

EXHIBIT E

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[2]

[3] REGISTER.COM, INC.

[4] Plaintiff,

[5] v. 00 Civ. 5747 (BSJ)

[6] VERIO INC.,

Oral Argument

[7] Defendant.

[8]

New York, N.Y.

[9] September 15, 2000

2:00 p.m.

[10] Before:

[11] HON. BARBARA S. JONES

[12] District Judge

[13]

APPEARANCES

[14]

[15] SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

Attorneys for Plaintiff

[16] WILLIAM PATRY

KENNETH A. PLEVAN

[17] SCOTT BROWN

Of counsel

[18]

JACK LEVY

[19] General Counsel

Register.com

[20]

MORRISON & FOERSTER LLP

[21] Attorneys for Defendant

MICHAEL A. JACOBS

[22] JAMES E. HOUGH

MARK DAVID McPHERSON

[23] Of counsel

[24] SUSAN E. GINDIN

Associate Counsel

[25] Verio Inc.

[1] you this."

[2] During the deposition, Mr. Ayers was asked, how do
[3] you explain this misrepresentation? These are directed
[4] towards people who said they weren't interested, yet you leave
[5] this message which says thanks for your interest and we are
[6] going to send you this stuff because you asked us to send it
[7] to them. He sort of pooh-poohed this, saying, well, this is
[8] poetic license. In light of their representation that they
[9] might put in an opt in as part of the license as well, their
[10] conduct actually, I think, speaks volumes more than the
[11] representations about what they might do in the future. The
[12] conduct in the past has violated our agreement, and they have
[13] kept it secret all along because they really don't want people
[14] to know.

[15] Thank you.

[16] **THE COURT:** I directed the argument by asking
[17] questions. Is there anything either side would like to argue,
[18] to stress, or just to close?

[19] **MR. BROWN:** May we have one moment, your Honor?

[20] **THE COURT:** Sure. In fact why don't we take just a
[21] quick recess.

[22] (Recess)

[23] **THE COURT:** Do you have any concluding remarks, Mr.
[24] Patry?

[25] **MR. PATRY:** Yes. Actually, Mr. Levy has expressed a

[1] strong desire to address the Court.

[2] **THE COURT:** Great.

[3] **MR. LEVY:** This is unfamiliar territory for me, your

[4] Honor, but I appreciate the opportunity to speak.

[5] There are two small points I would like to make

[6] almost as rebuttal points, and then I would like to make sure

[7] that your Honor understands why we brought this case, why we

[8] felt the need to report to this forum.

[9] The first rebuttal point relates to the ICANN model

[10] privacy agreement. I think it should be made clear and your

[11] Honor should understand that what ICANN desires be made

[12] understood with respect to privacy is within the standard

[13] terms and conditions of our registration agreement. That is

[14] important, because there was an implication that it is not.

[15] The second point I think Mr. —

[16] **THE COURT:** I am confused about that, then, because I

[17] think one of your witnesses testified at a deposition that you

[18] didn't have it written anywhere. Maybe the witness was wrong.

[19] If I look, I will find it, right?

[20] **MR. BROWN:** If I may, your Honor, I believe that the

[21] testimony was from Mr. Mornell was that there was not a

[22] defined privacy policy apart from the registration agreement.

[23] **THE COURT:** All right. I'm sorry, Mr. Levy.

[24] **MR. LEVY:** Thank you, your Honor. The second point,

[25] I just wanted to add to the discussion that took place as it

[1] relates to system capacity. It is absolutely, as Mr. Patry
[2] made clear, the race to the bottom here that we are most
[3] concerned about. But it also should be understood that our
[4] systems obviously contain a very important segment of what
[5] makes the Internet run, the domain name servers, which
[6] basically are the authoritative servers that address people to
[7] authoritative domain names. We monitor our systems,
[8] therefore, extremely carefully, not just because it is bad for
[9] business, our business, if we go down, it is bad for the
[10] Internet if we go down.

[11] Every time we get repetitive WHOIS queries from a
[12] particular IP address, our immediate suspicion is that it is a
[13] hacker, it is what they call a denial of service attack. A
[14] lot of what has come to the attention over here came from our
[15] technology specialists taking a look at the repetitive
[16] multiple WHOIS queries that were being done, and immediately
[17] they suspect hacking. I just wanted to give that color to it.

[18] Let me in summary say the following. Before we
[19] brought this case in this forum, your Honor, first of all, you
[20] should know that we did approach ICANN back in January of 1999
[21] to discuss with them, to bring to their attention various
[22] practices. As it was made clear here, Verio, though it
[23] started down the route of becoming an accredited registrar,
[24] ultimately stopped and decided to pursue this strategy
[25] instead, and ICANN said basically that they didn't have

[1] privity with Verio and gave us the impression that there
[2] wasn't that much that could be done about it.

[3] The second thing that should be understood is we took
[4] a really good look at ourselves in the mirror literally on the
[5] eve of filing this case and said to ourselves, should we start
[6] doing exactly what will Verio is doing, should we go ahead and
[7] start sending mass marketing emails to all of our competitors,
[8] the other registrars? This is a cutthroat business since
[9] competition has been introduced in June of 1999, on price, on
[10] services. Should we go ahead and just start telemarketing all
[11] of our —

[12] **THE COURT:** What do you mean telemarketing? Mass
[13] marketing emails would be, I think everybody agrees no one is
[14] going to do that, right?

[15] **MR. LEVY:** Apparently, Verio makes a distinction. So
[16] they are trying to draw a fine line, as Mr. Patry pointed out,
[17] as to what is a mass market and what is not. Do you hit the
[18] button once and numerous emails go out, or can a number of
[19] telemarketers in a room repeatedly, after they make queries,
[20] send emails numerous times?

[21] So should we start doing the kinds of things that
[22] they are doing? We decided ultimately that it is bad from a
[23] policy perspective, it is bad for the Internet community that
[24] this will happen, and it is illegal, for the reasons that we
[25] have presented here. And, quite frankly, we believe that

[1] misappropriate that database and market to those customers in
[2] a confusing manner, basically stealing from the good will
[3] which the registrars and the registrar community have built
[4] with these long-term strategies that I elucidated. That may
[5] be good business for the short term for a company that is in a
[6] hurry, for a company that is about to be sold. It is bad
[7] business for the long term.

[8] **THE COURT:** But your position is anti any marketing,
[9] even if it is honest marketing, right?

[10] **MR. LEVY:** That is correct, your Honor. The WHOIS
[11] database —

[12] **THE COURT:** I don't think anyone disputes that you
[13] can't market in violation of the Lanham Act.

[14] **MR. LEVY:** Correct, absolutely. There are ways to
[15] compete and there are ways to compete, absolutely. This is a
[16] competitive business. We are out there marketing every day
[17] with advertisements. But, again, that is expensive, it takes
[18] time, and that is apparently what the defendant in this case
[19] wasn't interested in doing.

[20] Let me be clear. If we were wrong when we took this
[21] good look in the mirror and decided no, we are not going to do
[22] that, we are going to go ahead and instead file this lawsuit,
[23] then let us be wrong and we will lead the charge to the race
[24] to the bottom. I believe that that will be bad. And the
[25] reason we will is because we will owe it to our shareholders

[1] to do that. We brought this case and we are proud of the fact
[2] that we brought this case, because we believe we owed it to
[3] the our stockholders and our customers.

[4] They say the record is thin as it relates to evidence
[5] of actual confusion. Your Honor, I believe it is like an
[6] iceberg. In other words, the customers that get annoyed don't
[7] come back to the person that they got annoyed with, that they
[8] thought violated their trust in the first place, and say, hey,
[9] why did this happen to me. They are just annoyed. Maybe they
[10] even transfer away from us. Maybe they leave us, they don't
[11] want to talk to us again.

[12] It is the partners, it is the business people that
[13] indeed we got most of the complaints from, because they do
[14] have obligations and they are trying to build a business and
[15] they are doing it responsibly. Those partners are competitors
[16] in the additional products and services market that Verio is
[17] in. Our 450 partners are primarily hosting companies and
[18] ISPs, and the largest one with whom we have a relationship is
[19] Concentric which is now one of Verio's largest partners in the
[20] hosting business.

[21] I recognize that your Honor is very interested in
[22] hearing from ICANN on these points, and I hope that ICANN gets
[23] the full record, because I am very confident that no one in
[24] the Internet community ever intended WHOIS data to be used for
[25] purposes that it is being used.

[1] **THE COURT:** For marketing, any kind of marketing.

[2] **MR. LEVY:** Exactly.

[3] **THE COURT:** That is really what this boils down to.

[4] **MR. LEVY:** That is correct. I believe that that is

[5] correct.

[6] Certainly — Maybe there is a small nuance here —
[7] certainly the nonbulk license WHOIS marketing. As far as
[8] relating to the bulk licensing WHOIS marketing, I believe that
[9] was intended to — and I don't know if I can say this, if I am
[10] entering new things into record here, but if I am, somebody
[11] will object, I presume — to basically give information which
[12] will then be put into products to help build additional
[13] products and services to help the IP community in the same
[14] effort. Let me be more specific so that your Honor
[15] understands.

[16] In order to prove violations of the Anticyber-
[17] squatting Act or to succeed in a uniform dispute resolution
[18] policy, it obviously helps if you can show bad faith on the
[19] part of the registrant, that they were a cybersquatter. Since
[20] the WHOIS of most registrars only allow query by query basis,
[21] there are, I believe, groups out there that will put the WHOIS
[22] data that they have bulk licensed together, and then they can
[23] provide it to law firms that represent the IP community, or
[24] the IP community itself, so that it will help them bring those
[25] claims. That is also legitimate use. That is what I believe

[1] the bulk license provision was about.

[2] Most telling, and I will finish with this point, your
[3] Honor, is that at every step of the way Verio has fought on
[4] the confidentiality of what they are doing. And it is not
[5] because, your Honor, I believe that they are so sensitive they
[6] think that what they have invented here is so unique and so
[7] special. It is not. It is pretty obvious. It is because,
[8] your Honor, even if it is good business in the short term,
[9] they know that it is bad business in the long term, and if the
[10] world knew about it, the world would not be happy about it.

[11] Thank you.

[12] **THE COURT:** Thank you, Mr. Levy.

[13] Mr. Jacobs.

[14] **MR. JACOBS:** A few items, your Honor. First, I would
[15] like to introduce Susan Gindin, an associate counsel at Verio,
[16] who is at the counsel table today.

[17] Secondly, I would like to correct something. I
[18] didn't quite get it right in response to your question about
[19] the terms of service of the other registrars, of what language
[20] they have.

[21] **THE COURT:** Yes.

[22] **MR. JACOBS:** 35 have no terms of service at all. 18,
[23] including NSI, have terms of service that match the language
[24] of 2(f)(5). And 7 have terms of service that deviate from
[25] that language and that go in the direction of Register.com's
