

Protecting Online Databases from Robotic Attack

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On January 23, 2004, in *Register.com, Inc. v. Verio, Inc.*,¹ the Second Circuit upheld a preliminary injunction, issued more than three years earlier, that prohibited Verio, Inc. from using software robots to harvest contact information from Register.com, Inc.'s WHOIS database of domain name registrants for the purpose of telemarketing those registrants via e-mail, fax or phone.

Register.com, Inc. is a domain name registrar, accredited by the Internet Corporation for Assigned Names and Numbers (ICANN). Verio, Inc. is not an accredited registrar, but provides various ancillary Internet services, such as Web hosting and Web site development, that potentially are of use to a consumer with a newly registered domain name. In Sep-

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tember 1999, Verio began what it referred to internally as "Project Henhouse," in which it used various software routines, or "robots," to generate a list of every domain name registered within the previous twelve hours and then to query the WHOIS database of each respective registrar to harvest the contact information of each new registrant. That contact information was then fed into a telemarketing computer system, and, within hours of a domain name being registered, Verio would telemarket the new registrant via unsolicited e-mail or telephone call.

After receiving numerous complaints from irate customers who believed that Register.com either was affiliated with the Verio telemarketers or had sold the personal contact information to Verio, Register.com complained to Verio, demanding that it stop accessing the WHOIS database for telemarketing purposes. When Verio refused to stop, Register.com filed a lawsuit in New York district court and sought a temporary restraining order and preliminary injunction. The causes of action included trespass to chattels and breach of contract under New York law as well as federal unfair competition and Computer Fraud and Abuse Act claims. After the parties agreed to the temporary restraining order, the district court allowed expedited discovery and granted the preliminary injunction, finding a likelihood of success on all counts.²

The unfair competition claim was based upon Verio's telemarketing scripts and e-mail templates,

which, in conjunction with the short time between registration and telemarketing, were held likely to create an impression that Verio's services were affiliated with or sponsored by Register.com.³ The breach of contract claim was premised on the terms of use for Register.com's WHOIS database, which prohibited use of the contact data for the purposes of spam and other telemarketing by phone or fax.⁴ These prohibitions were also the basis for the trespass to chattels and Computer Fraud and Abuse Act claims, which required a showing of unauthorized access (or access exceeding authorization) of Register.com's computer systems.⁵ The district court's injunction prohibited Verio from:

1. Using the REGISTER.COM or FIRST STEP ON THE WEB trademarks, or any similar designation, in connection with the advertisement of Verio's services;

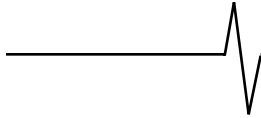
2. Making any statement or committing any act likely to cause third parties to believe that Verio's services were sponsored by or had the approval or endorsement of Register.com;

3. Accessing Register.com's computers using software robots or in any manner inconsistent with the terms of use; or

4. Further using any of the contact information previously harvested by Verio's software robots for telemarketing purposes.⁶

Verio's appeal was argued on January 21, 2001, but the court's opinion did not issue until more than three years later due to an unusual course of events. After oral argument, the three-judge panel, consisting of Judges Leval, Parker and Keenan (sitting by designation), unanimously voted to affirm the injunction. The task of drafting the opinion was assigned to Judge Parker.⁷ Some time thereafter, Judge Parker changed his mind as to some of the claims and produced a draft opinion that would have reversed the district court on portions of the injunction, although the prohibition on using software robots to harvest WHOIS data would have remained. Shortly after distributing his draft opinion to the panel in the hope of persuading the other judges to adopt his position, Judge Parker died. The other judges were not persuaded, however, and pursuant to Local Rule 0.14(b) of the Second Circuit, the appeal subsequently was decided unanimously by the two surviving judges. Judge Leval wrote the panel's opinion, and, out of respect for Judge Parker, included his draft opinion as an appendix to the official panel opinion.⁸

On appeal, Verio repeated the arguments rejected by the district court. First, Verio argued that the restrictions against telemarketing by phone and



fax in Register.com's terms of use were unenforceable against Verio because they exceeded the restrictions allowed in Register.com's accreditation agreement with ICANN. In rejecting this argument, the Second Circuit noted that the ICANN agreement contained a valid prohibition on third-party beneficiaries, precluding Verio from attempting to enforce the restrictions on Register.com's access controls, and further observed that there was a procedure available to Verio through ICANN to raise any objections to Register.com's compliance with the terms of the accreditation agreement. Moreover, ICANN filed an amicus brief requesting that the court not allow Verio to use the accreditation agreement as a defense and thereby circumvent the ICANN grievance process. Perhaps most damaging to Verio's policy position, the court also noted that ICANN had subsequently changed the accreditation agreement to allow the exact prohibitions on telemarketing contained in Register.com's terms of use.⁹

Next, Verio argued that it had not assented to Register.com's terms of use because the terms of use restrictions did not appear until after each query to the database was made. Indeed, the restrictions first appeared at the top of the search results page. The court rejected this argument because, even if it were persuasive as to a one-time query or sporadic use of the database, the record showed that Verio had submitted numerous queries on a daily basis, which put Verio on notice of the terms of use. Indeed, Verio had admitted that it knew of the restrictions in the terms of use.¹⁰

Under these circumstances, the Second Circuit found assent to the terms of use, distinguishing its recent ruling in *Specht v. Netscape Communications Corp.*¹¹ In *Specht*, the Second Circuit held that no contract was created where Netscape posted terms of an agreement at the bottom of a Web page on the Web site from which users could download the software. Because users would not see the terms if they did not scroll down the page, and because under the facts of that case there was no reason for the users to do so, the court held that there was no evidence that users should have been aware of the terms of the agreement. Unlike in *Specht*, the Second Circuit reasoned, Verio was not engaged in a one-time download from a Web page with hidden terms but had visited Register.com's computers daily, saw the terms of Register.com's offer and admitted knowing of the terms.¹²

The court also rejected the reasoning of the California district court in *Ticketmaster Corp. v. Tickets.com, Inc.*¹³ The *Ticketmaster* court found insufficient proof of assent to be bound by an offer on the ground that the Web site at issue did not force users to check an "I agree" box before proceeding. In refusing to fol-

low *Ticketmaster*, the Second Circuit noted that express agreement to be bound is not always required under contract law, and declined to create a higher standard in the rapidly-evolving field of e-commerce.¹⁴

Turning to the trespass to chattels claim, Verio argued that there was an insufficient showing of harm to Register.com's computer systems from the robotic activity. The Second Circuit upheld the district court's finding that even though Verio's actions did not incapacitate the system, the potential aggregate activity if other Internet service providers were allowed to use similar robots was a cognizable harm under trespass to chattels and sufficient to justify the injunction.¹⁵

Finally, with respect to the Lanham Act claim, the Second Circuit upheld the injunction on two grounds. First, the court noted that in early calls to Register.com's customers, Verio's telemarketing scripts explicitly mentioned the customer's registration with Register.com, and that the evidence showed that a number of registrants believed the telemarketer was affiliated in some way with Register.com.¹⁶ Second, the court upheld the district court's holding that even after ceasing to expressly use Register.com's name, Verio's telemarketers, calling shortly after registration of the domain name, left misleading messages stating that the call was regarding the recently registered domain name and asking to be called back. The evidence showed that callers receiving these messages thought they were being contacted about a problem with their registration and called back only to find out that the call was not about the registration at all but was a telemarketing call to sell ancillary services.¹⁷

By upholding the district court's injunction, the Second Circuit has validated a new arsenal of weapons against unauthorized data-harvesting from databases accessible on the Internet. The mere act of making such databases available does not automatically render such databases, or the computer systems on which they reside, public property. Rather, database owners retain the ability to restrict access to these systems and have the legal tools to enforce those restrictions. □

1. *Register.com, Inc. v. Verio, Inc.*, 2004 U.S. App. LEXIS 1074 (2d Cir. 2004) ("Register.com II").

2. *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000) ("Register.com I").

3. *Id.* at 254-55.

4. *Id.* at 245-46.

5. *Id.* at 249-253.

6. *Id.* at 255.

7. *Register.com II*, 2004 U.S. App. LEXIS 1074, at *2 n.1.

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