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Legal Issues in Live Entertainment Part I:  
Using New Technologies in Theatre  
Venues and Nightclubs

Friday, October 7, 2016  
9:30am-11:00am

Moderator  
Mark G. Tratos, Shareholder, Greenberg Traurig  
(Las Vegas, NV)

Panelists  
- James Algate, Vice President, Hakkasan  
  (Las Vegas, NV)  
- Jerry Nadal, Sr., Vice President, Cirque du Soleil  
  (Las Vegas, NV)
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Technological Innovations in the Live Entertainment Industry: Intellectual Capital and the Protection of Innovation by Mark G. Tratos

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Program Description
And Learning Objective

Explore technological trends in live stage performances and nightclub venues. Examine the virtues of adopting off-the-shelf technology vs obtaining exclusive licenses for equipment and proprietary technology including the potential for patents or other intellectual property protections. Learn how licensing fees for proprietary technologies impact budgetary and operations considerations.
TECHNOLOGICAL INNOVATIONS IN THE LIVE ENTERTAINMENT INDUSTRY: INTELLECTUAL CAPITAL AND THE PROTECTION OF INNOVATION

By: Mark G. Tratos¹

Introduction

More than 40,000,000 visitors come to Las Vegas every year with the desire to enjoy the widest variety of entertainment opportunities available anywhere in the world and often with a desire to be wowed by the most remarkable venues ever created. Fifteen of the 28 largest resort hotels in the world² compete for business on a 4-mile stretch of highway known as Las Vegas Boulevard. In order to thrive in such a competitive market, the hotel owners have had to invest billions of dollars in the planning, development and building of these resorts.

To entertain their guests, the resorts have developed a wide variety of entertainment options from free public spectaculars on the Boulevard like The Mirage volcano and the Bellagio fountains, to the most elaborate nightclubs and theatrical venues in the world. Yet the entertainment benefit which the public receives and the audience enjoys often obscures the technical hard work, effort and legal requirements which are required in first imagining and then developing or licensing and perfecting the venues that house stage spectaculars and remarkable performances in nightclubs and theatres throughout Las Vegas.

This article will examine some of the methodologies and techniques which producers, venues, developers and entertainers employ to develop, protect and use cutting edge technology in the Las Vegas resort venues. The article is further to be used as part of the ABA Section on Entertainment & Sports Law’s CLE program on Technology in Live Entertainment Venues as part of the 2016 ABA Annual Entertainment & Sports Law Conference.

Intellectual Property Protection of Technology

Technology comes in a wide variety of forms from physical apparatus to electronic storage mechanisms to software coding that drives devices. It is not surprising then that a wide variety


² Hotel room size, The Venetian and The Palazzo - 7,117; MGM and The Signature - 6,852; CityCenter - 6,790; Wynn Las Vegas and Encore - 4,750; Mandalay Bay, Delano and Four Seasons - 4,426; Luxor - 4,407; Excalibur - 3,981; Caesars Palace - 3,960; Bellagio - 3,950; Circus Circus - 3,773; Flamingo - 3,626; The Mirage - 3,044; Monte Carlo - 3,002; Cosmopolitan - 2,995.
of technologies would implicate a wide variety of intellectual properties\(^3\) which are used to protect the technology.\(^4\)

Generally, intellectual property can be understood as the expansive field of law that includes both common law developed principals such as trade secrets and unfair competition and statutory protections such as patents\(^5\), copyrights\(^6\), trademarks\(^7\) and rights of publicity\(^8\).

**Historic Development of Intellectual Property**

Anglo American law began protecting forms of intellectual property even before the emergence of the industrial revolution. Early forms of protection occurred in England where royal charters permitted certain vendors and craftsmen to proudly proclaim that they manufactured goods or provided services to the Crown of England. Perhaps not surprisingly, competitors hoping to benefit by being associated with the goodwill of a business that had received a royal charter began imitating the brand designation, manufacturing marks or official logos of the royally acknowledged vendor. As a result, English courts developed rules against competitors unfairly cheating the public by emulating the marks, brands and insignia of others.\(^9\)

In 1711, the newly established Parliament of the United Kingdom passed the first Copyright Act known as the Statute of Anne. The English Law was designed to encourage an illiterate populace by giving to authors the incentive to write by creating an individual monopoly for them to be able to exclusively print and distribute their writings.\(^10\) Publishers who formally had the benefit of royal charters soon found a way of negotiating with authors which required the authors

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\(^3\) Intellectual property (as an idea, invention, or process) that derives from the work of a mind or intellect; also: an application, right, or registration relating to this. Merriam-Webster Dictionary, n.d. Web. 12 Sept. 2016.

\(^4\) 1A: the practical application of knowledge especially in a particular area; B: a capability given by the practical application of knowledge; 2: a manner of accomplishing a task especially using technical processes, methods, or knowledge; 3: the specialized aspects of a particular field of endeavor. Merriam-Webster Dictionary, n.d. Web. 12 Sept. 2016.

\(^5\) Patents are a government issued monopoly which grants inventors the exclusive right to use, manufacturer, sell and practice the art of the invention in exchange for a full disclosure by the inventor of the information necessary to practice the invention upon expiration of the patent. In the U.S., utility patents have a life of 20 years.

\(^6\) Copyright protects original works of authorship against the unauthorized reproduction, copying or use by others. Original works of authorship may include literary, musical, dramatic, pictorial, graphic, sculptural, pantomime, choreographic works, motion pictures, sound recordings, and other audio/visual works. Copyrights protect the authors’ tangible expression of their ideas, not the ideas themselves. Thus, it is the act of copying and using pre-existing original works of authorship that creates potential copyright infringement.

\(^7\) Trademarks are words, symbols or combinations of both that are used to identify a person’s goods and products to distinguish them from the goods and products of others. Statutory trademarks are defined by 15 U.S.C. § 1052 and by various state laws but exist by common law as well.

\(^8\) The right of publicity is the right of every person to control the commercial use or exploitation of his or her identity. Rights of publicity typically protect a person’s name, photograph, or other image, voice, signature, and public persona. The rights of publicity give living persons and deceased persons’ heirs or assignees the ability to control the commercial exploitation or use of this right. Rights of publicity are generally recognized at common law or created by state statutes. See the 50-State Chart attached as Exhibit 1.

\(^9\) Trademark law is a subset of the Common Law of Unfair Competition. What distinguishes trademark law from other forms of intellectual property is that the purpose is to protect the public from being misled or confused as to the source of origin of the goods or services, rather than protecting the interest of the owner.

to transfer their copyrights to the publishers in exchange for an agreed upon royalty derived from the printing, binding and sales of their books.

In America, the United States Constitution gave Congress the exclusive right to pass laws which would benefit authors and inventors.\(^{11}\) The newly formed United States passed the first patent and copyright laws the year after the U.S. Constitution was ratified in 1790. In the United States, patent and copyright laws are exclusively statutorily created by Congress. On the other hand, the former colonies which had been governed by the United Kingdom, France and Spain had developed common law and civil code opinions over several decades of colonization before the new federal government was ratified. Accordingly, each of these colonies, now states, had different legal traditions including common law from Great Britain and civil code from France and Spain. In the development of United States law, all of these influences are brought to bear as we protect technology using different means and methods of intellectual property.

**Application of Intellectual Property in Live Theatrical and Nightclub Venues**

It is fair to say that contemporary nightclubs and theatrical venues are facilities which may touch upon the widest array of intellectual property issues and challenges ever contemplated in entertainment. This is true in part because these are venues where human creativity and performance are valued above all else. Music, musical compositions, words and lyrics are frequently associated with both types of venues and are therefore subject to the copyright considerations of live public performance and licensing through those organizations which grant public performance rights.\(^{12}\) However, copyright is not the primary focus of our examination. We instead are more concerned with the areas of intellectual property that relate to technology and the means by which technology aids in enhancement of the theatrical experience.

For example, the technology that allows for the simple act of raising and lowering curtains on a stage that commences and closes a performance is technology as old as the stage itself. Nevertheless, technology continues to evolve and improve as is required by every larger and more elaborate venue. For example, as stage size increases, the front enclosure of the stage, the proscenium, has enlarged therefore drapery size has increased and the mechanisms necessary to handle the increased volume and weight of enclosing curtains has, of necessity, needed to evolve and it has. If a venue wishes to use a particular type of closing curtain or mechanism, the venue may choose to use old technology which requires hand manipulation and stage hands or it may choose more sophisticated technology which allows a single operator using computer controls to open and close, raise and lower multiple curtain sets in the stage proscenium. Something as old and ordinary as raising and lowering curtains is subject to constant innovation, revision and updates as evidenced by a continued array of patents focused upon the ability to handle and closing curtains. *See,* Exhibit 2 which is a relatively recent patent addressing just such an issue with curtaining technology. USPTO Patent No. US8,636,265 BI.

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\(^{11}\) Article I, Sec. 8, subparagraph 8 “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”.

\(^{12}\) The organizations in the United States include ASCAP, BMI, CSAC and the newly formed World Rights Organization.
In fields as wide ranging as theatrical plays such as Peter Pan to magical performances of Las Vegas mainstay David Copperfield, the ability to create the illusion of weightlessness or flight in a closed stage environment requires mechanisms to allow a human body to be connected to lifting devices which are unobtrusive and are sufficiently obscured as to be unobvious to the audience. Such devices, including harnesses, lifting mechanisms and the like, have been in use for decades and are generally protected through patents. See USPTO patents #3,476,385 and 4,392,648. Exhibit 3 is patent specimens showing such technology which would need to be licensed or acquired in order for it to be used publically.

Not every new technology, however, is protected by patents. This is true because not every creation is patentable because it fails to meet the statutory requirements proscribed by Congress and the regulations of the United States Patent Office. What then can inventors or creators do to benefit from their inventive devices or methodologies? Frequently one-of-a-kind devices which are unique and are unlikely to be duplicated are best protected through trade secrets. The normal mechanisms by which owners continue to protect trade secrets include maintaining strict confidentiality and limited access to the secret. Confidentiality is maintained by ensuring that only persons that have a need to know are provided with the information. Confidentiality is maintained by ensuring that individuals who do have access to the proprietary information are subject to confidentiality requirements either through a confidentiality agreement or employment agreement which requires them to maintain the secret. Confidentiality is also maintained when the confidential materials are kept in a secure fashion under lock and key or in a manner which identifies to any person who is inadvertently exposed that the material is intended to be confidential and is not to be used or disseminated.

In other words, if an owner of proprietary information wants to treat the information as a trade secret, they must demonstrate that desire by taking reasonable business steps to protect the information and act as if they are treating the information as important and proprietary. 

**Protecting Technology in Live Theatre through Agreement**

Generally, all forms of intellectual property have both advantages and disadvantages. The largest disadvantage for owners of intellectual property is that intellectual property has finite durations where registrations are required such as in patents, copyrights and trademark registrations. Typically, intellectual properties are used by third parties under a license or written consent. There are several forms of agreements which every venue must address and use if the technology it wishes to use is derived from a third-party vendor or is not something they

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13 Trade secrets vary from state to state and while many states have adopted the Uniform Trade Secret Act, each state has the ability to modify the Uniform Act to fit the individual state’s legislative objectives. Accordingly, trade secrets vary slightly from state to state and the individual state law needs to be examined before making decisions relative to trade secrets.

14 In order to maintain a trade secret as confidential in Nevada, the Statute requires the owner claiming the secret must have treated the subject matter as secret in its business dealings. See, Nevada Trade Secret Act NRS 600A, 600A.010 through 600A.100, attached as Exhibit 4.

15 Copyrights and patents, because they were mandated by Congress, have fixed limited terms. The current life of a copyright is the life of the author plus 70 years. The current life of a utility patent is 20 years. Trademarks can be maintained indefinitely, however, registrations can be lost if they are not renewed and if they are not renewed and if a mark ceases to be used for 3 years, and the Lanham Act presumes the trademark has been abandoned.
produce itself. Historically, non-disclosure agreements, non-circumvention agreements and licenses have been a mainstay of users of technology.

**The Non-Disclosure Agreement (NDA)**

Most users of technology are familiar with the requirement that if they receive information regarding protectable technology, they would be required to agree to maintain the information that they receive in confidence and agree not to disclose or publish the information to third persons or parties. Typically a non-disclosure agreement permits someone who wants to enter into a business relationship with someone who professes to have technology that they would allow a venue to use or exploit, the vendor will present the venue with a written non-disclosure agreement which would require the venue to maintain the information it receives in strict confidence.

Historically, non-disclosure agreements have several exceptions. Typically, someone signing a non-disclosure agreement is not bound by it if the information that’s disclosed is already of common knowledge or already available information that’s in the public domain. Additionally, if the information is made public by the vendor itself or through disclosure by a third party at no fault of the venue who has signed the non-disclosure agreement, then the terms of the non-disclosure agreement are no longer applicable against the party who signed it.

Additionally, if the disclosed information is something that is already within the knowledge, understanding or expertise of the venue and the information that is being disclosed was already known by the venue, then the non-disclosure would typically not be binding.

**Non-Circumvention Agreement**

Like a non-disclosure agreement, a non-circumvention agreement requires the recipient of the proprietary information to maintain the information in confidence. The difference however is that in a non-circumvention agreement the recipient is further asked to make an affirmation promise or pledge that they will not act in a fashion to exploit the information that is being provided without the disclosing party. This would prevent them from going into a competitive business relationship with a third party to compete against the discloser armed with the proprietary information which the discloser had provided. This would also prevent them from engaging in conduct which might be ethically improper.

For example, a non-circumvention agreement would prevent an individual from turning the idea over to a corporation which had not signed a non-disclosure or non-circumvention agreement and allow that third-party corporation to exploit the technology disclosed. Generally, non-circumvention agreements seek to bind the party to whom the information is disclosed to a future business relationship with the disclosing party if at any time in the future they wish to use or exploit the technology, they must do so with the disclosing party. Non-circumvention agreements are, however, subject to the same type of preclusions as non-disclosure agreements.
Licensing

It is common in the use of technology for owners and inventors to license rather than sell their products for others to use and exploit. Particularly in the field of patents, licensing ensures that individuals who want to use the new technology can do so without the owner risking the loss of income from the unauthorized exploitation. As a general rule, there are a series of considerations which most licenses address either explicitly or indirectly. The typical types of consideration that are found in most licensing agreements include the following:

- **Exclusive or non-exclusive rights**

  Exclusive license agreements provide that only one entity or that entity and its affiliates may use the technology in question. Exclusive licenses historically prevent even the licensor from practicing the art of a patent or using the underlying copyright or trademarks. Exclusivity means that the licensee alone has the right to exploit the technology.

  Non-exclusive licenses, on the other hand, allow the licensor to provide the technology to many licensees thereby increasing the number of individuals or entities who can benefit from and exploit the technology.

- **Territory or area of use**

  The permission to use a technology either exclusively or non-exclusively often is tied to a specific geographic area where the use is permitted. The geographic scope of use is particularly important in non-exclusive licenses where the licensor anticipates that there will be multiple users. The licensees benefit from the license only if they have some predictability as to the scope or area in which they will be allowed to exploit the technology and most assume that they will not be forced to compete with others using the same technology in their immediate geographic location. The geographic restrictions however may be as limited as the four walls of a theatre or as expansive as a worldwide grant for use by a specific theatre chain.

- **Royalty Rate**

  Royalty rates can vary broadly from a flat rate such as a specific dollar amount per unit produced in a royalty regarding production goods to a percentage of gross revenues from the sale of goods or services provided under the technology. The range of royalty rates vary depending upon the industry and the standard and norms within each industry. For these reasons, attorneys drafting license agreements need to understand the industry and the norms which apply to that industry before they begin negotiating licensing arrangements. Industry custom and practice often are used to fill in gaps in a poorly drafted agreement when litigation ensues. For these reasons, it is vital for the attorneys drafting license agreements to understand the nature of the industry and its common customs and practices in which they are participating.
Books and records and accountings

Because most license agreements operate applying royalty rates, the agreements anticipate an ongoing relationship in which the licensor expects to receive income derived from the royalty rates that they have negotiated with the licensee. Typically the licensor wants to ensure that they are receiving the full benefit of the exploitation of the licensed technology and accordingly require the licensee to maintain accurate books and records and accountings. Typically such provisions will specify when an accounting must be given by the licensee; when the accounting is given whether or not the licensor should be receiving funds under the agreement, and to the extent that the licensor is uncertain as to the accounting that is being provided; whether the licensor has the right to audit the books and records of the licensee. Often the more concerned the licensor is about receiving an accurate accounting, the more time is spent by the parties negotiating these provisions and the greater the amount of space that is dedicated in the license agreement to issues of accounting, audits and repayment of underpaid royalties.

In addition to the accounting, licensees frequently are concerned with the technology’s ability to fully perform. Historically, licensees would ask licensors to make warranties and representations that the technology would work for the licensee as the licensor had promised. Licensors, on the other hand, typically want to avoid making such promises or representations and often seek to unravel a warranty if the licensee makes use of the technology in a form or matter that was not specifically anticipated or proscribed.

The Uniform Commercial Code (“UCC”) has harmonized the laws of many states by essentially incorporating the notion that when items are sold by a vendor to a recipient that the recipient can rely upon the goods being fit for the particular purpose for which they are being sold. This implied warranty is inherent with all products which are sold for a particular purpose and this applies to technologies that appear in theatres and live entertainment venues as well as in private homes and settings.

Conclusion

As technology continues to evolve and change, innovative creators in theatre, nightclub and live entertainment venues in Las Vegas and beyond have continued to seek to exploit the very best and most cutting edge technology to enhance the audience’s experience. Occasionally, that is done through inventing whole new technology, however, more often it is done by adapting existing technology or modifying it for use in a different way. One of the untold factors that exist in the story of Las Vegas entertainment is the immense expenditures which the venues have committed to make in order to obtain the very best or most cutting edge technologies. Simply stated, Las Vegas venues spend more on their theatres and nightclub facilities making larger financial investments than in most cities anywhere in the world. These large expenditures in turn allow the venue to have truly state-of-the-art facilities and technologies which allow the operators to wow the audience night after night with spectacular sites, sounds and images seen nowhere else in the world.