



State Privacy and Security Coalition, Inc.

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On behalf of NetChoice, a trade association of leading e-commerce businesses, and the State Privacy & Security Coalition, which is comprised of 20 leading communications, technology and media companies, we submit the following comments regarding the Uniform Law Commission's "Fiduciary Access to Digital Assets Act" draft dated May 31, 2013 ("May Draft").

We thank the drafters for their ongoing work to clarify the authority of fiduciaries over digital assets while at the same time respecting terms of service, copyright agreements, and federal privacy laws.

The Alternative A options in the May Draft take important steps in the correct direction. However, some changes are necessary to comply with federal law, specifically the Electronics Communications Privacy Act,¹ and to preserve terms of service and copyright agreements. We are concerned that without the changes below the May Draft likely create conflicts with federal law and false-expectations for account holders and fiduciaries with respect to a fiduciary's level of access and control over electronic communications.

1. Definition of Digital Property

Section 1:

(10) "Digital property" means the lawful ownership and management of and rights related to a digital account and digital asset. ~~The term does not include the contents of an electronic communication.~~ The term does not include the contents of an electronic communication.

Inclusion of the bracketed section is essential, because Section 3 seeks to extend full authority to the fiduciary over all digital property.

The comments suggest that it is designed to address issues under federal law concerning unauthorized access to computer and the content of electronic communications. However, including the "contents of an electronic communication" within the definition of "digital property" creates a major conflict with the Stored Communications Act, which expressly prohibits electronic communications service providers from disclosing the contents of an electronic communication absent the "lawful consent" of the originator, addressee or recipient of the email/communication(s).

We urge the drafting committee to remove the brackets from Section 1(10), definition of Digital Assets.

¹ 18 USC § 2701, *et al.*

2. Application of Electronic Communication to the Fiduciary Authority

Section 3:

(a) This [act] applies only to a grant of authority to a fiduciary ~~subject to copyright and other law as well as any applicable and enforceable terms of service agreement.~~

(b) A fiduciary with [legal] authority over digital property of an account holder has the same authority as the account holder. The exercise of authority by a fiduciary over digital property is not a transfer of the property. ~~The rights of the account holder are subject to copyright and other law as well as any applicable and enforceable terms of service agreement.~~

Currently, Section 3 limits the authority of fiduciaries over “digital property” to only those rights conferred by copyright law and terms of service agreements. If “electronic communications” are excluded from the definition of “digital property,” as we have suggested, then they do not receive the copyright and terms of service protection.

Because “electronic communications” are excluded from the definition of “digital property,” as we have suggested, to make it clearer that rights of access to such materials are still subject to copyright and terms of service protection, we would suggest amending section 3(a)-(b) to address copyright and terms of service agreements, which would decouple these issues from the definition of “digital property” by including “subject to copyright and other laws as well as any applicable and enforceable terms of service agreement.”

This change maintains the legal and terms of service protections for all content accessed by the fiduciary.

We therefore urge the drafters to move “subject to copyright and other law as well as any applicable and enforceable terms of service agreement” in Section 3(b) to 3(a) – moving lines 20-21 to line 17 of page 4.

3. Access to the Contents of Communications

It is important to understand that fiduciary access to the contents of electronic communications – as distinct from the contents of paper records – is governed by a federal statute called the Electronic Communications Privacy Act (“ECPA”), which imposes sharp limits on Internet companies’ ability to disclose the *contents* of communications. The contents of subscriber communications may not even be disclosed by an Internet company in response to judicial process in civil litigation. While ECPA contains limited exceptions that would allow disclosure of the contents of a subscriber communication, whether those exceptions allow fiduciary access is an entirely unsettled area of law.

If online service providers violate ECPA, they can potentially be sued for significant statutory damages and attorneys’ fees by third parties who communicated with the decedent and whose communications are stored in the decedent’s account.

Option B of the latest draft attempts to assume away the ECPA contents of communication issue by asserting that the fiduciary is acting with the consent of the subscriber. Express consent can most likely be established in a decedent’s will or if the decedent expressed a preference to share account information after death in signing up for service.

However, for decedents who die intestate and do not indicate a preference to share the contents of online communications, this is *a totally unsettled legal issue of federal law*. As a factual matter, these decedents did not actually consent. What is more, because this is a federal law issue, it is far from clear that a state law enacted years after ECPA will control how a courts rule on whether consent may be assumed.

We urge the drafting committee to adopt Alternative A for Section 4 and Section 5. We are concerned that Alternative B creates false expectations for account holders and fiduciaries, alike.

As mentioned previously, ECPA prevents online services from sharing the contents of communications unless they have the “lawful consent of the originator, or an addressee or intended recipient of such communication”.² But Alternative B is not likely to meet ECPA’s consent requirements, given that there is no requirement that such consent have been provided by the originator, addressee or recipient as the condition of the online service disclosing the content of the communication This puts online businesses in the tough spot of needing to disregard a state law in the face of a contradictory federal law. Moreover it prevents fiduciaries and account holders from the access they were expecting.

We also ask the drafters make the following changes to Alternative A to better address ECPA consent requirements:

Section 4 Alternative A:

SECTION 4. CONTROL OF DIGITAL PROPERTY AND ACCESS TO COMMUNICATIONS OF DECEDENT BY PERSONAL REPRESENTATIVE.

Except as a decedent otherwise provided by will or unless otherwise prohibited by a court, and subject to Section 3, a personal representative may:

- (1) exercise control over digital property of the decedent;
- (2) to the extent ~~not in~~consistent with 18 U.S.C. Section 2702(b)(~~3~~), obtain access to the contents of each ~~record~~ **electronic communication** controlled by an electronic communication service or a remote computing service sent ~~to~~ or received by the decedent; and
- (3) obtain other records of the decedent controlled by an electronic communication service or a remote computing service, including a log of the electronic address of each party with whom the decedent communicated.

We appreciate the creative approach of the drafting committee to parse the language of ECPA to address the matter of obtaining “legal consent.” Unfortunately, we do not agree that 18 USC § 2702(b)(1) necessarily allows disclosure of the contents of a communication to a fiduciary.

While § 2702(b)(1) allows disclosure of contents to an *agent* of “an addressee or intended recipient,” there is no statutory language, legislative history or case law interpreting section 2702(b)(1) which clarifies the meaning of “agent” and whether it would apply to a fiduciary of someone who has died.

² 18 USC § 2702(a)-(b)(3) “A person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage ... [without] the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.”

Indeed, a recent decision in federal district court for the Northern District of California refused to address this very issue, instead leaving it to the service provider to decide whether a decedent's estate could consent (via agency) on the decedent's behalf.

Rhode Island has addressed this conflict by requiring executors and administrators to obtain a court order declaring that they are an agent of the estate under ECPA and to indemnify providers before requiring service providers to provide the contents of communications.³ The ULC could implement the Rhode Island language by creating Section 4(4):

(4) access to the contents of electronic communications may be obtained under subsection (2) of this section by obtaining an order of the court of probate that by law has jurisdiction of the estate of such deceased person, designating such executor or administrator as an agent for the subscriber, as defined in the Electronic Communications Privacy Act, 18 U.S.C. § 2702(b), on behalf of his/her estate, and ordering that the estate shall indemnify the electronic mail service provider from all liability in complying with such order.

Without a court order and in the absence of further guidance, a provider who makes a unilateral decision to disclose such content is subject to litigation from third parties⁴ who disagree with this conclusion because the immunity provisions of ECPA, which apply when providers respond to subpoenas and court orders, may not apply to disclosure to an estate absent statutory authorization.

We therefore ask the drafters to remove "not in" and "(3)" in line 22 and "to" in line 24 and also replace "record" with "electronic communication" in line 23 of page 6. We ask the same changes would be carried forward to Alternative A of Section 5 of the May Draft -- remove "not in" and "(3)" in line 18 of and "to" in line 20 and also replace "record" with "electronic communication" in line 19 of page 8. Finally, we ask the drafters to consider adding the proposed (4) based on the existing Rhode Island law.

We thank you for considering our views and look forward to working with the ULC as it drafts this document.

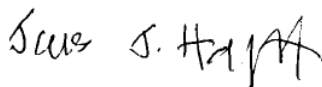
Sincerely,



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³ R.I. Gen. Law 33-27-3.

⁴ See, 18 U.S.C. § 2707 (a)