

## Claims Reciting Dice Game Fail Section 101; Judge Mayer's Concurrence Used as a Platform to Critique Idea That the Section 101 Analysis Includes Underlying Issues of Fact

DECEMBER 31, 2018

*In Re: Marco Guldenaar Holding B.V.*, No. 2017-2465 (Fed. Cir. Dec. 28, 2018)

The Federal Circuit affirmed a Patent Trial and Appeal Board (PTAB) final decision that patent claims related to a method of playing a dice game are patent-ineligible under 35 U.S.C. § 101. The claims were directed to the abstract idea of “rules for playing games” and were similar to card-game claims previously held ineligible. Further, the claims’ recital of physical dice having specialized markings did not provide an inventive concept under the printed-matter doctrine.

Judge Mayer penned a lengthy concurrence stating that precedent treats Section 101 as a pure question of law. He took issue with prior panels, for example the *Berkheimer* panel, as “without authority” to treat the analysis as potentially containing “underlying issues of fact” as to whether a claim element is unconventional. In Judge Mayer’s view, “inserting factual determinations into the eligibility decision will make Section 101 a dead letter” and risks pushing the eligibility determination until after trial and “return[ing] us to the era when the patent system stifled rather than promoted the Progress of Science and useful Arts.” With reference to the specific claims at issue on appeal, Judge Mayer stated that games “contribute nothing to the existing body of technological and scientific knowledge” and “should therefore be deemed categorically ineligible for patent.”

[A copy of the opinion can be found here ►](#)

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