



haynesboone

Setting precedent.

Tarrant County Bar Association Brown Bag Seminar  
Series: Trade Secrets, Confidential Information and  
Privileges in a Digital Age

*An Introduction to E-Claims*

Ben L. Mesches  
Haynes and Boone, LLP  
May 18, 2007

# Overview

- Computer Fraud and Abuse Act (18 U.S.C. § 1030)
- Mass Data Theft
- Common Law E-Torts
- Texas E-Claim Statutes



# Computer Fraud and Abuse Act (18 U.S.C. § 1030)

- Prohibited Conduct
- Scope of Civil Actions
- Damages



# Prohibited Conduct

- Unauthorized Access to Information on a *Protected Computer* (§ 1030(a)(2)(C))
- Unauthorized Access to a Protected Computer with *Intent to Defraud* (§ 1030(a)(4))



## Prohibited Conduct Cont'd

### Unauthorized Access Resulting in Damages to Protected Computer (§1030(a)(5(A))

- Without authorization, *knowing transmission* of a program or information and *intentionally* causing damages to a protected computer *or*
- Without authorization, *intentionally* accesses a protected computer and causes damage

## § 1030(a)(5) Cont'd

- *And* the Section (a)(5)(A) conduct caused
  - \$5000 Loss over 1 year;
  - Affects medical, examination or treatment;
  - Physical Injury;
  - Threat to public health or safety; or
  - Damage to governmental computer system

# What Civil Actions are Available?

## Section 1030(g):

Any person who *suffers damage or loss* by reason of *violation* of this section may *maintain a civil action* against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought *only* if the *conduct involves* 1 of the *factors* set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B). Damages for a violation involving only conduct described in subsection (a)(5)(B)(i) are limited to economic damages.

## ***Fiber Systems* – 470 F.3d 1150 (5th Cir. 2006)**

- Issue: Is there a civil action for violation of Section 1030(a)(4) – unauthorized access in furtherance of a fraud? Or is a civil action available only if there is a violation of Section 1030(a)(5)(A)?
- Holding: A civil action can be maintained if the conduct that violates (a)(4) involves (a)(5)(B) factors

## **Damage or Loss Requirement \$5000 Minimum (§ 1030(a)(5)(B)(i))**

Damage: *Any impairment to the integrity or availability of data, a program, a system or information (§ 1030(e)(8))*

- Example: Misappropriation of trade secrets or confidential information—value of the information
- Case: *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 118 F. Supp. 2d 1121 (W.D. Wash. 2000)

## Damage or Loss Requirement Cont'd

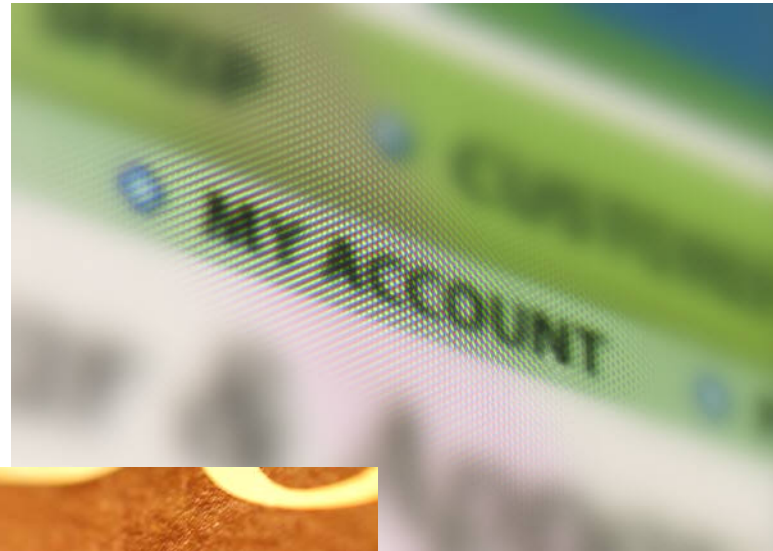
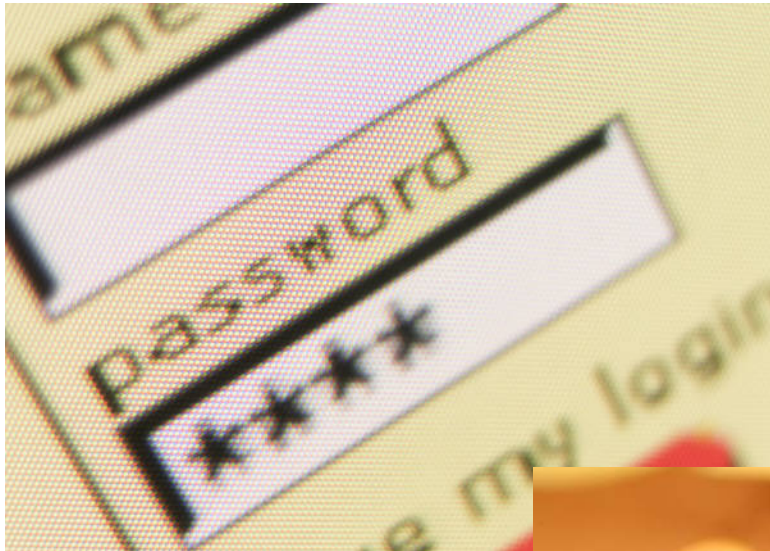
### Loss: Response Costs or Loss-of-Business Costs (§ 1030(e)(11))

- Example: Computer consultant or remedial/preventive measures
- Example: Loss of business and business goodwill
  - Cases: *Creative Computing v. Getloaded.com, LLC*, 386 F.3d 930 (9th Cir. 2004); *but see L-3 Comms. v. Robichaux*, 2007 U.S. Dist. LEXIS 16789 (E.D. La. Mar. 8, 2007)

# Statutory Defenses

- 2-Year Statute of Limitations
- No claim for negligent design or manufacture of computer hardware or software

# Liability for Mass Data Theft



# T.J. MAXX Data Theft

- Hackers stole data from at least 45 million credit and debit cards
- Largest data theft ever
- Encryption
- Maintaining Transaction Data too long
- Disclosure of Data Theft



# Potential Data Theft Claims

- No Federal Private Right of Action
- Federal Privacy Obligations
- State Law Claims
  - Consumer Protection Statutes
  - Data Security Statutes
  - Negligence
  - Fraud



# Claims Asserted in T.J. Maxx Suit

- Banks: Negligence (duty to safeguard, disclosure), Negligence Per Se (federal privacy protections—Gramm-Leach-Bliley), Contract, and Damages (reissue cards, fraudulent transactions)
- Customers: Negligence (duty to safeguard, disclosure) and Damages (credit monitoring, privacy, fraudulent charges, fear of identity theft)

# § 48.102 Tex. Bus. & Com. Code

## Identity Theft Enforcement and Protection Act

- A business has a **duty** to protect and **safeguard** sensitive personal info
- Duty to arrange for erasing, modifying, or shredding customer records
- Duty to provide **notice** of breach of system security
- Attorney General has a right of action



# E-Torts

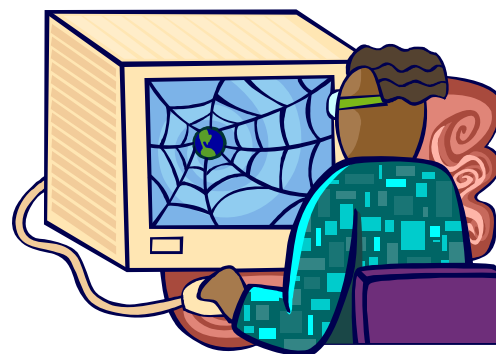
- Defamation/Disparagement
- Cyber Trespass
- Conversion



# Online Defamation

Reputation-damaging statements or publications can be made anywhere in cyberspace, potentially unlimited audience:

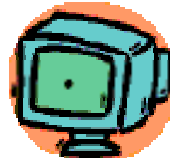
- Websites
- Blogs
- Message Boards
- Chat Rooms
- Email
- Online Journals
- Use of Hyperlinks



## **Third-Party Liability and Community Decency Act (47 U.S.C. § 230)**

- “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”
- Creates broad federal immunity for ISPs but if the computer service is actively involved in publication, no liability shield

# Cybertrespass



- Automated software programs (“Bots”)
- Emails
- Computer Viruses
- Denial of Service Attacks

# Cybertrespass Liability Theories

- Trespass to Chattels: Interference w/rights in movable *personal* property.
- Restatement Test: Intermeddling that harms the property or deprives owner of use.

# Cybertrespass Cases

- *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559 (Cal. App. 1996) (hacking)
- *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003) (email)
- *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Oh. 1997) (commercial email)
- *ebay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) ("bots")

## Conversion of Data or Information

- Test: Is there an unauthorized or wrongful exercise of dominion and control over personal property?
- *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283 (N.Y. 2007)—common law conversion applies to electronic data

## Texas Statutes

- E-Mail Solicitation (Chapter 46 of Tex. Bus. & Com. Code): provides for civil actions and DTPA-based liability but consider Federal CAN-SPAM (15 U.S.C. § 7701, 18 U.S.C. § 1037) preemption provision
- Breach of Computer Security (§ 33.02 of Penal Code)

## **Texas Statutes Cont'd**

- Identity Theft Enforcement and Protection Act (Chapter 48)—data security and identity theft
- Anti-Phishing Act (Chapter 48)—fraudulent emails and websites; authorizes civil action by ISPs and website owners; attorneys' fees and treble damages available

## **Texas Statutes Cont'd**

Consumer Protection Against Computer Spyware Act (Chapter 48 Tex. Bus. & Com. Code)—protects against use of “bots” that collect sensitive personal info, modify computer systems, and disable software—private right of actions for system operators/providers—attorneys’ fees and treble damages

# Questions?

