

U.S. Customs and Border Protection

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 11 2008)

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

SUMMARY: Presented herein are the copyrights, trademarks, and trade names recorded with U.S. Customs and Border Protection during the month of November 2008. The last notice was published in the CUSTOMS BULLETIN on November 6, 2008.

Corrections or updates may be sent to: Department of Homeland Security, U.S. Customs and Border Protection, Office of Regulations and Rulings, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Delois Johnson, Paralegal, Intellectual Property Rights Branch, (202) 572-8710.

Dated: December 9, 2008

GEORGE MCCRAY, ESQ.,
Chief,
Intellectual Property Rights Branch.

CBP IPR RECORDATIONS - NOVEMBER 2008

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restrictd
TMK 02-00436	11/4/2008	2/23/2019	MATRIX	L'OREAL USA CREATIVE, INC.	No
TMK 04-01100	11/4/2008	7/28/2018	HORSE HEAD DESIGN	PDB SPORTS, LTD.	No
TMK 08-01112	11/4/2008	10/30/2017	CONFIGURATION OF A MUSIC STAND LAMPS	MANHASSET SPECIALTY CO., INC.	No
TMK 08-01125	11/4/2008	7/10/2017	CONFIGURATION OF A BLENDING CONTAINER	VITA-MIX CORPORATION	No
TMK 08-01113	11/4/2008	11/10/2012	ARB	AIRLOCKER, INC.	No
TMK 08-01114	11/4/2008	4/1/2018	AB COASTER	AB COASTER HOLDINGS, INC.	No
TMK 08-01116	11/4/2008	10/3/2016	QUITPRO	PROTEAM, INC.	No
COP 08-00116	11/4/2008	11/4/2028	JUMPIN JIVE DVD COVER	DANCESPORT VIDEOS, LLC	No
COP 08-00117	11/4/2008	11/4/2028	WORKOUT POSTER FOR THE PERFECT PULLUP FITNESS DEVICE	BODYREV, LLC	No
TMK 08-01115	11/4/2008	3/8/2018	ROLAND	AMERICAN ROLAND FOOD CORP.	No
TMK 08-01117	11/4/2008	9/30/2018	AVA & GRACE	OUTRICO, INC.	No
TMK 08-01118	11/4/2008	9/30/2018	AXE OF IRON	JERRY ARLAND HUNSINGER	No
TMK 08-01119	11/4/2008	6/21/2015	ALEXIS BITTAR	ALEXIS BITTAR, INC.	No
TMK 08-01124	11/4/2008	5/6/2018	XPRESSO	FOX ENTERPRISES, INC.	No
COP 08-00122	11/4/2008	11/4/2028	PERFECT PUSHUP GET RIPPED WORKOUT INSTRUCTIONAL DVD	BODYREV, LLC. ADDRESS: 447 MILLER AVENUE, SUITE E, MILL VALLEY, CA, 94941, UNITED STATES	No
COP 08-00121	11/4/2008	11/4/2028	PERFECT PUSHUP POWER 10 ADVANCED	BODYREV, LLC	No
TMK 08-01123	11/4/2008	6/3/2018	PACHRANGA INTERNATIONAL PANIPAT (REGD) ACHAR PACRANGA IN OIL TRADE PIP MARK 5	M/S PACHRANGA SYNDICATE PVT. LTD.	No
COP 08-00118	11/4/2008	11/4/2028	CORE RHYTHMS DANCE EXERCISE PROGRAM SALSA BLAST	DANCESPORT VIDEOS, LLC,	No
TMK 08-01121	11/4/2008	9/4/2011	LSI	LEGACY SPORTS INTERNATIONAL LLC	No
COP 08-00120	11/4/2008	11/4/2028	PERFECT PUSHUP POWER 10 WORKOUT	BODYREV, LLC	No
COP 08-00119	11/4/2008	11/4/2028	HOMEDICS MINI	HOMEDICS, INC..	No
TMK 08-01122	11/4/2008	8/1/2016	LOGO FOR SHAXI	GUANGDONG YIHETANG PHARMACEUTICAL CO., LTD.	No
TMK 08-01120	11/4/2008	1/24/2016	CONFIGURATION OF A SPHERE WITH A CIRCUMFERENTIAL STRIPE	DENNIS GREEN DESIGN GROUP, LTD.	No
TMK 03-00274	11/19/2008	10/13/2018	DESIGN	MOSCHINO S.P.A.	No
TMK 03-00284	11/19/2008	10/13/2018	DESIGN	MOSCHINO S.P.A.	No
TMK 05-00910	11/19/2008	9/12/2018	A FILLED TRANSPARENT BOX WITH OVERLAP LABEL	FERRERO S.P.A.	No

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IPR No.	Applicant	Design Description	Effective Date	Registration Date	Design Type	Design Status
TMK 07-00322	COMPAGNIE DES MONTRES LONGINES	LONGINES & DESIGN	10/28/2018	11/19/2008	No	No
TMK 08-01126	FRANLILLON SA	FUSION	5/30/2016	11/19/2008	No	No
COP 08-00123	THE GILLETTE COMPANY	CAT SCISSORS	11/19/2028	11/19/2008	No	No
COP 08-00124	LINDA CONNORS	SQUIRREL SCISSORS	11/19/2028	11/19/2008	No	No
COP 08-00125	LINDA CONNORS	SEROSTIM PATIENT INFORMATION AND PACKAGING	11/19/2028	11/19/2008	No	No
TMK 08-01127	ARES TRADING S.A.	PARADISE MANGO RUM LIQUEUR	10/21/2018	11/19/2008	No	No
TMK 08-01128	DESTILERIA LIMITUACO	BASE-X	9/9/2018	11/19/2008	No	No
TMK 08-01129	BASE-X, INC.	EXPEDITIONARY EXCELLENCE	9/2/2018	11/19/2008	No	No
TMK 08-01130	BASE-X, INC.	SKEYS	9/30/2018	11/19/2008	No	No
TMK 08-01131	SKEYS UNLIMITED CORP.	DESIGN (WRITING INSTRUMENT)	7/29/2018	11/19/2008	No	No
TMK 08-01145	SANFORD/SARPPIE	OVERLAPPING CROSS DESIGNS	2/19/2018	11/19/2008	No	No
TMK 08-01173	CHROME HEARTS LLC	OVERLAPPING CROSS DESIGNS	2/19/2018	11/19/2008	No	No
TMK 08-01172	CHROME HEARTS LLC	DESIGN (CROSS WITH VINE DESIGNS)	7/24/2017	11/19/2008	No	No
TMK 08-01171	CHROME HEARTS LLC	DESIGN (DAGGER WITH VINE DESIGNS)	2/19/2018	11/19/2008	No	No
TMK 08-01170	CHROME HEARTS LLC	C AND H IN OLD ENGLISH FONT	2/26/2018	11/19/2008	No	No
TMK 08-01169	FILA LUXEMBOURG S.A.R.L.	F [FILA]	9/22/2017	11/19/2008	No	No
TMK 08-01168	CHROME HEARTS LLC	DESIGN ONLY	2/19/2018	11/19/2008	No	No
TMK 08-01154	CHROME HEARTS LLC	FLORAL CROSS DESIGN	2/26/2018	11/19/2008	No	No
TMK 08-01155	CHROME HEARTS LLC	DESIGN (CELTIC CROSS DESIGN)	2/26/2018	11/19/2008	No	No
TMK 08-01156	CHROME HEARTS LLC	OVERLAPPING CROSS DESIGNS	2/26/2018	11/19/2008	No	No
TMK 08-01157	CHROME HEARTS LLC	CHROME HEARTS AND DESIGN	3/19/2018	11/19/2008	No	No
TMK 08-01158	AMERICH CORPORATION	BEL AIR	7/23/2015	11/19/2008	No	No
TMK 08-01140	CINCINNATI BENGALS, INC.	BENGALS	9/9/2018	11/19/2008	No	No
TMK 08-01159	NEW WORLD MANAGEMENT INC.	TEAM TINS	10/7/2018	11/19/2008	No	No
TMK 08-01160	CHROME HEARTS LLC	CHROME HEARTS	8/12/2018	11/19/2008	No	No
TMK 08-01161	KOOPA, LLC	KOOPA	9/4/2017	11/19/2008	No	No
TMK 08-01144	BUFFALO BILLS, INC.	PANTHERS	10/21/2018	11/19/2008	No	No
TMK 08-01138	PANTHERS FOOTBALL LLC	APEX MICROTECHNOLOGY	8/1/2010	11/19/2008	No	No
TMK 08-01131	SPIN MASTER LTD.	BAKUGAN	8/19/2018	11/19/2008	No	No
TMK 08-01162	QUICKSILVER, INC.	MOUNTAIN WAVE DEVICE LOGO	8/29/2017	11/19/2008	No	No
COP 08-00128	SPIN MASTER LTD. D.B.A. SPIN MASTER	THEM ALL POSTER	11/19/2028	11/19/2008	No	No
TMK 08-01163	QUICKSILVER, INC.	HEART DEVICE LOGO	7/22/2017	11/19/2008	No	No
TMK 08-01142	BAYER HEALTHCARE LLC	ADVANTAGE	3/11/2017	11/19/2008	No	No
TMK 08-01137	THE GILLETTE COMPANY	M3POWER	1/31/2016	11/19/2008	No	No
TMK 08-01143	FILA LUXEMBOURG S.A.R.L.	FILA SPORT	3/24/2018	11/19/2008	No	No
TMK 08-01164	MEMPER DISTRIBUTORS, INC.	RABANO YODADO	8/24/2014	11/19/2008	No	No

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TMK 08-01141	11/19/2008	9/23/2018	CAROLINA PANTHERS UNI/O	PANTHERS FOOTBALL LLC MICROCHIP TECHNOLOGY INCORPORATED	No
TMK 08-01132	11/19/2008	8/19/2018			No
TMK 08-01133	11/19/2008	1/6/2018	K	MICROCHIP TECHNOLOGY INCORPORATED	No
TMK 08-01134	11/19/2008	7/18/2015	KEELOQ	MICROCHIP TECHNOLOGY INCORPORATED	No
TMK 08-01165	11/19/2008	11/17/2017	FUSION	FILA LUXEMBOURG S.A.R.L.	No
TMK 08-01135	11/19/2008	11/7/2015	PICSTART	MICROCHIP TECHNOLOGY INCORPORATED	No
TMK 08-01166	11/19/2008	1/1/2018	USA SOLAR	USA SOLAR & WIND INC.	No
COP 08-00129	11/19/2008	11/19/2028	MULTI BALL BRACELET WITH BS FLEUR CHARM : NO. 1	CHROME HEARTS, INC.	No
COP 08-00130	11/19/2008	11/19/2028	CHARM: ANGEL MEDAL	CHROME HEARTS, INC.	No
COP 08-00133	11/19/2008	11/19/2028	CLASSIC OVAL STAR RING	CHROME HEARTS, INC.	No
COP 08-00132	11/19/2008	11/19/2028	CLASSIC WIDE OVAL RING	CHROME HEARTS, INC.	No
COP 08-00126	11/19/2008	11/19/2028	STAR PENDANT	CHROME HEARTS, INC.	No
TMK 08-01146	11/19/2008	7/8/2018	BARKING SHEEP	SEWALL ROAD PARTNERS, LLC	No
TMK 08-01148	11/19/2008	9/23/2018	CROSSKEYWORDS	CHRIS DELELLIS	No
TMK 08-01150	11/19/2008	4/4/2016	BATTLE BRAWLERS	SPIN MASTER LTD.	No
TMK 08-01147	11/19/2008	7/1/2018	DESIGN	SEWALL ROAD PARTNERS, LLC	No
COP 08-00127	11/19/2008	11/19/2028	BAKUGAN BATTLE BRAWLERS LOGO 1.0.	SPIN MASTER LTD. D.B.A. SPIN MASTER	No
TMK 08-01136	11/19/2008	7/15/2013	PARAMOUNT AND DESIGN	PARAMOUNT PICTURES CORPORATION	No
COP 08-00131	11/19/2008	11/19/2028	CURVED NOTEBOOK COMPUTER	DAVID MICHAEL PROKOP	No
TMK 08-01167	11/19/2008	5/10/2017	FANTASIA	FANTASIA INDUSTRIES CORPORATION	No
TMK 08-01153	11/19/2008	10/28/2018	SLIPKNOT AND DESIGN	STAFFORD MANUFACTURING CORP.	No
TMK 08-01152	11/19/2008	9/30/2018	DI BRUNO	BRUNO D'ALFONSO	No
TMK 08-01149	11/19/2008	9/2/2018	INSTYLER	TRE MILANO L.L.C.	No
TMK 93-00111	11/21/2008	8/30/2018	TREE DESIGN LOGO	TIMBERLAND COMPANY, THE	No
TMK 98-00452	11/21/2008	10/11/2018	BEAR DOWN	ARIZONA BOARD OF REGENTS ON BEHALF OF THE UNIVERSITY OF ARIZONA	Yes
TMK 98-00455	11/21/2008	9/20/2018	ARIZONA WILDCATS AND DESIGN	ARIZONA BOARD OF REGENTS ON BEHALF OF THE UNIVERSITY OF ARIZONA	Yes
TMK 96-00676	11/21/2008	11/8/2018	SMITH & WESSON	SMITH & WESSON CORP.	No
TMK 05-00261	11/21/2008	11/3/2018	HELMET DESIGN	BUCCANEERS LIMITED PARTNERSHIP	No
TMK 06-00743	11/21/2008	11/10/2018	DESIGN ONLY (FLAG WITH SKULL)	BUCCANEERS LIMITED PARTNERSHIP	No
TMK 08-01174	11/21/2008	2/20/2017	ZERO GRAVITY	SPIN MASTER LTD.	No
COP 07-00361	11/21/2008	11/21/2028	BYZANTINE ALHAMBRA COLLECTION	VAN CLEEF & ARPELS S.A.	No

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TMK 07-00841	11/21/2008	6/27/2016	AFFLICTION	AFFLICTION, INC.	No
COP 07-00286	11/21/2008	11/21/2028	MAGIC ALHAMBRA COLLECTION	VAN CLEEF & ARPELS S.A.	No
TMK 08-01178	11/21/2008	4/15/2013	CHROME HEARTS PLUS A BANNER DESIGN	CHROME HEARTS LLC	No
TMK 08-01181	11/21/2008	2/19/2018	SP	WICKED FASHIONS, INC.	No
TMK 08-01177	11/21/2008	2/19/2018	PUFFUNS	GLYNN INCORPORATED	No
TMK 08-01182	11/21/2008	4/15/2017	DESIGN WICKED FASHIONS	WICKED FASHIONS, INC.	No
TMK 08-01175	11/21/2008	7/24/2017	WALL CLIMBER	SPIN MASTER LTD.	No
TMK 08-01176	11/21/2008	4/26/2015	S SPIN MASTER AND DESIGN	SPIN MASTER LTD.	No
TMK 08-01183	11/21/2008	3/4/2018	CONFIGURATION OF FIVE HEXAGONS	WICKED FASHIONS, INC.	No
TMK 08-01180	11/21/2008	4/15/2017	SOUTHPOLE WITH DESIGN	WICKED FASHIONS, INC.	No
TMK 08-01179	11/21/2008	8/8/2016	STYLIZED Y BRIGHAM YOUNG	BRIGHAM YOUNG UNIVERSITY	No
TMK 08-01184	11/21/2008	10/14/2018	MY HERO STOCKING CO.	SUSAN L KRISTENSEN	No

Total Records: 106
 Date as of: 12/2/2008

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, December 10, 2008

The following documents of U.S. Customs and Border Protection (“CBP”), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
*Executive Director,
Regulations and Rulings
Office of International Trade.*

**PROPOSED MODIFICATION OF RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE ADMISSIBILITY OF CERTAIN CUBE PUZZLES**

AGENCY: U.S. Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of proposed revocation of two ruling letters and treatment relating to the admissibility of certain cube puzzles.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by Section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) proposes to revoke two ruling letters relating to the admissibility of certain cube puzzles that fall within the scope of United States International Trade Commission Exclusion Order 337–TA–112. CBP also proposes to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before January 25, 2009.

ADDRESS: Written comments are to be addressed to Customs and Border Protection, Office of International Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W. (Mint Annex), Washington, D.C. 20229. Submitted comments may be inspected at Customs and Border Protection, 799 9th Street N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Dean Cantalupo, Intellectual Property Rights and Restricted Merchandise Branch: (202) 325-0085.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993 Title VI, (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625 (c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625 (c)(1)), this notice advises interested parties that CBP intends to revoke two ruling letters pertaining to certain cube puzzles falling within the scope of United States International Trade Commission (USITC) Exclusion Order 337-TA-112. Although in this notice, CBP is specifically referring to the revocation of Headquarters Ruling Letter (HQ) HQ477375, dated June 24, 2005 (Attachment A) and Headquarters Ruling Letter (HQ) HQ W480158, dated November 13, 2006 (Attachment B), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the two identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625 (c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625 (c)(2)), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions

should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In HQ 477375, set forth in Attachment A to this document, CBP determined that the subject merchandise, the "Intellectual Cube" and the "Magic Cube", was determined to be non infringing and therefore admissible. It is now CBP's position that the subject "Intellectual Cube" is admissible, and the "Magic Cube" is not admissible, as the "Magic Cube" falls within the scope of USITC Exclusion Order 337-TA-112.

In HQ W480158, set forth in Attachment B to this document, CBP determined that the subject merchandise, the "Magic Cube", was determined to be non infringing and therefore admissible. It is now CBP's position that the subject "Magic Cube" is not admissible, as the "Magic Cube" falls within the scope of USITC Exclusion Order 337-TA-112.

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke both HQ 477375 and HQ W480158, and revoke or modify any other ruling not specifically identified, in order to reflect the proper status of admissibility of the subject merchandise according to the analysis contained in proposed Headquarters Ruling Letter HQ H027746, set forth as Attachment C to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

DATED: December 2, 2008

JEREMY BASKIN,
Director,
Border Security and Trade Compliance Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ 477375
June 24, 2005
TMK-01-RR:IT:IP 477375 RSB
CATEGORY: Trademarks

GARY D. SWEARINGEN, ESQ.
GARVEY, SCHUBERT, BARER
Second & Seneca Bldg.
1191 Second Avenue, 18th Floor
Seattle, Washington 98101-2939

RE: Toymith Magic Cube; East Sheen's 4x4x4 Four-Layer Intellectual Cube; Seven Towns' Rubik's Cube; U.S. Patent & Trademark Office Registration No. 1,265,094; U.S. Customs & Border Protection Recordation No. TMK 04-00292; Request for Infringement Determination

DEAR MR. SWEARINGEN:

This letter is in response to your letter dated January 26, 2005, requesting an infringement determination. You assert that Toymith's Magic Cube ("Magic Cube") and East Sheen's 4x4x4 Four-Layer Intellectual Cube ("Intellectual Cube") do not infringe the Seven Towns' Rubik's Cube (Rubik's Cube) design trademark (U.S. Patent & Trademark Office [USPTO] Registration No. 1,265,094; U.S. Customs & Border Protection [CBP] Recordation No. TMK 04-00292) and request a ruling to confirm your assertion.

FACTS:

In your January 26, 2005 letter, you state that you are the attorneys for Toy Investments, Inc. d/b/a Toymith, owners of Magic Cube. You requested an infringement determination as to whether Magic Cube infringes on the Rubik's Cube design trademark (USPTO Registration No. 1,265,094; CBP Recordation No. TMK 04-00292) owned by Seven Towns, Ltd. ("Seven Towns"). You also state that although Toymith does not own Intellectual Cube, it is interested in importing the product and as such you requested an infringement determination as to whether that product infringes the same Rubik's Cube trademark.

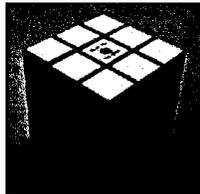
In your letter you discuss the differences in the packaging of the products. As product packaging generally relates to trade dress, this office will not issue a determination on that basis, but will rather focus on whether the suspect items violate existing trademarks.

In your letter, you contend that there can be no trademark rights in the cube itself as "the claims of the expired patent are evidence of the functional aspects of the toy". In addition, you contend that the Rubik's Cube design trademark is color specific, and therefore, CBP must rely on the colors of the trademark in determining infringement. You provided this office with a sample Rubik's Cube, Magic Cube and Intellectual Cube for examination.

Protected Work: Rubik's Cube

The protected Rubik's Cube trademark is employed in a three-dimensional twist cube puzzle. The trademark certificate describes the mark as follows: "The mark consists of a black cube having nine color patches on

each of its six faces with the color patches on each face being the same and consists of the colors red, white, blue, green, yellow and orange.” An image of the protected Rubik’s Cube follows.



Digital Photograph of the Protected Rubik’s Cube

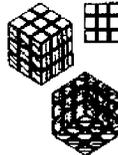
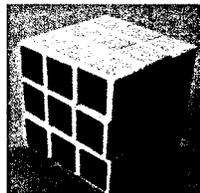


Image of the Protected Rubik’s Cube as it appears on the USPTO Trademark Electronic Search System

Magic Cube

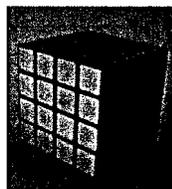
Magic Cube is a three-dimensional white twist cube puzzle, which features nine color patches on each of its six faces with the color on each face being the same and consists of the colors fuchsia, aqua, black, lime green, yellow and pink. An image of the Magic Cube will follow.



Digital Photograph of Magic Cube

Intellectual Cube

Intellectual Cube is a three-dimensional black twist cube puzzle which features sixteen color patches on each of its six faces with the color on each face being the same and consists of the colors red, green, blue, fuchsia, yellow and white. An image of Intellectual Cube will follow.



Digital
Photograph of
Intellectual Cube

ISSUE:

The first issue is whether Magic Cube infringes on the Rubik's Cube design trademark (USPTO Registration No. 1,265,094; CBP Recordation No. TMK 04-00292) owned by Seven Towns. The second issue is whether Intellectual Cube infringes on the same Rubik's Cube design trademark.

LAW AND ANALYSIS:

Insofar as CBP administration of the trademark laws to protect against the importation of goods bearing counterfeit marks is concerned, section 526(e) of the Tariff Act of 1930, as amended (19 U.S.C. §1526(e)) provides that merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) that is imported into the United States in violation of 15 U.S.C. §1124 shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violation of customs laws, where the trademark in question is registered with the USPTO and recorded with CBP. 19 U.S.C. §1526(e). See also, 19 C.F.R. §133.21(b). The term "counterfeit" is defined as "a spurious mark that is identical with, or substantially indistinguishable from a registered mark." 15 U.S.C. §1127. See also, 19 C.F.R. §133.21(a).

CBP also maintains authority to prevent the importation of goods bearing "confusingly similar" marks which, although neither identical nor substantially indistinguishable from protected marks, are violative nonetheless. 15 U.S.C. §1124. See also, 19 C.F.R. §133.22.

In either regard, as a general proposition, the Lanham Act provides for a claim of trademark infringement when a trademark holder can demonstrate that the use of its trademark by another is "likely to confuse" consumers as to the source of a product. Indeed, statutory language of the Lanham Act specifically prohibits the use of marks that are "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association." (See, Lanham Act, sections 1-45, 15 U.S.C. 1051-1127, also, e.g., Section 43(a), 15 U.S.C. 1125(a); *Soltex Polymer Corp. v. Fortrex Industries*, 832 F.2d 1325 [2d Cir. 1987]). We note that a plaintiff in a trademark infringement case need not establish that all or even most customers are likely to be confused. Plaintiff need only prove that an appreciable number of ordinarily prudent consumers will be confused. *Estee Lauder, Inc. v. The Gap, Inc.*, 932 F. Supp. 595 (S.D.N.Y. 1996).

The term "source" is construed liberally. That is, "likelihood of confusion" relates to *any* type of confusion, including confusion of source, confusion of affiliation, confusion of connection; or confusion of sponsorship. (See,

McCarthy, Trademarks and Unfair Competition, Section 23:8 (Rel. 2 6/97). Lanham Act, Section 43(a). (See also, *Champions Golf Club v. Champions Golf Club*, 78 F.3d 1111, (6th Cir., 1996); *Eclipse Associates, Ltd. v. Data General Corp.*, 894 F.2d 434, (“A U.S. District Court’s primary task, is to make factual determinations as to whether the public would likely be deceived or confused by similarity of the marks *as to source, relationship or sponsorship.*”)(Emphasis added). In addition, the court in *Merchant & Evans, Inc. v. Roosevelt Bldg. Products Co. Inc.*, 963 F.2d 628, (3d Cir. 1992) stated that trademark infringement only occurs when use sought to be enjoined is likely to confuse purchasers *with respect to such things as product’s source, its endorsement by plaintiff, or its connections with plaintiff.* (Emphasis added).

In order to establish “likelihood of confusion,” courts in each of the Federal Circuits have adopted the test first laid out in *Polaroid v. Polarad Electronics Corp.*, 287 F.2d 492, (2d Cir), *cert. denied*, 368 U.S. 820, 7 L. Ed. 2d 25, 82 S. Ct. 36 (1961). (See also, *White v. Samsung Electronics America Inc.*, 971 F.2d 1395, *amended, rehearing denied*, 989 F.2d 1512, *cert. denied*, 113 S.Ct 2443 (9th Cir. 1992); *E.A. Engineering, Science and Technology Corp. v. Environmental Audit, Inc.*, 703 F.Supp. 853 (C.D.Cal 1989); *Escerzio v. Roberts*, 944 F.2d 1235, *rehearing denied* (6th Cir. 1991). According to *Polaroid*, an analysis of factors including, but not limited to, the strength of the mark, the similarity of the marks, the proximity of the products, actual confusion and sophistication of the buyers are germane to establishing likelihood of confusion. Courts have been careful to note that no single *Polaroid* factor is more important than any other and that not all factors need be considered. Notwithstanding, in the vast majority of trademark infringement cases, “similarity of the marks” has been a factor upon which most courts have placed great emphasis.

In turning to the items at issue herein, in your first argument you assert that there can be no trademark rights in the cube itself. In support of this argument, you state that, as the patent for the Rubik’s Cube design has lapsed, the cube itself and its functional aspects are not at issue. Also, you quote from the Supreme Court case, *Traffix Devices, Inc. v. Marketing Displays, Inc.*, which states that “trade dress protection must subsist with the recognition that in many instances there is no prohibition against copyright goods and products,” apparently to support your contention that the appearance of the item at issue cannot be protected. *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 523 U.S. 23, 58 USPQ2d 1001, 1004–1005 (2001).

In response to those arguments, we note that in *Traffix*, in order to receive protection for its trade dress, respondent had the burden of proving that the matter sought to be protected was non-functional and distinctive. *Id.* The distinction between *Traffix* and the case at issue is that there exists both a valid trademark registration on the U.S. Patent and Trademark Office Principal Register and a recordation of that trademark with CBP again, which covers a black cube having nine color patches on each of its six faces with the color patches on each face being the same and consists of the colors red, white, blue, green, yellow and orange. As such, a valid trademark for the design of the cube exists in this case and it must be afforded protection.

In turning to the first item, Magic Cube, both Magic Cube and the Rubik’s Cube are three-dimensional puzzles consisting of nine color patches on each of the six faces with the color patches on each face being the same. The two cubes also are similar in that both include the color yellow on one face, al-

though the tone of the yellow on one differs from that of the other. The two items, however, differ in that Magic Cube is a white cube while Rubik's Cube is a black cube. Also, the colors used in the Magic Cube design are fuchsia, aqua, black, lime green, yellow and pink while the colors used in the Rubik's Cube design trademark are red, blue, green, yellow, orange and white.

While the structural aspects of the trademark, i.e. the number of faces and color patches constitute important features of the mark, because the protected trademark is color specific, the color component of the trademark must be given appropriate consideration. Although the structural aspects of the protected Rubik's Cube and Magic Cube are similar, each of the colors used on the Magic Cube, from the cube itself to each of the colors on the faces, differ from those used in the Rubik's Cube trademark. In examining the two marks, the white block structure and the use of entirely different colors on Magic Cube diminishes the likelihood of consumer confusion so much so as to render it non-violative of the protected mark. As to the second item, Intellectual Cube is a three-dimensional puzzle with six faces similar to the Rubik's Cube, but it differs from the Rubik's Cube in that it consists of sixteen color patches on each face in contrast to the nine color patches in the Rubik's Cube trademark. The Intellectual Cube design utilizes all but one of the same colors as the Rubik's Cube: red, green, blue (the shade of the blues differ), yellow and white. However, the structural elements of the Intellectual Cube differ substantially from the protected mark. Due to its sixteen color patches on each face in contrast to the Rubik's Cube nine colors patches on each face, combined with the fact that not all of the colors used on Intellectual Cube are the same, Intellectual Cube may be easily distinguished from the Rubik's Cube. As such, the mark used on Intellectual Cube is not likely to confuse consumers, and therefore, it does not infringe the protected trademark at issue.

HOLDING:

Based on the foregoing, neither Magic Cube nor Intellectual Cube infringes the Rubik's Cube design trademark (USPTO Registration No. 1,265,094; CBP Recordation No. TMK 04-00292).

GEORGE FREDERICK MCCRAY, ESQ.,
Chief,
Intellectual Property Rights Branch.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
HQ W480158
November 13, 2006
TMK-01-RR:BSTC:IP 480158 KMR
CATEGORY: TRADEMARKS

GARY D. SWEARINGEN, ESQ.
GARVEY, SCHUBERT, BARER
Second & Seneca Bldg.
1191 Second Avenue, 18th Floor
Seattle, Washington 98101-2939

RE: Toysmith Magic Cube; Seven Towns' Rubik's Cube; U.S. Patent & Trademark Office Registration No. 1,265,094; U.S. Customs & Border Protection Recordation No. TMK 04-00292; Ruling Request

DEAR MR. SWEARINGEN:

This letter is in response to your letter dated October 11, 2006, resubmitting your request of for a ruling, originally dated March 21, 2005. In your March 21, 2005 request, you assert that four samples of Toysmith's Magic Cube ("Magic Cube") do not infringe the Seven Towns' Rubik's Cube ("Rubik's Cube") design trademark (U.S. Patent & Trademark Office [USPTO] Registration No. 1,265,094; U.S. Customs & Border Protection [CBP] Recordation No. TMK 04-00292) and request a ruling to confirm your assertion.

FACTS:

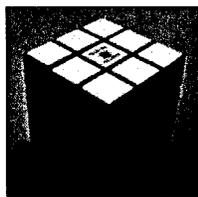
In your March 21, 2006 letter, enclosed with your October 11, 2006 letter, you state that you are the attorneys for Toy Investments, Inc. d/b/a Toysmith, owners of Magic Cube. You requested a ruling as to whether four distinct Magic Cube samples infringe on the Rubik's Cube design trademark (USPTO Registration No. 1,265,094; CBP Recordation No. TMK 04-00292) owned by Seven Town's, Ltd. ("Seven Towns"). You enclosed the four distinct Magic Cube samples with your request.

In your letter you discuss the differences in the packaging of the products. As product packaging generally relates to trade dress, this office will not issue a determination on that basis, but will rather focus on whether the suspect items violate existing trademarks.

In your letter you point out that none of the four samples is on a black or dark-colored cube, none bear the colors of the Seven Towns trademark registration, of those colors only white is on any of the samples, and one of the cubes includes a laser-cut design that differentiates the colors. Further, you point out that the four sample cubes are not materially different than the sample submitted January 2005, which was found non-infringing in a June 24, 2005 infringement determination. Finally, you enclose your letter of January 26, 2005, which you claim "provides a discussion of [your] view of the legal framework in which these toy products should be viewed, including discussion of the expired patent and that trademark cannot protect the functional aspects of the cubes."

Protected Work: Rubik's Cube

The protected Rubik's Cube trademark is embodied by a three-dimensional twist cube puzzle. The trademark certificate describes the mark as follows: "The mark consists of a black cube having nine color patches on each of its six faces with the color patches on each face being the same and consists of the colors red, white, blue, green, yellow and orange." An image of the protected Rubik's Cube follows.



Digital Photograph of the Protected Rubik's Cube

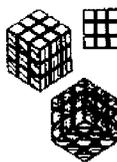
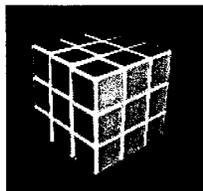


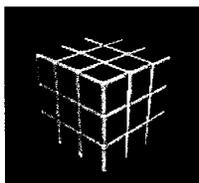
Image of the Protected Rubik's Cube as it appears on the USPTO Trademark Electronic Search System

Magic Cube Sample 1

Magic Cube Sample 1 is a three-dimensional white twist cube puzzle, featuring nine color patches on each of its six faces, where the color patches on each face are the same. The colors consist of fuchsia, light blue, aqua, lime green, yellow and pink. Below are images of Magic Cube Sample 1.



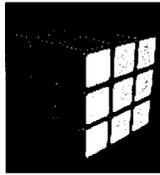
Magic Cube Sample 1: fuchsia, lime green, and yellow sides



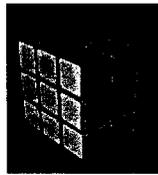
Magic Cube Sample 1: pink, light blue, and aqua sides

Magic Cube Sample 2

Magic Cube Sample 2 is a three-dimensional red twist cube puzzle, featuring nine color patches on each of its six faces, where the color patches on each face are the same. The colors consist of fuchsia, aqua, white, lime green, yellow, and pink. Below are images of Magic Cube Sample 2.



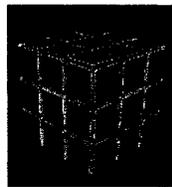
Magic Cube Sample 2:
lime green, pink, and white
sides



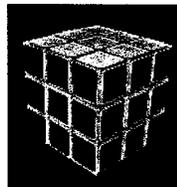
Magic Cube Sample 2:
aqua, yellow, and fuchsia
sides

Magic Cube Sample 3

Magic Cube Sample 3 is a three-dimensional bright green twist cube puzzle, featuring nine color patches on each of its six faces, where the color patches on each face are the same. The colors consist of fuchsia, aqua, purple, orange, yellow, and pink. Below are images of Magic Cube Sample 3.



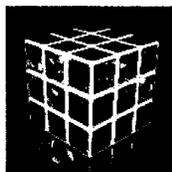
Magic Cube Sample 3:
aqua, pink, and orange
sides



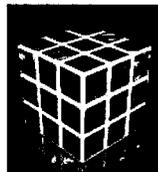
Magic Cube Sample 3:
yellow, purple, and pink
sides

Magic Cube Sample 4

Magic Cube Sample 4 is a three-dimensional grey twist cube puzzle, featuring nine color patches on each of its six faces, where the color patches on each face are the same. The colors consist of a reflective laser-cut design based on the colors blue, purple, green, yellow, silver, and rose. Below are images of Magic Cube Sample 4.



Magic Cube Sample 4:
purple, silver, and green
sides



Magic Cube Sample 4:
rose, blue, and yellow
sides

ISSUE:

The issue is whether any of the Magic Cube samples infringes on the Rubik's Cube design trademark (USPTO Registration No. 1,265,094; CBP Recordation No. TMK 04-00292) owned by Seven Towns.

LAW AND ANALYSIS:

Insofar as CBP administration of the trademark laws to protect against the importation of goods bearing counterfeit marks is concerned, section 526(e) of the Tariff Act of 1930, as amended (19 U.S.C. §1526(e)) provides that merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) that is imported into the United States in violation of 15 U.S.C. §1124 shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violation of customs laws, where the trademark in question is registered with the USPTO and recorded with CBP. 19 U.S.C. §1526(e). See also, 19 C.F.R. §133.21(b). The term "counterfeit" is defined as "a spurious mark that is identical with, or substantially indistinguishable from a registered mark." 15 U.S.C. §1127. See also, 19 C.F.R. §133.21(a).

CBP also maintains authority to prevent the importation of goods bearing "confusingly similar" marks which, although neither identical nor substantially indistinguishable from protected marks, are violative nonetheless. 15 U.S.C. §1124. See also, 19 C.F.R. §133.22.

In either regard, as a general proposition, the Lanham Act provides for a claim of trademark infringement when a trademark holder can demonstrate that the use of its trademark by another is "likely to confuse" consumers as to the source of a product. Indeed, statutory language of the Lanham Act specifically prohibits the use of marks that are "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association." (See, Lanham Act, sections 1-45, 15 U.S.C. 1051-1127, also, e.g., Section 43(a), 15 U.S.C. 1125(a); *Soltex Polymer Corp. v. Fortrex Industries*, 832 F.2d 1325 [2d Cir. 1987]). We note that a plaintiff in a trademark infringement case need not establish that all or even most customers are likely to be confused. Plaintiff need only prove that an appreciable number of ordinarily prudent consumers will be confused. *Estee Lauder, Inc. v. The Gap, Inc.*, 932 F. Supp. 595 (S.D.N.Y. 1996).

The term "source" is construed liberally. That is, "likelihood of confusion" relates to *any* type of confusion, including confusion of source, confusion of affiliation, confusion of connection; or confusion of sponsorship. (See, McCarthy, Trademarks and Unfair Competition, Section 23:8 (Rel. 2 6/97). Lanham Act, Section 43(a). (See also, *Champions Golf Club v. Champions Golf Club*, 78 F.3d 1111, (6th Cir., 1996); *Eclipse Associates, Ltd. v. Data General Corp.*, 894 F.2d 434, ("A U.S. District Court's primary task, is to make factual determinations as to whether the public would likely be deceived or confused by similarity of the marks *as to source, relationship or sponsorship.*") (Emphasis added). In addition, the court in *Merchant & Evans, Inc. v. Roosevelt Bldg. Products Co. Inc.*, 963 F.2d 628, (3d Cir. 1992) stated that trademark infringement only occurs when use sought to be enjoined is likely to confuse purchasers *with respect to such things as product's source, its endorsement by plaintiff, or its connections with plaintiff.* (Emphasis added).

To establish "likelihood of confusion," courts in each of the Federal Circuits have adopted the test first laid out in *Polaroid v. Polarad Electronics Corp.*, 287 F.2d 492, (2d Cir), *cert. denied*, 368 U.S. 820, 7 L. Ed. 2d 25, 82 S. Ct. 36 (1961). (See also, *White v. Samsung Electronics America Inc.*, 971 F.2d

1395, *amended, rehearing denied*, 989 F.2d 1512, *cert. denied*, 113 S.Ct 2443 (9th Cir. 1992); *E.A. Engineering, Science and Technology Corp. v. Environmental Audit, Inc.*, 703 F.Supp. 853 (C.D.Cal 1989); *Escerzio v. Roberts*, 944 F.2d 1235, *rehearing denied* (6th Cir. 1991). According to *Polaroid*, an analysis of factors including, but not limited to, the strength of the mark, the similarity of the marks, the proximity of the products, actual confusion and sophistication of the buyers are germane to establishing likelihood of confusion. Courts have been careful to note that no single *Polaroid* factor is more important than any other and that not all factors need be considered. Notwithstanding, in the vast majority of trademark infringement cases, “similarity of the marks” has been a factor upon which most courts have placed great emphasis.

Regarding your ruling request, you appear to reiterate that there are no trademark rights in the cube itself. In support of this argument, in your January 26, 2005 letter you state that because the patent for the Rubik’s Cube design has lapsed, the cube itself and its functional aspects are not at issue. Also, you quote from the Supreme Court case, *Traffix Devices, Inc. v. Marketing Displays, Inc.*, which states that “trade dress protection must subsist with the recognition that in many instances there is no prohibition against copyright goods and products,” apparently to support your contention that the appearance of the item at issue cannot be protected. *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 523 U.S. 23, 58 USPQ2d 1001, 1004–1005 (2001).

In *Traffix*, to receive protection for its trade dress, respondent had the burden of proving that the matter sought to be protected was non-functional and distinctive. *Id.* On the other hand, in this case there exists both a valid trademark registration on the U.S. Patent and Trademark Office Principal Register and a recordation of that trademark with CBP. As set forth above, the trademark covers a black cube having nine color patches on each of its six faces with the color patches on each face being the same and consisting of the colors red, white, blue, green, yellow, and orange. Thus, a valid trademark for the design of the cube exists in this case and it must be afforded protection.

Turning to the sample Magic Cubes at issue, both the Magic Cube and the Rubik’s Cube are three-dimensional puzzles consisting of nine color patches on each of the six faces, where the color patches on each face are the same color. But while the structural aspects of the Rubik’s Cube trademark, i.e. the number of faces and color patches, constitute important features of the mark, because the protected trademark is color specific, the color component of the trademark must be given appropriate consideration.

Although the structural aspects of the protected Rubik’s Cube and Magic Cube are similar, each of the colors used on the Magic Cube, from the cube itself to the colors on the faces, substantially differ from those used in the Rubik’s Cube trademark. For example, sample 1 is a white cube, sample 2 is a red cube, sample 3 is a bright green cube, and sample 4 is a grey cube. None of the four samples include a black cube, as in the protected mark. Furthermore, in sample 1, the only color found in the Rubik’s Cube mark is yellow. In sample 2, the common colors are white and yellow. In sample 3, the common colors are orange and yellow. Every other color is different. Although sample 4 includes the colors blue, green, and yellow, also found in the Rubik’s Cube mark, these colors are integrated into a reflective laser-cut design and, therefore, sample 4 is distinguishable.

Because the four Magic Cube samples consist of different colors from the protected mark, both on the cube itself as well as on almost all of their faces, they are unlikely to confuse consumers. Therefore, none of the four Magic Cube samples infringe the protected Rubik's Cube trademark.

HOLDING:

Based on the foregoing, none of the Magic Cube samples infringe the Rubik's Cube design trademark (USPTO Registration No. 1,265,094; CBP Recordation No. TMK 04-00292).

GEORGE FREDERICK MCCRAY, ESQ.,
Chief,
Intellectual Property Rights Branch.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H027746
July 30, 2008
OT:RR:BSTC:IPR
CATEGORY: Exclusion Order, Trademarks

GARY D. SWEARINGEN, ESQ.
GARVEY, SCHUBERT, BARER
Second & Seneca Bldg.
1191 Second Avenue, 18th Floor
Seattle, Washington 98101-2939

RE: Toy Investments Inc., d/b/a "Toysmith," Toysmith "Magic Cube"; East Sheen's 4x4x4 Four-Layer "Intellectual Cube"; Seven Towns' Rubik's Cube; USPTO Trademark Office Registration No. 1,265,094; Customs & Border Protection (CBP) Recordation No. TMK 04-00292; Request for Infringement Determination. U.S. International Trade Commission Exclusion Order 337-TA-112 (issued December 30, 1982, published January 1983); CBP Recordation No. TMK 04-00292. Prior determinations HQ 477374 (June 24, 2005); and HQ W480158 (November 13, 2006).

DEAR MR. SWEARINGEN:

This letter is in response to your letter dated January 26, 2005, requesting two infringement determinations; and your letter October 11, 2006, requesting infringement determinations. In the January 26, 2005 letter, it was asserted that Toysmith's "Magic Cube" was not infringing upon the Seven Towns' Rubik's Cube ("Rubik's Cube") design trademark, US Patent & Trademark Office (USPTO) Reg. No. 1,265,094, and CBP Recordation No. TMK 04-00292. In the same letter, it was also asserted that East Sheen's 4x4x4 Four-Layer "Intellectual Cube" was not infringing upon the Seven Towns' Rubik's Cube ("Rubik's Cube") design trademark, USPTO Reg. No. 1,265,094, and CBP Recordation No. TMK 04-00292. In the October 11, 2006 letter, you requested a ruling as to whether four distinct Magic Cube samples infringe on the Rubik's Cube design trademark (USPTO Registration No. 1,265,094; CBP Recordation No. TMK 04-00292) owned by Seven

Town's, Ltd. ("Seven Towns"). This letter supersedes the original determinations: HQ 477375, dated June 24, 2005; and HQ W480158, dated November 13, 2006.

FACTS:

In both of your letters, the January 26, 2005 letter and the October 11, 2006 letter, you requested on behalf of your client, Toy Investments, Inc., d/b/a "Toysmith," an infringement determination as to whether the "Magic Cube" infringes on the Rubik's Cube design trademark (USPTO Reg. No. 1,265,094, and CBP Rec. No. TMK 04-00292) owned by Seven Town's, Ltd. ("Seven Towns"). In the January 26, 2005 letter you also requested an infringement determination as to whether the "Intellectual Cube" infringes on the Rubik's Cube design trademark (USPTO Reg. No. 1,265,094, and CBP Rec. No. TMK 04-00292) owned by Seven Town's, Ltd. ("Seven Towns").

DISCLOSURE OF NEW MATERIAL FACTS and RELATED DOCUMENTS:

The determination for each of the "Magic Cube" and the "Intellectual Cube" is being re-examined in light of new factual information which was not addressed in the determinations HQ 477375, dated June 24, 2005; and HQ W480158, dated November 13, 2006. It is imperative that we re-examine this matter in light of the fact that the prior determination failed to address the U.S. International Trade Commission (ITC) Exclusion Order referenced as 337-TA-112, issued on December 30, 1982, and published in January 1983 in USITC Publication 1334.

U.S. Customs and Border Protection (CBP) initiates this amended determination, which shall supersede the prior determination. Such determinations by CBP require consideration of certain elements in order to be valid. Pursuant to 19 CFR § 177.2(b)(1), each ruling requires all material facts related to the transaction be included in consideration of the determination, and pursuant to 19 CFR § 177.2(b)(4), each ruling requires all directly related documents be included in consideration of the determination. The existence of the ITC Exclusion Order "In the Matter of CERTAIN CUBE PUZZLES, Investigation No. 337-TA-112," USITC Publication 1334, published January 1983, is a material fact and a directly related document to the determination at hand. Insofar as the initial determinations failed to consider all required relevant matters, they may no longer be relied upon, and this determination shall supersede the prior determinations.

ITC EXCLUSION ORDER 337-TA-112

The ITC Exclusion Order provides that, "Cube puzzles that infringe Ideal's common-law trademark in its Rubik's Cube puzzle are excluded from entry into the United States;" and "Packages consisting of a cylindrical black plastic base and a cylindrical clear plastic cover, the plastic base and plastic cover sealed by a strip of black and gold tape, that infringe Ideal's common-law trademark are excluded from entry into the United States." CBP enforcement of ITC Exclusion Orders is required pursuant to 19 CFR § 12.39(b),(c), as well as pursuant to the final order issued on September 9, 2005 in *Eaton*, enjoining CBP from permitting entry of merchandise subject to an ITC Exclusion Order. *Eaton Corp. v. United States*, 395 F.Supp. 1314, 1329 (2005).

Trademark protected by ITC Exclusion Order 337-TA-112

The protected Rubik's Cube trademark (USPTO Reg. No. 1,265,094, and CBP Rec. No. TMK 04-00292) is employed in a three-dimensional twist cube

puzzle. The trademark certificate describes the mark as follows, "The mark consists of a black cube having nine [square] color patches on each of its six faces with the color patches on each face being the same [when the puzzle is purchased, and when the puzzle is solved] and consists of the colors red, white, blue, green, yellow and orange." An image of the protected Rubik's Cube is provided below.

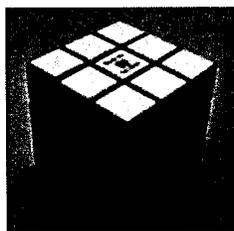
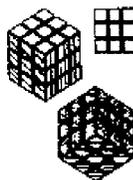


Image of the protected Rubik's Cube as used in commerce



USPTO Trademark Reg. No. 1,265,094
 CBP Rec. No. TMK 04-00292
 Image of the protected Rubik's Cube design mark.

The ITC Exclusion Order 337-TA-112 (issued December 30, 1982, and published in January 1983) is accompanied by images of both the protected and infringing merchandise, and these images provide examples of the protected merchandise, and of merchandise found to be infringing by the ITC Section 337 investigation. These images provide examples of merchandise that falls within the scope of the Exclusion Order 337-TA-112. Images from ITC Exclusion Order 337-TA-112 are provided below.

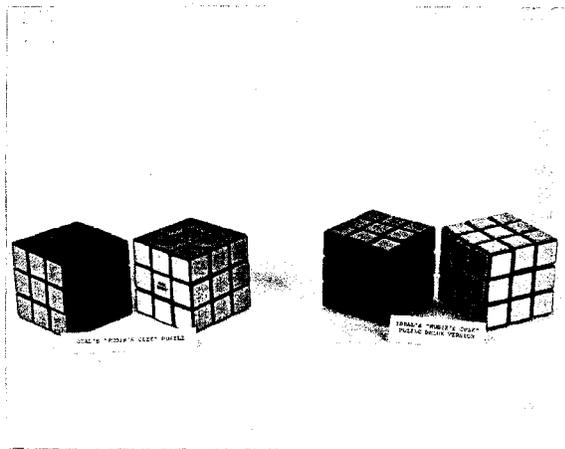


Image of: 'IDEAL'S "RUBIK'S CUBE" PUZZLE' and 'IDEAL'S "RUBIK'S CUBE" PUZZLE DELUX VERSION'
 USITC EXCLUSION ORDER 337-TA-112 (issued December 30, 1982, published January 1983)

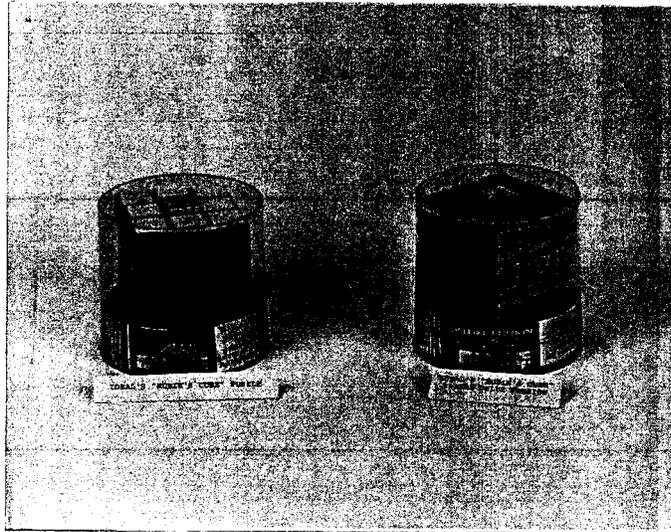


Image of: 'IDEAL'S "RUBIK'S CUBE" PUZZLE' and 'IDEAL'S "RUBIK'S CUBE" PUZZLE DELUX VERSION'
Image of Ideal's Cube Puzzle and Packaging

USITC EXCLUSION ORDER 337-TA-112 (issued December 30, 1982, published January 1983)

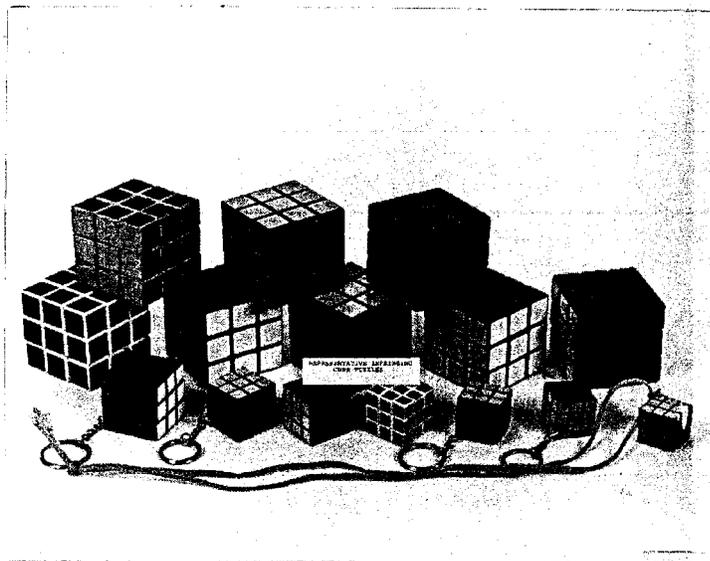


Image of: 'REPRESENTATIVE INFRINGING CUBE PUZZLES'
Note the variation in shades of colors that appear on the merchandise determined to be infringing by the USITC.
USITC EXCLUSION ORDER 337-TA-112 (issued December 30, 1982, published January 1983)

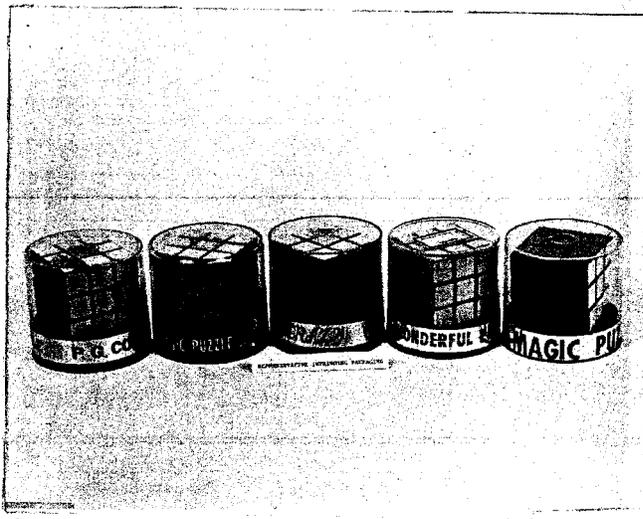


Image of: 'REPRESENTATIVE INFRINGING PACKAGING'
USITC EXCLUSION ORDER 337-TA-112 (issued December 30, 1982, published January 1983)

Subject Merchandise: The "Intellectual Cube" and the "Magic Cube"
East Sheen's, 4x4x4, Four-Layer "Intellectual Cube"

The "Intellectual Cube" is a three-dimensional 4x4x4, twist cube puzzle which features sixteen square color patches on each of its six faces with the color on each face being the same, when the puzzle is solved, and when the puzzle is purchased. An image of "Intellectual Cube" is provided below.

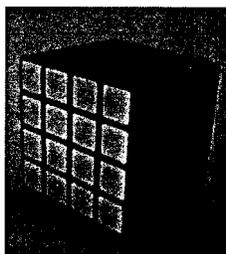


Image of the 4x4x4
"Intellectual Cube"

Toysmith's, 3x3x3, "Magic Cube"

The "Magic Cube" is a three-dimensional 3x3x3, white background twist cube puzzle, which features nine square color patches on each of its six faces

with the color on each face being the same, when the puzzle is purchased and when the puzzle is solved, and consists of the colors red, blue, black, green, yellow and pink. A selection of images of the “Magic Cube” are provided below.

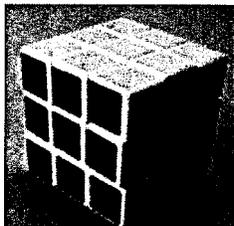


Image of the “Magic Cube”
(January 26, 2005 letter)

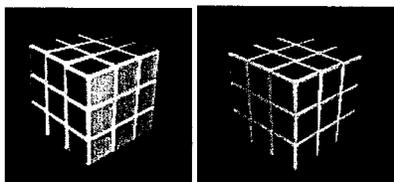


Image of sample one (1) of the “Magic Cube”
(October 11, 2006 letter)

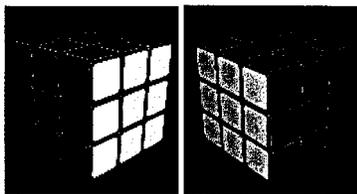


Image of sample two (2) of the “Magic Cube”
(October 11, 2006 letter)

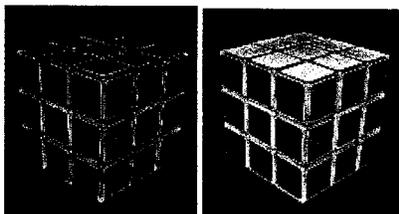


Image of sample three of the “Magic Cube”
(October 11, 2006 letter)

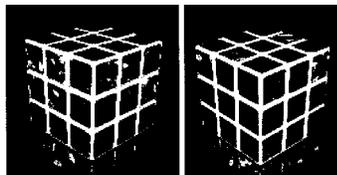


Image of sample four (4) of the "Magic Cube"
(October 11, 2006 letter)

ISSUE:

The first issue is whether the "Intellectual Cube" falls within the scope of the USITC Exclusion Order 337-TA-112. The second issue is whether the "Magic Cube" falls within the scope of the USITC Exclusion Order 337-TA-112.

LAW AND ANALYSIS:

Insofar as our administration of the trademark laws to protect against the importation of goods bearing counterfeit marks is concerned, section 526(e) of the Tariff Act of 1930, as amended (19 U.S.C. § 1526(e)) provides that merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) that is imported into the United States in violation of 15 U.S.C. § 1124 shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violation of the customs laws, where the trademark in question is registered with the U.S. Patent & Trademark Office and recorded with Customs (U.S. Customs and Border Protection, hereinafter "CBP"). 19 U.S.C. § 1526(e). 19 CFR § 133.21(b). The term "counterfeit" is defined as "a spurious mark that is identical with, or substantially indistinguishable from, a registered mark." 15 U.S.C. § 1127. 19 CFR § 133.21(a).

CBP also maintains authority to prevent the importation of goods bearing "confusingly similar" marks which, although neither identical nor substantially indistinguishable from protected marks, are violative nonetheless. 15 U.S.C. § 1114. 19 CFR § 133.22.

In either regard, as a general proposition, the Lanham Act provides for a claim of trademark infringement when a trademark holder can demonstrate that the use of its trademark by another is "likely to confuse" consumers as to the source of a product. The term "source" is construed liberally. That is, "likelihood of confusion" relates to any type of confusion, including confusion of source, confusion of affiliation, confusion of connection; or confusion of sponsorship. (McCarthy, Trademarks and Unfair Competition, Section 23:8 (Rel. 2 6/97); Lanham Act, Section 43(a)). We note that a plaintiff in a trademark infringement case need not establish that all or even most customers are likely to be confused. Plaintiff need only prove that an appreciable number of ordinarily prudent consumers will be confused. *Estee Lauder, Inc. v. The Gap, Inc.*, 932 F. Supp. 595 (S.D.N.Y. 1996).

In order to establish "likelihood of confusion", courts in each of the Federal Circuits have adopted the test first laid out in *Polaroid v. Polaroid Electronics Corp.*, 287 F.2d 492, (2d Cir), *cert. denied*, 368 U.S. 820, 7 L. Ed. 2d 25, 82 S. Ct. 36 (1961). *White v. Samsung Electronics America Inc.*, 971 F.2d 1395, *amended, rehearing denied*, 989 F.2d 1512, *cert. denied*, 113 S.Ct 2443 (9th

Cir. 1992); *E.A. Engineering, Science and Technology Corp. v. Environmental Audit, Inc.*, 703 F.Supp. 853 (C.D.Cal. 1989); *Escerzio v. Roberts*, 944 F.2d 1235, rehearing denied (6th Cir. 1991). According to Polaroid, an analysis of factors including, but not limited to, the strength of the mark, the similarity of the marks, the proximity of the products, actual confusion and sophistication of the buyers are germane to establishing likelihood of confusion. Courts have been careful to note that no single Polaroid factor is more important than any other and that not all factors need be considered. Notwithstanding, in the vast majority of trademark infringement cases, “similarity of the marks” has been a factor upon which most courts have placed great emphasis. Regarding “similarity” between marks, it has been noted that “a mark should not be dissected and considered piece-meal; rather, it must be considered as a whole in determining likelihood of confusion.” *Franklin Mint v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (C.C.P.A. 1981).

In your requests, dated January 26, 2005, and October 11, 2006, it is alleged that there can be no trademark rights in the cube itself. In support of this argument, you state that, as the patent (USPTO Patent Reg. No. 4,378,116, March 29, 1983) for the Rubik’s Cube design has lapsed, the cube itself and its functional aspects are not at issue. Also, you quote from the Supreme Court case, *Traffix Devices, Inc. v. Marketing Displays, Inc.*, which states that “trade dress protection must subsist with the recognition that in many instances there is no prohibition against copyright goods and products,” apparently to support your contention that the appearance of the item at issue cannot be protected. *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 523 U.S. 23, 58 USPQ2d 1001, 1004–1005 (2001).

In response to those arguments, we note that in *Traffix*, in order to receive protection for its trade dress, respondent had the burden of proving that the matter sought to be protected was non-functional and distinctive. *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 523 U.S. 23, 58 USPQ2d 1001, 1004–1005 (2001). The distinction between *Traffix* and the case at issue is that there exists both a valid trademark registration on the U.S. Patent and Trademark Office Principal Register (USPTO Reg. No. 1,265,094) and a recordation of that trademark with CBP (CBP Rec. No. TMK 04–00292), which covers a black cube having nine color patches on each of its six faces with the color patches on each face being the same and consists of the colors red, white, blue, green, yellow and orange. As such, a valid trademark for the design of the cube exists in this case and it must be afforded protection. Additionally, the USITC fully addressed the functional/non-functional issue with respect to Rubik’s Cube in its investigation and in the ITC Exclusion Order 337–TA–112 (issued December 30, 1982, and published January 1983).

The “Intellectual Cube”

The first article, the “Intellectual Cube” is a 4x4x4 three-dimensional puzzle with six faces, consisting of sixteen square color patches on each face in contrast to the nine square color patches in the Rubik’s Cube trademark. The structural elements of the “Intellectual Cube” differ substantially from the Rubik’s Cube protected design mark. Due to its 4x4x4 puzzle structure, and its sixteen square color patches on each face, in contrast to the Rubik’s Cube nine square color patches on each face, the two cube puzzles are distinctly different. Additionally, the ITC Exclusion Order 337–TA–112 specifically cites to the Rubik’s Cube in its Order, and the Order Remedy provides protection only for 3x3x3 cube puzzles. Accordingly, we find the “Intellectual

Cube” does not fall within the scope of the ITC Exclusion Order 337-TA-112, and is permitted entry into the United States.

The “Magic Cube”

As for the second article, the “Magic Cube”, both “Magic Cube” and the Rubik’s Cube are 3x3x3, three-dimensional puzzles consisting of nine square color patches on each of the six faces with the color patches on each face being the same, when the puzzle is purchased and when the puzzle is solved. The two items, however, differ in that “Magic Cube” is a white cube while Rubik’s Cube is a black cube. The ITC Exclusion Order (337-TA-112) specifically states in the ‘Remedy’ that, “*The plastic background can be any color, including black, white, blue, or grey.*” (*emphasis added.*) ITC Exclusion Order 337-TA-112, Remedy, at 34. Therefore, pursuant to the order, the difference in the background color is irrelevant. Additionally, several images of cube puzzles without a black background, and found to be infringing merchandise by the ITC appear in the Exclusion Order images provided above.

While the structural aspects of the trademark, i.e. the number of faces and square color patches constitute important features of the mark, the ITC Exclusion Order also names colors. The ITC Exclusion Order includes images of “representative infringing cube puzzles,” which are provided above, and clearly provide examples of merchandise found to be infringing with variations of shades of colors that fall within the scope of the order. The Rubik’s Cube design trademark is protected for the color patch colors of red, white, blue, green, yellow, and orange. The colors used in the “Magic Cube” design are red, blue, black, green, yellow and pink. (Letter of January 26, 2005). The colors used in the “Magic Cube” designs are as follows: for sample one: purple, green, yellow, red, blue, and another blue; sample two: green, red, white, blue, yellow, purple; sample three: blue, red, orange, yellow, purple, pink; sample four: purple, silver, green, red, blue, yellow. (Letter of October 11, 2006). At least four of the colors used by the “Magic Cube” (red, blue, green, and yellow, (and orange in place of green for sample three) (and possibly pink as pink also appears in the images of infringing merchandise in the Exclusion Order 337-TA-112)) are the same as for the protected Rubik’s Cube, and thereby the “Magic Cube” falls completely within the scope of the ITC Exclusion Order 337-TA-112. In order to comply with its enforcement obligations, CBP is required to enforce Exclusion Orders in accordance with *Eaton*, and this ITC Exclusion Order provides images that represent a variety of shades of colors already determined to be infringing by the ITC. Therefore, CBP shall comply with such determinations and CBP shall enforce the ITC Exclusion Order 337-TA-112. *Eaton Corp. v. United States*, 395 F.Supp. 1314, 1329 (2005) *supra*. Accordingly, the Intellectual Property Rights and Restricted Merchandise Branch at CBP finds the 3x3x3 “Magic Cube” puzzle falls clearly within the scope of the ITC Exclusion Order 337-TA-112 and is subject to exclusion from entry into the United States pursuant to the order.

HOLDING:

Based upon the foregoing, we find the “Intellectual Cube” does not fall within the scope of the USITC Exclusion Order 337-TA-112 and is permitted entry into the United States.

Based upon the foregoing, we find the “Magic Cube” does fall within the scope of the USITC Exclusion Order 337-TA-112, and is subject to exclusion from entry into the United States.

EFFECT ON OTHER RULINGS:

HQ 477375, dated June 24, 2005 is hereby REVOKED.

HQ W480158, dated November 13, 2006 is hereby REVOKED.

GEORGE FREDERICK MCCRAY, ESQ.,

Chief,

Intellectual Property Rights Branch.

