

Judge Jeremy Fogel on Consumers, Internet Technologists and Their Discontents

On June 24, 2011, at the Eight Annual eCommerce Best Practices Conference at Stanford Law School, U.S. District Judge Jeremy Fogel gave a thought-provoking keynote address about how internet-technologists have a tendency to talk past their customers, and how this lack of communication is the real driver of some of the internet-era's most notorious lawsuits. Judge Fogel knows whereof he speaks: he has written influential opinions in a number of such cases, including the "Let's Go Crazy" YouTube takedown case.

Judge Fogel's main concern was the tension or even disconnect between (a) consumer experience of eCommerce (and the Internet in general), (b) the technologists who enable and profit from eCommerce, and (c) the applicable law. The law is simply ill equipped to resolve this tension. This isn't a new concern by any means, but it was being expressed thoughtfully by a sitting federal judge who routinely hears technology cases.

What drives eCommerce lawsuits, according to Judge Fogel, is the consumer's sense of "identity and expectation." He referenced a few celebrated cases in his own courtroom as examples. To take one example, a woman sued Facebook after she was banned for being very aggressive in friending other users. It was a pretty clear-cut violation of Facebook's terms and conditions. When she complained, she received what might be charitably described as a form email from the "Facebook Team." She even drove to Facebook's headquarters--from Maryland--to complain in person but was turned away. (There's a pretty good summary of the facts in this story, <http://www.allfacebook.com/facebook-lawsuit-banne-2010-09>, which has links to the Complaint. The case--now dismissed at the pleadings stage--was *Young v. Facebook, Inc.*, Santa Clara County Superior Court Case No. 1-10-CV-178574, transferred to N.D. Cal. 5:2010-cv-3579.)

Judge Fogel's point was that she sued not because she had some kind of coherent legal claim--she didn't--but because Facebook wouldn't listen to her. Consumers expect that they'll have a chance to tell their side of the story before losing what feels like (but isn't really) a right. Facebook's attitude was simply that it was a private company that needed only to abide

by its own contract with its users. That's legally correct, but it strikes such a dissonant chord with consumer expectations that it's begging for a lawsuit.

Adding to the tension is the peculiar nature of many of the services provided over the Internet, such as those provided by Facebook, Google and Twitter. They feel like a "commons"--i.e., a public space, like a town square or a street--but they are controlled by private entities for profit. (Indeed, such service providers go out of their way to hide their natures.) They feel like commons, but they are more like shopping malls. When the plaintiff in the Facebook case had her account deleted, from her point of view, she was being kicked out of a commons. From Facebook's point of view, it was simply protecting its customers' online experiences (so that the customers would continue to use Facebook's online products).

Although the Facebook plaintiff's lawsuit was legally crazy--it didn't even make it out of the pleadings stage--it served to deliver an important message to Facebook that its customer service was pretty awful. Of course, not all crazy lawsuits are beneficial. Arguably, defending against them is simply part of the cost of doing business. But what if, to avoid such lawsuits, the defendant changes an otherwise popular and good corporate policy? That would be a market distortion: a handful of litigious plaintiffs ruining it for everyone else.

Finally, Judge Fogel worried that judges lack the necessary context to make good decisions in technology cases. Understanding the consumer experience is the easy part. Understanding the technology--which is hidden from the consumer (and judge)--is much harder. Complicating matters is the way in which Internet technology fits into legal categories. Judge Fogel was asked to discuss one best practice, and he drew from perhaps his best-known eCommerce decision. He thinks that a simple click-wrap license is not enough to make some of its more onerous provisions enforceable. Such provisions must be sign-posted.

Thanks for reading!