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'Register.com'

Circuit Applies Contract and Trespass Law to E-Commerce

The Internet may be relatively new, but much of the law governing its use, and misuse, pre-dates by decades the first ever online search for legal precedent. While many applaud the privatization that has allowed for the rapid expansion of the Web, the very dynamism of its development has created challenges for our judiciary that continue to emerge.

This convergence of old and new, and the creative tension it generates, is illustrated in *Register.com, Inc. v. Verio, Inc.*,[1] a recent decision of the U.S. Court of Appeals for the Second Circuit. Addressing the technology challenge, the court applied old principles to new developments in e-commerce. Most notably, it addressed yet another set of circumstances in which the click of a mouse can result in an enforceable agreement, and the actions of one computer system can constitute trespass to another.

In *Register.com*, the court was confronted with four primary issues as it considered Verio's appeal from the imposition of a preliminary injunction against it: whether the "browsewrap"-like agreement at issue resulted in a valid contract; the impact of Internet public policy concerns on third-party rights to a contract involving the registration of domain names; to what extent a company can conduct robotic queries into another's computer system; and, last, the application of trademark infringement law to the facts at hand.

As to each issue, the court held for Register.com, concluding that the lower court did not err in finding that Register.com's online contract terms were binding on Verio; that public policy did not favor granting third-party rights in this instance; that Verio's robotic inquiries constituted trespass to chattels; and that Verio's actions amounted to trademark infringement.

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INTERNET ISSUES

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The Case

Register.com was authorized to register domain names on the Internet. Besides performing this function, the company also offered services in Web design and other aspects of Web site development. Its authority to act as a registrar was granted by the Internet Corporation for Assigned Name and Numbers (ICANN), a public benefit corporation created by the U.S. government, in the interests of Internet privatization, to administer the domain name system.

Applicants for registration submitted contact data to Register.com, known as "WHOIS" information. ICANN required that companies registering domain names make the WHOIS information available to the public, and not impose restrictions on the use of the information, except to prevent the electronic spamming of the registrants. ICANN's agreement with each of the companies that provided this domain name registration service also included a provision that there were to be no third-party beneficiaries to the agreement.

As required by its agreement with ICANN, Register.com allowed free public access to its WHOIS information. Register.com's responses to inquiries for this information included a legend that restricted the inquirers from using the data to conduct mass solicitations of business by e-mail, regular mail, or telephone. This language was more restrictive than was required by Register.com's agreement with ICANN, which only sought to prevent mass solicitation by e-mail.

Verio sold services related to Web site design and maintenance, competing with Register.com for that business. To find leads, Verio used an automated software program, or robot, to make multiple daily WHOIS queries to Register.com and other domain name registrars. It used the contact data it obtained to solicit business by e-mail, phone and regular mail from the newly registered entities, thus ignoring the restrictions Register.com sought to impose on the data's use.

In making its solicitations, Verio referred to the fact that the entities being contacted had recently registered a new domain name, leading several entities to believe that they were being contacted by Register.com or an affiliate.

Register.com sought to prevent Verio from the mass solicitations, arguing that Verio had agreed to Register.com's terms forbidding that practice, displayed in Register.com's legend each time it provided WHOIS data to Verio. Disagreeing, Verio argued that it never became contractually bound to Register.com

since its legend with the restrictive language did not appear until after Verio submitted its query and received the WHOIS data. Thus, according to Verio, it had never manifested its assent to the terms proposed by Register.com.

In deciding the issue, the court considered several "wrap" decisions that had previously considered the issue of online contract formation. These began with the "shrinkwrap" cases: Are buyers bound by license agreements that are placed inside the cellophane shrinkwrap of computer software boxes?

Courts have found these agreements enforceable as long as the consumer has an opportunity to review the license terms and then return the software if the terms are unacceptable.[2]

Inevitably, courts were next called on to apply contract analysis to online transactions. These typically involve "clickwrap" agreements: Before a computer user can install software, or access a Web-provided service, the user is required to click an "I agree" box, manifesting consent to the terms of the software license or service. If the user does not affirmatively click the "I agree" button, the software will not be installed, or the service will not be provided. To the extent that the proposed contract terms have been conspicuous, and the assent to those terms unambiguous, courts have been willing to find clickwrap agreements enforceable.[3]

An online variant is "browsewrap," in which terms are not immediately visible, and affirmative assent to those terms is not required. Rather, the user needs to scroll to the bottom of the Web page, or click a button to go to a different page, in order to view the terms. Thus, the user could acquire new software, or a service, without necessarily knowing that terms apply, and without clicking an "I agree" button. The reaction by courts to browsewrap has been mixed.[4]

Verio, of course, argued that since it had not been required to click an "I agree" button, it had never assented to Register.com's terms regarding mass solicitations, and, in fact, had rejected those terms. The court took a different view.

In holding for Register.com on the contract issue, the Second Circuit relied on the fact that, unlike typical consumers, Verio was a commercial entity that made multiple, successive inquiries of Register.com's database. As a result, Verio had become well aware of Register.com's terms. According to the court:

> While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract. It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.

Thus, the browsewrap-like terms presented in this case, combined with Verio's actions in repeatedly obtaining Register.com's contact information, constituted a valid offer and acceptance. Verio also asked the court to enforce the agreement between ICANN and Register.com, which did not allow the blanket prohibition against mass solicitation demanded by Register.com.

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The court declined, emphasizing that the Register.com-ICANN contract specifically disallowed third parties from seeking any entitlement pursuant to that contract. Public policy concerns did not mandate a different result. Rather, in the fast evolving world of the Internet, those concerns required giving ICANN the flexibility it needed to adjust its registrar agreement terms when necessary — without interference from courts enforcing third-party claims.

Notably, ICANN had not sought to enforce the terms of its agreement with Register.com. Rather, it submitted an amicus brief on Register.com's behalf, urging the court to reject Verio's demands as a third-party beneficiary.

Adding to yet another area of emerging computer law, the court additionally considered the application of trespass law in the context of computer systems.[5] In challenging the preliminary injunction, Verio argued that its multiple successive queries of Register.com's computer system by means of a search robot did not constitute trespass to chattels. The court disagreed, citing the lower courts finding that Verio's repeated inquiries consumed a significant portion of Register.com's computer system capacity. It was also likely that other companies would create and use similar programs, causing Register.com's system to crash.

On the final issue, involving allegations of trademark infringement, the court again upheld the preliminary injunction against Verio. The evidence presented to the lower court showed that once Verio obtained contact information from Register.com, Verio used it to solicit Web-related business from marketing prospects. In doing that, Verio explicitly referred to the prospect's registration with Register.com, or its recently registered domain name.

Many of the prospects assumed that they were being contacted by Register.com, and, believing that there was some problem with their registration, returned the call. These acts constituted a violation of the Lanham Act, and thus the court held that Verio was appropriately enjoined from using Register.com's marks.

In *Register.com*, old law has been dusted off and made to fit new circumstances. The result is a further clarification of contract principles as they apply to the world of e-commerce, particularly in the context of browsewrap agreements.

The opinion also adds to a growing line of cases that apply age-old trespass law to modern computer systems. In the quickly evolving world of the Internet, it appears that the only reliable constants will be the legal principles that govern its use.

1. 356 F. 3d 393 (2d Cir. N.Y. 2004), 2004 U.S. App. LEXIS 1074.
2. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F. 3d 1447 (7th Cir. 1996).
3. See, e.g., *Moore v. Microsoft Corp.*, 293 A.D. 2d 587 (2d Dept. 2002).
4. See, e.g., *Specht v. Netscape Communications Corp.*, 306 F 3d 17 (2d Cir. 2002) and *Ticketmaster Corp. v. Tickets.com, Inc*., No. CV99-7654, 2003 U.S. Dist. LEXIS 6483 (C.D. Cal. Aug. 10, 2000).
5. See, e.g., *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App 4th 1559 (Cal. Ct. App. 4th 1996) and *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342 (2003).

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