

A. D&D Explainer

What the hell happened?

For the last 23 years, Wizards of the Coast, the owners of Dungeons & Dragons, have had a legal document called the Open Gaming License (or OGL) Version 1.0. In December, just about a month ago, they announced publicly that they would be changing that to OGL Version 1.1. Last week, a leaked draft of that proposed version 1.1 began to circulate on the Internet, and as a result, a respected game writer named Linda Codega wrote an article for Gizmodo absolutely blasting the crap out of Wizards that has the entire role-playing-game contingent of the Internet up in arms.

<https://gizmodo.com/dnd-wizards-of-the-coast-ogl-1-1-open-gaming-license-1849950634>

My position is that article is irresponsible fearmongering, it's tremendously unfair, and that most of the claims made in it that are gaining traction are either out-and-out false or materially misleading. I also think, and will evidence for you on this show, that those claims are not just careless or due to the fact that Codega isn't a lawyer – although they are *not* a lawyer, so it's possible it's just incompetence as opposed to bad faith.

Even worse, there's something that *is* really bad in the new OGL – it's definitely overreaching, and we'll talk about it at the end of the show. That provision is buried at the very bottom of the Gizmodo article and so you have this situation where a ton of people are super angry, and they're angry *at the wrong thing*, and hey, that's why you listen to this show.

What if you're not a gamer?

I still think this is a very cool deep dive into licensing, intellectual property, the stuff we do here. You do not need to be a gamer to listen to this show. I haven't played D&D since high school, Thomas has never played.

Disclaimer

I have communicated with legal counsel at Wizards of the Coast in connection with Magic: The Gathering; specifically, to try and get support for a gaming convention they're hosting at Rochester this spring. Other than that, and buying a ton of Magic cards for Alex, I have no professional or commercial relationship with Wizards of the Coast.

I am general counsel and have a financial interest in Puzzle in a Thunderstorm, LLC, which produces the D&D Minus podcast. **Nothing here should be attributed to Puzzle, and nothing here constitutes attorney-client advice, either to Puzzle or to you.**

We've previously covered Wizards on Episode 634, which was very pro-Wizards. I stand by that episode. <https://openargs.com/oa634-wizards-of-the-coast-vs-transphobic-racists/>

I also have to say I respect Wizards as a company. They share my progressive values. That's also evident in this new agreement. So if you want to dismiss me as a pro-Wizards shill, go ahead, even though at the end of this podcast I'm going to tell you how I would lobby Wizards if I were a D&D 3P creator.

With me still?

What the OGL 1.0 is, and why it needs to change.

So before we continue, let me make this absolutely clear: OGL 1.0 was not “Open Source” as that term is defined by the Open Source Initiative. It never was. It never could have been.

<https://opensource.org/osd>

And it certainly didn't place D&D's intellectual property in the public domain, saying that anyone can use any of it for any reason. Rather, the OGL 1.0 was – and is – a *license*. That's a way for IP owners to enforce their legal rights while allowing you to do things that might otherwise infringe them. The key aspect is that the license imposes certain conditions on that use. Essentially, the IP owner says, “hey, if you use this aspect of my intellectual property in these particular ways, I promise not to sue you.” But if you use *unauthorized* IP, or you fail to abide by the conditions, the owner can still sue you.

Here's the critical starting point: as an IP owner, that's a thing *you don't have to do at all*. You can say, “I want to maximally protect my intellectual property against any and all potential infringers.” That's the position many people associate with Disney, for example. No, you can't get on Etsy and sell a hand-stitched Mickey Mouse pillow. Many companies follow that model.

But some follow a more liberal model. The D&D OGL 1.0 is, in my view – and we'll start to dive into the actual text – incredibly liberal with allowing other people to use Wizards's intellectual property. That was 2000.

Then, three things happened in the last 23 years.

First, the gaming world generally became overrun with racists, neo-Nazis, actual Nazis, sexist, homophobic monsters. Wizards picked a side, and they picked the “woke” side. In episode 634, we covered an actual lawsuit brought by actual neo-Nazis trying to hijack a different Wizards property, a game called “Star Frontiers,” and turn it into white nationalism in space. The OGL 1.0 has no termination provisions for being a Nazi. So I have no doubt that there is a ton of third-party content out there under OGL 1.0 that's just gross, and Wizards literally can't do anything about it. So they want to fix that.

Second, crypto bros. There have been a bunch of these schemes, but the one I know the most about I know thanks to... respected game writer Linda Codega – yes, the same one -- writing in Gizmodo nine months ago, in an article titled “NFTs Are Here to Ruin D&D.”

<https://gizmodo.com/dungeons-dragons-nft-gripnr-blockchain-dnd-ttrpg-1848686984>

And so essentially that story, as I understand it, is that a crypto bro hired a professional illustrator who designed for D&D, and then was going to use those illustrations as NFTs, and again, my head hurts when I try to decipher this crap, so I'll just let Codega explain it:

To sum up: Players will buy a pre-generated *D&D* character, play with it in pre-generated adventures, level it up on the blockchain, and then sell it. It sounds like easy money, right?

Codega quotes a spokesperson for Wizards who says they will not let some random crypto bro “misappropriate our valuable intellectual property.” But Codega also quotes the crypto bro, who argues that he can do so just fine under OGL 1.0. I don't know who's right in that dispute, but what I do know is that NFTs and the like are not **clearly** prohibited uses under the OGL 1.0, and so that's a second thing Wizards would like to make crystal clear.

The third thing I will get into in some depth later, but this is a purely business matter. In 2000, I am positive that WotC created the OGL 1.0 to try and create a derivative community that synergized with the game. If you wanted to create a module – that’s an adventure for the D&D players to play – and then sell it, WotC would also benefit because the people who bought your module would also have to buy the D&D rules. So it’s a win-win.

But they discovered in 2011 that the same OGL allowed a competitor to create a product where you *didn’t* have to buy anything from Wizards, because they’ve taken the core of one of the sets of rules and then added some new concepts and called the whole thing a different name and then made tens, perhaps hundreds of millions of dollars selling what is essentially the same product as D&D. That’s not synergistic; that’s a direct competitor. More on them later.

And I mention that third thing because lots of people are fans of the competitor product, and I want to be completely honest: I have every reason to believe that the success of that competitor product blindsided Wizards and they were like, “okay, we’re never going to subsidize our direct competitors again, that was super dumb.”

So those three things – Nazis, crypto bros, and competitors – led Wizards to want to change the OGL. And I should emphasize here, and we’ll get to it, that the OGL 1.0 **explicitly reserves the right for Wizards to make future changes.**

And now we’ve seen a leaked draft of those proposed changes, and now, finally, we have enough background that we can tackle the new Linda Codega article in Gizmodo that... misrepresents almost everything about the new OGL 1.1. So if you’re on your computer and you want to follow along and verify my work, get three things up on your screen:

First, the OGL 1.0 (2000)

https://media.wizards.com/2016/downloads/DND/SRD-OGL_V5.1.pdf

Second, the leaked OGL 1.1

<https://openargs.com/wp-content/uploads/Open-Game-License-1-1-Leak.pdf>

And third, Codega’s article

<https://gizmodo.com/dnd-wizards-of-the-coast-ogl-1-1-open-gaming-license-1849950634>

So now let’s start at the beginning of Codega’s article, the very first half of a sentence.

The new *Dungeons & Dragons* [Open Gaming License](#), a document which allows a vast group of independent publishers to use the basic game rules created by *D&D* owner Wizards of the Coast, **significantly restricts the *kind of content* allowed...**

No, no it does not. OGL 1.0 and OGL 1.1 use exactly the same approach to allowing independent publishers to use D&D content, it’s just renamed. The *content* you can use is **exactly the same**. What OGL 1.1 changes are the ways in which you can use that content. So yeah, this half of the first sentence of the article is just not true.

Here’s the proof. Let’s look at OGL 1.0, starting at paragraph 1(d). It begins by defining the stuff you as a third party get to use, that’s “Open Game Content”:

1(d): *“Open Game Content” means the game mechanic and includes the methods, procedures, processes and routines to the extent such content [1] does not embody the Product Identity and [2] 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.*

Immediately following the definition of “Open Game Content” are 402 pages of game mechanic-y things, like Dwarf characters increase their Constitution by +2, Arcane Sword is a 7th-level evocation with a range of 60 feet that does 3d10 force damage to the target, and blue dragons can spit lightning breath that does a crapton of damage based upon their age. **That’s called the System Reference Document or SRD 5.1. Put a pin in that.**

As a side note, Cory Doctorow – whom I respect a lot, both his nonfiction and fiction writing – has argued that this OGL 1.0 didn’t really protect any copyrightable elements and I think he’s just plain wrong on it. This is the same “American Idol” versus “The Voice” – you can’t copyright an idea, but you can copyright the unique implementation of that idea so long as it is “minimally creative.” And I think the idea that a character has a fixed number of hit points before they die, that the statistic that modifies those points is called “Constitution,” that the score is on a scale of 3-18, and that Dwarves get a +2 bonus, all taken together, is unique to D&D and protectable.

Similarly, Wizards doesn’t own the idea of a dragon, generally – but the fact that Blue Dragons spit lightning, that’s probably at least minimally distinct and creative.

Anyway, what this means is that under the OGL 1.0, you can use the stuff that’s in the SRD 5.1 without Wizards coming after you for copyright infringement, but you can’t use “Product Identity.” What the hell is that? That’s defined in the next subparagraph, 1(e):

1(e) “Product Identity” means product and product line names, logos and identifying marks including trade dress [that’s the artwork on the packaging]; 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, 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;

Then the preface lists a whole bunch of things that are specifically, but not exhaustively, Product Identity and I’m going to read all of it because it’s hilarious:

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.

So let’s put all that together. Under the OGL 1.0, you could make and sell a module for D&D players that has your original character, let’s call him Bruce the Half-Orc Barbarian, fighting alongside Dwarf NPC companions casting Arcane Sword in a battle against lightning-spitting Blue Dragons. Without the OGL, Wizards of the Coast could sue the crap out of you. WITH the OGL, they agree not to sue you, because they’re *licensing* that intellectual property to you; and that’s paragraph 4:

4. Grant and Consideration: In consideration for agreeing to use this License, the Contributors grant You a perpetual, worldwide, royalty-free, nonexclusive license with the exact terms of this License to Use, the Open Game Content.

Notice that the OGL license doesn’t give away the store. You only get the stuff that’s “Open Game Content.” You don’t get the artwork; you can’t, you know, trace the Blue Dragon from the Monster Manual – or even copy it freehand – and put that on the cover of your module. And in terms of content, you couldn’t set your module in the Ever-Changing Chaos of Limbo, and for whatever reasons, you couldn’t have displacer beasts, mind flayers, or umber hulks in it.

That’s the content that was protected under OGL 1.0. So what changes to *content* does the OGL 1.1 make? You may be astonished to find that the answer right now is ABSOLUTELY NOTHING. If anything, it’s slightly *more* favorable to third-party creators, because it doesn’t have the special carve-out for umber hulks and displacer beasts. You may have heard that the new OGL 1.1 is divided into “commercial” and “noncommercial” use; that’s right, and we’ll talk about that later, but the covered content is the same for both licenses. It’s now paragraph 1, and there are three subparagraphs. **Subparagraph i is for what is now called “Licensed Content” and it says:**

- i. Usable D&D Content (“Licensed Content”) – This is Dungeons & Dragons content that is included in the SRD v. 5.1, including basic game mechanics and a curated selection of classes, monsters, spells, and items that allow You to make content compatible with Dungeons & Dragons 5th edition.*

This is the exact reference to those 402 pages that were previously called “Open Game Content” in OGL 1.0. It’s the exact same edition, 5.1. They’ve made **literally zero changes** to the content that you as a third-party creator are allowed to use, like Half-Orcs, Barbarians, Dwarves, Blue Dragons, and spells.

But what about the stuff that you’re *not* allowed to use? That’s OGL 1.1, subparagraph ii:

- ii. Not Usable D&D Content (“Unlicensed Content”) – This is Dungeons & Dragons content that has been or later will be produced as “official” – that is, released by Wizards of the Coast or any of its predecessors or successors – and is not present in the SRD v. 5.1. Unlicensed Content includes things like the most famous Dungeons & Dragons monsters, characters, magic spells, and things relating to the various settings used in Dungeons & Dragons official content over the years – what the old Open Game License referred to as “Product Identity.” Unlicensed Content is NOT covered by this agreement, and You agree not to use Unlicensed*

Content unless Your use is specifically authorized by a separate agreement with Us. If You want to include that content in Your work, You must go through the Dungeon Masters Guild or other official channels.

So again, this seems to be exactly the same as what the OGL 1.0 called “Product Identity,” that is, the more specific stuff, storytelling, settings, special monsters like Tiamat. No, you can’t use those. If it’s not in the 402 pages of SRD 5.1, you can’t use it.

Finally, OGL 1.1 makes the licensing arrangement clear; that’s Paragraph 1.C:

Licensed Works. For a work to be a Licensed Work under this OGL: Commercial, it must meet all four of the following criteria: i. it qualifies as a covered works as defined in Section 1.B; ii. It contains both Licensed Content and Your Content, but not Unlicensed Content; iii. It does not contain Unlicensed Content; and iv. It displays the following “Creator Content” badge in the manner specified in the Creator Content Badge Style Guide: [drop in picture]

Put a pin in that first point about “covered works” – we’ll get to that – but the other three points are **the exact same process as OGL 1.0**: you have to add your new stuff to the stuff that’s in the SRD 5.1, and not use any of the Product Identity stuff.

So, we’re one-half of a sentence in and there’s an out-and-out falsehood. That’s not great. Let’s finish up that sentence from Gizmodo:

...and requires anyone making money under the license to report their products to Wizards of the Coast directly, according to an analysis of a leaked draft of the document, dated mid-December.

That half too, is not entirely correct. Commercial users *do* have to register their licensed works, but there’s a huge loophole for “anyone making money under the license” and it covers a lot of the people who are likely to be up in arms after having read this Gizmodo article. It covers the D&D Minus podcast, for example. Here’s that loophole; it’s Paragraph VI of the OGL 1.1 Non-Commercial:

*VI. DONATIONS. Your distribution of Your work must be non-commercial. This means that You cannot require that anyone give You anything of value in exchange for Your work or copies of Your work. **However, You are permitted to accept donations through Patreon, Ko-fi, or other similar platforms provided that the donations are not a condition of the receipt of Your work, and You make that clear and obvious to Your donors. In other words, if You make Your work available for free and ask others to contribute what they like to You so that You can continue to do so? You’re fine. But if any of Your work is available only to “subscribers,” “patrons,” or any other word for people who give You money for access to it, then Your non-free work is subject to the OGL: Commercial and all of that income is “revenue” under that license.***

That’s a huge loophole! Lots of people who “make money under the license” by giving away their podcast, YouTube, art, whatever and who do what we do – beg for money on Patreon – will never have to register a thing.

So we’re 0-for-2 and we’re one sentence in. Let’s move on to sentence 2 in the Gizmodo article:

Despite reassurances from Wizards of the Coast [last month](#), the original OGL will become an “unauthorized” agreement, and it appears no new content will be permitted to be created under the [original license](#).

The article then contains a hyperlink to a “D&D Beyond” Message Board post by WotC on December 21, 2022: <https://www.dndbeyond.com/posts/1410-ogls-srds-one-d-d>

Now if you *don't* click on the post, you would think the introductory clause “Despite reassurances from Wizards of the Coast last month” would mean that post said “oh no, don't worry, the OGL isn't changing.” But if you actually *do* click on it, you'll see this:

[Question] 2. Will the OGL terms change?

Yes. We will release version 1.1 of the OGL in early 2023.

The OGL needs an update to ensure that it keeps doing what it was intended to do—allow the D&D community's independent creators to build and play and grow the game we all love—without allowing things like third-parties to mint D&D NFTs and large businesses to exploit our intellectual property. So, what's changing?

***First**, we're making sure that OGL 1.1 is clear about what it covers and what it doesn't. OGL 1.1 makes clear it only covers material created for use in or as TTRPGs, and those materials are only ever permitted as printed media or static electronic files (like epubs and PDFs). Other types of content, like videos and video games, are only possible through the [Wizards of the Coast Fan Content Policy](#) or a custom agreement with us. To clarify: Outside of printed media and static electronic files, the OGL doesn't cover it.*

Will this affect the D&D content and services players use today? It shouldn't. The top VTT platforms already have custom agreements with Wizards to do what they do. D&D merchandise, like minis and novels, were never intended to be part of the OGL and OGL 1.1 won't change that. Creators wishing to leverage D&D for those forms of expression will need, as they always have needed, custom agreements between us.

So I want you to notice two things about that FAQ answer. The first is the public disclosure, three weeks ago, and before OGL 1.1 was “leaked,” that the changes would restrict licensees to just printed media and static electronic files like epubs and PDFs. Put a pin in that. But for purposes of this sentence, note that the answer to the question “will these terms change” was YES. Not any kind of reassurance that the old OGL would continue to be in use.

Going back to the article, that second sentence makes much of the fact that OGL 1.1 declares the old OGL 1.0 to be an “unauthorized” agreement. It puts “unauthorized” in scare quotes. What it doesn't tell you is that **that's the only way to make changes to the older document**. Let's quote directly from OGL 1.0, which we told you in the introduction explicitly anticipated future changes; that's paragraph 9:

*9. Updating the License: Wizards or its designated Agents may publish updated versions of this License. You may use **any authorized version of this License** to copy, modify and distribute any Open Game Content originally distributed under any version of this License.*

So, since 2000, users of the OGL 1.0 have been on notice that WotC may update that license at any time. It then also says you can rely on the terms of “any authorized version of this License.” So in order to change those terms, you need to make that prior license “unauthorized.”

This is way better than what most ToS say – go click on one right now. Usually, they just say, ‘we reserve the right to make changes to these terms whenever we feel like it.’ At least Wizards promised to tell you when they were updating their terms and made it explicit what you can and can’t rely on. I just don’t get the outrage here.

Those two sentences were also the first two paragraphs. Now we’re on to paragraph 3:

The original OGL is what many contemporary tabletop publishers use to create their products within the boundaries of *D&D*’s reproducible content. Much of the original OGL is dedicated to the [System Resource Document](#), and includes character species, classes, equipment, and, most importantly, general gameplay structures, including combat, spells, and creatures.

OK, that’s not a lie, but it *is* misleading, because as I read to you, Section 1(i) of the new OGL explicitly defines their content as including the exact same SRD 5.1.

I’m going to skip the next two paragraphs, because they’re just narrative. Then we get to paragraph 6, and this was the point when I felt like Codega was doing a hatchet job:

What is in the new OGL 1.1? A lot, actually. While the original open gaming license is a relatively short document, coming in at under 900 words, the new draft of the OGL 1.1, which was provided to io9 by a non-WotC developer, is over 9,000 words long.

That makes me angrier than anything else in this article, because it’s technically true but so unbelievably misleading. The *implication* is that they took a simple 900-word document and larded it up with a bunch of lawyer bullshit that nobody can understand to make it ten times longer and who knows what scary crap is in there now.

The *reality* is the exact opposite. The original OGL 1.0 is just not very well-written. It’s compact, but it’s still full of impenetrable legalese. Take Paragraph 7 for example:

7. Use of Product Identity: You agree not to Use 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. You agree not to indicate compatibility or co-adaptability with any Trademark or Registered Trademark in conjunction with a work containing Open Game Content except as expressly licensed in another, independent Agreement with the owner of such Trademark or Registered Trademark. The use of any Product Identity in Open Game Content does not constitute a challenge to the ownership of that Product Identity. The owner of any Product Identity used in Open Game Content shall retain all rights, title and interest in and to that Product Identity.

Now I could explain to you what that paragraph probably means, but I think you’d agree it’s not very layperson-friendly. Now let’s see how OGL 1.1 handles it; here’s Paragraph II:

II. LICENSE. If, and only if, You fully comply with the terms and conditions of this agreement, You may copy, use, modify and distribute Licensed Content around the world as part of Licensed Works on a non-commercial basis, meaning for free: not in exchange for money or any other thing of value.

That's a lot more user-friendly. But wait, there's more! Immediately after paragraph 2 is a "Comments" section that's meant to explain that legalese in plain English. You may recall this as the practice I said I would use if I were drafting a new Constitution. It's really, really helpful. And here's that section after Paragraph 2:

COMMENTS: As We said in the intro, "commercial" distribution is any distribution You get paid for in any form: money, crypto, barter, Your brother doing Your chores for a week, whatever. It does not include donations people give You to support Your work as long as they can have access to Your work for free if they choose to, and You informed them of that in a clear and obvious way.

That's awesome! So to get to that "over 9,000 words" that Codega makes fun of – it's 9,154, by the way – that includes TWO INTRODUCTORY PAGES of the FAQ, that's to help the layperson, not crazy legalese, and 11 "COMMENTS" sections that are again, intended to help non-lawyers understand what the agreement means. It also includes the fact that the new OGL is now two agreements, one commercial, and one non-commercial, and they overlap substantially. Subtract out the FAQ and the comments sections, the non-commercial OGL is 2,682 words long.

Okay, but if you're defending the Codega article, you might say, well, that's still two-and-a-half-times the original bare-bones agreement. And you're right. So now I'm going to explain why that additional stuff got added. It falls into four categories:

- 1) Lawyer stuff I can't believe wasn't in OGL 1.0
 - a) No merger & integration clause
 - b) No limitations on liability
 - c) No clause that says failure to exercise a right is not a waiver
 - d) No severability clause
 - e) No governing law clause

I don't want to say that it's malpractice not to have these terms but... I would never draft a contract that didn't have each and every one of those provisions in it.

- 2) Stuff that makes sense but is beneficial to WotC
 - a) Termination clause

When you're community-building, and you're licensing your IP to fans or 3P creators, every agreement gives the licensor the ability to terminate that license when the 3P or the fan creates something that's grossly inconsistent with the licensor's intent.

Suppose someone creates "Sex Dungeons & Dragons," complete with the saving throw you have to roll when you're copulating with the half-Orc, and it's super inappropriate for kids, and it's also sexist and gross. Under the old OGL 1.0, so long as it was just a generic Sex Dungeon and not set in the Seven Mounting Heavens of Celestia, there was nothing WotC could really do about it.

The new agreement changes that; it's paragraph X: Termination. I'm not going to read the legalese, but I will read the Comment section:

We know this may come off strong, but this is important: If You attempt to use the OGL as a basis to release blatantly racist, sexist, homophobic, trans-phobic, bigoted or otherwise discriminatory content, or do anything We think triggers these provisions, Your content is no longer licensed. To be clear, We want to, and will always, support creators who are using the OGL to help them explore sensitive subjects in a positive manner, but We will not tolerate materials We consider to be in any way counter to the spirit of D&D.

So that benefits WotC, obviously, but I think it's minimum fairness. There are a few other provisions that fall into this category, like

- Paragraph XI: Indemnification. So take Sex Dungeons & Dragons, not only does the creator get sued, **but so does Wizards**. Under the old OGL, Wizards has to pay to defend itself for the harm caused by *your* stuff. Indemnification says the licensee is responsible for Wizards's attorneys' fees or any judgments they take because of your work. Again, mimally fair; and
- Forum selection, class action waiver – if you choose to sue Wizards for whatever reason, you have to sue them in Washington state, under Washington state law, and not as part of a class action. And if you sue them, that terminates your license.

Again, these all economically benefit WotC, but I think any lawyer would insist on it. Remember that the OGL is something *they don't have to do at all*, so saying, yeah, we're not going to fly out to Louisiana and hire local counsel and sue you under Louisiana's crazy Napoleonic Code, no. You want to sue us? Come to Washington state and sue us under the law our lawyers know. Again, this is something I would demand in every contract like this for my clients.

3) Limitation of License

-this was flagged in the December 21 FAQ

B. Works Covered This license only applies to materials You create for use in or as roleplaying games and as game supplements and only as printed media and static electronic files such as epub's or pdf's. It does not allow the distribution of any other form of media. And does not apply to creation of anything else.

COMMENTS: To be clear, OGL: Non-Commercial only allows for creation of roleplaying games and supplements in printed media and static electronic file formats. It does not allow for anything else, including but not limited to things like videos, virtual tabletops or VTT campaigns, computer games, novels, apps, graphics novels, music, songs, dances, and pantomimes. You may engage in these activities only to the extent allowed under the Wizards of the Coast Fan Content Policy or separately agreed between You and Us.

That policy:

<https://company.wizards.com/en/legal/fancontentpolicy>

Really forgiving. So basically, if you want to do those other activities, like VTT campaigns, you can't do it for money. What if you run VTTs for money? Well, this may be an indication that Wizards doesn't want you to do that any more.

- 4) Finally, the last category is stuff that's clearly for WotC's economic gain – if you want to call Wizards “greedy,” you might quibble with their efforts to add these provisions. I'll note that the Gizmodo article doesn't mention any of them:
- Paragraph 15.C makes it easier for Wizards to update or amend OGL 1.1 without declaring it an “unauthorized” agreement – they just have to send out notice that they're going to change.
 - Paragraph 15.H means you waive a trial by jury if you sue Wizards

Oh, and one more thing, that's the registration and royalty system, but I'm going to give that its own discussion. For now, I'll say that under the OGL 1.1, you have to register your stuff if it's commercial, and that less than 20 creators will have to pay royalties **starting in 2025**. **But** put a pin in this.

Back to Codega's article, paragraph 7:

One of the biggest changes to the document is that it updates the previously available OGL 1.0 to state it is “no longer an authorized license agreement.” **[We've covered that.]** By ending the original OGL, many licensed publishers will have to completely overhaul their products and distribution in order to comply with the updated rules. Large publishers who focus almost exclusively on products based on the original OGL, including Paizo, Kobold Press, and Green Ronin, will be under pressure to update their business model incredibly fast.

Okay, now here's where we talk about the competitor I alluded to in the introduction. That's Paizo, the company that makes a roleplaying game called Pathfinder. First thing you need to know: Paizo has 156 employees, and its revenue is an estimated \$34.7 million per year. So you know what? They can afford lawyers to figure out how to comply with a three-page licensing agreement.

<https://growjo.com/company/Paizo>

Second, the bulk of Paizo's revenue comes from Pathfinder, and I haven't played it, don't know it, so I'm just going to quote from Wikipedia. “The Pathfinder Roleplaying Game is a fantasy role-playing game (RPG) that was published in 2009 by Paizo Publishing. The first edition extends and modifies the System Reference Document (SRD) based on the revised 3rd edition Dungeons & Dragons (D&D) published by Wizards of the Coast under the Open Game License (OGL) and is intended to be backward-compatible with that edition. A new version of the game, Pathfinder 2nd Edition, was released in August 2019. It continues to use the OGL and SRD, but significant revisions to the core rules make the new edition incompatible with content from either Pathfinder 1st Edition or any edition of D&D.”

That's a competitor. Wikipedia continues, “Pathfinder was the top-selling role-playing game in spring 2011, fall 2012, spring 2013, fall 2013, and summer 2014. During that four-year period, Pathfinder was at times able to outsell Dungeons & Dragons itself, which was the best-selling game through various editions between 1974 and 2010. Upon the release of Dungeons & Dragons 5th Edition, that game has regained the top spot since fall 2014, with Pathfinder consistently still ranking second to D&D in sales”

So, your mileage may vary here, but I doubt that Wizards intended, when they created the OGL 1.0, to let a company steal their rules, tweak them a little bit, sell a competing product and then literally outsell you for four years, and if Wizards is saying “hey, we don't want to create any more Paizos,” I can kind of understand that.

Third, even if you're inclined to say, "won't someone *please* think of the multi-million-dollar companies stealing your work," Pathfinder adds some of their unique stuff to the core SRD 5.1 D&D stuff and is sold in either hardback book form or PDF. So all of their previous books and stuff were covered under the old OGL 1.0, and anything new they put out will be... covered under the new OGL 1.1. (They also make some toys, comic books, merch, but presumably that's all exclusive Paizo IP.) There's no huge change to their business model or anything.

Now, let me tell you what the new OGL will make Paizo do. It's three things, and it's covered by paragraphs 6 and 7 of OGL 1.1.

First, they have to register any new Licensed Works with WotC by filling out a form. That's an online portal, dndbeyond.com. The specific link isn't live yet, but the OGL says it will ask for contact information, where you're publishing it, and to describe basic things about the work – the title, a summary, and the name of the person(s) or entity who created it.

Second, because they're making more than \$50,000 in gross revenue from products covered by the OGL, Paizo will also have to provide WotC with the income they're making on those products. That's basically the transition from "I do this as a hobby" to "I do this as my job," and again, the burden increases only as your business is becoming more sophisticated.

And third, for the tiny handful that become *very* successful – that Wizards estimates as less than 20 creators, Paizo may have to pay revenues on any income they earn above \$750,000 starting in 2014, with such revenues due by March 31, 2025. In other words, there's 2¼ years of transition to help these big companies like Paizo "update their business model."

So, stealing from Liz Warren, the first three-quarters of a million bucks are on you. And all of 2023 is on you. But starting in 2024, for every dollar earned above \$750,000, you will owe Wizards a quarter. Or 20 cents if you raised the money on Kickstarter. And again, this isn't sinister: this is all laid out in both the public Q&A and in the FAQ section of the new OGL 1.1.

The Open Game License was always intended to allow the community to help grow D&D and expand it creatively. It wasn't intended to subsidize major competitors, especially now that PDF is by far the most common form of distribution. So moving forward, hugely successful businesses that generate more than \$750,000 of annual revenue will also need to share some of that success with us by paying a royalty of 20 to 25% of the "qualifying revenue" they make in excess of \$750,000. But even for these wildly successful creators, they will not owe anything on any sales made before January 1, 2024, no matter how much money they make in 2023. We're doing it this way so that creators have time to plan for the transition and adjust their business plans accordingly.

And notice I said Paizo will "probably" have to pay royalties. Paizo is a big company. They have lawyers. Those lawyers are almost certainly talking to WotC lawyers right now and trying to negotiate down the terms. WotC's document all over the place says stuff like "you'll either need to sign this or sign a custom direct deal with WotC for your project." They've invited negotiation. **Paizo will be fine.**

Back to the article. The next section is "what will happen to the original OGL," and the answer to that is: it's going away. It's a 23-year-old license that explicitly included the right to update terms.

The next section after that is "Who will be affected by the new OGL 1.1?" Codega says:

If the original license is in fact no longer viable, every single licensed publisher will be affected by the new agreement, because every commercial creator will be asked to report their products, new and old, to Wizards of the Coast.

No no no no no. That's desperately wrong on virtually every level. If you put out content under the old OGL 1.0, that agreement governs the stuff you did in the past. IF you agree to the new OGL 1.1, you are agreeing that the OGL 1.0 is "no longer an authorized agreement" for the works you create going forward pursuant to the new OGL. No one can force you to agree to the new OGL 1.1, and so if you're just selling the stuff you made in the past under the OGL 1.0, you haven't agreed that 1.0 is "no longer an authorized agreement." You have to agree to that.

And when you do, for virtually every publisher, the new OGL 1.1 means you will have to fill out an online form -- unless you're making money with the Patreon loophole; then you have to do *nothing*.

There's a bit complaining about the limitation to RPGs and modules; we've already talked about that, and Wizards was absolutely transparent about it.

Under the next section, "What's changing in the new OGL?" is another misleading-to-wrong paragraph. Let's read it:

Additionally, all creators will need to clearly and deliberately distinguish "their content" from "licensed content." The new document reads that this must be done "in a way that allows a reader of Your Licensed Work to understand the distinction without checking any other document." The updated OGL suggests a different color font, asterisks on the page, "or putting a separate index or list in the back of Your Licensed Work that lists out what, exactly, You used from the SRD."

Since Codega made such a big point about the previous OGL 1.0 being less than 900 words, I'm kind of surprised they managed to miss paragraph 8, which says the *exact same thing*, just without the helpful suggestions:

8. Identification: If you distribute Open Game Content You must clearly indicate which portions of the work that you are distributing are Open Game Content.

That's **no change** from OGL 1.0 to 1.1. You already have to do this if you're an OGL 1.0 creator.

Then there's the bit about royalties, we've covered that already, except that I want to emphasize just how much this system is set up to let everyone below the level of a Paizo skate. Let's suppose I'm making modules for D&D and I'm super duper successful at it, and I make \$40,000 per module, and I can crank out 5 modules a year. That's \$200,000, so I have to report my income to Wizards.

Or do I? Suppose for Module 1 I create a new LLC, call it Module 1 LLC, and register that as the creator of the Licensed Work. It sells \$40,000. Then, my next creation, I create Module 2, LLC, and register *it* as the creator. Module 3, you guessed it, Module 3 LLC. And so on. Now I own 5 companies each making about \$40,000, where all I have to do is click the form and register each one on the DnDBeyond site, and for *none* of them do I have to report the income.

On the internet, someone called this a “shell company” problem. But I want to be clear: those aren’t “shell companies” in the sense that they’re illegal or unethical or not covered by the agreement. In fact, this is standard practice for a ton of businesses. And here’s the important part: **Wizards’s lawyers know this and they wrote it this way anyway**. So I infer from this that they’re not particularly interested in mid-level creators, either.

Back to the article. Next is a section on “who has to register work with Wizards of the Coast?” and the answer is commercial content creators, as we’ve discussed. Here’s how Codega puts it:

This is a significant change from the original OGL, which allowed creators to publish without reporting. While it makes sense that Wizards wants to monitor who is using the Open Game Content, this feels like an impossible task. People are selling their work across dozens of platforms, and sometimes one product is being sold on multiple platforms. Whatever the reporting system looks like, the biggest burden will likely be on the smallest creators.

This is going to be an online form. Fill out the form, and the biggest burden will be on the biggest creators.

Then there’s a bit on Kickstarter, which again, this feels like a good thing:

This means that the updated OGL is directly encouraging Kickstarter over any other platform, including private company sites, as any non-Kickstarter revenue over \$750K will incur a 25% royalty, and only Kickstarter revenue gets a break. There is no reason stated in the OGL 1.1 why Kickstarter is Wizards’ preferred crowdfunding platform.

However, Jon Ritter, Director of Games at Kickstarter, [responded on Twitter](#), saying that “Kickstarter was contacted after WoTC decided to make OGL changes, so we felt the best move was to advocate for creators, which we did. Managed to get lower % plus more being discussed. No hidden benefits / no financial kickbacks for KS. This is their license, not ours, obviously.”

Finally, the last section is called “The power is back at Wizards of the Coast,” and it contains this accidentally hilarious gem:

While there is plenty more to parse, the main takeaway from the leaked OGL 1.1 draft document is that WotC is keeping power close at hand. There is no mention of perpetual, worldwide rights given to creators (which was present in section 4 of the original OGL)

That’s right, Section 4 of the OGL 1.0 has this legalese:

4. Grant and Consideration: In consideration for agreeing to use this License, the Contributors grant You a perpetual, worldwide, royalty-free, nonexclusive license with the exact terms of this License to Use, the Open Game Content.

BUT Section II of OGL 1.1 is *the exact same thing*, just rendered in more comprehensible English:

If, and only if, You fully comply with the terms and conditions of this agreement, You may copy, use, modify and distribute Licensed Content around the world as part of Licensed Works on a commercial basis.

That's what a perpetual, world-wide, royalty-free means! And the next section explains "nonexclusive": "We may offer others the ability to use Licensed Content or Unlicensed Content under any conditions We choose." So yeah, Wizards made legalize more comprehensible, and then Codega dings them for it! That's another area that seems just malicious.

There's also a silly argument that royalties would scale down extra products, but that's like arguing that nobody would ever want to earn money when there's a graduated income tax. Because you only pay the royalties on the money you earn *above* \$750,000, the best argument one could make is that you might grow more slowly under the new policy. But "I refuse to take 75 cents because you're going to get a quarter" is kind of dumb.

Finally, in the third-to-the-last paragraph, Codega finally mentions the IP provisions that really are objectionable. This is the section I've titled:

WHAT SHOULD YOU BE MAD ABOUT? And the answer is Paragraph 10.B of the Non-Commercial Agreement and Paragraph 12.B of the Commercial one. It reads:

XII. OTHER PRODUCTS. Sometimes, great minds think alike. We can't and won't cancel products out of fear that they'd be viewed as "similar to" Licensed Works. Therefore:

A. Nothing prohibits Us from developing, distributing, selling, or promoting something that is substantially similar to a Licensed Work.

B. You own the new and original content You create. You agree to give Us a nonexclusive, perpetual, irrevocable, worldwide, sub-licensable, royalty-free license to use that content for any purpose.

Now, note a bunch of things. Symmetry is sort of the hallmark of fairness. Sometimes there's a reason to protect one party differently than another, but generally speaking if a party offers you terms different than it reserves for itself, that should send up red flags.

12.B of the Commercial OGL 1.1 (and 10.B of the Non-commercial OGL) is asymmetrical in three ways. First, 12.B *does* use the word "irrevocable," even though section II doesn't. Perpetual means "this agreement has no fixed expiration date," but not that it can't be revoked. "Irrevocable" means it can't be revoked. So WotC *isn't* giving creators an irrevocable license to use their stuff, but they're taking an irrevocable license to use yours. That's not fair.

Second, that 12.B license includes everything that you create with no exceptions – even the equivalent of your super cool characters, place names, etc. *And third*, it's for "any purpose," not just modules and rulebooks.

So suppose I create a new character class, it's the Half-Wombat, -1 to dexterity, +2 to charisma. That's Original Content, and I own it. Then suppose I design a new character, Normo the Half-Wombat, and let's say for whatever reason it goes crazy viral. Under 12.B, WotC can use Normo in their next Monster Manual. They can write an entire module starring Normo. *They can sell Normo T-shirts.* They can create a new D&D TV series for Netflix that stars Normo. And they don't have to pay me dollar one for it.

Now, I'm not sure this provision is enforceable. It probably isn't, for a lot of reasons. But don't take legal advice from a podcast, and it might be. So if I am a creator, I would strike the second line of 12.B. I

encourage Wizards to modify this policy – it’s still in draft form – to eliminate that second line. If you’re *still* hopping mad, organize around striking that second line of 12.B. That would be productive. This section *isn’t* fair to creators. In my view, it’s the only thing that isn’t fair

That’s what you should be mad about! I think it’s lawyering gone awry and I would encourage WotC to change it. And if Codega had written the article about this provision, I’d be sharing it instead of slamming it.

So there you go: don’t be mad over the things Gizmodo wants you to be mad about. Be mad about 12.B. Demand Wizards change 12.B.

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Kel McClanahan on Biden's docs

A. Update on Dersh and Sanctions

1. Wilenchik bar complaint

Complaint

<https://openargs.com/wp-content/uploads/Wilenchik-Bar-complaint.pdf>

Response filed September 15

<https://openargs.com/wp-content/uploads/Wilenchik-response.pdf>

-hired Donald Wilson of Broening Oberg Woods & Wilson, a respected, top-shelf ethics lawyer.

Ariz. Rule 3.1

<https://casetext.com/rule/arizona-court-rules/arizona-rules-of-the-supreme-court/regulation-of-the-practice-of-law/lawyer-obligations/rule-42-arizona-of-professional-conduct/advocate/rule-er-31-meritorious-claims-and-contentions>

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT [2003 AMENDMENT]

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith and nonfrivolous arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is not in good faith, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, and is frivolous if the lawyer is unable either to make a nonfrivolous argument on the merits of the action taken or a good faith and nonfrivolous argument for an extension, modification or reversal of existing law.

[3] Although this Rule does not preclude a lawyer for a defendant in a criminal matter from defending the proceeding so as to require that every element of the case be established, the defense attorney must not file frivolous motions.

[4] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting an appeal that otherwise would be prohibited by this Rule.

Argument: No proceeding

-not defined in the model rules

Ariz. Rule 3.3a(3)

<https://casetext.com/rule/arizona-court-rules/arizona-rules-of-the-supreme-court/regulation-of-the-practice-of-law/lawyer-obligations/rule-42-arizona-of-professional-conduct/advocate/rule-er-33-candor-toward-the-tribunal>

a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Argument: No tribunal

So that's bad in two ways

- 1) Grammatically
- 2) "Tribunal" here clearly includes the Joint Session of Congress

Comment to Rule 3.3(a)

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See ER 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition.

And Rule 1.0

<https://casetext.com/rule/arizona-court-rules/arizona-rules-of-the-supreme-court/regulation-of-the-practice-of-law/lawyer-obligations/rule-42-arizona-of-professional-conduct/preamble/rule-er-10-terminology>

(l) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

AZ Rule 3.4

<https://casetext.com/rule/arizona-court-rules/arizona-rules-of-the-supreme-court/regulation-of-the-practice-of-law/lawyer-obligations/rule-42-arizona-of-professional-conduct/advocate/rule-er-34-fairness-to-opposing-party-and-counsel>

A lawyer shall not:

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

[NOT SUBMITTED SEPARATELY]

AZ Rule 8.4(a),(b),(c),(d) – catch-all

<https://casetext.com/rule/arizona-court-rules/arizona-rules-of-the-supreme-court/regulation-of-the-practice-of-law/lawyer-obligations/rule-42-arizona-of-professional-conduct/maintaining-the-integrity-of-the-profession/rule-er-84-misconduct>

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

RESPONSE:

[read garbage]

<https://openargs.com/wp-content/uploads/Wilenchik-response.pdf>

Also Ariz. Rule 54(i) – catch-call

2. Reply Brief

<https://s3.documentcloud.org/documents/23571367/dershowitzsanctionslakevhobbs.pdf>

Because Rule 11 awards “must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated,” and the County fails to allege any conduct by Mr. Dershowitz in the past, present or future that would be “deterred” by assessing fees against him, then no amount of fees should be assessed against Mr. Dershowitz or his consulting firm in this matter.

-that’s *bonkers*

a) there’s already a sanctions order

<https://storage.courtlistener.com/recap/gov.uscourts.azd.1294569/gov.uscourts.azd.1294569.106.0.pdf>

-you moved to “show cause”

<https://storage.courtlistener.com/recap/gov.uscourts.azd.1294569/gov.uscourts.azd.1294569.108.0.pdf>

-burden is on YOU

b) order at LENGTH lists the kind of behavior it wants to deter: saying stuff like “Arizona needs to switch to paper ballots” when it *already uses paper ballots*.

c) You know exactly how this would deter, because you say it yourself on pp. 2-3

There is no doubt that he is an accomplished constitutional jurist who has consulted on many notable cases in such capacity, without necessarily agreeing with or endorsing other substantive positions taken by co-counsel. **If he is wrong in this basic assumption, then he apologizes for such a mistake and will not repeat it – but it is an honest mistake, if a mistake at all. He represents that if he was mistaken, he will not repeat his mistake in any future filing.** Assessing fees against him here would advance no beneficial purpose and would only serve to deter him and other eminent legal scholars from trying to offer their well-reasoned opinions and research to counsel and to the Court on areas of their expertise, with the ultimate effect of stunting the development of law surrounding complex issues such as the one on which Mr. Dershowitz was retained (regarding the constitutional ramifications of public access to records held by private government vendors).

So to be clear: Dersh doesn’t know if he made a mistake, but *if* you assess sanctions, then he’ll know, and won’t repeat that mistake in any future filings!

It’s My First Day

The record stands undisputed that Mr. Dershowitz’s role was very limited and narrow in scope, and that he was not involved in the actual issues this Court has deemed sanctionable. In fact, he spent approximately three (3) hours in total on this case, again focusing on the single potential constitutional issue for which he was retained to consult as “of counsel.”

New Dersh Declaration

1. I am familiar with the number of hours that I have personally expended in connection with this court action (Lake et al. v. Hobbs et al., Arizona District Court Case No. 2:22-cv-00677). I believe that I have spent approximately three (3) hours in total on this case. That time was spent focusing on the single potential constitutional issue for which I was retained to consult as “of counsel” (regarding the constitutional ramifications of public access to records held by private government vendors). I had expected the bulk of my time to be spent on discovery, but the action did not proceed to discovery.
2. The pleadings filed by Parker Daniels Kibort which included my signature block were authorized by me as “of counsel,” and it was understood that I would be on these filings as “of counsel.”

-Tell Emily Newman that

-also a declaration from Andrew Parker of the lead firm saying:

1. I am an attorney with the law firm of Parker Daniels Kibort LLC and represent the Plaintiffs, Kari Lake and Mark Finchem, in the above-captioned matter.
2. With respect to the above captioned case, Parker Daniels Kibort retained Alan Dershowitz as an of counsel consultant to be part of our legal team representing the plaintiffs in this case for the purpose of providing legal counsel regarding constitutional issues. He was not retained to investigate the underlying facts in the case.
3. Mr. Dershowitz was part of the case as “of counsel” and was intended to be identified in all pleadings as such. Mr. Dershowitz was correctly identified as such in the complaint and amended complaint. To the extent the word “of” was left off other filings, this occurred only due to an administrative oversight. Both Mr. Dershowitz and I understood he was to be identified as of counsel.
4. The pleadings filed by Parker Daniels Kibort which included Mr. Dershowitz’s signature block were authorized by Mr. Dershowitz as of counsel, and it was understood that Mr. Dershowitz would be on these filings as of counsel.

Untimely?

Because the original Motion for Sanctions sought only sanctions against “counsel” (and did not name him or expressly include “of counsel”), and because of his lack of involvement in the case, he only became aware that he may have been the subject of a sanction after media reports mentioned him by name in connection with the Court’s sanctions order, at which time he retained counsel to file the instant Application and Response to the Motion for Attorneys’ Fees.

That’s admitting to malpractice.

-**first** listed “lead attorney” on the docket

<https://openargs.com/wp-content/uploads/Lake-v.-Hobbs-docket.pdf>

-entry no. 97

-he was served electronically

“against counsel”

-entry no. 99 is the opposition *he signed* /s/ ALAN DERSHOWITZ

<https://openargs.com/wp-content/uploads/DERSH-SIGNED-OPPO.pdf>

B. Rules Package

HR5

<https://www.congress.gov/bill/118th-congress/house-resolution/5/text>

Analysis

<https://docs.house.gov/billsthisweek/20230109/118-Rules-of-the-House-of-Representatives-SxS-V2.pdf>