

The New Texas Anti-Phishing Act
By Charlie Jones
Haynes and Boone, LLP

Phishing is using deceptive websites and email to obtain sensitive personal information. Texas Business and Commerce Code Chapter 325, effective April 1, 2009, represents an attempt by the Texas legislature to curb this growing problem. The Act, officially known as the Anti-Phishing Act, prohibits the fraudulent use or possession of identifying information obtained via misleading websites, domain names, or e-mails.

Chapter 325 applies to persons who act with the intent to engage in conduct involving the fraudulent possession or use of another person's identifying information. The Act defines identifying information by cross-referencing section 32.51 of the Penal Code. This definition covers all information that alone or in conjunction with other information identifies a person. This information includes, but is not limited to, social security numbers, dates of birth, government identification numbers, unique biometric data, unique electronic information, and personal identification numbers.

Section 325.004 prohibits the creation or use of a web page or domain name for fraudulent purposes. The Act prohibits:

1. the creation of a web page or domain name and the representation of such as a legitimate online business without the business owner's permission; and
2. use the fraudulent web page, link, domain name, or other web page to request, solicit, or induce another to provide identifying information for a purpose the provider believes is legitimate.

Similarly, section 325.005 prohibits phishing via e-mail. A person may not send or cause to be sent electronic mail to an address held by a Texas resident that:

1. is falsely represented as being from a legitimate business;
2. refers or links the recipient to a website represented to be associated with a legitimate online business; and
3. either directly or indirectly induces, requests, or solicits the recipient to provide identifying information for a purpose that he believes is legitimate.

The Act provides a cause of action against a person who engages in the prohibited conduct. Three entities may bring a civil action under section 325.006:

1. a person who provides internet access to the public and is damaged by the prohibited acts;
2. a trademark or website owner who is damaged by the prohibited acts; and
3. the Texas attorney general.

A plaintiff who brings an action under this statute may recover the greater of actual damages or \$100,000 for each violation of the same nature. The Act defines acts of the same nature as those consisting of the same course of conduct regardless of the frequency of the conduct. If the prohibited conduct occurs often enough to constitute a pattern or practice a court

may treble an award of actual damages. Additionally, a prevailing plaintiff is entitled to its reasonable attorney's fees and court costs. Injunctive relief is also available.

The Act contains a safe-harbor provision for internet service providers. Section 325.003 states that the Act does not apply to a provider of telecommunication or internet service when the provider engages in the good faith transmission, routing, or temporary storing or caching of identifying information.

The Anti-Phishing Act represents the Texas Legislature's recognition of the seriousness of fraudulent internet use. Large statutory damages and a statutory award of attorney's fees and costs to a successful plaintiff create an incentive for internet access providers and trademark holders to pursue phishers via state court litigation.