



Associated Law Offices of  
**B. Ondřej Formánek**  
Wodzisław Śląski, Ostrava  
email: formanek.pравни@seznam.cz

## **WHITE PAPER**

Agon Limited is a Jersey-registered corporation founded by Andrew Paulson,<sup>1</sup> now owned by Ilya Merenzon, and for purposes here the commercial agent of FIDE, the global chess federation recognized by the International Olympic Committee.<sup>2</sup>

With their biennial Candidates Tournament upcoming, Agon procured a legal white paper from a presumably Russian law firm Shekhovtsov & Partners (no other information given),<sup>3</sup> on [the] commercial value and protection of exclusivity of chess moves during broadcasts. Only a bit over 2 pages in length, this brief indicates that contract law is a dutiful mechanism to be used under a *clickwrap* agreement, and digresses into case law on the “hot news” doctrine.<sup>4</sup>

We specifically find reasons to disagree with Agon’s conclusions regarding the applicability of the latter, and will simply argue that it is (at best) not relevant to the position of Agon (at worst, it likely ails them).

With the exact language of the clickwrap agreement now appearing on the worldchess.com website, we are also able to review alternative attempts in this direction, and point out various failings of the Agon/Shekhovtsov protocol.

Being more expert in matters of EU and US law, we do not extend any analysis to the Russian Federation, as in the original white paper. Perhaps thankfully, there is no dispute in this matter that chess moves are not copyrightable under applicable law. Further, though much muddled Internet comments confuse the situation with the video broadcasts (copyrightable), only the moves themselves are at point. The analogues given concerning sporting leagues and their broadcast rights, are thereby nugatory.

### **Hot-news doctrine: inapplicability and irrelevance**

Shekhovtsov asserts that the state of New York, being in the Second Circuit, is an appropriate venue for choice of law, due to two cases on the “hot news” doctrine being heard there. However, neither case does much to avail Agon’s position.

The first cited case *National Basketball Ass’n v. Motorola, Inc.*<sup>5</sup> saw the Second Circuit quite critical of NBA’s claim, noting that Motorola (trading as STATS) was not in the same business as NBA *per se*, and developed a 5-element test, which is indeed recited by Shekhovtsov.<sup>6</sup> Continuing, in *Barclays Capital Inc. v. Theflyonthewall.com*,<sup>7</sup> this test was rather uncharacteristically declared to be non-binding (III.A.1.c: *Three- and Five-Part “Tests”*, to Footnote 34), in a bit of opposition to Shekhovtsov’s assertion that the test was “confirmed” by the latter. Already there was much criticism of the “hot news” doctrine in evidence with the NBA case.<sup>8</sup>

However, without further investigation, the final sentence of Shekhovtsov is already so faulty, as to reject “hot news” on the face of it. For instance, Agon has identified that it does *not*

<sup>1</sup> See [Agon corporate records](#) hosted at NY Times.

<sup>2</sup> See the FIDE-Agon agreement of 2012 as [Annex 11 of FIDE Congress](#)

<sup>3</sup> Available at [http://www.agonlimited.com/s/white\\_paper\\_position.pdf](http://www.agonlimited.com/s/white_paper_position.pdf)

<sup>4</sup> The *hot news doctrine* originates in wartime (1918) news services merely copying factual information from one another, and although has been put forth by various plaintiffs, has never seen broad application by courts.

<sup>5</sup> 105 F.3d 841 (2nd Cir. 1997) [https://www.law.cornell.edu/copyright/cases/105\\_F3d\\_841.htm](https://www.law.cornell.edu/copyright/cases/105_F3d_841.htm)

<sup>6</sup> See Paragraphs 16 and 69 of *supra*.

<sup>7</sup> 650 F.3d 876 (2d Cir. 2011) <http://caselaw.findlaw.com/us-2nd-circuit/1571485.html>

<sup>8</sup> In footnote 7 they quote the inimical Learned Hand cautioning against a broad usage of the doctrine, and further note that many subsequent decisions have expressly limited the INS case to its facts.

intend to broadcast the chess moves live, and such absence would immediately eliminate the fourth prong of “hot news”, and too the third as no one could “free ride” if they had to extract the moves themselves from alternative media.<sup>9</sup> In addition, the fifth prong is unlikely to pass muster, as the cost involved to provide live moves is negligible,<sup>10</sup> seeing Agon has previously relayed live moves for its events, so too with other top-level competitions. The Digital Game Technology (DGT) makes move relay basically automatic, and events from around the world do it at inconsequential cost.<sup>11</sup> Finally, from the rest of Agon’s argument it is evident that they think others will try to “scrape” the live move data from its video broadcasts (if not contractually prohibited from doing so), a direct indication that the service would continue to exist, even if Agon does not provide it. In short, a claim of “hot news” by Agon/Shekhovtsov is ludicrous. Moreover, given the intent of Agon to bind by contract, “hot news” is simply irrelevant.

### Spectators bound by contract

Many professional sports leagues have sought to limit the capacity of its fans to undertake various actions, particularly those that would reduce the value of their product. Naturally in this same way, opera houses do not allow patrons to record performances (even for “personal” usage), photography is restricted, etc. With the advent of instant gambling, more sports are preventing onsite attendees from transmitting information (by mobile for instance) from the venue itself, by restrictions printed on tickets and made well-known to attendees.

Agon/WCEL has announced their *Terms and Conditions of FIDE 2016 Candidates Tournament Online Broadcasting*,<sup>12</sup> that has the following #7 written in boldface.

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.

Contrary to the opinion of the Terms and Conditions (T&C), it is not “expensive to gather” information about chess moves, particularly for the organizers who (as noted above) can just use a DGT board. Though the T&C tries to continue in the model of the “hot news” doctrine, it is fallacious since undoubtedly *someone* would continue relaying live moves (by video scraping, communication from venue. . .), unless Agon specifically restricted it. Trying to argue both that element 5 of “hot news” is met, while at the same time aiming to contractually prevent anyone from providing the service, is a monstrous argument, certain to lose. Specifically, the T&C #7 confuses (as NBA did) the “incentive to organize similar events” (their language) with the “incentive to transmit live moves” (the reality of a “hot news” claim).<sup>13</sup> Yet at the same time, ignoring Agon’s shoe-horning attempt of “hot news”, they still can impose access restrictions.<sup>14</sup>

Agon/WCEL indicates in #10 that the laws of the state of New York shall apply, though they choose the venue as the arbitration courts in Moscow (#11). There is language in #8 about a restraining injunction against violators (speaking grandiosely in terms of “irreparable injury. . . not quantifiable in monetary damages”), but it is hard to think that this would easily

<sup>9</sup> This same conclusion is essentially reached in *NBA v. Motorola*, paragraphs 71ff, noting that the defendant tabulated data from television and radio broadcasts *at its own cost*.

<sup>10</sup> The argument of Shekhovtsov is absent, but could intend that the “cost” is also seen in the diminished sponsorship.

<sup>11</sup> A better citation for Shekhovtsov could be the decision in the *Morris Communications Corp. v. PGA TOUR, Inc.* case (364 F.3d 1288, 1296, 11th Cir. 2004) where at least the sports entity was victorious, though the verdict was largely on business grounds, particularly that PGA TOUR had spent a considerable amount on a quite complicated score-tracking system, while the “free-rider” simply copied their data.

<sup>12</sup> <http://worldchess.com/terms-moscow-2016>

<sup>13</sup> See Paragraph 73 of the NBA decision, and also its Footnote 8, regarding the necessity of direct competition.

<sup>14</sup> Taking flippant examples, they could try to place other speech restrictions on viewers, such as inhibiting them from conveying any negative media publicity that could “reduce the incentive” toward future organization of similar events.

be applied across jurisdictions. Agon/WCEL clearly want to be able to *stop* move transmitters from continuing to do so (even if monetary damages cannot be reobtained), which is a paradox of contract law here. Namely, Agon/WCEL could simply refuse to do business (not make a contract) with a violator — but the contract is what binds the violator in the first place! To spell it out, a non-party can do whatever they want with the moves, once they obtain them by legitimate means, and Agon/WCEL would need to control information leakage quite rigidly.

As for actual monetary damages, in #9 it notes the expectation that any proceeds gained from live transmission of moves shall be entitled to by the originating Company, though of course any value added to them (analysis or commentary) by violators could not be claimed. More to the point, would be whether Agon/WCEL could make business-oriented claims as to how any violative move transmissions affected themselves. This is the topic of the next section.

### **A previous ECU memo on the matter**

A direction for monetization of live chess moves via exclusivity was already trial-ballooned in 2011 by an European Chess Union (ECU) Commission on Copyright, which again fortunately for us had little to say about actual copyright.<sup>15</sup> As the Shekhovtsov proposal follows its outline (much more than any “hot news” diversion), we interrogate it in heightened detail.

Section 2.3 of the ECU report, takes a very practical view of the aspects of contractual law, noting that financial loss must be extant, and moreso *proven*, if conditions on move transmissions are to be legally efficacious. Corresponding in aspect, Agon has bartered a deal with the Norwegian TV broadcaster NRK,<sup>16</sup> though naturally the video rights (for Norway) are more prevalent in the portfolio than live move transmission. Other than this, it is not clear whether Agon has undertaken to find a “separate entity” to sell the rights to publish the game moves online.<sup>17</sup> As above, the words of Agon incline that they will *not* be transmitting moves (in raw form) until some hours after the game’s completion, which is a lacuna per the ECU plan. Particularly, without codifying such rights in a financial sense, Agon would be *de facto* powerless against a “scraper” who relayed the moves obtained from watching the broadcast.<sup>18</sup> Without a commercial basis to claim damages, and specifically for move transmission as opposed to other elements of their Broadcasting Materials, any court victory by Agon would verily be pyrrhic.

Agon mentions too that they wish to find live TV broadcasters, similar to NRK in Norway, mentioning ESPN and SkySports in their report.<sup>19</sup> However, this is greatly at odds with their desire to yoke spectators with contracts regarding move relays, as appending such to a TV broadcast appears infeasible on the basis of consent. Either delayed TV (in a condensed format) after the moves are no longer jealously guarded, or Internet viewing where a legal agreement from a chess fan could be demanded in exchange for access, would be more availing to Agon.

### **Conclusion**

(a) Agon cannot restrict live move transmission by relying on copyright law (a facet agreed by all instant parties), due to lack of viable subject matter;

(b) similarly “hot news” is inapplicable, as parallel to the NBA decision, Agon proposes no direct competition; too, the effect of “free-riding” on live moves isn’t particularly prohibitive;

(c) they can aim to restrict live move transmission by contract law, though must be very careful of information leakage, and can only hold violators liable for actual business damages;

(d) yet, they have (seemingly) made no effective attempt at quantification for the latter, when restricted to solely move transmissions divested from other broadcast material.

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<sup>15</sup> ECU Commission for Copyright, 2011 ([PDF](#))

<sup>16</sup> See [FIDE and Agon sign historic media rights deal with NRK](#)

<sup>17</sup> Item #4 of their [Terms and Conditions](#) indicates that the site is operated by “World Chess Events Limited” (WCEL) based in the British Virgin Islands, which might be a different entity, but then it immediately prevails this WCEL is “the official organizer of the FIDE 2016 Candidates Tournament” which as noted *supra*, by contract with FIDE (§3.1a) must be Agon Limited. Whatever is really true, there is almost zero chance (excepting NRK) that the transmission rights, if they be assigned at all, have been done so “at arm’s length” as is necessitated for substantial purposes per the ECU memo schema.

<sup>18</sup> Shekhovtsov lists “liability for breach of agreement” as a part of its proposal of a clickwrap agreement, but it is most unlikely that a contract of adhesion could contain a suitable penalty clause beyond actual commercial damages.

<sup>19</sup> Section 8 of Annex 54, 2015 FIDE Executive Board meeting ([PDF](#))