



Video Screens vs. Neon:

It's More than
a Battle of
Technology,
It's a Change
in Legal
Consequences

For many decades, casinos attracted their visitors and patrons by erecting magnificent marquees that featured the electric majesty of exquisite neon sign makers. Today, however, the neon signs are disappearing¹ and in their place massive video screens have appeared with constantly changing images and electronic beauty produced by LEDs, plasma and related technology.

The ever-changing images on the video screens are more than a “C” change in the quality or intensity of lighting and the ability to attract the eye of the passerby. The new technology raises complicated legal questions that hotel casinos must address, which are far more complex than the types of questions which neon signs and static marquees presented. This article will provide an overview of the legal questions that are implicated by the use of video screen advertising and marketing that now occurs.

Technology vs. Content

Historically, major casino marquees raised few intellectual property issues. Most of the marquees did not involve patents,² as neon was an old technology of electrified gasses in glass tubes. Some innovators like Steve Wynn, who developed his moving mechanical electrical sign, have patent protection.³ However, most signs were protected by either copyright⁴ in the artistic design of the sign, such as the Jetsonesque Stardust signage, or they relied upon the signage becoming a trademark⁵ identifying their property. Technically, hotel casino signages are service marks,⁶ because what is offered in either lodging or gaming entertainment is technically providing services.



Video Screens Rely Upon Content

The Las Vegas Strip and other gaming meccas are now dominated by large video screen displays. These displays require content. In particular, they are most effective when they attract the viewer's eye and deliver a message of the excitement and enjoyment that awaits the potential customer inside the resort's doors. Interestingly, many such video wall units have been used by resorts as a part of their overall aesthetic facade, meaning that by having artistic geometric or patterned displays, the video screen becomes part of the building facade and creates a visual impression to the viewer that it is equivalent to the exterior skin of the building, and not an ornamental appendage affixed to the exterior.

Yet, when video screens are most effective, they are delivering messages overtly or more subtly through the content that they project. Thus, as in television or film screens, content is king. Content can take a variety of forms, from the simply geometric and design patterns which an electronic software programmer can generate, or they can contain elaborate gaming graphics, depicting the screens of the most popular video games in the casino, or they can convey video content which depicts the type of non-gaming activities and amenities the resort offers. Some video screens entertain passersby by projecting images of their public areas and/or of the street itself on the screen. Thus, passersby actually become the subject of the video display.

Each of these types of uses presents a unique and complicated set of legal questions that relate to the gaming operators' right to use, capture, and publicly display the content.

Electronic Graphics

Electronic graphics or video screens are typically generated by computer programmers who, using various off-the-shelf algorithms commonly available or through their own software, create repeating designs of aesthetically pleasing patterns that stimulate the viewer. In order for the venue to be assured that such content is theirs to continue to use and alter in the future, the programming can be done by employees working for the venue that are engaged to do such specific programming activities, or by outside vendors who are specifically engaged to create such graphics as "works made for hire" under the Copyright Act.⁷

In most European countries, such graphics are also subject to the moral rights claims of artists under *Droit Morale*.⁸ The United States adopted a water-downed version of moral rights, as part of the Visual Artists Rights Act ("VARA") of 1990. However, those provisions are not as thorough as the European laws, and generally have not presented challenges to companies who have engaged graphic artists under work-made-for-hire contracts. Some states, such as California, New York, Illinois and Nevada, have also adopted states' artists' rights, statutes that prevent the venue from changing, altering or engaging in the improper display of art. To avoid the Visual Artists Rights Act, and states' laws interfering with the venue's ability to hire programmers to alter and amend the graphic visual depiction, gaming venues should simply ensure that their work-made-for-hire agreements also have a moral rights assignment provision.

Visual Content with Audio Synchronization

It is becoming more and more commonplace for resorts to also broadcast sound on the streets outside. Typically, while it may be music or crowd noise, if there is an audio component to a visual presentation, an additional set of copyright rights are implicated. Anytime that visual images are combined with audio, if the audio is subject to copyright protection such as music, jingles, dialogue or other protected copy or the like, a separate synchronization fee may be demanded by the audio copyright holder. Accordingly, the resort needs to make certain that the audio-visual clip creator they are using, first obtained synchronization rights, and second, had the ability to have the right to assign those synchronization rights to the resort for purposes of its video screen use, as such use is a public display.⁹

Third Party Video Content

Some venues want to display the video content of gaming devices within the resort, together with promotional items, such as video teasers for the entertainment offerings they are providing in the resort. Such videos should only be used with a license agreement for content obtained from third parties. Such a license agreement should, at the very minimum, include: (1) a specific express consent to the use; (2) a clear waiver of claims; (3) a warranty and representation that the third party has the exclusive rights and authority to grant the license of the license use; (4) a perpetual or indefinite term, such that the venue would not be required to remove the video

unexpectedly; and (5) appropriate releases and waivers from anyone depicted on the screen(s).

The greatest risk that gaming venues face when using third-party content is that the third party does not have the full right, title or interest in, or waivers for the content, and, therefore, lacks the authority to grant the license to use. For this reason, a specific representation and warranty is critical. However, some third parties simply decline to make such a warranty or representation. In such cases, should the venue simply decline the use? This depends, in part, upon the nature of the video, and the manner in which the licensing entity can describe its creation and its acquisition of the video. In those instances where a video is not something that was created by the third party, but was acquired by the third party, the venue faces greater challenges and, as such, discretion may be the better part of valor. On the other hand, videos that were created by the licensor carry with it the underlying presumption that the copyright is held by the creator and, therefore, their unwillingness to grant a warranty or representation is not dispositive as to the scope of their rights.

Video Screen Projection of Public Areas and/or Public Streets

Video images of individuals implicate a set of rights that are not controlled by Federal intellectual property laws. Each individual has a right of privacy¹⁰ and publicity,¹¹ which are state-recognized rights. The rights of privacy are recognized in the Second Restatements of Torts, and have generally existed as a matter of common law in those jurisdictions that have adopted the Restatement. States like New York have expressly created statutes recognizing a right of privacy, which prevents the commercial exploitation of a person's name, face or image for the commercial benefit of a third party without their consent.¹² Interestingly, this statute is similar to the rights of publicity statutes that many other states have adopted. Generally, the right of publicity prevents someone from commercially using or benefitting from the use of a person's persona¹³ without their consent.

There are several distinctions between rights of privacy and publicity. For example, rights of privacy are personal, while rights of publicity are commercial. Injury to a right of privacy is an injury to one's emotions or mind, where a right of publicity injury affects one's pocketbook. Rights of publicity have no post-mortem existence, where rights of publicity do in various states.¹⁴

Reasonable Expectations of Privacy

Rights of privacy and publicity create an obligation by the person creating the video to seek the consent or permission to commercially use or exploit the individual's persona. Thus, when a video camera is directed at a public area of a

resort/casino, what potential rights are being implicated? Generally, the right of privacy is premised upon a person's reasonable expectation of privacy. Therefore, most public areas are not places where persons have a reasonable expectation of privacy. For example, someone walking on a public thoroughfare would assume that they are likely to be photographed or that they are potentially under the scrutiny and observation of others. Therefore, they would have no reasonable expectation of privacy.

Obviously, that expectation is very different in the context of their hotel room, where they have the ultimate expectation of privacy, because they are behind closed doors. That hotel room is equivalent to their home with respect to their reasonable expectation of solitude and seclusion.

The thornier question arises in places such as European-style pools where sun worshippers may be topless and males may be in extremely brief swimwear. Depending upon the specific circumstances of each venue, the expectation of the patrons may vary. If the European-style pool area is posted as being private or exclusive, or for invited guests only, and there is no notice or posting of security or video camera filming present, then the patrons' expectation of privacy would be heightened. If, on the other hand, the pool faces a public road, the facilities have posted signs indicating that security or video camera filming is occurring, and if patrons are put on notice that the images from the public setting are subject to being recorded and broadcast, their expectation of privacy is significantly reduced.

As to the right of publicity, most videos that show multiple individuals or crowd scenes eliminate a single person's ability to establish damages under a right of publicity claim because the individual is not the sole or exclusive subject of the video image and, therefore, would have a difficult time establishing either that the video broadcaster received a financial benefit from such use or that the individual sustained a financial injury from such use.



Because rights of privacy and publicity are creatures of state law and each state applies such law somewhat differently, it is important to understand the nuances that exist from state to state.

Rebroadcast or Replay Rights

Typically, video screen content is comprised of short segments that are looped together to create a continuous presence on the video screen. Said another way, there is no dark time presented, and each moment is intended to present something visually interesting for the viewer or passerby to see. Recently, some resort operators have been displaying content from patrons and guests, such as videos shot within the properties' nightclubs, lounges and wedding chapels. Generally, the use of patron-generated content raises a wide variety of issues, and is typically not a good idea. Unlike a professional video recording, where the activities of the film crew, lights, and sound man usually act to put the person on notice that filming is occurring, filming that occurs from people's smart phones or cameras are less obvious and much less likely to be done with the knowing consent of the individuals who are potentially being filmed. For these reasons, resort operators should be very careful in posting or broadcasting any videos taken by patrons or guests and should develop a comprehensive set of releases and warranties, including express indemnifications from the video provider.

Conclusion

As technology continues to change, resort casinos have the opportunity to offer more exciting and expanded opportunities to excite, entice, and attract visitors; video screens are one such new innovation. Yet, such new technologies also present legal challenges that may manifest themselves in unexpected ways. Importantly, video content is intellectual property intensive, with licenses and clearances being required. Accordingly, the resort that uses video screens for public display needs to develop a comprehensive set of policies and forms to routinely clear the video content of their video marquees and video advertising displays. These existing new technological opportunities present new legal challenges that resort casinos need to be prepared to meet.

Mark Tratos is the founding Shareholder of the firm's Las Vegas office. Previously, he was the co-founder of the law firm of Quirk & Tratos. Mark focuses his practice on a variety of entertainment, intellectual property and litigation matters. His representations include numerous artists and performers, resort, hotel and casino entities in federal court litigation involving trademark, copyrights, domain names, rights of publicity and privacy law for known casino brands. He currently represents many of the largest resorts in the world on brand development and protection strategies, enforcement and infringement litigation. Mark has been a member of the adjunct faculty of the University of Nevada, Las Vegas for more than 25 years. He currently teaches entertainment law, rights of publicity and privacy law, and the law of cyberspace at UNLV's William S. Boyd School of Law; the business of entertainment at UNLV's Hotel College; and entertainment and fine arts law at the College of Fine and Performing Arts. He is also Chairman for the Board of Trustees of the National Judicial College in Reno.

¹ See: Neon Museum Illuminates Old School Las Vegas by John M. Glionna, Los Angeles Times, October 30, 2012.

² Occasionally, a marquee like Vegas Vic would take on important common law trademark qualities, but generally few intellectual property issues arise.

³ See: U.S. Patent 7/525510 for Display and Method of Operation <http://patft.uspto.gov/neta/cgi/nphparser?Sect1=PTO2&Sect2=HITOFF&p=1&u=%2Fnet>

⁴ 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.

⁵ 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.

⁶ Service marks are words, symbols or combinations of both that are used to identify a person's services and to distinguish them from the services of others. Statutory service marks are defined by 15 U.S.C. § 1053 and by various state laws but exist by common law as well.

⁷ See 17 USC § 101 a "Work Made for Hire" is (1) a work prepared by an employee within the scope of his/her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a "Work Made for Hire".

⁸ Morale right included the right to claim the creation of art work, the right to withdraw the art work, and the right to withdraw one's name should the artwork be miss-reproduced or improperly displayed.

⁹ Synchronization rights are not specifically detailed in the US Copyright Act. They are a product of industry standards and practice, and were developed by music publishers as an additional revenue source as films first began to have sound in the late 1920s. They have evolved as a matter of custom and practice. Typically, synchronization rights are maintained by the song writer, and frequently the music publishers do not have the right to grant synchronization rights without the song writer's consent.

¹⁰ The right of privacy includes 1) the right to maintain one's seclusion, 2) the right to prevent public disclosure of private fact, 3) the right not to be placed in a false light, and 4) the right to not have persona used without your consent.

¹¹ Rights of Publicity: NRS 597.770 Definitions. As used in NRS 597.770 to 597.810, inclusive:

1. "Commercial use" includes the use of the name, voice, signature, photograph or likeness of a person on or in any product, merchandise or goods or for the purposes of advertising, selling or soliciting the purchase of any product, merchandise, goods or service.
2. "Governmental agency" means the Commission on Tourism and a governmental entity in a county whose population is 100,000 or more that has as a statutory purpose, power or duty the promotion of travel or tourism in this state and that employs photographers full-time or by contract to take pictures to promote travel and tourism, portray historical events or commemorate persons or physical sites that are significant in the history of the state.
3. "Person" means a natural person.
NRS 597.780 Scope. The provisions of NRS 597.770 to 597.810, inclusive, apply to any commercial use within this state of a living or deceased person's name, voice, signature, photograph or likeness regardless of the person's domicile.

¹² New York Civil Code, sections 50 and 51.

¹³ A persona is typically defined as a person's overall recognized being. In its broadest application, in states like Indiana, persona would include the name, the voice, the signature, the photograph, the image, the distinctive characteristics, distinctive mannerism, and other identifiable characteristics of any individuals.

¹⁴ The length of post-mortem rights vary widely with the least being ten (10) years after death, to as much as one hundred (100) years after death.