as well as two films which parodied his life and artistic effort to create the infamous cult-hit "The Room". One of those two films is the 2017 Franco brothers hit, "The Disaster Artist". Among a litany of other claims, Wiseau brought a tort for damages under "misappropriation of personality". Schabas J. dealt with this claim succinctly in paragraphs 210-217: Wiseau did not meet the criteria for this tort. He could not establish any damage to his personality. Schabas J. followed *Gould Estate* and distinguished between a commercial effort versus a biographical work created for public interest. He found the two parody films were biographies, and worse, their popularity did not damage but rather revived interest in his waning celebrity.

[97] *Wiseau Studio LLC et al v. Harper et al,* 2020 ONSC 2504 at para 210.

[98] *Ibid* at para 213.

[99] *Succession Law Reform Act*, RSO 1990, c S.26.

[100] *Estates Act*, RSO 1990, c E.21.

[101] Where there have been recent, welcome changes to Ontario's *Succession Law Reform Act* through the *Accelerating Access to Justice Act, 2021,* SO 2021, c 4, these changes do not address the recent advances in technology considered in this paper. – Albert Oosterhoff, "Welcome Amendments to Ontario's Succession Law Reform Act" (20 February 2021) *WEL Partners* (blog), online: https://welpartners.com/blog/2021/02/welcome-amendments-to-ontarios-succession-law-reform-act/.

[102] Mark D. Fenwick, Wulf A. Kaal & Erik P.M. Vermeulen, "Regulation Tomorrow: What Happens When Technology is Faster than the Law?" (2017) 6:3 Am U Bus L Rev 561 at 568.

future-proof regulatory frameworks are more important than ever. A lack of successful reforms will result in increasing levels of uncertainty in the law[103].

Regulators of tomorrow must become more proactive, dynamic, and responsive[104]. How can they practically achieve these goals? Fenwick, Kaal and Vermeulen offers three guiding principles[105]. **First**, regulatory intervention should be driven by data[106]. **Secondly**, regulators should shift from a rule-based approach to a principle-based approach[107]. **Thirdly**, regulators should make use of "minimum regulatory sandboxes" to test and refine legislation[108].

The collection and interpretation of data is a tedious but necessary task. However, it can be used to answer the three critical questions of regulation: *what, when* and *how*?[109]

As for "what", not all innovative technologies will develop practical or commercial purposes. For those that do not, regulation may not be required.

As for "when", the timing of regulation should not be so early that it stifles or distorts the technology itself. Nor should it be so late that problems arise as a result of the absence of regulation.

As for "how", the form and substance of regulation should reflect society's view of that technology. Is it to be encouraged, prohibited or restricted in some way (e.g., deepfake technology)? What is the best way to achieve that goal?

The shift from a rule-based to a principle-based approach is a policy-shift from the certainty provided by black-letter law to the adaptability of general principles. As technological breakthroughs proliferate, this might be the only way to ensure that they do not outpace the legal reforms.

Legislation should be tested in minimally regulated sandboxes so that data on their efficacy can be collected. This way, any societal consequences will be kept to a minimum, and the final rollout of regulations will be smoother.

III.II – The Future of Estate Litigation

[103] *Ibid* at 573.
[104] *Ibid* at. 584.
[105] *Ibid* at 584.
[106] *Ibid* at 585.
[107] *Ibid* at 589.
[108] *Ibid* at 591.
[109] *Ibid* at 571.

Technological advancements are neither inherently good nor bad. They are amoral. Their effects can be detrimental or beneficial, depending on how they are used. The same AI technology which was used to infringe on Sinatra and Bourdain's personality rights, was used to return Val Kilmer's voice after it was lost through throat cancer[110]. In the decades ahead, we can expect growing pains as we strive to understand our relationship with disruptive technologies.

A complete submission of the necessary reforms to the abovementioned issues is outside the scope of this paper. However, by employing the three guiding principles, we can ruminate on what successful legislation might look like. The issues addressed in this paper are summarized as follows:

1) **Issues regarding digital assets:**
    a) **Currency-based assets:**
        i) How can fiduciaries be empowered to discover and access the crypto, NFTs and digital fiat money (including those within foreign jurisdictions) of a deceased?
        ii) Practically, how can fiduciaries be empowered to recover lost assets (loss of password through death) such as Bitcoin?
    b) **Platform-based assets:**
        i) How can fiduciaries be empowered to discover and access the personal information of a deceased?
        ii) How can the interaction between the specific terms of service agreements of digital platforms, and Canada's privacy laws be reconciled?
        iii) When is the right time to adopt UADAFA for Ontario, and what specific changes should be made to the model legislation?
        iv) When is the right time for Canada to adopt the DCIA, and what specific changes should be made to this legislation?
2) **Issues regarding intangible rights:**
    a) **Endorsement rights of the "living"**
        i) Who should own the rights to the endorsement rights of virtual influencers?

[110] Dalvin Brown, "AI Gave Val Kilmer His Voice Back. But Critics Worry the Technology Could Be Misused", *The Washington Post* (18 August 2021), online: https://www.washingtonpost.com/technology/2021/08/18/val-kilmer-ai-voice-cloning/.

ii) Should deepfake technologies be restricted to certain uses? For example, should the imitation of celebrities and politicians be banned?

b) **Reputational rights of the "deceased"**

i) Should film-makers be able to use AI technology to generate voice-over stand-ins of deceased celebrities?

ii) How might existing federal frameworks, such as Canada's *Copyright Act* be updated to address personality rights?

iii) How might provincial frameworks be updated to address personality rights (e.g., a statutory cause of action)?

For some of these issues, a sensible solution that fairly balances the interests of all stakeholders may not exist. For others, solutions may be outside the realm of our legislatures, and could depend more on shifting geo-political relations. For example, China's future regulation of eCNY might mean that foreign-held digital assets of deceased Canadians cannot be transferred back to Canadian jurisdictions.

For still others, solutions may come from outside the law. These might include the proliferation and development of new careers such as legislatively sanctioned crypto password hunters[111], or trust corporations specializing in administering digital assets.

Whatever form those future solutions may take, it will be important to keep in mind that legislators will not likely get it right on the very first try[112]. A societal gestalt shift will be necessary. Instead of viewing legislation as "final events" (decisions to be made for all-time and from which we can all move on), they should be viewed as "measured decision-making" in an open-ended and continuing process[113].

[111] Krause, *supra* note 44.

[112] For instance, the original 2014 draft of UFADAA empowered fiduciaries with access to a deceased's digital assets in the same way that they would have access to traditional property. Ideally, this approach would have given executors the right to compel corporations to provide lost passwords, information, and anything else necessary to wrap up the administration of an estate, even without consent from the deceased. However, this version of the law was met with such strong opposition from technology and privacy advocacy groups that only one state (Delaware) had enacted it in 2015. The revised version which has since been widely adopted in over 40 states provides fiduciaries with more limited powers.

[113] Fenwick, Kaal & Vermeulen, *supra* note 102 at 590.

Adaptation and changes to both the DCIA and UADAFA should be supported by data on the best time and best way to adopt them. Specific rules should give way to more general principle-based rules. These updates should be tested in regulatory sandboxes. For example, it may be preferrable to enable any new fiduciary powers to ETDLs, and have law firms and trust companies provide feedback on necessary refinements.

Importantly, no matter what form legislative guidance takes, it is imperative that they should be pursued proactively. Interim solutions such as the common law tort of misappropriation of personality should be treated as transitional, not permanent. It is the role of legislation to contemplate and give guidance on every possible scenario however unlikely they are to occur[114]. A statutory cause of action for personality misappropriation is recommended.

The legislature is the preferable forum to debate rules and the policy balance behind them. It is the preferred forum to consider creativity in new mediums of art, public interest, freedom of expression, and the right of an estate and heir to preserve and profit from star-power. Judges will appreciate legislative assistance in creating rules on unprecedented legal issues. With enough time and guidance, our open court system becomes a preferable forum to refining these rules. The direction is clear, and it is up to forward-looking legislators to take the first step.

[114] *Boughton v. Widner Estate*, 2021 BCSC 325 at para. 181. In making her decision, Duncan J. has explicitly considered the debate Hansard which led to the development of British Columbia's *Wills, Estates and Succession Act*, SBC 2009, c 13. In this case, even though polygamy is considered a federal offense, the legislature still considered situations where a deceased dies intestate but leaves behind multiple partners with whom they were in marriage-like relationships. The fact that a scenario is unlikely (in this case because of illegality, but in the case of this paper, because of unforeseen technological advances), should not stop legislature from giving guidance.

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