LEGAL UPDATE

BROWSEWRAP AGREEMENTS: *REGISTER.COM, INC. V. VERIO, INC.*

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I.   INTRODUCTION

In the twenty-first century, Internet law continues to grow at an astounding pace. Of all the emerging legal fields, online contracts affect average users the most dramatically.   Internet users form contracts with Web site owners whenever they download files, perform online searches or click on a button to enter a Web site. The law recognizes two basic forms of online contracts—clickwrap and browsewrap agreements.[1]

Clickwrap agreements require the user to click on an icon appearing on the user's computer screen to consent to certain terms before the Web site performs its side of the contract, such as permitting the user entry or allowing the user to download files from the Web site.[2] Courts usually enforce clickwrap agreements because they require the user to consent to the terms before forming the contract.[3] Browsewrap agreements allow the user to view the terms of the agreement, but do not require the user to take any affirmative action before the Web site performs its end of the contract.[4] In the past, most

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[1] In addition to clickwrap and browsewrap online agreements, software may be protected via shrinkwrap licenses. Shrinkwrap licenses usually include: "(1) notice of a license agreement on product packaging . . ., (2) presentation of the full license on documents inside the package, and (3) prohibited access to the product without an express indication of acceptance." Normally, the consumer agrees to the shrinkwrap terms by opening the shrinkwrap around the software inside the package rather than "at the time of purchase." *See* Register.com, Inc. v. Verio Inc., 356 F.3d 393, 428 (2d Cir. 2004).

[2] *See* Specht v. Netscape Communications Corp.*,* 150 F. Supp. 2d 585, 593-94 (S.D.N.Y. 2001).

[3] *See Register.com*, 356 F.3d at 429, (citing *Specht,* 150 F. Supp. 2d at 594 (citations omitted)).

[4] *See Specht,* 150 F. Supp. 2d at 594.

courts have refused to enforce browsewrap agreements because of the lack of
user consent to the contractual terms.[5]

Recently, in *Register.com, Inc. v. Verio*, *Inc.* the U.S. Court of Appeals for
the Second Circuit expanded Internet contract law by upholding a preliminary
injunction against Verio for failing to abide by an online agreement's terms,
even though the company never formally consented to the contract. The court
determined that Verio knew the contractual terms and should therefore be
bound by them.[6] This decision indicates that courts may begin recognizing
online contracts that they have been hesitant to enforce in the past.

II.   BRIEF HISTORY OF BROWSEWRAP AGREEMENTS

The advent of the Internet created many new legal challenges. Perhaps one
of the biggest dilemmas Web site owners face involves contracting with clients
over the Internet without disturbing user fluidity. Many Web site owners
believe that requiring Internet users to formally accept terms of a contract may
scare away users. As a solution to this problem, Web site owners introduced
the browsewrap agreement.

Browsewrap agreements allow Internet users to view the contract's "terms
and conditions" by clicking on a hyperlink; however, these agreements do not
require the users to click on the hyperlink before forming the contract.[7] If
users fail to click on the hyperlink to view the terms, they may not even realize
that they are contracting with the Web site owner. Because many users fail to
realize that they have entered into a contractual relationship, courts have been
reluctant to enforce browsewrap agreements.

Perhaps one of the most cited cases involving browsewrap is the Second
Circuit's decision, *Specht v. Netscape Communications, Corp.* In *Specht*,
Internet users sued Netscape over its "Smart Download" software, alleging that
the software illegally transmitted users' personal information.[8] Netscape
responded by trying to enforce an arbitration clause in the "Smart Download"
browsewrap agreement.[9] The court ruled the browsewrap agreement
unenforceable even though it asked users to "please review and agree to the
terms of the agreement," because it did not *require* any action or consent from
the users.[10] The *Specht* decision illustrates courts' reluctance to enforce

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[5] *See Register.com*, 356 F.3d at 429.

[6] *See id.* at 431.

[7] *See Specht*, 150 F. Supp. 2d at 593-94.

[8] The plaintiffs alleged that after they installed the "Smart Download" software, it
illegally eavesdropped on them by transmitting to Netscape the web addresses of all the
plaintiffs' future file downloads. *See* Specht v. Netscape Communications Corp*.,* 306 F.3d
17, 21 (2d Cir. 2002).

[9] *Id.*

[10] The court noted:

browsewrap agreements.

The District Court for the Northern District of California struck down another browsewrap agreement's arbitration clause in *Comb v. PayPal, Inc*.[11] The court ruled the arbitration clause unconscionable because it contained several excessively harsh provisions, such as PayPal reserving the right to change the agreement without notification and subjecting its users to the more burdensome rules of the American Arbitration Association.[12] However, in order to rule in favor of the plaintiffs on unconscionability grounds, the court had to conclude that the users consented to the agreement. To circumvent this, the court reasoned that despite PayPal's "weak showing," sufficient circumstantial evidence suggested the plaintiffs manifested consent.[13]

However, not all courts have dismissed the possibility that browsewrap agreements may be enforceable under certain circumstances. Most notably, the District Court for the Eastern District of California refused to reject the validity of a browsewrap agreement in a summary judgment motion.[14] In *Pollstar v. Gigmania, Ltd.*, a concert promoter's Web site contained a browsewrap agreement saying that "all documents and information may only be used for non-commercial purposes."[15] Even though the small gray printed agreement was superimposed on a slightly differently shaded gray background for the user to see before entering the Web site, the court rationalized that "people sometimes enter into a contract by using a service without first seeing the terms—the browser wrap license agreement may be arguably valid and enforceable."[16] The court's decision in *Pollstar* allowed for the possibility that some browsewrap agreements may be enforceable, setting the stage for the most important browsewrap decision to date, *Register.com, Inc. v. Verio, Inc*.

[T]here is no reason to assume that viewers will scroll down to subsequent screens [on a Web site] simply because the screens are there. When . . . users . . . download . . . [without] reasonably conspicuous notice that they are about to bind themselves to contract terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm's-length bargaining.

See id. at 32.

[11] Richard G. Kunkel, *Recent Developments in Shrinkwrap, Clickwrap and Browsewrap Licenses in the United States*, MURDOCH U. ELECTRONIC J. OF L. (Sept. 2002), *at* http://www.murdoch.edu.au/elaw/issues/v9n3/kunkel93.html.

[12] *Id.*

[13] The court refused to make a hard ruling on the issue of the plaintiffs' consent to the browsewrap agreement. Instead, the court assumed "for purposes of the instant motion" that the existence of the terms and conditions of the browsewrap agreement in the record sufficiently demonstrated the plaintiffs' consent to be bound by them. *See* Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1171-72 (N.D. Cal. 2002).

[14] *See* Pollstar v. Gigmania, Ltd., 170 F. Supp. 2d 974, 976 (E.D. Cal. 2000).

[15] *Id.*

[16] *Id.* at 981-82.

III. *REGISTER.COM, INC. V. VERIO, INC.*

A. *Facts*

The plaintiff, Register.com ("Register"), sells Internet domain names, and the defendant, Verio, designs and develops Web sites.[17]   The Internet Corporation for Assigned Names and Numbers requires all Internet domain name registrars, including Register, to provide a freely accessible online database containing the "names and contact information" of all their customers (WHOIS).[18]   The browsewrap agreement for Register's WHOIS queries prohibited any user from using the results of the query for commercial solicitations; however, the Web site disclosed the terms of the agreement to the user only *after* displaying the results of the query.[19]   According to the complaint, Verio allegedly solicited its services to Register's clients via email, direct mail and telephone after using automated software to perform daily WHOIS queries on the plaintiff's Web site.[20] In response, Register demanded that Verio stop soliciting its clients, but Verio ended only its email campaign and continued to aggressively contact Register's clients by telephone and direct mail.[21] Attempting to stop the onslaught of solicitations on its clients, Register brought suit for an injunction forbidding Verio from performing any more WHOIS queries as a penalty for its continuous violations of the browsewrap agreement.[22]

B. *Procedural History*

Register filed suit in the District Court for the Southern District of New York for a preliminary injunction prohibiting Verio from performing any further WHOIS queries on Register's Web site.[23] The district court granted Register a preliminary injunction against Verio, noting that "Register.com's terms of use are clearly posted on its Web site" and warns the Internet user "[by] submitting this query, you agree to abide by these terms."[24] Specifically, the district court ruled, "that by proceeding to submit a WHOIS query, Verio manifested its assent to be bound by Register.com's terms of use, and a

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[17] *See Register.com*, 356 F.3d at 395-96.

[18] *See Register.com*, 126 F. Supp. 2d at 241-42.

[19] *Id.* at 242-43.

[20] *See id.*

[21] Attempting to end the dispute, Register mailed Verio a terms letter requiring them to stop using the WHOIS database for marketing purposes via email, direct mail and telephone. However, Verio refused to sign the agreement and "continued to use the WHOIS contact information for telemarketing purposes into July 2000." *Id.* at 243-44.

[22] *See Register.com*, 356 F.3d at 396-97.

[23] *Register.com*, 126 F. Supp. 2d at 238.

[24] *Id.* at 248.

contract was formed and subsequently breached."[25]   Verio brought an interlocutory appeal of the district court's decision to the Second Circuit.[26]

C.   The Second Circuit's Decision

Although most courts have been hesitant to enforce browsewrap agreements, the Second Circuit upheld Register's preliminary injunction.[27] The court reasoned that Verio admitted knowledge of Register's contractual terms after it received the terms in its first query.[28]   Therefore, Verio's systematic method of performing queries on Register's Web site constituted valid contracts, even though Register's Web site failed to disclose the terms of each individual query to Verio until after the search had been performed.[29]

The court compared Verio's actions to that of a customer at a fruit stand who takes a bite of an apple before noticing the sign that says, "Apples, 50 cents."[30] The court reasoned that while it may be acceptable for the customer to avoid payment the first time for want of knowledge of the apple's cost, it would be grossly unfair to allow that same customer to return to the fruit stand every day and take a bite of an apple without paying just because he continually fails to notice the sign.[31] Applying this logic, the Second Circuit easily distinguished the facts of this case from its decision in *Specht*, in which users had no reason to possess knowledge of the browsewrap terms in a one-time download.[32] Since Verio admitted knowledge of Register's contractual terms, the court reasoned that the *Specht* decision should not be applied to this case.[33]   However, the court noted that "Verio's argument might well be persuasive if its queries addressed to Register's computers had been sporadic and infrequent."[34]

Similarly, the court rejected Verio's argument that it rejected the terms of Register's agreement.[35] To support its position, Verio cited the Central District of California case, *Ticketmaster Corp. v. Tickets.com, Inc.*[36] In *Ticketmaster*, the court denied a preliminary injunction aimed at enforcing a "regular user" to abide by the browsewrap terms regarding the use of data on Ticketmaster's

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[25] *Id.*

[26] *Register.com*, 356 F.3d at 397-98.

[27] *Id.* at 406.

[28] *Id.* at 431.

[29] *Id.* at 401.

[30] *Id.* at 401.

[31] *Id.*

[32] *See Specht,* 306 F.3d at 20-21.

[33] *Register.com*, 356 F.3d at 402.

[34] *Id.* at 401.

[35] *Id.* at 402-04.

[36] No. CV99-7654, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000).

Web site.[37] While acknowledging that the *Ticketmaster* decision gave Verio minimal support, the Second Circuit rejected the district court's analysis and concluded that a frequent visitor of a Web site who knew or should have known the terms of a browsewrap agreement should not be shielded from liability solely because the user did not explicitly consent to the terms of each identical contract beforehand.[38]

Finally, the court struck down Verio's contention that an injunction should not be used to enforce the terms of this contract.[39] The Second Circuit cautioned that "specific relief is not the conventional remedy for breach of contract, but there is certainly no ironclad rule against it."[40] Also, "injunctive relief is appropriate where it would be 'very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of [future] business.'"[41] Therefore, the court reasoned that without an injunction, Verio's actions "would cause Register irreparable harm through loss of reputation, good will and business opportunities."[42]

Even though the Second Circuit upheld the preliminary injunction against Verio, Register's online contract may not qualify as a browsewrap agreement.[43] While the Second Circuit's opinion never addressed this issue directly, the court published Judge Parker's unbinding draft opinion, which rejected the notion that Register's contract could be considered a browsewrap agreement because it "provided no hyperlink where one could view the proposed license terms" and Register only disclosed the agreement's terms to the user after the user received the WHOIS query results from Register's client

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[37] *See id.*

[38] *See Register.com*, 356 F.3d at 402-04.

[39] *Id.* at 404.

[40] *Id.*

[41] *See* Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 69 (2d Cir. 1999).

[42] *See Register.com*, 356 F.3d at 404-05.

[43] The Second Circuit's opinion failed to address whether Register's online contract constituted a browsewrap agreement. Instead, the court's decision focused mainly on traditional concepts of contract law.

> 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.

Id. at 403.

database.[44] Therefore, Register kept its terms more hidden than a typical browsewrap agreement, because Register made it *impossible* for Internet users to view the terms until *after* they received the results of the WHOIS query, whereas most browsewrap agreements give the Internet user the option of clicking on a hyperlink to view the terms *before* forming the contract. However, the Second Circuit never ruled directly on this issue, and Judge Parker's draft opinion should be treated as a dissenting opinion, so the law remains unclear as to whether Register's contract constituted a browsewrap agreement, or whether Register's contract should be considered to be a new and still undefined classification of online contracts.

IV. IMPLICATIONS

Register.com, Inc. v. Verio, Inc. adds more nuance to the already uncertain legal authority of online browsewrap agreements. The court upheld Register's contract in a preliminary injunction motion, even though Register kept its terms *more* secretive than a typical browsewrap agreement by providing *no* hyperlink for a user to click on to view the contractual terms *before* forming the contract. Therefore, the *Register.com, Inc. v. Verio, Inc.* decision radically departs from the history of courts showing reluctance to enforce browsewrap agreements.

In the future, browsewrap agreements may be enforceable against frequent visitors of a Web site, even if they remain unaware of the contractual terms. The Second Circuit clearly suggested that Verio would have been bound by the browsewrap agreement even if it lacked actual knowledge of the terms.[45] Indeed, the court concluded that Verio's repeated submitting of WHOIS queries nullified the argument that it lacked understanding of Register's desire to impose conditions on the search results.[46] Therefore, *Register.com, Inc. v. Verio, Inc.* leaves open the possibility that online contracts may be formed

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[44] *Id.* at 429-30. A unanimous two judge panel decided *Register.com, Inc. v. Verio, Inc.* because the third judge on the panel, Judge Parker, died before the case could be officially decided. The Second Circuit attached Judge Parker's draft opinion, which the court presumes would have been Judge Parker's dissenting opinion, if not for his untimely death. *Id.* at 395.

[45] The court noted:

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.

Id. at 401.

[46] *See generally id.*

even if the terms are not disclosed until later, if the Internet user knew or should have known the contractual terms by repeatedly entering into the agreement.

However, the Second Circuit only issued Register a preliminary injunction. In New York, courts will grant a preliminary injunction if:

> the plaintiff . . . demonstrate[s] both (1) that it will suffer irreparable harm if the motion is not granted and (2) either (a) a likelihood that it will succeed on the merits of the action or (b) a sufficiently serious question going to the merits of the litigation and the balance of hardships tipping decidedly in plaintiff's favor.[47]

Courts grant preliminary injunctions to plaintiffs more easily than success on the merits because the granting of a preliminary injunction only requires the plaintiff to show either a "*likelihood*" of success on the merits or a "*sufficiently serious question*" of whether the plaintiff would suffer serious hardships without the preliminary injunction.   Therefore, the ultimate ruling in *Register.com, Inc. v. Verio, Inc.* remains uncertain.

Regardless, *Register.com v. Verio* allows for Web site owners to sue Internet users for violating hidden online contracts, so long as they know or should have known of the agreements' terms. Therefore, Internet users must pay close attention when web browsing because many online actions may contain hidden contractual terms, such as downloading files or performing an online search. However, if the decision in *Register.com, Inc. v. Verio, Inc.* holds, such contracts would only bind frequent visitors to that Web site. Even so, hidden contracts could be a valuable tool for Web site owners seeking protection from abuses, such as Verio repeatedly using the WHOIS query to solicit Register's customers, but not wanting to scare away visitors with contractual legalese.

While it remains unclear whether Register's contract constituted a browsewrap agreement, the validity of these types of online contracts continue to be heavily litigated. A few months after the Second Circuit decided *Register.com, Inc. v. Verio*, *Inc.* the District Court for the Northern District of Texas rejected a defendant's contention that its contract with the plaintiff constituted an unenforceable browsewrap agreement in a motion for failure to state a claim.[48] The court noted that the Second Circuit in *Specht* only held that particular browsewrap agreement unenforceable under the circumstances of that specific case.[49]   Since the plaintiff's complaint alleged that the defendant entered into a valid contract, the court denied the defendant's motion for failure to state a claim and reasoned that the defendant's argument that the

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[47] *Register.com*, 126 F. Supp. 2d at 245.

[48] Southwest Airlines Co. v. Farechase, Inc., 318 F. Supp. 2d 435, 441 n.3 (N.D. Tex. 2004).

[49] *Id.*

browsewrap agreement should be unenforceable only raises an issue of fact that should be raised in a motion for summary judgment.[50]

Today, the law regulating browsewrap agreements remains unclear. In *Register.com, Inc. v. Verio, Inc.* the Second Circuit explicitly rejected the Central District of California's reasoning on browsewrap agreements in *Ticketmaster*, which may lead to a circuit split. With these serious legal questions unanswered, it appears that the law governing browsewrap agreements and other online contracts will continue to evolve in the future.

V.   CONCLUSION

As the Internet continues to grow, so too, will the laws that govern it. As with any emerging technology, many judges, who may have been hesitant to place restrictions on the Internet in the beginning, are now starting to feel comfortable applying common law doctrines to regulate Internet use. The Second Circuit's decision in *Register.com, Inc. v. Verio, Inc.* indicates that this trend will continue, and as it does, lawyers, as well as Internet users, will have to adapt along with it.

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[50] *Id.*