IF YOU LOVE SOMETHING, SET IT FREE?
OPEN CONTENT COPYRIGHT LICENSING AND CREATIVE CULTURAL EXPRESSION

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ABSTRACT

This dissertation seeks an answer to the question of when open content copyright licences can be most productively used to facilitate the creation and dissemination of cultural expression. Conventional copyright licences emphasize control and the policing of infringing activity. By identifying the circumstances in which open, permissive, and simple-to-understand copyright licensing models can successfully be employed, this dissertation provides a heuristic that articulates when open content licensing can be used to help foster creativity, dialogic collaboration and iterative cultural expression.

Using communicative copyright, an account inspired by the relational author approach of Carys Craig, as a theoretical framework, this dissertation posits that copyright licensing is best understood not as a mechanism for maximizing monetary returns, but instead as a mechanism for increasing creative participation and communication among community members. Employing the insights of the communicative account, and synthesizing the work of scholars from a range of disciplines, this dissertation sets forth a comprehensive definition for open content copyright licences and identifies a matrix of "success indicia" for the use of such licences, arrayed in sets of characteristics categorized by whether they pertain to the licensor, the work, the community, and the market.

At the heart of this research project is a case study of the use of the Open Game License ("**OGL**") in connection with the *Dungeons & Dragons* role-playing game – and how that licensing model has resulted in a vibrant community that creates, remixes and shares open content. The fieldwork for this research project uses a qualitative empirical method in the form of semi-structured interviews with role-playing game publishers and players, along with content analysis of online statements regarding the use of the OGL, such as those found in interviews, blog posts, forum posts and comments.

The findings of the fieldwork portion affirm the explanatory power of the communicative copyright account, and in turn yield an emphasis on the critical nature of the community-constitutive role of open content copyright licences. Open content copyright licences can be most productively used when licensors are committed to nurturing and facilitating a community of creatively-engaged consumers.

DEDICATION

For Heather, as with everything, and always.

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Introduction

I. Overview

This research project has its origins in observations I made while practising entertainment law at a large law firm. I knew that Creative Commons copyright licences were popular – the Creative Commons organization reported that its licences had been used hundreds of millions of times and many of the legal academics whose work I followed were enthusiastic about the kind of "open" licensing represented by Creative Commons – but my colleagues and I had effectively never encountered a client who was seriously interested in using a Creative Commons licence for their project. Why was that? Was it something about the kinds of clients we represented that meant they were not the kinds of people who would be interested in, or did not operate the kinds of business undertakings that would benefit from, using Creative Commons licences? Or was it something about the kinds of creative activity our clients were engaged in that rendered it unsuitable for open licensing? Was there something inherent to open content licences themselves that proved an impediment to our clients using them? Approaching the matter from the other direction, what if a client had called and asked us for advice about whether they *should* use an open content licence for their project? How would we assess the situation to provide sound advice? What considerations should a client take into account in deciding whether to use an open content licence?

Those various unanswered queries formed the backdrop to this dissertation, which ultimately seeks to answer the central question: when *should* a licensor give serious consideration to using an open content licence for disseminating their creative expression? Put slightly differently, how would we identify the optimal circumstances in which open content licences can be used to disseminate creative cultural expression? This backdrop also pointed the way to a particular approach that I wanted to employ when undertaking this project: I wanted to understand the theoretical underpinnings of open content licences, and I also wanted to talk to people who actually used them, to learn *why* they used them, and whether they were satisfied with that experience. As such, this dissertation begins by exploring relevant copyright theory, proceeds to examine the work of various legal scholars who have used empirical methodologies, and then employs a qualitative case study using semi-structured interviews to assess the propositions drawn from the theoretical analysis and literature review. It thereby seeks to contribute to the growing

body of empirically-inclined legal scholarship by using a qualitative methodology to, in Jessica Silbey's words, "learn more about the intersection of intellectual property law on the one hand, and creative and innovative work on the other … from the ground up".[1]

The case study at the heart of the empirical aspect of this research project examines the Open Game License ("**OGL**"). The OGL is an attractive object of study for this dissertation because it is a significant instance of the persistent use of an open content copyright licence in connection with a popular form of entertainment. The OGL was created for use with the *Dungeons & Dragons* ("**D&D**") role-playing game ("**RPG**"), one of the world's most popular games since its initial release in the 1970s. In 2000, in preparing the release of a new edition of the D&D game, its owners, inspired by open source software licences, created the OGL and released D&D's 3rd Edition ruleset under the OGL. The OGL embodied a "rip, remix and share" ethos, for the first time enabling players and other users to appropriate and even commercially release virtually the entirety of the game's copyrighted textual material. The release of D&D's 3rd Edition, powered by the OGL, rejuvenated the D&D market for new generations of players and spawned an industry of OGL-employing game producers. Today, as a direct result of the OGL, a thriving community of RPG gamers and publishers continues to create, mash-up, share and enjoy content that was once locked down under restrictive copyright claims. This research project includes interviews with OGL users in an effort to identify the subjective motivations of those who use the OGL, and their self-assessments as to whether such use has been "successful" (using criteria for "success" that they themselves articulate). The questions about open content copyright licences that I described above as forming the backdrop for this project are present but particularized for the fieldwork portion of this dissertation: Why are people using the OGL? And, are they satisfied with the results of their use of it?

This dissertation contains five primary contributions to the existing literature on open content copyright licences. Inspired by and drawing largely on Carys Craig's relational account of copyright law, it proposes an analytical framework – communicative copyright – that assists in explaining why people engage in open content licensing. It provides a comprehensive operational definition of open content copyright licences, one that can be used to determine whether and to what extent a particular copyright licence is properly described as "open". It synthesizes work from across a number of scholarly fields to

[1] Jessica Silbey, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (Stanford: Stanford Law Books, 2015) at 4.

identify a matrix of factors – termed "success indicia" – that suggests that a confluence of certain characteristics of licensors, works, communities and markets are conducive to the use of open content copyright licences. The fieldwork yields a rich set of data pertaining to how individuals explain and regard their use of open content copyright licences. Finally, the case study helps to highlight a critically important aspect of open content copyright licences: that they perform a community-constitutive function because they help to reduce the risk and uncertainty inherent in creative activity that incorporates and builds upon previous creative expression. Recognition of that community-constitutive function helps to demonstrate that the central commitments of a relational and communicative approach to copyright provide significant insight into why and when open content licensing can be successfully deployed for creative cultural expression.

II. Uncertainty, Risk, and Reassurance: The Community-Constitutive Function of Open Content Licences

Open content copyright licences have historically presented both opportunity and puzzle for creators and theorists. Copyright law has traditionally been conceived of in terms which prioritize and lionize exclusivity – it has been thought that granting exclusive property-like rights to copyright owners, and facilitating the enforcement of those rights, provides the necessary incentive to create and disseminate creative works. Open content licences – which are premised on unrestricted access to, and permissive use of, creative content – seem peculiar (or, at best, counter-intuitive) when approached using a traditional copyright justification framework. A hallmark of open content licensing is that it de-emphasizes the exclusive rights of the licensor in favour of maximizing the use and dissemination of the licensed content by an open-ended set of potential users. In short, open content licences do not appear to "fit" the usual conceptions of motivations and incentives on which copyright justification theories have traditionally relied. Approaching the "puzzle" of open content licences using a framework drawing on copyright justification theories that foreground motivations such as community creation and dialogic participation, this dissertation shows that the key to understanding open content copyright licences lies in understanding the role they play in community creation and maintenance.

In Craig's relational account of copyright, the copyright regime should strive to "maximise social engagement, dialogic participation and cultural contributions";[2] indeed, in Craig's account, "the copyright system must stand or fall as an institution that is able to maximise social communication and cultural interaction".[3] Those statements encapsulate the evaluative appraisal at the heart of relational and communicative copyright. Creative activity takes place embedded in a context of both possibilities and constraints; and one set of possibilities and constraints is the environment of uncertainty that attends copyright law. It can be, if not impossible, at least extremely difficult to demarcate the precise limits of rights between a copyright owner's claims and a user's expressive rights in connection with a copyright-protected work; in a digitalized environment, the tension resulting from that uncertainty can stifle creative activity that has been enabled by those same digital tools. What this dissertation reveals is that attentiveness to the environment or the community in which creative activity and copyright licensing occurs is of critical importance.

Other scholars have noted the importance of community in prior analyses of open licensing: Volcker Grassmuck for example, when reviewing empirical work on open source software licensing, noted that "the community itself and the cooperative creation it enables are clearly seen as the most important value that motivates people" to join communities by way of using open source licences.[4] Importantly, implicit in Grassmuck's observation is a recognition of the *facilitative* and *instrumental* function of open content licences: they operate as constitutive sinews that help to "string[] together" open content communities, along with "a set of common interests, the joy of creating and sharing, learning from and teaching others".[5] It is crucial to recognize the instrumentality of open content licensing – to recognize that open content licences facilitate achieving ends beyond the mere granting of permission inherent in the activity of licensing. The licences facilitate community because they, as Nic Suzor and Brian Fitzgerald

[2] Carys Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar, 2011) at 57. As Craig explains, attributing value to these goals is "premised upon an understanding of human associations as constitutive and essential to genuine human agency and fulfilment".

[3] *Ibid* at 234.

[4] Volcker Grassmuck, "Towards a New Social Contract: Free-Licensing Into the Knowledge Commons" in Lucie Guibault & Christina Angelopoulos, eds., *Open Content Licensing – From Theory to Practice* (Amsterdam: Amsterdam University Press, 2011) at 28.

[5] *Ibid* at 50.

noted, can provide "certainty and clarity" to a community.[6] In short, open content licences can provide the certainty and comfort, or at least enhance the levels of certainty and comfort, within which communities can grow.

One part of the work done in this dissertation is demonstrating that communicative copyright theories provide a theoretical backdrop for a cogent explanation of when and why the creators and disseminators of creative expression would elect to employ open content licensing. By engaging with Craig's theory, which emphasizes the communicative and dialogic functions of copyright, this project ascertains the circumstances in which open content licences are an appropriate device for the exploitation of creative cultural expression. As will be shown, copyright justification theories that highlight the systemic goals of facilitating participation and dialogue help to explain the popularity of open content licensing. Communicative copyright's emphasis on the importance of dialogue and communication provides an important supplement to conventional utilitarian and deontological copyright accounts – the additional explanatory power of the communicative account is not reducible into the terms of the other theories. People use open content copyright licences to sustain and enhance communities and their participation in those communities because of the importance to them of those communities and that participation. The communicative copyright account offers an analysis that in some material aspects better accords with the interests and experiences of those who make use of open content licensing *in the terms they themselves* use to describe those interests and experiences. That is not to say that utilitarian and deontological accounts are incorrect, but to say that they are insufficient: people use open content licences in ways that cannot easily be fully explained using utilitarian and deontological accounts; but once a communicative lens is added to the analytical toolkit, open content licensing becomes much easier to account for. The successful use of open content copyright licences therefore indicates something, not only about open licensing practices or the people who use them, but about the copyright system itself: that it can be marshalled to strengthen and augment creative communities and dialogic creative practices.

The results of this research not only bring to the fore the community-constitutive aspect of open content licences, but highlight that the constitutive function results from a particular feature of open

[6] Nic Suzor & Brian Fitzgerald, "The Role of Open Content Licences in Building Open Content Communities: Creative Commons, GFDL and Other Licences" (2007) at 16, online: http://eprints.qut.edu.au/6076/1/6076_1.pdf.

content copyright licences: they provide *reassurance* to licensors and licensees. That reassurance kickstarts communal creativity; it is the imprimatur of *invitation*, the reduction of *uncertainty* and the tamping down of fear of liability for infringement that is a crucial role played by the use of the open content licence. The interview and content analysis of this research project indicates that this encouragement to be creative, also understandable as a *confirmation* of the propriety of creative activities that are already occurring even if not fully visible, is a crucial component of the success of open content licensing.

Open content copyright licences represent not only a tool used to accomplish strategic business imperatives – there is also a performative aspect to the adoption of an open content licence, whether as licensor or licensee. The open content copyright licence serves to function as a badge or marker indicating membership in a community. The licence is not only the means to an end, it serves to help define those ends and to shape the community in which it is used and the activities that take place within that community. To use Craig's formulation, open content copyright licences serve to enable participation in a "collective conversation".[7] Individuals create because they are by nature social beings, because they, in Niva Elkin-Koren's terms, "may simply want to interact, communicate, connect with other people, be heard by their fellow users, feel they belong and affiliate themselves with groups".[8] One way to assess the success of a particular copyright regime, and to assess particular manifestations of that copyright regime, is to determine the extent to which it facilitates those activities. Open content copyright licences can be judged using that metric: how do they enable the creative and disseminative activities needed to sustain a community? Silbey's work has shown that creators and disseminators cite numerous motivations for their creative and disseminative decisions, including conventional ones such as generating revenue and increasing renown – but also, and crucially, the desire to build relationships, share and participate in creative "conversations".[9] The findings of this research project indicate that cultivating productive communities around creative expression also requires enhancing certainty and comfort – open content copyright licences are an effective mechanism for providing that assurance.

[7] Craig*, supra* note 2 at 3.

[8] Niva Elkin-Koren, "Tailoring Copyright to Social Production" (2011) 12 Theoretical Inq L 309 at 321.

[9] Silbey, *supra* note 1 at 252-62.

III. Chapter Roadmap

This dissertation is divided into eight chapters (plus an Introduction and Conclusion), that are structured to accomplish three tasks. First, I set out in detail the theoretical framework – communicative copyright – that is used to explain and assess the phenomenon of open content copyright licensing. Next, the existing literature on open content licensing is synthesized and extended to create a comprehensive definition of open content copyright licences and to identify a matrix of "success indicia" that are predictive of, or at least congenial for, the use of such licences. Finally, the fieldwork portion of the project – involving both interviews of users of the OGL and analysis of online discussions of OGL users – is used reflexively to test the definition, the matrix of success indicia, and the propositions generated by the communicative copyright account. The final result is, I hope, the development of a theoretically and empirically thicker account of when and why open content licences can be successfully used in connection with creative cultural expression.

The first chapter examines the legal nature of the "licence", locating its origin in the right of property owners to exclude others and control the ways in which others are permitted to interact with a particular resource or property-object. As will be shown, it is critical to note that the property owner's power to *exclude* contains within it inverse powers: the powers to *include* and *permit*. The terminology of rights and powers is derived from the work of Wesley Newcomb Hohfeld, whose analysis has been used by Wendy Gordon and Julie Cohen to describe licensing as a core component of the suite of rights granted to copyright owners to facilitate their autonomy with respect to the use of the resources they own. As will be seen, copyright legislation in Canada and the United States treats licensing capaciously, with copyright owners accorded considerable latitude in how they exercise their licensing powers. Using the lenses of various copyright justification theories, the chapter goes on to describe how licensing is explained at the level of systemic narrative, demonstrating that a critical step in the analysis of copyright licensing is choosing which framing account to employ. Pivoting from traditional consequentialist and deontological justification theories, the chapter ends by looking at what I describe as "communicative" theories – accounts that, in the words of Carys Craig, assess copyright by reference to its "capacity to structure relations of communications".[10] From this perspective, licensing defines in jural terms the

[10] Craig, *supra* note 2 at 52.

relationships and communicative acts that lie at the heart of communicative theories – licensing is a mechanism that facilitates the multitudinous "conversations" that communicative theories are concerned with enabling.

Chapter 2 is devoted to setting forth in detail the contours and content of "communicative copyright". Communicative copyright is an analytical frame that, drawing largely on Craig's relational account, pairs theoretical and empirical scholarship to both describe a justification theory for copyright that identifies goals for the copyright system and indicates a methodology for assessing whether those goals have been achieved. The theoretical aspect identifies a number of goals for copyright including facilitating and enhancing the dissemination of creative expression, allowing the development of mechanisms that enable communication and community development to support personal development and intercommunal relationships, and promoting sociality and dialogue to augment a civil society within which human flourishing can be maximized. The methodological aspect of communicative copyright encourages empirical attention to the actual practices of those who take action in the copyright ecosystem, whether as creators, disseminators and/or users.

By the end of Chapter 2, this dissertation will have set forth the legal concept of the licence and described in theoretical terms how copyright licensing functions; it will have also set forth, under the rubric of communicative copyright, a metric of sorts for articulating the goals of the copyright system and assessing whether those goals have been met. In Chapters 3 and 4, the analysis is particularized to the matter of open content licences, and two contributions are made to the literature: first, in Chapter 3, a comprehensive definition of the "open content licence" is articulated; second, in Chapter 4, a tentative matrix of "success indicia" is identified that sets out the circumstances in which it appears that open content licences might be productively used. The third chapter draws on both the scholarly literature focusing on open content licences, particularly Steven Weber's work on open source software licences, and on previous efforts to provide definitions of "openness", including David Wiley's work with the Open Content Project and Open Knowledge International's "Open Definition". The chapter culminates in the articulation of an ordering principle for open content licences: that they function to maximize access and dissemination by multiple users of copyright-protected works in a manner that maximizes the degree of freedom accorded to the users. That ordering principle is then applied to the various existing "open"

definitions to create a comprehensive operational definition for open content copyright licences that consists of necessary features, indicative features, non-disqualifying features and disqualifying features. That allows us, among other things, to identify whether or not a particular copyright licence is an open content licence, and to assess the comparative "openness" of different open content licences. Having worked through the various proffered definitions of open content licences, and having worked with Weber's insightful account, we will begin to see that open content copyright licences are partly an attempt to construct and define a *community*. That "community-constitutive" function of open content licences forms an analytical plumb line for the discussion contained in Chapter 4.

The reactions of legal scholars to open content licences, primarily the Creative Commons suite of modular licences, are the first object of attention in Chapter 4. We will see that the available legal literature on open content licences can be broadly arrayed between "skeptics" who identify various theoretical frailties in open content licensing, and "proponents" who see open content licensing as useful for achieving various ends, including production efficiencies, signaling effects, and market entry advantages. Uniting the two bodies of work is an appreciation that open content licences serve a facilitative role; though it may be trite to observe that open content licences can be used to accomplish certain goals, it is helpful to reconceive their function within a communicative framework and to foreground the notion that, as hinted in Chapter 3, a critical role played by open content licences is their community-constitutive operation. In short, to properly appreciate open content licensing, we need to recognize that open content licences can operate to sustain and enrich communicative activities and the communities within which those activities occur. Armed with that insight, the balance of Chapter 4 expands the lens beyond legal scholarship to engage with work in other fields such as economics and management in an effort to identify a matrix of "success indicia" that appear to be predictive of, or at least congenial for, the use of open content copyright licences. Synthesizing and extending the literature reviewed to this point, the chapter ends with a finding that the success indicia can be organized into four categories of factors or characteristics: those pertaining to the creator/licensor of the work, those pertaining to the nature of the licensed work itself, those pertaining to the community in which the work will be disseminated, and those pertaining to the market environment in which the licensor and the community engage with the licensed work.

Having detailed a theoretical framework that is pertinent to open content licensing, and identified a set of factors that can be relied on to make informed decisions about whether and when to make use of an open content licence, attention next turns to the fieldwork portion of this research project. Chapter 5 describes the empirical methodology used to collect data about the use of the OGL by means of interviews and content analysis of online discussions about the OGL; the chapter also discusses the case study approach that frames the collection of data against which the following propositions, drawn from the work done in the first four chapters, will be considered:

P1. In describing their motivations for using the OGL, users of the OGL will articulate and prioritize goals and values such as self-expression, interaction, reciprocity, community participation, dissemination and reputation enhancement. While traditional motivating factors such as economic benefit, profit maximization and control will be present in the motivation matrix of OGL-users, they play a subordinate role.

P1-Alt. Alternatively, it may be that users of the OGL do not articulate non-traditional motivations for their use of the OGL, either (a) because they view the OGL as a means for achieving *traditional* goals (such as profit), or (b) because their use of the OGL is not instrumental such that (i) they did not conceive particular motivations or incentives in connection with the decision to use the OGL or (ii) they are unable to articulate whatever motivations or incentives lead them to make their decision to use the OGL.

P2. Open content licensing is best-suited for situations in which there is an overlapping of the following conditions: (a) creators whose motivation matrix prioritizes factors other than profit (even when profit-making is one of their motivations); (b) content which exhibits characteristics of interactivity, modularity and expandability; (c) the market for the product exhibits network effects; and (d) the product exists within, or its creators hope to generate, a community of consumers who anticipate ongoing interaction with their peers.

P3. Communicative copyright justification theories that focus on values such as sharing, community-building and creative dialogue can better account for the use of open content licensing than can traditional copyright justification theories.

The detailed examination of the OGL and its use begins in earnest in Chapter 6, which sets forth a history of the RPG industry and describes the origins of the OGL, and scrutinizes its operation and impact; Chapter 6 thus provides the granular factual background necessary to understand the context for the results found in the fieldwork portion of this research project.

Chapter 7 summarizes and examines the data collected from the fieldwork, which focuses on the use of the Open Game License in connection with role-playing games, will be used to assess and supplement the claims made by the communicative copyright account and test the predictive power of the success indicia. As will be seen, OGL users articulate a diverse set of motivations for using the OGL, some of which are consistent with conventional utility-maximizing copyright justification theories and some of which are consistent with the communicative copyright account. The data confirms the validity of the communicative account's emphasis of encouraging engagement, participation and contribution by a multitude of community members; as will be seen, many OGL users emphatically and enthusiastically note that the OGL made it possible for a wider variety of contributors to participate in the RPG community's creative ferment and that it did so in a way that helped deepen and strengthen the connections among RPG community members. The OGL played (and continues to play) a community-constitutive role in the RPG community; but of perhaps most interest is a phenomenon emerging from the data, unpredicted by the communicative account but entirely consistent with it: the *certainty-enhancing* role of the OGL. The OGL communicated a message to licensors and licensees: "here is a sandbox within which your creative play is welcomed and encouraged". The OGL and that message facilitated an outpouring of creative expression that continues to reverberate in the RPG industry to this day.

Chapter 8 completes the dual task of assessing the claims of the communicative copyright account against the fieldwork data and confirming the validity of the matrix of "success indicia" set out in Chapter 4. Proposition *P1* will be shown to be partially consistent with the data: many OGL users do articulate and prioritize goals and values such as self-expression, interaction, reciprocity, community participation, dissemination and reputation enhancement; they *also* articulate traditional motivating factors

such as efficiency, convenience and economic benefit. It is not possible to determine the relationship between the two sets of motivations for any particular OGL user, but the fact that they consistently identify community-oriented motivations is itself significant. Proposition *P1-Alt* will be shown to not have been needed: all interview subjects had settled views on why they made use of the OGL and whether their use of it was something they were satisfied with. The data collected will also indicate that proposition *P2* is broadly accurate, though its formulation is incomplete: there is a set of numerous other circumstances (including those identified in *P2*) that are relevant factors for determining whether to make use of an open content copyright licence in connection with a particular work of creative expression; those circumstances can be plotted in a matrix in which the characteristics are categorized as being pertinent to the licensor, the work created, the community or audience, and the market in which they all interact. That matrix can be used to guide decisions about the use of open content licences. Finally, this dissertation will conclude that proposition *P3* is supported by the data collected: communicative copyright theories have something meaningful to say about open content copyright licences, capturing a key element of the reasons for their use that is otherwise missing from traditional explanations.

Open content copyright licences should be understood as being, in significant part, *about* community: maintaining community, enhancing community, and facilitating creative communication within and to a community. Where community and communal conversations are prioritized, where they are encouraged, where they are valued, *that* is where open content copyright licences have a productive role to play. To return to the questions that opened this Introduction, licensors should give serious consideration to using open content copyright licences for disseminating their creative expression when they find themselves in circumstances that display a significant portion of the features contained in the matrix of success indicia set out in this dissertation. Fundamentally, successful users of open content copyright licences will be those who want to foster relationships and creative expression in the community that comprises their audience, when enjoyment of their work can be enhanced by its communal reception and iterative dissemination, and when they can enthusiastically communicate to their community, by means of their use of an open content licence: we've created something we love, here it is – and not only *can* you play with this, we *want* you to play with this.

Chapter 1

Copyright Licensing and Copyright Justification Theories

I. Introduction

A primary goal of this dissertation is to identify the optimal circumstances in which open content copyright licences can be used to disseminate creative cultural expression. The core activity that is being examined is that of copyright *licensing*, and so an examination of the legal concept of the "licence" shall serve as an entry point for the subsequent discussion. This chapter describes the nature of copyright licensing and the manner in which copyright justification theories account for licensing. This initial chapter, along with Chapters 2 through 4 (which will examine "communicative copyright" theories and "open content" copyright licensing), will provide the theoretical framework utilized in the balance of the dissertation. This chapter describes how copyright licences function within copyright's jural order and explores the extent to which various copyright justification theories account for the right to license being one of the rights granted to copyright owners. Traditional copyright justification theories (such as the utilitarian,[1] Lockean labour-desert[2] and Kantian personality-based theories[3]) tend to focus on the problem of "original acquisition" in regards to copyright ownership[4] – *i.e.*, answering the question why an author should have copyright in his or her creations. This chapter enquires into a consequent concern: if we concede that creators should be granted some set of legally-enforceable rights in their creations, then why is licensing one such right?

The right to license is not a necessary component of the suite of rights granted to copyright owners; we could imagine a more limited set of copyright rights – for example, simply the right to sell or assign the copyrighted work, or merely the right to seek and obtain monetary damages for infringement. Nevertheless, the right to license recurs throughout all copyright systems as actually enacted, irrespective of the theoretical justifications which motivate (or are asserted to motivate) a particular regime. This

[1] See William M. Landes and Richard A. Posner, "An Economic Analysis of Copyright Law" (1989) 18 J. Legal Stud. 325.

[2] See generally Carys Craig, "Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law" (2002) 28 Queen's LJ 1 [hereinafter Craig, "Locke, Labour"].

[3] See Christopher S. Yoo, "Copyright and Personhood Revisited" (2012) University of Pennsylvania Law School *Faculty Scholarship*. Paper 423. Available online at http://scholarship.law.upenn.edu/faculty_scholarship/423.

[4] Adam D. Moore, "A Lockean Theory of Intellectual Property" (1997) 21 Hamline L. Rev. 65 at 78.

chapter explores the nature of the right to license and its relationship with the theoretical underpinnings, or justification theories, of the copyright superstructure. The discussion shall set forth how the licensing right functions within the copyright regime and explore how the licensing right is viewed through the lens of various paradigmatic theoretical rationales for copyright's existence. The discussion will illustrate that the right to license is a mechanism which reflects, gives effect to and reinforces the essential nature of the copyright regime, howsoever that nature may be characterized by a given copyright justification theory. Appreciating how justification theories conceptualize the role of licensing in the copyright scheme shall enhance our understanding of the social imperatives embedded in copyright, a topic which will be brought to the fore in subsequent chapters.

This chapter proceeds as follows: Part II is devoted to explaining the nature of the right to license, with an emphasis on the distinctions and relationships between property and contract conceptions of licensing; Part III examines the right to license from the perspective of various copyright justification theories, including consequentialist, deontological and communicative copyright theories; finally, Part IV draws together what has been shown about the right to license and what has been revealed about copyright justification theories, using that as a platform from which to delve further into the subjects of succeeding chapters on communicative copyright and open content licensing.

II. Understanding the "Licence"

(a) *Distinguishing Between Contract and Property*

Copyright is a species of what is conventionally termed "intellectual property", which hints that commencing an extended discussion of copyright requires an engagement with the concept of "property".[5] Though this discussion will in short order return to the relationship between the concept of the "licence" and property law, this analysis of the concept will begin by noting the negative relationship between licences and contracts: a licence is not a contract, though licences often come clothed in the form of contracts. Underscoring the distinction between licences and contracts is particularly critical in the context of this dissertation because much of the ensuing discussion and analysis involves written legal

[5] For a discussion on the relationship between "property" and "intellectual property", see generally Peter Drahos, *A Philosophy of Intellectual Property* (Chippenham: Ashgate, 1996), especially at 2-5. See also Pascale Chapdelaine, "The Property Attributes of Copyright" (2014) Buffalo IP L J 34.

instruments which are titled “licences” and which are often referred to as “contracts” and indeed are often drafted using contract terminology.[6] In considering licences, we must avoid the common elision of conflating the jural concept of the licence (which, as will be demonstrated, originates in property) with the form of written instrument in which many licences are embodied.[7] The concept of “licence” too often gets mingled with the concept of “contract”, even though the latter is merely the form of document which memorializes the granting of a licence.[8] As Christopher Newman articulates the point, “licenses are not contracts, though they may arise from acts of contracting”.[9]

While the same document can serve as evidence of both contractual rights (by evidencing mutual agreement) and property/licence privileges (by evidencing the granting by a property owner of permission),[10] the mere presence in a document of contractual rights alongside licenced property privileges does not convert the latter into the former. Of course, the contents of the contract in which a licence is documented will often evidence the precise terms on which the licence has been granted.[11] Distinguishing between licenced privileges derived from a property owner and obligation-claims agreed to in a contract has important legal consequences: for example, the privileges created by a licence can arise from the unilateral action of the property owner, whereas contract formation requires, among other things, privity, consideration and mutuality of agreement;[12] bare licences are revocable at the will of the licensor, whereas contracts are not “revocable”, though they may be terminable in accordance with their terms;[13] breaches of contract and trespasses to property give rise to differing remedies;[14] and, critically, contracts only create rights as between the parties to the contract – property bestows rights on the owner which are

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[6] See Herkko Hietanen, “The Pursuit of Efficient Copyright Licensing: How *Some Rights Reserved* Attempts to Solve the Problems of *All Rights Reserved*” (2008), unpublished PhD dissertation, available online at https://oa.doria.fi/handle/10024/42778, at 107.

[7] See generally Christopher M. Newman, “A License is Not a ‘Contract Not to Sue’: Disentangling Property and Contract in the Law of Copyright Licenses” (2013) 98 Iowa L Rev 1101.

[8] *Ibid* at 1129.

[9] *Ibid* at 1127.

[10] *Ibid* at 1137.

[11] *Euro-Excellence Inc. v Kraft Canada Inc.*, 2007 SCC 37 [*Euro-Excellence*] at para 122, per Abella J. (“the scope of the precise interest granted [by a copyright owner] is shaped by the terms of the licensing agreement”).

[12] Newman, *supra* note 7 at 1124, 1137.

[13] *Ibid* at 1127.

[14] See generally David McGowan, “The Tory Anarchism of F/OSS Licensing” (2011) 78 U Chi L Rev 207 at 216-220.

enforceable against all persons.[15] Property and contract are categories which describe the legal relations between parties, *i.e.*, they articulate which claims will be recognized and enforced by the legal order. The "licence" belongs to the category of property, and, in the context of copyright licences, that origin in property defines the nature and contours of the licensee's rights in the licensed work – as Eben Moglen states, "the work's user is obliged to remain within the bounds of the license not because she voluntarily promised, but because she doesn't have any right to act at all except as the license permits".[16]

For all the complications which may result from accounts of intellectual property rights which are premised on concepts of land-based property law,[17] it remains the case that, for a variety of historical and epistemological reasons, delineating the nature of the "licence" in copyright law must begin with copyright's roots in claims of exclusive ownership.[18] Though notoriously the subject of extensive (if inconclusive) consideration, it will suffice for purposes of this discussion to describe the legal concept of "property" as "a set of rules governing human relations in regard to resources",[19] or a means to achieve social coordination over (scarce) resources;[20] for present purposes, works of intellectual creation will be treated "resources". A property right can also be understood as a legal claim between persons in relation to "things" (things being objects, tangible or intangible, of legal consideration).[21] The content and contours of those rules and legal claims are the result of societal decisions concerning what is "deserved" and what kinds of "social utilities will result from granting property rights".[22]

The core concepts at the heart of "property" are those of ownership and title. By "ownership" is meant an indefeasible or irrevocable interest – the absence of a superior right to claim the rights to

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[15] *Ibid* at 1137. See also Sidney W. DeLong, "What Is a Contract?" (2015) S C L Rev 99 at 116 and see Thomas W. Merrill & Henry E. Smith, "The Property/Contract Interface" (2001) 101 Colum L Rev 773 at 780-89.

[16] Eben Moglen, "Enforcing the GNU GPL" (2001), available online at https://www.gnu.org/philosophy/enforcing-gpl.en.html, quoted in McGowan, *supra* note 14, at fn 11.

[17] See, e.g., Julie E. Cohen, "Property as Institutions for Resources: Lessons from and for IP" (2015) 94 Tex L Rev 1.

[18] See generally Drahos, *supra* note 5, esp at 2-8 and Chapter 2; see also Robert P. Merges, *Justifying Intellectual Property* (Cambridge: Harvard University Press, 2011) at 4-5.

[19] Wendy J. Gordon, "An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory" (1988-1989) 41 Stan L Rev 1343 at 1346. See also Cohen, *supra* note 17 at 4 quoting Thomas W. Merrill, "The Property Strategy" (2012) 160 U Pa L Rev 2061 at 2062 (property is "an institution for organizing the use of resources in society").

[20] Tom G. Palmer, "Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects" (1990) 13 Harv JL & Pub Pol'y 817 at 864.

[21] Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Cheltenham: Edward Elgar, 2011) at 3 and 5ff.

[22] Edwin C. Hettinger, "Justifying Intellectual Property" (1989) 18 Philosophy & Public Affairs 31 at 39.

control the resource which is the subject of the property right.[23] Ownership and title are, in property terms, the paramount legal claims: entitlements which confer "the exclusive right to assign uses to a resource".[24] They accord to the owner the exclusive right to use (or refrain from use of) the resource which is the subject of the property right, and likewise impose upon others *in rem* duties of non-interference with that resource.[25] A unifying characteristic of all licences is that they do not involve the owner/licensor losing its ownership/title claims, though depending on the nature and scope of the licence granted, the owner may be left only with "bare" title and will enjoy none of the economic incidents of future exploitation by the licensee.[26]

The right to determine the use of the property is often rendered, particularly with reference to intellectual property rights, as a "right to exclude" others from the use or other enjoyment of the property-object.[27] That right to exclude necessarily also entails a right to include, a right which is "a central attribute of ownership".[28] Robert Merges describes the right to include as the co-extensive flip side to the right to exclude.[29] The right of inclusion can be articulated as a right to "grant permission",[30] or simply as an election to waive or forebear from enforcement of the exclusion right.[31] The mechanics of how those rights of exclusion and inclusion are recognized in jural terms is further described in Parts II(b) and II(c), below. For present purposes, a licence can be described as the creation by a property owner of an exception to their power to exclude; articulated in the positive register, a licence is the extension of *conditional permission* – which may be evidenced by a positive act or forbearance from acting – by a property owner to make use of property such that use of the property in accordance with the terms of the permission insulates the licensee from any trespassing or infringement claims by the owner/licensor.[32]

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[23] Newman, *supra* note 7 at 1117 ("an ownership interest is one that nobody possesses any power to revoke").

[24] *Ibid* at 1112.

[25] *Ibid* at 1109. See also Merrill & Smith, *supra* note 15, at 780-789.

[26] Rahmatian, *supra* note 21 at 205-206. See also *Leuthold v Canadian Broadcasting Corporation*, 2014 FCA 174 at para 27.

[27] See, *e.g.*, *CCH Canadian Ltd. v Law Society of Upper Canada*, [2002] 4 FCR 213, 2002 FCA 187 at para 174; *Monsanto Canada Inc. v. Schmeiser*, [2003] 2 FCR 165 (CA), 2002 FCA 309 at para 30, var'd 2004 SCC 34; see also Daniel B. Kelly, "The Right to Include" (2014) 63 Emory LJ 857 at 862-866.

[28] Kelly, *supra* note 27 at 859, 869.

[29] Merges, *supra* note 18 at 296.

[30] Kelly, *supra* note 27, at 869, quoting Felix S. Cohen, "Dialogue on Private Property" (1954) 9 Rutgers L Rev 357 at 372.

[31] *Ibid*, citing Merges, *supra* note 18 at 295.

[32] *Euro-Excellence Inc.*, *supra* note 11 at para 32.

However, while the licence originates in property, it functions often through the vehicle of contract, which results in the copyright licence displaying features of both property and contract; the reasons for and consequences of that hybridity are explored next.

(b) *Property's Incidents*

Exploring how the concept of "property" can be distilled into its component parts, or legal "incidents", will demonstrate how the concept of the licence is operationalized in law. Wendy Gordon, drawing on Wesley Newcomb Hohfeld, describes "property" as consisting of three distinct entitlements in respect of a resource or thing: *rights* (which are premised on the legally recognized ability to *exclude* others), *privileges* (which relate to the unrestricted right of the owner to *use* the resource) and *powers* (to *alienate*, in whole or in part, the other incidents and entitlements of ownership in the resource by transferring or granting permissions).[33] "Powers" can be further understood as "denot[ing] an ability to alter legal relations"[34] – which is to say that by, for example, granting a licence to a licensee, a copyright owner alters the legal claims which that owner would have against that licensee in the absence of the grant of the licence. On some accounts, the power of "alienation" is a necessary defining characteristic of property ownership;[35] Julie Cohen, for example, describes alienability as "a core feature of [any] property regime".[36] The power to alienate is given effect through three primary mechanisms:[37] assignments, licences and mortgages.[38] Of those three mechanisms, the licence will be the focus of the remaining discussion in this chapter and this dissertation.

The power to alter entitlements means that an owner can voluntarily agree not to exercise the right of exclusion, perhaps in exchange for payment of compensation – thereby converting a third party's

[33] Gordon, *supra* note 19 at 1354. Gordon draws on the work of Wesley Newcomb Hohfeld (see "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale LJ 710), and this tri-partite description of property is often referred to as "Hohfeldian". See also Newman, *supra* note 7 at 1112-1113 who identifies a fourth Hohfeldian entitlement of "*immunity* against being deprived non-consensually of any of the [other three entitlements]" (emphasis in original).

[34] Gordon, *supra* note 19 at 1358.

[35] Antony M. Honore, "Ownership" in Antony G. Guest (ed.), *Oxford Essays in Jurisprudence (First Series)*, (Oxford: Oxford University Press, 1983) 107 at 112.

[36] Cohen, *supra* note 17 at 28.

[37] See Rahmatian, *supra* note 21 at 201ff.

[38] That is, using copyright as collateral by granting to a lender a security interest in the copyrighted work.

duty not to use (which is correlative to the owner's right of exclusion) into a privilege to use.[39] So, for example, a songwriter/owner granting to a third party the right to publicly perform a song in exchange for payment of a fee can be schematized as an owner exercising her power to void a third party's duty not to infringe and convert it into a privilege to publicly perform.[40] The power to alienate is conceptually not binary but is instead scalable; *i.e.*, alienation is not limited to just "keep" or "convey", but can be exercised along a spectrum of permissiveness and comprehensiveness, from, at one end of the spectrum, revocable "bare" permissions to make very limited uses to, at the other end of the spectrum, complicated arrangements involving grants of exclusive rights to a licensee in exchange for ongoing revenue participation entitlements in favour of the licensor. By facilitating a multiplicity of structural arrangements, the mechanism of the power of alienation enables the copyright owner to "organize the way [rights in copyright-protected works] are rationed and coordinated".[41]

Cohen describes property systems as having three necessary features reflected in their legal institutions: recognition of interest and owners (*i.e.*, identifying what can be owned and identifying the owner(s));[42] provision of public access (*e.g.*, justifying trespass to avert imminent danger to life; copyright's fair use or fair dealing provisions);[43] and the facilitation of market transactions.[44] Copyright and patent systems generally feature dissemination to end users as a "principal instrumental goal",[45] and alienability is the operationalization of the achievement of that goal.[46] Facilitating market transactions requires transfer rules (*i.e.*, the transfer of title from one owner to another, the core requirement for alienation), end user rules (*e.g.*, first sale or exhaustion doctrines in copyright and patent), assembly rules (facilitating the assembly of smaller units into "a larger, cohesive whole"[47]), and intermediate input rules ("cases in which resources are used as separately identifiable and often fractional inputs into larger end

[39] See Gordon, *supra* note 19 at 1392.

[40] *Ibid*.

[41] *Ibid* at 1393.

[42] Cohen, *supra* note 17 at 21.

[43] *Ibid* at 25-26.

[44] *Ibid* at 27ff.

[45] *Ibid* at 27.

[46] *Ibid* It should be noted that Cohen expresses skepticism about whether "maximizing alienability" will necessarily result in maximal dissemination (*e.g.*, because maximizing alienability can tend to result in concentration of ownership) (*ibid* at 28).

[47] *Ibid* at 29 (Cohen identifies eminent domain powers as an example of an assembly rule).

products"[48]). Licensing arises in the operation of assembly rules and intermediate input rules, because it is a device for achieving the presumptive systemic goals of incentivization, recognition and dissemination.[49]

As Cohen notes, because the creation of expressive works is "fundamentally heterogeneous … institutions tailored to [intellectual property] need to be correspondingly flexible".[50] That flexibility is also required because the "market" for creative expression relies heavily on "subsequent, aggregate and/or fractional uses" [51] much moreso than traditional land-based "property" conceptions. Licensing is embedded in concepts of property and alienation, but it is endemic in copyright because of the realities of contemporary creative and disseminative practices. The need to tailor property's institutions to the realities of intellectual production and dissemination has resulted in licensing taking on "hybrid forms that occupy an uneasy space between property and contract".[52] That analytical hybridity is also present in the market forms in which copyright-protected works are created and disseminated: Cohen argues that "firms, commons and hybrid modalities all play important roles in the production of intellectual goods".[53] Additionally, the copyright ecology is "populated by a variety of entities … that do not engage in intellectual production, but instead function as intermediaries, coordinating the distribution and use of intellectual goods produced by others".[54] Licences are, and the practice of licensing is, used to structure relationships in that copyright ecology.[55] While the licence originated in property, it has become an "intermediate relation" – a legal institution "at the boundary between property and contract with formalized (and often codified) rules that reflect attributes of both systems".[56]

As an "intermediate relation", licensing "reflect[s] political and policy judgments about which issues to leave to markets and what sorts of protection law should provide",[57] and is a way of "expressing

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[48] *Ibid* at 30.

[49] *Ibid* (Cohen notes the examples of licensing patents for the creation of an operating system for use on smartphones (an assembly operation) and the licensing of a song for synchronization in a movie (an intermediate input operation)).

[50] *Ibid* at 32.

[51] *Ibid.*

[52] *Ibid* at 33.

[53] *Ibid* at 39.

[54] *Ibid* at 46.

[55] *Ibid* at 50.

[56] *Ibid* at 51, citing Merrill & Smith, *supra* note 15 at 809-11.

[57] *Ibid* at 52.

the normative commitments of communities who feel that the default rules of the relevant property regime assign their concerns insufficient weight".[58] The Hohfeldian property entitlements are mechanisms for realizing the normative goals of a given property or copyright system,[59] and of the actors who must conduct themselves within that system. The licence originates in property but functions at the interface of property and contract, therefore taking on hybrid characteristics of both. It displays the substantive power of property coupled with the technical flexibility of contract.[60] Nestled at the core of property, the licence, given content by property and form by contract, is the adaptable implement which enables property's entitlements to be tailored to suit the complexity of the environment in which it is deployed. By using licences, participants in the copyright system are able to create bespoke arrangements which recognize, facilitate and enhance the value of "the irreducible heterogeneity of intellectual production and consumption".[61] Absent the licence, property's entitlements would be too blunt to properly mediate human relationships with regard to resources; the licence facilitates the optimal ordering of resource creation and use. The licence is a mechanism for recognizing and giving effect to the autonomy of the property owner.

At this point in the discussion it may be objected that we have undertaken a rather banal task: if the power to alienate is a necessary feature of "property", then it is less than illuminating to observe that the rights of copyright owners include the power to enter into licences. But Gordon's Hohfeldian account describes the *possible* parameters of copyright *qua* property right; it must be highlighted that the *particular* incidents of property ownership which are accorded to a particular property-thing is a policy choice, not an inevitable consequence of human existence. The Hohfeldian incidents of ownership are vessels for particular rights-claims – a given copyright system will "fill" those vessels with "content" consisting of the rights-claims that system accords to copyright owners. For example, the copyright system could recognize *only* powers of complete alienation (*i.e.*, outright transfer or sale) – or conversely, as is the case in some copyright systems, such as that in Germany, the copyright system could recognize

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[58] *Ibid* at 52-53.

[59] Gordon, *supra* note 19 at 1467.

[60] Merrill & Smith, *supra* note 15 at 799ff, 851-852. Merrill and Smith highlight that property's *in rem* rights are "standardized and immutable … [and therefore] easy to observe and grasp by a large and heterogeneous population of dutyholders" (at 852); contract's *in personam* rights, by contrast, "permit a high degree of customization" but consequently impose higher transaction costs due to the information gathering which is required by contract counterparties to determine the nature and scope of their rights (at 852).

[61] Cohen, *supra* note 17 at 57.

only powers of licence and refuse to recognize powers of complete alienation.[62] The willingness of the instruments of the state (including the courts) to enforce licence arrangements between copyright owners and licensees is not a necessary or natural feature of any given copyright system – it is a policy choice made in the crafting of the legal instruments by which property rights are created and given legal force.[63] Further, the policy decision to implement the power of alienation in the expansive manner described in Part II(c), below, is a hint at the way in which the right to license is to be assessed: the right to license copyright has been recognized in a fulsome, capacious manner, indicating that copyright regimes have been structured to permit individual rights-owners significant latitude in making decisions about how to exploit their property-objects. That latitude itself is indicative of a desire to facilitate the autonomy of copyright owners; *why* the copyright system would seek to empower copyright owners in this fashion is discussed further in Part III of this chapter.

(c) *The Right to License in Copyright Statutes*

In the abstract, the right to alienate/license appears to extremely flexible, matching the plastic nature of "property" as a concept.[64] As this section will describe, that conceptual flexibility is reflected in the manner in which licensing is instantiated in many copyright statutes, which allow for the allocation of rights along axes of content, territory, duration and exclusivity.[65] Short examinations of how each of the *Copyright Act* (Canada)[66] and the United States' *Copyright Act*[67] treat the right to license serves to indicate the expansiveness with which many copyright systems implement licensing.

Each of the various primary Hohfeldian property incidents is found in the *Copyright Act* (Canada) and the *US Copyright Act*, including the power to alienate. The *Copyright Act* (Canada) bestows upon copyright owners the exclusive rights to undertake certain activities in respect of copyright-protected

[62] See *infra* note 126 and accompanying text.

[63] Gordon, *supra* note 19 at 1359. As Gordon notes, powers to transfer are themselves often limited by other policy choices; Gordon cites, *inter alia*, the doctrine of declaring certain contracts void as contrary to public policy (at 1362).

[64] Merges, *supra* note 18 at 4.

[65] Rahmatian, *supra* note 21 at 205.

[66] RSC 1985, c C-42 [*Copyright Act* (Canada)].

[67] 17 USC §§ 101-810 [*US Copyright Act*].

works, including activities such as reproduction and public performance.[68] As discussed in the preceding sections of this chapter, those exclusive rights can be described as exclusive rights to exclude, or prevent, others from engaging in the enumerated activities (and can also be described co-extensively as exclusive rights to permit others to engage in the activities). Thus the power of alienation is nested in the entitlements of ownership conferred by the *Copyright Act* (Canada). That is confirmed and reinforced by the manner in which the *Copyright Act* (Canada) describes copyright infringement: "It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do".[69] The exclusive nature of the entitlements conferred by the statute is the source of the copyright owner's rights and the source of the owner's power to alienate or license rights in the copyrighted subject-matter; that the entitlement is bestowed "exclusively" means that the ability to exercise that power is reserved only to the owner and her successors-in-interest.[70]

The parameters of the alienation power are expressly treated in Section 13(4) of the *Copyright Act* (Canada). The section provides that the owner of copyright in a work can alienate any of the owner's rights in the work "either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof".[71] The "alienation" power as expressed in Section 13(4) makes use of three different concepts: assignments, grants of interests and exclusive licences. The relationship among the three concepts can be sketched along a spectrum of grants of interests where assignments and non-exclusive licences form the terminal points. An assignment "transfers the ownership in the work, or a part thereof", and is roughly analogous to the concept of a "sale" found in other areas of law.[72] By contrast, a non-exclusive licence "merely grants

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[68] *Copyright Act* (Canada), *supra* note 66, s 3(1) ("'copyright' … means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, [*etc.*]).

[69] *Ibid* s 27(1) [emphasis added].

[70] See Gordon, *supra* note 19 at 1366.

[71] *Copyright Act* (Canada), *supra* note 66, s 13(4).

[72] See Normand Tamaro, *The 2015 Annotated Copyright Act* (Toronto: Carswell, 2014) at 443-444 (stating that an assignment is "an operation which is roughly equivalent to the sale of [copyright] for the duration of the copyright", though noting that the analogy is "not perfect" because "the transfer of rights involved [in a transfer of copyright] is not as absolute as in the same of a physical object" due to the potential retention of moral rights and the author's reversionary right found in Section 14 of the Canadian Act).

certain rights in a work"[73] through the device of the grant of permission by the copyright owner. All assignments are grants of an interest in copyright, but only *exclusive* licences are grants of an interest – non-exclusive licences do not constitute a grant of an interest.[74] While exclusive licences must be in writing to be enforceable,[75] non-exclusive licences can be oral or implied.[76] The relationship among the three different concepts can be sketched as follows: an assignment involves a transfer of ownership and constitutes a grant of an interest; an exclusive licence is a bestowal of permission and constitutes a grant of an interest; a non-exclusive licence is likewise a bestowal of permission, but it does *not* constitute a grant of an interest.

Section 13(4) thus operationalizes the alienation power in the Canadian copyright scheme, and casts it in broad terms. The power of alienation can be effected either by assignment or licence – both are effective mechanisms by which the copyright owner can deal with their copyright entitlements.[77] That flexibility, in terms of both form and content, is one of the salient indicia of copyright.[78] The *US Copyright Act* reflects a broadly similar approach: copyright owners are vested with exclusive property entitlements to undertake particular activities,[79] and the legislation accords them broad powers to alienate those entitlements.[80] The power to alienate as enacted in Canadian and U.S. copyright legislation is demonstrably elastic, and as a practical matter, it is often the case that authors and owners license or assign the copyright in their works to others who act as intermediaries between the author/owner and the consumer/user.[81]

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[73] Sunny Handa, *Copyright Law in Canada* (Markham: Butterworths, 2002) at 337; see also, *Ritchie v. Sawmill Creek Golf & Country Club Ltd.* (2004), 35 C.P.R. (4th) 163 (Ont. SCJ) at para 18ff.

[74] See generally *Euro-Excellence*, *supra* note 11 at paras. 26-42, per Rothstein J.; see also David Vaver, "The Exclusive Licence in Copyright" (1995) 9 IPJ 163.

[75] *Copyright Act* (Canada), *supra* note 66, s 13(4).

[76] *Robertson v. Thomson Corp.*, 2006 SCC 43 at para 56.

[77] *Euro-Excellence Inc.*, *supra* note 11 at para 116, per Abella J., citing J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (looseleaf)), at p. 19-24.

[78] *Ibid*, per Abella J. ("vertical and horizontal divisibility is, arguably, a hallmark of copyright").

[79] *US Copyright Act*, *supra* note 67, § 106 ("the owner of copyright has the exclusive rights to do and to authorize any of the following…").

[80] *Ibid* § 201(d) ("the ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law"). Similar to the treatment found in the *Copyright Act* (Canada), the *US Copyright Act* also recognizes a distinction between exclusive licences (which must be in writing, per § 101 (see definition of "transfer of ownership")) and non-exclusive licences (which need not be in writing).

[81] Mark A. Lemley, "Romantic Authorship and the Rhetoric of Property" (1997) 75 Texas L Rev 873 at 883. See also Cohen, *supra* note 17 at 46.

To this point we have demonstrated that the incidents of copyright ownership include the right to alienate and license the entitlements that have been granted to the copyright owner by legislation. But while we can observe that all existing copyright systems include some form of the right to license, and we can see that the right to license is effected in complex terms, it would be a mistake to assume that *any* copyright system must *necessarily* include the right to license. There is a conceptual gulf between the right of a creator to "possess and personally use" the creator's creations (which would be the *sine qua non* of anything deserving the name "copyright"), and the exclusive "freedom to exchange a product in a market".[82] As with the rest of the panoply of copyright *qua* property entitlements, the power to trade the copyright in a market (*i.e.*, the power to alienate) is "largely a socially created phenomenon".[83] Bridging the conceptual gulf separating copyright's minimum necessary features and copyright as enacted requires a turn to copyright justification theories, which assist in explaining why the Hohfeldian vessels of rights, privileges and powers are given the shape and content they are given by a particular copyright system. It will be assumed for purposes of this discussion that a given copyright system is created to achieve particular goals – justification theories are a means of articulating what those goals may be for any given system. The fact that powers to alienate (and, hence, to license) are accorded to owners of copyright is indisputable; to be considered further is the matter of how theoretical accounts of copyright justify in their own terms why alienation and licensing are powers granted to copyright owners.

III. Licensing and Justification Theories

(a) *Justification Theories*

This chapter uses the term "justification theory" to describe a theoretical framework that seeks to explain why and the extent to which the legal construct of "copyright" is made a matter of enforceable legal claims. For a theory to serve as a "justification theory" it is not necessary for it to explain, or even seek to explain, every aspect of copyright law as it is actually implemented; all that is required is that the theory offer a coherent explanation for the societal decision to implement a copyright system. Intellectual property justification theories can be categorized in different ways, but this chapter will use three broad

[82] Hettinger, *supra* note 22 at 40.

[83] *Ibid.*

classes. First, consequentialist theories, being those which justify copyright on the basis of the "good consequences of [its] legal recognition";[84] this category includes utilitarian arguments which posit that some aspect of individual or social welfare is maximized by allocating intellectual property rights.[85] Second, deontological theories, being those which justify copyright on the basis that the creator "deserves" certain rights *because* he created something, or that creators are entitled to certain rights as a show of respect for the creator's *personality* or dignity being somehow embodied in the creation;[86] this category includes Lockean natural law justifications premised on the "right to the fruit of one's labor",[87] and Kantian and Hegelian personality-based arguments which posit that intellectual property rights facilitate the "development of personality"[88] or are required in order to affirm that personality. Finally, communicative theories, being those which contest the sufficiency of the utilitarian and deontological accounts and instead posit that copyright can only be "justified" (or, better, understood), if at all, as a device for the enhancement of communication among members of a cultural community and between members of different cultural communities.[89]

Each of the foregoing categories of justification theories seek to provide a normative grounding for the existence of copyright, and to identify criteria by which to measure copyright as it has been implemented and applied. Copyright law is capable of being justified in many ways – it has "many possible and plausible normative foundations";[90] that copyright is so receptive to plurality also means that it becomes necessary to ground any extended engagement with copyright in at least one justification theory. For purposes of this chapter, each of the justification theories will be treated relatively

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[84] Dale A. Nance, "Foreword: Owning Ideas" (1990) 13 Harv JL & Pub Pol'y 757 at 763.

[85] Palmer, *supra* note 20 at 850, refers to utilitarian arguments as "X-maximization arguments".

[86] Nance, *supra* note 84 at 764.

[87] Palmer, *supra* note 20 at 819.

[88] *Ibid*.

[89] See, *e.g.*, Carys Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar, 2011) at 248 [*Copyright, Communication and Culture*]. William Fisher identifies a number of different scholars whose work can plausibly be categorized in this way, which he terms "social planning theory", including Neil Netanel, Keith Aoki, Rosemary Coombe and Niva Elkin-Koren; see William Fisher, "Theories of Intellectual Property" in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001). It might be cogently argued that what I am terming "communicative" justification theories could be categorized as a species of consequentialist theory; I prefer a separate category to highlight what I perceive as a radical difference of focus between traditional utilitarian theories (which are a subset of consequentialist theory) and communicative theories. Utilitarian theories tend to make individuals and markets the primary objects of consideration; communicative theories focus on communities and how, through dialogic processes, individuals form their identities as members of those communities.

[90] Merges, *supra* note 18 at 291.

superficially; the next chapter will offer a more comprehensive account of communicative copyright theories, which will serve to ground the balance of this dissertation. As well, despite the plurality of justification theories, it is difficult to analytically separate copyright from its functioning in a market; as Drahos notes, copyright is "intimately related" to markets.[91] Because of that intimate relationship, this exploration of the right to license will commence with those justification theories most closely associated with the market; but a fulsome appreciation of the right to license will be attempted by moving from market-aligned consequentialist justification theories through deontological personality-based theories and into process-based communicative theories, where the function of the right to license is less obvious on first apprehension. The following discussion will reveal that the harder we have to work in order to explain the right to license in the context of a justification theory, the more we will reveal about its nature.

(b) *Consequentialist Theories*

Utilitarian theories are the paradigmatic consequentialist theory and so will be the focus of analysis for present purposes. Utilitarian theories are premised on the enhancement of public welfare or the maximization of social utility as the primary justification for the existence of copyright protection.[92] Particularly associated with the United States of America in part due to the wording of the US Constitution clause empowering the federal government to enact a copyright law,[93] utilitarian theories conceive of copyright as an instrument to "serve the public interest"[94] in accordance with something like the following formulation: society is enriched by the creation and, in particular, dissemination, of expressive works and therefore it is prudent to grant authors some form of exclusive right over their expressive works, which functions as an incentive for the creation of expressive works.[95] In this account, the granting of copyright rights confer the ability to "gain a reward in the market-place" thus providing the necessary incentive for

[91] Drahos, *supra* note 5 at 5.

[92] See Neil Netanel, "Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation" (1992-1993) 24 Rutgers LJ 347 at 365.

[93] US Const art I, § 8, cl 8 ("To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"). See generally Christopher Buccafusco & Jonathan S. Masur, "Intellectual Property Law and the Promotion of Welfare", University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 790, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905936##.

[94] Netanel, *supra* note 92 at 365.

[95] See, *e.g.*, Merges, *supra* note 18 at 2.

the creation of new works.[96] Often concerned with promoting economic efficiency, utilitarian theory seeks to "strike a balance" between providing legislated incentives to create works (in which it is assumed that exclusive property rights will serve as the incentive) and providing public access to the created works.[97]

A utilitarian account of copyright is predicated on the existence of a market: a collection of individual actors who will carry out particular activities in exchange for compensation (whether monetary or otherwise). The entitlement structure of copyright (*i.e.*, the allocation of the entitlements of rights, privileges and powers) is what enables markets in copyright works to form, and enables individuals and entities to interact within that market structure.[98] While the existence of the market is itself predicated on *property*, the power of alienability is what facilitates the functioning of that market; the ability to license itself gives rise to a more robust market than what would exist under a more restricted set of property entitlements.[99] By demanding compensation in exchange for exercising her powers (*i.e.*, alienating her ownership entitlements in whole or in part by assignments or licences), the owner is able to maximize her return, and facilitate the exploitation of her work by those who are better positioned (by reason of resources, time, contacts, or predilection) to handle commercialization and distribution of the work.[100] The right to license thereby enhances the initial incentive to produce, and allocates rights "to those economically best able to satisfy public tastes".[101] Further, alienability *increases* the value of the work under consideration because it expands the number of potential uses (as imagined by potential users) and because potential users now have the ability (as compared to a copyright system where there is ownership without alienability) to acquire the privilege of use.[102]

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[96] Drahos, *supra* note 5 at 122.

[97] See Landes & Posner, *supra* note 1 at 326.

[98] Gordon, *supra* note 19 at 1437 and at footnotes 210-231 and accompanying text. See also *Euro-Excellence*, *supra* note 11 at para 117, per Abella J. ("the economic objectives of copyright law are furthered through the transferability of either full or partial copyright interests", citing *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para 12).

[99] Diane Leenheer Zimmerman, "Copyright As Incentives: Did We Just Imagine That?" (2011) 12 Theoretical Inquiries in Law 29 at 30.

[100] Gordon, *supra* note 19 at 1393.

[101] *Ibid*. While such allocation does not necessarily lead to ideal results, that seems a defect of all property systems, and is not unique to copyright (at 1394).

[102] Ejan MacKaay, "Economic Incentives in Markets for Information and Innovation" (1990) 13 Harv JL & Pub Pol'y 867 at 876.

As a purely descriptive matter, Drahos describes intellectual property rights as rights "which are created for and exist within market contexts".[103] On a utilitarian account, Drahos' notion is not merely descriptive but also prescriptive: it is the market which most efficiently allocates resources, and so copyright law, in order to itself function most efficiently, must provide means which enable the creation and flourishing of markets in the "work" and ensure the maximal extent of that market. On this account, copyright can best be understood as "control of a market", in which the subject of the market is physical goods in which an idea is embodied.[104] If that is accurate, then the power to alienate (and hence to license) is necessary because it is what enables the market to most fully develop (*i.e.*, in the absence of a power to alienate, no market can arise and where the power does not include a right to license, only a stunted market will develop). For the utilitarian, because the public interest is served by the *dissemination* of works (and not merely by their creation), there must be a mechanism which enables that dissemination. The theory assumes that authors are not also optimal disseminators and so the device of alienability of the expressive work must exist in order to enable the author to enter into arrangements with others (such as traditional book publishers or film distributors) who will carry out the disseminating acts. The institution of property rights writ large, by creating scarcity, results in the creation of "marketable" value; the alienation right, and licensing in particular (by reserving rights to the licensor), enables market participants to optimally realize that value.[105]

Though the market generated by property rights is most closely associated with utilitarian theories, we should be careful not to assume that markets play no role in other justification theories. In part, this is a consequence of copyright's analytic grounding in property – the concept of alienation or exchange seems as inherent in the concept of property as the concept of inclusion is to the right of exclusion: "to realize the promise of property, the power to include is as important as the right to exclude".[106] Property concepts are deeply embedded even in stalwartly non-utilitarian accounts such as the deontological accounts explored in the next section of this chapter. Some species of private property

[103] Drahos, *supra* note 5 at 119. See also Cohen, *supra* note 17 at 27.

[104] Roger E. Meiners & Robert J. Staaf, "Patents, Copyrights and Trademarks: Property or Monopoly?" (1990) 13 Harv JL & Pub Pol'y 911 at 920.

[105] *Ibid* at 921; see also Drahos, *supra* note 5 at 125-128.

[106] Newman, *supra* note 7 at 1114.

may be required for facilitating individual autonomy[107] and may even be "essential to dignity",[108] and deontological and communicative theories make allowance for the functioning of the market, though the relationship between those justification theories and market functionality is more attenuated.

(c) *Deontological Theories*

The focal referent for deontological justification theories tends to be the author, and either the activities undertaken by the author or inherent characteristics of the author; nevertheless, as the discussion in this section will demonstrate, the right to license is intimately bound up in the operations of such justification theories. In deontological justification theories, the statutory grant of copyright constitutes not a benevolent grant of rights for the purposes of achieving a desirable social end, but rather a *recognition* of pre-existing "natural" rights. Informing many species of copyright justification theories is a Lockean "natural law" approach to property,[109] which posits that a person is entitled to a property right over things they "produce by their own initiative, intelligence and industry".[110] Sometimes referred to as a "labour-desert" theory,[111] such theories are premised on some variant of the following argument: each individual owns their own body and the labour that is produced by that body;[112] consequently, an author is entitled to a right in the expressive works they create "by virtue of having exerted the effort [required] to create it".[113]

There is a foundational relationship on the Lockean account between the institution of property and human flourishing;[114] effectively, property, and its consequence, the development of societal or state apparatuses which evolve to protect property rights, provide a framework within which humanity can flourish. Further, a Lockean account of copyright is in part an argument that labour, and in particular creative labour, has an inherent value which warrants recognition and valorization through the bestowal of

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[107] Merges, *supra* note 18 at 17 ("For Kant, legal ownership is central to human freedom") and 117 ("at least some form of property is essential to the development of a person's unique individual life projects").

[108] Hettinger, *supra* note 22 at 45, quoting Ronald Dworkin, "Liberalism" in Stuart Hampshire, ed., *Public and Private Morality* (Cambridge: Cambridge University Press, 1978) at 139.

[109] See generally Craig, "Locke, Labour", *supra* note 2 at 8ff.

[110] Lawrence C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge and Kegan Paul, 1977) at 32, quoted in Craig, "Locke, Labour", *supra* note 2 at 9.

[111] Netanel, *supra* note 92 at 366.

[112] Merges, *supra* note 18 at 35.

[113] Netanel, *supra* note 92 at 366

[114] Merges, *supra* note 18 at 38.

property rights to its results.[115] A Lockean approach invests an author with property rights as a consequence of the author's exertion of "creative" effort which results in the creation of a new property-object. In the Lockean account, expressive works are "property" and, as discussed above, to the extent that alienability is an "essential characteristic of property"[116] expressive works are *ipso facto* alienable.[117] Of course, there is also an instrumental advantage arising from this characteristic of alienability: it enables authors to "reap the pecuniary profits of his own ingenuity and labor".[118] The right to license thereby serves a reflexive function in a Lockean model: embedded in the concept of "property", it also serves to enhance the (market-derived) value of the property-thing which the author's labour produced, thereby further advancing the interests of the author and reifying the significance of the author's effort.[119]

A separate class of deontological theories derive from the works of Kant and Hegel. While, like the Lockean approach, they find their conceptual grounding in the concept of the "author", the focus of their concern is less the labour of the author and more the "personhood" of the author and entitlements resulting from that status. In particular, these accounts are concerned with the autonomy of the author and providing mechanisms for the author to project "personal and internal qualities and characteristics … his talents, opinions and unique personality into society at large".[120] Property, on these accounts, is a device for facilitating the self-determination of the individual.[121] These theories echo the Lockean "natural law" approach in the sense that statutory grants of copyright are characterized as resulting from the legislature's obligation to protect the inherent rights of authors.[122] The scope and nature of the right to license in Kantian and Hegelian "personality"-based justification theories is more analytically intricate than

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[115] *Ibid* at 293.

[116] Netanel, *supra* note 92 at 369. See also Lawrence C. Becker, "Deserving to Own Intellectual Property" (1992) 68 Chicago-Kent L Rev 609 at 621.

[117] See also Wendy J. Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property" (1992-1993) 102 Yale LJ 1533 at 1551, concluding that all "products of labor", including intellectual works, are alienable.

[118] *Millar*, 98 Eng. Rep. at 252, 4 Burr. at 2398 (Lord Mansfield), cited in Netanel, *supra* note 92 at 369, fn 88.

[119] See *supra* notes 98 to 105 and accompanying text.

[120] Merges, *supra* note 18 at 67, 72.

[121] *Ibid* at 67. See also *ibid* at 235 ("autonomy – the rather abstract goal at the root of all property – is increased when [creators] are given individual control rights over the assets they create").

[122] Netanel, *supra* note 92 at 371-372. This "Continental" approach found expression in France's Revolutionary Laws of 1791 and 1793; tellingly, the same statute in which the existence of the right was recognized also recognized the right of the author/owner to assign such rights, with assignees enjoying the full benefit of the assigned rights.

the treatment in consequentialist or Lockean theories and embodies a concern with permission, rather than the market-enabling function found in consequentialist theory.

The Kantian or "monist" conception of copyright is premised on the author's speech act.[123] In this account, unlike the Lockean account, expressive works are not an "external thing", but rather a communicative act or "exertion of the author's will";[124] the creative work remains, in a meaningful sense, a *part* or *component* of the author's person, rather than an external *object* which can be transacted with. An author has the exclusive right to "control" his or her speech, and so iterations and copies of the author's speech require the author's permission; the author can only grant *permission* to another to disseminate as an *agent*, working "in the author's name and on [the author's] behalf".[125] In a copyright regime which implements a rigidly monist approach, such as that found in Germany, the licence is the *only* method of alienating rights in copyright (*i.e.*, outright assignments of title are not permitted).[126] To speak of the transferability of a communicative act is incommensurate with Kantian precepts – rather, the expressive work is a communicative activity, with the author having autonomous control over the initiation, mode and recurrence of the activity.[127] The Kantian conception thus intrinsically limits the scope of alienability accorded to the author – title to the work cannot be alienated any more than the author could alienate ownership of his emotions. Such a Kantian conception means that expressive works can be licensed, but can *only* be licensed – true alienation by means of sale or assignment is not possible.[128]

However, even within those confines, the right to license within the Kantian model remains conceptually expansive. In a practical sense, in the Kantian model the right to license is functionally required in order to facilitate the author's communicative act beyond the (presumably limited) capacity of the author to disseminate the author's work. At the level of theory, a fruitful appreciation of autonomy requires an expansive implementation of the power of alienation;[129] it means implementing jural

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[123] Palmer, *supra* note 20 at 840; Netanel, *supra* note 92 at 378.

[124] Netanel, *supra* note 92 at 374.

[125] *Ibid* at 376. See also Yoo, *supra* note 3 at 12.

[126] Rahmatian, *supra* note 21 at 206.

[127] See Netanel, *supra* note 92 at 375.

[128] *Ibid* at 379; Netanel describes German copyright law as follows [citations omitted]: "The German Act permits authors to grant licenses to use their works, but does not permit any transfer of ownership, except by testamentary disposition. … Although an author may grant a global license of all exploitation rights in a work … the author retains statutory rights that significantly restrict the licensee's right and ability to exploit the work".

[129] See Merges, *supra* note 18 at 81.

mechanisms which can match the scope of an author's autonomous wishes for the communication of his creative expression – the flexibility of licensing is a mapping of the potential elasticity of the author's decisions about how and when to communicate. Thus, on a Kantian conception the right to license *qua* permission to speak has contours to its operations which reinforce the primacy of the author's personhood. On this view, while licensing enables authors to benefit financially from the exploitation of their work, this is more a happy accident than an integral element of the control which an author enjoys over their expressive work. The economic benefit is "subsumed within the personal",[130] with the author's personal rights to control the timing and means of their expression by means of permission/licensing irreducibly interrelated with, and even in priority to, their right to control the economic exploitation of the work.[131] Understanding licensing as extending or withholding permission is not only congruent with the precepts of property as described by Hohfeld, Gordon and Newman, but it also accords with the fundamental Kantian requirement that rights are justifiable only to the extent that they "take into account the freedom of others".[132] Allowing for the extension of permission enables a jural framework which recognizes authorial autonomy but also provides a mechanism for facilitating the desires of other autonomous agents by enabling the author and third parties to come to structure mutually agreeable arrangements for the exploitation and reception of creative expression.

While still rooted in a "personality" framework, a Hegelian or "dualist"[133] conception regards expressive works as "external things" which can be alienated – but even following alienation that external thing is imbued with or carries with it some element of the author's personality or dignity, and so the alienated object remains subject to certain exercises of authorial right.[134] The Hegelian conception erects two parallel sets of rights in the expressive work: one set relating to economic rights and the other relating to "personal" rights.[135] According a property right in the external work functions to define and organize the relationships which exist between authors and others;[136] the property right is "the essential way that the will manifests itself in the external world" and therefore is foundational to "defining a person as a

[130] Netanel, *supra* note 92 at 378.
[131] *Ibid.*
[132] Merges, *supra* note 18 at 96.
[133] Netanel, *supra* note 92 at 379.
[134] *Ibid* at 377.
[135] *Ibid* at 379-380.
[136] Yoo, *supra* note 3 at 14.

person".[137] The power of alienation is bound up in the reifying aspect of property rights (including intellectual property rights): "alienation necessarily contains the recognition by others that the property being alienated belongs to the person transferring the property".[138] That "intersubjective recognition" of wills[139] is constitutive of one's existence as a member of a community, and so the ability to alienate one's rights in one's creation is necessary for existence in a community to occur.

Drahos articulates Hegel's position as requiring property rights for survival in a social system – property rights confer "the ability to cope with life in the context of one's given social system".[140] But, when the concept of property is transposed to the political community, there develops a tension: property rights may become a tool for social separation, rather than integration.[141] That tension is modulated by the fact that property rights become entrenched as social norms which confer on individuals sufficient information to enable them to plan their own actions and predict how others in their community will react to those plans.[142] The mechanism of "permission" (*i.e.*, according the right to use property), acts a lubricant in a social system, reducing potential friction and enabling the integration of individuals with their communities and each other.[143]

(d) *Marxist Theories*

Expanding on the foregoing, a Marxist critique further illustrates how licensing reflects the deepest characteristics of a given copyright justification theory. The tension that Drahos identifies as implicit in the Hegelian alienation mechanic is amplified and takes on a sour cast in a Marxist theoretical framework, wherein copyright can be understood not as a device for incentivizing creativity, but rather a device for organizing and maintaining "a set of economic relations".[144] In the Marxist conception, copyright rules, like property rules generally, are, in short, "the legal basis upon which one class organizes

[137] *Ibid* at 16.
[138] *Ibid* at 18.
[139] *Ibid*.
[140] Drahos, *supra* note 5 at 77.
[141] *Ibid* at 89.
[142] *Ibid*.
[143] *Ibid* at 90.
[144] *Ibid* at 100.

production by another".[145] By means of copyright, capital "integrat[es] creative labour into production"[146] – in other words, copyright serves as another apparatus by which capital exploits labour. In Erich Fromm's Marxian analysis, the deep-running functions of "alienation" are even more profound, carrying psycho-social (and, as bears on the individual, psychological) import: (technical) alienation results in (personal) estrangement.[147] On this view, the alienability powers accorded to copyright owners serve a more nefarious function: they are the conceptual/legal tool by which humans are "translated ... into an exploitable economic entity"[148] – the individual is reduced to being merely "a producer of alienable property".[149] As a result of copyright being alienable and licensable, and thereby being the subject of, and to, the market, the alienation mechanic renders the human author into a mere expediency: producing materials which are "extracted" from the creator, exploited by capital (in the form of publishers, distributors, etc.) and ultimately rendered into commercial widgets to be traded in the market, entirely divorced from their creator.[150]

(e) *Communicative Theories*

To this point, we have seen how the power to alienate and license performs a constitutive role in consequentialist, deontological and even Marxist copyright justification theories. Alienability gives rise to the market in which utilitarian theory posits that copyright will achieve its maximal societal value, and it is the vector by which the personhood of the deontological approaches is respected and given vitality in a community of peers, or, in Marxist terms, one of the means by which labour is subordinated to capital. Communicative theories, which tend to be either anti-authorial or robustly multi-authorial, demand attention in this discussion because it is less obvious what role licensing plays in such theories, though the discussion above about Marxist theory offers a hint.

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[145] *Ibid* at 101.

[146] *Ibid* at 113.

[147] See Rahmatian, *supra* note 21 at 217-222.

[148] *Ibid* at 228.

[149] *Ibid*. Rahmatian goes on to describe the "combination of copyright with contractual relations, either as assignments or licenses" (at 256) as resulting in "neo-feudal" and "re-feudalized" societal relationships (at 272ff).

[150] The zenith of this is the stripping of the status of "author" from human individuals under the U.S. "work for hire" provision contained in *US Copyright Act*, 17 USC § 101.

Fulsome discussion of what is meant by the term "communicative copyright" can be found in Chapter 2; for purposes of this chapter, discussion of communicative theories is most easily framed by reference to the types of justification theories already discussed. Carys Craig argues that while copyright has an underlying consequentialist tenor in that it enhances the public good, the conception of the public good being enhanced should be re-oriented away from markets and towards participation in a "collective conversation".[151] The success of the copyright system is to be measured less with reference to the reward it secures for owners, or the volume of works disseminated, and more with an eye to the extent it encourages engagement, participation and contribution by a multitude of community members.[152] The referent of the copyright system is less the property or even the personality of the author/owner and more the *interactions* among authors and audiences (who are understood to be parties to a broad cultural conversation). A communicative justification theory, in Craig's terms, recognizes a "triadic" relationship among authors, works and public, but emphasizes the link between public and work, displacing the author and focusing on the communicative process which occurs in the interaction among all three elements in the model.[153] Somewhat similarly, as argued by Abraham Drassinower, copyright law is a "construal … of the communicative nexus between authors and public in respect of works of authorship",[154] and he expresses his notion that the "work", the central subject of copyright law, is a "communicative act".[155] Drassinower's account echoes Kant,[156] but where the Kantian account is largely unidirectional (proceeding from the author outwards), Drassinower's account is specifically dialogic: communication of a work (*i.e.*, an author's speech act) is "addressed to others reciprocally entitled to respond".[157] It is in the responses of those others (and the endless (right to) responses engendered thereby), that the "conversation" of communicative theory is found.

For communicative theories, copyright's importance and power is found "in its capacity to structure relations of communications, and also, to establish the power dynamics that will shape these

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[151] Craig, *Copyright, Communication and Culture*, *supra* note 89 at 3.
[152] *Ibid* at 234, 250.
[153] *Ibid* at 69.
[154] Abraham Drassinower, *What's Wrong With Copying?* (Cambridge: Harvard University Press, 2015) at 6.
[155] *Ibid* at 8.
[156] *Ibid* at 112-113.
[157] *Ibid* at 221.

relations."[158] That capacity to structure and render relationships and dynamics concrete in legally cognizable terms is made possible by the grant of "property" rights in works, but is enhanced and furthered by the Hohfeldian power of alienation and its most expansive expression, the right to license. Licensing – the deliberate exercise and retention of power (in the form of a reserved right to sue for infringement for violation of the license terms) – functions to facilitate and define in jural terms the relationships and communicative acts which form the core concern of communicative theories. The powers of alienation and licensing are the methods by which the conversation and dialogic processes of communicative theory are rendered into juridical form. It should, however, be highlighted that licensing does not *constitute* or *create* the relationships and communicative acts – rather the content of the licensing right gives them definition within the legal order. The relationships and communicative acts precede the legal order, but the power of alienation and the right to license make them cognizable within the terms of the legal order in which copyright exists.[159]

IV. Conclusion

This chapter has examined copyright licensing as one of the powers granted to copyright authors and owners, with particular reference to the nature of the "licence" as a concept. A licence is an alteration of jural relations initiated by the copyright owner: it arises when a property owner gives permission to another to use a property-object without being liable for infringement for such use. But describing the right to license as an incident of copyright's roots in concepts of property is only partially satisfactory, since it tells us what a licence is, but does not fully explain why copyright licensing, which is both notably flexible and notably pervasive, displays the characteristics it displays in virtually all copyright systems. As has been shown, copyright statutes in Canada and the United States contain largely unfettered rights to convey and license copyright; the presence of such an expansive right can be explained by turning to the theories used to justify and explain the existence and scope of copyright protection. Copyright justification theories provide accounts of the purpose of copyright; by helping to illuminate why copyright exists at all,

[158] Craig, *Copyright, Communication and Culture*, *supra* note 89 at 52.

[159] See, *e.g.*, Drassinower, *supra* note 154 at 181-182.

they can in turn can shed light on why licensing is one of the rights which copyright owners enjoy to the extent that they do.

As Neil Netanel observed, consequentialist and deontological copyright justification theories "assume and require the free alienability of copyright",[160] which includes the right to licence. Unpacking that assumption reveals important aspects of not just copyright but of justification theories themselves. Schematizing the relationships among different justification theories can be fraught with error, especially in light of the fact that they are called upon to do double duty not just as internally coherent theoretical systems but also to provide at least some account of the actual contents of copyright law as legislated and applied by the courts. It may be easiest to begin by acknowledging that copyright law is multi-nodal, driven by and responding to multiple concerns and interests, and so justification theories should be mapped in a similar fashion.

A useful metaphor is to map justification theories as orbiting around certain nodal concepts. For many copyright theories, two of the most important nodes are the concepts of authorship and property. Consequentialist theories orbit closer to the "property" node, but the concept of authorship nonetheless exerts significant pull on their form. Different deontological theories are located at different distances from "property" and "author" – thus, Lockean closer to the former, Kantian/Hegelian closer to the latter – but, again, the content of each theory nonetheless is meaningfully informed by the other node. If we conceive of justification theories in this way, the role that alienability and licensing play in their structure becomes clearer. For theories which revolve more around property, alienability/licensing is at the core of the theory's conceptual framework, a *sine qua non* whose absence would make the theory difficult if not impossible to articulate. For theories which orbit closer to authorship, licensing plays a subordinate role, one which is of secondary importance to the central animating feature of the theory, but critical from a practical perspective and indispensable from a critical perspective. For those theories, such as communicative approaches, which articulate their terms at a remove from both property and authorship, the right to license becomes the vehicle by which the conversations or dialogic processes at the heart of copyright are made possible. In all cases, licensing provides the connecting sinew or pathway on the map being drawn.

[160] Netanel, *supra* note 92 at 368.

The right to license copyrights is best understood as an *instrumental* feature, in a deep structural sense, of a given conception of copyright. It is instrumental because it functions to achieve the ends, not just of copyright *per se*, but of the ideological assumptions and teleology underpinning the conception. For utilitarians, therefore, the right to license is a mechanism for the creation of markets and maximizing social welfare; for Lockeans, the right to license is an instantiation of the property right arising from the exertion of labour; for Kantians and Hegelians, the right to license is the mechanism by which the author gives voice to her expression, thereby affirming her existence and dignity; for Marxists, alienability and licensing is no more or less than the means by which copyright becomes just another tool of capital; for communicative theorists, licensing is one of the devices by which the content and contours of communicative acts and relationships are given legal recognition.

It is also worth emphasizing that the "competing" consequentialist, deontological and communicative theories discussed in this chapter should not be viewed as intellectual silos – the concerns and motivations of each of them often interlineate with the others. Even stout consequentialists can be seen to articulate copyright's motivations in rhetorical terms which would be familiar to communicative theorists, as with David Ladd's views that copyright is "rooted both in utility and felt justice",[161] its highest utilitarian function to be a "necessary bulwark for liberal democracy" by facilitating an ecosystem of authors and disseminators who foster the creation and distribution of innovative ideas.[162] On this account, the power to license is facilitative of the ultimate goal: the development of a public space in which ideas can be expressed and contested – a notion which finds a comfortable refuge in a communicative theory such as Craig's. That being said, in consequentialist and Lockean accounts, licensing appears with an inherently mercantile hue, with facilitation being but an undertone; the more copyright justification theories are re-oriented towards communicative concerns, the more the facilitative nature comes to the fore, while the mercantile aspect becomes more muted.

As argued by Andreas Rahmatian,[163] the presence of alienability and licensing in the copyright system reveals deep structural characteristics of copyright's operation. That observation impels a further observation: the value of any particular form of licensing, from a systemic point of view, can be

[161] David Ladd, "The Harm of the Concept of Harm in Copyright" (1982-1983) 30 J Copyright Soc'y USA 421 at 426.
[162] *Ibid* at 427-28.
[163] Rahmatian, *supra* note 21.

determined by reference to the goals which copyright is trying to facilitate. That realization offers a hint of how we might assess open content copyright licences: when and whether they "work" will be informed by what we want them to accomplish. Subsequent chapters of this dissertation will explore in further detail the scholarly reception that has been accorded to open content copyright licensing; it will be seen that the reception has historically been somewhat ambiguous – for every enthusiastic proponent, there have been powerfully articulated dissents. However, before we can profitably review the scholarly assessment of open content copyright licensing, two other prefatory steps must be undertaken now that we have canvassed the origin and function of copyright's right to license. Chapter 2 will describe in further detail the theoretical accounts described herein as "communicative copyright", the primary theoretical framework which will be utilized in this dissertation. Chapter 3 will delineate a definition of "open content" licensing. Chapter 4 will examine various scholarly assessments of open content licensing's operation. Thereafter, attention will be focused on the history and mechanics of the Open Game License and its reception and use.

Chapter 2

Communicative Copyright – Copyright as Cultural Conversation

I. Introduction – Or, Why Communicative Copyright?

This chapter is the second of four chapters setting forth the theoretical foundations for this dissertation. The first chapter described the nature of copyright licensing as an incident of the exclusive rights granted to copyright owners, reflecting their power to alter the nature of their jural relationships with others in respect of the property-thing which they owned. That chapter also surveyed how we might conceive of the purpose or function of copyright licensing by referring to various justification theories which provide accounts of why legal regimes should recognize copyrights. That discussion indicated that licensing can be understood as an instrumental feature of the copyright system which facilitates the achievement of the goals of the copyright system, which goals are themselves articulable in as many different ways as there are copyright justification theories. This chapter offers a more fulsome description of "communicative copyright", the justification theory which will be used in this dissertation to explore and understand open content licensing. Chapters 3 and 4 will articulate the definitional elements of "open content" copyright licences and examine their operation.

The balance of Part I of this chapter provides the explanatory background for why communicative copyright has been chosen for this dissertation. What I term "communicative copyright" is a twining together of two bodies of theoretical and empirical approaches, which can be productively synthesized because they share common dispositions regarding copyright. Reviewing and integrating those bodies of literature will occupy Parts II through IV of this chapter. Part II identifies the core elements of communicative copyright as found in Carys Craig's "relational" theory of copyright, and particularizes the communicative approach by utilizing an abstraction of Neil Netanel's "civil society" account. Part III builds out the account by referencing the empirical methodologies and insights offered by scholars such as Yochai Benkler, Julie E. Cohen, Niva Elkin-Koren, Diane Leenheer Zimmerman, and Jessica Silbey; their work, which originates in puzzles about the motivations of copyright creators, will be shown to be consistent with the theoretical framework pioneered by Craig. Finally, in Part IV, the components of relational theory and empirical methodology are arrayed so as to offer a concise description of the elements of "communicative copyright".

There are two principal reasons why this dissertation uses communicative copyright as its primary theoretical framework. First, communicative copyright is the logical continuation of the theoretical and methodological approaches which have been used to date by many scholars giving extended consideration to open content licensing. Second, communicative copyright offers an account which comports with contemporary experience: the various theoretical and methodological approaches which are collated in the analysis contained in this chapter were responses to, and reflective of, creative expression as it is created, disseminated and consumed in a digitized, robustly networked society. Open content copyright licensing is an activity which occurs predominantly, though not exclusively, online – discussion of that activity therefore warrants a theoretical framework which not only takes account of that technological reality, but incorporates its features into the core of its account.

In part using communicative copyright is simply an extension of previous scholarship which has engaged with open content licensing. As will be described in further detail later this in this chapter, conventional copyright justification theories struggled to account for the emergence of open content copyright licensing in its initial appearance as open source software licensing. Traditional descriptions of the motivations of copyright actors lacked explanatory power in the face of open content licensing, indicating that a different account might be required. That analytical lacuna prompted the work of Benkler and Zimmerman,[1] which is explicitly drawn on and supplemented in the articulation of communicative copyright found in this chapter. This dissertation is in part an attempt to determine whether communicative copyright can provide the theoretical backdrop for a cogent explanation of when and why the creators and disseminators of creative expression would elect to employ open content licensing. The decision to utilize a communicative approach is intended to be reflexive: it is surmised that, and to be determined whether, communicative copyright has interpretive power in describing why creators, disseminators and consumers are doing what they are doing when they use open content licensing; it is also surmised that the fieldwork at the heart of this dissertation will serve to test the validity of the communicative account and may offer insights which can lead to confirmation and extension of the communicative copyright account. This dissertation queries whether communicative copyright offers an account that displays greater fidelity to the interests and experiences of those who make use of open

[1] See *infra* at note 67 and accompanying text and note 103 and accompanying text.

content licensing as they themselves articulate them, and whether users of open content licensing convey their understanding of what they are doing in ways which are congruent with the communicative copyright account.

Communicative copyright has also been chosen because it possesses an intuitive appeal, derived from the values foregrounded by Craig's relational account and Netanel's civil society account – in part this dissertation is an attempt to demonstrate that those accounts say something relevant and important about copyright law, both in terms of how copyright functions and how its functioning should be evaluated. That intuitive appeal is all the stronger in the contemporary environment where digital technology allows for the creation, extension, and deepening of relationships through digital networks – an environment whose salient characteristics are reflected in the core descriptive features of the communicative account, and are not just ancillary phenomena to be puzzled over. The core truth which fuels the communicative account – the fact of the relational nature of expression – possesses an internal logic that constitutes a normative foundation permitting assessments of copyright law as it is and critiques indicating what its content could be.[2]

Before turning to the theoretical basis for a communicative copyright account, I wish to make a brief comment on the terminology of "communicative" copyright. Communicative copyright is built on a foundation consisting of Craig's relational copyright account and Netanel's civil society teleological account and is supplemented by the work of Benkler, Cohen, Elkin-Koren, Zimmerman and Silbey. Relational copyright affirms that the activities with which copyright is concerned (creation, dissemination, consumption) necessarily take place within the context of a dense network of relationships. The use of "communicative" is meant to emphasize two aspects of the relational account as construed through the lens of Netanel's civil society account: first, that those activities of creation, dissemination and consumption are *processes* (alluded to in the relational account's emphasis on dialogue); and second that those processes have a teleology (*i.e.*, they have an articulable end or purpose: the flourishing of a dignified and productive individual and communal existence in a sustainable social context). The activities

[2] Carys J. Craig and Joseph F. Turcotte, with Rosemary J. Coombe, "What's Feminist About Open Access? A Relational Approach to Copyright in the Academy" (2011) 1 *feminists@law: an open access journal of feminist legal scholarship* 1 at 31 (relational feminism and open access "index[ ] a commitment to a lively public sphere of common deliberation, open dialogue, and the egalitarian quest for greater mutual understanding and social progress dependent upon the combined energies of participants mutually committed to improving the commonweal").

of creation, dissemination, and consumption, by virtue of occurring among parties having relationships within the setting of one or more communities, necessarily have *social* and *communicative* features.[3] In short, "communicative" indicates that there is a *processual* element to be considered; this dissertation is concerned with licensing, which itself is a process – and the teleological aspects of those processes are important factors to be taken into account when formulating criteria for determining the "success" of open content licensing.

II. Communicative Copyright – A Theoretical Approach

Julie Cohen has described copyright theory as traditionally sorting itself into two oppositional strands: one grounded in "a theory of rights", the other in a "theory of economic analysis".[4] A communicative copyright theory approaches the matter orthogonally; rather than being derived from logical propositions about the just legal recognition of rights-bearing creators or from calculations regarding the optimal allocation of social resources,[5] a communicative theory of copyright proceeds from recognition of the necessarily relational act of communication.[6] As Craig describes her project of re-imagining copyright law, she seeks to understand copyright law using the lens of a "relational author [who is] a participant in a process of cultural dialogue and exchange".[7] On Craig's "relational" account, the public good that copyright seeks to enhance is found not in utility calculations or recognition of *a priori* rights, but rather is found in participation in a "collective conversation",[8] or "the creation of opportunities for improved communication between members of society",[9] thus identifying a value inherent in the process of communication itself. Communicative relationships are predicates of "communities and relationships [which] foster, rather than undermine, self-worth and genuine autonomy",[10] where autonomy

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[3] Sampsung Xiaoxian Shi and Brian Fitzgerald, "A Relational Theory of Authorship" in Mark Perry and Brian Fitzgerald, eds., *Knowledge Policy for the 21st Century: A Legal Perspective* (2011: Toronto, Irwin Law Canada) 291 at 294, 296.

[4] Julie E. Cohen, "Creativity and Culture in Copyright Theory" (2007) 40 UC Davis L Rev 1151 at 1155.

[5] *Ibid.*

[6] Craig & Turcotte, *supra* note 2 at 4 (noting "the intangible, dialogic and communicative nature of human expression").

[7] Carys Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar, 2011) at 3.

[8] *Ibid* at 3.

[9] *Ibid* at 2.

[10] Craig & Turcotte, *supra* note 2 at 11.

is itself a relational concept (*i.e.*, actualizing autonomy is only possible within relationships).[11] The relational account posits that the success of the copyright system can be measured less by reference to the reward it secures for owners or its capacity to recognize entitlements, and more by reference to the extent that it encourages engagement, participation and contribution by a multitude of community members,[12] which itself enables human flourishing by enhancing relational autonomy.

Craig's relational author is a deliberate turn away from the atomistic 'Romantic genius' conception of the author and the individualisation of the act of authorship or creativity.[13] In its place, Craig describes an author who creates while enmeshed in a dynamic web of relationships among creators, ideas and works. This relational account turns on its head the conventional copyright account which "presupposes that individuals live in isolation from one another … ignoring the individual's relationship with others within her community, family, ethnic group, religion – the very social relations out of which and for the benefit of whom the individual's limited monopoly rights are supposed to exist".[14] In part, consistent with the impulse motivating the accounts of the scholars whose work is discussed in Part III of this chapter, Craig's reconfiguration of copyright's author is an effort to describe an author construct which reflects the lived experience of creativity more accurately than does the atomised solitary genius author of conventional copyright theory.[15]

Drawing on the work of philosopher Roland Barthes and the later copyright scholarship of Jessica Litman, Craig describes one aspect of the "contemporary demystification of authorship" as a declaration that reproduction of existing works is an indispensable component of creativity: cultural expression necessarily "builds upon the old", recombining and adapting prior texts.[16] That recognition allows for a re-visioning of the author concept: instead of the author being an autonomous, originating source of expression, the author is described as a participant in a social process of creativity, exchange,

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[11] *Ibid*, citing Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale J L & Fem 7.

[12] Craig, *supra* note 7 at 234, 250.

[13] *Ibid* at 11.

[14] Shelley Wright, "A Feminist Exploration of the Legal Protection of Art" (1994) 7 CJWL 59, quoted in Craig & Turcotte, *supra* note 6 at 7-8.

[15] See Craig, *supra* note 7 at 36 ("copyright theory has to complicate the author construct if it is to recognise the realities of cultural creativity"). See also Julie E. Cohen, "Property as Institutions for Resources: Lessons from and for IP" (2015) 94 Tex L Rev 1 at 32 (describing the "fundamentally heterogeneous" production processes of intellectual goods).

[16] *Ibid* at 16.

communication and dialogue.[17] This *situated* author, and her creative activities, are embedded in, indeed constituted by, the author's social environment, formed by "relations, discourses and communities".[18] Crucially, however, the copyright author is not *merely* a relational subject on whom external forces act; the author also possesses agency and individual "creative capacity", enabling the author some (bounded) ability to navigate the environment in which he or she is situated.[19] The relational author's creativity functions as a result of the interplay between her connectedness within overlapping communities and the individual's capacity for internal reflection, recombination and expression.[20]

Referring to the literary theory work of Mikhail Bakhtin and Laurie Finke, Craig embeds in the concept of the relational author the notion of dialogism. "Authoring" is a discourse that is "inherently dialogic and multivocal", with all cultural expression being "interactive and inter-animating" with prior and subsequent cultural expression.[21] Quoting Finke, Craig points out that we can thus see cultural communication as "a productive, complex exchange with … other's words".[22] In Craig's words, cultural expression is "a discursive interplay which operates at the levels of the text, society and the self".[23] Cultural expression can be seen as cumulative and contributory: "the creative author is entering a cultural conversation … [w]hatever she adds [to the conversation] will therefore incorporate and respond to that which has already been said; and she must trust that her contribution will inform what others say after her."[24] The author's act of creativity is participative, interactive and interdependent – in short, collaborative and communicative.[25] In this relational context, one aspiration is to structure communities which foster autonomy – while recognizing that autonomy exists within, indeed is dependent upon, a network of interdependent relationships.[26]

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[17] *Ibid* at 32.

[18] *Ibid* at 33. See also Rosemary J. Coombe, "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue" (1991) 69 Texas L Rev 1853 at 1859-69 ("the self is … constituted through communicative activity").

[19] *Ibid* at 34.

[20] Craig & Turcotte, *supra* note 2 at 13.

[21] Craig, *supra* note 7 at 38.

[22] *Ibid* at 39, quoting Laurie A. Finke, *Feminist Theory, Women's Writing* (Ithaca: Cornell University Press, 1992) at 14.

[23] *Ibid* at 40.

[24] *Ibid* at 54.

[25] *Ibid* at 41.

[26] *Ibid* at 46-47.

Craig identifies a tension in copyright, one which arises "between the idea of authorship as both originating within oneself and being derived from the social and cultural context within which the author creates".[27] Part of addressing – even if never fully resolving – that tension is recognizing that creation is less about novelty and more about "reinterpretation, recombination and transformation" of the materials, concepts and tools which are available to a given individual at a particular moment in a particular society.[28] The authorial process is dialogic, though in two relevant ways, one inward-looking and one outward-oriented. Creativity is *intra*personal in that the author draws on the author's own experiences and predilections, but also *inter*personal in that the author draws upon existing texts and discourses and seeks to "communicate meaning to an anticipated audience".[29] Copyright law constitutes part of the legal framework within which creative, communicative activities occur. As Craig notes, "[t]he importance of copyright lies in its capacity to structure relations of communication, and also, to establish the power dynamics that will shape these relations".[30]

At this juncture, the relational account has two components which warrant highlighting: it offers a description of human nature and operationalizes that description by positing a normative metric against which copyright law can be assessed. Craig describes the purpose of copyright as being to "maximise communication and exchange by putting in place incentives for the creation and dissemination of intellectual works".[31] One purpose of copyright, therefore, is to provide, or at least allow, *mechanisms* which facilitate that creation and dissemination. In assessing copyright we must look not just at the rights/liabilities superstructure, but at the particulars of the system within that superstructure; the more latitude a copyright regime permits for the creation, entrenchment and improvement of such mechanisms, the better. Relational copyright recognizes that creativity occurs within a matrix of intersecting communities, identities and works.[32] If copyright law is to encourage expression and communication, it must have a means of "recognising *and valuing* the derivative, collaborative and communicative nature of

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[27] *Ibid* at 50.

[28] *Ibid* at 51-52.

[29] *Ibid* at 53-54. See also Cohen, *supra* note 4 at 1179-80.

[30] *Ibid* at 52. Copyright can also play an instrumental role in enabling dialogue which is "essential for the ongoing scrutiny and negotiation of power relations within communities and social structures", see Craig & Turcotte, *supra* note 2 at 12.

[31] Craig, *supra* note 7 at 52.

[32] *Ibid* at 55-56.

creativity".[33] Copyright should, in short, "maximise social engagement, dialogic participation and cultural contributions";[34] indeed, in Craig's account, "the copyright system must stand or fall as an institution that is able to maximise social communication and cultural interaction".[35] The normative value of creative activity has been asserted by other scholars, including Rebecca Tushnet, who observes that "[c]reativity, including remix creativity, is part of a good life. It should be valued for itself, not [simply] tolerated".[36] Those statements encapsulate the evaluative appraisal at the heart of relational and communicative copyright.

Critical to a communicative understanding of copyright is recognizing that structure of the copyright regime requires making choices "about the kind of intellectual creativity and exchange that we want to see in our society, and the relations of communication that are likely to foster it".[37] Choice functions in this respect as a descriptor and also as a normative value: first, there are choices to be made in the types of activities which are given jural recognition by the copyright regime; second, there is value in maximizing the latitude of choices available to those who are subject to the copyright regime in terms of the nature of their interaction with the legal incidents of the regime. Licensing, and in particular open content licensing, appears to be one means by which copyright law can facilitate those choices, thereby facilitating communication and exchange, and thereby enabling creators to navigate the relational tension between self and situation.[38]

While Craig's relational account is the primary theoretical approach on which this dissertation's conception of communicative copyright is built, other theoretical approaches describe normative commitments which resonate with those of communicative copyright theories. For example, Abraham Drassinower's account, premised at least partially on a Kantian view of copyright-protected works being speech acts of the author,[39] describes copyright as concerned primarily with the "communicative act" of

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[33] *Ibid* at 56. Italics in original.

[34] *Ibid* at 57. As Craig explains, attributing value to these goals is "premised upon an understanding of human associations as constitutive and essential to genuine human agency and fulfilment" (at 57).

[35] *Ibid* at 234.

[36] Rebecca Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions" (2009) 51 Wm & Mary L Rev 513 at 538.

[37] Craig & Turcotte, *supra* note 2 at 14.

[38] See Robert P. Merges, *Justifying Intellectual Property* (Cambridge: Harvard University Press, 2011) at 85 ("Autonomy with flexibility: this is the magic combination we as a society should be looking for.").

[39] Abraham Drassinower, *What's Wrong With Copying?* (Cambridge: Harvard University Press, 2015) at 112-113.

the creator.[40] In Drassinower's description, an internally coherent understanding of copyright requires that it be dialogic: copyright protection enables the communication of works to recipients who are entitled to respond to the work.[41] For Drassinower, copyright as dialogue is not only descriptive, but justificatory:[42] copyright is defensible so long as its limits are set at the boundaries of communicative activities and so as to be "consistent with the communicative rights of others".[43] So, even in a Kantian rights-based approach such as Drassinower's, we find a conception of copyright which is "communicative": authors speak, and it is in the responses of others to the author's speech act that the "conversation" of communicative copyright theory is found. Approaching the matter from a different, though still deontological, direction, David Ladd articulates an account with Lockean "natural law" premises overlaid by utilitarian concerns which seek to maximize the number of copyright authors and disseminators. [44] On Ladd's account, copyright "supports a system, a milieu, a cultural marketplace which is important in and of itself",[45] in order to foster "a pluralism of opinion, experience, vision and utterance … our freedom depends not only freedom for a few, but also on variety [of ideas and expression] … [c]opyright fosters that variety."[46] Although couched in the syntax of liberty from state control and notions of a "marketplace of ideas", Ladd's account alludes to copyright functioning to facilitate the creation and maintenance of venues or channels by which individuals can express and react to the expressions of others, an account which overlaps in material ways with the relational account developed by Craig.

Part of the power of the relational account lies in its recognition of and emphasis on the fact that humans necessarily live and create within a dense network of relationships with other individuals and to larger social concerns such as geographic, demographic, ideological, and interest group communities. The relational account has its own internal animating dynamic which imparts a teleology: harnessing and developing relationships to enhance human flourishing – something which is done through the mechanism of communication. The nature of that desired human flourishing can itself be articulated in a

[40] *Ibid* at 8.

[41] *Ibid* at 221.

[42] *Ibid* at 220.

[43] *Ibid* at 221.

[44] David Ladd, "The Harm of the Concept of Harm in Copyright" (1982-1983) 30 J Copyright Soc'y USA 421 at 425-426.

[45] *Ibid* at 429.

[46] *Ibid* at 428.

number of different ways, by linking the recognition of humanity's relational nature to the purposes of communication. Neil Netanel offers perhaps the most fully-formed theory which can be harmonized with Craig's relational account to result in what this dissertation terms communicative copyright.[47] By threading together the normative goals of Netanel's and Craig's accounts, we can complete the construction of communicative copyright's theoretical basis. It is important to note that Netanel is writing in a particularly American register, relying in significant part on rhetorical devices which employ the U.S. "Founding Fathers" narrative. However, it is possible to abstract from the singularity of that context to identify underlying universal liberal democratic norms. Elements of Netanel's account comport with the relational account, and the two can be harmonized by emphasizing Netanel's views of civil society and democratic self-governance; doing so presents an option for orienting communicative copyright in an abstract political framework which avoids predetermining the particular features of the political choices or settlements within that framework.[48]

The core of Netanel's account of copyright is the role it can play in sustaining democratic civil society.[49] Netanel's concept of civil society is expansive, encompassing "the sphere of voluntary, nongovernmental association in which individuals determine their shared purposes and norms", covering "formal and informal organizations, group identities and the shared purposes, histories, and discursive norms that hold groups together".[50] This conception of civil society includes "public communication and discourse" ranging from mass media outlets to internet discussion forums; a "proliferating welter" of communication channels that serves as "an independent manifestation of civic association, the space in which political, social, and aesthetic norms are debated and determined".[51] Many political theorists describe a "robust, pluralist civil society as a necessary, proactive foundation for democratic governance in a complex modern state".[52] A flourishing civil society has an educative and socializing effect on

[47] Madhavi Sunder has also described an understanding of intellectual property law, that he dubs "intellectual property as social relations", that foregrounds concerns with human flourishing, see Madhavi Sunder, "IP[3]" (2006) 59 Stan L Rev 257, esp 315ff.

[48] Of course, this is an arbitrary stopping point for such framework construction, which otherwise threatens to be endlessly recursive. We could query the advisability or primacy of liberal democratic norms, but that is well beyond the scope of this project.

[49] Neil Weinstock Netanel, "Copyright and a Democratic Civil Society" (1996) 106 Yale L J 283 at 341.

[50] *Ibid* at 342.

[51] *Ibid.*

[52] *Ibid.*

community members by allowing them to cultivate independence, "self-direction, social responsibility … political awareness and mutual recognition".[53] While Netanel's account posits that association and communication foster the types of political skills that enable individuals to hold state power to account,[54] those same processes also foster the type of relational skills – self-development and affirmation, mutual recognition and support, debate via articulation, challenge and subversion – which correspond with Craig's relational account. There is also consonance between the emphasis in the relational account on developing a capacity and vocabulary for the challenging of existing power structures[55] and the emphasis in Netanel's account on developing opportunities for challenging formal government power.[56] For Netanel, copyright law functions to incentivize the "production and dissemination of fixed original expression concerning a broad range of political, social, cultural, and aesthetic matters" [57] which fosters the development and maintenance of a robustly democratic civil society. Two additional aspects of Netanel's account warrant emphasis at this point in the discussion because of their congruence with Craig's relational account. First, the positive social and political instrumental effects of copyright which Netanel envisions are not solely the product of works which expressly or pedantically consider social and political issues – in his view, while a work of popular culture may entertain, it also

> "often reveals contested issues and deep fissures within our society, just as it may reinforce widely held beliefs and values. To be understood by their audiences [works of popular culture] must deal in the currency of prevailing practices, ideologies, and stereotypes, and in so doing must either reinforce or challenge them".[58]

Second, copyright facilitates what he refers to as a "participatory culture", one in which the "creation, critical interpretation, and transformation" of works empowers individuals who "gain a measure of expressive vitality and independence of thought".[59]

This Part has delineated the theoretical component of "communicative copyright", drawing primarily on Craig's relational account and incorporating foundational political commitments highlighted by

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[53] *Ibid* at 343.

[54] *Ibid.*

[55] Craig & Turcotte, *supra* note 2 at 12.

[56] Netanel, *supra* note 49 at 344.

[57] *Ibid* at 348.

[58] *Ibid* at 350.

[5959] *Ibid* at 351. Sunder's "law as social relations" account identifies a set of values that he believes intellectual property law should promote, and those values are broadly similar to the ones identified by Netanel: autonomy, culture, democracy, equality, and development (Sunder, *supra* note 47, at 324-325).

Netanel's civil society account. These elements constitute a justification theory and normative framework for copyright which consists of a constellation of values which includes: the nurturing of interpersonal relationships and their attendant mutual obligations and commitments; expression as its own good worthy of pursuit; plurality and diversity of form, content and mode of communication; mechanisms of accountability and responsiveness; and the development and maintenance of a sphere of communicative participation which has salutary political and civil consequences. This approach to understanding copyright takes the relational aspect of human nature as its foundational fact and its teleological end: to recognize, facilitate and expand dialogue, communication and, therefore, personal and communal flourishing.[60]

III. Empirical Approaches to Communicative Copyright

To this point, I have used communicative copyright to describe, essentially, a form of Craig's relational copyright theory with additional elements drawn from Netanel's civil society account; that theoretical approach can be supplemented with a methodological approach which shares a similar animating impulse – namely, that the dominant copyright justification theories are somehow deficient in providing an account of copyright's core concern of creative expression. To some extent that dissatisfaction stems from a disjunction between, on the one hand, the foundational assumptions of conventional American intellectual property accounts (which assume that the prospect of pecuniary gain is the motivation for creative expression) and, on the other hand, intuitive apprehensions of how creativity functions, coupled with the results of empirical experimental and ethnographic work (indicating that the prospect of pecuniary gain insufficiently accounts for creativity).[61] The second primary component of what I am terming communicative copyright stem less from *a priori* theory or observations of the human condition writ large, and more from descriptions of the practices and psychology of creativity over which copyright law asserts domain. This second strand of literature that I wish to include under the

[60] David W. Opderbeck, partially in response to the account offered by Sunder (*supra* note 47), has described a copyright justification theory that focuses on the role that sharing (or gifting) of creative expression plays in human flourishing (David W. Opderbeck, "Beyond Bits, Memes and Utility Machines: A Theology of Intellectual Property as Social Relations" (2013) 10 Univ St Thomas L J 738). Opderbeck's account is explicitly premised on accepting a Christian ontology of human beings as created in the image of a trinitarian God.

[61] See Christopher Buccafusco & Christopher Jon Sprigman, "Experiments in Intellectual Property" in Peter Menell & David Schwartz, eds, *Research Handbooks on the Economics of Intellectual Property Law (Vol. II – Analytical Methods)* (Edward Elgar Publishing, 2016), esp Part II.A.

communicative copyright rubric is one that starts from observations of creativity in practice and in particular the relationship between creativity and digital technology. Michael Carroll's observations about the mode of creativity enabled by digital technology, in which "users" in the digital environment can be active participants and not merely passive recipients, led him to state that "much of the creativity that digital technology enables is conversational in nature".[62] Consequently, Carroll argues for a vision of copyright in which "creators or copyright owners seek to facilitate the use of their expression for purposes such as dialog and education".[63] Similarly, Eric Johnson contends that the promises of technological change, particularly what he terms the "democratization" of the means of media production and distribution, can only be fully realized through open content licensing;[64] citing the work of Richard Stallman, the originator of open source software licensing, Johnson posits that the proper motivating impulses for the copyright regime should be articulated as friendship, community and freedom.[65]

While Carroll and Johnson describe copyright using communicative terms, their work is somewhat narrowly-focused.[66] A more consequential strand of the literature uses a broadly similar empirical approach to arrive at a more considered pace at largely the same conclusion – namely, that conventional accounts of copyright theory and motivation are inaccurate or at least incomplete in that they fail to take proper account of what motivates individuals to create. Yochai Benkler's 2002 article "Coase's Penguin, or, Linux and *The Nature of the Firm*",[67] provides a suitable point of entry for discussing this strand of the literature as it offers an early demonstration of the methodological approach being utilized. Benkler noticed that traditional theoretical accounts of creative activity were unable to satisfactorily explain the participation by computer programmers in open source software projects and sought to identify what might motivate these programmers. The programmers were contributing to software projects

[62] Michael Carroll, "Creative Commons as Conversational Copyright" in Peter K. Yu, ed., *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, vol. 1 (Prager, 2007) at 448.

[63] *Ibid* at 452.

[64] Eric E. Johnson, "Rethinking Sharing Licenses for the Entertainment Media" (2008-2009) 26 Cardozo Arts & Ent LJ 391 at 393-394.

[65] *Ibid* at 431ff.

[66] In Carrol's case, his work focuses on describing and critiquing Creative Commons licensing. Johnson's work constitutes, in significant part, a proposal for a new form of open content licensing for use in connection with cinematographic works.

[67] Yochai Benkler, "Coase's Penguin, or, Linux and *The Nature of the Firm*" (2002) 112 Yale LJ 369.

without being paid to do so, and without being ordered or required to do so, a result which did not align with the existing models used by economists.[68]

Extrapolating from the case of software, Benkler sought to identify characteristics that made large, dispersed collaborative efforts to create information-based products – what Benkler refers to as "commons-based peer production"[69] – "sustainable and productive in the digitally networked environment without reliance either on markets or managerial hierarchy".[70] In part, the failure of theory identified by Benkler was a function of technological change – digitization, increased computing power and interconnectivity had given rise to methods of collaborative working among geographically distant contributors which were simply not previously possible. But in significant part the failure was also the result of theoretical models which were insufficiently sensitive to the variegated motivations of creative individuals. By presuming that only prices (in the form of wages or salary) or coercive direction (in the form of activities mandated by an organizational superior) could explain participation, the existing economic models neglected a set of motivations which were not easily reducible into conventional economic terms.[71]

Benkler introduced a model which proposed a more nuanced approach to understanding motivations in the context of creative activity; though using terminology which sounds derived from psychology, his work is largely based on the then-extant economic literature. His model expanded the traditional copyright scholarship notion of "reward" by creating sub-categories of reward, the latter two of which had not received overmuch attention in the then-current legal scholarship: extrinsic monetary, intrinsic hedonic and social-psychological.[72] For these purposes, an "extrinsic" motivation for behaviour is one which originates outside an actor, such as the payment of wages for work, whereas an "intrinsic"

[68] *Ibid* at 372.

[69] *Ibid* at 375.

[70] *Ibid* at 374.

[71] Some accounts posit that participation in peer production is at least in part motivated by the opportunity to *indirectly* access monetary gains, *e.g.*, participation enhances reputation which can result in better compensation on future projects. See Benkler, *supra* note 67 at 424-425 and see also Diane Leenheer Zimmerman, "Copyrights as Incentives: Did We Just Imagine That?" (2011) 12 Theoretical Inquiries in Law 29 at 40, 43ff.

[72] Benkler, *supra* note 67 at 426. For further discussion on the different types of motivations, see also Christopher Buccafusco, Zachary C. Burns, Jeanne C. Fromer & Christopher Jon Sprigman, "Experimental Tests of Intellectual Property Laws' Creativity Thresholds" (2014) Texas L Rev 1921 at 1935-1938.

motivation is one which is "inherent in the behaviour [or activity] itself".[73] Benkler uses a variety of phrases to describe what he terms "intrinsic hedonic" rewards: the "pleasure of creation", "an urge to create" and the opportunity to "play at creation".[74] "Social-psychological" rewards "take the form of actual effect on social associations and status perception by others or … internal satisfaction from one's social relations".[75] By adding hedonic and social-psychological rewards to the calculation, Benkler was better able to explain why individuals might participate in a peer production project when the monetary rewards were low or even negative.[76]

There are additional layers of sophistication to the notion of "intrinsic" rewards which can be explored through the development in scientific psychology of the concept of "well-being" and that are of relevance to the account of communicative copyright that is being developed. Communicative copyright hinges on recognition of an individual's position within one or more communities, and on that individual's emotional and psychological well-being within those contexts. Nestled in the relational account is the proposition that the best version of a person is one that is productive and well-adjusted within the norms and expectations of the given community or set of communities (each understood as its own network of relationships) within which that individual lives. Two primary conceptions of "well-being" are conventionally referred to as "hedonic" and "eudaimonic".[77] Hedonic well-being can be equated to "happiness" or "pleasure"; in this conception, well-being "consists of subjective happiness and concerns the experience of pleasure versus displeasure … [which] can be derived from attainment of goals or valued outcomes".[78] Eudaimonic conceptions of well-being utilize a richer notion of human flourishing or wellness, one which might be described as "happiness plus" – the content of the additional factor ranges

[73] Richard M. Ryan & Edward L. Deci, "When Rewards Compete With Nature: The Undermining of Intrinsic Motivation and Self-Regulation" in Carol Sansone & Judith M. Harackiewicz, eds., *Intrinsic and Extrinsic Motivation: The Search for Optimal Motivation and Performance* (San Diego: Academic Press, 2000) at 16.

[74] Benkler, *supra* note 67 at 424.

[75] Benkler, *supra* note 67 at 426.

[76] That is, where the hedonic or social-psychological gains from peer participation are sufficiently high, an individual will be motivated to participate even if there are alternative courses of action which would result in higher monetary gains; see Benkler, *supra* note 67 at 429.

[77] See generally Richard M. Ryan & Edward L. Deci, "On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being" (2001) 52 Ann Rev Psychol 141.

[78] *Ibid* at 144.

from "meaningfulness",[79] to self-actualization,[80] to a six-factor matrix consisting of autonomy, personal growth, self-acceptance, life purpose, mastery, and positive relatedness.[81] While the legal literature on creativity has generally not employed the hedonic/eudaimonic concepts of scientific psychology, the development of that legal literature, as outlined below, indicates that copyright scholars are moving towards thicker conceptions of motivation which roughly correspond with eudaimonic descriptions of well-being. That movement in favour of thicker accounts of motivation is paralleled in relational copyright's proffering of a thicker account of creative expression within the encompassing network of relationships and communities.

While Benkler's analysis included discussion of non-monetary motivations, it nonetheless still expressed the matter in terms cognizable by economic theory – it spoke of motivations for creativity as "rewards" to be slotted into a formula, producing a mathematical product which purported to determine when non-remunerative creativity would occur. For all its insight, this seems a less than satisfactory approach because it speaks about creativity in dissonantly mechanical terms. Julie Cohen argued that understanding creativity was "especially problematic for copyright scholars because it sits at the nexus of three methodological anxieties";[82] Cohen attributes each of the anxieties to a blinkered approach predicated on "false binar[ies]" stemming from the pre-commitment of many conventional copyright scholars to either rights-based or economic theories of copyright.[83] Communicative copyright, building on a relational copyright core and seeking to employ qualitative empirical methods, allows us to avoid the false binaries and anxieties posited by Cohen. Cohen's own theory, built outwards from a description of creative activity, describes a theoretical model which posits that cultural artifacts are produced not simply by "individual creators nor social and cultural patterns … but rather the dynamic interactions between

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[79] *Ibid* at 161, citing Ian McGregor and Brian R. Little, "Personal Projects, Happiness, and Meaning: On Doing Well and Being Yourself" (1998) 74 J Pers Soc Psych 494.

[80] *Ibid*, citing Richard M. Ryan and Edward L. Deci, "Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being" (2000) 55 Am Psych 68.

[81] *Ibid* at 146, citing Carol D. Ryff & Corey Lee M. Keyes, "The Structure of Psychological Well-Being Revisited" (1995) 69 J Pers Soc Psych 719.

[82] Cohen, *supra* note 4 at 1152. The identified anxieties consisted of (1) whether the unit of analysis for copyright scholars should be individual creators or aggregate patterns of creativity, (2) the appropriate criteria for assessing creativity and (3) whether abstract theorizing or attention to concrete examples of creative artifacts should be the focus of analysis.

[83] *Ibid* at 1153.

them".[84] Cohen's account shares analytic space with that of Craig: positing that creative processes take place within a "given network of social and cultural relations", the network affords "freedom of movement" within which creativity is "shaped by the concrete particulars of expression, the material attributes of artifacts embodying copyrighted works, and the spatial distribution of cultural resources".[85] That observation, the result of an inquiry which sought to investigate and describe creativity *as it actually occurs*, coincides with Craig's observation that creativity necessarily occurs within a given paradigm.[86]

Employing insights from the work of social and cultural theorists, Cohen describes a copyright theory which pays close attention to "the material realities of everyday practice".[87] Informed by the capabilities approach of Martha Nussbaum and Amartya Sen,[88] Cohen describes creativity as "an emergent property of social and cultural systems, continually shaped by and shaping other social changes".[89] Cohen's account of creativity is one of a situated process whose nature is ineffable.[90] The "situated" aspect of creativity is crucial for Cohen: creativity is ineluctably constrained by the path dependencies of a particular culture, taking place "within a web of semantic and material entailments".[91] Cohen identifies four purposes of situated creators who make use of pre-existing cultural expressions: consumption (for enjoyment); communication with other community members; self-development; and "creative play".[92] Noting Craig's relational account, Cohen describes creativity as occurring "in the process of working through culture alongside others who are always already similarly engaged".[93] Consequently, "from a systemic perspective, artistic and intellectual culture is most usefully understood not as a set of products, but rather as a set of interconnected, relational networks of actors, resources, and emergent

[84] *Ibid*.

[85] *Ibid* at 1154.

[86] See *supra* note 19 and accompanying text.

[87] Cohen, *supra* note 4 at 1156.

[88] *Ibid* at 1159. The capabilities approach "takes as its lodestar the fulfillment of human freedom, and defines freedom in terms of the development of affirmative capabilities for flourishing. Thus defined, freedom is not simply a function of the absence of restraint, but also depends critically on access to resources and on the availability of a sufficient variety of real opportunities" (at 1159).

[89] *Ibid* at 1177.

[90] *Ibid* at 1178.

[91] *Ibid* at 1178-79.

[92] *Ibid* at 1179.

[93] *Ibid* at 1180.

creative practices".[94] By seeking to engage with the puzzle of human creativity through "an eclectic range of methods", and not merely the economic, Cohen situates her work as an extension of Benkler's, emphasizing a "commitment to human flourishing … [which] requires more direct engagement with the patterns of cultural progress and with the material and spatial realities of cultural processes".[95] Such an approach to understanding creativity and how copyright law does and should interact with those human processes is necessarily a methodology which examines *how people actually create and disseminate* their creative works.

The same dissatisfaction with conventional economic and rights-based approaches to copyright and creativity which animates Cohen's work suffuses the approach of Diane Leenheer Zimmerman, Rebecca Tushnet, and Niva Elkin-Koren in certain of their works to be discussed herein. Each of them, situating themselves conceptually in space that Craig, Benkler and Cohen would find familiar, challenge the traditional understanding of copyright's grant of exclusive rights as an "incentive" for creativity. Tushnet expressly relies on psychological and sociological concepts to help explain the human urge to creativity, and in particular relies on the accounts of motivation provided by artists themselves;[96] she observes that artists "speak of compulsion, joy, and other emotions and impulses that have little to do with monetary incentives".[97] On Tushnet's account, while creative activity can certainly provide pleasure to an artist, many subjective experiences of creativity "simply do not fit into the incentive model, whether … measured in money or in reputation";[98] instead, it is perhaps better understood as an "autonomic function", rather than simply "a response to an external incentive".[99] Zimmerman's conclusion, referencing the work of behavioural economists and psychologists, is that intrinsic motivations are at least, if not more, important than extrinsic, monetary motivations.[100] Wrestling with a puzzle similar to that noted by Benkler, Zimmerman describes the conventional economic approach to copyright as "conceiv[ing] of the creative individual as a rational profit-maximizer whose willingness to invest effort, time and resources in

[94] *Ibid* at 1183.

[95] *Ibid* at 1197.

[96] See Rebecca Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions" (2009) 51 Wm & Mary L Rev 513.

[97] *Ibid* at 546.

[98] *Ibid* at 522.

[99] *Ibid* at 526-527.

[100] For further discussion about the distinction between extrinsic and intrinsic motivations, see *supra* notes 72ff and accompanying text.

creative enterprises is directly correlated to the expected extent of the returns".[101] In place of that pecuniary calculation, Zimmerman seeks to explore "intrinsic motivation as an alternative understanding of what explains the decision to engage in creative expression", incorporating work from the fields of psychology and behavioural economics.[102] As did Benkler before her, Zimmerman identifies the open source movement as the inception of serious questioning by copyright scholars of the conventional economic incentive theory.[103] The enthusiastic participation of many computer programmers in open source software projects highlighted the inadequacy of economic explanations – describing creativity as entirely or even primarily a function of economic reward is not so much wrong as it is incomplete.[104]

In supplementing the traditional approach of legal scholars describing motivations for creativity as solely or primarily pecuniary, and challenging the explanatory power of extrinsic motivations,[105] Zimmerman surveys the work of other scholars, including those outside the legal academy, who have investigated the role of intrinsic motivation. The development of a richer account of motivation for creative expression is, in Zimmerman's account, an iterative process. She notes that the largely "non-empirical nature of neoclassical [economic] models" could be usefully supplemented by drawing on the work of psychologists and psychiatrists.[106] Zimmerman describes those intrinsic motivations using a variety of terms: "a sense of duty to create",[107] "a personal responsibility to transform the world that far transcends the profit motive",[108] a human activity which has "a spiritual, if not a frankly religious, component".[109] Moving from the work of economists to the work of psychologists, particularly that of Abraham Maslow and Mihaly Csikszentmihalyi, Zimmerman describes creativity as "an aspect of self-actualization rather than a response elicited by [external] motivations",[110] the result of an innate drive or calling.[111] Other

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[101] Zimmerman, *supra* note 71 at 31.

[102] *Ibid* at 34.

[103] *Ibid* at 36.

[104] See, *e.g.*, Zimmerman's discussion about the unpromising monetary prospects facing poets ("poets have long had particularly poor hopes of economic success in the marketplace, but the writing of poetry continues"; *ibid* at 37) and, more broadly, the comparatively poor economic prospects of creative expression generally (*ibid* at 38ff).

[105] *Ibid* at 43ff.

[106] *Ibid* at 45-46, highlighting the contributions of Abraham Maslow, *Motivation and Personality* (2d ed, 1970) and Everett E. Hagen, *On the Theory of Social Change: How Economic Growth Begins* (1962).

[107] *Ibid* at 36.

[108] *Ibid*, quoting Hagen, *supra* note 106 at 93.

[109] *Ibid* at 36, citing Roberta Rosenthal Kwall, "Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul" (2006) 81 Notre Dame L Rev 1945 at 1951-62.

[110] *Ibid* at 46, citing Maslow, *supra* note 106 at 15-31.

descriptions of intrinsic motivations cited by Zimmerman include the enjoyment of learning,[112] "satisfaction from the sense of membership in a community",[113] a sense of self-determination, and a sense of reciprocal obligation to give back to society or a community;[114] each of those are comfortably accommodated within Craig's relational theory.

Elkin-Koren's discussion of creativity pivots from Zimmerman's references to psychology and behavioural economists, and echoes the practice-focused approaches of Carroll, Johnson and Cohen. In this regard, Elkin-Koren's account concentrates on the social dimension of creativity, by examining creative content produced on digital networks via what she terms "social production".[115] Elkin-Koren's analytical approach encompasses the "matrix of relationships" defined by users, their community and the "facilitating platform" used to create the content.[116] A form of creativity largely birthed by digital technology,[117] Elkin-Koren describes "social production" as "a type of communicative act, reflecting engagement in a conversation or an interaction with a community".[118] Social production is "driven by social motivation",[119] which is nurtured in the online environment because digital technology marks a shift in content production away from industrial, firm-centred processes to individual, community-centred processes.[120] Individuals create for a variety of reasons: "self-expression, creative satisfaction, a desire to establish online reputation or a wish to strengthen one's self-esteem";[121] but the online environment brings into relief a distinction between what Elkin-Koren refers to as "self-oriented" and "other-oriented"

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[111] *Ibid*, citing Everett E. Hagen, *supra* note 106 at 93, and Mihaly Csikszentmihalyi, *Creativity: Flow and the Psychology of Discovery and Innovation* (1996) at 37.

[112] *Ibid* at 44, quoting Eric von Hippel & Georg von Krogh, "Open Source Software and the 'Private-Collective' Innovation Model" (2003) 14 Org Sci 209.

[113] *Ibid*, citing von Hippel & von Krogh, *supra* note 112.

[114] *Ibid*, citing John Cahir, "The Information Commons" (July 23, 2003) (unpublished manuscript).

[115] Niva Elkin-Koren, "Tailoring Copyright to Social Production" (2011) 12 Theoretical Inq L 309.

[116] *Ibid* at 311-312.

[117] *Ibid* at 313, citing Yochai Benkler, "Freedom in the Commons: Towards a Political Economy of Information" (2003) 52 Duke LJ 1245 at 1260 (describing social production as "a new mode of production, one that was mostly unavailable to people in either the physical economy (barring barn raising and similar traditional collective efforts in tightly knit communities) or in the industrial information economy. In the physical world, capital costs and physical distance – with its attendant costs of communication and transportation – mean that most people cannot exercise much control over their productive capacities, at least to the extent that to be effective they must collaborate with others").

[118] *Ibid* at 338.

[119] *Ibid* at 318.

[120] *Ibid.*

[121] *Ibid*.

motives.[122] The former refers to both intrinsic hedonic and eudaimonic motivations (enjoyment, personal growth) and extrinsic motivations (such as financial reward), whereas the latter refers to motivations such as "affiliation, altruism and reciprocity".[123]

In describing "other-oriented" motivations as "social motivations", and again using language consonant with that of Craig's relational account, Elkin-Koren also highlights that such motivations are processual rather than transactional – rather than a one-time exchange, social motivation "involves a relationship with a concrete or partially imagined community", where the creative act "derives its meaning from the actual engagement and interaction with others".[124] Seen through this lens, individuals who create, because they are by nature social beings, "may simply want to interact, communicate, connect with other people, be heard by their fellow users, feel they belong and affiliate themselves with groups".[125] Such social motivations, and the activities which they inspire, are tied to dialogue or conversation: as Elkin-Koren describes it, "[c]reative activities often aim at expressing oneself in a conversation with others", with creators seeking "to gain the attention of their fellow users, to be heard, attended to, and receive some feedback".[126] Such participatory activity generates further social motivations. These include desires for affiliation, peer recognition and the "sense of belonging to a community".[127] Participation in the community partly stems from, and also furthers, communal obligations of reciprocity, being a perceived obligation to "contribute for the benefit of others from whom you have benefited in the past".[128] The sense of community involvement is itself generated through perceptions of shared identity, shared emotional sensibilities and shared fulfilment of perceived needs.[129]

Jessica Silbey's work interviewing creators is the logical extension of the practice-oriented approach noted in the empirically-inclined literature discussed to this point. Her work stems from much the same intuition as that informing other academics whose work I am collating under the term

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[122] *Ibid* at 319, citing Naren B. Peddibhotla & Mani R. Subramani, "Contributing to Public Document Repositories: A Critical Mass Theory Perspective" (2007) 28 Org Stud 327.

[123] *Ibid* at 319.

[124] *Ibid* at 320.

[125] *Ibid* at 321.

[126] *Ibid*.

[127] *Ibid* at 321-22.

[128] *Ibid* at 322.

[129] *Ibid* at 330, citing Sheizaf Rafaeli & Yaron Ariel, "Online Motivational Factors: Incentives for Participation and Contribution in Wikipedia" in A. Barak ed., *Psychological Aspects of Cyberspace: Theory, Research, Applications* (2008) at 243.

communicative copyright: that "a model of self-interested, wealth-maximizing, and risk-averse individuals and corporations … is the wrong model".[130] In speaking to creators across a variety of fields, including patentable innovation and expressive works, Silbey noted that, among other things, creators value "the opportunity to share and distribute" their work, and to "continue working without unreasonable hurdles to sharing, distributing and carrying on".[131] The interviewee responses confirm what the work of Cohen and Zimmerman foreshadowed: creators often seek to "foster productive and emotionally fulfilling relationships" and "consider diverse distributional choices as central and inevitable to their success".[132] Silbey's work also identifies the notion of "openness" (in the sense of the making available of creative expression) as crucial for realizing the goals of some creators; she describes openness as a "priority for developing and facilitating relationships with collaborators and audiences; openness appears to 'breed creativity' in myriad contexts".[133]

Silbey describes dissemination of creative expression as the "*ultimate* goal" of copyright law.[134] In her phrasing, creative expression "is meant to circulate".[135] A portion of her project therefore entails examining how creators disseminate their works and the goals they are trying to accomplish when they make dissemination decisions. When she examines the "forms dissemination takes and the many reasons for engaging in it",[136] Silbey acknowledges she is doing so in a changed technological environment where digital technology has made the creation and distribution of creative content easier and more accessible. Her respondents describe motivations in connection with their dissemination choices which are similar to those they describe in connection with making creative decisions: "making money, building relationships, fostering autonomy or self-definition, and critically engaging and developing core competences".[137] Silbey's respondents indicate that in their view sharing has multifarious motivations and results. These include generating revenue, increasing renown, continued usage outside the narrow parameters of commercial exploitation cycles, emotional gratification and building

[130] Jessica Silbey, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (Stanford: Stanford Law Book, 2015) at 275.

[131] *Ibid*.

[132] *Ibid* at 277.

[133] *Ibid* at 279.

[134] *Ibid* at 221. Italics in original.

[135] *Ibid*.

[136] *Ibid* at 224.

[137] *Ibid* at 225. Italics removed from original.

relationships.[138] Silbey finds the concept of sharing and the metaphor of conversation in many of the interview responses she collects, even among scientists and engineers.[139] In Silbey's view, "value" is not measurable solely in monetary terms; the act of sharing itself *results in* value being realized: "if the work is meant to be used and appreciated, it must be in the hands of many people to exploit and develop its value".[140] Silbey's research also indicates that the "impulse to share" is not only one found in individuals, but also in firms and institutions, some of which see the value in harnessing the sharing impulses of their employees.[141] In many respects Silbey's work finds that creators and disseminators describe their creative process, and their dissemination decisions, in terms that were predictable from Craig's relational account: creativity and dissemination as activities constitutive of the self, the community and the interrelationship between the two.

This Part has reviewed a strand of literature originating in the same ontological frustration that gave birth to Craig's relational account, namely that prevailing copyright justification theories are unproductively incomplete and offer only inadequate explanations of observable activities. This strand of literature challenges conventional copyright theories using a variety of methodologies, drawing on numerous disciplines including psychology and cognitive science. The unifying elements of this literature are a grounding in qualitative empirical approaches – an insistence on paying attention to actual creative practices, culminating in Silbey's in-depth interviews – and shared conclusions about the character of the motivations for creativity, which orbit around notions of conversation, community, and relationships. While not identical to the propositions put forward by Craig's relational account, the observations and conclusions offered by this strand of the literature are nonetheless sufficiently congruent with them to warrant the attempt to unify the theoretical and methodological approaches.

IV. Conclusion – Threading the Communicative Copyright Strands

This chapter has described a framework for understanding copyright, termed "communicative copyright", which consists of the following elements:

[138] See, e.g., *ibid* at 252-62.
[139] *Ibid* at 255.
[140] *Ibid* at 257.
[141] *Ibid* at 259.

(a) a theoretical aspect which draws primarily on Carys Craig's "relational copyright" approach, and her emphasis on the processual and communicative aspects of creative expression; Craig's theoretical framework is combined with elements of Neil Netanel's "civil society" account to form an approach which identifies the following normative goals for copyright:

(i) facilitating and enhancing the creation and dissemination of creative expression because of the inherent value therein;

(ii) abetting the creation and maintenance of mechanisms that enable communication and community creation in order to develop and support personal and mutual affirmation, as well as interpersonal and intercommunal relationships; and

(iii) promoting interaction, sociality, dialogue, and participation as their own ends, but also to facilitate the stewarding and augmentation of a pluralist democratic civil society within which human flourishing can be maximized;

(b) a qualitative empirical methodological aspect attentive to the practices and views of creators, disseminators and consumers, as revealed by them in their words and activities.

By twining together the theoretical and empirical approaches described in this chapter into what I have termed communicative copyright, we can articulate a concept of copyright birthed from observations of contemporary creative practices which also contains a cogent teleology for the copyright regime. Communicative copyright is intended to represent a synthesis of prior scholarship and is intended to provide a reorientation – a new attitudinal vector – to guide assessments of copyright and, in the case of this dissertation, the practice of using open content copyright licenses. In its methodological approach, communicative copyright, to paraphrase Jessica Silbey, seeks to understand, through the straight-forward mechanism of talking to them about it, what people think they are doing when they engage with the copyright regime.[142] It is anticipated that this approach, in both its theoretical assumptions and its

[142] Silbey, *supra* note 130 at 288 ("[i]f we are interested in understanding or more precisely defining the human motivations and incentives that intellectual property doctrine asserts is present in creative and innovative fields, interviews provide direct evidence from the individuals who actually do the work").

methodological tools, may be better able to account for the popularity of open content licensing than conventional copyright justification theories.

A communicative account of copyright conceptualizes copyright as a purposive system which promotes the occurrence of dialogue, interaction, and the creation and strengthening of communities of individuals sharing common interests, predilections, and propensities, thereby instrumentalizing the interests of creators and disseminators in receiving reward and recognition. Conceptualizing copyright from such a standpoint facilitates an understanding of both *why* and *how* open content licences are used. It also affords us a measure to be used in determining *when* open content licensing might be "successful". As will be shown in Chapter 4, assessments of open content licensing that are premised on traditional copyright justification theories tend to lack explanatory power for the popularity of the phenomenon; a communicative approach, by contrast, offers fertile ground for an appraisal of such licences. In short, by using communicative copyright as a framework for understanding why and how creative works are disseminated, a solution to the puzzle of the popularity and potential promise of open content licensing for creative works may be possible.

To this point, this dissertation has developed a teleological account of copyright licensing and has outlined a theoretical framework within which to analyze how open content copyright licences are used by the creators, disseminators and consumers of creative works. The next chapter will continue the initial work of laying an analytical foundation for the balance of the dissertation by providing a definition of "open content" copyright licences, enabling us to identify the subject towards which this dissertation is ultimately oriented.

Chapter 3

Defining the Open Content Licence

I. Introduction

(a) *Chapter Plan*

This third chapter is the penultimate in the opening set of four chapters which set out the theoretical and analytical framework for this dissertation's discussion of the use of open content licensing for creative works. The first chapter developed a teleological account of copyright licensing which indicated that the licensing mechanism embedded in all copyright regimes is a device for the realization of copyright's systemic goals. The second chapter outlined the theoretical and methodological approach, termed communicative copyright, which will be utilized in the balance of this dissertation to analyze how open content copyright licences are used by the creators, disseminators and consumers of creative works. This chapter furthers the work of laying an analytical foundation for this dissertation by providing an operational definition of "open content" copyright licences.

Because of its orientation in favour of user-friendliness, definitions of "open content" licensing have often been formulated at first instance in "plain English" vocabulary. Open Knowledge International's *Guide to Open Licensing* states that "[b]roadly speaking, an open license is one which grants permission to access, re-use and redistribute a work with few or no restrictions".[1] This chapter aims to formulate a definition which enables identification of open content licences with a greater degree of precision than does a broad description. The definition developed in this chapter will explicitly identify the theoretical underpinning of the elements which are identified as necessary features of open content licences. It will draw upon three prior definitions of open content licensing which have been developed, despite the fact that even relatively recent academic considerations of open content licensing have stated that the concept lacks a generally accepted definition.[2] For reasons which will be recounted below, that lack of consensus may be an inescapable feature of dealing with "open" initiatives which are by their nature

[1] http://opendefinition.org/guide/.

[2] Till Kreutzer, "User-Related Assets and Drawbacks of Open Content Licensing" in Lucie Guibault & Christina Angelopoulos, eds., *Open Content Licensing – From Theory to Practice* (Amsterdam: Amsterdam University Press, 2011) at 110 ("no generally accepted definition of open content has been achieved so far"). As explored below in Part II, it is arguable that Kreutzer's observation (published in 2011) has been overtaken by the release of version 2.0 of the "Open Definition", published by Open Knowledge International in 2014.

diffuse and often fractious. Nevertheless, each of the three most prominent competing definitions for open content licensing which have been proffered over the last two decades provides guidance for the definition developed in this chapter. Consistent with the methodological commitment outlined in Chapter 2, because we are interested in how creators, users and disseminators are engaging with copyright licensing, attention is paid in this chapter to the work of those who use, and reflect upon their use of, open content licences regardless of whether their views about their task are expressed in the niceties of lawyers and legal scholars.

My task in this chapter is to identify the distinguishing characteristics of open content licences by drawing on preceding efforts to craft a comprehensive definition of open content licences, and supplementing those efforts with insights gleaned from the limited academic treatment of the concept. By delineating the criteria which mark open content licences as distinct from other types of licences (including other types of "open" licences), licensors who wish to use open content licences in connection with their creative works will be able to determine whether a particular existing licence qualifies as an "open content" licence and what elements need to be included in a new licence in order for it to bear any salutary effects which might be bestowed by open content licences. Further, scholars who examine the use of open content licences can use the definition to assess whether a particular licence is properly characterized as an open content licence.

The balance of Part I of this chapter addresses two matters which will assist in framing the ensuing discussion. First, Part I(b) offers a brief background on the development of the various "open" movements and situates "open content" within that broader set of initiatives. Next, Part I(c) discusses the nature of the "viral", "copyleft" or "share-alike" provisions which are often encountered in assessments of "open" licences. Part II of this chapter reviews the constituent elements of the most prominent definitions of open content licences developed and promulgated by individuals and organizations who have been active in open content communities, namely David Wiley (through his Open Content Project), the Definition of Free Cultural Works project, and the Open Knowledge Institute. In Part III, theoretical analyses of open content licensing are surveyed, including the work of Steven Weber, Andrew Katz and Ross Gardler. Finally, Part IV synthesizes the work of the preceding Parts and delineates a fulsome operational definition for open content copyright licences.

(b) *Distinguishing "Open Content" From Other "Open" Initiatives*

We live in an era replete with "open" initiatives: from open source software to open data to open standards to open content and others besides.[3] These various initiatives and communities are not necessarily doing the same or similar things, but unifying them is their espousal of a philosophy or praxis of "openness", though precisely what that means is context-dependent.[4] As Alan Cunningham observes, openness "depends very much on the context in which it is being deployed as a concept".[5] Andrew Katz describes the common element of the various "opens" as their intention "to remove restrictions to use (including modification and reuse) and access" various forms of information or resources.[6] The differing material, political and processual realities of different fields of endeavour mean that different "open" communities have developed differing conceptions of "open" which are not always easily transposable across those different communities.[7] So, for example, the need for "open source software" licences to explicitly permit a right to access a computer program's source code is of minimal relevance to those toiling in the "open data" movement; similarly, those in the open data movement need to navigate matters arising from the special characteristics of databases, such as the *sui generis* database right found in the European Union,[8] which are not obviously applicable to efforts in the "open standards" community.

Of the various "open" initiatives, this dissertation is most concerned with "open content" licences because they are most directly concerned with, and applicable to, the types of creative expression which are the core concern of the copyright regime. While we must avoid making too strong an argument for the unity of the various "open" initiatives, there are relevant commonalities, particularly between open source and open content licences, which reward the attention paid to other "opens". In the briefest formulation of the history of these initiatives, "open" started with open source software, which began largely as a

[3] Andrew Katz, "Everything Open" in Noam Shemtov & Ian Walden, eds, *Free and Open Source Software: Policy, Law, and Practice* (Oxford: OUP, 2013) at 440 (identifying the following "opens": open source software, open source hardware, open hardware, open knowledge, open content, open data, open software services, open politics, open democracy, open government, open public services, open standards, open specifications and formats, open innovation, open education, open publishing, and open access).

[4] *Ibid* at 441 (the term "open" has acquired "additional shades of meaning, and its usage varies from field to field").

[5] Alan Cunningham, "Open Source, Standardization, and Innovation" in Shemtov & Walden, *supra* note 3 at 384.

[6] Katz, *supra* note 3 at 440.

[7] See, generally, *ibid*.

[8] *Ibid* at 447.

process for collaboratively developing software, and only later accreted the additional meaning of a *type of licence*.[9] As Katz has highlighted, "for a field to develop an open movement, there has to be a corresponding closure, or at least a threat of closure"; in the case of software, the exclusive rights granted by copyright to the owners of software code prompted a movement to "liberate" or "open" the code.[10] Thus many "open" initiatives "gain their ideological inspiration from the open source process and tap into some of the same motivations … but in many instances these projects are not organized around the property regime that makes the open source process distinctive".[11] Open content bears a more linear relationship with open source than some of its "open" brethren due to its concern with materials capable of being protected by copyright. Because open source is as much about *process* as it is about *licensing*, not all observations about open source can be seamlessly transposed to open content. But there is a critical point of interface between the two: at some point, both open source and open content processes have an object of consideration that is protected by copyright and that can be licensed in a variety of different ways, and at some point the licensor who owns that object makes a decision to make it available under an open licence. That shared feature results in this dissertation's focus on open content licensing often being approached through the history and vernacular of open source software licensing. There is sufficient family resemblance between open source and open content licences to warrant a study of the latter having regard to scholarly examinations of the former.

The "open" initiatives have parallel and partially co-extensive development histories, and all share an originating point in the open source software movement. While they continue to display broadly similar political and ethical orientations, open initiatives are currently cognizable as separate social initiatives and have developed their own communities of participants, advocates, and scholars.[12] This section offers a

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[9] See, *e.g.*, Steven Weber, *The Success of Open Source* (Cambridge, MA: Harvard University Press, 2004) at 37-49. See also *ibid* at 56 ("The essence of open source is not the software. It is the *process* by which software is created." [emphasis in original]).

[10] Katz, *supra* note 3 at 444.

[11] Weber, *supra* note 9 at 268.

[12] The use of the plural "communities" is intentional; as Ross Gardler has observed in reaction to use of the term "open source community", "there is no such community, just as there is no 'closed source community'. Instead, there are a number of distinct communities who rally around specific software projects, modes of licensing and development models to address specific needs. These communities do not form a part of a larger coordinated and coherent 'open source community', although they may be related in one or more ways with other sub-communities. There are therefore a number of distinct clusters of communities that for a variety of reasons gather in a single place" (Ross Gardler, "Open Source and Governance" in Shemtov & Walden, *supra* note 3 at 42). Gardler's observation is apposite for other "open" initiatives and their communities.

brief survey of the parallel histories of these "open" movements to facilitate the subsequent narrowing of focus on "open content" licences and the competing definitions advanced for the term.

The "open source" software movement was the first of the open movements to develop a coherent public identity. The movement initially used the name "free software"[13] and was almost entirely the work of Richard Stallman, who in the mid- and late-1980s developed a computer operating system he dubbed "GNU", released it under a "free" licence called the GNU General Public Licence ("**GNU GPL**"), and established the Free Software Foundation ("**FSF**").[14] Nearly fifteen years prior to the founding of the FSF, in 1971, Michael S. Hart initiated what would become Project Gutenberg, an effort to digitize and archive the texts of public domain literary works and make them available for download through computer networks.[15] Notwithstanding its early origins, Project Gutenberg would not become widely known or particularly active until wider access to the internet during the 1990s enabled the distribution of the labour of digitizing and proofreading the works beyond the efforts of Hart himself.[16] In the meantime, the "free software" movement experienced a seminal moment in 1991 when software developer Linus Torvalds made use of the GNU code and released (under the terms of the GNU GPL) the Linux "kernel" – the central core of an operating system which would go on to become one of the most popular computer operating systems in the world.[17] Also in 1991, Paul Ginsparg, a professor at Cornell University, created the www.arXiv.org repository for early versions of physics papers. By the late 1990s, the proliferation of article repositories led to the creation of the Open Archives Initiative, which sought to develop interoperability standards for the repositories.[18]

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[13] With respect to the use of the word "free", Richard Stallman coined the frequently cited epigram that he was using "free" in the sense found in the phrase "free speech", but not in the sense found in the phrase "free beer" (see Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004) at xiv; see also Richard M. Stallman, *Free Software, Free Society: Selected Essays of Richard M. Stallman* (Boston, MA: Free Software Foundation, 2002) at 43).

[14] See generally Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York, NY: Vintage Books, 2002) at 52ff. See also Richard Stallman, "Free Software" in Mark Perry and Brian Fitzgerald, eds., *Knowledge Policy for the 21st Century: A Legal Perspective* (2011: Toronto, Irwin Law Canada) at 9ff.

[15] See Glyn Moody, "Gutenberg 2.0: the birth of open content" (March 29, 2006) available at https://lwn.net/Articles/177602/. See also https://en.wikipedia.org/wiki/Project_Gutenberg and http://www.gutenberg.org/wiki/Gutenberg:The_History_and_Philosophy_of_Project_Gutenberg_by_Michael_Hart

[16] See Glyn Moody, "Gutenberg 2.0: the birth of open content" (March 29, 2006) available at https://lwn.net/Articles/177602/.

[17] Lessig, *supra* note 14 at 54-55. See also https://en.wikipedia.org/wiki/Linux.

[18] See Glyn Moody, "Parallel universes: open access and open source" (February 22, 2006) available at https://lwn.net/Articles/172781/. See also https://en.wikipedia.org/wiki/Open_Archives_Initiative.

Over the course of the two decades since the mid-1990s, as what would come to be called "open source" matured and cohered, a set of previously amorphous movements that focused on what would come to be known as "open" principles began to sort themselves more pronouncedly by reference to area of endeavour and began to expressly adopt "open" terminology. Stallman's "free software" movement had mutated in the process of its dissemination, until there was increasing divergence between different subsets of the "free software" community. The Debian Project, for example, in 1997 published a "social contract" which included a set of "Free Software Guidelines"[19] – but "free software" purists objected to the Debian definition because it permitted commercial use of nominally "free" software. The movement ultimately branched into separate initiatives, with Stallman continuing to police what he deemed acceptable as "free software",[20] while a different set of participants cohered around a model that was more willing to embrace commercial exploitation of open source software; marking the rupture between the two was the christening of the non-Stallman movement as "open source" (as distinct from "free") at an historic software development conference in 1998.[21] The Open Source Initiative, founded in 1998, continues to be a leading organization in the maintenance of and advocacy for the open source software community, and has developed the Open Source Definition, which draws on the Debian Free Software Guidelines.[22] The "free open scholarship" movement which had been germinated by Ginsparg's archiving and Project Gutenberg culminated in a series of declarations about "open access" to research literature – namely, the Budapest Open Access Initiative (2001),[23] the Bethesda Statement on Open Access

[19] See https://www.debian.org/social_contract.

[20] See, *e.g.*, Stallman, *Selected Essays*, *supra* note 13 at 57ff.

[21] See Glyn Moody, "Parallel universes: open access and open source" (February 22, 2006) available at https://lwn.net/Articles/172781/. See also Press Release dated April 14, 1998 ("Open Source Pioneers Meet in Historic Summit") available at http://www.oreilly.com/pub/pr/796 and http://www.elearnspace.org/Articles/open_source_part_1.htm. On the split between Stallman's "free software" and "open source", see https://en.wikipedia.org/wiki/Open_Source_Initiative ("The Open Source Initiative chose the term 'open source' … to 'dump the moralizing and confrontational attitude that had been associated with 'free software'' and instead promote open source ideas on 'pragmatic, business-case grounds"). See also Weber, *supra* note 9 at 114-115.

[22] See https://opensource.org/about ("we are the stewards of the Open Source Definition (OSD) and the community-recognized body for reviewing and approving licenses as ODS-conformant"). See also https://en.wikipedia.org/wiki/Open_Source_Initiative. The OSI has published the "Open Source Definition" (https://opensource.org/osd) which delineates eight requirements for a licence to be considered an "open source" licence.

[23] See Glyn Moody, "Parallel universes: open access and open source" (February 22, 2006) available at https://lwn.net/Articles/172781/. See also http://www.budapestopenaccessinitiative.org/.

Publishing (2003),[24] and the Berlin Declaration on Open Access to Knowledge in the Science and Humanities (2003).[25] The related "open data" movement advocated for increased access to government-generated and otherwise publicly-funded data; seminal moments in the "open data" movement include the 2004 Final Communique of the OECD Committee for Scientific and Technological Policy Ministerial Level[26] and the 2007 Sebastopol, California conference which resulted in the "8 Principles of Open Government Data".[27] In 2012, as the culmination of a series of declarations and conventions pertaining to matters of education and internet access, the UNESCO-hosted World Open Educational Resources (OER) Congress adopted the 2012 Paris OER Declaration, which pertained to materials for teaching and learning.[28]

While the various "open" movements, initiatives and definitions discussed to this point share some common sources and impulses, we can nonetheless identify a contemporary taxonomy of "open" movements distinguishable by the primary object of their attention or the endeavour they seek to promote.[29] "Open source" is concerned primarily with computer software (and the related "open hardware" movement is concerned with computer hardware); "open access" is largely concerned with facilitating access to the outputs of academic research, while "open data" focuses on government-generated data and has pronounced governance and political accountability overtones; and "open education" is focused on materials of various types which are to be used for teaching, learning and research purposes, with

[24] http://legacy.earlham.edu/~peters/fos/bethesda.htm. See also https://en.wikipedia.org/wiki/Bethesda_Statement_on_Open_Access_Publishing.

[25] https://openaccess.mpg.de/Berlin-Declaration. See also https://en.wikipedia.org/wiki/Berlin_Declaration_on_Open_Access_to_Knowledge_in_the_Sciences_and_Humanities.

[26] http://www.oecd.org/science/sci-tech/sciencetechnologyandinnovationforthe21stcenturymeetingoftheoecdcommitteeforscientificandtechnologicalpolicyatministeriallevel29-30january2004-finalcommunique.htm.

[27] https://opengovdata.org/. For further details on the history of the open data movement, see http://www.paristechreview.com/2013/03/29/brief-history-open-data/.

[28] See http://www.unesco.org/new/en/communication-and-information/access-to-knowledge/open-educational-resources/what-is-the-paris-oer-declaration/. "Open Educational Resources" are "teaching, learning and research materials in any medium, digital or otherwise, that reside in the public domain or have been released under an open license that permits no-cost access, use, adaptation and redistribution by others with no or limited restrictions" (UNESCO 2012 Paris OER Declaration). For a history of the OER movement, see http://www.oerup.eu/module-1/oer-history/ and http://timemapper.okfnlabs.org/okfnedu/open-education-timeline#54.

[29] An illustration of how the different focal points impact the work of the organizations and their relationships to "open content": the Free Software Foundation has released the GNU Free Documentation License https://www.gnu.org/licenses/fdl.html), which, while applicable to text-based works, was designed for use with, and is almost solely used in conjunction with, computer software instruction manuals (see also: https://en.wikipedia.org/wiki/GNU_Free_Documentation_License).

significant, though not exclusive, attention paid to education initiatives in countries with developing economies.[30] Notwithstanding the articulable distinctions among the various initiatives, there is often considerable overlap among the participants and organizations concerned with "open" matters.

Advancing in tandem with those other open initiatives was the development of a concept termed "open content". While initially focused on materials for use in teaching, the open content movement in relatively short order was reoriented towards addressing creative expression more generally. The term "open content" was coined by David Wiley in 1998 in conjunction with his creation of the Open Content Project, which he started "to evangelize a way of thinking about sharing materials, especially those that are useful for supporting education".[31] In 2001, Lawrence Lessig, Hal Abelson and Eric Eldred started what would become the Creative Commons Corporation, which created and released a modular suite of "open" content licences; Lessig has cited Stallman as an inspiration for the organization, and described the goal of the Creative Commons initiative as "produc[ing] copyright licenses that artists, authors, educators, and researchers could use to announce to the world the freedoms that they want their creative work to carry".[32] Wiley eventually shuttered the Open Content Project and folded it into the work of the Creative Commons organization. In 2003, Wiley announced the "official closing" of the Open Content Project because he felt that the Creative Commons initiative had overtaken the work of the Open Content Project; he advised readers to cease using the open licences published by the Open Content Project and encouraged them to instead adopt Creative Commons licences.[33]

As can be gleaned from the description of the story thus far, there is significant cross-pollination of ideas and individuals among these various projects. Following the combination of the Open Content Project and Creative Commons, two other relevant initiatives flowered, one of which has since shuttered and one of which has grown into an international organization rivalling Creative Commons in the scope of

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[30] For a more detailed examination of the interrelationships among the development histories and ideological aspects of various "open" movements see Severine Dusollier, "Sharing Access to Intellectual Property Through Private Ordering" (2007) 82 Chicago-Kent Law Review 1391. See also Katz, *supra* note 3, who identifies further "open" initiatives, including open government, open standards and open innovation.

[31] http://web.archive.org/web/20030802222546/http://opencontent.org/. The Open Content Project maintains a website at http://opencontent.org.

[32] https://creativecommons.org/2005/10/06/ccinreviewlawrencelessigonsupportingthecommons/.

[33] http://web.archive.org/web/20030802222546/http://opencontent.org/ ("I'm closing OpenContent because I think Creative Commons is doing a better job of providing licensing options which will stand up in court"). Wiley joined Creative Commons as its Director of Educational Licences (*ibid*). Wiley continues to maintain and update the opencontent.org website, which includes a blog authored by Wiley devoted to "open content"-related matters with a particular focus on educational materials.

its ambitions and the volume of its activity. Second to start, though first to fold, was the Definition of Free Cultural Works ("**DFCW**") project initiated in 2006 by Erik Möller.[34] Similarly to what Wiley had done with the Open Content Project, though more programmatically, the DFCW project developed definitions of both "free cultural works" and "free culture licences".[35] Additionally, the DFCW provides a list of putatively "open content" licences and the extent of their compliance with the DFCW's Free Culture License definition.[36] While the DFCW appears to be defunct as a viable project,[37] the DFCW definitions retain some salience in the open content community – for example, Creative Commons still identifies some of its licences (namely the CC-BY and CC-BY-SA licences) as compatible with the DFCW's definition of "free cultural works".[38]

The other initiative that started after the merging of the Open Content Project and Creative Commons was the Open Knowledge Foundation, founded by Rufus Pollock in 2004. The Open Knowledge Foundation has subsequently turned into Open Knowledge International ("**OKI**"), which operates an international "network of people passionate about openness, using advocacy, technology and training to unlock information and enable people to work with it to create and share knowledge".[39] OKI has shepherded the development of the "Open Definition", which explicitly cites the Open Source Definition and the Debian Free Software Guidelines as precursor definitions.[40] OKI's Open Definition "sets out principles that define 'openness' in relation to data and content".[41] The original public version of the "Open Definition" (version 1.0) was released in 2006, with the current version (version 2.1) having been publicly released in 2015;[42] as such, the OKI "Open Definition" represents the most recently attended to iteration of a definition for "open content" licences. As with the DFCW, OKI maintains a website that

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[34] See http://freedomdefined.org/History. Among those contributing or providing feedback to the DFCW were Richard Stallman and Lawrence Lessig.

[35] See http://freedomdefined.org/Definition.

[36] See http://freedomdefined.org/Licenses.

[37] The most recent substantive edit to the DFCW's online definition was made in 2008 and at least one scholar has described the project as a failure due to the fact that "the community never widely agreed upon the term [*i.e.*, "free cultural work"] or its definition" (see Kreutzer, *supra* note 2 at 111).

[38] See https://creativecommons.org/share-your-work/public-domain/freeworks/.

[39] https://okfn.org/about/. See also https://en.wikipedia.org/wiki/Open_Knowledge_International.

[40] See https://en.wikipedia.org/wiki/Rufus_Pollock. See also https://okfn.org/ and http://opendefinition.org/.

[41] http://opendefinition.org/. OKI offers two summaries of the "open" concept: (1) "open means anyone can freely access, use, modify, and share for any purpose (subject, at most, to requirements that preserve provenance and openness)"; and (2) "open data and content can be freely used, modified, and shared by anyone for any purpose" (*ibid*). A copy of the complete OKI definition is included in Appendix C.

[42] http://opendefinition.org/history/.

provides the Open Definition and identifies "Conformant Licenses" which are "conformant with the principles laid out in the Open Definition".[43] While this chapter focuses on articulating a definition of open content licences, and it bears noting that Creative Commons licences are among the most well-known open content licences, a number of other open content licences have been promulgated, including the Licence Art Libre / Free Art License and the Open Audio License.[44]

In 2019, therefore, any attempt to define "open content licence" must contend with two different elements: the active organizations and the definitions that have been developed to date. The dominant active organizations are Creative Commons and Open Knowledge International. While the Creative Commons organization maintains and promotes a suite of user-friendly copyright licences and works with a large number of other organizations to "develop, support, and steward[] legal and technical infrastructure that maximizes digital creativity, sharing, and innovation",[45] it does not currently espouse a purportedly categorical definition of what constitutes an open content licence. Open Knowledge International operates a variety of different projects around the world focused primarily on fostering adoption of open data and open knowledge practices; while it does not offer its own form of licence, it does devote time and resources to the development and maintenance of the Open Definition, which purports to provide a comprehensive definition of open content licences. For purposes of this chapter, then, OKI will be the object of attention, while Chapter 4 will attend to the Creative Commons licences and their reception. As will be set out in detail in the next Part of this chapter, there have been three sustained attempts (the Open Content Project, the DFCW and the OKI "Open Definition") at creating a definition of the concept of open content licences; two of those definitions (the Open Content Project and

[43] See www.opendefinition.org and http://opendefinition.org/licenses/. Interested parties can submit a licence to OKI for determination as to whether it conforms to the Open Definition.

[44] For the Licence Art Libre see http://artlibre.org/. For the Open Audio License, see https://web.archive.org/web/20040818074301/http://www.eff.org/IP/Open_licenses/20010421_eff_oal_1.0.html. Severine Dusollier identified a number of other open licences, though many of them appear to be defunct in that they are no longer accessible online and no longer appear to be maintained by their original authors or sponsoring organizations (see Severine Dusollier, "Open Source and Copyleft: Authorship Reconsidered?" (2003) Columbia J L & Arts 281 at fn 13). For a list of other open content licences, see Lawrence Liang, *Guide to Open Content Licenses* (v1.2) (2005, Piet Zwart Institute), available at https://archive.org/stream/media_Guide_to_Open_Content_Licenses/Guide_to_Open_Content_Licenses_djvu.txt.

[45] https://creativecommons.org/about/mission-and-vision/.

the DFWC) are no longer actively maintained, but all continue to be referenced by open content community participants.[46]

Before turning to the three definitions of open content licence which have been developed by open content advocates, the concept of "copyleft" or "share-alike" provisions which are often found in open licences warrants attention. In part the attention is warranted because, historically, analyses of open licensing, particularly open source licensing, often entail at least some discussion of the topic. But the attention is warranted also because the matter permits the introduction of some general concepts relevant to open content licensing.

(c) *"Copyleft" / Viral / Share-Alike Provisions*

Debates over "share-alike" provisions are ubiquitous in discussions about open licences.[47] Such provisions are referred to using various terms – share-alike, viral, copyleft – but irrespective of the terminology used, they describe contractual provisions that are employed to accomplish the same purpose: in Katz's formulation, they are "designed to ensure that once material is made available under an open licence, it, and its derivatives, will remain available under that licence".[48] Séverine Dusollier describes such provisions as the mechanism by which the "anti-exclusion effect propagates" through the family tree of derivative works derived from the initial openly-licensed work.[49] As Dusollier notes, share-alike provisions are not necessary features of all open content licences,[50] but their use is widespread.[51] Where a share-alike provision is present, it imparts a "viral nature" to the licence: the license "applies

[46] See, *e.g.*, supra note 38 and accompanying text.

[47] See generally https://www.gnu.org/licenses/copyleft.en.html and https://opensource.com/resources/what-is-copyleft.

[48] Katz, *supra* note 3 at 445.

[49] Dusollier, "Sharing Access", *supra* note 30 at 1397-98. Dusollier has written that "[i]n a broad sense, copyleft can be used as a synonym of open source or open access. It results from a play on words where copy*left* stands in a stark contrast with copy*right*"; but that "[i]n a more strict sense", the term is used simply to refer to a type of contract provision which carries the features of virality (1397-98). This dissertation adopts Dusollier's stricter sense of the term. Margaret Jane Radin appears to have been the scholar who coined the term "viral contract" (Margaret Jane Radin, "Human, Computers and Binding Commitment" (2000) 75 Ind L J 1125 at 1132).

[50] Dusollier, "Sharing Access", *supra* note 30 at 1399.

[51] For example, the GNU General Public License (GPL), the oldest of the popular open source software licences, utilizes what is referred to as a "strong copyleft" provision (Luke McDonagh, "Copyright, Contract, and FOSS" in in Shemtov & Walden, *supra* note 3 at 82). The Creative Commons licence suite includes a "ShareAlike" (SA) module, and Creative Commons' own reports on usage indicate that 51% of Creative Commons licensors make use of the SA module (see *State of the Commons Report 2015*, available at https://stateof.creativecommons.org/2015/; the report indicates that 37% of users use the CC-BY-SA licence, with an additional 14% using the CC-BY-NC-SA licence).

automatically – along the chain of distribution – to each new copy" of the licensed work and to derivatives and adaptations.[52] As Dusollier describes it, "the free/open-source qualification of the [work/licence] is said to contaminate each derivative work based on it".[53] The Creative Commons BY-SA (Attribution-ShareAlike) 4.0 license contains an illustrative example of a share-alike provision: the "human-readable" summary of the licence states that "if you remix, transform, or build upon the material, you must distribute your contributions under the same license as the original". [54] The intention of the drafters is to employ such "contamination" mechanisms to "construct a chain of successive contracts imposing the sharing principle at each stage … impos[ing] the sharing ethos [on] improvers of works or inventions".[55] To ensure the propagation of the share-alike mechanism, open content licences use two related mechanisms: a condition that subsequent distributions of the licensed work and its derivatives must themselves be licensed on the same open terms and a condition that a copy of the open content licence be included with (or "attached to") the licensed work in its subsequent distributions.[56] The share-alike provision represents an attempt to endow or impress upon the property-object of the copyrighted work a form of jural relationship redolent of real property relationships – Margaret Jane Radin has described it as an "attempt to make commitments run with a digital object … to make the fine print run with the product".[57]

Although not every open content licence contains a share-alike provision, from Ross Gardler's work we can draw the conclusion that all open content licences can be categorized in terms of the manner in which they address the share-alike issue, whether through explicit treatment or by negative inference. Gardler describes open source licences as arrayed on a spectrum ranging from, at one end, reciprocal (or "copyleft") licences (which include explicit "share-alike" provisions that preclude a licensee from applying proprietary business models or licensing terms to the licensed content) to, at the other end,

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[52] Dusollier, "Sharing Access", *supra* note 30 at 1399.

[53] *Ibid*.

[54] https://creativecommons.org/licenses/by-sa/4.0/. The "legal code" version of the CC BY-SA 4.0 licence states (capitalization in original): "if You Share Adapted Material You produce, the following conditions also apply (1) The Adapter's License You apply must be a Creative Commons license with the same License Elements, this version or later, or a BY-SA Compatible License. (2) You must include the text of, or the URI [Uniform Resource Identifier] or hyperlink to, the Adapter's License You apply. … (3) You may not offer or impose any additional or different terms or conditions on, or apply any Effective Technological Measures to, Adapted Material that restrict exercise of the rights granted under the Adapter's License You apply." (https://creativecommons.org/licenses/by-sa/4.0/legalcode).

[55] Dusollier, "Sharing Access", *supra* note 30 at 1414.

[56] *Ibid* at 1414-15.

[57] Radin, *supra* note 49 at 1132.

permissive licences (which "allow the adoption of any business model, including the creation of proprietary derivatives").[58] Somewhere between those two poles are what Gardler describes as "partial copyleft" licences which "only demand reciprocal sharing of modifications to the free software, but do permit embedding of this code in proprietary products";[59] such terms require that the licensed content remain available under the "open" terms on which they were made available, but do not require that "open" terms be applied to the entirety of any new or derivative work into which the licensed content is incorporated.[60] The categorization of open licences is sometimes rendered as strong copyleft, weak copyleft and non-copyleft.[61] An illustration assists in schematizing the operation of open licences in accordance with the strong/weak/non-copyleft spectrum. Imagine a licensor (A) has a made a piece of copyright-protected content – a fifty-line poem – available under an open licence; a licensee (B) wishes to include the poem in an anthology and wishes to make the anthology available for sale to others. If the licence in question is a *strong* copyleft licence, then if B wants to make use of A's poem in compliance with the terms of the licence, B must make the *entirety* of the anthology available under the "open" terms of the licence which A used to license the poem. If the licence in question is a *weak* copyleft licence, then in order to comply with its terms B is *not* required to make B's anthology available under the same terms as A's open licence, but *is* required to continue to make A's poem available under the terms of the licence which A used. If the licence in question is a *non*-copyleft licence (*i.e.*, it does *not* contain any share-alike provision), then B is under no restrictions or obligations in respect of how B licences or otherwise exploits the anthology – B can treat the licensed poem however B sees fit.

Some commentators have expressed skepticism about the effectiveness of share-alike provisions and have identified considerable practical complexities that arise from attempts to comply or enforce such provisions.[62] Dusollier refers to the matter as the "legal trick of copyleft or viral contamination",[63] and states that "even though it pretends to propagate through the distribution … of the [work] it covers, the self-perpetuation of a copyleft license depends on many conditions", including thresholds questions about

[58] Gardler, *supra* note12 at 41.

[59] *Ibid* at 44.

[60] See Vikrant Narayan Vasudeva, *Open Source Software and Intellectual Property Rights* (Alphen aan den Rijn, the Netherlands: Wolters Kluwer, 2014) at 90-94.

[61] See generally McDonagh, *supra* note 51.

[62] See, *e.g.*, Kreutzer, *supra* note 2 at 130-134 and Vasudeva, *supra* note 60 at 95-122.

[63] Dusollier, "Sharing Access", *supra* note 30 at 1434.

the enforceability of the licence across differing jurisdictions and legal systems and competing (or non-existent) definitions of "derivative work" in different copyright regimes.[64] Some open licences attempt to solve the enforceability issue by stipulating that use of the work to which the licence is "attached" constitutes acceptance of the terms of the licence.[65] It is beyond the scope of this project to delve into the problems posed by share-alike provisions; however, the topic is relevant to this discussion because share-alike provisions, at first glance (though not on further inspection), seem to mark out a particular *type* of licence, and assist in the project of formulating a definition for open content licences. Share-alike provisions are indicia that a licence may be, or may be attempting to be, an open content licence. While not all open content licences contain share-alike provisions, and not all content licences that contain share-alike provisions qualify as "open" content licences, it is the case that where a share-alike provision is present, the openness of the licence needs to be assessed.

II. Definitions Developed by Advocates of "Open Content"

This Part reviews the three definitions of open content licence developed by David Wiley (in the context of his Open Content Project), the Definition of Free Cultural Works, and the Open Definition developed by Open Knowledge International. As alluded to above, these three definitions are canvassed for two primary reasons: (i) each is a fully-developed consideration of the matter whose final form was made through the collaborative efforts of multiple individuals (*i.e.*, these are not simply idle or transitory musings by a single author who devoted little time or effort to the matter); and (ii) each achieved widespread recognition within the open content community and, to greater or lesser extent, continue to exert influence in contemporary discussions within the community about open content licences. The definitions of open content licences which have been developed by initiatives such as the Open Content Project are examples of what Thomas Riis has referred to as "user generated law": non-state or private ordering structures, norms and practices which are developed through a user-driven process of

[64] *Ibid.*

[65] See, *e.g.*, Section 9 of the GNU General Public License (available at https://www.gnu.org/licenses/gpl-3.0.en.html) ("by modifying or propagating a covered work, you indicate your acceptance of this License to do so"). See also Robert W. Gomulkiewicz, "How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2B" (1999) 36 Hous L Rev 179 and Note, "On Enforcing Viral Terms" (2009) 122 Harv L Rev 2184.

emergence, diffusion and adoption.[66] That development is made possible because copyright law leaves an appreciable "autonomy space" for those are subject to it: in Riis' terminology, "autonomy space" is the latitude for private ordering "left over" by a legal regime, a reserve within the bounds of the legal regime wherein actors are afforded the latitude to autonomously establish private regulatory models.[67] As described in Chapter 1, the copyright regime's allowance for licensing accords a significant degree of autonomy to those who are subject to copyright's purview to structure their relationships – in their guises as licensors and licensees – as they may agree. Open content licences, and the definitions developed by open content communities to enable them to recognize and identify licences as "open", can thus be understood as a form of user generated law, developed in the manner envisioned by the Riis model.[68] That facilitation of autonomy, through the development, adoption and iteration of open content licences, echoes the importance of autonomy noted in the accounts of the communicative copyright scholars discussed in Chapter 2.

(a) *David Wiley and the Open Content Project*

David Wiley, as part of the Open Content Project ("**OCP**"), designed the OpenContent License, which has been termed "the first proper free content license";[69] released in 1998, it was subsequently replaced by the Open Publication License.[70] In addition to the release and updating of the licences, the Open Content Project published a definition of the term "open content" – in the OCP's taxonomy, open

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[66] Thomas Riis, "User generated law: re-constructing intellectual property law in a knowledge society" in Thomas Riis, ed, *User Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society* (Cheltenham: Edward Elgar Publishing, 2016) at 11. Riis develops his model of user generated law by reference to Eric von Hippel's work on the process of innovation in products and services; see *ibid* at 5, citing, *inter alia*, Eric von Hippel, *The Sources of Innovation* (Oxford: OUP, 1988). User generated law can take a wide variety of forms – Riis notes examples ranging from Creative Commons licences to roller derby pseudonyms to magicians' secrets to stand up comedians (*ibid* at fns 34-41 and accompanying text).

[67] *Ibid* at 10. Riis posits that in some areas of law (*e.g.*, tax) the "public policy considerations are so strong that private actors only have very limited freedom to establish private regulatory models" (*ibid*); by contrast, copyright law and contract law each leave a large (though not equivalent) autonomy space for those subject to them.

[68] See Henrik Udsen, "Open source Licences" in Riis, *supra* note 66 (concluding that the history of open source software licencing accords with the Riis model).

[69] Volker Grassmuck, "Towards a New Social Contract: Free-Licensing into the Knowledge Commons" in Guibault & Angelopoulos, *supra* note 2 at 30.

[70] The "OpenContent License" ("**OCL**") was made publicly available in 1998, and was replaced in 1999 with the "Open Publication License" ("**OPL**"). When Wiley announced the shuttering of the OCP, he advised that development of the OCL and OPL had ceased, that he discouraged their continued use and that in his view users were "far better off using a Creative Commons license" (see http://opencontent.org/blog/archives/329). For a copy of the OCL, see http://web.archive.org/web/20030806033000/http://www.opencontent.org/opl.shtml. A copy of the OPL is available at http://opencontent.org/openpub/.

content "describe[s] any copyrightable work (traditionally excluding software, which is described by other terms like 'open source') that is licensed in a manner that provides users with free and perpetual permission to engage in the 5R activities".[71] The OCP defines the "5R activities" as follows:

(1) Retain – the right to make, own and control copies of the content (*e.g.*, download, duplicate, store, and manage)

(2) Reuse – the right to use the content in a wide range of ways (*e.g.*, in a class, in a study group, on a website, in a video)

(3) Revise – the right to adapt, adjust, modify, or alter the content itself (*e.g.*, translate the content into another language)

(4) Remix – the right to combine the original or revised content with other material to create something new (*e.g.*, incorporate the content into a mashup)

(5) Redistribute – the right to share copies of the original content, your revisions, or your remixes with others (*e.g.*, give a copy of the content to a friend)[72]

The OCP website notes that there are many different versions of what it terms "open licenses", the use of which in connection with a creative work "qualifies [that work] to be described as open content".[73] Those different open licenses may "place requirements (*e.g.*, mandating that derivate works adopt a certain license) and restrictions (*e.g.*, prohibit 'commercial use') on users as a condition of the grant of the 5R permissions".[74]

The OCP definition of an open content licence is relatively rudimentary and, therefore, expansive, allowing a plethora of licenses to qualify as open content licences. Although parsimonious in its criteria, its power lies in its identification of the core *activities* that comprise "open" treatment of a licensed work.

[71] http://opencontent.org/definition/. A copy of the complete OCP definition is included in Appendix A.

[72] *Ibid.*

[73] *Ibid*.

[74] *Ibid.* The Open Content Project goes on to gently criticize those who might elect to impose requirements and restrictions (specifically noting the Creative Commons licences which prohibit commercial use) because "the choice typically harms the global goals of the broader open content community".

(b) *The Definition of Free Cultural Works*

The Definition of Free Cultural Works ("**DFCW**") project was launched in May 2006 and offers definitions of two concepts: "Free Cultural Works" and "Free Culture Licenses".[75] The DFCW stipulates that a "Free Culture License" must "grant the following freedoms without limitation":[76]

i. to use and perform the work

ii. to study the work and apply the information

iii. to redistribute copies

iv. to distribute derivative works

The DFCW definition allows for "permissible restrictions" which do not "impede [the] essential freedoms" and which would not obviate the possibility of qualifying as a "Free Culture License".[77] The following are identified as permissible restrictions:[78]

(i) requirements for attribution and restrictions on implying endorsement

(ii) "symmetric collaboration"[79] provisions which "ensure that derivative works themselves remain free works" (*e.g.*, "a requirement that all derivative works are made available under the same license as the original")[80] [*i.e.*, share-alike, copyleft provisions]

(iii) provisions that "strive to further ensure that the work is a free work: for example, access to source code, or prohibition of technical measures restricting essential freedoms"[81]

The DFCW stipulates that the following are not permissible restrictions on a licensed work:[82]

1. restrictions on the creation of derivative works

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[75] The DFCW material is located at www.freedomdefined.org. The DFCW stipulates that licensing under a "Free Culture License" is a necessary, but not sufficient, condition for a work to qualify as a "Free Cultural Work". To qualify as a "Free Cultural Work", the work must, in addition to being licensed under a "Free Culture License", be made available on the following bases: (a) all available source data must be made available; (b) for digital files, the work must be made available in a format which is not protected by patents; (c) no technical measures can be used to limit any of the essential freedoms; and (d) there must not be any other legal restrictions (*e.g.*, patents, contract rights, privacy rights) which would impede the essential freedoms.

[76] http://freedomdefined.org/Definition. Note that the discussion herein relies on version 1.1 of the "Free Culture License" Definition, accessed January 2, 2017. A copy of the complete DFCW definition is included in Appendix B.

[77] *Ibid.*

[78] http://freedomdefined.org/Permissible_restrictions.

[79] http://freedomdefined.org/Definition.

[80] http://freedomdefined.org/Permissible_restrictions.

[81] *Ibid.*

[82] *Ibid.*

2. restrictions on advertising of a derivative work

3. restrictions on commercial use

4. restrictions on use in connection with political causes

5. limitations to use of the licensed work in "3rd world" or "poor countries"

While the DFCW definition incorporates elements of the OCP definition's "5Rs" when it identifies the core "freedoms" which an open content licence must impart on its licensees, the DFCW also innovates on the OCP definition by identifying disqualifying features whose presence would convert a purportedly open content licence into a non-open content licence. The DFCW is more refined and elaborate as compared to the OCP definition, in particular with its delineation of permissible and impermissible restrictions, introducing the notion that an ideal definition should make use of both qualifying and disqualifying features.

(c) *Open Knowledge International's Open Definition*

The OKI Open Definition offers a lengthy definition which purports to "define 'openness' in relation to data and content".[83] OKI provides two summary statements of the Open Definition:

> "Open means **anyone** can **freely access, use, modify, and share**, for **any purpose** (subject, at most, to requirements that preserve provenance and openness)".
>
> "Open data and content can be **freely used, modified, and shared** by anyone for **any purpose**".[84]

Section 2 of the Open Definition defines an "Open License" as one which contains the following "required" permissions in respect of the licensed work: [85]

i. free use

ii. redistribution (including sale), whether on its own or as part of a collection of works

[83] http://opendefinition.org/.

[84] http://opendefinition.org/ [emphasis in original].

[85] http://opendefinition.org/od/2.1/en/. Note that the discussion herein relies on version 2.1 of the Open Definition, accessed January 2, 2017. The Open Definition page includes the following note: "The Open Definition was initially derived from the Open Source Definition, which in turn was derived from the original Debian Free Software Guidelines, and the Debian Social Contract of which they are a part, which were created by Bruce Perens and the Debian Developers. Bruce later used the same text in creating the Open Source Definition. This definition is substantially derivative of those documents and retains their essential principles. Richard Stallman was the first to push the ideals of software freedom which we continue."

iii. modification (*i.e.*, the creation of derivatives and the distribution of such derivatives)

iv. separation (*i.e.*, the licensed work may be disaggregated and the parts freely used, distributed or modified)

v. compilation (*i.e.*, the license "must allow the licensed work to be distributed along with other distinct works without placing restrictions on these other works")

vi. non-discrimination (the "license must not discriminate against any person or group")

vii. propagation ("the rights attached to the work must apply to all to whom it is redistributed without the need to agree to any additional legal terms")

viii. application to any purpose ("the license must allow use, redistribution, modification, and compilation for any purpose. The license must not restrict anyone from making use of the work in a specific field of endeavor")

ix. no charge ("the license must not impose any fee arrangement, royalty or other compensation or monetary remuneration as part of its conditions")

In addition to the foregoing required permissions, the OKI Open Definition stipulates that an "open license" cannot "limit, make uncertain, or otherwise diminish" the required permissions, except for the following "allowable conditions":

(i) attribution – may require identification of contributors, owners, sponsors, creators, etc.

(ii) integrity – may require that modified versions carry a different name or version number

(iii) share-alike – may require that distribution of the licensed work be made under the same (or similar) licence terms

(iv) notice – may require retention of copyright notices and identification of the licence

(v) source – may require that recipients of the work be provided with access to the preferred form for making modifications

(vi) technical restriction prohibition – may require that the work remain free of technical measures that would restrict exercise of otherwise allowed rights

(vii) non-aggression – may require that those who modify the licensed work also grant the public such additional permissions (*e.g.*, patent licences) as may be required to exercise the rights allowed by the license and may also condition permissions on not taking enforcement actions against licencees in connection with exercising any permitted right

By comparison with the DFCW definition, the Open Definition offers further elaboration on the nature of what an open content licence *must* contain and what it *can* contain without jeopardizing its ability to qualify as an open content licence. Lost in the transition from the DFCW definition to the Open Definition, however, is a clear articulation of what an open licence *cannot* contain, aside from the rather vague assertion that an open licence cannot "limit, make uncertain, or otherwise diminish" the required permissions.

III. Scholarly Definitions of Open Content Licensing

As noted earlier, as recently as 2011, Till Kreutzer observed that the definition of open content remained an "open issue".[86] Scholarly work regarding open licensing has tended to cluster around considerations of open source software licences and Creative Commons licences. What little attention has been paid to abstract considerations of "open" licensing has taken place largely in the context of open source licensing, rather than in connection with open content licenses. That discrepancy in attention can be explained by the different trajectories on which open source and open content licensing have developed. Open source, as a community, has been riven with multiple competing initiatives aimed at creating open source licences, often distinguished as much by philosophical and ethical divergence as by substantive differences between the provisions of the licences. Open content licensing, by contrast, has since 2001 been dominated by the Creative Commons licences, to the point that "open content" and "Creative Commons" sometimes appear to have become synonymous. Users and scholars of open source licences, then, are confronted with an ontological problem that users and scholars of Creative Commons licences are not: there are a plethora of purportedly "open source" licences and determining what qualifies as an "open source" licence is the subject of extensive practical debate within the open source community;[87] there is no similar mystery regarding what "qualifies" as a Creative Commons licence. So, while there has been significant work devoted to describing the permutations of open source licences and how they interact with one another, relatively few scholars have attempted in any systematic

[86] Pardon the pun. Kreutzer, *supra* note 2 at 111.

[87] Regarding open source licensing and the debates about what qualifies and what does not, see generally Gardler, *supra* note 12 at 41-51 and Vasudeva, *supra* note 60 at 47-60.

way to establish the defining conceptual elements of "open" licences;[88] of the handful of scholars that have done work on the matter, they often have proceeded by inductive inference from the provisions of what participants in open source communities deemed to be representative open source licences. This Part canvasses and summarizes the work of those scholars, commencing with observations about abstract aspects of open licences.

Ian Walden describes the concept of "open" as having distinguishing characteristics that can be sorted into positive and negative aspects; its positive characteristics bestow permissions on those who use "open" content, while its negative characteristics impose restrictions on those users.[89] As a result, the positive characteristics of "open" include freedoms granted to users "to use, modify and share" the licensed object, and imply a "freedom of choice and conduct" by contrast with an (undefined) archetypal non-open licensing regime.[90] The negative characteristics of "open" are the restrictions imposed on licensees that may be necessary in order to preserve the "positive" elements of the "open" licence (*e.g.*, prohibitions on asserting ownership of the licensed object thereby rendering it "closed").[91] As Walden notes, open licences are required to realize the goals of open approaches to content: so, for example, open source software licences are utilized to "enable the use of source code by others, specifically its modification and redistribution" – the open licence is the mechanism by which the open ethos is operationalized.[92] Because they are efforts to circumscribe the extent to which copyright law can be used to control content, open licences necessarily focus on the legal implications of the acts of reproduction, modification, and redistribution – activities that, in a digital environment, are effectively synonymous with any "use" of the licensed object.[93]

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[88] Okoli and Carillo (Chitu Okoli & Kevin Carillo, "Beyond Open Source Software: A Framework, Implications, and Directions for Researching Open Content" (September 19, 2013) available at https://ssrn.com/abstract=1954869) have offered their own "formal definition" of open content: "open content is any digitized work for which the rights holder authorizes royalty-free redistribution, while perhaps imposing some conditions and retaining some restrictions" (*ibid* at 5). The work of Okoli and Carillo on open content licensing is addressed more closely in Chapter 4, but their proposed definition, particularly as compared to the DFCW and OKI definitions, has limitations (such as the lack of definitional precision regarding permissible conditions and restrictions) that leave it outside the scope of this chapter's attention.

[89] Ian Walden, "Open Source as Philosophy, Methodology, and Commerce: Using Law with Attitude" in Shemtov & Walden, *supra* note 3 at 20.

[90] *Ibid*.

[91] *Ibid*.

[92] *Ibid* at 21.

[93] *Ibid*.

Dusollier identified three characteristics common to all open initiatives:[94] an initial assertion of an intellectual property right by an owner/licensor; the "reverse use" of exclusivity, *i.e.*, the exercise by the owner of their exclusive rights so as "not to exclude, but to grant freedom to use";[95] and the absence of discrimination with regard to licensees or "the equal treatment of any user who wants to use" the licensed work.[96] The second of Dusollier's common characteristics requires further attention in the context of open content licences: what is meant by "freedom to use" a licensed copyright-protected work? Richard Stallman enunciated what he called the "four essential freedoms" that define "free software";[97] others, such as Robert Gomulkiewicz, have adapted Stallman's four freedoms to describe them as necessary elements of an open source licence.[98] If we abstract the terminology used in Stallman's four essential freedoms, we can identify the core permissions which define an open content licence: (1) to access the licensed work (the *sine qua non* of any licence is that it grant permission to access in some fashion the jural object which is the subject of the licence); (2) to use or exploit the licensed work (specifically, permission to exercise the exclusive rights granted to copyright owners, which would include the rights of reproduction and communication); and (3) to modify the licensed work. As hinted at by Stallman and Gomulkiewicz, key to the nature of the open content licence is its granting of permission with respect to the licensor's exclusive right to control what activities can be undertaken with the licensed work and what can variably be termed adaptations or derivative works of the licensed work.[99]

As mentioned above, Open Knowledge International has published a *Guide to Open Licensing* that, utilizing relatively colloquial language, states that "an open [content] license is one which grants

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[94] Dusollier, Sharing Access *supra* note 30 at 1407-1410.

[95] *Ibid* at 1409 (further, "[t]he exclusivity conferred by the intellectual property right is thus conceived not as an exclusionary power but as a liberty or monopoly to decide not to engage in exclusion"). See also the discussion in Part II(a) of Chapter 1 of this dissertation.

[96] *Ibid* at 1409.

[97] Stallman's "four essential freedoms" are described as follows by the Free Software Foundation: (freedom 0) the freedom to run the program as you wish, for any purpose; (freedom 1) the freedom to study how the program works, and change it so it does your computing as you wish (access to the source code is a precondition for this); (freedom 2) the freedom to redistribute copies so you can help your neighbor; (freedom 3) the freedom to redistribute copies so you can help your neighbor (see https://www.gnu.org/philosophy/free-sw.html).

[98] See, *e.g.*, Robert W. Gomulkiewicz, "De-Bugging Open Source Software Licensing" (2002) 64 U Pitt L Rev 75 at 81 ("there are four fundamental rights that an open source license needs to grant: First, access to source code; second, the right to run the software for any purpose; third, the right to change the software in any way; fourth, the right to redistribute the original software and any derivatives").

[99] See Vasudeva, *supra* note 60 at 89 (writing in the context of open source software, Vasudeva refers to the copyright owner's right to control "improvements").

permission to access, re-use and redistribute a work with few or no restrictions".[100] That description can be rendered in the vocabulary of copyright theory and legislation as follows: a fundamental feature of the open content licence is the grant of permission by the owner-licensor to exercise the exclusive rights in a work granted to the owner-licensor by copyright law; Volker Grassmuck has described the same feature as the relinquishment of the right to make legal claims based on the economic rights that attend copyright ownership.[101] Steven Weber, writing specifically about open source licences, emphasizes a critical point about open licences: the open approach "radically inverts the idea of exclusion as a basis of thinking about property", instead conceptualizing and configuring the owner-licensor's exclusive rights "around the right to distribute, not the right to exclude".[102] A hallmark of open licensing is a reorientation of the purpose of the licence: it de-emphasizes the protection of the rights of the licensor and emphasizes the rights of the licensee with the goal of maximizing "the ongoing use, growth, development, and distribution" of the licensed content.[103]

The content and operation of open content licences is difficult to separate from the intentionality of its users and the norms and practices of the communities in which they operate. This is because the licences themselves are part of the attempt to construct and define that very community. Open licensing as an activity involves the creation of a "social structure" that enables a process of re-use and distribution, thereby expanding the scope of the content being licensed.[104] Weber describes the social structure of open source software as designed to achieve the following goals: (i) empowering users in part by shifting the locus of control over rights in the licensed content from licensor to licensee (subject to the licensor's right to "police" conformity with the conditions of the licence and possibly terminate it); and (ii) "constraining users from putting restrictions on other users (present and future) in ways that would defeat the original goals".[105] In Weber's view, focusing on the legal status or enforceability of open source licences is in part to misunderstand their function – they are a "de facto constitution … the core statement

[100] http://opendefinition.org/guide/.

[101] Grassmuck, *supra* note 69 at 22. As to the economic rights granted to copyright owners, see *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para 12.

[102] Weber, *supra* note 9 at 16.

[103] *Ibid* at 84.

[104] *Ibid* at 85.

[105] *Ibid*. The second goal described by Weber is consistent with a "strong copyleft" approach; but as an empirical matter, not all open licences contain copyleft provisions, and none of the definitions offered by the OCP, DFCW or OKI require copyleft provisions.

of the social structure that defines the community".[106] Such licences function within an effort to alter discourse and legal practice regarding intellectual property rights;[107] open content licences are thus often the documentary artifact that accompanies a larger program of advocacy and reform.[108] An open source licence is not merely a document that establishes and memorializes jural relations, it is also a performative statement that constitutes the explicit enunciation of the "norms and standards of behaviour that hold the community together".[109] The licence thus acts as a threshold, articulating the social code that will govern those who elect to enter the community defined by the licence and setting the terms of entry into the community; the identity of the community, and membership within it, is in part defined by the adoption of the licence. Weber identifies one of the animating norms of the communities defined by open licences as a norm of fairness – this standard of "fair" conduct is in part generated because those who participate in the community often expect to "be on both sides of a license", *i.e.*, they will be acting as both licensor and licensee at different times in connection with content made available under the licence.[110]

This notion of fairness – described by Weber as a core component of the open source community's identity and self-image[111] – acts as a vehicle for a number of normative expectations which are contained in open content licences. It entails expectations of freedom of action[112] and reciprocity amongst licensors and licensees. This notion of fairness is concerned less with distributional fairness than it is with predictability and equitable treatment: it is an expectation that the licensed content is made available on a set of stable terms, whose provisions are transparently disclosed and (comparatively)

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[106] *Ibid* at 179.

[107] Dusollier, "Sharing Access", *supra* note 30 at 1394 ("open-access licensing schemes seek to cause a normative change in the way intellectual property rights are exercised … [a] powerful discourse and ideology is voiced by the open-access movement – not only do they exercise IP rights differently, they hope their model will signify a real and durable change in the law itself").

[108] See, *e.g.*, Niva Elkin-Koren, "What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons", (2005) 74 Fordham L Rev 375 at 387 ("Creative Commons is a form of political activism and is best understood as a social movement seeking to bring about social change").

[109] Weber, *supra* note 9 at 179.

[110] *Ibid*.

[111] *Ibid.*

[112] I use the term "freedom of action" to cover three different concepts which Weber describes as "freedom", "non-discrimination" and "pragmatism" (*ibid* at 180). His three concepts cover, respectively: permission to undertake activities otherwise reserved to the copyright owner (*e.g.*, reproduction, telecommunication, *etc.*); the ability to avail oneself of the benefits of an open content licence irrespective of your identity (*e.g.*, your membership in a certain demographic group or community); and the latitude to carry out the permitted activities for any of a variety of different purposes (*e.g.*, whether commercial or non-commercial, and regardless of which industry the licensee operates).

readily understandable, and that can be subscribed to by any who voluntarily assent to be governed by the terms.

Andrew Katz, writing about conceptualizations of "open" and how attempts have been made to realize it in various communities and initiatives, describes "open" as having four "connotations".[113] With some slight embellishments to Katz's analysis, it is possible to use his connotations as descriptive criteria for the formulation of a definition for open content licences. Katz describes the four connotations (or characteristics) using the terms use-maximization, anti-closure, transparency and anti-lock in.[114] Katz's characteristics of openness can be re-cast as follows: (1) an initial disposition in favour of granting access to, and the right to reuse, information or content; (2) a concomitant tension between "anti-closure" and "use maximization" tendencies, meaning, on the one hand, a desire to prevent the "opened" information from being "re-closed" (*e.g.*, by prohibiting certain types of uses, activities or transactions using the information, such as by making access to the information conditional on not using the information for commercial purposes), and, on the other hand, maximizing the freedom to use the information (*i.e.*, by *not* placing restrictions on accessing or using the information);[115] (3) transparency of approach, which has further connotations of both processual transparency (*e.g.*, transparency regarding the identity of those involved in the development and maintenance of the licence document)[116] and flatness of availability *(i.e.*, non-discrimination towards licensees based on their demographic characteristics or purposes);[117] and (4) a bias in favour of "anti-lock-in", meaning a "rejection of structures which would allow dominance [of the content or the licence development process] by a specific entity or group".[118]

As can be observed from the characteristics which Katz describes as "transparency" and "anti-lock-in", the literature to date has tended to be particularly concerned with the *process* by which open licences are developed. This is in large part a function of open source software licences being a dominant topic of consideration in the literature. Open source licences have received the bulk of the attention in part due to their having been the first of the open licences to be developed, thereby presenting the longest

[113] Katz, *supra* note 3 at 441.
[114] *Ibid* at 444.
[115] *Ibid* at 441.
[116] Regarding the governance of open source software licences, see Gardler, *supra* note 12 at 54-60.
[117] Katz, *supra* note 3 at 442.
[118] *Ibid* at 469.

period of opportunity for analysis. As Weber phrases the point, open source software licences stem from an attempt to solve a production problem: open source "is a way of organizing production, of making things jointly".[119] As Ian Walden notes, open source is a development methodology,[120] and *also* a licensing and distribution model.[121] The open source software licence is a product of the need to accomplish something, namely the creation of software – it is a product of the attempt to solve the problem of coordinating large numbers of people to work on complex projects that require integration of many different components.[122] Open content licences, by contrast, display a different orientation and teleology. The open content licence is in part the product of a desire to distribute something that has already been created, namely the copyright-protected original work which is being licensed. Open source licensing is, in the main, a solution to a problem of process (organizing lots of people to productively work on creating a complex thing) – open content licensing is, in the main, a mechanism for disseminating an object whose creation has already occurred.[123] Accordingly, features that are important to the open source licensing process, such as transparency in connection with the drafting of the licence and revisions to it, are less obviously definitionally required for open content licences. That being said, the first two principles identified by Katz (i.e., the granting of access and the tension between use maximization and anti-closure) are consonant with the principles identified by Walden, Grassmuck and Weber.

[119] Weber, *supra* note 9 at 224.

[120] Walden, *supra* note 89 at 29, quoting the Open Source Initiative ("Open source is a development method for software that harnesses the power of distributed peer review and transparency of process.").

[121] Gardler, *supra* note 12 at 40.

[122] Weber, *supra* note 9 at 224.

[123] It must be noted, however, that these observations are generalizations of the orientation of open source and open content licences. Open source licences originated to solve process issues, but they necessarily speak to the licensing of copyright-protected work (in the form of software code); open content licences, while originally created to enable sharing of completed works (see Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: The Penguin Press, 2008) at 15 (Creative Commons "provides free copyright licenses to enable artists to mark their creative work with the freedoms they want it to carry")), are also often deployed to solve "input" challenges in contexts where the licensed work is a precursor element or constituent part of a complicated final end-work (*e.g.*, the inclusion of an open content-licensed musical work in a film) (see, *e.g.*, Eric E. Johnson, "Rethinking Sharing Licenses for the Entertainment Media" (2008-2009) 26 Cardozo Arts & Ent LJ 391).

IV. An Operational Definition of Open Content Licences

(a) *Context and Development of an Ordering Principle*

The goal of this chapter is to formulate an operational definition of open content licensing that allows us to identify whether or not a particular copyright licence is an open content licence.[124] The preceding Parts of this chapter have recounted a series of efforts by "open" advocates, starting with David Wiley's Open Content Project and culminating in the "Open Definition" of Open Knowledge International, to devise a definition of open content licence; those definitions have largely been articulated using non-technical terminology and without an explicit attempt to tie the definitions to legal or theoretical principles. This chapter has also reviewed scholarly discussions of "openness" as a concept, which identify a collection of dispositions and orientations that underlie the text of open licences and hint at the nature of that text. Those two approaches can be synthesized to create a coherent and comprehensive definition of open content licences; the remainder of this chapter sets out that definition.

Attending to the issue of developing a definition for open content licences requires us to step away from the concerns of process that capture so much of the attention of the open source community and its theorists, and also to move away from the elements of open source licences that are peculiar to software (such as the need for access to the software's source code). What we can distill from the work of Grassmuck, Walden, Weber, and Katz as described in the preceding Part is an ordering principle against which we can test the texts of open content licences. The ordering principle of open content licences is that they function to maximize[125] access and dissemination (colloquially, "use") by multiple licensees/users of a copyright-protected work in a manner that maximizes the degree of freedom afforded

[124] Historically, formal assessments of whether a licence is "open" proceed as follows (this has most often been done in the context of software licences, but latterly in the broader set of "open content" licences as well – see, *e.g.*, the list of "open" licences maintained by OKI): a coordinated group creates a definition; a new licence is created or an existing licence is mooted for compliance with the definition; the coordinated group follows an internal governance process to assess the licence for compliance with the group's definition; the group publishes a finding about the status of the licence's compliance with the definition (see, *e.g.*, Vasudeva, *supra* note 60 at 184-186; see also the list of compliant or conformant licences maintained by the Free Software Foundation, the Open Software Initiative and Open Knowledge International).

[125] The use in this discussion of the term "maximize" in relation to the term "use" is intended not in an absolute sense, but in a relative sense – open content licences need not enable the *maximum possible* use of a licensed work, rather, they serve to enhance the scope of the licensee's rights to use the licensed work by comparison with traditional or conventional bilateral licensing arrangements. Although use of the term "maximize" and its variants is thus inexact, it will be retained in deference to its usage in the existing literature (*e.g.*, in Katz's invocation of a "use-maximization" principle, *supra* note 114 and accompanying text).

to the licensees/users. Embedded within the ordering principle are concerns with enhancing autonomy and fairness (in the sense of predictability and flatness of availability).

Operationalizing the ordering principle requires that open content licences effect a voluntary forbearance from exercising the exclusive rights enjoyed by copyright owners in favour of an open-ended set of licensees who are entitled to take up the terms of the licence irrespective of their personal characteristics or intentions. Articulating the foundational principle of open content licences facilitates moving forward with the articulation of our comprehensive definition of open content licences because it enables us to formulate the criteria by which we will identify qualifying open content licences – and it enables us to identify matters which are *not* necessary for identifying open content licences. So, for example, the ordering principle tells us that certain types of licences can never qualify as open content licences: a bilateral licensing arrangement (*i.e.*, an arrangement which contemplates that the licensed work is the subject of an exclusive licence between the licensor and a single licensee) fails to display the requisite feature of maximizing use/access by an indeterminate number of licensees/users who themselves are empowered to further distribute the licensed work.[126] The ordering principle also assists us in determining which of the various characteristics identified by the Open Content Project, the DFCW and the Open Definition are genuinely *required* for open content licences, and which are merely sufficient, but not necessary, conditions. While it may not be possible to generate a universal definition of "open" (though, as noted above, the Open Knowledge Institute has tried), it is possible to craft with a fair degree of precision what "open" means within a particular field of endeavour. The definition of "open content licence" that is crafted in this chapter is intended to be universalizable at least within the field of copyright-protected works.

Lawrence Lessig has an epigrammatic description of Creative Commons that we might borrow to begin this attempt to define the open content licence: an open content licence is one wherein instead of

[126] It is important to note that the question of *whether in fact* open content licences maximize dissemination by making the licensed work available to multiple licensees is irrelevant to the definitional project being undertaken. (One way of formulating the question would be whether a licensor is better off entering into an exclusive distribution arrangement with, for example, Amazon, than they are in making their work available under, for example, a Creative Commons licence.) Answering that question would require extensive empirical work, as well as consideration of many other variables such as marketing bugets, and would of course be helpful in answering the question of whether open content licences are *better* at disseminating works that conventional licences – but that is not the question being tackled by this project.

all rights being reserved to the licensor, only some rights are reserved.[127] One way to approach the matter of defining open content licences would be to do so juxtapositionally: we could define open content copyright licences as those copyright licences that are not closed content copyright licences. Such a juxtapositional approach is reductive and, I suggest, epistemologically unsound – in addition to begging the question of how to define "closed" licences, it risks leading us to deal with caricatures, rather than with copyright licences as they are actually drafted and used. It is difficult, if not impossible, to erect binary distinctions among "types" of licences.[128] In addition, it must be emphasized that "openness" as a concept is both binary and also capable of being arrayed along a continuum. The concept is binary in the sense that a licence which displays all of the "necessary" features identified below is by definition an open content copyright licence; any licence which does not display those features is not an open content copyright licence.

However, not all open licences are *equally* open. Even as among "open" licences, there is wide recognition that some are more open than others;[129] so, rather than oppositional camps, it makes more sense to array licences on a spectrum of varying degrees of "closed"-ness or openness. Closely related to a dichotomous approach is one that seeks to define open content licences by enumerating what they are *not*. Such an approach seems more promising, inasmuch as developing of list of counter-features could also be helpful in determining where on our spectrum of licences a particular licence should be slotted. We have seen hints of such an approach in the DFCW definition, which stipulates that the presence of certain provisions in a licence will render it non-conforming to the DFCW definition, and also

[127] Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: The Penguin Press, 2008) at 277-278 ("Creative Commons gives authors free tools … to mark their creativity with the freedoms they intend it to carry. … Not 'All Rights Reserved' but 'Some Rights Reserved'").

[128] A juxtapositional approach also begs the question of whether *all* licences can be properly characterized as either "open" or "closed" (*e.g.*, is a non-exclusive licence from Party A to Party B open or closed? what other information about the licence terms might we need in order to even attempt to make sense of the question?).

[129] See Committee for Economic Development, *Open Standards, Open Source, and Open Innovation: Harnessing the Benefits of Openness* (Washington: CED, 2006) at 8 ("works and processes are not simply open or closed. They need to be placed on a continuum that ranges from closed to open and encompasses varying degrees of openness"). See also http://opencontent.org/definition/ ("there is disagreement in the community about which requirements and restrictions should never, sometimes, or always be included in open licences"). See also https://creativecommons.org/share-your-work/public-domain/freeworks/, where Creative Commons arranges their licences on a continuum ranging from "most open" to "least open".

in the mature form of the Open Definition,[130] which stipulates that a conforming open licence "must not limit, make uncertain, or otherwise diminish" the "required permissions".[131]

Because the term "open content licence" contains within it three separate concepts, it indicates the threshold matters which must be addressed in crafting our definition. First, we must identify whether the jural object in question is a *licence*. Then, we must attend to the question of whether the licence in question is a *content* licence. Finally, we can attempt to distinguish whether the content licence is an *open* content licence. The first two steps can be addressed in relatively short order. As discussed in Chapter 1, a licence is a grant of permission by a property owner to make use of a jural object – a grant of permission that insulates the recipient of the permission from claims of trespassing or infringement. The second step asks us to determine whether something is a content licence, that is, to turn our attention to the subject of the licence: is the thing being licensed protected by copyright? Of the three steps, the second step may at first appear to be the only one which admits a binary conclusion: either the thing being licensed is copyright-protected or it is not.[132] The final step in the analysis requires us to ascertain whether the content licence is an "open" one – the balance of this Part is devoted to delineating how to conduct that analysis.

The definition of open content licences developed in this chapter makes use of four sets of criteria: necessary features; indicative features; non-disqualifying features; and disqualifying features. Necessary features are those elements whose absence makes a licence something other than an open content licence. Indicative features are those which, as an observable matter, are often, but not always, present in open content licences – crucially, however, their mere presence does not render a content licence into an open content licence unless they are accompanied by the necessary features. Non-disqualifying features are those whose presence does not obviate the qualification of a particular content licence as an open content licence. Disqualifying features are those whose presence *does* disqualify a content licence as an open content licence. The ultimate arbiter of where a particular feature fits into those sets of criteria is the ordering principle: that the licence functions to further access and

[130] See Part II(b), above.

[131] See Part II(c), above.

[132] Note, though, that the document within which the licence is contained may contain multiple licences (*e.g.*, a trade-mark licence along with a copyright licence).

dissemination by multiple licensees/users of a copyright-protected work in a manner that augments the degree of freedom afforded to those licensees/users as compared to their baseline set of rights as copyright users vis-à-vis the copyright owner.

In creating these sets of criteria (which draw on and synthesize the fundamental elements of the OCP, DFCW and OKI definitions), the following approaches have been employed with respect to each of the features of the prior definitions: (a) sorting them as indicated by the ordering principle; (b) eliminating any element which is unnecessary because the underlying activity is not prohibited by copyright;[133] (c) condensing the features where they are duplicative.[134] The features discussed below are presented in checklist form in Appendix D. One additional note: in employing this operational definition, the analysis of whether a particular licence qualifies as an "open content" licence must be conducted on a licence-by-licence basis, rather than on collections of licences – so, for example, it is possible that some Creative Commons licences qualify as open content licences (such as the CC BY licence, which imposes only a condition of attribution) while other Creative Commons licences do not (such as a CC BY-NC-ND licence, which imposes a condition of non-commercial usage of the licensed work and prohibits the creation of derivative works using the licenced work).

(b) *Necessary Features*

This operational definition identifies as necessary features those aspects that must be present in the legal relationship between two (or more) parties in respect of a particular jural object in order for that relationship to be considered an open content licence. As a threshold matter, the relationship between the parties (*i.e.*, the putative licensor and licensee) in respect of the jural object in question must be a licence.[135] Further, the jural object being licensed must be a work or other subject-matter protected by

[133] See, *e.g.*, the DFCW stipulation that a licensee be free "to study the work and apply the information" – copyright law does not grant the owner the exclusive right to "study" a work, and does not grant the owner the exclusive right to "apply the information" contained in a work.

[134] For example, the Open Definition lists "use", "redistribution" and "modification" as "Required Permissions" – there is conceptual overlap between "use" and the other two categories.

[135] There must be a grant of permission by an owner in respect of the jural object over which they have title. See Chapter 1 for further discussion of the nature of a licence.

copyright.[136] The licence must be non-exclusive and available for take up by any interested party who wishes to observe the conditions of the licence.[137] Additionally, the licence must have a stable form, *i.e.*, there must at a given point in time be a version of the licence which is capable of being accessed by the licensee and identified as the definitive, authoritative version of the licence. The grant of permission contained in the licence must be perpetual, *i.e.*, at least equal to the longest potential term of copyright protected under any copyright regime, and irrevocable by the licensor, subject only to revocation for breach of the conditions imposed on the grant of the licence. The permissions accorded to the licensee pursuant to the licence must not expire with the use by the first licensee or upon a certain number of uses by a certain number of licensees.[138] The core feature of an open content licence is the set of permissions granted by the licensor to the licensee; this definition adopts the entirety of Wiley's "5Rs" in describing the set of activities which must be permitted in respect of the licensed work (or any part thereof):

- Retain – the right to make, own and control copies of the content (*e.g.*, download, duplicate, store, and manage);
- Reuse – the right to use the content in a wide range of ways (*e.g.*, in a class, in a study group, on a website, in a video);
- Revise – the right to adapt, adjust, modify, or alter the content itself (*e.g.*, translate the content into another language);
- Remix – the right to combine the original or revised content with other material to create something new (*e.g.*, incorporate the content into a mashup); and
- Redistribute – the right to share copies of the original content, your revisions, or your remixes with others (*e.g.*, give a copy of the content to a friend).

[136] This feature precludes a purported open content licence from applying to materials which are in the public domain by virtue of the applicable copyright term having expired or by virtue of them not being suitable subject-matter for copyright protection (*e.g.*, unfixed ideas or mathematical formulas).

[137] A licence that grants exclusive rights to a single identifiable licensee fails to exhibit the necessary use-maximization feature required by the operational principle.

[138] In addition to furthering the use-maximization principle, this feature respects the stability and predictability criteria identified by Weber and Katz – such a feature avoids user licensee uncertainty about whether a licensed work is still "available" for use.

In addition, the licence must permit uncompensated exercise of the 5Rs.[139] Finally, depending on the jurisdiction in which the license is being assessed, the licence must contain either (i) a waiver of the owner's moral rights or (ii) a covenant by the licensor not to assert, enforce or otherwise exercise his or her moral rights in a manner which would interfere with the uses otherwise permitted by the licence.[140]

(c) *Indicative Features*

Indicative features are those that are often, but not always, present in open content licences. Their mere presence does not render a content licence into an open content licence unless they are accompanied by the necessary features identified above. The first indicative feature of an open content licence is the presence of a connection between the licence and a public statement by the author or sponsoring issuer of the licence of principles or aims to be furthered or achieved through use of the licence.[141] In the absence of a formal manifesto, there may be another observable connection between the licence and a relatively stable, definable political or social "movement" or "initiative" that cites

[139] That is, no compensation (in the form of a royalty, for example) is owing to the licensor for any permitted use of the licensed work. This feature respects the use-maximization principle, while still allowing for business models based on charging for allowing *initial* access to the licensed work – *e.g.*, a licensor charges subscribers a subscription fee in exchange for which the licensor sends copies of the licensed work to subscribers; or a licensor makes low-resolution copies of a licensed photograph available for free, but charges for high resolution copies of the photograph or for copies printed on high quality paper or which are signed by the licensor; or a licensor makes a book available pursuant to an open content licence, offers free downloads of the book's content, and sells physical copies of the book (which are printed on high quality paper). For other examples of business models which employ Creative Commons licences, see http://thepowerofopen.org/. See also Creative Commons FAQ, in answer to the question "Are Creative Commons works really free to use?" (https://creativecommons.org/faq/#are-creative-commons-works-really-free-to-use).

[140] This final feature is the only "necessary" feature whose status introduces an element of jurisdictional variability into the definition. A moral rights waiver is required in order to respect the principle of use maximization. In those jurisdictions (such as the United States) where moral rights are not recognized or are given only limited recognition, a waiver of moral rights is not required (unless the licensed work falls within the category of works for which limited moral rights recognition is afforded, *e.g.*, a work of the visual arts in the United States, see *Visual Artists Rights Act of 1990*, 17 USC § 106A). In jurisdictions (such as Canada) whose copyright regime recognizes plenary moral rights in respect of works, the absence of a moral rights waiver renders a purportedly open licence non-open *in that jurisdiction*. Thus, a purportedly "open" content licence that fails to waive the licensor's moral rights may qualify as an open content licence in one jurisdiction (the United States) while failing to do so in another (Canada). Creative Commons has attempted to address this matter in more recent iterations of its licence suite (*i.e.*, version 3.0 and higher) – see https://wiki.creativecommons.org/wiki/License_Versions#Treatment_of_moral_rights.

[141] See, *e.g.*, the GNU Manifesto(authored by Richard Stallman in connection with GNU, his pioneering open source operating system; available online at https://www.gnu.org/gnu/manifesto.en.html); the Creative Commons FAQ in response to the question "What is Creative Commons and what do you do?" (https://creativecommons.org/faq/#what-is-creative-commons-and-what-do-you-do) or the organization's Mission and Vision statement (https://creativecommons.org/about/mission-and-vision/).

openness, access, or freedom as its guiding ethic.[142] The second indicative feature of an open content licence is the presence of copy-left / viral / share-alike provisions.[143] It is widely recognized in the open source community, for example, that share-alike provisions are often present in open source software licences, but are not required for qualification as open source.[144]

(d) *Non-Disqualifying Features*

Consistent with the approach adopted by the DFCW and the Open Definition, this definition includes "non-disqualifying features", which are those whose presence does not prevent a particular content licence from qualifying as an open content licence. While the presence of these features does not prevent a content licence from being considered an open content licence, their presence can impact the analysis of the "openness" of an open content licence as compared to open content licences that do not include these features. Attribution requirements, or requirements that the licensed work be accompanied by a copyright notice, do not offend the operational principle, or do so only minimally, and so do not disqualify by virtue of their presence. Similarly, requirements that a copy of the licence be made available in conjunction with the licensed work impose only a negligible burden on the licensee, as do requirements that any modifications to the licensed work be identified (*e.g.*, by a statement that modifications have been made to the original version of the work). In the same vein, an open content licence can require licensees to provide notice of use to the licensor, provided that such requirements are relatively easy to comply with and do not impose unreasonable or undue burdens on the licensee.

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[142] Dusollier has stated that "[a]ll open-access projects are backed up by an ideological manifesto", though she notes that "manifestos are stronger in some projects" than in others (Dusollier, "Sharing Access", *supra* note 30 at 1411). Whether all open content licences are in fact accompanied by manifestos or public declarations of association with a political or social movement is an empirical question; whether they *must* be so accompanied in order to qualify as an open content licence seems an untenable conclusion: the licence must operate on its own terms to give effect to the requisite "open" relationship between licensor and licensee, and the presence or absence of a manifesto does not operate to affect that relationship. The presence or absence of the manifesto may play a role in the articulation of community norms among those who make use of a particular licence, but it cannot operate to obviate the function of the licence on its own terms.

[143] See discussion above in Part I(c). This definition treats share-alike provisions as non-necessary because they are not required to respect the use-maximization principle for the licensed work in question – though it is in theory possible that share-alike provisions operate to maximize use for works *generally* (i.e., by "infecting" all subsequent works with the share-alike terms), there is little empirical evidence of this being the case, and some evidence that share-alike provisions lead to inadvertent "locking up" of works; see Zachary Katz, "Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing" (2005-2006) 46 IDEA 391.

[144] See, *e.g.*, the Open Source Initiative's FAQ in answer to the question "What is 'copyleft'? Is it the same as 'open source'?" ("Most copyleft licenses are Open Source, but not all Open Source licenses are copyleft.", https://opensource.org/faq#copyleft).

As discussed above in the context of necessary features, there is no prohibition on the licensor imposing a cost in connection with the grant of the licence or the sale of the licensed work which is made available under the license – the licensed work need not be "free", *i.e.*, the grantor can charge a fee for the initial granting of the licence (but the grantor cannot impose a royalty triggered by exercise of the granted rights).[145] The lack of a prohibition on imposing a cost stems from the fact that the operational principle is concerned with activities relating to the use of the licensed work after initial access, rather than the initial making available of the licensed work. Relatedly, because the operational principle is oriented towards use-maximization, prohibitions on licensees imposing "digital locks" or other technical measures that restrict access to the licensed work are permissible.[146] An open content licence can also contain restrictions on the licensee's use of other intellectual property rights owned or controlled by the licensor (*e.g.*, patents or trade-marks) – such restrictions are permissible because the operational principle is concerned with maximizing use of the copyright-protected work, and restrictions relating to the use of the licensor's other IP rights do not impose restrictions on the licensed work.

(e) *Disqualifying Features*

Consistent with the approach adopted by the DFCW (and, to a lesser extent, the Open Definition), and in an effort to maximize definitional certainty, this definition includes disqualifying features – that is, a feature whose presence prevents a content licence from being considered an open content licence.[147] Whether some of these restrictions, such as use-based restrictions, can be included in open licences is a hotly-debated topic within various open licensing communities; for example, whether only "non-commercial" uses can be made of the licensed content was the precipitating disagreement for the split between the "free software" and "open source" communities.[148] In creating this definition, I have, seeking to respect the principle of use maximization at the heart of the open content ordering principle,

[145] See *supra* note 139 and accompanying text.

[146] A *failure* to prohibit the imposition of digital locks is also not disqualifying.

[147] The Open Definition also contains disqualifying features, though they are not categorized separately. For example, Section 2.1.6 of the Open Definition's "Required Permissions" states that "the license must not discriminate against any person or group".

[148] This type of provision is often found in open source licences and is regarded by some commentators as a necessary requirement (see, *e.g.*, Lawrence Rosen, *Open Source Licensing: Software Freedom and Intellectual Property Law* (Upper Saddle River, NJ: Prentice Hall PTR, 2005) at 9.

elected to stipulate that restrictions that are use-based or based on the identity of the licensee are impermissible restrictions because (a) they seek to pre-emptively limit the pool of potential licensees, (b) they fail to respect the principle of use-maximization, and (c) they are inconsistent with the principle of fairness because they introduce definitional uncertainty into the process (*e.g.*, forcing licensees to conduct potentially irresolvable inquiries into whether their desired use for the licensed content is "commercial" or "non-commercial" or constitutes the creation of a "derivative work") thereby compromising the embedded principles of predictability and flatness of availability. That inevitably has boundary-drawing consequences that may not accord with the conclusions reached by others – for example, using this definition, a Creative Commons licence bearing the NC (non-commercial) or ND (no derivate works) modules would *not* qualify as an open content licence, whereas the Creative Commons organization concludes that such a licence is only "less open".

The most obvious disqualifying features are those that restrict entire categories of use or activity by the licensee. Prohibitions on commercial use of the licensed work or restrictions on the nature of the activities that a licensee can undertake (*e.g.*, restrictions on using the licensed work in connection with pharmaceutical or military research) violate the operational principle and its use-maximization orientation. Similarly, restrictions on creating derivative works using the licensed content are disqualifying, as are provisions that attempt to mimic or replicate "moral rights"-type restrictions on association or modification, such as prohibiting alteration of the licensed work without permission of the licensor or prohibitions on the use of the licensed work in advertising, or in association with a product, cause, or institution. Finally, provisions that restrict availability of the licence to individuals or entities based on their inherent personal characteristics or organizing principles also offend the operational principle and thus are disqualifying.[149]

[149] For example, prohibitions on use of the licence by members of racialized communities or those espousing certain political creeds or commitments. See *supra* notes 96 and 117 and accompanying text. The Definition of Free Cultural Works (see Appendix B) proscribes the use of geographical restrictions in open content licences. I have elected not to include such a prohibition in this definition because there may be defensible reasons for the inclusion of geographical restrictions – such reasons would include the limited scope of the licensor's rights (*e.g.*, the licensor may be jurisdictionally restricted and so the licensor cannot license beyond those jurisdictions), and would also include decisions not to permit access in jurisdictions whose domestic laws may threaten the freedom of the licensed work, the licensor(s) or the licensee(s) (*e.g.*, a country whose national security laws require the construction of a state database of open content users). Such geographic provisions would affect the degree of openness of the licence, but not its openness *per se*.

(f) *Conclusion*

This chapter has culminated in the articulation of an operational definition of open content licences. That definition is the penultimate element setting forth the theoretical and analytical framework which will be employed in the balance of this dissertation. Before moving on to the case study of the Open Game License which forms the core of this research project, the next chapter reviews in further detail the scholarly reception accorded to the Creative Commons suite of licences and discusses certain characteristics of open source and open content licences that scholars have identified as being indicia for their successful use. That review will complete the literature review component of this dissertation, offering a comprehensive backdrop against which to undertake the assessment of the history and ongoing use of the Open Game License.

Chapter 4

The Community-Constitutive Function and Indicia of Success

I. Introduction

The question at the core of this dissertation is the identification of those circumstances that are optimal for the use of open content licences to disseminate creative cultural expression. In subsequent chapters, the focus of the analysis will be the use of the Open Game License in connection with the *Dungeons & Dragons* game and the consequences of its use for the broader role-playing game community. Before turning to that fieldwork, however, this chapter – the final in the set of four chapters which set out the theoretical and analytical framework for this dissertation – turns from theory construction and definition to a closer examination of the particularities of how open content licensing operates, in both theory and practice, by drawing on scholarly efforts from a number of fields of inquiry. My aim in this chapter is to develop a rich theoretical account of open content licensing that is substantially informed by attentiveness to its practical use. The chapter begins with a review of the assessments of open content licensing articulated by Niva Elkin-Koren, Severine Dusollier, and others who question its viability as a vehicle for transforming copyright. They identify a tension lurking in the operational logic of open content licensing: is it possible to implement an ethos of sharing by employing the mechanism of licensing, which is itself derived from the proprietarian assertion of a right to exclude? The power and deftness of their skeptical position is evidenced by its progeny: other scholars have echoed their skepticism and advocates for open content licensing must contend with their account. Nevertheless, scholarly proponents of open content licensing perceive benefits to its operation that seem to operate on a perpendicular vector from the practical and theoretical challenges highlighted by the skeptics. In addition, open content licensing enjoys an enduring popularity among content creators and users as evidenced by the continuing success of the Creative Commons ("**CC**") initiative.[1]

This chapter explores how the resolution to the apparent paradox of open content licensing's theoretical frailties and its popular embrace can be found in recognizing a constitutive function that is

[1] In December 2015 the Creative Commons non-profit organization announced that more than one billion copyright-protected works had been made available using a Creative Commons licence; see "State of the Commons Report Highlights Milestone of Over 1 Billion Creative Commons Works Shared Online", available online at https://creativecommons.org/weblog/entry/46632/. By 2017, the number of Creative Commons-licensed works was reported to have increased to over 1.4 billion (https://stateof.creativecommons.org/).

performed by open content licensing. A communicative copyright approach reconciles the accounts of open content's skeptics and proponents by reorienting the analysis towards a focus on the instrumental use of open content licensing to create and sustain relationships and communities. After reviewing the competing accounts of open content licensing and exploring the community-constitutive nature of open content licensing as a means of reconciling them in Part II, I extend the instrumental analysis by undertaking in Part III a review of scholarly work from a variety of disciplines to catalogue the circumstances and factors that are predictive of successful uses of open content licensing. As the discussion in Part III shows, we can identify a matrix of circumstances – what I call "success indicia" that indicate situations that are fertile for the use of open content copyright licences.

II. Synthesizing the Scholarly Assessments of Creative Commons

(a) *Skeptics*

CC licences, the most widely-used of the open content licences, have attracted the bulk of scholarly attention to date. Scholars have developed a body of robust critical literature that, while generally supportive of the professed goals of the CC movement, assert that CC licences are deficient on both theoretical and practical grounds. The work of Niva Elkin-Koren and Severine Dusollier – whose analyses suffuse the work of later contributors – is the starting point for this literature that expresses skepticism about the capacity of open content licensing to achieve what are purported to be the goals of the CC initiative.[2] The core of the critique advanced by Elkin-Koren and Dusollier is that open content licensing suffers from an inherent and irresolvable tension that threatens the viability of the endeavour: the "open" goals of the CC initiative are jeopardized by the impulses of the proprietarian copyright regime on which the CC licences are necessarily predicated. What may be intended to be an "easy" way for creators to openly licence their works is threatened by the practical complexities, interpretive challenges and theoretical inconsistencies caused by trying to craft a solution to copyright's problems by using copyright's own mechanics.

[2] See Niva Elkin-Koren, "What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons" (2005) 74 Fordham L Rev 375 [Elkin-Koren, "Contracts"]; Severine Dusollier, "The Master's Tools vs The Master's House: Creative Commons v Copyright" (2005-2006) 29 Colum JL & Arts 271 [Dusollier, "Master's Tools"].

Both Dusollier and Elkin-Koren identify technological change, in particular digitalization, as the stimulant for open content licensing movements.[3] Dusollier notes that the impetus for the creation of open content licences originated with the discontent of creators who viewed copyright as "a hegemony of financial interest that presents an insurmountable hindrance to freedom of creation".[4] That discontent arose in a particular milieu, where technology, attitudes and philosophy interlace and catalyze each other. Dusollier describes the development of open content licensing as driven by digital technology in two countervailing ways: technology enables the easy reproduction and communication of creative content, while simultaneously making possible widespread monitoring of infringement along with the imposition of rights management measures on that same content;[5] it is in an effort to resolve the tension generated by those two possibilities that open content licensing has developed. Drawing on the work of Roland Barthes, Stéphane Mallarmé, and open text theory,[6] Dusollier argues that open content licensing, simultaneously driven by and also the culmination of technological developments, results in the "reposition[ing] of the user as more than passive consumer", finding pleasure in creating, distributing and appropriating.[7] Dusollier's early work on open content licensing highlights the reliance of open content licensing on the proprietary foundations of copyright law, noting that it is only via "recourse to the exclusive right of the author" that open content licensing is possible.[8]

In Elkin-Koren's account, copyright law is "designed to serve the needs of the content industry",[9] a system that serves the needs of "intermediaries" (*e.g.*, publishers and distributors) at the expense of individual creators. Because creative expression in a digital environment often relies on the use of pre-existing creative works, there is a pronounced need to navigate usage restrictions that are imposed by

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[3] See also the discussion in Part III of Chapter 2, where the digitalization of creative activity and creative works has informed the scholarship of Michael Carroll, Yochai Benkler, Julie Cohen, Elkin-Koren and Jessica Silbey.

[4] Severine Dusollier, "Open Source and Copyleft: Authorship Reconsidered?" (2003) 26 Colum JL & Arts 281 [Dusollier, "Copyleft"] at 282. In addition to the CC licences and open source software licences such as the GNU GPL, Dusollier identifies numerous other open content licences, including the Free Art Licence, the Design Science Licence, the Free Music Public Licence, the Open Audio Licence, the Public Multimedia Licence, and La Licence Ludique Générale (at fn 13).

[5] *Ibid* at 288. See also Dan Burk, "Copyright, Culture, and Community in Virtual Worlds" (2016) *Laws* 5(4), 40 at 7 ("devices [such as computers and smart phones] allow a widening majority of ordinary people who were once classed as simply content users, to digitally manipulate copyrighted materials and visibly disseminate the results").

[6] See generally, Dusollier, "Copyleft", *supra* note 4 at 289ff.

[7] *Ibid* at 293.

[8] *Ibid* at 294.

[9] Elkin-Koren, "Contracts" *supra* note 2 at 384.

owners through the exercise of exclusive rights. Individual creators are generally unable to bear the high cost of navigating the shoals of copyright licensing, and thus copyright's grant of exclusivity imposes a burden on creative activity that falls more heavily on individuals than on firms.[10] To solve the problem of excessive transaction costs imposed by conventional copyright licensing practices, the CC licences were created: a standardized suite of licences that empower individual creators to determine the treatment of their creative expression and to simplify access to the creative expression of others. Unlike open source licences that are used exclusively by software developers, the goal of the CC initiative is complete coverage of creative activity: "a popular movement that addresses the public at large".[11]

The copyright licensor's initial assertion of exclusive rights – and the act of permission-granting that constitutes and animates the licence – is the source of the theoretical tension identified by Dusollier and Elkin-Koren. Though the CC initiative seeks to change "social practices and norms" by "exercising copyright in a way that would enhance sharing and reuse,"[12] Elkin-Koren laments that CC licences are nonetheless *licences*, the use of which will inevitably, in her view, result in a paradoxical strengthening of copyright's proprietarian impulses, contrary to the purported desire of the CC initiative to promote a widely accepted norm of sharing.[13] Elkin-Koren theorizes that facilitating licensing only further embeds "the hold of copyright in our everyday life",[14] encouraging a proprietarian mentality among creators which may ultimately backfire and result in more widespread assertions and enforcement of exclusive rights.[15] In Elkin-Koren's view, the ultimate goals of the CC movement cannot be achieved by the CC licences: "conceptualizing an alternative to the current regime may require an option of opting out of the proprietary system … In the long run, creating an alternative to copyright will require [legislative] copyright reform".[16] For Elkin-Koren, the device of open content licensing is incommensurate to the tasks of both reforming copyright's deficiencies and inculcating a new predisposition opposed to aggressive enforcement of

[10] *Ibid* at 383-84.

[11] *Ibid* at 388.

[12] *Ibid* at 394.

[13] While Elkin-Koren notes that there is an "ideological fuzziness" to the CC movement (*ibid* at 377, 390) she variously characterizes the "proclaimed goal" of the CC movement as "to change the default rule created by copyright law" (*ibid* at 383), "seek[ing] to change the social consequences of copyright law by instantiating an alternative" (*ibid* at 388), and "to develop a rich repository of high-quality works in a variety of media and to promote an ethos of sharing, public education, and creative interactivity" (*ibid* at 388).

[14] *Ibid* at 400.

[15] *Ibid* at 400-01.

[16] *Ibid* at 422.

exclusive rights in creative expression. While she identifies concerns about the enforceability of open content licences against third parties, and the incompatibility of various open content licences,[17] more salient for current purposes is that Elkin-Koren's work highlights a foundational challenge to the successful use of open content licensing.

Echoing Elkin-Koren, Dusollier's later writings on open content licensing locate her most forceful critiques of CC licenses in what she identifies as a paradox originating in theory but landing in practice: "the narrative of property rights, backed up by contract, is bound to entail a logic of exclusion that seems to contradict the ideology of sharing that the Creative Commons scheme advocates".[18] While still celebrating Creative Commons for expanding the autonomy of authors by means of a uniform and widespread licensing device,[19] she remains perturbed by the reliance on contract, identifying it as a potential "Achilles' heel".[20] Drawing on Elkin-Koren's work, Dusollier's criticism here is less about open content licensing or even contract *per se* than it is about the dangers of cultivating an overly proprietarian approach to creative activity. Dusollier contends that the private ordering of contractual arrangements threatens to entrench a view of creative expression as merely one more commodity to be consumed, cementing the functioning of a consumerist "market" into the process of creation and enjoyment of creative works; as a result, the dominant norm for creators and "consumers" becomes "the post-modern idea of consumerism, which is that access to commodities should be easy and unencumbered by legal barriers".[21]

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[17] *Ibid* at 402-12. See also Niva Elkin-Koren, "Tailoring Copyright to Social Production" (2011) 12 Theoretical Inq L 309 [Elkin-Koren, "Tailoring"] at 339 (finding CC licences unsatisfactory due to their multiplicity, which "compromis[es] clarity and predictability", thereby impeding the effort to coordinate large-scale social production).

[18] Dusollier, "Master's Tools", *supra* note 2 at 283.

[19] *Ibid* at 280-81.

[20] *Ibid* at 282.

[21] *Ibid* at 288. In Dusollier's view, by focusing on the needs and desires of "users", the CC licensing system insinuates in, if not imposes upon, individual creators (as distinct from industrial-sized creative factories such as Disney or Microsoft) a "free" or gifting culture which ignores the social and economic conditions in which artistic activity takes place (*ibid* at 288-289). Which is to say that the conditions in which individual creators create is often one of financial precariousness, and they are left vulnerable to exploitation in a market where what little power they possesses they are encouraged to yield by means of a CC licence. Dusollier expresses concern about the CC's movements focus on consumer access, positing that it results in the subordination of concerns about creator compensation thereby contributing to an environment in which creators are devalued and undercompensated (*ibid* at 289-293).

Dusollier's final assessment of open content licensing can be characterized as neutral, leaning towards negative.[22] She describes an "ideological" component that she sees in many open content initiatives: "the desire to subvert the IP regime from within".[23] Dusollier posits that open content initiatives seek to foment a norm of "sharing" as the alternative to the traditional "remuneration-based or control-centred [copyright] model".[24] Any potential inherent in open content licensing schemes to alter the relationship that individual rights-owners have to their creative expression, or even any potential to effect change of the copyright system, is jeopardized on this account by the taint of the proprietarian regime within which the initiatives are operating.[25] Citing Elkin-Koren, Dusollier argues that using contracts (themselves premised on property rights) carries negative symbolic weight: "claiming property rights in creative works communicates a message that information is proprietary, that it always has an owner … [and] reinforces the perception that a licence is always necessary, and that sharing is prohibited unless authorized".[26] Dusollier concludes, following detailed dissections of the problems of the enforceability and (particularly cross-border) incompatibility of open content licences,[27] that the "normative force" of open content licensing, riven by ideological weaknesses, is inevitably going to falter in the face of the strength of the conventional copyright "narrative of exclusivity".[28] Uniting the accounts of Elkin-Koren and Dusollier is the conviction that the goals of open content licensing – characterized as replacing proprietarian instincts with norms of sharing – can only be achieved by legislative reform, ultimately a political project requiring the deployment of political resources and techniques such as lobbying of legislators.[29]

By examining the interactions of various CC licences, Zachary Katz demonstrated empirically what Dusollier and Elkin-Koren had anticipated with their concerns about the compatibility of the various CC licences: the provisions of open content licences could have structural instabilities which threatened to create "marooned" works.[30] That is, works that were intended to be "open" or freely available for use

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[22] Severine Dusollier, "Sharing Access to Intellectual Property Through Private Ordering" (2007) 82 Chicago-Kent LR 1391 [Dusollier, "Sharing Access"].

[23] *Ibid* at 1394.

[24] *Ibid* at 1411-12.

[25] *Ibid* at 1411-12.

[26] *Ibid* at 1412-13, citing Elkin-Koren, "Contracts", *supra* note 2 at 398.

[27] Dusollier, "Sharing Access", *supra* note 22 at 1421-1433.

[28] *Ibid* at 1434.

[29] *Ibid* at 1434-35.

[30] Zachary Katz, "Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing" (2005-2006) 46 IDEA 391.

can become inadvertently "locked" by the use of open content licensing due to the specific terms of CC licences and how they interacted with each other.[31] The operation of the CC Share Alike (SA) and CC No Derivative (ND) licence terms would "inhibit[] the creation of new works, contrary to the apparent wishes of the creators of the original works".[32] Katz hints that this practical, drafting-related, problem is a reflection of the foundational "tension inherent in using exclusive rights and restrictive licences to help grow a commons".[33]

Other criticisms of CC licences flourished in the wake of the criticisms levelled by Dusollier, Elkin-Koren and Katz: Bas Bloemsaat and Pieter Kleve, for example, describe CC licences as a confusing, uncertain, largely "politically motivated" initiative which lacked consumer-side demand and was suitable only for amateur or "home-made" content from which creators did not intend to profit in the first place.[34] The insinuation that CC licences are perhaps best suited for the untutored comports with the findings of Michal Koscik and Jaromir Savelka that many of those using CC licences are doing so incorrectly.[35] Other academic observers of CC licences, such as Lynn Forsythe and Deborah Kemp, have been content to reserve judgment on the viability of the project.[36]

The early concerns with structural and theoretical problems identified by Dusollier, Elkin-Koren, and Katz continue to be echoed in more recent work such as that of Susan Corbett, who concludes that the frailties of CC licences are "merely a symptom of the broader problems created" by a copyright regime "ill-suited to modern creativity and its supporting technologies".[37] For Corbett, the perceived problems of the suite of CC licences, and open content licences generally, are simply a function of a broader systemic

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[31] When CC licences use the "Share-Alike" provision, which is intended to make the licence terms "viral" in that the licensee is required to apply the same CC licence to any derivative work created by the licensee which uses the licensed work (*ibid* at 395), and combine it with the "No Derivative Works" and/or the "Non-commercial" provisions (*ibid* at 395-95), the result is that, over time, the licences interlock resulting in the "block[ing of] a wide range of potential uses" (*ibid* at 409).

[32] *Ibid* at 393.

[33] *Ibid* at 411.

[34] Bas Bloemsaat and Pieter Kleve, "Creative Commons: A Business Model for Products Nobody Wants to Buy" (2009) 23 Int'l Rev L Computers & Tech 237 at 248.

[35] Michal Koscik and Jaromir Savelka, "Dangers of Over-Enthusiasm in Licensing Under Creative Commons" (2013) 7 Masaryk U J L & Tech 201 at 205, 210ff. Koscik and Savelka reviewed CC licence usage on websites, concluding that "a significant group of users does not understand the legal concept of Creative Commons licences and uses them incorrectly" (at 205).

[36] Lynn Forsythe & Deborah J. Kemp, "Creative Commons: For the Common Good?" (2008-2009) 30 U La Verne L Rev 346 at 369 ("[t]he authors and the public are still undecided on whether Creative Commons is 'for the common good'").

[37] Susan Corbett, "Creative Commons Licenses, the Copyright Regime and the Online Community: Is There a Fatal Disconnect?" (2011) 74 Mod L Rev 503 at 531.

problem: "the failure of the copyright system itself in an online environment".[38] Reviewing the prior criticisms of CC licences (including those of Dusollier, Katz and Elkin-Koren), Corbett observes that what might appear to be a disparate collection of criticisms is

> "in fact thematically linked. The underlying theme is that there is a fatal disconnect between copyright law and civil society and that this disconnect cannot be remedied by strategies which rely upon copyright law for their very existence".[39]

Corbett characterizes that disconnect as being a disjunction between legal discourse (consisting of legal texts and principles) and "community perceptions and expectations".[40] While Corbett recognizes certain benefits in the CC licensing initiative (such as enabling easy access to standardized licensing templates), her view seems to be that the system's defects (such as the lack of clarity inherent in the use of terms such as "non-commercial") outweigh the advantages.[41] Reiterating the conclusions of Elkin-Koren, though with an emphasis on changes in the technological environment, Corbett determines that the CC initiative is doomed to failure, with its flaws being:

> "merely a symptom of the broader problems created by a traditional law that was drafted to suit earlier technology but which is ill-suited to modern creativity and its supporting technologies, combined with a community to whom copyright law and concepts are neither intuitive nor comprehensible."[42]

The dominant theoretical assessments of open content licensing are thus relatively pessimistic: tainted by copyright's intrinsic proprietarian bias, open content licensing seems a project doomed to perpetuate the existing problems of the copyright regime regardless of the intentions of open content licensing's originators or users. However, this body of scholarship exists in contrast to the work of a different group of scholars who are less troubled, if at all, by the tension between open content licensing's "open" architecture and the proprietarian foundation on which it is erected. Instead, these scholars have developed accounts of open content licensing that laud what they identify as its benefits. The next section of this chapter reviews the work of proponents of open content licensing before proposing a reconciliation of the accounts of the skeptics and the proponents.

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[38] *Ibid* at 507.

[39] *Ibid* at 527.

[40] *Ibid*.

[41] *Ibid* at 531.

[42] *Ibid*.

(b) *Proponents*

This section reviews the work of scholars espousing a more positive view of open content licensing than that found in the work of the scholars discussed in the previous section. While these scholars approach the matter from a variety of disciplines and utilize a diverse set of theoretical and methodological approaches, they share similar conclusions in that they contend, untroubled by the caveats of the skeptics, that open content licences can be successfully used to accomplish certain goals. To emphasize certain thematic commonalities in the literature, this review organizes their work according to whether the work foregrounds the value of efficiency or norms of sharing. Two dispositions unite these seemingly disparate assessments: first, their empirical focus, with their attention to how open content licensing is employed by content owners, creators and digital services; second, their recognition of the instrumentality of open content licensing. That instrumentality can be characterized as a recognition that open content licences have a *facilitative* function: they enable the achievement of certain ends beyond the mere granting of permission which is inherent in the activity of licensing. While the ends facilitated can be described in a number of different ways, I have chosen to use economic efficiency and the activity of multilateral sharing of creative expression. As will be seen in Part II.c, contained within those two purposes are the seeds of an analytical solvent which may be capable of unifying the analyses of open content's skeptics and proponents.

Josh Lerner and Jean Tirole, whose work is discussed in further detail in Part III(a) of this chapter, pioneered the use of economic theory to assess open source software licensing.[43] Herkko Hietanen employs a similar economic methodology in his assessment of the CC licensing suite and concludes that CC licences offer "efficiency improvements and reduced transaction costs" compared to conventional bi-partite negotiated or standard form licenses.[44] The efficiency with which Hietanen is concerned is the utilization of inputs to produce outputs at the lowest possible cost – in particular, he is concerned with assessing how to maximize the utilization of works as inputs.[45] In Hietanen's account,

[43] Josh Lerner and Jean Tirole, "Some Simple Economics of Open Source" (2002) 50 Journal of Industrial Economics 197 [Lerner and Tirole, "Simple Economics"].

[44] See Herkko Hietanen, "The Pursuit of Efficient Copyright Licensing: How *Some Rights Reserved* Attempts to Solve the Problems of *All Rights Reserved*" (2008), unpublished PhD dissertation, available online at https://oa.doria.fi/handle/10024/42778 at 25, 250.

[45] *Ibid* at 25.

increased efficiency is of particular salience for amateur creators (*i.e.*, those whose creative expressive is not their primary source of income): the enhanced creative capacity they are offered in a digital environment is not matched by an increased ability to structure or negotiate bilateral copyright licences; relatedly, the networked digital environment gives rise to a desire for "collaborative creation" and "social sharing", which can be impeded by copyright's grant of exclusive rights.[46] In Hietanen's view open content licences allow creators to overcome those impediments and maximize the "utilization rate" of creative works.[47] Acknowledging the issues identified by, among others, Dusollier and Elkin-Koren, Hietanen recognizes that the CC licences are imperfect in that the wording of the CC licences can be improved in order to fully realize the promises of ease of use and compatibility.[48] However, supplementing his analysis with case studies of examples of CC licences being used by for-profit undertakings,[49] Hietanen's ultimate conclusion about the facilitative aspects of open content licensing is a positive one, both with respect to open content licensing in the abstract and CC licences in particular.

Occupying adjacent analytical territory to that of Hietanen, the work of Gerald Spindler and Philipp Zimbehl builds on that of Lerner and Tirole by focusing on open content licences. Spindler and Zimbehl frame successful uses of open content licences as a function of the role that use of the licences plays in facilitating signaling operations in a secondary market for reputation: content owners release their copyright-protected works using open content licences in the belief and expectation that the quality of the content so released will enhance their reputation, thereby leading to increased income.[50] While Spindler and Zimbehl query whether the multiplicity of open licences (ranging from the various species of open source software licences to the various permutations of CC licences) is truly an advantage as compared

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[46] *Ibid* at 253-254.

[47] *Ibid* at 25. Hietanen is explicit that he "is less interested in the number of works that are created and more interested in maximizing the utilization rate that the works have by reducing the friction and waste" (*ibid*).

[48] See *ibid* at 101. Among the deficiencies identified by Hietanen: inherent difficulties in interpreting terms such as "non-commercial" and "derivative work"; the complexities of interoperability between different national jurisdictions; and the complexities of interoperability between more and less restrictive versions of the CC licences (e.g., mixing NC-licensed works with BY/SA-licensed works).

[49] Examples discussed by Hietanen include Flickr, Magnatune, MusicBrainz and Cory Doctorow. See *ibid* at 173-216.

[50] Gerald Spindler & Philipp Zimbehl, "Is Open Content a Victim of Its Own Success? Some Economic Thoughts on the Standardization of Licenses" in Lucie Guibault & Christina Angelopoulos, eds., *Open Content Licensing – From Theory to Practice* (Amsterdam: Amsterdam University Press, 2011) at 60-61. Spindler and Zimbehl acknowledge that the Lerner & Tirole account is not universally accepted, and requires additional empirical validation – as well, Spindler and Zimbehl acknowledge the work of other scholars who posit that motivations other than signalling for the purposes of increased income may be at work (at fn 38 and accompanying text).

to traditional "bespoke" or unilaterally-drafted "standard form" licences,[51] their framing helps to highlight that open content licensing performs its function within a particular social setting. Adopting a neo-institutional approach, Spindler and Zimbehl observe that open content licences perform a constitutive role in content production: standardized open content licences used by diffuse and otherwise unconnected producers effectively replace the labour contracts which might be used in a vertically-integrated firm, and help to efficiently organize new modes of digitialized production.[52] In performing that constitutive role, standardized open content licences also guarantee that other participants in the particular project adhere to a consistent set of principles, and, if properly drafted, can obviate the need to continually scrutinize the scope of rights being acquired or transferred.[53]

In addition to potential efficiency and coordinative gains, the facilitative function of open content licensing can describe the achievement of other ends, such as communicative sharing and dialogue. Michael Carroll, echoing Dusollier and Elkin-Koren, describes the CC licences as a suitable response to a problem that arose due to the digitization of otherwise "evanescent" discussions and creativity: as people's interactions with each other move from the "analogue" living room or dorm room and onto online platforms, those activities "enter[] copyright law's domain".[54] In the wake of digitalization, the CC licences function as a "tool" that is "easy to use and that licenses back to the public some of the power to control the [copyrighted] work that the public gave to the authors through copyright law".[55] Carroll's laudatory assessment of CC licences is grounded in the facilitative benefits of open content licensing with an emphasis on the communicative or dialogic activities that are facilitated.[56] Carroll concludes that CC licences facilitate "cheap speech",[57] "amateur-to-amateur communication"[58] and the creation of new intermediaries (such as search engines, libraries and publishers) which exist solely, or in large part, to

[51] *Ibid*. Spindler and Zimbehl conclude that while the diversity of open content licences may result in high transaction costs arising from the need to navigate through the variety of competing terms, such costs may nevertheless be lower than or equivalent to the "clearance" costs incurred in connection with conventional copyright licences.

[52] *Ibid* at 68-69.

[53] *Ibid*.

[54] Michael Carroll, "Creative Commons as Conversational Copyright" in Peter K. Yu, ed., *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, vol. 1 (Prager, 2007) at 448.

[55] *Ibid*.

[56] Michael W. Carroll, "Creative Commons and the New Intermediaries" (2006) Mich St L Rev 45.

[57] *Ibid* at 48.

[58] *Ibid* at 52.

cultivate and make available open content.[59] Similar to Hietanen, Carroll cites numerous examples of CC licences being used in for-profit business ventures.[60] Carroll's emphasis on the importance of sharing has been supported by Jessica Silbey's empirical work, which indicates that creative individuals place priority on forms of distribution that "reflect and reinforce … productive relationships".[61] Of the five modes of distribution identified by Silbey, two – sharing and gifting – are closely correlated with open content licensing as a concept; sharing is also the form of distribution most often mentioned by Silbey's interview subjects.[62] While Silbey discovers that preferences with respect to distribution models vary across different fields of endeavour, sharing was the most popular method of distribution among her interviewees, and the norm of sharing was also the most distributed among the different fields and professionals who were interviewed.[63]

The work of Hughes *et al* indicates that for certain types of information goods – what they term "culture goods" – their value is "realized as a social process".[64] Culture goods (they use the examples of literature, songs, and movies) are "irreducibly contextual", "their meaning and value … largely created through shared experiences".[65] Digitalization has rendered what were once largely immutable artifacts into "liquid" properties that are "appropriable for extension, recombination and innovation … easily reproduced, easily distributed, and amenable to endless modification, extension and recombination".[66] In order for the resulting "open source culture" to flourish, Hughes *et al* are of the view that mechanisms such as open content licensing are necessary in order to maximize the contributions that can be made by audience-participants.[67] The contemporary environment is one in which the "transmutability" of digital

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[59] *Ibid* at 47.

[60] Carroll discusses, *inter alia*, Magnatune, CC Mixter, OpSound and Flickr.

[61] Jessica Silbey, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (Stanford: Stanford Law Book, 2015) at 282.

[62] *Ibid* at 225-227, 252. The five modes of distribution identified by Silbey are: "many and more" (essentially, dissemination as widely as possible); managed performance (akin to in-person performances); sharing; (making the work available at low or no cost for personal use or subject to other minimal conditions on usage); gifting (offer the work with "no strings attached"); and "holdout" (or non-distribution).

[63] *Ibid* at 252-53.

[64] Jerald Hughes, Karl R. Lang, Erick K. Clemons, & Robert J. Kauffman, "A Unified Interdisciplinary Theory of Open Source Culture and Entertainment" online: SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1077909 at 3.

[65] *Ibid* at 3 ("songs and stories are situated and realize their value in specific cultures and subcultures").

[66] *Ibid* at 4.

[67] *Ibid* at 23 ("digital content can be made available for re-mix, and … such availability cultivates the contributions of peer artists and communities of dedicated fans").

culture goods has broken down the previously sharp divide between culture producers and consumers – or, in the parlance of Coasian economics, has begun effacing the boundaries of the firm, within which production has traditionally occurred.[68] The partial relocation of the capacity to create culture goods from firm-producer to audience-producer can be viewed as "value-adding" – and open content licensing is one way of sharing across the traditional divide of firm and customer both the content of culture goods and also the capacity to create them and enhance their value.[69]

Similarly, Cheryl Foong surveyed various examples of creative businesses and other undertakings making use of CC licences[70] and concluded that CC licences are beneficial because they facilitate direct creator/audience interaction, while still preserving the possibility of financial remuneration.[71] In Foong's view, CC licences are preferable to conventional distribution and licensing models for some creators because they present the opportunity of "decentralizing who gets to make, share and profit from art".[72] For content owners who stand little chance of accessing traditional content distribution channels, CC licences provide a simple way of disseminating their content – a tool for solving the challenge Tim O'Reilly described in his aphorism "the problem for most artists isn't piracy, it's obscurity".[73] In a similar vein, Maritza Schaeffer has observed that CC licences can assist in enabling widespread dissemination of creative expression when such dissemination is effectively a vehicle for the transmission of ideas or messages embedded in the work or even merely a vehicle for achieving renown within a particular community.[74]

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[68] *Ibid* at 41.

[69] *Ibid*.

[70] Cheryl Foong, "Sharing with Creative Commons: A Business Model for Content Creators" (2010) *PLATFORM: Journal of Media and Communication*, A Creative Commons Special Edition (December) 64. Foong profiles four motion picture projects which in some way made use of CC licences (*Cafuné*, *Star Wreck: In the Pirkinning*, *Kiss Kiss Bang Bang*, and *Two Fists, One Heart*); in the latter two cases, only portions of the films were made available via CC licences.

[71] *Ibid*; Guido Russi, "Creative Commons, CC-Plus, and Hybrid Intermediaries: A Stakeholder's Perspective" (2011) 7 BYU Int'l L & Mgmt Rev 102.

[72] Foong, *supra* note 70 at 22.

[73] *Ibid* at 20 (Foong attributes a version of this saying to Cory Doctorow; Doctorow himself attributes it to Tim O'Reilly, see http://www.publishersweekly.com/pw/by-topic/columns-and-blogs/cory-doctorow/article/55513-cory-doctorow-how-writers-lose-when-piracy-gets-harder.html).

[74] Maritza Schaeffer, "Contemporary Issues in the Visual Art Realm: How Useful are Creative Commons Licenses?" (2008) 17 JL & Pol'y 359 at 361 (CC licences are best suited for artists "who are not primarily concerned with remuneration, but would rather attain popularity or spread a message through the dissemination of their work"). Schaeffer also concluded that CC licences are a "natural fit" for "appropriation art" because use of CC licences by an appropriation artist might reduce concerns about infringement claims; Schaeffer's observation on this point

Collating a variety of economic, psychological and social science research, Eric Johnson concludes that "sharing" may be the most economically efficient and socially rewarding form of exploitation of copyright-protected works and that open content licences can facilitate such beneficial sharing activity.[75] But Johnson's desire for an optimally productive sharing mechanism is not found in the CC licences: he concludes that they "provide less-than-optimal results" when measured against the project of "eliminat[ing] as much copyright overkill as possible".[76] Johnson's preferred solution is open content licensing of a different form – one which embeds obligations of reciprocity and notification of usage (in order to satisfy licensors' desires for recognition and engagement). His assessment of CC licences is not so much a negative one, as it is a lament – in Johnson's view the problem is not open content licensing as a concept, it is that CC licences are not open *enough*, or at least not open in the correct way.

Recent scholarship by Sao Simao, Santos & Alvelos synthesizes the prior work of some proponents by highlighting a set of advantages that can be gained by employing open content licences, particularly CC licences, in creative expression markets: reducing production costs; reducing transaction costs and legal uncertainty; facilitating access to customer-driven feedback and improvements; accelerating entry to the market and thereby seizing first mover advantage; creating "a collaborative, distributed production network" that creates access to "opportunity benefits" derived from the interactions made possible by unencumbered sharing; and creating reputational capital by signaling interest in collaboration, interaction, and sustainable business practices.[77]

The work of the scholars that I have identified as "proponents" is informed by recognition of the facilitative aspect of open content licensing: it can lead, as Hietanen and Johnson note, to efficiencies in

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is presumably limited to CC licences which do not prohibit the creation of derivate works or prohibit commercial usage.

[75] Eric E. Johnson, "The Economics and Sociality of Sharing Intellectual Property" (2014) 84 B U L Rev 1935.

[76] *Ibid* at 1981. Johnson cites four failings: (1) failures to distinguish between completed works and "work parts"; (2) complexity and ambiguity in the licence terms resulting confusion among users; (3) lack of reciprocity between licensor and licensee (*e.g.*, someone can use CC-licensed works without ever contributing a new work to the pool of CC-licensed works); and (4) inevitable gaps in coverage which result from the use of standardized wording (*i.e.*, by being forced to use from a pre-written set of licence templates, there may be mismatches between the desired level or nature of the licensor's openness and the wording of the licence).

[77] Fatima Silva Sao Simao, Helena Santos & Heitor Alvelos, "Open Business Models for the Creative Industries – How the Use of Open Licenses in Business Can Increase Economic Results and Cultural Impact" (Paper delivered at the 2017 Annual Congress of the Society for Economic Research on Copyright Issues, Turin, Italy, 10-11 July 2017) [unpublished], online: http://www.serci.org/2017/SaoSimao.pdf.

the production and dissemination of creative expression; it can perform signaling operations that enhance reputation, as noted by Spindler & Zimbehl and Foong; and, as Carroll and Hughes *et al*, conclude, open content licensing facilitates the dialogic activities that are the core concern of a communicative understanding copyright. Understanding the facilitative function of open content licensing is crucial for attempting to explain why people do and should use open content licences – and embedding that facilitative aspect within a communicative framework is necessary for integrating the insights of the skeptics and proponents.

(c) *Reconciling the Accounts*

At this point, we have reviewed analyses of open content licensing which can be construed into two broad sets: skeptics who highlight foundational tensions involved in trying to create a culture of openness which is based on a logic of exclusion; and proponents who emphasize the facilitative functions of open content licences to realize ends of efficiency and communicative sharing. It seems possible to reconcile these two contending bodies of scholarship, or at least to situate the work of the proponents within an analytical space that takes account of the skeptical position while preserving an ability to reckon with open content licensing's continued prevalence. To do so, we must first respond to the concerns of the skeptics. That response can be formulated by means of a concession, a caveat, and a reorientation. To begin, we must concede the power and accuracy of the skeptics' critique – open content licensing is unlikely to do much, if anything, to change the proprietarian nature of copyright, because open content licensing is, by its nature, an exercise of a proprietarian claim through the mechanism of conditional permission. However, we must also voice a caveat to the concession: many of the most trenchant critiques of open content licensing to date, including those of Elkin-Koren and Dusollier, have been written with reference to the CC set of licences, highlighting their complexity, lack of compatibility and concerns with enforcement; we should thus temper the concession by noting that certain problems of the CC licences may be unique to, or particularly pronounced in respect of, CC licences (or even only certain CC licence modules) and are not necessarily systemic to all open content licences.[78] While the CC suite of

[78] For example, one of the longest-standing, and most powerful, criticisms of the CC licences is that the "No Commercial Use" and "No Derivatives" modules are inherently ambiguous and may require sophisticated legal knowledge to interpret and apply. True as that may be, it is not a valid criticism of an open content licence that

licences is almost synonymous with open content licensing because it is, by any measure, the most popular form of open content licensing, we must be careful to avoid the fallacy of composition: any deficiencies of the CC licences are not necessarily deficiencies of open content licensing as a concept or in practice.

Next, a reorientation is required. For all the elegance and analytical power of their critiques, the work of open content licensing's skeptics seems detached in certain respects from the experience of those who use open content licensing in disseminating their creations and accessing the works of others.[79] The proprietarian taint that critics identify as the unexpungable deficiency of open content licences seems an unfalsifiable assertion – there seems to be little or no evidence of an increasing tendency towards copyright maximization among open content users, and little indication as to precisely how such a process of creeping proprietarianism would manifest.[80] At the same time, those scholars who have catalogued "successful" uses of CC licences – such as Hietanen, Carroll, and Schaeffer – offer a starting point for understanding open content licensing's popularity, but there remains room for a more richly developed theoretical account of open content licensing. The notion that the primary attraction of open content licensing is its economic efficiency lacks explanatory power because it is not clear from the work of those who laud open content licensing that efficiency is the only or even the primary metric that is ever considered by users of open content licensing.

Critically, we must reorient the attention paid to open content licensing, away from the centripetal pull of the Creative Commons licences with their attendant organizational and drafting idiosyncrasies, and towards an instrumentalized understanding of open content licensing in the abstract – an understanding

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simply does not contain any restrictions on the use of the licensed content in commercial activities or in the creation of derivative works.

[79] Till Kreutzer has attempted to explain why open content enthusiasts continue to use open content licences despite their apparent deficiencies (see Till Kreutzer, "User-Related Assets and Drawbacks of Open Content Licensing" in Guibault & Angelopoulos, *supra* note 50). Kretuzer notes that the analysis of those who "use" content made available under open content licences should appreciate that there are really two groups of users: "passive" users who obtain free access to work they find interesting or useful and who, because they are not making further use of the work, need not concern themselves with the complexities of interpreting or otherwise complying with the licence terms; and "active" (or "creative") users who "circumvent the burden of complex and expensive license management, while simultaneously saving money on the royalties they do not have to pay" (at 135). In short, passive users never need to worry about open content's problems, while for active users the costs of open content's complexities remain lower than the comparable costs which would be incurred in navigating the complexities of conventional bilateral copyright licences.

[80] One potential method for investigating expanding proprietarian tendencies among open content licensors would be to track whether their use of open content licences changes over time (*e.g.*, whether they change their habits from using comparatively "open" CC licences to more restrictive CC licences) or whether they move from using open content licences to conventional bilateral licences.

that is present, whether implicitly or explicitly, in all the scholarship thus far canvassed. Open content licensing need not be appraised solely by reference to whether it will effect systemic change, even if some of its proponents expressly formulate their goals in such radical terms. It should also be assessed and explained using concepts and criteria that resonate with the experience of its users. Appraising open content licensing from a perspective that sets more modest goals offers an opportunity to contend with open content licensing's enduring popularity and provides a criterion by which to assess it. The focus of that reorientation is one to which a communicative copyright approach tells us to attend: using licensing to create or strengthen relationships and community.

The proposed reorientation enables an assertion that the problems with open content licences identified by its skeptics may be perceived to be most acute when they are assessed from within the standpoint of traditional copyright justification theories. Dusollier's recognition that there was often an ideological component to open content initiatives[81] is a hint that conventional copyright justification theories may be ill-equipped to account for open content licensing, and so we might profitably turn towards a communicative copyright approach. In short, perhaps the most productive way to reconcile the skepticism of Elkin-Koren, Dusollier *et al* with the accounts of open content licensing's proponents is to frame the matter using communicative copyright theory. While open content licensing will not solve copyright's systemic problems, it need not do so in order to be considered valuable or functional. Open content licensing is there, in part, to facilitate dialogic communication and relationships – it is, in part, a way to instrumentally use copyright licensing in furtherance of community creation and sustenance. This reorientation calls, in short, for using the metrics of communicative copyright as the relevant criteria for assessing open content licences. The next section of this chapter further explores the nature of the instrumental use of open content licences.

[81] Dusollier, "Sharing Access", *supra* note 22 at 1411. Elkin-Koren, by contrast, has argued that the CC movement, in particular, suffers from "ideological fuzziness" which undermines the goal of providing an alternative to maximalist copyright protection, even though such fuzziness aids the effort to gain adherence from disparate social groups (Elkin-Koren, Niva, "Exploring Creative Commons: A Skeptical View of a Worthy Pursuit" in Guibault, Lucie, & Hugenholtz, P. Bernt, eds. *The Future of the Public Domain* (Amsterdam: Kluwer Law International, 2006) at 377).

(d) *Instrumentalizing Licences for Community Creation*

An implicit recognition can be found in the work of the scholars surveyed thus far in this chapter: open content licences may be able to perform an instrumental constitutive function by providing a mechanism for creating, sustaining, or enhancing relationships and communities.[82] Sociological scholarship identifies three elements of "community": consciousness of kind (the "intrinsic connection that members feel toward one another, and the collective sense of difference from others"); shared rituals and traditions; and "a felt sense of duty or obligation to the community as a whole, and to its individual members".[83] The concept of community has at its core notions of belonging and shared perceptions of similarity and common identity.[84] As Betsy Rosenblatt has noted, notions of "belonging" are central to questions of community participation and identity, and belonging itself is "born of interaction", [85] and "tied up with questions of authenticity or qualification".[86] In addition, there appears to be a mutually catalytic relationship between community values and norms and perceptions of community belonging and identity.[87] Open content licensing can function to address all of those related concepts: use of an open content licence is emblematic of the adoption of certain norms and values; it facilitates dialogue and interaction with respect to and through the licensed work; its use functions as a marker of belonging; and it serves as a totemic indicator of the "open" values and behavioural norms that inform the licence terms.

I refer to these functions of open content licensing as "community-constitutive", though I emphasize that I do not yet want to advance a claim that a licence has the capacity to *create* community on its own – rather, at this point I restrict my contention to the notion that an open content licence can give rise to new relationships and can supplement, sustain, or reinforce an existing community or give formal structure to a nascent proto-community. It may be the case that the open content licence is at least as much a reflection of the norms of a pre-existing community as it a causal factor in the creation of those

[82] See, *e.g.*, *supra* notes 50-53 and accompanying text and notes 61-63 and accompanying text.

[83] See Albert M. Muniz, Jr & Thomas C. O'Guinn, "Brand Community" (2001) 27 J of Consumer Research 412 at 413.

[84] Betsy Rosenblatt, "Belonging as Intellectual Creation" (2017) 82 Missouri L Rev 91 at 98-99. See also Muniz, Jr. & O'Guinn, *supra* note 83 at 413 ("[c]onsciousness of kind … [is] a way of thinking about things that is more than shared attitudes or perceived similarity. It is a shared sense of belonging").

[85] Rosenblatt, *supra* note 84 at 101.

[86] *Ibid* at 100.

[87] *Ibid* at 103 ("people who experience a sense of belonging with a community tend to shape, adopt, and enact the values of that community, which, in turn, reinforces their sense of belonging with the community" [citations omitted].

norms and that community. Drawing on one of the signal elements of the communicative copyright framework, the community-constitutive function of open content licensing enables the reconciliation of the accounts of open content licensing's skeptics and proponents. As was seen in the preceding chapter, open content licences, like open source software licences before them, were the product of efforts made by individuals acting within self-identifying communities. The licences were created not merely to document contractual relationships, but to function both as declarative statements of shared norms and as tools to facilitate certain outcomes (the process of collaborative software development and the sharing of creative expression). Open content licences, like their open source software predecessors, are a "de facto constitution … the core statement of the social structure that defines the community".[88] The open content licence operates both as a threshold defining the boundaries of admission to a given community (by using the licence, whether as licensor or licensee, one signals membership in the community), and also contains the content of the normative code that governs those who join the community; the identity of the community, and membership within it, is in part defined by the adoption of the licence. There is a performativity to the adoption of an open content licence, whether as licensor or licensee – it functions as a badge or marker indicating membership in a community; further, the adoption serves to identify the licensor as interested in encouraging communal activities, and not simply a rights-holder to be feared.

Skepticism about open content licensing's capacity to effect systemic change is compatible with recognition that it can perform a community-constitutive role.[89] Elkin-Koren describes online community participation as enabled by platforms, code and legal constraints. The interactions among creators and users "are often shaped by the design, economic models and legal strategies of the social media platforms" on which the interactions take place.[90] Describing the coordinating tools which are used to enable community interaction, including private ordering arrangements such as copyright licences and website "terms of use", she notes that those "[c]oordinating tools are not neutral. Their design and architecture often determine the nature of collaboration and shape the relationships among users".[91]

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[88] See Steven Weber, *The Success of Open Source* (Cambridge, MA: Harvard University Press, 2004) at 179.

[89] See, *e.g.*, Dusollier, "Sharing Access", *supra* note 22 at 1401 ("to a certain extent, Creative Commons can be said to provide a useful answer to the needs of some communities of creators who might consider sharing as the normal way of disseminating their creation").

[90] Elkin-Koren, "Tailoring", *supra* note 17 at 328.

[91] *Ibid*.

Interestingly, though Elkin-Koren sees deficiencies in CC's modular approach (which lends itself to a multiplicity of contract forms), she finds more promise in what she terms a "single licensing standard" approach, such as that found in a standardized Terms of Use or End-User License Agreements that a website might apply to users of its services.[92] Such an approach "enables the community of users/authors to agree upon a set of shared norms" relating to their collective activity,[93] and "allow[s] communities to tailor the governance of content to fit the nature of collaboration, the group identity and the values shared by its members".[94] Rosenblatt has also noted this norm-generating function of communities, and its formative effect on individual members, with particular reference to its attentiveness to activities that fall within copyright's domain:

> "[g]roups create their own norms as group members select modes of behaviour that bond the group together and serve the community's needs and endeavors. … people who desire a sense of belonging are likely to adopt the values and norms of the community to which they belong. In creative communities, therefore, creators conform to their creative community's protection, enforcement, and copying norms because compliance reinforces their sense of belonging to that community".[95]

Esther Hoorn, similarly, sees open content licences as a mechanism for fostering "dialogue" between creators and audiences (or, in her rendering, artists and the public).[96] Echoing the institutional observations of others such as Elkin-Koren and Spindler and Zimbehl, Hoorn notes that the constraints imposed by legal code, software code, and institutional imperatives contribute to frameworks that "give meaning, sense and normative direction to their thinking and actions".[97] Depending on the features of the relevant architecture, those frameworks can either limit or facilitate the conversation or dialogue taking place among participants within the relevant framework; open content licensing can thus be seen as an architectural element in constructing institutional community frameworks.

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[92] *Ibid* at 339. Spindler and Zimbehl, *supra* note 50, also imply that the standardization of open content licences can be productive, because it cuts down on transaction costs; in other words, it is better for a given set of open content licensors and licensees to coalesce around a single form of license in order to reduce transaction costs. Spindler and Zimbehl describe a spectrum of the relationship between transaction costs and licences, with open content licences located in the middle of the spectrum between "highly standardized open source licenses" and conventional bespoke licences at the other end (at 73). Their view is that the plethora of open source licences may be more apparent than real, citing that the GNU GPL "dominates markets by more than 75%" (at 71).

[93] Elkin-Koren, "Tailoring" *supra* note 17 at 339.

[94] *Ibid*.

[95] Rosenblatt, *supra* note 84 at 123.

[96] Esther Hoorn, "Contributing to Conversational Copyright: Creative Commons Licenses and Cultural Heritage Institutions" in Guibault & Angelopoulos, *supra* note 50 at 239.

[97] *Ibid* at 209.

Katherine Strandburg's concept of intellectual property boundary zones has relevance to the project of reorienting the analysis of open content licensing towards their community-constitutive function. Strandburg describes boundary zones where private ordering arrangements abut intellectual property regimes: in these boundary zones, innovation and creativity occurs in communities that "actively discourage reliance on formal intellectual property even when it is available".[98] Strandburg notes that the deployment of intellectual property rights through licence agreements can be used "to define a creative group and enforce its governance regimes".[99] Citing the example of the copyleft clause of the GNU GPL, she notes that the clause plays two different roles: it sets behavioural norms for the community, and provides a formal enforcement mechanism (based on the underlying exclusive right) to be used in the event of a breach of the norm.[100] The licence is a means of "ensuring reciprocity between members of the loosely knit group".[101]

Relatedly, the work of Michael J. Madison, Brett Frischmann, Strandburg and others on "constructed cultural commons" also hints at the community-constitutive function of open content licences.[102] Defining constructed cultural commons as "environments for developing and distributing cultural and scientific knowledge through institutions that support pooling and sharing that knowledge in a managed way",[103] Madison *et al* describe cultural commons as being constructed on a base of formal intellectual property regimes that are "combined with licenses and contracts, with social norms, and with cultural and other institutional forms".[104] As Madison *et al* note, cultural commons "depend on – but are built alongside and on top of – the basic forms of knowledge and culture, on the one hand, and intellectual property rules, on the other hand".[105] How participants in the commons "interact with rules, resources, and each other … is itself an outcome that is inextricably linked with the form and content of

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[98] Katherine J. Strandburg, "Intellectual Property at the Boundary" (2013) NYU Public Law & Legal Theory Research Paper Series Working Paper No. 13-60 at 3, online: http://lsr.nellco.org/nyu_plltwp/432/. Among the communities described by Strandburg are innovator groups of physicians, chefs, and academic scientists.

[99] *Ibid* at 30.

[100] *Ibid* at 31.

[101] *Ibid*.

[102] Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, "Constructing Commons in the Cultural Environment" (2010) 95 Cornell L Rev 657.

[103] *Ibid* at 659.

[104] *Ibid* at 669.

[105] *Ibid*.

the knowledge or informational output of the commons".[106] As Volcker Grassmuck has noted, "it is the community itself that creates the conditions for a free flow of ideas and for reciprocal synergistic enhancement within its boundaries".[107] It is Grassmuck's view, when reviewing empirical work on open source software licensing, that "the community itself and the cooperative creation it enables are clearly seen as the most important value that motivates people" to join communities by way of using open source licences.[108] Grassmuck describes open content licences as critical constitutive sinews that help "string[] together" open content communities, along with "a set of common interests, the joy of creating and sharing, learning from and teaching others".[109]

As pointed out by David McGowan, citing Karl Llewellyn, open content licences have an instrumental effect in that they function, in part, to form "attitudes towards performance as to what is to be expected and what 'is done'" by those who make use of the licences.[110] That notion of community construction appears to be one of the distinctive functions of open content licensing. Nic Suzor and Brian Fitzgerald have argued that copyright licensing "plays a fundamental role in the development and day-to-day functioning" of online communities that make use of copyright-protected content.[111] Operating in the shadow of copyright law's regime of exclusive rights over creative expression, communities "rely on a set of basic norms to determine how that expression is to be treated",[112] and can use open content licenses in part to express the content of those norms and also to facilitate the development and evolution of those norms. The choice of licensing terms affects not only the business model of the licensor, but "the entire social structure" of the community.[113] As Suzor and Fitzgerald note, the particular set of rules chosen by (or for) the community "will affect the level of participation, the willingness to share and build off other's works, the manner in which participants interact, and, critically, the long term sustainability of the

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[106] *Ibid* at 682.

[107] Volcker Grassmuck, "Towards a New Social Contract: Free-Licensing Into the Knowledge Commons" in Guibault & Angelopoulos, *supra* note 50 at 28.

[108] *Ibid*.

[109] *Ibid* at 50.

[110] David McGowan, "The Tory Anarchism of F/OSS Licensing" (2011) 78 U Chi L Rev 207 at 221, quoting Karl N. Llewellyn, "What Price Contract? An Essay in Perspective" (1931) 40 Yale L J 704 at 725.

[111] Nic Suzor & Brian Fitzgerald, "The Role of Open Content Licences in Building Open Content Communities: Creative Commons, GFDL and Other Licences" (2007) at 1, online: http://eprints.qut.edu.au/6076/1/6076_1.pdf

[112] *Ibid*.

[113] *Ibid* at 15.

community".[114] Open content licences are particularly useful for online communities because they facilitate the dynamism, creative serendipity and collaboration that are often a feature of those communities.[115] While acknowledging, in a nod to the concerns raised by Elkin-Koren and Dusollier, the risks of "reifying the notion of property and turning every social relation into a legal relationship",[116] Suzor and Fitzgerald emphasize the "certainty and clarity" that adoption of open licensing can provide to a community.[117]

Dan Burk has noted that, just as copyright-protected works can provide the nodal point around which a community forms, the manner in which copyright rights are *enforced* has an impact on how copyright-protected works interact with community creation and community norms.[118] Content owners often deliberately promote wider adoption and use of copyright-protected material in an effort to ensure cultural saturation (and hence increase revenues).[119] Cultural saturation is married with digital saturation to create an environment in which copyright infringement becomes, if not impossible to avoid, at least entirely predictable.[120] Internet-facilitated engagement can have many positive attributes from the standpoint of the copyright owner (such as providing platforms where shared interests are focused and amplified, obtaining feedback from fans, and facilitating durable public exposure); there are also potential risks such as loss of control.[121] Such cultural play and interaction with protected works will often amount to infringement – unless, that is, the content owner has elected to *permit* or *tolerate* such play.[122]

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[114] *Ibid*.

[115] *Ibid* at 16.

[116] *Ibid*.

[117] *Ibid*.

[118] See Burk, *supra* note 5. Burk discusses the community of gamers who played the online game *Uru: Ages Beyond Myst* – when the online platform was shut down, the users "colonized other virtual worlds where they could continue their community, importing with them … the distinctive design motifs of the architecture and artifacts from the Uru game world" (at 2).

[119] *Ibid* at 7.

[120] *Ibid*, describing how children have long acted out *Star Wars* fantasies with their friends, but digital cameras and social media mean those performances / infringements can be exposed on a scale previously unimagined.

[121] *Ibid* at 7-8.

[122] I draw a distinction here between (a) permitted uses which do not constitute infringement (*e.g.*, by virtue of the availability of an assertion of fair use or fair dealing), (b) non-permitted uses which are *prima facie* infringement but which the content owner elects to ignore or otherwise not sanction by means of an assertion of exclusive rights, and (c) uses for which a content owner provides express permission by means of a licence such as an open content licence. As Burk notes, content owners have adopted a wide variety of positions relating to use of their content (see *ibid* at 8).

The use of licensing to disseminate a product has long been recognized as an integral component of product strategy,[123] and can be foregrounded as "an explicitly proactive element of … marketing strategy".[124] Some licensors have turned from intellectual property enforcement towards a permissive, even facilitative, approach to consumer interaction with what is nominally proprietary product information. LEGO is one of the more notable examples of this strategy. When the company launched Mindstorms, a programmable robotics-based product, consumers reverse-engineered the technology and posted their findings online. Rather than taking steps to enforce their intellectual property rights and seek removal of the content, LEGO wrote "right to hack" provisions into the Mindstorms software licence and encouraged customers to manipulate the software and create their own improvements.[125] A thriving online community resulted, and the episode is often cited as an example of harnessing "user-driven product innovation" into brand co-creation.[126] Microsoft has similarly provided a facilitative licence for players of its Xbox videogames to use elements of the games to create new content – as Microsoft's Game Content Usage Rules explain, "we know that people like you … love our games and sometimes want to use things like gameplay footage, screenshots, music and other elements of our games … to make things like machinima, videos, and other cool things … . We'd like to make that easier to do…".[127]

The constitutive operation of open content licensing works multi-directionally, flowing between licensor and licensee and between community and individual. Adoption of an open content licence, and use of open content material, places one within the ambit of the community. Just as "[a]uthors use copyright to structure their creation and distribution of expression in ways that suit their aims and temperaments",[128] so too do licensees elect to make use of open content works in a purposive and declarative fashion. The relationship among creator, content, licensing arrangement and community, appears therefore to be catalytic and symbiotic, with licensing not only reflecting the production and

[123] Masaaki Kotabe, Advind Sahay, & Preet S. Aulakh, "Emerging Role of Technology Licensing in the Development of Global Product Strategy: Conceptual Framework and Research Propositions" (1996) 60 Journal of Marketing 73 at 81, 85.

[124] *Ibid* at 74.

[125] See Brendan I. Koerner, "Geeks in Toyland" (2006) Wired Magazine, online: https://www.wired.com/2006/02/lego/.

[126] See Mary Jo Hatch & Majken Schultz, "Toward a theory of brand co-creation with implications for brand governance" (2010) 17(8) Brand Management 590, esp at 596.

[127] Microsoft *Game Content Usage Rules* (updated January 2015), online: https://www.xbox.com/en-us/developers/rules.

[128] McGowan, *supra* note 110 at 223.

dissemination processes, but also helping to shape them.[129] Using the criteria identified by communicative copyright theories as the relevant criteria against which to assess open content copyright licensing – and as the framework informing the analysis – helps to explain the apparent paradox of open content licensing popularity despite its theoretical frailties. The "community-constitutive" function played by open content licensing identifies a facilitative function played by open content licences that assists in making the findings of open content's "proponents" cognizable in terms that its "skeptics" might find congenial: yes, there are problems with open content licensing but its role in sustaining and enhancing communicative activities explains, in part, why it seems such an enduring phenomenon. But while open content licensing is used in many contexts, its distribution is "lumpy" across creative activities: it does not appear to be used with equal enthusiasm by all licensors in connection with all types of creative expression. What next requires attention is an examination of those circumstances that seem to be particularly favourable for the use of open content licences.

III. Indicia of Success

Having identified dialogic relationship-building and community creation as an instrumental purpose for open content licensing that comports with the accounts and concerns of both its skeptics and its advocates, I turn now to the task of identifying those situations that seem to offer promise for the use of open content licences. This is an extension of the instrumentality that informed the previous section: if we know that open content licensing can be used constitutively to achieve certain goals or results – in particular dialogic relationship-formation, and community creation, sustenance and enhancement – what remains to be examined is the circumstances which are most conducive to the achievement of such results. The following discussion begins with a review of Lerner and Tirole's work on open source software licensing, before moving on to discuss the work of other scholars who have focused on the particularities of open content licensing. A note of caution is warranted when trying to analogize from findings about open source software to other types of creative expression (which I will short-hand as

[129] For important cautions and caveats about community creation, see Laura J. Murray, Tina S. Piper and Kirsty Robertson, "Copyright Over the Border" in *Putting Intellectual Property in its Place: Rights Discourses, Creative Labour, and the Everyday* at 21-22 (Oxford: OUP, 2014) (noting that communities do not "coalesce spontaneously" and are "dependent on material factors such as time, education, access to technology, and so on").

"cultural expression") and even making generalizations among and between different types of cultural expression. As Grassmuck has noted, "there might be a categorical difference between software and others kinds of works; a difference that affects incentives to invest creativity, time and attention in sustaining a knowledge commons, as well as the community norms around it".[130] Cogent observations on how to optimally license creative expression can be difficult to articulate because, as Grassmuck has noted, we are "far from a comprehensive ontology" of different types of "works",[131] and it may well be the case that, even assuming that open content licences are appropriate mechanisms for disseminating creative expression, different types of cultural or expressive works will be best served by different types of open content licences.[132] Different taxonomies for creative expression have been offered: Grassmuck, for example, while noting that his proposed categories are "tentative and fuzzy at the edges",[133] describes works as "functional" ("those created for getting a job done") and "expressive" (created for "enlightenment and enjoyment"); Richard Stallman has proposed three categories: functional, aesthetic, and a category of works whose purpose is "to say what people think" (in this category Stallman includes memoirs, opinion essays, and scientific papers).[134] As will be seen in the discussion below, scholars such as Chitu Okoli and Kevin Carillo have created more granular definitions in their efforts to identify the optimal conditions in which to make use of open content licences; nevertheless, the core distinction between functional and cultural expression remains operative and should be borne in mind throughout the discussion.

(a) *Lerner & Tirole: Signaling, Modularity, Environments*

As noted above, Lerner and Tirole authored the seminal article examining, using economic analysis, why programmers elect to participate in open source projects.[135] The two core insights of their work as it relates to the indicia of success for open content licensing are, first, the presence of potential reputational benefits – termed "signaling" – that accrue to contributing participants, and, second, that the

[130] Grassmuck, *supra* note 107 at 29.

[131] *Ibid* at 30, fn 29.

[132] *Ibid* at 30-31.

[133] *Ibid* at 30, fn 29.

[134] Richard M. Stallman, "Copyright and Globalization in the Age of Computer Networks" in *Free Software, Free Society: selected essays of Richard M. Stallman,* 133 at 143-144 (Boston: Free Software Foundation, 2002), online: <http://www.gnu.org/philosophy/copyright-and-globalization.html>

[135] Lerner & Tirole, *supra* note 43.

nature of some works – particularly those which are "modular" – can lend itself to creation and dissemination by means of open licensing.

In trying to determine the motivations of those who participate in open source projects, Lerner and Tirole's analysis identified a number of benefits accruing to participants, of which signaling effects are most salient for this discussion.[136] They concluded open source projects are particularly attractive to those who highly value signaling opportunities – those who desire an "opportunity to signal talent to peers, prospective employers, and the venture capital community".[137] Signaling consists of two related incentives: first, a "career concern incentive", or reputational enhancement effect, whereby participation in the open source project can result in "future job offers, shares in commercial open source-based companies, or future access to the venture capital market";[138] second, an "ego gratification incentive", premised on peer recognition, which motivates participation in projects that will have a large audience.[139] Two features of participation can enhance signaling incentives: the extent to which performance or participation is (i) "visible" and (ii) attributable to a given individual.[140] A pair of extended studies by Gian Marco Campagnolo *et al* have examined "open content film-making" practices, namely the use of Creative Commons-licensed materials in independent filmmaking communities.[141] Their conclusions align with the predictions of Lerner and Tirole: open content licences primarily play a role in "early stage careers", as creators use open content licensing to create and disseminate "calling card" materials that

[136] Lerner and Tirole divided the benefits into couplets of "immediate" benefits and "delayed" benefits (*ibid* at 213ff). In the category of immediate benefits are (i) the increased knowledge or skills imparted by participating in the open content projects, and (ii) a contingent enjoyment or "fun" factor realized if the open source project is more interesting than a competing non-open source project. The delayed benefits are the signaling benefits that are more fully described in the body of this Part.

[137] *Ibid* at 217. Of course, whether a particular participant is engaged in economic signaling of this sort (such as to an employer or a financier) is an empirical matter to be assessed.

[138] *Ibid* at 213 [citations omitted].

[139] *Ibid* at 213-214.

[140] *Ibid* at 216. By comparison with traditional corporate models for software creation, open source projects display those features because outsiders are able to identify with particular individuals with the components they created and, because there is no hierarchical command structure mandating that a particular participant contribute in a particular way, participants are attributed with the full value of the initiative they display, and the quality of their product.

[141] Gian Marco Campagnolo, Evi Giannatou, Michael Franklin, James Stewart & Robin Williams, "Revolution remixed? The emergence of Open Content Film-making as a viable component within the mainstream film industry" (2018) Information, Communication & Society.

can be leveraged into jobs in the "traditional" filmmaking industry – as the authors describe it, "film-makers see the value of their action as a vehicle for future revenue creation".[142]

Spindler and Zimbehl echo the findings of Lerner and Tirole when they conclude that open content licences are likely to be most attractive in those environments where their use may generate positive network externalities.[143] Assessments of network effects in open content scenarios need to be made using nuanced concepts of reciprocity, as Namjoo Choi and Indushobha Chengalur-Smith have argued.[144] In short, they use two different concepts of reciprocity: generalized reciprocity, in which contributions are made with little or no expectation of direct attributable reciprocation or return, and balanced reciprocity, in which contributions are made with some specific expectation of reciprocation or return.[145] Choi and Chengalur-Smith indicate that motivations for participation in open content projects are likely to be different depending on the characteristics of the target audience – where the audience is relatively cohesive and shares characteristics and community norms with the participant, the motivation is likely to be driven by balanced reciprocity, whereas with more diffuse audiences, the motivation is more likely to be generalized reciprocity.[146] Similarly, decisions to participate in projects aimed at a cohesive community are more likely to be motivated by local network effects (i.e., by reference to the number of network members with whom the contributor is directly connected, rather than the aggregate number of members[147]), whereas participation in projects intended for a larger audience are more likely to be motivated by direct or indirect network effects.[148] They also find that projects aimed at the general

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[142] *Ibid* at 14.

[143] Spindler and Zimbehl, *supra* note 50 at 52. A "network effect", sometimes referred to as "network externality", is present when the value of a good or service to a particular owner increases as the number of other people using the good or service increases. The classic example of a product displaying a network effect is the telephone – the more people that have telephones (and hence can be communicated with by telephone), the more valuable the telephone is to each owner. See, generally, Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006).

[144] Namjoo Choi & Indushobha Chengalur-Smith, "Characteristics of Open Source Software Projects for the General Population: Reciprocity and Network Effects" (2015) 56 Journal of Computer Information Systems 22.

[145] *Ibid* at 23. See also generally Marshall Sahlins, *Stone Age Economics* (Chicago: Aldine-Atherton, 1972).

[146] *Ibid* at 23-24. Choi and Chengalur-Smith's work focuses on software development projects they characterize as being targeted at "techies only" or at the "general population".

[147] *Ibid* at 24.

[148] *Ibid*. With direct network effects, the size of the user network for a good directly increases the value to the base user – *e.g.*, in the case of the telephone network, the more people that have telephones, the more people you can communicate with by telephone. Indirect network effects are premised on the notion that the size of the user network for a good causes production of complementary goods which in turn increases the value of the original good to the base user – *e.g.*, DVD players prompting the production of more DVDs, thereby increasing the value of the DVD player.

population tend to use more restrictive licences as compared to projects aimed at smaller, cohesive communities indicating that smaller communities tend to attract more open licensing terms.[149]

Because reputation only accrues within, and signaling can only occur within, relational contexts,[150] Lerner and Tirole's conclusion indicates that the presence of a community is needed to provide the forum in which open licensing can flourish; it remains unclear whether that community must precede the use of open content licensing, or whether such community can be brought about by that usage, but it seems clear that there must be some coincidence in time between the existence, whether nascent or fully-formed, of community and open content licensing. The relative value of signaling effects and the potential viability of projects is also a function of the characteristics of given communities: projects that are likely to elicit interest from high status members of a discrete community (or sub-community) from whom the participant is desirous of soliciting attention or feedback will be most suitable for open licensing strategies.[151] This speaks to a distinction between signaling to different communities, or different parts of different communities. Signaling is worthwhile when it is done to high status community peers (or those whom one wishes to be community peers), but of less value when it is done to low status peers or non-members. This hints that for open content licensing to be viable there needs to be a cognizable community (or at least a subset of participants within a larger community) made of members who possess cultivated tastes (in the sense that they have been honed with respect to a particular artifact of interest to the community) who can perceive, interact with, and respond to the licensed good in order to provide the feedback necessary for signaling to occur.

The other critical component of Lerner and Tirole's work is that they made inroads in determining whether certain *kinds* of projects or content lend themselves to dissemination by means of open licensing. Key amongst these structural characteristics is modularity, *i.e.*, the extent to which a project can be "divided into much smaller and well-defined tasks … that individuals can tackle independently from other

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[149] *Ibid* at 28.

[150] See generally David Rolph, *Reputation, Celebrity and Defamation Law* (Burlington, VT: Ashgate Publishing, 2008), esp at 3-6 (the "unifying feature of all these definitions of 'reputation' is the dependence of an individual's reputation on the recognition of others"; "reputation is derived from the exhibition of … personal characteristics in interactions with others, reinforcing its social nature").

[151] Lerner & Tirole, *supra* note 43 at 217. They use the examples of programming operating systems as compared to interfaces – the quality (and hence performance) of the former are of interest to sophisticated knowledge workers such as system administrators, while the latter is of concern mostly to end-users, whose approbation may be of lower value to open source participants

tasks".[152] The notion of modularity can also be applied to creative works on a number of different axes. Creative works may be comparatively modular (*e.g.*, a short story is more modular than novel, because the story is shorter and will take less time to create), and they can also be internally modular (*e.g.*, while a poem may not be easily viewed as modular, it is possible to see how a song can be so treated by breaking it down to the constituent parts played by different instruments, and even easier to see with certain types of creative expression such as videogames, which can be compartmentalized into different things like character, equipment or scenery designs). Additionally, Lerner and Tirole note that the capital cost of creating individual components can act as a limiting factor in identifying suitable situations for open content licensing:[153] the more expensive it is for each "module" or component to be created, the less appropriate the situation is for open content licensing. Even if modularity is possible, if the costs of creating a single module are too high, the number of potential contributors will be limited by that cost. Success favours not just modular works, but modular works whose costs of creation are low.

Lerner and Tirole have also noted that environmental or contextual factors play a role in decisions made by firms to adopt open source licensing and by programmers to participate in open source projects. For example, they have noted the incentivizing effects of "facing a battle against a dominant firm".[154] In addition, decisions about whether to make use of restrictive forms of open licensing (*e.g.*, a licence with a copyleft provision, requiring that derivative works be licensed on the same terms, is considered "restrictive" by Lerner and Tirole) appear to be informed by factors such as the nature of the project being licensed, the composition of the target audience, and the formal structure of the environment in which the project is being exploited. They observe that consumer-oriented applications (such as games) are more likely to have restrictive licences; projects intended for commercial environments tend not to use restrictive licences; and projects geared towards end-users are more likely to use restrictive licences.[155] Spindler and Zimbehl have likewise noted that the advisability of using open content licences will depend

[152] *Ibid* at 220.

[153] *Ibid* at 231.

[154] *Ibid* at 228.

[155] Josh Lerner & Jean Tirole, "The Scope of Open Source Licensing" (2005) J of Law, Economics, & Org 20 [Lerner & Tirole, "Scope"] at 54-55.

on the characteristics of the market in which they are being used, that is, on "the different structures of production and dissemination and the potential lack of quality signalling".[156]

(b) *Cheliotis – Appetite for Marginal Differences, Transient Utility and Frames of Constraints*

Giorgos Cheliotis has worked to provide an account of how the processes and licences originating in open source software can be transposed to the creation of cultural or entertainment goods.[157] In Cheliotis' view, concepts of motivation are easily transferable between open source and open content: creator-contributors may participate in open content communities because they are deriving hedonic rewards from the participation itself, or are motivated by factors such as ideological commitment or altruism.[158] Relatedly, to the extent that financial factors are a consideration for open content creators, Cheliotis notes that the specifics of an open licensing arrangement "can help create the conditions under which non-financial private, altruistic or ideological motivations may be translated to monetary rewards".[159] Cheliotis identifies a distinction between "functional" information goods (*i.e.*, software) and "cultural" information goods (seemingly all other forms of information goods) which is predicated on differences in their production processes and the characteristics of their consumption.[160] On Cheliotis' account, the democratization of production of cultural goods is driven partly by technology, but also by two inherent characteristics of contemporary society: what he terms the "distribution of skills" and the "distribution of tastes".[161] Briefly, creative talent is "not uniformly distributed in the population, nor is it concentrated in only a small number of individuals",[162] and there is an observed large demand for close substitutes in cultural works (roughly, people consume lots of entertainment products such as songs or books that may be largely similar to each other, *i.e.*, a particular audience member's consumption of

[156] Spindler and Zimbehl, *supra* note 50 at 73.

[157] Giorgos Cheliotis, "From open source to open content: Organization, licensing and decision processes in open cultural production" (2009) 47 Decision Support Systems 229 [Cheliotis, "From Open Source"] at 229. As with Dusollier, Elkin-Koren and others, Cheliotis notes that open content licensing has arisen in the context of a "democratization of innovation" enabled by digitalization.

[158] *Ibid* at 236.

[159] *Ibid* at 237.

[160] *Ibid* at 229.

[161] *Ibid* at 230.

[162] *Ibid*.

creative expression often "clusters" around *types* of works, such as fans of science fiction or guitar rock music reading or listening to lots of different examples of those types of works).[163]

The insight that the aggregate audience for cultural works often has an appetite for multiple slightly different versions of largely similar cultural works hints again at the sorts of cultural works that will lend themselves to open content licensing, which enables low-barrier production of multiple competing works. While not all, or even many, of us have the capacity or dedication to produce creative works that will be of interest to large segments of the population, many more may "have the capacity to produce something that is of value to a particular audience".[164] Digital technology assists in allowing audiences to find the work of creators and facilitates the payment of remuneration for access to the work (whether by means of purchases, donations, or indirectly via advertising).[165] In addition, Cheliotis notes that pluralism of choice and serendipity in creation are valued more highly in the case of cultural goods than in the case of functional goods: for functional goods such as word processing programs, consumer choice tends to coalesce around a few dominant offerings, which is not the case for cultural goods, such as novels, and there is value attributed by consumers to idiosyncrasy and individuality in cultural works.[166] Thus the creative processes used for functional goods are likely to be different from those used for cultural goods: more coordinated in the case of functional goods (to ensure that all contributions are incrementally adding to the desired end product), more *ad hoc* in the case of cultural goods (allowing for serendipitous discovery and improvisation that may result in the creation of an entirely different culturally valuable artifact).[167]

Cultural works also display what Cheliotis refers to as a transient utility: depending on the medium and the characteristics of the particular work, the work can be consumed quickly (e.g., movies take longer than songs to "consume") and the utility of the work is usually exhausted relatively soon after consumption.[168] Therefore the aggregate utility of a work to an individual audience member may depend on how quickly it can be consumed and how "replayable" it is. Therefore, it seems to be conducive to use

[163] *Ibid* at 231.

[164] *Ibid* at 230.

[165] *Ibid*.

[166] *Ibid* at 232.

[167] Some forms of cultural goods – special-effects laden motion pictures for example – will require more coordinated, centrally-directed effort than others.

[168] *Ibid* at 232.

open content licences for cultural goods that are easily created and quickly consumed but still leave their audience with an appetite for more of the same or similar cultural works; in such an environment, the open content licence, by lowering or removing transaction and input costs and providing access to "raw materials", facilitates fast, low-cost creation and rapid dissemination.

Echoing the findings of Lerner and Tirole's later work on open source licensing, Cheliotis has introduced the notion of a "frame of constraints" within which open content licensing decisions are made by creators and content owners. The frame of constraints consists of internal factors (such as desire for financial return and ideological conviction), community influences (such as community norms), and limitations imposed by the medium of expression (such as the medium's ease of replication and dissemination).[169] The decisions are also subject to influence by broader social and contextual factors,[170] restrictions imposed by the terms of applicable licences and the normative patterns that emerge from decisions made by the community members.[171]

Matters of dissemination and network effects play a nuanced role in Cheliotis' account of open content licensing for cultural works.[172] Many cultural goods require public exposure or revelation in a way that is different than is the case for functional goods: cultural works are typically designed for *dissemination*, *i.e.*, consumption on their own terms, and not merely as inputs to a larger project.[173] Dissemination also has a bearing on network effects: while some cultural goods may exhibit no network effects, where network effects do exist they may be indirect, having "more to do with enhancing the [consumption] experience, rather than being essential" to it[174] – so, for example, while it is not necessary to talk about the most recent episode of *Game of Thrones* with your friends, doing so may enhance your

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[169] *Ibid* at 243.

[170] See Girgos Cheliotis *et al*, "Taking Stock of the Creative Commons Experiment: Monitoring the Use of Creative Commons Licencses and Evaluating Its Implications for the Future of Creative Commons and for Copyright Law" (2007), 35th Research Conference on Communication, Information and Internet Policy, September 28-30, National Center for Technology & Law, George Mason University School of Law [Cheliotis, "Taking Stock"] at 7 ("the aims of the community and the beliefs of the other members of the same community likely influence the decisions of the individual … also possible that the geopolitical, legal and economic background of a user's offline community … also play a role").

[171] Cheliotis, *supra* note 157 at 243.

[172] *Ibid* at 231. On network effects generally, see *supra* note 143.

[173] Cheliotis *supra* note 157 at 236. Consider the difference between a file management sub-program written for an open source project as compared to a song – the former is unlikely to have any utility or even planned existence outside of the context of the program for which it was written, while the latter, though it may be incorporated into a motion picture, will also often have its own status as a consumable work.

[174] *Ibid* at 232.

enjoyment of it (and being able to access, share, and modify or re-mix the actual content in the course of those conversations may increase that enhancement effect). This accords with the observations of Hughes *et al* that the value of some types of creative expression is inherently relational and contextual[175] – hinting that works that display such relational network effects would most benefit from the employment of a mechanism, such as open content licensing, that enables maximal relational and additive contextual use of those works.

Cheliotis has created a decision tree that identifies the factors that he has found to impact the decision as to which form of CC licence to use; it is reproduced below as Figure 4-1 because it also assists in identifying the factors taken into account in the decision as to whether to make use of open content licensing *at all* and informs the table set forth in Part III(f) of this chapter:[176]

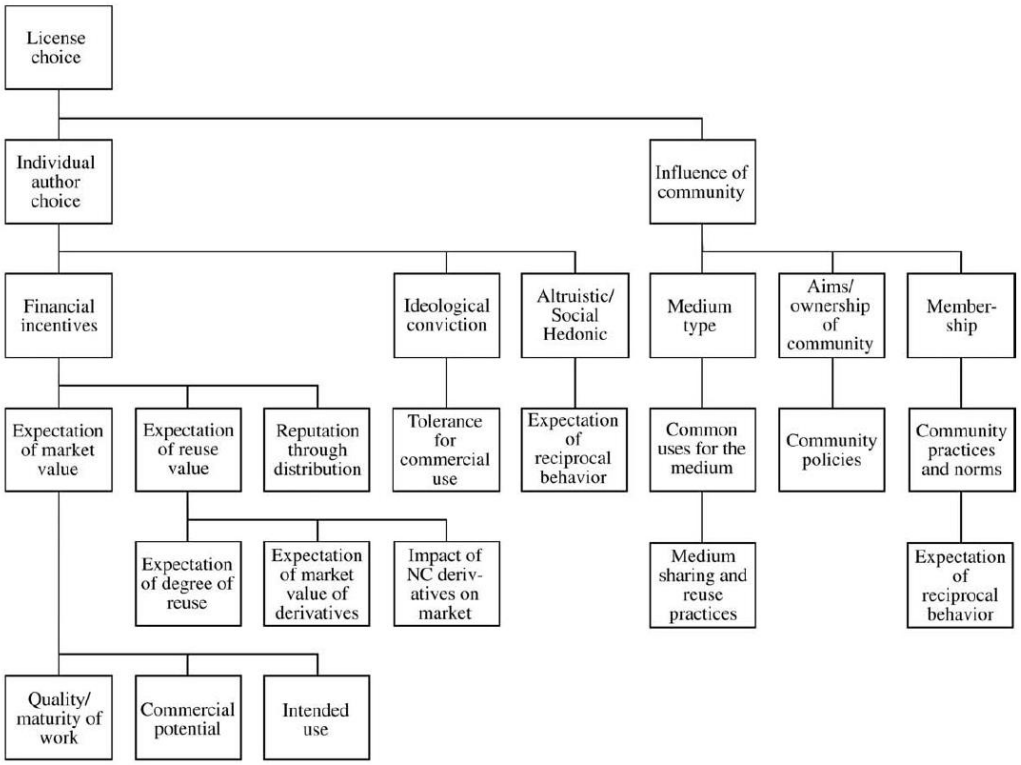

Fig. 9. Factors impacting the choice of license within an open cultural production setting.

[175] See *supra* note 64 and accompanying text.

[176] Cheliotis, *supra* note 157 at 243. Note that Cheliotis has also created a different version of the decision tree showing additional environmental factors (such as the "piracy rate", "degree of economic development" and "global consciousness") whose influence was more speculative; see Cheliotis, "Taking Stock", *supra* note 170 fig. 2 at page 8.

(c) *Okoli & Carillo – Licensors, Communities, and Works*

Chitu Okoli and Kevin Carillo have developed a taxonomy of creative expression that they use as a lens through which to focus their attention on the business models used to support commercial-level open content licensing. Okoli and Carillo's taxonomy consists of four categories derived from the perspective of users/consumers of the works:[177] utilitarian works;[178] factual works;[179] aesthetic works;[180] and opinioned works.[181] Each of the four categories of works has particular creation characteristics: utilitarian and factual works, for example, often involve large numbers of contributors and are highly modular, whereas aesthetic and opinioned works involve smaller numbers of contributors (in some cases only a single contributor) and their modularity varies widely (paintings and novels are generally non-modular, but motion pictures and songs may be highly modular). After reviewing a series of studies that investigated the effect of open source licensing in the software industry, Okoli and Carillo hint that open content licensing may be particularly suited for works whose quality "is improved by an increase in the number of contributors, which is usually the case of utilitarian and factual works", such as online encyclopedia like Wikipedia.[182] In addition, they observe that works that lend themselves to open content licensing will by their nature be expandable and non-bounded;[183] so, for example, works of narrative fiction that provide a "platform" for the telling of additional stories through the use of extensive casts of

[177] Chitu Okoli & Kevin Carillo, "Beyond Open Source Software: A Framework, Implications, and Directions for Researching Open Content" (September 19, 2013) at 10, available at https://ssrn.com/abstract=1954869. The categories derive from two categorization dimensions: what Okoli and Carillo term "truth perspective" (which may be either relativist (useful /not-useful or beautiful/ugly) or universalist (true/false or accurate/inaccurate)) and "value assessment" (which may be either objective (measured against an extrinsic standard) or subjective (measured against individualist preferences)).

[178] Utilitarian works are objectively evaluated and relativistic – examples include software, recipes, how-to manuals, and blueprints (either architectural or engineering); these are works which are intended to be valuable according to a subjective criteria (did the recipe result in a tasty dish or the software perform the function I needed?) (*ibid* at 13).

[179] Factual works are objectively evaluated and universalist – examples include dictionaries, maps, and news reports); these works are capable of being measured against an independent truth value (does the map accurately depict the area in question?) (*ibid* at 13-14).

[180] Aesthetic works are subjectively evaluated and relativist – examples include novels, paintings, music, and stage plays; these works are evaluated from the standpoint of the observer's personal preferences (*ibid* at 13-15).

[181] Opinioned works "make universalistic claims, but such claims are understood to be subjective without an inordinate attempt to objectively evaluate" them – examples include essays, blog posts, editorials, and religious and philosophical texts (*ibid* at 13, 15-17). The unifying element of opinioned works is that they are "presented … as a faithful representation of the author's beliefs or opinions" (*ibid* at 16).

[182] *Ibid* at 21. As above, Okoli and Carillo strike a cautionary note about whether findings applicable to the software industry are generalizable to other industries because of the idiosyncratic nature of creative works.

[183] *Ibid* at 22 (commenting on "finite projects that have a definite ending with a limited number of revisions" not being suitable for open source processes).

characters and richly-developed settings (such as the *Star Wars* or *Harry Potter* franchises) can be characterized as expandable and non-bounded.

Reviewing the business models and commercialization strategies that have been used to provide revenue for open source and open content projects,[184] Okoli and Carillo highlight that different categories of works may lend themselves to different open licensing approaches.[185] For example, they are skeptical that factual and opinioned works can be successfully exploited using open content licensing though they note that Wikipedia appears to have found a viable model (namely donations and grants).[186] Their analysis is also attentive to the characteristics of the project participants, the environment in which it is being launched and the nature of the creative expression. They highlight that licensors need a cluster of attributes: a lack of desire on the part of the licensor to dominate and control the process;[187] recognition and acceptance that the value of competing proprietary works owned by the licensor may diminish in the presence of open alternatives;[188] and a desire to take steps to assist in establishing an open and trusted ecosystem (for example by making public commitments to not renege on the open approach and to not adopt a policy of strict enforcement of its intellectual property rights).[189] Also critical, in Okoli and Carillo's review, is that open projects be launched into a community with a shared ethos[190] and having mechanisms to efficiently assess content quality,[191] echoing the emphasis noted earlier by Lerner and Tirole and Spindler and Zimbehl on the signaling capabilities of particular markets or communities.

At this point we can draw out some additional observations about the shared characteristics of open content community members. Open content licensing seems suitable for certain types of creators, or at least creators who bear certain characteristics when they first join the community. If the creator-contributors are expecting immediate commercial-grade monetary compensation from their contributions,

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[184] *Ibid* at 21.

[185] *Ibid* at 13-17 (for example, Okoli and Carillo (echoing Stallman) think that opinioned works, because they are supposed to be authentic representations of the author's voice, do not lend themselves to the creation of derivative works, and so the most suitable open content licences would be those which restrict the creation of derivative works (CC ND) and restrict commercial exploitation (CC NC). I quibble with some of their views on the most appropriate licences to use, and instead highlight the notion that different *types* of works may be particularly suitable for different *types* of open content licences.

[186] *Ibid* at 21.

[187] *Ibid*.

[188] *Ibid*.

[189] *Ibid*.

[190] *Ibid* at 22.

[191] *Ibid* at 22-23.

open content licensing may not be appropriate for them. But if the creator-contributors are willing to contribute on the basis that their financial compensation will be deferred, or that they will be "compensated" by other mechanisms, open content licensing seems more promising. Of course, some of the creator-contributors who enter the community may not be interested in compensation (monetary or otherwise). These observations are consistent with the work of Russi,[192] who reviewed case studies of digital music market participants who used the CC licensing scheme, and concluded that the use of CC licences would likely "primarily be attractive to non-famous artists"[193] who would seek the possibility of exposure to a broader audience through CC-enabled online platforms. In a similar vein, Maritza Schaeffer's discussions with visual artists who had used or thought about using CC licences led her to conclude that CC licences are best suited for artists "who are not primarily concerned with remuneration, but would rather attain popularity or spread a message through the dissemination of their work".[194] Dusollier, too, has noted that CC licences are "unhelpful" for creators interested primarily in monetary remuneration, though they may be suitable for those whose "primary purpose in creation might not be remuneration".[195]

(d) *Foong and Hietanen – Creator Dispositions and Market Structures*

Cheryl Foong and Herkko Hietanen have also closely examined the commercialization strategies which have been successfully used by open content licensors. Foong, using the "CwF + RtB = $$$" formulation originated by Mike Masnick,[196] posits that open content licensing can be successfully deployed in situations where the licensor is able to "Connect with Fans" (CwF) by developing an engaging relationship with potential consumers, and then giving them a "Reason to Buy" (RtB) by providing access

[192] Russi, *supra* note 71. Russi profiles websites which license music using the CC-Plus (or CC+) licensing protocol. CCPlus (or CC+) is a protocol which allows licensors to adopt a CC licence and supplement it by means of a separate agreement which grants additional permissions to the licensee; see https://wiki.creativecommons.org/wiki/CCPlus.

[193] Russi, *supra* note 71 at 119.

[194] Schaeffer, *supra* note 74 at 361. Schaeffer also concluded that CC licences are a "natural fit" for "appropriation art" because use of CC licences by an appropriation artist might reduce concerns about infringement claims; Schaeffer's observation on this point is presumably limited to CC licences which do not prohibit the creation of derivate works or prohibit commercial usage.

[195] Dusollier, "Master's Tools", *supra* note 2 at 282. (*Cf* the observations of Schaeffer on the suitability of CC licences for those whose primary motivation is not compensation, *supra* note 194 and accompanying text.)

[196] Mike Masnick, "My MidemNet Presentation: Trent Reznor and the Formula for Future Music Business Models" online: http://techdirt.com/articles/20090201/1408273588.shtml.

to a scarce product (which in some cases means access to the creator themselves through live appearances or personalized products such as signed physical artifacts).[197] In Foong's final analysis, CC licences seem most appropriate for a subset of creators and content owners who prioritize disseminating their content, but do not have meaningful access to conventional distribution channels, and who can productively cultivate relationships with their potential audience.

Hietanen identifies the traditional "market positioner" or, in the contemporary context, "dual licensing", strategy as the model used by most open content businesses.[198] The conventional market positioner strategy involved making a consumer good available either for free or below cost to encourage sales of other, profitable, goods.[199] Adapted to the content industries in the digital environment, the dual licensing strategy involves making content available for free using an open content licence and generating revenue from the provision of that same content in other formats (*e.g.*, allowing free downloads of the digital copy of a book, and selling hardcopy versions of the same book, possibly with additional content (such as illustrations) via conventional retail means) or providing other content (*e.g.*, offering the first issue of a book series via an open content licence and selling sequels via traditional channels), services (*e.g.*, offering a book for free and charging for in-person readings or related speaking engagements) or rights (*e.g.*, offering a book by means of a licence that restricts commercial exploitation, and charging a fee for the right to exploit the content for commercial purposes).

Hietanen's review of creators and businesses who have successfully made use of open content licensing in bringing their creative expression to market also identifies a number of situations in which using open content licensing "makes economic sense":[200] where a market for the content has never

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[197] Foong, *supra* note 70 at 8-11. Foong, citing Masnick, *supra* note 196, uses songwriter/performer Trent Reznor (of Nine Inch Nails) as an example of an artist who has utilized the CwF + RtB formula by providing fans with free downloads of portions of albums, or free low-quality versions of albums and paid high-quality versions of albums, sometimes under CC licences which allowed them to be remixed, and selling limited edition premium quality merchandise and boxed set collections of recordings. The model as used by Reznor entails selling a small number of expensive goods to a devoted fanbase. For further details on Reznor's various experiments with distribution approaches, see Leah Belsky *et al*, "Everything in Its Rights Place: Social Cooperation and Artist Compensation" (2010) Michigan Telecommunications and Technology Law Review 1 at 8ff. It can be objected that Reznor is an unrepresentative outlier because he was only in a position to engage in such experiments and leverage his fame because he had attained stardom in the 1990s by means of the conventional record industry apparatus.

[198] Hietanen, *supra* note 44 at 176.

[199] *Ibid* at 176, citing Glossary of Industrial Organisation Economics and Competition Law, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, (1993), http://www.oecd.org/dataoecd/8/61/2376087.pdf

[200] Hietanen, *supra* note 44 at 215.

existed (*i.e.*, the content is new to the market); where the market has "dried up" (*i.e.*, the content was previously available but demand has withered); where value can be generated by means other than limiting access to the content (*i.e.*, the dual licensing strategy can be used); or where rights holders "want to shift development and marketing costs to users".[201] Additionally, he identifies two indicia of commercial success for open content licensing: first, that any open business model is supplemented by a non-open business model (*i.e.*, employment of the dual licensing strategy);[202] second, that the content be accessible through an easy-to-use user interface.[203]

Scholars who have examined the role of technology licensing in connection with product sales strategy have also identified a variety of market-structural considerations to be taken into account in making licensing decisions. Uniting the consideration is the extent to which wide dispersion of information, or wide access to a particular product, is sought – by lowering access costs, an open content licence enables broader dissemination.[204] Where network externalities for a product are high, there will

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[201] *Ibid*.

[202] *Ibid*. Hietanen profiled numerous different businesses which utilized open content licensing (at 173-215). The overview contained in this footnote reviews five of those businesses for the purposes of giving an indication of how they made use of the dual licensing strategy. The Finnish producers of the ultra-low budget "*Star Wreck*" series of parodic science fiction films released the franchise's sixth installment ("*Star Wreck: In the Pirkinning*") using a CC BY-NC-ND licence; they generated revenues by selling authorized DVD copies of the film and licensing the film for broadcast on the Finnish public broadcaster. Flickr, the online photo sharing website, allows its users to make their uploaded content available using a variety of licensing options, including CC licences; Flickr offers free ad-supported accounts with limited bandwidth and storage, and charges for ad-free accounts and larger bandwidth and storage capacities. Magnatune, a Los Angeles record label, licenses music from artists and makes the music available using CC BY-NC-SA licences, charging subscription fees for an "all you can eat" option which permits unlimited downloading, streaming and conforming use of the entire Magnatune catalogue; Magnatune also generates revenues from licensing music for commercial usage. MusicBrainz offers a free metadata database for music and licenses its data and source code using a variety of open licences, including the GNU GPL, CC NC-SA and CC0 licences; MusicBrainz licences the dataset for commercial purposes through the MetaBrainz Foundation, which solicits donations and also provides consulting services and support services to users of the database. In 2016, the Foundation had total income of over $323,000 and net profits of just over $27,000. Cory Doctorow is a writer and activist who has released multiple novels and short stories through publisher Tor Books simultaneously using CC licences and conventional print runs; Doctorow makes money primarily through speaking fees, but also generates revenue from advances and royalties for hard copy sales of his books.

[203] *Ibid* at 215-216. Hietanen also states that successful open content licensing models require "interesting content that can be easily modified" (at 215); while the content being "interesting" seems to be a self-evident requirement, it is less clear on what basis he concludes that the content must be "easily modified" – of the various businesses he profiles, the majority do not appear to expect that their users will modify the content being provided. It seems more consistent with Hietanen's account to assert that, instead of easy modification, the content be easily *shareable* (*i.e.*, made available in a file format which is not restricted by digital rights management mechanisms).

[204] Not all products are equally intended or suitable for broad, low-cost, dissemination – a trite example would be luxury brand goods such as Rolex watches.

often be a correlating desire for widespread dispersion.[205] Similarly, where there is a desire to establish the product as an industry standard,[206] where an industry has multiple viable competitive producers,[207] and where there is a premium on getting a product to market (*e.g.*, in competitive industries where market turnover is rapid due, for example, to technological obsolescence or changing consumer tastes),[208] wide dispersion is strategically valuable.

(e) *Consumption Community Scholarship*

The literature on consumption communities and brand communities has been attentive to issues of community construction by means of product dissemination strategies.[209] The related concepts of consumption communities and brand communities describe a "form of human association situated within a consumption context",[210] consisting of relationships among consumers, products, firms, marketers, and institutions premised either on consumption or interaction with a particular brand[211] or type of product.[212] It is increasingly the case that consumption and brand communities are geographically de-located, forming and persisting online (though with occasional real-world activities that supplement the online activity).[213] Firms have recognized that by encouraging the formation of consumption and brand communities they can involve their customers in the process of value creation and product innovation.[214] The development and maintenance of customer relationships are predicated on collaboration and trust; the approach posits the firm-product/brand-consumer relationship as way to "mobilize users to increase revenue".[215] As Rosenblatt has noted (though writing in a different discipline), communities that cohere around the

[205] Kotabe, *supra* note 123 at 77. Kotabe et al mention the decision by Matsushita to license its VHS technology as widely as possible in order to "achieve a higher initial installed base that would, in turn, act as an incentive for prospective customers to adopt VHS rather than Betamax" (at 77).

[206] *Ibid* at 78.

[207] *Ibid* at 79.

[208] *Ibid* at 81.

[209] Muniz, Jr & O'Guinn, *supra* note 83 and James H. McAlexander, John W. Schouten & Harold F. Koenig, "Building Brand Community" (2002) 66 Journal of Marketing 38.

[210] Muniz, Jr. & O'Guinn, *supra* note 83 at 426.

[211] *Ibid* at 412.

[212] McAlexander, *supra* note 209 et al at 39.

[213] See generally Stefano Brogi, "Online brand communities: a literature review" (2014) 109 Procedia – Social and Behavioural Sciences 385.

[214] Hope Jensen Schau, Albert M. Muniz, Jr. & Eric J. Arnould, "How Brand Community Practices Create Value" (2009) 73 Journal of Marketing 30.

[215] See Saiqa Alemm, Luiz Fernando Capretz, & Faheem Ahmed, "Empirical Investigation of Key Business Factors for Digital Game Performane" (2016) 13 Entertainment Computing 25 at 27.

creation and consumption of creative expression seem particularly well-suited to develop a positive sense of belonging,[216] and so seem particularly well-suited for development into consumption/brand communities. As discussed above in the context of LEGO's decision to permit access to its toy software by means of a permissive licence,[217] and as explained by Hughes *et al*,[218] inherent in the consumption/brand community strategy is the instrumentalization of the community of customers/users/audience to accomplish tasks (such as marketing or innovation) that would otherwise be accomplished within the confines of the firm.[219]

A series of related observations from this literature are relevant to this discussion. It is recognized that brands and consumption practices are socially constructed,[220] and that, generally, consumption communities with stronger senses of community have more value to firms than those with weaker senses of community.[221] The creation of the brand and the community is "a complex and fascinating dance of social construction" in which firms and consumers play authorial roles.[222] Consumption/brand communities engage in an "active interpretive function",[223] an operation that aligns with those identified by Hughes *et al*.[224] The communities are often self-aware and self-reflexive, including with respect to their commerciality.[225] The process of social brand construction – the enablement and encouragement of the process of interaction with a product and among community members – is itself potentially valuable.[226] It follows that forms of dissemination and licensing that themselves further those goals of interaction have potential strategic value. The internet, in particular the "Web 2.0" environment that foregrounds user

[216] Rosenblatt, *supra* note 84 at 104 ("creative communities are often well-suited to developing belonging: they unite people around types of creative endeavors, and they provide opportunities for people to experience a sense of competence and accomplishment. It seems, however, that some sorts of creative communities are more likely than others to foster a sense of belonging: those that provide opportunities for recognition, collaboration, and status, and those that embrace shared norms and facilitate trust among members").

[217] See *supra* note 125 and accompanying text.

[218] See *supra* note 64 and accompanying text.

[219] See also McAlexander, *supra* note 209 at 51 ("community-integrated customers" can "serve as brand missionaries", are more loyal and forgiving of lapses in quality, and "are motivated to provide feedback").

[220] Muniz, Jr & O'Guinn, *supra* note 83 at 427.

[221] *Ibid*.

[222] *Ibid* at 428.

[223] *Ibid* at 414.

[224] See *supra* note 64 and accompanying text.

[225] Muniz, Jr & O'Guinn, *supra* note 83 at 415.

[226] McAlexander, *supra* note 209 at 50 ("[t]o the extent that the company behind the brand facilitates such interactions [i.e., interpersonal relationships among community members], the customer base is likely to reciprocate with increased appreciation for the company and a sense of being an important part of a larger set of social phenomena").

participation and interaction, provides fertile ground for the deployment of community-based product strategies and development of those communities.[227]

Drawing on the work of Rosenblatt and Hughes *et al*, we can begin to see that products that are based on creative expression, and that are capable of being creatively interacted with, seem like suitable candidates for the development of associated consumption/brand communities. Further, we can see how open content licences, which are designed to facilitate frictionless dissemination and re-use of the licensed work, can play a productive role in the development of such communities by enabling dialogue and interaction among community members with respect to the very product which is the focus of the community. The nature of the product also has bearing on community development: as Muniz and O'Guinn have observed, products "that are publicly consumed may stand a better chance of producing communities than those consumed in private",[228] an observation that comports with those of Hughes *et al* regarding product consumption and interaction which is amplified by being communal or relational in nature. Scholars examining brand communities have also identified common practices among firms successfully maintaining brand communities – the practices evidence expectations and commitments which evidence norms of communicative copyright: access, engagement, dialogue, and support.[229]

(f) *Summarizing the Indicia*

The foregoing literature review and discussion has identified a number of indicia of success for the use of open content licences. The following organizes the indicia thematically into four categories that emerge from the literature.

[227] Brogi, *supra* note 213 at 387.

[228] Muniz, Jr & O'Guinn, *supra* note 83 at 415.

[229] See Schau, *supra* note 214 (identifying twelve common practices organized by four themes, which include "social networking", "welcoming" and empathizing); see also Hatch & Schultz, *supra* note 126.

Creator / Licensor	**Nature of Licensed Work**	**Community**	**Market**

▪ owns other intellectual property rights that can be utilized in a "dual licensing" strategy (H)
▪ sublimated desire/need:
  ○ for immediate financial return (C; O&C; Ru; F; S)
  ○ to dominate and control creative process (O&C)
▪ philosophical alignment with "open" goals (C; O&C; F; S)
▪ willingness and capacity to cultivate ongoing relationships with customers (F)
▪ licensor recognition and acceptance that value of competing proprietary works will diminish in presence of open alternatives (O&C)
▪ willingness and capacity to assist in establishing an open and trusted community (O&C)
▪ heightened desire to achieve maximal dissemination (even in absence of compensation) (F; R; S; K)
	▪ modularity (L&T)
	▪ low capital cost to create (L&T; C)
	▪ transient utility, ease of consumption and "replayability" (C)
	▪ ease of replication (C; H)
	▪ expandable and non-bounded (O&C)
	▪ quality of work can benefit from multiple contributions (O&C)
	▪ displays network effects (L&T; S&Z; C; H; H&L)
		▪ predisposition to active participation in creation of creative expression (Ro)
		▪ shared ethos (particularly with respect to treatment of copyright) (O&C); Ro)
		▪ community within which signaling effects can occur (L&T; S&Z; C; O&C)
		  ○ capacity for visibility and willingness to provide attribution (L&T)
		▪ values idiosyncrasy, individuality, serendipity and improvisation (C)
		▪ presence and participation of high-status community members (L&T)
		▪ cohesiveness (C&CS)
			▪ conducive competitive environment (*e.g.*, market dominated by monopolistic enterprise which provides an opponent to struggle against) (L&T)
			▪ audience appetite for multiple, slightly-variant versions of works (C)
			▪ capacity for, and receptive to use of, "dual licensing" strategy (H)
			▪ ease of access to work (e.g., through user-friendly online interfaces) (H)
			▪ market receptivity (H)
			  ○ content is new to market / first-mover advantage possible (SS&A)
			  ○ licensed work was previously popular but market has since "dried up"
			  ○ users willing to take on marketing/development tasks

Legend: **C** (Cheliotis); **C&CS** (Choi & Chengalur-Smith); **F** (Foong); **H** (Hietanen); **H&L** (Hughes et al); **K** (Kotabe); **L&T** (Lerner & Tirole); **O&C** (Okoli & Carillo); **Ro** (Rosenblatt); **Ru** (Russi); **S** (Schaeffer); **S&Z** (Spindler & Zimbehl); **SS&A** (Sao Simao, Santos & Alvelos)

IV. Conclusion

The desired goal for this chapter was to develop a theoretically rich and empirically-grounded account of open content licensing. The chapter began with an effort to reconcile an apparent disconnect between skeptical scholarly assessments of open content licences with the popularity of their actual use and the accounts of scholars whose assessments were more positive than those of the skeptics. Drawing on the precepts of communicative copyright, the chapter proposed a reconfigured approach to assessing open content licensing, emphasizing the community-constitutive role that can be played by open content licences. That community-constitutive role assists in dissolving some of the tensions between the diverging strands of the legal academic literature, and potentially assists in explaining the popularity of some examples of open content licensing, including its exemplar, Creative Commons.

As Rosenblatt has noted, communities that cohere around the creation and consumption of creative expression seem particularly well-suited to develop a positive sense of belonging;[230] open content licensing, focused as it is on creative expression and capable of instrumental deployment to enhance dialogue and interaction, seems particularly apposite for use in the formation, sustenance and strengthening of creative communities. The chapter culminated with an effort to identify the indicia for successful use of open content licences, in order to assist in understanding when and why open content licences will be successful. We have identified a cluster of criteria, arranged around aspects of the creator/licensor, licensed work, market and community, that appear to be useful in identifying the circumstances that are optimal for open content licensing. What still requires careful attention is the relationship between communities, community norms and open content licensing. There are indications in the literature canvassed thus far that there is an iterative process at play between the formation of communities and norms within communities, the nature of the works which are the object of attention for a given community, how copyright is deployed in that community by rightsholders, and how copyright is viewed by other community members.[231] Part of the explanation for the "success" of open content

[230] Rosenblatt, *supra* note 84 at 104 ("creative communities are often well-suited to developing belonging: they unite people around types of creative endeavors, and they provide opportunities for people to experience a sense of competence and accomplishment. It seems, however, that some sorts of creative communities are more likely than others to foster a sense of belonging: those that provide opportunities for recognition, collaboration, and status, and those that embrace shared norms and facilitate trust among members").

[231] See, *e.g.*, Grassmuck, *supra* note 107 at 50 ("the nature of a given community depends on the nature of the works that are jointly created").

licensing in the context of certain communities may lie in the extent to which those communities celebrate and enable the performance of norms and practices that are "communicative" and "dialogic" in the senses described by the communicative copyright account. Open content licences might "work" when introduced to an existing closely-knit community, as happened with open source software licences, but they may not be capable of *creating* such a community, which is one of the express goals of the CC initiative.[232] As Julie Cohen has observed, social groups "play important roles in determining both conceptions of artistic and intellectual merit and … of the appropriate domains of creative practice".[233] In addition, the social group can also interface with validating institutions (which function as gatekeepers or tastemakers) in either a reinforcing or disjunctive manner.[234] Open content licensing may be capable of strengthening pre-existing normative commitments within a given community, but it may not be capable of instantiating them in the first place (or may only be capable of doing so at great expense or with great effort).

In order to examine more closely the relationship between communities, open content licensing, and the indicia of success identified in this chapter, this dissertation next turns its attention to the case study at the core of this research project: the use of the Open Game License by members of the community centred around the *Dungeons & Dragons* role-playing game.

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[232] Elkin-Koren, "Contracts", *supra* note 2 at 420; as Elkin-Koren notes, the "open source / free software movement addressed a relatively homogenous group of elite programmers, who share a set of well-established social norms. … [O]ne question that arises is to what extent the [open content] licensing strategy could work in the absence of social cohesion".

[233] Julie E. Cohen, "Creativity and Culture in Copyright Theory" (2007) UC Davis L Rev 1151 at 1188.

[234] See *ibid.* at 1185, 1188.

Chapter 5

Fieldwork Methodology

I. Introduction

This research project is in part an attempt to answer the question of whether and when open content copyright licences can be productively used to disseminate creative expression such as books, movies, music, and games. In this chapter, I describe the methodology used for the case study that forms the empirical core of the project: the use of the Open Game License ("**OGL**") by members of the community of role-playing game ("**RPG**") publishers, with particular emphasis on the subjective motivations of those who use the OGL, and their self-assessments as to whether such use has been "successful" (using such criteria for "success" as they themselves articulate).[1] Examining the use of the OGL serves to indicate the accuracy of the success indicia for open content licensing that were set forth in Chapter 4 and provides qualitative empirical data that serve to indicate the aptness of the propositions derived from the communicative copyright account described in Chapter 2. In colloquial terms, two questions are at the heart of the empirical aspect of this dissertation: First, why are people using the OGL? Second, are they satisfied with the results of their use of the OGL?[2] Examining how the OGL is actually used by some members of the RPG community assists in answering the question of when open content licenses can be productively used in connection with creative cultural expression. An in-depth empirical examination of the use of the OGL yields explanatory insights about open content copyright licensing and, consistent with the goals of the extended case method,[3] identifies instances where observations conflict with, support, or supplement, the theoretical elements of the communicative copyright account.

[1] For further discussion of the concepts of motivation and success, see Part IV(d), below.

[2] To echo Jessica Silbey, I am interested in asking those who use the OGL to answer the questions, "How and why do they do what they do?" (Jessica Silbey, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (Stanford: Stanford Law Books, 2015) at 6).

[3] See generally Earl Babbie, *The Practice of Social Research*, 13th ed, (Andover, MD: CENGAGE Learning, 2013) at 338 (whereas case studies are "chiefly descriptive", the purpose of the extended case method is "discovering flaws in, and then modifying, existing social theories").

Over the last decade, copyright scholars have generated a wide-ranging body of academic literature using both quantitative and qualitative empirical methods.[4] Much of the leading literature in this area, such as that found in Jessica Silbey's *The Eureka Myth*,[5] is oriented towards testing or otherwise critically assessing the validity of the utilitarian consequentialist theories conventionally advanced to justify the existence or extent of contemporary copyright law. This dissertation seeks to contribute to the growing body of empirically-inclined literature by using a qualitative methodology to, in Silbey's words, "learn more about the intersection of intellectual property law on the one hand, and creative and innovative work on the other … to learn how creative and innovative work occurs from the ground up".[6]

The fieldwork for this research project relies on a qualitative empirical method, in the belief that a qualitative approach that asks for the subjective views of respondents will yield insights that strictly quantitative or experimental approaches are unable to provide.[7] Exploring the actual experiences of licensors and licensees, as described by them in their own words, rather than relying on the artificiality of experiments or examining quantitative data tracking the volume of production of creative expression, offers an opportunity to better understand how the licensing of creative expression occurs – an understanding informed by the perspective of those who are actually doing the licensing. As noted by Silbey, "[i]f we are interested in understanding or more precisely defining the human motivations and incentives that intellectual property doctrine asserts is present in creative and innovative fields, interviews provide direct evidence from the individuals who actually do the work."[8] There are a relatively large number of RPG publishers who use the OGL and who are potentially available to participate as

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[4] For scholarship using quantitative methodologies, see, *e.g.*, Christopher Buccafusco & Christopher Jon Sprigman, "Experiments in Intellectual Property" in Peter Menell & David Schwartz, eds, *Research Handbook on the Economics of Intellectual Property Law (Vol II: Analytical Methods*) (Cheltenham: Edward Elgar Publishing, 2016); for scholarship using primarily qualitative methods see, *e.g.*, Dotan Oliar & Christopher Sprigman, "There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy" (2008) 94 Virginia L Rev 1787; Aaron Perzanowski, "Tattoos & IP Norms" (2013) 98 Minnesota L Rev 511; Eden Sarid, "Don't Be a Drag Just Be a Queen – On the Way Drag Queens Protect Their Intellectual Property Without Legal Regulation" (2014) 10 Florida Int'l U L Rev 133; Tina Piper, "Putting Copyright In Its Place" (2014) 29 Can J L & Soc 345; and Laura J. Murray, S. Tina Piper & Kirsty Robertson, eds, *Putting Intellectual Property In Its Place: Rights Discourses, Creative Labor, and the Everyday* (New York: Oxford University Press, 2014); Courtney Doagoo, "The Use of Intellectual Property Laws and Social Norms by Independent Fashion Designers in Montreal and Toronto: An Empirical Study", unpublished PhD dissertation, online: http://dx.doi.org/10.20381/ruor-20342.

[5] Silbey, *supra* note 2.

[6] *Ibid* at 4.

[7] See *ibid* at 287ff.

[8] *Ibid* at 288.

interviewees; in addition, there is a wealth of written statements online that have been authored by people who use the OGL or use the content that is licensed pursuant to the terms of the OGL. How those sources of data were accessed for this research project is the topic of this chapter.

This chapter proceeds as follows: Part II describes the case study method and explains the methodology for using it in this examination of the OGL, including a discussion of why that approach is consistent with the communicative copyright account described in Chapter 2; Part III describes why use of the OGL is a particularly apt object for consideration when examining open content copyright licensing; and Part IV describes the steps and procedures used to gather the empirical evidence for this project, as well as the process used to code and analyze the collected data.

II. The Case Study Approach and Working Propositions

This research project is designed within the broadly-construed field of socio-legal research; it is a project that employs some of the empirical tools of sociological enquiry to acquire knowledge about a social activity consisting of the use of a form of legal instrument by a set of people and entities.[9] The project uses the case study as a research method for understanding the use of a particular legal phenomenon, that of open content copyright licensing, within a particular social environment, that of the RPG community. In seeking to understand the use of the OGL and the implications thereof for the open content licensing of creative expression generally, I have used an empirical case study research design to collect and analyze data in part because doing so is consistent with the empirical elements of the communicative copyright theoretical framework described in Chapter 2.[10] This project utilizes a broadly sociological approach to obtain information regarding how individuals actually make use of open content licences and seeking to understand why they do so by reference to the explanations they themselves provide to describe that use. The preceding chapters in this dissertation set forth an account of copyright licensing as an instrumental mechanism for achieving the justificatory goals of a copyright system

[9] For an overview of socio-legal theory and methodology, see Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Clarendon Press, 1997). For a discussion of socio-legal approaches generally and in the context of copyright scholarship, see Doagoo, *supra* note 4 at 44-49 and fn 213, quoting John R. Sutton ("the sociology of law is an intellectual project in which empirical data are used to describe and explain the behavior of legal actors"; John R. Sutton, *Law/Society: Origins, Interactions, and Change* (Thousand Oaks: Pine Forge Press, 2001) at 15).

[10] See especially Chapter 2, Part III.

(Chapter 1), defined the concept of the open content copyright licence (Chapter 3) and proposed a framework for determining when such licences can be successfully employed (Chapter 4); that work has been done in the context of a theoretical framework, communicative copyright, that emphasizes the dialogic nature of copyright and foregrounds concerns with how copyright is actually utilized by those who are subject to it and make use of it (Chapter 2).

Use of the OGL is a phenomenon that features characteristics that make it suitable for study by means of the case study method. Robert Yin defines the case study method as "an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between the phenomenon and context are not clearly evident".[11] Additionally, Yin describes the case study as a form of inquiry that "copes with the … situation in which there will be many more variables of interest than data points, and as one result relies on multiples sources of evidence".[12] The use of the OGL, which is an example of a contractual mechanism being employed to disseminate creative expression, is a phenomenon that displays the characteristics identified by Yin: it is a contemporary phenomenon that lacks clear boundaries between the phenomenon and its context, that has more variables of interest than data points, and that can be examined by drawing on multiple sources of data.[13] The case study method also offers flexibility along a variety of axes, including flexibility as to the nature of the research questions being posed, the theoretical framework being employed, and the unit of analysis.[14] Unlike other sociological methods such as ethnographies, the case study method is appropriate for research projects that are scheduled for a relatively circumscribed period of time during which fieldwork will be conducted – because case studies do not "depend solely on ethnographic or participant-observer data",[15] and can be supplemented by reviewing documentation, the case study method can be executed in relatively short timeframes such as that available for this dissertation.

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[11] Robert K. Yin, *Case Study Research: Design and Methods* (4th ed), (Los Angeles: SAGE Publications, Inc., 2009) at 18.

[12] *Ibid* at 18.

[13] Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, "Constructing Commons in the Cultural Environment" (2010) 95 Cornell L Rev 657 at 669 ("cultural production is an inherently social phenomenon, taking placing over a wide range of scales and within a complex, overlapping variety of formal and informal institutional structures").

[14] Yin, *supra* note 11 at 29 (noting that case studies have been done about phenomena as diverse as individuals, neighbourhoods, and "decisions, programs, the implementation process, and organizational change").

[15] *Ibid* at 15.

Yin's view is that, as a result of the foregoing characteristics of the case study method of inquiry, case study analysis "benefits from the prior development of theoretical propositions to guide data collection and analysis".[16] In many case studies, theory development precedes data collection, and the theoretical framework adopted for the research is used to develop propositions that serve a "blueprint" for the study's data collection and analysis phases.[17] This research project has been guided by that observation: the development of the theoretical accounts of communicative copyright and open content licensing in the preceding chapters have structured the gathering and analysis of the data.[18] As is the case with this project, the case study method is often used for projects in which the goal is to generalize from the findings to theoretical propositions by means of analytical generalization in which "a previously developed theory is used as a template with which to compare the empirical results of the case study".[19] Qualitative empirical research displays an initial emphasis on description of behaviour, before proceeding with analytical attempts to explain such behaviour by reference to theory; in other words, theory will be the mechanism by which the analysis is generalized from the specific accounts and situations observed through the data collection process. One goal of this project is to use its findings about use of the OGL to confirm (or discount), expand (or narrow), or otherwise supplement the theoretical communicative copyright account described in Chapter 2 and the indicia of success framework for open content licences described in Chapter 4.

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[16] *Ibid* at 18.

[17] *Ibid* at 36.

[18] Other approaches to theory construction and data collection are possible, and Yin specifically contrasts the case study method with that of grounded theory, in which no theoretical framework or hypothesis is formulated prior to data collection, but rather the project commences with data collection and only subsequently develops a theoretical framework and hypothesis using the data collected (see Yin, *supra* note 11 at 35). Recent intellectual property-focused empirical research projects using a grounded theory approach include Silbey, *supra* note 2, and see Doagoo, *supra* note 4, esp at 49ff. Doagoo has employed a constructivist grounded theory approach for her work on copyright in the fashion industry, an approach which "acknowledges the subjectivity of the researcher … [and] take[s] into account the role of the researcher in the context of how the data was collected" (Doagoo at 50). I have used the case study approach because I find it difficult to envision how, even using a constructivist approach, the subjectivity of the researcher could be divorced from the formulation of the theoretical framework. Having found the communicative copyright account, and its antecedent, Craig's relational author account, congenial, I was interested in testing its observations against empirical evidence – an approach abjured by grounded theory for fear of researcher bias (see Babbie, *supra* note 3 at 338).

[19] Yin, *supra* note 11 at 15, 38 (Yin distinguishes analytical generalization from statistical generalization, in which findings are generalized not to a theory, but to a population). See also Babbie, *supra* note 3 at 338, citing Michael Burawoy *et al* (eds), *Ethnography Unbound: Power and Resistance in the Modern Metropolis* (Berkeley: University of California Press, 1991) for the proposition that the case study tries "to lay out as coherently as possible what we expect find in our site *before entry*" [emphasis in original] so as to identify "theoretical gaps and silences".

Drawing on the communicative copyright account, I formulated the following three propositions, and the case study approach frames the collection of the data against which the propositions are assessed. The propositions are as follows:

P1. In describing their motivations for using the OGL, users of the OGL will articulate and prioritize goals and values such as self-expression, interaction, reciprocity, community participation, dissemination and reputation enhancement. While traditional motivating factors such as economic benefit, profit maximization and control will be present in the motivation matrix of OGL-users, they play a subordinate role.

P1-Alt. Alternatively, it may be that users of the OGL do not articulate non-traditional motivations for their use of the OGL, either (a) because they view the OGL as a means for achieving *traditional* goals (such as profit), or (b) because their use of the OGL is not instrumental such that (i) they did not conceive particular motivations or incentives in connection with the decision to use the OGL or (ii) they are unable to articulate whatever motivations or incentives lead them to make their decision to use the OGL.

P2. Open content licensing is best-suited for situations in which there is an overlapping of the following conditions: (a) creators whose motivation matrix prioritizes factors other than profit (even when profit-making is one of their motivations); (b) content that exhibits characteristics of interactivity, modularity and expandability; (c) the market for the product exhibits network effects; and (d) the product exists within, or its creators hope to generate, a community of consumers who anticipate ongoing interaction with their peers.

P3. Communicative copyright justification theories that focus on values such as sharing, community-building and creative dialogue can better account for the use of open content licensing than can traditional copyright justification theories.

The case study research design described in this chapter is intended to speak directly to P*1, P1-Alt* and *P2*, with the findings of those analyses informing the pertinence of *P3*. The propositions are

revisited in the concluding chapter of this dissertation. The foregoing propositions are taken from my extended dissertation proposal dated August 2, 2016 (the "**Proposal**"). In the Proposal these items were described as "hypotheses", but I have substituted the term "proposition" in this final analysis because these statements are not (and are not intended to be) capable of being quantitatively proven or disproven (the hallmark of a hypothesis), or at least are not capable of such without significant re-formulation. The propositions are not intended to be testable or measurable, yielding a binary "correct" or "incorrect" determination; instead, the propositions are intended to orient the collection and analysis of the data, to provide touchstones for the exploratory portion of the project and for the interpretative activity at the heart of the analysis. The propositions provide parameters within which the research project is conducted – the data has been analyzed to identify evidence that supports (to greater or lesser extent) or refutes (to greater or lesser extent) the propositions.

As noted above,[20] this research project does not adopt a "grounded theory approach", in which no theoretical framework is formulated prior to data collection. Instead, this project has proceeded on the basis that my own subjectivity as a researcher cannot be obviated, but only accounted for; it has attempted to acknowledge my theoretical pre-commitments, and steps have been taken to correct for biases by, for example, taking care to be as facially neutral as possible in the formulation of the questions posed to interview respondents. Twinning an elaborated theoretical account with qualitative empirical data collection is a deliberate attempt to assess the explanatory power of the theoretical account – this dissertation has collected qualitative information that is used in appraising the consonance of the communicative copyright account with the experience of disseminating creative expression using an open content copyright licence as related by users of that licence.[21] The propositions identify what I expected to find in the course of my data collection; Chapters 7 and 8 will describe in detail the extent to which what I found was consistent with those expectations.

[20] *Supra* note 18.

[21] See *supra* note 19 and accompanying text.

III. Why the Open Game License?

The OGL is an attractive object of study for this dissertation for three primary reasons: it is a significant instance of the persistent use of an open content copyright licence, rather than a marginal or time-limited example of such use; it is a form of open licence whose characteristics are similar to other forms of open licences and so observations of the OGL are suitable for generalization to other forms of open content licences; and the OGL is amenable to study by means of an empirical case study approach. In this Part, each of those three reasons is discussed in turn.

The OGL warrants attention because it represents one of the few examples of open content licensing being used in a sustained manner in connection with a commercially successful entertainment product. There have been examples of open content licences being used in connection with various entertainment product releases, such as the release under Creative Commons licences of novels by writer Cory Doctorow, recorded music by the band Nine Inch Nails,[22] and the card game *Cards Against Humanity*.[23] Those innovative uses have been significant for the particular artists and publishers who used them and their audiences; depending on the reputation or success of the particular person or product, it might also be claimed that such uses indicate a viable alternative to traditional intellectual property management and licensing practices in the relevant segment of the entertainment industry. However, the use of the OGL in connection with the *Dungeons & Dragons* ("**D&D**") gaming line and other RPGs represents something of a different order: Wizards of the Coast, the publisher of the world's most popular RPG – a game with decades of commercial and cultural success which, even in unremarkable years, can generate tens of millions of dollars in revenues[24] – elected to release their flagship product using an open content copyright licence, in a deliberate effort to not only revive the commercial fortunes of the game, but to spur innovation in the industry in which they were the dominant provider of creative

[22] See generally Cheryl Foong, "Sharing with Creative Commons: A Business Model for Content Creators" (2010) *PLATFORM: Journal of Media and Communication*, A Creative Commons Special Edition (December) 64.

[23] See cardsagainsthumanity.com.

[24] On the enduring cultural legacy of D&D, see Neima Jaromi, "The Uncanncy Resurrection of Dungeons & Dragons", *The New Yorker* (October 24, 2017), online: https://www.newyorker.com/culture/cultural-comment/the-uncanny-resurrection-of-dungeons-and-dragons; on the commercial success of D&D, see Shannon Appelcline, *Designers & Dragons – A History of the Roleplaying Game Industry: The '90s* (Silver Spring, MD: Evil Hat Productions, 2014) at 174 (in 2005, five years after the release of the 3rd edition of the D&D game, it was estimated that the D&D line of products was grossing between $25-30 million annually).

product.[25] The OGL has been in use since 2000, and Wizards of the Coast has released two different editions of the D&D game using the OGL (the 3rd Edition in 2000 and the 5th Edition in 2014).[26] This research project explores the reasons those decisions were made and why other RPG publishers have elected to make use of the OGL in creating and releasing their own creative expression in the form of gaming content. Unlike other open licences such as the Creative Commons licences and open source software licences, the OGL has received almost no attention among legal scholars.

Another reason why the OGL warrants attention is the fact that the OGL and the RPG industry bear characteristics that overlap with both of the forms of open licences that have been the subject of previous scholarship: like open source software licences (but unlike Creative Commons licences), the OGL has been used within the confines of a relatively well-defined and somewhat insular community of individuals with shared interests; and like the Creative Commons licences (but unlike open source software licences), the OGL has been used in connection with unmistakably "creative" works.[27] Studying the OGL sheds light on whether either of those characteristics are necessary or sufficient conditions for successful uses of open content licensing. The indicia for success identified in Chapter 4 hinted at the importance of community networks within which open content copyright licensing is used,[28] and also indicated that certain types of creative expression lend themselves better to dissemination through open

[25] See Ryan S. Dancey, "Who Am I & How Did I Get Here?" (blog post, January 18, 2011, online: http://www.enworld.org/forum/showthread.php?299860-4-Hours-w-RSD-Who-Am-I) (part of the strategy behind introducing the OGL was to prompt other industry participants to "explore[] and exploit[] all the niches and genres that Wizards [of the Coast] couldn't do profitably" and that "by sharing a common license many different game systems could 'share DNA' with each other and the common pool of design would improve the many derivative works that drew from it").

[26] Further details on the history of the OGL and its use in connection with the D&D game are contained in Chapter 6.

[27] From inception, open source software licensing has largely been concerned with, and used in connection with, "functional" or non-expressive computer software. See, *e.g.*, Eric E. Johnson, "Rethinking Sharing Licenses for the Entertainment Media" (2008-2009) 26 Cardozo Arts & Ent LJ 391 at 405-406 (describing Richard Stallman, the creator of the original GNU Manifesto from which "open source" software was derived, as conceiving of copyrighted works falling into three categories: "functional" (described as "tools"), "testimonial" (such as diaries or research logs) and "personally expressive" (creative works such as novels); Stallman envisioned open source as applying only to "functional" computer code). See also generally Josh Lerner and Jean Tirole, "Some Simple Economics of Open Source" (2002) 50 *The Journal of Industrial Economics* 197 for a brief history of the development of open source software licensing; it appears that the vast majority of open source software licences have been used in connection with "utility" software such as programming languages (*e.g.*, Java), operating systems (*e.g.*, Linux), internet server software (*e.g.*, Apache), internet browser software (*e.g.*, Firefox) and email (*e.g.*, Sendmail).

[28] As indicated in Part III(f) of Chapter 4, it is helpful, for example, that a community exist within which signaling effects can occur, that a significant subset of the community members share certain tastes (*e.g.*, valuing creativity and idiosyncrasy of expression) and that community members are predisposed to creative participation.

content licences.[29] The OGL and the community in which it has been used display many of the indicia identified in Chapter 4; that observation coupled with the fact that the OGL shares common features with Creative Commons licences and open source software licences indicates that studying the OGL will be fruitful for assessing the aptness of the success indicia and the propositions generated from the communicative copyright approach.

The features of the case study research method have been described more fully in Part II of this chapter, but for present purposes it is sufficient to note that the OGL is an appropriate phenomenon to be examined by means of the case study method because of the nature of the questions at heart of this research project. Yin has identified three considerations relevant to determining whether the case study method is appropriate to a topic: the nature of the questions being posed, the extent to which the researcher has control over the relevant events being examined, and the extent to which the researcher has access to living persons who participated in the events being examined.[30] The project of examining use of the OGL by RPG publishers satisfies all three considerations. The first consideration relates to the nature of the questions being posed in respect of the topic, with "how" and "why" questions being preferable for the case study method. This project is seeking to answer "how" and "why" questions ("why do people use open content licences", "in what circumstances (*i.e.*, how) can open content licences best be utilized") about the complex social phenomenon of using open content copyright licences. With respect to the second consideration, there should not be – and in this case there is not – any ability or desire on the part of the researcher to affect the behaviour of the individuals and entities who have used the OGL. With respect to the third consideration, which focuses on the contemporaneity of the events being examined, the history of the OGL (described in further detail in Chapter 6) effectively begins in 2000 and remains ongoing; as a result, and consistent with Yin's indication of the importance of having access to contemporaneous accounts, it is possible to speak with individuals who were present at, indeed responsible for, the origination of the OGL and who continue to make use of it currently. Additionally, Yin indicates that case studies are appropriate for studying complex social phenomena, where causal and

[29] As indicated in Part III(f) of Chapter 4, open content licensing seems particularly apposite for creative expression that is modular, relatively inexpensive to create, expandable, and confers transient utility to audience members.

[30] Yin, *supra* note 11 at 8-11.

operational links between factors need to be examined.[31] Activities relating to the production and dissemination of creative expression generally are analytically complex in that they occur in situations where contextual factors appear relevant but it is difficult to separate out context from phenomenon.[32]

IV. Methodology

(a) *Introduction*

In this section I describe the procedures used to collect and analyze data for this research project. All data were collected and analyzed by me without delegation to any assistants. Critics of the case study method have often pointed to the danger of lack of reliability, *i.e.*, the difficulty of repeating the investigation because the procedures used in the case study were poorly documented.[33] This concern with reliability can be addressed, in part, by being as explicit as possible about the steps taken in conducting the case study.[34] The deliberate activity of formalizing and documenting the procedures used in a case study to collect and analyze data can help to identify errors and biases, particularly those of the researcher, that may affect the data collection and analysis.[35] Case studies often make use of multiple sources of evidence, a feature often cited as a particular strength of the method as compared to other forms of empirical inquiry such as experiments.[36] This research project utilizes two main sources: interviews and documentary evidence obtained from online sources. In accordance with the foregoing, then, this Part sets forth the procedures used in conducting this research project, first addressing the collection of data by means of interviews and then turning to the collection of documentary online data.

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[31] *Ibid* at 4, 9.

[32] See *supra* note 13 and accompanying text.

[33] Yin, *supra* note 11 at 45. Yin distinguishes (a) the ability to repeat the procedures and steps that comprised the study from (b) the *replication* of the same results using those same procedures and steps.

[34] *Ibid* ("[t]he general way of approaching the reliability problem is to make as many steps as operational as possible and to conduct research as if someone were always looking over your shoulder … conduct the research so that an auditor could in principle repeat the procedures and arrive at the same results").

[35] *Ibid*.

[36] *Ibid* at 101, 114.

(b) *Interviews*

(i) Preface

Interviews are often associated with case studies, and are viewed as "essential sources of case study information".[37] While there is often overlap between the questioning structure used in surveys and interviews, it is generally accepted that case study interviews are best approached as "guided conversations rather than structured queries", with the sequence of questions "in a case study interview … [being] fluid rather than rigid".[38] The importance of interviews to case studies lies in the interview providing access to human behaviour and explanatory insights offered by the individuals who themselves participated in the behaviour.[39] That being said, interviewees are susceptible to the usual human frailties of "bias, poor recall, and poor or inaccurate articulation";[40] as a result, and as has been done in this study and is described in further detail in Part IV(c), below, it is useful to employ documentary sources of evidence to corroborate the information provided by interviewees.

The research protocol for this project, including the set of template interview questions, was approved by the York University Office of Research Ethics. Each interviewee was required to sign a consent form as a condition of participating and a condition of their responses being included in the data to be analyzed. Interviewees were given the option of participating on a confidential or non-confidential basis, the primary practical difference being whether their names could be disclosed and associated with quotations from their interview responses; the vast majority of interviewees elected to participate on a confidential basis.[41] All oral interviews were conducted via Skype, and the audio of those interviews was recorded using the MP3 Skype Recorder app. The audio of each oral interview was manually transcribed by me without the use of audio-to-text transcription software.[42] The audio files of all oral interviews have

[37] *Ibid* at 106.

[38] *Ibid*.

[39] *Ibid* at 108.

[40] *Ibid* at 108-109.

[41] Eleven of twelve interviewees participated on a confidential basis; one interviewee participated on a non-confidential basis.

[42] Interviews were transcribed using Microsoft Word and the online platform *Transcribe* (available at https://transcribe.wreally.com/), which does not itself transcribe the audio but offers a service that facilitates the *process* of transcribing: it plays the audio recording in seven second segments, pauses, then automatically rewinds and replays the same audio segment, thereby giving the transcriber multiple opportunities to reduce the audio to typed text and to verify the accuracy of the transcription. During the transcription process the interviewee responses were mildly edited to remove verbal filler (*e.g.*, "um", "ah", "like", "you know", *etc.*); such

been saved as .MP3 files. All oral interview transcripts, and all interviewee responses provided by participants who elected to be interviewed in writing, are stored in Microsoft Word format (.docx) word processing files. All interviewee response files have been uploaded to the NVivo (versions 11 and 12) analytic software, which was used for coding the interviewee responses as described in further detail in Part IV(e), below.

(ii) Scope

With respect to interviewees, this project limits its scope to the use of open content copyright licensing arrangements by publishers located in Canada, the United States, and England creating English-language gaming products that have been publicly released since 2000 (the year in which OGL was first made publicly available).[43] While there is worldwide usage of OGL-licensed content over the internet, and RPG publishers are located in many different countries, my research has indicated that the majority of the publishers of OGL-licensed content are located in the United States, with a comparatively small number located in Canada and the United Kingdom.[44] Wizards of the Coast (the owners of the D&D game and brands and the company that initiated the use of the OGL) and its primary competitor in the RPG industry, Paizo, Inc. (the publishers of the *Pathfinder* RPG, which is released using the OGL) are both located in the United States. The decision to limit the geographic location of interviewees has been motivated in part by the foregoing structural features of the industry, and also in part by a desire to avoid analytical complications arising from diverging national understandings and conceptions of the purposes of copyright law.[45] The justification theories articulated by legislation and courts in the US, Canada, and

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modifications were made only where the filler was superficial and did not impact the content of the statement being made.

[43] My research has indicated that the vast majority of OGL content has been created and disseminated in English. I have been unable to identify any translations of the OGL into another language, and have not discovered any online discussion that mentions foreign translations of the OGL (though of course I have been perusing English-language forums and so there is a relatively low likelihood that such translations would be mentioned in such sources). Two interviewees are resident in Canada, two interviewees are resident in England, and one interviewee is currently resident in Europe, but was born in the U.S. and lived there well into his adulthood; the remaining interviewees are resident in the United States.

[44] I identified publishers located in the United States, Canada, France, the United Kingdom, Spain, Australia, New Zealand, and Finland.

[45] For example, the theoretical foundations of German law are premised on a conception of an author's creative works constituting an inalienable extension of the author's personality – a notion that is almost completely foreign to US copyright law (see, e.g., Neil Netanel, "Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation" (1992-1993) 24 Rutgers L.J. 347 at 351-352, 396ff, comparing the

England have traditionally echoed the consequentialist theories described in Chapter 1;[46] to the extent that this project belongs in the cohort of research that queries the veracity of those consequentialist theories, it is appropriate to limit the scope of investigation to those environments in which individuals are most likely to have developed views about copyright that are consistent with such theories.

A total of twelve interviews were conducted for this research project. There appears to be little common agreement regarding how many interviews is "sufficient" for phenomenological qualitative research projects (*i.e.*, projects that explore the perspectives and understandings of those who have experience of the phenomenon being studied). Much of the guidance for conducting qualitative research suggests conducting interviews until the point of "saturation" or "theoretical saturation" has been reached;[47] the notion of "saturation" is itself notoriously under-defined, though it is often understood to refer to the point at which interview responses repeat the same themes or concepts heard in prior interviews.[48] Yin suggests collecting data until the researcher has "confirmatory evidence (*i.e.*, evidence from two or more sources) for most main topics" and the evidence "includes attempts to investigate major rival hypotheses or explanations".[49] Some scholars have made recommendations with hard numbers, ranging from as low as five or six interviews to as many as thirty-five.[50] Guest, Bunce & Johnson attempted to operationalize the concept of "saturation" by examining the effect that additional interviews

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theoretical foundations of German and U.S. copyright law) and which finds qualified recognition in Canadian copyright law (see generally *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at paras. 12-19; note that the moral rights accorded to authors under the *Copyright Act* (Canada) are waivable pursuant to Section 14.1(2)).

[46] For the Canadian view, see *Théberge*, *supra* note 45, at para. 30 ("The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)."). For the US view, see US Const art I, § 8, cl 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."). Note that, even when comparing such abstract statements of purpose, there are points of significant divergence; see, *e.g.*, Carys J. Craig, "The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest" (2005) 2 UOLTJ 425 at 440 (in the Canadian approach, "[c]opyright has *two* goals. While, following the US approach, the author's private rights are ultimately a means to secure a public end, in the Canadian context, the author's rights are at once a means to an end and an end in themselves" [italics in original]).

[47] Silbey, *supra* note 2 at 190.

[48] See Greg Guest, Arwen Bunce & Laura Johnson, "How Many Interviews Are Enough? An Experiment with Data Saturation and Variability" (2006) 18 Field Methods 59 at 60 (noting that the literature they reviewed "provid[es] no description of how saturation might be determined and no practical guidelines for estimating sample sizes").

[49] Yin, *supra* note 11 at 100.

[50] See Guest, Bunce & Johnson, *supra* note 48 at 61 (citing multiple scholars, including Morse, who recommends at least six interviewees for phenomenological studies, Creswell who suggests between five and twenty-five, and Kuzel who recommends six to eight for homogenous samples and twelve to twenty for maximum variation).

had on coding structures (*i.e.*, whether additional interviews resulted in additions of new coding categories) – they concluded that a set of a dozen interviews will be sufficient for many research purposes, particularly where the study involved a "relatively homogenous population and had fairly narrow objectives".[51] In this research project, saturation—whether using Yin's notion of confirmatory evidence or Guest, Bunce & Johnson's notion of marginal effect on coding categories—was reached by the time twelve interviews were completed. In the iterative processes of coding and theme development, no new coding categories or themes were developed by the time I reached the end of the twelve interviews. As described further in Part IV(f), below, because this research project is also using online documentation as a data source, it is expected that the volume of data available from the online documentation will assist in "filling in" gaps and supplementing the limitations on generalizability arising from the small set of interviews.[52]

(iii) Method

This project employed focused interviews to collect data from RPG publishers who have released material using the OGL.[53] Potential interviewees were contacted by email and asked to participate; because interviewees were geographically dispersed around North America, they were given the option

[51] *Ibid* at 75-76, and 79 ("For most research enterprises … in which the aim is to understand common perceptions and experiences among a group of relatively homogeneous individuals, twelve interviews should suffice"). As Guest, Bunce & Johnson point out, in research projects with purposive samples (as with this project), participant homogeneity can often be assumed because the participants "are, by definition, chosen according to some common criteria" and the higher the homogeneity among participants, the more quickly saturation can be expected.

[52] It is acknowledged that the limited set of interviews will, in addition to the limitations noted in Part IV(f), below, impact the generalizability of the interview data – however, that is a shortcoming of almost all qualitative research methods, and focuses on what has been termed statistical-probabilistic or representational generalizability (a hallmark of quantitative research). Other forms of generalizability have been described that are appropriate for qualitative research, including inferential generalization (whether findings can be inferred to contexts beyond the study's sample) and theoretical generalization (using empirical inquiry to establish the relevance or validity of propositions derived from theory) – this study aims for the latter two notions of generalizability, rather than representational generalizability. On the generalizability of qualitative data, and for further discussion of the three forms of generalizability described above, see Jane Lewis and Jane Ritchie, "Generalising from Qualitative Research" in Jane Ritchie and Jane Lewis, eds, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Thousand Oaks, California: SAGE Publications, 2003). See also *supra* note 19 and accompanying text.

[53] Yin contrasts two types of case study interviews: "in-depth" interviews, which usually take place over an extended period of time rather than a single conversation; and "focused" interviews, which usually take place for "a short period of time – an hour, for example" (Yin, *supra* note 11 at 107).

of being interviewed orally via Skype or in writing via email.[54] My preference was to conduct interviews via Skype using its video capabilities in order to allow for enhanced interaction via observation of visual cues and other non-verbal reactions and to permit interviewer reaction and follow-up to responses. However, where interviewees indicated a preference for written questions and answers, that preference was accommodated. Six interviews were conducted orally via Skype, and six interviews were conducted in writing via email. To the extent possible, the interviews were conducted using a semi-structured approach, which contemplates a set of standardized questions while allowing for deviation from the strict sequence and wording of questions to allow for improved conversational flow and follow-up clarifications. Such fluidity was of course easier to achieve with oral interviews; where interviews were completed via email, follow-up questions were posed via email in response to the initial set of answers provided by the interviewee.

Data collection by interviews commenced in September 2017 and was completed in December 2017. Oral interviews generally lasted between sixty and ninety minutes. Appendix E sets out the template interview questions. The questions included in the template were intended to cover a variety of topics and themes, with some questions being deliberately repetitive (*i.e.*, using different wording to cover themes or concepts already addressed by earlier questions) in order to assess the consistency of the answers and to tease out deeper meanings by obtaining oblique or impressionistic responses to variant wording formulations. The interview questions covered matters such as the history of the respondent's involvement in the RPG industry, their subjective impressions of using the OGL, their views on what other people thought of the OGL, and whether (and if so, why) they would consider using the OGL for future projects or advising others to use the OGL. As much as was reasonably possible in the conversational context, the questions were structured and posed in a way that tried not to prompt any particular responses from interviewees – for example, rather than my asking interviewees if they used the OGL because they liked to share or because they found it efficient to do so, they were asked to describe their reasons for using the OGL.

[54] Three potential interviewees were resident in Toronto; these individuals were given the option of an in-person interview; two of the three responded to my outreach, and both indicated they preferred to be interviewed via Skype rather than in-person.

(iv) Population and Sampling

The population that is the subject of the interview component of this research project consists of RPG publishers who have licensed material using the OGL. For these purposes, a "publisher" is a person or entity that creates and publicly releases RPG gaming-related materials (such as rulebooks, rules supplements, rules modifications, adventure modules, etc.)[55] To be a member of the relevant population, a publisher must have released all or a portion of at least one work with the OGL, as evidenced by the presence of a copy of the OGL in the published works.[56] The unit of analysis for this project is the "publisher" which, as noted above, may be either an individual human being or a corporate entity. Where the publisher is an individual, the unit of observation is that individual. Where the publisher is a corporate entity, the unit of observation is the individual who is authorized to speak on behalf of the entity (such as the owner or an appointed officer or other representative). All interviewees are adults, and, with one exception, I had no relationship with any of the individuals or entities in the population of potential or actual interviewees prior to the commencement of this research project.[57]

There were two additional individuals who were interviewed, one on a confidential basis (Respondent 004) and one on a non-confidential basis (Ryan S. Dancey, the former Wizards of the Coast executive who was responsible for developing the OGL).[58] Respondent 004 is a journalist who has written extensively about the RPG industry but who has not himself created or released material using the OGL. Both Respondent 004 and Dancey were interviewed using a separate set of questions for the purposes of obtaining background information about the RPG industry and the OGL. Their responses were not included in the data that was analyzed and coded because they were responding to a bespoke set of questions designed to elicit background information about the origins of the OGL and its impact on the RPG industry rather than insight into decisions made to disseminate RPG material using the OGL; some

[55] Further details on the differences between these types of RPG content are contained in Chapter 6.

[56] For printed materials or materials published online using .pdf format, the presence of the OGL is easily determined: a copy of the OGL is present in the document (usually occupying the final pages of the product). Some of the respondent publishers also make gaming material available on their blogs or websites – in those cases, the publisher will often publish the content as text or graphic material contained in a blog post or on a page of their website, and then include in the post or on the page a notation saying, *e.g.*, "The material in the box below is hereby designated Open Game Content via the Open Game License", with a hyperlink to the full text of the OGL, which is located on a separate page of their blog or website (see, *e.g.*, http://grognardia.blogspot.ca/2008/10/grognards-grimoire-s-paladin.html).

[57] I corresponded online with Respondent 001 about shared RPG-related interests for a brief period in 2010.

[58] For details on Dancey's role in the development of the OGL, see Chapter 6, Part III(c).

of their responses were incorporated into the description of the history of the OGL set forth in Chapter 6 and the discussion contained in Chapter 8.

A roster of potential interviewees was created by: (a) including those publishers who used the OGL as identified in Shannon Appelcline's four-volume history of the RPG industry;[59] (b) conducting online searches for RPG publishers whose website contained mention of the OGL; and (c) consulting the list of publishers contained at opengamingstore.com, an online retailer of RPG materials. Using snowball sampling, as interviews were completed, each interviewee was asked if they could recommend or refer me to a friend, peer or colleague in the RPG industry who they thought would be willing to participate as an interviewee.[60] The final roster of potential interviewees consisted of one hundred publishers (including Wizards of the Coast, publishers of the D&D game, and Paizo Publishing, publishers of the *Pathfinder Roleplaying Game*, D&D's primary competitor in the fantasy RPG market).

The population of OGL publishers has been separated into two different strata, the first of which can be divided further into two different sub-strata. The classification of a publisher within this taxonomy is made on the basis of which sub-strata they belong to at the time of data collection. The population of publishers is defined as follows:

[59] See Shannon Appelcline, *Designers & Dragons – A History of the Roleplaying Game Industry: The '90s* (Silver Spring, MD: Evil Hat Productions, 2014) and *Designers & Dragons – A History of the Roleplaying Game Industry: The '00s* (Silver Spring, MD: Evil Hat Productions, 2014).

[60] Babbie, *supra* note 3 at 129-130.

Roster of Interviewees				
Population		**Description**	**Roster Frequency (Potential)**	**Roster Frequency (Actual)**
1	**A**	*Professional Publishers – the "Big Two"* The two largest RPG publishers, measured by revenue and volume of product. This sub-population consists of (i) Wizards of the Coast, a division of Hasbro, Inc., and (ii) Paizo Inc.	2	0
	B	*Professional Publishers – Others* RPG publishers other than the "Big Two" who carry out business by means of a separate legal entity (LLC or corporation)	30	6
2		*Amateur Publishers* RPG publishers who do not carry on business by means of a separate legal entity (LLC or corporation)	68	6

Within the stratum of "professional" publishers, a distinction is drawn between the "Big Two" and other publishers on the basis that the Big Two publishers dominate the market in terms of their revenue and volume of product, have larger operating budgets as indicated by their large complement of employees and staff dedicated to intellectual property management and licensing. It is to be expected that the level of managerial scrutiny that accompanied the decision to use (or not use) the OGL by the Big Two would be significantly higher than that at other publishers.[61] The distinction between "professional" publisher and "amateur" publisher is made on the basis of whether a separate legal entity (such as a corporation or limited liability company) has been created to carry on the publishing activities of the publisher. The use of a separate legal entity, which necessarily requires the expenditure of funds and may require the engagement of professional advice from lawyers and/or accountants, serves as a proxy for distinguishing publishers who anticipate generating significant revenues from the sale of RPG product. "Amateurs", in short, are individuals who create RPG material and release it under the OGL without the use of a separate legal vehicle for their activity, irrespective of whether they do so with the expectation of

[61] As further discussed below (see *infra* note 108 and accompanying text), drawing a distinction between the "Big Two" and other publishers was also warranted by the sheer volume of publicly-available documentation regarding the decisions made by the Big Two with respect to the OGL.

generating a profit. Some of the interviewees could be described as occupying more than one population stratum: for example, some game designers have written materials that have been released by publishers in category 1A and category 1B, and have also released materials on their own without the involvement of another publisher, and hence can be placed in category 2.

I attempted to conduct interviews with representatives of each sub-population. Brief biographies of the interviewees are set forth in Appendix F. With respect to sub-population 1A (Professional Publishers – The "Big Two"), as there are only two population elements, there was no need to sample for this stratum. Representatives of the "Big Two" publishers (Wizards of the Coast and Paizo Publishing), did not make a representative available to be interviewed.[62] With respect to sub-populations 1B (Professional Publishers – Others) and 2 (Amateur Publishers), these strata each contain multiple elements for which a comprehensive census would be extremely time-consuming and potentially impossible to compile. The sampling frames were populated using the method described above (*i.e.*, reference to the Appelcline history supplemented by internet searches and "snowball" referrals from identified population elements). Sampling frames for both strata were created using the non-probabilistic methods of quota and purposive or judgmental sampling, with inclusion in the sampling frame decided on the basis of: (a) the raw number of OGL publications released by the publisher, choosing both high volume and low volume publishers; and (b) the frequency of OGL publishing efforts, *i.e.*, choosing both those who have published OGL content over an extended period of time and those who published only one or a small number of RPG products using the OGL and subsequently stopped publishing entirely or stopped using the OGL.

The sampling frame for sub-population 1B (Professional Publishers – Others) consisted of thirty publishers who were listed in alphabetical order. The sampling frame for sub-population 2 (Amateur Publishers) consisted of sixty-eight publishers who were listed in alphabetical order. Systematic sampling was then applied to each frame, with every second element contacted to determine their willingness to

[62] While a number of Paizo, Inc. representatives responded to my initial emailed queries and indicated a willingness to be interviewed, none of the representatives ever agreed to schedule a Skype interview or provided written responses to the interview questions or signed the consent form required of all interviewees, and they subsequently ceased responding to my emails. A WOTC representative was referred to me through one of the other respondents, and contacted me indicating a willingness to participate; however, subsequent correspondence between me, the individual in question and a member of the WOTC communications department resulted in WOTC declining to make anyone available to participate in an interview.

participate in an interview. While periodicity is one potential risk of systematic sampling,[63] the population elements do not seem to have any characteristics which would give rise to it (or at least the arrangement in alphabetical order would help to obviate that concern). Where no response was received, a follow-up email was sent; if there was still no response received, the next available unsampled element in the population was contacted and the process repeated.

The primary drawback to using these sampling methods is that there is no external metric by which to measure whether the subjects chosen are representative of the broader sub-population of publishers; that being said, understanding the general characteristics of the population of the RPG industry enabled greater representational validity in the selection of respondents. Trying to achieve diversity in the sampling frame across the metrics identified earlier in this paragraph (publishing frequency, *etc.*) aids in making the data generalizable, even if falling short of the kind of inferential generalizability that would be possible with randomized samples.[64] As Silbey notes, "the key to analytic generalizability derives from the extent of the diversity in the sample";[65] to increase the diversity, the sample should strive to "include all possible variations that might exist along critical dimensions relevant to the subject being studied".[66] To that end, this study includes respondents occupying each of the major gradations along the spectrum of OGL users: publishers who carry on business as large corporations; smaller publishers who are incorporated but with a comparatively small operating budget; and "amateurs" who are effectively publishing as an extension of their hobby pursuits, as well as publishers who have published a large number of works over extended periods of time and publishers who have only recently begun publishing or who have published a comparatively small number of works over a long period of time. Subjects chosen for interviews are not perfectly random or sampled – however, the selection for inclusion in the frame attempted to identify respondents with varying characteristics in order to increase analytic generalizability.

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[63] Periodicity risk in sampling is the danger that a cyclical variation in the roster population coincides with the sampling interval being used (*e.g.*, a "classic" example cited by Babbie, *supra* note 3 at 149-150, involved a study of soldiers, where every tenth soldier on the roster was chosen for study – but because the soldiers were listed in the roster according to their ten-man units and by descending order of rank, choosing every tenth soldier meant that only sergeants were selected, and so the sample was biased because it included only sergeants and no individuals of any other rank).

[64] See Silbey, *supra* note 2 at 289.

[65] *Ibid*.

[66] *Ibid* at 289-290.

(c) *Online Documentation*

Documents are critical sources of evidence for case studies, and the data obtained from documents can serve both as primary evidence and a source of corroboration for data obtained from other sources.[67] In this research project, the data obtained from online documentation were used to supplement and corroborate (or contradict) the findings derived from the interview data in a manner consistent with what Robert Kozinets has described as "netnography", a term he uses to describe "data collection, analysis, ethical and representational research practices, where a significant amount of the data collected … originates in and manifests through data shared freely on the internet".[68] This research project draws on the data collection aspects of Kozinets' netnography approach in identifying and collecting data from online sources;[69] as Kozinets has noted, netnographic approaches can supplement or be supplemented by data collected by means of interviews.[70] Access to online data in this approach is not intended to acquire or encompass all data on a topic – rather, it is intended to obtain curated data that "carefully selects lesser amounts of very high quality data that are then used to reveal and highlight meaningful aspects of the particular".[71] Netnography contemplates an iterative, reflective process of data collection and analysis wherein each set of data (interview and online), through a process of "ground[ing], emplac[ing] and contextualiz[ing]", reveals something about the other set of data, whether through

[67] Yin, *supra* note 11 at 103.

[68] Robert V. Kozinets, *Netnography: Redefined* (2d ed) (London: Sage Publications, 2015) at 79.

[69] While aspects of Kozinets' netnography approach have been used, this research project does not employ a "netnographic" methodology in the most robust sense of that term, in a variety of different ways. First, this project is not an attempt to achieve "an ethnographic understanding[ ] and representation[ ] of online social experience" (*ibid* at 67), and it is not intended as a description of a particular community (see Babbie, *supra* note 3 at 333); rather, this project is intended to observe, explain and assess the use of a particular form of legal licence by members of a community. Second, questions relating to the "sociality" of the online experience, or relating to the effect of technological mediation on communications, which are critical to the netnographer (see Kozinets, *supra* note 68 at 4) are of little relevance to the data collection aspect of this project, which is focused much more on the *content* of the online communications than the implications of the medium in which they are expressed. Finally, although participant-observation is not a necessary component of netnographic research, it bears emphasizing that this researcher did not participate in the online communities in order to prompt or obtain responses from other community members; significant quantities of OGL-related discussion and commentary have accumulated since 2000 and so there is no need to prompt further discussion; further, intervention by the researcher into the community raises ethical issues and other concerns about the negative effects of observer intervention on the validity of responses which are not necessary to contend with given the volume of content already available. The interview and survey portion of this project's fieldwork supplies all of the new material required for data collection and analysis purposes.

[70] Kozinets, *supra* note 68 at 79.

[71] *Ibid* at 99.

providing additional information that assists in situating the information or by means of corroborating, refuting or otherwise complicating the story revealed by the data and its analysis.[72]

The online documentation accessed in this project consists of English-language statements regarding the use of the OGL and the use of OGL-licensed materials, taken from online sources such as blog posts and contributions to message boards.[73] Because the OGL was released in 2000 and was made available online, a significant portion of the discussion about the OGL has taken place in open online forums and thus is accessible by online searching.[74] Data were collected from the online sources in September and October 2017. Appendix G describes in detail the online sources that were accessed for this project and how the data on those sources were isolated. As an overview, the data were obtained from four blogs and six online forums;[75] in Kozinets' taxonomy of network archetypes, all of these data sources can be understood as components of a "tight social network", where individuals interact online about a topic in respect of which they have strong emotional commitments.[76] The four blogs consist of websites authored by game designers that (a) contain blog posts that directly address or consider the OGL and (b) generated responses in the form of comments on the posts from blog readers. Of the six online forums, four (enworld.org, dragonsfoot.org, rpg.net, and paizo.com) were chosen because of their evident broad popularity in the RPG community – each of the four chosen forums displays statistics about their users and their activity indicating thousands of individual registered user accounts and post numbers reaching into, in some cases, the millions of contributions.[77] The two remaining forums (story-games.com and indie-rpgs.com) were chosen because they appear to be forums whose contributors are primarily game designers and publishers (and aspiring game designers and publishers), with a significant

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[72] *Ibid* at 79, 98-99.

[73] Kozinets refers to this type of data as "archival" (as distinct from "elicited" or "produced"); this type of data, "[a]lthough clearly shaped by selection biases and observer effects … does not bear the imprint of the researcher as creator or director", instead the data "establish[es] a historic record" (*ibid* at 165).

[74] Online statements from prior to 2000 were examined for purposes of describing the prior conduct of TSR, Inc. (the publishers of D&D prior to the 3rd Edition) in regards to the enforcement of their intellectual property rights and the reactions of the RPG community to that conduct.

[75] The term "online forum" is used here to describe a website that hosts online discussions or conversations that take the form of "threads" consisting of an initial post followed by responses; such sites are sometimes also referred to as "message boards" (see https://en.wikipedia.org/wiki/Internet_forum).

[76] See Kozinets, *supra* note 68 at 44-45.

[77] For an indication of the volume of activity on the forums, the "Tabletop Roleplaying Open" forum located at rpg.net (accessed December 13, 2017), which is one of seventeen separate sub-forums identified on the forums.rpg.net "home page", hosts 186,767 different "threads" (or conversations) featuring an aggregate total of more than 4,980,000 individual posts.

proportion of the hosted discussions relating to the practicalities and mechanics of producing and distributing RPG products.[78] The content of all online sources that were used for this project were accessible without registration, subscription, or payment.

The online sources that were selected generally feature the factors identified by Kozinets as indicating suitability for selection;[79] that is, each of the sources contain data that is relevant to the research questions; they are active in that they feature regular and recent communications between individuals; they are interactive, in that they permit interaction among site users (*e.g.*, by allowing users to post and allowing replies to posts); they are substantial in that they generally have a large number of contributors; they display hetereogeneity in that the participants, while all obviously connected in some fashion to the playing of RPGs, appear to perform a variety of roles within the RPG community and approach RPG-playing with varying degrees of frequency and a plethora of different preferences as to game type, genre and playing style; and the sources are rich in data, as they contain extensive ruminations and debates about the OGL (and other RPG-related topics).[80]

The nature of the online statements that were collected for this project bear significant discontinuities from the interview data; those discontinuities warrant some attention. First, it is generally not possible to identify with any precision various aspects of the identity of an online contributor: their real name, age, geographic location, and even the truth of their assertions about their online and offline activities are not easily susceptible of proof. Second, because I was accessing online conversations that had commenced and continued without my intervention or involvement, the statements contributed to the online discussions developed organically and according to the logic of the particular discussion in which they were taking place. Some of the threads were better characterized as debates (or arguments) than as conversations, and so the nature and tenor of the statements made in those contexts were significantly different than those contained in the interviewee responses. Because there is no structure to the online statements as compared to the interviewee responses, there is no ability to compare the online

[78] The population of these two game designer forums appears to be significantly different from the population of the other four gaming forums, which appear heavily populated by individuals who are RPG players but not designers or publishers and feature large amounts of game-playing discussions and a smaller proportion of meta-gaming discussions on topics like design, publication, and marketing.

[79] Kozinets, *supra* note 68 at 168.

[80] Kozinets has also identified a seventh factor, “experiential”, that he articulates as “offering you, as a user of the site, as the netnographer, a particular kind of experience” (*ibid* at 169); accessing the data contained on the selected sources is experiential in the way used by Kozinets.

statements in the same manner that the interviewee responses can be compared (e.g., all interviewee responses to the question of what advice they would give to someone considering using the OGL can be compared for commonalities and divergences).

(d) *Operationalization of Key Concepts*

The primary phenomena of interest in the fieldwork portion of this research project are (i) the motivations of users of the OGL, and (ii) their subjective assessments of whether their use of the OGL was "successful". Both the phenomena being studied and the manner of their study raise concerns about validity which require attention. With respect to the issue of "motivation", where possible, in an effort to overcome validity concerns in respect of stated and revealed preferences, misrepresentation, hindsight bias, self-serving bias and response bias,[81] the stated preferences of respondents has been validated by reference to online documentation evidencing usage of the OGL (*e.g.*, continued or discontinued usage of the OGL). Assessments of "success" are inherently subjective and contingent, particularized to specific undertakings or activities, as individuals and organizations lack comprehensive external criteria for determining "success" across different projects and fields of endeavour.[82] That being said, the manner in which respondents articulate their motivations, even if not reconcilable with their demonstrated activities in respect of open content licensing, is itself noteworthy. In her study of how creators interact with intellectual property regimes, Silbey noted that the language and the narratives that people use to describe their work and the decisions they make provides "evidence of culturally circulating schema, memes, interpretations, and understandings of law as it relates (or doesn't) to creative and innovative

[81] Hindsight bias is the tendency to see an event as having been predictable, potentially resulting in the attribution of causation to non-causal factors (see https://en.wikipedia.org/wiki/Hindsight_bias). Self-serving bias is the tendency to perceive oneself or one's actions in a favourable manner, driven by the need to maintain or enhance self-esteem (see https://en.wikipedia.org/wiki/Self-serving_bias). Response bias is the tendency of participants to respond inaccurately or falsely to questions (see https://en.wikipedia.org/wiki/Response_bias).

[82] By way of example, in respect of open source software development, the fields of project management and information systems design have developed heuristics for determining "success" of particular projects by reference to a variety of criteria (*e.g.*, targets such as budget, delivery date and desired functionality); however, there is recognition in both fields that different stakeholders will use different evaluative criteria for determining "success" or "failure" of the same project. See, *e.g.*, Nitin Agarwal & Urhvashi Rathod, "Defining 'success' for software projects: An exploratory revelation" (2006) 24 International Journal of Project Management 358; and Kevin Crowston, Hala Annabi & James Howison, "Defining Open Source Software Project Success" (2003) ICIS 2003 Proceedings. Paper 28, available online at http://aisel.aisnet.org/cgi/viewcontent.cgi?article=1133&context=icis2003.

work";[83] the words used by people to describe their motivations and actions are themselves constitutive of identities and relationships and can reveal the stories and justifications that people *tell themselves* about why they did what they did. As Silbey emphasizes, these stories and the way they are articulated has political importance as they can be used as "justifications for the status quo or [for] change".[84]

Four aspects of the concept of motivation being explored in this project should be stressed. First, it was anticipated that respondents would evidence not a single motivation, but rather multiple motivations, some of which are understandable in financial terms and others of which will be more emotional or psychological.[85] Second, it was anticipated that the motivations of respondents would be arrayed along a spectrum irrespective of which sub-population they occupy, *i.e.*, the motivations of "professional" publishers would not be markedly different as a class from the motivations of "amateur" publishers – though it was anticipated that the "more" professional a publisher is (as measured by volume of production, sales, employees, *etc.*), the more their motivations would be financial in nature. Third, the questions that this research project seeks to answer are not solely questions relating to the process of creation but also relate to decisions regarding the method by which creative works are disseminated; the analysis contained in this project therefore employs concepts of motivation found in the existing literature on creativity, but extends the application of those concepts to the decision to make creative expression available pursuant to an open content copyright licence. Finally, due to its nature as a mental state or process, the content of an individual's "motivation" can necessarily be inferred or deduced only in reliance on the descriptions provided by that individual; that being said, motivations can be assessed using a taxonomy that has been developed and used by researchers exploring human creativity.

While there is limited empirical research on how creators make creative decisions,[86] there is a broader theoretical literature that posits that creators create expressive works for a wide range of motivations and goals. Among the various factors which have been surmised to motivate creators (in no particular order): revenue-generation; profit-maximization; efficient allocation of resources; pleasure; desire for feedback; desire for social connectedness; desire for "belonging"; sense of empowerment;

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[83] Silbey, *supra* note 2 at 289.

[84] *Ibid.*

[85] See, *e.g.*, Silbey, *supra* note 2 at 80.

[86] Stefan Bechtold, Christopher Buccafusco & Christopher Jon Sprigman, "Innovation Heuristics: Experiments on Sequential Creativity in Intellectual Property" (2016) 91 Indiana L J 1251 at 3 [*Innovation Heuristics*].

identity creation; and enhancing reputation.[87] As noted in the previous paragraph, while the existing literature employs concepts of motivation in examining creativity (asking, essentially, why individuals engage in creative activity), there is no comparable set of concepts that has been developed and applied to examine why creators or copyright owners make the decisions they make with respect to the dissemination or other exploitation of their copyright-protected works. Silbey's work has indicated that the concepts applicable to creativity can be usefully extended to apply to the examination of the motivations for the decisions made in connection with dissemination and exploitation.[88] By means of the interview questions, respondents were asked to articulate their subjective views of their motivations in using the OGL and their assessment of their experiences having made use of the OGL. Through the coding process described in Part IV(e), below, collected online statements and interviewee responses were coded so as to characterize them in a form that is congruent with the motivating factors posited by copyright justification theories (including the communicative copyright account).

A "motivation" can be defined as a reason for acting in a particular manner, or as "a driving force that initiates and directs behaviour".[89] In describing what motivates individuals to undertake activities, psychologists and economists categorize motivations into two classes: extrinsic and intrinsic.[90] Extrinsic motivations originate from external sources, for example payment, praise or opportunity for advancement.[91] Intrinsic motivations originate within the individual, such as subjective enjoyment of or interest in an activity "for its own sake".[92] It has long been recognized that both types of motivation are at play in the kinds of activities which result in the creation of "works" protected by copyright law. Indeed, copyright law itself, by virtue of the exclusive rights it confers on authors, is often described as an extrinsic motivator.[93] Experimental research has been conducted that attempts to identify the impact of extrinsic

[87] See Elizabeth Rosenblatt, "Belonging As Creation" (2017) 82 Missouri L Rev 91 at fns 11-18 and accompanying text.

[88] See generally, Silbey, *supra* note 2.

[89] Charles Stangor, *Introduction to Psychology* (2011), available online in the MIT Open Courseware library at http://ocw.mit.edu/ans7870/9/9.00SC/MIT9_00SCF11_text.pdf at 521.

[90] See Christopher J. Buccafusco, Zacahry C. Burns, Jeanne C. Fromer and Christopher Jon Sprigman "Experimental Tests of Intellectual Property Laws' Creativity Thresholds" (2014) 93 Texas Law Review 1921 at 1935.

[91] *Ibid.*

[92] *Ibid.*

[93] *Ibid.* at 1936.

and intrinsic motivations on "creativity",[94] *i.e.*, testing whether individuals are more or less creative when provided with various extrinsic motivations. The empirical literature that relies on experiments has produced insights into motivations and the creative process that are often counter-intuitive to what might have been expected in reliance on conventional copyright accounts.[95] Alongside that literature there is also a developing body of empirical literature, to which this project is intended to contribute, that focuses on descriptions of the creative process provided by creators themselves.[96] These two streams of empirical work can be viewed as proceeding along similar paths towards the goal of obtaining more and better data in an effort to better understand how copyright law functions and how it might be reformed.[97] The body of qualitative empirical literature is, as noted above, relying on qualitative methodologies to engage with subjective accounts of intrinsic motivation, moving beyond hedonic descriptors of "pleasure" or "enjoyment" and invoking eudaimonic concepts such as belonging, compulsion and other non-pecuniary impulses.[98] One finding of the empirical literature is that "typical intellectual property values" such as monetary compensation in exchange for the exploitation of rights are infrequently mentioned by creators when describing their motivations for creating and disseminating their works; instead, "emotional and personal rewards" are cited.[99] As will be discussed in Chapter 7, that is consistent with what was found in the course of this research project.

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[94] See, *e.g.*, the research described in *ibid*. at 1936ff and "Innovation Heuristics", *supra* note 86.

[95] See, *e.g.*, Christopher Jon Sprigman, "Copyright and Creative Incentives: What We Know (and Don't)" (2017) 55 Houston Law Review 451 (at 477: "the results from the lab experiments further complicate the simple theoretical story of creative incentives … copyright may contribute to creative incentives in some contexts and under some conditions, but not in others—and usually not in the manner or to the extent that orthodox economics would predict").

[96] See, e.g., Rebecca Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions" (2009) 51 Wm & Mary L Rev 513; Rosenblatt, *supra* note 87; and Silbey, *supra* note 2.

[97] See Sprigman, *supra* note 95 at 477-478 and Silbey, *supra* note 2 at 281-285.

[98] Or, when "pleasure" is used, it is deployed in a "thicker" way, as when Silbey describes her interviewees as deriving enjoyment from "the momentum of work" or valuing arduous, repetitive practice (see Silbey, *supra* note 2 at 64ff).

[99] Silbey, *supra* note 2 at 56 ("… interviewees focus only implicitly or tangentially, if at all, on the product of the workday, like a painting or a software program. While these products may become assets for reproduction, distribution or commercialization, interviewees infrequently cite these typical intellectual property values.").

(e) *Data Analysis / Coding*

Coding data is the process of labelling or tagging the data using various headings or labels called "codes".[100] Coding is not itself analysis, rather it is a tool to assist in analysis.[101] As noted above, in an effort to ensure consistency in the analysis, all data were coded and analyzed by me without the use of assistants, using NVivo (versions 11 and 12) coding software. Yin's view is that the preferred analytic strategy for case studies is to employ the theoretical propositions that form the framework for the research;[102] that strategy was employed in this project. The coding of the interviewee responses and online documentation[103] was completed in accordance with a set of codes that was developed as follows: a set of codes was initially prepared by referring to the communicative copyright account, preliminary findings, and the socio-legal academic literature on creativity, as well as my own experience and knowledge of copyright law and the business of monetizing creative expression; the interview transcripts and the online content was then given an initial read, without coding, but updating the coding categories with emergent concepts derived from the initial reading; on a second reading of the data, the material was coded; coding categories were further modified and developed in a recursive process during the coding to incorporate concepts that emerged from the data (*e.g.*, when relevant interviewee responses could not be coded using any existing codes, a new code was created); a final coding of the materials was undertaken once the coding categories had stabilized.

Coding categories were used that addressed both manifest content (such as the presence of particular words or phrases) and latent or thematic content. A key aspect of the analysis procedure is the identification of repetitions and patterns in the data, whether based on recurring words or thematic elements.[104] Coding of the data involved marking word choices (*e.g.*, use of the word "share" or "sharing") and conceptual themes (*e.g.*, coding statements such as "it made things easier" or "I didn't have to reinvent the wheel" into categories of, respectively, "efficiency" and "ease of access to pre-existing material"). It emerged that two sets of coding categories were required: because the online data was

[100] Babbie, *supra* note 3 at 396-400.

[101] Yin, *supra* note 11 at 128.

[102] *Ibid* at 130.

[103] When coding web content, multiple posts from the same user in the same thread making the same point were not duplicably coded – the first statement on the topic by the poster (e.g., "I think the OGL is great!") was coded, and subsequent re-statements by that same poster of the same sentiment were not coded.

[104] Yin, *supra* note 11 at 128, 136-141.

effectively unstructured due to the statements being the organic result of conversations that I did not prompt or influence, the online data produced a conceptually more wide-ranging set of material. While there was overlap between the two sets of coding categories, the set of codes for the online data is larger, denser, and more thematically robust. The trajectory of the analytical process consisted of a set of iterative steps beginning with the formulation of a theory or proposition (as found in the preceding chapters), moving to comparison of the theory/proposition with the analyzed data, then revising the proposition and then comparing the revised proposition to other data, and repeating that process through the accumulated data.[105] The outcome of that process is the subject of Chapter 7 of this dissertation.

(f) *Limitations*

There are a number of limitations inherent in the data that resulted from this research project, which can be grouped into limitations arising from the interview process, the capabilities of the interviewer and the demographics of the interviewees, and the scope of data collection. The number of interviews is relatively small – as noted above, while some suggest that upwards of twenty interviews be conducted for qualitative projects,[106] there is also acceptance of the notion that interviews can be stopped at the "saturation" point (*i.e.*, where answers and themes contained in them begin to repeat); saturation occurred with these interviews relatively quickly.[107] Also, the decision to proceed with the analysis with the small number of interviews was made on the basis that whatever limitations arise from the number of interviews are more than off-set by the volume of data derived from the online documentation. Neither of the "Big Two" publishers made a representative available to be interviewed;[108] the decision to proceed without their involvement was made on the following bases: (a) the online documentation contained significant amounts of data emanating from authorized representatives of those companies on the matter of their use of the OGL; (b) the decisions of those two companies with respect to their use of the OGL is publicly-observable (*e.g.*, the decision of WOTC to return to use of the OGL in connection with the 5th edition of D&D as described in Chapter 6) which itself provides data relevant to the analysis; and (c) the

[105] *Ibid* at 143.
[106] Silbey, *supra* note 2 at 290.
[107] For further discussion on the topic of saturation, see *supra* note 47 and accompanying text.
[108] See note 62, above, and accompanying text.

online documentation has generated copious amounts of data that speak to the motivations and views of a large set of OGL users. A general limitation of interviewing as a method is the unanswerable question of whether interviewees have reliably reported their own subjective states regarding their motivations and rationales for making decisions; this limitation was partially addressed by attempting to corroborate statements by reference to the online documentation, and partially by posing questions with slightly different wording at different times in the interview that were designed to elicit responses to the same general matter (*e.g.*, asking interviewees to describe their motivations or reasons for using the OGL near the beginning of the interview and then near the end asking them to describe what their purpose was in using the OGL).

I note also that I have limited experience with respect to conducting interviews in the context of collecting qualitative data for academic research projects and there are likely failings in my interviewing technique. To counteract this, I conducted all interviews and coding (rather than relying on research assistants) so that if there are errors, they are at least consistent across all of the interviews and the data coding and analysis process. Any inability to obtain valid data from interviewees due to frailties in my interviewing technique will hopefully be balanced by the raw, unprompted nature of the data contained in the online documentation. I think I was able to develop rapport with each oral interviewee, and those interviewees all seemed comfortable and were relatively expansive in their answers, so I think that their responses were genuine and were not self-serving.

The gender demographics of the interviewees and authors of the collected data also bear mention. With respect to the authors of the statements collected in the online documentation, it is impossible to determine the identity of many of the online commenters – they often use pseudonyms and adorn their online profiles with visual images that may or may not resemble their offline identities. Of the oral interview subjects who were visually identifiable via Skype, all appeared to be white males, ranging in age from their mid-twenties to their early-sixties. Only four female potential interviewees were identified – two responded to my outreach and declined to participate, the third responded and indicated an initial willingness to participate but then ceased communications, and the fourth never responded. Transparent and accurate publicly-available demographic information on the RPG industry is sparse to non-existent.

The paucity of female players has long been remarked upon by academic observers of the community,[109] although there is anecdotal evidence that contemporary female participation in the gaming community has grown significantly.[110] It is possible, perhaps even likely, that the single-gender demographics of the interviewee respondents have skewed the data as compared to a respondent pool that contained more females.

More generally, caution is warranted in generalizing from the data because the data bears certain limitations in scope. For example, the interviewees were geographically limited to residents of the United States, Canada and England.[111] Additionally, the data collected for this project is limited to English-speaking people who are engaged in a particular cultural activity, that of playing RPGs. The community of RPG players who use the OGL has its own demographic characteristics that may make it unrepresentative of other creative communities. The extent to which what is true about the creative activity and copyright licensing that occurs in the RPG community can be generalized to other fields of creative endeavour is debatable; that being said, I describe in Chapter 6 why I think that the nature of the creative activity in RPG content creation bears important structural commonalities to other creative activity. Different sampling methods and different interviewee respondents could have resulted in different data, and a different researcher with different predilections could have analyzed the data to draw different conclusions. The data collected in this project is, to borrow from Silbey, "suggestive rather than exhaustive",[112] and so generalization should be approached with caution and recognizing the potential limitations described in this Part.

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[109] Gary Alan Fine, *Shared Fantasy: Role-Playing Games as Social Worlds* (Chicago: University of Chicago Press, 1983) at 62 (estimating that between 5-10% of all players were female). See also Jon Peterson, "The First Female Gamers", (October 5, 2014) *Medium* (blog), online: https://medium.com/@increment/the-first-female-gamers-c784fbe3ff37.

[110] See David M. Ewalt, *Of Dice and Men: The Story of Dungeons & Dragons and the People Who Play It* (New York: Scribner, 2013) at 145, 183-184, and see, *e.g.*, Cecilia D'Anastasio, "Dungeons & Dragons Has Caught Up With Third Wave Feminism", (August 27, 2014), *Vice*, (website), online: https://www.vice.com/en_us/article/exmqg7/dungeons-and-dragons-has-caught-up-with-third-wave-feminism-827; CBC Radio, Interview with Tina Hassannia, "Why Dungeons & Dragons is a source of female empowerment" (October 26, 2016), online: http://www.cbc.ca/radio/the180/d-d-as-a-path-to-female-empowerment-keeping-the-creep-in-halloween-and-stop-making-police-cars-so-menacing-1.3821006/why-dungeons-and-dragons-is-a-source-of-female-empowerment-1.3822661.

[111] With the exception of one respondent who currently resides in Europe, see *supra* note 43.

[112] Silbey, *supra* note 2 at 295.

Chapter 6

The History and Mechanics of the Open Game License

I. Introduction

The core issue towards which this dissertation is oriented is the identification of the optimal circumstances in which open content licences can be used to disseminate creative cultural expression. In an effort to identify those circumstances, I am using the Open Game License ("**OGL**") and its history and impact on the role-playing game ("**RPG**") industry as a case study. This chapter provides background information on the RPG industry and describes the history and mechanics of the OGL, a form of copyright licence originally developed for use in connection with the *Dungeons & Dragons* ("**D&D**") RPG.[1] The history of the OGL set forth in this chapter focuses on the business background and a chronological recounting of the OGL's development, release, and impact as detailed in written primary and secondary sources. In addition, this chapter examines the operation of the provisions of the OGL and considers whether the OGL qualifies as an open content licence as defined in Chapter 3. Relatedly, this chapter addresses whether the OGL was necessary in order for licensees to enjoy the permissions that the OGL purports to grant to them, or whether the activities the OGL was designed to treat as non-infringing would have been non-infringing in any event. Subsequent chapters, relying on the data obtained from the fieldwork and content analysis portions of this research project, explore the rationales provided by those who have used the OGL to release their own RPG products or who have used materials released under the OGL and synthesize the findings of the fieldwork with the theoretical accounts and analysis provided in Chapters 1 through 4. In addition to describing the relevant history of the OGL, this chapter also describes the manner in which the OGL and RPGs generally resonate with the theoretical underpinnings of communicative copyright as described in Chapter 2.

Part II of this chapter offers an overview of D&D and RPGs in order to provide the necessary context for the subsequent discussion of the OGL. Part III presents an overview of the history of the OGL,

[1] A copy of the full text of the OGL is reproduced in Appendix 1 and is available online at http://www.opengamingfoundation.org/ogl.html; a copy is also on file with the author. The proper name given to the OGL is the "Open Game License", as indicated in the text of the OGL. However, many commentators and sources, including on occasion Wizards of the Coast, Inc., the originators of the OGL, erroneously refer to the OGL as the "Open *Gaming* License".

from its genesis in the late 1990s through to 2016. In Part IV, a preliminary assessment of the impact of the OGL on the RPG industry is offered. Parts V, VI and VII, respectively, examine the mechanics and operation of the OGL, discuss whether the OGL was in fact necessary in light of copyright law relating to the protectability of games, and describe how the OGL qualifies as an open content licence in accordance with the definition provided in Chapter 3.

II. D&D and RPGs: A Backgrounder

(a) *History and Basics*

D&D was first commercially released in 1974 and was the pioneering entrant in a new form of game called tabletop role-playing games.[2] RPGs may be usefully characterized as multi-participant storytelling: they involve players taking control of fictional characters and guiding the characters through various activities in a "game world" where their activities are refereed by a "game master" who administers a framework of rules that often use dice (or other randomization mechanics such as cards or chits) as an action resolution mechanic.[3] A comprehensive description of the history of the D&D game is beyond the scope of this project;[4] for present purposes, the summary contained in this Part will suffice to provide the context for the subsequent discussion of the OGL. The first commercial release of a game called "Dungeons & Dragons" occurred in 1974. However, the "1st Edition" of "Advanced Dungeons & Dragons" (usually shortened to "AD&D" and representing the most popular, longest-lived and most

[2] See generally David M. Ewalt, *Of Dice and Men: The Story of Dungeons & Dragons and the People Who Play It* (New York: Scribner, 2013). For a discussion of the relationship between role-playing games and games generally, see Jon Peterson, *Playing at the World: A History of Simulating Wars, People and Fantastic Adventures, from Chess to Role-Playing Games* (San Diego, CA: Unreason Press, 2012). RPGs can be played in a variety of ways, including in single-player computer games or multi-player online games; the original format of play for D&D took place literally around tables, using pen, paper, and dice – hence the term "tabletop" or "pen-and-paper" to distinguish this traditional form of RGP gaming from its digital variants and other forms such as "live action role-playing" (LARPing) which entails players donning costumes and moving around a physical space (see generally Sarah Lynne Bowman, *The Functions of Role-Playing Games: How Participants Create Community, Solve Problems and Explore Identity* (Jefferson, NC: McFarland & Co., 2010) at 24ff). This dissertation uses "RPG" to refer to "tabletop" / "pen-and-paper" RPGs.

[3] For more comprehensive definitions of RPGs, see generally Michael Hitchens & Anders Drachen, "The Many Faces of Role-Playing Games" (2008) 1 International Journal of Role-Playing 3, and Jonne Arjoranta, "Defining Role-Playing Games as Language Games" (2009) 2 International Journal of Role-Playing 3. Hitchens and Anders provide a definition of RPGs that consists of the following features: players who guide characters through a game world through a process of interaction with a game master that results in narrativity.

[4] For a more detailed history, see *30 Years of Adventure: A Celebration of Dungeons & Dragons* (Renton, WA: Wizards of the Coast, Inc., 2004). See also Michael Witwer, *Empire of Imagination: Gary Gygax and the Birth of Dungeons & Dragons* (New York: Bloomsbury USA, 2015).

developed version of the game) was published beginning in 1977. AD&D's 2nd Edition was published in 1989. The 3rd Edition of the game (later dubbed "3.0") dropped the "Advanced" modifier, leaving the game named simply "Dungeons & Dragons", and was published in 2000 under the OGL; a version dubbed "3.5" was subsequently released in 2003. The 4th Edition was released in 2008, with the 5th Edition following in 2014.

Beginning with the 2nd Edition, each new edition of D&D represented a significant overhaul in game mechanics and presentation (with the exception of the 3.5 release, which contained incremental changes). Nonetheless, the core of the D&D game has remained consistent throughout all editions, in both substance and style. Play is overseen by a "dungeon master" who runs the gaming activities of two or more players,[5] and involves the use of polyhedral dice, ranging from four-sided to twenty-sided or higher, which are used to determine various aspects of the game, such as whether an attempt to hit an enemy with a weapon is successful, and the "amount" of damage inflicted by a successful hit. The game largely takes place "in the imagination", with supplemental maps and miniature artificial landscapes and figurines sometimes used to make it easier for participants to visualize the relative positions of characters in combat. Players create "characters" that are described by various characteristics such as "race" (human, elf, dwarf, etc.), "class" (fighter, wizard, cleric, etc.) and numerical attributes (strength, dexterity, charisma, etc.). Characters "persist" and "advance" in experience from session to session (unless the character is killed in the game) – that persistence leads to characters becoming "unique persona[e] to be inhabited like an actor in a role".[6]

The activities of the characters in RPGs take place in a fictional setting; in D&D the setting is usually a fantasy world featuring vaguely medieval technology levels where magic exists and monsters pose threats to civilization. Characters are equipped with accoutrements such as weapons, armour, and adventuring gear, and undertake quests of varying difficulty and narrative complexity. A series of linked adventures taking place in a consistent setting is referred to as a "campaign", and some campaigns continue for months or years of real playing time. The D&D game itself is traditionally presented by means of three "core" rulebooks, consisting of a "Player's Handbook" (featuring the rules to which players are

[5] In non-D&D RPGs, the "Dungeon Master" role is referred to by other names including "game master", "storyteller" or "referee" (see Bowman, *supra* note 2 at 12).

[6] Ewalt, *supra* note 2 at 10, 22-23.

privy), a “Dungeon Master's Guide” (which contains rules and game-running advice for the game referee responsible for administering the proceedings) and a “Monster Manual” (containing descriptions and game “statistics” for the foes arrayed against the players’ characters). Since the 1st Edition of AD&D, the rulebooks have been a minimum of 128 pages, though they are often much longer, and contain lavish illustrations, tables, charts, indexes and glossaries along with significant amounts of expository text.[7] In addition to the three core rulebooks, each edition is augmented by a plethora of “supplements”, ranging from pre-packaged adventures (sometimes referred to as adventure “scenarios” or “modules”) to richly-detailed campaign settings to additional rules and game components (setting forth such matters as additional treasures to be won, spells to be cast or rules for playing additional character classes).

Key to understanding D&D and other RPGs is that the games are not “static” in the way that, for example, a traditional board game like chess or Monopoly is fixed. Traditional games consist of a finite set of rules. Effectively, once a player owns the “equipment” needed for chess or Monopoly (the requisite board, gaming pieces, copy of the rules, dice in the case of Monopoly, etc.), there is limited additional “input” required from the players – to “play” chess or Monopoly, players can simply (and indeed are expected to) utilize the equipment in accordance with the settled rules. RPGs, however, taking place as they do “in the imagination”, requires players to *engage* with the rules and *create* additional materials in order to play the game.[8] Traditional board games include “victory conditions” the achievement of which indicates that the game is completed (checkmate for chess, being the wealthiest player at the end of the game in Monopoly, *etc.*). D&D has no built-in “victory conditions” – play can continue indefinitely and is potentially infinitely iterative.[9] The D&D gaming materials explicitly encourage players to modify and supplement the rules and, more importantly, to create their own “dungeons”, “adventures” and “campaigns”. To play D&D and other RPGs in the manner contemplated by their publishers, players (particularly the game masters who are in charge of running the game sessions) are obliged to create

[7] The 5th edition rule books run to 320 pages (*Dungeon Master’s Guide*), 320 pages (*Player’s Handbook*), and 352 pages (*Monster Manual*).

[8] See Jennifer Grouling Cover, *The Creation of Narrative in Tabletop Role-Playing Games* (Jefferson, NC: McFarland & Co., 2010) at 160 (noting that not *all* RPG players will engage with RPG materials in the same productive capacity – some are content simply to *play* the game using pre-published materials or materials created by other participants).

[9] It is also worth noting that the game is not limited to its default pseudo-medieval setting – just among official TSR/WOTC supplements, the game has been adapted to settings which include: post-apocalyptic sword & sorcery (*Dark Sun*); outer space swashbuckling (*Spelljammer*); noir steampunk (*Eberron*); Mesoamerican (*Maztica*); Arabian (A*l-Qadim*); and Gothic horror (*Ravenloft*).

new materials in order to "bring the game to life";[10] the creative processes that are an integral part of RPG gaming activity are described in further detail in the next section.

(b) *Creativity and Community-Building in RPG Gaming*

Because of their multi-player nature, and the manner in which participants are called upon to interact with and creatively contribute to the rules, RPGs and their play resonate with the communicative copyright framework being used in this dissertation.[11] Some have described RPGs as displaying three levels of "authorial" activity: the authors of the written rulebooks and supplements; the authorial work of the game master who, in refereeing a game session transmutes written material into verbal discourse; and that of the players as they "perform" their interactions with the game environment.[12] The activities of those multiple authors result in the production of a collaborative "text",[13] with authorship "in constant motion as narrative control shifts among the game designers, DM, and players".[14] In their authorial activity, RPG participants often drawn upon pre-existing texts (such as fantasy fiction) for inspiration and to inform their contributions to the game.[15] Sarah Lynne Bowman has described RPG playing as "a form

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[10] See, *e.g.*, David "Zeb" Cook, "Introduction to the *Dungeon Master's Guide*" in *Advanced Dungeons & Dragons Dungeon's Master Guide* (2nd Ed.) (TSR, Inc., 1989) at 3: "Take the time to have fun with the AD&D rules. Add, create, expand, and extrapolate. Don't just let the game sit there". See also Wizards of the Coast, Inc., *Open Game Definitions: FAQ* (Version 2.0: January 26, 2004), online: http://wizards.com/default.asp?x=d20/oglfaq/20040123d; a copy is also on file with the author ("Most roleplaying games … are based on the implicit assumption that the people using them will create their own content in the form of adventures, characters and even whole campaign settings. … It has been an established feature of RPGs since their inception that they should be used to create new content.").

[11] See generally Gary Alan Fine, *Shared Fantasy: Role-Playing Games as Social Worlds* (Chicago: University of Chicago Press, 1983); Bowman, *supra* note 2; Cover, *supra* note 8.

[12] Cover, *supra* note 8 at 126-127, citing Jessica Hammer, "Agency and Authority in Role-Playing Texts" in M Knobel & C Lankshear, eds, *A New Literacies Samples* 67 (New York: Peter Lang, 2007). To illustrate some aspects of the creative expression that makes up game design, consider the decisions and content that must be made by a designer who wants to create a game allowing players to indulge in rollicking adventures: the milieu to depict in the game (*e.g.*, swashbuckling pirates (*7th Sea*), Looney Toons-inspired animated mayhem (*Toon*), gonzo science fiction (*Gamma World*)); the game mechanics that best express the desired spirit of the game and the text that will best express to players how to actually use the mechanics; descriptions of the setting or game world in which the game's adventures will occur, which may include richly-detailed descriptions of things like countries, political systems, historical background and details of in-game religious activities; images and other illustrations that will be included in the rulebooks; sample adventures that give examples of how game play should be carried out; and descriptions of various characters or personalities who inhabit the game world.

[13] *Ibid* at 142, 147.

[14] *Ibid* at 129.

[15] *Ibid* at 129-132. See also Casey Fiesler, "Pretending Without a License: Intellectual Property and Gender Implications in Online Games" (2013) 9 Buff Intell Prop LJ 1 at 9-10 ("borrowed source material provides the required common point of reference for players").

of art, melding creative writing, gaming, and improvisational drama in a co-created Shared World".[16] The constant creative activity required of RPG participants results in a particularly robust form of relationship- and community-building.

Bowman contends that the notion of community is definitional to RPGs: in order to qualify as an RPG, a game must "establish some sense of community through a ritualized storytelling experience amongst multiple players".[17] RPGs entail both small group dynamics and larger communal dynamics: RPG play fosters relationships among the participants in a particular gaming group who gather to play at one or more game sessions, and also fosters relationships among members of a broader set of individuals who are members of the gaming subculture.[18] With respect to the small group dynamic, as is the case with most games, RPGs are meant to be played by multiple participants – in the case of RPGs, the game master and one or more players. In contrast to many conventional games, tabletop RPGs involve high levels of interactivity and cooperation (as distinguished from competition) among participants – players do not compete *against* each other so much as contest against the elements of a narrative setting that is refereed by the game master.[19] Jennifer Grouling Cover argues that such participatory interaction among RPG players and game masters is the defining characteristic that sets RPGs apart from other games.[20] Successfully playing RPGs requires the participants to jointly "construct a shared fantasy" – RPGs are inherently social in a way which is different from the sociality found in conventional games because of the need in RPGs for the participants to construct a shared social world in which the activities of the player's characters take place.[21] Playing RPGs constitutes a "collective achievement",[22] as the group of game players "construct a shared culture through game events".[23]

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[16] Bowman, *supra* note 2 at 181.

[17] Bowman, *supra* note 2 at 11.

[18] Fine, *supra* note 11 at 236-237.

[19] Ewalt, *supra* note 2 at 9; Fine, *supra* note 11 at 165 (RPG "gaming is designed to be cooperative, unlike most games, in which competition is central … there are no losers, and … everyone can win"). "Cooperation" here is used in the sense of participants simultaneously participating in the game play and making decisions in the context of the environment presented by the game master (*ibid* at 86); participants may of course "fight and bicker" and players may be jockeying for relative position and even be combatants within the game world (*ibid* at 106ff and esp 153ff).

[20] Cover, *supra* note 8 at 11.

[21] Fine, *supra* note 11 at 231.

[22] *Ibid* at 5-6.

[23] *Ibid* at 136.

RPGs also often function as nodal points of community for their players.[24] David Fine's seminal sociological work on RPGs identified a number of explanations or motivations for why players participate in RPG games: he found that gaming provides value by enhancing player autonomy[25] and by providing "a structure for making friends and finding a sense of community".[26] As Fine observed, RPG gaming constitutes a subculture, one that "provides a sense of community with other similar individuals" and enables participants to "develop a social network" consisting of other gamers (who may or may not be members of the same gaming group that gathers to play a particular session).[27] Similarly, Bowman identifies "community building" as one of the three main functions performed by RPGs.[28] The form of play involved with RPGs, requiring as it does narrativity and interactivity, connects the form of RPG play with its functions. RPG play entails a constant conversation among participants making use of both verbal and textual elements, including the written rulebooks and supplements, descriptions of a setting voiced by a game master, in-character speech voiced by a player, and the provision of written materials by the game master to the players. In Bowman's account, RPG playing cultivates empathy among players because in enacting their character roles players "interface with alternate modes of thinking both in-character and out-of-character";[29] the interactive and communal nature of RPG play often facilitates the creation of friendships and other socialization that otherwise would not have occurred.[30] "Immersiveness" is a quality highly prized among RPG players,[31] and immersion and the participatory creation of narrative result in social interaction that many gamers cite as a primary motivation for playing RPGs.[32]

While these aspects of RPG culture may seem to render it idiosyncratic amongst cultural activities, there are affinities between RPG play and other forms of creative expression that indicate that observations of RPG play can have broader implications for discussions about contemporary forms of

[24] Ewalt, *supra* note 2 at 26, 118-119 (quoting Johan Huizinga, "a play community generally tends to become permanent even after the game is over").

[25] Fine, *supra* note 11 at 57-59 (gaming "gives participants confidence in their personal powers … facilitates ego mastery, producing psychological growth and insight" and providing a "sense of control and personal insight").

[26] *Ibid* at 59.

[27] *Ibid* at 236-237.

[28] Bowman, *supra* note 2 at 32 (the other two functions being problem-solving and identity alteration).

[29] *Ibid* at 59ff.

[30] *Ibid* at 70.

[31] Cover, *supra* note 8 at 108ff.

[32] *Ibid* at 116.

creativity and copyright law's impact on it. As noted above, there are multiple layers of authorial activity that occurs with RPGs: the game designers who write the foundational rules texts and supplements; the individual game masters who creates their own text and graphics in overseeing the game sessions; and the players who respond to and contribute their own performances to the ongoing narrative framed by the game designers and game masters. RPG play occurs in an environment replete with pre-existing works, with the participants in constant authorial and creative dialogue with the pre-existing works and each other as they create the game experience and its supporting texts. There are significant parallels between the type of bricolage production seen in RPGs and that described by numerous scholars in a variety of contexts.

Henry Jenkins has written about the "textual poaching" and participatory culture of popular culture fandom; these are the viewers of television shows such as *Star Trek* and *Doctor Who* that engage in a wide range of cultural production activities, from writing detailed critiques informed by literary theory to creating audio-visual works to composing and performing songs, the core common component of which is "appropriat[ing] raw materials from the commercial culture but us[ing] them as the basis for the creation of a contemporary folk culture".[33] Perhaps the dominant mode of expression found in the fandom culture described by Jenkins is the specific literary form of "fan fiction", defined by Rebecca Tushnet as the borrowing of characters and settings from commercially-released productions by fan authors for the creation of non-professional writing.[34] Echoing Jenkins, Tushnet describes the "raw materials" of professional commercial culture as providing the "common language" or vocabulary for a set of participant-viewers, for whom "community" represents both a defining ethos and an audience for their

[33] See Henry Jenkins, *Textual Poachers: Television Fans & Participatory Culture* (New York: Routledge, 2012) at 279. As Jenkins notes (at 157), the breadth of source materials for fan communities extends well beyond the traditional sci-fi and fantasy genre properties often associated with fan culture (noting fan culture works drawing on properties such as TV shows from the 1970s and 1980s like *M*A*S*H*, *Magnum P.I.*, and *Moonlighting*). See also Cover, *supra* note 8 at 148 (noting the similar approaches in RPG gaming to "textual transformation" and "productive interactivity" identified by Jenkins).

[34] Rebecca Tushnet, "Legal Fictions: Copyright, Fan Fiction, and a New Common Law" (1997) 17 Loyola LA Ent L J 651 at 655. See also Cover, *supra* note 8 at 150 (noting the similarities between RPG gaming and fan fiction, citing Barthes' concept of "re-reading" being "not consumption but play"). On fan fiction generally and its copyright implications, see Rebecca Tushnet, "Payment in Credit: Copyright law and Subcultural Creativity" (2007) 70 L & Contemporary Problems 135; and Anupam Chander & Madhavi Sunder, "Everyone's a Superhero: A Cultural Theory of 'Mary Sue' Fan Fiction as Fair Use" (2007), 95 Cal L Rev 597. See also Betsy Rosenblatt, "Belonging as Intellectual Creation" (2017) 82 Missouri L Rev 91 at 104 (on the relationship between fan fiction, belonging and identity).

creative expression.[35] In the contemporary online context, those sorts of activities bear commonalities with the "social production" contemplated by Niva Elkin-Koren,[36] in which a variety of "social" motivations such as sharing, self-expression and creative satisfaction (as distinct from pecuniary incentives) propel collaborative creation of expressive content. Those accounts are of a piece with the description by Carys Craig of "relational" authors who are "entering a cultural conversation" and whose contributions "incorporate and respond to that which has already been said".[37] Craig's account, in turn, is consistent with Julie E. Cohen's account of the "situated" user, whose creativity draws on, indeed depends on, the material components and the "social and cultural patterns" of the culture in which they are located.[38]

RPG gamers engage in a form of cultural production that bears all of the hallmarks of the creativity described by the foregoing scholars: they are inspired by, incorporating, responding to, and extending the works—both RPG-related and otherwise—that form the cultural milieu in which they game.[39] RPGs, in the density of the exposition required to articulate the game rules and to engage in their structured play, in their need to create extremely layered depictions of a shared artificial reality, are closer to literature than to modes of expression like board games, which consist usually of relatively brief explications of rules along with a single game board bearing imagery and a handful of playing pieces. The hundreds of thousands, if not millions, of words written to describe the rules, settings, characters, storylines, cosmology, and other elements of various RPG games are in many cases at least as creative, and in some cases more so, than works of expressive literature filed under "Science Fiction" or "Fantasy" in a local bookstore. The types of syncretic creativity and communicative activity that mark RPG culture have parallels in many other aspects of contemporary culture, particularly in its online digital forms.[40]

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[35] Tushnet, *Legal Fictions*, *supra* note 34 at 656-657.

[36] See discussion in Chapter 2 at notes 115-129 and accompanying text. See also Niva Elkin-Koren, "Tailoring Copyright to Social Production" (2011) 12 Theoretical Inq L 309, esp at 318ff.

[37] Carys Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar, 2011) at 54.

[38] See Julie E. Cohen, "Creativity and Culture in Copyright Theory" (2007) 40 UC Davis L Rev 1151 at 1153.

[39] As Cover notes (see *supra* note 8, at 170-172) RPG gamers and their modes of playing are not homogenous: there are different playing "styles", and some players are more "productive" than others—some just want the visceral pleasure of having their characters kill orcs in a dungeon, while others are interested in creating and participating in grand narrative arcs that extend over multiple sessions or even years of play (Cover, *supra* note 8.

[40] But, it should also be noted, not only in online activities. Cultural activities that display, to greater or lesser degree, patterns of iterative, communicative, spontaneous creativity include improvisational theatre and comedy, as well as free jazz and certain other forms of avant-garde live music performance. Digital communications media have made collaboration, particularly amongst large groups and at a distance, easier, but communicative creativity is certainly not limited to online interactions.

While the form of play and creativity which occurs in the context of RPGs may appear unique, observations and analysis of it are relevant to contemporary creative activities more broadly due to these shared characteristics.

Although RPGs have often been viewed as a marginal cultural activity, their consistent popularity, particularly that of D&D, should not be underestimated.[41] For more than forty years, from their origins in the mid-1970s through to the second decade of the 21st century, RPGs have played a significant, if sometimes obscured, role in popular culture, influencing and inspiring millions of players and even giving rise to entire forms of media such as massively multiplayer online video games like *Warcraft*.[42] The peculiar characteristics of RPGs have been utilized well beyond the confines of recreational activity—as Neima Jahromi notes, D&D is used by "therapists … to get troubled kids to talk about experiences that might otherwise embarrass them, and [by] children with autism … to improve their social skills".[43] With roots in forms of improvisational theatre, role-playing activities are at the core of various forms of drama therapy, educational techniques, and even employee and professional training strategies.[44] RPGs have been shown to enhance sociality, encourage the development of problem-solving skills, and improve emotional and imaginative faculties.[45] As Fine has noted, for those "interested in the interactional components of culture, few groups are better suited to analysis" than RPG players.[46] What at first glance may seem to be "merely" a quirky subculture has traits that resonate beyond its immediate context; as Fine has concluded, the RPG community is "a unique social world, treasured for its uniqueness, but like any social world it is organized in ways that extend beyond its boundaries".[47] The community of RPG publishers and players, and their activities in respect of copyright licensing, warrant attention because of the global and persistent popularity of the activity and because the capacity of RPGs to enable and

[41] Neima Jahromi, "The Uncanny Resurrection of Dungeons & Dragons" (October 24, 2017) *The New Yorker*, online: https://www.newyorker.com/culture/cultural-comment/the-uncanny-resurrection-of-dungeons-and-dragons.

[42] *Ibid* (noting that D&D's influence extends from the writer and showrunners of HBO's *Game of Thrones* series to the characters portrayed in the Netflix series *Stranger Things* to the writings of essayist Ta-Nehisi Coates who has described D&D as his "first literature—that and hip-hop").

[43] *Ibid.*

[44] See Bowman, *supra* note 2 at 35-54, 98-102.

[45] See generally *ibid* at 80-103.

[46] Fine, *supra* note 11 at 229.

[47] *Ibid* at 242.

encourage creative productivity is of particular salience in the era of robustly networked "social producers".

III. History of the Open Game License

(a) *Road to the Open Game License*

For most of the first three decades of its existence, D&D was published by TSR, Inc. Beginning in the 1970s and continuing into the very early 1990s, D&D represented not just the pioneering entry in an entirely new category of entertainment product (*i.e.*, the RPG), and not only was it by far the most popular example of that product, but there were stretches in which the game was a genuine popular culture phenomenon. In the 1980s alone, D&D spawned a Saturday morning cartoon (which ran for three seasons) and a moral panic arising from the suicide of a university student which was blamed on the fact that he played D&D;[48] in 1982, CBS aired *Mazes & Monsters*, a prime time "movie-of-the-week" starring Tom Hanks; in 1985 *60 Minutes* devoted a segment to exploring whether D&D was a danger to the moral and mental health of its players;[49] and playing D&D is a recurring element on *The Big Bang Theory*, currently broadcast television's most popular sitcom.[50] For the first twenty or so years of its publication, from the first copies mailed in 1974 from the living rooms of its co-creators Gary Gygax and Dave Arneson to the sprawling product line that developed in the wake of the release of the 2nd Edition in 1989, which was carried in book, toy and hobby shops around the world, D&D was a steady source of income for its owners and by far their most lucrative product.

TSR had long been seen to be an aggressive enforcer of its intellectual property rights.[51] Indeed, the company had gone so far as to sue its co-founder, Gary Gygax, for copyright infringement after he

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[48] See BBC News, "The great 1980s Dungeons & Dragons panic" (April 11, 2014), online: http://www.bbc.com/news/magazine-26328105.

[49] *60 Minutes* episode originally aired September 15, 1985. See https://archive.org/details/60_minutes_on_dungeons_and_dragons.

[50] See also Ewalt, *supra* note 2 at 30 (in 2012, "more than forty-one thousand [attendees] descended on Indianapolis for the D&D-heavy GenCon gaming convention – the biggest crowd in its forty-five year history. In San Francisco, gamers show up on Market Street and repurpose outdoor chess tables for open-to-the-public D&D sessions. In New York, trendy bars and coffee shops host D&D nights.")

[51] See Cover, *supra* note 8 at 157-158 (describing TSR's "notorious reputation for litigious pursuits … known for pursuing even the smallest copyright infringement, especially in the later years as the company was beginning to fail"); the perception of TSR as overly-litigious appears to have been widespread among gamers, and it is the perception, irrespective of its veracity, that came to be viewed as problematic by WOTC, as described in Part VI, below.

had departed the company and tried to publish competing RPGs with other publishers.[52] Throughout the 1980s, TSR had sued or threatened to sue competitors and even players who published gaming materials which were expressly designated as being "compatible" with D&D.[53] By the mid-1990s, with the community of RPG gamers enthusiastically moving into the nascent online world, TSR's attempts to enforce its copyright and trade-mark rights against gamers who shared fan-created material had earned it the sobriquet "T$R" and prompted long-running online debates about the extent of TSR's intellectual property rights.[54] TSR's positions on online fan content have been described as "adversarial".[55] The company routinely (if understandably) objected to websites hosting online files that contained digital copies of entire published TSR works; but they also voiced objections to websites and files containing excerpts from published works, and even to entirely new player-generated content containing "elements from our copyrighted properties, including characters, settings, realm names, noted magic items, spells, elements of the gaming system, such as ARMOR CLASS, HIT DICE, and so forth".[56]

Despite its historic commercial successes, by the mid-1990s TSR was in dire financial straits. Those troubles were the result of a mix of fiscal and popular culture stresses.[57] One of the major causes was a pronounced and durable shift in gamer preferences from "tabletop" or "pen-and-paper" RPGs like

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[52] See, *e.g.*, Allen Rausch, "Gary Gygax Interview – Part 2" (August 16, 2004), online: http://pc.gamespy.com/articles/538/538820p1.html.

[53] Ewalt, *supra* note 2 at 107-108, 137 (describing TSR sending cease-and-desist letters to competitors who mentioned the D&D game in their advertisements and to players who created their own blank "character sheets" (on which the attributes of characters are recorded) and sold them to other players for two cents per copy). One situation that has garnered notoriety in D&D fan circles involved Mayfair Games: in the early 1980s Mayfair marketed some its *Role Aids* line of RPG products as being useable with D&D; TSR threatened a lawsuit, and the two companies entered into an agreement that permitted limited use of the TSR marks to indicate compatibility; in 1991, TSR sued Mayfair asserting breach of contract, copyright infringement, trademark infringement, and unfair competition; the breach of contract elements of the dispute were addressed in a judgment (see *TSR, Inc v Mayfair Games, Inc.* (March 17, 1993), 1993 WL 79272 (N.D.Ill.)); TSR is thought to have subsequently purchased all rights in the *Role Aids* line and dropped the remaining claims. For a detailed discussion of TSR's copyright enforcement practices, see Jim Vassilakos, "Spinning in Circles: A History & Analysis of TSR's Copyright Policies" (2000), *The Guildsman* (Fall 2000), pages 3-16 (online: http://www.fantasylibrary.com/period/guild/guild.htm).

[54] See generally "TSR Legal Debate", online: http://www.hoboes.com/pub/Role-Playing/About%20Gaming/Role-Playing%20Defense/Gaming%20Law/TSR%20Legal%20Debate/.

[55] Shannon Appelcline, *Designers & Dragons – A History of the Roleplaying Game Industry: The '90s* (Silver Spring, MD: Evil Hat Productions, 2014) at 152.

[56] See email dated July 28, 1994 from Rob Repp (Manager, Digital Projects Group, TSR, Inc.), archived at http://www.hoboes.com/pub/Role-Playing/About%20Gaming/Role-Playing%20Defense/Gaming%20Law/TSR%20Legal%20Debate/03%20TSR%27s%20Letters%20to%20an%20FTP%20Site/ [capitalization in original].

[57] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 126. See also Ewalt, *supra* note 2 at 173-174.

D&D to computer- and console-based video games and to "collectible card games" ("**CCGs**").[58] CCGs, the most popular of which was *Magic: The Gathering*, released in 1993 by Wizards of The Coast ("**WOTC**"), used decks of pre-printed cards similar in size and shape to baseball cards, and attracted enormous amounts of attention and gamer spending away from traditional RPGs.[59] A second major cause, related to the first, was the financial impact of massive amounts of returned inventory from book retailers who had overestimated the continued popularity of traditional RPGs and RPG-inspired fantasy novels in the face of the new CCG craze which developed in the wake of *Magic: The Gathering*'s success.[60] A sustained run of poor business decisions by TSR's management and ownership increased financial strain on the company. Notably, TSR overpaid for licensed content, alienated popular writers and published an overabundance of gaming and gaming-related products which resulted in a market glut and decreased revenues; by the end of 1996, the company was $30 million in debt and numerous potential purchasers were considering an acquisition.[61] In 1997, WOTC, riding a wave of success from its CCGs, purchased all of the assets of a floundering TSR for an undisclosed amount.[62] Two years later, in 1999, Hasbro, Inc., one of the largest toy and game producers in the world, purchased WOTC for a reported $325,000,000.[63]

(b) *Creation of the OGL and D&D's 3rd Edition*

Shortly after purchasing TSR's assets in 1997, and with the 2nd Edition of D&D nearing its ten-year anniversary, WOTC turned its attention to the development of a new edition of the game in an effort to revive the brand following its displacement at the front of the gaming industry by CCGs. The 3rd Edition of D&D (retroactively dubbed and referred to in this chapter as "3.0") was released by WOTC in 2000.[64] Although WOTC was wholly-owned by Hasbro, Hasbro evidently adopted something of a hands-off

[58] According to one estimate, the tabletop RPG business "lost 60% to 70% of its unit sales from the period from 1993 to 1997", see *Open Game Definitions: FAQ*, *supra* note 10.

[59] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 134. WOTC, currently organized as Wizards of the Coast, LLC, is a subsidiary of Hasbro, Inc. (see https://corporate.hasbro.com/en-us).

[60] See Ewalt, *supra* note 2 at 174.

[61] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 142.

[62] Ewalt, *supra* note 2 at 179 reports the amount as $25 million.

[63] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 154. The purchase price is approximately $477,000,000 in inflation-adjusted 2017 US dollars (see http://www.usinflationcalculator.com/).

[64] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 155.

approach to the development and release of 3.0, given that the process was far advanced by the time of the acquisition.[65] Containing revamped game mechanics (dubbed the "**d20 system**" for its reliance on using the icosahedric "20-sided" die as its core gaming mechanic), one of the transformational aspects of 3.0 was that it was released in tandem with the OGL, an open content licence created especially for the 3rd Edition.[66] The OGL was one component of three related but discrete aspects of WOTC's 3.0 release strategy: the d20 system, the OGL and its associated "system reference documents" ("**SRDs**"), and the d20 Trademark License. Each of these elements and the interaction between them requires further explanation.

The d20 system was a reconfiguring of the D&D rules to streamline them and unite them around a core game-play mechanic using the twenty-sided die as the main device for assessing success or failure within the rules of the game.[67] Previous editions of the game had made promiscuous and haphazard use of various multi-sided dice in game play. Only devotees of the game knew when a 6-sided die would be needed as compared to when a 4-, 8-, 10-, or 12-sided die would be required; 3.0 consolidated most dice-based activity around the 20-sided die. While "under the hood" the revision of the rules was fairly dramatic, the game still looked and operated much as it always had: it was still a tabletop fantasy RPG that made use of elements already present in the original 1974/79 editions of the game, and someone who had played the game in the late 1970s would have little difficulty in picking up the new rules or recognizing the game that was being played. Though the D&D rules had been "streamlined" into the d20 system, they nonetheless still filled hundreds of pages spread across the 3.0 *Player's Handbook*, *Dungeon Master's Guide* and *Monster Manual* (which itself was nothing new: the 1977 1st Edition of AD&D also occupied hundreds of pages of rules).

The OGL was designed to operate in conjunction with the d20 system, *i.e.*, it was intended to make the d20 system "open" by granting "access" to the d20 system. That access was enabled by a separate component: the release of the text of the D&D rules in the SRDs. While the printed 3.0

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[65] *Ibid* at 154. See also Wizards of the Coast, Inc., *The d20 System Concept: FAQ* (Version 1.0), online: http://www.wizards.com/default.asp?x=d20/srdfaq/20040123a; a copy is also on file with the author ("In the great scheme of things, Hasbro as a corporation doesn't care one way or the other about Open Games and the d20 System.")

[66] Appelcline, *Designers & Dragons: The '90s*, *supra* 55 note at 155-56.

[67] To use a simplified example, in deciding whether a fighter had successfully "hit" an enemy with his sword, the rules specified a number between 1 and 20 as the "target number", *e.g.*, 13; a player would roll the 20-sided die and if the die turned up 13 or higher, then the player's character was deemed to have "hit" their enemy.

rulebooks were hardbound books containing lavish illustrations, WOTC also released the SRDs: Rich Text Format (.rtf) files containing stripped-down expressions of the game rules – in effect, the SRDs were the "source code" of D&D.[68] The SRDs were made available online and were (and remain) free to access and download. Making available the SRD, then, is the equivalent of the open source approach of providing access to the source code of computer software. The SRDs were made available under the terms of the OGL, an open content licence that permitted re-use of the materials contained in the SRDs on the condition of compliance with the OGL. The mechanics of the operation of the OGL are examined in further detail in Part V of this chapter.

Finally, the d20 Trademark License permitted the use of WOTC's registered "d20 System" trade-mark to indicate compatibility with the d20 system.[69] The "d20 System" trade-mark itself was simply a stylized text-box that included the words "d20 System"—it was intended to be placed on the covers of publications to indicate that the gaming product used the mechanics of the d20 system. By using the d20 Trademark License, other RPG publishers could publish RPG material that was expressly marketed as being compatible with the d20 system that underlay the new 3.0 edition of D&D, the world's most popular RPG.[70] The d20 Trademark License was supplemented by the "d20 System Trademark Guide", which contained detailed guidelines on the use of the mark, ranging from required statements of compatibility with WOTC's D&D publications (e.g., licensees were required to include certain statements on the front or back cover of their publications, such as: "Requires the use of the Dungeons & Dragons Player's Handbook, Third Edition, published by Wizards of the Coast, Inc.") to required logo and font sizes (the logo must be one inch in width by one inch in height; the text of required statements must be no smaller

[68] The SRDs are available online at: http://www.wizards.com/default.asp?x=d20/article/srd35 and http://www.opengamingfoundation.org/srd.html. Copies are also on file with the author.

[69] A copy of version 6.0 of the d20 Trademark License is available at https://www.wizards.com/d20/files/d20stlv6.rtf; a copy is also on file with the author. See also Wizards of the Coast, Inc., *d20 System Trademark FAQ*, online: http://www.wizards.com/default.asp?x=d20/srdfaq/20040123b; a copy is also on file with the author.

[70] According to one industry observer, for many RPG publishers in the early 2000s, the d20 Trademark License was considered far more valuable than the OGL: it was the d20 Trademark License that effectively allowed WOTC competitors to ride the coattails of the D&D brand (Respondent 004, Interview on file with author; "In the early days, the d20 Trademark License was the one that was the feature. It allowed third-party publishers to publish D&D products. They sold blockbusters and let other members of the industry participate in Wizards of the Coast's success. Consumers were thrilled with the glut of D&D products, while publishers were thrilled to get D&D sales"). The ability to merely claim compatibility with the d20 system (and thereby, indirectly, with the D&D game itself) was welcomed because previous owners of the D&D game had sued other publishers who had made compatibility claims, see *supra* note 53 and accompanying text.

than 10-point and no larger than 12-point).[71] From its first version, the d20 Trademark License, in conjunction with the d20 System Trademark Guide, also imposed restrictions on the *content* of gaming products which could be created and branded as "d20 system" products. One significant restriction prohibited such products from containing rules for "character creation" and advancement.[72] The creation and advancement rules are foundational to any RPG game-playing experience: they enable a player to define the character that the player will be using in the game world, and provide a mechanism for the character's persistence and advancement through multiple sessions by the application of "experience points" to the character's defined abilities and characteristics (essentially, the rules by which the character becomes stronger and more powerful within the game system).[73] Without such rules, a gaming product could not be considered a "full game" usable by players – thus, through that restriction the d20 Trademark License functionally prohibited licensees from creating complete gaming products which could compete with D&D and still use the d20 system branding.

The three different components (d20 system, SRD / OGL and d20 Trademark License) were intended by WOTC to operate as follows: a non-WOTC publisher could use the OGL to obtain a licence to use the d20 system rules that were contained in the SRDs and, in reliance on the content contained in the SRDs, create new RPG gaming materials that could be marketed and sold, subject to compliance with the terms of the d20 Trademark License, as being "compatible" with the d20 system (and hence the 3rd edition of the D&D game). In other words, WOTC anticipated that the OGL and the d20 Trademark License would be used in tandem by publishers—those publishers would create materials such as gaming supplements such as adventure modules that WOTC viewed as less profitable than the "core" rulebooks of the D&D game.[74] That being said, it was not necessary to use the SRD / OGL and the d20

[71] A copy of version 4.0 of the d20 System Trademark Guide is available online at http://www.wizards.com/d20/files/d20Guidev4.rtf; a copy is also on file with the author.

[72] See Shannon Appelcline, *Designers & Dragons – A History of the Roleplaying Game Industry: The '00s* (Silver Spring, MD: Evil Hat Productions, 2014) at 26.

[73] The d20 System Trademark Guide defined "character creation" as the "process of generating and assigning initial scores to abilities, selecting a race, selecting a starting class, assigning initial skill points, selecting initial feats, selecting initial talents, selecting an occupation, and picking an initial alignment".

[74] Further details about WOTC's expectations regarding the use of the OGL are provided in Part III(c) of this chapter. Ryan S. Dancey, the WOTC executive who spearheaded the development of the OG (as discussed in further detail in Part III(c) of this chapter), participated in an interview with the author for this research project and has provided details about the background of the OGL's development and its intended deployment in a variety of different forums; some of the most detailed of his explanations on the OGL's development can be found in discussions that occurred on the Cc-bizcom mailing list (which describes itself as a forum for "discussion of

Trademark License in tandem. As described in more detail in Part V of this chapter, use of the OGL is not conditional upon use of the d20 Trademark License; licensees are free to use the SRD / OGL to create gaming products without using the d20 Trademark License. While the d20 system was created in conjunction with D&D's 3rd Edition, WOTC itself also adapted it for use with other RPGs: they released a d20 system *Star Wars* RPG in 2000[75] and at least two other "genre" RPGs, including *d20 Modern* and *d20 Future*.[76]

(c) *WOTC's Motivations and Rationales for the Creation of the OGL*

The OGL has been described as the "brainchild" of Ryan S. Dancey, a corporate vice-president and brand manager at WOTC,[77] who is credited with the initial conception and even the drafting of the OGL.[78] In describing the origins of what he dubbed the "Open Gaming Movement",[79] Dancey explicitly identified Richard Stallman, generally recognized as the founder of the "free software" and "open source" movements,[80] as a source of inspiration. In an interview with Dancey published prior to the release of D&D's 3.5 Edition, Dancey cited the GNU General Public License, the pioneering open source licence of the Free Software Foundation's GNU Project, as "the foundation of our ongoing attempt to create a similar licence for gaming".[81] Dancey noted various similarities between software development and RPGs:

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hybrid open source and proprietary licensing models") in September 2004, which are archived online at https://lists.ibiblio.org/pipermail/cc-bizcom/ (copy on file with author).

[75] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 160.

[76] *Ibid* at 169.

[77] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 155-56. See also Wizards of the Coast, Inc., *The Open Gaming Foundation: FAQ* (Version 2.0, January 26, 2004), online: http://wizards.com/default.asp?x=d20/oglfaq/20040123e; a copy is also on file with the author.

[78] See *The Open Gaming Foundation: FAQ*, *supra* note 77. Dancey is described in the document as having "drafted the Open Game definition, wrote the Open Game License, wrote the d20 System Trademark License, created the Open Game Foundation, and prepared the first version of the System Reference Document". He served as VP of Tabletop Roleplaying Games at WOTC from 1999 to 2000.

[79] Ryan S. Dancey, "Interview with Ryan Dancey", online: http://www.wizards.com/dnd/article.asp?x=dnd/md/md20020228e [the "**WOTC Dancey Interview**"] (there is no date indicated in the online text of this interview; however, the URL seems to indicate it was published on February 28, 2002).

[80] See generally https://en.wikipedia.org/wiki/Richard_Stallman and https://stallman.org/biographies.html#serious. See also the *Open Game Definitions: FAQ*, *supra* note 10 (explicitly naming Richard Stallman and noting that the term "open gaming" is "derived from the software development community" and also linking to the Open Source Definition maintained by the Open Source Initiative).

[81] WOTC Dancey Interview, *supra* note 79.

he described them both as "complex systems, using standardized protocols and interfaces, that are shared by many people, with many independent sub-components that have to work together."[82]

The trifecta of components that made up D&D's 3rd Edition (the d20 System, the SRD / OGL and the d20 Trademark License) "originated in Dancey's belief that the strength of *D&D* was not in its game system, but instead in its gaming community – the set of all the people who actually played the game".[83] Business considerations played a prominent role in Dancey's innovations. His view was that the proliferation of competing gaming systems was detrimental to the RPG industry, because it fragmented gamer attention and dollars.[84] Twenty dollars spent on a gaming supplement for, say, the competing game *Ars Magica* was not only twenty dollars that could not be spent on D&D, but was "lost" from the point of view of the D&D community because the *Ars Magica* supplement would have little or no cross-pollination with D&D due to the incompatibility of the underlying game systems.[85] If, however, the underlying mechanics of all games could be unified into a single, adaptable system, then all gaming supplements would functionally contribute to the viability of an ever-increasing market of RPGs.[86] Dancey expressly mentioned what he described as the "Theory of Network Externalities",[87] according to which the value of a product is dependent on the number of users of that product; hence the desire to create a unified mechanic: the d20 system. Dancey also believed in the truth of what was referred to within WOTC as the "Skaff Effect", named after WOTC staffer Skaff Elias.[88] The Skaff Effect was the belief that as the

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[82] *Ibid*.

[83] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 156.

[84] See *The d20 System Concept: FAQ*, *supra* note 65 (WOTC "believes that one of the major factors which caused the collapse of the commercial tabletop RPG market from 1993 to 1996 was the proliferation of different, incompatible, core game systems. … [WOTC] would like to see the number of widely distributed [RPG] systems reduced.")

[85] Dancey decried the proliferation of RPG gaming systems through the 1980s and 1990s: "Every one of those different game systems creates a "bubble" of market inefficiency; the cumulative effect of all those bubbles has proven to be a massive downsizing of the marketplace. I have to note, highlight, and reiterate: The problem is not competitive >product<, the problem is competitive >systems<. I am very much for competition and for a lot of interesting and cool products." (WOTC Dancey Interview, *supra* note 79) [emphasis in original].

[86] See *The d20 System Concept: FAQ*, *supra* note 65 (WOTC "has decided it is possible that consumers can be educated to understand the problems of system over-proliferation, and for those consumers to apply pressure to publishers to use standardized systems. … [WOTC] believes that by [release the SRD and the OGL] … the fundamental economics of the tabletop RPG category will be improved.")

[87] WOTC Dancey Interview, *supra* note 79.

[88] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 156.

market leader for RPGs, WOTC would only benefit from the success of other RPG publishers.[89] In short, the Skaff Effect predicted that people who became gamers via an RPG other than D&D would almost inevitably eventually become players (and hence purchasers) of D&D products due to its overwhelming market presence – and that transition to D&D would be eased if the games all used a unified mechanic. A rough analogy can be constructed to traditional 52-card playing card deck manufacturers (*i.e.*, card decks containing suites of hearts, spades, clubs and diamonds): if you are a card manufacturer, you have an interest in fostering the development of multiple different card games that use the 52-card deck, from solitaire to bridge to poker to blackjack and so on, because as new games are developed or become more popular, players of those games will continually need to purchase more decks of cards.[90]

Combining all of these considerations led Dancey to the conclusion that the optimal strategy for D&D was to ensure that all RPG gamers were using the same underlying gaming system, *i.e.*, the d20 system, but also to "open" the D&D rules themselves to others. As he described it, such an "open access" approach would lead to:

> … rapid, constant improvement in the quality of the rules. With lots of people able to work on them in public, problems with math, with ease of use, of variance from standard forms, etc. should all be improved over time. The great thing about Open Gaming is that it is interactive -- someone figures out a way to make something work better, and everyone who uses that part of the rules is free to incorporate it into their products. Including [WOTC].[91]

In a marked move away from the position adopted by TSR, the previous owners of D&D, WOTC adopted the stance that the D&D rules themselves should not be the focus of enforcement activity: "we want to use the trade-marks of D&D to hold the value of the business, rather than the rules themselves".[92] This appears to be a reference to the use of the dual-licensing strategy noted in Chapter 4: WOTC made the D&D rules (in the form of the SRDs, which were essentially text-only Word files) available for free

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[89] Dancey himself described the Skaff Effect as follows, quoting Skaff Elias: "All marketing and sales activity in a hobby gaming genre eventually contributes to the overall success of the market share leader in that genre." (WOTC Dancey Interview, *supra* note 79).

[90] See Ewalt, *supra* note 2 at 96 ("[t]he key to TSR's success would be found not in a single set of rules but in a whole universe of stories, settings, and color").

[91] WOTC Dancey Interview, *supra* note 79. See also *Open Game Definitions: FAQ*, *supra* note 10 ("in addition to the potential improvement in the business of game publishing, Open Games will be subjected to a large, distributed effort to improve the games themselves. … a publisher who thinks they have found a better way to write a game rule will be free to do so. And, if that new way is perceived as better than the existing alternatives, other publishers will be able to take that new rule and use it as well. In this way, the overall design of an Open Game should improve over time…").

[92] WOTC Dancey Interview, *supra* note 79.

download, and sold at retail high-quality printed books bearing the D&D logos; in other words, consumers could get stripped-down versions of the D&D rules for no cost, and could purchase D&D-compatible content created by third party publishers who used the OGL, but "official" D&D product would remain the exclusive provenance of WOTC.[93] In Dancey's conception, the D&D game itself, conceived of as a creation separate and apart from the trade-marks associated with it "should benefit from the shared development of all the people who work on the Open Gaming derivative of D&D".[94]

Dancey was explicit that he wanted and expected the OGL to result in the creation of new D&D content authored by WOTC's competitors. He wanted to "let other publishers create supplements" for D&D and to incentivize the creation of more D&D-compatible products.[95] Such an opening of the D&D "network" to infusions of D&D-compatible content from creators outside the walls of WOTC required an explicit pivot from the IP enforcement policies previously pursued by TSR—the OGL itself was to be both instrument and symbol of the changed approach:

> "One of my fundamental arguments is that by pursuing the Open Gaming concept, Wizards can establish a clear policy on what it will, and will not allow people to do with its copyrighted materials. Just that alone should spur a huge surge in independent content creation that will feed into the D&D network."[96]

There were also, perhaps self-serving, motivations articulated—concerns about freedom of expression were cited (though such articulations are consistent with those voiced by the open source advocates who inspired the OGL):[97]

> "Open Gaming is recognition that your natural human right to free speech is protected and enhanced. The Open Game system is a way for the game publishing industry to finally deliver on the basic promises made by the very first RPGs; that individuals should be free to copy, modify and distribute their own creative works derived from the game systems they have acquired."

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[93] WOTC's approach in this regard is reminiscent of the dual-licensing strategies (discussed in Chapter 4) used by some open source software providers, who will, for example, make a "standard" version of their software available on an open source basis for free, and then offer a "premium" version with more built-in features on a proprietary basis (see Andrew J. Hall, "Open Source Licensing and Business Models: Making Money by Giving It Away" (2017) 33 Santa Clara Computer & High Tech L J 427 esp at 436ff).

[94] *Ibid*.

[95] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 156.

[96] WOTC Dancey Interview, *supra* note 79.

[97] *Open Game Definitions: FAQ*, *supra* note 10.

In addition, what were described as "business-related" reasons were set out—noteworthy in the explanation is the emphasis on the value of the trade-marks and brands associated with the RPG product and the use of the open content licence to "drive value" to the owners of the marks and brands:[98]

> **"Q: Is there a business-related reason to support Open Games?**
>
> A: In the case of companies who own trademarks and brands associated with large player networks, one school of thought holds that Open Games which link to those large networks will tend to reinforce them and drive value to the owners of those trademarks and brands. That is the primary reason that Wizards of the Coast, as a company, is supportive of the Open Game concept. It fully expects that it will gain a direct financial reward in years to come from the widespread positive effects Open Gaming will have on its RPG properties, specifically on sales of **Dungeons & Dragons** materials. Of course, the flip side to that theory is that if it is successful, it is successful because other publishers have also been able to extract value from the network of players through the sale and promotion of their own Open Game product lines. Thus, at the same time the owners of large game network trademarks and brands stand to benefit greatly, so do smaller companies or individuals that simply want to sell their work to the largest possible audience of consumers."

(d) *Impact of the OGL*

Describing the history of the OGL after its release in 2000 is best accomplished by separating out and focusing on five overlapping phases: (1) the years 2000-2003, during which the OGL was used by third parties in a manner consistent with the expectations of WOTC, *i.e.*, in conjunction with the SRDs and the d20 Trademark License and primarily to create D&D supplements (particularly, in the early portion of this era, to create adventure modules); (2) from 2003 onwards, a period in which the OGL was used entirely apart from the d20 Trademark License and instead in connection with the publication of stand-alone games which competed with D&D in the RPG market; (3) beginning in 2006, the use of the OGL by multiple publishers to create "retroclones", re-creations of old versions of D&D, which directly compete with D&D in the fantasy RPG market; (4) beginning in 2008, the abandonment of the OGL by WOTC in connection with the release of D&D's 4th Edition, followed in 2009 by the use of the OGL by Paizo Publishing to create the *Pathfinder Roleplaying Game*, which became D&D's largest competitor in the RPG market; and (5) finally, in 2016, the re-adoption of the OGL by WOTC in connection with the release of D&D's 5th Edition. Each of these phases will be discussed in turn.

[98] *Ibid*.

(i) Used as Intended (2000-2003)

The creation and release of the d20 system, the OGL and the d20 Trademark License marked a decisive turning point in the history of the RPG industry. Indeed, the new approach indicated by these devices was such a departure from the previous IP enforcement approach of industry heavyweight TSR that some publishers initially thought it was some kind of "trap".[99] As described above in Part III, the previous owners of D&D had engaged in aggressive enforcement activities, even going so far as to sue competing publishers who published materials that were described as "compatible" with D&D.[100] But WOTC were evidently committed in good faith to abiding by the spirit of the OGL and Dancey's public statements about "open gaming", and the result was a renaissance in RPG gaming that saw the release of numerous new RPG products: "hundreds of new companies cropped up" in response to the OGL.[101] For the initial years following the release of the OGL and the d20 Trademark License in 2000, it is difficult to separate out the effects of the SRD / OGL (which enabled access to the D&D "source code" contained in the SRDs) from the effects of the d20 system and the d20 Trademark License (which permitted identification with the d20 system and hence D&D 3.0 generally), as it appears that most publishers elected to make use of both the OGL and the d20 Trademark License simultaneously by releasing products that were expressly designed and marketed as being compatible with D&D 3.0 and the d20 system. Regardless, the immediate impact was obvious: within a year of the release of the SRD / OGL, the number of publishers exhibiting "d20 system" products at the RPG industry's largest annual trade show and convention jumped from three to an estimated seventy-five.[102] The industry experienced a "d20 boom" that entailed the publication of hundreds of d20 system-compatible supplements and D&D's 3rd Edition was an unqualified commercial success: Ryan Dancey has stated that in 2000, the year when D&D 3.0 was released, the *Player's Handbook* alone was selling more copies in a single month than the

[99] Appelcline, *Designers & Dragons: The '00s*, *supra* note 72 at 404.

[100] *Ibid* at 404.

[101] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 3.

[102] *Ibid* at 157-58; the estimate is based on publishers selling "d20 system" products at the 2000 and 2001 Gen Con Game Fairs.

2nd Edition sold in all of 1989, the year of its first release.[103] Further, Dancey has described the OGL as an integral aspect of the revival of D&D's fortunes:[104]

> "The most important thing to know about the history of the OGL is that it succeeded in its primary goal, which was to help relaunch Dungeons & Dragons. D&D returned to its place as a successful and profitable business in part because of the OGL/d20 project. That project was not the sole reason for the restoration of the business but it was an integral part of a very complex plan."

(ii) Instrumental Usage (2003-?)

In 2003, WOTC took steps which fundamentally altered the OGL / d20 system landscape. Unlike the OGL, the d20 Trademark License was both revocable and amendable, and it also imposed restrictions on the nature of the gaming products which could be released bearing the d20 trade-mark;[105] the latter feature meant that anyone using the d20 Trademark License was barred from creating a complete game capable of competing with D&D by supplanting it. In 2003, WOTC revised the d20 Trademark License to require that all materials released under the d20 Trademark License meet "community standards of decency" as determined by WOTC; the change was made in order to stymie publication by Valar Project, Inc. of the controversial *Book of Erotic Fantasy*, a sexually-themed supplement to D&D.[106] Valar, relying on the irrevocable OGL, ultimately published the book, dropping use of the d20 Trademark License. What this meant, practically, was that the content of Valar's book was largely unchanged, but the book and its marketing materials did not contain any reference to the d20 system or use the d20 marks and was not identified as being compatible with the d20 system. Around the same time, WOTC made the decision to release a new edition of D&D, dubbed "3.5". The move was made with little announcement, leaving many other OGL publishers angry due to the fact that their

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[103] Ryan S. Dancey, "4 Hours with RSD: Who Am I?" (January 18, 2011), *ENWorld* (online message board) (http://www.enworld.org/forum/showthread.php?299860-4-Hours-w-RSD-Who-Am-I) ("In all of 1989, when TSR transitioned from the 1st to the 2nd Edition of D&D, it sold 289,000 copies of the Players Handbook. In 2000 when Wizards of the Coast did that transition from 2nd to 3rd, it sold 300,000 Player's handbooks in one month. And then, sales continued to grow."). See also Ewalt, *supra* note 2 at 180 (describing D&D in 2004 as "growing faster than it had in a decade").

[104] Interview with Ryan S. Dancey (October 2, 2017) ["**Dancey Author Interview**"], on file with author.

[105] See *supra* note 72 and accompanying text.

[106] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 171.

product schedules continued to be geared towards "3.0" D&D, which made them *passé* in what had become a fast-moving RPG market.[107]

Due to the fallout from these events, which demonstrated to publishers that the newly-amended d20 Trademark License tethered them uncomfortably to content-related decisions made by WOTC, use of the "d20" trade-mark under the terms of the d20 Trademark License dropped precipitously after 2003, with many publishers switching to use of the d20 system rules solely by relying on the SRD / OGL, and ceasing to brand their products as compatible with the d20 system.[108] Nonetheless, D&D remained a successful product line even five years after the release of 3.0: in 2005, it was estimated that the D&D line of products was grossing between $25-30 million annually.[109]

As realization spread that they could continue creating materials using the OGL without also using the d20 Trademark License, competing publishers created not just relatively small-scale "adventures", but also longer-form "sourcebooks", "campaign settings" (*i.e.*, lengthy descriptions of the "worlds" and scenarios through which games could be played)[110] and even new games that directly competed with the D&D game (something that had been effectively prohibited by the d20 Trademark License because of its restrictions on products including character-generation provisions).[111] Multiple games using well-known fantasy and science fiction brands were published using the OGL: *WarCraft: The Roleplaying Game* (based on the hugely popular online game), *Babylon 5* (based on the popular sci-fi television series of the same name) and *EverQuest* (based on a popular online game).[112] White Wolf Publishing, estimated at one point to have a 25% share of the RPG industry,[113] made enthusiastic use of the OGL, publishing dozens of OGL-based gaming products in the 2000s, many of which competed

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[107] *Ibid* at 171-172.

[108] *Ibid* at 172.

[109] *Ibid* at 174.

[110] *Ibid* at 165, 169.

[111] Appelcline, *Designers & Dragons: The '00s*, *supra* note 72 at 9, 404. Among the publishers who released new games using the OGL: White Wolf Publishing, Alderac Entertainment Group (AEG), Atlas Games, Grey Ghost Press, Guardians of Order and Pagan Publishing.

[112] Other games published using the OGL included *13th Age* (Pelgrane Press), *Fate* (*Evil Hat Productions*), *Gumshoe* (Pelgrane Press), *Open D6* (West End Games), *True20* and *Mutants & Masterminds* (both published by Green Ronin Publishing), and also OGL editions of other popular RPGs with relatively long publishing lineages, such as *Traveller* (a science fiction RPG originally published in 1977 and published under the OGL in 2008 by Mongoose Publishing) and *RuneQuest* (a game originally published in the late 1970s, with a new OGL edition published in 2004 by Mongoose Publishing).

[113] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 7.

directly with D&D and almost none of which used the d20 Trademark License or referred to their compatibility with D&D.[114]

At this point in the history of the OGL, it became clear that there were two distinct ways in which RPG publishers could make use of the OGL.[115] The first way of using the OGL, which I dub "conventional", involves a publisher using the OGL as a way of accessing the d20 system contained in the SRDs; this form of use means that the gaming material produced by the publisher consists in some measure of the d20 system or the other "open game content" material contained in the original WOTC D&D SRDs, such as making use of the d20 system's rules for combat or spell-casting, and that the new gaming material is intended, to greater or lesser degree, to be used by consumers in conjunction with the D&D game. In other words, conventional uses are those which align with WOTC's stated expectation that the material would be used to supplement their core gaming products. A second way of using the OGL, which I dub "instrumental", involves a publisher using the OGL as means of making their content available on an "open" basis irrespective of whether their content makes use of the d20 system or the WOTC SRDs. In an instrumental use, a publisher creates gaming material (be it an adventure, a campaign sourcebook or an entirely new game system) and releases it under the terms of the OGL in a manner which is entirely divorced from any use of D&D, the d20 system, or the d20 marks.[116]

(iii) Rise of the Retroclones (2006-?)

As described above, the OGL spawned the creation of numerous gaming products: from the anticipated "adventures" that players could use with the D&D game, to longer "sourcebooks" and even entire new games competitive with D&D. But perhaps the most unpredictable result of the OGL was the

[114] See *ibid.* at 32ff.

[115] Whether a publisher has elected to license material under the OGL is relatively easy to determine: as described in Part V, below, the terms of the OGL require that a copy of the full text of the OGL be included in any gaming material which purports to be OGL-compliant. Conventionally, most publishers place a copy of the OGL in the final few pages of printed books, or, if the material is being published online, by including in the post or on the webpage a notation saying, *e.g.*, "The material in the box below is hereby designated Open Game Content via the Open Game License", with a hyperlink to the full text of the OGL, which is located on a separate page of their blog or website.

[116] Ryan Dancey, speaking in 2017, stated that he "always thought people would make entirely new games with the OG which is why the license does not have requirements that would force people to just use it to make D&D compatible stuff … publishers started entirely new 'trees' in the OGL forest by releasing their own System Reference Documents" (Dancey Author Interview, *supra* note 104.

creation of what are sometimes referred to as "retroclones".[117] Understanding the retroclone phenomenon requires a quick recap of D&D's publication history. From the initial version of the game released in 1974 through to the 4th Edition released in 2008, what marked each new release of the game was its increasing complexity and density – the 1974 release consisted of three undersized softcover booklets totalling 112 pages; by the time of the 2008 release, the core game consisted of three oversized hardcover books totalling more than 800 pages. But it is important to note that each new set of rules contained in succeeding "editions" were, functionally, iterations of previous releases: a player reading the D&D rules in 2008 could see something which was certainly *longer* than the rules were in 1978, but, at its core, the 2008 version would be recognizable as being premised on largely the same mechanics, though often embellished in various ways. Whereas earlier versions of the game, being comparatively underdeveloped, embodied a somewhat free-wheeling, improvisational dynamic, placing significant onus on the game master and players to resolve in-game complications on the fly, by the 4th Edition the design of the game had become increasingly granular and rigid, with complicated sets of rules meant to govern virtually every conceivable permutation of game play.

There was a significant cohort of the gaming community, consisting mostly of older players, who were not just interested in playing D&D, but were particularly interested in playing the versions of D&D that they had played back in the 1970s and 1980s.[118] But those versions of the game were long out-of-print and difficult to obtain. RPG player Stuart Marshall happened upon a solution: since the SRD contained all of the rules for 3.0/3.5 D&D, and since the rules for 3.0/3.5 D&D are, at their core, essentially just more complicated versions of the rules for prior versions of D&D, then it should be possible to use the SRD and the OGL to "reverse engineer" or "deconstruct" the rules in order to *replicate* the rules for the desired prior version of D&D. The analogy is imperfect, but it is akin to extracting the rules of straight poker from the rules of Texas hold-'em, or the rules of checkers from the rules of chess. In 2006, Marshall published *OSRIC (Old School Reference and Index Compilation*) which "re-created" the

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[117] Appelcline*, Designers & Dragons: The '00s*, *supra* note 72 at 9. See also Adam Jury, "The History, Current State of OGL Publishing, Pathfinder and 'd20'" (March 28, 2015), online: http://adamjury.com/2015/the-history-current-state-of-ogl-publishing-pathfinder-and-d20/ (describing the retroclones as an "unexpected result").

[118] James Maliszewski's blog Grognardia (http://grognardia.blogspot.ca) became a leading voice and online gathering place for self-described "grognards", *i.e.*, RPG players who preferred the older versions of RPGs, with particular, though not exclusive, reference to D&D.

1977 1st Edition AD&D game.[119] In relatively short order, more "retroclones" were released, each utilizing the OGL: *Labyrinth Lord* (2007) re-created a 1981 version of "basic" D&D; *Swords & Wizardry* (2008) re-created the original 1974 version of D&D; and *For Gold & Glory* (2012) re-created the 2nd Edition AD&D game.[120] These "retroclones" were part of a fan-based movement dubbed the "Old School Renaissance" that was documented in online publications including dozens of blogs and multiple fanzines.[121] More than a dozen publishers identified themselves as members of an "Old School Renaissance Group".[122] The publishers of D&D, as a result of the OGL, thus found themselves in competition with the resurrected versions of prior editions of their own game, given new life by a community of gamers who, perhaps driven in part by nostalgia, sought out simpler, less-involved rules systems with which to play.[123]

(iv) Abandonment of the OGL and the Advent of Pathfinder (2008-2015)

By 2008, many of the individuals (including Ryan Dancey) who had spearheaded the development of the OGL at WOTC nearly a decade earlier were no longer employed by WOTC. As it undertook efforts to develop and release the 4th Edition of D&D, there was a major change in the institutional stance of WOTC with respect to the OGL. The 4th Edition, released in 2008, abandoned use of the OGL and was released using a new "Gaming System License" ("**GSL**") that was significantly more restrictive than the OGL.[124] An extract from the GSL's "Frequently Asked Questions" document gives a flavour of the new approach:

"Q: What parts of Dungeons & Dragons is Open Game Content?

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[119] See http://www.knights-n-knaves.com/osric/index.html and http://www.knights-n-knaves.com/osric/a1.html ("OSRIC ... is intended to reproduce underlying rules used in the late 1970s to early 1980s, which being rules are not subject to copyright, without using any of the copyrighted 'artistic representation' originally used to convey those rules. In creating this new 'artistic representation', we have made use of the System Reference Document produced by [WOTC]".).

[120] Appelcline, *Designers & Dragons: The '00s*, *supra* note 72 at 9. See also https://en.wikipedia.org/wiki/Dungeons_%26_Dragons_retro-clones.

[121] Appelcline, *Designers & Dragons: The '00s*, *supra* note 72 at 95.

[122] *Ibid*.

[123] Eventually, WOTC responded to the market demand by digitizing their out-of-print gaming materials and making them available for purchase online. See: www.dndclassics.com.

[124] A copy of the current version of the GSL (revised February 27, 2009), is available online at http://wizards.com/d20/files/4E_GSL.pdf; a copy is also on file with the author. The GSL FAQ is available online at http://wizards.com/d20/files/4E_GSL_FAQ.pdf; a copy is also on file with the author. The 4th Edition was heavily criticized as "tweak[ing] the game in ways … [that] made it too much like a video game" (Ewalt, *supra* note 2 at 180).

> A: None of the 4th Edition Dungeons & Dragons product line is considered Open Game Content made available to third parties through the Open Game License (OGL). Certain content from 4th Edition is available royalty free for specified uses subject to the GSL."

The move away from the OGL to the GSL was credited in part to the departure of Dancey from WOTC.[125] The GSL featured major structural differences as compared to the OGL: in addition to mandatory licensing fees and restrictions on objectionable content (similar to those that had been implemented when revisions were made to the d20 Trademark License), the GSL prohibited the creation of new games based on the underlying game mechanics of the 4th Edition. That prohibition avoided the spectre of the 4th Edition giving rise to the creation of games that competed with D&D using its own mechanics, which had been seen since the move away from use of the d20 Trademark License that began in 2003.[126] Even more controversial was the inclusion in the GSL of a "poison pill" clause that was intended to obviate the functioning of the OGL: anyone who published material under the GSL was prohibited from using the OGL and surrendered any claim to be able to exercise rights under the OGL.[127] Many RPG publishers elected not to use the GSL at all, with one publisher describing it as "a total unmitigated failure".[128] Changes to the GSL in 2009, including the removal of the "poison pill" clause that forced users of the GSL to give up any right to use the OGL, were perceived by the industry as too little, too late.[129] D&D's 4th Edition has been viewed in retrospect as generally unsuccessful, partly due to a reorientation of the rules to focus the game more on tactical combat and what has been described as an aesthetic and mechanical sensibility that seemed targeted at videogame players rather than traditional RPG players.[130]

The negative effects of the bungled 4th Edition release were compounded by a new development: the creation of the *Pathfinder Roleplaying Game* by Paizo Publishing. In 2007 Paizo Publishing (to that date primarily a publisher of magazines serving the RPG fan market) released the first of its *Pathfinder Adventure Path* publications – a series of interconnected adventures for D&D. Notably, consistent with the industry trend described above, Paizo released its gaming supplements using only the OGL, and not

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[125] Appelcline, *Designers & Dragons: The '90s*, *supra* note 55 at 177.

[126] *Ibid* at 178.

[127] *Ibid*.

[128] *Ibid* at 179, quoting Clark Peterson of Necromancer Games.

[129] *Ibid* at 180 and Appelcline, *Designers & Dragons: The '00s*, *supra* note 72 at 404.

[130] See Jahromi, *supra* note 40 (describing how the designers of the 4th Edition, "surrounded by copycats and perplexed about how to bring D. & D. online, made flat-footed attempts at developing new rule books to mimic the video games that D. & D. had inspired").

the d20 Trademark License.[131] Of greater consequence, in 2009 Paizo used the OGL to create and release the *Pathfinder Roleplaying Game* in 2009. *Pathfinder* is a complete gaming system, based on the underlying d20 system made popular by WOTC's D&D 3.0/3.5, and was designed specifically to appeal to those gamers who liked 3.0/3.5 and did not want to switch over to D&D's 4th Edition.[132] Paizo updated and tweaked the rules, aiming for something akin to a version "3.6" or "3.75", rather than the complete overhaul represented by D&D's 4th Edition. *Pathfinder* represented a new game, but one that was still "recognizable" as *Dungeons & Dragons* 3.0/3.5.[133] By 2012, the industry consensus was that Paizo's *Pathfinder* game was outselling WOTC's venerable D&D, and the efforts of many RPG publishers were devoted not to creating materials to support D&D's 4th Edition, but instead to support Paizo's *Pathfinder*.[134] Lisa Stevens, the CEO of Paizo has expressly credited the OGL with making the company's success possible: "if [Ryan Dancey] hadn't had the crazy idea to create the OGL and then champion it through the halls of [WOTC] … then I wouldn't have been able to have the success that Paizo has become…".[135]

Paizo's use of the OGL to release *Pathfinder* is supplemented by their active nurturing of an online community that creates additional *Pathfinder* content using the OGL.[136] They have done so in part by creating two additional governance documents that exist alongside the OGL and speak to different types of activity carried on by the RPG community. As is discussed in further detail in Part V of this chapter, the OGL allows licensees to use the "Open Game Content" of the licensor, but prohibits use of the licensor's trade-marks and any content that the licensor designates as "Product Identity". In the RPG market, claiming compatibility with an existing game can be vital for the success of a gaming supplement.

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[131] Appelcline, *Designers & Dragons: The '00s*, *supra* note 72 at 219.

[132] *Ibid* at 221ff.

[133] *Ibid* at 223.

[134] *Ibid* at 227-28.

[135] Stevens was responding to a post by Ryan Dancey on Paizo's online discussion forum in which Dancey had stated, "I think the OGL was a benefit to the industry and to the players, and I think it is still generating good works" (Lisa Stevens (November 23, 2010 at 02:35pm), online: http://paizo.com/threads/rzs2ieov&page=4?Opinions-Mike-Mearls-Has-Open-Gaming-Been-a#158). See also the statements of Lisa Stevens contained at http://paizo.com/paizo/blog/v5748dyo5ldxl?Paizo-Publishings-10th-Anniversary (describing some of the business decisions that were made prior to the release of *Pathfinder*, including Paizo's desire to take advantage of the widespread availability and popularity of OGL-licensed material).

[136] See Lisa Stevens, "Paizo Publishing's 10th Anniversary Retrospective – Year 7 (2009)" (September 27, 2012), online: http://paizo.com/paizo/blog/tags/paizo/auntieLisasStoryHour. Lisa Stevens, CEO of Paizo Publishing, has stated that the "growth of the third-party community has been one of my favorite parts of the whole Pathfinder RPG business" (*ibid*).

To enable such claims, the Pathfinder Roleplaying Game Compatibility License allows licensees to create new *Pathfinder* material (using the OGL) and expressly identify it as compatible with *Pathfinder.*[137] To facilitate access to their "Product Identity", Paizo has developed a "Community Use Policy" that permits their customers to create and make publicly available content that incorporates Paizo's Product Identity so long as it not exploited for commercial purposes.[138]

Those interested in making use of Paizo's RPG content thus have three ways in which they can do so: by using the OGL on its own (in which case they are limited to Open Game Content and cannot make claims about compatibility but are otherwise free to use the licensed content in accordance with the OGL, including for commercial purposes); by using the materials released under the OGL in conjunction with the Trademark Compatibility License (in which case they can claim compatibility with the *Pathfinder* game but are subject to the constraints set forth in the Compatibility License); or using content that has been designated as Product Identity in accordance with the Community Use Policy (which restricts any such use to non-commercial activity). The Paizo.com website hosts online discussion forums featuring hundreds of thousands of posts, and the website hosts an online retail store that stocks not only Paizo's own products, but also the products of other publishers who create materials using the OGL or the Compatibility License. To a significant extent, during the period when WOTC was stepping back from the OGL and its underlying philosophy and strategy, it was Paizo that delivered on Ryan Dancey's premise of how an RPG publisher should interact with its customers—by means of a continued commitment to the OGL and the cultivation of an ongoing relationship with *Pathfinder* players and content creators.[139]

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[137] See http://paizo.com/pathfinderRPG/compatibility.

[138] See http://paizo.com/paizo/about/communityuse.

[139] See Chad Perrin, "The Open Game License: A case study in open source markets" (July 14, 2011), online: http://www.techrepublic.com/blog/linux-and-open-source/the-open-game-license-a-case-study-in-open-source-markets/ ("Paizo has continued to involve customer feedback in its design process, with central employees and game designers at Paizo regularly interacting with customers in its discussion forum, occasional beta test releases of free PDFs containing content in development for upcoming books, and game material development contests that encourage customers to cross the line to becoming professional RPG developers. This involvement of the community surrounding the game has created an intensely loyal, interested customer base, but it has also contributed to cheaper and better game material development that better targets the needs and desires of Paizo's customers. In short, Paizo has made use of the benefits of an open development model, similar to the way open source software is developed, in ways that WotC never did. WotC seemed largely content to at first reap the rewards of third-party support for its core products without ever interacting with those publishers and, later, to blame those publishers for flagging sales. Paizo has, instead, invited third party publishers to contribute to the greater body of PRPG materials without trying to directly compete with those products, and invited customers to participate in the development of core products.").

(v) Re-Adoption of the OGL by WOTC (2016-?)

In 2014 WOTC replaced D&D's 4th Edition with a new 5th Edition.[140] The new edition was the result of the most extensive playtesting effort the RPG industry had seen to date; the new mechanics are simpler and enable a more narrative form of gameplay than the constricted 4th Edition allowed.[141] Prior to the release of the 5th Edition, there was some confusion about whether it would be released under the terms of the GSL, a different licence, or no licence at all. Nearly eighteen months after the 5th Edition was publicly released, WOTC announced on January 12, 2016 that they had released an SRD for the 5th Edition, and that it was being made available under the terms of the OGL.[142] The company that had created the OGL had completed a full cycle between 2000 and 2016: from its initial release in 2000 through its abandonment in 2008 and its re-adoption in 2016, WOTC returned to use of the OGL in the face of market competition spawned by that very same licence. Concurrently with its re-adoption of the OGL in January 2016, WOTC appeared to borrow a strategy from Paizo Publishing and announced the creation of the Dungeon Masters Guild, an online marketplace where WOTC, powered by online publisher OneBookshelf, provides space for its customers (and competitors) to sell content made using the OGL.[143] The Dungeon Masters Guild allows contributors, who agree to a set of content guidelines,[144] to offer for sale on the WOTC-run website materials that are compatible with D&D's 5th Edition, using some of WOTC's Product Identity.

In 2019, the RPG industry appears healthy and more facilitative of participation than ever before. Publishers who are interested in selling their RPG content can choose among a variety of online platforms, including online storefronts powered by WOTC and Paizo, independent retailers such as www.rpgnow.com and www.drivethrurpg.com and even platforms dedicated solely to selling content licensed under the OGL such as https://www.opengamingstore.com/ (which at the time of writing lists well

[140] Appelcline, *Designers & Dragons: The '00s*, *supra* note 72 at 228.

[141] See Jahromi, *supra* note 40 (noting that the designers of the 5th Edition "seemed to remember that D. & D.'s strength lay in creating indulgent spaces" and were inspired to create a game that is "simpler and more subjective").

[142] See https://dnd.wizards.com/articles/features/systems-reference-document-srd. The 5th Edition SRD (which includes the text of the OGL) is available online at http://media.wizards.com/2016/downloads/DND/SRD-OGL_V5.1.pdf; a copy is also on file with the author.

[143] See http://dnd.wizards.com/articles/news/dungeon-masters-guild-now-open, http://dnd.wizards.com/articles/features/systems-reference-document-srd and http://www.dmsguild.com/.

[144] See https://support.dmsguild.com/hc/en-us/articles/217028818-Content-Guidelines.

over one hundred publishers offering content for sale). RPG conventions, at which gamers gather to play in person, take place globally, with the largest attracting crowds of over fifty thousand attendees.[145] The industry is dominated by two large publishers (WOTC and Paizo), but an entire ecosystem of medium-sized, small, and hobbyist publishers publish material for a playing audience estimated to number in the millions.[146]

IV. Consequences of the OGL – Overview

The OGL has been regarded positively by many professionals within the RPG industry. The OGL and the d20 system served as the entry point for numerous publishers, who began by creating d20 system material for use with D&D, and then further developed and deepened their publishing lines.[147] Clark Peterson, principal of Necromancer Games, described the OGL and the d20 Trademark License as a "wonderful addition to the health of the roleplaying hobby".[148] Lisa Stevens, CEO of WOTC competitor Paizo Publishing noted that "the OGL and the d20 license had … inspired an explosion of [RPG] books the likes of which the gaming industry had never before seen".[149] Many publishers who made use of the OGL to release material went through a maturation process: during the first half-decade following its release in 2000 there was a consistent pattern of publishers using the OGL in conjunction with the d20 Trademark License (as WOTC initially intended) to create RPG materials for use in conjunction with D&D; over the subsequent years, many of those same publishers then dropped the d20 Trademark License in favour of utilizing the OGL on its own to create their own standalone games which competed with D&D in the RPG market.[150] For example, Mongoose Publishing published six different games using the OGL between 2003 and 2006, including games based on Robert E. Howard's *Conan the Barbarian* character

[145] GenCon, the largest RPG-focused convention in North America, claims annual attendance of 140,000 (https://www.gencon.com/press/corporatefacts).

[146] Larry Frum, "40 years later, 'Dungeons & Dragons' still inspiring gamers" (May 19, 2014) CNN.com (reporting that "[b]y 2007, that number [of players] grew to 6 million, and the numbers keep rising"), online: http://www.cnn.com/2014/05/19/tech/gaming-gadgets/dungeons-and-dragons-5th-edition/index.html.

[147] These publishers include Necromancer Games, Fiery Dragon Productions, Green Ronin Publishing and Troll Lord Games. See generally Appelcline, *Designers & Dragons: The '00s*, *supra* note 72.

[148] Appelcline, *Designers & Dragons: The '00s*, *supra* note 72 at 8.

[149] See Stevens, *supra* note 136.

[150] Appelcline, *Designers & Dragons: The '00s*, *supra* note 72 at 109.

and Robert Heinlein's *Starship Troopers* novel.[151] Troll Lord Games likewise started by using the OGL and d20 Trademark License in tandem, but then moved on to publish *Castles & Crusades* – a stand-alone game released using the OGL which tried to evoke the "feel" of early versions of D&D.[152] The *Year of Living Free* wiki, devoted to cataloguing "free and open game systems", identifies sixty-four separate games (including D&D) that have been released under the OGL;[153] the *FOSsil Bank* wiki lists one hundred fifty four separate games released under the OGL.[154] While the subjective views of OGL users regarding the OGL's impact will be explored further in subsequent chapters, this preliminary overview turns to public statements made by two prominent figures in the RPG industry: Ryan Dancey, the originator of the OGL; and Mike Mearls, one of WOTC's leading game designers on D&D's 4th and 5th editions.

In a variety of different forums, Dancey has articulated his views on the consequences of the OGL.[155] Dancey has identified a number of different rationales for the creation of the OGL. He has described its primary goal as helping to "relaunch" the D&D game, and expressed the view that the OGL succeeded in accomplishing that goal.[156] He has also stated that the purpose of the OGL was "to act as a force for change", and that "[i]n that sense I think it is an unqualified success,"[157] describing the OGL as "a driver of innovation".[158] Dancey's description of the changes brought about by the OGL can be understood as structural in multiple senses, but most saliently he described the OGL as having altered

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[151] *Ibid.* See also Jury, *supra* note 117.

[152] Appelcline, *Designers & Dragons: The '00s*, *supra* note 72 at 45ff.

[153] http://livingfree.wikidot.com/open-game-license. The wiki lists an additional 180+ games published another form of "open" license, including 154 under a Creative Commons licence, and 16 released under a form of license unique to the publisher. Some of the listings are duplicative (i.e., the same game is listed under two or more forms of licence), others do not satisfy the definition of open content licence set forth in Chapter 3 (e.g., those using the Creative Commons Non-Commercial licence module) and the "open" status of others is unclear as a result of the licence not being available for review due to dead hyperlinks.

[154] http://fossilbank.wikidot.com/licence:ogl/p/1. The wiki also lists hundreds of other "open" works categorized by type of work and form of licence.

[155] This discussion relies on three primary sources: (1) a post in 2010 that Dancey posted on a Paizo message board in reply to the post of a forum participant who indicated he wanted to hear Dancey's views on "whether [Dancey] thinks the goals of the OGL have been met yet" (Ryan Dancey (November 23, 2010 at 01:57pm), online: http://paizo.com/threads/rzs2ieov&page=4?Opinions-Mike-Mearls-Has-Open-Gaming-Been-a#157 ["**Paizo Dancey Post**"]; (2) a 2011 post by Dancey to the enworld.org forums entitled "Who Am I & How Did I Get Here?", which was the first installment in a series of "columns" (Ryan Dancey, January 18, 2011 05:14pm, online: http://www.enworld.org/forum/showthread.php?299860-4-Hours-w-RSD-Who-Am-I ["**ENWorld Dancey Post"**]; and (3) the Dancey Author Interview, *supra* note 104.

[156] Dancey Author Interview, *supra* note 155. See also *supra* note 104 and accompanying text.

[157] Paizo Dancey Post, *supra* note 155.

[158] ENWorld Dancey Post, *supra* note 155 (describing the creation of non-d20 system games that were released using the OGL, including *Action! System*, *FUDGE* (Grey Ghost Press), and *Open D6* (West End Games).

the relationships among publishers, professional RPG developers, amateur player-creators and the content itself. As he wrote, the OGL "changed the relationship of fans to publishers – any person with an idea could participate in the market if they wished"; it also "changed the relationship of developers to publishers … developers were free to show their creativity using a widespread system (which also meant that their talent could more easily be determined instead of having to first decipher a whole new set of notation and rules)". Dancey also stated that the OGL altered the delivery systems for RPG content: "[p]rior to the OGL, other than perhaps as a magazine submission, short form material had no viable commercial market. Likewise the idea that an electronic-only product could be marketed effectively was doubtful." Dancey described having been "amazed and surprised at the number of commercial ventures that got their start around the OGL", and he highlighted that "in terms of getting more people into the business of publishing TRPGs [tabletop RPGs], and more people into the role of 'was paid to do TRPG design', the OGL broadened and deepened the talent pool in our industry". Of particular note, in light of the OSR and the creation of the retroclones, Dancey wrote that he "also had the goal that the release of the SRD would ensure that D&D in a format that I felt was true to its legacy could never be removed from the market by capricious decisions by its owners".[159] The OGL, in other words, served an archival function as well—preserving the accessibility of the game from the vagaries of assertions of intellectual property rights by a recalcitrant owner. In his interview for this research project, Dancey took pains to make it clear that the development and realization of the OGL were the product of a team effort involving many people at WOTC; but his closing words from the interview encapsulate his view of its impact: "thousands of other people took it and did creative and exciting things with it outside the company and are still doing that today".[160]

Dancey also identified negative aspects to the OGL / d20 system innovations: a glut of "OGL crap" flooded the market, and some RPG publishers tried to shoehorn into the d20 system games which would have been better-served by other mechanics. There were also organizational failings which

[159] Paizo Dancey Post, *supra* note 155. Dancey specifically highlighted the risk that had been posed by the fact that TSR had pledged its intellectual property as collateral for its loans in the mid- to late-1990s. In Dancey's telling, but for the "rescue" of TSR's assets by WOTC, the D&D game (among others) might have been owned by financiers who had little idea of how to effectively exploit it and left it ensnared in bankruptcy-related lawsuits. The OGL and the SRD, having made the core mechanics of D&D widely and openly available, obviated the possibility of such a scenario unfolding in the future.

[160] Dancey Author Interview, *supra* note 104.

Dancey noted: he viewed WOTC's abandonment of the d20 Trademark License as a mistake; he thought the OGL itself should have been updated to address certain drafting deficiencies (the treatment of software, handling content from multiple sources and citation of sources); and he bemoaned the lack of a central authoritative "clearinghouse" which would make OGL-licensed content "searchable and accessible to future designers". Ultimately, however, Dancey's assessment of the OGL was positive: "I sleep pretty well at night. I think the OGL was a benefit to the industry and to the players, and I think it is still generating good works."

In 2008, prominent game designer Mike Mearls wrote a blog post entitled "Has Open Gaming Been a Success?"[161] Mearls' assessment was somewhat more equivocal than Dancey's—he described the OGL as having had "some successes and some failures", and the primary "failure" he identified was a processual one: the "iterative design process embraced by software developers", which leads to continuous improvements in software code, did not meaningfully translate into the RPG context. Mearls had hoped that the OGL would lead to "an active community of designers, all grinding away on D&D to make it better"; but that desired result happened in only a "fragmentary manner". That failure to transpose the open source process to the RPG environment is, in Mearls' view, a function of differences between software and games: "RPGs lack easily defined metrics for quality, success, and useful features" – unlike software development, where the open source process allows for rapid identification and fixing of problems, RPGs suffer from the "crippling problem … that no one can agree on what problems need to fixed … [or] how to fix them". In Mearls' final assessment, open gaming was not a failure, "it just took a different path … when compared to software". Mearls' observation is a reminder that, although they share some common structural elements as described in Chapters 3 and 4, open source software licences and open content copyright licences need not, indeed should not, be judged by the same criteria. Open source software licences are meant to facilitate, through the inputs of multiple contributors, continuous improvement in the software being designed. Since the notion of "improvement" is one that is not easily transposed to creative expression, the lack of consensus that the OGL resulted in "improved" RPGs is not necessarily fatal to an assessment of the value of the OGL. As was discussed in Chapter 4 and as will be explored further in Chapters 7 and 8, in the context of creative expression, the relevant object of attention

[161] Mike Mearls, "Has Open Gaming Been a Success?" (June 19, 2006), *LiveJournal* (blog), online: http://mearls.livejournal.com/151714.html.

for the criterion of "improvement" may not be the work itself, but rather the community of consumers for that work and the level of participatory engagement undertaken by them.

In ultimately concluding that the OGL was a "success", Mearls identifies three interrelated factors with the following orientations: market, community, and individual. With respect to the market, the OGL and the design of 3.0 "facilitated short, cheap, but eminently useful designs", which helped catalyze and in turn benefited from, the nascent use of .pdf files and e-commerce platforms (such as drivethrurpg.com) to distribute and sell OGL-licensed RPG content: OGL publishers did not need to rely on printed materials – historically the main delivery mechanism for RPG content – and instead could distribute their publications to customers by means of .pdf downloads. In Mearls' view, the use of .pdf's to disseminate RPGS "benefited immensely from the OGL". The community and individual factors which Mearls describes are the "sharing" and "training" that were facilitated by the OGL: "[o]pen gaming, the indie movement, and PDF sales have made it more possible now than ever for a good GM with a knack for writing to put together a book and get it out there for others to see". Mearls highlights that game designers used the OGL to "swap stuff back and forth", and that "sharing" might be "the best that open gaming can offer designers". In Mearls' view, the OGL "made it more likely for writers to build and sustain a skill set" that would be attractive to potential employers in the RPG industry. The OGL, amplified by the technology of digital communication and easy online dissemination, resulted in the RPG market "recruiting a far, far larger pool of talent … there are more people today designing and publishing RPG material than ever before". Open gaming "made more people into designers and publishers, and that's a good thing for this hobby".[162] The OGL's ultimate impact, in Mearls' telling, appears to be that it furthered (and was furthered by) technologically-driven changes in the RPG market, reduced (along with the aforementioned technological changes) barriers to sharing, and in turn facilitated the development of writing and design skills among that subset of the RPG player community who wanted to become game designers.

[162] Chris Pramas, a game designer and publisher who founded Green Ronin Publishing, one of the largest and longest-lived of the RPG publishers who flourished in the wake of D&D's 3rd Edition revival in 2000, has contested whether the OGL lead to any appreciable increase in the pool of available talent for RPG game design; see Chris Pramas, "Debating the OGL" (March 31, 2008), *Ex-Teenage Rebel* (blog), online: http://www.chrispramas.com/2008/03/31/debating-the-ogl/ ("It is certainly true that the OGL created a pool of people who garnered a lot of experience working with the D&D rules. The idea that without the OGL WOTC would have had difficulty finding talented designers to hire is pretty ludicrous though. The industry has always had more designers than it knew what to with and TSR and WOTC after them never had any difficulty finding talent").

V. Mechanics of the OGL

This Part describes in detail how the OGL "operates", *i.e.*, how its conditional grant of permission to use the licensed content is accompanied by terms that demarcate the metes and bounds of the permission granted. The analysis in this Part is based on the text of the OGL (the text of which is reproduced in Appendix H) and a series of "Frequently Asked Questions" postings made by WOTC.[163] The OGL is a relatively short document of less than two printed pages, consisting of fifteen clauses, one of which is a copyright notice. Only a single version of the OGL, Version 1.0a, has ever been released.[164] The operation of the OGL relies on two foundational defined terms: "Open Game Content" ("**OGC**") and "Product Identity" ("**PI**"). OGC is defined to mean the game mechanic and "any additional content clearly identified as Open Game Content" by the licensor, but excluding any PI.[165] PI consists of three sets of concepts which *can*, at the election of the licensor, be deemed to be "Product Identity" by "clearly identif[ying]" them as such: identifying marks (including brand names, logos and registered trade-marks); non-textual graphical elements (including symbols, designs, depictions, and photographic representations); and other game components (such as creatures, storylines, dialogue, character names, magical abilities and supernatural effects); in each case excluding any content identified as OGC.[166]

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[163] See Wizards of the Coast, Inc., *Open Game License: FAQ* (Version 2.0, January 26, 2004), online: http://wizards.com/default.asp?x=d20/oglfaq/20040123f; *Open Game Definitions: FAQ, supra* note 10; *The d20 System Concept: FAQ*, *supra* note 65; Wizards of the Coast, Inc., *Other Licenses: FAQ* (Version 2.0, January 26, 2004), online: http://wizards.com/default.asp?x=d20/oglfaq/20040123g; Wizards of the Coast, Inc., *Software FAQ* (Version 1.0, January 26, 2004), online: http://wizards.com/default.asp?x=d20/oglfaq/20040123i.

[164] Section 9 of the OGL contemplated WOTC publishing "updated versions" of the OGL, but no such update appears ever to have been publicly released.

[165] The complete definition states that OGC means "the game mechanic and includes the methods, procedures, processes and routines to the extent such content does not embody the Product Identity and is an enhancement over the prior art and any additional content clearly identified as Open Game Content by the Contributor, and means any work covered by this License, including translations and derivative works under copyright law, but specifically excludes Product Identity". Following release of the OGL, there apparently was some confusion as to whether the concept of "Open Game Content" was restricted to the "game mechanic". In the *Open Game License: FAQ*, *supra* note 163, WOTC advised that in their view OGC was not restricted to the game mechanic and that *any* content could be designated as OGC ("Q: Is Open Game Content limited to just 'the game mechanic'? A: No. The definition of Open Game Content also provides for 'any additional content clearly identified as Open Game Content.' You can use the Open Game License for any kind of material you wish to distribute using the terms of the License, including fiction, artwork, maps, computer software, etc. Wizards, however, rarely releases Open Content that is not just mechanics.")

[166] The complete definition states that PI means "product and product line names, logos and identifying marks including trade dress; artifacts; creatures characters; stories, storylines, plots, thematic elements, dialogue, incidents, language, artwork, symbols, designs, depictions, likenesses, formats, poses, concepts, themes and graphic, photographic and other visual or audio representations; names and descriptions of characters, spells, enchantments, personalities, teams, personas, likenesses and special abilities; places, locations, environments,

Critical to an understanding of how the OGL operates is a recognition that the OGC and PI designations are made at the election of the licensor—and that some licensors are more generous and others more restrained in what they choose to designate as OGC.[167] By way of illustration, imagine a publisher who releases a 50-page RPG book that contains text (including various new rules, statistics for four new character "classes", and descriptions of various in-game personalities and storylines) and visual images (such as drawings of in-game personalities and maps). A relatively generous OGC / PI declaration would state that the only components of the 50-page publication that are PI are the name of the game and its logo, the name of the publisher and their logo, and the visual images contained in the book, with all other content being declared OGC (an even more generous approach would include the visual images in the OGC declaration).[168] A much more restrictive approach to the OGC / PI declaration would state that PI consists of the name of the publisher, their logo, the visual images contained in the book, the names of the in-game personalities and their attendant descriptions, and the text relating to two of the four new character "classes".[169]

By means of the OGC and PI definitions, the OGL enables a licensor to license content on both an "open" and "closed" basis and to use the two concepts to apply to different elements contained within

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creatures, equipment, magical or supernatural abilities or effects, logos, symbols, or graphic designs; and any other trademark or registered trademark clearly identified as Product identity by the owner of the Product Identity, and which specifically excludes the Open Game Content".

[167] As will be discussed in Chapter 7, the "amount" of content that a publisher/licensor declares as OGC is sometimes a source of dissatisfaction amongst OGL users, with some taking the view that narrow OGC declarations are inconsistent with the "spirit" of the OGL (and some taking the view that deliberately narrow or obfuscatory OGC declarations—sometimes referred to as "crippled" OGC—are a cynical ploy to trade on the goodwill of the OGL movement while making only a bare minimum of content available on an open basis).

[168] Publishers use a variety of approaches in crafting their OGC / PI declarations. Examples include: dividing content into chapters and declaring some chapters to consist entirely of OGC and others to consist entirely of PI; declaring the content on some pages to be OGC and that on others to be PI; placing all OGC-designated content within shaded text boxes; and identifying OGC by formatting it using italics.

[169] By way of example, the Product Identity designation used by WOTC for the 403-page D&D 5th Edition SRD consists of the following, a list of brands followed by the names of various names, locations, and monsters: "The following items are designated Product Identity, as defined in Section 1(e) of the Open Game License Version 1.0a, and are subject to the conditions set forth in Section 7 of the OGL, and are not Open Content: Dungeons & Dragons, D&D, Player's Handbook, Dungeon Master, Monster Manual, d20 System, Wizards of the Coast, d20 (when used as a trademark), Forgotten Realms, Faerûn, proper names (including those used in the names of spells or items), places, Underdark, Red Wizard of Thay, the City of Union, Heroic Domains of Ysgard, Ever Changing Chaos of Limbo, Windswept Depths of Pandemonium, Infinite Layers of the Abyss, Tarterian Depths of Carceri, Gray Waste of Hades, Bleak Eternity of Gehenna, Nine Hells of Baator, Infernal Battlefield of Acheron, Clockwork Nirvana of Mechanus, Peaceable Kingdoms of Arcadia, Seven Mounting Heavens of Celestia, Twin Paradises of Bytopia, Blessed Fields of Elysium, Wilderness of the Beastlands, Olympian Glades of Arborea, Concordant Domain of the Outlands, Sigil, Lady of Pain, Book of Exalted Deeds, Book of Vile Darkness, beholder, gauth, carrion crawler, tanar'ri, baatezu, displacer beast, githyanki, githzerai, mind flayer, illithid, umber hulk, yuan ti." All other content contained in the 5th Edition SRD is declared to be Open Game Content.

a single publication. Each component of the content of a gaming product can be categorized as either OGC or PI. The distinction is crucial: as described below, OGC is licensed on an open basis, whereas licensees are prohibited from using PI in the absence of a separate agreement with the owner of the rights in the PI. As described by Adam Jury, a game designer and commenter on the RPG industry, the OGL allows for the "intermingling" of open and closed content.[170] That innovative approach to licence construction distinguishes the OGL from its predecessor open source and open content licences, which generally only contemplate a binary approach to licensing software code or expressive content: either the "work" being licensed is licensed on an open basis or it is not; with the OGL, the dense sets of material that tend to constitute RPG products can be licensed in different ways even within the same "product".

Section 3 and 4 of the OGL erect the conditional permission mechanism familiar from open source licences:[171] by using any OGC, the user is deemed to have accepted the terms of the OGL, and in consideration for agreeing to use the OGL, the licensor grants a perpetual, worldwide, royalty-free, non-exclusive license to use the OGC.[172] Section 13 of the OGL provides for automatic termination of the grant of permission if any failure to comply is not cured within thirty days.[173] Sections 2 and 10 of the OGL contain the "share-alike" or "copyleft" mechanism of the OGL:[174] Section 10 requires that a copy of the OGL be included with every copy of OGC that is "Distributed";[175] Section 2 stipulates that (a) any use of OGC must be accompanied by a notice indicating that the OGC may only be used in accordance with the terms of the OGL, (b) the OGL applies to any OGC containing a notice that it may only be used in accordance with the OGL (and by virtue of Section 2, all OGC must be accompanied by such notice), (c) the provisions of the OGL may not be modified, and (d) no other terms or conditions aside from the OGL can be applied to any OGC distributed using the OGL. By means of Sections 2 and 10, any content that a

[170] Jury, *supra* note 117.

[171] See Lawrence Rosen, *Open Source Licensing: Software Freedom and Intellectual Property Law* (Upper Saddle River, NJ: Prentice Hall PTR, 2005) at 103ff.

[172] Section 1 of the OGL defines "Use", "Used" and "Using" as "use, Distribute, copy, edit, format, modify, translate and otherwise create Derivative Material of Open Game Content". "Distribute" is defined in Section 1 of the OGL to mean "reproduce, license, rent, lease, sell, broadcast, publicly display, transmit or otherwise distribute". "Derivative Material" is defined in Section 1 of the OGL to mean "copyrighted material including derivative works and translations (including into other computer languages), potation, modification, correction, addition, extension, upgrade, improvement, compilation, abridgment or other form in which an existing work may be recast, transformed or adapted".

[173] Section 13 also stipulates that any sublicences granted by a licensee survive any termination of the originating grant of permission for breach.

[174] For further discussion of the operation of "share-alike" provisions generally, see Chapter 3, Part I(c).

[175] See *supra* note 172 for the definition of "Distribute".

licensor has declared as OGC is permanently "open" and its openness perpetuates through all down-stream works that include the OGC in question. A licensee cannot revoke the OGC status of content and cannot claim proprietary rights in OGC that they have licensed. Thus, if licensor A declares content X to be OGC, licensee B can use X in accordance with the OGL and can incorporate X in B's product on that basis (even if no other content in B's product is declared OGC); X remains OGC even when included in B's products, and X remains available for licensees C, D, and E to use in their own products (subject, of course, to their compliance with the OGL in respect of their use of X).

The use of PI is further addressed in Section 7 of the OGL: OGL licensees agree not to use any PI unless separately licensed to do so. Further, PI cannot be used "as an indication as to compatibility" and OGL licensees are restricted from using "Trademarks" to indicate "compatibility or co-adaptability" in the absence of a separate agreement.[176] WOTC explicitly took the position that by agreeing to the OGL a licensee agreed to limit any other rights the licensee might have to use PI, with particular sensitivity regarding trade-marks.[177] It is important to note the optionality of PI and OGC designations: a licensor can elect to designate some or none of its content as PI (if a licensor designated all of its content as PI, there would be no need to use the OGL) – WOTC itself elected to designate a significant portion of the content of the D&D product line as PI, but licensors who use the OGL make varying decisions as to how extensively to identify content as PI.[178]

The remaining provisions of the OGL address mechanical or interpretive matters: Section 5 consists of a representation from any licensee who contributes OGC that they own or control all necessary rights in the contributed OGC; Section 6 requires licensees to update the copyright notice

[176] "Trademark" is defined in Section 1 to mean "the logos, names, mark, sign, motto, designs that are used by a Contributor to identify itself or its products or the associated products contributed to the Open Game License by the Contributor".

[177] See *Open Game License: FAQ*, *supra* note 163 ("The terms of the [OGL] supecede the terms of general Trademark law. By agreeing to accept the [OGL], gaining the benefit of the consideration of being able to use [OGC] under the terms of the OGL, you limit certain other rights that you might otherwise have."). In the same document, WOTC was candid about the value they perceived in their trademarks ("The rationale behind this clause is related to the value of the material covered by the Open Game License. Companies (and individuals) spend a lot of time and effort to create and establish Trademarks that others recognize in the marketplace. By restricting your right to indicate compatibility or co-adaptability with other people's Trademarks, the License recognizes that the value of those Trademarks is separate from the value of the Open Game Content itself. If you want to tap into the value represented by a given Trademark, you will need to negotiate a separate agreement with the Trademark holder for that privilege.").

[178] *Ibid* (noting that some publishers have identified OGC by placing OGC "in shaded boxes, using a different font, italicizing or bolding the [OGC], and segregating all the [OGC] into specifically designated chapters or appendixes. Some publishers have released documents that are identified as being comprised completely of [OGC].").

contained in the OGL to include attribution for all OGC-designated content the licensee uses in any OGC they distribute (this results in some OGC products containing copyright notices that occupy large portions of a printed page); Section 11 restricts licensees from using the names of contributors of OGC in advertising and marketing unless permission is obtained from the relevant contributor; and Sections 12 and 14 address the effects of judicial severance, unenforceability and the inability of a licensee to comply due to court order, statute or regulation.

VI. Was the OGL Needed at All?

An obvious question to ask about the OGL is: why was it needed at all? The short answer is that two related factors made the OGL a compelling proposition both for WOTC and its audience: first was (and still is) the ambiguity involved in trying to determine the extent of copyright protection for RPG game materials; and second was the perceived history of TSR, WOTC's predecessor as owner of the D&D game, as an aggressive enforcer of its intellectual property rights. Both aspects of that short answer require further examination.

It is sometimes taken as axiomatic that copyright law does not protect game rules; as Bruce Boyden has noted, "copyright law has developed a very simple black-letter rule… : games are not copyrightable"—though he stresses that it is a rule that "begins to fall apart on close examination".[179] Similarly, Pamela Samuelson has noted that U.S. jurisprudence contains a series of cases holding that "games, rules and tactics cannot be protected by copyright law,"[180] though she highlights that the cases "are quite spare in analysis,"[181] and that none of them "offered any explanation as to why copyright did not protect games or rules".[182] Boyden states that the "origins of the rule against copyright in games are lost in the mists of time; [with] even the earliest cases refer[ring] to the rule without discussion, as though it were obvious".[183] While the origins of the rule may be obscured, both Boyden and Samuelson conclude that the rule that games are not protected by copyright is justified and consistent with the proposition that

[179] Bruce E. Boyden, "Games and Other Uncopyrightable Systems" (2011) 18 Geo Mason L Rev 439 at 440.

[180] Pamela Samuelson, "Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection" (2007) 85 Texas L Rev 1921 at 1942.

[181] *Ibid* at 1943.

[182] *Ibid* at fn 161.

[183] Boyden, *supra* note 179 at 440.

copyright law does not protect systems or methods of carrying out an activity. For that latter proposition, numerous authorities can be identified. As Samuelson notes, the U.S. Supreme Court decision of *Baker v Selden*, involving a plaintiff who unsuccessfully sued for infringement of the copyright in his book describing a book-keeping system, is often cited as authority for the notion that U.S. copyright law does not extend to systems or methods of practicing an activity;[184] that notion was ultimately codified in U.S. copyright law as 17 U.S.C. § 102(b), which provides that "[i]n 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".

In Commonwealth jurisprudence, similar authorities for the proposition that systems and methods cannot be protected by copyright are found in the English case of *Hollinrake v Truswell* (which held there was no copyright in a sleeve chart used by tailors)[185] and the Supreme Court of Canada decision in *Cuisenaire v South West Imports Ltd.* (holding that the plaintiff's method for teaching mathematics using coloured rods was not a "work" for purpose of the *Copyright Act*, and noting that carrying out the method for teaching mathematics described by the plaintiff constituted only a use of the plaintiff's ideas),[186] as well as in the *Copyright Act* (Canada) itself (stating that "using any method or principle of manufacture or construction" does not constitute infringement of copyright in a work).[187] In the *Cuisenaire* case, the Supreme Court of Canada approvingly quoted from an Australian case and concluded that a person who "carried out the instructions" in an instruction manual could no more infringe the copyright in that literary work than would a person "who made rabbit pie in accordance with the recipe of *Mrs. Beeton's Cookery*

[184] *Baker v Selden*, 101 US 99 (1879). See Samuelson, *supra* note 180 at 1922 and 1924ff.

[185] *Hollinrake v Truswell* [1894] 3 Ch 420 (Eng CA) at 428 ("No doubt one may have copyright in the description of an art; but having described it, you give it to the public for their use and there is a clear distinction between the book which describes it and the art or mechanical device which is described").

[186] *Cuisenaire v South West Imports Ltd.* (1968), 57 CPR 76, [1969] SCR 208, 2 DLR (3d) 430 (SCC) [*Cuisenaire*, cited to SCR] (holding that putting into practice a method described in a book does *not* infringe any copyright held by the author of the book ("[w]hat has in fact happened is that the respondent has adopted and used the ideas contained in the appellant's literary work"); the SCC cited *Hollinrake v Truswell*, *supra* note 185 with approval).

[187] *Copyright Act* (Canada), RSC, 1985, c. C-42, s 64.1(1)(d). See also *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, (1994) 25 IIC 209, Art 9.2 ("Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such").

Book".[188] One might analogize the rules of a game to a set of instructions or system for the playing of the game, and so conclude that copyright protection does not extend to game rules.

Samuelson regards the exclusion of games from copyright protection as consistent with the rule excluding systems from copyright protection,[189] which, she explains, is critical for "preserving the public domain, promoting the ongoing creation and dissemination of knowledge, stimulating competition and innovation in the marketplace, and maintaining a proper balance between the rights of authors and the rights of the public in intellectual property law".[190] On Samuelson's account, the rule against copyright protection in systems plays a role in maintaining a sphere of activity free from copyright concerns, illustrated by examples such as performing accounting calculations, cooking rabbit pies, and teaching mathematics using a system of coloured rods, each informed by the description of the system but not infringing whatever copyright might exist in that description. Boyden's conclusion is premised on the notion that systems are "shells into which the user pours meaning",[191] and that the game *qua* system is best understood as a mechanism for facilitating expression by the players, but does not itself constitute protectable expression. But then, assuming that the statement "games are not protected by copyright" is true, why would a copyright licence be required in order to permit anyone to reproduce or otherwise make use of game rules? Because as alluded to in Boyden's statement first noted at the beginning of this Part, the abstract rule that games are not protected is complicated to apply in practice, with many aspects of any particular game occupying an ambiguous zone between protectable expression and non-protectable ideas, systems and methods.

While a "game" may not be protected by copyright, the various means by which the game is "expressed" may very well be protected. Boyden notes that the "constituent elements" of a game, such as "the rules sheet, the game board, [and] the pieces", are capable of being protected by copyright.[192] Put differently, while game *mechanics* are not protected by copyright,[193] the particular form in which rules are

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[188] *Cuisenaire*, *supra* note 186 at 213-214, quoting *Cuisenaire v Reed*, [1963] VR 719.

[189] Samuelson, *supra* note 180 at 1944.

[190] *Ibid* at 1977.

[191] Boyden, *supra* note 179 at 479.

[192] *Ibid* at 445, 477.

[193] For further examination of what Boyden considers to constitute "mechanics", see *infra* note 198, and see Bowman, *supra* note 2 at 25 (describing RPG "mechanics" as the "governing laws … often mathematical in nature" which "delineate the structure of the game").

expressed may be protectable (assuming the satisfaction of other prerequisites for protection, such as originality,[194] and subject to other limiting rules such as the merger doctrine[195]), as are other elements of the game such as illustrations and graphic elements on game boards.[196] Videogames offer particularly "thick" examples of games, and few would question the proposition that the software code, on-screen images (including depictions of characters), and even plots of videogames could be protected by copyright.[197] As Boyden has highlighted, the "uncopyrightable core" of a game consists of the systems that underlie the game and the playing of the game itself.[198]

That being said, the analysis involved in drawing distinctions between unprotected ideas, unprotected game mechanics, unprotected "merged" expression, and protected original expression, is a convoluted, even arcane, one, and it is not clear how plausible it is to expect a non-specialist to apply it in the context of RPGs: as noted above, RPG rule books routinely run to the hundreds of pages that contain lengthy articulations of the notionally unprotected systems which make up the game. Disentangling the unprotected "rule" from the hundreds of words and accompanying charts that "express" the rule is not a task that is easily accomplished, and not susceptible to a process that would produce unambiguous

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[194] To qualify for copyright protection, a work must be "original" (see *Copyright Act* (Canada), RSC, 1985, c. C-42, s 5; and *Copyright Act of 1976*, 17 U.S. Code § 102(a)). In Canada, the originality threshold requires that an author engage in "an exercise of skill and judgment" that will "necessarily involve intellectual effort" and "must not be so trivial that it could be characterized as a purely mechanical exercise" (*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 [*CCH v LSUC*] at para 16). In the U.S., the originality threshold stipulates that a work be "independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity" (*Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)).

[195] Boyden, *supra* note 179 at 445. The "merger" doctrine is a corollary of the idea/expression dichotomy, which is the axiom that copyright does not protect ideas, but only the expression thereof (see *CCH v LSUC*, *supra* note 194 at para 8); the "merger" doctrine is the notion that copyright will not be extended to the expression of an idea where the idea is "capable of only one or a very small number of expressions", such that to give protection to that expression would functionally be to grant copyright to the idea so expressed (Samuelson, *supra* note 180 at 1934). Samuelson describes a number of U.S. cases in which courts applied the merger doctrine in the context of games (*ibid* at 1934, 1944), including *Morrissey v Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967) (denying copyright protection for rules of contest due to limited number of ways to express the ideas). The merger doctrine has been applied in Canada as well (see *Delrina Corp v Triolet Systems Inc* (2002), 58 OR (3d) 339), and see David Vaver, *Intellectual Property Law*, 2d, (Toronto: Irwin Law, 2011) at 60 fn 26.

[196] Boyden, *supra* note 179 at 440.

[197] See generally Thomas M.S. Hemnes, "The Adaptation of Copyright Law to Video Games" (1982) 131 U Pa L Rev 171; William Patry, "Electronic Audiovisual Games: Navigating the Maze of Copyright" (1983) J Copyright Soc'y USA 1.

[198] Boyden, *supra* note 179 at 477-479. Boyden uses system to mean the "mechanism or set of rules for transforming a given range of inputs into particular outputs" (at 458). The unprotected game system "establishes the environment for play – the game space – and it defines permissible moves and the conditions for winning or drawing" (at 466). Relatedly, the *playing* of the game – the performance by the players of the game system or the *experience* of the performance of the game system – is not something which can be protected by copyright or something in respect of which a copyright owner can have exclusive rights (at 475-477).

determinations on which everyone would agree. In addition, much RPG material is extraneous to the rules in any event, consisting of images, maps, and lengthy expository text detailing storylines, characters, monsters or foes, and other "background" information about the settings in which the games take place. Even the most austere application of a "games are not protected" rule would not exclude that "extraneous" (or, as some RPG players call it, "fluff") content from the ambit of copyright protection.[199]

WOTC cited that confusion and uncertainty in its explanation of its rationale for the creation of the OGL:[200]

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[199] The extent to which a game, including an RPG, can be patentable subject-matter is outside the scope of this research project, though the issue warrants attention, in part because of the common conflation in online RPG discussion forums between copyright and patent protection (though it should be noted that such mistaken conflation is almost always corrected by multiple participants in the online conversation) and in part because the OGL would seem to allow an OGL licensor to, on the one hand, license its RPG materials on an open copyright basis using the OGL but, on the other hand, enforce exclusive claims on those same materials grounded in patent. Such a scenario does not appear to have ever transpired. I was unable to locate any reference to any such enforcement activity, and I was also unable to identify any issued US or Canadian patent for a fantasy, science fiction or other genre tabletop RPG (though there are some issued patents that refer to RPGs as a concept: see, *e.g.*, US Patent No 9,931,574 (leadership role playing game and method therefor), which appears to use the characteristics of RPGs, such as characters and quests, for management leadership coaching; and see Can Patent No 2,609,785 (system and method for playing a role-playing game), which describes an RPG that involves players wagering and eliminating others in competition for a prize). There are also a number of abandoned RPG-related applications (*e.g.*, US App No 13,156,507 (role-playing board game with character dice)). WOTC applied for a patent on their card games (see US Patent No 9,616,323 (game, such as electronic collectable and card game or tradable object game employing customizable features), though it appears that was applied for more than a decade after their card games first achieved popularity (the patent was applied for in 2013 and issued April 11, 2017). All that being said, there are a number of United States patents that have been issued in connection with *videogame* and *online* RPGs (see, *e.g.*, US Patent Nos. 9.352,224 (gathering path data from massively multiplayer on-line role-playing game), 9,223,469 (configuring a virtual world user-interface), 8.547,396 (systems and methods for generating personalized computer animation using game play data) and 6,106,399 (internet audio multi-user roleplaying game) and Can Patent 2,539,392 (system and method for controlling access to a massively multiplayer on-line role-playing game)). As Shubha Ghosh has noted, the rules of a game "are functional and procedural, and therefore could arguably be protected by [US] patent law" as "process patents", and US patents have historically been issued for games that cover both the rules of the game and the gaming apparatus (board, pieces, *etc.*) (see Shubha Ghosh, "Patenting Games: *Baker v. Selden* Revisited" (2009) 11 Vand J Ent & Tech L 871 at 873, 876 (citing, *inter alia*, US Patent No 2,026,082 (covering rules for Monopoly board game)). The United States Patent and Trademark Office has issued numerous patents covering board games (*e.g.*, US Patent Nos 9,962,603 (board game with stackable tokens), 9,962,601 (automated table game system), 9,908,035 (game for a plurality of players, and method of play)). Canadian patent law does not appear to pose a barrier to games being patentable subject-matter in Canada (see *Canada (Attorney General) v. Amazon.com, Inc.*, 2011 FCA 328, and see the Canadian patents noted earlier in this note). Some scholars have concluded that game rules, as a policy matter, should not be patentable subject matter because of the negative impact on expressive autonomy (see, *e.g.*, Ghosh, *supra* this note, who expresses concern that the owner of a patent on game rules could restrict individuals from engaging in purely aesthetic expressive activity; similar concerns animate the argument in Samuelson, *supra*, note 180, regarding whether copyright protection should extend to systems or processes). Questions about whether a game designer can obtain a copyright or patent on their proposed game design are a recurring feature of online RPG discussions forms, though, as noted above, the discussion usually fairly quickly moves away from discussion of patent and focuses on copyright; I surmise that one reason for the dearth of tabletop RPG patents is the relative expense of securing patent protection, which could prove a barrier for the relatively thinly-capitalized publishers of the RPG industry.

[200] *Open Game Definitions: FAQ*, *supra* note 10.

“Q: Can game rules be copyright [sic]?

A: In the United States, the rules of games cannot be copyright [sic]. The law may be different in other countries, but most countries are signatures [sic] to the Bern [sic] Convention on Copyrights, and under the terms of the BCC, the rules of games cannot be copyright [sic]. If you have questions about your ability to apply the copyright law to a game, consult your legal counsel.

Q: Why does every RPG product I own claim a copyright for the publisher?

A: RPGs are more complex than just rules for games. A typical RPG includes substantial material that is not "rules for a game". The line between the copyrightable portion and uncopyrightable portion of a particular product is very blurry and under U.S. copyright law, is left to a court to interpret in the event of a lawsuit.

Q: What good is a copyright license for Open Games then?

A: Even though portions of an RPG may not be copyrightable as an idea or as a rule, the actual text used to describe those rules is copyrightable. In addition, all the material surrounding the non-copyright portion is protected by the copyright law as well. The copyright licenses used by Open Games ensure that no matter where an individual judge might draw the line between copyright and non-copyright, you can be sure that you have the freedom to copy, modify and distribute the work. Removing this gray area creates a "safe harbor" that publishers can use to shield themselves from litigation. The safe harbor is an important component to the commercial viability of Open Games. Without it, most rational publishers would not attempt to use a shared rules system out of fear that someone somewhere would sue them for copyright infringement.

Another very valuable right you gain from an Open Game is the right to make a derivative work based on someone else's copyright. Without that right, you cannot legally make and distribute a derivative work. Since RPGs are often self-referencing (meaning, you use one part of the RPG to indicate how another part works or interacts with players during the game), RPGs are essentially chains of linked, derivative works. By giving you the right to make a derivative work, an Open Game license allows you to extend or modify these chains as you see fit.”

WOTC also alluded to the history of aggressive copyright and trade-mark enforcement by the previous owners of D&D, stating that reliance on an “informal agreement” among publishers would be viewed as too risky by many RPG publishers who possessed “relatively modest financial resources” and would be unwilling to run the risk of potentially ruinous copyright disputes.[201] The use of the OGL meant that creators and publishers could rely on “a formal, explicit agreement describing how to use copyrighted

[201] *Ibid*. On the dissuasive role that ambiguity about the validity of copyright ownership claims plays in creative decisions, see Betsy Rosenblatt, “The Adventure of the Shrinking Public Domain” (2015) 86 University of Colorado Law Review 561 at 608-622.

material owned by others without triggering lawsuits or threats of litigation".[202] The need for the OGL was framed by reference to implicit communal understandings deriving from the nature of RPGs:[203]

> "Most roleplaying games, for example, are based on the implicit assumption that the people using them will create their own content in the form of adventures, characters and even whole campaign settings. However, few commercial roleplaying game products provide a license of sufficient rights to allow the purchasers of those games to distribute the content they create using the frameworks provided by the gaming system. The Open Gaming concept addresses this problem by explicitly providing such rights. … . It has been an established feature of RPGs since their inception that they should be used to create new content. Prior to the advent of widespread Open Game licenses, there was no practical way for that kind of material to be legally and widely distributed."

Ryan Dancey has also stated that in his view

> "the heart of the OGL is that it gets rid of legal gray areas which have plagued RPGs from the beginning … it has always been 'dangerous' to publish RPG content that isn't derived from an entirely new game system. The OGL tears down all the ambiguity and legal risk and says 'if you do x, y & z, you can do a, b & c totally legally. That unlocked a tremendous amount of capital to invest in game publishing that otherwise would never have been committed due to legal risks."[204]

One commentator described the OGL as a "concession" that "was really no concession at all", because it "granted no rights or privileges to third party publishers that they did not already have".[205] Nonetheless, in the view of that same commentator, given the history of litigation and threats of litigation in the RPG industry, the OGL served a distinct purpose:

> "[the OGL] is nothing more than a license to breathe. But, for a community that thought it could not breathe without permission, the OGL serves an important purpose. It let's [sic] the gaming community feel safe about publishing game content, something that has had a long history of being a quasi-dangerous game".[206]

That description of the OGL as a "license to breathe" is consistent with the description of the concept of a licence that was set forth in Part II(a) of Chapter 1: the licence being the manifestation of the licensor's election to waive or forebear from enforcing the licensor's right to exclude others. And as described more fully in that earlier Chapter, we can understand the licensor's "covenant not to sue" not just as a forbearance from the right to exclude, but as its *inversion*, as a positive act of *inclusion* and community creation. Those aspects of the OGL will be explored further in Chapter 8.

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[202] *Open Game Definitions: FAQ*, *supra* note 10.

[203] *Ibid*.

[204] Dancey Author Interview, *supra* note 104.

[205] Andrew Asplund, "Legal Issues in Gaming: The Open Game License" (December 19, 2012), *Tales from the Gamer Viceroy* (blog), online: http://gamerviceroy.blogspot.ca/2012/12/legal-issues-in-gaming-open-game-license.html.

[206] *Ibid.* See also Rosenblatt, *supra* note 201.

VII. Is the Open Game License an Open Content Licence?

Subject to a jurisdictional qualification relating to moral rights, the OGL qualifies as an open content licence as defined in Chapter 3 of this dissertation – it displays all of the necessary features and none of the disqualifying features. An important caveat is that the OGL does not contain a waiver of moral rights, or otherwise expressly address moral rights in any fashion; as a result, the OGL does not qualify as an open content licence in those jurisdictions, such as Canada, that vest authors with moral rights. The OGL does unequivocally qualify as an open content licence in the United States, the jurisdiction in which WOTC and its primary competitors in the RPG market are headquartered, and in which most users of the OGL appear to be resident. The OGL is properly characterized as a copyright licence as discussed in Chapter 1: it is a conditional grant of permission in respect of an exclusive right possessed by the licensor, and the permission granted by the OGL is with respect to copyright-protected works. The OGL has a stable form (indeed it has only a single iteration) and is non-exclusive and available for take up by any interested party who wishes to and agrees to abide by the conditions of the licence. The grant of permission contained in the OGL is perpetual and the permission can only be terminated for breach of the licence terms. The OGL does not expire or limit the number of uses which can be made of the content to which it is applied. No royalty payment or other form of compensation becomes owing as a result of the use of OGL-licensed content, and the broad definitions of “Use”, “Distribute”, and “Derivative Material” found in the OGL are sufficient to include all of the activities contemplated by Wiley’s “5Rs” (i.e., retain, reuse, revise, remix, and redistribute). The OGL does not contain any restrictions on commercial use or otherwise impose restrictions on the use of the licensed content that pertain to the nature or characteristics of the licensee or of the activities being carried on by the licensee.

The strongest argument against categorizing the OGL as an open content licence is that it contains restrictions in Sections 7 and 11 that unacceptably hinder the rights of OGL licensees. Section 7 of the OGL prohibits a licensee from using “any Product Identity, including as an indication as to compatibility, except as expressly licensed in another, independent Agreement with the owner of each element of that Product Identity” and obliges licensees “not to indicate compatibility or co-adaptability with any Trademark or Registered Trademark in conjunction with a work containing Open Game Content”

(except as may be authorized in a separate licence). Section 11 of the OGL restricts licensees from "market[ing] or advertis[ing] the Open Game Content using the name of any [licensor of Open Game Content]" (unless separately permitted by the licensor). However, neither of those restrictions serve to render the OGL a closed licence, the first because it is merely a mechanism within the licence that particular licensors may elect to use in relatively more open or closed ways, and the second because it restricts only ancillary activities that do not impinge on the core usage rights in respect of the copyright-protected licensed material. The restriction on using PI in Section 7 does not violate the requirements identified in Chapter 3 because of the optionality and flexibility of the PI designation. A licensor can elect to designate none, some, or all of the licensor's content as PI – and while different designations may make particular *products* or *instances of use of the licence* more or less "open", the mere fact that the OGL allows such designations to be made does not render the OGL a "closed" licence.[207] Similarly, the restrictions on the use of trade-marks and compatibility statements contained in Sections 7 and 11 of the OGL, which prohibits the licensee from carrying on marketing and advertising activities using the name of the licensor, does not impact the licensee's rights in respect of the use of the licensed copyright-protected content itself and hence does not affect the core "5 Rs" needed to qualify as an open content licence.[208]

VIII. Conclusion

As a precursor to the fieldwork portion of this research project, this chapter has reviewed the origin and history of the Open Game License. The OGL began in an effort to revitalize the market for a desiccated brand, and resulted in a burst of activity and creativity within the role-playing industry, with many sustained and unpredictable results. This chapter has also described how structural aspects of role-

[207] Chris Sakkas describes the optionality of the PI designation as an issue of "engagement" by the licensor with the particular provision ("whether or not [the OGL] counts as open knowledge depends on whether certain aspects of the licence are engaged"; see https://freedomdefined.org/Licenses/OGL).

[208] I leave aside consideration of whether the contractual restrictions on the use of trade-marks and copyrights contained in the OGL are enforceable. Both Sections 7 and 11 of the OGL purport to restrict OGL licensees from carrying out activities that would otherwise be permissible under trade-marks and copyright legislation, such as by virtue of the definition of "use" under the *Trade-marks Act* (Canada)(RSC, 1985, c T-13, ss 2, 4) and under the United States doctrine of "nominative fair use" (see, *e.g.*, *Wham-O, Inc. v Paramount Pictures Corporation,* 101 Fed. Appendix 248 (9th Cir. 2004) and the U.S. *Lanham (Trademark) Act*, 15 USC §1125(c)(3)(A)) or under the fair dealing and fair use provisions of, respectively, the *Copyright Act* (Canada), RSC, 1985, c. C-42, ss 29-29.2 and *Copyright Act of 1976*, 17 U.S. Code § 107. Whether contracts can be used to impede statutory use rights is a fertile field of inquiry (see, *e.g.*, Lucie Guibault, *Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations on Copyright* (The Hague: Kluwer Law International, 2002) and Pascale Chapdelaine, *Copyright User Rights – Contracts and the Erosion of Property* (Oxford: Oxford University Press, 2017) at 52-54), but one that is beyond the scope of this analysis.

playing games lend themselves to certain creative practices by RPG participants which foreground dialogue and relationships, and how those practices bear commonalities with other creative activities, particularly those that occur in an environment of digitalized connectivity. The analysis also examined whether the OGL was "required" and examined why the history of the RPG industry and inherent complications in the copyright analysis of RPGs mean that the use of the OGL was, at least, an advantageous business strategy.

With reference to the indicia of success for open content licensing identified in Chapter 4, we find that the OGL was introduced in an environment that seems particularly receptive to successful employment of open content licensing. WOTC, through the offices of Ryan Dancey, had a pre-disposition in favour of the "open" goals of the open source software community, a sublimated need for immediate financial returns (expecting, in alignment with the predictions of the so-called "Skaff Effect" that initial openness would yield financial rewards in the future), a willingness to establish and maintain an open community, a willingness to allow third parties to take on design and marketing efforts, and a desire for maximal dissemination. RPG game materials are modular, non-bounded, expandable, inexpensive to create, easy to reproduce, display transient utility, ease of consumption and replayability. There appears to have been at least a conjecture, if not a settled belief, that the RPG market displayed network effects. The OGL was used in the context of an existing RPG community whose members displayed predispositions to actively create additional material and valued idiosyncrasy and improvisation. The RPG market itself also displayed a number of the indicia identified in Chapter 4: it was a market featuring a dominant (if diminished) competitor, the market for D&D had recently been depressed due to the advent of competing gaming options, and it featured a consumer that displayed an appetite for multiple iterative variants of the same content. Also of significance was the capacity of the market to sustain a dual licensing approach in a variety of ways: WOTC and Ryan Dancey were explicit in noting their belief that the value of D&D was found primarily in the trade-mark and brand, and only secondarily in the copyright-protected material. While the OGL offered free access to stripped-down versions of D&D's "source code", printed materials bearing the D&D trade-mark and brand were sold for premium prices in hardbound books. Even the copyright-protected material was licensed on a dual basis: that which was designated as "Product Identity" was not licensed on an open basis under the OGL. WOTC's approach indicates that the

presence of rights in a trade-mark or brand as the repository of value may be required or at least desirable when disseminating by means of an open content licence; however, while the presence of such a brand was certainly true for WOTC and D&D, it is less obviously the case for other OGL publishers, a matter that will be discussed further in Chapter 8.

Having described the context within which the OGL was created and outlined its operation, the following chapters of this dissertation explore the data obtained from the fieldwork elements of the research project. That data is then analyzed using the theoretical framework developed in Chapters 1 through 4, in an effort to develop a richer account of when and why open content licences can be successfully used in connection with creative cultural expression.

Chapter 7

Fieldwork

I. Introduction

In Chapter 5, I identified two primary questions that the fieldwork and content analysis aspects of this research project are intended to answer: First, why are people using the Open Game License ("**OGL**")? Second, are they satisfied with the results of their use of the OGL? Obtaining answers to those questions about how and why the OGL is actually used by members of the role-playing game ("**RPG**") community assists in answering the broader question posed by this dissertation: When can open content licenses be productively used in connection with creative cultural expression? The two preceding chapters have described the methodology used to obtain the fieldwork data and have explored the history of the OGL and its operation. This chapter sets out an in-depth examination of the use of the OGL as revealed through my fieldwork, including identifying the rationales provided by those who have used the OGL to release their own RPG products or who have used materials released under the OGL; the next chapter will detail the explanatory insights about open content copyright licensing that have been derived from my fieldwork and discuss how my observations and analysis map onto the communicative copyright account presented in Chapter 2 and the success indicia matrix set out in Chapter 4.

I organize this chapter around the themes contained in the interview responses, focusing first on revealing the general context of the respondents' use of the OGL, and then moving on to describe the reasons they articulate for their use. I have identified three broad themes in the fieldwork data: first, an overwhelmingly positive assessment of their use of the OGL; second, an instrumentality to the use of the OGL; and third, a community-constitutive function that co-exists adjacent to the other motivations identified by OGL users. As will be seen, respondents often describe an instrumental motivation to their use of the OGL: they are using it to accomplish *something* beyond the mere fact of giving licensees permission to use the licensed work. Respondents often do not offer only a single explanation for their use of the OGL and, similar to the analytical move that was undertaken in Chapter 4, what we discover is that their instrumentality has a particular orientation: the responses, even given all their commonalities and divergences, are often suffused with notions of *community*. The OGL functions for many of the respondents as a way to identify themselves as part of a community, as a way to participate in that

community, and as a way to strengthen that community. In particular, the OGL operates to facilitate and maintain community by obviating confusion or uncertainty relating to copyright infringement and fear of being sued for infringing copyright.

I do not want to elide the fact that many respondents explicitly cite utilitarian notions such as convenience or efficiency in explaining why they used the OGL – but none of the respondents identified *only* utilitarian motivations. Though many of the respondents are clearly interested in making money from their RPG activities, monetary compensation was never explicitly mentioned as reason for using the OGL (though a number of respondents noted that their revenues had increased or their business had been more successful as a result of using the OGL). I also want to note that a handful of respondents expressed what might be viewed as cynical observations about the original motivation of Wizards of the Coast, Inc. ("**WOTC**") for creating and releasing the OGL: responding to the question "How would you describe the purpose of the OGL?", one publisher answered, "Ensuring D&D remained the top selling RPG".[1] That same respondent consistently expressed sentiments about the OGL that can be characterized as viewing the OGL as a mechanism to be manipulated for, or primarily used to provide, market advantage (while also, in other responses, expressing positive sentiments about the benefits of the OGL for both the respondent and the RPG community more broadly). That respondent's views were consistent with a stable current of views found in the online commentary – wry, even caustic, about the OGL and the "promise" of open content licensing more generally; I'm inclined to describe this decided minority of views as a more suspicious subset of the broader body of more credulous OGL users. This strain of unsentimental OGL users is a vocal minority – but even they, consistently, seem to view the OGL positively (if somewhat cantankerously).

As anticipated by the communitarian copyright account, and as will be demonstrated in this chapter, users of the OGL are often using the OGL as a facilitative device for participating in and augmenting creative communal practices – and they are utilizing the OGL in myriad ways to address lingering concerns about the extent and applicability of copyright law. Further, they are using the OGL to engage in discursive conversations based on creative practices – more, they are using the OGL to enable and encourage *others* to participate in those same conversations. The OGL is purposely being used to

[1] Respondent 018.

accomplish a number of goals by publishers – and consistent among those goals is a set of other-oriented activities that would make little sense absent a recognition of the community within which they occur. As will be seen in the discussion below, despite efforts to compartmentalize the analysis of the data, community-related notions resonate throughout many of the interviewee responses and online discussions.

II. Experiencing the Open Game License

(a) *Positivity*

The overwhelming sentiment of respondents was that their use of the OGL was a predominantly positive experience.[2] Respondents referred to their experience with the OGL as "positive" and even expressed "gratitude" for the opportunities it afforded;[3] one respondent described his company's experience as "extremely good – in fact, I cannot think of any true negatives".[4] They consistently observed that their use of the OGL had been warmly received by their customers.[5] Indeed, the OGL appears to have resulted in RPG consumers by default anticipating that at least some elements of RPGs would be made available to their audience under some form of open content licence.[6] Some respondents

[2] No respondents described themselves as having a negative experience with the OGL. One respondent (001) indicated that he'd heard other people had negative experiences with the OGL because they had not paid close enough attention to its "legal" aspects, but he was unable to provide any further details. One respondent (015) observed that the products that third parties had created using the respondent's OGL-licensed materials were "not of a great standard", but accepted that as one "risk" of using the OGL. A third respondent (020), who started using the OGL on its release in 2000 but subsequently stopped using it in connection with the RPG products his company published, said that the OGL was initially "difficult to understand and navigate … and we were always concerned with the potential to accidentally violate it", but also said that "Seventeen years later, I am thankful and grateful for the opportunity it provided, but once we left it behind we never looked back".

[3] Respondent 001 ("I have a very positive feeling about it in general. … I was very grateful for the fact that WOTC had done that [i.e., used the OGL in connection D&D's 3rd Edition], because, as I say, there were these lots of ideas and concepts both in terms of just creative things but also in terms of the hard tack mechanical things that gamers were familiar with all along, but now they were given *license*, literally and figuratively, to go ahead and use that. … [If asked to give advice to someone interested in using the OGL] I would be positive about it. I would encourage them to use it"); Respondent 033 ("Positive! It let me do what I want, I haven't had any hassles from it, and the only problems were, you know, my own initial sloppiness"); Respondent 039 ("I think it's been positive. The people are excited to have [OGL-licensed materials] available)"; Respondent 050 ("Very positive, very positive"); Respondent 062 ("I would say it's great. … I think it's awesome").

[4] Respondent 018.

[5] *E.g.*, Respondent 015 ("The reaction to [the use of the OGL in some of the company's crowdfunding efforts] was certainly positive, and had a positive effect on our customers' views of our company").

[6] Respondent 039 ("there's now an expectation in general that game companies will eventually make their core systems available, if not through a literal OGL, then something like what Shane Hensley does with Savage Worlds where he is never going to make that available as an open license, but if you contact him and ask for a license, his requirements are so slender that's almost the same, functionally, as having an open license. And I

were even more effusive in their descriptions of the OGL: "It has been great, fantastic, and all around an amazing boon for the game system. Without the OGL, we would not have the embarrassment of riches that we have in gaming".[7] Some respondents tied the OGL very closely to their own successes:

> "I'd credit the majority of our success in [the publisher's OGL-licensed game] to the fact that we've provided OGL content for a decade-plus … It's very positive for us, it keeps the community of players and publishers happy, and has given [our game] some real legs as an emerging brand in the field".[8]

Statements obtained from the online data echoed the generally positive response to the OGL and its use, though not nearly as uniformly as the interviewee responses; statements evincing positive sentiments outweighed those evincing negative sentiments in the sample by a more than 2:1 margin.[9]

Motivating many of the interviewee responses seemed to be a sense of happiness arising from the fact that the OGL permitted access to materials that the gaming community had been strongly desirous of using in connection with their own creative activities – as one respondent noted in response to WOTC's use of the OGL with D&D's 3rd Edition,

> "I was very grateful for the fact that WOTC had done that, because, as I say, there were these lots of ideas and concepts both in terms of just creative things but also in terms of the hard tack mechanical things that gamers were familiar with all along, but now they were given *license*, literally and figuratively, to go ahead and use that."[10]

It is clear from the interviews that the subjective view of the respondents is that their use of the OGL has been valuable to them; more, they view the OGL as having been both productive for their own publishing activities and also beneficial for the RPG industry as a whole. One publisher did describe their use of the OGL as having had "minimal" effect on their sales, while still noting that using the OGL was "useful" in their creative process because they didn't need to "re-invent" the elements that were available to them under the OGL.[11] All other respondents indicated that their use of the OGL had been measurably

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think there is that expectation now that game systems not be proprietary and that they have some way of fans be able to access them").

[7] Respondent 027.

[8] Respondent 047.

[9] I want to stress the broad range of sentiments expressed in the online statements, from effusive praise for the OGL ("It was hella successful. Look around… see all that published material. That is the success") to equivocal assessments (noting both positive and negative outcomes of the OGL) to startlingly negative ("The gates to hell were opened with the SRD and OGL, and suddenly we were awash in everybody's jerk dreams of their basement campaigns revealed like dirty laundry" – though the same commenter went on to state "in a lot of cases the stuff was good"). That being said, as noted in the main text, the balance of the sampled commentary was positive in its assessment of the OGL.

[10] Respondent 001 (italics indicates verbal emphasis used by respondent).

[11] Respondent 001 ("minimal … in terms of sales, business perspective, I don't think it had much of an impact at all")

beneficial to their sales, and, interestingly, expressed positive views of the OGL because of its impact beyond the bare metric of sales.[12] For example, one publisher stated "I think it's improved our revenue modestly. I suspect it's more the other way round – using our license has enabled small new publishers to sell products, *which we consider a positive thing*;"[13] the same publisher expressed the view that the company's use of the OGL "had a positive effect on our customers views of our company", and further noted that a third party had taken the company's OGL-licensed System Reference Document, and created a website for players, a development that "has been of great help to our community, and I suspect has led to more [game] sales". In short, what publishers count as a "success" in making use of the OGL is not limited to their own revenues or sales numbers, but includes such community-oriented considerations as the revenues and business opportunities of *other publishers*, and the availability to the community of easy-to-use resources (such as the cited website).

One publisher specifically cited the OGL, and its making available of D&D's core rules, as integral to the company's enduring success: "without the direct access to D&D, things would have been much, much more difficult. Using the OGL allowed us to get off the ground in a big way – we would likely not be around if we had not been able to tap into that right at the start".[14] Similar themes about the "leg up" that the OGL offered to publishers echoed throughout the responses:

> "The OGL opened doors for us initially … The combination of quality [i.e., the high quality of the publisher's own materials] and the early demand for OGL product resulted in modest success such that we were encouraged to build a publishing company around the experience."[15]

> "Absolutely increase [*i.e.*, the use of the OGL has increased the publisher's sales of their own RPG products]. Everything I do in the gaming industry, even paid freelance work, is due to the fact that I was able to experiment and practice my writing start-to-finish under the OGL. … the freelancing I do earns me around $20,000 per year now, and that's all an outgrowth of my publication under the OGL."[16]

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[12] The percentage of their RPG products that publishers released using the OGL varied widely among respondents. Some indicated that all of their RPG products were released using the OGL, while many indicated that they released a mix of OGL and non-OGL products, though only two were willing or able to ascribe percentages to that mix. One publisher indicated that the number was as low as low as 15%, and one publisher indicated that the number had dropped from 100% ten years ago to "almost nothing" in 2017 (they indicated that this was a result of them moving away from creating products that supplemented games that used the d20 System (the system that the OGL was originally released in conjunction with, as described in Chapter 5) and moving towards creating products that supplemented proprietary systems.

[13] Respondent 015 (emphasis added).

[14] Respondent 018.

[15] Respondent 020.

[16] Respondent 057.

Among the myriad positive results of the OGL noted by respondents, a dominant theme was that it enabled new publishers to "break into" the industry. A little more than half of respondents described the OGL as effectively lowering barriers to entry, and all of them were of the view that this was a positive result.[17] The lowering of the barrier to entry was in part a function of lowering or eliminating the time and cost involved in developing an entirely new game system.[18] As one respondent described it: "I believe the role-playing industry was truly opened up in 2000 with the release of the OGL. ... This would not have been possible without the OGL". [19] Another common observation among respondents was that many of the publishers who used the OGL to gain entry into the industry subsequently expanded well beyond the OGL and the D&D-derived games that it initially catered to:[20]

> "In terms of the industry, it was enormously positive, because it has allowed so many publishers to get into the game. The OGL combined with print-on-demand has completely transformed the game industry. And a lot of companies catapulted themselves off of their OGL experience into making either non-OGL work or stretching the OGL so far beyond recognition but still, they got their start using the OGL. So in that respect the industry was enormously well-served."[21]

Another respondent tied together a number of different themes in commenting on the OGL, including iterative creative patterns and increasing the number of RPG publishers and players: "It allows publishers to build on the creative efforts of other designers, crediting all contributors for the use. It allows existing publishers to license our [sic] their games and settings, increasing the number of people playing and buying their own games."[22]

Some respondents specifically noted that the OGL resulted in a wider and more diverse community: "it made it possible for a community of fans to transition to being publishers without fear. It's a voice multiplier".[23] A number of respondents who expressed gratitude that the OGL had been made

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[17] Respondents 001, 018, 027, 033, 047, 050, 054, 062 ("I also think [the OGL] lets people like me come to the table. I like to be able to design for a system I know, rather than be, like, well if I want to get into game design, I better design my own system"). This sentiment was also widely echoed in the sampled online commentary.

[18] Respondent 054 ("It has allowed small-time publishers to get a foothold into publishing that [they] otherwise couldn't. … [T]hey could save production costs by not having to develop an in-house game system. That would cause, you know, I mean that takes time, that takes resources, and those things take away from profitability…").

[19] Respondent 027.

[20] Respondent 054 ("… you've got somebody like Green Ronin who were able to star up back in the early parts of 2000, put out some pretty neat and interesting products, that really got their name out there, and then today they're still going strong, and I believe the only OGL product they still produce is still *Mutants & Masterminds 3*, and it does not look much like it used to").

[21] Respondent 050.

[22] Respondent 015.

[23] Respondent 047.

available linked such gratitude to the "opportunity" that the licence provided for those who were "outside" a relatively closed industry and wanted access.[24]

The OGL was not the only contributor to these developments, of course. As noted in the quotation above, changes in technology, including broader access to the internet and the availability of less expensive publishing options (such as print-on-demand) were also contributing factors. And the OGL was not an unalloyed good, resulting simply in an ever-increasing cohort of new publishers releasing popular and high-quality products. The deployment of the OGL also resulted in what many observers have called a "glut" of poor quality RPG products. One respondent, while noting that the OGL resulted in the market becoming more democratized, also noted that there was a process of over-production followed by a thinning of the ranks as consumers sought quality.[25] A second oft-cited result of the OGL was an increase in the sheer *number* of games that are available, though there are conflicting views as to whether that has been accompanied by an increase or decrease in the average *quality* of the games published.[26]

Respondents frequently expressed a sense that the OGL had been a net positive for the RPG industry as a whole, for their own publishing activities within that industry, and, more subjectively, for them *personally* because the OGL had enabled them to create RPG materials in a way (*i.e.*, using the D&D

[24] Respondent 001 ("I have a very positive feeling about it in general. … I was very grateful for the fact that WOTC had done that [i.e., made the D&D 3rd Edition system reference documents available using the OGL]"). Respondent 020 ("Seventeen years later I am thankful and grateful for the opportunity [the OGL] provided…"); Respondent 062 ("… I really do think it's a great and generous tool, and I think it also benefits WOTC as much as it benefits us").

[25] Respondent 047 ("It's certainly helped clutter the marketplace, but the OGL was also on the rise during the advent and rise of digital-product marketplaces and cheap consumer-facing print-on-demand technologies, so it's only a component of that. It *definitely* contributed to the OGL/d20 glut of the early 21st century and not in a good way … the 'democratization' of publishing in general that followed from all those factors meant that it was easier and less expensive/risky than ever to publish crap. But a few publishers, including our company, managed to emerge from that as healthy new entrants to the field. The cream continues to rise to the top"); Respondent 015 ("Certainly there was a huge harvest of terrible dross as a result of the d20 licence, causing a damaging glut which it made it hard for a whole for non-d20 publishers to get a look-on, but that has passed").

[26] Respondent 015 ("I think that the OGL has clearly had an effect on the availability of games. Monte Cook's company came straight of the related d20 licence, as did Pathfinder. I'd argue that this demonstrates an increase in quality, and the very high sales of both companies has influenced price, lowering it"); Respondent 018 ("There is certainly much more product around because of it and no, not all of it is good, but you will always find some gems in the rough"); Respondent 027 ("I don't have numbers. However, I don't believe the RPGNow and DriveThruRPG [online markets for RPG publishers to sell their products] would be a present and major source of paid RPG content if the early 2000s works weren't of the OGL … the OGL has reduced a barrier to entry, so more creators can create content. The better products rise to the top (through reviews)"); Respondent 057 ("[the OGL] absolutely has increased the amount of games, and has absolutely decreased the overall quality of games. … I'm torn on this. With others, I think the OGL has produced a massive glut of poor-quality material. … So I dislike the OGL for its consequence of creating a sea of bad products I've had to work to rise above, but without it I wouldn't have had the opportunity to publish at all").

core rules) that they had long wanted to create them, and, as will be discussed in further detail later in this chapter, in a way that was unequivocally non-infringing. The positive views of the respondent publishers about the OGL and their experience with it extended to the commonly-held view that they would advise others to make use of the OGL for their own RPG publishing activities. Multiple publishers explicitly stated that they would "encourage" other publishers to use the OGL, or "recommend" it to them.[27] When asked what advice they would give to another publisher who was thinking of using the OGL for their own RPG products, the dominant tenor of the responses was an instrumental one, and one that was sensitive to the particularities of an individual's creative aims. Respondents indicated they would advise others to take the time to read and understand how the OGL functions. A number advised other publishers to make sure they were comfortable with the implications of the OGL's openness and the possibilities of others re-using their OGL-licensed content.[28]

Multiple publishers encouraged new users to be mindful of *how* they use the OGL, and to use it in a way that made it easy for other users to quickly identify what was being licensed as Open Game Content,[29] thereby indicating a concern with facilitating the community's use of the new OGC-designated content. A significant number of the publisher respondents took an overtly instrumental approach and advised that prospective OGL users should ensure that the OGL, and its attendant openness and restrictions, was "suitable" or "appropriate" for their publishing goals.[30] Many respondents indicated that they adopted a fluid strategic approach, mixing and matching open content and proprietary approaches as they deemed appropriate for particular projects. As one respondent noted, in a reversal of what might

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[27] Respondents 001, 062.

[28] "Imagine someone took your entire game under the OGL, made minor tweaks and sold it, would you be unhappy? If so, don't use the OGL." (Respondent 015); also Respondent 018 ("be aware that anyone can use the mechanics you create – if you are good with that, go ahead!").

[29] Respondent 033.

[30] Respondent 062 ("… big advice would be, it would really depend on what you are creating and why you are creating it … if what you are creating is something that you don't need WOTC IP [i.e., content that has *not* been made available under the OGL, such as a specific setting or characters] … then I would recommend … using the OGL and the System Reference Document, to create something then that you're putting out into the world"); Respondent 033 ("… first thing is, are you sure you need [the OGL]? What do you think you need it for? How would you use it?"); Respondent 039 ("I would ask why they want to do that [i.e., use the OGL], what their objectives are, and what they're trying to achieve"); Respondent 050 ("I'd ask them, 'why'? 'Why do you *need* the OGL for what you want to do? Unless you *need* it, at this point, unless you're going to be skirting some edges where WOTC might get worried about you, it's not really *necessary* any more, although if you're going to be publishing for old school stuff that was published under the OGL, then you'll want to do it"); Respondent 054 ("Is this [i.e., the OGL] the right tool for what you want to do? … I would ask, 'what is it that you want to do without the tool? What is the design purpose? What is it that you want to have happen in this?").

have been expected, his preferred strategy was to build up a customer base first using a proprietary approach, and then to release the product under the OGL later:

> "so that when you do, it's exciting to people. Because if you create something that no one is familiar with and bring it to market, no one cares if you make it OGL, because they're not invested in it yet. They're not thinking, "oh, how can I possibly make my own FATE book, or my own Drama system book", they're not having that equivalent thought about your thing, because they're not invested in it yet. ... Your audience comes from the good old fashioned ways that you get people excited in your game, which is you have something that nobody else is doing, that has an exciting engaging core activity, that has a fun world associated with it, and then once you start to get people on board, then they will get an additional hit of excitement from learning, 'oh now we're going to make this available [under] the OGL'"

As indicated by that response, while the mere fact of making content available under the OGL, of opening the content up for use by the consumer (and other publishers), possesses some element of commercial attractiveness to the RPG audience, respondents' use of the OGL was rarely an "all or nothing" approach. Respondents were aware that there were advantages to disseminating their products using conventional proprietary strategies, and sometimes made use of them either instead of or in conjunction with open strategies. In so doing, they were implicitly recognizing the potential limits of open content licensing, something that echoed the approach taken by D&D's owners both historically and currently: some products are released using the OGL and others are not. Precisely *why* respondents would use the OGL for a particular RPG appears to be a mix of a variety of considerations, as will be discussed below, ranging from their desired dissemination goals, to customer anticipations, to a more ineffable sense that some projects are a better creative "fit" for both the content already available under the OGL and the "type" of gaming experience they are looking to create.

Publishers were approximately evenly split as to whether the OGL had served as a "selling point" for their customers – five thought it was a selling point, while six thought it was not. As one publisher described it, "the OGL is a chassis, not a designator of quality, so I don't see it acting as a selling point".[31] Another publisher noted that while he did not think that the OGL was of much importance to customers, he thought it was primarily other publishers, particularly other publishers who were interested in making use of OGL-licensed material, who viewed the presence of the OGL as a positive feature.[32] Two publishers were of the view that the use of the OGL had previously (e.g., in the early- to mid-2000s) been

[31] Respondent 057.

[32] Respondent 054.

a significant factor in consumer decisions (particularly because the OGL's presence served as "consumer short-hand for 'D&D compatible'") but that it's importance had subsequently faded;[33] for both of these publishers, the use of the OGL in the contemporary marketplace largely served to indicate a particular "style" or "type" of gaming product (*i.e.*, "old-school", D&D-derived). However, those publishers who thought the OGL *did* serve as a selling point for their customers tended to be emphatic about its positive results: "the reaction to [the inclusion of OGL-licensed content in Kickstarters] was certainly positive and had a positive effect on our customers views of our company";[34] "it was very much a selling point";[35] it was "absolutely" a selling point.[36] When queried as to whether the presence or absence of the OGL was a consideration for the publishers personally when they made RPG-buying decisions, only one publisher indicated that it was.[37] The remaining publishers indicated that another publisher's use of the OGL would not affect their buying decisions one way or another;[38] one publisher explicitly noted that they were "well aware of the irony of being a third-party OGL publisher that doesn't play with third-party OGL products".[39]

The perceived impact that the use of the OGL had on the creative activity that makes up the game design process itself fell along a spectrum: many of the publishers indicated that the OGL had little or no influence on their game design process,[40] while others indicated that they were influenced by consumer expectations about the *kind* of material that would be licensed under the OGL, namely that OGL-licensed content would largely be "mechanical" (or, in RPG parlance, "crunch" instead of "fluff").[41]

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[33] Respondents 050, 054.

[34] Respondent 015.

[35] Respondent 018.

[36] Respondent 039.

[37] Respondent 027 ("I play RPGs for pleasure. And it [i.e., the use of the OGL by a publisher] is a serious consideration in the games I purchase").

[38] One respondent (001) indicated that "once upon a time it [i.e., the OGL] would have been a big draw – now, it's less so only in that there's so much more material that's been published overall. I mean the hobby seems to have become a lot more diverse in terms of the kinds of games that are being released now").

[39] Respondent 057.

[40] Respondents 015, 018, 027, 039 ("When I'm working on a design, nothing could be further from my mind [than the OGL]").

[41] Respondent 001 ("any product that was released under the OGL, there's the assumption that at least some percentage of it … would be open in turn, so that it could add to this growing body of open gaming content, and what most people wanted from that, or expected, in terms of open content, was more game mechanics rather than, sort of, background information or setting material or things of that sort. So there was a... it wasn't always explicit, but there was a subtle expectation that the material you were producing would always have this additional game mechanical content that could be added to the pool of material that was open. So it did influence the way that I wrote things, and some of them I suspect became a bit more "crunchy", you know, mechanically robust, I guess, than it otherwise might have been if it were released in a different way.")

Some publishers indicated that the relationship between creativity and licensing flowed in the other direction: the type of content they wanted to create and release could be determinative of their licensing strategy.[42] For example, because the OGL had developed certain connotations in the market about its being connected to certain *styles* of gaming (primarily "old-school" gaming and d20 System gaming), one publisher indicated that if they created a product with that kind of "sensibility" or game mechanic, then they were more likely to release that product under the OGL.[43] The terms of the OGL itself also impacted how some publishers approached marketing: for example, because the OGL prohibits claims of "compatibility" with D&D (*i.e.*, restricting by contract what a publisher would otherwise not be restricted by trade-mark law from claiming), one publisher stated that when he first started publishing RPG materials, he avoided using the OGL for some products precisely so that he could assert their compatibility with the industry's dominant RPG game, thereby presumably attracting more interest in his products.[44]

When asked if they would use the OGL for a future RPG project that was entirely new (*i.e.*, a project that was not merely a supplement to an existing OGL product or intended to be a d20-based system, but was conceived of as an entirely new game system unrelated to prior projects), nearly all interview respondents indicated they would at the very least consider using the OGL for such a project. Only one respondent indicated that they would definitely not use the OGL for a future new project, on the basis that the OGL was too closely associated with the d20 System of 3rd Edition D&D.[45] Some respondents stated that they were not predisposed to using the OGL for all of their projects, but would use it only when it was "suitable" for a project.[46] The generally congenial disposition towards the OGL and its results – what were often positively noted as the consequences of the OGL, such as mild increases in revenue, increased creativity by others (the "bigger pie" phenomenon) and the provision of opportunities to improve one's craft – were often cited as reasons for an inclination for continuing to use the OGL:

> "… it's worked well – a number of companies have produced great new games or supplements based on our lines, which is what we really wanted. As a gamer I'm also

[42] Respondents 047, 054, 057.

[43] Respondent 054.

[44] Respondent 033.

[45] Respondent 050. The respondent was of the view that the OGL was too closely associated with the d20 system, and expressed the concern that if he created a brand-new game or product that was *not* d20-based, his customers were "going to feel cheated", *i.e.*, they would associate the "OGL" name with the d20 system and so would be expecting a game that used the d20 system and would be disappointed to find that was not the case.

[46] Respondent 018 ("we used the OGL when it was suitable, and something else if it was not").

> happy to see new games. In addition, its good training for potential [writers of the company's product lines]. … it's improved our revenue modestly … [and] using our license has enabled small new publishers to sell products, which we consider a positive thing."[47]

The majority of respondents who were open to using the OGL for a future project indicated that their decision to use it would be largely an instrumental one: would they be targeting the types of customers for whom the use of the OGL would itself be a selling feature or attract their attention,[48] would they want to draw on the existing stock of OGL resources for inclusion in their new project,[49] or would the OGL be a good "match" or "suitable" for the *type* of game envisioned – multiple respondents indicated that they could foresee using the OGL for certain *kinds* of projects, though most were unable to articulate what criteria would make a project a suitable one.[50] Other respondents were more markedly mercantile in their approach:

> "that's the kind of scenario I could see, you know, where if like I was going to release something that I knew I wanted to put out into the wild for other people to glom onto, and they would be deliberately building on the core that I made … that's something that I could see doing. … let's say I do that, and then somebody over here comes out with this really awesome setting for this, like a city or whatever, and it gets great reviews and everybody's talking about it and they're selling a zillion of them, and all those people are going to want to come back to the thing that it's made for [i.e., the core set of rules released by the original licensor], that's the thought"[51]

The responses describe a group of OGL users who are generally enthusiastic about the licence that they have chosen to use, who would encourage others to use it, and who think it has had a positive impact for their own RPG activities and the RPG industry as a whole. Perhaps just as importantly, there is a complete *absence* of negative thoughts about the OGL among the interview respondents. None of the

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[47] Respondent 015.

[48] Respondents 001 ("it's more the audience, the sorts of people I was aiming to have as customers") and 054 ("it depends on the audience I want to sell it to as well. … If I'm looking at say, an old school crowd, I definitely want to go with an OGL-based, OSR [Old School Renaissance] sort of game. Not that I necessarily need to do that every single time, but that would be a consideration").

[49] Respondents 001 ("I would most definitely consider using it again if I were doing an original project of any size. Because it's just a store... I mean, having access to those SRDs is remarkable, it's a lot of material to draw upon, even if you're only taking a small portion of it"), 054 ("… part of the decision is also based on, how much do I want to write. With the OGL, I get some distinct advantages. I'm not very interested in writing long swathes of equipment lists or combat rules. So I can borrow those from somebody else and just cite it properly... and then I can concentrate on the things I like to do") and 062.

[50] Respondents 033 ("that would really depend on what the needs of the project would be … maybe yes, maybe no, depending on the needs of the project"), 054 ("it would depend on what the [new] game needs to do. … For me, I think of, what is it I want first, what do I want it to do first, and then I think, well what is the appropriate system for that") and 062 ("it would really depend on what you are creating and why you are creating it").

[51] Respondent 050.

respondents spoke negatively about their use of it, or indicated they would recommend others not use it. None of the respondents offered a cautionary tale about "losing control" of their creative expression, or expressed regret about their decision to use the OGL. Only one publisher, after using the OGL to establish their name in the RPG industry, eventually moved entirely away from its use, citing, in part, the association of the OGL with the d20 System, a perception that the publisher viewed as limiting potential sales and creative options.[52]

As noted in the Introduction to this chapter, views of the OGL were not entirely uncritical. While most of the publisher respondents indicated that, if given the opportunity, they would not change anything about the terms of the OGL, one aspect of the OGL which appears to have caused some dissatisfaction is the difficulty of distinguishing between "Product Identity" and "Open Game Content".[53] One publisher indicated they would alter the OGL's restrictions on making statements of compatibility (*i.e.*, changing it to allow for such statements).[54] One publisher suggested making the OGL more user-friendly not by altering its terms, but by providing more examples or tutorials of how to properly use it.[55] One publisher expressed the view that the "DM's Guild" model that WOTC implemented for D&D's 5th Edition – by which D&D's publisher provides third parties with access to its own online retail platform, including storefront and payment processing capabilities, in exchange for receiving a portion of sales proceeds – is really the optimal evolution of the process that began with the OGL; in other words, not simply opening up the

[52] Respondent 020 ("Ultimately, we determined that having the D20 logo on our products made them less desirable in the marketplace. As well, through the creation of our RPG products, we established a thriving audience around a rich IP and we wanted to make sure we had the creative latitude to do what we wanted with it. Restrictions within the OGL hampered that, so we eventually abandoned it for both marketing as well as creative reasons." The "creative reasons" mentioned in the response refers to the fact that because the D&D OGL designates certain materials as "Product Identity" which *cannot* be used by OGL licensees, some publishers will avoid using the OGL if they want to make use of something that is designated Product Identity. So, for example, some of the items designated as Product Identity in D&D are monsters that are particularly iconic and beloved by many D&D players (e.g., the "beholder" and "mind flayer"); on a strict reading of the D&D OGL Product Identity restriction, even using the word "beholder" is prohibited – and so someone wanting to write an RPG product that uses the term "beholder" will want to avoid using the OGL and thereby being restricted from using it for fear of running afoul of the Product Identity restriction. As discussed in Chapter 6, Parts V-VII, Wizards of the Coast's use of the OGL in connection with D&D is comparatively restrictive, as they designate a fair amount of their material as Product Identity; that restrictiveness is entirely optional, and other publishers who use the OGL, such as the publishers of the FATE game, do not have such extensive Product Identity designations).

[53] Respondent 027.

[54] Respondent 033.

[55] Respondent 027

content and making it available for use, but taking the additional step of providing a centralized online marketplace in which all the content can be marketed, rated and sold.[56]

Finally, not all consequences of the OGL were positively viewed. Chapter 6 noted the criticism, even by Ryan Dancey, the originator of the OGL, of the "glut" of D&D / d20 System product that the OGL made possible. In a gaming environment that prizes innovation and idiosyncracy, the sheer volume of OGL-derived product was viewed as "overkill", "a huge harvest of terrible dross", "oversaturated", "clutter", "nonsense and crap".[57] But many of those who conceded that there was a significant amount of poor quality product generated by the opening up of the market balanced that against the opportunity that the OGL had provided to so many:

> "I'm torn on this. With others, I think the OGL has produced a massive glut of poor-quality material. With such a broad license, allowing such poor-quality work to flood the market, it's hard to shine. So I dislike the OGL for its consequence of creating a sea of bad products I've had to work to rise above, but without it I wouldn't have had the opportunity to publish at all. (I'm also well aware others would lump my products in with the "bad products" that have "flooded the market," so tastes differ.)"[58]

(b) *Instrumentality*

Uniting the multifaceted descriptions provided by the respondents of their OGL use is a sense of deliberate instrumentality: they all obviously made a conscious decision to use the OGL,[59] but more than that they all appear to have *considered* their use of it, and in their responses they identified specific reasons for that use. The instrumentality emerging from the responses exists along a number of axes: some are purely "efficacious" reasons (such as efficiency and expediency) that would be immediately familiar in terms of a conventional utilitarian economic analysis; others are reasons that could be characterized in terms recognizable by scholars such as Lerner and Tirole (*e.g.*, signaling of marketable skills) and Elkin-Koren (*e.g.*, other-oriented and eudaimonic purposes such as sharing and skill-building that also have market value); still others are best understood using the communicative copyright frame (*i.e.*, the community-constitutive role played by the OGL as a badge of belonging and norm-setting for

[56] Respondent 050.

[57] Respondents 001, 015, 020, 047 and 050, respectively.

[58] Respondent 057.

[59] By this I refer to the fact that a publisher who uses the OGL must, at minimum, include a copy of the OGL in their own published materials; every respondent indicated that they had read and made an attempt to *understand* the terms of the OGL. That can be contrasted with the manner in which someone might "agree" to an online service's Terms of Use by clicking "I Agree" or some similar action.

RPG community). The following discussion begins with an examination of the efficacious motivations identified before moving on to discuss the community-constitutive elements in the subsequent section. I highlight that most respondents identified a variety of reasons or motivations for their use of the OGL, and that the following summary of the responses and online data focuses on those reasons and motivations that recurred throughout the data.

(i) From Commercially Efficacious Motivations…

Many respondents characterized their use of the OGL at least partially in nakedly instrumental terms, indicating that they viewed use of the OGL as providing a commercial advantage to which they otherwise lacked access. Many interviewees described the OGL as an efficient way to create RPG materials and enter the marketplace more quickly because it provided no-cost access to pre-existing RPG material created for the most popular RPG in the market that they could use to quickly create new content.[60] These responses tended to use terminology that was explicitly economic or coloured by economic considerations: the OGL was "efficient", it saved time, it made the creative process easier and less onerous. Some respondents noted that the OGL and the d20 System that was originally licensed under it had, in some sense, begun to function as an "industry standard" that they wanted to adhere to, or that the promise of compatibility with a large number of other RPG products was particularly attractive.[61]

One respondent mentioned the desire to obtain "feedback" from consumers so as to improve future product offerings – by making the product available without friction, and building a rapport with the audience simply by making it available, the audience would provide feedback in an iterative loop of

[60] Respondent 001 ("… one of the things too about it is that if something is released under the OGL, some portion of those other materials have to be made open as well, so it meant that there was this ever-expanding body of materials to draw upon that you could take things from other publishers and repackage them and reuse them and expand upon them"; "… mechanically, in terms of producing a product, you could use material that was already made available out there. … it actually was a time-saver in some respects because it provided this store of information and of text even that I could re-use, rather than sort of going over the same ground again and re-inventing the wheel. It saved a lot of time in development for myself…. So, it was efficient."); Respondent 033 ("that's why I went with the OGL, because I was taking a lot of text from these other games that had used the OGL … there was already a lot of ready-made text there, it was really a no-brainer to go with that license. … Why re-write every single thing for the hell of it, when I could just copy the stuff I find boring but necessary and re-write the things I'm more excited about"); Respondent 050 (responding in the affirmative to a question about the OGL offering "efficiency"); Respondent 054 ("With the OGL … I get some distinct advantages. … I can borrow [text from other OGL-licensed games] from somebody else and … then I can concentrate on the things I like to do"); Respondent 062.

[61] Respondent 001 ("it was the compatibility of it that was the big draw"); Respondent 015 ("We offered the OGL because it is an industry standard"); Respondent 047 ("OGL … is more familiar to older folks in the RPG community so even if it is more baroque as licences go it's worth offering for those people who are already familiar'); Respondent 057 ("All the other third-party publishers were using the OGL, as was Paizo, so it was the most widely-used – and widely-discussed, and therefore best-understood – licence to publish under").

communication.[62] As noted in previous chapters,[63] there has been recognition that transposing the concept of "iterative improvement" from the context of open source software licensing is an awkward fit with creative expression; none of the respondents identified using the OGL to improve a particular OGL-licensed product (*i.e.*, releasing Product X under the OGL and then relying on downstream uses of Product X to *improve Product X*), rather they seemed to view the OGL as a means to seed material into the market and that would help them identify what was popular by seeing it widely shared (which would prompt them to create other products that were similar to or derivative of Product X) or they spoke in broader terms of the OGL prompting improvement in RPG products *generally* or prompting more engagement in the community. Many respondents indicated that the network effects of an open content licence were a primary motivating factor in their decision to adopt it, and indicated that the adoption had, in fact, resulted in increased sales of their product; often the anticipated or observed consumer behaviour is that the audience will experience a downstream or derivative product, and will be inclined to "come back" to the originating source product that was licensed.[64] As one respondent noted, their

> "primary motivation for OGL … is about adoption. The more readily available a system, the more likely it will spread. … while one could argue some sales might be lost by making a system available for free and for re-use for free, the benefit is one of marketing and audience-building".[65]

The same respondent noted that allowing other publishers to create materials helped "support" the original game, thereby removing the cost and risk of continually creating new materials from the original publisher/licensor.

A closely-aligned set of responses described an instrumentality to the OGL's use that was oriented more towards the relationship between the creator and the wider RPG community. Many

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[62] See, *e.g.*, Respondent 062.

[63] See, *e.g.*, Chapter 6, Part IV.

[64] Respondent 015 ("the more [game] players there are, the more likely they are to pick up our games, and make [our game] a go-to system"; the OGL "allows existing publishers to license out their games and settings, increasing the number of people playing and buying their games"; "we offer it for [two games published by the respondent] so more people play [them]"); Respondent 039 ("… on a more practical business level you're hoping that by making the rule set available you will expose more people to it and they will come back to you and buy more of your books"). Respondent 039 also described a situation where his company's set of OGL-licensed rules was adapted by another company for another style of game, and expressed the view that players of the adapted game would be inclined to "come over and check out some of our [other games, including the original game that was adapted]"). Respondent 050 ("… if I was going to release something that I knew I wanted to put out into the wild for other people to glom onto, and they would be deliberately building on the core that I made … all those people are going to want to come back to the thing that it's made for, that's the thought").

[65] Respondent 047.

respondents noted that using the OGL gave "access" to a community of gamers who had coalesced around OGL-licensed materials.[66] However, the instrumental use of the OGL was not always directly linked with driving sales of the licensor's product – in some cases, respondents were explicit in their view that one reason they used the OGL was the expectation that licensees would take the original licensed product and create their own stand-alone games that would be sold on their own and would compete in the market with the licensor's own products.[67] Some respondents specifically noted the beneficial reputational effect that adopting the OGL had for them: "… to a large part having it available is it's own positive emotional benefit, that the people get excited and it makes the company look good, it makes the rules accessible to people, they like it…".[68] The corollary to that is that making the content available to consumers using the OGL is sometimes viewed itself as a "reward" for those consumers.[69]

Other respondents lauded the OGL because its use enabled a collaborative form of creativity that would result in innovation in the RPG ecosystem that would be enjoyed by all community members: "the OGL allows experimentation at various levels (entire systems, sub-systems, rules element, or procedure). I believe innovation in RPGs accelerated with the advent of the OGL and the increased access to collaborative technology."[70] Other respondents remarked on the fact that the terms of the OGL enabled

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[66] Respondent 001 ("One of them, the most important one I guess, probably, is that quite a large number of people were already familiar with the rules and concepts that were covered under the OGL … so by using material, publishing material, under the OGL, you got access to that sort of market of people who were already familiar with that. And I think a lot of publishers large and small started to realize 'oh, we have access to this market…' … …it opened up a segment of the market that might otherwise not be as interested in what I was doing"); Respondent 015 (indicating that they used the OGL to create a D&D-derived fantasy RPG to appeal to that market); Respondent 018 ("the OGL gave direct access to the D&D market, at the time the largest segment of the RPG market … [the OGL offered] prying open the D&D market, above all else. It was simply a way to access the largest possible market"); Respondent 020 ("… by using [the OGL], one could tap into the existing market of D&D players. This is a huge advantage as the alternative is trying to create an audience from scratch"); Respondent 033 (noting that "stores don't want to give shelf space to adventures for obscure games" and so using the OGL for his RPG adventures was a way to draw attention to his products); Respondent 054 ("… we really wanted to take, a lot of people that I was online with at the time, really wanted to take advantage of it [i.e., the popularity of 3rd Edition D&D]. There was a system that was already in place that people knew, and I liked the idea of using a system that everybody was very familiar with. … And I felt that the flexibility that I had of using someone else's tool set outweighed the limitations I had of using somebody else's tool set").

[67] Respondent 039 ("the [system reference document] for [respondent's game] is not a playable game unto itself. It is a toolkit for designers to take and build upon to create their own playable games").

[68] Respondent 039. See also Respondent 062 (expressing the view that WOTC's decision to move back to the OGL for D&D's 5th Edition was "sort of a way to build goodwill" with RPG community members).

[69] Respondent 039 (describing Kickstarter fundraising campaign where one of the "stretch goals" (*i.e.*, a result that would be triggered only if a sufficient amount of funds had been raised) was making the game materials available via the OGL; the respondent described that as "an effort to reward people who participated in the Kickstarter and got excited about the Kickstarter". The stretch goal was achieved, and the materials made available using the OGL).

[70] Respondent 027.

them to retain authorial credit within the RPG community for their creative expression. One respondent specifically identified the fact that the terms of the OGL require that contributors be accorded credit as a motivating factor for using the licence.[71] A different respondent noted that he particularly liked that aspect of the OGL (what he referred to as its "quasi-provenance feature") because it was reflexive: it not only ensured that he would receive credits in the eyes of others, but it "help[ed] [him] discover where else [he] may want to explore in both [his] reading and [his] writing".[72]

Taken together, these responses describe a set of decisions to adopt the OGL that are best characterized as *commercially* or *efficaciously* instrumental: the OGL facilitates the achievement of certain ends that can fairly readily be described in economic terms – using the OGL is more "efficient", it "saves time", it reduces labour, the network effect functions as a kind of proxy for marketing and promotional expenditures, and its use helps to build reputation and goodwill. But as is hinted at in the later responses, there is also a social component to the use of the OGL: the reasons cited for its use make the most sense in the context not of a raw *market*, but in the context of a community within which significant market activity occurs.

(ii) … To Community-Constitutive Motivations

As alluded to the in the responses noted at the end of the preceding section, I found that many respondents used language that contained either explicit or implicit appeals to associational norms or ideals. Uniting those norms and ideals is a concern with contributing to or otherwise participating in an ongoing communal conversation. One prominent recurring element was the notion of the OGL providing a mechanism that enabled *practicing* creative expression and offering a means of *learning* how to create RPG materials. Multiple respondents viewed one useful function of the OGL as its capacity to facilitate "training" of new talent, whether their own[73] or that of others.[74] In part, this was a reflection of the OGL signalling a change in the relationship between publishers and consumers:

[71] Respondent 015 ("We offered the OGL because it … ensures proper credit to its contributors…").

[72] Respondent 027.

[73] Respondent 062 ("… I wanted to build up my design chops … and so the blog was a way to do that, and get stuff out into the world and get feedback…"); Respondent 057 ("Everything I do in the gaming industry, even paid freelance work, is due to the fact that I was able to experiment and practice my writing start-to-finish under the OGL").

> "it really changed the relationship between individual creators and WOTC, who held the copyrights on D&D, because it was much easier … formally sanctioned, it was *encouraged* by WOTC to actually go ahead for individual creators to make materials that were explicitly compatible with the game".[75]

One respondent noted that his work on D&D's 5th Edition, using OGL-licensed material and making it available via the DM's Guild online marketplace had brought him to the attention of WOTC, the publishers of D&D, who had invited him to participate in one of their formal writing groups.[76] Multiple respondents expressed in positive terms the view that the OGL, either generally or their own particular employment of it, had resulted in additional new publishers joining the RPG market.[77] As one described it, the introduction of the OGL, which provided an "opportunity" to create materials compatible with D&D, the most popular game in the RPG industry, "was tantamount to the discovery of gold in California in the 1800s, and it created a virtual gold rush for RPG publishers".[78] As noted above, one respondent stated that "using [the OGL] has enabled small new publishers to sell products [based on the licensor's OGL-licensed materials], which we consider a positive thing"[79] – that warrants highlighting because each new publisher that is enabled by the OGL is *de facto* a competitor within a relatively small market. The attention paid in these responses to the expansion of the cohort of RPG publishers via the OGL – that is, the increase in the number of people who could *participate in the creative process of being RPG publishers* – echoes throughout the interviewee responses. What is noteworthy about it is that the sentiment is community-oriented: it reflects happiness not just about the OGL enabling *the respondent* to create, it reflects happiness about *other people* being empowered to create.

The concern with and appreciation for a multi-nodal community of creative participants is also reflected in the multiple responses that cite "sharing" as a motivating factor for use of the OGL. The

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[74] Respondent 015 (describing the use of the OGL as "good training" for "potential writers" who might one day be hired to develop materials for the respondent's published games); Respondent 047 (the OGL "made it possible for a community of fans to transition to being publishers without fear. It's a voice multiplier"). Respondent 039 expressed the view that WOTC was using the OGL in conjunction with D&D's 5th Edition to facilitate WOTC's identification of promising new talent.

[75] Respondent 001.

[76] Respondent 062.

[77] Respondent 018 ("[the OGL] allowed small publishers to gain a lot of ground when tied to the d20 licence"); Respondent 047 ("a few publishers, including our company, managed to emerge from [the combination of the OGL, digital-product marketplaces and inexpensive print-on-demand technology] as healthy new entrants to the field").

[78] Respondent 020.

[79] Respondent 015.

notions of sharing that recur throughout the responses are concerned not only with the act of sharing that is undertaken by the respondent, but by the further acts of sharing by *others* that the OGL enables. Some respondents referred to either a philosophical predilection for sharing or a hedonic satisfaction derived from the act of sharing:

> "I believe it is a personal moral imperative to share my creative outputs, and provide a framework for legal derivatives, remixing, translation and expansion. … I believe in sharing my creative endeavours and the OGL is a great mechanism for doing so".[80]

> "… from my standpoint as a creator, it's exciting to me that other people will take the ideas in [my games] and use them for other purposes. And perhaps mix and match them quite a bit and go in different directions".[81]

As indicated by the latter quotation, concepts pertaining to sharing were evident in many interviewee responses, though in a variety of modes. For some, sharing was simply *the* reason to use the OGL: "… the point of [the] OGL from the point of the person generating the material is to put stuff out there for other people to use".[82] For others, the OGL-facilitated act of sharing had beneficial downstream creative effects, which in turn could yield additional consumer purchases:

> "[the OGL is] meant as a … here is what we've done, go create your own thing, right? And I think it's great because it helps out both, right? It makes it super easy for Kobold Press or Roll20 or whoever to put out awesome, awesome 5th Edition content, which then makes other people say, 'well, now I'll go buy the Player's Handbook so that I can play this great supplement, adventure'".[83]

Concerns with sharing were also a prominent feature of the sampled online commentary. The following quotations demonstrate the nature of much of the online discussion as it relates to the concept of sharing:

> "Creative contributors for what purpose? To make money off your creativity? No, to share that creativity. Getting a little something in cash is nice once in a while, but really, the true reward for me is hearing about people using and reading stuff I had a hand in. The OGL made that possibility seem more likely and indeed it did make it more likely. … I actually figured most long term roleplayers felt the same way about their own work. Talking with them seems to suggest the drive to create and share that creativity is not a small factor in the RPG community, at least that has always been the feeling I get from our crowd."

> "Every single player is a potential GM, and every single GM is a potential writer/publisher. And they're all passionate and creative, and that when you inspire them they may very well want to share. And that motive still dwarfs the profit motive in this industry. And so some of us, at least, look up to and want to build on those who share the most, and share the nicest. … I don't want to build a brand identity; I'm not even going to be charging for my product. I simply want to share what I've done in a completely legal and aboveboard

[80] Respondent 027.

[81] Respondent 039.

[82] Respondent 039.

[83] Respondent 062.

fashion without having to retain an offshore law firm."

> "Which brings me to another important point: the Open Game License and SRD. Together, these two things "freed" D&D forever, making most of its core concepts and ideas the property of us all. Looking back now, a decade later, as piles of D20 shovelware clogs up bookshelves and (no doubt) landfills across the world, it's hard to remember just how amazing things felt back then. To a lot of us, it felt, if only briefly, like we were on the cusp of a new Golden Age, one where gaming was every bit as vibrant, varied, and imaginative as it had been back in the heady times of my youth. Sure, there was a lot of junk being made, but there was also a lot of amazing product being released and, best of all, shared. For several years, it was 1979 again, at least for me, and I'm glad I got to experience that."

One respondent offered what seemed to be a more straight-forwardly mercantile mindset to describe their reasons for adopting the OGL: "a number of companies have produced great new games or supplements based on our lines, which is what we really wanted";[84] however, further questioning revealed that what they "really wanted" was not that others would create new games or supplements that would then redound in a commercial manner to the original licensor, but rather it was the *simple act of creation itself* by others that was desired, and the licensor was agnostic about whether that additional creative activity resulted in further sales for the originating product.

Many of the foregoing motivations – whether pertaining to sharing or feedback or increased sales – have implicit dialogic and communal elements: for example, sharing can only occur within a relationship or a set of relationships (*i.e.*, there has to be at least two people in order for there to be a successful act of "sharing"). More explicit notions of "community", and the importance of nurturing a community, are replete throughout the interview responses. Suffusing many responses were simple celebrations of the OGL's facilitation of creative activity; "[the OGL] set off a whole wave of creativity that I found really wonderful"[85] exemplifies a recurring theme in the responses of multiple interviewees. The answers of nearly all respondents included statements in which notions of community, creativity and collaboration were intertwined. One response offered a particularly expansive articulation of themes that were common among interviewees:

> "[the OGL] has had a strong sort of creative influence and sort of a general message to gamers about what tabletop role-playing games are, which is that it's still something that is participatory, that it requires your creativity, in which your creativity matters and other... and fosters a sense of community in a world where the things that people engage with in the world of entertainment, particularly nerdy things, are generally the property of vast

[84] Respondent 015.

[85] Respondent 001.

> mega-corporations and although certainly these tiny companies that make role-playing games, most of them are tiny, Hasbro of course is a big publicly-trade company, that there is still a sort of a spirit mutual cooperation and the idea that you would try to lock down game rules and make it difficult to be creative with them and use them has sort of been pushed back to the fore, so the idea that is a creative community rather than just an audience of passive consumers is I think one of the things that is really strong about role-playing games"[86]

Many of the interviewees shared these sentiments of celebrating participatory creativity, and their responses suggested that use of the OGL itself was a performative act, demonstrating solidarity with a dialogic, interactive and constantly flowering form of imaginative community engagement. As one respondent noted, the kind of creative ferment that occurred when people were using OGL-licensed materials and generating content for an OGL-licensed game provided validation and created its own vibrant dynamic of use:

> "… when people do that, it's advertising not only the game itself, because you never know when someone's going to be clever enough to get their stuff in some avenue that you haven't, but it communicates a vibrant community for the game. That it's not just, I'm not just some idiot sitting here pushing my stuff, that people actually play it and they're enthused enough about it that they're going to put their own energy and effort to do a publication for it"[87]

One respondent celebrated the fact that one player had taken the respondent's OGL-licensed content and made it available via a searchable, hyper-linked website, thereby providing a "great help to our community".[88] The desire to be "part of a community", and the OGL's facilitation of activities – such as creation and dissemination – that lead to that feeling of inclusion were also noted.[89] One respondent, publisher of a notably popular RPG, stated that the OGL played a causal role in "building" the "community and audience for the system that we [have] today", and that continuing to provide OGL-licensed materials plays a role in "keep[ing] the community of players and publishers happy, and has given [their game] some real legs as an emerging brand in the field".[90] Again, the responses indicate that the OGL is being instrumentalized in a way that is particularly consonant with the concepts at the heart of the

[86] Respondent 039.

[87] Respondent 033.

[88] Respondent 015.

[89] Respondent 039 ("I think that is maybe where we're seeing the energy that originally lead to the OGL explosion, I think we're starting to see more a move towards marketplace models [such as WOTC's DM's Guild online marketplace for D&D's 5th Edition, in which WOTC allows OGL-licensed materials to be sold] as doing all of the things that people wanted from OGL, plus the ability to make money doing it and to feel like more of a community").

[90] Respondent 047.

communicative copyright account: it is not just about generating and attending to the needs of an *audience*, the OGL is being used to develop and sustain a *community* (within which an audience is embedded). The notions of marketing, facilitating, sharing, and community are reflexive, each catalyzing the other:

> "[With any OGL-licensed material] you are hoping to, on a creative level, see your design ideas percolate through the world of gaming, and so it's always exciting to see other people do stuff with those and treat them less like a proprietary thing that you keep in a vault, and more like, here's a set of tools that I would like to see other people make use of. You know, a metaphor might be in film, the first person who developed the tracking shot didn't go out and get a patent on the tracking shot, that just became a thing that became part of the general vocabulary of film, and so from my standpoint as a creator, it's exciting to me that other people will take the ideas in [the respondent's OGL-licensed games] and use them for other purposes. And perhaps mix and match them quite a bit and go in different directions."[91]

One respondent, whose initial engagement with the OGL (commencing at the time of its release in 2000) arose in the context of a group of players and publishers who interacted through online forums, explicitly cited "giving something back to the community" as a primary motivation for using the OGL:

> "we wanted to do something, we were all very motivated by giving something back to the community. We had all, everybody in the group was semi- or quasi-professional but nobody was like all the way professional at the time, so we felt that this was a good way to hone our skills while giving something back to the community. Because we all really kind of bought into this whole open gaming idea, where everybody would work on a similar system and there would be a sense of community through it all. … So we liked that idea quite a lot actually."[92]

As noted by the same respondent, the OGL was re-purposed by the RPG community; as described in Chapter 6, one of the primary rationales for using the OGL as espoused by its initiator, Ryan Dancey, was to drive sales of core D&D products. But once the RPG community began using the licence, its function, as perceived by some of those using it, was transformed: "I think the idea [of the OGL] became more of this community of 'hey, we all have this shared set of tools that we can use and that we can create things for, let's do that and constantly build something better each time'".[93]

Multiple respondents made note of a particular salutary effect that the OGL had: effectively failure-proofing the D&D game by making its core freely available, thereby preventing a scenario where a bankruptcy by its owner (or a decision to simply stop publishing the game) would leave it untouchable by

[91] Respondent 039.

[92] Respondent 054.

[93] Respondent 054.

fans. The OGL, in other words, made the core D&D materials freely available, in perpetuity, for the RPG community. Additionally, having access to older, out-of-print materials (something made possible by means of the "reverse-engineering" function described in Chapter 6 that lead to the "Old School Renaissance") was a boon enthusiastically cited by numerous respondents: "I firmly believe without the OGL, there would've been a serious danger of losing access to previous play styles, creative efforts and even the back bone of role-playing that D&D represents".[94] In this regard, the OGL was described by multiple respondents as functioning as an "intellectual property insurance policy", preserving via openness the copyright-protected materials that might otherwise be "lost" due to management neglect or an unfavourable business climate:

> "The purpose [of the OGL] as I understood it, is, going all the way back to the late 90s, when [Ryan] Dancey was trying to keep, essentially, what then was 2nd edition D&D alive, from falling, 'cause if the company who held it fell apart, and they say the copyright went into holding of some giant corporate conglomerate who didn't care, then what would happen? Well, nothing. It would sit there. Good example would be something like, say, the Star Frontiers rules [an out-of-print game from the 1980s], which some people like, but there's really nothing you can do about it right now, or do anything with it. With the OGL, this was a means to keep this in the hands of at least somebody who could do something with it"[95]

(iii) The OGL as Solvent of Risk and Confusion

The relationship among the OGL, those who use it, and the communities in which the use occurs can be understood by having sufficient regard to the OGL's effect on a particular cluster of sentiments: confusion, fear, uncertainty, and the apprehension of risk. The OGL appears to function so as to convert those sentiments into more positive attitudes of reassurance – trending towards, if not quite entirely reaching, safety, security, and comfort. Half of the respondents specifically and explicitly identified the fact that the OGL offered a form of security or comfort in the face of uncertainty or fear relating to intellectual property rights infringement. For example:

> "the OGL, whether it does it or not, the perception is it provides a sort of like a shield"[96]

> "[the OGL] gives me legal cover … I have an implicit guarantee that they're not going to sue, because they're already giving me a licence. And that licence, even though it's an open licence, I'm still using it, and they're still bound by it. As long as I don't violate the

[94] Respondent 027. Also Respondent 001 and Respondent 033 (the OGL was created "specifically so that if for some reason the people who owned D&D went out of business or stopped publishing D&D, that D&D could survive").

[95] Respondent 054.

[96] Respondent 033.

terms of the license, I should be covered"[97]

"… the safe harbour of the OGL was very appealing to me"[98]

The fear of being sued for copyright infringement for creating "derivative" RPG materials prior to the introduction of the OGL was mentioned by many respondents;[99] by evidencing the grant of permission and the invitation of inclusion from the owners of D&D, the OGL, as noted by another respondent "made it possible for a community of fans to transition to being publishers *without fear*".[100] As one respondent described his reaction to the introduction of the OGL:

> "When I first saw the OGL in 2000, I was immediately interested. It created clear guidelines on what you could leverage and reproduce and what you couldn't. I loved that there was a SRD for 3rd edition D&D rules. I saw a fertile ground available to play, develop, and explore. Knowing this, I felt comfortable and assured, that content would be available. (I remember the dark days of TSR when they were using lawyers to try and fight to wall off content. …)"[101]

The same respondent repeatedly reiterated his view that he took great comfort in knowing "where the lines were", and, when asked to describe the benefits of using the OGL, responded "the benefits are a sense of security. If I follow the licence, I know what I can and cannot use".[102]

The legal uncertainty surrounding the extent to which copyright law protected existing D&D materials, and the history of TSR, Inc.'s aggressive enforcement of its purported rights, discussed in detail in the previous chapter, was the backdrop for the positive reaction of many respondents to the OGL:

> "… without [the OGL], I'm on unsteady legal ground creating rules systems and adventures for existing games. I feel like the work to publish my own *Call of Cthulhu* or *Deadlands* or *Torg* [NB: all games that have *not* been released using an open content copyright licence] adventure would be a long, uphill battle and I might not end up with any rights to do so anyway. The OGL makes my rights clear."[103]

Multiple respondents also couched their sense of security within the context of an acceptable trade-off;

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[97] Respondent 050.

[98] Respondent 054.

[99] For example, Respondent 001 ("… some people didn't want to get into that for fear of being sued by whoever it is that held the copyright. When that changed, it made it very, very attractive to people to go ahead and start doing this … So, seeing that, I suspect, is part of what encouraged me to do it on my own"; the OGL "opened up a market that previously was always there but many people weren't willing to take the legal risks that were involved").

[100] [emphasis added] (Respondent 047).

[101] Respondent 027.

[102] Respondent 027 ("I wanted to share what I had done, and do so in a safe way for others to both share and extend"; "the [OGL] created a stronger sense of where the lines were"; "the purpose of the OGL is to create a clear safe harbour for sharing content").

[103] Respondent 057.

while accepting the OGL meant they agreed to certain limitations (*i.e.*, not using materials that had been reserved as "Product Identity"), the sense of assurance arising from decreased uncertainty meant that they were willing to make the trade:

> "Having that peace of mind, that I'm on WOTC's good side, is more than enough to make up for the few limitations that are imposed on me".[104]

This enabling of the creative activity that defines a community of OGL creators and players should be understood as part of the community-constitutive role played by open content licences that was identified in Chapter 4. Nic Suzor and Brian Fitzgerald have described the "certainty and clarity – and constitutional foundation" that open content licenses can furnish for a community.[105] To be clear, this is not an assertion that the OGL (or another open content licence) itself *creates* the community, but an assertion that such a licence imparts a particular complexion to an existing community and can assist in enlarging that community (or the range of creative activities that take place within it) by providing reassurance to the risk-averse. The OGL changed the *tone* and *nature* of the creative activities that were taking place in the RPG community: the activities went from being furtively conducted to being openly, expansively and enthusiastically undertaken and in many cases even commercialized.

The online comments also prominently featured statements about the OGL serving to blunt fears of negative consequences for inadvertent copyright infringement; the following sample of quotations from the online commentary indicates the tenor of the views of many commentators:

> "[the OGL] allows fans to support us without worries of legal hassles"

> "[the OGL provided] permission to do the things that gamers naturally do, without fear of lawsuits or complex legalese or requiring our approval"

> "it's useful to BOTH parties, in the way it specifies which items constitute a breach of the license. It's as much of a legal shield for the licensee as it is for the licensor, in other words"

> "the OGL is insurance against legal trouble. If you distribute this thing that may or may not infringe on WotC's copyright, there's risk there. Use the OGL, and that risk is nil, as long as you abide by the terms of the license, which is nor burdensome"

> "The OGL gave fans a very real safeguard against this kind of thing. At that point in time, it was probably the most important aspect of the OGL. Not to sell the games, but to be sure that WotC wasn't going to send the lawyers after you or to have a safe haven if

[104] Respondent 050.

[105] Nic Suzor & Brian Fitzgerald, "The Role of Open Content Licences in Building Open Content Communities: Creative Commons, GFDL and Other Licences" (2007) at 16, online: http://eprints.qut.edu.au/6076/1/6076_1.pdf.

WotC got out of control like TSR did before them”

> “Yes, the OGL was created for publishers, but it also works to protect fan sites... no more draconian C&D letters CAN be sent to you if you do it right... and IIRC, this was also (a small) part of the reason for the OGL - to let you know what you can & can't post on the internet without getting sued and what are the "rules of the game." As a fan, I want to know what I can and can't copy, re-use, distribute to my players, post on the web, and so forth - without getting in legal hot water. THAT's a very good reason to educate yourself RE the OGL”

> “Without the OGL, collaborating and using rules created by others would be a pain in the ass, and fraught with risk of getting into legal issues.”

> “What I do know is that the OGL has been good to me, as a consumer. It provided me with products that I would never have seen otherwise - from Midnight to tiny Philip Reeds pdfs. It allowed me to feel connected to a community, and know that I at least have the option of publishing D&D stuff legally without WotC or anyone else having a say about it. I just don't want to go back to pre-OGL days.”

> “You could do a lot of this stuff without a license. You could fall back on regular IP law, fair use, all sorts of other stuff. But then you need to know what you're doing, and you probably need to hire a lawyer to be sure. And even then, you might get it wrong. The OGL is a safe way to do it, written in clear language, making it nice and easy for you. It's a pretty sweet deal.”

“Confusion” and “certainty” also occur along a separate vector worth mentioning. “*Confusion*” was identified as one common initial reaction in the RPG community to the OGL – “the concept behind it struck people as strange”.[106] As a result of the confusion it caused, the OGL itself has served as a node for discussion, engagement and dialogue. Many respondents described how they learned (and continue to learn) to use the OGL by means of ongoing conversations with other OGL users. One respondent’s description of his process of immersion into the OGL community is illustrative:

> “[in 2000] the OGL had just been released, and we all decided we were going to get together and start publishing different material, on our own. To be released for free, not you know for wide distribution or even really publication, or for sale. But just, you know, release them out on the net, sort of like what everybody had been doing in the mid to late 90s with the so-called netbooks, where there was just fan material. We wanted to have something that was fan material, but a little bit better. So a bunch of us all got together, we picked through the OGL to learn it. I was on the Open Gaming Foundation mailing list at the time, so I got all of the professional traffic, you know, discussion as well. People like Clark Peterson and Ryan Dancey were all on it. And so we could all talk issues surrounding the OGL and the Open Gaming Foundation”.[107]

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[106] Respondent 001. As noted in Chapter 5, there were a number of community members who thought the OGL was some kind of ruse or trap, a view whose existence was confirmed by the recollections of a number of respondents (Respondent 001: “there were other people who were convinced that it was a trap, that it was all designed so that WOTC could sue you or something … They were paranoid about it”).

[107] Respondent 054.

When I was obtaining content from online RPG discussions forums for this project, I was repeatedly struck by the sheer volume of discussion about *how* to interpret or apply the OGL – the posing of an initial question about whether a particular action would be compliant with the OGL would erupt into a thread containing dozens or hundreds of responses debating the matter and quickly branching off into debates about the commercial advisability of using the OGL or the relative pros and cons of the OGL and Creatives Commons licences. Whether the OGL was a "good idea" for WOTC or the RPG industry generally is a perennial topic of discussion. The OGL, even nearly twenty years after its initial release, remains very much a "live" object of enquiry amongst RPG gamers – and thereby itself serves as a vector of community engagement.

(c) *Additional Relevant Context*

As described above, use of the OGL tends to be not only a choice made consciously, but one made *conscientiously*: OGL users tend to be immersed not only in the minutiae of its use, but interested in both conversing with others about its use and sharing with them information and knowledge. This section describes insights derived from the gathered data that relate to: OGL users' subjective view of their own understanding of copyright law; the extent to which they consulted with legal counsel regarding the OGL; their use of other forms of intellectual property (particularly trade-marks) in conjunction with their use of the OGL; and their views regarding copyright infringement and improper use of the OGL and how they respond to instances of both.

(i) Copyright Knowledge and Engagement of Advisors

Because the OGL is an open content *copyright* licence, it is pertinent to enquire into respondents' subjective view of their own understanding of copyright law and how the OGL operates as a copyright licence. Most of the respondents indicated that they were relatively comfortable in their understanding of copyright law generally,[108] and that they were comparatively much more certain about their understanding

[108] In describing their own understanding of copyright law respondents used phrases such as "a decent layman's understanding" (Respondent 001), "pretty comfortable" (Respondent 062), and "a fair working understanding" (Respondent 027) and "a well-informed layman" (Respondent 050), with some qualifying their knowledge by using descriptives such as not having "a very deep knowledge of it" (Respondent 001) or "I am by no means an

of how the OGL itself worked and what activities would constitute a violation of its terms.[109] They were also fairly certain that many fellow OGL publishers had a good grasp of how the OGL functioned. Many respondents, however, expressed skepticism that non-publisher consumers (*i.e.*, RPG players who made use of OGL-licensed materials in their gaming but did not also create OGL-licensed material intended for distribution to others) were familiar with the OGL's terms or understood what kinds of activities would breach its terms. While some respondent publishers took pride in the fact that, despite their lack of legal training, they had familiarized themselves with the terms of the OGL and thought they had a strong understanding of its proper use,[110] others indicated that they took a much more lackadaisical approach to its use, and relied on what they perceived as community norms and expectations surrounding use of OGL-licensed material.[111]

Respondents indicated that their view was that general knowledge levels in the community about the OGL and its functioning appear to have, predictably, increased over time as publishers and gamers used the licence themselves and observed its use by others. Many respondents described an iterative process in which extensive discussions about the OGL took place online, where people debated how to properly use it, posing and answering questions in wide-ranging discussions:

> "I think when you do see that happen [i.e., a breach of the terms of the OGL, such as making use of a game component such as a monster that has *not* been released under the OGL], it's a pretty big goof that gets jumped on pretty quickly, somebody in the community points it out or that kind of thing. … I think learning those differences and learning those little nuances … is important for a lot of people."[112]

In other words, learning how to use the OGL in conjunction with others, drawing on their own experiences and interpretations and contributing one's own, appears to have become one of the activities that many RPG gamers participate in – using and navigating the use of the OGL has become part of the RPG gaming experience.[113] This indicates that use of the OGL is to an extent inseparable from the broader

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expert" (Respondent 050) and "certainly far from expert" (Respondent 062). As one respondent described his level of knowledge, "I know enough to keep myself out of trouble" (Respondent 054).

[109] Only one publisher respondent indicated they did not have a particularly good understanding of the OGL (Respondent 015: "I am not comfortable with it, and have a modest grasp of what constitutes a violation").

[110] E.g., Respondent 050.

[111] E.g., Respondent 033 ("I try to avoid as much of that [copyright law] as possible. I just, I basically have looked at what other people have done and not gotten in trouble for, and that's my guide").

[112] Respondent 062.

[113] There appears to be a consistent ethic of making allowance for inadvertent or non-malicious infringing activities and responding to them first with offers of helpful guidance to explain the parameters of acceptable conduct

experience of simply participating in the online milieu of the RPG community.

With respect to consulting legal counsel or other professionals prior to or during the period in which they used (or continue to use) the OGL none of the respondents indicated that they had ever formally engaged a lawyer or other independent advisor (such as a business consultant) to obtain advice regarding their use of the OGL. Only one respondent indicated that he had spoken with a lawyer about the OGL, and that was only in the context of what he called "community-based knowledge", *i.e.*, he corresponded online with people in the RPG community who identified themselves as lawyers and had conversations with them about how they interpreted the terms of the OGL.[114] Numerous respondents indicated that their primary resource for questions about the OGL had been online discussions.

(ii) Other Forms of IP Protection

A similarly informal approach marked how respondents used other forms of intellectual property in conjunction with their OGL-licensed materials. The majority of respondents had never taken any steps to formally register any form of intellectual property, including trade-marks. Ten of the twelve respondents released their RPG products using some form of mark, "business style", or "brand" in addition to identifying themselves as authors of those products – these "brands" usually consist of an evocative name along with a logo (*e.g.*, Onyx Path Publishing and Shattered Pike Studio, two RPG publishers who were not respondents for this project); two of the respondents used only their own personal names to identify their products in the marketplace (one of those respondents primarily released his materials through other publishers). Most respondents displayed a keen appreciation of the importance of developing a "brand" for their creative activities (usually by means of a game's title or a business style that they used to identify their projects beyond their own personal name):

> "Yeah, having a branded core game to act as a spearhead for everything else that I'm doing definitely helped a great amount. And the OGL just made it easier to do that."[115]

(e.g., Respondent 062, in discussing his reaction to finding out about infringements of his works, said "I always think it's better to… because when I started, I didn't know what was cool, what wasn't, that kind of thing, and so I'd love to give the same amount of understanding that I [received] to somebody else").

[114] Respondent 054.

[115] Respondent 033.

Only two respondents had ever registered trade-marks in connection with their RPG business activities;[116] as will be seen in the discussion below, one of those respondents was one of the two respondents who responded most passionately about his negative feelings towards infringing activities. Two aspects are worth noting about the use of registered trade-marks. First, the two registrant respondents were *not* the largest publishers in the respondent pool: one was a Category 2 Amateur Publisher (i.e., does not carry on his RPG publishing activities through a separate business entity), while the other is a Category 1B Professional Publisher (*i.e.*, carries on business through a separate legal entity); this is noteworthy because it indicates a disjunction between operational heft and the use of trade-mark rights – there does not seem to be a correlation between sophistication or success and any use of formal trade-mark rights in addition to copyright rights. Additionally, both of the registrant respondents fell, generally, toward the utilitarian end of the spectrum in their descriptions of why they used the OGL, which hints that a tendency to rely on formal trade-mark rights may correlate with a lack of community-oriented motivations (though, of course, that is speculation given the small sample size). Two other respondents noted that while they did not register their trade-marks, they were cognizant that they enjoyed rights in their marks by virtue of their use in commerce – indicating that the lack of trade-mark registrations was not a result of ignorance but rather a considered course of action. As well, almost all respondents indicated that they used personalized domain names or blogs (hosted on commercial services such as blogger.com, owned by Google) for their online business activities. Of the respondents who did not have registered trade-marks, those who expressed a view on the matter indicated that they thought the expense of registering their trade-marks outweighed any potential benefit.

(iii) Infringement

Views regarding the moral and practical implications of copyright infringement and breach of the terms of the OGL (for example, making use of OGL-licensed material without retaining the OGL for that licensed material) were variegated among the respondents. As with many of the other facets of the data, a strong sense of community-facing norm construction was present across many of the responses. Formal interactions with copyright infringement were essentially non-existent: none of the respondents

[116] Respondents 018 and 033.

had ever been involved in a copyright infringement dispute that had escalated to the point of formal legal action; none had been the recipient of a cease-and-desist letter from a lawyer or had ever retained a lawyer to send a cease-and-desist letter in respect of their RPG products. Only two respondent publishers indicated that they had had any communications *at all* (e.g., exchanging emails) relating to copyright infringements generally or violations of the OGL in particular; according to one of those publishers, "one in five of our licensees make errors. We asked them to make changes and they do".[117] When asked how they might respond to an instance of copyright infringement or OGL violation, all respondents indicated that they would first take a non-aggressive approach, either not reacting at all, or attempting self-help or relying on communal shaming before resorting to something as formal as instructing a lawyer to send a cease-and-desist letter.[118] Some respondents indicated that they would, subject to a caveat relating to the "amount" or "extent" of the infringement, find instances of infringement to be flattering, or their initial negative reaction to the perceived wrong of an infringement or breach might be subordinated to an overriding norm of sharing:

> "Gee, that's a tough scenario, because it's not one I've really thought about. I think it would depend what they had done with it and the extent of the violation. I have to admit that part of me is sort of, 'anyone who is taking enough of an interest in it to steal something would sort of fill me with a slight bit of pleasure'"[119]

> "I sort of that take that as, 'well, that's fine', you know, they're out there and hopefully they'll look up my name and maybe find some of the stuff I've been doing since then."[120]

> "I think my first assumption would be that it's an error rather than malicious; I might even be honored someone would think to re-use my material in its entirety in that way. However, I'd almost certainly reach out and ask them to stop doing so."[121]

A number of responses indicated that while the respondent would feel initially wronged by acts of infringement, their preferred form of resolution would involve a dialogue with the infringer:

> "I would reach out to them and work to correct it. This is my hobby and I want to share it with others. I would want to make sure they have a chance to make it right."[122]

> "Oh, yeah, I mean, I would be upset. And … my first instinct would be to reach out to

[117] Respondent 015.

[118] See, e.g., Respondent 018 ("We have always been pretty relaxed about this [copyright infringement]. … We would start with a polite email, and work from there. I doubt lawyers would ever get involved").

[119] Respondent 001.

[120] Respondent 054.

[121] Respondent 057.

[122] Respondent 027.

> them and say 'hey, I just wanted you to know, like, this is my product that you are selling', or whatever, and try to have that dialogue with them, person to person, and see if they would be willing to take that down, right."[123]

Almost all respondents indicated that they thought that intentional violations of the OGL were exceedingly rare, with most breaches being the result of inattention or failure to take the time to understand how the OGL operates.[124] However, some respondents seemed to draw a distinction between infringement of the OGL and more straight-forward wholesale copying of works by means of making .pdf copies available for download via torrent sites (which one respondent (Respondent 050) described as "endemic"). Examples of the latter were viewed as regrettably common, but essentially not something worth worrying about. Multiple respondent publishers indicated that their RPG products were routinely the subject of infringing activities such as being placed on torrent sites without permission; they expressed frustration, perhaps best characterized even as resignation, about the infringement, but indicated that they did not take any actions in connection with it.[125] The source of the complaining respondents' frustration in most cases appeared to be the view that there was a misappropriation of the labour that had expended in creating the products.[126]

Only one respondent (Respondent 050) described significant negative emotions associated with the discovery of infringing activity ("I dislike it intensely"); that said, even those negative emotions conflicted with feelings of flattery ("You know, in a way it's flattering, costs me a little money probably, but I'm not going to sweat it too much"). Only in one instance did Respondent 050 recall being moved to take action to stop the infringement: a third party took one of Respondent 050's .pdf publications, removed the cover page (which contained Respondent 050's name), replaced it with their own cover (which substituted the third party's name) and began offering it for sale online. Respondent 050's reaction was intense:

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[123] Respondent 062; the respondent went on to describe additional steps that they would take, such as contacting the website hosting service, but none of the steps involved contacting a lawyer.

[124] "I suspect in most cases it was entirely out of ignorance. It really was. I don't think there were any… I suspect almost all of it was out of ignorance" (Respondent 001). "I don't think there are many people who do it deliberately, or at least I don't know of any" (Respondent 015). "I know there's a lot of confusion out there, because if you go onto gaming message boards or on Facebook groups, people are *still*, years later, asking "how do I use the OGL?". Just like, *read it*! Like I said before, even people that publish under the OGL have obviously not read it. Or at least not understood it. … They're just being sloppy. They're either rushing or they think they understand it and they really don't and they're not being careful enough." (Respondent 050).

[125] For example, Respondent 033 ("it's frustrating, but it's like, okay, I can spend all my time worrying about that, or I can just realize you know the music industry can't figure it out, what the hell am I going to do?").

[126] *E.g.*, "the production that went into it, for the original writing I put into it, it's still all the layout, the artwork, it's still *my* stuff that they've put up there" (Respondent 033).

> "I was so enraged. That felt literally like I got kicked in the stomach, 'cause that wasn't just somebody taking my stuff, 'hey, I like this, you'll probably like it too', this was, he was taking credit for my work. *Oh my gods* did I get angry at that".

Respondent 050 contacted the online vendor who was making the infringing product available for sale and they pulled the product from their page; despite the vendor giving Respondent 050 contact information for the third party who had made the infringing copy available for sale, Respondent 050 did not contact the infringer, having been satisfied with the removal of the product from the online store.[127] It is worth noting that the respondent's description of the wrong that he had suffered related to a concern with authorial attribution ("he was taking credit for my work") more than appropriation of his content – the negative reaction seemed less about the act of copying *per se*, and more about the misrepresentation of the source of the copied material. As will be discussed in Chapter 8, the OGL community seems to have developed a strong communal norm regarding the importance and value of authorial attribution.[128]

Many respondents described a community sensitivity to copyright infringement and a desire and willingness to take corrective action when it happens:

> "I have peers that have come... that have probably run... I don't want to say they've run afoul of copyright, but they've certainly made some missteps in their proper attribution [as required by the OGL]. And it's been my experience that most of the professionals out there, once they discover that this is what has happened, they will say "oh my god, I'm sorry, I apologize", they make amends and they fix it. I also have several secondary or tertiary acquaintances who have run quite afoul of it, and seen them throw absolute fits that they should be allowed to do what they do, and no, that's not at all what they should be allowed to do."[129]

In some cases, respondents expressed views of infringing activity and responses to it that were enmeshed in broader communal participation and activities:

> "If they're just not doing the OGL correctly, it'll depend if I know who they are. If it's someone I know who it is, I might be, "hey, take a look at this", and then otherwise, it's not my problem [LAUGHS]. As far as basically counterfeit products or truly pirated products … other people are going to find fraudulent releases like that long before I'm going to get my eyes on it. But what I would do, that's a good question, because if someone does that, there's no point in complaining to them, because they obviously do

[127] It is worth noting that the removal of authorial credit – what in the Canadian context would be identified as an infringement of an author's moral right to attribution in respect of a work – is itself a breach of the OGL which, while it does not contain a waiver of moral rights, requires (pursuant to Section 15) the crediting of prior authors of embedded OGL-licensed works. The same respondent (Respondent 050) also expressed concerns about the copyright in visual artists' works being infringed by OGL publishers – he indicated that he took pains to identify the owners of artistic works whose images he used in his projects, and that he "believe[s] very strongly in paying my artists, and when I see artists having their work ripped off, it makes me angry. … It annoys the heck out of me when I see their stuff being infringed."

[128] See Chapter 8 note 11 and accompanying text.

[129] Respondent 054.

> not give a shit. It's just what kind of alarm do I sound in the community. My guess, my thinking is I'd forward that example to someone who does talk about those things more, that likes being a rabble-rouser, like "eh, take a look at this, this might be an issue", and let them deal with it"[130]

Respondents' reactions to imagined cases of infringement tended to downplay formal legal responses, and were contingent on whether money was being made. This description of a respondent's reaction to a hypothetical case of infringement is illustrative:

> "It would depend on … whether they had benefitted financially. … I'd tell them to get compliant [and if they were benefitting financially] I'd send a cease-and-desist and ask to see revenue statements. In every case I'd rather come to an arrangement than go to law, though of course that possibility is there. In either case there'd be a bit of eye-rolling, mainly at the waste of my time, but it's not likely something like this would affect my revenue".[131]

Use of the OGL is thus often coupled with knowledge and sensitivity about copyright infringement and what constitutes copyright infringement. That being said, it is also coupled with a certain resignation about the inevitability of infringement, and subject to countervailing interests in sharing and receiving affirmation that their products are considered of high enough quality to warrant sharing. In some cases, at least, they are willing, it seems, to accept some water with their wine.

III. Summary

This chapter has described the data obtained from the fieldwork portion of this research project. The data collected from the online discussions is consistent with the data obtained from the interviews, though by its nature the online data is almost kaleidoscopic in its breadth and diffuseness. As noted at the outset, the answers to the following questions were sought: Why are people using the OGL? And, are they satisfied with the results of their use of the OGL? While the data is not entirely uniform, there is enough consistency among the interview responses and the online statements to make the following observations.

Most OGL users are happy with their use of the OGL – it appears to have assisted them in accomplishing the goals they sought to achieve through its use. Respondents identified numerous goals that they were attempting to achieve by using the OGL: for some, the OGL simply provided easy, low-

[130] Respondent 033.

[131] Respondent 015.

friction access to a wealth of D&D-related material that they wanted to make use of, and enabled ready access to a market of RPG consumers; for some, the OGL offered an instrument by which they could hone their creative aptitude, develop a reputation and come to the attention of potential employers; for still others, the OGL facilitated their desire to share their creative expression with others and to foster the creative activity of others. For many respondents, their motivations for using the OGL consisted of a combination of many or all of the described reasons. Discussions about the use of the OGL reflect not only – or even that often – a concern for revenue, or compensation or other pecuniary matters, but a regard for what Jessica Silbey described as the "emotional and personal rewards"[132] that arise from the act of creating and sharing.

In addition, concerns with community engagement and dialogic creative activity are features of many of the responses and online statements. The language used by respondents and online commenters is saturated with notions of collaboration, creativity, and sharing. The data also reflects that the OGL interfaces with the RPG community in a particular way: the OGL serves to obviate, or at least dramatically lessen, concerns about being held liable for copyright infringement. The data suggests that attentiveness to the community-constitutive function played by open content copyright licences should be a significant factor when licensors make decisions about whether to employ open content copyright licences.

In the next chapter, I will examine how the data informs the propositions set out in Chapter 5, as well as describing how the data supports the claims of the communicative copyright account proposed in Chapter 2. Further, the next chapter discusses the implications of the findings of this research project, including the extent to which the data from the fieldwork validates the success indicia matrix set out in Chapter 4.

[132] Jessica Silbey, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (Stanford: Stanford Law Books, 2015) at 56.

Chapter 8

Successful Use of Open Content Licences for Creative Expression

I. Introduction

The research project contained in this dissertation has been designed to provide an answer to the question of when a copyright licensor should give serious consideration to using an open content copyright licence for disseminating their creative expression. The first four chapters of this dissertation outlined a theoretical framework within which to seek an answer to that question, centred on a communicative copyright account that was itself a supplement to Carys Craig's relational copyright theory. In Chapter 4, a matrix of "success indicia" was set out that synthesized work by scholars from a variety of different disciplines; the indicia are a set of characteristics that indicate whether a particular set of circumstances – categorized by reference to the licensor, the licensed work, the market within which the work is being exploited, and the community within which that market operates – is congenial for the use of an open content copyright licence. The data obtained from the fieldwork and summarized in the preceding chapter focused on a particular open content copyright licence: the Open Game License ("**OGL**"). In this chapter, I complete the tasks, having reference to the fieldwork data, of assessing the claims of the communicative copyright account and confirming the validity of the success indicia matrix. In addition to examining the propositions laid out in Chapter 5, I discuss the implications of my work for the use of open content copyright licences, and offer an answer to the question: when should a copyright owner use an open content copyright licence to disseminate their work?

This chapter is structured in three parts. First, the propositions identified in Chapter 5 are reviewed in light of the information and data set out in Chapters 6 and 7; as will be seen, the propositions are largely supported by the data and the other information presented in this dissertation. Second, the data and the story of the OGL more generally is examined through the lenses provided by the literature that was surveyed in Chapter 4 and the communicative copyright theoretical framework presented in Chapter 2; the insights arising from that examination are outlined, with particular attention paid to the most salient observation arising from my research, namely the community-constitutive role of open content licences. Finally, the matrix of success indicia is reviewed and supplemented with the insights and information that are set forth in this chapter.

II. Revisiting the Propositions; Community and Brands

In Chapter 5, the following three propositions were formulated, based on claims about copyright licensing drawn from the communicative copyright approach:

> ***P1.*** In describing their motivations for using the OGL, users of the OGL will articulate and prioritize goals and values such as self-expression, interaction, reciprocity, community participation, dissemination and reputation enhancement. While traditional motivating factors such as economic benefit, profit maximization and control will be present in the motivation matrix of OGL-users, they play a subordinate role.[1]
>
> ***P2.*** Open content licensing is best-suited for situations in which there is an overlapping of the following conditions: (a) creators whose motivation matrix prioritizes factors other than profit (even when profit-making is one of their motivations); (b) content that exhibits characteristics of interactivity, modularity and expandability; (c) the market for the product exhibits network effects; and (d) the product exists within, or its creators hope to generate, a community of consumers who anticipate ongoing interaction with their peers.
>
> ***P3.*** Communicative copyright justification theories that focus on values such as sharing, community-building and creative dialogue can better account for the use of open content licensing than can traditional copyright justification theories.

Proposition *P1* is partially supported by the data. As seen in Chapter 7, many of the OGL-user respondents do articulate and prioritize goals and values such as self-expression, interaction, reciprocity, community participation, dissemination and reputation enhancement. However, many of those same OGL users *also* articulate traditional utility-maximizing motivating factors, primarily efficiency, convenience, and

[1] There was also an alternate proposition (*P1-Alt*): Alternatively, it may be that users of the OGL do not articulate non-traditional motivations for their use of the OGL, either (a) because they view the OGL as a means for achieving *traditional* goals (such as profit), or (b) because their use of the OGL is not instrumental such that (i) they did not conceive particular motivations or incentives in connection with the decision to use the OGL or (ii) they are unable to articulate whatever motivations or incentives lead them to make their decision to use the OGL. *P1-Alt* did not need to be examined because OGL users did in fact articulate non-traditional motivations for their use of the OGL (in conjunction with traditional motivations) as anticipated by proposition *P1*.

the economic benefit to be realized from having access to a particular market of consumers. It is not possible to determine the relationship between the two sets of motivations for any particular OGL user, but the fact that they consistently identify community-oriented motivations is itself significant and validates elements of the communicative copyright account, which informs proposition *P3*.

Proposition *P2* has been supported by the data and is consistent with the matrix of success indicia identified in Chapter 4, though the set of conditions identified in *P2* is incomplete. A much larger number of factors are relevant for determining whether to make use of an open content copyright licence in connection with a particular work of creative expression. As set out in the success indicia matrix, the relevant factors can be categorized into four types, being features pertaining to: the licensor, the work created, the community or audience for the licensed work, and the market in which they all interact. As discussed further in Part IV of this chapter, the factors contained in the matrix (which was based on prior scholarship) can be usefully supplemented by adding additional factors that emerged from this research project. Ultimately, the matrix can be used to guide decisions about the use of open content licences.

Additionally, proposition *P3* is shown to have been supportable. Communicative copyright theories have something meaningful to say about why people make use of open content copyright licences, capturing an element of the reasons for their use that is otherwise missing from traditional explanations; the insights offered by the communicative copyright account are explored further in Part III of this chapter.

In reflecting on the propositions in light of the data collected for this project, and in light of the broader history of the OGL recounted in this dissertation, I am struck by how positive and enthusiastic many OGL users appear to be about the use of the licence, both in their capacities as licensor and licensee.[2] The point bears emphasizing: OGL users are expressing remarkably favourable sentiments about a *legal instrument*. I query whether other legal instruments such as a website's terms of use or the licence agreement entered into when accessing an online music or audio-visual streaming service would prompt such reactions (whether from the licensor or the licensee); I suspect not. As the responses and online statements set forth in Chapter 7 indicate, it appears that part of the reason why OGL users are so

[2] It is worth noting that each of the interview respondents is both an OGL licensor and licensee, *i.e.*, they obtained access to OGL-licensed materials (primarily D&D-related materials) as licensees and they used the OGL to disseminate their own RPG products as licensors.

pleased with the licence is because of the opportunities that the OGL provides and the commitment to communal engagement that its use symbolizes. OGL users appear to place significant value on the potentiality that an open content licence represents: for creativity, for sharing, for interaction, for *participation*. All of those elements exist and have existed in RPGs since their inception – what the OGL does is enable their furtherance. Community is a facet of each of those prospects – all that creativity, sharing, interaction and participation takes place within and among members of a community, and it is a set of concepts and activities clustered around community that undergirds each of the propositions described above and the data that has been found to support them.

This quotation from Adam Jury, co-owner of Posthuman Studios (an award-winning RPG publisher),[3] who has written about open content licensing for games and has published gaming material using both the OGL and Creative Commons licenses, illustrates the welter of motivations, concerns, and commitments that seem to animate so many OGL users:

> "[open content licensing] isn't just about 'downloading for free,' it's about giving fans permission to hack our content and distribute those hacks. Permission to do the things that gamers naturally do, without fear of lawsuits or complex legalese or requiring our approval. Our fans have built and distributed complex character generation spreadsheets, customized GM Screens, converted our books into ePub/mobi format, and all sorts of neat things. When they do things like this, that gives us guidance as to what we should be doing: because fans aren't just *saying* they want something, they're putting their time where their mouth is … a strong indication that they and other fans would be willing to pay for those things if we produced them. And in the end, if licensing our material Creative Commons is not financially successful: it's the right thing to do, socially. We have to build the future we want to live in. Giant corporations locking up intellectual property is dangerous to society and culture.[4]

Contained within Jury's description are a number of different considerations: an ideological commitment (against "locking up intellectual property"), a concern with avoiding the perceived legal complications and threats of traditional copyright law ("without fear of lawsuits or complex legalese"), a sensitivity to other-oriented normative considerations ("the right thing to do"), a desire to comport oneself in a manner consistent with RPG community conventions ("the things that gamers naturally do"), and marketing tactics (taking product development cues from what their customers are creating). The OGL is – and open content licences are – a device for achieving all of those goals, even within the context of strategies employed by for-profit businesses such as Jury's. The fact that many OGL licensors use it in

[3] See www.adamjury.com and www.posthumanstudios.com.

[4] http://adamjury.com/2010/creative-commons-part-of-why-we-give-our-games-away/. Emphasis in original.

the context of business activities – particularly its most prominent users, Wizards of the Coast (publishers of the D&D game) and Paizo Publishing (publishers of the *Pathfinder* RPG, D&D's primary competitor) – means that further attention is warranted to the relationship between business strategy and open content copyright licences.

There is an increasing awareness in management research scholarship that the use of "open" approaches to intellectual property rights can be a viable route for product development and exploitation.[5] As Kristofer Erickson has noted, employing an economic analysis, open approaches might be attractive to for-profit undertakings "when the private benefits of [open sharing] outweigh the costs";[6] Erickson's summary of the existing management research indicates that those benefits are enjoyed on both the input side (*e.g.*, lower costs of product development and faster time to market) and the output side (*e.g.*, reputation enhancement, network effects (such as wider dissemination of the product), improvements identified by consumer revealed preferences, and improved marketing via word-of-mouth recommendations).[7] Erickson's own work examined "creative industry" firms that made use of public domain "inputs" (ranging from fairy tales to literary works by Bram Stoker and Jules Verne to impressionist paintings and photographs licensed using Creative Commons); he concluded that creative industry firms "are uniquely able to generate and capture value from openness by *investing in relationships with communities* that improve and circulate their products".[8] As alluded to in Erickson's conclusion, and as the story and information about the OGL contained in this dissertation has shown, the operational logic at the heart of successful use of open content copyright licensing – simultaneously the motivation for, the outcome of, and the relevant measure to be used in assessing, its use – is the nurturing of communities, and it is in markets that are embedded within communities and with an appreciation for the cultivation of those communities that open content licences can be most productively employed by for-profit enterprises.

[5] See, *e.g.*, Kristofer Erickson, "Can creative firms thrive without copyright? Value generation and capture from private-collective innovation" (2018) 61 Business Horizons 699.

[6] *Ibid* at 700.

[7] *Ibid* at 702, 707.

[8] *Ibid* at 708 [emphasis added].

The roles played by trade-marks and dual-licensing strategies are critical to understanding the successful use of open content licences as a business strategy. As noted in Chapter 4,[9] a dual licensing strategy involves making content available for free using an open content licence and generating revenue from the provision of that same content in other formats. In the context of D&D, for example, the "core rules" are made available under the OGL and can be downloaded for free in the form of text and .pdf files, but Wizards of the Coast sells hardbound books printed on high-quality paper containing the same core rules accompanied by extensive graphical illustrations; they also sell additional adventures and other game supplements that are not themselves licensed under the OGL (though some of the material contained therein may be). Paizo adopts a similar strategy with respect to the *Pathfinder* game, and both companies have registered trade-marks (for D&D and *Pathfinder*, respectively) that they make available for other parties to use only on restrictive bases. This indicates that large-scale, commercially-driven uses of open content copyright licences (*i.e.*, uses that occur in contexts where the exploitation of creative expression is the primary source of income for the licensor and where significant amounts of revenue are required to support operations consisting of dozens of employees and the release of multiple long-form publications per year) *need* to employ dual licensing strategies and retain tightly-controlled trade-mark rights.

However, as the fieldwork for this project indicates, there is a significant cohort of smaller publishers who are willing and able to employ open content copyright licensing strategies in the absence of either a rigidly-adhered to dual licensing strategy or registered trade-mark protection. As seen in Chapter 7, the vast majority of respondents did not obtain registered trade-mark protection, while at the same time also cultivating a particular "brand" for their publications, usually in the form of a consistent business style or publishing "imprint" with an associated logo. All of the respondents also sell their RPG products, usually via online "storefronts" or retail platforms (such as www.rpgnow.com ("The Leading Source for Indie RPGs")); in most cases their products are available for sale online in pre-printed or print-on-demand versions, almost always for less than $20). Their use of the OGL does not appear to interfere with their ability to charge customers for their products, which is perhaps a function of the RPG community containing a large number of small publishers and other gamers who are willing to purchase

[9] See Chapter 4, notes 198-203 and accompanying text.

each other's content in a spirit of reciprocity or respect (*e.g.*, purchasing content as a display of respect for the effort and creativity reflected therein).

There is of course an inherent tension between the openness of open content copyright licensing and the retention and policing of exclusive trade-mark rights with respect to a licensor's brand. One way of formulating the observation is that the use of the OGL is really only a case of "partial" openness, or that it is an openness that is being cynically deployed – purportedly "open" with respect to some content, and determinedly "closed" with respect to other content. While there is some power to that critique, there are a number of qualifications which need to be made about it. I noted in Chapter 6 that the OGL is extremely flexible in its application, allowing OGL licensors a great deal of autonomy in deciding what they will license as "Open Game Content" ("**OGC**") and what they will reserve as "Product Identity" (which can be applied to both creative expression and marks); this has led to a wide spectrum of "openness" among OGL licensors, some of whom will be relatively circumspect in how much of their content (even within a single RPG product) is declared as OGC, and others of whom will elect to apply the OGL to the entirety of their published materials.

OGL users appear to be keenly aware of the tensions arising from the optionality of the OGL's "openness", and the online commentary yielded extensive debates about what is derisively termed "crippled" OGC (essentially, use of the OGL for only very limited portions of a product or use of the OGL in a way that makes it difficult for licensees to determine what portion of a product has been declared OGC).[10] Partisans in the debate include those who think "everything" should be OGC and any shortfall from that position represents a moral failing and others who argue for the validity of any particular licensor's determination as to "how much" of their content they are willing to declare open. There appears to be a recognition among OGL users that the debate is functionally irresolvable, and that there will simply be an ongoing disagreement about the normatively appropriate ratio of OGC-designated content a publisher should release. Many OGL users also appear to be cognizant of the difference between

[10] An online commenter offered the following definition: "Crippled OGC is when the text explaining what is OGC is so vague, and/or the OGC text is so interwind [sic] with non-OGC text, that extracting just the OGC portions from the work becomes impossible. The phrase's meaning also extends to cases where the designation is simply not inclusive enough, not releasing as OGC something that should be released under the OGL - but this is somewhat an extension of the term and will not be accepted by all. For example, a publisher might say that "all game mechanics derived from OGC in this work are OGC". That's meaningless, you have to guess which parts of the text are OGC and which are not, and there is practically no way to reliably extract all the OGC text from it."

copyright and trade-mark rights and an infringement of trade-mark rights (*e.g.*, deliberately misappropriating another's "brand") seems to be almost universally viewed as unacceptable.

That observation is closely aligned with another observation that emerged from both the interview data and the online commentary and which blunts the sting of any perceived hypocrisy on the part of OGL users who rely on their trade-mark rights: a widely-shared concern with authorial credit. The significance of authorial attribution to contributors to online communities that share creative expression has been remarked on by scholars.[11] Many of the interview respondents specifically lauded the fact that the OGL required that downstream users of OGL-licensed content accord credit to upstream licensors.[12] In the sample of online commenters, the seemingly universally-held opinion was that people wanted to know who the author of RPG material was, and that proper conduct necessitated retaining and promulgating information that allowed later identification of an author. In light of this information, and in light of the consistent trade dress practice in the RPG industry (which involves author's names and other brands being prominently featured on RPG publications) I posit that trade-mark rights are asserted largely to preserve authorial credit and reputation in the community (*i.e.*, to ensure that particular authors are identified with their work so that they reap the reputational benefits of high quality content). For larger publishers, their use of trade-marks is a fairly straightforward means of realizing on the value of their content.[13] For smaller publishers, their use of a brand and the retention of their brand as Product Identity under the OGL appears to be at least as much an effort to retain authorial *identity*. And that, too, is consistent with their participation with the community: communities are made up of individuals, not automatons, and individual identities provide the locus through which participation occurs, praise is earned and blame attributed.

[11] See, *e.g.*, Casey Fiesler, "Everything I Needed to Know: Empirical Investigations of Copyright Norms in Fandom" (2018) 59 IDEA 65 at 81.

[12] See Chapter 7, notes 71-72 and accompanying text.

[13] In the initial public statements about the OGL, Ryan Dancey and Wizards of the Coast repeatedly referred to the notions that the D&D-brand trade-marks were where the "real value" of the asset resided; see, *e.g.*, Chapter 6, notes 92, 98 and accompanying text.

III. Revisiting Communicative Copyright and the Community-Constitutive Function

I have been emphasizing the community-constitutive function of open content copyright licences because that aspect emerged in a signal way from the data. However, returning to the literature review in Chapter 4 indicates that the data is consistent with many of the findings and observations made by scholars who have written about open source software licences and open content copyright licences. In this Part III, I will review the data in light of the previous scholarly work with emphasis on how the data has confirmed the community-constitutive role of open content copyright licences – further, I will highlight the part played by open content copyright licences in obviating risk and uncertainty and how that very process serves to improve and intensify the kinds of dialogic interactions that characterize communities centred around creative expression.

(a) *Many Motivations for Use*

To begin the review of the relevant literature, it is important to note that the use of open content copyright licences is not *only* consonant with what communicative copyright approaches have to say. The efficacious instrumental motivations noted in the fieldwork data are consistent with the work of Hietanen and Lerner & Tirole discussed in Chapter 4:[14] open content copyright licences clearly provide downstream creators with a logistical "short-cut" by making content freely available for use, and that is clearly a reason that many OGL users want to use it. Likewise, as described by Spindler & Zimbehl and Lerner & Tirole,[15] the fieldwork data confirms that some licensors use open content copyright licences in order to accomplish "signaling" goals of reputation enhancement within a community of audience members that includes potential employers or other parties who might pay to commission creative work. As anticipated by Carroll,[16] we have seen how RPG gamers have used the OGL to engage in "cheap speech", and to create new community hubs, such as searchable repositories of OGL-licensed materials.

I also discussed in Chapter 4 the work of scholars that I described as "proponents" of open content copyright licensing, among them Hietanen, Carroll and Sao, Santos & Alvelos, whose work

[14] See Chapter 4 notes 44-49 and accompanying text (discussing Hietanen) and Chapter 4, Part III(a) (discussing Lerner & Tirole).

[15] *Ibid* and see Chapter 4 notes 50-53 and accompanying text.

[16] See Chapter 4, notes 54-60 and accompanying text.

highlights the productive and distributive efficiencies that can be achieved by using open content licences. As has been shown in Chapter 7, some users of the OGL do indeed describe their motivations in starkly economic terms (what I described as "efficacious" instrumental reasons), sometimes even specifically using the term "efficiency". But those descriptions are often supplemented by users with concerns about community and sharing – in other words, while efficiency is valued, it is not the only or the most important metric that informs the decision to engage in open content copyright licensing, and that search for efficiency occurs within a complex web of concerns about communicative matters; for some OGL users, monetary considerations are heavily discounted against the personal satisfaction they derive from sharing the results of their creative efforts with others. I suggest that the communicative account – along with other non-utilitarian accounts – provides explanatory power otherwise lacking from conventional copyright justification theories. Emphasizing the importance of dialogue and communication is a salient addition to the explanations provided by conventional utilitarian and deontological copyright particularly because it accords better with the descriptions provided by those who use open content copyright licences and materials licensed thereunder. To the extent that we rely solely on utilitarian accounts when discussing open content licensing we miss an important aspect of the story – important both analytically and important in the sense of being congruent with the description of the phenomenon as provided by those who are themselves participating in it.

As detailed in Chapter 6, the RPG gaming experience is a quintessential "culture good" as described by Hughes *et al*:[17] one whose value is realized through the social process of gaming and attendant shared experiences. As noted by Hughes *et al*, open content copyright licences can help facilitate the near-frictionless use, modification and sharing of licensed content, and the OGL has demonstrably served that function in the RPG community. The "collaborative, distributed production network" powered by open content licences (as described by Sao Simao, Santos & Alvelos[18]) appears now to be an inextricable component of the RPG community following the adoption of the OGL in 2000 and further catalyzed by technological innovations such as the proliferation of online retail "storefronts" and Wizards of the Coast's online "DM's Guild" sales platform for OGL-licensed content.

[17] See Chapter 4, notes 64-69 and accompanying text.

[18] See Chapter 4, note 77 and accompanying text.

A core claim of the communicative copyright account is that the relational process of dialogic creative conversation is an unalterable and desirable feature of human life; further, that the copyright system should be oriented so as to, and measured by the degree to which it manages to, promote interaction between individuals and the sustenance of the communities within which those interactions take place. The communicative account of copyright avers that when people disseminate creative expression, they are engaging in an activity that offers opportunities for personal and communal development, which in turn can increase the possibilities of individual and relational flourishing. In short, one additional explanatory insight offered by a communicative account is that people create and communicate their copyright-protected works not simply because they are engaged in a process of utility maximization (though they may in part be doing so), but because they seek to interact and participate in an ongoing creative conversation *because that is something they find inherently worthwhile* irrespective of the prospect of monetary compensation or even quantifiable "gain". The community-constitutive element of open content copyright licences helps describe the nature of this "inherently worthwhile" endeavour: it is a eudaimonic, other-oriented and relational concept of flourishing, one that takes place within, and draws it value from, a community of creative, expressive activity.[19]

(b) *Constituting Community Through Licences and Licensing*

People use the OGL – and other open content copyright licences – because they want access to a particular community, sometimes in the sense of commercial "access" to a particular audience or market, and sometimes in the sense of simply wanting to be able to *join* a creative community, not (only) in order to sell something to people but in order to participate in the creative process occurring amongst members of that community. The OGL serves as a device to mark the joining of the creative RPG community because by adopting it in connection with the dissemination of their creative expression, OGL licensors are demonstrating they are the kind of person who does the kind of thing that people in that community do. For some licensors, the OGL performs an identity-constructing function that, in turn, performs a community-constitutive function. The licence both *facilitates* sharing and iterative creativity and

[19] See, *e.g.*, Rebecca Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions" (2009) 51 Wm & Mary L Rev 513 at 537 ("creativity is a positive virtue, not just because of its results but because of how the process of making meaning contributes to human flourishing").

signals that sharing and iterative creativity are sanctioned and even expected. Open content copyright licences offer *validation* of creative activity – they confirm that the licensor *wants* users to engage in the permitted activities. As Volcker Grassmuck has noted in his comments on open source software licensing communities, "the community itself and the cooperative creation it enables are clearly seen as the most important value that motivates people" to join,[20] but it is the open licences themselves that assist in "stringing together" open content communities.[21]

Licensing practices can have an organizing impact on communities, in the sense that the terms on which permission to use copyright-protected materials can interact with and alter communal norms pertaining to questions of use, distribution, and the provision of authorial credit.[22] In the words of Nicolas Suzor and Brian Fitzgerald, open content copyright licences serve as "the cornerstone of many user generated online communities", and they posit that Creative Commons licences, in particular, have been "utilised … as a tool of community building".[23] This constitutive role that licensing decisions plays is foundational, having consequences for the nature and complexion of the community and the types of activity that occur within it: "the rules selected by and for the community will affect the level of participation, the willingness to share and build off other's works, the manner in which participants interact, and, critically, the long term sustainability of the community".[24] Suzor and Fitzgerald emphasize the increased clarity that adoption of open licensing can provide to a community because they help to forestall "law suits, bad blood and distrust".[25] The case of the OGL supports the assertions of Suzor and Fitzgerald; as has been seen, the licence itself was both a signal that an era of "bad blood and distrust" had come to a close and an apparatus that sustains the ongoing creative activities and communities it was intended to foster.

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[20] Volcker Grassmuck, "Towards a New Social Contract: Free-Licensing Into the Knowledge Commons" in Lucie Guibault & Christina Angelopoulos, eds., *Open Content Licensing – From Theory to Practice* (Amsterdam: Amsterdam University Press, 2011) at 28.

[21] *Ibid* at 50.

[22] Nic Suzor & Brian Fitzgerald, "The Role of Open Content Licences in Building Open Content Communities: Creative Commons, GFDL and Other Licences" (2007), online: http://eprints.qut.edu.au/6076/1/6076_1.pdf.

[23] *Ibid* at 3. Suzor and Fitzgerald identify five "communities" that utilize or provide their users with the option of using open content copyright licences: ccMixter (a music remixing website), Flickr (a photo-sharing online service), the National Library of Australia's *Click and Flick* initiative (which uses Flickr to encourage users to upload photos), Wikipedia (the online user-generated encyclopedia) and *Second Life* (an online virtual world).

[24] *Ibid* at 15.

[25] *Ibid* at 16.

The OGL has also been shown to assist in the creation of a sense of "belonging":[26] by facilitating interaction within the RPG community, the licence has allowed for greater immersion in that community, and by serving as the topic of extensive online conversation and debate, the licence has led to the kinds of ongoing (and seemingly never-ending) dialogue and debate (and disagreement) that mark a vibrant online community. The processes and perceptions of "belonging" are complex and multi-variant, but the act of adopting the OGL itself appears to have played a role in enabling a sense of belonging for users. There is a performativity to the adoption of an open content licence, whether as licensor or licensee – it functions as a badge or marker indicating membership in a community, as the use of the OGL does within the RPG community.[27] Use of an open content licence can serve as both declaration and structural timber: the licence itself indicates "this is the kind of people we are", and "these are the kinds of things we do and of which we approve".[28]

(c) *Community Construction by Obviating Risk and Uncertainty*

As alluded to above, the story of the OGL cannot be told or understood without referring to the background of the aggressive intellectual property enforcement stances taken by D&D's owners prior to the OGL; the creation of the OGL, and the blossoming of the RPG market that all observers agree took place after and as a direct result of the release of the OGL and the d20 Trademark License, are the consequences of the decision made by D&D's new owners in the late 1990s to turn away from aggressive, restrictive enforcement of their copyright rights and adopt a posture of permissive re-use. This reflects Burk's observation that decisions about copyright enforcement have community-constitutive consequences.[29] Wizards of the Coast, the owners of D&D at the time of the creation of the OGL, also alluded to the history of aggressive copyright and trademark enforcement by the previous owners of D&D,

[26] See Chapter 4, note 87 and accompanying text (discussing Betsy Rosenblatt's work on "belonging").

[27] Indeed, as seen in Chapter 7, some publishers have elected to move away from use of the OGL because it suggests *too strong* an association with certain sub-communities within the RPG community (*e.g.*, use of the OGL for an RPG product is thought to indicate that the product is part of the "Old School Renaissance" movement or uses the d20 System mechanic, both described in Chapter 6).

[28] For an example of the use of copyright licences as "badges", see Tina Piper, "An 'Independent' View of Bill C-32's Copyright Reform" in Geist, Michael, ed., *From "Radical Extremism" to "Balanced Copyright* (Toronto: Irwin Law, 2010) at 440 noting a record label that uses Creative Commons licences not "so much as a legal document but as a brand. … the licences are valuable for their signaling function to fans, many of whom adopt an anti-corporate stance towards music and its commercialization").

[29] See Chapter 4, notes 118-122 and accompanying text.

stating that reliance on an "informal agreement" among publishers would be viewed as too risky by many RPG publishers who possessed "relatively modest financial resources" and would be unwilling to run the risk of potentially ruinous copyright disputes.[30] The use of the OGL meant that creators and publishers could rely on "a formal, explicit agreement describing how to use copyrighted material owned by others without triggering lawsuits or threats of litigation".[31] The need for the OGL was framed by reference to implicit communal understandings deriving from the nature of RPGs:[32]

> "Most roleplaying games, for example, are based on the implicit assumption that the people using them will create their own content in the form of adventures, characters and even whole campaign settings. However, few commercial roleplaying game products provide a license of sufficient rights to allow the purchasers of those games to distribute the content they create using the frameworks provided by the gaming system. The Open Gaming concept addresses this problem by explicitly providing such rights. … . It has been an established feature of RPGs since their inception that they should be used to create new content. Prior to the advent of widespread Open Game licenses, there was no practical way for that kind of material to be legally and widely distributed."

Open content licences function according to a different operating and behavioural logic than that applicable to conventional "closed" licences: the animating dynamic is an inversion of the traditional "covenant not to sue" and grant of permission on limited terms; instead, the open content licence functions by means of an *invitation* to use, modify and share – an invitation meant to foster inclusion and participation. That invitation, evidenced and instantiated by the open content licence, accomplishes a number of things: it not only sets rules for the community, but it is a vehicle for communicating a number of sentiments, including the message "you *can* do this and we *want* you to do this".

In understanding the reception, use and effect of the OGL, the role played by the sense of confusion and the process of social explication offers further illumination of the community-constitutive function of open content copyright licences. The online forums that were examined in the course of this research were replete with questions and discussions about *how* to use the OGL – what constituted proper and improper use of the OGL and OGL-licensed content. Discussions about the OGL also explore ancillary issues such as the OGL's drafting deficiencies and comparisons of the OGL with other open content licences (primarily Creative Commons). The OGL itself, indeed the confusion it engendered, has

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[30] See Chapter 6, note 201 and accompanying text.

[31] See also Wizards of the Coast, Inc., *Open Game Definitions: FAQ* (Version 2.0: January 26, 2004), online: http://wizards.com/default.asp?x=d20/oglfaq/20040123d.

[32] *Ibid*.

served as a node for discussion, debate, engagement and dialogue – the licence *itself* has become the subject of extensive community attention, and thereby fostered further development of that community. The open content licence can serve as a mechanism for navigating and negotiating the complexity of copyright as it applies to creative expression. The uncertainty that arises from trying to understand a dense body of law, further complicated by over-claiming, is tempered by the use of the open content licence.

To reiterate, reliance on the communicative account is not intended to displace or elide the instrumentalist origins of the OGL or its ongoing use. As discussed in Chapter 6, Ryan Dancey, the originator of the OGL, was explicit about his intentions and the intentions of the owners of D&D when they released the game's 3rd Edition using the OGL: they wanted to revive interest in the game, and they sought to reap the monetary benefits they anticipated would accrue to them from a revitalized RPG industry that drove gaming consumers back to the core D&D products. But, critically, they sought to accomplish those ends through the mechanism of strengthening the RPG community by permitting the use of materials in ways that would otherwise potentially have been the subject of copyright infringement claims. The OGL functioned, in the manner of copyright licences, as not simply a "covenant not to sue", but as the inverse: as a positive act of inclusion and community encouragement. And that act of inclusion – the use of the open content copyright licence – featured its own striking quality: its granting of permission served to eliminate risk and fear. Dancey, discussing the OGL within a handful of years after its initial release, said:

> "One of my fundamental arguments is that by pursuing the Open Gaming concept, Wizards can establish a clear policy on what it will, and will not allow people to do with its copyrighted materials. Just that alone should spur a huge surge in independent content creation that will feed into the D&D network."[33]

Discussing the matter further in an interview conducted for this dissertation:

> "The heart of the OGL is that it gets rid of legal gray areas which have plagued RPGs from the beginning. Because copyright law is not a good system for intellectual property in the sense that RPGs are intellectual property, it has always been 'dangerous' to publish RPG content that isn't derived from an entirely new game system. The OGL tears down all the ambiguity and legal risk and says 'if you do x, y & z, you can do a, b & c

[33] Ryan S. Dancey, "Interview with Ryan Dancey", online: http://www.wizards.com/dnd/article.asp?x=dnd/md/md20020228e [the "**WOTC Dancey Interview**"] (there is no date indicated in the online text of this interview; however, the URL seems to indicate it was published on February 28, 2002).

> totally legally'. That unlocked a tremendous amount of capital to invest in game publishing that otherwise would never have been committed due to the legal risks."[34]

As Dancey's comments indicate, uncertainty can be a creativity killer. There is a fear that arises from not knowing the extent of copyright protection and fear that arises from unpredictability of legal doctrine and how rightsholders and lawyers will conduct themselves. There is a need for comfort, security, reassurance – those elements can help in building and maintaining communities. Open content copyright licences can provide additional reassurance, enhanced certainty, and comfort – they can act as "insurance" – for *both* licensor and licensee. Jessica Silbey, quoting William Patry, has noted that intellectual property rights can be seen as performing a "risk-reducing" function for *owners*: by granting an enforceable exclusive right they serve as a "form of legal insurance protecting value otherwise created".[35] What this dissertation has shown is that the exclusive rights of copyright owners, when deployed through the permission-facilitating mechanism of an open content copyright licence, can likewise serve as a form of legal insurance for *users*; the open content licence serves to shield creative activity that might otherwise be infringing, or, just as damagingly, might otherwise be *claimed* or *perceived* as infringing. That sheltering of creative expression has value to both individual users and systemically: as Silbey has also noted, openness "breed[s] creativity", and where exclusive rights restrict openness, they are "suboptimal for those who seek to create and innovate, even for those who want to make money from their creations and innovations".[36] The open content copyright licence is a mechanism for converting the exclusive rights granted to copyright owners into a device facilitating openness, creativity and sharing.

The results of this research project highlight the role that "uncertainty" or "risk" plays in creative activity. As noted by numerous scholars, the relationship between copyright law and creative activity results in irreducible uncertainty: the scope of copyright protection in any given work is doctrinally ambiguous due to the indeterminacy of many critical copyright concepts such as the "idea/expression dichotomy", and many creative endeavours make use of pre-existing works that are themselves protected by copyright to some (similarly indeterminate) extent; further, the viability of a defence to a claim of

[34] Interview with Ryan S. Dancey (October 2, 2017) ["**Dancey Author Interview**"], on file with author.

[35] Jessica Silbey, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (Stanford: Stanford Law Books, 2015) at 276, quoting private correspondence between Silbey and Patry.

[36] *Ibid* at 279.

infringement is difficult to analyze and predict.[37] That uncertainty can result in continual expansion of the perceived bounds of copyright's protection, due to risk averse downstream user-creators obtaining licences in order to avoid risky claims, even for uses that might qualify as non-infringing.[38] The complexity of copyright licences, which can be further amplified by uncertainty about the relationship between the licence terms and the underlying rights, can further heighten confusion and anxiety among downstream creators. As David Lametti describes the matter, "[t]he misunderstanding, exaggeration and misinterpretation of copyright's rights channels and inhibits the creation of new work by hindering borrowing and duplication, necessary components of the creative process".[39] Confusion about copyright appears to be pervasive in online creative communities;[40] certainly the online discussions about the OGL that were canvassed for this research project were replete with seemingly endless discussions and debates about whether a particular activity constituted copyright infringement or a violation of the terms of the OGL. As Fiesler *et al* have noted, online community discussions commonly contain discussions centered around "worry over whether something they are doing might be infringing someone else's copyright";[41] that confusion leads to the predictable outcome of a chilling effect, with less creative activity occurring (or at least less dissemination of the results of creative activity).[42]

Rosenblatt has also highlighted the dampening role that uncertainty and risk play in creative activity that occurs in connection with materials in respect of which one or more parties may assert claims of intellectual property ownership.[43] As Rosenblatt characterizes the matter, non-expert "adapters" of pre-existing materials can face immense difficulties in properly identifying the contours of how source material

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[37] James Gibson, "Risk Aversion and Rights Accretion in Intellectual Property Law" (2007) 116 Yale L J 882 at 887.

[38] *Ibid.* See also, *e.g.*, W. Michael Schuster, "Fair Use and Licensing of Derivative Fiction: A Discussion of Possible Latent Effects of the Commercialization of Fan Fiction" (2014) 55 S Tex L Rev 529.

[39] David Lametti, "The Virtuous P(eer): Reflections on the Ethics of File Sharing", in Annabelle Lever, ed, *New Frontiers in the Philosophy of Intellectual Property* (Cambridge: 2011, Cambridge University Press) at 14 [citation to online SSRN version: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889165].

[40] Casey Fiesler, Jessica L. Feuston & Amy S. Bruckman, "Understanding Copyright Law in Online Creative Communities" (2015) in *CSCW '15 Proceedings of the 18th ACM Conference on Computer Supported Cooperative Work & Social Computing* at 116-129 ("misunderstandings, misconceptions, and confusion about the law are commonplace among many different types of content creators and consumers").

[41] *Ibid.*

[42] *Ibid.*

[43] Elizabeth L. Rosenblatt, "The Adventure of the Shrinking Public Domain" (2015) 86 University of Colorado Law Review 561 at 608ff. Rosenblatt's article uses as a case study the literary character Sherlock Holmes – a character that has been the subject of decades of extensive litigation and conflicting ownership claims, as well as the subject of the attentions of an active fan community.

is protected by copyright, who the relevant owner might be, and whether their adaptations or other creative activity properly qualify as non-infringing under copyright doctrine – but "they *can* know that they may face expensive litigation with potentially severe consequences".[44] As discussed in Part VI of Chapter 6 of this dissertation, RPGs pose particular challenges for assessing the validity of copyright ownership claims – the purported benefit of the supposed "bright-line" rule that "games are not copyrightable" is problematized by the density of the expression that accompanies most RPGs, with their confusing agglomeration of game mechanics, characters, settings, storylines and a mix of both textual expression and graphical imagery.

As Rosenblatt avers, the lack of predictability arising from the doctrinal uncertainty of copyright disputes (*i.e.*, the inability to predict the success of a particular argument premised on public domain status or fair use / fair dealing) falls unequally in many situations: rights-holders are sometimes better-resourced to advance claims (whether spurious or not), and consumer-users lack the funds and expertise to even assess the viability of the claim, to say nothing of mounting an effective defence against it. As described in Part III of Chapter 6, the confusion engendered by trying to analyze an uncertain legal landscape was historically compounded by the aggressive enforcement stance adopted by TSR, Inc., the original owners of the D&D game. The dynamic that Rosenblatt observed for literary characters was also present in the RPG community: an inherent "risk imbalance" as between owners and users made the source material "'off-limits' to creators even when the law would almost certainly permit their use",[45] or at least limited the downstream creativity to non-commercial exploitation that took place only within the confines of a particular trusted gaming group.

Rosenblatt has had occasion to complicate the conclusion that legal uncertainty inevitably results in a chilling of downstream creative expression.[46] She identified, in her description of the community that produces Sherlock Holmes fan fiction, a "rebellious approach" to fan works, an approach that, in reaction to perceived aggressive enforcement of intellectual property rights, sees fans deliberately flouting copyright norms in the creation of unauthorized fan works; in part, that "rebellion" relies on the involved

[44] *Ibid* at 608 [emphasis in original].

[45] *Ibid* at 630.

[46] Betsy Rosenblatt, "The Great Game and the Copyright Villain" in Betsy Rosenblatt and Robert Pearson, eds, (2017) 23 Transformative Works and Cultures.

fans identifying and relaying narratives of illegitimacy and inauthenticity on the part of rights-holders who would seek to squelch their creativity. In short, Rosenblatt's work shows that any "chilling effect" arising from copyright's uncertainty and the over-enthusiastic claims of well-resourced rights-owners can discourage some fans but not others – and the ones who are not discouraged may bear certain socio-economic or other demographic markers.[47] Other scholars have also noted that the chilling effects of copyright uncertainty have unpredictable results, perhaps due to the differing risk tolerances among individual creators.[48] A similar dynamic appears to have been at play in the RPG community: there is certainly evidence of online users creating and sharing D&D-related materials in the 1990s (and some of that activity gave rise to the enforcement steps taken by TSR, Inc., as described in Chapter 6) – but what was absent prior to the OGL was the kind of robust, sustained, broadly-accessible, openly-celebrated and even commercialized activities that have proliferated after the release of the OGL. An open content copyright licence, by virtue of its "flatness" (i.e., its availability to all interested licensees), helps "level the playing field", and democratizes the availability of creative activity across communities, making it accessible to anyone interested, irrespective of their personal risk-aversion inclinations and resources available to resist copyright claims.

An important function or effect of the OGL, then, was to obviate the risk imbalance that arose due to the legal uncertainty: the OGL set the parameters, and conveyed a clear message of "you're allowed to do this". It also provided *validation* for the creative activity that was already occurring – it allowed that creative activity to emerge from the shadows of furtive sharing amongst friends, and instead become a viable commercial activity, thereby extending its reach and enhancing the vitality of the entire RPG industry. The account of the OGL indicates that open content licences appear to intensify the volume and "density" of the sharing: more of it takes place, and the type of content created gets longer and more fully developed.

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[47] *Ibid* (noting that fans who "rebel" against copyright claims might be more likely to those who "are particularly affluent or privileged in terms of race, gender, sexuality, or ability", among other characteristics). In short, the ability to be *blasé* about potential liability for copyright infringement may be determined, at least in part, by external factors.

[48] Rebecca Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions" (2009) 51 Wm & Mary L Rev 513 at 538 (citing Edward Lee, "Warming Up to User-Generated Content" (2008) U Ill L Rev 1459 for proposition that even risk-averse community members will join in to online remix activities if they observe others doing so).

As is the case with open source software licences, an appreciation of the OGL, and open content licences generally, is best achieved by understanding its use within a particular context, that is, within a particular community. Julie Cohen's observations about the role played by social groups in creativity are apposite. Cohen notes that social groups "play important roles in determining both conceptions of artistic and intellectual merit and … of the appropriate domains of creative practice".[49] In addition, the social group can also interface with validating institutions (which function as gatekeepers or tastemakers) in either a reinforcing or disjunctive manner.[50] This research project has shown that whether a social group adopts, promotes, criticizes or otherwise discursively engages with a legal mechanism, such as a copyright licence, is also important. In the case of the OGL, which was of course released into a pre-existing community, but which sought to alter the formal norms and expectations of that community, the originator of the licensor certainly *did* adopt it enthusiastically, and made efforts to proselytize in favour of its use and adoption. High-status members of the RPG community, such as Ryan Dancey and other publishers, were active participants in encouraging others to adopt the OGL and in offering public explanations of its usage. Many of the RPG community's institutions – its largest publishers, its highest-profile members, its online community – helped to reinforce the new message of the OGL: remix, remake, and share. That validation has continued for nearly twenty years, and one telling current manifestation is that Wizards of the Coast now makes its DM's Guild online retail platform available to third parties who wish to sell their OGL-licensed content.

As a final observation, what I have termed the community-constitutive function of open content copyright licences is performed not only by the performative act of using the licences, but by the terms of the licences themselves. Weber has described this function of open source software licences as providing a "de facto constitution", one that sets out "the core statement of the social structure that defines the community".[51] And like a constitution, the terms of the OGL and how to apply them in particular circumstances are the subject of near-continual debate in the RPG community. In the words of Elkin-Koren, the terms of the OGL helps to "determine the nature of collaboration and shape the relationships

[49] Julie E. Cohen, "Creativity and Culture in Copyright Theory" (2007) UC Davis L Rev 1151 at 1188.
[50] See *ibid.* at 1185, 1188.
[51] See Steven Weber, *The Success of Open Source* (Cambridge, MA: Harvard University Press, 2004) at 179.

among" members of the RPG community.[52] One way in which the OGL operates in this regard can be seen in a set of extensive online debates about what kinds of activity are consistent with the "spirit" of the OGL: the debates revolve around "how much" of an RPG product should be declared as "Open Game Content" versus "Product Identity"; participants in the debates contest ontological matters such as whether there is even such a thing as a "spirit" of the OGL with which to comply, and more prosaic (but no less hotly contested) matters such as whether particular uses by particular licensors should be viewed as miserly and therefore normatively unacceptable because they are too limited and result in what is derisively termed "crippled" Open Game Content.[53] These debates, fueled by the wording of the OGL itself and the work of licensors and licensees in trying to understand it, are an integral part of the experience of using the OGL and, as was noted in Chapter 7, have been a part of the RPG community's activities from the earliest days of the OGL. Many scholars have noted the role that formal legal texts and dialogically- and iteratively-developed social norms play in constructing and deepening community relationships[54] – the OGL offers further evidence of that phenomenon; in fact, as noted in the discussion in Chapter 7 about how OGL users respond to instances of copyright infringement or breach of the terms of the OGL, such violations in some cases serve to provide opportunities for dialogue and efforts to inculcate communal norms.[55] The data indicates that the OGL is being used, at least in part, to maintain and foster community and participation therein. As suggested by Craig's relational account, as discussed in Chapter 2, that community-constitutive aspect is an appropriate criterion by which to measure the "success" of open content licenses: the extent to which they serve to facilitate and enhance dialogic communal participation.

IV. Revisiting the Matrix

In Chapter 4 I described a matrix of "success indicia" for the use of open content copyright licences. Returning to that matrix, I make two observations: one related to the matrix itself, and one related to the OGL. The first observation is that, as shown by the history of the OGL set forth in Chapter

[52] Niva Elkin-Koren, "Tailoring Copyright to Social Production" (2011) 12 Theoretical Inq L 309 at 328.
[53] See note 10, *supra*, and accompanying text.
[54] See Chapter 4, notes 96-117 and accompanying text.
[55] See Chapter 7, notes 122 and 123 and accompanying text.

6, the data in Chapter 7, and the preceding discussion in this chapter, the comprehensiveness of the factors identified in the matrix can be supplemented by four additional factors that emerge from the results of this research project. The second observation relates to the interface between the matrix and the history and ongoing use of the OGL, and will be discussed in turn.

First, in the category of *Work*, we can add the feature that the extent of the copyright protection for the licensed work is unclear as a doctrinal or jurisprudential matter; as has been shown to be the case with games generally and with RPGs in particular, there is an inherent conceptual ambiguity about the extent to which RPGs are protected by copyright, an ambiguity that results in it being difficult even for lawyers to definitively parse which elements, particularly textual elements, of an RPG product are protected by copyright and which are not.

Second, in the category of *Community*, we can add the feature of the presence of a cluster of widely-shared sentiments among members of the audience community pertaining to confusion about the extent of copyright protection in the licensed work, a sense of fear or risk aversion relating to the possibility of engaging in copyright infringement and being held liable for it, and a concomitant appetite for clarity and certainty about what activity in respect of the licensed work will give rise to such liability; in its most fulsome expression, we might describe the relevant sentiment as a mix of confusion and fear coupled with a desire to understand what the rules are and abide by them.

Third, in the category of *Licensor*, responsive to the two preceding factors, and consistent with those factors already present in this category, we can add the feature of the licensor being willing to publicly make a statement, by adopting an open content copyright licence, that accords with the sentiments, “you *can* play with our content” and “we *want* you to play with our content”. This feature speaks to not only the willingness to adopt that disposition, but the level of enthusiasm and demonstrated ongoing commitment with which it is conveyed.

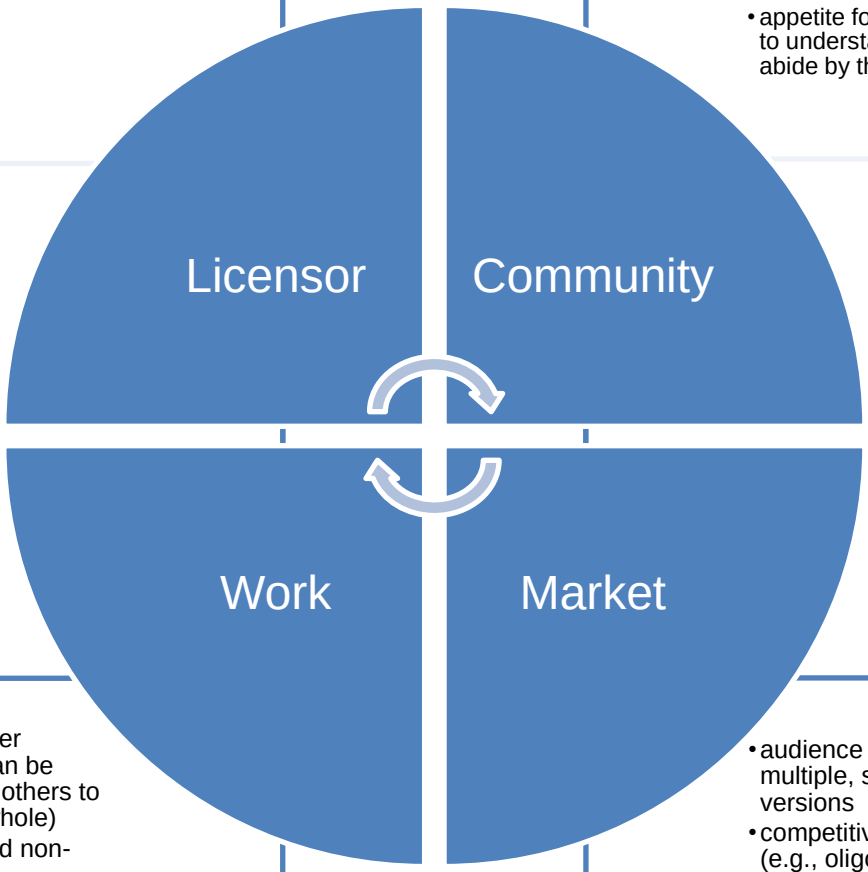
Finally, in the category of *Market*, there is a capacity within the market to recognize the open content licence itself as a form of “insurance” from which market participants can benefit via adoption of the licence. This factor is an extension of the three preceding new features: the final outcome of a state of legal uncertainty breeding confusion and a desire for increased certainty, which in turn is responded to by the adoption of the open content licence that signals the rules and is intended to provide additional clarity,

and which is interpreted and applied by market participants as a structuring quality of the post-licence commercial ecosystem in which the creative activities are occurring. In order for a market to have the requisite capacity there must be participants in the market who are aware of the presence of the licence and who can interpret and apply it in connection with their own expressive activities in connection with the licensed work.

Figure 8-2, on the following page, presents a reconfigured matrix of success indicia from Chapter 4, now including the four additional features outlined above.

- sublimated desire for control
- sublimated desire for money
- alignment with open goals
- desire for maximal dissemination
- willingness and capacity to cultivate community
- owns other IP for dual licensing
- desire to signal "you can play with this" + "we want you to play with this"

- values idiosyncrasy, individuality, serendipity, improvisation
- predisposed to active participation in creating creative expression
- shared ethos among community members (particularly as regards copyright)
- cohesive community within which signalling effects can occur
- presence and participation of high-status community members
- confusion about extent of copyright protection
- appetite for clarity, desire to understand rules and abide by them



- modular (smaller components can be combined with others to create larger whole)
- expandable and non-bounded
- low cost to create / easy to replicate
- transient utility, ease of consumption, "replayability"
- quality can benefit from mutiple contributors
- displays network effects
- extent of copyright protection is unclear

- audience appetite for multiple, slightly-variant versions
- competitive environment (e.g., oligopoly)
- receptive to use of "dual licensing" strategy
- ease of access to work (user-friendly interfaces)
- content is new to market / first-mover advantage
- licensed work previously popular but market has since "dried up"
- users willing to take on marketing/development tasks
- licence can act as "insurance"

Having updated the matrix of success indicia, I turn to applying the matrix to the history and use of the OGL. The history of the OGL supports the fitness of the matrix as a predictive tool. Both the initial use of the OGL in 2000 by D&D's owners and subsequent uses by RPG publishers thereafter map comfortably onto the matrix: almost all of the factors identified in the four categories of Licensor, Work, Market and Community were present in D&D's situation at the end of the 1990s and continue to be present for many publishers of RPGs generally. The following table sets out the congruence of the matrix factors and the OGL's initial use in 2000 in connection with D&D's 3rd Edition.

Licensor	
Factor	*Application to OGL*
sublimated desire for control	√
sublimated desire for money	√
alignment with open goals	√
desire for maximal dissemination	√
willingness and capacity to cultivate community	√
owns other IP for dual licensing	√
"you can play with this / we want you to play with this"	√
Work	
Factor	*Application to OGL*
modular (smaller components can be combined)	√
expandable and non-bounded	√
low cost to create / easy to replicate	√
transient utility / ease of consumption / replayability	√
quality can benefit from multiple contributors	√
displays network effects	√
extent of copyright protection unclear	√

Community	
Factor	*Application to OGL*
values idiosyncrasy, individuality, serendipity, improvisation	√
predisposed to active participation in creating creative expression	√
shared ethos among community members	√
cohesive community within which signalling effects can occur	√
presence and participation of high-status community members	√
confusion about extent of copyright protection	√
appetite for clarity, desire to understand rules and abide by them	√
Market	
Factor	*Application to OGL*
audience appetite for multiple, slightly-variant versions	√
competitive environment (e.g., oligopoly)	√
receptive to use of dual-licensing strategy	√
ease of access to work (user-friendly interfaces)	√
content is new-to-market / first-mover advantage	X
licensed work previously popular but market has since "dried up"	√
users willing to take on marketing / development tasks	√
capacity of licence to act as "insurance"	√

In the *Licensor* category, Wizards of the Coast ("**WOTC**") seemed an ideal open content licensor: they were, primarily through the office of Ryan Dancey, publicly enthusiastic about their new approach to licensing their content, and took time to offer explanations of the licence and build an infrastructure of

support which included websites and FAQs. They had clearly reconciled themselves to the fact that the OGL meant they were releasing control of their content, and while they were also frank about their desire to use the OGL to drive revenue long-term, were also publicly candid about the fact that they would be relinquishing potential revenues to third parties who would be creating OGL-licensed content. A significant, perhaps the most significant, factor in WOTC's successful use of the OGL was that they had a substantial repository of trade-mark rights and other copyright-protected material that they strategically deployed in a dual licensing strategy: the core D&D system was made available under the OGL, but a large number of other D&D-branded offerings were *not* licensed under the OGL; further, their print products were well-designed, lavishly illustrated, and sold at a high retail price point.

With respect to the *Work* category, D&D is an optimal product for open content licensing: the extent of copyright protection is contestable, it is designed to be literally modular and expandable (*i.e.*, not only is each RPG product merely one new release in an ongoing series of releases, but even within each product gamers are free to choose particular components and use them or not), and the "product" seems almost endlessly expandable (*e.g.*, more than a dozen official "campaign settings" have been released for D&D, and some of those campaign settings have had dozens of additional "sourcebook" expansions released for them – over the years, hundreds of thousands, if not millions, of words have been published by D&D's owners describing these various settings). The content is relatively low-cost to create (being mostly comprised of text) and easy to replicate (whether in printed or digital form). Players can "consume" the content as quickly as they can read it, and game sessions themselves can run from a few minutes to a few hours duration. D&D also handily displays network effects: the more players there are, the more likely any individual player is likely to find others to play with.

The D&D *Community* seems to have a voracious appetite for new D&D content, whether official publications, third party supplements, or individual "home-brewed" materials; aesthetically, that appetite ranges across an enormous swathe of genre and style, from Tolkien-esque "high fantasy" to high octane pulp-derived "swords and sorcery" to horror-inflected psychological thrillers. Eccentricity of expression appears to be prized among a sizable contingent of the RPG audience: "vanilla" RPG offerings are derided, and one hears a constantly-expressed desire for new and more singular adaptations of previous forms and content (*e.g.*, games that focus on new or different subgenres, or gaming supplements that

reflect more particularized sensibilities). As described in Chapter 6, the game effectively requires participants to undertake their own creative activities in connection with the gaming experience, from crafting new scenarios to preparing detailed character backgrounds to improvising conversations while describing their in-game actions. The community is also comparatively small with a number of structural "nodes" around which community activities cluster, from weekly gaming sessions at which players gather to annual conventions attended by hundreds or thousands of gamers to the kinds of active online post-based communities that were sampled for the data collection of this research project. While seemingly demographically fairly homogenous,[56] the community appears fairly variegated in that community members who occupy a variety of different roles and strata within the community regularly interact online – creators, corporate executives, and consumers, directly communicate with one another (primarily online) on a regular and fairly egalitarian basis under the guise of their shared identity as "gamers". This research project has also shown that the RPG community was previously fraught with uncertainty about copyright rights and the boundaries of non-infringing activities; the overwhelmingly positive reaction to the OGL, and its continued use, demonstrates that there was (and remains) a desire for assurance that common RPG-related creative activities – even those that entail commercial exploitation – are sheltered under the terms of the OGL.

Finally, the *Market* within which commercial RPG activities take place reflects many of the factors identified in the success indicia matrix. As noted above, the audience desire for a constant stream of new variations appears to be matched by a willingness to consume new offerings. Additionally, RPG consumers evidently have both the willingness and the capacity to accommodate a publisher's dual licensing strategy – the D&D game books themselves being a perfect example, where the fact that the core rules are available for free download does not result in a lack of retail sales for the printed, illustrated versions. Further, by virtue of the creative burden that RPGs put on their players (*i.e.*, the stated expectation that gamers will create their own materials for use in the game), RPG consumers appear willing to take on the kinds of development and refinement tasks that are expected for openly-licensed materials. The RPG market is currently dominated by two large publishers, which presents a useful competitive environment for both those publishers and their putative OGL-using competitors: for the

[56] See *supra* Chapter 5 notes 109-110 and accompanying text.

dominant publishers, they enjoy the prospect of flooding the market with their freely available OGL-licensed content, thereby shouldering proprietary competitors out of the field; for upstarts, as was the case with open source software advocates militating against a Microsoft-dominated computing landscape, the two dominant publishers present a useful target for an insurrectionist marketing approach. RPG works are easily accessible online, including through multiple retail storefronts offered by both the publishers and third party service providers. With respect to the initial offering of the OGL in 2000, D&D's position in the market had shrunk by comparison to previous years – and so the offering under the OGL (in conjunction with the new d20 system of the 3rd Edition and the d20 System Trademark License) clearly primed the market and revived interest in the brand and the revised content. The one factor that was *not* present for D&D was the "new-to-market" / first-mover advantage – D&D in particular, and RPGs in general, were nearly thirty years old by the time of the 3rd Edition. Finally, multiple RPG publishers, as noted in Chapters 6 and 7, have been and are willing to rely on the OGL to provide a form of risk management as they make their publication decisions: they have confidence that proceeding in accordance with the terms of the OGL provides them with a form of insurance against copyright infringement claims.

Looked at through the prism of the matrix, the use of the OGL in connection with the D&D RPG seems to have occurred in virtually the optimal set of circumstances for use of an open content licence. Only one of the success indicia identified in the matrix (*i.e.*, that the content be first-to-market) was definitively not present in 2000, when the OGL was first used.[57] The fact that the environment in which the OGL was launched displayed so many of the characteristics identified in the matrix should not, however, be taken as an indication that there is something so idiosyncratic about RPGs or Wizards of the Coast that the successful use of the OGL was effectively a one-time fluke. Open content copyright licences have been used in a variety of other industries (as described in Chapter 4); the Creative Commons licences (with the caveat that not all Creative Commons licences qualify as "open content" in accordance with the definition provided in Chapter 3) are continually and even increasingly popular. It is likely a safe prediction

[57] The "first-to-market" indicator was identified by Herrko Hietanen as one of a cluster of congenial "market conditions", (see Chapter 4, Part III(d)). While D&D could not claim to be "new" to the market, it is arguably the case that the 3rd Edition of D&D was so different from previous editions that it was *functionally* new, and further distinguished by the use of the OGL and the d20 System as points of differentiation. Further, D&D also displayed another closely-related factor identified by Hietanen: as discussed in Chapter 6, D&D's popularity and commercial prospects had significantly waned in the last half of the 1990s.

that no other use of an open content copyright licence will be as enduringly successful as the use of the OGL has been for RPGs, or as financially successful as Wizards of the Coast's use has been in connection with D&D – and the singular nature of those successes are potentially ascribable to idiosyncrasies of the RPG form and the D&D brand. But as discussed in Chapter 6, there are significant and salient overlaps among the forms, creative processes, and dissemination practices of RPGs and other kinds of creative activity, such as fan fiction and online videogaming. Open content licensing may not work *as well* for every form of creative expression, but it stands the prospect of working "successfully" for at least *some* significant modes of creative activity, namely, those activities that lie at the nexus of the various factors identified in the success indicia matrix. Further, the types of creative activity that seem most promising for open content copyright licensing are those which seem most embedded in contemporary leisure and entertainment culture – namely, those that are enabled and disseminated by digital networks.

V. Concluding Thoughts

To return to the question raised at the start of this chapter: when should a copyright owner use an open content copyright licence to disseminate their work? Answering that question involves referring to the matrix of success indicia identified in Chapter 4 as supplemented by the additional factors outlined in this chapter. The matrix essentially provides copyright owners, and those advising them, with a heuristic: when considering whether an open content copyright licence might serve them better than a traditional proprietary approach, they should assess their situation by examining the four categories of factors and determine how many of the success indicia are present in their circumstances. So, for example, a potential licensor should examine their own subjective willingness to forsake control over their creative expression, and the extent to which their actions are motivated by revenue or maximal dissemination; they should consider whether the work that is being considered for open content licensing is modular and expandable, and the extent to which there is uncertainty, both doctrinally and in the perception of potential customers, about the contours of the work's copyright protection. Essentially, the more success indicia that are present in the circumstance of a particular proposed use, the more likely it is that use of an open content copyright licence will be "successful".

While that might seem a tautological (or at least irreducibly subjective) observation, the communicative copyright account provides an objective (or at least independent) touchstone by which to evaluate the success of open content copyright licensing. Open content copyright licences are successful because, and to the extent that, they facilitate the creation and dissemination of creative expression, thereby assisting the maintenance and enhancement of dialogic community relationships. As has been seen, it is precisely that ability of open content copyright licences – the ability to improve communication and creative practices within creative communities, particularly by providing increased clarity and comfort with respect to risks of liability for copyright infringement – that motivates many people to use such licences, and provides a basis on which to assess their "success".

In the conclusion to this dissertation, I turn to propose some of the broader implications of the findings and observations to this point.

Conclusion

The preceding chapters contribute four insights to the ongoing conversation about open content copyright licences; two of those insights are drawn from the original empirical data contained in this dissertation, derived from interviews with people who use the Open Game License to disseminate their creative expression. The first insight is to highlight the vital importance, both in terms of theoretical analysis and in terms of practical application, of the community-constitutive role played by open content copyright licences arising from their capacity to reduce the levels of subjectively-perceived doubt and uncertainty among those who engage in creatively expressive activities that build upon existing copyright-protected materials. Secondly, the empirical evidence set out in this dissertation regarding that community-constitutive function affirms that the primary tenets of a relational and communicative justification theory for copyright are salient for explaining why some licensors and licensees use open content copyright licences – in short, the data collected in this research project corroborates certain propositions drawn from communicative/relational accounts of copyright's animating purposes. Thirdly, this dissertation provides an operational definition for the term "open content copyright licence" that can be used to assess the extent to which a particular copyright licence can properly be described as "open". Finally, this dissertation has identified a matrix of factors that are advantageous for any proposed use of open content copyright licence to disseminate creative expression; those factors have been termed "success indicia" and have been arrayed to provide a heuristic for licensors and their advisors to use in making decisions about whether to use open content copyright licences. That matrix heuristic is valuable and useful in part because open content copyright licences have conventionally been viewed by content owners as a puzzling curiosity.

Open content copyright licences seem a peculiar phenomenon when viewed from the perspective of traditional copyright justification theories. If copyright grants authors and owners exclusive rights on the theory that such rights are needed to incentivize the creation and dissemination of cultural expression by enabling creators to recover the costs of their creative inputs, then why would a copyright owner just… give their work away? Open content copyright licences are designed to eliminate restrictions on access and use of creative expression – the opposite of traditional licensing approaches premised on narrowly-crafted grants of rights coupled with rights of remuneration. The use of open content licences seems to be

a puzzle, explainable in terms of conventional copyright theories, but only with some effort. Nevertheless, such licences are undeniably popular for at least *some* copyright owners – Creative Commons licences have been used more than a billion times in the last two decades.

That puzzle, that disconnect between conventional copyright theory and the quotidian use of open content licences, is the question that underlies this dissertation, which poses the question of when a copyright owner should consider making use an open content copyright licence. It is too glib to answer, "when they are prepared to contribute to and make efforts to sustain a community which celebrates participatory and iterative creative expression" – but that answer, glib as it may seem, captures an insight essential to a proper understanding of such licences, and hints at when they can be productively employed. Open content copyright licences can be usefully understood as devices for sustaining and enhancing communities centered around creative expression; such licences do so, in part, because they reduce uncertainty for both licensor and licensee by giving each side greater comfort as what constitutes non-infringing activity, mitigating the dampening effect of copyright "chill". However, a licensor's commitment to community is not the *only* relevant variable in assessing when to use open content copyright licences. This dissertation has identified a matrix of what I have termed "success indicia", set out in final form in Chapter 8, that are relevant factors to be taken into account by copyright owners in making decisions about whether to use an open content copyright licence with respect to a particular work. I undertook a case study of the Open Game License ("**OGL**"), a form of open content copyright licence that was created in 2000 for use with the *Dungeons & Dragons* ("**D&D**") role-playing game ("**RPG**"), and which continues to be used by D&D and other RPG gamers nearly twenty years later. I utilized a qualitative empirical method of focused, semi-structured interviews to obtain responses from individuals and companies that have used the OGL to release RPG materials. To supplement the information gathered from the interview process, I used a "netnographic" approach to obtain data from online discussions about the OGL. The data collected served to validate the success indicia matrix as it had been set out in Chapter 4, but also, in conjunction with the theoretical framework discussed in Chapters 1 through 4, led me to add four additional factors to the matrix, each pertaining to different aspects of what I have referred to as the "community-constitutive" function of open content copyright licences.

That there is a community-constitutive aspect to the use of open content copyright licences is not an unprecedented insight – as traced in Chapters 1 through 4, the community-constitutive function of such licences is an observation drawn from previous scholarship across a number of disciplines. But what this dissertation has tried to demonstrate is that the community-constitutive aspect should be foregrounded both as a theoretical matter in alignment with the communicative copyright account, and as a practical matter in strategic terms. From the standpoint of copyright justification theories, open content copyright licences are valuable on a communicative or relational account because they facilitate dialogic creativity and the development of personal and communal communicative capacities. The central commitments of a relational and communicative account of copyright are reflected in open content copyright licensing practices and those commitments provide insight into why and when open content licensing can be successfully deployed for creative cultural expression.

As anticipated by the communicative copyright account, many users of the OGL use it because they are interested in conversing, in an expansive sense, with others in their chosen community of gamers, about and through their creative expression – they seek a comparatively uncomplicated way of mutually sharing their creative expression because they enjoy both the creative process and the responses of their audience. More, they are interested in contributing to a communal creative effort which is akin to an ongoing colloquy of creators and consumers. Open content copyright licences will "work" best for certain types of licensors who are dispositionally committed to disseminating certain types of works into certain types of markets that are rooted in certain types of communities; further, there is a mutually-catalytic effect at play, whereby "community" helps explain what kinds of works and licensors are best-suited to open content copyright licensing – namely, works that can productively be enhanced and enjoyed in communal settings, and licensors who are interested in genuinely participating in, and facilitating the participation of others in, a given creative community. Open content copyright licences offer a means by which, when used in the appropriate manner and circumstances, copyright's traditional logic of the policing of exclusive rights can be productively inverted to secure the very goals of creativity and dissemination that are said to be at the heart of the rationale for copyright's existence.

Open content copyright licenses provide their users with an operational grammar for conduct within a market and community. Such licences not only set the terms of the relationships within the

community with respect to the licensed works – relationships premised on sharing and iterative creativity – but also function as markers of communal identity. The successful open content licensor will have a genuine interest in and commitment to nurturing the consumptive communities that will make use of the licensed content. Further, it appears that successful open content licensors will either already be part of a creative community or be willing to become active participants in that community. As was the case with the OGL, it appears that the pre-existence of such a cohesive community will certainly make it *easier* for a licensor to avail themselves of the benefits of open content licensing; that is not to say that open content licences cannot be used to *create* new communities, but the absence of a pre-existing community means that many of the success indicia factors will not be present, thus indicating that any such use will likely be more difficult and the benefits thereof slower to accrue.

Having said that there is clearly a set of circumstances, as identified in the matrix, in which open content copyright licensing can be successfully used, I want to speculate about potential uses beyond RPGs. What other kinds of entertainment products might be particularly suitable for open content licensing? Based on the matrix, three obvious candidates present themselves: science fiction and fantasy "franchises" (such as *Lord of the Rings*), comic book "universes" (such as the Marvel and DC comics lines), and serialized video game series (such as the *Call of Duty* series of games). All contain the kind of content that would seem to lend itself to open content licensing, including expandable "landscapes" featuring multitudinous characters, settings, and storylines capable of iterative development, and a wide range of creative forms in which the content can be re-purposed (such as text stories and digital animations). From a commercial standpoint, such entertainment properties seem well-placed to take advantage of a dual licensing strategy: relying on their trade-mark rights, owners can by means of an open content licence empower their audiences to create downstream derivative works and monetize the value of "official" product offerings, drawing a distinction in the market between third party offerings and "original" offerings on the basis of source. Such products also, in many cases, have extensive fan communities, many of whom *already* engage in remix creativity. Of course, it remains to be seen whether such entertainment properties will be owned by potential licensors who can satisfy the criteria for licensors identified in the success indicia matrix – but for such licensors, open content licensing seems an opportunity just waiting to be seized.

More imaginatively, as the matrix of indicia set out in Chapter 4 indicates, open content licences can be successfully used in a variety of contexts, well beyond software and even commercialized creative expression. One potential use that warrants further attention is that of "traditional knowledge" (TK), defined as "the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities".[1] TK features a number of characteristics that might lend it to being disseminated by means of an open content licence: TK's content is often not capable of being protected by copyright, and those components of it that are capable of being protected by copyright can display fuzziness about the extent of protection and ownership; and because TK is definitionally embedded in and derived from the practices of certain communities, issues of consent and ethicality of use are prominent.[2] A proposal published by the Carleton University Geomatics and Cartographic Research Centre and the Canadian Internet Policy and Public Interest Clinic features an open licensing system inspired by Creative Commons licences.[3] The proposed licensing scheme includes licensing modules such as "community consent" and "community identification" requirements, and "give back / reciprocity" requirements that would oblige licensees to provide the licensing community with access to the resulting research and/or remuneration-sharing.[4] The proposal sets forth a licensing model that is modular, adaptable and "tailored to the needs of TK and indigenous communities".[5] The licensing scheme could serve a signalling and constitutive function, consistent with the analysis above: not only indicating the willingness of the licensor community to permit use of their TK on the stated terms, but inviting the use while also setting the ethical boundaries of the use. For present purposes, another noteworthy element of the proposal is the emphasis its authors place on the prospect of the proposed licensing scheme to "clarify expectations" and "enhance certainty of expectations" for both the community-licensors and licensee-users.[6] Those themes are consistent with the concerns that have been highlighted in this dissertation. Other projects inspired by Creative Commons are being pursued that seek

[1] *A Proposal: An Open Licensing Scheme for Traditional Knowledge* (July 2016), Carleton University Geomatics and Cartographic Research Centre & Canadian Internet Policy and Public Interest Clinic at 1-2, citing the World Intellectual Property Organization "Traditional Knowledge" Glossary. Online: https://cippic.ca/sites/default/files/file/CIPPIC_GCRC--TK_License_Proposal--July_2016.pdf.

[2] *Ibid* at 2-6.

[3] *Ibid* at 8.

[4] *Ibid* at 13-14.

[5] *Ibid* at 28.

[6] *Ibid* at 8, 29.

to adapt open context licensing to other TK management initiatives, including the *Local Contexts* project.[7] Consistent with the analysis contained in this dissertation, the importance of community is of course an integral consideration for such projects. What remains to be seen is whether such licensing schemes can properly function in licensing environments where it is unclear whether there is an alignment of objectives between the TK licensors and their licensees – it is not obvious that there is sufficient pre-existing community cohesion among licensors and licensees to provide a fertile environment for use of the licensed content.

A final observation about the nature of openness as it relates to using open content licences for creative expression. This dissertation has indicated that the presence of some other form of intellectual property rights, usually trade-marks, appears necessary for successful commercial-grade uses of open content copyright licences. There is a valid point to be made that what Wizards of the Coast articulated as a move *away* from copyright is not accurately described as a turn *towards* "openness" – or at least that the concept of "openness" needs to be qualified in this context because it was not a turn *away* from intellectual property control writ large. As was made explicit by the terms of the d20 Trademark License" that was paired with the OGL and which allowed limited use of the marks owned by Wizards of the Coast, an "open" approach was definitely *not* being adopted by Wizards of the Coast with respect to trademark rights. As described in Chapter 7, many of the interview respondents were sensitive to use of their own (mostly unregistered) trade-marks to brand themselves in the competitive RPG market. What may appear to be the embrace of "openness" with respect to copyright can plausibly be described as merely the displacement or diversion of intellectual property enforcement activities from the site of copyright to the site of trademark. To echo Dusollier's critique of Creative Commons, despite the talk of "openness", it can be said that OGL licensors continue to "play the game" of intellectual property.[8] Trade-mark rights, at a minimum, have played an important role in the story of the OGL, and appear to be an important aspect of commercially viable uses of open content copyright licences.

But, while bearing in mind the role played by trade-mark rights (as well as certain restrictions premised on copyright), the move towards open content licensing should be celebrated for what it

[7] See http://localcontexts.org/.

[8] Severine Dusollier, "Sharing Access to Intellectual Property Through Private Ordering" (2007) 82 Chicago-Kent LR 1391 at 278 ("Creative Commons thus plays the game of copyright and does not attempt to abolish it").

represents, as evidenced by the history of the OGL and its use in the RPG community: a meaningful and sustainable amplification of creative ferment that has yielded an enormous amount of expressive activity, provided the foundation for many active business undertakings, and, at a minimum, played a positive role in facilitating dialogic interactions among RPG community members. Those are not small accomplishments for a copyright licence. Turning back to Carys Craig's relational author account of copyright law, the formative theoretical framing that undergirds this dissertation's analysis, she posited that copyright and its constituent parts could be assessed by the extent to which they "maximise social engagement, dialogic participation and cultural contributions".[9] Open content copyright licensing, properly deployed, does those things; the Open Game License, a superlative deployment of open content licensing, has demonstrably done those things. Copyright owners who wish to accomplish those goals among their own audience communities would be well-advised to use open content licences as a means by which to accomplish them.

[9] Carys Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar, 2011) at 57.

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Contractual Instruments

Creative Commons Licences - http://creativecommons.org/licenses/

D&D System Reference Documents - http://www.opengamingfoundation.org/srd.html

Debian Social Contract - https://www.debian.org/social_contract

GNU Licences

https://www.gnu.org/licenses/fdl.html

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

https://www.gnu.org/licenses/copyleft.en.html

https://www.gnu.org/philosophy/free-sw.html

Open Audio License

https://web.archive.org/web/20040818074301/http://www.eff.org/IP/Open_licenses/20010421_eff_oal_1.0.html

Open Game License - http://www.opengamingfoundation.org/ogl.html

Licence Art Libre - http://artlibre.org/

Microsoft Xbox Game Content Usage Rules - https://www.xbox.com/en-us/developers/rules

Online Resources - General

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http://www.paristechreview.com/2013/03/29/brief-history-open-data/

https://stallman.org/biographies.html#serious

Online Resources – "Open" Initiatives and Definitions

Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities - https://openaccess.mpg.de/Berlin-Declaration

Bethesda Statement on Open Access Publishing - http://legacy.earlham.edu/~peters/fos/bethesda.htm

Budapest Open Access Initiative - http://www.budapestopenaccessinitiative.org/

Creative Commons

https://creativecommons.org/2005/10/06/ccinreviewlawrencelessigonsupportingthecommons/
https://creativecommons.org/about/mission-and-vision/
https://creativecommons.org/licenses/by-sa/4.0/
https://creativecommons.org/licenses/by-sa/4.0/legalcode
https://creativecommons.org/share-your-work/public-domain/freeworks/
https://creativecommons.org/share-your-work/public-domain/freeworks/
https://creativecommons.org/weblog/entry/46632/
https://stateof.creativecommons.org/
https://stateof.creativecommons.org/2015/
https://wiki.creativecommons.org/wiki/License_Versions#Treatment_of_moral_rights

Definition of Free Cultural Works

https://freedomdefined.org/Definition

http://freedomdefined.org/Definition

http://freedomdefined.org/History

http://freedomdefined.org/Licenses

http://freedomdefined.org/Permissible_restrictions

O'Reilly Press Release re Open Source Summit - http://www.oreilly.com/pub/pr/796

OECD Final Communique - http://www.oecd.org/science/sci-tech/sciencetechnologyandinnovationforthe21stcenturymeetingoftheoecdcommitteeforscientificandtechnologicalpolicyatministeriallevel29-30january2004-finalcommunique.htm

Opencontent.org

http://opencontent.org

http://web.archive.org/web/20030802222546/http://opencontent.org/

http://opencontent.org/blog/archives/329

http://opencontent.org/openpub/

http://web.archive.org/web/20030806033000/http://www.opencontent.org/opl.shtml

Open Definition

http://opendefinition.org/

http://opendefinition.org/od/2.1/en/

http://opendefinition.org/guide/

http://opendefinition.org/history/

http://opendefinition.org/licenses/

Open Educational Resources

http://www.unesco.org/new/en/communication-and-information/access-to-knowledge/open-educational-resources/what-is-the-paris-oer-declaration/

http://www.oerup.eu/module-1/oer-history/

Open Education Timeline - http://timemapper.okfnlabs.org/okfnedu/open-education-timeline#54

Open Government Data - https://opengovdata.org/

Open Knowledge International

https://okfn.org/

https://okfn.org/about/

Opensource.com - https://opensource.com/resources/what-is-copyleft

Open Source Initiative

https://opensource.org/about

https://opensource.org/osd

Project Gutenberg

http://www.gutenberg.org/wiki/Gutenberg:The_History_and_Philosophy_of_Project_Gutenberg_by_Michael_Hart

Online Resources – Open Game License, D&D, RPGs

Official Wizards of the Coast Materials

5th Edition SRD (which includes the text of the OGL) - http://media.wizards.com/2016/downloads/DND/SRD-OGL_V5.1.pdf

http://dnd.wizards.com/articles/features/systems-reference-document-srd

http://dnd.wizards.com/articles/news/dungeon-masters-guild-now-open

http://wizards.com/d20/files/4E_GSL.pdf

http://wizards.com/d20/files/4E_GSL_FAQ.pdf

http://www.dmsguild.com/

www.dndclassics.com

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Other Licenses: FAQ (Version 2.0, January 26, 2004), online: http://wizards.com/default.asp?x=d20/oglfaq/20040123g

d20 System Trademark Guide Version 4.0 - http://www.wizards.com/d20/files/d20Guidev4.rtf

d20 Trademark License Version 6.0 - https://www.wizards.com/d20/files/d20stlv6.rtf

d20 System Trademark FAQ, online: http://www.wizards.com/default.asp?x=d20/srdfaq/20040123b

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Appendix A – Open Content Project Definition

[http://opencontent.org/definition/]

Defining the "Open" in Open Content and Open Educational Resources

The terms "open content" and "open educational resources" describe any copyrightable work (traditionally excluding software, which is described by other terms like "open source") that is licensed in a manner that provides users with free and perpetual permission to engage in the 5R activities:

1. Retain - the right to make, own, and control copies of the content (e.g., download, duplicate, store, and manage)
2. Reuse - the right to use the content in a wide range of ways (e.g., in a class, in a study group, on a website, in a video)
3. Revise - the right to adapt, adjust, modify, or alter the content itself (e.g., translate the content into another language)
4. Remix - the right to combine the original or revised content with other material to create something new (e.g., incorporate the content into a mashup)
5. Redistribute - the right to share copies of the original content, your revisions, or your remixes with others (e.g., give a copy of the content to a friend)

Legal Requirements and Restrictions Make Open Content and OER Less Open

While a free and perpetual grant of the 5R permissions by means of an "open license" qualifies a creative work to be described as open content or an open educational resource, many open licenses place requirements (e.g., mandating that derivative works adopt a certain license) and restrictions (e.g., prohibiting "commercial" use) on users as a condition of the grant of the 5R permissions. The inclusion of requirements and restrictions in open licenses make open content and OER less open than they would be without these requirements and restrictions.

There is disagreement in the community about which requirements and restrictions should never, sometimes, or always be included in open licenses. For example, Creative Commons, the most important provider of open licenses for content, offers licenses that prohibit commercial use. While some in the community believe there are important use cases where the noncommercial restriction is desirable, many in the community strongly criticize and eschew the noncommercial restriction.

As another example, Wikipedia, one of the most important collections of open content, requires all derivative works to adopt a specific license - CC BY SA. MIT OpenCourseWare, another of the most important collections of open content, requires all derivative works to adopt a specific license - CC BY NC SA. While each site clearly believes that the ShareAlike requirement promotes its particular use case, the requirement makes the sites' content incompatible in an esoteric way that intelligent, well-meaning people can easily miss.

Generally speaking, while the choice by open content publishers to use licenses that include requirements and restrictions can optimize their ability to accomplish their own local goals, the choice typically harms the global goals of the broader open content community.

Poor Technical Choices Make Open Content Less Open

While open licenses provide users with legal permission to engage in the 5R activities, many open content publishers make technical choices that interfere with a user's ability to engage in those same

activities. The ALMS Framework provides a way of thinking about those technical choices and understanding the degree to which they enable or impede a user's ability to engage in the 5R activities permitted by open licenses. Specifically, the ALMS Framework encourages us to ask questions in four categories:

1. Access to Editing Tools: Is the open content published in a format that can only be revised or remixed using tools that are extremely expensive (e.g., 3DS MAX)? Is the open content published in an exotic format that can only be revised or remixed using tools that run on an obscure or discontinued platform (e.g., OS/2)? Is the open content published in a format that can be revised or remixed using tools that are freely available and run on all major platforms (e.g., OpenOffice)?
2. Level of Expertise Required: Is the open content published in a format that requires a significant amount technical expertise to revise or remix (e.g., Blender)? Is the open content published in a format that requires a minimum level of technical expertise to revise or remix (e.g., Word)?
3. Meaningfully Editable: Is the open content published in a manner that makes its content essentially impossible to revise or remix (e.g., a scanned image of a handwritten document)? Is the open content published in a manner making its content easy to revise or remix (e.g., a text file)?
4. Self-Sourced: It the format preferred for consuming the open content the same format preferred for revising or remixing the open content (e.g., HTML)? Is the format preferred for consuming the open content different from the format preferred for revising or remixing the open content (e.g. Flash FLA vs SWF)?

Using the ALMS Framework as a guide, open content publishers can make technical choices that enable the greatest number of people possible to engage in the 5R activities. This is not an argument for "dumbing down" all open content to plain text. Rather it is an invitation to open content publishers to be thoughtful in the technical choices they make - whether they are publishing text, images, audio, video, simulations, or other media.

Appendix B – Definition of Free Cultural Works

[excerpted from freedomdefined.org/Definition]

Definition

Stable version

This is the stable version **1.1** of the definition. The version number will be updated as the definition develops. The editable version of the definition can be found at Definition/Unstable. See authoring process for more information, and see translations if you want to contribute a version in another language.

version **1.0**

Summary

This document defines "Free Cultural Works" as works or expressions which can be freely studied, applied, copied and/or modified, by anyone, for any purpose. It also describes certain permissible restrictions that respect or protect these essential freedoms. The definition distinguishes between *free works*, and *free licenses*which can be used to legally protect the status of a free work. The definition itself is *not* a license; it is a tool to determine whether a work or license should be considered "free."

Preamble

Social and technological advances make it possible for a growing part of humanity to *access, create, modify, publish and distribute* various kinds of works - artworks, scientific and educational materials, software, articles - in short: *anything that can be represented in digital form*. Many communities have formed to exercise those new possibilities and create a wealth of collectively re-usable works.
Most authors, whatever their field of activity, whatever their amateur or professional status, have a genuine interest in favoring an ecosystem where works can be spread, re-used and derived in creative ways. The easier it is to re-use and derive works, the richer our cultures become.

To ensure the graceful functioning of this ecosystem, works of authorship should be **free**, and by *freedom* we mean:

- the **freedom to use** the work and enjoy the benefits of using it
- the **freedom to study** the work and to apply knowledge acquired from it
- the **freedom to make and redistribute copies**, in whole or in part, of the information or expression
- the **freedom to make changes and improvements**, and to distribute derivative works

If authors do not take action, their works are covered by existing copyright laws, which severely limit what others can and cannot do. Authors can make their works free by choosing among a number of legal documents known as licenses. For an author, choosing to put their work under a *free license* does not mean that they lose all their rights, but it gives to anyone the freedoms listed above.
It is important that any work that claims to be free provides, practically and without any risk, the aforementioned freedoms. This is why we hereafter give a precise **definition of freedom** for licenses and for works of authorship.

Identifying Free Cultural Works

This is the *Definition of Free Cultural Works*, and when describing your work, we encourage you to make reference to this definition, as in, "This is a freely licensed work, as explained in the *Definition of Free Cultural Works*." If you do not like the term "Free Cultural Work," you can use the generic term "Free Content," or refer instead to one of the existing movements that express similar freedoms in more specific contexts. We also encourage you to use the Free Cultural Works logos and buttons, which are in the public domain.

Please be advised that such identification does *not* actually confer the rights described in this definition; for your work to be truly free, it must use one of the Free Culture Licenses or be in the public domain. We discourage you to use other terms to identify Free Cultural Works which do not convey a clear definition of freedom, such as "Open Content" and "Open Access." These terms are often used to refer to

content which is available under "less restrictive" terms than those of existing copyright laws, or even for works that are just "available on the Web".

Defining Free Culture Licenses

Licenses are legal instruments through which the owner of certain legal rights may transfer these rights to third parties. Free Culture Licenses do not take any rights away -- they are always optional to accept, and if accepted, they grant freedoms which copyright law alone does not provide. When accepted, they never limit or reduce existing exemptions in copyright laws.

Essential freedoms

In order to be recognized as "free" under this definition, a license must grant the following freedoms without limitation:

- **The freedom to use and perform the work:** The licensee must be allowed to make any use, private or public, of the work. For kinds of works where it is relevant, this freedom should include all derived uses ("related rights") such as performing or interpreting the work. There must be no exception regarding, for example, political or religious considerations.
- **The freedom to study the work and apply the information:** The licensee must be allowed to examine the work and to use the knowledge gained from the work in any way. The license may not, for example, restrict "reverse engineering".
- **The freedom to redistribute copies:** Copies may be sold, swapped or given away for free, as part of a larger work, a collection, or independently. There must be no limit on the amount of information that can be copied. There must also not be any limit on who can copy the information or on where the information can be copied.
- **The freedom to distribute derivative works:** In order to give everyone the ability to improve upon a work, the license must not limit the freedom to distribute a modified version (or, for physical works, a work somehow derived from the original), regardless of the intent and purpose of such modifications. However, some restrictions may be applied to protect these essential freedoms or the attribution of authors (see below).

Permissible restrictions

Not all restrictions on the use or distribution of works impede essential freedoms. In particular, requirements for attribution, for symmetric collaboration (i.e., "copyleft"), and for the protection of essential freedom are considered permissible restrictions.

Defining Free Cultural Works

In order to be considered free, a work *must* be covered by a Free Culture License, or its legal status *must* provide the same *essential freedoms* enumerated above. It is not, however, a sufficient condition. Indeed, a specific work may be non-free in other ways that restrict the essential freedoms. These are the additional conditions in order for a work to be considered free:

Availability of source data: Where a final work has been obtained through the compilation or processing of a source file or multiple source files, all underlying source data should be available alongside the work itself under the same conditions. This can be the score of a musical composition, the models used in a 3D scene, the data of a scientific publication, the source code of a computer application, or any other such information.

Use of a free format: For digital files, the format in which the work is made available should not be protected by patents, unless a world-wide, unlimited and irrevocable royalty-free grant is given to make use of the patented technology. While non-free formats may sometimes be used for practical reasons, a free format copy *must* be available for the work to be considered free.

No technical restrictions: The work must be available in a form where no technical measures are used to limit the freedoms enumerated above.

No other restrictions or limitations: The work itself must not be covered by legal restrictions (patents, contracts, etc.) or limitations (such as privacy rights) which would impede the freedoms enumerated

above. A work may make use of existing legal exemptions to copyright (in order to cite copyrighted works), though only the portions of it which are unambiguously free constitute a free work.

In other words, whenever the user of a work cannot legally or practically exercise his or her basic freedoms, the work cannot be considered and should not be called "free."

Permissible restrictions

There are certain requirements and restrictions on the use or interchange of works that we feel do not impede the essential freedom in our definition. These restrictions are described below.
Apart from these allowed restrictions, the license *must not* include clauses that limit essential freedoms. Especially, *it must not specify any usage restrictions* (such as prohibiting commercial use of the work, restricting use depending on political context, etc.).

Attribution of authors / No Endorsement

Attribution protects the integrity of an original work, and provides credit and recognition for authors. A license may therefore require attribution of the author or authors, provided such attribution does not impede normal use of the work. For example, it would not be acceptable for the license to require a significantly more cumbersome method of attribution when a modified version of the licensed text is distributed.

Such an attribution should not imply an endorsement by the original authors of changes made by others. Licenses may place restrictions on the use of one author's trademarks in versions of the work which have been modified by others.

Transmission of freedoms

The license may include a clause, often called *copyleft* or *share-alike*, which ensures that derivative works themselves remain free works. To this effect, it can for example require that all derivative works are made available under the same free license as the original. **Strong copyleft** licenses have the broadest definition of derivative works - only permitting the modified versions of the work to be distributed with other Free Cultural Works. **Weak Copyleft** licenses require modified versions of the work to be distributed under the same license as the original work but allow it to be distributed with non-free cultural works - such as allowing photographs licensed under Free Culture licenses to be published with text which is not. (Licenses without copyleft/share-alike restrictions are called **permissive** or **copyfree**.)

Protection of freedoms

The license may include clauses that strive to further ensure that the work is a free work: for example, access to *source code*, or prohibition of *technical measures*restricting essential freedoms.

Availability of source data: Where a final work has been obtained through the compilation or processing of design information or a source file or multiple source files, all underlying source data should be available alongside the work itself under the same conditions. This can be the score of a musical composition, the models used in a 3D scene, the data of a scientific publication, the drawings and parts list of a machine, or any other such information.

Use of a free format: For digital files, the format in which the work is made available should not be a format that can only be read using a particular manufacturers programme. Formats should be documented and should not be protected by patents, unless a world-wide, unlimited and irrevocable royalty-free grant is given to make use of the patented technology. While non-free formats may sometimes be used for practical reasons, a free format copy means that the information will be accessible to everyone, for ever.

No technical restrictions: The work must be available in a form where no technical measures are used to limit the freedoms enumerated above.

No other restrictions or limitations: The work itself must not be covered by legal restrictions (patents, contracts, etc.) or limitations (such as privacy rights or being for non-commercial use only) which would impede the freedoms enumerated above. A work may make use of existing legal exemptions to copyright (in order to cite copyrighted works), though only the portions of it which are unambiguously free constitute a free work.

Restrictions which are not permissible

Apart from these allowed restrictions, the license must *not* include clauses that limit essential freedoms. Especially, it must not specify any usage restrictions

Non Derivatives

The freedom to make changes and to distribute derivatives -- one of the core freedom at the heart of the definition -- is clearly not available to use the users of works under licenses which block or restrict the creation of derivative works. As a result, no license that bars the creation of derivative works without permission can be considered a Free Culture license.

Non Commercial

Licenses which only allow non-commercial use are not considered Free Culture licenses. This is because in practice there are many ways that Cultural works can be used and reused which would be considered commercial. Another problem is that there is no generally agreed definition of where the border line is between Commercial and Non Commercial uses with very many cases falling in the undefined area in between. In practice **Share Alike** or **Copyleft** clauses provide a restriction on commercial profits since any reuse making excessive profits will soon stimulate a bunch of copycats which will bring prices down while encouraging even wider distribution of the works - which is the objective of the free culture licenses.

Political

Restrictions to limit use of works in support of causes which the original author abhors have been proposed at times. Licenses with these restrictions are not considered to be Free Culture licenses. In practice there are so many different causes, each of which has supporters so certain works can only be used with certain other works. This means any reuse must be subject of careful checking of exactly what restrictions apply.

3rd world only

Licenses for free distribution in poor countries only have been proposed. These are not considered Free Culture licenses.

Advertising

The original BSD license included a clause requiring all advertising for a derivative work to include an acknowledgement of the contribution of the original author. With collaboratively produced works with many authors this would be a significant burden. Attribution requirements for Free Cultural Works should be simpler than this.

Appendix C – Open Definition

[opendefinition.org/od/2.1/en/]

Version 2.1
The Open Definition makes precise the meaning of “open” with respect to knowledge, promoting a robust commons in which anyone may participate, and interoperability is maximized.

Summary: *Knowledge is open if anyone is free to access, use, modify, and share it — subject, at most, to measures that preserve provenance and openness.*

This essential meaning matches that of “open” with respect to software as in the Open Source Definition and is synonymous with “free” or “libre” as in the Free Software Definition and Definition of Free Cultural Works.

The term **work** will be used to denote the item or piece of knowledge being transferred.

The term **license** refers to the legal conditions under which the work is provided.

The term **public domain** denotes the absence of copyright and similar restrictions, whether by default or waiver of all such conditions.

The key words “must”, “must not”, “should”, and “may” in this document are to be interpreted as described in RFC2119.

1. Open Works

An open **work** *must* satisfy the following requirements in its distribution:

1.1 Open License or Status
The **work** *must* be in the **public domain** or provided under an open **license** (as defined in Section 2). Any additional terms accompanying the work (such as a terms of use, or patents held by the licensor) *must not* contradict the work’s public domain status or terms of the license.

1.2 Access
The **work** *must* be provided as a whole and at no more than a reasonable one-time reproduction cost, and *should* be downloadable via the Internet without charge. Any additional information necessary for license compliance (such as names of contributors required for compliance with attribution requirements) *must* also accompany the work.

1.3 Machine Readability
The **work** *must* be provided in a form readily processable by a computer and where the individual elements of the work can be easily accessed and modified.

1.4 Open Format
The **work** *must* be provided in an open format. An open format is one which places no restrictions, monetary or otherwise, upon its use and can be fully processed with at least one free/libre/open-source software tool.

2. Open Licenses

A **license** *should* be compatible with other open licenses.

A **license** is open if its terms satisfy the following conditions:

2.1 Required Permissions
The **license** *must* irrevocably permit (or allow) the following:

2.1.1 Use
The **license** *must* allow free use of the licensed work.

2.1.2 Redistribution
The **license** *must* allow redistribution of the licensed work, including sale, whether on its own or as part of a collection made from works from different sources.

2.1.3 Modification
The **license** *must* allow the creation of derivatives of the licensed work and allow the distribution of such derivatives under the same terms of the original licensed work.

2.1.4 Separation
The **license** *must* allow any part of the work to be freely used, distributed, or modified separately from any other part of the work or from any collection of works in which it was originally distributed. All parties who receive any distribution of any part of a work within the terms of the original license *should* have the same rights as those that are granted in conjunction with the original work.

2.1.5 Compilation
The **license** *must* allow the licensed work to be distributed along with other distinct works without placing restrictions on these other works.

2.1.6 Non-discrimination
The **license** *must not* discriminate against any person or group.

2.1.7 Propagation
The rights attached to the work *must* apply to all to whom it is redistributed without the need to agree to any additional legal terms.

2.1.8 Application to Any Purpose
The **license** *must* allow use, redistribution, modification, and compilation for any purpose. The license *must not* restrict anyone from making use of the work in a specific field of endeavor.

2.1.9 No Charge
The **license** *must not* impose any fee arrangement, royalty, or other compensation or monetary remuneration as part of its conditions.

2.2 Acceptable Conditions
The **license** *must not* limit, make uncertain, or otherwise diminish the permissions required in Section 2.1 except by the following allowable conditions:

2.2.1 Attribution
The **license** *may* require distributions of the work to include attribution of contributors, rights holders, sponsors, and creators as long as any such prescriptions are not onerous.

2.2.2 Integrity
The **license** *may* require that modified versions of a licensed work carry a different name or version number from the original work or otherwise indicate what changes have been made.

2.2.3 Share-alike
The **license** *may* require distributions of the work to remain under the same license or a similar license.

2.2.4 Notice

The **license** *may* require retention of copyright notices and identification of the license.

2.2.5 Source

The **license** *may* require that anyone distributing the work provide recipients with access to the preferred form for making modifications.

2.2.6 Technical Restriction Prohibition

The **license** *may* require that distributions of the work remain free of any technical measures that would restrict the exercise of otherwise allowed rights.

2.2.7 Non-aggression

The **license** *may* require modifiers to grant the public additional permissions (for example, patent licenses) as required for exercise of the rights allowed by the license. The license may also condition permissions on not aggressing against licensees with respect to exercising any allowed right (again, for example, patent litigation).

The Open Definition was initially derived from the Open Source Definition, which in turn was derived from the original Debian Free Software Guidelines, and the Debian Social Contract of which they are a part, which were created by Bruce Perens and the Debian Developers. Bruce later used the same text in creating the Open Source Definition. This definition is substantially derivative of those documents and retains their essential principles. Richard Stallman was the first to push the ideals of software freedom which we continue.

Open Definition is a project of Open Knowledge International – Source Code

Appendix D – Features Checklist

Necessary Features of an Open Content Licence

- must be a licence
- the "thing" being licensed must be a work or other subject-matter protected by copyright
- must be non-exclusive and available for take up by any interested party who wishes to observe the conditions of the licence
- must have a stable form
- grant of permission must be perpetual (*i.e.*, at least equal to the longest potential term of copyright protected under any copyright regime) and irrevocable by the licensor (subject only to revocation for breach of the conditions imposed on the grant of the licence)
- the rights granted pursuant to the licence must not expire with the use by the first licensee or upon a certain number of uses by a certain number of licensees;
- the licence must permit uncompensated exercise of Wiley's "5Rs":
    - Retain – the right to make, own and control copies of the content (*e.g.*, download, duplicate, store, and manage);
    - Reuse – the right to use the content in a wide range of ways (*e.g.*, in a class, in a study group, on a website, in a video);
    - Revise – the right to adapt, adjust, modify, or alter the content itself (*e.g.*, translate the content into another language);
    - Remix – the right to combine the original or revised content with other material to create something new (*e.g.*, incorporate the content into a mashup);
    - Redistribute – the right to share copies of the original content, your revisions, or your remixes with others (*e.g.*, give a copy of the content to a friend); and
- in jurisdictions which accord moral rights to authors of copyright-protected works, the licence must contain either (i) a waiver of the owner's moral rights or (ii) covenant by the licensor not to assert, enforce or otherwise exercise his or her moral rights in a manner which would interfere with the uses otherwise permitted by the licence

Indicative Features of Open Content Licences

- connection between the licence and a public statement by the author or sponsoring issuer of the licence of principles or aims to be furthered or achieved through use of the licence
- presence of copy-left / viral / share-alike provisions

Non-Disqualifying Features of Open Content Licences

- attribution requirements, or requirements that the licensed work be accompanied by a copyright notice
- requirements that a copy of the licence be made available in conjunction with the licensed work
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- prohibitions on commercial use
- restrictions on creating derivative works using the licensed content
- restrictions on permissible uses of the licensed work by nature of use (*e.g.* prohibition of use of licensed work in connection with pharmaceutical research)

- “moral rights”-type restrictions on association or modification of the licensed work (*e.g.*, prohibiting alteration of the licensed work without permission of the licensor or prohibitions on the use of the licensed work in advertising, or in association with a product, cause, institution, *etc.*)
- provisions that restrict availability of the license to individuals or organizations based on their inherent personal characteristics or organizing principles

Appendix E – Template Interview Questions

1. Briefly describe [your][your organization's] business history and activities in the role-playing game community (*e.g.*, year of first publication, type of gaming products you publish, who you view as your "peers" in the gaming industry, etc.).

2. [for respondents in sub-populations 1A and 1B] Describe your role or position in your organization, and how long you have been with the organization in any capacity. Do you have any equity interest (i.e., share of ownership) in the organization?

3. [for respondents in sub-populations 1A and 1B] Briefly describe (without using numbers) how you are compensated for your work in your organization in connection with gaming products (e.g., flat salary, hourly wage, bonuses, etc.). Please indicate whether the success or failure of a particular gaming product on which you work has any direct impact on your compensation (e.g., you get a bonus if one of the gaming products on which you work reaches certain sales targets).

4. [for respondents in sub-populations 1A and 1B] To the extent you have access to this information, briefly describe (without using numbers) how your colleagues in your organization are compensated for their work in connection with gaming products (e.g., flat salary, hourly wage, bonuses, etc.). Please indicate whether the success or failure of a particular gaming product on which your or they work has any direct impact on their compensation (e.g., they get a bonus if one of the gaming products on which they work reaches certain sales targets).

5. Describe the history of how [you][your organization] decided to make use of the Open Game License [including, to the extent you know, who in your organization was directly responsible for making the decision]. Were there any other types of licences or release strategies [you][your organization] considered (e.g., Creative Commons)? If so, describe why the decision was made not to use those alternatives.

6. What, in your view, were the motivations or goals [you were][your organization was] attempting to achieve by using an open content licence? Please describe any reasons why you chose the Open Game License specifically. With respect to motivations, please try to give a sense of which motivations were most or least important, as compared to each other.

7. How would you generally describe [your experience][the experience of your organization] with the Open Game License?

8. Describe any positive or negative results you think [you][your organization] realized from using an open licence. Do you believe the Open Game License gave different results or increased these positive (or negative) results as compared to other open licences or as compared to not using an open licence?

9. Do you think [your][your organization's] use of an open licence generally and the Open Game License specifically has contributed to an increase or decrease in [your][your organization's] gaming product revenues and/or net profits? If yes, and you are comfortable doing so, please try to quantify the amount of the increase or decrease.

10. Would you use the Open Game License for future gaming projects? Why or why not?

11. Do you think using the Open Game License was a "selling point" or made your product[s] more attractive to gamers? Why or why not? Did it make them less attractive? Why or why not?

12. Have you used the Open Game License for some of your products, and at the same time <u>not used it for other products</u> (i.e., products which have been simultaneously released in the market)? If yes, describe the reasons for deciding to use it with some but not others.

13. Have you previously used the Open Game License for one or more products, but then subsequently decided not to use it at all? If yes, describe the reasons for making the decision to discontinue use of the Open Game License. Did you use a different open copyright licence (e.g., Creative Commons) or did you not use an open copyright licence at all? Please explain the reasons for that decision.

14. Do you play role-playing games for pleasure? If yes, does a publisher's use of open licences generally and the Open Game License specifically have any impact on your decision to purchase or use their product?

15. Do you believe open licences generally, and the Open Game License specifically, have had an influence on the availability (for good or bad) and/or quality and/or price of games?

16. Are you a gaming product creator? If yes, describe whether you think that the Open Game License has any impact on the design, publication and/or marketing decisions you have made about a particular gaming product. To the extent relevant, describe whether and how knowledge that a project you have been working on will be released using an open content licence affects your design / creative process / decisions.

17. What is your understanding of how the copyright doctrine of fair [use][dealing] operates?

18. Have you ever been involved in a copyright infringement dispute or lawsuit (including threats of litigation) as either a plaintiff or defendant? If yes, was the Open Game License a factor in that dispute? To the extent possible, please provide a brief description of the material aspects of the dispute.

19. Are you aware of any copyright infringement disputes involving colleagues, friends, or partners / competitors? Were open licences, or the Open Game License specifically, a factor?

20. Are you aware of any instances of companies or individuals using your gaming product released under the Open Game License in a manner which you thought violated the terms of the Open Game License? If yes, please briefly describe any actions you took in connection with the perceived violation. Are you aware of such instances that may not have been a technical violation of the licence, but nevertheless made you uncomfortable or you believe affected you negatively in some manner? Please describe.

21. Do you rely on any other intellectual property rights in connection with your gaming products? [verbal prompt: trade-marks, domain name registration]

22. Do you have any registered trade-marks in respect of your gaming products? If yes, why did you obtain the registration? If no, have you ever considered obtaining a registration?

23. Do you have any domain name registrations you use in connection with your gaming products? Have you encountered any situations where someone else used a domain name which you thought was a deliberate attempt to encroach on the name of your company or gaming product(s)? If yes, please describe what action, if any, you took in response.

24. Are you aware of anyone ever having used the name (or, if applicable, registered trade-mark) of your gaming product in a way which you considered an infringement of your rights? If yes, please describe the situation and what steps you took, if any, to address the matter.

25. What would you describe as the most valuable aspect of your gaming products? [verbal prompts: game design, graphic design, copyright, trade-mark] (For example, what is their "selling point" or distinguishing feature in the marketplace?)

26. Describe your understanding of how the Open Game License functions. What types of activities, in your view, would constitute a violation of the terms of the Open Game License? Do you feel you have a good grasp of what would constitute a violation of the terms of the Open Game License?

27. How would you describe the understanding of other people who use material licensed under the Open Game License (e.g., other people you work with, other people you game with, other people who use your gaming products)? Do you think they have a good grasp of what would constitute a violation of the terms of the Open Game License?

28. Do you think people generally abide by the terms of the Open Game License? Do you know of people who make use of Open Game Licensed-content without complying with the terms of the Open Game License? If so, can you think of any reasons why they would do so?

29. Have you ever asked customers or potential users of your gaming products for their views on whether your products should be licensed using the Open Game License? If yes, describe their responses.

30. Imagine you became aware of someone who breached the terms of the Open Game License in connection with your gaming product – for example, they copied and distributed the entirety of your work, but did not include a copy of the Open Game License – describe what your reaction would be to that discovery (your reaction can include emotional responses, actions you would take, what you would "think" about that person).

31. How would you describe the purpose of the Open Game License?

32. If someone were to ask you why [you use or do not use][your organization uses or does not use] the Open Game License, what would your response be?

33. What advice, if any, would you give to someone considering releasing a gaming product using the Open Game License?

34. If you could make changes to the Open Game License, would you make any, and what would they be?

35. Did [you][your organization] ever seek legal advice (including from in-house counsel) about using the Open Game License? If yes, please describe, to the extent you feel comfortable and are able, the advice they provided to you about its use.

36. Did [you][your organization] ever consult any other expert (*e.g.*, business consultant, accountant, management consultant, creative consultant, *etc.*) about using the Open Game License? If yes, please describe, to the extent you feel comfortable and are able, the advice they provided to you about its use.

37. Is there anything else you would like to tell me about your views of the Open Game License, copyright law or the role-playing game industry in general?

Appendix F – Roster of Interviewees

These capsule biographies of the interviewees are intended to (a) give readers enough information to assess the sample of the population represented in the interviews and (b) preserve the anonymity of those interviewees who requested anonymity via their consent forms.

Respondent Number	Population Category	Date of Interview	Brief Description
001	2	2017.09.13	Individual resident in Canada who has been both a game designer and publisher. Published one stand-alone RPG game and one gaming supplement under the OGL, and has made the content of numerous blog posts available under the OGL.
015	1B	2017.09.26	Co-owner of company located in England. Has carried on business in the RPG industry for more than fifteen years, and publishes a wide range of RPG products including stand-alone games and gaming supplements for other RPG games published by others, both under the OGL and otherwise.
018	1B	2017.10.06	Managing Director of company located in England. Has carried on business in the RPG industry for more than fifteen years, and is among the largest RPG publishers in the country. Has published multiple OGL-licensed RPGs.
020	1B	2017.09.12	Owner of company located in the United States. Began using the OGL upon its release in 2000, but ceased doing so after a few years and has shifted from RPG games to card games, board games and miniatures.
027	2	2017.09.16	Game designer resident in the United States, with an active blog focusing on RPG-related matters. Has published materials using the OGL both on his own and through other publishers since 2000.
032	2	2017.10.03	U.S. citizen currently living in Europe. Award-winning game designer who has published a single stand-alone RPG using the OGL, and publishes numerous RPG supplements (for his own game and others) not using the OGL.
039	2	2017.10.16	Award-winning game designer resident in Canada. Has written a wide variety of RPG materials for many different publishers, and has written multiple stand-alone RPG games released under the OGL.
047	1B	2017.11.22	Owner of award-winning publisher located in the United States that publishes its flagship gaming product using the OGL. The publisher also sells numerous other RPGs and card/board games, as well as selling gaming-related fiction.
050	1B	2017.10.31	Publisher located in the United States. Has published two long-form RPG products using the OGL and occasionally publishes shorter items using the OGL on his popular blog.
054	2	2017.11.02	Hobbyist game designer located in the United States who has released material using the OGL since 2000, occasionally for other publishers and since 2010 under his own imprint, both on his blog and through an online RPG retailer.
057	2	2017.12.14	Hobbyist game designer located in the United States who has published more than a dozen RPG products under the OGL in the last ten years through a variety of online RPG retailers.
062	1B	2017.11.21	Game designer located in the United States, produces a popular RPG-focused podcast and has been publishing OGL-licensed materials on hi blog and through Wizards of the Coast's "Dungeon Masters Guild" with the goal of being hired by Wizards of the Coast to write for them.

Appendix G – Online Documentation Procedure

Blogs

RPG-focused blogs were identified through online searching and four blogs were chosen on the basis that they (a) were authored by individuals who were professional game designers (i.e., had written RPG material that had been published by other publishers who carried on business through a legal entity such as a corporation or limited liability company), (b) featured blog posts about the OGL, and (c) featured comments from readers on the posts about the OGL. Each blog was searched using the blog's built-in search function to search for all posts and comments that contained the text string "open game license", "open gaming license" and "OGL". Search results were then manually reviewed to exclude posts that only used "open game license", "open gaming license" or "OGL" to indicate that the content of the post was being released under the OGL or that the content being discussed in the post had been released under the OGL. Where a blog enabled tagging of posts by the author, and indexing of posts by their tags, the tags "OGL" or "open game license" or "open gaming license", as applicable, were also used to identify relevant posts. The identified posts and comments were imported into NVivo.

Sources (and number of posts and attendant comment strings imported):
http://www.grognardia.blogspot.com (17 posts); https://mearls.livejournal.com/ (4 posts); http://www.chrispramas.com (5 posts); http://www.adamjury.com (2 posts)

Forums

Six online forums were identified through online searches and content from them was imported into NVivo. Four forums (http://www.enworld.org, http://www.dragonsfoot.org, http://www.rpg.net, and http://paizo.com/paizo/messageboards) were chosen because of their evident broad popularity in the RPG community. Three of the foregoing forums (excluding dragonsfoot.org) were explicitly mentioned by interviewees in the course of their interviews. Each of the four chosen forums displays statistics about their users and their activity indicating thousands of individual registered user accounts and post numbers reaching into, in some cases, the millions of contributions. The two remaining forums (http://www.story-games.com/ and http://www.indie-rpgs.com/forge/index.php (referred to as "The Forge")) were chosen because they appear to be forums heavily populated by game designers and publishers (and aspiring game designers and publishers), with a significant proportion of the hosted discussions relating to the practicalities and mechanics of producing and distributing RPG products. (The "Forge" forum has been inoperative since 2012.) The procedure for searching each forum for relevant OGL-related posts is described below. When manually filtering the search results on each forum, posts that were focused solely or almost entirely on straightforward analysis of how to comply with the OGL (e.g., "I want to do X, is that compliant with the OGL?"), were excluded unless the discussion expanded to include statements about the philosophy behind the OGL and its use, the advisability of using the OGL, or similar contextual matters.

Each forum was searched as follows:

story-games.com: searched "open game license", "open gaming license", "OGL" using the site's embedded search function, and then manually reviewed for relevance. Imported 25 pages of threads.

The Forge: embedded search function is disabled, so did manual reviews of all thread topics listed in the index of the “Independent Publishing” forum, then did manual CTRL-F searches for “open” and “OGL” in all likely threads. Imported 12 pages of threads.

Paizo.com forums: searched “open game license”, “open gaming license” and “OGL” with qualifier “messageboards” using the site’s embedded search function, and then manually reviewed for relevance. Imported 110 pages of threads.

Dragonsfoot forums – Used embedded search engine to search text strings “open game license”, “open gaming license” and “OGL”. Imported 4 pages of threads.

Rpg.net - Used embedded search engine to search text strings “open game license”, “open gaming license” and “OGL” across all content categories. Due to the volume of threads that matched the search criteria, the downloaded threads were limited to those threads that contained one of the search terms in the title of the posts. Imported 13 pages of threads.

ENworld: Used embedded search engine to search text strings “open game license”, “open gaming license” and “OGL” across all content categories. Due to the volume of threads that matched the search criteria, the downloaded threads were limited to those threads that contained one of the search terms in the title of the posts and that had 10+ pages of comments. One thread containing 147 pages of comments was excluded due to its size. Imported 226 pages of threads.

Appendix H – Open Game License

OPEN GAME LICENSE Version 1.0a[10]

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