

**REGISTER.COM, INC. v. VERIO, INC.**  
**United States Court of Appeals for the Second Circuit**  
**356 F.3d 393 (2d Cir. 2004)**

LEVAL, Circuit Judge.

Defendant, Verio, Inc. (“Verio”) appeals from an order \* \* \* granting the motion of plaintiff Register.com, Inc. (“Register”) for a preliminary injunction. The court’s order enjoined Verio from \* \* \* accessing Register’s computers by use of automated software programs performing multiple successive queries; and \* \* \* using data obtained from Register’s database of contact information of registrants of Internet domain names to solicit the registrants for the sale of web site development services by electronic mail, telephone calls, or direct mail. We affirm.

**BACKGROUND**

This plaintiff Register is one of over fifty companies serving as registrars for the issuance of domain names on the world wide web. As a registrar, Register issues domain names to persons and entities preparing to establish web sites on the Internet. Web sites are identified and accessed by reference to their domain names.

Register was appointed a registrar of domain names by the Internet Corporation for Assigned Names and Numbers, known by the acronym “ICANN.” ICANN is a private, non-profit public benefit corporation which was established by agencies of the U.S. government to administer the Internet domain name system. To become a registrar of domain names, Register was required to enter into a standard form agreement with ICANN, designated as the ICANN Registrar Accreditation Agreement, November 1999 version (referred to herein as the “ICANN Agreement”).

Applicants to register a domain name submit to the registrar contact information, including at a minimum the applicant’s name, postal address, telephone number, and electronic mail address. The ICANN Agreement, referring to this registrant contact information under the rubric “WHOIS information,” requires the registrar \* \* \* to preserve it, update it daily, and provide for free public access to it through the Internet as well as through an independent access port, called port 43.

\* \* \* An entity making a WHOIS query through Register’s Internet site or port 43 would receive a reply furnishing the requested WHOIS information, captioned by a legend devised by Register, which stated,

By submitting a WHOIS query, you agree that you will use this data only for lawful purposes and that under no circumstances will you use this data to . . . support the transmission of mass unsolicited, commercial advertising or solicitation via email.

The terms of that legend tracked \* \* \* the ICANN Agreement in specifying the restrictions Register imposed on the use of its WHOIS data. Subsequently, as explained below, Register amended the terms of this legend to impose more stringent restrictions on the use of the information gathered through such queries.

In addition to performing the function of a registrar of domain names, Register also engages in the business of selling web-related services to entities that maintain web sites. These services cover various aspects of web site development. In order to solicit business for the services it offers, Register sends out marketing communications. Among the entities it solicits for the sale of such services are entities whose domain names it registered. However, during the registration process, Register offers registrants the opportunity to elect whether or not they will receive marketing communications from it.

The defendant Verio, against whom the preliminary injunction was issued, is engaged in the business of selling a variety of web site design, development and operation services. In the sale of such services, Verio competes with Register's web site development business. To facilitate its pursuit of customers, Verio undertook to obtain daily updates of the WHOIS information relating to newly registered domain names. To achieve this, Verio devised an automated software program, or robot, which each day would submit multiple successive WHOIS queries through the port 43 accesses of various registrars. Upon acquiring the WHOIS information of new registrants, Verio would send them marketing solicitations by email, telemarketing and direct mail. To the extent that Verio's solicitations were sent by email, the practice was inconsistent with the terms of the restrictive legend Register attached to its responses to Verio's queries.

At first, Verio's solicitations addressed to Register's registrants made explicit reference to their recent registration through Register. This led some of the recipients of Verio's solicitations to believe the solicitation was initiated by Register (or an affiliate), and was sent in violation of the registrant's election not to receive solicitations from Register. Register began to receive complaints from registrants. Register in turn complained to Verio and demanded that Verio cease and desist from this form of marketing. Register asserted that Verio was harming Register's goodwill, and that by soliciting via email, was violating the terms to which it had agreed on submitting its queries for WHOIS information. Verio responded to the effect that it had stopped mentioning Register in its solicitation message.

In the meantime, Register changed the restrictive legend it attached to its responses to WHOIS queries. \* \* \* [I]ts new legend undertook to bar mass solicitation "via direct mail, electronic mail, or by telephone." \* \* \* Register wrote to Verio demanding that it cease using WHOIS information derived from Register not only for email marketing, but also for marketing by direct mail and telephone. Verio ceased using the information in email marketing, but refused to stop marketing by direct mail and telephone.

Register brought this suit on August 3, 2000, and moved for a temporary restraining order and a preliminary injunction. \* \* \* On December 8, 2000, the district court entered a preliminary injunction. The injunction barred Verio from \* \* \* "[a]ccessing Register.com's computers and computer networks in any manner, including, but not limited to, by software programs performing multiple, automated, successive queries, provided that nothing in this Order shall prohibit Verio from accessing Register.com's WHOIS database in accordance with the terms and conditions thereof \* \* \* ." Verio appeals from that order.

## DISCUSSION

**A. Verio's enforcement of the restrictions placed on Register by the ICANN Agreement**

Verio conceded that it knew of the restrictions Register placed on the use of the WHOIS data and knew that, by using Register's WHOIS data for direct mail and telemarketing solicitations, it was violating Register's restrictions. Verio's principal argument is that Register was not authorized to forbid Verio from using the data for direct mail and telemarketing solicitation because the ICANN Agreement prohibited Register from imposing any "terms and conditions" on use of WHOIS data, "except as permitted by ICANN-adopted policy," which specified that Register was required to permit "any lawful purpose, except . . . mass solicitation[ ] via email."

Register does not deny that the restrictions it imposed contravened this requirement of the ICANN Agreement. Register contends, however, that the question whether it violated \* \* \* its Agreement with ICANN is a matter between itself and ICANN, and that Verio cannot enforce the obligations placed on Register by the ICANN Agreement. \* \* \* ICANN intervened in the district court as an amicus curiae and strongly supports Register's position, opposing Verio's right to invoke Register's contractual promises to ICANN. \* \* \* We are persuaded by the arguments Register and ICANN advance. \* \* \*

**B. Verio's assent to Register's contract terms**

Verio's next contention assumes that Register was legally authorized to demand that takers of WHOIS data from its systems refrain from using it for mass solicitation by mail and telephone, as well as by email. Verio contends that it nonetheless never became contractually bound to the conditions imposed by Register's restrictive legend because, in the case of each query Verio made, the legend did not appear until after Verio had submitted the query and received the WHOIS data. Accordingly, Verio contends that in no instance did it receive legally enforceable notice of the conditions Register intended to impose. Verio therefore argues it should not be deemed to have taken WHOIS data from Register's systems subject to Register's conditions.

Verio's argument might well be persuasive if its queries addressed to Register's computers had been sporadic and infrequent. If Verio had submitted only one query, or even if it had submitted only a few sporadic queries, that would give considerable force to its contention that it obtained the WHOIS data without being conscious that Register intended to impose conditions, and without being deemed to have accepted Register's conditions. But Verio was daily submitting numerous queries, each of which resulted in its receiving notice of the terms Register exacted. Furthermore, Verio admits that it knew perfectly well what terms Register demanded. Verio's argument fails.

The situation might be compared to one in which plaintiff P maintains a roadside fruit stand displaying bins of apples. A visitor, defendant D, takes an apple and bites into it. As D turns to leave, D sees a sign, visible only as one turns to exit, which says "Apples—50 cents apiece." D does not pay for the apple. D believes he has no obligation to pay because he had no notice when he bit into the apple that 50 cents was expected in return. D's view is that he never agreed to pay for the apple. Thereafter, each day, several times a day, D revisits the stand, takes an apple, and eats it. D never leaves money.

P sues D in contract for the price of the apples taken. D defends on the ground that on no occasion did he see P's price notice until after he had bitten into the apples. D may well prevail as to the first apple taken. D had no reason to understand upon taking it that P was demanding the payment. In our view, however, D cannot continue on a daily basis to take apples for free, knowing full well that P is offering them only in exchange for 50 cents in compensation, merely because the sign demanding payment is so placed that on each occasion D does not see it until he has bitten into the apple.

Verio's circumstance is effectively the same. Each day Verio repeatedly enters Register's computers and takes that day's new WHOIS data. Each day upon receiving the requested data, Verio receives Register's notice of the terms on which it makes the data available—that the data not be used for mass solicitation via direct mail, email, or telephone. Verio acknowledges that it continued drawing the data from Register's computers with full knowledge that Register offered access subject to these restrictions. Verio is no more free to take Register's data without being bound by the terms on which Register offers it, than D was free, in the example, once he became aware of the terms of P's offer, to take P's apples without obligation to pay the 50 cent price at which P offered them.

Verio seeks support for its position from cases that have dealt with the formation of contracts on the Internet. \* \* \* Verio, however, cannot avail itself of the reasoning of [*Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002)]. In *Specht*, the users in whose favor we decided visited Netscape's web site one time to download its software. Netscape's posting of its terms did not compel the conclusion that its downloaders took the software subject to those terms because there was no way to determine that any downloader had seen the terms of the offer. There was no basis for imputing to the downloaders of Netscape's software knowledge of the terms on which the software was offered. This case is crucially different. Verio visited Register's computers daily to access WHOIS data and each day saw the terms of Register's offer; Verio admitted that, in entering Register's computers to get the data, it was fully aware of the terms on which Register offered the access.

Verio's next argument is that it was not bound by Register's terms because it rejected them. Even assuming Register is entitled to demand compliance with its terms in exchange for Verio's entry into its systems to take WHOIS data, and even acknowledging that Verio was fully aware of Register's terms, Verio contends that it still is not bound by Register's terms because it did not agree to be bound. In support of its claim, Verio cites a district court case from the Central District of California, *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000), in which the court rejected Ticketmaster's application for a preliminary injunction to enforce posted terms of use of data available on its website against a regular user. Noting that the user of Ticketmaster's web site is not required to check an "I agree" box before proceeding, the court concluded that there was insufficient proof of agreement to support a preliminary injunction. *Id.* at \*5.

We acknowledge that the *Ticketmaster* decision gives Verio some support, but not enough. In the first place, the *Ticketmaster* court was not making a definitive ruling rejecting Ticketmaster's contract claim. It was rather exercising a district court's discretion to deny a preliminary injunction because of a doubt whether the movant had adequately shown likelihood of success on the merits.

But more importantly, we are not inclined to agree with the *Ticketmaster* court's analysis. There is a crucial difference between the circumstances of *Specht*, where we declined to enforce Netscape's specified terms against a user of its software because of inadequate evidence that the user had seen the terms when downloading the software, and those of *Ticketmaster*, where the taker of information from *Ticketmaster*'s site knew full well the terms on which the information was offered but was not offered an icon marked, "I agree," on which to click. Under the circumstances of *Ticketmaster*, we see no reason why the enforceability of the offeror's terms should depend on whether the taker states (or clicks), "I agree."

We recognize that contract offers on the Internet often require the offeree to click on an "I agree" icon. And no doubt, in many circumstances, such a statement of agreement by the offeree is essential to the formation of a contract. But not in all circumstances. 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.

Returning to the apple stand, the visitor, who sees apples offered for 50 cents apiece and takes an apple, owes 50 cents, regardless whether he did or did not say, "I agree." The choice offered in such circumstances is to take the apple on the known terms of the offer or not to take the apple. As we see it, the defendant in *Ticketmaster* and *Verio* in this case had a similar choice. Each was offered access to information subject to terms of which they were well aware. Their choice was either to accept the offer of contract, taking the information subject to the terms of the offer, or, if the terms were not acceptable, to decline to take the benefits. \* \* \*