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ROLL FOR DAMAGE: EXPLORING THE STRUGGLE BETWEEN INTELLECTUAL PROPERTY PROTECTIONS AND INNOVATION WITHIN TABLETOP ROLEPLAY GAMES

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I. INTRODUCTION

In early January 2023, the Dungeons and Dragons publisher, Wizards of the Coast, became the center of widespread controversy, with over 60,000 people signing an open letter condemning their actions after a revised version of their open gaming license (“OGL”) was leaked (the “Leak”).¹ Dungeons and Dragons, a popular tabletop roleplay game, has used an OGL since 2000 to allow fans and publishers to create works compatible with the original game.² This OGL has allowed third party creators to use Dungeons and Dragons rules and systems without any form of royalty fees.³ Since 2000, third party content created under this OGL has helped build a large network of Dungeons and Dragons gamers who have innovated the game while driving it into mainstream success.⁴

The Leak revealed major potential changes for third party creators including the termination of the original OGL, and a new OGL that imposed restrictions and royalty systems.⁵ Third party creators such as Foundry Virtual Tabletop and Sly Flourish signed the open letter condemning the proposed OGL.⁶ This open letter expressed concerns that the proposed OGL “chokes the vibrant community that has flourished under the original license.”⁷ The letter noted how the proposed OGL would affect small time creators as well as larger third party creators.⁸ While smaller creators would face restrictions on their work and need to report their revenue, the larger creators would face high

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¹ Benjamin Abbot, *D&D OGL Controversy, Explained – All the Drama Explained and Why You Should Care*, GAMES RADAR (Jan. 30, 2023), <https://www.gamesradar.com/dandds-licensing-controversy-explained-heres-why-you-should-care/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Open Letter*, OPEN DND, (last visited Apr. 25, 2023), <https://www.opendnd.games>.

⁷ *Id.*

⁸ *Id.*

royalty fees.⁹ The royalties would make it near impossible for these small businesses to afford publishing products.¹⁰ The backlash did not end there as Paizo, a company who relies on the original OGL, announced that they did not believe the original OGL could ever be deauthorized and were “prepared to argue that point in a court of law if need be.”¹¹

Wizards of the Coast Executive Producer, Kyle Brink, responded to the backlash by asking the Dungeons and Dragons community to give their feedback on the proposed OGL.¹² Brink posted another update, recognizing that 89% of those responding were dissatisfied with the deauthorization of the original OGL.¹³ He announced that Wizards of the Coast were backing down from the proposed OGL and allowing third party creators the options to publish materials under the original OGL or a Creative Commons license.¹⁴

Wizards of the Coast is not the only company releasing OGLs to permit the use of tabletop gaming rules and mechanics.¹⁵ However, Wizards of the Coast’s attempt to balance protecting their intellectual property and their customer base’s satisfaction illustrates a much bigger issue within the tabletop roleplay game industry.¹⁶ While OGLs promoted innovation, a Creative Commons license is an alternative that is widely recognized and easily understood.¹⁷

Companies producing tabletop roleplay games who want to promote third party creation should opt for transparency of unprotected game mechanics and release of these mechanics through Creative Commons licenses. Part II provides a necessary background of both Dungeons and Dragons and its licenses. Part III analyzes the slim intellectual property protections covering tabletop roleplay and how gaming licenses such as OGLs and Creative Commons seek to cover that while promoting innovation. Part IV uses the findings from Part III to create a practical solution that balances protecting intellectual property and promoting innovation.

II. BACKGROUND

A. *Dungeons and Dragons Overview*

Tabletop games have been a staple in homes, with games like Monopoly and Clue being easily recognizable to the vast majority of Americans.¹⁸ While most mainstream tabletop games are confined to a predetermined board, characters, set of moves, and number of players, Dungeons and Dragons offers more freedom and creativity for its players. With the freedom players have in creating their own adventure, games can take an afternoon or a lifetime to complete. As long as players can create their own content, the only limitation they face is their own imagination.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Paizo Announces Systems-Neutral Open RPG License, (Jan. 12, 2023), <https://paizo.com/community/blog/v5748dyo6si7v?Paizo-Announces-SystemNeutral-Open-RPG-License>.

¹² Kyle Brink, *A Working Conversation About the Open Game License (OGL)*, D&D BEYOND, (Jan. 18, 2023), <https://www.dndbeyond.com/posts/1428-a-working-conversation-about-the-open-game-license>.

¹³ Kyle Brink, *OGL 1.0a & Creative Commons*, D&D BEYOND, (Jan. 27, 2023), <https://www.dndbeyond.com/posts/1439-ogl-1-0a-creative-commons>.

¹⁴ Abbot, *supra* note 1.

¹⁵ Paizo Publishing, Green Ronin Publishing, White Wolf Publishing, and Frog God Games have released variations of OGLs. Renata Price, *Dungeons and Dragons Is Jeopardizing Its Greatest Strength: Its Ubiquity*, VICE (Jan. 12, 2023), <https://www.vice.com/en/article/3ad9kn/dungeons-and-dragons-is-jeopardizing-its-greatest-strength-its-ubiquity>.

¹⁶ *See id.*

¹⁷ Brink, *supra* note 13.

¹⁸ Alexander Kunst, *Frequency of Buying New Card and Board Games in the U.S. 2018*, STATISTA (Jan. 6, 2020), <https://www.statista.com/forecasts/862853/frequency-of-buying-new-card-and-board-games-in-the-us>.

Dungeons and Dragons began in 1974.¹⁹ Gary Gygax and Dave Arneson created the game using a ruleset from a 1971 game, Chainmail.²⁰ Their new game differed from other wargames by allowing players to create and play their own characters.²¹ The ultimate idea behind the game was that players could choose adventures by purchasing scenarios created by publishers.²² From there, players used publisher materials to create characters who could develop as a direct result of their combat encounters and other events within the game.²³ Since its creation, Wizards of the Coast acquired Dungeons and Dragons in 1997.²⁴ Two years later, Hasbro acquired Wizards of the Coast and remains the parent company today.²⁵

B. Original Open Gaming Licenses

At the turn of the 21st century, Wizards of the Coast released an Open Gaming License: OGL1.0(a) (the “original OGL”).²⁶ The original OGL allowed third parties to create Dungeons and Dragons compatible games, characters, creatures, and adventures without any special permission or contracts.²⁷ It also allowed for creators to sell their works without permission from Wizards of the Coast.²⁸ This document was released with a System Reference Document (SRD) that outlined the specific parts of Dungeons and Dragons intellectual property people could use.²⁹

Third party creators who took advantage of the original OGL could use any content contained in the SRD.³⁰ They could not, however, use anything that fell under the umbrella of product identity.³¹ The listed product identity included several elements such as “Dungeons & Dragons, D&D, Player’s Handbook, Dungeon Master, Monster Manual, d20 System, Wizards of the Coast, d20 (when used as a trademark)[.]”³² This would restrict third party creators from even indicating that their content was compatible with anything listed as product identity.³³

The original OGL ultimately gave third party creators “perpetual, worldwide, royalty-free” usage of the SRD.³⁴ This allowed for outside designers and publishers to make revenue through creating Dungeons and Dragons compatible products without any royalty fees to Wizards of the

¹⁹ Sarah Le-Fevre, *A Brief History of Role Playing Games*, LUDOGOGY (Apr. 14, 2022), <https://ludogogy.co.uk/a-brief-history-of-role-playing-games/>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Janelle Brown, *Disaffected Fans Cheer D&D Buyout*, WIRED (Apr. 10, 1997), <https://web.archive.org/web/20180623061913/https://www.wired.com/1997/04/disaffected-fans-cheer-dd-buyout/>.

²⁵ Danni Button, *Hasbro Just Tanked One of Its Biggest Revenue Drivers*, STREET (Jan. 14, 2023), <https://www.thestreet.com/media/hasbro-just-tanked-one-of-its-biggest-revenue-drivers>.

²⁶ Linda Codega, *Why Are Dungeons & Dragons Fans so Upset?*, GIZMODO (Jan. 27, 2023), <https://gizmodo.com/dungeons-and-dragons-ogl-1-1-explained-wizards-of-the-c-1850006448/slides/2>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Open Gaming License v 1.0a*, WIZARDS OF THE COAST, (last visited Apr. 28, 2023), https://media.wizards.com/2016/downloads/SRD-OGL_V1.1.pdf.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

Coast.³⁵ Paizo, for example, created a tabletop roleplay game, Pathfinder, around the original OGL.³⁶ Pathfinder later became Dungeons and Dragons' top competition in the tabletop roleplay game market.³⁷

C. Proposed Open Gaming License

In January 2023, Gizmodo released an article detailing the leaked draft of a proposed OGL agreement, OGL 1.1.³⁸ This leaked draft proposed key changes to the original OGL.³⁹ The proposed OGL required creators to register their content with Wizards of the Coast and report revenue.⁴⁰ Based on this information, third party users would be separated into three tiers: initiate, intermediate, and expert.⁴¹ While the first two tiers imposed no royalties, creators generating over \$750,000 in sales from OGL content would fall into the expert tier and pay 20% to 25% royalty on revenue in excess of that amount.⁴²

Beyond that, the proposed OGL intended to replace the original OGL completely.⁴³ Part of this replacement would allow Wizards of the Coast to use anything created under the proposed OGL without paying royalties to the third party creator.⁴⁴ The language of the proposed OGL specifically stated that, Wizards of the Coast would have a “nonexclusive, perpetual, irrevocable, worldwide, sub-licensable, royalty-free license to use that content for any purpose.”⁴⁵

In response, fans and creators alike signed an open letter to Wizards of the Coast voicing their support for the original OGL and condemning the proposed OGL.⁴⁶ The open letter claimed that the original OGL has been a pillar of the tabletop gaming industry since its release in 2000 and has done more to foster creativity and innovation within the industry than any other element.⁴⁷ It stressed that terminating and replacing the original OGL with the proposed OGL would effectively dismantle the entire industry through stifling innovation and crushing small businesses with royalties.⁴⁸

Wizards of the Coast recognized this backlash and released a survey asking creators for their opinions on the proposed OGL.⁴⁹ The survey showed an overwhelming support for the original OGL.⁵⁰ Beyond that, 62% of the community was satisfied with the inclusion of some content in Creative Commons.⁵¹ Those who were dissatisfied asked for an increase in content released in

³⁵ Linda Codega, *Dungeons & Dragons' New License Tightens Its Grip on Competition*, GIZMODO (Jan. 5, 2023), <https://gizmodo.com/dnd-wizards-of-the-coast-ogl-1-1-open-gaming-license-1849950634>.

³⁶ Price, *supra* note 15.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Codega, *supra* note 35.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Kit Walsh, *Beware the Gifts of Dragons: How D&D's Open Gaming License May Have Become a Trap for Creators*, EFF DEEPLINKS BLOG (Jan. 10, 2023), <https://www.eff.org/deeplinks/2023/01/beware-gifts-dragons-how-dds-open-gaming-license-may-have-become-trap-creators>.

⁴⁴ *Id.*

⁴⁵ Codega, *supra* note 35.

⁴⁶ *Open DnD*, *supra* note 6.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Brink, *supra* note 12.

⁵⁰ Brink, *supra* note 13.

⁵¹ *Id.*

Creative Commons.⁵² In response, Wizards of the Coast announced that they would allow creators to choose to publish content under the original OGL or under a Creative Commons license.⁵³ This Creative Commons license would make content freely available for any use.⁵⁴ More importantly, the Creative Commons license would be open and irrevocable.⁵⁵

III. ANALYSIS

The proposed OGL would not promote innovation within the tabletop gaming industry.⁵⁶ The original OGL was good for innovation in the industry, however, there are few benefits, and better alternatives have been developed since the OGL's release in 2000.⁵⁷ A Creative Commons license is a better alternative because it (1) is widely used across other industries and (2) completes the same goals as the OGL, protecting intellectual property while promoting innovation.⁵⁸

A. Intellectual Property Protections and Tabletop Gaming

Intellectual property protections for tabletop games are complex and, in many cases, minimal. Copyright is extended to works of authorship including: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”⁵⁹

Games in their entirety, however, are traditionally not protected by copyright law.⁶⁰ Tabletop games as a set of rules and systems are typically not available for copyright.⁶¹ While the game may not be entirely protected under copyright law, limited protections are available for some parts of the game.⁶² Game designers may copyright pieces of their game that fall within 17 USC § 102(a).⁶³ These elements can range from labels for the game, the design of game boards, playing cards, and graphic works.⁶⁴ Beyond those elements, the wording of the game's instructions may also be protected from literal copying.⁶⁵

The *scenes-a-faire* doctrine limits what aspects of a game may be protected by copyright.⁶⁶ Aspects covered by the *scenes-a-faire* doctrine include “incidents, character or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”⁶⁷ Aspects that

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Open Gaming License 1.1*, WIZARDS OF THE COAST, (last visited Apr. 28, 2023), <https://rollforcombat.com/wp-content/uploads/2023/01/Open-Game-License-1-1-Leak.pdf>; *Open DnD*, *supra* note 6.

⁵⁷ *Open Gaming License v 1.0a*, *supra* note 30; *The Story of Creative Commons*, CREATIVE COMMONS, (last visited Apr. 28, 2023), <https://certificates.creativecommons.org/ccertedu/chapter/1-1-the-story-of-creative-commons/>.

⁵⁸ *The Story of Creative Commons*, *supra* note 57.

⁵⁹ 17 U.S.C. § 102(a).

⁶⁰ 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2A.14[c][1] (Matthew Bender, Rev. Ed.).

⁶¹ *Id.*; 17 U.S.C. § 102(b) (“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.”).

⁶² Nimmer, *supra* note 60.

⁶³ 17 U.S.C. § 102(a); Nimmer, *supra* note 60.

⁶⁴ Nimmer, *supra* note 60; *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F.Supp.2d 394, 404 (D.N.J. 2012).

⁶⁵ Nimmer, *supra* note 60.

⁶⁶ *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982).

⁶⁷ *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978).

are found to be *scenes-a-faire* only receive protection from virtually identical copying.⁶⁸ For example, the 7th Circuit found that the maze, scoring table, and tunnel exits in PAC-MAN were all standard game devices for a maze-chase game and, as such, *scenes-a-faire*.⁶⁹ This doctrine could apply to elements that are standard for tabletop roleplay games, such as the components players use to create a character.⁷⁰

While there are some opportunities for tabletop game creators to protect their creations, these can also be limited by fair use.⁷¹ Fair use of copyrighted works is not considered an infringement of the copyright.⁷² It includes instances where the copyrighted work is used for, “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”⁷³ Four factors are considered when determining fair use:

- 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁷⁴

Ultimately, this makes it clear that third parties looking to create and publish content compatible for tabletop roleplay games have two options outside of OGLs. First, for example, in the absence of the original OGL, third party creators could create and publish companion content compatible with the rule system of Dungeons and Dragons without ever infringing on copyright protected content. Second, third party creators could use game mechanics to create their own content and use copyrighted Dungeons and Dragons content, so long as their content fits within the legal bounds of the fair use doctrine.⁷⁵

B. Open Gaming Licenses Stunt Innovation

OGLs can be useful tools to reassure third parties that they can use original source material.⁷⁶ In the tabletop gaming industry, however, OGLs can limit the use of noncopyrighted material and make it difficult for small-time hobbyist creators to use.⁷⁷

The primary purpose of an open license is to act as an offer for third parties to use the original material in specific ways.⁷⁸ The benefit third parties usually derive is the right to use copyrighted material without having to fit within the fair use exceptions found in 17 USC § 107.⁷⁹ However, in the original and proposed OGLs released by Wizards of the Coast, third party creators

⁶⁸ *Atari, Inc.*, 672 F.2d at 617.

⁶⁹ *Id.*

⁷⁰ *See id.*; *Chapter 1: Step-By-Step Characters*, D&D BEYOND, (last visited Apr. 28, 2023), <https://www.dndbeyond.com/sources/basic-rules/step-by-step-characters> (explaining components for characters, including (1) race (elf, human, etc), (2) class (rouge, bard, etc.), and (3) abilities).

⁷¹ 17 U.S.C. § 107.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Walsh, *supra* note 43.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*; *Open Gaming License 1.1*, *supra* note 56.

are limited in what they may use.⁸⁰ The original OGL offered creators access and use of Open Game Content, which they defined as “the game mechanic and includes the methods, procedures, processes and routines to the extent such content does not embody the Product Identity” and listed in the SRD.⁸¹ The list of Product Identity is extensive and prevents creators from even advertising that their content is compatible with ‘Dungeons & Dragons’ or ‘D&D’ unless they have an agreement with Wizards of the Coast outside of the OGL.⁸²

Comparing the two OGLs, the proposed OGL provides no incentive for third party creators to publish content. It gives creators access to the same content as the original OGL with more strings attached.⁸³ In comparison to the shorter original OGL, the proposed OGL is more complicated by including distinctions between commercial and non-commercial use, and explicitly clarifying that the proposed OGL would not allow for anything other than roleplay games and supplements in the form of printed media and static electronic files.⁸⁴ This would restrict third party creators from using the Open Game Content to create virtual tabletop roleplay games, novels, graphic novels, and many other forms of content.⁸⁵

While it only authorizes creators to use non-protected content (the Open Game Content) that they would have been able to use absent an OGL, the original OGL still incentivizes innovation within the industry.⁸⁶ The original OGL’s largest incentive for creators is a document detailing what content is considered Open Game Content.⁸⁷ It also did not prohibit the creation of non-printed media or static electronic files.⁸⁸ In fact, under the original OGL, many virtual tabletop roleplay games have flourished, including Foundry Virtual Tabletop and Roll20.⁸⁹

C. Creative Commons Licenses Promote Innovation

While the original OGL does a superior job at incentivizing creators than its proposed counterpart, there are other licensing options that tabletop roleplay companies can embrace. Wizards of the Coast used one of these alternatives when they released the Dungeons and Dragons game mechanics into the Creative Commons following community backlash to the Leak.⁹⁰

Creative Commons is a nonprofit organization that creates licenses to make it easier for companies to allow third parties to use their content.⁹¹ The nonprofit began in 2002 in response to the growth of the internet and the ability to access, share, and collaborate that came with it.⁹² They published a set of public licenses allowing original creators to keep their copyrights while simultaneously allowing for sharing and remixing.⁹³

⁸⁰ Walsh, *supra* note 43.

⁸¹ *Open Gaming License v 1.0a*, *supra* note 30.

⁸² *Id.*

⁸³ *Open Gaming License 1.1*, *supra* note 56.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Open Gaming License v 1.0a*, *supra* note 30.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Rami Tabari, *Best Virtual Tabletop Software in 2023: How to Play D&D and More TTRPGs Online*, LAPTOPMAG, (Apr. 4, 2013), <https://www.laptopmag.com/best-picks/best-virtual-tabletop-software>.

⁹⁰ Brink, *supra* note 13.

⁹¹ *Systems Reference Document (SDR)*, WIZARDS OF THE COAST, (last visited Apr. 28, 2023), <https://dnd.wizards.com/resources/systems-reference-document>.

⁹² *The Story of Creative Commons*, *supra* note 57.

⁹³ *Id.*

Since the founding of this nonprofit, Creative Commons licenses have been developed, updated, and adopted by governments, institutions, and individuals as the “global standard for open copyright licenses.”⁹⁴ It has become so broadly accepted that today, Creative Commons licenses cover nearly two billion works.⁹⁵

The Creative Commons offers six types of licenses with a range of permissive behavior and adaptations.⁹⁶ The Creative Commons license that makes the most sense to use in place of an OGL would be the most permissive license – a CC BY 4.0.⁹⁷ Third party creators publishing under the CC BY 4.0 license would be free to share and adapt content released under the license.⁹⁸ The only term third parties are required to comply with is attribution: they must give appropriate credit, link the license, and indicate if they made changes.⁹⁹ Where the OGLs lacked the ability to cover technological advances such as virtual adaptations of tabletop roleplay games, the CC BY 4.0 addresses media formats and allows for technical modifications.¹⁰⁰

Beyond this, the CC BY 4.0 also contains a downstream recipients clause.¹⁰¹ The clause guarantees that every recipient of the material created under the license automatically receives an offer to use the CC BY 4.0 to create their own work based on that material.¹⁰² This clause ensures that licensees may not offer or impose additional or different terms to the material they publish using the CC BY 4.0.¹⁰³ This inability for licensees to impose restrictions would allow for the creative process within the tabletop roleplay game community to continue indefinitely.

As only particular portions of tabletop roleplay games fall into intellectual property protections, the primary purpose of an OGL is to facilitate and encourage innovation.¹⁰⁴ However, based on restrictions within the proposed OGL, it would not promote innovation.¹⁰⁵ The original OGL did promote innovation, however, a Creative Commons license is a better alternative. A Creative Commons license is a better-known alternative that protects intellectual property while promoting innovation.¹⁰⁶ As such, companies publishing tabletop roleplay games should opt for a Creative Commons license instead of OGLs.

IV. RECOMMENDATION

Ultimately, companies in the tabletop roleplay game industry should move away from OGLs. Instead, they should clearly disclose what parts of their game are unprotected mechanics and release those under a well-recognized license such as a Creative Commons license. Historically, OGLs have allowed the tabletop gaming industry to grow and innovate by incentivizing third party

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *About CC Licenses*, CREATIVE COMMONS, (last visited Apr. 28, 2023), <https://creativecommons.org/about/cclicenses/>.

⁹⁷ *Attribution 4.0 International (CC BY 4.0)*, CREATIVE COMMONS, (last visited Apr. 28, 2023), <https://creativecommons.org/licenses/by/4.0/>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ 17 U.S.C. § 102(a); 17 U.S.C. § 102(b); *see Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982); Nimmer, *supra* note 60; *Open Gaming License v 1.0a*, *supra* note 30.

¹⁰⁵ *Open Gaming License 1.1*, *supra* note 56; *Open DnD*, *supra* note 6.

¹⁰⁶ *The Story of Creative Commons*, *supra* note 57.

creators to create and publish their own content.¹⁰⁷ However, considering the proposed OGL leak, community response to it, and Wizards of the Coast's final decision, it is apparent that the future of gaming licenses within the tabletop community is unsteady. Companies similar to Wizards of the Coast have several options moving forward.

First, companies could choose to do away with gaming licenses all together. To begin, OGLs do not give licensees such as third party creators any access to materials beyond those that the public has access to use. Unless the game mechanics in question under the OGL are protected by copyright or another intellectual property avenue, then it is free for third party use and creation.¹⁰⁸ The main legal benefit an OGL provides is a guideline for what is considered game mechanics versus protected product identity. Meaning it gives third party creators an idea of what the company releasing the OGL would sue over. In turn, the legal benefit reaped by companies is that their intellectual property is clearly distinguished from game mechanics. While there have been non-legal benefits such as community building, game innovation, and increased revenue due to widespread knowledge, the lack of legal benefits makes OGLs redundant and confusing.

Additionally, companies could follow Wizards of the Coast's lead by publishing a document outlining what aspects of their game are game mechanics and what constitutes intellectual property. Since game mechanics are traditionally uncopyrightable, third party creators do not need an OGL to publish content as long as they do not include intellectual property.¹⁰⁹ However, it can be confusing for anyone to determine what is and is not protected by a copyright or trademark. By identifying what materials are not subject to copyright protections, companies would be facilitating and incentivizing the same third party content that brought the tabletop roleplay community from niche to mainstream.

Lastly, if companies truly want to facilitate third party involvement and put their gaming community on notice that content is free to use, they should opt for a Creative Commons license. The original OGL was released shortly before the creation of the Creative Commons and release of those licenses.¹¹⁰ While the original OGL functions similar to Creative Commons licenses, it makes far more sense for companies to switch to the Creative Commons.

The Creative Commons is widely accepted and commonly used across many different industries. Specifically, CC BY 4.0 would be the most comparable to the original OGL.¹¹¹ It allows for the licensee to use content in all media and formats and share them with the public by any means or process.¹¹² Beyond facilitating community involvement, the Creative Commons license would ensure that the company is protected through attribution and indication of changes.¹¹³ Licensees would attribute to companies to ensure they are given proper credit as well as indicate where they made changes to the companies work.

V. CONCLUSION

By phasing out OGLs, releasing document outlining unprotected game mechanics, and releasing those game mechanics through a well-recognized license such as a Creative Commons license, tabletop roleplay game companies can best promote community involvement while protecting their intellectual property. As illustrated with Dungeons and Dragons, OGLs can create

¹⁰⁷ Codega, *supra* note 26; Codega, *supra* note 35; Price, *supra* note 15.

¹⁰⁸ 17 U.S.C. § 102(b); 17 U.S.C. § 107; Nimmer *supra* note 60.

¹⁰⁹ 17 U.S.C. § 102(b); 17 U.S.C. § 107; Nimmer, *supra* note 60.

¹¹⁰ Codega, *supra* note 26; *The Story of Creative Commons*, *supra* note 57.

¹¹¹ Brink, *supra* note 13; *Open Gaming License v 1.0a*, *supra* note 30; *The Story of Creative Commons*, *supra* note 57.

¹¹² *About CC Licenses*, *supra* note 96; *Attribution 4.0 International (CC BY 4.0)*, *supra* note 97.

¹¹³ *Attribution 4.0 International (CC BY 4.0)*, *supra* note 97.

chaos and confusion. Due to the complicated relationship between copyright law and games, the line between what is and is not an uncopyrightable game mechanic is difficult for the average gamer to determine. As such, a document clarifying would completely remedy this. Lastly, the creation of Creative Commons offers a recognizable alternative OGLs that fundamentally serves the same purpose while being easier and more accessible for third party creators to understand.