

HOSPITALITY LITIGATION

Ownership of Hotel Guest Data Upon New Management



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Detailed information about customers' personal preferences has become an essential tool for businesses of all types, enabling those businesses to tailor their marketing efforts and other promotional activities to targeted clientele. This is especially true in the hotel industry, where individual hotels and hotel brands attempt to capitalize on the vast data accumulated from their guests during a hotel stay. Detailed guest information—room type preferences, food and beverage tastes, credit card information—is routinely captured by hotel owners and managers, providing them with very specific and detailed information about each of their guests. In the increasingly competitive hotel market, this information enables hotel operators to tailor marketing and guest service experience, allowing them both to anticipate guest needs and to target particular guests with their marketing and sales strategies.¹

Given the importance of this data, a significant issue universally arises when a hotel transitions to new management, whether by sale, as a result of a termination of the previous hotel management agreement or otherwise. Hotel owners and operators are keenly aware of the value of this information—which frequently leads to clashes over ownership and control over such data. While hotel owners are the owners of the real estate and the entirety of the hotel business, hotel operators have a contractual obligation to manage the owner's property during the term of the management or agreement and typically bring their valuable reservation systems, client roster, intellectual property and sales expertise to the owner's business.

Ultimately, the question of which party owns the guest data turns on the language of a management agreement. Too often, however, these

contracts are either outdated—having been drafted in an era when the value of guest data was not fully appreciated—or not given the detailed attention this issue deserves. So who owns the guest data? This article examines the issue.

Hotel Guest Records

As discussed above, hotel guest records are comprised not only of the "guest histories" and data concerning the room reservations—such as the names of guests and their dates of arrival and departure—but also information concerning the guests' personal preferences and other guest information which constitutes the "guest's profile" (collectively referred to as "hotel guest records").² In some instances, courts have found these "detailed customer profiles" to be trade secrets, as "this information has economic value, is not generally known or readily available by others..." and was the subject of reasonable efforts to be kept private.³ However, whether treated as trade secrets or not, the question still remains unanswered: to whom do these records, which may constitute trade secrets, belong?

It seems clear that, to start, the hotel guests about whom such data is collected do not have an ownership interest in the records. Indeed, in the Fourth Amendment context, courts have held that the hotel's business has both a possessory and ownership interest in hotel guest records. The hotel business also has an expectation of privacy in such records because businesses "do not ordinarily disclose, and are not expected to disclose, the kind of commercially sensitive information contained in the records—e.g., customer lists, pricing practices, and occupancy rates."⁴ In *Patel v. City of Los Angeles*, the court held that the guests lacked any privacy interest in hotel guest records the guests freely disclosed to the hotel.⁵ But, while the guests may not own the data, the question still to be addressed is who, as between the hotel owner and operator, owns and can exploit it after the management agreement expires? To answer



this question requires an analysis of the terms of the management agreement.

Contractual Provisions

Though often overlooked when negotiating a hotel management contract, ownership of hotel guest records can rapidly become a point of contention when a hotel transitions to new management, either by termination of the previous management agreement or otherwise, and both parties want to retain and continue to make use of the hotel guest records. Ownership of this information is also critical to a potential purchaser in evaluating a hotel acquisition, especially if the potential purchaser intends to retain new management after the sale closes while continuing to market the hotel to the clientele who may have been introduced to the property by the prior hotel manager. Without control over the hotel guest records and the systems necessary to utilize and maintain the information, a prospective buyer must consider the sales and marketing efforts necessary to generate sufficient business without the assistance of such information.⁶

Frequently, hotel management agreements fail to directly address the issue of the ownership of such guest data. However, an examination of the typical terms of such agreements demonstrates that such data is the property of the hotel owner and not the

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operator retained by the owner to manage the hotel.

First, hotel management agreements generally provide that the owner of the hotel also owns the hotel's books and records; that the hotel operator is obligated to maintain those books and records; and that during the term of the agreement, the owner is entitled to inspect the books and records of the hotel. Further, management agreements regularly provide that upon the expiration or sooner termination of the hotel management agreement, the operator is obligated to return those books and records to the owner. But there is much disagreement about whether a hotel's "books and records" include the hotel guest records.

For example, in *RC/PB v. The Ritz-Carlton Hotel, Marriott, Int'l, and Avendra*, the owner of the Ritz-Carlton Palm Beach Hotel brought an action against Ritz-Carlton and its parent company, Marriott International, Inc., the former operators of that hotel. Among the claims asserted by the owner was a cause of action alleging that the operator breached the management agreement by, among other things, denying the owner access to the hotel's books and records, including the guest records. There, the management agreement contained a relatively standard provision addressing the books and records of the hotel, providing:

The books of account and all other records relating to or reflecting the operation of the Hotel shall be kept either at the Hotel or at RITZ-CARLTON'S executive offices, and shall be available to the Owner and its representatives and its auditors or accountants, at all reasonable times for examination, audit, inspection and transcription. All of such books and records pertaining to the Hotel including, without limitation, books of account, guest records and front office records, but excluding any of Operator's proprietary information, at all times shall be the property of Owner (but Operator shall be entitled to keep a copy of such books and records and the information contained therein for the purposes of performing its duties hereunder)....⁷

Faced with this language, the court held that the clear intent of the parties in drafting this provision was that all of the "books and records" for the operation of the business were the property of the owner, except those items which were proprietary to the operator (which were not specified either in the court's decision or the management agreement). Thus, the court ordered the former operator of the hotel to make all of the books and records, including the guest records, available for the owner's inspection.⁸

When Agreement is Silent

Paradoxically, the situation is often more simple when the hotel management agreement is entirely silent on the issue of ownership of the hotel books and records. It is generally held that, absent a provision in a hotel management agreement specifically granting rights to the hotel

guest records to the operator, those records belong to the hotel owner.⁹

In *Gov't Guar. Fund of the Re-public of Fin. v. Hyatt*, the owner of a Hyatt hotel in the U.S. Virgin Islands terminated its hotel management agreement with Hyatt and then successfully obtained an order holding that its termination of the management agreement was valid. In connection with its efforts to secure an orderly transition of the hotel, the hotel owner sought all of the hotel's books and records (including the guest history records) from Hyatt. Hyatt refused, forcing the hotel owner to apply to the court for an order requiring the operator to turn over those records. Addressing this issue, the district court ordered the operator to turn over to the owner all of the following:

[K]eys, alarm access codes, key cards, other means of access and egress thereto, books, records, correspondence, documents, computer and electronically-maintained records, reservations information, furniture, fixtures, equipment, vehicles, documents of title and receipts, cash, coupons, instruments for the payment of money, certificates of deposit, accounts receivable, contract rights, intangible personal property, and all other personal property relating to the operation of the resort.¹⁰

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The operator appealed, arguing that the court's order could not be reconciled with the language of the management agreement as it interfered with the operator's use, enjoyment and possession of its own property. The U.S. Court of Appeals for the Third Circuit affirmed the District Court's order, holding that "the termination of Hyatt's presence in the hotel raised fairly complex practical problems, and we will not fault the district court for effectuating the transition in a common sense way."¹¹

Thus, the Third Circuit, affirming the District Court's order, held that the "common sense way" to provide for the "smooth" transition of the hotel from the operator to owner was for the former operator to turn over to the owner all of the "documents," "books," "records," "reservations information" and "electronically-maintained records."¹²

Other Practical Issues

Even when there is no disagreement over the ownership of hotel guest records, there are also many practical issues that arise when a hotel undergoes a transition in management

and a new operator takes over management. It is prudent to address these issues in the hotel management agreement, including how and in what form hotel guest records will be kept by the operator, and how a transition to a new operator or to the owner will occur when the management agreement ends so that there is no dispute concerning ownership and control over the hotel guest records.

While the owner is primarily concerned with the ongoing business at the property and maintaining continuity with past and future business, the operator will want to insure that its proprietary information, intellectual property and guest records relating to other hotels managed by the operator (which may also be included in the hotel's system) are protected and controlled by the operator.¹³

Further, it is advisable for the parties to address the manner and form—electronically or in hard copy, for example—the operator will turn over hotel guest records when the management agreement is terminated or otherwise transitioned.¹⁴

Conclusion

The most prudent way to re-solve the question of who owns hotel guest records and forestall litigation over the issue is to address it during the negotiation of the hotel management agreement. The parties should also specifically define what information is "proprietary to" or "intellectual property of" of either party, so there is no ambiguity when management is in transition. Courts will first look to the language of the hotel management agreement in determining which party owns the hotel guest records, and if the agreement is silent the court generally will consider those records to be the property of the hotel owner.

1. Ellen Smith & Victor Haley, *Hotel Law* §1.02 (Law Journal Press 2011)

2. *Four Seasons Hotels & Resorts B.V. v. Consorcio Barr*, S.A., 267 F. Supp. 2d 1268, 1326 (S.D. Fla. 2003).

3. *Id.* at 1325 (citations omitted).

4. See *Patel v. City of Los Angeles*, 738 F.3d 1058, 1062 (9th Cir. 2013).

5. *Id.*

6. Ellen S. Smith, "Feature Information Technology Issues in Hotel Acquisitions: A Buyer's Perspective," 16 *Probate & Property* 36 (2002).

7. *RC/PB v. The Ritz-Carlton Hotel Marriot Int'l, and Avendra*, Case No.: 502011CA010071XXXXMB, Division AH., Order, at 2 (Fla. Cir. Ct. July 1, 2013).

8. *Id.*

9. Ellen S. Smith, "Feature Information Technology Issues in Hotel Acquisitions: A Buyer's Perspective," 16 *Probate & Property* 36 (2002); see also Ellen Smith & Victor Haley, *Hotel Law* §1.02 (Law Journal Press 2011).

10. *Gov't Guar. Fund of the Republic of Fin. v. Hyatt Corp.*, 95 F.3d 291, 307 (3d Cir. 1996)

11. *Id.* at 308

12. *Id.* at 307-08.

13. Ellen Smith & Victor Haley, *Hotel Law* §1.11 (Law Journal Press 2011)

14. *Id.*