

White Paper on Commercial Value and Protection of Exclusivity of Chess Moves during Broadcasts

Overview

The purpose of this white paper is to state the position that chess moves during live broadcasting are protected and represent commercial value. This document addresses the challenges arising in course of organization of major chess events in Russian Federation but the recommendations contained herein can be used when organizing other chess events as well.

Background

Due to the inherent features of the game of chess a simple move-by-move textual broadcasting can be even more valuable then a video or audio broadcasting of the event.

As it was determined in various court decisions in different jurisdictions including Bulgaria, the Russian Federation and the United States of America, a notation of a chess game lacks the necessary elements to be considered a copyright object. As of today, no universal default copyright-like legal protection has been attributed to the chess notations which often results in organizers of chess events suffering severe losses in sponsorship values and diffusion of audience due to the fact that numerous chess media free riders simply copy all the information from the events' websites.

Thus, the use of additional legal tools is absolutely necessary to ensure the resolution of the free rider problem and helping chess organizers to realize sponsorship value.

Position

Because limiting free riders and maintaining exclusivity of chess broadcasts is a must to be able to attract sponsors, restriction on the use of information about chess moves during live broadcasting should be attained through contractual restrictions and, in particular through a so-called *clickwrap license* agreement. A clickwrap agreement represents a license agreement covering access to or use of materials on a web-site. By clicking the "I agree" or similar button the user of the website agrees to be bound by the agreement contained on the website "Terms of Use" page.

The clickwrap agreement shall inter alia contain:

- The extent to which the user shall be able to use and distribute information contained on the website;
- Liability for the breach of the agreement;
- Applicable law;
- Forum selection.

The clickwrap agreement shall be supplemented with notices on the restrictions of textual broadcasting of the chess games moves at the venue of the event and/or restriction on use of mobile phones and other recording devices in the playing hall. Reasonable measures should be taken to ensure that all the concerned third parties, including journalists, chess media sources and visitors of the event are informed about the restrictions prior to the start of the games.

Such contractual restrictions will be enforced in most jurisdictions on the basis of the freedom of contract principle. Legislation of Russian Federation also recognizes this principle.¹

Furthermore, the breach of the contractual obligations will give the event organizer an opportunity to make use of Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights² as the information about the moves in this case will be deemed obtained in a manner contrary to honest commercial practices.

In order to ensure the protection of the information of chess moves should certain provisions of the clickwrap agreement be unenforceable, it is important to choose the appropriate applicable law.

The law of the state of New York (USA) is a good choice as the case-law of the United States of America has developed a so-called hot news doctrine, which provides legal protection for time sensitive facts.

The United States Court of Appeals for the Second Circuit which territory comprises the states of Connecticut, New York and Vermont has set out a 5-element test of a hot news misappropriation claim in *National Basketball Ass'n v. Motorola, Inc.*,³ which it later confirmed in *Barclays Capital Inc. v. Theflyonthewall.com.*⁴

Such elements were described in the following way: (i) a 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.

¹ Civil Code of the Russian Federation, P.1, 51-FZ, adopted on November 30, 1994, *art. 421*;

² Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994;

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

⁴ *Barclays Capital Inc. v. Theflyonthewall. com, Inc.*, 650 F. 3d 876 - Court of Appeals, 2nd Circuit 2011.

Taking into consideration the nature of the chess game and the value of its textual move-by-move broadcasting, it is safe to assume that all the five elements are met in a case concerning the live broadcasting of a chess event.