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** D&D – still a fun and new legal discussion! – most of the show – how much of a game is actually copyrightable?

-ONE source for comments on this

<https://www.facebook.com/groups/YodelMountain/posts/1939629846374018>

- hundreds of comments
- unmoderated – people can insult me
- that’s where I’m going to respond

- Vindicated in 3 main ways
 1. Zero comments about the clearly identified scope of the article itself: the many inaccuracies and falsehoods in the Linda Codega Gizmodo article
 - not one person has said “oh, you accused them of X, but X is actually correct’ or ‘you accused them of Y, but they actually said ‘not Y’”
 - cited everywhere, including the MSM coverage of this (e.g., *Guardian* article)

2. Wizards announcement

<https://www.dndbeyond.com/posts/1423-an-update-on-the-open-game-license-ogl>

-there’s also a very stupid argument circulating that says this wasn’t really a “draft” OGL; they got caught and now they’re pretending because a draft wouldn’t have dates in it. Of course it would. This is very clearly a draft because there are major segments in brackets in it.

-basically confirmed everything we said

It was never our intent to impact the vast majority of the community. So, here is what we are doing.

The next OGL will contain the provisions that allow us to protect and cultivate the inclusive environment we are trying to build and specify that it covers only content for TTRPGs. That means that other expressions, such as educational and charitable campaigns, livestreams, cosplay, VTT-uses, etc., will remain unaffected by any OGL update. **Content already released under 1.0a will also remain unaffected.**

What it will not contain is any royalty structure. It also will not include the license back provision that some people were afraid was a means for us to steal work [12.B]. That thought never crossed our minds. Under any new OGL, you will own the content you create. We won’t. Any language we put down will be crystal clear and unequivocal on that point. The license back language was intended to protect us and our partners from creators who incorrectly allege that we steal their work simply because of coincidental similarities.

-I’ll let you judge that as an outcome.

3. Our predictions

They made Sex Dungeons & Dragons (The Book of Erotic Fantasy) and Wizards didn't sue them!

If I were WotC, there is no fucking way I would let that stand

Reddit comment: "Second, the OGL v1.0 specifically attempted to *solve* that problem because what you (a third party publisher) give up by agreeing was *the right to use any WotC trademarks in any claim of compatibility or approval*. The product's only reference to WotC would be in the copyright of the OGL license in the back! No-where else would be any mention of D&D or any other protected terms. No brand damage."

Not true AT ALL, and in likelihood of confusion cases, I would say The Book of Erotic Fantasy has a strong likelihood of confusion of someone thinking it was an authorized product.

That commenter also asks: "In my reading, the OGL v1.1 actually re-introduces this offensive content problem, because now WotC claims they will review all OGL-based content. Now, if something slips through their review cracks, they do have a connection and a possible liability. I would be curious if Andrew or others agree with this take."

STRONG disagree, and one of the things I flagged as missing in the 1.0 covers that – it's only about 10 seconds in the actual episode because length, it's on page 9 of my notes which are available to the public, and it's a clause that says "failure to exercise a right is not a waiver of that right."

So there's no affirmative duty on Wizards to investigate offensive content, and even if they did, and they didn't pull X offensive thing, they would have full rights to pull Y offensive thing that's substantively similar or even identical to X. That's part of why the OGL needs updating

Bottom line: understanding what we were doing

- Critiquing an article with millions of page views that *no one defends* on the merits
- Discussing a legal document where the alternative isn't "you get to do whatever you want in perpetuity," but rather, the alternative is *you getting sued by Hasbro*

Jenessa [hardcore gamer, law student, professor]: Without the OGL, all these creators would be in copyright violation, and WotC would have to Disney-style defend their copyright by suing them all. The OGL allows WotC to essentially selectively enforce their copyright, by saying you're agreeing to a revocable use, and WotC can decide to create classes who cannot use it (Nazis) or classes who owe royalties (people making a shitload of money). From the standpoint of a gamer, who is used to DnD being ubiquitous, it's hard to imagine a world in which you can't just do whatever you want with it for free. From the legal standpoint, it's mind boggling to hear anyone express entitlement to make money off of someone else's intellectual property without an express contract.

B. Things We Could Have Covered In More Depth

Three broad areas:

1. Paizo

Hoo boy. I thought this was clear but WOW apparently it wasn't. This was a side story, for color, about why WotC wants to change the license, and *from their perspective*, they think Paizo ripped off their game mechanics and then outsold them. How do I know this? Because WotC keeps saying it! Their latest press release continues to emphasize:

“And third, we wanted to ensure that the OGL is for the content creator, the homebrewer, the aspiring designer, our players, and the community—not major corporations to use for their own commercial and promotional purpose.”

-Yes, I actually did do some research into the flop that was the move from D&D 3.5 to D&D 4e. The fact that Paizo is referred to as D&D 3.75 I thought would make that joke clear.

I also do not understand the “boo Wizards huge company yay Paizo same size”

But: I wish I'd make this sidebar more clear because apparently a bunch of people think I was criticizing Paizo, so let me be super clear: they played by the rules, they used OGL to make hundreds of millions of dollars. They may have also made more friends in the community or whatever, but primarily what they did was legally sell a product that absolutely competitively hurt Wizards.

2. Ryan S. Dancey & “originalism” – open source

<https://rsdancey.medium.com/22-years-ago-i-saved-d-d-today-i-want-to-save-the-open-gaming-license-77e79eaddfb2>

-published on FRIDAY, we recorded the show on THURSDAY. So the biggest reason I didn't cover it was because it wasn't out when we did our show

-I wouldn't have covered it even if it had – and that's because of a law thing that I realize I need to explain to people. And it's this: **contracts are not originalist**.

So let's say, Thomas, you and I sign a contract that says (in full) “every month, on the first of the month, the company will pay you, Thomas Smith, 50% of our ad revenues.” Now suppose you and I both subjectively believe, and would testify in court that when we wrote it, that was meant to say each partner gets their proportionate share of the ad revenues. But it doesn't say that. It doesn't say what Andrew Torrez gets. It doesn't say what happens if we bring in a third partner. And suppose we do, and we don't sign a new agreement, and that third partner sues for 33% of the ad money. **They would lose**.

Because contracts do not follow a rule of subjective interpretation. It does not matter what either party intended; it matters what the words on the paper say. There's a rule, it's called the parol evidence rule, that says you *cannot* introduce extrinsic testimony to vary the terms of a contract. Lawyers get this, but I get that gamers might not, so this is a good time to explain.

Here's what Ryan's Medium post says:

"In 1999 I was made the VP of Tabletop Roleplaying Games and the D&D Brand Manager. Also in 1999, Hasbro bought Wizards of the Coast. They've been a wholly owned subsidiary ever since. My team and I diagnosed the many problems that beset D&D and we engineered a multi-pronged solution. We released a new edition of the game, the Third Edition. And we convinced the company to take a huge risk — licensing the D&D game system and content that used that game system via an innovative [copyleft license](#) modeled on successful open source software licenses. That license is called the [Open Gaming License](#) (aka the OGL) and the version that was authorized for release was 1.0a.

-so when I claimed the OGL is not open source, a bunch of people said, "well, that's not what the guy who wrote it thinks"

Be careful with those claims. He says he and his team "convinced the company" to use the OGL, and the OGL is "modeled on" open source software licenses. Not relevant.

"Modeled on" is doing a LOT of work, because I thought it was obvious enough to devote only 30 seconds in the original show and I'm getting a lot of pushback

[I'm gonna great space coaster this shit]

GNU General Public License

<https://www.gnu.org/licenses/gpl-3.0.en.html>

2 major principles of open-sourcing that are **just not in the OGL**, and those are:

- 1) *All* of the original work must be open-sourced; and

GNU's *entire source code* is freely available for me to use. I can sell it, as is, to anyone dumb enough to buy it from me.

That's paragraph 4 of the GNU GPL:

4. **You may convey verbatim copies of the Program's source code as you receive it**, in any medium, provided that you conspicuously and appropriately publish on each copy an appropriate copyright notice; keep intact all notices stating that this License and any non-permissive terms added in accord with section 7 apply to the code; keep intact all notices of the absence of any warranty; and give all recipients a copy of this License along with the Program. You may charge any price or no price for each copy that you convey, and you may offer support or warranty protection for a fee.

To be clear: you may NOT convey verbatim copies of D&D as you receive it! You may work with a subset of the D&D environment as set out on the SRD 5.1.

But perhaps the most important part of the open-source environment is that

- 2) *EVERYONE* who uses the original work must agree to the same terms for *their* work, including their additional content, *on the same terms*

That's paragraph 5 of the GNU GPL:

5. Conveying Modified Source Versions. You may convey a work based on the Program, or the modifications to produce it from the Program, in the form of source code under the terms of section 4, provided that you also meet all of these conditions:
 - a) The work must carry prominent notices stating that you modified it, and giving a relevant date.
 - b) The work must carry prominent notices stating that it is released under this License and any conditions added under section 7. This requirement modifies the requirement in section 4 to "keep intact all notices".
 - c) **You must license the entire work, as a whole, under this License to anyone who comes into possession of a copy.** This License will therefore apply, along with any applicable section 7 additional terms, to the whole of the work, and all its parts, regardless of how they are packaged. **This License gives no permission to license the work in any other way,** but it does not invalidate such permission if you have separately received it.
 - d) If the work has interactive user interfaces, each must display Appropriate Legal Notices; however, if the Program has interactive interfaces that do not display Appropriate Legal Notices, your work need not make them do so.

In other words, not only can D&D not withhold mind flayers, umber hulks, and the like, but if I create a module I'm now giving up my exclusive right to Normo the Half-Wombat. ON THE SAME TERMS.

I could copy all of Paizo's product and resell it verbatim as the Opening Arguments RPG.

That's just not what the OGL is. If Wizards used that open-source language, particularly if they used it weaselly, *bad on them*. But if you think you have an open-source right to use the core D&D stuff you do not.

REAL OPEN QUESTION

3. Copyrightability of game mechanics

I flagged this in the beginning with the disagreement with Doctorow. I didn't cover it on the main episode for two reasons: 70 minutes, and **because it's the exact opposite claim of the one Codega made in their article.**

Unpack that: Codega is saying OGL 1.0 was awesome, and the 1.1 is a screw-job

This argument is that 1.0 was a screw-job because it led you to believe more stuff was subject to the Wizards license than could be protected, and you're better off without a license at all!

Doctorow made his points over a series of tweets, but he's part of the Electronic Frontier Foundation (EFF), and they weighed in with an article called "Beware the Gifts of Dragons: How D&D's Open Gaming License May Have Become a Trap for Creators" by Kit Walsh

<https://www.eff.org/deeplinks/2023/01/beware-gifts-dragons-how-dds-open-gaming-license-may-have-become-trap-creators>

I disagree with that too!

Let's unpack it here

a. **"You can't copyright game rules"**

Misleading: you can *patent* them, and in fact, Wizards patented the Magic: The Gathering game mechanism themselves in 1995

<https://patents.google.com/patent/US5662332A/en>

(Expired in 2014)

Provided herein is a novel method of game play and game components that in one embodiment are in the form of trading cards (10, 12, 40, 42, 44, 48, 54, 60, 64). However, the game components may take other forms, such as a board game, or the game may be played in different media, such as electronic games, video games, computer games, and interactive network. In one version, the game components comprise energy or mana cards 40 and command or spell cards (10, 12, 42, 44, 48, 54, 60, 64) having commands or spells associated therewith that utilize the energy to enable a player to attack, defend and modify the effect of other mana cards, spell cards, and the fundamental rules of play. The goal of the game is to reduce the life points of other players to a level below one. In this game of strategy and chance, players construct their own library of cards, preferably from trading cards, and play their library or deck of cards against the deck of cards of an opposing player. Cards may be obtained from retail outlets, trading with other players or collectors, and winning cards at games and tournaments.

So if you hear someone saying that a sexy YouTuber told them that game mechanics aren't *intellectual property*, they're inaccurately mischaracterizing the law. Mechanics aren't *copyright* or *trademark*, but they can be patent. Monopoly was patented in 1935; you didn't see knockoffs until that patent expired.

Written in the US Code, 17 U.S.C. 102(b):

<https://www.law.cornell.edu/uscode/text/17/102>

"In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

So then the question is: is the SRD 5.1 nothing but mechanics?

https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2014-15/march-april/not-playing-around-board-games-intellectual-property-law/

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