Federal Law Needed to Safeguard 'Digital Afterlives'

Federal law ought to play a stronger role in regulating social networking sites by allowing users to determine what happens to their "digital afterlives," says a recently published paper by a University of Illinois expert in intellectual property law. Allowing social networking sites to set their own policies regarding the content associated with the accounts of deceased users does not adequately protect individual and collective interests, especially with people spending an increasing part of their lives online using social networking sites, says Jason Mazzone, [1] a professor of law. "Virtually no law regulates what happens to a person's online existence after his or her death," he said. "This is true even though individuals have privacy and copyright interests in materials they post to social networking sites." Mazzone (pronounced "Maht-ZONE-A") says in the absence of legal regulation, social networking sites are unlikely to adopt user-friendly policies for the disposition of copyright materials from the accounts of the deceased. "The current situation is that there's very little law involved," said Mazzone, the Lynn H. Murray Faculty Scholar at Illinois. "Social networking sites determine on their own what, if anything, to do with a deceased user's account and the materials the user posted to the site. And their policies are not likely to reflect the collective interests that exist with respect to copyright law. It's a little bit like letting the bank decide what to do with your money after you die." According to the paper, a federal statute could impose some requirements upon social networking sites to give users a degree of control over what happens to their accounts. "You only want the federal government involved if there's some failure on the part of the states," Mazzone said. "But it would be very difficult for any particular state to set up a legal regime that would adequately regulate Facebook, which not only operates all across the U.S. but also all over the world. Some states have enacted legislation in an effort to protect their own citizens, but it's not at all clear how it would affect Facebook as a whole. "In order for this type of law to be effective, we have to turn to the federal government." There are also broader societal interests for preserving content for historical purposes, said Mazzone, the author of "Copyfraud and Other Abuses of Intellectual Property Law," published by Stanford University Press in 2011. "It's becoming increasingly common for people to have digital assets, and some of them do actually have value," he said. "Not only are such sites repositories of intellectual property, they also are important to family members and friends. Historians of the

future will likely depend upon digital archives to reconstruct the past, which creates a real problem, particularly in an age when we don't leave diaries, and, increasingly, people don't write books." According to Mazzone, Facebook's current policy is to "memorialize" the account of the deceased, meaning all uploaded content – status updates, photos, videos – disappears but the wall remains intact for current friends to express condolences. "The content is no longer visible but it's all still on Facebook's servers," he said. "It's just that no one can actually see it." So why is Facebook hoarding all of this content? "Well, I suspect that Facebook thinks that there's going to be some future value to having all of that content locked away," Mazzone said. "Either because it will have historical significance, or because Facebook thinks there will be something they are going to do with that content down the road. There are already pretty crude avatars being built based on their email exchanges and Facebook posts, so it's conceivable that there could be things like holograms that are developed 100 years from now thanks to the mining of all of this data. But Facebook doesn't know that for sure, and that's why they see the value in holding on to all of this." But ultimately the content is not Facebook's to keep, Mazzone says. "Whoever uploaded the content has a property right that is protected – it's not extinguished by anything that Facebook does," he said. "The trouble, though, is how you or your heirs get your hands on that content. The person who has inherited the copyright, who has the ability to control the uses of the work, can't take advantage of it because it's locked away in Facebook's digital vault. That's why we need to get to a place where we can require an entity like Facebook to give individual users at least some possibility of deciding while they're still alive what's going to happen to their content after they die." Mazzone says there are plenty of different ways to produce that result, with the Health Insurance Portability and Accountability Act providing a good example of how to protect privacy interests while allowing users to "exercise affirmative control." "HIPAA allows patients to specify who is going to get access to health records, and you have to affirmatively opt-in to that system," he said. "It's another area of federal law where you have information that's important and there are privacy interests involved. So I think that sort of model has some potential." According to Mazzone, it's something of a sore spot for Facebook users. "It's really pretty astonishing that there is no way for individual users to say, 'When I die, this is what happens to my account,' " he said. "Instead, it comes under the control of Facebook. I know many users have complained about the lack of just such an option. I also think it's the way Facebook users would think that things ought to work, and many users would be surprised to learn that there is no such option. I do think that it's pretty essential that that be available given the sorts of intellectual property and privacy interests that are at stake." The paper, "Facebook's Afterlife," was published in the North Carolina Law Review.

The article is available online [2].

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