SB467

Measure Title:	RELATING TO FIDUCIARY ACCESS TO DIGITAL ASSETS.
Report Title:	Fiduciary; Digital Assets
Description:	Gives various types of fiduciaries access to the digital assets of the principal.
Companion:	
Package:	None
Current Referral:	CPN, JDL
Introducer(s):	KEITH-AGARAN, BAKER, DELA CRUZ, ENGLISH

Sort by Date		Status Text
1/23/2015	S	Introduced.
1/26/2015	S	Passed First Reading.
1/26/2015	S	Referred to CPN, JDL.
1/30/2015	S	The committee(s) on CPN has scheduled a public hearing on 02-05-15 9:00AM in conference room 229.

TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION

ON S.B. NO. 467

RELATING TO FIDUCIARY ACCESS TO DIGITAL ASSETS.

BEFORE THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION.

DATE: Thursday, February 5, 2015, at 9:00 a.m.
Conference Room 229, State Capitol

PERSON(S) TESTIFYING: PETER J. HAMASAKI, Commissioner
Commission to Promote Uniform Legislation

To Chair Baker, Vice Chair Taniguchi, and Members of the Committee:

My name is Peter Hamasaki and I am testifying on behalf of the Commission to Promote Uniform Legislation, which supports passage of the S. B. No. 467, Relating to **FIDUCIARY ACCESS TO DIGITAL ASSETS.**

The issue of fiduciary access to digital assets was considered by the Uniform Law Commission ("ULC") and in 2014, the ULC approved the Uniform Fiduciary Access to Digital Assets Act ("UFADAA") for consideration by the states.

The purpose of UFADAA is to modernize fiduciary law for the Internet age. Nearly everyone today has digital assets, such as documents, photographs, email, and social media accounts. Digital assets may have real value, both monetary and sentimental. However, Internet service agreements, passwords that can be reset only through the account holder's email, and federal and state privacy laws that do not contemplate the account holder's death or incapacity may prevent fiduciaries from gaining access to these valuable assets. UFADAA addresses the problem by ensuring that legally appointed fiduciaries can access, delete, preserve, and distribute digital assets as appropriate.

UFADAA incorporates five principles as follows:

- ***UFADAA gives account holders control.*** UFADAA allows account holders to specify whether their digital assets should be preserved, distributed to heirs, or destroyed.

- ***UFADAA treats digital assets like all other assets.*** If a fiduciary has the legal authority to inventory and dispose of all of a person's documents, it should not matter whether those documents are printed on paper, stored on a personal computer, or stored in the cloud. UFADAA provides a fiduciary with

access to both tangible and digital property.

- ***UFADAA provides rules for four common types of fiduciaries.*** The executor of a decedent's estate may have responsibilities altogether different from those of an agent under a living person's power of attorney. UFADAA provides appropriate default rules governing access for executors, agents, conservators, and trustees.

- ***UFADAA protects custodians and copyright holders.*** Under UFADAA, fiduciaries must provide proof of their authority in the form of a certified document. Custodians of digital assets that comply with a fiduciary's apparently authorized request for access are immune from any liability. A fiduciary's authority over digital assets is limited by federal law, including the Copyright Act and the Electronic Communications Privacy Act.

- ***UFADAA provides efficient uniformity for all concerned.*** Digital assets travel across state lines nearly instantaneously. In our modern mobile society, people relocate more often than ever. Because state law governs fiduciaries, a uniform law ensures that, regardless of the state, fiduciaries will have equal access to digital assets and custodians will benefit from uniform regulation.

Outline of UFADAA

Collectively, a person's digital property and electronic communications are referred to as "digital assets" and the companies that store those assets on their servers are called "custodians." Access to digital assets is usually governed by a restrictive terms-of-service agreement provided by the custodian. This creates problems when account holders die or otherwise lose the ability to manage their own digital assets.

A fiduciary is a trusted person with the legal authority to manage another's property, and the duty to act in that person's best interest. UFADAA concerns four common types of fiduciaries:

1. Executors or administrators of deceased persons' estates;
2. Court-appointed guardians or conservators of protected persons' estates;
3. Agents appointed under powers of attorney; and
4. Trustees.

UFADAA gives people the power to plan for the management and disposition of their digital assets in the same way they can make plans for their tangible property: by providing instructions in a will, trust, or power of attorney. If a person fails to plan, the same court-appointed fiduciary that manages the person's tangible assets can manage the person's digital assets, distributing those assets to heirs or disposing of them as appropriate.

Some custodians of digital assets provide an online planning option by which account holders can choose to delete or preserve their digital assets after some period of inactivity. UFADAA defers to the account holder's choice in such circumstances, but overrides any provision in a click-through terms-of-service agreement that conflicts with the account holder's express instructions.

Under UFADAA, fiduciaries that manage an account holder's digital assets have the same right to access those assets as the account holder, but only for the limited purpose of carrying out their fiduciary duties. Thus, for example, an executor may access a decedent's email account in order to make an inventory of estate assets and ultimately to close the account in an orderly manner, but may not publish the decedent's confidential communications or impersonate the decedent by sending email from the account. Moreover, a fiduciary's management of digital assets may be limited by other law. For example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not access the contents of communications protected by federal privacy laws.

In order to gain access to digital assets, UFADAA requires a fiduciary to send a request to the custodian, accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust. Custodians of digital assets that receive an apparently valid request for access are immune from any liability for good faith compliance.

UFADAA is an overlay statute designed to work in conjunction with a state's existing laws on probate, guardianship, trusts, and powers of attorney. Enacting UFADAA will simply extend a fiduciary's existing authority over a person's tangible assets to include the person's digital assets, with the same fiduciary duties to act for the benefit of the represented person or estate.

Proposed Amendments to Senate Bill No. 467

We note that Senate Bill No. 467 contains some differences from the final form of UFADAA as adopted by the ULC (which can be accessed at http://www.uniformlaws.org/Act.aspx?title=Fiduciary Access to Digital Assets), and we respectfully request that consideration be given to making conforming amendments so that custodians will be presented with a uniform set of laws relating to fiduciary access. Some of the amendments the Commission suggests are as follows:

1. In the title of the chapter to be added and the act's short title, insert "uniform" as section 1-24, Hawaii Revised Statutes, expressly recognizes uniform acts:

> **§1-24 Interpretation of uniform acts.** All provisions of uniform acts adopted by the State shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact

them.

2. Incorporate the definition of "content of an electronic communication" from UFADAA to shorten and simply sections -2, -3, -4 and -5.

3. Provide that access by a guardian or agent (as well as personal representative or trustee) is subject to the provision of -6(b). Section -6(b) allows an account holder to use an online feature to direct what the custodian of digital assets should do in the event of the account holder's death or incapacity. The account holder can direct the custodian to delete the digital assets, or provide an email address and phone number for a person who should be granted access to the digital assets. Google already offers such a feature called the "Inactive Account Manager." Section -6(b) allows the account holder's choice to be legally enforced, provided it was an actual choice requiring an affirmative act by the account holder and not part of the general terms-of-service agreement.

4. Consider revising -6(b) and -6(d) by combining them into a single provision similar to Section 8(b) of UFADAA for clarity.

5. Under Section 9(b)(2) of UFADAA, express authority over digital assets is required from the court, rather than just a plenary guardianship order, before a guardian may access a living ward's digital assets, and the Commission recommends that authority under a plenary guardianship order be deleted from section -7(b)(2).

We respectfully urge adoption of S.B. No. 467 with the amendments described herein, and the Commission would be happy to provide assistance with any amendments approved by your Committee. Thank you for your consideration of the Commission's comments.

Committee:	Committee on Commerce and Consumer Protection
Hearing Date/Time:	Thursday, February 5, 2015, 9:00 a.m.
Place:	Conference Room 229
Re:	Testimony of the ACLU of Hawaii **in Opposition to S.B. 467**, Relating to Fiduciary Access to Digital Assets

Dear Chair Baker and Members of the Committee on Commerce and Consumer Protection,

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in **opposition to** S.B. 467, Relating to Fiduciary Access to Digital Assets.

This bill – modeled on the Uniform Fiduciary Access to Digital Assets Act – does not sufficiently protect decedents' privacy, nor does it protect the privacy of surviving individuals who communicated with the decedent while s/he was alive. The bill sets the default at no privacy; that is, unless an individual spends the time and money to specify in a will that digital assets are private, those digital records are automatically disclosed (in full) to the decedent's estate and representative. Very few people have a traditional will (let alone a will that provides for disposition of digital assets), such that the default position for disposition of digital assets is quite important – not only for the decedent, but for anyone with whom the decedent communicated while alive.

S.B. 467 provides that if you do not hire an attorney and draft a will providing for the disposition of your digital assets when you die, then every digital file you ever possessed – that is, everything you ever e-mailed, uploaded, or saved in digital form – will become open and available to your fiduciary (most likely a family member) when you die. In the attached letter, the ACLU, along with the Electronic Frontier Foundation, the Center for Democracy and Technology, and Consumer Action, explain that the UFADAA improperly sets the default at no privacy; instead, the default should be that digital records remain private unless the decedent specifically authorizes otherwise.

As an alternative, the ACLU recommends the Privacy Expectation Afterlife and Choices Act ("PEAC") as a model bill. This model legislation is available at http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/.

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Thank you for this opportunity to testify.

Daniel M. Gluck
Legal Director
ACLU of Hawaii

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for 50 years.

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January 12, 2015

re: Civil Liberty Organizations Respond to the Uniform Fiduciary Access to Digital Assets Act

To Whom it May Concern:

The Uniform Law Commission (ULC) has proposed model legislation that grants a personal representative or other fiduciary access to digital content associated with an individual's estate or assets,[1] which could include a wide range of online content, bank accounts, photo albums, email accounts, text messages, voicemail, social media profiles, health and fitness data, and dating messages. As civil liberties organizations dedicated to protecting individuals' privacy and autonomy, we write to express our concerns with the model bill and to urge state legislatures to reject legislation based on its provisions.

As more of our lives are captured and stored digitally, we recognize the need for clear rules governing digital estates. However, any model that grants full access to all of a decedent's digital accounts and information by default fails to address the unique features of digitally stored content and creates acute privacy concerns. Below, we discuss several specific concerns with this model. Most importantly, we do not believe that a user's digital content, which implicates privacy concerns of both the decedent and third parties, should ever be disclosed by default. In addition, the ULC proposal may conflict with federal law protecting the privacy of electronic communications.

Fundamentally, we believe that users should have the autonomy to control who can access their accounts after death — be that through account controls, or in a formal will or estate plan. A digital estate regime should not provide default access to all digital content. To protect privacy, it should instead incentivize individual users to knowingly opt in to the sharing of their electronic communications especially when those communications involve the privacy rights of other parties, such as email communications sent by a sponsor of members of Alcoholics Anonymous.

In detail, we oppose this legislation for the following reasons:

Digital assets are not analogous to physical records.

The ULC model legislation is based on the premise that digital accounts are not fundamentally different than physical records with respect to estate law. However, given that online accounts

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[1] The Uniform Fiduciary Access to Digital Assets Act: This model legislation is intended to clarify the access rights of four different types of fiduciaries, outlining somewhat different rights for each: (i) the personal representative of a decedent's estate may access content "unless otherwise provided by the court or in the will of the decedent," or by the user's direction in an account control separate from the click through terms of service agreement (Section 8(b)) (ii) the conservator for an incapacitated person as granted authority by a court, (iii) the holder of a power of attorney may access content to the extent provided in the power of attorney agreement, and (iv) a trustee may access content owned by the trust "unless otherwise provided by the court or the settlor in the terms of a trust." Having specified these "rights of access," the model law then provides that a fiduciary that has the right (under Sections 3, 4, 5, or 6) has the lawful consent of the account holder for the custodian (the service provider) to divulge the content of an electronic communication. Finally, the model legislation also provides that a custodian *shall* comply with the fiduciary's request, if the fiduciary submits specified documentation of the fiduciary's authority (Section 8).
Full text and comments available here:
http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf

are often accessed in private and stored in password-protected formats, it is unlikely that consumers would expect anyone else to have the capacity to access their communications unless they have made a conscious choice to make that information available. Many digital assets differ significantly from physical estates in three important ways:

- Digital accounts often store content by default rather than as an active choice by the individual.
- In many cases there are no storage costs associated with saving digital content for the user, eliminating the burden of storing tremendous volumes of personal data.
- Consumer expectations are as variable as the huge array of digital accounts and cannot be governed by an unconditional rule.

First, content such as correspondence and photographs are generally preserved by default in the digital world. By comparison, we edit our brick-and-mortar lives in a manner that we aren't prompted to do in online accounts. Most people deliberately preserve only a small percentage of real-world correspondence or pictures for any significant period of time. For example, we actively decide what photos to place in an album or what letters to keep—and discard the rest. However, in the digital world, providers typically store content unless a user actively deletes it. Individuals may not even realize a file is still accessible because they haven't gone out of their way to look for it. That these accounts store tremendous amounts of data by default, often without any active choice from the user, makes their contents fundamentally different than physical assets.

Second, there is little incentive for users to delete or edit their digital assets as a result of practically unlimited storage space. Digital communications are often stored without cost to the consumer, and they are stored remotely without creating a physical burden or presence. Further, unlike a physical asset, online accounts outlast a user's change of physical location and may span decades. One account may hold un-curated communications from different eras of a user's life. Few people keep such complete physical records—which could include every financial transaction, communication, and photograph ever taken, not to mention the data collected by service providers like search histories and the metadata of files. The lack of burdens for storage of digital assets changes the calculus of how much, and what content an individual will keep throughout her life such that the sum total is far more comprehensive and personal than it would have been if she were required to store these materials physically.

Third, as the Supreme Court has noted, the Internet is "as diverse as human thought."[2] Digital content is not monolithic and consumers do not consider all of their stored content to be equally sensitive. Some information is deliberately shared with the public[3] or with a curated list of friends,[4] while communications like emails are sent to specific email addresses. And some information is kept completely private on password- protected accounts. Some users may expect an online billing account to be turned over to a fiduciary executing their estate, but may think very differently about access to their dating profile. Additionally, people understand that their

[2] *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

[3] For example, Twitter accounts and blogs are often, but not always, made public.

[4] Google Plus and Facebook are examples of services that allow users to vary privacy settings among groups of "friends."

consciously stored physical communications may be accessed when they die because those physical items must be disposed of to resolve an estate. But most people probably do not consider their online dating profiles or email accounts an "asset" necessary to resolve their estate after their death. Treating all of these equally under this law is not in line with the variance of consumer expectations among accounts and types of media.[5]

Digital Assets Implicate the Privacy of Third Parties.

The disclosure of digital communications data implicates the privacy not just of the decedent, but of all those who communicated with the deceased, many of whom will still be alive. While the ULC model bill is limited to providing access to fiduciaries of the estate — as opposed to heirs — in practice, a personal representative is likely to be a close family member, especially in the event of an intestate death (more than half of Americans die without a will). Consider an example of a deceased, closeted youth from a family that is hostile to LGBT persons; granting digital access to the deceased's online accounts would not just only the gay youth, it could implicate other closeted youth who communicated with the deceased as well. Similarly, the anonymity and confidentiality of counseling relationships and 12-step sponsorship would be compromised for all parties involved by granting access to the digital accounts of a deceased person. Today's email is often more analogous to phone calls than to physical letters because of its immediacy and the amount and type of information disclosed.

Turning over access to communications content compromises the privacy of all those who wrote to the decedent throughout their lives, and gives access to relatives who were never meant to see the communications. Once a representative has access to (and real-time control of) a decedent's accounts, there is no practical limitation on their ability to peruse every single email, IM, or text sent or received by the decedent.

Conservatorships Should Not be Included in Digital Estates Legislation.

One uniquely troubling aspect of UFADAA is its inclusion of conservators among the categories of personal representatives entitled to access an individual's digital accounts. Conservatorships are designed to assist a protected *living* person with financial or healthcare decisions, and as such implicate delicate questions about disability rights and personal freedom. While a conservatorship may warrant access to a protected person's specific financial or medical accounts—which can currently be accomplished by court order when the circumstances require—it would be a far more acute invasion of privacy to grant unfettered access to all of that individual's online accounts. Even where a conservator is allowed to manage the protected person's social decisions,[6] a grant of access to—and control of—all of that individual's

[5] Providers are starting to develop tools to help users to declare what should happen to their data in the event of death or incapacitation. For example, Twitter and Facebook will both delete accounts when presented with documentation of the passing of an account holder. Alternately, Facebook allows pages to be "memorialized," which preserves the individual's privacy settings as-is (meaning that individuals can see only the content that the deceased chose to share with them). Google has perhaps the most granular settings in its "Inactive Account Manager." This service enables individuals to designate a person to access their account after a certain period of inactivity, the content to which the person will have access, and what should happen to the copy the company has after this process takes place (i.e. whether should it be deleted). Google also warns that unless an election is made, it will be difficult for an heir to get access.

[6] "Social decisions" may include decisions related to marriage, sexual relationships, selection of residence, and persons who the individual can socialize with.

communications on various online platforms (including e-mail, social media, and dating profiles) is completely unwarranted. A presumption that control of a person's digital accounts is a routine aspect of conservatorship significantly impairs a disabled individual's personal autonomy and liberty. For that reason, we oppose any inclusion of conservatorships in a bill that is fundamentally designed to regulate assets of the deceased.

The ULC model legislation conflicts with the federal Electronic Communications Privacy Act.

The Electronic Communications Privacy Act (ECPA)[7] permits providers to voluntarily disclose certain non-content records to anyone other than a governmental entity, but it bars providers from voluntarily disclosing content to anyone except in very limited circumstances.[8] One relevant exception is that providers can voluntarily disclose the contents of a communication with the consent of the author or her "agent." ECPA does not define either "consent" or "agent." Yet the ULC model bill presumes that a fiduciary, without court approval, is entitled to full access to a decedent's estate, without any finding that such fiduciary is also an agent for purposes of federal law. Cloud service providers interpreting a ULC-based statute and ECPA will be forced to make a legal determination of whether executors or other court-appointed personal representatives are legally "agents" or have the lawful consent of the deceased subscriber. Given that the wrong choice means a potential violation of federal law, the ULC model bill could be wholly ineffective. If providers believe that following a state law mandate of access creates federal law liability, they are unlikely to comply absent a court order clearly designating them as an "agent" for purposes of ECPA.

For these reasons, we urge you not to pass this legislation.

We are not indifferent to the difficult situations that arise when loved ones cannot access records of deceased individuals. However, this legislation will negatively impact many individuals' ability to control their digitally stored content in a material way, potentially for generations to come. It is impossible to predict what the future of technology will bring to digital content, and whatever we do today must stand on the principle that individuals have power over their own data and all of the personal experiences recorded within it. We must create a system that allows and encourages individuals to control what happens to their records.

Sincerely,

CENTER FOR DEMOCRACY & TECHNOLOGY

ACLU AMERICAN CIVIL LIBERTIES UNION

EFF

consumer action
Education and advocacy since 1971

[7] 18 U.S.C. 2702 - Voluntary Disclosure Of Customer Communications Or Records

[8] "(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;; ... (3) with 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." 18 U.S.C. 2702(b).

Senate Committee on Commerce and Consumer Protection
Hawaii State Capitol, Room 229
February 5, 2015; 9:00 AM
415 South Beretania St.
Honolulu, HI 96813

Written Testimony of Jim Halpert
on behalf of the
State Privacy and Security Coalition, Inc.

Dear Chair Baker, Vice Chair Taniguchi and Members of the Committee:

Thank you very much for the opportunity to testify on Senate Bill 467 Relating to Fiduciary Access to Digital Assets.

The State Privacy & Security Coalition is comprised of 25 major technology and media companies and 6 trade associations representing companies in the technology, media and advetising sectors.

While we support the idea of clearly defining the rules governing access to a decedent's digital assets, we have serious concerns with this bill's complete disregard for the privacy of other persons who communicated with the decedent, as well as the privacy of the decedent, and its potential conflicts with federal law and the laws of other states that grant greater privacy protection to online accounts.

We note that a recent Zogby Interactive Poll found that more than 70% of Americans want their online communications to remain private after they pass.[1] This poll also found that a mere 15% of Americans think that their estate attorneys should have control over their private communications without their prior consent.

Nevertheless, this bill would effectively mandate disclosure of *all* of a decedent's online communications to his/her personal representative by default, ignoring both what Americans want and important privacy and confidentiality interests, such as those raised by confidential communications of third parties with a decedent who is a marriage counselor, alcohol or drug counselor, doctor, psychiatrist, therapist, or lawyer. By assuming that digital communications are the same as physical assets, such as a letter, S.B. 467 overlooks the fact that digital communications are fundamentally different than letters and should be protected differently. *See Riley v. California*, 134 S. Ct. 2473, 2489-2492 (2014) (pointing out the increased scope of privacy interests in digital materials on smart phones in holding that police generally may not, without a warrant, search digital information on a cellphone seized from an individual who has been arrested).

We are also concerned about the potential conflicts that this bill would create with federal law. There is a serious and totally unsettled question of law about whether the personal representative

[1] NetChoice, "Americans Overwhelmingly Want To Control Personal Privacy Even After Death", http://netchoice.org/library/decedent-information/.

access under this bill would be permitted under the federal Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2702, *et seq.*, which imposes criminal penalties and $1,000 per violation class action exposure against providers of electronic communications services that disclose contents of communication that the provider holds in storage. People who have sent emails to the deceased may be able to file class action lawsuits in federal court against service providers ordered to disclose account contents under this bill. While there are some exceptions under ECPA, the pertinent exceptions do not apply on their face to disclosures to personal representative or trust and estate lawyer, and it is very unclear whether they would allow the sort of disclosures S.B. 467 is designed to push.

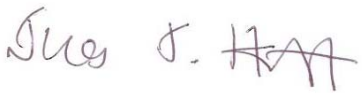
S.B. 467 contains an exception for disclosures prohibited by ECPA, but it would create a powerful disincentive against any service provider who receives a request for decedent communications raising this exception: The bill one-sidedly would require service providers to pay the attorneys' fees of the personal representative or executor if a court disagreed with their raising an ECPA objection. This puts a very heavy thumb on the scale against a service provider contesting a request under the bill and would incentivize service providers in Hawaii to give in to the request, instead of testing whether the disclosure is in fact prohibited by ECPA.

What is more, S.B. 467 creates conflicts with other state laws that grant protection to the privacy of decedents' online accounts by trying to trump those states laws. Where people who have communicated with the deceased live in those states, those people may bring a lawsuit against a service provider who would be required under S.B. 467 to provide unfettered access to the decedent's account, including access to all the decedent's communications.

For all these reasons, we respectfully request that you not move forward with S.B. 467. In the alternative, our Coalition – along with privacy advocates such as the ACLU – has been involved in the drafting of a model bill that respects the privacy choices of decedents: the Privacy Expectation Afterlife and Choices (PEAC) Act. We would support introduction of the PEAC Act as a substitute and are happy to discuss the PEAC Act with you further.

Please feel free to contact us if you have any questions or would like to discuss our concerns in greater detail. We thank you for addressing this important issue and would be happy to assist as the bill moves forward.

Respectfully submitted,



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