

# THE HOUSE ADVANTAGE: TRADE SECRET PROTECTIONS ON THE CASINO FLOOR<sup>1</sup>

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## INTRODUCTION

As long as there have been slot machines, there have been slot cheats. From the early days of slugs and shaving, to today's more sophisticated cheaters who target a machine's programing, cheating technology has developed in lock step with gaming technology. As a result, gaming operators and regulators are rarely surprised by what occurs within their casinos. However, occasionally a malicious act is so unexpected that it causes the entire industry to react. Generally speaking, these surprises are typically new techniques or devices that beat the machine. In July of 2013, it was *who* beat the machine.

### I. "2341" KEYS AND ELECTRONIC ESPIONAGE

On July 12, 2013, Ryan Tors, the then-director of slot operations at the Peppermill Hotel and Casino in Reno, Nevada, was apprehended while using a "reset" key to access the diagnostic screens of slot machines at the Grand Sierra Resort, a local competitor.<sup>2</sup> This "reset" key, also known across the industry as a "2341" or a butterfly key, allows a technician to place machines in or out of service, clear meters, or adjust a machine's sound.<sup>3</sup> It also allows access to the diagnostic information, play history, logs, and game configuration of the slot machine.<sup>4</sup> Tors, however, was most interested in the theoretical hold percentage and theoretical payback percentage of the games, which his key allowed him to access.<sup>5</sup> These settings dictate the amount that the machine will pay out over time and are provided to operators by manufactures on a "Probability Accounting Report," or PAR sheet.<sup>6</sup> As a result, they are commonly referred to

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<sup>2</sup> Complaint at 5-6, *St. Gaming Control Bd. vs. Peppermill Casinos, Inc.*, NGC 13-23 (2014).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 6.

<sup>6</sup> See E. MALCOLM GREENLEES, CASINO ACCOUNTING AND FINANCIAL

as the PARs of the machine.<sup>7</sup> To understand why he was interested in these PARs, one must understand the trends occurring in the wider Reno market.

Long before Tors set foot inside the Grand Sierra Resort, the Reno market had begun to flounder.<sup>8</sup> In 2000, gaming revenues for the Reno-Sparks market hit a peak of between 1.2 and 1.3 billion dollars.<sup>9</sup> Over the next ten years, these revenues would fall by nearly fifty percent.<sup>10</sup> While there is no single reason for this collapse, the legalization of Indian gaming in California was particularly damaging to Reno's casinos.<sup>11</sup> Visitors from San Francisco and Sacramento who previously drove to Reno now had closer, nicer alternatives to "budget friendly" Reno.<sup>12</sup> Moreover, gaming revenue's downward trend accelerated with the great recession, which brought the entire industry to its knees.<sup>13</sup> It was against this bleak backdrop that new ownership took over the Grand Sierra Resort.<sup>14</sup>

Facing this threat to their market position and renewed competition, the Peppermill decided to take action. In an effort to understand their competitor's strategic positions, management instructed Tors to systematically gather the PAR information of their competitors.<sup>15</sup> He was able to collect this information by hacking machines throughout Reno from 2011 until he was detained by gaming control authorities on July 12, 2013.<sup>16</sup>

As Tors was interrogated by gaming control agents, the value of this stolen information became clear. The theoretical payout percentage dictates how much a machine pays back over time.<sup>17</sup> For example, if a machine's pay out

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MANAGEMENT 132–139 (1988); *see also* Sheryl L. Ashley, *Understanding Slot Machine Math Basics*, 25 INDIAN GAMING 1, 36 (Dec. 2015), [http://www.indiangaming.com/istore/Dec15\\_Ashley.pdf](http://www.indiangaming.com/istore/Dec15_Ashley.pdf).

<sup>7</sup> *See* GREENLEES, *supra* note 6, at 139.

<sup>8</sup> William R. Eadington, *Analyzing the Trends in Gaming-Based Tourism for the State of Nevada: Implications for Public Policy and Economic Development*, 15 UNLV GAMING RES. & REV. J. 1, 46 (2011) [hereinafter Eadington, *Analyzing the Trends*].

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> William R. Eadington, Richard H. Wells & Derek Gossi, *Estimating the Impact of California Tribal Gaming on Demand for Casino Gaming in Nevada*, 14 UNLV GAMING RES. & REV. J. 1, 44 (2010).

<sup>12</sup> *See* Eadington, *Analyzing the Trends*, *supra* note 8, at 46.

<sup>13</sup> *Id.*

<sup>14</sup> *See generally* *GSR Changes Ownership*, KOLO 8 NEWS NOW (Feb. 23, 2011), [http://www.kolotv.com/home/headlines/Grand\\_Sierra\\_Resort\\_Changes\\_Ownership\\_116774664.html](http://www.kolotv.com/home/headlines/Grand_Sierra_Resort_Changes_Ownership_116774664.html).

<sup>15</sup> *See* Complaint, *supra* note 2, at 5–6; *see also* Stipulation for Settlement and Order at 1, State Gaming Control Bd. v. Peppermill Casinos, Inc., NCG-13–23 (2014) (stating that Peppermill Casinos, Inc., admitted "each and every allegation set forth in the Complaint").

<sup>16</sup> *See* Stipulation for Settlement and Order, *supra* note 15.

<sup>17</sup> *See* Ashley, *supra* note 6, at 36 (noting that when discussing a similar example, stating that a single player receiving this pay out "would most likely not be true in

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percentage is set to ninety-five percent, it will pay back \$0.95 of every dollar played into it.<sup>18</sup> However, the average slot player does not see this kind of return.<sup>19</sup> These percentages govern payouts over time, not to each individual player.<sup>20</sup> This means that nearly everyone who plays a given machine will lose what they bet.<sup>21</sup> However, that machine will eventually pay out a jackpot that is large enough to make the percentage accurate once again.<sup>22</sup> The theoretical hold percentage is the inverse of the theoretical payout.<sup>23</sup> If the payout is set to ninety-five percent, then the hold percentage is five percent.

This information for a single machine at any point in time is functionally worthless. However, the PAR percentages of an entire casino floor or a specific popular game across the floor can be useful information; especially if this information is tracked and evaluated over time.<sup>24</sup> It can indicate how “loose” or “tight” a property is relative to another and indicate wider trends that are occurring in the market.<sup>25</sup> Moreover, if these percentages are known over a length of time, a casino could gain valuable insight into its competitor’s operational strategy and strategically position itself in the marketplace to maximize profits.<sup>26</sup>

This possible window into the Grand Sierra Resort’s corporate strategy and improving market position is what interested Ryan Tors and the Peppermill. In an effort to protect the Peppermill’s position in the market, Ryan Tors had been systematically collecting this information from his competitors for years. This gave him the unique ability to fact-check his competitors’ marketing claims and undermine them. When a casino claimed to be the loosest, he knew exactly

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real life due to the low amount of play”).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (“1. The payback percentage – this is the theoretical percentage of what the customer should retain.”).

<sup>20</sup> *Id.*

<sup>21</sup> See GREENLEES, *supra* note 6, at 132 (stating that some machines pay a “single jackpot that is sufficiently large to outweigh the lack of small payoffs,” while others are “multiple-payoff machine[s], which may have much more frequent but smaller payoffs”).

<sup>22</sup> *Id.*

<sup>23</sup> See Ashley, *supra* note 6, at 37 (“[T]he the casino reinvests the same dollar amount regardless of the hold percentage, thereby making the reinvestment percentages much larger on smaller theoretical holds (an inverse relationship).”); see also GREENLEES, *supra* note 6, at 132 (“The payoff schedules also relate to the use of casino hold percentages, a widely accepted procedure to be able to determine what a slot machine should theoretically hold, based on a given number of plays and the known reel patterns and payoff schedule.”).

<sup>24</sup> See GREENLEES, *supra* note 6, at 138 (“*Hold percentage* is a vital management concept in the casino and is very important in the slot machine area.”)

<sup>25</sup> *Id.* at 132 (“The comparison of theoretical hold percentage and actual hold percentage can form the basis for diagnostic and managerial analysis of slot operating results.”)

<sup>26</sup> *Id.*

how loose they were and could react quickly. More importantly, armed with this information, the Peppermill could know exactly how much it had to adjust its machines to undercut the competition without lowering their hold percentages too much and impairing profitability. For example, a nickel machine might have four possible theoretical payout settings, 97%, 95%, 93%, and 91%. One of the Peppermill's competitors might claim the loosest nickel slots in town and have its machines set at ninety-three percent. Without knowing this setting, the only way the Peppermill could positively make the same claim would be to set its machines to the highest possible payout settings — in this case, ninety-seven percent. Any other setting, and the Peppermill could not know that its advertising is accurate. However, if it knew that its competitor set their machines to ninety-three percent and claimed to have the loosest machines in town, the Peppermill could set its nickel slots to ninety-five percent and take the title for itself without having to sacrifice two percent of all its nickel slot play. In short, thanks to its casino spy, the Peppermill eliminated much of the guesswork inherent in operating a slot floor while maximizing their possible profits.

When Tors was finally caught and turned over to gaming control authorities, the depth and scope of this scheme gradually began to unfold. Through their investigation, the Gaming Control Board discovered several important facts. First, Mr. Tors had been active in gaming properties throughout Reno.<sup>27</sup> Second, it became clear that Tors was acting “in the course and scope of his employment,” and that the Peppermill Casinos’ management “knew of, approved of, and directed Mr. Tors’ conduct of obtaining theoretical hold percentage information from the slot machines of other casinos using a ‘reset’ key.”<sup>28</sup> As a result of these facts, the Peppermill was fined one million dollars, which represented the one of the largest fines ever levied by the Nevada Gaming Commission at the time.<sup>29</sup> The Peppermill’s electronic espionage also led to other changes in the industry. Primarily, gaming regulators in Nevada mandated new procedures and controls for “2341” keys and the employees that have access to them statewide.<sup>30</sup>

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<sup>27</sup> In addition to the Grand Sierra Resort, Tors had keyed machines at the (a) Eldorado Hotel and Casino, Reno, Nevada; (b) Circus Circus Hotel/Casino, Reno, Nevada; (c) Siena Hotel Spa Casino, Reno, Nevada; (d) Tamarack Junction, Reno, Nevada; (e) Wendover Nugget Hotel & Casino, Wendover, Nevada; (f) Red Garter Hotel & Casino, Wendover, Nevada; (g) Atlantis Casino Resort, Reno, Nevada; (h) Hobey’s Casino, Sun Valley, Nevada; (i) Rail City Casino, Sparks, Nevada; and (j) Baldini’s Sports Casino, Sparks, Nevada. *See* Complaint, *supra* note 2, at 6.

<sup>28</sup> *Id.*

<sup>29</sup> Stipulation for Settlement and Order, *supra* note 15, at 2; Howard Stutz, *Inside Gaming: Fattest Fines Have Come in a Flurry*, L.V. REV.-J. (Mar. 23, 2014, 8:12 AM), <https://www.reviewjournal.com/business/business-columns/inside-gaming/inside-gaming-fattest-fines-have-come-in-a-flurry/>.

<sup>30</sup> *See* Bill O’Driscoll, *Nevada Regulators: Slot Reset Keys Give Limited Access*,

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Eventually, the Peppermill's breaches led to civil actions as well. The Grand Sierra Resort filed a civil suit seeking damages against the Peppermill.<sup>31</sup> The Grand Sierra Resort alleged, among other things, that the information stolen amounted to a trade secret that the Peppermill had misappropriated. The ensuing litigation raised novel issues never before examined by any court — namely, whether the PAR settings maintained by a company could be held as a trade secret.

## II. TRADE SECRETS GENERALLY

Protecting trade secrets is not a novel concept. Scholars have traced the concept of a “trade secret” back to the ancient Roman practice known as *actio servi corrupti*, interpreted as an “action for making a slave worse.”<sup>32</sup> Essentially, this idea meant that a “Roman owner of a mark or firm name was legally protected against unfair usage by a competitor. . .”<sup>33</sup> Essentially, “*actio servi corrupti* [allowed authorities] to grant commercial relief under the guise of private legal actions.”<sup>34</sup> A more recognizable form of trade secret law emerged in 1817 with the English case *Newbery v. James*.<sup>35</sup> This case involved the unsuccessful attempt to prevent the disclosure of a secret invention.<sup>36</sup> Despite being unsuccessful, this case marks the first time an issue was discussed in a way that would foreshadow future trade secret cases.<sup>37</sup> *Vickery v. Welch* marks the first American consideration of a trade secret case, where the Massachusetts's Supreme Court considered the sale of a secret chocolate making method.<sup>38</sup>

Trade secret law continued to grow on both sides of the Atlantic until finally making an appearance in the Restatement (First) of Torts published by the American Law Institute in 1939.<sup>39</sup> In 1974, the U.S. Supreme Court cleared the way for states to develop their own trade secret protections.<sup>40</sup> Shortly thereafter, states began to adopt the Uniform Trade Secrets Act. To date, forty-

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RENO GAZETTE J. (Feb. 22, 2014), <http://www.rgj.com/story/money/gaming/2014/02/21/nevada-regulators-slot-reset-keys-give-limited-access/5702819/>.

<sup>31</sup> See Order, *MEI-GSR Holdings LLC v. Peppermill Casinos Inc.*, CVIS-01704 (S.J.D.C.Nev., Aug. 27, 2014).

<sup>32</sup> A. Arthur Schiller, *Trade Secrets and the Roman Law: The Actio Servi Corrupti*, 30 COLUM. L. REV. 837 (1930).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See *Newbery v. James*, 2 Mer. 446, 35 Eng. Rep. 1011, 1013 (Ch. 1817).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *Vickery v. Welch*, 36 Mass. 523, 523 (1 Pick. 1837).

<sup>39</sup> See Restatement (First) of Torts § 757 (Am. Law Inst. 1939) (stating that “one who discloses or uses another’s trade secret, with or without a privilege to do so, is liable to the other” if certain conditions are satisfied).

<sup>40</sup> See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 470 (1974).

nine states have done so, along with Washington D.C., Puerto Rico, and the U.S. Virgin Islands.<sup>41</sup> At the federal level, the Economic Espionage Act of 1996 made it a federal crime to misappropriate trade secrets for the benefit of a foreign government.<sup>42</sup> Most recently, the federal government passed the Defend Trade Secrets Act which, for the first time, provided owners of trade secrets with a private civil right of action at the federal level.<sup>43</sup>

#### A. *Approaching Trade Secrets Today*

Nonetheless, trade secrets law is not easily understood. In fact, legal scholars cannot agree among themselves what trade secret law actually is.<sup>44</sup> Traditionally, trade secret law stems in part from intellectual property theory and part from tort theory.<sup>45</sup> On one hand, trade secrets convey property rights to the holder of the trade secret as a patent or trademark would.<sup>46</sup> On the other, they seek the “deterrence of wrongful acts . . . [and] to punish and prevent illicit behavior, and even to uphold reasonable standards of commercial behavior,” which makes them more punitive in nature, similar to an action in tort.<sup>47</sup>

Likewise, trade secrets have been alternatively described as a collateral issue of contract law, a question of property law, and even a question of “commercial morality,” based in the inherent equitable powers of a court.<sup>48</sup> Other legal theorists reject these approaches altogether and call trade secret law a “collection of other legal norms . . . united only by the fact that they are used to protect secret information.”<sup>49</sup> These scholars view trade secret law as nothing more than an attempt to provide a remedy for conduct that “feels” wrong.

Each of these approaches has its strengths and its weaknesses and trade secret law integrates aspects of all of them. With time however, the intellectual property theory of trade secrets has taken over as the prevailing justification for this area of law, although elements of torts and contract law persist.<sup>50</sup> This unique character has required both judicial and legislative adjustments to make

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<sup>41</sup> *Legislative Fact Sheet - Trade Secrets Act*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade%20Secrets%20Act> (last visited Mar. 27, 2018).

<sup>42</sup> 18 U.S.C. § 1831 (2012).

<sup>43</sup> *Id.* § 1836.

<sup>44</sup> Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 312-13 (2008).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 319.

<sup>48</sup> *See id.* at 329.

<sup>49</sup> Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 245 (1998).

<sup>50</sup> *See* Lemley *supra* note 44, at 363 (“While the theoretical justifications for trade secret law historically have been more varied and controversial than for patent or copyright, courts and scholars increasingly theorize trade secret law as a subset of intellectual property because it encourages information production.”)

the theory practicable. “Secrecy” and “independent economic value” have become substitutes for other factors commonly evaluated in intellectual property cases such as ownership, authorship, or originality.<sup>51</sup> These adjustments form the basis of any trade secret analysis and are codified in the Uniform Trade Secrets Act as adopted by most states. Under the Uniform Trade Secrets Act, a “trade secret” is defined as:

Information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>52</sup>

The elements contained in this definition are at the center of trade secret litigation. Therefore, this article will analyze them in turn against the nature of PAR information and the facts of the Peppermill case.

### III. WHAT ARE TRADE SECRETS?

Unlike patents, trademarks, or copyrights, trade secrets do not have the benefit of clearly defined subject matter or judicial frameworks. This has led to a variety of outcomes and a relative uncertainty behind each trade secret action. These outcomes often directly contradict each other as the same potential trade secret is tried in different courts and results in different outcomes. For instance, some courts have held that Scientology’s religious texts are trade secrets on the grounds that they have licensing value.<sup>53</sup> While other courts have held that these same texts cannot be trade secrets as they are religious and not commercial in nature.<sup>54</sup> Likewise, restaurant recipes have been considered trade secrets in some courts and denied protection in others.<sup>55</sup> Sometimes rulings turn on semantics as the same concept under different names finds different results in different courts.<sup>56</sup> Other times there is no identifiable rationale behind the

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<sup>51</sup> *See id.* at 244–46.

<sup>52</sup> UNIFORM TRADE SECRETS ACT § 1(4)(i)–(ii) (1985).

<sup>53</sup> *See Religious Tech. Ctr. v. Netcom On-Line Comm. Serv., Inc.*, 923 F. Supp. 1231, 1253 (N.D. Cal. 1995).

<sup>54</sup> *See Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1091 (9th Cir. 1986).

<sup>55</sup> *See Buffets, Inc. v. Klinke*, 72 F.3d 965, 966 (9th Cir. 1996) (holding that a buffet’s recipes were not trade secrets); *Uncle B’s Bakery, Inc. v. O’Rourke*, 920 F. Supp. 1405, 1429 (N.D. Iowa 1996) (holding that a bagel recipe was a trade secret).

<sup>56</sup> *Compare Astro Tech., Inc. v. Alliant Techsystems, Inc.*, Civ. No. AH-03-0745, 2005 WL 6061803 (S.D. Tex. 2005) (holding that a “generalized” plan for reaching a “general” goal was not a trade secret), *with Avery Dennison Corp. v. Kitsonas*, 118 F. Supp. 2d 848, 854 (S.D. Ohio 2000) (holding that a “business philosophy”

decisions. For instance, nearly every type of financial record a business can produce has been designated as both a trade secret and *not* a trade secret.<sup>57</sup>

Facing this confusion, scholars have attempted to establish a baseline understanding of what a trade secret is. Some may look at the factual circumstances and identify certain situations as more likely to give rise to trade secrets, such as competitive intelligence, certain business transactions, and departing employees.<sup>58</sup> Others look for characteristics of the trade secret itself to establish a framework that could be used to identify other trade secrets. These traits include whether the secret is worth clawing back after release, discreteness of the secret, or spoilability, among others.<sup>59</sup> Despite how unsettled this area of law is among scholars, as a practical matter, the courts and legislators have reduced trade secrets to a two-factor test.<sup>60</sup> First, is the information secret? Secrecy is “indispensable to an effective allegation of a trade secret,” is a question of fact, and must be claimed and maintained by the party claiming a trade secret.<sup>61</sup> Second, the holder must “derive independent economic value, actual or potential, from [the information] not being generally known to, and not being readily ascertainable by proper means.”<sup>62</sup>

Applying this mess of authority to the chaos of a casino is not easy. There are only a few cases that have attempted to do this, and they have focused on issues only tangentially related to gaming such as casino player information.<sup>63</sup> Moreover, the analysis performed in these cases has been less focused on the trade secret analysis itself and more focused on collateral issues such as non-compete clauses, and are therefore of little value to this analysis. Rather, this article will be an organic review of the events that occurred in Reno and applicable case law out of multiple jurisdictions that have adopted the Uniform Trade Secret Act or similar legislation.

#### IV. SECRECY: THE FOUNDATION OF TRADE SECRETS

What occurred in Reno at the Grand Sierra Resort is an interesting case study in secrecy and efforts to maintain it for the purposes of trade secret law. Like many trade secrets, PARs are inherently secret. Unless explained to them,

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was protectable as a trade secret).

<sup>57</sup> See, e.g. *Prairie Island v. Minn. Dept. of Pub. Safety*, 658 N.W.2d 876, 890 (Minn. Ct. App. 2003) (holding that consolidated balance sheets, cash-flow statements, and profit-and-loss statements were not trade secrets); *RKI, Inc. v. Grimes*, 177 F. Supp. 2d 859, 874 (N.D. Ill. 2001) (holding that financial information in a company’s database is a trade secret).

<sup>58</sup> Lemley, *supra* note 44, at 318.

<sup>59</sup> Eric E. Johnson, *Trade Secret Subject Matter*, 33 HAMLINE L. REV. 545, 560-61 (2010).

<sup>60</sup> UNIFORM TRADE SECRETS ACT § 1(4)(i)–(ii) (1985).

<sup>61</sup> 1-1 MILGRIM ON TRADE SECRETS § 1.03 (2015).

<sup>62</sup> UNIFORM TRADE SECRETS ACT § 1(4)(i)–(ii).

<sup>63</sup> See *Golden Rd. Motor Inn, Inc. v. Islam*, 376 P.3d 151, 161 (Nev. 2016).

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the average player would not even know that they existed and were shaping the course of their evening spent gambling.<sup>64</sup> However, their secrecy can be pierced by an individual with the right knowledge and skills. Armed with the proper mathematical formulas and data, PARs can be accurately reversed engineered.<sup>65</sup> This dismantling of a secret is often put forth as a defense to trade secret cases. After all, if a trade secret is easily determined by competitors, can it really be considered a secret?

There is no dispute that PARs can be reversed engineered by someone who has the knowledge to do so and access to a slot floor's data.<sup>66</sup> Without access to floor data, experts in slot operation can utilize complicated formulas for determining what a casino's PARs are. All of these techniques require extensive slot play and complex mathematical formulas to evaluate the data collected while playing. Five of these schemes — the request, ratio analysis, ratio elimination, blind bin analysis, and minimal bin analysis — require in depth knowledge of a casino's player loyalty programs.<sup>67</sup> Other methods, termed video deconstruction or fingerprinting of real trip elimination, require employees to secretly and repeatedly photograph the slot machine while it is being played.<sup>68</sup> The question is whether or not being reverse engineer-able through these means defeats trade secret protection.

Multiple courts have evaluated the ease of a reverse engineering defense. In *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, the Eighth Circuit held that revised helicopter overhaul specifications were trade secrets under the Uniform Trade Secret Act.<sup>69</sup> Rolls-Royce developed and produced engines used in both civilian and military helicopters.<sup>70</sup> A subsidiary of Rolls-Royce was tasked with developing modifications to these engines and issued proprietary instructions for doing so.<sup>71</sup> These instructions were used by AvidAir without authorization and became the subject of this suit.<sup>72</sup> Even though the revisions were “relatively minor” updates from publicly available information, and the defendant could have easily received “FAA approval for a procedure that [was] based on only publicly available information . . . [the defendant's] repeated attempts to secure the revised [overhaul information] without [the plaintiff's] approval belie[d] its claim that the information in the

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<sup>64</sup> See *supra* Part I.

<sup>65</sup> See generally Ashley, *supra* note 6.

<sup>66</sup> See *id.*

<sup>67</sup> These methods are largely proprietary themselves and developed and employed by various experts in the field.

<sup>68</sup> *Id.*

<sup>69</sup> *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 969 (8th Cir. 2011).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 969–70.

<sup>72</sup> *Id.* at 970.

documents” was easily reverse engineered and not secret.<sup>73</sup> The court reasoned “[e]ven if information potentially could have been duplicated by other proper means, it is no defense to claim that one’s product could have been developed independently of plaintiff’s, if in fact it was developed by using plaintiff’s proprietary designs.”<sup>74</sup>

Likewise, in *K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv.*, the Texas Supreme Court held that a magnetic fishing tool was a trade secret.<sup>75</sup> In doing so, the court found that the tool could be easily duplicated “by an examination of the tool without disassembling it,” and wasn’t obviously secret at all.<sup>76</sup> However, the court reasoned that because defendant “did not learn how to make the [plaintiff’s] tool or a device similar thereto by observing it in an assembled or unbroken condition, but learned of its internal proportions, qualities, and mechanisms, by taking it apart despite an agreement that it would not do so” they could not later argue it was not a trade secret.<sup>77</sup> The court further held that when “a trade secret is of such a nature that it can be discovered by experimentation or other fair and lawful means does not deprive its owner of the right to protection. . .”<sup>78</sup> In other words, even if a trade secret can easily be determined through lawful means such as reverse engineering, it can still be considered secret.

Other courts have held that for this defense to work, the trade secret must be ascertained “quickly” or be so “self-revealing” to be ascertainable “at a glance.”<sup>79</sup> This line of thinking has lead courts to require speed and efficiency to reverse engineering for the defense to be persuasive.<sup>80</sup> Courts generally look

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<sup>73</sup> *Id.* at 973–75.

<sup>74</sup> *Id.* at 973.

<sup>75</sup> *See K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv.*, 314 S.W.2d 782, 793 (Tex. Sup. Ct. 1958).

<sup>76</sup> *Id.* at 786–87.

<sup>77</sup> *See id.* at 787.

<sup>78</sup> *See id.* at 788.

<sup>79</sup> *See Motorola, Inc. v. Lemko Corp.*, No. 08 C 5427, 2012 WL 74319, at \*19 (N.D. Ill. Jan. 10, 2012) (holding that trade secret protection is applicable assuming the secret does “not involve self-revealing information that any user or passer-by sees at a glance”); *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 919 (Ind. 1993) (specifying that the protected information need not “be unascertainable at all by proper means, but only that they not be readily or quickly ascertainable by such means”); *Nat’l Instrument Labs., Inc. v. Hycel, Inc.*, 478 F. Supp. 1179, 1181–82 (D. Del. 1979) (stating that secrets that are “ascertainable at a glance” will lose protections); *see also Smith v. Dravo Corp.*, 203 F.2d 369, 374–75 (7th Cir. 1953) (holding that cargo container, available on the open market and accessible to defendant for inspection, was a protectable trade secret because there was no evidence that the “construction of which was ascertainable at a glance”).

<sup>80</sup> *See CheckPoint Fluidic Sys. Int’l, Ltd. v. Guccione*, 888 F. Supp. 2d 780, 797 (E.D. La. 2012) (holding even though “pumps can be reverse engineered does not bar a trade secret claim, as long as the pumps cannot be reverse engineered so quickly as to be ‘readily ascertainable’”); *Rycoline Products, Inc. v. Walsh*, 756 A.2d 1047, 1055 (N. J. App. Div. 2000) (stating that to be readily ascertainable,

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at the average knowledge and capabilities of the industry to determine the required speed and efficiency of reverse engineering.<sup>81</sup>

Here, reverse engineerability should not defeat secrecy when discussing PARs. Even if they could be reverse engineered, this fact alone is not enough to prevent trade secret protection. They must also be quickly and easily reverse engineered “at a glance.”<sup>82</sup> Requiring experts and complicated formulas to mount a defense undermines the ability to argue that reverse engineering is easy or quick. The helicopter designs in *Rolls Royce* were clear to anyone in the industry and easily recreated. Likewise, the magnetic fishing tool in *K & G Oil* was a simple product by any standard. Both trade secrets were simpler and easier to reverse engineer than PARs and yet both were still considered trade secrets.

There is no case law that allows a defendant to claim that the complicated observation and mathematical formulas necessary to determine the PARs of a casino can justify reverse engineering as a defense. Even if there was, the fact that the PARs in a single machine and across the casino floor are so quickly and easily changed makes it even harder to show that they could be easily reverse engineered. By the time an agent had observed a machine long enough and collected enough data to determine the PARs, the settings could easily be changed once again. This variability is a serious obstacle to reverse engineering and explains why a party seeking this information would have to steal it.

Finally, it is important to note even the best formula deployed by the most capable expert can only approximate the PARs across the casino floor. They may be able to get very close, but they cannot determine PARs with exactness. There are too many machines on the floor and too many possible variables for this calculation to work. This lack of definiteness further undermines the claim that the PARs aren’t secret and easily reversed engineered. In short, reverse engineering is only a defense if it can be done quickly, easily, and accurately. PARs are sufficiently difficult to reverse engineer and so easily varied that they cannot likely be reverse engineered quickly, easily, and accurately. However, even if the Peppermill could not successfully claim reverse engineering as a defense, this is not the end of the secrecy analysis.

#### A. *The Secrecy Analysis Beyond Reverse Engineering*

Declaring something “secret” has its reasonable limits when determining whether or not it can effectively be reverse engineered. An aggrieved business owner can’t simply declare information as secret once they allow it to become

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defendant must demonstrate that the information can be ascertained quickly).

<sup>81</sup> See *Stewart & Stevenson Services, Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 111 (Tex. Ct. App. 1994) (holding that to be a protected trade secret, “the trade secret must not be generally known to or used by the industry or a matter completely disclosed or ascertainable at a glance”).

<sup>82</sup> See *e.g. Motorola, Inc.*, No. 08 C 5427, 2012 WL 74319, at \*19.

widely known and then attempt to file suit. In other words, one cannot “claw-back” trade secrets once they are made public.<sup>83</sup> To embody this principle, the secrecy requirement of trade secrets often morphs into an analysis of a party’s reasonable efforts to keep the information secret. In *E.I. duPont deNemours & Co. v. Christopher*, the defendants were photographers hired by an unknown third party to take aerial photographs of new construction at the Plaintiff’s industrial plant.<sup>84</sup> The Defendants brought a motion for summary judgment arguing that they were in public airspace and that the plant’s design was not kept secret.<sup>85</sup> The Fifth Circuit held that fencing and maintaining security at the site were sufficient efforts to maintain secrecy and upheld the district court’s denial of summary judgment.<sup>86</sup>

Likewise, other courts have approved of pedestrian measures undertaken by the plaintiffs to protect their trade secrets. In *Matter of Innovative Const. Sys., Inc.*, the court held that even though plaintiff “did not employ security personnel, and the plant was not locked during working hours” formulas were considered reasonably protected trade secrets because they “were kept in a notebook in the plant manager’s office, and hence out of view.”<sup>87</sup> A similar holding was reached in *Hickory Specialties, Inc. v. B & L Labs., Inc.*, which also dealt with an unguarded plant and employees that were not instructed as to secrecy.<sup>88</sup> The court held that the plaintiff took reasonable steps to protect its trade secret, since “plaintiffs took some steps to keep its operations confidential” even though “these measures admittedly were not stringent enough to withstand a deliberate spying attempt.”<sup>89</sup>

Other courts have applied a similar test and found the efforts taken to maintain secrecy insufficient.<sup>90</sup> Looking at the entirety of the situation surrounding claimed trade secrets, the Minnesota Supreme Court in *Electro-Craft Corp v. Controlled Motion, Inc.* found that “fatally lax” security measures were insufficient to sustain a trade secret claim.<sup>91</sup> These failings included a failure to mark technical documents, drawings, and diagrams as “confidential” when they were distributed to customers and vendors, unrestricted employee access to confidential documents, and a failure to properly train staff on

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<sup>83</sup> See generally Johnson, *supra* note 59.

<sup>84</sup> See *E. I. duPont deNemours & Co. v. Christopher, et al.*, 431 F.2d 1012, 1013 (5th Cir. 1970).

<sup>85</sup> See *id.* at 1014.

<sup>86</sup> See *id.* at 1015–16.

<sup>87</sup> See *Matter of Innovative Constr. Sys., Inc.*, 793 F.2d 875, 884-85 (7th Cir. 1986).

<sup>88</sup> See *Hickory Specialties, Inc. v. B & L Labs., Inc.*, 592 S.W.2d 583, 587 (Tenn. Ct. App. 1979).

<sup>89</sup> *Id.*

<sup>90</sup> See *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 902-03 (Minn. 1983).

<sup>91</sup> See *id.* at 902.

document secrecy.<sup>92</sup> Informal tours of the facilities where products were being made and plans were stored also contributed to an environment incapable of producing trade secrets.<sup>93</sup>

Casinos have protections in place to keep their PARs secret. First, PARs are only accessible by a physical key.<sup>94</sup> More importantly, casinos are required to follow extensive minimal control standards to protect the integrity of their machines.<sup>95</sup> These measures include quarterly inventories of all “2341” keys and other instruments that provide any access to this data as well as investigations of any keys that are unaccounted for.<sup>96</sup> However, it should be noted that despite the security in casinos, the “2341” keys in question are readily available. At the time of this writing, used “2341” keys were available for purchase by anyone online.<sup>97</sup> Since the incident in Reno, Nevada gaming regulators have required increased security measures surrounding reset keys at all properties in the state.<sup>98</sup> This state action along with the wide availability of the keys undercuts the contention that the keys were useful to secure the secrecy of trade secrets. Likewise, the other security measures in place have nothing to do with trade secrets, but were designed to prevent cheating, stealing, and other conventional crimes on the casino floor.<sup>99</sup>

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<sup>92</sup> See *id.* at 903.

<sup>93</sup> See *id.*

<sup>94</sup> See Bill O’Driscoll, *Nevada Regulators: Slot Reset Keys Give Limited Access*, L.V. REV.-J. (Feb. 22, 2014), <https://www.rgj.com/story/money/gaming/2014/02/21/nevada-regulators-slot-reset-keys-give-limited-access/5702819/>

<sup>95</sup> See NEV. GAMING CONTROL BD., VERSION 8, MINIMUM INTERNAL STANDARDS: GROUP 1 LICENSEES, <http://gaming.nv.gov/index.aspx?page=182> (last visited Mar. 27, 2018).

<sup>96</sup> See *id.* Such measures are explicitly defined within the Nevada Gaming Control Board’s minimum internal standards as follows:

205. Quarterly, an inventory of all slot machine door keys, reset keys, 2341 keys, attendant keys, any other similar slot key or device, slot fill cabinet keys, count room, drop box release, storage rack and contents keys is performed, and reconciled to records of keys made, issued, and destroyed. Investigations are performed for all keys unaccounted for, with the investigation being documented.

<sup>97</sup> See Howard Stutz, *Slot Machine Keys Sold Online but Are They Useful?*, WASH. TIMES (Mar. 14, 2014), <http://www.washingtontimes.com/news/2014/mar/14/slot-machine-keys-sold-online-but-are-they-useful/>; see also EBAY, <http://www.ebay.com/itm/Attendant-reset-keys-2341/121746934761?hash=item1c58aecbe9:g:H0UAAOSwHnFVu6z-> (last visited Mar. 27, 2018) (showing an example of “2341” keys available for purchase online).

<sup>98</sup> See Stutz, *supra* note 97.

<sup>99</sup> These measures include security cameras, on floor personal, and other visible means employed by the casino to watch patrons suspected of cheating. Likewise, dealers and other employees follow strict procedures when beginning and ending their shifts to maintain the integrity of each casino game. See NEV. GAMING CONTROL BD., SURVEILLANCE STANDARDS FOR NON-RESTRICTED LICENSEES, <http://gaming.nv.gov/modules/showdocument.aspx?documentid=2944> (last visited

Attacking the security measures in place is common and may make logical sense, but doing so is undermined by the established case law. The court in *DuPont* held that a party claiming trade secret protections did not have to take extreme and unorthodox measures to protect their trade secrets.<sup>100</sup> Requiring a casino to put extra protections in place for their trade secrets would be akin to requiring the plaintiff in *DuPont* to put a massive roof over their factory. It would not be practical or fair to require such lengths to protect their trade secrets.

Courts have codified this principle into common law. The court in *Electro-Craft* found security measures lacking, as the basic requirements common in the industry were not being followed.<sup>101</sup> Failure to implement these industry norms rendered the plaintiff's precautions "fatally lax."<sup>102</sup> In the casino, the theft of PAR information is unprecedented. As such, established security measures were not prepared to handle it.<sup>103</sup> However, the measures in place, as a whole, were in no means "fatally lax." This is evidenced by the fact that hundreds of slot cheats are captured each year as they attempt to tamper with machines.<sup>104</sup> As you will recall from the Peppermill case, Mr. Tors was captured as he attempted to misappropriate trade secrets from his competitors.<sup>105</sup> However, even if the Grand Sierra Resort's security measures hadn't been effective, the court in *Hickory* made it clear that security measures need not withstand "a deliberate spying attempt."<sup>106</sup> By evaluating these facts and the relevant case law, it is clear that casino security systems are more than sufficient to maintain the secrecy of PAR information.

Finally, it is possible to inadvertently publish your trade secret and lose any protection you may have been entitled to.<sup>107</sup> When dealing with PAR information, this mistaken disclosure would likely look like a marketing campaign or other public statement by the casino. A casino may advertise that

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Mar. 27, 2018).

<sup>100</sup> See *E. I. duPont deNemours & Co. v. Christopher, et al.*, 431 F.2d 1012, 1016-17 (5th Cir. 1970).

<sup>101</sup> *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 890 (Minn. 1983).

<sup>102</sup> *Id.* at 902.

<sup>103</sup> *Id.*

<sup>104</sup> For example, the Nevada Gaming Control Board had 574 arbitration cases in 2015, disputing \$51.8 million, and made 602 criminal arrests of attempted cheats. Further, between 250 to 500 casino employees are arrested by the Gaming Control Board each year. See Nicole Raz, *Basic Casino Cheating Scams Hardest to Catch*, L.V. REV.-J. (Sep. 26, 2016, 5:30 PM), <https://www.reviewjournal.com/business/casinos-gaming/basic-casino-cheating-scams-hardest-to-catch-gaming-experts-say/>.

<sup>105</sup> Complaint, *supra* note 2, at 5-6.

<sup>106</sup> *Hickory Specialties, Inc. v. B & L Labs., Inc.*, 592 S.W.2d 583, 587 (Tenn. Ct. App. 1979).

<sup>107</sup> *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 975 (8th Cir. 2011); *Conseco Fin. Servicing Corp. v. N. Am. Mortgage Co.*, 381 F.3d 811, 819 (8th Cir. 2004); *Clark v. Bunker*, 453 F.2d 1006, 1010 (9th Cir. 1972).

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they have the loosest casino in town. They may advertise that a popular game found at every casino pays out the most at their property. For example, the “Buffalo” is a nickel slot machine that is among the most popular games on any casino floor.<sup>108</sup> Promoting the loosest Buffalo machines in town would be a good way to win over local, frequent gamblers who play only this specific machine. As these machines are so common, the PAR settings for them would likely be widely known to the other operators in town. So, by advertising the loosest PAR settings in town, a casino would essentially be publishing their exact PARs on this game to all of their competitors and they would no longer be secret.

Even if the Grand Sierra Resort had published their PAR information in this way, many trade secrets cases deal with expressly public information, which is not a bar to trade secret protection. In *Avidair*, the information had been made expressly public through the Federal Aviation Administration and it was still found to be a trade secret.<sup>109</sup> Likewise, in *Conseco Fin. Servicing Corp. v. N. Am. Mortgage Co.*, the court evaluated whether marketing “lead sheets” could be considered trade secrets.<sup>110</sup> These sheets were “accessible to the public,” but were still deemed trade secrets because the information they contained could not “be obtained from alternative sources.”<sup>111</sup> In *Clark v. Bunker*, information in a plan for marketing prepaid funeral services was still considered a trade secret despite being contained in brochures distributed to the public.<sup>112</sup> In short, the secrecy required for trade secret protection is not total or complete secrecy, and may not be automatically defeated simply because some PARs are potentially ascertainable from public advertisements.

As the preeminent element behind trade secret cases, secrecy is complicated but vital. The very nature of PARs and slot machine data speaks to their being secret. Likewise, PARs are not sufficiently public or obvious to be reversed engineered without considerable effort. Finally, casinos generally have substantial security measures in place to protect their operations and by extension their PAR data. Taking all of these factors together, theoretical hold percentages in a casino generally meet the secrecy requirements to gain trade secret protection. As in many trade secret cases, this secrecy surrounding PARs is tied directly into the misappropriation that occurs on a case by case basis.

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<sup>108</sup> See *Aristocrat Performs Strongly in Latest Eilers-Fantini Quarterly Slot Survey*, MARKET WIRED (Feb. 1, 2016), <http://www.marketwired.com/press-release/aristocrat-performs-strongly-in-latest-eilers-fantini-quarterly-slot-survey-2092977.htm>.

<sup>109</sup> *AvidAir*, 663 F.3d at 975.

<sup>110</sup> *Conseco*, 381 F.3d at 819.

<sup>111</sup> *Id.*

<sup>112</sup> *Clark*, 453 F.2d at 1010.

## V. MISAPPROPRIATION AND USE OF PARS AS TRADE SECRETS

Nevada and other jurisdictions that have adopted the Uniform Trade Secret Act provide three alternative definitions for “misappropriation.”<sup>113</sup> The Nevada Uniform Trade Secret Act defines “misappropriation” as:

- (a) Acquisition of the trade secret of another by a person by improper means;
- (b) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (c) Disclosure or use of a trade secret of another without express or implied consent by a person who:
  - (1) Used improper means to acquire knowledge of the trade secret;<sup>114</sup>

Each one of these definitions requires that the trade secret be gained through improper means. “Improper means” is defined as:

- (a) Theft; (b) Bribery; (c) Misrepresentation; (d) Willful breach or willful inducement of a breach of a duty to maintain secrecy; (e) Willful breach or willful inducement of a breach of a duty imposed by common law, statute, contract, license, protective order or other court or administrative order; and (f) Espionage through electronic or other means.<sup>115</sup>

Likewise, the Restatement (Third) of Unfair Competition § 39, cmt. f, states: “When a defendant has engaged in egregious misconduct in order to acquire the information, the inference that the information is sufficiently inaccessible to qualify for protection as a trade secret is particularly strong.”<sup>116</sup> Finally, the United States Supreme Court held that trade secret law “does not offer protection against discovery by fair and honest means,” however, it does protect “the holder of a trade secret against disclosure or use when the knowledge is gained, not by the owner’s volition, but by some ‘improper means.’”<sup>117</sup>

Misappropriation is a vital part of any trade secret claim. In *Saturn Sys., Inc. v. Militare*, the court held that under the Uniform Trade Secret Act, a claim for misappropriation requires proof of “acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means” such as theft.<sup>118</sup> *DSMC, Inc. v. Convera Corp.*,

<sup>113</sup> NEV. REV. STAT. §§ 600A.010, 030(2) (2016).

<sup>114</sup> *Id.* § 600A.030(2).

<sup>115</sup> *Id.* § 600A.030(1).

<sup>116</sup> Restatement (Third) of Unfair Competition § 39, cmt. f. (Am. Law. Inst. 1995).

<sup>117</sup> *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475–76 (1974).

<sup>118</sup> *Saturn Sys., Inc. v. Militare*, 252 P.3d 516, 525 (Colo. App. 2011).

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also held that to “establish a trade secret misappropriation claim” under the Uniform Trade Secret Act, a plaintiff must “demonstrate (1) the existence of a trade secret; and (2) acquisition of the trade secret by improper means, or improper use or disclosure by one under a duty not to disclose”<sup>119</sup> Multiple other courts who have adopted the Uniform Trade Secrets Act have reached similar conclusions.<sup>120</sup>

The confluence of misappropriation and secrecy is illustrated in *Reingold v. Swiftships, Inc.*<sup>121</sup> The Fifth Circuit held that a boat hull mold was entitled to protection as a trade secret under the Uniform Trade Secret Act.<sup>122</sup> This ruling was based on the mold still being a secret even though defendant “could have reverse engineered a mold from an existing hull,” because the defendant did not create the infringing mold from an existing hull, but instead “misappropriated the trade secret” by improper means.<sup>123</sup> The parties to this action had entered into a contract that required payment each time the mold was used and notification of any adjustments made to the mold.<sup>124</sup> Swiftships began to use the mold to construct an order of hulls for an international client without paying or notifying Reingold.<sup>125</sup> This breach of contract was held to be “improper means” of appropriating the trade secret.<sup>126</sup> The fact that the hull design could have been used legally if the terms of the contract were followed was immaterial.<sup>127</sup> The court stated that “protection will be accorded to a trade secret holder against disclosure or unauthorized use gained by improper means,

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<sup>119</sup> *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 77 (D.D.C. 2007).

<sup>120</sup> *See, e.g.* *Beard Research, Inc. v. Kates*, 8 A.3d 573, 589 (Del. Ch. 2010) *aff’d* sub nom. *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010) (holding, under the Uniform Trade Secret Act, to “maintain a successful claim for misappropriation of trade secrets, a plaintiff must show both the existence of a trade secret and its misappropriation” “through the acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means”); *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 683 (8th Cir. 2002) (quoting *Sip-Top, Inc. v. Ekco Group, Inc.*, 86 F.3d 827, 833 (8th Cir. 1996)) (holding that misappropriation of a trade secret is established by “(1) improper acquisition of a trade secret” such as by theft; “or (2) disclosure or use of a trade secret without consent”); *DTM Research, L.L.C. v. AT & T Corp.*, 245 F.3d 327, 332 (4th Cir. 2001) (holding under the Uniform Trade Secret Act that a “misappropriation occurs when one *acquires* the secret information ‘by improper means’ or *discloses* the secret information acquired by ‘improper means’”); *Smithfield Ham & Products Co. v. Portion Pac, Inc.*, 905 F. Supp. 346, 350 (E.D. Va. 1995) (holding Virginia’s Uniform Trade Secret Act “prohibits the improper acquisition of a trade secret, whether or not the secret is used”).

<sup>121</sup> *Reingold v. Swiftships, Inc.*, 126 F.3d 645, 650-52 (5th Cir. 1997).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 651–52.

<sup>124</sup> *Id.* at 650.

<sup>125</sup> *Id.* at 650–51.

<sup>126</sup> *Id.* at 650.

<sup>127</sup> *Id.* at 651.

even if others might have discovered the trade secret by legitimate means.”<sup>128</sup>

This holding is not unique. “The fact that a trade secret . . . can be discovered by experimentation or other fair and lawful means does not deprive its owner of the right to protection from those who would secure possession of it by unfair means.”<sup>129</sup> Likewise, stealing a trade secret is “evidence [that] supports a finding that [the trade secret] was not readily ascertainable” and therefore “deserves protection as a trade secret.”<sup>130</sup>

It is important to note that to be considered misappropriation, the action does not necessarily have to be illegal. Returning to *E.I. DuPont DeNemours & Co. v. Christopher*, the Fifth Circuit held that “aerial photography of plant construction [to determine another’s secret manufacturing process] is an improper means of obtaining another’s trade secret.”<sup>131</sup> The Fifth Circuit reached this holding even though the defendant “violated no government aviation standard, did not breach any confidential relation, and did not engage in any fraudulent or illegal conduct.”<sup>132</sup> The court did find however, that this conduct fell well “below the generally accepted standards of commercial morality and reasonable conduct.”<sup>133</sup> This ruling was based on the premise that the court would not “require a person or corporation to take unreasonable precautions to prevent another from doing that which he ought not to do in the first place.”<sup>134</sup> Put a different way, “thou shall not appropriate a trade secret through deviousness under circumstances in which countervailing defenses are not reasonably available.”<sup>135</sup>

Examining what happened in Reno, there is little doubt that the PARs in question were misappropriated through improper means. Upon investigation by Gaming Control officials, it became immediately clear that the Peppermill was conducting a systematic and purposeful effort to steal information from their competitors.<sup>136</sup> As a result of these findings, the Peppermill was fined one million dollars by the Control Board which represented one of the largest fines ever assessed in Nevada up to this point.<sup>137</sup> The more interesting question that came out of Reno is not whether the PARs had been misappropriated, but if use of the PARs is required for them to be misappropriated. If the Peppermill could

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<sup>128</sup> *Id.* at 652.

<sup>129</sup> *Smith v. Dravo Corp.*, 203 F.2d 369, 375 (7th Cir. 1953).

<sup>130</sup> *DPT Labs., Ltd. v. Bath & Body Works, Inc.*, No. CIV.SA-98-CA-664-JWP, 1999 WL 33289709, at \*5 (W.D. Tex. Dec. 20, 1999).

<sup>131</sup> *E. I. duPont deNemours & Co. v. Christopher, et al.*, 431 F.2d 1012, 1015 (5th Cir. 1970).

<sup>132</sup> *Id.* at 1014.

<sup>133</sup> *Id.* at 1016.

<sup>134</sup> *Id.* at 1017.

<sup>135</sup> *Id.*

<sup>136</sup> Complaint, *supra* note 2, at 6.

<sup>137</sup> See Stipulation for Settlement and Order, *supra* note 15, at 2; see also Stutz, *supra* note 29.

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show that what happened in Reno was simply the obsession of an over-eager employee that management was foolish enough to indulge, could it still be misappropriation?

A. *Equating Use and Misappropriation*

Defendants often attempt to substitute a “use” analysis for misappropriation. They reason that if information is not used, then the misappropriation did not occur. While this may seem logical, this approach is not supported by established case law. In *Binary Semantics Ltd. v. Minitab, Inc.*, logic demanded that the court find that a “theft of trade secrets necessarily implies that they will be used.”<sup>138</sup> Likewise, in *RKI, Inc. v. Grimes*, the court held that, in several situations, use of trade secrets gained during the course of employment would be inevitable when an employee changed jobs.<sup>139</sup> Whether it was proven or not, the former employee and his new employer “unlawfully misappropriated [his former employer’s] trade secret information because it is inevitable [that the employee] will use the information he obtained.”<sup>140</sup> The court noted that “direct evidence of theft and use of trade secrets is often not available,” and therefore “the plaintiff can rely on circumstantial evidence to prove misappropriation.”<sup>141</sup> Applying this standard, the court concluded, that the former employer had “proven by a preponderance of the evidence that [the former employee and his new employer had] misappropriated its trade secrets.”<sup>142</sup> The court also relied on circumstantial evidence in *Uhlig LLC v. Shirley*.<sup>143</sup> Even without presenting “much, if any, direct evidence of use of the compilation trade secrets,” by proving that the employee took “confidential and trade secret information,” the former employer provided “the jury with substantial circumstantial evidence from which it could have determined that [the employee] actually used the information.”<sup>144</sup>

In *PepsiCo, Inc. v. Redmond*, the Seventh Circuit concluded that an employee “pursuing and accepting his new job” with a direct competitor was enough to conclude that the employee would “inevitably . . . rely on” his knowledge to benefit his new employer.<sup>145</sup> The court reached this conclusion

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<sup>138</sup> *Binary Semantics Ltd. v. Minitab, Inc.*, Civil Action No. 4:07-CV-1750, 2008 WL 763575, at 4 (M.D. Pa. Mar. 20, 2008).

<sup>139</sup> *RKI, Inc. v. Grimes*, 177 F. Supp. 2d 859, 876 (N.D. Ill. 2001).

<sup>140</sup> *Id.* at 875.

<sup>141</sup> *Id.* at 876.

<sup>142</sup> *Id.* at 877.

<sup>143</sup> *Uhlig LLC v. Shirley*, Civil Action No. 6:08-CV-01208-JMC, 2012 WL 2923242, at 7 (D.S.C. July 17, 2012).

<sup>144</sup> *See id.*; *see also* *Frantz v. Johnson*, 999 P.2d 351, 360 (Nev. 2000) (holding that “circumstantial evidence” is “sufficient” to support finding that defendants “misappropriated trade secrets”).

<sup>145</sup> *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269–70 (7th Cir. 1995).

without any proof that the competitor had even stolen any trade secrets.<sup>146</sup> The basis for this finding was practical in nature; the court held that “unless [the employee] possessed an uncanny ability to compartmentalize information, he would necessarily be making decisions . . . by relying on his knowledge of [his former employer’s] trade secrets.”<sup>147</sup>

Other courts have taken a simpler approach. In *Saturn Sys., Inc. v. Militare*, the Colorado Court of Appeals, interpreting Colorado’s Uniform Trade Secret Act, held that no actual use of the stolen information was required.<sup>148</sup> The plaintiff showed that the defendant “knowingly acquired password-protected information by improper means” even though defendant “did not utilize or print any information.”<sup>149</sup> This conclusion was important because the court held that “it is irrelevant whether [the defendant] actually used [plaintiff’s] client and debtor information to compete against [the plaintiff] because . . . there is no requirement in [the Uniform Trade Secret Act] that there be actual use or commercial implementation of the misappropriated trade secret for damages to accrue.”<sup>150</sup> Other courts which have reached the same conclusion, have found that an entity willing to employ improper means to obtain information will certainly use the information gained.<sup>151</sup> While others have reached the same conclusion based only upon the lack of a “use” requirement in the Uniform Trade Secrets Act.<sup>152</sup> To date, no version of the Uniform Trade Secrets Act has been adopted that has specifically required use.<sup>153</sup>

Even if use of the trade secret was required, the facts and circumstances behind trade secret cases nearly always create the presumption of use regardless of what the defendant may claim. For example, it is apparent from the Nevada Gaming Control Board’s Complaint against the Peppermill that the information Ryan Tors gathered was continuously and repeatedly shared with the Peppermill’s top brass.<sup>154</sup> This sharing of information with the executives heavily implies that it was in fact at least reviewed by those persons. Otherwise, there would be no reason for them to continuously accept the information gathered.

Unlike in *Uhlig* and *Minitab*, where the competitor could argue that they

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<sup>146</sup> *Id.* at 1270.

<sup>147</sup> *Id.* at 1269.

<sup>148</sup> *Saturn Sys., Inc. v. Militare*, 252 P.3d at 525; *Dealertrack, Inc. v. Huber*, 460 F. Supp.2d 1177, 1184 (C.D.Cal. 2006).

<sup>149</sup> *Id.* at 525.

<sup>150</sup> *Id.*

<sup>151</sup> *Ajuba Int’l, L.L.C. v. Saharia*, 871 F.Supp.2d 671, 691 (E.D. Mich. 2012).

<sup>152</sup> *Insituform Technologies, Inc. v. Reynolds, Inc.*, 398 F.Supp.2d 1058, 1063 (E.D. Mo. 2005); *Smithfield Ham & Products Co. v. Portion Pac, Inc.*, 905 F. Supp. 346, 350 (E.D. Va. 1995).

<sup>153</sup> Nevada’s Uniform Trade Secret Act allows for evidence of use or distribution. NEV. REV. STAT § 600A.030(2) (2016).

<sup>154</sup> Complaint, *supra* note 2, at 5.

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knew nothing of the misappropriation, the management of the Peppermill admitted directing and condoning Mr. Tors' actions. In the Stipulation for Settlement and Order between the Peppermill and the State Gaming Control Board, the Peppermill admitted that between 2011 and July 12, 2013, the Peppermill management "knew of, approved of, and directed Mr. Tors's conduct of obtaining theoretical hold percentage information from the slot machines of other casinos using a 'reset' key."<sup>155</sup> There is also much more circumstantial evidence than in either *Uhlig* or *Minitab*. Likewise, the conduct in this case is far beyond the "lack of candor" the Seventh Circuit found troubling in *PepsiCo*.<sup>156</sup>

The sheer number of times the data was stolen indicates that the Peppermill had a program and a use for the data. Moreover, Mr. Tors admitted that he had stolen PAR data from the Grand Sierra Resort and other properties on multiple occasions over many years.<sup>157</sup> If the data was taken out of mere curiosity and never used, there was no reason for Mr. Tors to continuously steal it while risking his livelihood each time. Furthermore, the nature of slot machine gambling and the data itself points towards its use. Casinos often portray themselves as the "loosest" in town. The data collected by Mr. Tors allowed the Peppermill to do so without sacrificing any profits they did not need to. In essence, knowing this information eliminated the guess work from operating a slot floor. As the information stolen by Mr. Tors would allow the Peppermill to operate more efficiently, it is arguably illogical to assume they did not use the data to do so.

The PARs at issue here were clearly misappropriated through theft.<sup>158</sup> Moreover, their use is not required to show misappropriation.<sup>159</sup> Even if it was, there exists ample direct and circumstantial evidence that the Peppermill was interested in and had a use for this data.<sup>160</sup>

## VI. INDEPENDENT VALUE OF PAR INFORMATION

Once secrecy has been established, the plaintiff must show that the information has actual or potential independent economic value that flows from it not being generally known.<sup>161</sup> There have been dozens of theories put forth by scholars as tests for "independent value," one of the more common theories

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<sup>155</sup> See *id.*; see also Stipulation for Settlement and Order, *supra* note 15, at 1.

<sup>156</sup> See *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269–70 (7th Cir. 1995).

<sup>157</sup> Complaint, *supra* note 2, at 5–6.

<sup>158</sup> *Id.*

<sup>159</sup> *Ajuba Int'l., L.L.C. v. Saharia*, 871 F.Supp.2d 671, 691 (E.D. Mich. 2012). *Insituform Technologies, Inc. v. Reynolds, Inc.*, 398 F.Supp.2d 1058, 1063 (E.D. Mo. 2005); *Smithfield Ham & Products Co. v. Portion Pac, Inc.*, 905 F. Supp. 346, 350 (E.D. Va. 1995).

<sup>160</sup> See Complaint, *supra* note 2, at 5.

<sup>161</sup> UNIFORM TRADE SECRETS ACT § 1(4) (1985).

is one of “positive value” to the secret holder.<sup>162</sup> Some academics have gone as far as to declare that “positive value” to the holder of the trade secret is the first and most important characteristic of a trade secret.<sup>163</sup> This way of thinking is based on the assumption that positive value is what makes the difference between a trade secret and any other secret. As an example, a recipe for a popular soda has positive value to the corporation that produces the soda. Other secrets, such as a history of tax evasion by key executives, have no positive value. Both would be devastating if released to the public, but only one can be considered a trade secret.

As the embodiment of their strategic plans and decisions, PARs arguably have extraordinary positive value to the corporation. This importance would stem less from what the numbers were at any given time and more from the observable trends over time. These trends could be a kind of formula for success that competitors could easily copy once they had stolen it. Conversely, the Peppermill’s program of secretly gathering PAR information is a classic example of a secret that has no positive value. The PAR information program was devastating to the company when its existence became public because of the punishment it brought to the Peppermill, not because the conduct was no longer secret. This is the central difference between a secret that derives positive value from being secret and the average secret.

Other scholars argue that the value behind a trade secret must be objective and transferrable from one party to another. This means that a secret must have potential value to any party that misappropriates it.<sup>164</sup> For example, if one firm develops a novel technique for manufacturing their product and another firm could utilize this information to streamline their own production it has objective transferrable value. Alternatively, some information only has subjective value.<sup>165</sup> This type of information is only useful to the party that possesses it and it cannot be a trade secret.<sup>166</sup> Examples include a company’s human resource records. These records may be very valuable to a company and its ongoing operations, but would not mean anything to a competitor. The value cannot transfer directly to others. The aphorism “one man’s trash is another man’s treasure,” perfectly describes subjective information.<sup>167</sup> When dealing with trade secrets, one man’s treasure must be another man’s treasure.<sup>168</sup>

One may argue that PARs are objective and transferrable because the misappropriating party could make immediate use of it as soon as the

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<sup>162</sup> Johnson, *supra* note 59, at 567 (discussing that the “holder” of a trade secret may be either the rightful owner of the trade secret or an alleged misappropriator).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 568.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

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information is in their possession. Conversely, one could also argue that PARs are a textbook example of one man's trash being another's treasure. Even within the casino industry, some parties may be completely uninterested in their competitor's PARs, while other parties, like the Peppermill, are willing to go to great lengths to get them.

There are still other possible ways to approach the question of independent value. Some argue that a trade secret must be emancipatable from the trade secret holder.<sup>169</sup> This is similar to transferability and means that the information must stand on legs of its own apart from the creator.<sup>170</sup> For example, a manufacturing process that is more efficient and cost effective than what currently exists would still have value if the company that created it went into bankruptcy tomorrow. It could be sold or licensed by whoever obtained it from the bankruptcy estate. Conversely, plans to roll out a new product might have strategic value to competitors, but it would be worthless if the company was forced to close and the product launch never happened.<sup>171</sup> Spoilability is also sometimes put forth as a measure of independent value.<sup>172</sup> Simply put, if the information is spoiled by disclosure, then it could be considered a trade secret. The rationale behind this theory of independent value is directly tied to the secrecy analysis above. The strongest trade secrets would be subject to both the emancipatable and spoilability requirements.

Evaluated together, these tests weigh both for and against PARs as trade secrets. On the one hand, PARs cannot be emancipated from the property where they originate. If that property's doors close tomorrow, the PARs would be worthless. However, the PAR holder could counter by arguing that PARs are incredibly spoilable. Neither party can effectively argue these factors together and take advantage of the powerful one-two punch that they provide.

All of these theories work primarily in the pages of academic journals and are not discussed frequently in the common law. This makes their application difficult. Courts have however, employed a definition based approach to the words "independent economic value."<sup>173</sup> "Economic Value" is not a difficult term to define. A secret is worth what someone is willing to risk to obtain it. In this case, the Peppermill was willing to risk a great deal to obtain PARs from their competitors. They were willing to risk their gaming license and their entire operation to gain this information, so it clearly must have economic value to them.

On the other hand, the word "independent" is more interesting and less studied. A few courts have summarily attached practical definitions to the word "independent" to make its application easier including the following: the fact

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<sup>169</sup> *Id.* at 569.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 569–70.

<sup>172</sup> *Id.* at 566.

<sup>173</sup> *Id.* at 547.

that someone would pay money to get the information;<sup>174</sup> that the firm holding the information stands to lose money if the information is disclosed;<sup>175</sup> that the information allows the firm having it to gain competitive advantage over firms not having it;<sup>176</sup> that the information's economic value (to the holding firm) comes from its secrecy;<sup>177</sup> and that the information took a substantial amount of time, effort, and/or money to develop.<sup>178</sup>

Some academics have argued that the word "independent" should mean that the information has the same academic value to every firm in the industry for the same reason and that this value exists independently of the information's creator.<sup>179</sup> This definition is effectively the "emancipatability and spoilability" combination test discussed above, and has not yet been applied by any court. However, one court has ruled that there is no trade secret when information is only useful to the plaintiff.<sup>180</sup> While this is not exactly the same as the "emancipatability and spoilability" test, it is in the same ball park.

As this area of trade secret law is so unsettled and the possible tests the court could apply is so varied any determination of who should triumph between the Peppermill and Grand Sierra Resort is pure speculation. It would most likely depend not upon the state of the law, but upon the particular judge, jury, or attorneys arguing the case on any given day. As such, this factor is less important than the others and rarely addressed in detail by the courts.

## VII. DAMAGES

Finally, the Plaintiff in any action for the misappropriation of trade secrets must establish damages. There are multiple ways and means that damages are evaluated and measured. The Uniform Trade Secret Act as adopted by Nevada allows for "damages caused by misappropriation [to] be measured by imposition of liability for a reasonable royalty for a misappropriator's

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<sup>174</sup> *Editions Play Bac, S.A. v. Western Pub. Co.*, No. 92 Civ. 3652 (JSM), 1993 WL 541219, at 7 (S.D.N.Y. Dec. 28, 1993) (holding that the willingness of companies in the industry to pay for a license for the information was sufficient to raise an inference of independent economic value).

<sup>175</sup> *See Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1455 (Cal. App. 2002).

<sup>176</sup> *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1309-10 (9th Cir. 1989) (holding that religious material qualifies as a trade secret if it confers on its owner an economic advantage over competitors).

<sup>177</sup> *E.g. Dodson Int'l. Parts, Inc. v. Altendorf*, 347 F. Supp. 2d 997, 1010 (D. Kan. 2004) (applying Kansas law); *Conseco Fin. Serv. Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 818-19 (8th Cir. 2004) (applying Missouri law); *Strategic Directions Grp., Inc. v. Bristol-Myers Squibb Co.*, 293 F.3d 1062, 1064 (8th Cir. 2002) (applying Minnesota law).

<sup>178</sup> *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 848 (10th Cir. 1993).

<sup>179</sup> Johnson, *supra* note 59, at 571.

<sup>180</sup> *Optic Graphics, Inc. v. Agee*, 591 A.2d 578, 587 (Md. App. 1991).

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unauthorized disclosure or use of a trade secret.”<sup>181</sup> This approach has found support in multiple courts and is a concept appropriated from patent law.<sup>182</sup>

In *University Computing Co. v. Lykes-Youngstown Corp.*, the Fifth Circuit Court explained that the “reasonable royalty standard” measures “the value of the secret to the defendant” and not a more practical literal valuation that would be applied in other types of actions.<sup>183</sup> This case dealt with stolen computer tapes that contained a retail management program called AIMES III.<sup>184</sup> This system was stolen by an employee, who attempted but failed to successfully find a buyer for it.<sup>185</sup> Despite the fact that it was never sold, the court still held that plaintiff was entitled to reasonable royalty for the program, even though “no actual profits exist by which to value the worth to the defendants of what they misappropriated.”<sup>186</sup> The court continued that “the lack of actual profits does not insulate the defendants from being obliged to pay for what they have wrongfully obtained in the mistaken belief their theft would benefit them.”<sup>187</sup> The court ultimately concluded “that the risk of defendants’ venture, using the misappropriated secret, should not be placed on the injured plaintiff, but rather the defendants must bear the risk of failure themselves.”<sup>188</sup>

Since the “reasonable royalty” approach has its roots in patent law, patent cases are instructive when evaluating damages for misappropriating trade secrets.<sup>189</sup> In patent law, when determining “reasonable royalties” actual profit earned after the infringement are only “among the factors to be considered in determining a reasonable royalty.”<sup>190</sup> Further, “the law does not require that an

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<sup>181</sup> NEV. REV. STAT § 600A.050(1) (2016).

<sup>182</sup> See also *Storagecraft Tech. Corp. v. Kirby*, 744 F.3d 1183, 1186 (10th Cir. 2014) (holding language in Uniform Trade Secret Act stating that “[i]n lieu of damages measured by any other methods,” provides that reasonable royalty damages are a “general option”); *Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, No. 08-0840-CV-W-ODS, 2012 WL 3047308, at 3 (W.D. Mo. July 25, 2012) (ruling, under the Uniform Trade Secret Act, that plaintiff may elect to recover the royalty value of its trade secrets in lieu of damages measured by both plaintiff’s loss and defendant’s unjust enrichment).

<sup>183</sup> *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 536 (5th Cir. 1974).

<sup>184</sup> *Id.* at 529.

<sup>185</sup> *Id.* at 533-34.

<sup>186</sup> *Id.* at 536, 540.

<sup>187</sup> *Id.* at 536.

<sup>188</sup> *Id.*

<sup>189</sup> See *Sw. Energy Prod. Co. v. Berry-Helfand*, 411 S.W.3d 581, 609 (Tex. App. 2013) (explaining the “use of a ‘reasonable royalty’ in the calculation of damages in trade secret misappropriation cases was borrowed from patent infringement cases”); *Olson v. Nieman’s, Ltd.*, 579 N.W.2d 299, 310 (Iowa 1998) (explaining that “[g]iven the difficulty of assessing damages in trade secret cases, courts have frequently analogized damages in a trade secret action to those measures of damages usually employed in patent infringement cases” including damages based on “reasonable royalties”).

<sup>190</sup> *Monsanto Co. v. Ralph*, 382 F.3d 1374, 1384 (Fed. Cir. 2004).

infringer be permitted to make a profit.”<sup>191</sup> This would transform the royalty into “a form of compulsory license,” granted “against the will and interest of the person wronged, [and] in favor of the wrongdoer.”<sup>192</sup>

In *Storagecraft Tech. Corp. v. Kirby*, the Tenth Circuit affirmed a large jury verdict for the misappropriation of trade secrets.<sup>193</sup> This royalty award was upheld despite the fact that the Plaintiff did not show that the Defendant made commercial use of the trade secret.<sup>194</sup> The court clarified that any requirement that a party prove commercial use to obtain damages calculated under a reasonable royalty theory were based on “the common law’s requirements . . . well before the adoption of the Uniform Trade Secrets Act.”<sup>195</sup> This is because the Uniform Trade Secrets Act as adopted in every state provides for reasonable royalty damages for cases involving disclosure or use.<sup>196</sup> This approach makes logical sense because of the inherent complexity involved in proving these damages when all of the evidence needed is in the hands of the defendant.<sup>197</sup> This fact alone “may be enough to explain why a state would wish to make reasonable royalty awards generally available to misappropriation plaintiffs” as “it is hardly unknown for the law to resolve ambiguities about the appropriate quantity of damages against the proven wrongdoer rather than his victim.”<sup>198</sup>

Other courts have employed a slightly different method to determine reasonable royalties including “hypothetical negotiations between a willing licensor and willing licensee.”<sup>199</sup> The court in *Fromson* explained:

[the] methodology encompasses fantasy and flexibility; fantasy because it requires a court to imagine what warring parties would have agreed to as willing negotiators; flexibility because it speaks of negotiations as of the time infringement began, yet permits and often requires a court to look to events and facts that occurred thereafter and that could not have been known to or predicted by the hypothesized negotiators.<sup>200</sup>

It is important to note that trade secret cases are often not a “willing licensor/willing licensee” negotiation . . . as the [plaintiff] does not wish to

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Storagecraft Tech. Corp. v. Kirby*, 744 F.3d 1183, 1183, 1192 (10th Cir. 2014).

<sup>194</sup> *Id.* at 1183, 1186.

<sup>195</sup> *Id.* at 1187.

<sup>196</sup> *Id.* at 1186–88.

<sup>197</sup> *Id.* at 1186.

<sup>198</sup> *Id.* at 1186–87.

<sup>199</sup> *Fromson v. W. Litho Plate & Supply Co.*, 853 F.2d 1568, 1574 (Fed. Cir. 1988), *overruled* on other grounds by *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1338, 1341 (Fed. Cir. 2004).

<sup>200</sup> *Fromson*, 853 F.2d at 1575 (Fed. Cir. 1988).

grant a license.”<sup>201</sup> For that reason, the Sixth Circuit held the “setting of a reasonable royalty after infringement cannot be treated . . . as the equivalent of ordinary royalty negotiations among truly ‘willing’” parties because that “view would constitute a pretense that the infringement never happened.”<sup>202</sup> This would also grant competitors the ability to effectively force a “compulsory license” on their competition where “the infringer would have nothing to lose, and everything to gain if he could count on paying only the normal, routine royalty non-infringers might have paid.”<sup>203</sup> To prevent this from occurring, the courts have wide latitude to determine what a proper royalty should be. Courts often consider the “opinion testimony of qualified experts, the [plaintiff’s] relationship with the infringer, and other factors that might warrant higher damages.”<sup>204</sup>

This approach stems from the principle “that every case requires a flexible and imaginative approach to the problem of damages.”<sup>205</sup> The overarching principle is that “[w]here the damages are uncertain, we do not feel that uncertainty should preclude recovery; the plaintiff should be afforded every opportunity to prove damages once the misappropriation is shown.”<sup>206</sup> Courts in other jurisdictions have also applied this same standard.<sup>207</sup> Regardless of whatever other methods are used to determine damages, general royalties remains as a “general option” for the courts to pursue.<sup>208</sup>

PAR data presents an interesting testing ground for the “reasonable royalty” theory of trade secret damages. On one hand, PARS have no obvious commercial value and so any theory of damages based upon royalties would seem unlikely to succeed. Experts could argue that PARs cannot be trade secrets and so it is not possible to sustain damages for their misappropriation. They could cite the fact that no one has ever released the PAR information of their casino floor to a competitor for any kind of royalty. This approach makes logical sense and would likely win the day in any other type of case. However, it is inconsistent with the established case law of trade secrets. It overlooks the fact that trade secret cases are inherently punitive in nature.

The aggrieved party should approach the “reasonable royalty” standard in a

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<sup>201</sup> *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, n. 13 (Fed. Cir. 1995).

<sup>202</sup> *Panduit Corp. v. Stahl Bros. Fibre Works Inc.*, 575 F.2d 1152, 1158 (6th Cir. 1978).

<sup>203</sup> *Id.*

<sup>204</sup> *M. Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1109 (Fed. Cir. 1996).

<sup>205</sup> *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 538 (5th Cir. 1974).

<sup>206</sup> *Id.*

<sup>207</sup> *See Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, No. 08-0840-CV-W-ODS, 2012 WL 3047308, at 3 (W.D. Mo. July 25, 2012) (ruling under the Uniform Trade Secret Act, that plaintiff may elect to recover the royalty value of its trade secrets in lieu of damages measured by both plaintiff’s loss and defendant’s unjust enrichment).

<sup>208</sup> *Storagecraft Tech. Corp. v. Kirby*, 744 F.3d 1183, 1183, 1186 (10th Cir. 2014).

way that is more analogous with trade secret case law. As in *Storage Craft*, where the plaintiff was not required to show evidence of commercial use, it would be impractical to require the plaintiff in a trade secrets action to establish damages when all the evidence required to do so is held by the other side. This problem is addressed by the court's reasoning in *University Computing Co.*, the court pointed out that the "reasonable royalty standard" meant the value of the trade secret to the defendant and not the plaintiff, effectively side stepping the issue entirely.<sup>209</sup> Approaching the issue of damages from this direction allows the PAR holder to articulate the subjective worth of the information and does not require them to prove actual damages. Any other approach would allow a bad actor to hide behind the inherent difficulty of determining the financial value of information such as PARs.

Courts have also evaluated the value of trade secrets and damages based upon what a party is willing to risk to obtain the trade secret. In *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, the Eighth Circuit Court identified "repeated attempts" to secure plaintiff's trade secrets by improper or "reprehensible means" and held that they demonstrated the value of the trade secret to the infringing party.<sup>210</sup> This was one of the key factors that allowed the court to uphold the jury's verdict for \$350,000 in actual damages as reasonable.<sup>211</sup> Other courts have also recently applied this same standard.<sup>212</sup>

The Peppermill's actions show the value of the PAR information and the damages they should face. The Peppermill's system of electronic espionage could have cost the company its gaming license and devastated its reputation throughout the state of Nevada. The Peppermill potentially faced multiple lawsuits — and possibly even criminal charges — at both the state and federal level. It is fair to say that no reasonable person, let alone corporation, would risk these consequences unless they stood to gain something of substantial value. Based upon this inherent value, a party could easily argue that it is entitled to damages for the misappropriation of its PARs.

Other courts have applied other flexible and imaginative approaches to determining damages. For instance, in *Mid-Michigan Computer Sys., Inc. v. Marc Glassman, Inc.*, software used to maintain prescription and billing records for customers was licensed for use between the parties.<sup>213</sup> Part of this

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<sup>209</sup> *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 536 (5th Cir. 1974).

<sup>210</sup> *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 973-74 (8th Cir. 2011).

<sup>211</sup> *Id.* at 971, 977.

<sup>212</sup> *See W. Plains, L.L.C. v. Retzlaff Grain Co. Inc.*, 927 F. Supp. 2d 776, 784-85 (D. Neb. 2013) (holding the improper methods "used by the Individual Defendants to take Confidential Information from [plaintiff] suggest that the information was valuable").

<sup>213</sup> *Mid-Michigan Computer Sys., Inc. v. Marc Glassman, Inc.*, 416 F.3d 505, 507 (6th Cir. 2005).

agreement included a “Source Code Agreement” that made the code behind the program accessible in emergency situations.<sup>214</sup> Glassman, Inc. used this agreement to access the code, copy it, and create new software to replace what they had previously licensed.<sup>215</sup> When Mid-Michigan prevailed in court on their trade secret claims, they were granted damages based upon a liquidated damages clause in the contract.<sup>216</sup> The defendant argued that because the source code agreement wasn’t breached, it was not an accurate measure of damages. The Sixth Circuit held that even though this agreement was not breached, it still provided “a benchmark for estimating what the parties would have agreed to as a fair licensing price.” Had it been unreasonable, they assumed that the parties would not have agreed to it.<sup>217</sup> The court applied this novel approach because “the precise value of a trade secret may be difficult to determine.”<sup>218</sup> However, the overarching principle is that “by sanctioning the acquisition, use, and disclosure of another’s valuable, proprietary information by improper means, trade secret law minimizes ‘the inevitable cost to the basic decency of society when one . . . steals from another.’”<sup>219</sup>

Other less common methods of determining damages in trade secret cases include lost profits and unjust enrichment.<sup>220</sup> Lost profits can be a logical approach to formulating damages as it attempts to formulate the profits that would have been made if no misappropriation had occurred.<sup>221</sup> In *Salsbury Laboratories, Inc. v. Merieux Laboratories, Inc.* the Court took the sales made by the defendant and awarded the plaintiff the profits they would have made if they had made the lost sales.<sup>222</sup> This approach can be difficult logistically as it is not always clear what lost profits would be when the misappropriated information is not a traditional trade secret.<sup>223</sup> Unjust enrichment is a simpler proposition for most courts and provides a remedy when lost profits would be impractical.<sup>224</sup> Neither of these approaches is logically applied to the misappropriation of PAR data and so they will not be discussed at length here.

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 509.

<sup>217</sup> *Id.* at 512.

<sup>218</sup> *Id.* at 510–11.

<sup>219</sup> *DVD Copy Control Ass’n, Inc. v. Bunner*, 75 P.3d 864, 881 (Cal. 2003) (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974)).

<sup>220</sup> UNIFORM TRADE SECRETS ACT § 3(4) (1985).

<sup>221</sup> *See Pioneer Hi-Bred Int’l v. Holden Foundation Seeds*, 35 F.3d 1226, 1243–44 (8th Cir. 1994).

<sup>222</sup> *See Salsbury Laboratories, Inc. v. Merieux Laboratories, Inc.*, 735 F. Supp. 1555, 1573 (M.D. Ga. 1989).

<sup>223</sup> *See generally* Michael A. Rosenhouse, Annotation, *Proper Measure and Elements of Damages for Misappropriation of Trade Secret*, 11 A.L.R. 4TH Art. 11 (1982).

<sup>224</sup> *Id.*

## CONCLUSION: FINDING A WORKABLE SOLUTION

After years of pleadings and discovery, the Grand Sierra Resort and the Peppermill eventually met in court.<sup>225</sup> Ultimately, the jury was not convinced that theoretical hold percentages were trade secrets.<sup>226</sup> However, the Grand Sierra Resort quickly appealed this decision based upon issues that arose throughout litigation and the jury instructions given by the court. This appeal is currently pending before the Nevada Supreme Court with oral arguments to be heard at a later date. This case presents a number of issues of first impression for the court to decide regarding trade secret law in the state of Nevada.

Based upon case law and the reasoning presented above, the Nevada legislature should enshrine in Nevada law several crucial concepts. First, trade secret cases are highly fact-specific and assumptions either way should not be made. Nonetheless, a trade secret must not be quickly ascertainable or be so “self-revealing” as to be ascertainable “at a glance.”<sup>227</sup> Additionally, whether a secret can be reverse engineered is immaterial to this trade secret determination unless the defendant claims to have actually reverse engineered the trade secret instead of obtaining it improperly.<sup>228</sup> Assuming these elements are met, the information must also be protected by common, reasonable security measures to protect the alleged trade secret.<sup>229</sup>

When a trade secret is obtained by “(a) [t]heft; (b) [b]ribery; (c) [m]isrepresentation; (d) [w]illful breach or willful inducement of a breach of a duty to maintain secrecy; (e) [w]illful breach or willful inducement of a breach of a duty imposed by common law, statute, contract, license, protective order or other court or administrative order; and (f) [e]spionage through electronic or

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<sup>225</sup> See Jason Hidalgo, *Jury Rules in Favor of Peppermill in Grand Sierra Resort Trade Secrets Case*, RENO GAZETTE-J. (Jan. 27, 2016), <http://www.rgj.com/story/money/gaming/2016/01/27/jury-clears-peppermill-grand-sierra-resort-trade-secrets-case/79408290/>.

<sup>226</sup> See generally *id.*; see also Complaint, *supra* note 2, at 5 (defining theoretical hold percentages).

<sup>227</sup> See *Motorola, Inc. v. Lemko Corp.*, No. 08 C 5427, 2012 WL 74319, at 19 (N.D. Ill. Jan. 10, 2012) (holding that trade secret protection is applicable assuming the secret does “not involve self-revealing information that any user or passer-by sees at a glance”); *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 919 (Ind. 1993) (specifying that the protected information need not “be unascertainable at all by proper means, but only that they not be readily or quickly ascertainable by such means”); *Nat’l Instrument Labs., Inc. v. Hycel, Inc.*, 478 F. Supp. 1179, 1182 (D. Del. 1979) (stating that secrets that are “ascertainable at a glance” will lose protections); *Smith v. Dravo Corp.*, 203 F.2d 369, 375 (7th Cir. 1953) (holding that cargo container, available on the open market and accessible to defendant for inspection, was a protectable trade secret because there was no evidence that the “construction of which was ascertainable at a glance”).

<sup>228</sup> *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 973 (8th Cir. 2011).

<sup>229</sup> *E. I. duPont deNemours & Co. v. Christopher, et al.*, 431 F.2d 1012, 1015 (5th Cir. 1970).

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other means,”<sup>230</sup> the factfinder should assume a rebuttable presumption that the information constitutes a trade secret and has been misappropriated. Cases should not end as soon as the misconduct is shown, but the presumption should be strong.

Next, the plaintiff should not be required to show that the defendant used the secret or gained financially from it when misappropriation has been established. Ruling otherwise would reward the misappropriator of the secret and place an unfair burden on the wronged party. For these same reasons, the plaintiff should only be required to show that the misappropriated trade secret has positive value to them. The trade secret obviously has value to the party who misappropriated it, so no more analysis should be required.

Finally, as trade secret cases are so fact specific, the finder of fact should be free to determine damages under any theory that is appropriate. This will allow a wide variety of theories to be considered by the judge or jury and for them to reach the most equitable results, and when necessary, take punitive action against the misappropriating party. Likewise, the defendant would still have the appellate courts to turn to for redress if the damages entered against them are unreasonable.

Upon hearing the Jury Verdict, Bill Paganetti, the Peppermill’s General Manager said to the media, “We are extremely pleased with the verdict. Once again, we express our apologies to the gaming community for our mistakes.”<sup>231</sup> As there was no affirmative guidance on the topic at hand in Nevada, a deliberate, multi-year effort to steal valuable information from competitors was reduced to a “mistake” made and was excused with a short apology. If juries are armed with proper instructions based on clearly established caselaw, then they will be empowered and confident enough to return appropriate verdicts. With this adjustment to existing Nevada law, any company that is able to cheat their competitors will not be able to cheat the law and the corporation who was one of the largest slot cheats in gaming history will not escape the consequences of their actions.

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<sup>230</sup> NEV. REV. STAT § 600A.030(1) (2016).

<sup>231</sup> Hidalgo, *supra* note 225.