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Re: Chess24.com FAQs

1. Are chess moves protected under U.S. copyright law?

Chess moves are not protected by United States copyright law. This is because, like sports scores and statistics, the moves that a player makes on a chessboard during a match are not creative works of authorship. The United States Court of Appeals for the Second Circuit gave the following explanation of the difference between facts and works of authorship in the context of sporting events:

> "Sports events are not 'authored' in any common sense of the word. There is, of course, at least at the professional level, considerable preparation for a game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. Unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script. Preparation may even cause mistakes to succeed, like the broken play in football that gains yardage because the opposition could not expect it. Athletic events may also result in wholly unanticipated occurrences, the most notable recent event being in a championship baseball game in which interference with a fly ball caused an umpire to signal erroneously a home run."

NBA v. Motorola, 105 F.3d 841, 846 (2d Cir. 1996). This conclusion has been reaffirmed in a variety of circumstances, including in *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, which noted that sports data used in a fantasy baseball league was "all readily available in the public domain." 505 F.3d 818, 820 (8th Cir. 2007). Basic factual information about chess moves is no different from any other factual information generated from a sports match or other public event and thus cannot be protected under copyright law.

2. Can the organizer or promoter of a chess match or a chess tournament prevent or obstruct other media from live-broadcasting the chess moves of a match or a tournament based on U.S. copyright law?

Because chess moves are not subject to copyright, they may be freely published and communicated without risk of liability for copyright infringement. This is the case even if the organizer of a chess match or tournament possesses rights in the recorded broadcast of an event or restricts access to the event. The organizer of a chess match or tournament may control access to the event (such as by requiring the purchase of a ticket) and may prevent the unauthorized broadcast or copying of recordings of the event. However, the organizer cannot use copyright law to prevent or obstruct other media from viewing the match through lawful channels and reporting or broadcasting the play-by-play development of the game, including by visually depicting the match on a virtual chessboard. The organizer also cannot prevent other media from commenting on the match, discussing the course of the game or the players' strategies, or providing a database of moves in each chess match.

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3. Can the organizer of a chess match or a chess tournament have claims for State Law Misappropriation, unfair competition or conversion against media live-broadcasting the chess moves?

Under the doctrine of federal copyright preemption, United States copyright law bars state law claims arising from the copying, distribution, or display of material that is within the "subject matter" of copyright law. Facts, including sports scores and player moves, while not *protectable* under U.S. copyright law, are nevertheless within the "subject matter" of copyright. As a result, claims for misappropriation, conversion, or unfair competition for the unauthorized publication of facts or sports scores are usually preempted.

4. What about so called "hot news"?

Under certain very limited facts and circumstances New York law recognizes a claim for so-called "hot news" misappropriation, and such claims are not preempted by Copyright Law.

Claims for misappropriation of factual data originate from a 1918 United States Supreme Court decision *International News Service v. Associated Press*, 248 U.S. 215 (1918) ("*INS*"). In that case, the defendant had obtained the plaintiff's (the Associated Press ("AP")) news content by wire and rapidly republished that content. The Court found that the plaintiff had stated a claim for misappropriation because it took "material that ha[d] been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money." *Id.* at 239. Thus, the defendant "in appropriating it and selling [the AP's content] [was] endeavoring to reap where it ha[d] not sown . . . ." *Id.*

The basic concept of an *INS* "misappropriation of fact" claim is that the plaintiff has expended time, money and energy developing or creating its product (e.g. collecting and aggregating factual data); as a result of that effort the plaintiff has acquired an intangible property right in that product; and the defendant has appropriated the plaintiff's product and passed it off as its own. In the case of *INS* the material at issue was highly time-sensitive and was valuable precisely *because* of its time-sensitivity. Thus, the danger of the defendant's conduct was that by redistributing the plaintiff's news feed the defendant was taking for itself the plaintiff's most valuable asset – namely, the "hot news" that it had gathered. Thus, this type of claim is sometimes referred to as a "hot news" misappropriation claim.

Today, "hot news" misappropriation claims have been narrowly limited to a set of very discrete circumstances – namely, those circumstances roughly analogous to the *INS* case and involving the appropriation of time-sensitive material in a manner likely to jeopardize the plaintiff's business. The most important case addressing "hot news" misappropriation of sports scores is *NBA v. Motorola*, 105 F.3d 841, 846 (2d Cir. 1996). That case involved a Motorola paging device known as the "SportsTrax." The SportsTrax pager offered a feature whereby users could receive, in real-time, information concerning NBA games in progress, including the teams playing, score changes, the team in possession of the ball, whether the team is in the free-throw bonus, the quarter of the game, and the time remaining in the quarter. Motorola provided updates every two or three minutes, generally a couple of minutes after the play actually occurred. In order to provide data to

the SportsTrax, Motorola employed reporters to watch the games on television or listen to them on the radio and then input changes into the computer.

The Court found that in order to assert a claim for "hot news" misappropriation, the plaintiff must prove that:

> "(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."

NBA, 105 F.3d at 845. The *NBA* court found that Motorola's conduct did not meet the test for "hot news" misappropriation, largely because defendants did not "free-ride" on the work of the NBA, but rather "expend[ed] their own resources to collect purely factual information generated in NBA games." *Id.* at 854. The Court also based its holding on the fact that the existence of the SportsTrax did not threaten the viability of the NBA as a whole. *Id.* Other courts have come to the same conclusion in analogous circumstances, thereby confirming that "hot news" misappropriation claims only arise in very limited circumstances, and only where the defendant is free-riding on the plaintiff's efforts in direct competition with the plaintiff and in a manner likely to threaten the existence of the plaintiff's business.

5. Can the live broadcasting of chess moves which are gathered from freely accessible sources (e.g. websites, television channels, twitter etc.) fall within the scope of a "Hot News" misappropriation claim of the Organizer or Promoter of a chess match or tournament?

The following reasons speak against the possibility that the "real-time" publication of chess moves, particularly if collected from third party websites, television stations, or twitter feeds, would give rise to a "Hot News" misappropriation claim:

- **The Chess Moves Are Not The "Product" Of The Time And Effort Spent By The Organizer Or Promoter Of The Match or The Tournament.** Chess moves and plays are not generated or created by the Organizer or Promoter, are not collected by the Organizer or Promoter, and are not the "product" of the Organizer's or Promoter's effort and labor. Additionally, once the chess moves occur and are disseminated to the public, either through licensed television broadcasts or through third party "tweets" or emails, these moves become information that is in the public domain.

- **No "free-riding."** When media broadcast chess moves after gathering them from freely accessible sources like websites, television stations, twitter etc. they do not appropriate the Organizer's or Promoter's product and resell it at lower cost. Rather, the collection and display of chess moves by media different from the Organizer or Promoter is the result of their *own* effort and expense.

- **No "Scooping."** In *INS*, the **Court** found that the defendant's rapid appropriation of its news content, combined with the time-sensitivity of the material, resulted in the possibility that the defendant was able to "scoop" the plaintiff by disseminating news as rapidly as the plaintiff – thereby siphoning the plaintiff's audience. As a result, the most important aspect of the plaintiff's business – the ability to get news to the public before anyone else – was being undermined by the defendant. That is not the case when chess moves are gathered from freely accessible sources. Additionally, the key advantage of a chess organizer, as in other sports, is the exclusive right to the live or on-demand video feed of the players in action. The broadcast of moves does not undermine that in any way, and may in fact encourage additional views of video available only on an official website.

- **No Substitution Or Destruction of The organizer's Business Model.** The broadcasting of chess moves by other media than the Organizer or Promoter or their licensed broadcaster will not threaten the existence of the Organizer's or Promoter's business, particularly when the moves are being transmitted for free to as large an audience as possible and the Organizer or Promoter retains the exclusive right to create, distribute, and/or stream video from the playing venue.

6. Can the broadcasting of chess moves be protected by the First Amendment to the U.S. Constitution?

The First Amendment to the U.S. Constitution broadly protects the rights of free speech, especially in the context of news and factual reporting. Thus, courts may not enforce laws that unreasonably restrict the press's right to report on matters of public interest or the public's right to freely transmit public or historical information. Several courts have noted that there is a strong public interest in dissemination of factual data, including sports data. Thus, in *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P.*, the court held, in a slightly different context (*i.e.*, the use of players' names and likeness in connection with fantasy sports), that "it would be strange law that a person would not have a first amendment right to use information that is available to everyone" and that "[c]ourts have [] recognized the public value of information about the game of baseball and its players . . . ." 505 F.3d 818, 823 (8th Cir. 2007).

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