

SB641

Measure Title: RELATING TO DIGITAL MEDIA.

Report Title: Contracts; Digital Media; Uniform Probate Code

Description: Defines digital media account. Prohibits contracts that prohibit, limit, or restrict the transfer of a digital media account upon the account holder's death, and provides for the transfer of a decedent's digital media account to a devisee or heir. Effective July 1, 2015.

Companion:

Package: None

Current Referral: EDT/CPN, JDL

Introducer(s): KEITH-AGARAN, BAKER, ENGLISH, TOKUDA, Ihara, Shimabukuro



Committee: Committees on Economic Development and Technology and Commerce and Consumer Protection
Hearing Date/Time: Friday, February 6, 2015, 9:45 a.m.
Place: Conference Room 229
Re: Testimony of the ACLU of Hawaii in **Opposition to S.B. 641**, Relating to Digital Media

Dear Chair Wakai, Chair Baker, and Committee Members,

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in **opposition to S.B. 641**, Relating to Digital Media.

This bill does not sufficiently protect decedents’ privacy. 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. S.B. 641 provides that if someone does not hire an attorney and draft a will providing for the disposition of digital assets upon death, then all that person’s digital media – including racy photographs or other items the decedent may have wanted to remain private – will become the property of her/his heirs (often, the decedent’s children).

This bill may also be pre-empted by the Electronic Communications Privacy Act (ECPA), codified at 18 U.S.C. §§ 2701-2703, which governs all electronic communications and prevents disclosure to third parties absent the user’s consent.

As an alternative, the ACLU of Hawaii recommends that service providers be given incentives to offer, and for account users to make, affirmative choices specifying their preferences for disclosure of digital information after death. The ACLU recommends the Privacy Expectation Afterlife and Choices Act (“PEAC”) as a model bill (available at <http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/>).

In sum, the ACLU of Hawaii recommends that the Committees defer this measure.

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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MEMORANDUM IN OPPOSITION TO HAWAII SENATE BILL 641 DISPOSITION OF DIGITAL ACCOUNT FOR DECEASED PERSONS

The Motion Picture Association of America, Inc. (MPAA) and its member companies*, which are the largest producers and distributors of motion pictures in the U.S., oppose Hawaii Senate Bill 641. The bill prohibits any contracts governing a digital media account from prohibiting, limiting or restricting the transfer of a person's digital media account, upon the account owner's death. The bill requires that digital accounts be passed to devisees or heirs. But, this legislation fails to take into account federal copyright law, which provides that the copyright owner of any work has the exclusive right to set the terms and conditions of the exploitation and distribution of the work, including motion pictures and television programs. Copying and redistribution by a fiduciary of motion pictures stored in a digital account would violate federal copyright law.

Many digital assets are stored remotely and the values can be significant. According to an Intel study, Americans value their digital assets on average at \$55,000. Today, there is some uncertainty about the nature and scope of a fiduciary's ability to manage these accounts and assets upon the death or incapacity of the asset holder. However, a personal representative, as well as heirs, should be required to adhere to the federal copyright law.

The bill contains a general provision that anyone who receives a decedent's digital assets, through a will or through intestate succession, "shall be subject to the same terms and conditions as were applicable to the decedent at the time of death." However, this language is inadequate to ensure compliance with copyright law

For example, motion pictures and television programs that are stored in a cyberlocker or in another form of remote digital "cloud" storage facility and that have been lawfully purchased are subject to licenses, governing the right to share and/or copy the digital files, as well addressing public performances of those files, including charging others for on-line viewing. The provisions of SB 641, fail to include the specific

*MPAA member companies are: Paramount Picture Corporation, Sony Pictures Entertainment Inc;

obligations and responsibilities of copyright law or particular terms of service agreements that govern the account.

Additionally, billions of illegally copied motion pictures, sound recordings, computer programs and television programs reside within individuals' cyber-lockers. This infringement causes enormous harm to intellectual property owners. For example, the indictment of Megaupload, one such alleged service, estimates the loss from that service alone at \$500,000,000. While intellectual property owners and the federal government are attempting to address the harm from this theft, state law should not exacerbate the problem by allowing personal representatives to copy and distribute these infringing files of deceased persons.

For these reasons, MPAA and its member companies strongly urge the Hawaii Legislature defeat Senate Bill 641.

February, 2015