

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

Steve DelBianco, Executive Director
1401 K St NW, Suite 502
Washington, DC 20005
202-420-7482
www.netchoice.org



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Sen. Thomas K. Norment, Jr., Chairman
Courts of Justice Committee
Virginia Legislature
Richmond, Virginia

RE: Opposition to SB 913, Relating to powers of personal representatives; digital accounts

Dear Chairman Norment and Members of the Committee:

On behalf of our member companies and their millions of online users, we urge that you not support SB 913 in its current form and at the present time.

Every day, some Virginia residents die without having given enough thought to what happens to their email accounts and online documents after they're gone. Often, their families and estate managers face a wide variety of company policies and conflicting state and federal laws. And the growing use of social media provides even more challenges and opportunities for grieving families.

However, the approach taken in SB 913 could cause more harm than good -- partly by giving estate representatives the power to disregard the express privacy choices of Virginia residents.

There are several 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)¹ prevents online services from sharing the contents of communications unless they first obtain consent from the subscriber or sender.²

There is an argument that executors stand in the shoes of the deceased and are thus entitled to access their accounts if consistent with the intent of the deceased and if necessary to fulfill the executors' duties. However, this argument is untested and mandating access by executors would raise new questions.

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:

¹ 18 USC § 2702(a)-(b).

² *Id.* § 2702(a)-(b) "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."

- Some users choose their online services based on the strong privacy protections and data deletion policies in the *Terms of Service*. Shouldn't that be enough to indicate a user's wishes, or must the user also make affirmative choices about privacy and deletion options?
- 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 are what prompted the Uniform Law Commission (ULC) to begin drafting model state legislation for "Fiduciary Access to Digital Assets."³ This ULC project already has 18 pages of draft legislative language and will continue its work through the year.

This ULC project is focusing government and industry to address concerns of a growing number of your constituents, fed in part by media coverage like the recent Wall Street Journal article, "*Life and Death Online: Who Controls a Digital Legacy?*"

The Journal focused on the tragic example of a family managing the online legacy of their teenage daughter. While the article concerned a teenager, the majority of users are adults who expect their online privacy preferences to be respected—even after death. Today, social networks offer innovative options – like Facebook's "Memorialize" – that respect a user's privacy wishes while also letting their friends and family post messages and memories.

But creating a patchwork of conflicting state and federal laws will obstruct that 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 Virginia residents using any form of Internet communications or document storage.

We therefore urge that you not support SB 913 in its current form and at the present time. In addition to the present ULC project discussed above, there will undoubtedly be additional court decisions and discussions of federal privacy laws that will impact this issue.

For all these reasons, we believe it is best to defer consideration of SB 913 at this time. Thank you for considering our views. Please let me know if I can provide further information.

Sincerely,



Steve DelBianco
Executive Director, NetChoice
cc: Members of the Committee

NetChoice is a trade association of e-Commerce businesses who share the goal of promoting convenience, choice and commerce on the Net. More information about NetChoice can be found at www.netchoice.org

³ Uniform Law Commission, *Fiduciary Access to Digital Assets Act* (Jan. 18, 2013), available at <http://bit.ly/ulcdraft1-18-13>.