The Gray Zone: Inspiration vs. Plagiarism

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Every art, science, and technology known to man derives from the accumulated wisdom of those who have gone, done, and thought before. The process of recycling and improving upon ideas is a beneficial process, and a source of income for the creative and industrious. Law protects and encourages this process by recognizing specific expressions of ideas, and specific embodiments of ideas, as intellectual property.

Ideas and their embodiments make us think. In an aesthetic sense, we think "Wow! That moves me!" In a creative sense, we think, "I could take that to the next level." In a business sense, we think "I could make that for less money or, with a few changes, take it into new markets."

When is acting on these thoughts inspiration, and when is it plagiarism? Some scenarios present an obvious answer, while in others the answer is less obvious. It is these ambiguous scenarios that constitute what I call The Gray Zone.

Defining Inspiration and Plagiarism

Our first steps into The Gray Zone require an understanding of basic terminology. The presentation of terminology will, itself, serve as an introduction to the operating principles of The Gray Zone.

> **"inspiration**, n. The infusion or communication of ideas or poetic spirit by a superior being or supposed presiding power; as, the *inspiration* of Homer or of other poets." – Webster's New Twentieth Century Dictionary, 1950

> **"plagiarism**, n. The act of appropriating and representing as one's own production the literary work of another; literary theft." – Ibid.

Someone, perhaps a grammar school instructor, might once have told you that you must never, *ever* begin your writing with a definition – but that it's quite alright to begin with a quotation. Did I just begin with a definition (bad), or was it a quotation (ok)?

The notion of a superior being or presiding power is central to Webster's idea of inspiration. Put another way, inspiration comes from someone or something greater than us, and makes us reach toward that greatness to claim it, in our own words or expressions, as our own.

Plagiarism makes no such pretense. When a work was created, in whole or in part, by another yet we say we created it ourselves, that lie is plagiarism. It doesn't matter whether we stole credit from a god or a peasant, a friend or an enemy.

The relationship between inspiration and plagiarism forms a continuous spectrum of information re-use techniques, with a large Gray Zone in the center. Let's look more closely at this spectrum.

At one extreme, we see something in nature, and in our mind a solution comes together inexplicably: the answer to our industrial engineering problem lies in the motion of the whale in a tide. Inspiration!

At the other extreme, we make a false claim (whether implicit or explicit) about literary creation: "I wrote *Paradise Lost*." Plagiarism, unless you are the John Milton who actually penned the work.

In The Gray Zone, we experience something – a Muse – that motivates us to set down a work on paper or in electronic media. Paradoxically, the more the Muse informs our work, the less we can claim it as

inspiration. In the limit, “our” work is actually that of the Muse. If we’ve watched carefully, we’ve been taught rather than inspired; if not, we’re become nothing but a vessel and a plagiarist.

Exploration of The Gray Zone from an ethical perspective, while intellectually interesting, will not be the primary focus of this essay. Rather, the distinction between being *taught* and being *inspired* proves itself of crucial importance in intellectual property law. It is along these more pragmatic lines – what is legal, what is illegal, and what might one get away with – that I intend to proceed.

A Capitalist’s Take on Intellectual Property

“What,” you might ask, “does an antique economic philosophy have to do with inspiration, plagiarism, or intellectual property law?”

Quite a lot. Our shared understanding of the economic nature of intellectual property will serve as a kind of Polestar by which we can navigate the turgid waters of The Gray Zone.

Fortunes are made by controlling and adding value to cheap, abundant raw materials, whether through manufacturing or through transporting materials to markets in which they are relatively scarce (aka *arbitrage*).

In business terms, a free market is the community within which price and availability information are transmitted instantaneously. Economic “laws of supply and demand” cause equivalent goods with equivalent availability to have the same price everywhere in a market.

Within the framework of Capitalism, a literary work is a virtually free and infinitely renewable resource because it contains valuable information, the cost of reproducing which technology – whether the printing press or the Internet – has lowered to negligible levels. As examples of value, a literary work might incorporate a popular story, the recipe for Coca-Cola®, or the plans for building a cold fusion power source. Each of these represents vast potential income (and therefore, capital) to anyone who can add the value of printing, formulating, or constructing the literary work. Printing, formulating, and constructing are all relatively low in value – the necessary skill sets and equipment can be purchased as commodities.

The developer of a literary work invests capital – time, money, talent, and resources – to turn an idea into a resource. Intellectual property law prevents these virtually free, infinitely renewable, value-addable resources from becoming cheap, abundant raw materials with no return on the developer’s investment. This is accomplished recognizing the work as something that may be owned and used in commerce, and by granting the owner a limited legal monopoly to use the work.

A monopoly is a business operating in a market without competition for its goods. Economic “monopoly powers” allow the business to set the price of goods based solely on demand; there’s no need to worry about being undersold by competitors. The resulting prices are higher than those created in a free market.

When the monopolized goods are intellectual property, the copyright, trademark, or patent monopoly means that although *in fact* anyone can easily and freely obtain the intellectual property (e.g. by simply copying it), *by law* everyone (with very few, generally non-commercial, exceptions) is prohibited from adding value to the intellectual property without the permission of the owner. The legal monopoly makes the intellectual property *by law* relatively scarce within its market, but cheap and abundant to its owner.

As a source of wealth, intellectual property is much like a diamond. Diamonds are not rare, but supply is closely regulated by cartels that own the diamond fields. Their profits are determined by how much demand they can create for diamonds, combined with their ability to regulate supply.

Capitalism as an economic philosophy acknowledges intellectual property, and most other private monopolies, as legitimate and ethical. No government in the world today is purely Capitalistic, but many

have established domestic laws and entered into international trade agreements that respect the Capitalistic principle of intellectual property.

Inspiration and Plagiarism Revisited

I've suggested above that the distinction between being *taught* and being *inspired* is of crucial importance in intellectual property law.

Works protected by copyright, trademark, and patent laws share in common that each must be documented to the extent that appropriate workers of ordinary skill may learn to reproduce them. In the case of a literary work protected by copyright, the work is itself the documentation – one who reproduces the documentation reproduces the work. In the case of work protected by patent, the required documentation is not the work itself, but rather the instructions for reproducing the work.

If you are capable of experiencing and understanding a work protected by intellectual property, you are by definition an appropriate worker of at least ordinary skill. In understanding the work and reproducing it, you achieve nothing unusual. Doing so without a license makes you a plagiarist.

Let's look more closely at the idea of *stealing credit*, in the context of intellectual property. The intellectual property monopoly gives the owner of the patent, trademark, or copyright legal control over most uses. As a practical matter the owner has the ability to dictate terms of use (a license) to anyone who wants to add value. The license can specify pricing, but also dictates restrictions on use of the property and liability for use, dispute resolution procedures, and how the owner of the property will be credited for her contribution once the value has been added.

Making any use of intellectual property without obtaining a license, or inconsistent with the license, can be plagiarism. It doesn't matter whether the use is for-profit or non-profit. It doesn't matter whether credit is given for the intellectual property. It doesn't matter whether we're more skilled or less skilled than the owner of the property. The plagiarist has disrespected the legal right of the owner to establish terms of use, including pricing and how the use will be credited; the plagiarist has taken these rights, the result of the literary work of another, as his own.

Suppose you experience and understand a work protected by intellectual property law, and you to make an improvement. You have truly been *inspired,* exceeding the expectation of an ordinary worker. You want your own intellectual property rights, and indeed, with proper documentation and application to the presiding government, you might get a patent on your improvement.

Your invention does not, however, invalidate or supersede the status of the original work as intellectual property. Your work depends on the original, and you must license the original from its owner before adding your value. It's a two-way street, and the original owner can't incorporate your improvement without licensing from you. Perhaps the two of you can come to a mutually beneficial agreement.

Sometimes a work exists in a given market with a given application, and you think of another application for similar concepts. You have been *inspired!* Will you develop a new solution yourself, or find a way to repackage the original work? Clearly the later requires a license from the original owner. Either way, talk with a lawyer and study the original intellectual property to understand what you do and don't need to license.

Raw Materials for Game Developers

The process of game development is one of adding value to intellectual property. Most of us naturally seek the least expensive and most suitable raw materials for our projects. Again, consider the limits. If material A and material B are equally suitable, but material B is twice as expensive, it's common to choose material A. If material C and material D are the same price, but material B is the more suitable, it's common to choose material B.

A game developer's raw materials include created and licensed intellectual property ranging from source code to libraries to music to artwork to 3D models to patented technologies and more. The developer adds value by refining and arranging these raw materials into a form of entertainment.

Some of these refining and arranging actions are clearly inspired, others clearly plagiarized, and yet others, somewhere in The Gray Zone.

Using or sampling pre-fabricated materials seems like a great way to reduce costs while achieving both quality and a unique, evocative mood. There's nothing wrong with sampling or using intellectual property, as long as you have a license from the owner. If your raw materials are truly in the public domain, they're available free of both cost and license.

License for certain "fair uses" of intellectual property is automatic. Your safest legal assumption is that none of the "fair uses" apply to materials used in game development or game asset development, whether for-profit or non-profit.

Here are some common sources of raw material for games, and some hints on how they might inspire you without driving you to plagiarism.

Public Domain Content

The best and worst thing about public domain content (music, sound, art, models, code, algorithms) is that it's freely available to anyone. You can use this content as-is without fear of legal hassles; so can anyone else who wants to copy you. You don't own the content, so you can't copyright or trademark or patent it as-is.

In The Gray Zone, you can add value to public domain content and might succeed at copyrighting, trade marking or patenting the added value. You can use public domain content as a framework for creating your own content, by editing the content, and might succeed at copyrighting, trade marking or patenting the edited version.

Copyleft and GNU Public License Content

These terms refer to specific licenses for intellectual property. Often this intellectual property (most often source code) is communally "owned" by everyone who has contributed to its creation, and the terms of the license allow anyone free use of the property as long as they don't change the license and don't make a profit on the property or any derivative work. Copyleft and GPL absolutely rely on the legal validity of intellectual property rights, particularly the ability of the owner if intellectual property to dictate terms of use under a government-granted limited monopoly.

If you use GPL code or Copyleft content (all of it, or samples and excerpts) in a commercial project, you violate the terms of the license and are breaking the law. To use GPL code or Copyleft content legally in a commercial project, you need to identify the legal owner(s) of the intellectual property, and negotiate a commercial license.

In The Gray Zone, it's often impossible to identify the legal owners of GPL code; ownership is communal. You can still use GPL code as a source of inspiration for commercial projects, by studying the algorithms and structure of the code, and creating your own "work-alike". One common technique, "backfilling," begins with 100% GPL code and systematically replaces functions and architecture with proprietary or public domain equivalents until nothing covered by the GPL remains. The result is your own intellectual property. If you want to try this, consult with a competent attorney first to decide whether you want to keep very good, or very poor, records of the process.

Sampling And Quoting Intellectual Property

Copyright protects a lot of really appealing and complex content. Sometimes all a developer wants is a little piece of that content to create just the right mood in an image or musical arrangement. It's tempting to take a *sample* and use it commercially. That little sample can become the subject of a legal firestorm if used without permission.

Macintosh guru Guy Kawasaki was fond of saying, "Ask forgiveness, not permission." It's important to remember the context of Guy's admonition: it was about doing the right thing, rather than blindly following The Corporate Rules. It wasn't about taking things that aren't yours. Getting permission (from the owner) before using sampled content is doing the right thing.

In The Gray Zone, you have several legitimate and inspired alternatives. Consider replicating the sound of a sample of music, or the look of a sample of an image, using your own artistic tools and talent. If you have talent, you can use a technique similar to "backfilling" (see above) to construct an entire work that is definitely not the original, definitely not built from literal samples of the original, and yet blatantly evocative of the original.