

Open Game License: An Overview and Update

What is the OGL? What has the Wizards of the Coast permitted historically?

What recent changes have been made to the OGL?

Understand the limits and requirements of legal fair use and permissive licensing

Gary Con XV – 25 March 2023



Hibbs Law, LLC

Genna Hibbs & Emily Mosnick



- ▲ Intellectual Property boutique firm **founded in 2013**
- ▲ **Bar Admissions:** Illinois, US Northern District IL, US Patents & Trademark Office
- ▲ **Focus Areas:** Patents, Trademarks, Copyrights, Unfair Competition, Trade Secrets, Infringement Enforcement/Litigation, Licensing, Entity Formation, Regulatory Compliance, and Business Transactions
- ▲ **Clientele:** Small business, medium corporations, individuals
- ▲ **Expertise**
 - ▲ **Genna:** Biotechnology, Genetics, Small Business, Government,
 - ▲ **Emily:** Regulatory, International Law, Trademark, Copyright, Privacy
- ▲ **Gaming Experience:**
 - ▲ **Genna:** TTRPG, MTG, WH40K, FPS
 - ▲ **Emily:** Browser-based RPG games
- ▲ Substantial dedication to **pro bono** legal services (20-30% of time)



Legal Disclaimer



- ▶ **Nothing** in this presentation is meant to imply or suggest that an attorney-client relationship is created through this presentation or related communications
- ▶ After a private initial client meeting, a signed **letter of engagement** would be the official step to create that relationship with Hibbs Law, LLC
- ▶ Legal analysis is largely fact-based and involves a full examination of all details and factors. **General rules** presented, or questions asked and answered, are posed as hypotheticals, and should not be relied on as legal advice. The most common answer to a ‘simple’ legal question is: “It depends.”

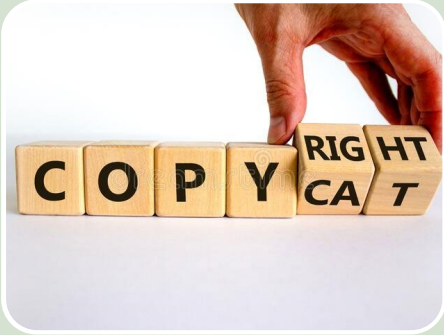


Fair Use & Fandom

Interplaying factors



Road Map



1

Copyright
Fair Use

2

Trademark
Fair Use

3

Licensing
and
Royalty
Structures

Bonus
Round!

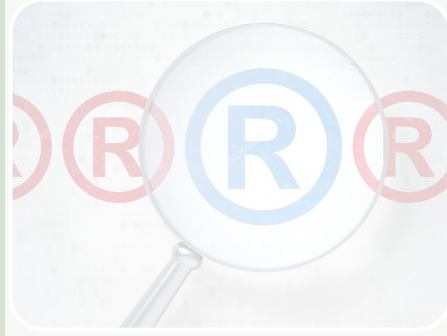
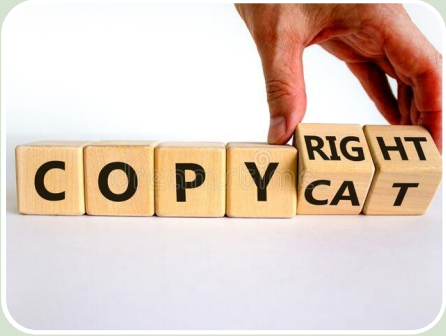
Application
to the OGL

What Is Fair Use?

- ▲ Generally, justified use of another's Intellectual Property for a specific reason
- ▲ Legally, an affirmative defense to Copyright or Trademark infringement
- ▲ Someone can use your Intellectual Property fairly!
- ▲ You can use someone else's Intellectual Property fairly!



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FAIR USE FOR
COPYRIGHTS

Copyright Fair Use



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Copyright Fair Use: Factors



- ▲ The purpose and character of the use (commercial versus nonprofit/educational; the “transformative” nature);
- ▲ The nature of the infringed copyrighted work (factual versus creative; published versus unpublished);
- ▲ The amount and “substantiality” of the original work; and
- ▲ The effect on the market or value of the original work



Copyright Fair Use: Categories

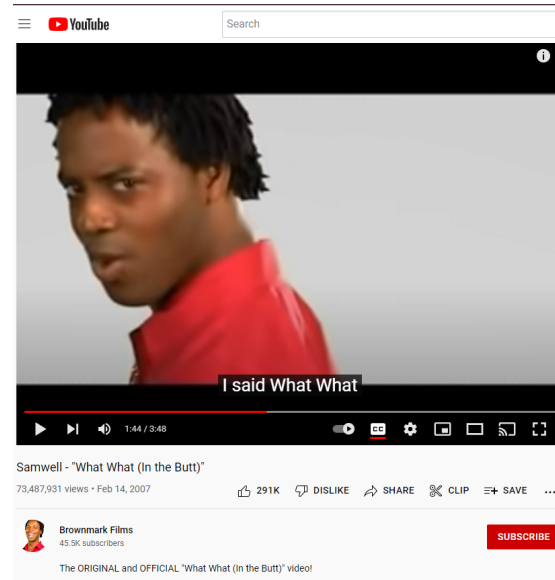


- ▲ Criticism
- ▲ Comment
- ▲ News reporting
- ▲ Teaching (including multiple copies for classroom use)
- ▲ Scholarship
- ▲ Research
- ▲ Satire (not the same as Parody!)

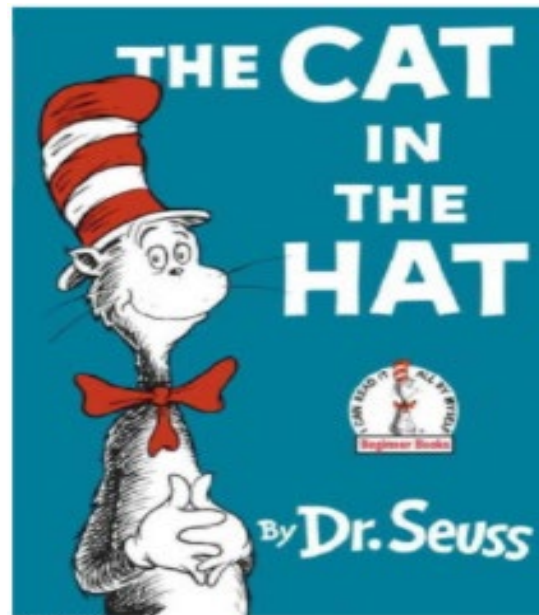
Copyright Fair Use: In Reality



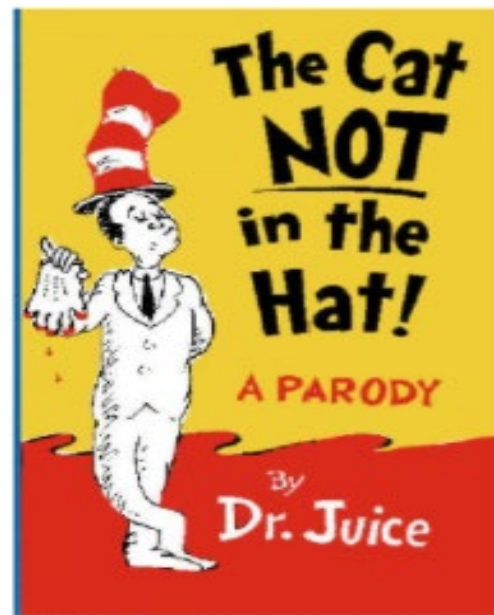
Fair Use:
commentary
on viral videos



Not Fair Use:
using the work
as a “vehicle”



Plaintiff



Defendant

Additional Defenses Against Infringement in the Copyright Act

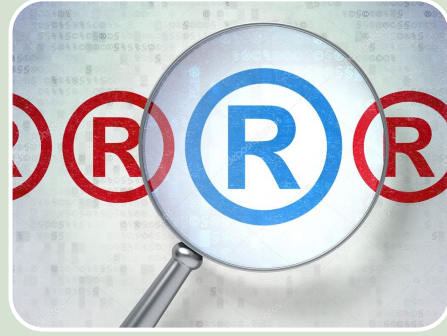


- ▲ Sec. 108: Libraries and Archives can make/provide copies
- ▲ Sec. 109: Phonorecords (sound recordings) - resale of the original is allowed, but NO rental / leasing / lending and NO public display
- ▲ Sec. 110: Performances and Displays - exclusions generally for non-profit, non-commercial and private uses, or educational classes

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FAIR USE FOR TRADEMARKS:

NOMINATIVE

&

DESCRIPTIVE

Nominative Fair Use



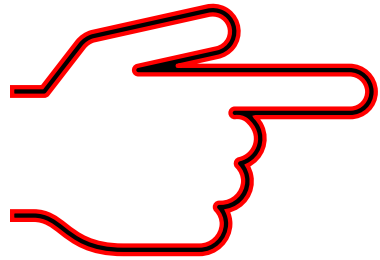
Allowed to use another's trademark to describe your product, but only so much as necessary

Generally reserved for comment, criticism, comparison, or a point of reference

Often comes up in comparative advertising



Nominative Fair Use



Legal test has 3 parts:

1. The product can't be identified without using the trademark
2. Used only what is "reasonably necessary"
3. No suggestion of affiliation

Descriptive (“Classic”) Fair Use



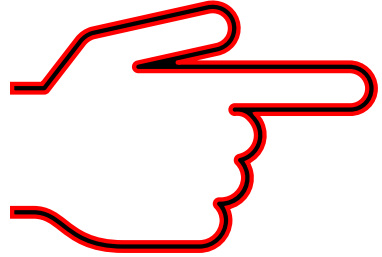
- ▶ Using someone else’s trademark to describe your own product
- ▶ Describes an attribute, location, or a person
- ▶ The placement/prominence of the use can be important



vs.



Descriptive (“Classic”) Fair Use



Legal test has 3 parts:

1. Not used as a trademark (i.e. to identify the source of the product)
2. Use is descriptive (literal or aspirational)
3. Good faith

The Spectrum of DISTINCTIVENESS



Arbitrary/Fanciful



Suggestive

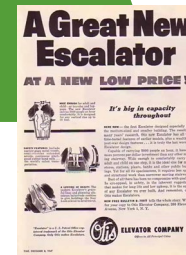


Descriptive with secondary meaning



World's Best Beer!

Merely descriptive/generic



DRY ICE



1st Amendment,
Free Speech

Competitors ought to be allowed to describe their own goods/services and to distinguish from the competition clearly.

Fair Use for Patents



Is there such a thing?

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ADDITIONAL FACTORS:
IP LICENSING
&
ROYALTIES

Property Rights Bundles!

These bundles give licensee the right to:



Patent

- manufacture
- use
- sell
- offer for sale
- import a patented product
- perform a patented method



Copyright

- reproduce
- distribute
- display
- perform
- create derivative works
+
- Specific rights for certain art



Trademark

- exclusive right to sell or market under that mark within a geographic territory
- use in commerce
- identify source of origin

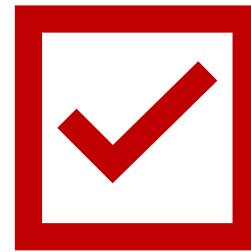


How to Interpret the Language you See



▲ Patent Language

- ▲ “Rights in the entirety” - the party gives up everything
- ▲ Joint ownership - ownership by more than 1 party
- ▲ Royalty percentages - if you only get the rights for a period of time, how much you have to pay to the owner
- ▲ Present tense language - must be an immediate transfer, can not be in the future



Special
Language

Trademark Language

Must Have Quality Control
of the TM use and the products/services!

Quality control = approval of new marketing uses

Goodwill: Licensee's use and goodwill 'inures' (flows) to you

Dilution/Disparagement/Tarnishment

Product Liability

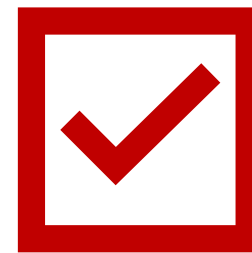
Goods/Services

[[Go through OGL for keywords]]



Copyright Language

- ▲ Derivative Works/Material - adaptations, extensions, additions, or modifications made to an original work
- ▲ Notice - often a “copyright notice” is required



Special
Language

Time-Related Factors



Term of your license:

- ▲ Length of license determined in contract
- ▲ Notice requirements to make adjustments or terminate if problems arise
- ▲ Early termination is possible for any “breach” of the contract

Termination:

Only for limited causes or at your discretion?



- ▲ Some contracts have renewal periods after the original term
- ▲ Assignments in trademark are forever
- ▲ Assignments for copyright can (in some very specific instances) be terminated by the author or heirs 25 years after the grant, and cannot be effective until the 35-year mark; in other instances the notice starts at 35 years and will not be effective until the 40-year mark

What can influence royalty structure? aka “Valuation”



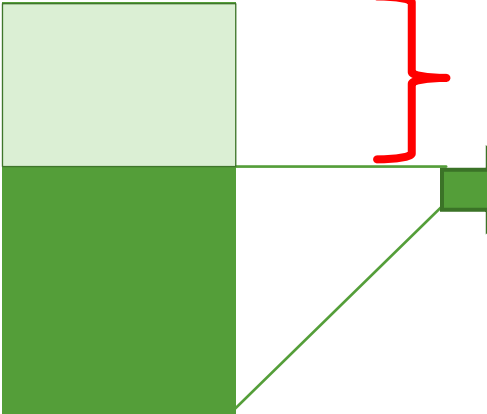
- ❑ What is the Licensee’s investment to bring your invention to market?
 - ▲ Help secure international rights?
 - ▲ Help expanding patents in a family?
 - ▲ Building out final product vs. only licensed distributor?
 - ▲ Are you bringing compliance/permits with you?
- ❑ Potential market and ROI
- ❑ Strength or weakness of the IP rights (especially trademark)
- ❑ Which rights are they looking at? Future rights?
- ❑ Length and market desired?
- ❑ Available alternatives?
- ❑ Cost of invalidating your IP?

General Royalty Structures



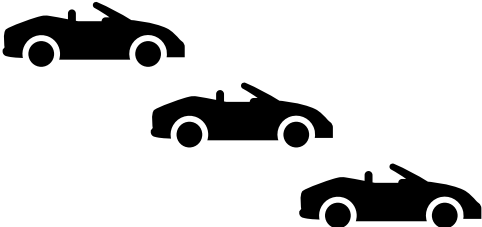
(1) Gross Sales %:

Fixed Royalty: most common, no extra incentives
Decreasing %: as more sales made, % goes down



What is deducted?? the big fight!

(2) Net Profit %



(3) \$ Per action: units made or sold (health and auto)

Modifiers to Royalty Structures



Minimum payment?

Initial lump sum, mile post, or termination pay out?

Residuals after IP expiration? ‘accrue during term, but paid over time’.

Royalty Rates



Patent

- Patent pending = 1%
- Patent Issued = 1-2%
- Pharma = 2-3%



Copyright

- Artwork = <10%
- Toys = 3-8%
- Fashion = 2-10%
- Entertainment = 8-12%
- Average = 5%



Trademark

- Royalty rates all over the place
- Anywhere between .1% and 15%



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OGGL Timeline



1999

Wizards of the Coast is bought out by Hasbro

2008

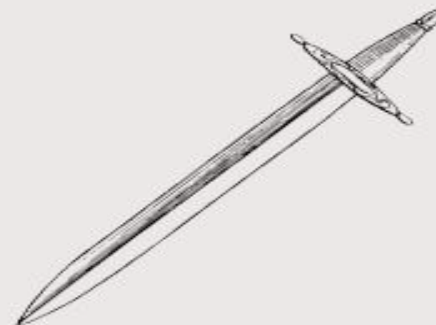
The 4th Edition of D&D is released, along with the GSL (Game System License), a more restrictive version of the OGL.

1997

TSR, the owner of D&D, is going bankrupt. Wizards of the Coast purchases D&D to save it.

2000

The 3rd Edition of D&D is released, along with that, the OGL (Open Gaming License)



2016

The 5th Edition of D&D is released, and they return to the OGL.

OGL Timeline



NOVEMBER 2022

Unconfirmed leaks hint that WoTC may be discontinuing the OGL for the "One D&D" iteration.

JANUARY 5, 2023

A version of OGL 1.1 is leaked. This is 10x the size of the original OGL, and the most important change is that it voids the original OGL.



AUGUST 2022

WotC announces "One D&D."

DECEMBER 21, 2022

Details on the new OGL 1.1 are released by WotC.

JANUARY 10, 2023

WotC posts on Twitter that they will be sharing more information on the new OGL soon.



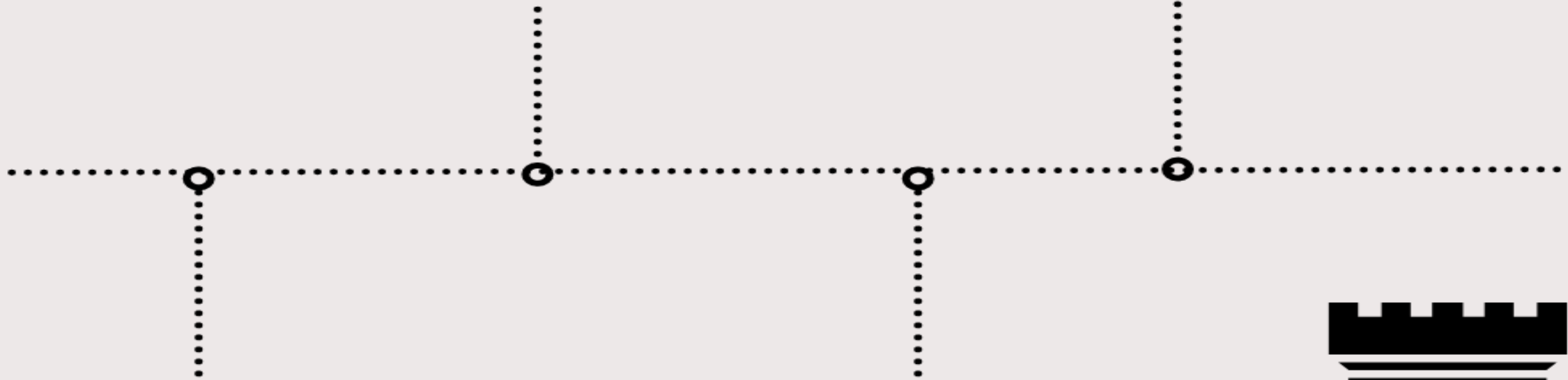
OGL Timeline

JANUARY 18, 2023

Kyle Brink releases an apology on behalf of WoTC for the controversy.

JANUARY 27, 2023

WotC confirms 1.1 will not be moving forwards, and they'll instead be pursuing Creative Commons for SRD 5.1

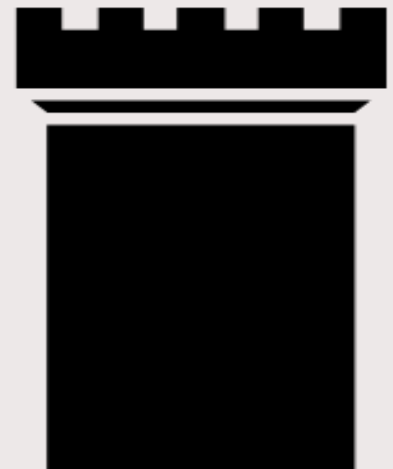


JANUARY 13, 2023

WotC releases a statement that they will be reconfiguring the OGL 1.1.

JANUARY 19, 2023

WotC releases details on OGL 1.2, a draft which addresses the concerns of the community.



OGL 1.1



| | Announced Updates | 1.2 Draft |
|---|-------------------|----------------------------|
| Invalidates the original OGL | Yes | No |
| Stops D&D-related NFTs and blockchain | Yes | Not specified |
| Allows termination of the license for content that is “blatantly racist, sexist, homophobic, transphobic, bigoted, or otherwise discriminatory” | Yes | Yes - Part of original OGL |
| Requires reporting to WoTC of any earnings from all monetized content | Yes | Not specified |
| Creators falling under the OGL must pay a 25% royalty on all income over \$750,000 per year; 20% royalty if funded through Kickstarter | Yes | No |
| Claims the right to use all OGL content the way that WoTC sees fit | Yes | Yes - Part of original OGL |
| Clarifies that creators own their own content, except for underlying content covered by OGL | No | Yes - Part of original OGL |
| Assurances that livestreams, virtual tabletops, and actual plays are not affected | Not specified | Yes |

Fair Use Policy Comparison: Games Workshop vs. Wizards of the Coast

| | Games Workshop | Wizards of the Coast |
|--|---------------------------------|--|
| Use characters and/or settings for written stories | Yes | Yes |
| Use characters and/or settings for artwork | Yes | Yes |
| Use characters and/or settings for fan sites | Yes | Yes |
| Use characters and/or settings for films or animations | No | Yes |
| Use characters and/or settings for PC games/apps | No | Not specified - Likely No |
| Use official content for tattoos | Not specified - Likely No | Yes |
| Use exact text, artwork, and/or imagery | No | No - exact text content Yes - artwork and imagery |
| Use official videos or music for fan content | Not specified - Likely No | No |
| Sell content (all forms, digital and non) | No | No |
| Generate ad revenue from content | No | Yes |
| Generate revenue from sponsors or donations | Not specified - Likely No | Yes (but no competitor sponsorships) |
| Put content behind a subscription/registration requirement (email address, downloads, surveys, etc.) | Not specified | Yes |
| Public distribution (non-digital) | No | Yes |
| Digital distribution (free) | Yes | Yes |
| Disclaim association with the source | Yes | Yes |
| Include “unofficial” on books/fan-fiction/magazines/journals | Yes (must be on front cover) | Yes (use specific language from website) |
| Use logos or other trademarks | No | No |
| Use content in a non-discriminatory/”polite” manner | Yes | Yes |
| Post or copy rules or stats from official materials | No | No |
| Copy game mechanics | No | No (some use granted in the DnD OGL) |
| Copy physical products | No | No |

What We Might Expect from the ORC

| | |
|--|---|
| | |
| Use characters and/or settings for written stories | Yes |
| Use characters and/or settings for artwork | Yes |
| Use characters and/or settings for fan sites | Yes |
| Use characters and/or settings for films or animations | Yes |
| Use characters and/or settings for PC games/apps | Likely No |
| Use official content for tattoos | Possibly Yes |
| Use exact text, artwork, and/or imagery | Likely No |
| Use official videos or music for fan content | No |
| Sell content (all forms, digital and non) | No |
| Generate ad revenue from content | Yes |
| Generate revenue from sponsors or donations | Likely Yes (may have limitations like non-compete) |
| Put content behind a subscription/registration requirement (email address, downloads, surveys, etc.) | Likely Yes |
| Public distribution (non-digital) | Yes |
| Digital distribution (free) | Yes |
| Disclaim association with the source | Yes |
| Include “unofficial” on books/fan-fiction/magazines/journals | Likely Yes (use specific language from content policies) |
| Use logos or other trademarks | No |
| Use content in a non-discriminatory/”polite” manner | Yes |
| Post or copy rules or stats from official materials | No |
| Copy game mechanics | No |
| Copy physical products | No |

QUESTIONS?



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