

NetChoice *Promoting Convenience, Choice, and Commerce on the Net*

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Rep. Peter C. Schwartzkopf, Speaker
Delaware House of Representatives
Dover, Delaware

June 12, 2014

RE: *Opposition to HB 345, An Act To Amend Title 12 Of The Delaware Code Relating To Fiduciary Access To Digital Assets And Digital Accounts*

Dear Speaker Schwartzkopf and members of the Delaware House of Representatives:

We urge you to oppose HB 345.

Families and estate managers of the deceased face a wide variety of company policies and conflicting state and federal laws when attempting to access the deceased's online accounts. And the growing use of social media provides even more challenges and opportunities for grieving families.

However, the approach taken in HB 345 could cause more harm than good -- partly by giving estate representatives the power to disregard the express privacy choices of Delaware's residents.

HB 345 grants fiduciaries with unfettered access to private online accounts and confidential communications and allows fiduciaries to ignore the wishes of the deceased. By granting this access, HB 345 allows fiduciaries to read private and/or confidential communications such as spousal communications or a deceased doctor's communications with their patients.

HB 345 also revokes some privacy choices made by the deceased -- overriding a user's wish to have all of their digital account deleted upon death or delivered only to a specific individual, i.e. not the fiduciary or executor.

There are several other reasons to consider more carefully the question of how families and estate managers may access the online communications of deceased persons.

There's the question of how online services can reconcile state disclosure mandates against existing federal privacy protections. As the committee knows, the Electronic Communications Privacy Act (ECPA) prevents online services from sharing the contents of communications unless they first obtain consent from the subscriber or sender.

Beyond ECPA, there are many other key questions about how to manage and legislate in the area of access to the digital legacy of deceased Americans. For example:

- Under what circumstances can the state authorize an executor to override privacy and deletion choices made by the user?

- Should online services be required to retain emails and documents for a minimum period -- despite the subscriber's express wishes to delete their account upon death?
- When must estate representatives obtain probate court orders to force online services to retain or divulge documents and communications?
- When states empower a representative to take control of an account, will that cause online services to violate their obligation to prevent unauthorized access?

Questions like these prompted online service providers and social networks to develop innovative features and choices to users. For example, Facebook's "Memorialize" feature respects user's privacy wishes while also letting their friends and family post messages and memories. Other services allow users to designate a next of kin.

But creating a patchwork of conflicting state and federal laws will obstruct this kind of innovation by online services. Worse, these laws would empower an estate attorney to disregard the privacy wishes of the departed, which would impact the interests of all Delaware residents using any form of Internet communications or document storage.

Instead, of heading down this path, Delaware should protect the choices and privacy interests of its citizens by looking to existing law¹ and requiring the fiduciary send the provider:

- A written request for access,
- A copy of the death certificate and copy of appointment certificate, and
- An order of the probate court designating the fiduciary as an agent as defined in ECPA, and ordering the estate to indemnify the provider from liability in complying with the order.

For all these reasons, we urge that you oppose HB 345.

Thank you for considering our views. Please let me know if I can provide further information.

Sincerely,



Carl Szabo
Policy Counsel, NetChoice

NetChoice is a trade association of e-Commerce and online businesses. www.netchoice.org

cc: Delaware House of Representatives

¹ Rhode Island law § 33-27-3