

MEMO

To: European Chess Union
President Silvio Danailov

From: Geoffrey Borg, Tomasz Sielicki and Morten Sand

Date: 5 May 2011

Re: Copyrights of chess games – internet transmission of chess games

1. Background

1.1 The assignment

The authors (the Committee) of this Memo have been tasked by the ECU to give their opinion regarding some legal issues and other aspects arising from internet transmission of chess games. Baring in mind that this is a huge and complicated area of law, the Committee will give their best opinion as to how the involved issues should be looked at and then point to the best direction in order to secure the rights of the Organizer of high level chess tournaments.

It is the Committees hope that this Memo will lead to further discussions and if necessary, that expert opinions from independent law firms within the EU will be obtained.

1.2 The Sofia case

The nature of possible conflicts has recently been highlighted through the Court case handled by Land Court Berlin, regarding unauthorized internet transmission from the 2009 Topalov – Kamsky match.

In this case The Bulgarian Chess Federation (BCF) filed a lawsuit against Chessbase because they transmitted all 12 games on their Playchess server. Before the match started, the organizer BCF explicitly announced that transmission of the moves from the match needed prior written consent from the organizer. Such transmission was done in the way that Chessbase published the moves just shortly after the official transmission took place. From the court records, the actual gathering of information re the moves was described as:

“They (Chessbase) provided information from different free available information sources on the Internet and also from a journalist from the press area on the spot and then they fed them to the server manually. Thereby it came to a delay of at least 30 seconds up to 5 minutes.” (Unauthorized translation from German)

In the Berlin Land Court all claims from the BCF were rejected. The case argument was closely linked to technical aspects of Copyright law, IT law, data bases and EU directives.

1.3 Copyrights of chess game

During the recent years there have been several discussions in the chess world regarding the possibilities to obtain copyright to chess moves and chess games, but the issue has a long history as pointed out in Edward Winters article: Copyright on Chess Games. The reason often being the possible financial impact such a copyright may have for players and organizers.

Copyright is normally defined as:

“A set of exclusive rights granted to the author or creator of an original work, including the right to copy, distribute and adapt the work. Copyright does not protect ideas, only their expression. In most jurisdictions copyright arises upon fixation and does not need to be registered. Copyright owners have the exclusive statutory right to exercise control over copying and other exploitation of the works for a specific period of time, after which the work is said to enter the public domain. Uses covered under limitations and exceptions to copyright, such as fair use do not require permission from the copyright owner. All other uses require permission. Copyright owners can license or permanently transfer or assign their exclusive rights to others. (Wikipedia)

In the opinion of the Committee it will be extremely hard, next to impossible, to argue that a chess game or a chess move in itself qualifies as “...an original work” in a way that leads to a legal definition of Copyright. And if it is possible to establish such a copyright, what would be the consequences? For an ancient old game like chess, no player can really claim to be the first one to play a certain move in a certain position etc. Most probably, the move has been played before. The only sensible idea would be to give such copyright to the two players of a certain game or to the organizer through a contract with the players. However, the Committee feels that this is not really achieved through the world of copyright and copyright law. We have to enter in to more professionalized system where contractual law will be the basis and where commercial aspects will rule.

To underline this, we quote the following regarding professional ice hockey (NHL):

“The way Mikhail Grabovski (Toronto Maple Leafs) passes the puck isn’t subject to copyright; the CBC’s broadcast of it would be.”

2. Commercial contracts

2.1 Free access to games on Internet

Before we analyze the options whereby the players/organizers can try to secure their interests through commercial contracts, the Committee would like to point out that such a step would immediately limit the number of spectators around the world.

There are arguments both in favor and against a move to such limited access to the games played in Top level Tournaments:

Against:

- Internet transmission has been free since it started
- Free access is important in the promotion of the game world wide
- Free access can generate huge traffic and income to organizer
- Payment would require credit cards and thus excludes huge parts of the world
- No current information channel (media, news papers, blog etc) have up today succeeded in introducing payment for their services

In favor:

- It's of vital importance that organizers of top level chess can commercialize their product
- Internet transmission is extremely popular and has huge income potential
- The time for paid access has now come due to the technological developments the last 10 years

The Committee has no wish to express any form of opinion in favor or against a transfer to closed and paid transmission. It only points out that before entering into a new system there should be a possibility to debate possible consequences of such a move.

Access to the transmission of the games could happen on 2 different levels:

Level 1:

Standard access is free of charge. Fees are introduced for "premium services" such as GM commentary, cameras covering different angles, exclusive interviews during and after games, analysis with engines etc.

Level 2:

No free access to the games.

2.2 The rights of the players

The Committee feels it's best to analyze the establishment of contracts from the organizers point of view. Of course it's the players who perform the game, but their main interest is taken care of when they accept to participate in a chess tournament. If the players are not happy with conditions or their possible "copyright" to the games, they just don't play.

According to the laws of chess, the organizer already possesses the ownership of the score sheets from the game:

"8.3 The score sheets are the property of the organisers of the event"

However, one cannot legally argue that the player has renounced any legal rights because if this. The issue of ownership of the score sheets mainly has to do with enforcement of other parts of the Laws of Chess, such as establishing 40 moves rule, repetition of moves etc. Based on the above, the contract between the organizer and the player must explicitly state that the player transfers any and all rights to the game and individual moves to the organizer for the sole purpose of internet transmission during the tournament. The purpose is not to limit the player's possibilities to make analyzes after the game in any shape or form.

2.3 Contract with a chess site

The organizer should as next step enter into a contract with a separate entity (TE) that is given the actual right to publish the game online in real time. The technical transmission (putting up and maintaining the system) is still done by the organizer.

If the aim is to move to Level 2 transmission, it will be important that the rights to publish the transmission are transferred to the TE for a specific sum of money. In most contractual disputes where the issue is possible infringement of rights, the value and financial profit from reselling access to consumers, will be the core of the dispute.

The TE that holds the right to transmit provides:

- A fully developed payment system for the consumers including system for billing accounting etc.
- Full responsibility towards the consumer regarding quality of transmission, servers etc.
- Contracts with consumers forbidding any transfer of moves during the actual game and + 1 hour after the game.
- Legal capability to fight infringements of the transmission rights worldwide.

The contract with the organizer should contain a model for profit sharing which also might include the players in closed top tournaments.

If there is no contract between the organizer and the TE exclusively transferring the transmission rights, it's almost impossible to claim a violation by a third party.

If transmission takes place on a Level 2 basis, it will further be of vital importance that there is a financial loss when others transmit as well, like in the Sofia case. In all contractual law disputes the issue will be financial loss.

The transmission itself must be possible to access from the organizers website and maybe also from the TE's own website. The consumer however, will meet identical payment system regardless of where he/she chooses to access.

2.4 Contract with the consumer

Today in many parts of the world it has become more and more acceptable to use credit cards online with the purpose of buying services and products from the net. Payment systems has been created long time ago and they function very well.

When the consumer wants to follow a game transmitted to internet, he either goes to the tournament web site or to the website of the TE. Here he clicks on ...YES, I want to follow the games. Then, he has to accept the conditions.... YES, I have read and understood the conditions... Then he goes through the standard credit card payment andwatches the games!

The standard conditions that must be accepted must contain an absolute ban on further transmission by the consumer during the game and1 hour after. This does not limit the right to report the result as "news" in a blog or in any other way (GM Topalov defeated World Champion Anand today, in a sharp Sicilian variation, the game lasted 32 moves and Topalov won after a crushing queen sacrifice!)

For the accredited journalists a similar set of conditions must be accepted, only difference is that they get the games for free. Journalists have to sign in writing that they accept the conditions before they are accredited.

Spectators in the playing hall may not enter with mobile phones etc. Huge signs at the spectator's entrance inform of the transmission limitations etc and addition to printed information on the ticket itself.

Further, the conditions do not limit any form of publication of games and moves from 1 hour after the game. This includes from consumer, players, spectators or other websites.

2.5 Will it work?

To ensure a successful transition from watching games for free to a payment system, it would require the full cooperation from the main organizers, such as FIDE, ECU and private organizers of Top level Tournaments. If each individual organizer is left to deal with and operate a payment system required under Level 2 transmission, the whole idea will most likely collapse.

If however, FIDE commits WCC Cycle both men and women, Grand Prix, World Cup, Olympiads and if ECU commits European Championships both men and women, and Tournaments like: London, Mtel, Aeroflot, Bilbao, then it might very well work after a while.

In this case where the main organizers agree to move to Level 2 transmission, it has potential to work since all the top level tournaments are part of the system. Gradually the consumers will move over to payment for access.

Contractually, FIDE, ECU or other Organizers, should get a fixed percentage of the net revenue, after the TE has recovered the investment and the actual cost involved for each tournament. The sum the organizers will ask for the transmission rights will then be dependent on the success of the system. If ECU introduce a Level 2 transmission for their Championships in 2012 and they ask € 50 000 for this, it means the TE needs one thousand subscriptions of € 50 each to recover the investment.

The financial upside is huge. If 10 000 spectators pay € 75 each for following all the games in the next WCC Match, it generates a gross income of € 750 000.

Oslo, 5 May 2011

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