

*ProCD v. Zeidenberg*: Tidying Up After the Stranger on the Street

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Abstract

Richard Epstein has described *ProCD v. Zeidenberg* (7th Cir. 1996) as “one of the most important contract cases of the past generation” for its functionalist, rather than doctrinalist, approach to contract formation. Judge Frank Easterbrook’s opinion for the Seventh Circuit, explains Epstein, achieves an economically sensible result, but it did so at the expense of various contract law rules that stood in the way. As many commentators have pointed out, Judge Easterbrook’s opinion ignored various black letter rules, and it obscured assorted difficulties with the legal analysis, including the relation of strangers to the contract at issue in *ProCD*. The result in *ProCD* is likely sensible, but the doctrinal problems are a genuine cause for concern. Lawyers are surely better at traditional legal analysis than economic analysis; lawyers are better able to advise their clients when disputes can be resolved based on legal doctrine. In the interest of minimizing the need for functionalist departures from the rules that lawyers and others cannot easily predict, it is preferable that the doctrine itself makes economic sense. In *ProCD* the problem of copyright preemption stood in the way of a more doctrinally anchored opinion, but it need not do so anymore. The Digital Millennium Copyright Act can be used to solve the problem in *ProCD* that necessitated the court’s disregard of multiple contract law rules and the court’s unsatisfying (or possibly misleading) discussion of preemption. *ProCD* can be redescribed as a pedestrian application of settled rules, making the decision much less disruptive of these rules. In the interest of doctrinal faithfulness, courts should take a functionalist approach to *ProCD*, ignoring much of what it said in favor of what it now could say.