

# Kluwer Copyright Blog

## Merit, Monetisation and Open Game Licences

Amy Thomas (CREATe, University of Glasgow) · Monday, April 17th, 2023

*This blog is a continuation of an earlier Kluwer post ‘Getting paid to play? Copyright, contract, and the rewards for UGC’ and is based on the findings of the You Can Play project.*



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When does a ‘creative work’ become ‘user generated content’ (UGC)? [My recent research](#) on video game UGC policies suggests the thin line on which UGC is constructed depends on whether content is being *commercialised* or *monetised*. This blog will explore the relationship between commercialisation and monetisation of game content by examining a recent controversy surrounding Wizards of the Coast, best known as the publishers of *Dungeons and Dragons (D&D)*, the iconic fantasy tabletop role-playing game.

For the uninitiated, *D&D* involves players forming an adventuring group of player-created characters that navigate a fictionalised world of battles, puzzles, and interactions with other non-playable characters. The ‘Dungeon Master’ acts as the referee and storyteller for the other players, guiding them and narrating the story and progression of the players through the game world. Traditionally mediated only by a rulebook, pen and paper, and a set of dice to determine player-action outcomes, *D&D* has been a relatively free-form and accessible entertainment staple since the 1970s (with a recent resurgence in popularity largely attributable to its portrayal in Netflix’s *Stranger Things*).

In 2000, *D&D* introduced the Open Game Licence (OGL) to permit the use of portions of the game’s third edition. This GNU/Creative Commons-esque licence permitted users and third parties to modify, copy, and distribute certain game content from the various worlds of *D&D*. In particular, the OGL was designed only to cover permissions to use ‘game mechanics’, specifically ‘methods, procedures, processes and routines’ detailed in an extensive System Reference Document. The types of mechanics include e.g., class features of a druid character, including their appearance, base attributes and compatible weaponry; or the properties of magic equipment, such

as the Ring of Contrariness, which forces the wearer to disagree with everything anyone says. In 2016, the OGL was updated to its fifth edition, including generous allowances for users and third-party publishers to create and sell content based upon these mechanics – in short, allowing for the commercialisation and monetisation of *D&D*-based UGC.

At this point, we should acknowledge that the OGL has always presented a bit of a puzzle to the copyright lawyer. Game mechanics are generally understood to [fall outwith the boundaries of copyright protection](#) (hence the interesting phenomenon of [game cloning](#)). As such, by agreeing to the ostensibly ‘open’ OGL, the recipient in fact receives fewer rights than they would otherwise benefit from under the default copyright system. Nonetheless, the OGL has always been interpreted by the community and legal commentators as a good faith position statement, assuring users against any vexatious litigation.

Indeed, the OGL has been credited with starting the ‘open gaming movement’ through the enablement of the colloquial ‘homebrew’ – that is, any user creation which is not in the official *D&D* rulebooks. This led to a widespread tabletop role-playing boom in the 2000s, with the development of commercial competitors including [Paizo](#) (creators of *Pathfinder*), [Kobold Press](#) (creators of *Kobold Quarterly*) and [Green Ronin](#) (creators of *Mutants and Masterminds*), all of which are, to some extent, modified editions of *D&D* published under the OGL. The 2000s also saw the introduction of *D&D* livestreaming by groups such as *Critical Role*, now [reportedly the highest-paid Twitch channel](#) as of 2021.

This boom has, however, apparently caused anxiety with executives at Hasbro (of which Wizards is a subsidiary) that *D&D* is being ‘[under monetised](#)’ under the traditional tabletop paradigm. This has led to development of the new edition of *D&D*, [OneD&D](#), anticipated to be released in 2024. [Concerned commentators](#) report leaks that [OneD&D](#) will introduce a new digital subscription-based service *à la* Netflix (the ‘virtual’ tabletop), which could package thousands of printed *D&D* materials into digital rulebooks, accessible to subscribers at different payment tiers. With the removal of the physical table from the *D&D* business model, it’s also possible that the virtual table could achieve new modes of monetisation to substitute for physical effects – perhaps [beautiful, customisable dice](#) for the player to virtually roll.

On the path to monetisation, Wizards introduced, and swiftly revoked, an updated [OGL 1.1](#), which was leaked earlier this year. In a far cry from the origins of the OGL, the updated agreement purported to:

- revoke the existing OGL 1.0a, effectively withdrawing ongoing permission to produce any products created under that licence;
- mandate reporting of new and existing commercial projects to Wizards of the Coast;
- mandate a royalty payment of 25% for commercial creators who earn in excess of 750,000 USD per annum (estimated to be around 20 companies worldwide);
- restrict the creation of new content to materials which are printable or can be printed, excluding commercialisation of ‘videos, virtual tabletops, games, novels, apps, graphic novels, music, songs, dances and pantomimes’ [n.b. – it is unclear why the latter items have to be specified but may relate to [TikTok](#)]. Those excluded items would be regulated under the [Fan Content Policy](#) which does not permit commercialisation of content (more on this below).
- mandate a licence to Wizards of the Coast which permits ‘the perpetual, irrevocable right to use [those commercial works] in any way it sees fit without payment’.

The new OGL also purported to introduce a ‘Tiered Earning system’ to identify *successful* commercial users and third parties as targets for these policies. Here, the manner in which Wizards identifies ‘successful’ uses of *D&D* content deserves particular attention, as there is a clear struggle to articulate the boundaries between commercial and non-commercial activities, and indeed the justification in making a distinction between the two when regulating UGC.

Wizards frame the definition of commerciality as a fairly straightforward matter: it is ‘any exchange of money or anything else of value changing hands to get *access* to the things you create’ (including ‘your brother doing your chores for a week, whatever’ at [p4 para 4](#)). Likewise, non-commercial uses of content are considered self-evident – per the Fan Content Policy ‘FREE means F-R-E-E’. Curiously, Wizards acknowledges in their own [FAQ](#) that this distinction would technically forbid the passive monetisation of the streamed *D&D* content of smaller creators. To this, Wizards addresses the user as a ‘rules lawyer’ (who obeys the letter, rather than the spirit of the game rules), clarifying that passive monetisation and fan donations are distinct concepts from commercial projects. Specifically, these concepts are not tied to an access point but rather a reward for the ‘hard work’ (merit) of the user. Even if the user effectively ‘paywalls’ access to their content by creating a payment schedule or membership service (e.g., via [Patreon](#)), this is still considered ‘non-commercial’, provided that others can access that content for free elsewhere. The ethos appears to be one of ‘content made by the community, for the community’ is permissible, with larger, commercial corporations being excluded from the ‘open’ ambit of the licence.

It should be noted that, following significant community pushback and [overwhelmingly negative results from a survey consultation](#), Wizards have since withdrawn their proposals, affirming the status of OGL 1.0a for older content, and a new [OGL 5.1](#) released under an irrevocable Creative Commons Attribution Licence for future content. Nonetheless, the history and development of the OGL is a curious story about the waxing and waning of one game creator’s construction of ‘openness’ in relation to UGC. Quite separately from the law, user communities have worked together to construct a nuanced concept of ‘openness’ of game content which in this case has proven to be semi-enforceable as the original OGL 1.0a has been preserved. In combination, this curious case suggests that users are beginning to challenge the validity of their non-commercial status. The case of the OGL shows that the manner in which uses are characterised as either commercial or not is illusory – a characterisation that does not hold up to scrutiny from the ‘rules lawyers’ among us.

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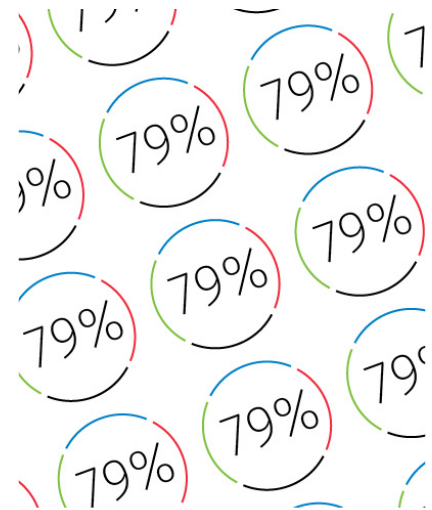
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