

U.S. Customs and Border Protection

General Notices

AGENCY INFORMATION COLLECTION ACTIVITIES: Application for Identification Card

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

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651-0008.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Application for Identification Card (Form 3078). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 8, 2009, to be assured of consideration.

ADDRESS: Direct all written comments to the U.S. Customs and Border Protection, Attn: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the U.S. Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344-1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the

burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Application for Identification Card

OMB Number: 1651-0008

Form Number: CBP Form 3078

Abstract: CBP Form 3078 is used by licensed Cartmen, Lightermen, Warehousemen, brokerage firms, foreign trade zones, container station operators, their employees, and employees requiring access to CBP secure areas to apply for an identification card so that they may legally handle merchandise which is in CBP custody.

Current Actions: This submission is being submitted to extend the expiration date. There is an increase in the burden hours due to a revised estimate by CBP in the number of respondents.

Type of Review: Extension (with change)

Affected Public: Businesses

Estimated Number of Respondents: 150,000

Estimated Number of Total Annual Responses: 150,000

Estimated Time Per Response: 17 minutes

Estimated Total Annual Burden Hours: 42,450

Dated: April 1, 2009

TRACEY DENNING,
*Agency Clearance Officer,
Customs and Border Protection.*

[Published in the Federal Register, April 9, 2009 (74 FR 16229)]

**AGENCY INFORMATION COLLECTION ACTIVITIES:
Certificate of Registration**

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

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651-0010.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Certificate of Registration (Forms 4455 and

4457). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 8, 2009, to be assured of consideration.

ADDRESS: Direct all written comments to the U.S. Customs and Border Protection, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the U.S. Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency’s estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Certificate of Registration

OMB Number: 1651–0010

Form Number: Forms 4455 and 4457

Abstract: The Certificate of Registration is used to expedite free entry or entry at a reduced rate on foreign made personal articles that are taken abroad. The articles are dutiable each time they are brought into the United States unless there is acceptable proof of prior possession.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Individuals, Travelers

Estimated Number of Respondents: 200,000

Estimated Number of Annual Responses per Respondent: 200,000

Estimated Time Per Respondent: 3 minutes

Estimated Total Annual Burden Hours: 10,000

Dated: April 1, 2009

TRACEY DENNING,
*Agency Clearance Officer,
Information Services Branch.*

[Published in the Federal Register, April 9, 2009 (74 FR 16226)]

**AGENCY INFORMATION COLLECTION ACTIVITIES:
Protest**

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

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651-0017

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning Protest. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 8, 2009, to be assured of consideration.

ADDRESS: Direct all written comments to the U.S. Customs and Border Protection, Attn: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the U.S. Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344-1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the

collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Protest

OMB Number: 1651-0017

Form Number: Form 19

Abstract: This collection is used by an importer, filer, or any party at interest to petition CBP, or Protest, any action or charge, made by the port director on or against any; imported merchandise.

Current Actions: There are no changes to the information collection. This submission is being made to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses

Estimated Number of Respondents: 3750

Estimated Number of Annual Responses per Respondent: 12

Estimated Number of Total Annual Responses: 45,330

Estimated Time Per Respondent: 63 minutes

Estimated Total Annual Burden Hours: 47,596

Dated: April 1, 2009

TRACEY DENNING,
Agency Clearance Officer,
Customs and Border Protection.

[Published in the Federal Register, April 9, 2009 (74 FR 16227)]

**AGENCY INFORMATION COLLECTION ACTIVITIES:
Exportation of Used Self-Propelled Vehicles**

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

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651-0054

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection require-

ment concerning the Exportation of Used Self-Propelled Vehicles. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 8, 2009, to be assured of consideration.

ADDRESS: Direct all written comments to the U.S. Customs and Border Protection, Attn: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the U.S. Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency’s estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Exportation of Used-Propelled Vehicles

OMB Number: 1651–0054

Form Number: None

Abstract: 19 U.S.C. 1627 requires the exporter of a used self-propelled vehicle to present both the vehicle and a document describing it (which includes the vehicle identification number) to CBP prior to lading if the vehicle is to be transported by vessel or aircraft, or prior to export if the vehicle is transported by rail, highway, or under its own power. This information helps CBP ensure that stolen vehicles are not exported from the U.S.

Current Actions: There are no changes to the information collection. This submission is being made to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Individuals
Estimated Number of Respondents: 750,000
Estimated Number of Total Annual Responses: 750,000
Estimated Time Per Response: 10 minutes
Estimated Total Annual Burden Hours: 125,000

Dated: April 1, 2009

TRACEY DENNING,
*Agency Clearance Officer,
Customs and Border Protection.*

[Published in the Federal Register, April 9, 2009 (74 FR 16227)]

**AGENCY INFORMATION COLLECTION ACTIVITIES:
Petroleum Refineries in Foreign Trade Subzones**

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

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651-0063

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Petroleum Refineries in Foreign Trade Subzones.. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 8, 2009, to be assured of consideration.

ADDRESS: Direct all written comments to the U.S. Customs and Border Protection, Attn: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the U.S. Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344-1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the

agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Petroleum Refineries in Foreign Trade Subzones

OMB Number: 1651-0063

Form Number: None

Abstract: This is a recordkeeping requirement that involves data necessary to account for admissions into, and operations occurring within each phase of the refining operation for all withdrawals of crude petroleum from Foreign Trade Subzones.

Current Actions: There are no changes to the information collection. This submission is being made to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses

Estimated Number of Respondents/Recordkeepers: 81

Estimated Time Per Respondent/Recordkeeper: 1000 hours

Estimated Total Annual Burden Hours: 81,000

Dated: April 1, 2009

TRACEY DENNING,
Agency Clearance Officer,
Customs and Border Protection.

[Published in the Federal Register, April 9, 2009 (74 FR 16228)]

**AGENCY INFORMATION COLLECTION ACTIVITIES:
Importer's ID Input Record**

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

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651-0064.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection require-

ment concerning the Importer's ID Input Record. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 8, 2009, to be assured of consideration.

ADDRESS: Direct all written comments to the U.S. Customs and Border Protection, Attn: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the U.S. Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344-1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Importer's ID Input Record

OMB Number: 1651-0064

Form Number: Form 5106

Abstract: This document is filed with the first formal entry which is submitted or the first request for services that will result in the issuance of a bill or a refund check upon adjustment of a cash collection. The number, name, and address conveyed on the Form 5106 is the basis for establishing bond coverage, release and entry of merchandise, liquidation, issuance of bills and refunds, and processing of drawback and FP&F actions.

Current Actions: There are no changes to the information collection. This submission is being made to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses
Estimated Number of Respondents: 500
Estimated Number of Annual Responses per Respondent: 2
Estimated Number of Total Annual Responses: 1000
Estimated Time Per Response: 6 minutes
Estimated Total Annual Burden Hours: 100

Dated: April 1, 2009

TRACEY DENNING,
Agency Clearance Officer,
Customs and Border Protection.

[Published in the Federal Register, April 9, 2009 (74 FR 16226)]

**AGENCY INFORMATION COLLECTION ACTIVITIES:
Western Hemisphere Travel Initiative (WHTI)**

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

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651–0132.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Western Hemisphere Travel Initiative (WHTI). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 8, 2009, to be assured of consideration.

ADDRESS: Direct all written comments to the U.S. Customs and Border Protection, Attn: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the U.S. Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the

agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Western Hemisphere Travel Initiative

OMB Number: 1651-0132

Form Number: None

Abstract: DHS has developed alternate procedures to comply with WHTI for U.S. and Canadian citizen children through age 18, traveling with public or private school groups, religious groups, social or cultural organizations, or teams associated with youth sport organizations that arrive at U.S. sea or land ports-of-entry. In lieu of requiring a passport, these children will be permitted to present an original or a copy of a birth certificate (rather than a passport), when the groups are under the supervision of an adult affiliated with the organization (including a parent of one of the accompanied children who is only affiliated with the organization for purposes of a particular trip) and when all the children have parental or legal guardian consent to travel. For purposes of this alternative procedure, an adult would be considered to be a person age 19 or older, and a group would consist of two or more people.

Current Actions: There are no changes to the information collection. This submission is being made to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Individuals

Estimated Number of Respondents: 6,500

Estimated Number of Total Annual Responses: 6,500

Estimated Time Per Response: 15 minutes

Estimated Total Annual Burden Hours: 1,625

Dated: April 1, 2009

TRACEY DENNING,
Agency Clearance Officer,
Customs and Border Protection.

**AGENCY INFORMATION COLLECTION ACTIVITIES:
Transfer of Cargo to a Container Station**

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

ACTION: 30-Day Notice and request for comments; Extension of an existing information collection with a change to the burden hours: 1651-0096

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Transfer of Cargo to a Container Station. This proposed information collection was previously published in the **Federal Register** (74 FR 5846-5847) on February 2, 2009, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before May 15, 2009, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed U.S. Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344-1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public

record. In this document CBP is soliciting comments concerning the following information collection:

Title: Transfer of Cargo to a Container Station

OMB Number: 1651-0096

Form Number: None

Abstract: Before the filing of an entry of merchandise for the purpose of breaking bulk and redelivery of the cargo, containerized cargo may be moved from the place of unloading, or may be received directly at the container station from a bonded carrier after transportation-in-bond. This also applies to loose cargo as part of containerized cargo. The container station operator may make a request for the transfer of a container intact to the station. This is pursuant to the requirements of 19 CFR 41, 19 CFR 42, 19 CFR 44, and 19 CFR 45.

Current Actions: This submission is being made to extend the expiration date with a change to the burden hours resulting from a more accurate estimate of the number of container stations.

Type of Review: Extension (with change)

Affected Public: Business or other for-profit institutions

Estimated Number of Respondents: 14,327

Estimated Time Per Respondent: 7 minutes

Estimated Number of Annual Responses per Respondent: 25

Estimated Total Annual Burden Hours: 41,548

Dated: April 8, 2009

TRACEY DENNING,
*Agency Clearance Officer,
Information Services Branch.*

[Published in the Federal Register, April 15, 2009 (74 FR 17503)]

**QUARTERLY IRS INTEREST RATES USED IN
CALCULATING INTEREST ON OVERDUE ACCOUNTS AND
REFUNDS ON CUSTOMS DUTIES**

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

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties. For the calendar quarter beginning April 1, 2009, the interest rates for overpayments will be 3 percent for corporations and 4 percent for non-corporations, and the interest rate for underpayments

will be 4 percent. This notice is published for the convenience of the importing public and Customs and Border Protection personnel.

EFFECTIVE DATE: April 1, 2009.

FOR FURTHER INFORMATION CONTACT: Ron Wyman, Revenue Division, Collection and Refunds Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 614-4516.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85-93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2009-7, the IRS determined the rates of interest for the calendar quarter beginning April 1, 2009, and ending on June 30, 2009. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%). For corporate overpayments, the rate is the Federal short-term rate (1%) plus two percentage points (2%) for a total of three percent (3%). For overpayments made by non-corporations, the rate is the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%). These interest rates are subject to change for the calendar quarter beginning July 1, 2009, and ending September 30, 2009.

For the convenience of the importing public and Customs and Border Protection personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

| <u>Beginning Date</u> | <u>Ending Date</u> | <u>Under- payments (percent)</u> | <u>Over- payments (percent)</u> | <u>Corporate Overpay- ments (Eff. 1-1-99) (percent)</u> |
|---------------------------|------------------------|--|---|---|
| 070174 | 063075 | 6% | 6% | |
| 070175 | 013176 | 9 % | 9 % | |
| 020176 | 013178 | 7 % | 7 % | |
| 020178 | 013180 | 6 % | 6 % | |
| 020180 | 013182 | 12 % | 12 % | |
| 020182 | 123182 | 20 % | 20 % | |
| 010183 | 063083 | 16 % | 16 % | |
| 070183 | 123184 | 11 % | 11 % | |
| 010185 | 063085 | 13 % | 13 % | |
| 070185 | 123185 | 11 % | 11 % | |
| 010186 | 063086 | 10 % | 10 % | |
| 070186 | 123186 | 9 % | 9 % | |
| 010187 | 093087 | 9 % | 8 % | |
| 100187 | 123187 | 10 % | 9 % | |
| 010188 | 033188 | 11 % | 10 % | |
| 040188 | 093088 | 10 % | 9 % | |
| 100188 | 033189 | 11 % | 10 % | |
| 040189 | 093089 | 12 % | 11 % | |
| 100189 | 033191 | 11 % | 10 % | |
| 040191 | 123191 | 10 % | 9 % | |
| 010192 | 033192 | 9 % | 8 % | |
| 040192 | 093092 | 8 % | 7 % | |
| 100192 | 063094 | 7 % | 6 % | |
| 070194 | 093094 | 8 % | 7 % | |
| 100194 | 033195 | 9 % | 8 % | |
| 040195 | 063095 | 10 % | 9 % | |
| 070195 | 033196 | 9 % | 8 % | |
| 040196 | 063096 | 8 % | 7 % | |
| 070196 | 033198 | 9 % | 8 % | |
| 040198 | 123198 | 8% | 7% | |
| 010199 | 033199 | 7% | 7% | 6% |
| 040199 | 033100 | 8% | 8% | 7% |
| 040100 | 033101 | 9% | 9% | 8% |
| 040101 | 063001 | 8% | 8% | 7% |
| 070101 | 123101 | 7% | 7% | 6% |
| 010102 | 123102 | 6% | 6% | 5% |
| 010103 | 093003 | 5% | 5% | 4% |
| 100103 | 033104 | 4% | 4% | 3% |
| 040104 | 063004 | 5% | 5% | 4% |
| 070104 | 093004 | 4% | 4% | 3% |
| 100104 | 033105 | 5% | 5% | 4% |
| 040105 | 093005 | 6% | 6% | 5% |

| <u>Beginning Date</u> | <u>Ending Date</u> | <u>Under- payments (percent)</u> | <u>Over- payments (percent)</u> | <u>Corporate Overpay- ments (Eff. 1-1-99) (percent)</u> |
|---------------------------|------------------------|--|---|---|
| 100105 | 063006 | 7% | 7% | 6% |
| 070106 | 123107 | 8% | 8% | 7% |
| 010108 | 033108 | 7% | 7% | 6% |
| 040108 | 063008 | 6% | 6% | 5% |
| 070108 | 093008 | 5% | 5% | 4% |
| 100108 | 123108 | 6% | 6% | 5% |
| 010109 | 033109 | 5% | 5% | 4% |
| 040109 | 063009 | 4% | 4% | 3% |

Dated: April 10, 2009

JAYSON P. AHERN,
Acting Commissioner,
U.S. Customs and Border Protection.

[Published in the Federal Register, April 15, 2009 (74 FR 17505)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.

Washington, DC, April 15, 2009

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.

**REVOCATION OF A RULING LETTER AND REVOCATION
OF TREATMENT RELATING TO THE TARIFF
CLASSIFICATION OF SUCTION DIFFUSER BODIES**

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

ACTION: Notice of revocation of a tariff classification ruling letter and revocation of treatment relating to the classification of suction diffuser bodies

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) is revoking a ruling letter relating to the tariff classification of suction diffuser bodies (aka “suction diffusers”), under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP also is revoking any treatment previously accorded by it to substantially identical transactions.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 30, 2009.

FOR FURTHER INFORMATION CONTACT: John Rhea, Tariff Classification and Marking Branch: (202) 325–0035

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 to 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 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI, a notice was published in the Customs Bulletin Volume 43, No. 9 on February 19, 2009, proposing to revoke one ruling letter pertaining to the tariff classification suction diffuser bodies (aka “suction diffusers”). Although in this notice, CBP is specifically referring to the revocation of New York Ruling Letter (“NY”) E80816, dated April 19, 1999, 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 one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised 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 decision on this notice.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY E80816 and any other ruling not specifically identified, to reflect the proper classification of the suction diffuser bodies according to the analysis contained in Headquarters Ruling Letter ("HQ") W967677, set forth as an Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

DATED: April 9, 2009

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachment

[ATTACHMENT]

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ W967677
April 9, 2009
CLA-2 OT:RR:CTF:TCM W967677 JER
CATEGORY: Classification
TARIFF NO.: 8421.29.00

PAUL F. HEISS
IBCC INDUSTRIES, INC.
3200 South 3rd Street
Milwaukee, WI 53207

RE: Revocation of NY E80816; 8412.29.00, HTSUS; suction diffuser bodies

DEAR MR. HEISS:

On April 19, 1999, U.S. Customs and Border Protection ("CBP") issued New York Ruling Letter ("NY") E80816 to IBCC Industries, Inc., classifying a suction diffuser body in subheading 7326.90.8585 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as other articles of steel or iron. After reviewing NY E80816, we have found that ruling to be in error.

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, 2186 (1993)), notice of the proposed revocation was published on February 19, 2009, in the Customs Bulletin, Volume 43, No. 9. One comment was received in response to this notice.

FACTS:

NY E80816 described the subject merchandise in the following manner:

The suction diffuser bodies and covers are made from ASTM A48 Class 30 steel. These bodies and covers are assembled with domestic parts and sold as complete units in sizes ranging from 1-1/2" x 2" through 10" x 12". Suction diffusers are used in building fluid services to minimize turbulent flow at the inlet of a pump. In addition, the suction diffuser incorporates a strainer to remove large particulates from the fluid in order to protect the pump from possible damage. A sample was submitted.

ISSUE:

Whether the subject merchandise is classifiable under heading 8421, HTSUS as a filtering apparatus or under heading 7326, HTSUS, as an article of iron or steel.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

7326 Other articles of iron or steel:

7326.90 Other:

Other:

Other:

7326.90.85 Other.

8421 Centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gases; parts thereof:

Filtering or purifying machinery and apparatus for liquids:

8421.29.00 Other.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

EN 84.21 provides in pertinent part that:

This heading covers:

- (I) Machines which, by the use of centrifugal force, completely or partly separate substances according to their different specific gravities, or which remove the moisture from wet substances.
- (II) Filtering or purifying machinery and apparatus for liquids or gases, other than, e.g., filter funnels, milk strainers, strainers for filtering paints (generally Chapter 73).

(II) FILTERING OR PURIFYING MACHINERY AND APPARATUS, FOR LIQUIDS OR GASES

Much of the filtration or purification plant of this heading is purely static equipment with no moving parts. The heading covers filters and purifiers of all types (physical or mechanical, chemical, magnetic, electro-magnetic, electrostatic, etc.). The heading covers not only large industrial plant, but also filters for internal combustion engines and small domestic appliances. The heading **does not**, however, **include** filter funnels, milk strainers, vessels, tanks, etc., simply equipped with metallic gauze or other straining material, nor general purpose vessels, tanks, etc., even if intended for use as filters after insertion of a layer of gravel, sand, charcoal, etc.

In general, filtering machinery and plant of this heading is of two distinct types according to whether it is intended for liquids or gases.

* * *

- (4) **Filters for boiler water.** These usually consist of a large vessel fitted internally with several superimposed layers of filtering materials and, in addition to the inlet and outlet tubes, a system of pipes and valves for cleaning the filtering elements by a cross-current of water.

* * *

(B) Filtering or purifying machinery, etc., for gases

These gas filters and purifiers are used to separate solid or liquid particles from gases, either to recover products of value (e.g., coal dust, metallic particles, etc., recovered from furnace flue gases), or to eliminate harmful materials (e.g., dust extraction, removal of tar, etc., from gases or smoke fumes, removal of oil from steam engine vapours).

NY E80816 classified the merchandise at issue under subheading 7326.90.8585, of the 1999 HTSUSA, which provided for “[o]ther articles of steel or iron: Other: Other.” However, we have found this decision to be inconsistent with other rulings classifying substantially similar merchandise. Specifically, Headquarters Ruling Letter (“HQ”) 964174, dated July 10, 2000, classified “Y” Strainers used to filter or trap contaminants in water or steam lines under heading 8421, HTSUS. This ruling also revoked a previously issued ruling which classified “Y” Strainers in heading 7326, HTSUS.¹ In HQ 964174, CBP found that heading 8421, HTSUS, provided a more specific description of the merchandise than did heading 7326, HTSUS. See also, HQ 963308 dated July 10, 2000 (which revoked a previously issued ruling that classified “Y” Strainers under heading 7325, HTSUS).

Our research indicates that the subject suction diffuser bodies (hereinafter “suction diffusers”) and “Y” Strainers are substantially similar in physical structure, use and function. Generally, suction diffusers function as a strainer, flow straightener, elbow and pipe reducer. Strainer, Suction Diffuser, at <http://www.grainger.com>; see also FSI Suction Diffusers, at <http://www.suctiondiffuser.com>. Also, the filtration capacity of the suction diffuser is designed to increase or ensure pump protection against harmful debris in fluids which flow throughout the pipe system. Id. Likewise, “Y” Strainers have a strainer orifice designed to increase filtration capacity in pipe systems. Typically, both the suction diffusers and “Y” strainers have an iron body and stainless steel screens and are used in industrial or commercial systems to strain out debris (and provide pump protection in the case of suction diffusers). Both are used in high pressure water and steam systems and through the use of screens, mesh liners and covers, are able to filter and trap contaminants. Id. We find that these filtration functions are covered in heading 8421, HTSUS.

Note 1(f) to Section XV, HTSUS, states in pertinent part that “[t]his section does not cover: Articles of section XVI (machinery, mechanical appliances and electrical goods).” Filtering and purifying apparatus for liquids or gases are articles of Section XVI, HTSUS, and are therefore excluded from classification in heading 7326, HTSUS, which is a heading of Section XV, HTSUS.

Similarly, the ENs to heading 7326, HTSUS, explain that, “[t]his heading covers all iron or steel articles obtained by forging or punching, by cutting or stamping or by other processes such as folding, assembling, welding, turning, milling or perforating **other than** articles included in the preceding

¹NY B81839, dated February 7, 1997 was revoked by HQ 964174. Likewise, NY B81286, dated January 30, 1997, was revoked by HQ 963308, which classified “Y” Strainers in heading 7325, HTSUS.

headings of this Chapter or covered by Note 1 to Section XV or included in **Chapter 82 or 83** or more specifically covered elsewhere in the Nomenclature.”

By contrast, heading 8421, HTSUS, covers filtering or purifying machinery and apparatus for liquids and for gases. The ENs to heading 8421, HTSUS, explain that the heading covers filters and purifiers of all types, including filters for boiler water consisting of a system of inlet and outlet tubes, pipes and valves for cleaning the filtering elements by a cross-current water.

The comment received in response to the February 9, 2009, suggests that the subject merchandise should be classified as a “part” of a pump under subheading 8413.91, HTSUS. The commenter argues that since the suction diffusers have additional functions beyond the primary filtering function (i.e., acting as a pipe reducer, elbow and flow strainer), and because these functions may be used with pumps, the suction diffusers are thus classifiable as a “part” of a pump. We disagree. While we do not find this article to be a “part” of a pump, we note that the classification of “parts” of headings of Chapter 84 are subject to Note 2 (a) to Section XVI which states that “[p]arts which are goods included in any of the headings of Chapter 84 or 85 . . . are in all cases to be classified in their respective headings.” Accordingly, even if the subject merchandise were considered to be a “part” of a pump, because it is also classifiable as a “good” of Chapter 84, it must be classified in its own heading pursuant to Note 2 (a) to Section XVI. *Nidec Corporation v. United States*, 861 F. Supp. 136, 142, 18 Ct. Int’l Trade 821, *aff’d* 68 F. 3d 1333 (Fed. Cir. 1995),

Based on all the foregoing, we find that the subject suction diffuser body was incorrectly classified under heading 7326, HTSUS, and is provided for in heading 8421, HTSUS.

HOLDING:

By application of GRI 1 and Note 1 (f) to Section XV, HTSUS, the subject suction diffuser body is classified in heading 8421, HTSUS. Specifically, the merchandise is provided for in subheading 8421.29.00, HTSUS, which provides for: “Centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gases; parts thereof: Filtering or purifying machinery and apparatus for liquids: Other.” The column one, general rate of duty is Free.

EFFECT ON OTHER RULINGS:

NY E80816, dated April 19, 1999, is hereby revoked. In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

**PROPOSED REVOCATION OF RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF A CERTAIN PEZ
DISPENSER**

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

ACTION: Notice of proposed revocation of a ruling letter and treatment relating to tariff classification of a Pez dispenser.

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 one ruling letter relating to the tariff classification of a Pez dispenser under the Harmonized Tariff Schedule of the United States (HTSUS). 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 May 31, 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, 799 9th Street, 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. 20001 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: Greg Connor, Tariff Classification and Marking Branch: (202) 325–0025

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 to 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 a ruling letter pertaining to the tariff classification of a Pez dispenser. Although in this notice, CBP is specifically referring to the revocation of New York Ruling Letter (NY) 852481, dated June 5, 1990 (Attachment A), 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 one 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 proposes 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 NY 852841, set forth as Attachment A to this document, CBP determined that the subject Pez dispenser was classified in heading 3923, HTSUS, specifically subheading 3923.90.00, HTSUSA (1990), which provided for: "[a]rticles of plastic for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics: [o]ther." It is now CBP's position that the subject Pez dispenser is properly classified in heading 3926, HTSUS, specifically subheading 3926.90.9980, HTSUSA, which provides for: "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: [o]ther: [o]ther . . . [o]ther."

Pursuant to 19 U.S.C. 1625(c)(1), CBP proposes to revoke NY 852841 and revoke or modify any other ruling not specifically identified, in order to reflect the proper classification of the subject Pez dispenser according to the analysis contained in proposed Headquar-

ters Ruling Letter H026238, set forth as Attachment B 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 23, 2008

Robert Altneu for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
NY 852481
June 5, 1990
CLA-2-39:S:N:N3D:221 852481
CATEGORY: Classification
TARIFF NO.: 3923.90.0000

MR. JOE COURET
PANALPINA, INC.
Harborside Financial Center
34 Exchange Place, Plaza Two – 8th Floor
Jersey City, NJ 07302

RE: The tariff classification of a Pez dispenser from Hong Kong and China.

DEAR MR. COURET:

In your letter dated May 4, 1990, on behalf of Pez Manufacturing Corp., you requested a tariff classification ruling. The plastic Pez pocket-size dispenser will be imported empty and after importation will be packaged for retail sale in a plastic bag that will include two individually wrapped packages of candy. The final consumer will place the candy in the dispenser, which he can then carry around with him. The sample dispenser has a "Snoopy" head at the top.

The applicable subheading for the Pez dispenser will be 3923.90.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for articles for the conveyance or packing of goods, of plastics, other. The rate of duty will be 3 percent ad valorem.

Importations of this product might be subject to the provisions of Section 133 of the Customs Regulations if they copy or simulate a trademark, tradename or copyright registered with the United States Customs Service. This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H026238
CLA-2 OT:RR:CTF:TCM H026238 GC
CATEGORY: Classification
TARIFF NO.: 3926.90.9980

JOE COURET
PANALPINA, INC.
Harborside Financial Center
34 Exchange Place, Plaza Two – 8th Floor
Jersey City, New Jersey 07302

RE: Tariff classification of Pez dispensers; Revocation of NY 852481

DEAR MR. COURET:

In New York Ruling Letter (NY) 852481, dated June 5, 1990, Customs and Border Protection (CBP) issued to Pez Manufacturing Corp. (Pez) a binding ruling on the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of certain pocket-sized candy dispensers. We have since reviewed NY 852481 and find it to be in error.

FACTS:

The merchandise subject to NY 852481 was a plastic Pez pocket-size dispenser imported without any candy. After importation, the subject candy dispenser is packaged with two individually wrapped packages of candy, which the consumer will place within the dispenser. The sample Pez dispenser provided for in NY 852481 had a “Snoopy” head at the top.

In NY 852481, CBP held that the subject Pez dispenser was classified under subheading 3923.90.00, HTSUS (1990), which provided for: “[a]rticles of plastic for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics: [o]ther.” The subheading remains unchanged in the 2008 version of the HTSUS.

ISSUE:

Whether the Pez dispenser is classified under heading 3923, HTSUS, as a plastic article for the conveyance of goods, or under heading 3926, HTSUS, as an other article of plastic?

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings

and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. The HTSUS provisions under consideration are as follows:

| | |
|--------------|---|
| 3923 | Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics: |
| 3923.90.00 | Other . . . |
| 3923.90.0080 | Other |
| | * * * |
| 3926 | Other articles of plastics and articles of other materials of headings 3901 to 3914: |
| 3926.90 | Other: |
| 3926.90.99 | Other . . . |
| 3926.90.9980 | Other |
| | * * * |

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80. The relevant ENs are as follows:

The EN to heading 3923, HTSUS (EN 3923), provides, in pertinent part:

This heading covers all articles of plastics commonly used for the **packing or conveyance of all kinds of products**. The articles covered include:

- (a) Containers such as boxes, cases, crates, sacks and bags (including cones and refuse sacks), casks, cans, carboys, bottles and flasks. (Emphasis added).

As indicated by the heading text and EN 39.23, above, heading 3923, HTSUS, covers articles of plastic for the conveyance of goods. It is CBP's consistently stated position that the exemplars listed in EN 39.23 are used generally to convey or transport goods over long distances and often in large quantities. See, e.g., Headquarters Ruling Letter (HQ) 087635, dated October 24, 1990; HQ 951404, dated July 24, 1992; HQ 953841, dated September 27, 1993; and HQ 963493, dated March 23, 2000. Furthermore, heading 3923, HTSUS, provides for cases and containers used for shipping purposes. See HQ 089825, dated April 9, 1993 and HQ 953275, dated April 26, 1993. Accordingly, heading 3923, HTSUS, provides for cases and containers of bulk goods and commercial goods, not personal items. See HQ 954072, dated September 2, 1993; HQ 963493, *supra*; and HQ 953841, *supra*.

With respect to personal items, CBP has revoked a series of rulings in which containers used for personal articles were classified under heading 3923, HTSUS. In HQ 960199, dated May 15, 1997, we revoked an earlier ruling, NY 887467, dated July 9, 1993, which classified a plastic molded pencil box under heading 3923, HTSUS, and reclassified the article under

heading 3926, HTSUS. Citing to the rulings which state that heading 3923, HTSUS, provides for cases and containers of bulk goods and commercial goods, not personal articles, we found that the pencil boxes transported pens, pencils, erasers, etc. for personal use and were not described by heading 3923, HTSUS. *See also* HQ 960196, dated May 15, 1997; HQ 960198, dated May 15, 1997; HQ 960152, dated May 15, 1997; and HQ 960153, dated May 15, 1997.

The subject Pez dispenser is not designed to carry bulk or commercial goods. In fact, the Pez dispenser does not carry candy until the purchaser places the candy within the dispenser. Stated differently, the subject merchandise is not used in the conveyance of goods, but is designed to facilitate the purchaser's personal transportation and storage of candy in the same manner that the pencil box of HQ 960199 facilitated the personal storage and transportation of pencils.

Because the subject Pez dispenser is designed for the purchaser's personal use with regards to carrying and dispensing candy, it is not within the scope of heading 3923, HTSUS.

Because the subject Pez dispenser does not fall within the scope of heading 3923, HTSUS, it is classifiable under heading 3926, HTSUS, which covers "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914".

HOLDING:

By application of GRI 1, the subject Pez Dispenser is currently classifiable under heading 3926.90.9980 HTSUS, which provides for: "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: [o]ther: [o]ther . . . [o]ther." The column one, general rate of duty is 5.3 percent *ad valorem*.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

NY 852481, dated June 5, 1990, is hereby REVOKED.

MYLES B. HARMON,

Director,

Commercial and Trade Facilitation Division.

**PROPOSED REVOCATION OF A RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF PAINTBALL CAPSULES**

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

ACTION: Notice of proposed revocation of a tariff classification ruling letter and proposed revocation of treatment relating to the classification of paintball capsules.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), this notice advises interested parties that U.S. Cus-

toms and Border Protection (CBP) intends to revoke a ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of paintball capsules. CBP also proposes to revoke any treatment previously accorded by it to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before May 31, 2009.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of International Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 799 9th Street N.W., Washington, D.C., 20229, and may be inspected 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: Isaac D. Levy, Tariff Classification and Marking Branch: (202) 325-0028.

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 to 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 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke one ruling letter pertaining to the tariff classification of paintball capsules. Although in this notice, CBP is specifically referring to the modification of

New York Ruling Letter (NY) B85784, dated June 4, 1997 (Attachment "A"), 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 one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a 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 (19 U.S.C. § 1625(c)(2)), as amended by section 623 of Title VI, 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 decision on this notice.

In NY B85784, CBP classified paintball capsules under subheading 9504.90.40, HTSUS, which provides for: "Articles for arcade, table or parlor games, including pinball machines, bagatelle, billiards and special tables for casino games; automatic bowling alley equipment; parts and accessories thereof: Other: Game machines, other than those operated by coins, banknotes (paper currency), discs or similar articles; parts and accessories thereof." Upon our review of NY B85784, we have determined that the merchandise described in that ruling is properly classified under subheading 9306.90.00, HTSUS, which provides for: "Bombs, grenades, torpedoes, mines, missiles and similar munitions of war and parts thereof; cartridges and other ammunition and projectiles and parts thereof, including shot and cartridge wads: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP intends to revoke NY B85784, and to revoke or modify any other ruling not specifically identified to reflect the proper classification of the subject merchandise according to the analysis contained in proposed Headquarters Ruling Letter (HQ) H054812, set forth as Attachment "B" 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: April 13, 2009

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
NY B85784
June 4, 1997
CLA-2-95:RR:NC:2:224 B85784
CATEGORY: Classification
TARIFF NO.: 9504.90.4000

PETER D. ALBERDI
A.J. ARANGO, INC.
1516 E. 8th Ave.
Tampa, FL 33605

RE: The tariff classification of paintballs from Italy.

DEAR MR. ALBERDI:

In your letter dated May 20, 1997, you requested a tariff classification ruling, on behalf of R.P. Scherer North America.

You are requesting the tariff classification of paintballs. Paintballs are soft gelatin capsules which are a mixture of vegetable oil and food coloring. These paintballs are used in the game of paintball. Literature on the game of paintball is attached. Basically, paintball is a game in which opposing teams attempt to capture the other's flag station. When a player gets tagged (hit by a paintball) he/she is out of the game. The paintballs are an essential part of the game of paintball.

The applicable subheading for the paintballs will be 9504.90.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for "Game machines, other than coin- or token-operated; parts and accessories thereof". The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Thomas A. McKenna at 212-466-5475.

GWENN KLEIN KIRSCHNER,
*Chief, Special Products Branch National Commodity,
Specialist Division.*

[ATTACHMENT B]

HQ H054812
 CLA-2 OT:RR:CTF:TCM H054812 IDL
 CATEGORY: Classification
 TARIFF NO.: 9306.90.00

MR. PETER D. ALBERDI
 1516 East 8th Avenue
 Tampa, Florida 33605

Re: Paintballs from Italy; Proposed Revocation of NY B85784

DEAR MR. ALBERDI:

This letter concerns New York Ruling Letter (NY) B85784, dated June 4, 1997, issued to you, on behalf of your client, R.P. Scherer North America, by the National Commodity Specialist Division, U.S. Customs Service (now Customs and Border Protection (CBP)). The decision in NY B85784 involves the classification of “paintballs from Italy” under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed NY B85784 and find that it is incorrect.

FACTS:

In NY B85784, the paintballs were described as follows:

Paintballs are soft gelatin capsules which are a mixture of vegetable oil and food coloring. These paintballs are used in the game of paintball. . . . [P]aintball is a game in which opposing teams attempt to capture the other’s flag station. When a player gets tagged (hit by a paintball) he/she is out of the game. The paintballs are an essential part of the game of paintball.

The game of paintball is described in an article written by the chief editor of a popular paintball magazine, “Recon,” as posted on the Web site (<http://www.paintball.org>) of the Paintball Sports Trade Association, thus:

Paintball is a game in which players use compressed-gas-powered guns (paintball markers) to shoot each other with small balls of encapsulated gelatin. When these paintballs break, they leave a brightly-colored mark, about the size of a quarter, signifying that the player is eliminated from the game.

* * *

Games are played in the woodst. . . or on small fields containing brightly colored inflatable bunkers (Allcot, Dawn, Ed., Recon Magazine).

In NY B85784, the U.S. Customs Service classified the subject paintballs in heading 9504, HTSUS, as “articles for arcade, table or parlor games.” CBP now takes the position that the subject paintballs are properly classified in heading 9306, HTSUS, as “projectiles.”

ISSUE:

Whether the subject paintballs are properly classified in heading 9306, HTSUS, as “projectiles,” or in heading 9504, HTSUS, as “articles for arcade, table or parlor games”?

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall

be determined according to the terms of the headings and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, HTSUS, and if the headings or notes do not require otherwise, the remaining GRIs 2 through 6 may be applied in order. GRI 3 provides for goods that are, *prima facie*, classifiable under two or more headings. GRI 6 provides that “for legal purposes”, classification of goods in the subheading of a heading shall be determined according to the terms of those subheadings and any related subheading notes, and *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. GRI 6 thus incorporates GRIs 1 through 5 in classifying goods at the subheading level.

The 2009 HTSUS provisions under consideration are as follows:

9306

Bombs, grenades, torpedoes, mines, missiles and similar munitions of war and parts thereof; cartridges and other ammunition and projectiles and parts thereof, including shot and cartridge wads:

* * *

9306.30

Other cartridges and parts thereof:

9306.30.41

Cartridges and empty cartridge shells. . . .

* * *

9306.90.00

Other. . . .

* * *

9504

Articles for arcade, table or parlor games, including pinball machines, bagatelle, billiards and special tables for casino games; automatic bowling alley equipment; parts and accessories thereof:

* * *

9504.90

Other:

9504.90.40

Game machines, other than those operated by coins, banknotes (paper currency), discs or similar articles; parts and accessories thereof. . . .

Note 1(s) to chapter 95, HTSUS, provides the following:

1. This chapter does not cover:

* * *

(s) Arms or other articles of chapter 93;

* * *

The game of paintball is “played in the woods...or on small fields,” as described above, not in an arcade, parlor, or on a table. As such, the subject articles are not “articles for arcade, table or parlor games,” as provided in heading 9504, HTSUS. Therefore, we find that the subject articles do not meet the terms of heading 9504, HTSUS. Furthermore, pursuant to Note 1(s) to chapter 95, HTSUS, insofar as the subject articles are classifiable in a heading of chapter 93, HTSUS, they cannot be classified in a heading of chapter 95.

Heading 9306 of chapter 93, HTSUS, describes cartridges and projectiles. Merriam-Webster's Third New International Dictionary, Unabridged (1965), defines "cartridge", in pertinent part, as follows:

1a: a tube of metal, paper, or a combination of both containing a complete charge for a firearm and in modern ammunition usu. containing a cap or other initiating device. . . . **b:** a case containing an explosive charge for blasting. . . . [Emphasis added]

Similarly, the American Heritage Dictionary of the English Language: Fourth Ed. (2000), defines "cartridge", in pertinent part, as follows:

1a: a cylindrical, usually metal casing containing the primer and charge of ammunition for firearms." [Emphasis added]

Further, "projectile" is defined in Merriam-Webster's, in pertinent part, as follows:

1: a body projected by external force and continuing in motion by its own inertia. . . .

The subject articles are not cartridges, as they contain no casing, primer, or charge. Although no specific information is available in the instant case regarding the precise mechanism used to propel the subject paintballs, paintballs are ordinarily propelled using "compressed-gas-powered guns," as discussed above. Upon firing, paintballs continue in motion by their own inertia. As such, the articles meet the definition of "projectiles." Therefore, we find that the subject articles are classified in heading 9306, HTSUS, and specifically, in subheading 9306.90.00, HTSUS.

HOLDING:

By application of GRI 1, the paintballs described above are classified in heading 9306, HTSUS, and are specifically provided for under subheading 9306.90.00, HTSUS, as: "[P]rojectiles . . . : Other." The 2009 column one, general rate of duty is "free."

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at <http://www.usitc.gov/tata/hts/>.

EFFECT ON OTHER RULINGS:

NY B85784, dated June 4, 1997, is revoked.

MYLES B. HARMON,

Director,

Commercial and Trade Facilitation Division.

**REVOCATION OF A RULING LETTER AND 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 revocation of two ruling letters and revocation of 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, 2186 (1993), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking 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 is also revoking any treatment previously accorded by it to substantially identical transactions. Notice of the proposed action was published in the Customs Bulletin and Decisions, Vol. 43, No. 1, on December 26, 2008. One letter with comments was received in response to the notice.

DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 30, 2009.

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 to 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 (19 U.S.C. § 1625 (c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is revoking 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. 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., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during the notice period.

Similarly, pursuant to section 625 (c)(2), Tariff Act of 1930 (19 U.S.C. §1625 (c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in the 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 decision on this notice.

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 admissible. It is now CBP's determination 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 admissible. It is now CBP's determination 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 is revoking Headquarters Ruling Letter (HQ) HQ477375, dated June 24, 2005 and Headquarters Ruling Letter (HQ) HQ W480158, dated November 13, 2006 and any other ruling not specifically identified, to reflect the admissibility of certain cube puzzles that fall within the scope of United States International Trade Commission Exclusion Order 337-TA-112, according to the analysis contained in Headquarters Ruling Letter (HQ) H027746 (Attachment C). We note that CBP had proposed to find the "Intellectual Cube" admissible, and the "Magic Cube" not admissible as it falls within the scope of the International Trade Commission Exclusion Order 337-TA-112. In response to arguments made in the comments received, we find in accordance with 19 U.S.C. § 1337(e), (g), (k) and 19 CFR § 210.76 the proper agency au-

thorized for modification or rescission of exclusion orders is the International Trade Commission. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this action will become effective 60 days after publication in the Customs Bulletin and Decisions.

DATED:

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: Toysmith 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 Toysmith'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 Toysmith, 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 Town's, Ltd. ("Seven Towns"). You also state that although Toysmith does not own Intellectual

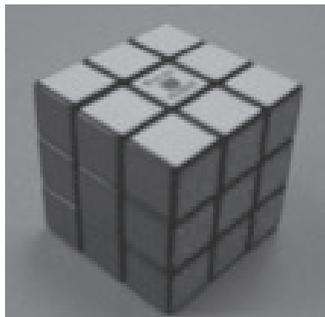
Cube, it is interested in importing the product and as such you requested an infringement determination as to whether that product infringes the same Rubik's Cube trademark.

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

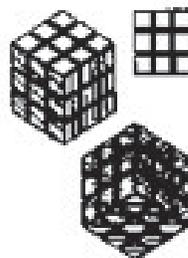


Image of the Protected Rubik's Cube as it appears on the USPTO Trademark Electronic Search System

Magic Cube

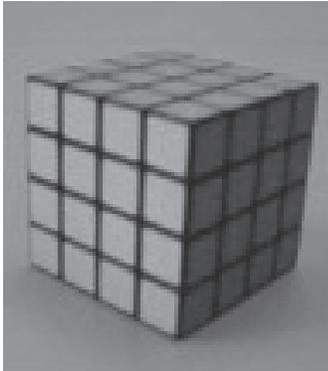
Magic Cube is a three-dimensional white twist cube puzzle, which features nine color patches on each of its six faces with the color on each face being the same and consists of the colors fuchsia, aqua, black, lime green, yellow and pink. An image of the Magic Cube will follow.



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, although 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

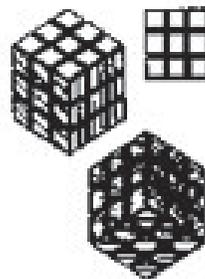
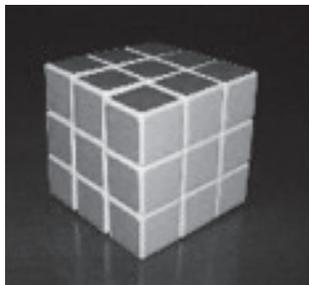


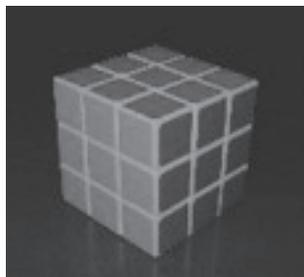
Image of the Protected Rubik's Cube as it appears on the USPTO Trademark Electronic Search System

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.



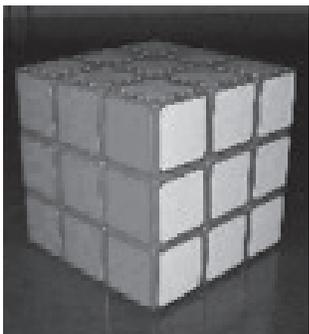
Magic Cube Sample 1: fuchsia, lime green, and yellow sides



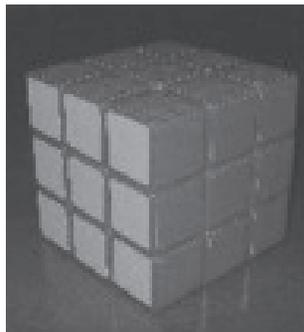
Magic Cube Sample 1: pink, light blue, and aqua

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.



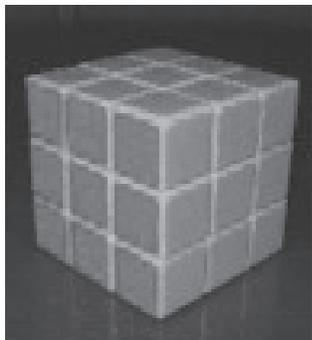
Magic Cube Sample 2: lime green, pink, and white sides



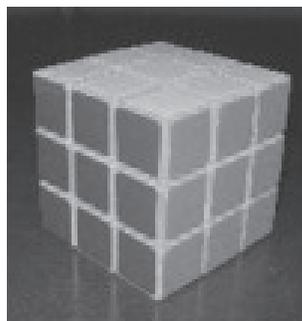
Magic Cube Sample 2: aqua, yellow, and fuchsia sides

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.



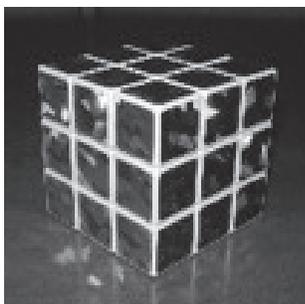
Magic Cube Sample 3: aqua, pink, and orange sides



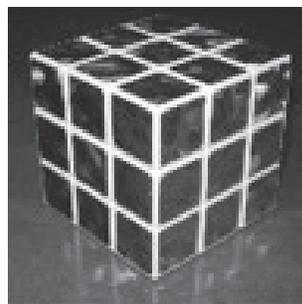
Magic Cube Sample 3: yellow, purple, and pink sides

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 analy-

sis 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
March 6, 2009
OT:RR:BSTC:IPR
CATEGORY: Exclusion Order, Trademarks

SCOTT WARNER, 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 477375 (June 24, 2005); and HQ W480158 (November 13, 2006).

DEAR MR. WARNER:

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

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, 2186 (1993), notice of the proposed modification was published on December 26, 2008, in the Customs Bulletin and Decisions, Volume 43, No. 1. One letter with comments was received in response to this notice and is addressed in this ruling.

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.

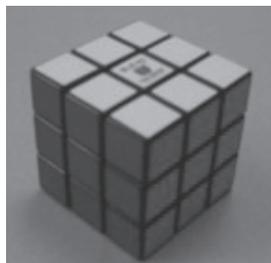
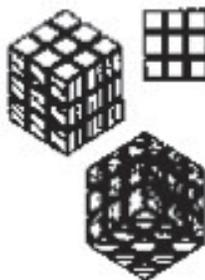


Image of the protected Rubik's Cube as used in commerce



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.

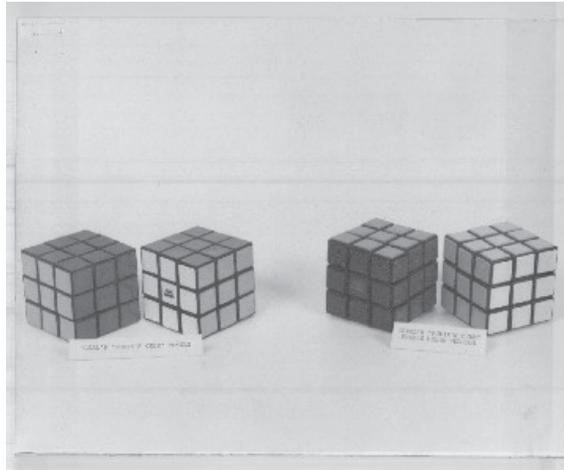


Image of: 'IDEAL'S "RUBIK'S CUBE"' and 'IDEAL'S "RUBIK'S CUBE" PUZZLE DELUX VERSION' USITC EXCLUSION ORDER 337-TA-112 (issued December 30, 1982, published January 1983)

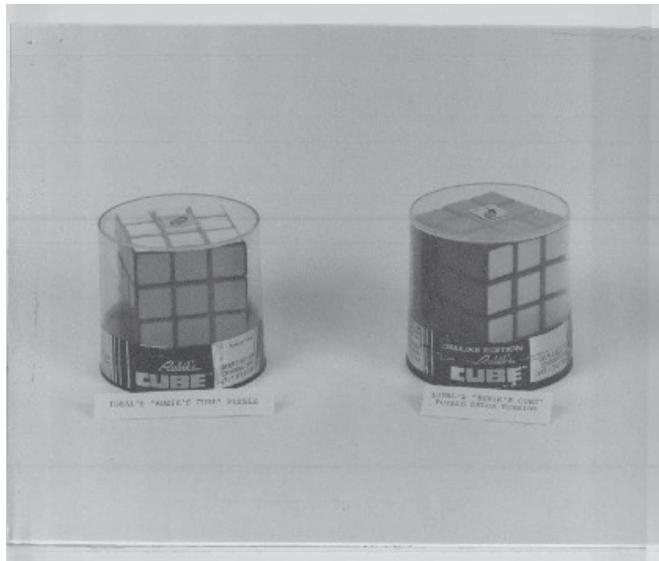


Image of: 'IDEAL'S "RUBIK'S CUBE" PUZZLE' and 'IDEAL'S "RUBIK'S CUBE" PUZZLE DELUX VERSION' Image of Ideal's Cube Puzzle and Packaging USITC EXCLUSION ORDER 337-TA-112 (issued December 30, 1982, published January 1983)

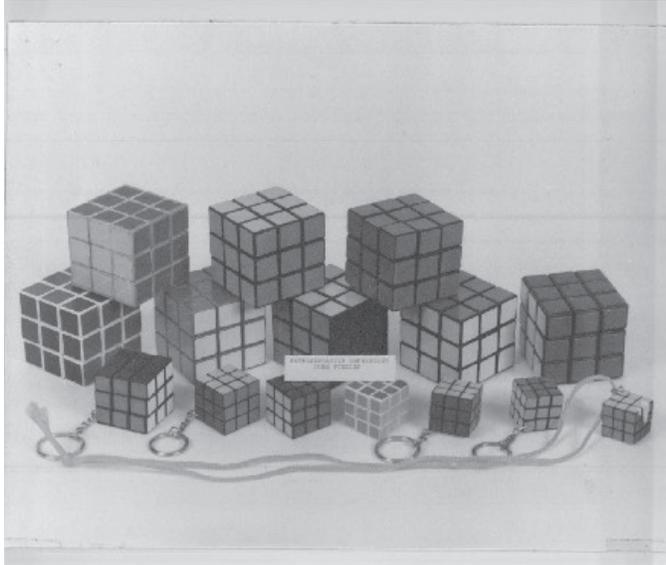


Image of: 'REPRESENTATIVE INFRINGING CUBE PUZZLES' Note the variation in shades of colors that appear on the merchandise determined to be infringing by the USITC.
USITC EXCLUSION ORDER 337-TA-112 (issued December 30, 1982, published January

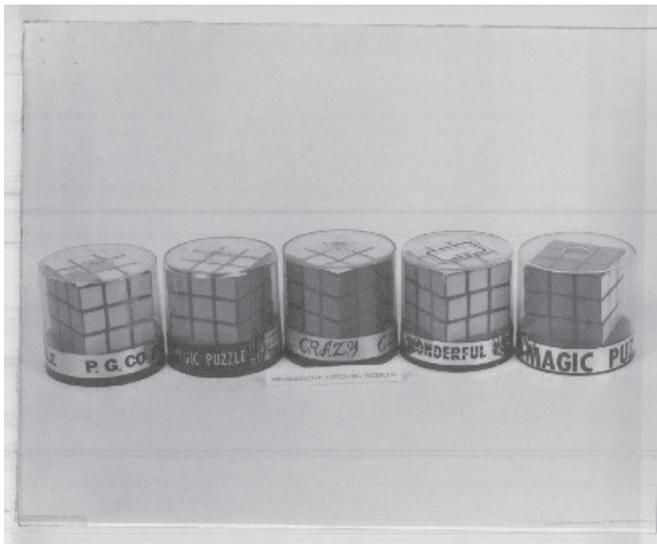


Image of: 'REPRESENTATIVE INFRINGING PACKAGING' USITC EXCLUSION ORDER 337-TA-112 (issued December 30, 1982, published January 1983)

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.

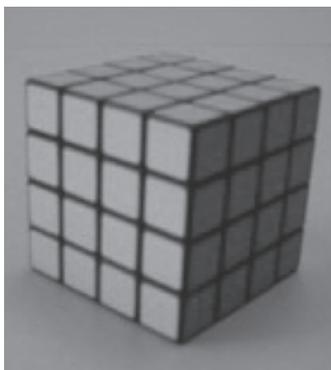


Image of the 4x4x4 “Intellectual Cube”

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)

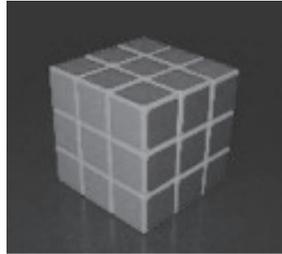
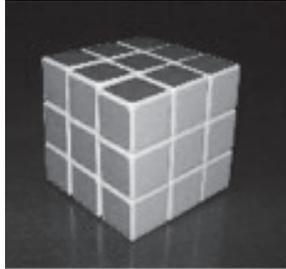


Image of sample one (1) of the "Magic Cube" (October 11, 2006 letter)

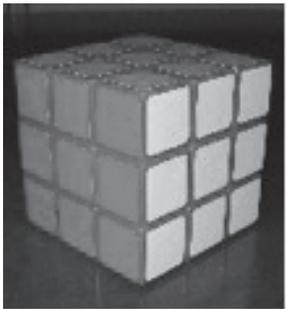


Image of sample two (2) of the "Magic Cube" (October 11, 2006 letter)

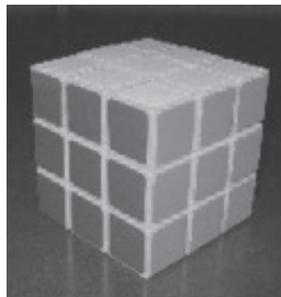
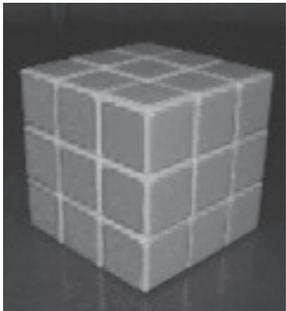


Image of sample three (3) of the "Magic Cube" (October 11, 2006 letter)

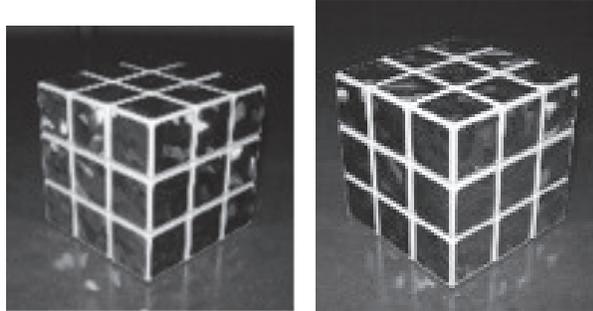


Image of sample four (4) of the “Magic Cube” (October 11, 2006 letter)

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, 1125, 1127. 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 num-

ber 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. 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). *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 colors 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.¹ 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 ac-

¹Federal Register, 48 FR 12142, March 23, 1983: "On December 29, 1982, the Commission concluded the above-captioned investigation under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) with a determination that there is a violation of that section in the importation into and sale in the United States of certain cube puzzles. On January 12, 1982, *complainant Ideal Toy Corp. (Ideal)* filed a petition for reconsideration pursuant to § 210.58 of the Commission's Rules of Practice and Procedure (19 CFR 210.58) *requesting that the Commission issue cease and desist orders and broaden its exclusion order to include 4 by 4 . . . cube puzzles. On February 17, 1983, Ideal withdrew its request for cease and desist orders. On March 16, 1983, the Commission denied the petition for reconsideration.*" 48 FR 12142, March 23, 1983. (*emphasis added.*)

cordance 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.

The comments were submitted by the law firm of Garvey Schubert Barer, on behalf of their client Toysmith. In the letter received January 25, 2009, Garvey Shubert Barer, on behalf of Toysmith, states the firm received a letter containing the proposed revocation on December 23, 2008. The comments submitted by Toysmith were timely received in response to the formally published notice of proposed revocation.

One of the comments presented by Garvey Shubert Barer on behalf of Toysmith states the International Trade Commission (ITC) Exclusion Order 337-TA-112, issued on December 30, 1982 and published in January 1983 is not new factual information because it is a “26-year old ITC order.” The original rulings issued by CBP did not address the ITC Exclusion Order 337-TA-112, and such a related document is required to be addressed in accordance with 19 CFR § 177.2. Although Toysmith claims the ITC Exclusion Order was included in its ruling requests, contrary to this assertion, Toysmith did not include such Exclusion Order with its prior submissions as required by § 177.2.

One of the comments presented by Toysmith states that the colors used on the sample magic cubes were found to be characterized differently within the original rulings than in the proposed revocation. The colors examined in the notice of proposed revocation were compared with the images of infringing articles provided by the ITC as exhibits and demonstrative examples of merchandise falling within the ITC Exclusion Order 337-TA-112. The colors on the sample magic cubes were found to fall within the colors appearing on such images of articles subject to exclusion. In accordance with 19 U.S.C. § 1337(e), (g), (k)² and 19 CFR § 210.76³, if Toysmith believes the order is

² 19 U.S.C. § 1337(k). Period of effectiveness; termination of violation or modification or rescission of exclusion or order.

(1) Except as provided in subsections (f) and (j), *any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury, that the conditions which led to such exclusion from entry or order no longer exist.*

(2) If any person who has previously been found by the Commission to be in violation of this section petitions the Commission for a determination that the petitioner is no longer in violation of this section or for a modification or rescission of an exclusion from entry or order under subsection (d), (e), (f), (g), or (i)—

(A) the burden of proof in any proceeding before the Commission regarding such petition shall be on the petitioner; and

(B) relief may be granted by the Commission with respect to such petition—

(i) on the basis of new evidence or evidence that could not have been presented at the prior proceeding, or

(ii) on grounds which would permit relief from a judgment or order under the Federal Rules of Civil Procedure. (*emphasis added.*)

³ 19 CFR § 210.76. Modification or rescission of exclusion orders, cease and desist or-

subject to modification or rescission due to a change in conditions of fact or law, the proper agency authorized for modification or rescission of exclusion orders is the International Trade Commission.

One of the comments presented by Toysmith states that it has not had the opportunity to see the images of the infringing articles provided by the ITC. The ITC Exclusion Order is dated December 30, 1982 and was published in January 1983, Toysmith has had adequate time to contact the ITC and inspect and examine the images provided by the ITC of articles subject to exclusion.⁴ Additionally, Toysmith claims that trademark rights do not remain constant over time. In accordance with 19 U.S.C. § 1337(e), (g), (k) and 19 CFR § 210.76, if Toysmith believes the order is subject to modification or rescission due to a change in conditions or fact or law, the proper agency authorized for modification or rescission of exclusion orders is the International Trade Commission.

One of the comments presented by Toysmith states that CBP proposes to expand protection beyond the “relatively narrow ambit afforded under current law governing trademarks in product configuration color elements,” as well as functionality and non-functionality. As pointed out above, the ITC 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). Toysmith has asserted there has been a change in the facts and the law. In accordance with 19 U.S.C. § 1337(e), (g), (k) and 19 CFR § 210.76, if Toysmith believes the order is subject to modification or rescission due to a change in conditions of fact and law, the proper agency authorized for modification or rescission of exclusion orders is the International Trade Commission.

One of the comments presented by Toysmith states that the ITC Order was based on now-obsolete legal standards and a materially different factual context. As provided in 19 CFR § 210.76, “*Whenever any person believes that changed conditions of fact or law, or the public interest, require that an exclusion order, cease and desist order, or consent order be modified or set aside, in whole or in part, such person may file with the Commission a petition requesting such relief. The Commission [ITC] may also on its own initiative consider such action.*” (*emphasis added.*) The ITC has had ample time

ders, and consent orders. (a) Petitions for modification or rescission of exclusion orders, cease and desist orders, and consent orders. (1) *Whenever any person believes that changed conditions of fact or law, or the public interest, require that an exclusion order, cease and desist order, or consent order be modified or set aside, in whole or in part, such person may file with the Commission a petition requesting such relief. The Commission may also on its own initiative consider such action.* The petition shall state the changes desired and the changed circumstances warranting such action, shall include materials and argument in support thereof, and shall be served on all parties to the investigation in which the exclusion order, cease and desist order, or consent order was issued. Any person may file an opposition to the petition within 10 days of service of the petition. [59 FR 39039, Aug. 1, 1994, as amended at 61 FR 43433, Aug. 23, 1996] (*emphasis added.*)

⁴ Federal Register, 48 FR 537, January 5, 1983: “The Commission Action and Order, the Commission opinions, and all other nonconfidential documents on the record of the investigation are available for public inspection Monday through Friday during official working hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Room 156, Washington, D.C. 20436, telephone 202-523-0471. By order of the Commission. Issued: December 30, 1982. Kenneth R. Mason, Secretary.” 48 FR 537, January 5, 1983. (*emphasis added.*)

to initiate action on its own and has not taken such action. In accordance with 19 U.S.C. § 1337(e), (g), (k) and 19 CFR § 210.76, if Toysmith believes the order is subject to modification or rescission due to a change in conditions of fact or law, the proper agency authorized for modification or rescission of exclusion orders is the International Trade Commission.

The ITC has not taken action for modification or rescission of ITC Exclusion Order 337-TA-112. *See* 19 CFR § 210.76. 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*.

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.