

Third Parties to the Rescue

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Date : November 9, 2009

Michael Risch, [Virtual Third Parties](#), 25 **Santa Clara Computer & High Tech. L.J.** 416 (2009).

Michael Risch's [Virtual Third Parties](#), 25 **Santa Clara Computer & High Tech. L.J.** 416 (2009) tips the scales at a mere eleven pages—but it punches far above its weight class. He gives a clear and straightforward reading of third-party beneficiary doctrine in contract law to put a new spin on old problems of online power.

Risch's subject is virtual worlds, where the immense technical power of the world's provider is so well-recognized that it has its own shorthand name: the "[God Problem](#)." If Blizzard wants to exile you from World of Warcraft, confiscate everything you own in-world, or stick your avatar in the stocks, their control over the servers lets them do it with a few keystrokes. Your avatar's arms are never going to be long enough to box with a game god whose software controls arm length.

This power imbalance has generated a rich scholarly literature concerned with the rights of virtual world users, from [Jack Balkin's work](#) on protecting free speech interests to [Joshua Fairfield's work](#) on protecting property interests. Legally, though, users are faced with an uphill struggle; standing between them and the game gods are the user agreements they clicked through when signing up. These agreements are infamously one-sided; the world provider typically reserves vast freedom of action for itself while binding users to a whole panoply of terms restricting their conduct.

Scholars concerned with user rights, then, have typically had to make one of two moves. Some reach into the thousands of law review pages on the contractual bona fides of clickthrough mass-market contracts, looking for a doctrine that would void or modify them. First-year staples—consideration, mutual assent, offer and acceptance, and unconscionability—make regular appearances. Other scholars reject the contractual frame altogether. Fairfield has [powerfully argued](#) that bilateral contracts are simply inadequate for the complex governance problems of virtual worlds, and that other bodies of law will necessarily have to pick up the slack.

Risch doesn't so much advance these debates as cleverly sidestep them. His point of departure is a familiar but underappreciated truth about virtual worlds (and online services in general). A provider can also harm its users by doing *nothing*. Virtual worlds are filled with griefers, gold farmers, and spawn campters. It only takes a few immature jerks to ruin a wiki or a discussion board. A provider that sets rules of conduct and then does nothing to enforce them leaves users at the mercy of the worst of their fellows. The average World of Warcraft user probably wants Blizzard to ban *more* accounts, not fewer.

Thus, Risch asks not whether users should be able to escape from user agreements, but whether they should be able to enforce user agreements against each other. This is an almost deceptively simple question, and section 302 of the Restatement (Second) of Contracts is directly on point. Users are third parties to each others' user agreements, and according to the Restatement, a contract is enforceable by a third-party beneficiary if the "circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

For examples, Risch looks to common user-versus-user disputes in virtual worlds, such as virtual

property transactions gone bad, grieving, and impersonation. These are all situations in which the misbehaving user is actually in breach of the user agreement; they're also all commonly underenforced by the world provider. He asks whether the circumstances suggest an intent to let other users enforce the terms of the agreement. The answer turns, in his view, on how targeted the contractual provision is towards protecting other users. Thus, for example, anti-grieving clauses are drafted specifically to protect players from being harassed and annoyed, and are thus good candidates for user-to-user enforcement. Generic clauses requiring users to provide accurate identifying information when they sign up, on the other hand, don't work to the benefit of any particular other user, and thus shouldn't create enforceable rights in those other users.

Risch may or may not be right that users are often intended third-party beneficiaries. I suspect that the moment courts start to recognize users' rights to enforce user agreements against each other, companies will immediately rewrite their terms of service to expressly disclaim any possible third-party benefits. Virtual world providers tend to want the freest possible hand; their instinctive reaction to players suing each other is likely to be panic at the possibility that real-life courts will usurp their control over the world. Uneasy lies the head that wears a crown.

The real accomplishment of Risch's piece, then, is not so much the doctrinal analysis itself as the serious, rigorous way he uses the doctrine to set up a new perspective on a central question in virtual world studies: what would real self-governance by a player community look like? (Replace "virtual world" by "Internet" and "player" by "user" to see the wider significance of that question.) Julian Dibbell [gave us](#) the provocative metaphor of a user agreement as a social contract; Risch gives us a clever, slyly subversive take on the idea that puts the "contract" front and center. The one-sided user agreement is more of a Möbius strip; travel far enough along it and everything turns inside-out.

Cite as: James Grimmelmann, *Third Parties to the Rescue*, JOTWELL (November 9, 2009) (reviewing Michael Risch, *Virtual Third Parties*, 25 **Santa Clara Computer & High Tech. L.J.** 416 (2009)), <https://cyber.jotwell.com/17/>.