Blackjack, craps, roulette, poker, and baccarat are table games that have entertained gamblers around the world for hundreds of years. To enjoy blackjack, poker and baccarat, all one needs is a deck of cards and an understanding of the rules. Similarly, craps and roulette can be readily enjoyed by one armed with knowledge of the game and dice or a roulette wheel, respectively. The simplicity of these games likely contributes to their strong popularity and, despite their long histories, they are still played in virtually every casino around the world. The success of these games has inured to the benefit – including through revenue generation – of the proprietors who have made these games available.

While these table games are still widely successful, new table games are constantly being explored, developed, and introduced with the hope that they can capture at least some of the same success (and revenue) as the prior long standing table games. Success in the gaming industry, however, is not only predicted on the popularity of the game itself, but often resides in the ability of a company to obtain a patent and thus exclusively manufacture, market, and sell the game. Accordingly, most companies seek to secure patents for any table and card game developments in the hopes they can avail themselves of these significant benefits. However, the United States Patent and Trademark Office (USPTO) has begun to question whether table games are the proper subject of a patent.

The traditional blackjack, craps, roulette, poker and baccarat games – which all predate the U.S. patent system – are not the subject of U.S. Patents. However, over the last twenty years, the USPTO has awarded patents to inventors for various improvements and variations of these traditional games. For example, over that period, patents have been awarded for brand new table games which incorporate different rules and set ups, improvements on existing table games, and new betting options and/or payouts for existing games. Like with most developments, the owners of these patents...
hope to take advantage of the exclusivity they afford in the
event the patented game experiences success in the
marketplace.

As is known, the patent system will reward any person
with a patent who invents “any new and useful process,
machine, manufacture, or composition of matter, or any
new and useful improvement thereof” as long as the
other conditions for patentability are satisfied. 35 U.S.C.
§101. As indicated above, inventions for new methods
(processes) of playing card games or other table games
have been uniformly accepted by the USPTO for the last
couple of decades, without any objection as to whether
they constitute patentable subject matter. Now, however,
the patentability of table games and card games in the
U.S. is under attack with the USPTO beginning to reject
patent applications directed to table game methods under
the premise that some are directed to non-patentable
subject matter.5

Part of the attack stems from a recent decision of the
United States Court of Appeals for the Federal Circuit
(“CAFC”) – the court having exclusive jurisdiction over
any appeal involving patents. In that case, In re Bilski,
545 F.3d 943 (Fed. Cir. 2008), the CAFC considered
the issues of when method claims qualify for patent
protection in the U.S. In Bilski, the court held that
patent claims directed toward a method of hedging
risks in commodities trading were not patentable as
they constituted an abstract idea. In so doing, the
court relied on the machine-or-transformation test,
which essentially provides that a claim needs to recite
some kind of a machine or some sort of transformation
to qualify for patentability.6 In response to the Bilski
decision, the USPTO has issued guidelines to its
examiners as to how to evaluate whether method claims
constitute patentable subject matter, including the
machine or transformation test.7

While the Bilski decision dealt with business method
patents, the USPTO has taken the position that the
decision also applies to table game methods. Of
particular interest is the fact that the USPTO continues
to issue patents for table and card game methods that
are played in an electronic environment, such as on
an electronic gaming device or over the Internet. The
USPTO apparently believes that an electronic version
of these table games employs a machine (i.e., computer)
and thus electronic table games constitute patentable
subject matter. However, according to the USPTO, the
identical table game method performed in a gaming
floor environment does not satisfy the requirements for
patentability. Thus, a company that invents a new table or
card game can secure a patent for the electronic version,
but not the version played on the casino floor.

A review of the USPTO records indicate that owners of
many patent applications that seek protection for the floor
version of new table games, are of the opinion that the
USPTO has incorrectly denied them patent protection.
Accordingly, many have filed appeals within the USPTO.
In support of these appeals, many claims directed to card
games in a non-electronic environment specifically recite
structure in the form of the playing cards themselves,
which arguably satisfies the machine portion of the
machine-or-transformation test. Alternatively, many
claims directed to card games in a non-electronic
environment recite transformation of the playing cards,
e.g., dealing hands (some face up, some face down),
dealing further cards, drawing cards, and flipping cards
over, any of which arguably satisfy the transformation
portion of the machine-or-transformation test.

Most of these appeals are still pending and are awaiting
a decision. To the extent any decision requires a review
outside of the USPTO, an appeal to the Federal Circuit
is also available. While the belief is that these appeals
ultimately be successful, there are no guarantees; and in
any event, a final resolution still appears to be a couple
years away. In the short term, companies will likely face
challenges securing patent rights and the exclusivity
afforded thereby for new table or card games. To address
this issue, patent applicants could limit the claims to an
electronic environment. Alternatively, patent applicants
should look for creative ways to include structural
elements in the claims, such as the table, betting
implements or other features attendant to the game.

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2. See e.g., U.S. Patent No. 5,997,002.

3. See e.g., U.S. Patent Nos. 6,702,289 and 8,128,472.

4. See e.g., U.S. Patent Nos. 5,788,574 and 6,450,500.

5. This issue applies only to table game methods that are played in gaming establishments, such as casinos, and not the identical method played on an electronic device or the Internet. The USPTO has determined that the electronic versions of table game methods employ structure (i.e., a computer) that is not present in the table game version. Indeed, the USPTO continues to issue patents for inventions related to such games played in an electronic environment.

6. The Supreme Court affirmed the CAFC decision, but held that the machine-or-transformation test is not the sole test for determining patentability as other criteria for making this determination were also available. Bilski v. Kappos, 130 S. Ct. 3218 (2010).