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,

[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).