

## **EXHIBIT H**

MORRISON & FOERSTER LL

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October 10, 2000

Writer's Direct Contact  
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*By Telefacsimile*

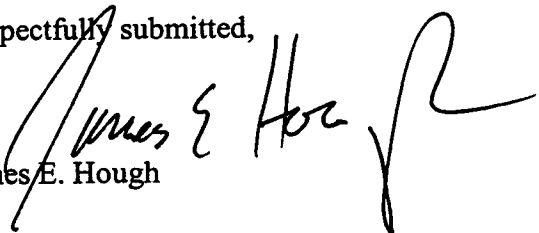
The Honorable Barbara S. Jones  
United States District Judge  
Southern District of New York  
United States Courthouse  
Foley Square  
New York, New York 10007

Re: *Register.com v. Verio, Inc.*  
00 Civ. 5747 (BSJ)

Dear Judge Jones:

As part of their responses to ICANN's *amicus curiae* submission, the parties have included Your Honor on the correspondence between them regarding defendant Verio's (whom we represent) request to license WHOIS data in bulk form from plaintiff register.com. (See Verio's Response to *Amicus Curiae* Submission of ICANN, at Ex. A; Kenneth A. Plevan letter to Your Honor dated September 29, 2000.) In keeping with that practice, and to ensure that Your Honor has the benefit of a complete record on this issue, we are attaching a copy of Verio's most recent letter forwarding a draft of a bulk license agreement.

Respectfully submitted,

  
James E. Hough

cc: Kenneth A. Plevan, Esq.

VERIO™

the new world of business™

Kyle M. Hall  
Assistant General Counsel  
Phone: 303-708-2408  
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E-Mail: khall@verio.net

October 9, 2000

Kenneth A. Plevan, Esq.  
Skadden, Arps, Slate, Meagher & Flom LLP  
Four Times Square  
New York, New York 10036-6522

Re: Draft Bulk Access License Agreement

Dear Mr. Plevan:

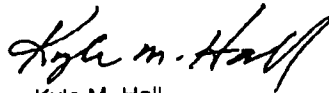
Thank you for your letter of September 29, 2000. First, let me inform you that your accusation that my September 28 letter was intended to posture rather than to commence business negotiations is wrong. On the contrary, my letter was a sincere attempt to pursue an "industry standard" bulk access agreement with your client. Indeed, I was a little surprised to receive a reply letter from you, Register.com's litigation counsel, as what I was pursuing was a commercial/business matter with your client.

Pursuant to your request, attached you will find a draft bulk access license agreement that Verio Inc. is prepared to sign. We would have signed it in the first instance, but that would have implied that we were unwilling to discuss any reasonable comments your client might have to the draft agreement. We look forward to receiving any such comments from your client and the opportunity to discuss such comments with them.

Please note that although we disagree with your characterization of Verio's past use of e-mail in its direct marketing program, the enclosed agreement specifically references a Verio policy already in effect that prohibits use of Register.com's WHOIS data for initial e-mail correspondence. Under such policy, e-mail from Verio to any customer first identified via Register.com's WHOIS data is not permitted unless such customer first requests such e-mail. All other lawful marketing uses of the WHOIS data are permitted.

Thank you in advance for your assistance in getting the attached draft to your client. If your client would like a soft copy of the draft, please arrange for me to receive (via my e-mail address above) the proper e-mail address to which it should be sent.

Sincerely,



Kyle M. Hall  
Assistant General Counsel

Attachment

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8005 S. Chester Street, Suite 200

Englewood, CO 80112

t: 303-645-1900 f: 303-708-2490

www.verio.com

## BULK ACCESS AGREEMENT

This agreement ("Agreement") is entered into as of the 5th day of October 2000 ("Effective Date"), by and between Verio Inc., a Delaware corporation ("Company") and Register.com, Inc., a Delaware corporation ("Registrar"). Company and Registrar are referred to herein individually as a "Party" and collectively as the "Parties."

### Recitals

WHEREAS, Registrar maintains a domain name registration database, a data set containing information about its customers that have and will obtain domain name registration services through Registrar, acting in its capacity as an Internet domain name registrar, as presented at <http://www.register.com> or within any related Registrar site(s) (as more particularly described herein, the "Data"); and

WHEREAS, Company desires to obtain the Data for lawful purposes, either for internal purposes or commercial purposes, but not for any unlawful purpose.

### Agreement

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the parties agree to the terms and conditions set forth below.

#### 1. Grant of Right.

(a) Subject to the terms and conditions of this Agreement, Registrar hereby grants to Company and Company accepts a limited, non-exclusive, non-transferable right to access and use the Data described in Exhibit A (the "Data") for lawful purposes, except to: (i) allow, enable or otherwise support the transmission of mass unsolicited, commercial advertising or solicitations via e-mail (i.e., spam); or (ii) enable high volume automated, electronic processes that apply to Registrar (or its systems). Notwithstanding the foregoing, Company agrees not to sell or redistribute the Data except insofar as the Data has been incorporated by Company into a value-added product or service that does not permit the extraction of a substantial portion of the bulk data from the value-added product or service for use by other parties. Notwithstanding anything to the contrary above, Verio will (i) implement an internal policy requiring that no e-mail be sent to a domain name registrant of which Verio first becomes aware via Registrar's Data unless such registrant first requests such e-mail from Verio, and (ii) use its commercially reasonable best efforts to ensure its employees, agents and representatives comply with the aforementioned e-mail policy.

During the Term (as defined below), Registrar will make an electronic copy of the Data available for download by Company via file transfer protocol ("FTP") from Company's server

designated below. The Data will be updated on Friday of each week, at or about 9:00 a.m. eastern United States time. Within one Business Day (as defined below) of Registrar's receipt of Company's Fee for the Initial Term (as defined below), Registrar will provide Company in writing with its UsrID and Password so that Company can download the Data using a server that Company will name (i.e., IP address and location) to Registrar upon receipt of its UsrID and Password. Unless otherwise notified in writing by the Company, Company agrees to download the Data only from such named server. As used herein, the term "Business Day" means any day other than Saturdays, Sundays and other days on which commercial banks are authorized or required to close in New York, New York

(c) Company acknowledges that if Registrar has a policy that enables domain name registrants to elect not to have Personal Data (as defined below) concerning their domain name registrations available for bulk access for marketing purposes (an "Opt-Out Policy"), Registrar will not (i) make the Personal Data from such individuals available for bulk access hereunder, or (ii) permit itself or others to use such Personal Data subject to the Opt-Out Policy for marketing purposes of its/their own value-added products or services. As used herein, the term "Personal Data" means any data about any identified or identifiable natural person.

## 2. Fees.

(a) As the sole consideration for the right to use the Data as granted hereunder, Company shall pay Registrar a fee in the amount of ten thousand United States dollars (\$10,000) (the "Fee") per year payable in advance. The Fee for the Initial Term (as defined below) shall be paid upon execution of this Agreement. Registrar's obligation to provide Company access to the Data is expressly contingent upon its receipt of the Fee from the Company. The Fee for any Renewal Term (as defined below) shall be paid at least five (5) days prior to the start of the Renewal Term with respect to which it relates. No payment to be made hereunder shall be contingent upon any other payment or obligation under this Agreement or any other agreement between the Parties. Fees payable hereunder shall be wire transferred to Registrar in immediately available funds to an account designated in writing by Registrar.

(b) The Fee(s) paid pursuant to this Agreement shall be paid in U.S. dollars and shall be non-refundable and, except as provided in Section 6(b) below, not pro-rated or pro-ratable.

## 3. Publicity.

Neither Party will make any public statement, press release or other announcement relating to the terms of or existence of this Agreement without the prior written approval of the other, which approval shall not be unreasonably withheld.

## 4. No Transfer of Other Rights.

Except for the rights expressly granted hereby, Company shall not acquire any right, title and interest in and to the Data.

5. Term.

The initial term of this Agreement shall begin on the Effective Date and shall end on the first anniversary thereof (the "Initial Term"). Unless Company provides Registrar with a written notice at least thirty (30) days prior to the end of the Initial Term or any Renewal Term, this Agreement shall automatically renew on a yearly basis thereafter (each such renewal term a "Renewal Term") subject to Registrar' receipt of the Fee for such Renewal Term at least five (5) days prior to the expiration of the Initial Term or the then current Renewal Term. The Initial Term and all Renewal Terms, if any, are referred to herein collectively as the "Term."

6. Termination.

(a) Either Party may terminate this Agreement if the other Party materially breaches its obligations hereunder and such breach remains uncured for thirty (30) days following notice to the breaching Party of the breach, except Registrar may terminate this Agreement immediately if Company fails to pay any Fee amount due hereunder and such non-payment remains uncured for five (5) days.

(b) The parties also agree that this Agreement may be terminated or modified by Registrar at any time pursuant to a policy adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN") governing bulk access to the Data or to comply with other ICANN policies issued to comply with applicable statutes, regulations or for other reasons; provided, however, that Company shall be entitled to terminate this Agreement immediately upon written notice to Registrar in the event any such modification results in further restrictions or limitations on Company's use of the Data such that Company may no longer use the Data for the lawful purposes that it practiced or intended to practice after the Effective Date; and provided, further, however, that within thirty (30) days following any such termination under this Section 6(b), Registrar shall refund Company a pro rata share of the annual fee paid for the year in which such termination has occurred reflecting the portion of such year that Customer will not be obtaining the Data as the result of such termination.

(c) The provisions of Section 4 (No Transfer of Other Rights), Section 6 (Termination), Section 7 (Warranty and Indemnity), Section 8 (Limitation of Liability) and Section 9 (General) will survive any termination or expiration of this Agreement.

7. Warranty and Indemnity.

(a) THE DATA PROVIDED HEREUNDER IS PROVIDED "AS-IS." NEITHER PARTY MAKES ANY WARRANTY IN CONNECTION WITH THE SUBJECT MATTER OF THIS AGREEMENT AND HEREBY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES, INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT REGARDING SUCH SUBJECT MATTER.

(b) Registrar will indemnify, defend and hold harmless Company, its affiliates, officers, directors, employees, consultants and agents from any and all third party claims,

liability, damages and/or costs (including, but not limited to, attorneys fees) arising from Registrar's breach of any warranty, representation or covenant in this Agreement including, without limitation, any failure to exclude from the Data the Personal Data of domain name registrants that elected to avail themselves of Registrar's Opt-Out Policy, if any. Company will promptly notify Registrar of any and all such claims. Company will reasonably cooperate with Registrar with the defense and/or settlement thereof; provided that, if any settlement requires an affirmative obligation of, results in any ongoing liability to or prejudices or detrimentally impacts Company in any way and such obligation, liability, prejudice or impact can reasonably be expected to be material, then such settlement shall require Company's written consent (not to be unreasonably withheld or delayed) and Company may have its own counsel in attendance at all proceedings and substantive negotiations relating to such claim at Company's sole cost and expense.

(c) Company will indemnify, defend and hold harmless Registrar, its affiliates, officers, directors, employees, consultants and agents from any and all third party claims, liability, damages and/or costs (including, but not limited to, attorneys fees) arising from Company's breach of any warranty, representation or covenant in this Agreement, including, without limitation, any breach of Section 1(a) hereof. Registrar will promptly notify Company of any and all such claims. Registrar will reasonably cooperate with Company with the defense and/or settlement thereof; provided that, if any settlement requires an affirmative obligation of, results in any ongoing liability to or prejudices or detrimentally impacts Registrar in any way and such obligation, liability, prejudice or impact can reasonably be expected to be material, then such settlement shall require Registrar' written consent (not to be unreasonably withheld or delayed) and Registrar' may have its own counsel in attendance at all proceedings and substantive negotiations relating to such claim at Registrar' sole cost and expense.

#### 8. Limitation of Liability.

IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES, WHETHER BASED ON BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, WHETHER OR NOT THAT PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE.

#### 9. General.

(a) Assignment. Neither Party may assign this Agreement, in whole or in part, without the other Party's written consent (which will not be unreasonably withheld), except that no such consent will be required in connection with a merger, reorganization or sale of all, or substantially all, of such Party's assets or of such Party's assets utilized on connection with its performance under this Agreement. Any attempt to assign this Agreement other than as permitted above will be null and void.

(b) Governing Law. This Agreement will be governed by and construed in accordance with the laws of the State of New York, excluding its conflicts of law rules.

(c) Notice. Any notice under this Agreement will be in writing and delivered by personal delivery, express courier, confirmed facsimile, confirmed e-mail or certified or registered mail, return receipt requested, and will be deemed given upon personal delivery, one (1) day after deposit with express courier, upon confirmation of receipt of facsimile or email or five (5) days after deposit in the mail. Notices will be sent to a Party at this address set forth below or such other address as the Party may specify in writing pursuant to this Section:

If to Company: Verio Inc.  
8005 S. Chester Street, Ste. 200  
Englewood, CO 80112  
Attention: General Counsel

If to Registrar: Register.com, Inc.  
575 8<sup>th</sup> Avenue  
New York, New York 10018  
Attention: General Counsel

(d) No Agency. The Parties are independent contractors and will have no power or authority to assume or create any obligation or responsibility on behalf of each other. This Agreement will not be construed to create or imply any partnership, agency or joint venture.

(e) Force Majeure. Any delay in or failure of performance by either Party under this Agreement will not be considered a breach of this Agreement and will be excused to the extent caused by any occurrence beyond the reasonable control of such Party including, but not limited to, acts of God, power outages and governmental restrictions.

(f) Severability. No determination by a court of competent jurisdiction that any term or provision of this Agreement is invalid or otherwise unenforceable shall operate to invalidate or render unenforceable any other term or provision of this Agreement and all remaining provisions shall be enforced in accordance with their terms.

(g) Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

(h) Entire Agreement. This Agreement is the complete and exclusive agreement between the parties with respect to the subject matter hereof, superseding any prior agreements and communications (both written and oral) regarding such subject matter hereof. This Agreement may only be modified, or any rights under it waived, by a written document executed by both parties.



IN WITNESS WHEREOF, the Parties hereto have signed this Agreement as of the date first mentioned above.

REGISTER.COM, INC.

VERIO INC.

By: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBIT A**

**Data Description**

The Data will be comprised of the following data fields, as available. Some records do not have all data fields:

Domain Name  
Registrant Name  
Registrant Address  
Identify of Registrar  
Primary DNS Server IP Address and corresponding name  
Secondary DNS Server IP Address and corresponding name  
Administrative Contact name and postal address  
Administrative Contact telephone number, email address and fax number (where available)  
Technical Contact name and postal address  
Technical Contact telephone number, email address and fax number (where available)  
Record Creation date  
Record Expiration Date