

Ajemian v. Yahoo!

Appeals Court of Massachusetts (Norfolk division), 7 May 2013 (987 N.E.2d 604)

A case involving a request by a deceased man's relatives to access his Yahoo! email account, which was denied by Yahoo!, highlights the difficulty of balancing electronic privacy with the rights of those claiming a legitimate reason to access online content.

In the good old days, prior to the widespread adoption of electronic mail, obtaining access to a beloved one's personal documents after his or her death was a fairly straightforward process. The executor of the estate would, consistent with any specific instructions in the decedent's will, be authorised by a court of law to have banks and postal offices open the decedent's safety deposit boxes to determine their contents and aid with the administration of the estate. A recent Massachusetts appeals case, *Ajemian v. Yahoo!, Inc.*¹, highlights a growing conflict between traditional US probate law and outdated US electronic privacy laws, with respect to ownership and protection of a decedent's electronic communications.

Background facts

Around August or September of 2002, Robert Ajemian opened a Yahoo!, Inc. email account for his brother John; Robert intended that the two access and share the account as co-users. Yahoo!'s Terms of Service and Privacy Policy (TOS) at the time the account was first opened gave it the right to terminate a password and discard account content for any reason, in its sole discretion².

In August of 2006, John was struck and killed by a motor vehicle. At the time of his death, Yahoo!'s TOS included a clause excluding any third-party beneficiaries to the agreement and terminating any right of survivorship to Yahoo! email accounts. There was no evidence that this change in policy was ever communicated to the decedent or his brother³.

Beginning shortly after John's death, Marianne and Robert Ajemian, siblings of the decedent, tried repeatedly to gain access to their brother's email account. Initially, they sought access in

order to obtain the email addresses of John's friends to notify them of his death and memorial service. Subsequently, the plaintiffs (by then appointed as co-administrators of decedent's estate) sought the emails to help identify and locate assets and administer the decedent's estate.

Although Yahoo! initially agreed to turn over the information, provided the family produced a copy of John's birth and death certificates and other documentation, it later refused them access to the account or its contents, relying on the Stored Communications Act, 18 U.S.C. §§ 2701 et seq. (2006). Yahoo! interpreted that law to prevent it from disclosing decedent's emails, even to the administrators of his estate. Subsequent negotiations led the parties to a partial resolution, requiring Yahoo! to produce 'all subscriber records and email header information, not to include email content,' which Yahoo! produced pursuant to the judgment⁴.

Probate court decision

The co-administrators then filed a second complaint in Probate Court seeking the contents of the emails on the grounds that they were the property of John's estate and property of Robert as co-owner of the account. The probate judge dismissed the complaint on the grounds that the Yahoo! forum selection clause in the TOS required that any lawsuit be brought in California. The probate judge also concluded that *res judicata* barred the co-administrators from bringing their claim in a Massachusetts court, but not in a California court⁵.

Appeals Court decision

The Appeals Court of Massachusetts (Norfolk division) determined that there was a failure

in the record as to whether the forum selection clause had been 'reasonably communicated and accepted' by the email account users; therefore, Yahoo! had not met its burden of proof with respect to its contract claims. Further, since the co-administrators were not signatories to the Yahoo! contract, the court determined that it would not be reasonable to enforce the forum selection clause against them.

With respect to jurisdiction over this dispute, the Appeals Court favoured Massachusetts over California. The Appeals Court held that since John was domiciled in Massachusetts at the time of his death, 'Yahoo! [had] offered nothing to suggest that jurisdiction over assets of his estate [should be] anywhere other than Massachusetts.'⁶

The Appeals Court did not reach the question of whether Yahoo! was required to keep the emails confidential under the Stored Communications Act. The Court noted that Yahoo!'s request that the Probate Court's decision be affirmed under the Stored Communications Act had been raised only in a footnote and did not 'rise to [the] level of argument acceptable for appellate review.'⁷ The judgment was reversed and the matter remanded to the Probate Court for further proceedings consistent with the appellate opinion.

Comments: family law in the internet age

Recent news of apparent widespread electronic snooping by the US government has heightened concerns that internet service providers guard and protect their customers' electronic communications. On the other hand, in a world where most people in developed nations communicate and engage in

commerce largely via electronic means, cases like *Ajemian v. Yahoo!* highlight the often legitimate interests of non-governmental entities in gaining access to someone else's electronic communications.

Under Massachusetts law, as with most states, upon a person's death, that person's real and personal property passes to their devisees or heirs⁸. Further, the decedent's personal representative has the right and responsibility to take control of the decedent's assets to the extent necessary to handle the administration of the estate⁹. While it is unclear from the Appeals Court decision whether the decedent had a valid will upon his death, this dispute might have occurred with or without a will, given uncertainties under Massachusetts law as to whether email should be deemed property of an estate.

Yahoo! somewhat half-heartedly relied on the Stored Communications Act to deny the co-administrators access to the decedent's email records. Nevertheless, privacy rights are generally understood to cease upon a person's death¹⁰. And, personal effects such as letters and pictures that traditionally pass to heirs are just as likely as emails to contain personal information. The real concern for email service providers lies with potential liability for unauthorised disclosure to 'bad guys,' not family members, of private and protected electronic communications.

One lesson to be learned from this case is that the drafters of wills may need to focus their attention

on the central importance of electronic assets. Still, it could be another generation until the phrase 'personal effects' is recognised to include all of one's electronic communications and electronic documents.

In the meantime, courts will continue to struggle with this tension between electronic privacy rights and the legitimate interests of a decedent's estate administrators. As shown in this case, contract law provides only a partial solution, and may be part of the problem. Although 'a common law cause of action for invasion of privacy may cease upon death, general freedom of contract principles suggest that it may still be possible to create a contractual right of privacy which is effective to protect private information of deceased individuals.'¹¹ However, if a contract is deemed unlawful or contrary to public policy, it is unenforceable¹². Absent some record evidence that the decedent intended Yahoo!'s privacy policy to be binding on his estate, the Appeals Court likened Yahoo!'s privacy policy to a contract of adhesion, the kind a majority of internet users fail to read¹³. Consequently, the family's public policy interest in administering the estate outweighed Yahoo!'s inchoate interests in protecting the privacy of a deceased customer.

A change in venue, or even a change in email service provider, may have led to a different outcome. For instance, Indiana, Connecticut, Rhode Island, and Oklahoma have adopted laws granting estates certain property rights in the electronically stored

communications of decedents¹⁴. At the same time, many email service providers have policies in place that would have allowed the plaintiffs access to the decedent's emails¹⁵. Absent changes in federal or state electronic privacy laws, these types of probate court disputes may become increasingly common.

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1. *Ajemian v. Yahoo*, 987 N.E.2d 604 (Mass. App. Ct. 7 May 2013).
2. *Ibid.* at 607-08.
3. *Ibid.* at 608.
4. *Ibid.* at 608-09.
5. *Ibid.* at 609-10.
6. *Ibid.* at 613-15.
7. *Ibid.* at 616 (citing Mass. R. App. P. 16(a)(4), as amended by 367 Mass. 921 (1975)).
8. Mass. Gen. Laws ch. 190B, § 3-101 (2012).
9. Mass. Gen. Laws ch. 190B, § 3-709 (2012).
10. 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, 314 (2006-2007) (citations omitted).
11. *Ibid.* at 314 (citing Willard Packing Co. v. Javier, 899 A.2d 940, 947 (Md. Ct. Spec. App. 2006); State v. Pleva, 456 N.W.2d 359, 362 (Wis. 1990)).
12. *Ibid.*; see also *Ibid.* at 293-94.
13. See Tyler G. Tarney, 'A Call for Legislation to Permit the Transfer of Digital Assets at Death,' 40 Cap. U. L. Rev. 773, 778 (Summer 2012) (citation omitted).
14. Ind. Code § 29-1-13-1.1 (2010); Conn. Gen. Stat. § 45a-334a (2010); R.I. Gen. Laws § 33-27-3 (2007); Okla. Stat. tit. 58 § 269 (2010).
15. See Darrow & Ferrera at 294-295.

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