to ensure that the organisation is fully protected from these legal issues.

1   Chris Jenkins 'NSW paves way for Linux move' (2004) *news.com.au* http://www.news.com.au/common/story_pa ge/0,4057,10431763%5e15306.00.html

2   'NSW Office Of State Revenue Banks on Open Source for Mission Critical Applications' (2004) *ORACLE Australia* http://www.oracle.com/global/au/press_rele ases/oow_dell_osr.html

3   Ben Woodhead 'NSW increases Linux project to $40m' (2004) *The Australian Financial Review*

4   Stephen Shankland, 'Government bodies 'embracing open source" (2004) *ZDNet UK* http://news.zdnet.co.uk/business/0,3902064 5,39165424,00.htm

5   'SO10 Explore Open Source Alternatives' (2004) *California Performance Review*

http://www.report.cpr.ca.gov/cprrpt/issrec/s tops/it/so10.htm

6   Correspondents 'Vienna joins open source trend' (2004) *Australian IT* http://australianit.news.com.au/articles/0,72 04,10369714%5e15344%5e%5enbv%5e15 306-15321,00.html

7   John Blau 'Over 500 German govt agencies using open source' (2003) *Computerworld.com.sg* < http://www.computerworld.com.sg/pcwsg.n sf/unidlookup/0D52113E72876B8F48256D 5500208F1B?OpenDocument>

8   Michelle Delio 'Munich Open Source Plows Ahead' (2004) *Wired News* http://www.wired.com/news/infostructure/0 ,1377,62236,00.html

9   http://www.opensource.org/docs/definition. php

10 eWEEK Editorial Board 'Time Is Now for Linux Vendors to Protect Users' (2004) *eWeek* http://www.eweek.com/article2/0, 1759,1634067,00.asp

11 Stephen Shankland 'IBM pledges no patent attacks against Linux' (2004) *ZDNet* http://zdnet.com.com/2100-1104_2- 5296787.html

12 Robert McMillan, IDG News Service 'Microsoft patents could threaten Linux' (2004) *TECHWORLD* http://www.techworld.com/opsys/news/inde x.cfm?NewsID=2012

Good Rap for Browsewrap in USA

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Register.com Inc v Verio Inc.

In a landmark decision supporting the enforceability of browsewrap agreements in certain circumstances, the US Court of Appeal for the Second Circuit **(the Court)** has upheld a preliminary injunction issued against Verio Inc.[1] **(Verio)**, a website developer and hosting firm, for breaching the browsewrap-style terms of use for the services of the plaintiff, Register.com **(Register)**.

Facts

Register, a provider of domain name registration services, derived its authority to act as a registrar for the issue of domain names from a standard form agreement with the Internet Corporation for Assigned Names and Numbers **(ICANN)**, a public benefit corporation established by the US Government to administer the domain name system.

Under the agreement **(ICANN Agreement)**, Register was required to maintain and update a publicly available "WHOIS" database of registrants' contact information, and was not to impose restrictions on the

use of this data, except in relation to the electronic spamming of registrants.

Register established a WHOIS database, which it updated on a daily basis, and provided a free public inquiry service for the information contained therein. Register's responses to WHOIS queries were captioned by a "legend" stating that, by submitting a query, the user agreed to refrain from using the data to conduct mass solicitation of business by email, direct mail or telephone (a more stringent restriction than that envisaged under the ICANN Agreement, which was only in relation to the restriction of mass solicitation by email).

In an aggressive marketing campaign, Verio developed an automated software program to "mine" the WHOIS database and compile massive lists of new domain name registrants whom Verio then subjected to a barrage of unsolicited marketing by email, direct mail and telephone.

Register demanded that Verio stop this practice. However, Verio only partially complied with this demand by ceasing the email solicitations, but continuing to market by direct mail

and telephone. Register proceeded to charge Verio with breaching the prohibition on use of data for mass solicitation contained in browsewrap-style terms of use that were displayed in Register's legend each time it provided WHOIS data.

Verio argued that it did not become contractually bound to Register because it did not receive legally enforceable notice of Register's conditions as the restrictive legend did not appear until *after* Verio had submitted the query and received the WHOIS data. Accordingly, Verio contended that it did not assent to Register's contract terms and therefore, should not be deemed to have taken the WHOIS data from Register's systems subject to these conditions.

Decision

The Court upheld the preliminary injunction granted at first instance, concluding that online contracts do not always require formal acceptance by the offeree. In the circumstances, Register's "browsewrap"-style terms of use, combined with Verio's actions in repeatedly accessing the WHOIS

database constituted a valid offer and acceptance, thereby resulting in a legally enforceable contract with Verio.

In its judgment, the Court distinguished the present case from the facts in the earlier browsewrap decision in *Specht*.[2] Importantly, the Court also disagreed with the *Ticketmaster*[3] terms of use decision.

The Court in *Specht* declined to enforce terms specified by Netscape against a user of Netscape's software due to insufficient evidence that the user had seen the terms when downloading the software. The terms of Netscape's offer of software were posted on the website from which the user downloaded the software. However, the user would not have seen the terms without scrolling down their computer screen and there was no reason for users to do this.

In the present case, the Court held that the circumstances at hand were crucially different to those in *Specht*. Particular significance was attached to the fact that Verio was a commercial entity making numerous, successive inquiries of Register's database, each of which resulted in it receiving notice of Register's conditions. The overall effect of this was that Verio had become well aware of the terms stipulated by Register (moreover, Verio actually admitted that it was fully aware of these conditions). Accordingly, the Court dismissed Verio's 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".

The Court noted, however, that this argument may have been persuasive had Verio's queries been sporadic and infrequent.

In the *Ticketmaster* decision, although the taker of the information was fully aware of the terms on which information was offered on Ticketmaster's site, they were not provided with an "I agree" icon to click. Accordingly, the Court concluded that there was insufficient proof of an agreement to support a preliminary injunction. The Court in the present case expressly rejected the

argument that the terms were unenforceable due to the fact that user had not clicked an "I agree" icon, commenting that: *"[u]nder 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".*

The Court further stated:

"[w]e recognize that contract offers on the Internet often require the offeree to click on an "I agree" icon... no doubt in many circumstances, such a statement 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".

The decision also canvasses issues in relation to ICANN policy and trespass to chattels, but these are beyond the scope of this article.

Implications

As electronic commerce has developed, courts have been confronted with the task of applying age-old principles of contract law to various online permutations of the classic idea of agreement between parties. While, in recent years, courts have become comfortable with enforcing agreements supported by "clickwrap" procedures, up until now there has been no authority in relation to the enforceability of "browsewrap" or "Web wrap" agreements.

This case helps to elucidate contract principles as they apply to browsewrap agreements and, in particular, clarifies the circumstances in which the provisions of browsewrap agreements may be held to be enforceable. Importantly, this case demonstrates that explicit acceptance may not be required for an online agreement to be enforceable if it can be shown that the user is fully "aware"

of its terms and conditions. Of course, the range of circumstances in which courts will be prepared to find that a user has the requisite "awareness" is a matter that requires further clarification.

In relation to the future applicability of this decision, it must be borne in mind that the case involved a fairly extreme example of large-scale and deliberate exploitation by a commercial entity of a competitor's database. Whether courts will readily enforce browsewrap-style agreements in situations involving less sophisticated users remains to be seen. Despite these issues and the fact that Australian courts are not bound by American case law, the decision in *Verio* provides a useful guide as to how an Australian court might deal with the issue.

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[1]   *Register com Inc v Verio Inc* 356 F. 3d 393 (2d Cir. N.Y. 2004), 2004 U.S. App. LEXIS 1074

[2]   *Specht v Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002).

[3]   *Ticketmaster Corp. v Tickets.com Inc.*, No. CV99-7654, 2000 U.S. Dist. LEXIS 12987, 2000 WL 1887522