



2009

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### Recommended Citation

Michael Risch, *Virtual Third Parties*, 25 SANTA CLARA HIGH TECH. L.J. 415 (2012).

Available at: <http://digitalcommons.law.scu.edu/chtlj/vol25/iss2/5>

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# VIRTUAL THIRD PARTIES

Michael Risch<sup>†</sup>

In virtual worlds, where 20 million people spend \$200 million each year,<sup>1</sup> rules of life are governed by contract,<sup>2</sup> and three-party transactions are ubiquitous; every exchange of virtual cash, property, sound, pictures, and even conversation introduces a third party into the contractual relationship between user and virtual-world provider.<sup>3</sup> Whenever a contract affects a non-party, the third-party beneficiary (TPB) doctrine might apply. To date, however, the practical and theoretical boundaries of this important doctrine's application to virtual worlds have yet to be fully explored,<sup>4</sup> perhaps because of an overly narrow doctrinal conception.<sup>5</sup>

Many states have loosened TPB requirements somewhat,<sup>6</sup> with most having adopted an approach similar to that of the Second

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† Copyright © 2009 Michael Risch. Associate Professor of Law and Project Director—Entrepreneurship, Innovation and Law Program, West Virginia University College of Law; Of Counsel, Russo & Hale LLP, Palo Alto, California. I thank Vincent Cardi, Joshua Fairfield, Eric Goldman, Greg Lastowka, Caprice Roberts, Will Rhee, and participants of the WVU Faculty Colloquia for their helpful comments. Valuable research assistance was provided by Nate Griffith.

1. Mike Musgrove, *Virtual Games Create a Real World Market*, WASH. POST, Sept. 17, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/16/AR2005091602083.html>. These numbers are surely higher today.

2. *But see* Joshua Fairfield, *Anti-Social Contracts: The Contractual Governance of Online Communities* 3 (Indiana Legal Studies Research Paper No. 89, July 2007), available at <http://ssrn.com/abstract=1002997> (arguing that contracts alone cannot govern virtual worlds).

3. Joshua Fairfield provides a helpful graphic depicting the complexity of contractual and other relationships in virtual worlds. Joshua Fairfield, *Electronic Contract, Virtual Property, and the God Paradox* 6-8, [http://www.hans-bredow-institut.de/webfm\\_send/86](http://www.hans-bredow-institut.de/webfm_send/86) (last visited Oct. 13, 2008).

4. Dan E. Lawrence, *It Really Is Just a Game: The Impracticability of Common Law Property Rights in Virtual Property*, 47 WASHBURN L.J. 505, 530-32 (2008) (discussing the theory briefly).

5. *See* Fairfield, *supra* note 2, at 57 (“Third-party beneficiary law does not help: that law has always required that the beneficiary be named, and thus specific, at the time of the creation of the contract.”).

6. Jennifer Sapp, Note, *Aging Out of Foster Care: Enforcing the Independent Living Program Through Contract Liability*, 29 *Cardozo L. Rev.* 2861, 2891 (2008) (“In most jurisdictions, the intent of the parties may be proven by the surrounding circumstances rather than by relying on the express language of the contract.”).

Restatement of Contracts, which looks at the totality of circumstances to determine whether a third party can enforce the terms of a contract.<sup>7</sup> As a result, TPB rights are judicially cognizable claims that will impact virtual world contracting<sup>8</sup> and interacting. Though its application is not universal, TPB enforcement envisioned by the Restatement is an important, and in some cases the only, way to vindicate user rights in the hub and spoke contractual relationships between a virtual world provider and its many users.

This essay introduces the TPB concept to virtual worlds in three ways. First, it describes how third-party interactions permeate virtual worlds. Second, it provides a general framework for applying the TPB doctrine to virtual world user agreements. Third, it applies that framework to particular recurring problems that virtual world users face.

## I. THIRD PARTIES IN VIRTUAL WORLDS

Virtual world providers enter into a contract with each user.<sup>9</sup> These user agreements establish rules of conduct for the user's interaction with the provider and the user's interaction with other users. Both types of interactions offer potential benefits to third parties, namely other users. Many virtual wrongs that are not real-world torts nonetheless might violate the "virtual law" rules of conduct enforceable only in contract.<sup>10</sup> In the absence of a directly actionable crime, tort, or contract,<sup>11</sup> all that remains are benefits bestowed by user agreements. Thus, the contract to be enforced in three-party interactions is the real-world contract between a user and the provider. Where the provider does not enforce the contract against a breaching user, it falls to third-party users who have been harmed to attempt to enforce the breaching user's agreement with the provider—a contract to which the harmed user is not a party due to the hub and

7. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

8. This is not to imply that a contract is necessarily the best solution. As others have argued, there are problems with contractual property systems. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 776-77 (2001). However, so long as contracts govern virtual worlds, contract doctrine will be relevant. Eric Goldman, *Speech Showdowns at the Virtual Corral*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 845, 846 (2005) (arguing that virtual worlds are no different than any other online environment, and that standard rules should apply to them).

9. This analysis assumes that the terms of service are a binding contract.

10. For example, morally wrong or socially unacceptable virtual harassment, spam, theft, and murder may not be real-world crimes or torts.

11. There may well be virtual or real-world contracts between users; those contracts would be directly enforceable by the aggrieved user.

spoke nature of multiple separate user agreements with a single provider.

For example, in *Hernandez v. Internet Gaming Entertainment, LTD.*,<sup>12</sup> the class-action plaintiff, a user of Blizzard Entertainment's World of Warcraft (WoW), sued another WoW user, Internet Gaming Entertainment (IGE), for breach of IGE's agreement with Blizzard.<sup>13</sup> IGE is in the business of buying and selling currency, items, and accounts in virtual worlds,<sup>14</sup> and allegedly sells WoW gold that it "farms" using low-cost independent contractors.<sup>15</sup> Hernandez claims that IGE's farming and sale of virtual gold for real money breaches the Blizzard terms of service,<sup>16</sup> and Blizzard has failed to take action against the breach. This breach allegedly depleted available virtual gold and devalued virtual currency for third-party users, causing real world loss of use of the system, lost time spent prospecting virtual resources, and computer speed degradation.<sup>17</sup>

Another example is the "No Control Provision" of the Linden Lab Second Life agreement, which states that users can interact with the environment and Linden Lab generally will not regulate those interactions.<sup>18</sup> While this section's primary purpose is to limit provider liability for users' untoward actions, it also creates a set of

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12. Amended Class Action Complaint, *Hernandez v. Internet Gaming Entm't, LTD.*, No. 07-21403-Civ-COHN/SNOW (S.D. Fl., filed Aug. 17, 2007) [hereinafter *Amended Complaint*], available at <http://docs.justia.com/cases/federal/district-courts/florida/flsdce/1:2007cv21403/296927/5/>.

13. *Id.* at 1-2.

14. Ige.com, Our Business, <http://www.ige.com/about> (last visited Dec. 30, 2008).

15. *Amended Complaint*, *supra* note 12, at 1-2. Gold farming is a term of art that describes the generation of gold and other valuable objects for sale through the use of cheap labor. Dave Rosenberg, 'Gold Farming' Good for Multiplayer Games?, CNet News NEGATIVE APPROACH, Oct. 2, 2008, [http://news.cnet.com/8301-13846\\_3-10056262-62.html](http://news.cnet.com/8301-13846_3-10056262-62.html). Thus, IGE is technically not a user—its employees and contractors would actually click the "agree" button to become users.

16. World of Warcraft Terms of Use § 11, <http://www.worldofwarcraft.com/legal/termsofuse.html> (last visited Dec. 30, 2008) ("Accordingly, you may not sell items for 'real' money or otherwise exchange items for value outside of the Game.").

17. *Amended Complaint*, *supra* note 12, at 9-13.

18. Second Life Terms of Service § 1.2, <http://secondlife.com/corporate/tos.php> (last visited Dec. 29, 2008) ("1.2 Linden Lab is a service provider, which means, among other things, that Linden Lab does not control various aspects of the Service. You acknowledge that Linden Lab is a service provider that may allow people to interact online regarding topics and content chosen by users of the service, and that users can alter the service environment on a real-time basis. Linden Lab generally does not regulate the content of communications between users or users' interactions with the Service. As a result, Linden Lab has very limited control, if any, over the quality, safety, morality, legality, truthfulness or accuracy of various aspects of the Service.").

beneficiaries, whether intended or unintended.<sup>19</sup> In essence, Linden Lab is agreeing that the virtual world will not be regulated except as set forth in the agreement. Any third party interacting with a user is a beneficiary of that lack of regulation.

For example, a Second Life user called Performer might want to perform a juggling show. Performer would advertise the show, either online or offline. If it looks sufficiently entertaining, user Audience might pay virtual money—which, unlike in WoW, costs Audience real money. If Linden Lab decides to terminate the show in breach of its agreement with Performer, then Audience—who has paid for a show that never occurred—would be a non-contracting beneficiary of the No Control Provision.

Pervasive third-party benefits are not surprising; providers want to take little or no responsibility for interactions between their users so long as users do not leave in droves. For example, if User A engages in offensive behavior, a provider would want User B to pursue a remedy with User A rather than the provider. Thus, much of the user activity under a provider's agreement would be for the benefit of the users, whether directly or indirectly.

## II. WHAT RIGHTS DO AND SHOULD THIRD PARTIES HAVE?

Receipt of benefits by the third party does not end the inquiry; the TPB doctrine only protects non-parties who are *intended* to benefit from the contract.<sup>20</sup> Only then may a third party sue for a contractual breach despite not being a party to the agreement.<sup>21</sup> The “intention” threshold for such an extra-contractual action is strict; the contracting parties must intentionally bestow something of value, an affirmative benefit, or even a savings, on the third party.<sup>22</sup> The third

19. As discussed below, this does not mean that the third party has legal rights.

20. SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 37:8 (4th ed. 2000); RESTATEMENT (SECOND) OF CONTRACTS § 315 (1981); R. T. Kimbrough, *Right of Third Person to Enforce Contract Between Others for His Benefit*, 81 A.L.R. 1271, 1286 (1932) (“It is often stated by the courts that the contract must have been intended for the benefit of the third person, in order to entitle him to enforce the same.”).

21. To be sure, third-party users will be separately subject to the same agreement with the provider, but the question here is what User B's rights are when User A and the provider have a contractual dispute.

22. WILLISTON & LORD, *supra* note 20, at § 37:7 (“For example, in a case involving an agreement between a divorcing husband and wife, the husband promised to pay his wife's attorney's fees resulting from the divorce proceedings, and the court held that the agreement amounted to a third party creditor beneficiary contract for the benefit of the attorney.”).

party cannot be a remote or an “incidental” beneficiary.<sup>23</sup> For example, a neighbor who might enjoy looking at a nice lawn is not an intended beneficiary of the contract between the homeowner and the landscaper. However, if the threshold is surpassed, then the TPB can sue the breaching party even if the other contracting party will not.<sup>24</sup>

The difficult task is determining which beneficiaries are intended and which are merely incidental. The analysis is complicated and quite important where a user has paid for an un-received service or is divested of virtual property caused by someone else’s breach of an unrelated contract.

For example, the *Hernandez v. IGE* complaint summarily alleges intent.<sup>25</sup> The provider requires that each user agrees not to cheat, intuitively so as to benefit other users. To be sure, Blizzard benefits as well because it cannot attract and retain users if the users are unhappy from being continuously cheated by others, but this only reinforces the intuition that user happiness was an intended benefit of the Blizzard-IGE contract.

However, this intuitive argument is limited. What if Blizzard desires certain cheating activity (despite the contract) and does not really want other users to be able to stop a cheater? The intent to benefit others may be lacking. Also, extending the Second Life hypothetical, what if Linden Lab terminates not only the juggling show, but Performer’s account, which leads to the termination of the show? Intuitively, Audience and every other user who might see the show is a beneficiary of Performer’s right to exist in Second Life, but they seem more like neighbors enjoying a nice lawn. These two examples illustrate the limits of intuition.

When intuition fails, what should determine intention? Many cases involving service agreements provide little guidance. These cases are contradictory,<sup>26</sup> and most litigated contracts are not

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23. *Id.*; RESTATEMENT (SECOND) OF CONTRACTS § 315 (1981); Kimbrough, *supra* note 20, at 1287 (“It follows from the foregoing that a mere incidental or consequential benefit which might accrue to a third person by reason of the performance of the contract is not sufficient to enable him to maintain an action on the contract”).

24. The classic TPB example is the named beneficiary of an insurance policy.

25. *Amended Complaint*, *supra* note 12, at 18.

26. *See, e.g.*, *Locke v. Ozark City Bd. of Educ.*, 910 So. 2d 1247 (Ala. 2005) (a league contract mandating police protection at games was intended to benefit umpires of those games); *Stewart ex rel. Womack v. City of Jackson*, 804 So. 2d 1041, 1050 (Miss. 2002) (bus passenger was a beneficiary of a contract between city and bus operator); *Bush v. Upper Valley Telecable Co.*, 524 P.2d 1055 (Idaho 1973) (customer was a TPB of a contract between city and cable franchisee with respect to fees charged by franchisee); *New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc.*, 651 F. Supp. 802, 815-17 (S.D.N.Y. 1986) (customer is TPB of

analogous to “virtual law” agreements because most service agreements do not contemplate interaction between users.

However, the broad definition of intended beneficiaries in the *Restatement (Second) of Contracts* provides a starting point, finding intention if a totality of circumstances shows that the promisee intended to confer a benefit on another.<sup>27</sup> Intent is construed objectively rather than subjectively,<sup>28</sup> and the third party’s reasonable reliance on the contract is relevant.<sup>29</sup> The appeal of an objective analysis is that intent may be found even if the provider and the user have no subjective desire to enforce the contractual terms;<sup>30</sup> thus, TPB rights may be the only way to enforce what would otherwise be empty promises.

Trade associations provide a good hub and spoke analogy—each member has an agreement with the association, but not with each other. The question becomes which terms are actionable by one member against another and which terms are not. Judge Posner provided useful analysis in *MacGregor v. Rutberg*,<sup>31</sup> a case where one doctor sued another for a violation of rules imposed by a professional association to which each doctor belonged.<sup>32</sup> Such a violation was not

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contract between city and cable franchisee with respect to franchisee’s refusal to carry unaffiliated cable channels); *but see, e.g.*, *CDP Event Servs., Inc. v. Atcheson*, 656 S.E.2d 537, 539 (Ga. Ct. App. 2008) (concert patrons not TPB’s of contract between security company and concert venue: “But the fact that performance of the contract *might* benefit Atcheson does not alone establish the requisite intent. Instead, the contract must show the parties’ clear intent to confer a benefit on Atcheson and other patrons of the Amphitheatre, as ‘[a] third-party beneficiary must be the *intended* beneficiary of the contract; the mere fact that a third party would benefit incidentally from the performance of the contract is not alone sufficient to give such person standing to sue on the contract.(citations omitted, emphasis in original); *Joseph v. Hospital Dist. No. 2*, 939 So.2d 1206, 1213-14 (La. 2006) (doctor members of association are not TPB’s of contract between hospital and association because no direct benefit flowed to doctors from hospital).

27. RESTATEMENT (SECOND) OF CONTRACTS § 302(b) (1981) (Beneficiary is intended “if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”).

28. RESTATEMENT (SECOND) OF CONTRACTS § 302 reporter’s note (1981) (“The new language in the preamble of Subsection (1) takes account of factors not dependent on intention as stated in Comment *d*”); WILLISTON & LORD, *supra* note 20, at 37:8 n.11.

29. RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d (1981) (In examples of intended beneficiaries, “if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary.”).

30. *Fairfield*, *supra* note 2, at 4-5 (pointing out that contracts fail when companies do not enforce the agreements).

31. *MacGregor v. Rutberg*, 478 F.3d 790 (7th Cir. 2007).

32. *Id.* at 791, 793-95.

actionable under the TPB doctrine, but a requirement that two members arbitrate disputes would be actionable:

The rule [requiring arbitration] would be for the direct benefit of the disputants and not the rest of the membership, and so they would be the logical enforcers of it. This is not true with regard to the rule governing expert testimony by members. Its logical enforcer is the association's management and the logical remedy if it determines that there has been a violation is to expel the violator.<sup>33</sup>

This analysis tracks the requirement of the Restatement: consideration of the objective benefits to parties as well as the likely remedies based on reliance on the contract with the central party.<sup>34</sup>

However, not all jurisdictions will apply a broad reading of the Restatement in every case.<sup>35</sup> For example, in *Register.com, Inc. v. Verio, Inc.*,<sup>36</sup> a domain name registrar (Register.com) entered into an agreement with its governing body (ICANN) mandating that Register.com not limit other registrars' use of its public customer database.<sup>37</sup> Despite finding that the agreement conferred a benefit on the other registrars, the court ruled that they were not third-party beneficiaries of the agreement because the agreement provided a specific grievance procedure for ICANN to determine whether the contract had been breached.<sup>38</sup> The refusal to find an intentional benefit in this case is still arguably within the ambit of the Restatement. The court looked at all of the circumstances to determine whether the parties objectively intended to confer a benefit on other registrars, and found that the intention was that a grievance procedure should be used rather than a breach of contract action.

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33. *Id.* at 794-95 (citations omitted). *Accord* Specht v. Netscape Commc'ns Corp., 150 F. Supp. 2d 585, 597-98 (S.D.N.Y. 2001) (no enforcement of arbitration agreement as TPB where party had no connection with agreement at issue).

34. *See also* Hall v. Nat'l Collegiate Athletic Ass'n, 985 F. Supp. 782, 796-97 (N.D. Ill. 1997) (holding that a college football player had a likelihood of proving that student athletes were TPBs of a contract between NCAA and member schools where the issue is eligibility, something determined by NCAA contract).

35. *See* Fairfield, *supra* note 2, at 57. However, most states are not as strict as Professor Fairfield implies. WILLISTON & LORD, *supra* note 20, § 37:8 (providing example cases from several states that do not require explicit contractual TPB clauses and instead look only to objective intent and circumstances. Further, even those states that are strict will be more likely to accept the Restatement than, say, to declare virtual property real property.).

36. *Register.com, Inc. v. Verio, Inc.* 356 F.3d 393 (2d Cir. 2004).

37. *Id.* at 395-96.

38. *Id.* at 399-400.

### III. APPLICATION TO VIRTUAL WORLDS

The Restatement definition provides guidance about how courts might handle several types of virtual world disputes. Five contractual provisions that might lead to such disputes are anti-cheating clauses, property ownership clauses, legal compliance clauses, anti-harassment clauses, and identification clauses.

#### A. *Anti-Cheating Clauses*

Determining whether third-party users are intended beneficiaries of anti-cheating provisions depends on the type of cheating and the harm caused. For example, a Second Life user might improperly create “Linden Bucks,” the virtual money in Second Life.<sup>39</sup> Linden Lab charges users real money for Linden Bucks, so “counterfeiting” in violation of the contract would directly deprive Linden Lab of income. Other users, whose primary harm would be inflated virtual prices due to a larger virtual money supply, would not be intended beneficiaries because Linden Lab stands to lose the most by such conduct. In *Hernandez*, however, where WoW gold cannot be purchased, cheating deprives other users of potentially limited resources in addition to devaluing their currency.<sup>40</sup> Thus, other WoW users objectively benefit from the anti-cheating provision because more gold and other resources are available to them.

#### B. *Ownership Clauses*

The intent of clauses that grant ownership of property<sup>41</sup> to users can also vary. Certainly such clauses are intended to benefit the initial owner, but can they really be said to intentionally benefit *third-party* users, such as potential buyers?

For example, a user could acquire property and then sell the property to a third party for real money. If the provider divests the buyer of ownership—either wrongly in breach of its agreement to grant ownership to the seller or rightly because the seller breached its

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39. See Second Life Terms of Service, *supra* note 18, § 4.2 (“You agree not to create or provide any server emulators or other software or other means that provide access to or use of the Servers without the express written authorization of Linden Lab.”).

40. *Amended Complaint*, *supra* note 12, at 8-10. WoW could solve this by “planting” more gold, but such acts may not be contractually required, nor would it be terribly helpful—it would simply cause hyper-inflation just as if a real government simply printed more and more currency.

41. Property could be real intellectual property (an uploaded song) or virtual (gold or land). See JOSEPH WILLIAM SINGER, PROPERTY LAW RULES, POLICIES, AND PRACTICES § 15.1 (3d ed. 2002); see also *Fairfield*, *supra* note 2, at 14.

agreement with the provider by cheating to obtain the property—then the third-party buyer would want to sue either the provider or the seller for the breach that caused the loss. The buyer would have no direct contractual recourse against the deep-pocketed provider, nor could it obtain the property from the seller even if it could recover its purchase price.<sup>42</sup> Indeed, the buyer might not even have direct recourse against the seller for breach of contract if the seller did not realize it had breached (no fraud) and also delivered the property as promised (no breach of contract).<sup>43</sup>

Despite this potential harm to third parties, however, ownership clauses do not generally create intended beneficiaries. The primary reliance on such a clause would be by the contracting party (the owner of the property) and not potential buyers. Otherwise, every purchasing contract could be construed to create intended beneficiaries for all potential downstream buyers, which has never been the law.<sup>44</sup>

There is one important scenario where intended beneficiaries might be created—where the provider revokes *all* rights to either own or trade property in the world. In such a case, third-party users could argue that the entire system of property trading was intended to benefit them.

### *C. Legal Compliance Clauses*

Clauses that require users to obey real-world laws (“no fraud”) and virtual-world laws (“be polite”) are complex from a third-party perspective. These clauses are non-targeted and the promise does not necessarily benefit other users. Also, real-world unlawfulness would likely be actionable independently, such that breach of contract would be superfluous.

When read in conjunction with “no control” provisions, however, such clauses objectively benefit other users. Lawfulness covenants are essentially agreements to follow “virtual law.” If the

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42. For example, if one buys a car that the bank is about to repossess (rightly or wrongly) from the seller, one cannot sue the bank for a direct breach of contract, and suing the seller for specific performance would be no use—the bank holds the car.

43. This is a situation in which an implied covenant to deliver “clean title” to virtual property might be helpful.

44. For example, one is not an intended beneficiary of the loan contract between the car seller and the bank, even if one incidentally benefits from the seller’s use of loan proceeds to buy the car to sell to that individual. *Cf. Varwig v. Anderson-Behel Porsche/Audi, Inc.*, 74 Cal. App. 3d 578, 580-81 (1977) (holding that the seller of an automobile without clear title was only liable for fraud on downstream third-party purchasers where seller knew that car was intended for resale).

provider makes clear in the contract that it will not intervene to enforce that law, then no one is left to enforce the contract except other users. If other users could not enforce contractual requirements to behave lawfully, such rules would essentially be written out of the contract. Therefore, other users are necessarily intended beneficiaries of lawfulness provisions; users are entitled to a civil action<sup>45</sup> for unlawful acts that do harm, just as they would be in real-space, where it is the government and not a contract that imposes the law.

*Noah v. AOL Time-Warner, Inc.*<sup>46</sup> accentuates the importance of finding intentional beneficiaries for user misconduct. Noah sued AOL for the allegedly harassing conduct of another user that violated AOL's user agreement with that user.<sup>47</sup> AOL was immune from direct liability under the Communications Decency Act,<sup>48</sup> leaving only a contract claim against AOL for failure to enforce its user agreement. The court found that AOL had no duty to enforce its agreement. The contract was quite clear that AOL had discretion to enforce any user's breach of its rules.<sup>49</sup> Noah attempted to claim TPB status as to AOL, but the court ruled that "AOL no more owes a duty to other AOL members to enforce its Community Guidelines than it does with respect to plaintiff."<sup>50</sup>

Cases like *Noah* show that user agreements which do not require provider enforcement—and no strategically written user agreement does so—render conduct rules in such agreements illusory, practically, if not legally. The only currently available means for enforcement, therefore, is for the aggrieved user to be considered a TPB of such provisions, especially where, unlike the *Register.com* case, there is no enforcement and no grievance policy with the provider. Had Noah sued the other user rather than AOL, he might have had more success on a TPB breach of contract claim.<sup>51</sup>

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45. Injured users would have a contract claim for virtual wrongs to correspond to acts that might give rise to tort claims if they occurred in real-space.

46. *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 545-46 (E.D. Va. 2003).

47. *Id.* at 534.

48. 47 U.S.C. § 230 (2000).

49. *Noah*, 261 F. Supp. 2d at 545.

50. *Id.* at 545-46.

51. Of course, the other user may be more difficult to locate, and almost certainly would not have the assets of AOL Time Warner. These difficulties, however, do not mean that AOL should be liable for failure to enforce a contract that explicitly states that enforcement is not contractually required.

#### D. *Anti-Spam and Anti-Harassment Clauses*

As an extension of general compliance rules, users targeted for spam or harassment specifically should be considered intended beneficiaries of any contract barring such activity. Subjectively, intentional harassers, commonly called “griefers,”<sup>52</sup> nominally “agree” to such provisions in order to gain virtual world access but actually intend to harm other users in breach of such provisions. Objectively, though, a promise not to harass other users must be construed as an intention to benefit those users. The practical effect is that users who are targets of harassment or spam can directly sue other users for harassment that is contractually, but not otherwise legally, objectionable.

#### E. *Identification Clauses*

Clauses that require users to disclose their real identities do not create intended beneficiaries. Real identities are usually hidden from users, so there can be no intent to benefit others. However, agreements not to impersonate other users do create intended beneficiaries; those who are impersonated rely on others’ agreements not to do so. Thus, one could sue an impersonator for breach of the impersonator’s agreement with the provider as a TPB.

### IV. CONCLUSION

The third-party beneficiary doctrine has the potential to allow participants to vindicate rights that might otherwise be ignored by the contracting parties. Full recourse requires a broad reading of intended beneficiary status under the Second Restatement, but states are moving in this direction. Because no new “law” is required, courts will entertain third-party beneficiary claims before they consider more exotic virtual-world theories.<sup>53</sup>

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52. Electronic Arts, Customer Support, *What do you consider “grief tactics,” anyway?*, <http://tinyurl.com/4y9w6h> (last visited Dec. 30, 2008) (referring to “grief players” and their tactics).

53. Such enforcement may provide fertile foundation for courts to adopt recommendations of more provocative virtual-world analyses. Even the gaps in enforcement, such as with ownership clauses, may encourage new treatment of virtual worlds. See, e.g., Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1094 (2005) (arguing that virtual property should be treated like real property); Steven J. Horowitz, Note, *Competing Lockean Claims to Virtual Property*, 20 HARV. J.L. & TECH. 443, 446-47 (2007).

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