

Stalemate Over Chess Broadcast Rights

Tom Platt looks at an interesting copyright issue arising from the commercialisation of the burgeoning sport of professional chess.¹

Over 200 million people tuned in to watch Magnus Carlsen, the 'Mozart of Chess', win the Chess World Championship from Viswanathan Anand in 2013. With top chess players becoming younger and more marketable (Carlsen moonlights as a G Star Raw model in his spare time), and chess participation growing rapidly in China and India, these figures will likely only increase. However, the potential commercial value of this interest is unclear, with the chess world having reached a stalemate over the scope of the right to broadcast a chess game.

In November 2016, Carlsen successfully defended his World Championship title against Russian challenger Sergey Karjakin. Ahead of the event, the official broadcaster of FIDE (Fédération Internationale des Échecs), Agon Limited (**Agon**), announced its intention to strictly enforce its "exclusive rights to broadcast the games".² In any other sporting context such a statement would not be controversial. Subject to prior agreements, an organising body ordinarily has the prima facie rights to license (on an exclusive basis or otherwise) a third party to create and broadcast a video stream, commentary, and related content such as press conferences. This conventional understanding was recently applied in *England And Wales Cricket Board Ltd & Anor v Tixdaq Ltd & Anor* [2016] EWHC 575 (Ch), with Justice Arnold holding that the publication of 8 second video clips infringed the copyright in cricket broadcasts owned by the England Cricket Board.

However, the nature of chess means that the spectacle of a chess game is not entirely captured by these traditional broadcast components. All you need to follow a chess game are the moves. As the November 1905 edition of *Lasker's Chess Magazine* noted, "[c]hess differs from other things in that the score of a game adequately and absolutely represents everything that transpires over the board.... Where is the reporter who could really convey a tithe of what transpires on the football field, the cricket field, the billiard table, the concert room or the theatre?"³

On this basis, it has been common practice (until now) for chess websites to report on live games by relaying the moves as they are played onto graphical chess boards. It is this practice that Agon is attempting to stop, seeking to restrict websites from relaying the moves until two hours after the end of each game. In the April 2016 Candidates Tournament (where the challenger for the World Championship was decided), Agon threatened four chess websites (**third party websites**) with legal proceedings if they continued to relay the moves live. With one of the third party websites having declared its intent to continue its live coverage,⁴ and Agon publishing a legal 'white paper' to justify its position,⁵ it appeared that the issue would again come to a head again in November.

Copyright in a chess game

Agon's claim has renewed a long debated topic of whether copyright can subsist in a chess game. Wilhelm Steinitz, the first ever Chess World

Champion, prior to his 1886 match with Johannes Zukertort, inserted a clause into the match contract providing that the "[p]roperty right in the record of all games played in the match shall insure to each player, who shall have the separate right of publishing any or all the games during the match".⁶ This went against the understanding of the day, with the International Chess Congress in 1899 noting "[w]e do not profess to be lawyers, but we have yet to learn that a spectator reproducing a game from memory is guilty of any breach of copyright."⁷

There are several reasons why the International Chess Congress's view remains appropriate today. Chess moves are made according to the rules of the game and therefore are unlikely to constitute a work of authorship. The 'discovery' of a move from a finite number of possible moves suggests that a chess move is inherently 'factual'. As has been argued elsewhere, "chess parameters... yield abstract concepts that are discovered rather than created... [and] one cannot legally (by chess terms) make or create moves on the board that fall outside the confines of those rules."⁸ By contrast, annotated chess games (where players add their analysis of the game alongside the notation of the moves) would be more likely to be protectable.

The third party sites argue that relaying the moves of a game is equivalent to an online newspaper publishing a rolling feed of a live football game, updating readers on the score and the progress of play. They argue that Agon's claim to be able to restrict reporting on and

1 Tom is a lawyer in Gilbert + Tobin's Intellectual Property group.

2 Agon, 'Agon Ltd Commences Legal Action Against Chess24, InternetChessClub, Chessgames and Chessbomb For Breaching Broadcast Restrictions', 12 March 2016, available at: <<http://www.agonlimited.com/news/2016/3/12/agon-ltd-commences-legal-action-against-chess24-internetchessclub-chessgames-and-chessbomb-for-breaching-broadcast-restrictions>>.

3 Lasker's Chess Magazine, November 1905, p 34.

4 Chessdom, 3 March 2016, 'AGON's new policy puts the Candidates Tournament idea in jeopardy', available at <<http://www.chessdom.com/agons-new-policy-puts-the-candidates-tournament-idea-in-jeopardy/>>.

5 Shekhovtsov & Partners, White Paper on Commercial Value and Protection of Exclusivity of Chess Moves during Broadcasts, available at <http://static1.squarespace.com/static/52cd2778e4bobo2edf9e4eed/t/56da18f8555986bc67eaae2d/1457133816887/white_paper_position.pdf>.

6 *Chess Monthly*, January 1886, p 136.

7 *Illustrated London News*, 20 May 1899, p 726.

fan discussion (including on social media) of the games while they are in progress, goes much higher than the right enjoyed by broadcasters in other sports. This appears to be the case. Due to the 'factual' nature of chess moves and the freedom of individuals to publish news (and in this context, scores of a football game, or moves in a chess game), it is unlikely that copyright will allow Agon to sustain its claims.

Click wrap agreements

Agon acknowledged the potential difficulty of protecting its broadcast through copyright and noted in its White Paper that the use of "additional legal tools" will be "absolutely necessary".⁹ To this end, Agon has inserted a click wrap agreement on its website that users are required to accept as a condition to viewing the broadcast. Clause 7 of the agreement inserted on the website for the April Candidates Tournament provided the following:¹⁰

*By using this website you expressly agree that the information about chess moves of the fide 2016 candidates tournament games is expensive to gather and time-sensitive and that uncontrolled copying of this information during or shortly after the end of respective chess game may reduce the incentive of the company to organize similar events in the future. **You further agree not to publish any information concerning the chess moves of the candidates tournament 2016 chess games during such games and within two hours after their end.** (emphasis added)*

With similar conditions imposed on spectators at the actual event, Agon is attempting to prevent the initial dissemination of the moves. However, notwithstanding potential issues relating to the enforceability of the agreement across different jurisdictions, Agon's click wrap solution faces two practical problems. First, the agreement is

only enforceable against the website user and does not create any cause of action against a third party website that has merely received the information. And second, if a third party website begins relaying the moves, it will be practically impossible to identify the user who has breached the agreement.

'Hot news' doctrine of misappropriation

The final ground on which Agon is attempting to protect its broadcast is under the US 'hot news' doctrine. For this reason, Agon chose New York state as the applicable jurisdiction governing its click wrap contract. Agon claims that its broadcast clearly satisfies the five elements of the doctrine, being:

- i. the plaintiff generates or gathers information at a cost;
- ii. the information is time-sensitive;
- iii. a defendant's use of the information constitutes free riding on the plaintiff's efforts;
- iv. the defendant is in direct competition with a product or service offered by the plaintiffs; and
- v. the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

The doctrine has been relevantly considered twice in recent years by the United States Court of Appeals for the Second Circuit. In *National Basketball Association v Motorola Inc* (1997),¹¹ the Court considered Motorola's handheld pager that displayed live statistics of NBA games in progress. In *Barclays Capital Inc v Theflyonthewall.com* (2011), the Court considered a third party website's reporting of daily stock recommendations.¹² In both cases, the Plaintiffs failed to make out the fifth 'free rider' element. Motorola and Theflyonthewall website were

both found to have expended significant resources in collecting the information themselves and therefore were not held to be free riding.

For Agon, it is tempting to think that the relaying of chess moves can be distinguished from both of these cases. The third party websites are not expending significant resources, they are simply relaying the moves, and they indeed appear to be reducing Agon's incentive to broadcast the information. However, Agon would likely face difficulties invoking the doctrine. The significant costs expended by Agon are not expended for the purpose of broadcasting the moves, but rather for the purpose of holding and hosting the event. Indeed, the cost of actually broadcasting the moves is negligible and is almost entirely accomplished by the chess boards themselves, which track and relay the moves electronically.

Breaking the stalemate

In 1899 the world's greatest chess players (including Wilhelm Steinitz) played in the London Chess Tournament. The tournament organisers received £70 from newspapers for the right to publish the games.¹³ While the value of this right may have since increased, come November, the onus will be on Agon to show that the legal position has changed. Agon has played a gambit, resting its case on click wrap agreements and the 'hot news' doctrine. But like most gambits, although we are only just out of the 'opening', Agon's position is looking dubious.

Postscript: On the eve of the match, Agon's application in the US District Court for an interlocutory injunction to prevent the rebroadcast of moves by the third party websites was rejected. Judge Marrero noted that the case was "quite comparable" to *NBA v Motorola* and that damages were likely an adequate remedy if Agon chose to seek relief after the event.

8 Alisa Melekhina and Neal Orkin, 'Intellectual Property Issues in Chess Games' (2011) 6 *Journal of Intellectual Property Law & Practice* 723 at 726.

9 Shekhovtsov & Partners, White Paper on Commercial Value and Protection of Exclusivity of Chess Moves during Broadcasts, available at <http://static1.squarespace.com/static/52cd2778e4bobo2edf9e4eed/t/56da18f8555986bc67eaae2d/1457133816887/white_paper_position.pdf>, 1.

10 FIDE, Terms and Conditions of FIDE 2016 Candidates Tournament Online Broadcasting, 12 March 2016, available from <<https://worldchess.com/terms-moscow-2016/>>.

11 *National Basketball Association v Motorola Inc*, 105 F. 3d 841 Court of Appeals, 2nd Circuit 1997.

12 *Barclays Capital Inc v Theflyonthewall.com Inc*, 650 F. 3d 876 Court of Appeals, 2nd Circuit 2011.

13 Edward Winter, 'Copyright on Chess Games', last updated 19 April 2012, available at <<http://www.chesshistory.com/winter/extra/copyright.html>>.