

# A Repetition of Moves

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## 1. INTRODUCTION

A chess player, having considered all other possible moves, thinks that the move he makes offers the best opportunity to win.<sup>1</sup> His opponent, after similarly considering all other possible moves, thinks that his move offers the best chance of winning. Both think that their move will at least draw the game and that any other move will weaken the position to such an extent that it could lead to a loss. The first player sometimes sees no better move than to go back to the previous position. If his opponent does the same and the first player again can think of no other possibility than to repeat the previous move, then one speaks of repetition of moves. If that occurs three times in a row, it is a draw according to the rules of the game on account of repetition of moves.

I feel like such a player at the moment, now that I have absolutely no wish to pass up the opportunity to contribute to this special present for my dear former colleague Bernt Hugenholtz, the more so because the theme chosen for this collection is sports and copyright. That theme is really appropriate for Bernt, who in his wonderful thesis dealt extensively with the ‘concept of work’ in copyright law. This concept of work is also at stake when it comes to the question of whether a chess player has the copyright in games played by him.

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1. I write ‘chess player’ and ‘he’ and ‘his’ here. However, please bear in mind that since long before the popular film *The Queens Gambit*, there have been many and very talented female chess players. Just think of chess master Judith Polgar (1976) with an ELO rating in 2005 of 2735; the strongest Dutch chess player of today, who won several times against the current world champion Carlsen, has an ELO rating of 2776 in 2021. The ‘chess player’ in this contribution is gender neutral.

I have considered this question in the past and have published on it, so it is an obvious topic for me to address now as well.<sup>2</sup> But actually, I do not have many new and better insights than what I have written together with Jaap Haeck – also a former IViR-ian – in the Dutch journal *Auteursrecht* (previously *Informatierecht/AMI*).<sup>3</sup> Anything I might add would risk detracting from the foregoing and thus lead to a loss, while I also see no possibility of arriving at new and better views. At the very best, I can sharpen up some ideas here and there.

In all this, it is also a fact that I have been enjoying my retirement since 2004 and since my seventy-fifth birthday I have no longer been involved in ‘the profession’ at all. But for Bernt, even Heintje Davids comes back.<sup>4</sup> Who among the present Dutch generation still knows who she was? And who I am?

## 2. CHESS AND COPYRIGHT IN LITERATURE

Chess as an object of protection is not a new topic in copyright literature. The German Nestor Josef Kohler wrote about it back in 1908: a chess game is an event and everyone is free to publish about it.<sup>5</sup> In our country, Oskam and Rueb suggested in 1927 in the *Nederlands Juristenblad* that the press and the public should only be granted access to the playing room on condition that nothing would be published about the games without prior permission. Many years later, we saw such a ‘domain monopoly’ become reality with regard to television footage – so-called ‘flashes’ – of football matches. The Dutch Supreme Court confirmed in *NOS v. KNVB* that football clubs, on the basis of their control over access to venues, could impose restrictions on reporting.<sup>6</sup>

Oskam and Rueb sidestepped the copyright problems. For example, what about the fact that there are two co-authors? Is it only the winner who has the copyright (to prevent a veto by the embarrassed loser)? How do we deal with draws? Spoor, Verkade and Visser devote only a few paragraphs to this in the latest edition of their treatise on Dutch copyright, which are broadly in line

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2. Gerard Schuijt, ‘The Van Geet opening, the Niemeijer convention and Piet Keijzer’s scissors’, 3 *Sic Letterkundig Tijdschrift* (1991), 132–140, an essay-like essay in which I tended towards granting copyright to a chess game: ‘Chess players are the poets among sportsmen’.
  3. J.F. Haeck and G.A.I. Schuijt, ‘De schaker een maker? On Chess as a Copyright Issue’, 3 *Informatierecht/AMI* (1994), 43–50. We came to the conclusion that there is no copyright on a chess game.
  4. Heintje Davids (1888–1975), sister of the popular singer-comedian Louis Davids, was an equally popular singer of humorous songs. After her grand farewell in 1954, she soon made her comeback. She continued to perform well into the 1960s, regularly announcing that this was really the last time.
  5. Josef Kohler, ‘Besteht ein Autorschutz an einem Schachspiel’, *GRUR* (1908); J. Kohler, ‘Nochmals das Recht des Schachspielers’, *GRUR* (1910); see also Walter Jung, *Gibt es ein Urheberrecht am Schachspiel*, (diss. 1931), and some other publications which I found in the master’s thesis of G.J. Wildschut, *infra* note 7.
  6. See inter alia Dommering, ‘De sportprestatie. Protection and free reporting’, in W.F. Korthals Altes and G.A.I. Schuijt (eds.), *Sport and information monopolies* (Cramwinckel, Amsterdam, 1991), 9–21, and Sven Klos, ‘Sport on the playing field of intellectual property’, 3 *IER* (1997), 81–88.

with what they wrote in earlier editions. They think that the great masters can make choices that testify to a personal stamp, which would argue for granting copyright to the chess player. For them, the reason for rejecting copyright in chess games is not so much that the concept of work is not appropriate, but that the infringement criteria of ‘making public and reproducing’ are not appropriate, i.e. where it concerns a newspaper report or a replay.

Chess player and bridge player Bob van de Velde alerted me to the 1979 doctoral thesis by Gerard Wildschut, ‘The intellectual property of chess games’. An excellent thesis, although I cannot agree with his argument, which is in favour of granting copyright to chess players. More on that later.<sup>7</sup>

Oskam and Rueb themselves were not without merit as chess players and also the (semi-Dutch) grandmaster Lasker, who was also an accomplished draughts player and bridge player, engaged in the subject of rights in games. During a tournament in New York in 1893, the hosting Manhattan Chess Club claimed the right to ‘sell’ the games in order to cover the costs of the tournament. This caused dissatisfaction among the press, but not among the players who had apparently agreed to it. The same happened at an international tournament – also won by Lasker – held in Paris in 1900. Much later on, in 2007, a chess commentator wrote: ‘A few years later, Lasker was once again back in England and trying to earn a living from chess. Did he get the idea from New York 1893?’<sup>8</sup>

Chess players saw mainly opportunities in copyright law to negotiate remuneration for their performances. Nowadays, that is no longer a problem for the top players. There are very large sums involved in prizes and starting fees, even in the internet tournaments of the COVID-19 era. The lesser gods have to make do with little or nothing, but then again, the fact that I have copyright on my Saint Nicholas Day poems does not really make a financial difference either, and my achievements on the sixty-four squares even less so.<sup>9</sup>

### 3. WHAT MOVES THE CHESS PLAYER?

I have said on previous occasions, in a somewhat mocking way, that chess players do not know what copyright is and that lawyers do not know what chess is. Lawyers often have a somewhat romantic idea about chess. This is not so much about the beauty of the game because that is only right, but about the choices a chess player has during a match. He can see the most beautiful combination – queen sacrifice and so on – but if it does not lead to victory, he will not execute it. A failing combination, where the opponent already finds the refutation in the game, is therefore not a possible combination at all.

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7. G.J. Wildschut, ‘The intellectual property of chess games’, Free University, 1979.

8. I have this information from chess player and bridge player Bob van de Velde, who is co-editor of a biography of Lasker.

9. Drs. P will probably have received a fee for his wonderful ‘Het schrijven van een sinterklaasgedicht’ (Writing a Saint Nicholas poem); Drs. P and Ivo de Wijs, *Het rijmschap compleet en nog meer lief en leed* (Bzztôh, The Hague, 1984).

Therefore, one must take the ‘personal style’ as an argument for copyright with a large grain of salt. Certainly, there are chess players with a personal style: either adventurous, or wait-and-see, defensive, or rigid and solidly built, impossible to get through. In his thesis, the aforementioned Gerard Wildschut mentions a small study he conducted among grandmasters. Were they able to identify the players on the basis of a written-out anonymous game? Only two grandmasters said they would be able to, but all the others whom he had asked the question, were at least convinced that their chances of identifying the names were many times greater than the statistical chance of ‘guessing correctly’. For Wildschut, this was an argument to support his proposition that chess games have a personal character.<sup>10</sup> But – and this is my point of view – although a chess player indeed has a choice of many moves, the move he eventually makes is the only one he judges, after extensive calculation, to be the best one at that particular moment, i.e. the one that leads to winning, or at least to not losing. Winning is the (technical) goal and that comes first. The fact that some chess players have their own, even recognisable, style of playing does not alter this. One may play defensively, the other aggressively; one may rely on his pair of bishops, the other on his two knights. It was no different with the famous Michael Tal. It is said of this ‘magician from Riga’ that he did not always make the ‘best’ move (in terms of chess technique); rather, he wanted to complicate the gameplay with his moves. I think that in the end Tal would also make a move that he estimated made his chances of winning better than with another, perhaps more obvious, move. However, for every chess player it is true that if he sees a move, which leads (almost) immediately to a win, he will make that move and he will deviate from his earlier ‘personal’ set-up and style. For the record: a chess player does not always make the best move, he just thinks he does!

Moreover, one has to put ‘ingenuity and beauty’ of often spectacular combinations into perspective. Many combinations are not recognised during the game. That happens, especially in speed chess, often only afterwards during the analyses. Combinations are also seldom prepared and ‘built up’, but more often thrown into the player’s lap by a bad move from the opponent. Suddenly the combination is there; the winner sees it, the loser did not see it coming. If neither sees the combination, it will surface only in the analyses, or it may not. In our 1991 article Jaap Haeck and I reported an incident that occurred during an international tournament in Groningen. In the commentary room, under the direction of Ger Ligterink, there was a fierce discussion with the audience about the best continuation for black, until someone from the audience shouted: ‘Queen takes c3’, a Queen sacrifice! Ligterink, no slouch at chess himself, did not take the suggestion seriously at first, but together and in unison with the audience, he came to the conclusion that this move was indeed an ingenious one that would lead to victory. To the great disappointment of the whole audience, the black player at the board overlooked the combination and the game ended in a draw. Anyhow, combinations, like beautiful combinations in football, remain one of the attractive aspects of the game for the public. Every Saturday I still

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10. G.J. Wildschut, ‘De intellectuele eigendom van schaakpartijen’, Free University, 1979, 8.

try to solve the ‘problem’ (usually a beautiful combination) presented by Dutch chess journalist Hans Ree in the newspaper *NRC Handelsblad*. I rarely succeed, sometimes I can see the first two moves, but not the correct third one, and therefore I often miss the essence.

A chess match is an event, Kohler said. That is also how it was seen by the Federal Court in New York in 2016 in connection with the world championship duel between Carlsen and Karjakin. That duel was followed move by move by American television and internet commentators and the International Chess Federation tried to oppose this. The American judge reasoned ‘It is well-established that sports scores and events, like players’ moves in the Championship, are facts not protectable by copyright.’ Hot news, we could also say here. Incidentally, it is the only court ruling on chess that I have been able to find. A strong argument that already argues against granting copyright to the chess game.<sup>11</sup>

If a chess game is an event, what happens? Well, not much physically, but in the minds of chess players a lot. In a move, the players’ hands move pawns or pieces on the chessboard. There are few variations, but no matter how elegantly or exuberantly the chess player executes his move, it is nothing other than the result of his thinking, which sometimes takes a very long time. That result is: I think this move is the best continuation to lead this game to a win, if not to a draw at least. Even the (alphanumeric) notation of the move on paper (1. E2–E4)<sup>12</sup> says nothing more than from which square to which square the piece has been moved and says therefore the same as the physical moving of a pawn or a piece, namely the result of the chess player’s thinking: this is the best move to win. It says nothing about all the considerations and calculations that led him to that move.

We could call the game of chess not only an event, but also an intellectual battle of ideas. White makes a move and says: ‘With this move, white is better’. Black’s reply is: ‘With this counter-move I have the best defence, it leads to at least a draw’. Whether it is a beginner or a chess grandmaster who makes the move, it is just as much a battle of ideas, carried out with only a small physical movement and put on paper with a tiny alphanumeric formula. Copyright does not prevent another chess player who has found himself in the same position from making the same move because he too has the idea of making the best move. Where ideas are not protected by copyright and lead to copyright protection only through a personal expression – and thus not through the impersonal alphanumeric design or through a move on the chessboard – we should also conclude from this explanation that there can be no question of copyright on a game. We will never know, or only find out after the fact, in the chess player’s analysis of the game, how thoroughly his move has been worked out according

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11. U.S. District Court Southern District of New York 11 Nov. 2016, *Agon v. Chess24*, <https://chess24.com>

12. The chessboard is divided into 64 squares which are alphanumerically represented from A to H and from 1 to 8; so ‘1. E2–E4’ means 1: first move; E2–E4 means that a pawn has moved from square E2 to square E4.

to a plan in his head. But when more is written down, only then does it begin to look like a work in the copyright sense. More on that later.

If a chess game is an intellectual battle of ideas, could one not see it as a dialogue or, even better, a discussion, between two people? Such a discussion also has a purpose: to win the debate.<sup>13</sup> In my first essay-like publication on this subject (in a literary magazine!) I found in this comparison an argument for considering a chess game as a work in the copyright sense, but I later abandoned it, in the article written with Jaap Haeck.<sup>14</sup> Unlike in dialogue – and also unlike musical improvisation – in a chess game idea and expression coincide.

#### 4. BOUNDARIES OF COPYRIGHT

Jaap Haeck and I revisited all the arguments for and against granting copyright to a chess game in our article. Naturally the criteria used to define the concept of work were discussed. What moved the creator to his work? What constitutes the original character and the personal stamp of the maker? Where do the free and creative choices come in? Here, Gerard Wildschut argues at length that a chess game fulfils all these requirements, but he disregards the argument that each move represents an idea. The most appealing to us were the arguments of professors Anton Quaedvlieg and Egbert Dommering. In his dissertation on copyright and technology, Quaedvlieg writes: 'If the result is determined entirely by the laws of nature and is therefore not dependent on the personality of the person who brings about that result', then the choices made are based on inventiveness, not on creativity and originality.<sup>15</sup> An innovative modification of a classical opening<sup>16</sup> is not made because it is 'original', but because the chess player, after extensive study, has come to the conclusion that the new variation is better than the moves hitherto assumed by chess scholars to be the best.

The result of this inventiveness does not meet the requirement of personal character and free creative choice. What is necessary to obtain a technical effect falls outside copyright's originality test. According to Dommering, what is decisive is that a chess game is not aimed at an expression aimed at creation, but at an outcome beyond that, the win.<sup>17</sup>

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13. E.J. Dommering, 'Vormen van handelingen en arbeid een werk?', 3 *Informatierecht/Ami* (1986), 72–76 and 'De sportprestatie. Protection and free reporting', in W.F. Korthals Altes and G.A.I. Schuijt (ed.), *Sport and information monopolies* (Cramwinckel, Amsterdam, 1991), 9–21.

14. Schuijt, *supra* note 2, 132–140.

15. A.A. Quaedvlieg, *Auteursrecht op techniek* (W.E.J. Tweek Wilink, Zwolle, 1987), 21; see also HR 16 June 2006, ECLI: NL:HR:2006:AU8940 (*Lancôme/Kecofa*), NJ 2006, 585 with J.H. Spoor. J.H. Spoor; *Informatierecht AMI* 2006-14 m. nt. A.A. Quaedvlieg.

16. The first moves in a chess game are called the 'opening'; many openings have been given a name: 'French', 'Sicilian', 'Nimzo-Indian', etc. After the first move, a game can go in many directions, which are called 'variations', which have been extensively studied and commented upon in chess literature. These studies often go far beyond the twentieth move.

17. E.J. Dommering, 'Do acts and labour constitute a work?', 3 *Informatierecht/AMI* (1986), 74.

Looking at the case law on the ‘work concept’, we can conclude from the above that a chess game can certainly be called an intellectual creation of two persons, namely the result of diligent intellectual preparation and thinking during the game. The work is also very precise and objectively identifiable.<sup>18</sup> But that is not enough if we take into account the case law of our own Supreme Court, that in order to qualify for copyright protection, a work must also have its own personal character and bear the personal stamp of the author.<sup>19</sup> Similar requirements are also law in countries other than the Netherlands. In my opinion, a chess game does not meet these requirements, because what is necessary to obtain a technical effect – winning – falls outside the work test.<sup>20</sup>

## 5. WHAT CHESS PLAYERS ARE ENTITLED TO

I hope that the attentive reader has noticed that so far I have only discussed the question of whether there is copyright in a chess game. However, one should not think that by answering in the negative, a chess player will be deprived of any source of income other than prizes and starter fees.

I have already mentioned analyses. One finds them for example in newspaper reports, on internet sites, and in chess books. Such analyses explain why a certain move in the game was crucial: a strong move or a very weak move. Based on what could have been played differently, it is then explained how the game would have continued and whether that would have resulted in a win, a draw or a loss. The more detailed the analysis, the more such variations are discussed.

The reader can now follow, re-enact and judge, as it were, the train of thought or the calculation of the idea behind the player’s moves. It goes without saying that interesting games are chosen for analyses. Salon draws, in which a certain opening variation is reproduced, are skipped. There are also many chess players who analyse and comment on their most important games themselves. It strikes me as no problem to consider such analyses as copyright works, of course with the limitation of the right to quote from them. Compare it with the analysis of a poem. Practically the entire chess literature consists of such analyses of the opening variations, of whole games, and of endgames. And there is hardly a top chess player who has not made money from his publications. The textbook *Uncle Jan Teaches His Nephew Chess* by our only world champion (1935–1937)

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18. CJEU 13 November 2018, ECLI:EU:2018:899 (*Levola Hengelo/Smilde Foods*).

19. HR 1 June 1990, NJ 1991, 377 (*Kluwer/Lamoth*); HR 4 January 1991 (*Van Dale/Romme*), NJ 1991, 608 w.n. D.W.F. Verkade; *Ars Aequi* 1992, p. 31 n.n. H. Cohen Jehoram; *Copyright and Media Law* (1991), 177 m.nt. J.H. Spoor; *Computer Law* (1991), 84 m.nt. P.B. Hugenholz; *IER* (1991), 38 m.nt. F.W. Grosheide. The earlier case-law of the Dutch Supreme Court is generally held to be in keeping with the EU’s Court of Justice on the originality requirement.

20. HR 16 June 2006, ECLI:NL:HR:2006:AU8940 (*Lancôme/Kecofa*). Extensive on the case law mentioned in this and the previous notes: Spoor, Verkade, Visser, *Copyright* (Wolters Kluwer, Deventer, 2019), 70–98.

Max Euwe, was extremely popular well into the twentieth century, until it was succeeded in the 1970s by *The Pawn Diploma* by Berry Withuis.<sup>21</sup>

By the way, it is interesting to consider that a tournament organisation had protection for the notations of the games, through the protection of non-original writings that Dutch copyright granted, until this was abolished because of the EU's Database Directive. In practice there were no problems here. Providing notations was and still is a service to the press and to fellow chess players. Now, after the abolition of protection for non-original writings, the single – alphanumeric – written representation of the game is rightly regarded as information that is in the public domain. This is different from New York 1893 and Paris 1900.

Jaap Haeck and I also saw the possibility for the chess player to oppose the publication of his 'complete works'.<sup>22</sup> The Dutch Copyright Act contains such protection for parliamentary speeches, for example. A chess player could be successful in an action out of unfair competition or performance protection (tort), because the (collected) performances of a chess player can be equated with those that justify protection by an intellectual property right. However, in my judgment, a positive outcome for the chess player is not yet very certain.

There are also chess players who engage in certain studies: composing ingenious combinations, studying opening variations and endgame studies. The result of this is undeniably protected by copyright. Here too, however, one must take into account copyright limitations and exceptions, notably the right to quote.

Finally, in COVID-19 times, tournaments are played via the internet. That brings me to the chess computer programme. They are there to play via the internet. They are also available to play against or to calculate variations. The design of such a programme seems to me to be protected by copyright (and/or patent law). The game played by a chess robot, however strong it may be, is not protected by copyright as the game of a living being is.<sup>23</sup>

## 6. DATABASES

Especially for Bernt, who is a specialist in the field of database protection, I would like to say the following. By now, all kinds of digital databases of countless chess games have been built.<sup>24</sup> The alphanumeric representation is of course a great advantage and for the users it makes the search for, for instance, opening variations considerably easier than with the earlier card indexes that were compiled

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21. By the way, Euwe's book is still for sale today: Max Euwe and Albert Loon, *Uncle Jan Teaches his Nephew Chess* (Tirion Sport, Baarn, 2011).

22. See for instance: J. Timman, *Timman's Triumphs. My 100 Best Games* (New in Chess, 2020).

23. Extensive and interesting in this context: Laurens Buijtelaar and Martin Senftleben, 'Copyright on robot secretions? An analysis based on the incentive theory', 3/4 *AMI* (2020), 77–93; see further on the development of computer chess: H.J. van den Herik, *Computerschaak. Chess world and artificial intelligence* (diss. Delft University of Technology, 1983), and H.J. van den Herik, 'Intuition can be programmed', farewell lecture, Tilburg University, 2016.

24. For this paragraph, I thank Prof. D.J.G. Visser and Prof. H.J. van den Herik for some useful suggestions.

with much care and devotion. Such a collection of data is of course subject to the database copyright of the collector, if the selection and arrangement of the content testifies to his own intellectual creation. This seems to me to be the case. The researcher can use various search criteria: chess players, tournaments, openings, variations, endgames, etc. The collector in his turn can include the games as played from chess literature in his database, but for the analysed games he will have to ask permission from the author(s) of the analyses.

Chess players will be able to benefit from such databases and will only have to confess to the collector when copying from the database if it involves such a substantial part of the database that what is original to the collection is copied. If the database is subject to a *sui generis* right, the producer may only oppose copying by a chess player or other party if he gradually ‘milks’ the database by repeatedly taking insubstantial parts, or if he extracts substantial parts of it. Otherwise, users of the database will have to approach the author of the analyses when copying them, unless they can invoke an exemption or limitation such as the right to quote. All this insofar as the right holder of the database has not already given permission on behalf of the authors and is not allowed to do so.

## 7. CONCLUSION

In short, chess players have no copyright in their games. That is a good thing. For the development of the game it is essential to be able to quickly and fully take note of the games of fellow chess players. For a chess player it is not interesting that Giri won over Carlsen, they especially want to know how he managed to do so and they want to study and analyse that in detail. And on those analyses, they can have copyright!