THE NEW TABLE GAME CRAZE: THE GAMBLE MAY PAY OFF BUT MANY INVENTORS SHOULD BE WARY TO PUT ALL THEIR CARDS ON THE TABLE

*Madison Zornes**

I. INTRODUCTION

Every year, an increasing number of inventors create new casino table games with hopes that their game will hit a casino floor and maybe even make them rich. However, in Nevada, the procedures and regulations used for the introduction of new table games into casinos are costly, time-consuming, and essentially, one big gamble. The Nevada Gaming Control Board ("GCB") strictly enforces these regulations and procedures for the introduction of new table games to protect casinos and patrons, as well as to prevent the introduction of faulty or inappropriate games into Nevada casinos. These regulations also attempt to balance both the casinos' interests in acquiring new tables games to attract customers and generate a profit with the game inventors' interest in successfully introducing their games into the casinos. This note describes the new table games evaluation procedure currently used by the GCB. Then, this note focuses on the requirement that the applicant must first file a U.S. patent, describes the basic requirements for obtaining a U.S. patent, and then applies these requirements to casino table games. Next, this note will discuss the policies behind Nevada's New Game Evaluation Procedure, the corresponding potential advantages and disadvantages, and the realities inventors face on the road to successfully introducing a new table game into Nevada casinos. Finally, this note will briefly analyze whether the New Game Evaluation Procedure successfully balances the interests of the GCB, Nevada casinos, and inventors.

II. NEW GAME EVALUATION PROCEDURE

The current procedure used to evaluate new table games is based on several of the Nevada gaming regulations. These regulations require strict compliance, and any deviation from the rules and requirements will result in the denial

* J.D. Candidate, May 2014, William S. Boyd School of Law. A sincerest thanks to everyone who helped in the completion of this note, most notably Bill Zimmer, Charlie Stone, Mark Clayton, Esq., Professor Marketa Trimble, and the staff of the *UNLV Gaming Law Journal*. Finally, many, many thanks to my family, who mean everything to me, especially Peggy and Brett - I'd be lost without you.

of any new game application.[1] First, Nevada gaming regulations dictate that licensed Nevada casinos cannot have any games in their establishments other than those specifically named in the Nevada Gaming Control Act.[2] Any casino wishing to host a game not listed in the Act must apply for and receive permission from the Nevada Gaming Commission ("NGC").[3] If the NGC grants permission, the casino must then obtain all required state, county, and city licenses required for the new game.[4] Applications for approval of a new table game or game variation must comply with Nevada gaming regulations and the forms and procedures prescribed by the GCB chairman.[5] Three requirements must be met in order for approval to be granted.[6] First, each application must include the name, permanent address, social security number, and driver's license number of the person developing the new game.[7] Second, each application must include the name of the new game, which must be a unique name currently not used by any other game approved by the NGC.[8] Third, the application must include a description of the game, including the rules, the proposed payouts, and a statistical evaluation of the theoretical percentages of the game.[9] Finally, the application must include all materials that relate to the results of an independent testing laboratory's inspection and certification process.[10]

Further, the chairman may also allow or require new table games to be field tested at a licensed gaming establishment prior to approving the application for up to 180 days.[11] However, the chairman may also elect to terminate the test period if he determines, in his sole and absolute discretion, that the game developer or licensed gaming establishment failed to comply with the terms and conditions of the testing period.[12] Furthermore, the casino may elect to terminate the field trial for any reason, if it so chooses.[13]

The chairman also has the discretionary power to enact additional procedures and requirements.[14] The current chairman has chosen to include seventeen additional requirements to the Gaming Control Board's New Game Evaluation Procedure.[15] To submit a new game for evaluation, the applicant is required to submit a package of these seventeen items to the Enforcement Divi-

---

[1] *New Game Evaluation Procedure*, STATE OF NEVADA GAMING CONTROL BOARD (July 2012). (hereinafter, *New Game Evaluation Procedure*).

[2] Nev. Rev. Stat. Ann. § 463.010 (West) (Chapter 463 of the Nevada Revised Statutes is known as the Nevada Gaming Control Act.).

[3] Nev. Gaming Reg. 5.085 (1983).

[4] *Id.*

[5] Nev. Gaming Reg. 14.230 (2012).

[6] *Id.*

[7] *Id.* at 14.230(2)(a).

[8] *Id.* at 14.230(2)(b).

[9] *Id.* at 14.230(2)(c).

[10] *Id.* at 14.230(2)(d).

[11] Nev. Gaming Reg. 14.240 (2010).

[12] *Id.*

[13] *See* Richard N. Velotta, *Seeking a Place at the Gaming Table: How Two Teams of Inventors are Defying the Odds and Getting Their New Games Approved for the Casino Floor*, LAS VEGAS SUN (May 10, 2009), http://www.lasvegassun.com/news/2009/may/10/seeking-place-table/.

[14] *See* Nev. Gaming Reg. 14.230; *New Game Evaluation Procedure*, *supra* note 1.

[15] *New Game Evaluation Procedure*, *supra* note 1.

sion of the Gaming Control Board. First, the applicant is required to submit a CD-ROM in PDF or Word format that includes five items: (1) a letter requesting approval for the new game, (2) one copy each of the table layout and player betting positions as they would appear in the casino, (3) the rules of game play, including specific examples of possible win/lose/tie game outcomes, (4) the proper dealing procedures, and (5) a proposed payout system.[16] Additionally, the applicant must include a copy of the rack card.[17] The applicant must also provide a copy of the filing receipt from the U.S. Patent and Trademark Office, referencing the patent application for the new table game the Gaming Control Board will evaluate.[18] This note will discuss the requirements and ramifications for this particular step in detail below.

Further, the applicant must include a mathematical certification from a GCB licensed Nevada independent test laboratory.[19] The NGC adopted regulations for independent test labs in 2012.[20] Currently, the GCB has approved and registered two independent gaming equipment-testing laboratories: Gaming Laboratories International LLC and BMM International LLC.[21]

Additionally, the applicant must provide a letter from a non-restricted casino licensee, evidencing that the property has agreed to allow the new game to be field tested on the establishment's casino floor.[22] The applicant must provide a notarized document that includes the following statements: (1) the applicant agrees that, if the field trial is approved, the casino agreeing to conduct the field trial will keep 100% of the revenue generated from the game during the course of the field trial, (2) the applicant agrees to pay all costs incurred in connection with the testing and evaluation of the new game, including inspection, shipment, and any incidental costs documented by the GCB, (3) the applicant ensures that there is at least one functional model of the new game available immediately, and (4) how projected profits are likely to be made from the game if the game is approved.[23]

Should there be more than one applicant per new game, a detailed personal history record is required for each applicant.[24] Additionally, each applicant must provide signed and notarized "Request to Release Information," "Release and Indemnity of All Claims," and "Affidavit of Full Disclosure" forms.[25] Should there be more than one credited owner of the new game, a breakdown of ownership percentages by company or corporation is required.[26] Applicant(s) must also provide a list of names and telephone numbers of people

---

16 *Id.*

17 *Id.;* a "rack card" is a small card with all of the game rules the hosting casino makes available to players during a field trial.

18 *Id.*

19 *Id.*

20 Richard N. Velotta, *Two Independent Gaming Test Labs Approved by the State*, VEGAS INC., (June 22, 2012, 9:58 AM), http://www.vegasinc.com/news/2012/jun/22/two-independent-gaming-test-labs-approved-state/.

21 *Id.*

22 *New Game Evaluation Procedure*, *supra* note 1.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

with whom the GCB may discuss the different parts of the game and its creation, rules, etc.[27] Finally, the applicant must provide a deposit by check or cashier's check for $5,000 payable to the Nevada GCB.[28] The GCB will create an account with this deposit and the money is used to pay investigative costs, including the Enforcement Division's investigative costs at $135 per hour and the Technology Division's game evaluation costs of $150 per hour.[29] The Enforcement Division may request additional deposits throughout the evaluation period, and the applicant must pay all costs incurred before the game will be approved.[30]

Once the GCB determines that the applicant has properly submitted all of the application items, the Enforcement Division sends the statistical evaluation to the Technology Division, which is in charge of verifying the independent testing laboratory's results.[31] Next, the Gaming Control Board evaluates all of the submitted materials and determines whether to approve a field trial of the game.[32] If the new game's field trial is approved, the applicant must begin the trial within 30 days of receiving notification.[33] In order to thoroughly evaluate the new game's practical suitability, field trials can last anywhere from 45 to 180 days.[34] Additionally, the length of the field test is determined by the game's popularity. The more casinos that host a trial or the more popular a game turns out to be, the shorter the field test will be to analyze financial and player feedback reports.[35]

Once the field trial of the game in the casino(s) is completed, the GCB measures the financial results from the casino tryout against a control game to verify that the hold percentages are consistent with expectations and the independent test results.[36] Unless otherwise approved in writing by the GCB, only one field trial table per casino is allowed.[37] Similarly, once the GCB has approved a game for field trial, any changes, including but not limited to rules, payouts, or table design and layouts changes cannot be made unless the applicant obtained prior written permission from the GCB.[38] The casino conducting the field trial is responsible for providing statistical data to the GCB in a timely manner, and must videotape the game during the entire field trial.[39]

---

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Telephone Interview with Mark A. Clayton, Senior Partner, Lionel, Sawyer & Collins (March 22, 2013) [hereinafter, Clayton Interview].

[36] Velotta, *supra* note 11.

[37] *New Game Evaluation Procedure*, *supra* note 1.

[38] *Id.*

[39] *Id.*

III. The Patent Requirement

As previously stated, one of the requirements for the application for new table games is the submission of a copy of a patent filing receipt from the U.S. Patent and Trademark Office (USPTO).[40] A basic patent application consists of an oath of declaration, required filing fees, and a specification of the invention.[41] A patent application may also include one or more drawings of the invention, especially where a visual representation can aid the examiner in determining the specifications of the invention.[42] The invention specification must provide a "written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same. . ."[43] In other words, the patent application must contain an adequate written description of the invention that would enable someone of ordinary skill to make and use the invention, and must set forth the "best" method of practicing or using the invention.[44]

The basic requirements for patentability are: (1) novelty; (2) nonobviousness; and (3) usefulness, also known as utility.[45] Novelty simply means that the invention is "new"; a device or invention is considered novel if its basic scheme, what it is and what it does, has not been previously patented or disclosed in prior art.[46] Prior art is all information about the invention that has been previously disclosed to the public or is otherwise commercially available[47] and, depending on when it was disclosed, who disclosed it, and how it was disclosed, can act to defeat the patentability of a claimed invention.[48]

Obviousness is determined by looking at the invention and all prior art, and determining whether or not a person skilled in the field would have been able to start from the prior invention or prior art disclosure and easily make the "jump" to the invention to be patented.[49] Finally, the invention must have utility; in other words, it must have some practical application.[50] Patentable subject matter includes "any new and useful process, machine, manufacture, or

---

[40] *Id.*

[41] 35 U.S.C. § 111 (2012).

[42] 35 U.S.C. § 113 (2006) ("The applicant shall furnish a drawing where necessary for the understanding of the subject matter sought to be patented. When the nature of such subject matter admits of illustration by a drawing and the applicant has not furnished such a drawing, the Director may require its submission within a time period of not less than two months from the sending of a notice thereof."); Autogiro Co. of Am. v. United States, 384 F.2d 391, 398 (Ct. Cl. 1967).

[43] 35 U.S.C. § 112(a) (2006).

[44] Jon H. Muskin, *Pitfalls of Provisional Patent Applications*, Inventors Digest (Jan. 20, 2010), http://www.inventorsdigest.com/archives/4111.

[45] 35 U.S.C. §§ 101-103 (2012).

[46] Roberts v. Sears, Roebuck & Co., 723 F.2d 1324, 1332 (7th Cir. 1983).

[47] David L. Lange, Mary LaFrance, Gary Myers & Lee Ann W. Lockridge, Intellectual Property: Cases and Materials 487 (4th ed. 2012).

[48] *See* 35 U.S.C § 102 (2012).

[49] Roberts, 723 F.2d at 1334.

[50] *See* 35 U.S.C. § 101 (2012) (Section 101 of the Patent Act states: Patentable subject matter includes "any new *and useful* process, machine, manufacture, or composition of matter, or any new *and useful* improvements thereof. . ." indicating that the claim invention must have utility or be useful. (emphasis added)).

composition of matter, or any new and useful improvements thereof. . .”[51] A successfully executed patent will give the patent holder the exclusive right to use and to exclude others from making, using, etc., the patented invention for a term of twenty years.[52]

A. The Novelty Requirement

The novelty requirement of patent law creates a significant obstacle to patentability.[53] An invention is not patentable unless it differs in some way from all other publicly available inventions in the field, also known as the “prior art,”[54] unless it falls into one of the exceptions under the Patent Act and the AIA.[55] Thus, a patent may be invalidated for lack of novelty if the party challenging the validity of the patent can show that the invention is found to be the same as a previously patented invention, including all information about the invention that has been previously disclosed to the public in any form, prior patents somehow related to the invention, published articles about the invention, and any public demonstrations on the invention.[56] Further, the inventor’s subjective knowledge or awareness of the prior art is irrelevant.[57] Therefore, even if the inventor independently created the invention, if the same invention is discovered within the prior art, then the invention will be considered non-patentable.[58]

B. The “Non-Obvious” Requirement

A patent may be invalidated for obviousness if, before the effective filing date, the difference between the invention to be patented and the relevant prior art shows that the invention as a whole would have been obvious to a person having ordinary skill in the art, also known as a “PHOSITA.”[59] In other words, the obviousness requirement is met as long as the invention’s progressive evolution is not obvious to a PHOSITA, based on characteristics and/or elements from publicly available material at the time the subject matter was invented.[60] Although the USPTO makes the initial determination as to whether a claimed invention is obvious,[61] a party can challenge a patented invention for

[51] 35 U.S.C. § 101.
[52] *Id.* § 154(a)(2).
[53] LANGE ET AL., *supra* note 47.
[54] *Id.*
[55] See 35 U.S.C § 102(b) (2012) (listing the various types of prior art that will not defeat patentability).
[56] Mary Bellis, *Prior Art Definition*, ABOUT.COM, http://inventors.about.com/od/definations/g/prior_art.htm (last visited Aug. 14, 2013).
[57] Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 36 (1966) (“It is also irrelevant that no one apparently chose to avail himself of knowledge stored in the Patent Office and readily available by the simple expedient of conducting a patent search-a prudent and nowadays common preliminary to well organized research.”).
[58] LANGE ET AL., *supra* note 47, at 487.
[59] 35 U.S.C. § 103(a) (2012).
[60] Progressive Games, Inc. v. Shuffle Master, Inc., 69 F. Supp. 2d 1276, 1282 (D. Nev. 1999).
[61] A patent applicant who is dissatisfied with the final decision in an appeal to the Patent Trial and Appeal Board may appeal the Board’s decision to the United States Court of Appeals for the Federal Circuit. 35 U.S.C. 141 (2012).

nonobviousness in any U.S. District Court.[62] The factors used by courts to determine obviousness are: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claimed invention and the prior art; and (4) the extent of any proffered objective indicators of nonobviousness, also called secondary considerations, such as commercial success, long felt but unresolved needs, and failures of others.[63]

Obviousness is evaluated on a claim-by-claim basis; thus, these are questions of fact and generally require a costly and time-consuming analysis and comparison of all relevant prior art[64] with the subject matter of the patent.[65] The purpose behind the non-obvious requirement is to prevent "granting patent protection to advances that would occur in the ordinary course without real innovation" because this is thought to hinder progress and possibly deprive prior inventions of their value or utility.[66] Thus, an inventor is simply required to show some form of true innovation in order for the USPTO or a court to deem the invention patentable.

C. The Utility Requirement

Finally, to obtain a patent from the USPTO, an invention must have utility or be considered useful in some way.[67] To satisfy the utility requirement, the inventor must provide some evidence that the patented invention has substantial or practical utility.[68] The evidence required to prove an invention's utility depends on the nature of the invention to be patented.[69] Further, evidence of the utility of an alleged invention should be convincing to one who is ordinarily skilled in the art.[70] Finally, a patent will only have the requisite utility if the inventor can identify a specific and immediate benefit to the public.[71]

D. Recent US Patent Reform Under the America Invents Act

In March 2013, the U.S. patent system moved from a first-to-invent system to a first-to-file system. The Leahy-Smith America Invents Act (AIA), also called the Patent Reform Act of 2011, was enacted on September 16, 2011.[72] Two of the AIA's goals were to harmonize US patent law with norms in international patent laws and to promote early filing or disclosure by the true inven-

---

[62] LANGE ET AL., *supra* note 47, at 443.
[63] Shuffle Master, Inc. v. MP Games LLC, 553 F. Supp. 2d 1202, 1220 (D. Nev. 2008).
[64] Courts are only supposed consider art that is sufficiently analogous to the invention. *See* Brenda M. Simon, *The Implications of Technological Advancement for Obviousness*, 19 MICH. TELECOMM. & TECH. L. REV. 331 (2013) 332, 353-361 (discussing the scope of what should be considered prior art to determine whether a claimed invention is obvious).
[65] *Shuffle Master*, 533 F. Supp. 2d at 1220.
[66] *Id.*(citation omitted).
[67] 35 U.S.C. § 101 (2006).
[68] Fujikawa v. Wattanasin, 93 F.3d 1559, 1563 (Fed. Cir. 1996).
[69] *In re* Blake, 358 F.2d 750, 753 (C.C.P.A. 1966).
[70] *In re* Irons, 340 F.2d 974, 978 (C.C.P.A. 1965).
[71] *See* Brenner v. Manson, 383 U.S. 519, 534-35, 86 (1966); *In re* Fisher, 421 F.3d 1365, 1371 (Fed. Cir. 2005).
[72] Deborah L. Lu, Smitha B. Uthaman, Ph.D. & Thomas J. Kowalski, *Summary of the America Invents Act*, NAT'L L. REV. (Apr.12, 2012), http://www.natlawreview.com/print/article/summary-america-invents-act.

tor.[73] Three major changes under the AIA affect inventors. First, the AIA gives priority of ownership to the first person or entity that discloses the invention or files an application with the USPTO but, the first-to-file must also be the first person to actually invent the patentable subject matter.[74] Second, the grace period, the period of time during which an inventor could publicly disclose his invention without losing priority and novelty, is now one year from the date of disclosure.[75] Thus, inventors are now required to file their application within one year from the public disclosure of their invention or else the USPTO will deem the disclosure prior art and therefore, their invention will not be patentable.

Finally, the AIA enlarged the scope of what is considered prior art.[76] For example, the AIA now mandates that any description in a printed publication, any offer to sell the invention or otherwise make it available for sale, and any actions that essentially make the invention available to the public are evidence and rebuttable presumptions of prior art.[77] Thus, inventors must be careful about any public disclosures regarding their inventions, and must ensure that they file all necessary patent applications within the one-year grace period. However, under the AIA, inventors may still file a provisional application, which requires specifications and drawings, but no claims.[78] This is a simpler application and allows the inventor to retain priority so long as the inventor files a full application within twelve months.[79] Finally, the AIA created prior user rights to any person who "acting in good faith, commercially used the subject matter in the United States" at least one year before the effective filing date of a patent application or public disclosure by the inventor or another.[80]

E. The GCB Patent Requirement and What it Means for Inventors of Casino Table Games

The GCB's patent requirement has many implications for table games inventors. Interestingly, years ago, courts invalidated patents on gambling devices on the ground that they were "immoral."[81] For example, in *Brewer v. Lichtenstein*, the court invalidated a patented invention because the only perceived utility was as a lottery device.[82] Similarly, in *Schultze v. Holtz,* the court invalidated a patent on a coin-controlled device for lack of utility because the

---

[73] LANGE ET AL, *supra* note 47, at 441-42, 491.
[74] *Id.*
[75] *See*, U.S.C. §102 (2012).
[76] *Compare* U.S.C. §102 (2006), *with* U.S.C. §102 (2012) (For example, the amended version of the statute removed the geographical limitations present in the pre-AIA version of the statute.).
[77] 35 U.S.C. §102 (2012).
[78] 35 U.S.C. §111(b) (2012).
[79] *Id.*
[80] 35 U.S.C. §§273(a)(1)-(2) (2012).
[81] Juicy Whip, Inc. v. Orange Bang, Inc., 185 F.3d 1364, 1366-67 (Fed. Cir. 1999) ("[T]he principle that inventions are invalid if they are principally designed to serve immoral or illegal purposes has not been applied broadly in recent years. For example, years ago courts invalidated patents on gambling devices on the ground that they were immoral (citations omitted), but that is no longer the law." (citation omitted)).
[82] Brewer v. Lichtenstein, 278 F. 512, 513 (7th Cir. 1922) ("In appellant's patent, as the specification and claims clearly disclose, the utility. . . was to enable the gambling instinct of

device had only been used for "gambling purposes in saloons, barrooms, and other drinking places" and could serve no other purpose than that of a gambling device.[83] However, courts no longer pass judgment on the morality of gambling devices.[84] Today, there are hundreds, if not thousands of patents on casino table games and gambling equipment.[85]

As described above, to obtain a US patent, a table game inventor must meet the basic requirements of novelty, nonobviousness, and utility.[86] For a table game to meet the novelty requirement, the inventor must show that the game is new, unique, or at the very least, the game is not "substantially similar" to an existing game.[87] This requirement presents an especially difficult problem for many table game inventors because, arguably, there is a large, yet finite number of games that can be created using only fifty-two cards and basic card games.[88] For example, a substantial number of the table games that the NGC has approved are variations of poker, blackjack, pai gow, and baccarat, and are all derived from the same basic instruments: 52 cards and/or 6-sided dice.[89]

An inventor or developer must show that her game is not an obvious "next-step" in the progression of table games and that her game truly possesses some unique or innovative feature not easily reached by someone of ordinary skill in table games.[90] However, the ever-increasing use of technology in the table games industry is likely to provide inventors and developers with more and more ways of ensuring that a new table game is not obvious because technological advances can potentially add a new feature or "twist" that had not been previously contemplated. Finally, the inventor or developer must show that the game or feature has utility, in other words, that the invention can be implemented and applied to an actual table game.

The Nevada Gaming Control Board's New Game Evaluation Procedure only requires an applicant to provide a copy of the filing receipt from the US Patent and Trademark Office.[91] However, a cautious inventor or owner of a new table game should likely spend the extra time and money to hire a skilled patent attorney to help ensure that the USPTO grants a fully executed patent to

---

purchasers to be appealed to in promoting the sale of merchandise. No other utility than as a lottery device (in promoting sales or for similar uses) is suggested in the patent;. . .").

[83] Schultze v. Holtz, 82 F. 448, 449 (C.C.N.D. Cal. 1897).

[84] *Juicy Whip*, 185 F.3d at 1367.

[85] *See* NEVADA GAMING COMMISSION, APPROVED GAMBLING GAMES (Aug. 1, 2013), http://gaming.nv.gov/Modules/ShowDocument.aspx?documentid=7097(last visited Sept. 3, 2013) (listing over seven hundred approved table games, all of which were required to file a U.S. patent application prior to approval.)

[86] *See* 35 U.S.C. §101 (2006) (The statute provides that an inventor may obtain a patent "subject to the conditions and requirements of this title."); 35 U.S.C. §§102-103 (discussing the novelty and non-obviousness requirements.).

[87] *See* Progressive Games, Inc. v. Bally's Olympia, L.P., 967 F. Supp. 193, 199 (S.D. Miss. 1997).

[88] Benjamin Spillman, *Global Gaming Expo 2006: Take My Game, Please*, LAS VEGAS REV. J., Nov. 20, 2006, at 1D.

[89] *See* NEVADA GAMING COMMISSION, *supra* note 75.

[90] Progressive Games, Inc. v. Shuffle Master, Inc., 69 F. Supp. 2d 1276, 1282 (D. Nev. 1999).

[91] *New Game Evaluation Procedure*, *supra* note 1 (step 10 only requires a copy of the filing receipt).

the inventor. The process of obtaining a patent is more rigorous than the process to obtain any other form of intellectual property rights.[92] Thus, many "self-prepared" provisional applications will fall short of meeting the basic statutory patent requirements under 35 U.S.C. §§ 111-12.[93] Conversely, skilled patent attorneys know the USPTO's requirements and are trained to write patent applications that contain all of the necessary details, describing which features of the invention can be claimed.[94] After all, a provisional patent application that does not meet statutory requirements "is tantamount to not having filed anything at all."[95]

Additionally, a fully executed patent can help protect the inventor against potential future challenges to the game's patent validity and allow the game owner to protect against potential patent infringment. This is especially important because patent infringement suits are relatively common in the casino gaming industry.[96] Under the US Patent Act, any person who "without authority makes, uses, offers to sell, or sells any patented invention, within the United States . . . infringes the patent."[97] A patent infringement analysis involves two steps. First, the court must determine the meaning and scope of the claims in the patented device. Second, the court must compare the properly construed claim with the allegedly infringing device to determine whether the infringing device infringes on the right holder's patent.[98] Patent infringement claims in the casino industry usually arise because competing game developers make small changes to a game layout, pay-out, or other minor change and then try to obtain a new patent on the game variation.[99] However, in patent law, under the doctrine of equivalents, a patentee can raise an infringement claim even though each individual element of the patented invention is not identically present in the allegedly infringing product.[100]

The purpose of the doctrine of equivalents is to prevent an infringer from stealing the benefits associated with a patented invention by retaining the invention's same functionality but only making minor or insubstantial changes to the details of the claimed invention.[101] The essential inquiry is to compare each element of a patent claim to determine whether the allegedly infringing product contains elements identical or essentially the same as the patented invention[102] to ensure that "[m]ere colorable differences, or slight improvements, cannot shake the right of the original inventor."[103]

---

[92] LANGE ET AL., *supra* note 47, at 440.
[93] Muskin, *supra* note 44.
[94] *Id.*
[95] *Id.*
[96] *See generally* Progressive Games, Inc. v. Bally's Olympia, L.P., 967 F. Supp. 193 (S.D. Miss. 1997); Progressive Games, Inc. v. Shuffle Master, Inc., 69 F. Supp. 2d 1276 (D. Nev. 1999); Shuffle Master, Inc. v. MP Games LLC, 553 F. Supp. 2d 1202 (D. Nev. 2008).
[97] 35 U.S.C. § 271(a) (2006).
[98] *Shuffle Master*, 553 F. Supp. 2d at 1213.
[99] *See Progressive Games*, 69 F. Supp. at 1280.
[100] Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 29 (1997).
[101] Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 607-608 (1950).
[102] *Warner-Jenkinson*, 520 U.S. at 29.
[103] *Shuffle Master*, 553 F. Supp. 2d at 1213 (quoting Hilton Davis Chem. Co. v. Warner-Jenkinson Co., 62 F.3d 1512, 1517 (Fed. Cir. 1995)).

For example, in *Progressive Games, Inc. v. Shuffle Master, Inc.,* Progressive brought an infringement suit against Shuffle Master concerning one of its table game patents.[104] The suit arose after Shuffle Master received permission from the Nevada GCB to operate a single field test table of the jackpot-equipped game, Bahama Bonus, a variation of Let It Ride poker,[105] at the MGM Grand Hotel and Casino in Las Vegas.[106] Progressive alleged that Shuffle Master's jackpot component in Bahama Bonus infringed the jackpot component of their successfully patented Caribbean Stud Poker game.[107] Here, the court found the phrase "jackpot component" referred to both progressive and fixed jackpot payouts; thus, even though Shuffle Master's Bahama Bonus jackpot component consisted solely of fixed jackpot payouts, this component was substantially similar to Progressive's patent.[108] As such, the court granted an injunction against Shuffle Master for infringement.[109]

Similarly, in *Progressive Games, Inc. v. Bally's Olympia, L.P.,* Progressive brought a patent infringement claim against Bally's based on a jackpot component used as an additional feature in the game of Caribbean Stud Poker.[110] Here, Progressive claimed that Bally's patent, which permitted "progressive jackpot wagering" in Let It Ride, infringed upon its patent, an "apparatus for including a jackpot component as an additional feature" in Caribbean Stud.[111] However, the court denied the injunction because of differences between the games' specifications language and because Progressive did not prove that Bally's Let It Ride game performed substantially the same overall function by a substantially similar method to obtain substantially the same overall result.[112] Accordingly, even though the patents were similar, Progressive did not meet the burden of proof required to show that Bally's tournament feature was substantially the same as the progressive jackpot feature of their patented game.[113]

Thus, because the protections offered by a fully executed patent include protections against infringers, a smart inventor or game owner should seek guidance from a patent attorney. Although obtaining a patent is a costly and time-consuming process, the benefits likely outweigh the burdens because the fact that the inventor holds a patent is what gives the inventor the ability to file future infringement claims. Further, due to changes in patent law under the new America Invents Act described above, table game developers and inventors should be aware of several things. First, the USPTO considers a presentation of

---

104 *Progressive Games*, 69 F. Supp. 2d at 1280.

105 *Id.* at 1279-80.

106 *Id.* at 1280.

107 *Id.* at 1279-80.

108 *Id.* at 1286-87.

109 *Id.* at 1288.

110 Progressive Games, Inc. v. Bally's Olympia, L.P., 967 F. Supp. 193, 194-95 (S.D. Miss. 1997).

111 *Id.* at 195-96.

112 *Id.* at 199

113 *Id.*

a game at a trade show, such as the Global Gaming Expo[114] ("G2E"), a public disclosure/prior art and, therefore, the presentation would be relevant to determining whether the game meets the novelty requirement.[115] Therefore, game developers and inventors who choose to market their games at similar events should be aware of changes to the grace period under AIA and ensure that their game does not fall outside of the grace period, thereby invalidating the patent for lack of novelty.

One of the AIA's benefits for inventors in the casino gaming industry is the expansion of prior user rights as described above. The AIA's expansion of prior user rights is especially important because of limited possible variations to casino table games.[116] At any given time, any number of inventors across the country could be developing, marketing, or selling the same or substantially similar game at the same time, thus creating the potential for infringement claims. This practical issue is especially true since each year, more and more people "join the fray trying to market their innovations," thereby making the development of a new and unique game increasingly difficult.[117] However, under the AIA, a game inventor who commercially used the game in a casino or tradeshow would retain rights to his invention, albeit limited ones, even though he was not the first to file for the patent.[118] Though prior user rights are not as beneficial as priority rights through a fully completed patent application, prior user rights still provide some protection for bona fide inventors. For example, a table games developer with prior user rights would be entitled to at least some use of the patented game even if a large gaming company held the patent.

Moreover, although each country manages and executes its own patents individually, inventors should still be aware that international disclosures of prior art may be used to invalidate U.S. patent applications when completed applications are not filed within the twelve-month grace period.[119] This is especially important for table game inventors and developers since the gaming industry has become a truly international industry.[120] However, because of the immense popularity and exposure provided by trade shows such as Global Gaming Expo,[121] inventors that want to take advantage of these major international casino gaming trade shows can protect themselves by filing a provisional application with the US Patent and Trademark Office within twelve months of their presentation at the trade show.

---

[114] The Global Gaming Expo is a yearly conference, exhibition, and networking event for the international gaming industry, held in Las Vegas, Nevada. For more information, see, GLOBAL GAMING EXPO, http://www.globalgamingexpo.com (last visited Aug. 30, 2013).

[115] *See* 35 U.S.C. § 102(b)(1)(B) (2012).

[116] Spillman, *supra* note 88.

[117] *Id.*

[118] *See* 35 U.S.C. § 273(a) (2012).

[119] PAUL GOLDSTEIN & MARKETA TRIMBLE, INTERNATIONAL INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS, 427 (3d ed. 2012).

[120] *See* Worldwide Casinos, Horse Tracks and Other Gaming, CASINO CITY.COM, http://www.casinocity.com/casinos/ (last visited Aug. 19, 2012) (listing the more than 140 countries that have some legalized form of gambling).

[121] *See*, Spillman, *supra* note 88.

IV. Assessment of the Nevada Gaming Control Board's New Game Evaluation Procedures & the Effects on Table Game Inventors

As of March 20, 2013, the Nevada Gaming Commission has approved over 700 table games, many of them being variations on the traditional table games of blackjack, craps, roulette, baccarat, and poker.[122] In fact, of the fifty-six table games approved by the Nevada Gaming Commission in 2012, only nine were specifically designated as "new games."[123] Established casinos are constantly looking for new games because players want both contemporary themes and variety in their gaming experience.[124] Because casinos are constantly looking for a competitive advantage in a crowded market,[125] new table games that are appealing as well as profitable are highly desired. However, because the successful introduction of a new table game into the gaming market requires a tremendous amount of time and expense, the chances of success for any game inventor is extremely low.[126] In addition, an inventor is even less likely to succeed unless the game is marketed and financed by a corporation specializing in developing casino games and related gaming supplies, such as Shuffle Master or Progressive Games.[127]

In fact, perhaps only five percent of all conceived table games actually make it onto a casino floor.[128] Of those, approximately five percent of all introduced to the casino floor actually remain on the floor for any substantial length of time; thus, only about one percent of all newly created table games actually provide some financial success for the inventor.[129] These percentages show the difficulty of predicting the success of a new table game with any substantial amount of certainty.[130] Rather, the game must simply perform up to the hosting casino's expectation; thus, a game's success is ultimately at the whim of the players.[131] Elliot Frome,[132] a gaming author and analyst with nearly twenty years of programming experience has candidly said, "I have been working directly with inventors for a decade, and indirectly for three decades, and there is no clear rhyme or reason as to what succeeds and what doesn't. The only thing certain is if you bring it to the players and they don't approve, it is not a success."[133]

---

122 *See* Nevada Gaming Commission, *supra* note 85.
123 *Id.*
124 Eliot Jacobson, Ph.D., *The Elements of a Successful Carnival Game*, Jacobson Gaming, LLC, http://www.jacobsongaming.com/Successful_Carnival_Game.htm.
125 *Id.*
126 *See*, Spillman, *supra* note 88; Michael Shackleford, *Marketing New Casino Games*, Gamingmath.com, http://www.gamingmath.com/new-games.html.
127 Velotta, *supra* note 13.
128 Elliot Frome, *Inventing a New Casino Table Game Takes Perseverance*, Gaming Today (May 08, 2012, 3:00 AM) http://gamingtoday.com/articles/article/36061-Inventing_a_new_casino_table_game_requires_perseverance.
129 *Id.*
130 *Id.*
131 *Id.*
132 Biography of Elliot Frome, Gaming Today, http://gamingtoday.com/columnist/bio/526 (last visited Sept. 10, 2013).
133 Frome, *supra* note 128.

A. *The Policy Behind the New Game Evaluation Procedures*

After all of the evaluation and field-testing procedures are complete, the Nevada GCB makes the final decision on whether to recommend the game's approval to the Nevada Gaming Commission.[134] Here, the Nevada GCB and the Commission consider whether approval of the new game is consistent with the public policy of the state.[135] Mark Clayton, a former member of the Nevada GCB who oversaw the state's gaming laboratory in his tenure, said regulators don't pass judgment on the popularity of a game, preferring to let the casinos, and the market make those conclusions.[136] However, the Nevada GCB must first review all of the reports from the field test to ensure that approving a particular game is in the best interest of both casinos and their patrons.[137] For example, the Enforcement Division of the Nevada GCB determines whether the game "lends itself to cheats" and analyzes the level of possible player confusion.[138] The Enforcement Division wants to ensure that a table game does not open up a substantial possibility for fraud or cheating to protect Nevada casinos.[139] Therefore, the Nevada GCB will likely not recommend a game that does not perform up to expectations or could be subject to a high risk of cheating.[140] Additionally, the Enforcement Division reviews player interviews taken during the field trial, to determine whether patrons were confused by the rules and/or payouts of the game, whether players were able to play the game optimally, and assesses any consumer complaints associated with the game.[141] For public policy reasons, the Nevada GCB will not recommend a new table game for approval unless it can determine that the game's rule are sufficiently clear to the average player.[142]

B. *Time and Cost Considerations*

One disadvantage of the New Game Evaluation Procedures used in Nevada is that the application and approval process usually takes over twelve months to complete and can be extremely costly for the game owner.[143] Thus, the inventor/developer could potentially incur a substantial amount of expense during those twelve months with no guarantee the table game will ever be approved. Additionally, the current procedures necessitate that a game inventor or developer pay for a substantial amount of professional help, including intellectual property attorneys and mathematicians in order to have any real chance of success.[144] However, experts such as Michael Shackleford, also known as

---

134 Nev. Gaming Reg. § 14.250 (1989).
135 *Id.*
136 Clayton Interview, *supra* note 35.
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*
143 Michael Shackleford, *Marketing New Casino Games*, GAMINGMATH.COM, http://www.gamingmath.com/new-games.html (last visited Sept. 10, 2013).
144 *Id.*; *See* NEW GAME EVALUATION PROCEDURE, *supra* note 1 (requires a math certification from an independent testing lab and a copy of a filing receipt from the US Patent and

the Wizard of Odds, believe that the costs associated with these professionals are justified because they ensure the game will have successful market appeal and confirm that the game's concept is new and has not already been patented.[145]

Hiring a patent attorney to file a patent application can cost anywhere from $9,000 to over $15,000.[146] The current average turn-around time for the U.S. Patent and Trademark Office's issuance of new patents is 24.6 months.[147] This long waiting period creates the potential opportunity for copycats to get away with infringements of the patent while the application is processed. However, the inventor who files a patent, which is later successfully executed, will still have protection against infringement claims.[148] Thus, even though the patent requirement benefits likely outweigh the drawbacks, it is nonetheless a substantial cost that must be incurred by the inventor during the long process of the creation of a successful new casino table game.

Furthermore, the requirement that new games must be field-tested requires a tremendous amount of additional time and expense because the applicant must provide all of the required custom-made equipment and signage in addition to all other application materials.[149] Then, the applicant must market the game to a casino and try to convince that casino to field test the new game on the casino floor.[150] The difficulty here is that to make room for the new game, the casino must remove one of its existing games, and replace it with a game that has never actually shown it can turn a profit for a casino. Because existing table games usually generate substantial revenues, many casinos do not want to take the risk of removing a strong performing table game and replacing it with something new and unknown.[151] Many of the games that successfully obtain a field trial do not last the full trial because the casinos hold the right to terminate the field trial at any time should the game not perform up to expectations.[152] Thus, the game owner needs to show not only that his game will consistently make money, but also, more importantly, that it will actually make more money than a game that is already on the casino floor.[153] Further, the casino will have to spend time and money training its table game staff, including dealers, shift mangers, and surveillance staff, on how to properly run and supervise the new game.[154] Many casinos will not take this risk despite the common misconcep-

Trademark Office); Muskin, *supra* note 44 (recommending that inventors hire skilled patent attorneys to ensure their inventions are adequately protected).

145 Michael Shackleford, *Ten Commandments for Game Inventors*, WIZARDOFODDS.COM, http://wizardofodds.com/gambling/ten-commandments-game-inventors/ (last visited Sept. 12, 2013).

146 Spillman, *supra* note 88; Shackleford, *supra* note 126.

147 US PATENT AND TRADEMARK OFFICE, *Frequently Asked Questions*, USPTO.GOV, http://www.uspto.gov/main/faq/index.html (last visited Sept. 12, 2013).

148 *See* 35 U.S.C. § 271 (2012).

149 *See* Shackleford, *supra* note 126.

150 *Id.*

151 Interview with Bill Zimmer, Vice President of Table Games, Wynn Las Vegas, in Las Vegas, Nev. (Mar 22, 2013) [hereinafter Interview with Bill Zimmer].

152 *See*, Velotta, *supra* note 13.

153 Jacobson, *supra* note 124.

154 Shackleford, *supra* note 126; John Bloom, *Game Masters*, PLAYBOY MAGAZINE, Aug. 2004, at 73, *available at* http://jacobsongaming.com/Article_1.html.

tion that casino management will "fall all over themselves" trying to get a new game into their casino. The reality is that game inventors face an uphill battle to see their game successfully on a casino floor.[155]

For example, Charlie Stone, the Director of Casino Profitability at Wynn Las Vegas & Encore Resort[156] ("Wynn/Encore") receives several calls each week from inventors, most of who are independent game owners, trying to pitch their games and hoping for a chance to get their game on Stone's casino floor.[157] According to Stone, he "almost always" takes these meetings to ensure he does not pass on a potentially profitable game.[158] However, in the same breath, he stated that he and the game owner will have a lot to talk about before the game can get to the floor and that the chances of any of these games actually ending up on the casino floor is extremely rare.[159] Additionally, Stone has two caveats to consider before he is willing to host a new table game. First, he wants to know who has performed the "math" (the statistical evaluation of the game's hold percentages) on the game. Second, he wants to know whether the game has successfully completed a field trial.[160] The GCB requires mathematical certification,[161] and the Wynn/Encore review this certification closely before agreeing to host a game.[162]

Although the Wynn/Encore are open to working with both inventors and the Nevada GCB to conduct field trials, Stone says the Wynn/Encore generally do not perform field tests because its existing table games "generate substantial revenues" and, therefore, "it is risky and does not always make good business sense to remove a strong performing game to 'try' something new."[163] Thus, although many game owners try to convince Wynn/Encore to use their game by promising an exclusive license after the field test, Stone says that large casinos like Wynn/Encore would prefer a game that has already been field-tested at another casino because being a "first-mover" creates a substantial amount of risk.[164] Thus, games that have been field tested at other Nevada casinos, especially casinos on the Las Vegas Strip, have a much better chance of convincing the larger casinos such as the Wynn to host the game.[165] Additionally, games that have proven successful in smaller casinos, whether in Las Vegas or on tribal lands in California or elsewhere, will have a better chance of convincing the larger casinos to host the game.[166] Stone opines that players' familiarity with games is the real deciding factor. Casinos want games that players specifi-

---

155 Jacobson, *supra* note 124.

156 Wynn Las Vegas & Encore Resort are two connected casino/resort properties, owned and operated by Steve Wynn. See *About Us*, WYNN LAS VEGAS, www.wynnlasvegas.com/AboutUs, last visited October 9, 2013.

157 Interview with Charlie Stone, Dir. of Casino Profitability, Wynn Las Vegas, in Las Vegas, Nev. (Mar. 19, 2013) [hereinafter Interview with Charlie Stone].

158 *Id.*

159 *Id.*

160 *Id.*

161 New Game Evaluation Procedure, *supra* note 1.

162 Interview with Charlie Stone, *supra* note 157.

163 Interview with Bill Zimmer, *supra* note 151.

164 Interview with Charlie Stone, *supra* note 157.

165 *Id.*

166 *Id.*

cally ask for and are comfortable playing.[167] Due to the tight-knit gaming community in Nevada, casino managers' recommendations to one another about table games carry considerable weight.[168]

Further, if the game owner can show that the new game has solid math and has completed one or more successful casino field trials, Stone asks that the game owner send him the mathematical results, the rules, and the layout of the game to determine whether to invite the game owner to come into the Wynn/Encore and do a presentation of the game.[169] The most important factors for Stone are the game's hold percentages and marketability.[170] According to Stone, marketability is the absolute most important factor because if a game is not marketable, in the end, the numbers won't matter; a successful game is one that keeps casino patrons coming back to the table.[171] To determine marketability, Wynn/Encore looks at many things, such as: whether or not the game is easy to learn (if a new guest cannot fully understand how to play the game from a forty-five second or less explanation from the dealer, then the Wynn/Encore will decline to try the game); whether the game is exciting or has a high hit frequency that will keep the guests interested; and, whether the game appeals to a large segment of the customer base rather than being a niche game.[172]

Next, if Stone feels as though the game has a good chance of being successful, he will make a recommendation to the Vice President of Table Games, Bill Zimmer.[173] If Zimmer is "convinced the game will be a hit," he will agree to host the game. The parties then sign a contract for lease of the game to Wynn/Encore during the trial period.[174] Generally, Nevada casinos pay game owners a flat fee to use their game on the casino floor, usually somewhere in the range of $500-$2000 per table, per month.[175]

C. Chances of Success: Independent Inventors v. Large Gaming Companies

Another potential disadvantage associated with the Nevada GCB's New Game Evaluation Procedures is that the initial expense and low probability of success mean that it is almost impossible for individual inventors to have any significant chance of successfully introducing their game onto a casino floor unless they go through an established gaming company.[176] For example, at G2E,[177] the major Las Vegas gaming convention, the major players in the gaming industry have the money to rent booths in the front of the convention center, complete with scantily clad models, free alcohol, and promotional materials to snag potential clients.[178] Conversely, because of the substantial costs associated with renting space at G2E, one can typically only find the

167 *Id.*
168 *Id.*
169 *Id.*
170 *Id.*
171 *Id.*
172 Interview with Bill Zimmer, *supra* note 151.
173 Interview with Charlie Stone, *supra* note 157.
174 Interview with Bill Zimmer, *supra* note 151.
175 Interview with Charlie Stone, *supra* note 157.
176 Spillman, *supra* note 88.
177 *See*, GLOBAL GAMING EXPO, *supra* note 114.
178 Spillman, *supra* note 88.

individual entrepreneurs in the back of the convention center, in much smaller spaces, with only business cards and brochures.[179]

According to Charlie Stone, Director of Casino Profitability for Wynn/Encore, the most successful game owners are the large companies like Shuffle Master because first, they employ smart game inventors whose only job is to come up with profitable and marketable table games, and, second, because Shuffle Master has the money to buy games from inventors, successfully market the games, and still make a profit.[180] Additionally, because companies like Shuffle Master have their own legal and sales departments, the contract process to leasing their table games generally runs smoothly with little hassle for the casinos.[181] However, casinos are also open to working with independent inventors because of the benefits involved, such as better financial deals for the casinos and because the casinos can potentially host a wider variety of games.[182]

Although it is difficult for individual inventors to successfully market a new table game without the help of a recognized company, it is not impossible.[183] For example, in 2003, game inventors George Boutsifakos and Sung Chang, dealers at the Golden Nugget, began attempting to introduce and market their game, Two Cards High, a derivation of blackjack and poker.[184] Their research included obtaining mathematical proof of the casino's potential hold percentage, obtaining patent and trademark protections on the game and its name, and creating a professional felt table in order to demonstrate the game to the casinos. Boutsifakos and Chang hired a professional to guide them through the process and were advised that initial start-up costs would be $60,000.[185] This was no small investment, especially since there was absolutely no promise that their risk and hard work would pay off.[186] Further, the partners eventually had to hire other professionals including a patent attorney, a mathematician, a gaming attorney, and a gaming equipment supplier.[187]

Then, the inventors met with casino floor managers in order to field test under real-life casino conditions.[188] However, casino after casino rejected their request to host the field trials.[189] Some of the casino administrators thought the game was too complicated, others did not think it would gain the popularity and consistent play on the same level as other recently introduced games, and others simply were not interested in the game at all.[190] Finally, in 2008, Harrah's Entertainment agreed to host the field trial at the Flamingo Casino.[191] The Nevada GCB told Boutsifakos and Chang that they were the first small com-

---

179 *Id.*
180 Interview with Charlie Stone, *supra* note 157.
181 *Id.*
182 Interview with Bill Zimmer, *supra* note 151.
183 Spillman, *supra* note 88.
184 Velotta, *supra* note 13.
185 *Id.*
186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.*
190 *Id.*
191 *Id.*

pany to successfully have their game field tested on the Las Vegas Strip.[192] The pair thought things were finally looking up. However, the field trial at the Flamingo was cut short because the game did not generate the revenue that the casino managers initially thought it would.[193]As a result, Boutsifakos and Chang were forced to start over and try to convince another casino to host their field trial run.[194] The Golden Nugget eventually agreed to host the game on its casino floor, but unfortunately, yet again, the trial was halted before the field trial was completed.[195]

One day, unexpectedly, a Korean company that previously expressed some interest in Two Cards High at the Global Gaming Expo in 2005, called and said they were opening a new casino and told Boutsifakos and Chang they wanted to operate their game.[196] The game made its debut in Seoul in 2008 and surpassed all expectations; they were hoping for $500,000 in wagers in the year, but the game exceeded this goal within the first three months.[197] Meanwhile, back in Las Vegas, casino administrators were hearing about a hot new game being played in Korean casinos, which Stations Casino's Director of Casino Operations Rick Carrig was surprised to find out had actually been created right in his backyard.[198] Eventually, Stations Casino offered to host the field trial for Two Cards High, and later featured the game in some of their casino properties.[199]

Similarly, Michael Christian and Jack Chapelle spent years developing their game, Play Craps, which involved playing craps with cards instead of dice.[200] After much of the same difficulties experienced by Boutsifakos and Chang, Christian and Chapelle were finally able to convince two casinos, the Eureka Casino in Mesquite, Nevada, and the Rampart Casino in Summerlin, a residential suburb and non-tourist area of Las Vegas, to host the field trial of their game.[201] Here, however, the game ended up making more money than the gaming laboratory had projected in its statistical analysis.[202] Then, on May 1, 2009, the Viejas Casino near San Diego, CA bought their game.[203] Although this was a good start to success, the pair still had a long road ahead of them. Up to that point, they had anticipated a $100,000 investment. However, after all the costs, including application fees, gaming lab analysis expert fees, the equipment and supplies for the game itself, the manufacturing costs of the custom table, the marketing, and the cost of the patent and trademark attorney's fees, the pair had spent $450,000.[204] Thus, whether or not the investment eventually

192 *Id.*
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.*
204 *Id.*

pays off will depend on the continued lease of tables to additional casinos and the continued popularity of the game.

These two examples show that small companies that hope to successfully introduce their games into a Nevada casino have a tremendously expensive, tiresome, and difficult task ahead of them. Further, these examples are rare instances of small companies actually getting their foot in the door of the casino table games industry. However, many inventors are happy to take such a risk because if they beat the odds, it can mean a lifetime of royalties and even millions of dollars for the inventor.[205] A game with approximately 200 tables in various casinos can be worth over $3 million.[206] In fact, the three most successful carnival games, "Three Card Poker," "Caribbean Stud," and "Let it Ride" each bring in more than $10 million a year.[207] Therefore, it is no surprise that companies such as International Gaming Technology (IGT) are constantly bombarded by inventors wanting to show off their ideas.[208]

Moreover, low-budget game inventors and developers have the alternative to market their games to jurisdictions outside of Nevada that are less competitive, such as states that have only recently legalized gambling or Indian tribal casinos.[209] However, success in these jurisdictions will not necessarily entice the larger Nevada casinos to acquire the game because, according to one commentator, there is a general attitude that players in other parts of the country will play anything.[210] On the other hand, as noted previously, casinos such as Wynn/Encore may view success in smaller or out-of-state casinos as an advantage and it may actually bolster their decision to host the new table game.[211] Thus, success elsewhere is not necessarily a good projection of success in Las Vegas or, likely any of the other larger gambling markets,[212] but it may be better than nothing, and may even make a difference in certain circumstances.[213]

Conversely, some believe there are too many new table games being produced by individuals with little experience in the gaming industry.[214] For example, Michael Shackleford, said, "[t]he perception of those new to the business is that casino management will fall all over themselves trying to get your game into their casino. What is closer to reality is that game inventors fall all over themselves trying to get their games into a casino."[215] Even though the market has recently been flooded with new games, many of them are not marketable to casinos because the inventors simply do not understand the basic parameters for what will likely make a successful new game.[216] For example, according to Eliot Jacobson, owner of Jacobson Gaming, LLC, there are ten

---

205 Spillman, *supra* note 88.
206 *Id.*
207 Bloom, *supra* note 154.
208 Spillman, *supra* note 88.
209 Shackleford, *supra* note 126.
210 *Id.*
211 Interview with Charlie Stone, *supra* note 157.
212 Shackleford, *supra* note 126.
213 Stone Interview, *supra* note 157.
214 Jacobson, *supra* note 124.
215 *Id.*
216 *Id.*

basic principles for what will make a successful new table game.[217] Similarly, Shackleford has created "Ten Commandments for Game Inventors" with many of the same basic principles.[218] The three most basic principles are:

First, the game should be easily explainable to someone of average intelligence and new players should be able to learn the game in less than thirty seconds.[219] In fact, Galaxy Gaming welcomes new game ideas,[220] but has a "20-second rule" that requires a game owner to be able to explain the rules in twenty seconds or less.[221] Second, the game should be easy for the dealers, supervisors, and casino security to learn, have a simple and ergonomic layout, and the name of the game and its components should involve popular cultural interest.[222] Finally, the game should be resistant to advantage play, such as card counting, and the game creator should be knowledgeable about the techniques used in similar table games that players use to manipulate and gain advantage.[223]

In addition to these game factors, Jacobson stresses that a game developer be patient and refrain from trying to create an overnight table game sensation. Jacobson continues by saying that developers may need to offer the game free of charge for a certain amount of time, and spend lots of time generating player interest.[224]

D. The New Game Evaluation Procedure Represents a Balanced Approach to the Approval of New Table Games

Overall, the benefits of the New Game Evaluation Procedures outweigh the burdens on game owners and inventors. Moreover, these procedures appear to strike the proper balance between protecting both casinos and their patrons and promoting innovation in the gaming industry. First, although the process is time consuming and can be extremely expensive, the procedures and regulations ensure that only fair and functional table games end up on the casino floor. The procedures weed out games that lead to high levels of player confusion, open themselves up to cheating, or simply create too much advantage for the house. Second, the patent requirement, although somewhat daunting, was likely put in place to protect the game owner's property rights in the game and to protect casinos from liability. Additionally, once a game owner obtains a fully executed patent, he has the ability to protect against infringement. Further, these procedures require independent mathematical results to ensure that a game actually has a chance of success.

Additionally, even though independent inventors are generally at a financial disadvantage in the process, as discussed above, it is not impossible for them to find success in the field. In fact, some casinos recognize the advantages

---

[217] *Id.*
[218] Shackleford, *supra* note 126.
[219] *Id.*
[220] *Invitation to Innovation*, GALAXY GAMING, http://www.galaxygaming.com/game-submission/ (last visited Aug. 30, 2013).
[221] Shackleford, *supra* note 126.
[222] Jacobson, *supra* note 124.
[223] *Id.*
[224] *Id.*

with working with independent inventors.[225] Moreover, even though the State of Nevada spends a significant amount of time and resources evaluating new table games, the state gives each application a chance to succeed. This is true whether the applicant is a large gaming company or a first-time inventor. Further, during field trials, the Enforcement Division of the Nevada GCB conducts interviews with patrons and works with casino staff to work out any of the game's issues.[226] Thus, although the process to get a new table game is time-consuming and costly, the procedures associated with introducing new table games are beneficial because it is important for the industry to have set policies and procedures in place to ensure that the games are fair and that the math is correct.[227] Finally, and most importantly, these procedures are necessary to protect the integrity of the gaming industry.[228]

V. Conclusion

Successfully introducing a new table game in a Nevada casino is a substantial undertaking. Anyone who chooses to take on this challenge should be aware that investing in a new casino table game is one big gamble. Very rarely will a new table game find its way onto a casino floor. Even rarer is the game that stays on a casino floor for any substantial amount of time or proves to be commercially successful. Although casinos are always on the lookout for successful new games, many of them have their own strict requirements concerning what games they will allow and many casinos will only host games that have proven successful in other casinos. Additionally, casinos place a large emphasis on the marketability of a game since a successful game is one that keeps players coming back to the table. Therefore, even a game that looks great on paper can fail on the casino floor if it does not appeal to the players.

Even large corporations that specialize in developing and marketing casino games are likely to find the requirements, regulations, and risks associated with obtaining approval from the Nevada GCB to be daunting and procedurally difficult. Anyone who is serious about seeing their new game on a casino floor should be prepared for a long and expensive uphill battle and should seek out professional assistance to ensure that its game will perform up to expectations and to protect its intellectual property rights in the game. Moreover, a smart and cautious inventor will do whatever it takes to secure the proper patent (and other relevant intellectual property) rights in the game because of the tremendous potential for infringement in the gambling industry.

Finally, even though the New Game Evaluation Procedures may seem overly strict, time-consuming, and expensive, these procedures protect the casinos, players, and inventors. These procedures also act to protect the integrity of the gaming industry as a whole by ensuring new table games are profitable, unique, and live up to the high standards demanded by the industry.

---

[225] Interview with Bill Zimmer, *supra* note 151; Interview with Charlie Stone, *supra* note 157.
[226] Telephone Interview with Mark A. Clayton, *supra* note 35.
[227] Interview with Charlie Stone, *supra* note 157.
[228] *Id.*