

**EXHIBIT D**

COPY

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
REGISTER.COM, INC.,

Plaintiff,

-against-

00 Civ. 5747  
(Judge Jones)

VERIO, INC.,

Defendant.  
-----X

August 24, 2000  
9:15 A.M.

Deposition of Plaintiff, by  
RICHARD FORMAN, taken by Defendant, pursuant  
to Notice, at the offices of Morrison &  
Foerster LLP, 1290 Avenue of the Americas, New  
York, New York 10104-0012 before Arta  
Pascullo, a Registered Professional Reporter  
and Notary Public within and for the State of  
New York.



ARTA PASCULLO, PRES.

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A P P E A R A N C E S:

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IT IS HEREBY STIPULATED AND AGREED by  
and between the attorneys for the respective  
parties herein that the sealing, filing and  
certification of the within deposition be waived;  
that such deposition may be signed and sworn to  
before any officer authorized to administer an  
oath, with the same force and effect as if signed  
and sworn to before a judge of this court.

IT IS FURTHER STIPULATED AND AGREED  
that all objections, except as to the form, are  
reserved to the time of the trial.

1 R. Forman

2 legal conclusion.

3 Q. I'm not asking for your lawyer's  
4 judgment. I'm asking if you have any other  
5 information.

6 A. Can you rephrase the question?

7 Q. Sure. Have you had any  
8 conversations with ICANN in which ICANN has  
9 given an interpretation of the provisions of  
10 the accreditation agreement governing access  
11 to the WHOIS database?

12 MR. BROWN: Objection on the  
13 ground of relevance. I also would like  
14 a time period quantified, please.

15 Q. Let's limit the time period for  
16 the next line of questioning to the period  
17 after the accreditation agreement was  
18 finalized. I believe that date is November  
19 12, 1999?

20 A. Now, can you rephrase the  
21 question? I understand the time period. What  
22 is the question?

23 Q. Have you had any conversations  
24 with ICANN about the interpretation of those  
25 provisions?

1 R. Forman

2 MR. BROWN: Objection on the  
3 grounds of relevance.

4 You may answer.

5 MR. JACOBS: Let me back up.  
6 Forget it. Go ahead.

7 Q. Answer the question. You are in  
8 the corporate sense now.

9 A. In the corporate sense?

10 Q. Yes.

11 A. I believe that we've had many  
12 conversations with ICANN about the  
13 accreditation agreement. And I believe that  
14 the WHOIS license is probably one of the  
15 things that were discussed.

16 Q. Can you summarize the substance  
17 of those communications with reference to the  
18 WHOIS database?

19 A. I think that -- can I summarize?

20 Q. Would it help to break it down  
21 into its component issues? I believe there  
22 are at least a couple with respect to the  
23 WHOIS database.

24 One is bulk access provisions  
25 regarding access to the WHOIS database.

1 R. Forman

2 Second issue is the specific provisions that  
3 we contend are at issue in this litigation,  
4 that is the public access to the WHOIS  
5 database.

6 Now, are there any other issues  
7 regarding issues to the WHOIS database; that  
8 level of extraction that you talked about with  
9 ICANN.

10 A. I don't believe so.

11 Q. So now let's talk about the bulk  
12 access provisions. You have -- as a company,  
13 you've taken the position that you can limit  
14 bulk access to preclude bulk access for people  
15 who want to market using the bulk form of  
16 WHOIS database, correct?

17 MR. BROWN: Can I have that read  
18 back?

19 (Record read.)

20 A. I can't acknowledge the question  
21 that broadly. What I do know is that there is  
22 an incident with one company that wanted to  
23 license our database that was a confirmed  
24 spammer. And we had an assurance from them  
25 that they would not spam our customer base as

1 R. Forman

2 part of licensing the agreement.

3 Q. And?

4 A. And?

5 Q. Was that the only position you've  
6 taken with respect to access under the bulk  
7 access provisions?

8 A. I know that there is a contract.  
9 I have not read the contract. And I know that  
10 we are -- I know that we, to date, have not  
11 licensed the data to any entity. But I know  
12 for sure that we will not license it to a  
13 spammer.

14 Q. Again, just so there are no trick  
15 questions, we have documents about a bunch of  
16 these incidents with companies wanting to  
17 license bulk access.

18 Do you want to see them first or  
19 do you recall, in fact, that there is more  
20 than one company that has sought bulk access?

21 A. I'm aware that there is more than  
22 one company that has sought bulk access.

23 Q. You are also aware that you have  
24 not licensed anyone who has asked for it;  
25 correct?



1 R. Forman

2 A. As I said before, yes.

3 Q. You are also aware that in  
4 addition to the issue of marketing, that  
5 you've asked for multi-million dollar bonds  
6 from the companies that have asked to license  
7 data on a bulk access basis, correct?

8 A. I'm aware of that.

9 Q. There are two sub-issues within  
10 bulk issues; one is the bond issue and the  
11 other is the marketing use to which the data  
12 is put. Are there any other issues with  
13 respect to bulk access that you are aware of?

14 A. I don't see an issue with any of  
15 them, in terms of this bonds issue.

16 Q. Are there any other issues?

17 A. Not that I'm aware of. Again,  
18 people don't call me up and say: We have a  
19 problem with X, Y and Z or whatnot. I'm not  
20 on the front line of that. I'm not going back  
21 to my counsel and saying: What is the latest  
22 update on that budding license.

23 Q. That is fine. The level at which  
24 you are involved in these issues and the level  
25 I'm involved in these issues, that is fine.

1 R. Forman

2 Have you had communications with  
3 ICANN about either of those topics?

4 MR. BROWN: Objection as to  
5 relevance. Go ahead.

6 A. I have personally not. On a  
7 corporate basis, I believe that we have.

8 Q. What has been the substance of  
9 those communications?

10 A. I have not been involved with  
11 them. As I said, I have not been on the call.  
12 But ICANN is aware of everything that is going  
13 on in terms of the licensing of the data. I  
14 believe they are.

15 Q. What do you mean they are aware  
16 of everything that is going on?

17 A. They are aware that we have a  
18 license.

19 Q. You've taken a position with  
20 respect to marketing uses of the bulk access  
21 database?

22 A. As I said, I'm not involved with  
23 all the negotiations but I believe they are  
24 aware.

25 Q. And they are aware of your bond

1 R. Forman

2 requirement?

3 A. I believe they are aware.

4 Q. Have they taken a position one  
5 way or the other as to whether those are  
6 consistent with the accreditation?

7 A. I do not -- as far as I know, the  
8 way that I know that there is an issue with  
9 ICANN is that Louie will send a letter saying  
10 you are in violation of your accreditation  
11 agreement because of X, Y and Z. We are not  
12 in violation of our accreditation agreement  
13 today.

14 Q. Meaning that you have not reached  
15 such a letter on these topics?

16 A. I don't think.

17 Q. And has ICANN said you are not in  
18 violation -- they affirmatively said these  
19 positions you are taking do not represent  
20 violations of the accreditation agreement?

21 MR. BROWN: Can I have that read  
22 back.

23 (Record read.)

24 MR. BROWN: I renew my relevance  
25 objection.

1 R. Forman

2 MR. JACOBS: Do you want to have  
3 a standing relevance objection to  
4 communications with ICANN so we can  
5 speed this up?

6 MR. BROWN: That would be  
7 wonderful.

8 Mr. Forman, you can answer the  
9 question?

10 A. ICANN doesn't issue, I guess,  
11 estoppel certificates to say that you are  
12 okay. They don't do that. They don't say  
13 everything is hunky-dory. They tell you when  
14 you are doing something wrong, and they don't  
15 talk to you when things are okay.

16 Q. They have been silent on this  
17 issue. To be particular, they have been  
18 silent on the question of whether you can  
19 restrict access under the bulk access  
20 provisions of your accreditation agreements to  
21 persons --

22 A. We are not in violation of our  
23 ICANN accreditation agreement.

24 Q. You are not letting me ask my  
25 question. I think you've established that

1 R. Forman

2 they haven't sent you a -- you are in  
3 violation letter?

4 A. Correct.

5 Q. They have not sent you that on  
6 any topic in the last say four months?

7 A. I don't know, but I don't think  
8 so.

9 Q. And now I'm trying to find out if  
10 they affirmatively agreed with your position  
11 with respect to what I have identified as  
12 issues. And you can just give me a clean  
13 answer?

14 MR. BROWN: I believe the  
15 question has been asked and answered.

16 Mr. Forman, if you have a  
17 yes-or-no answer, please provide it to  
18 counsel.

19 Q. Let's be specific. Have they  
20 affirmatively agreed with your position, or on  
21 the other hand, have they been silent with  
22 respect to restricting access under the bulk  
23 access provisions on the basis of the  
24 marketing use to which the recipient would put  
25 the data?

1 R. Forman

2 MR. BROWN: Objection. Compound  
3 question.

4 MR. BROWN: If you want to ask  
5 two separate questions, feel free to do  
6 so.

7 Q. Do you understand my question?

8 A. Say it one more time.

9 Q. Let's do it this way. Let me  
10 show you an exhibit that we premarked as  
11 Exhibit 8. It's a collection of E-mails from  
12 the register.com's document production. It's  
13 in sequential order starting with Bates No.  
14 R-545 and ending with R-573.

15 (Collection of E-mails produced  
16 by register.com bearing  
17 production Nos. R-545 through  
18 R-573 premarked Exhibit 8 for  
19 identification, as of this date.)

20 A. Okay.

21 Q. This is an interaction with Dunn  
22 & Bradstreet concerning the licensing of the  
23 WHOIS database, correct?

24 A. It looks that way.

25 Q. What is the status of Dunn &

1 R. Forman

2 Bradstreet -- you'll see on the page 546 that  
3 Dunn & Bradstreet writes to Mr. Mornell and  
4 says:

5 "I am interested in purchasing  
6 register.com's WHOIS file --"

7 Do you see that?

8 A. Yes.

9 Q. And then Mr. Mornell refers him  
10 to Lauren Gavisier, correct?

11 A. Yes.

12 Q. And what is Lauren Gavisier's  
13 title?

14 A. Director of strategic  
15 initiatives.

16 Q. Does she report to you?

17 A. No.

18 Q. Who does she report to?

19 A. Ronald Fried.

20 Q. Does he report to you?

21 A. Yes, he does.

22 Q. What is the status of Dunn &  
23 Bradstreet's request to license WHOIS data?

24 MR. BROWN: Objection. Asked and  
25 answered. Mr. Forman has testified

1 R. Forman

2 that register.com has not yet licensed  
3 their WHOIS data to anyone, including  
4 Dunn & Bradstreet.

5 Q. What was the last action on that?

6 A. I have no idea.

7 Q. Do you know anything other than  
8 the fact that you sent the license -- the  
9 company sent a license agreement to Dan Rucker  
10 on July 24th as the last thing that happened?

11 A. This is the first time I have  
12 ever seen this E-mail.

13 Q. Is this the first time that you  
14 heard that Dunn & Bradstreet licensed the  
15 WHOIS data?

16 A. Yes.

17 Q. And in this proposed license  
18 agreement, you have in this section a  
19 requirement for a bond of \$5 million. Do you  
20 see that?

21 A. Yes.

22 Q. Leaving aside the amount of the  
23 bond for a moment, let's say a multi-million  
24 dollar bond, has the -- has ICANN said  
25 anything one way or the other to register.com



1 R. Forman

2 about the imposition of such a bond  
3 requirement on licensees of the WHOIS  
4 database?

5 A. They haven't spoken to me  
6 directly, but I get the sense that no one is  
7 happy with the bond.

8 Q. Including ICANN?

9 A. I'm referring to ICANN.

10 Q. And that sense comes from  
11 conversations they had with Lauren Gavisser?

12 A. I don't know.

13 Q. Where do you get the sense?

14 A. Either from Jack or Lauren or  
15 Ronnie. I don't know.

16 Q. What did they convey to you?

17 A. ICANN is not happy with the  
18 bonds -- not ICANN is not happy with the  
19 bonds, rather things would be a lot easier if  
20 we didn't have this bond requirements.

21 Q. What does that mean, "things  
22 would be a lot easier"?

23 A. I believe certain people are not  
24 licensing our data because of the bond  
25 requirements and hence without the bond

1 R. Forman

2 requirement, people would license it out.

3 Q. We are talking now about ICANN's  
4 reaction to this issue?

5 A. ICANN is a bureaucracy. They  
6 don't want phone calls. They don't want to  
7 get bothered.

8 Q. So the substance --

9 A. Leave me alone.

10 Q. The substance that has been  
11 reported to register.com of ICANN's reaction  
12 to the bond requirement is: Our lives would  
13 be easier if you didn't have the bond  
14 requirement, because we wouldn't be bothered  
15 by the bond requirement issue and why don't  
16 you guys sort this out?

17 A. No. I would say the reaction  
18 is -- again. I have never had any direct  
19 conversations with ICANN about this issue.

20 Q. You've been designated by the  
21 company to testify on Register's policy and  
22 practices with respect to providing bulk  
23 access to the WHOIS database. I get to ask  
24 you corporate questions about this topic.

25 If I'm not happy with your level

1 R. Forman

2 of preparation, we have been able to work it  
3 out by taking breaks and making phone calls.

4 A. The question is --

5 (Record read.)

6 Q. Please complete your answer.

7 A. Because some entities are  
8 reluctant to post a bond. They have  
9 complained to ICANN. And ICANN has informed  
10 us of it. However, that is where it ends.

11 It's not -- we're not in  
12 violation of the accreditation agreement, and  
13 if there were no bond provision, there would  
14 be one fewer phone call to make and one fewer  
15 conversation from ICANN's perspective.

16 Q. Let me tie this up. There has  
17 been no substantive statement from ICANN, one  
18 way or the other, about whether the bond  
19 requirement is consistent with the  
20 accreditation agreement, rather there has been  
21 silence on that substantive question?

22 A. There is definitely no --  
23 neither. There is no determination or rather  
24 we are allowed to put that bond requirement  
25 into the license agreement. We are allowed

1 R. Forman

2 to.

3 Q. That is your position or that is  
4 something that ICANN has said to you or both?

5 A. ICANN is lightweight government.  
6 They don't tell you what you can do. They  
7 tell you what you can't do. So if they are  
8 silent about it, you can do it.

9 Q. I'm not asking you for your  
10 interpretation of the silence. I'm asking for  
11 a clean answer as to whether they have said  
12 something about whether it's permissible or  
13 not or been silent on whether it's permissible  
14 or not?

15 A. They have been silent.

16 Q. Now, the other interesting  
17 provision of the proposed license agreement  
18 with Dunn & Bradstreet is the use of the data  
19 provision.

20 And in particular I want to ask  
21 you about Section 2.3 first. That says that  
22 the recipient of the data company shall not  
23 use the data "for unlawful purposes,  
24 including, but not limited to the  
25 transmission" -- I think there is a missing

1 R. Forman

2 "of" there -- "mass or targeted unsolicited,  
3 commercial advertising or solicitations via  
4 electronic mail."

5 Then it goes on to say:

6 "To collect or harvest the names,  
7 addresses, telephone numbers, facsimile  
8 numbers or electronic mail addresses  
9 from the Data for the purpose of (a)  
10 sending mass unsolicited, commercial  
11 advertising or solicitations via direct  
12 mail, facsimile, or electronic mail, or  
13 (b) making --" unsolicited -- "making  
14 mass unsolicited telephone calls."

15 Those are the two subsections of  
16 that paragraph that I want to focus on, okay?

17 A. Uh-huh.

18 Q. First of all, has any party  
19 objected to those restrictions on use of data  
20 from the WHOIS database?

21 A. You mean proposed licensees?

22 Q. Yes.

23 A. I do not know.

24 Q. Has there been any interaction  
25 with ICANN as to whether those provisions are

1 R. Forman

2 consistent with the accreditation agreement?

3 A. Similar to the bond provision,  
4 they are aware of these cross-clauses and they  
5 are silent regarding them.

6 Q. This is a segue. The segue is to  
7 Section 2.5 of this agreement.

8 A. Uh-huh.

9 Q. You've been designated on this  
10 topic too, which is why this segue is useful:

11 "In the event register.com  
12 develops an opt-out policy, Company  
13 shall abide by the terms of that  
14 policy, pursuant to which SLD holders  
15 who are individuals have elected not to  
16 have Personal Data concerning their  
17 registrations available for bulk access  
18 for marketing purposes."

19 Do you see that?

20 A. Uh-huh.

21 Q. First of all, has register.com  
22 developed such as opt-out policy?

23 A. Yes.

24 Q. What is that policy?

25 A. Customers can opt-out of

1 R. Forman

2 solicitation.

3 Q. Is that an opt-out policy or  
4 opt-in policy?

5 No trick questions. Mornell  
6 yesterday described it as a opt-in policy. He  
7 referred to the survey that somebody  
8 approaching the register.com registration site  
9 would fill out and opt-in to receiving certain  
10 kind of solicitations.

11 That is I want to be sure that  
12 you are aware of that when you are answering  
13 my question about an opt-out policy.

14 A. I'm the designated representative  
15 for this topic?

16 Q. Yes.

17 A. Can we take a break?

18 (Recess taken.)

19 Q. There was a pending question, do  
20 you have it in mind?

21 A. You have to repeat it.

22 Q. Is the policy that you were  
23 referring to in your answer earlier an opt-in  
24 or opt-out policy?

25 A. Opt-in policy.

1 R. Forman

2 Q. You are referring to the survey  
3 that Mr. Mornell -- you've now had a chance to  
4 explore this issue.

5 You are aware that you are  
6 referring to the survey that Mr. Mornell is  
7 referring to?

8 A. Yes.

9 Q. Have you considered developing an  
10 opt-out policy in which someone would signal  
11 to you we do not wish to be marketed and we  
12 want you to -- strike that.

13 Have you considered the  
14 development of an opt-out policy?

15 A. People that receive E-mail can  
16 opt-out. People that receive the newsletter  
17 can opt-out in receiving any future  
18 newsletter.

19 Q. That is more of a subscription  
20 unsubscribed, correct?

21 A. Correct.

22 Q. Have you done any other opt-out  
23 policy considerations?

24 A. We have considered masking the  
25 name of the registrants, but we've not yet



1 R. Forman

2 implemented it.

3 Q. That is a service in which you  
4 would service the agent for the registrant?

5 A. Effectively. I don't know the  
6 legal definition.

7 Q. From the practical standpoint,  
8 it's not that the customer -- information  
9 would be there, but there would be a box  
10 saying that I have opted out, but rather, that  
11 the customer's information would not be  
12 present; is that correct?

13 A. I don't know about -- you said a  
14 couple of things. For sure, this sort of  
15 consistent theme that I would agree with you  
16 on is that the customer's information, true  
17 information, would not be present.

18 Q. Now, any other consideration of  
19 an opt-out policy?

20 A. None that I'm aware of.

21 Q. Am I right in understanding  
22 Section 2.5 as referring then to some policy  
23 that you have not yet developed?

24 MR. BROWN: Objection. The  
25 document speaks for itself.

1 R. Forman

2 Mr. Forman, you may answer the  
3 question.

4 A. I think it does speak for itself  
5 in the event register.com develops an opt-out  
6 policy. One is not developed.

7 Q. Let's look at Exhibit 4 and 18.  
8 (Series of E-mails from  
9 netnames.com bearing production  
10 Nos. R-562, R-563, R-151, R-501  
11 and R-513 premarked Exhibit 4 for  
12 identification, as of this date.)

13  
14 (Document entitled "Registrar  
15 Accreditation Agreement"  
16 premarked Exhibit 18 for  
17 identification, as of this date.)

18 Q. Exhibit 4 is several E-mails that  
19 we have assembled in a single exhibit, Bates  
20 No. R-562, 563, 151, 501 and 513, and they are  
21 communications from netnames.com, regarding  
22 bulk license agreement; do you see that?

23 A. Yes.

24 MR. JACOBS: Do we have a  
25 standing stipulation on authenticity?

1 R. Forman

2 MR. BROWN: For purposes of  
3 preliminary injunction, yes.

4 Q. J. Levy is Jack Levy at  
5 register.com?

6 A. Yes.

7 Q. He's your in-house counsel?

8 A. Yes.

9 Q. This exchange is consistent with  
10 your testimony that you haven't licensed the  
11 WHOIS database on a bulk basis to anyone,  
12 correct?

13 A. Yes.

14 Q. Seeing this doesn't refresh your  
15 recollection as to any of the answers you've  
16 given so far about your policy -- this is not  
17 a trick question. I just -- I don't know of  
18 something that is inconsistent with anything  
19 that you've said so far.

20 I want to know by seeing the  
21 netnames exchanged, it causes you to think  
22 that any of the global answers you gave  
23 previously were incorrect?

24 A. I don't think it changes anything  
25 that I have said.

1 R. Forman

2 Q. I believe you said as part of the  
3 informal exchanges with ICANN about bulk WHOIS  
4 database licensing, that complaints from  
5 potential licensees were, in fact, forwarded  
6 to you, is that correct, or reported to you?

7 A. Yes.

8 Q. Was the identity of the  
9 complainant reported to you?

10 A. To the best of my knowledge, just  
11 ENIC.

12 Q. And just to make that a complete  
13 answer, ENIC is the only complainant whose  
14 identity has been reported to you by ICANN?

15 A. In an informal manner, I believe,  
16 yes.

17 Q. And I realize there is another  
18 way of looking at it.

19 Are you aware of complainants  
20 whose identity has not been forwarded to you?

21 A. I just read an E-mail right now.

22 Q. Complainants to ICANN?

23 A. Oh, complainants to ICANN  
24 regarding our bulk WHOIS licensing data  
25 requirements?

1 R. Forman

2 Q. Right.

3 A. I would probably say there are  
4 others, but I'm not aware of any specific  
5 companies.

6 Q. So --

7 A. I would not be surprised if there  
8 were others.

9 Q. You would not?

10 A. I would not be surprised if there  
11 were others.

12 Q. Let's take a look at Exhibit 18.  
13 Exhibit 18 is a document entitled "Registrar  
14 Accreditation Agreement," and it's signed by  
15 you on page 18.

16 A. Uh-huh.

17 Q. Is this a registrar accreditation  
18 agreement that register.com signed with ICANN?

19 A. Yes.

20 Q. And to the best of your  
21 knowledge, is this the current registrar  
22 accreditation agreement in force between the  
23 companies?

24 MR. JACOBS: Scott, if you want  
25 to help him on this. I'm not sure if

1 R. Forman

2 there have been any amendments to this  
3 accreditation agreement or supplements  
4 or extension.

5 A. I don't know if this is the  
6 latest one.

7 THE WITNESS: You may have better  
8 knowledge of that. I thought there was  
9 one in May.

10 MR. BROWN: The effective date is  
11 April 27, 2000. I believe that this  
12 is, in fact, the current registrar  
13 accreditation agreement between  
14 register.com and ICANN.

15 A. There is no date on it.

16 Q. No signature date?

17 A. No.

18 MR. BROWN: Let's go off the  
19 record for one moment.

20 MR. JACOBS: All right.

21 (Discussion off the record.)

22 Q. Is this Exhibit 18 the  
23 accreditation agreement currently in force  
24 between ICANN and register.com?

25 A. I'm not positive, but I believe