

In the Matter of

CERTAIN CUBE PUZZLES

Investigation No. 337-TA-112



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United States International Trade Commission / Washington, D.C. 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

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COMMISSION ACTION AND ORDER

Introduction

The United States International Trade Commission has concluded its investigation under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), of alleged unfair methods of competition and unfair acts in the unauthorized importation of certain cube puzzles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the alleged effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The Commission's investigation concerned allegations of (1) infringement of common-law trademarks of complainant Ideal Toy Corp., (2) false representation by copying complainant's trade dress, and (3) passing off of respondents' cube puzzles as those of complainant.

This Action and Order provides for the final disposition of investigation No. 337-TA-112 by the Commission. It is based upon the Commission's determination (Commissioner Stern dissenting), made in public session at the Commission meeting of December 15, 1982, that there is a violation of section 337.

Action

Having reviewed the record compiled and information developed in this investigation, including (1) the submissions filed by the parties, (2) the transcript of the evidentiary hearing before the ALJ and the exhibits which were accepted into evidence, (3) the ALJ's recommended determination, and (4) the arguments and presentations made by the parties and witnesses at the Commission's public hearing on November 18, 1982, the Commission on December 15, 1982, determined (Commissioner Stern dissenting) that—

1. There is a violation of section 337 with respect to the importation and sale of imported cube puzzles and their packaging that infringe Ideal's common-law trademarks;
2. The appropriate remedy for such violation is a general exclusion order issued pursuant to section 337(d) (19 U.S.C. § 1337(d));
3. The public interest factors enumerated in section 337(d) do not preclude the issuance of the order referred to in paragraph 2 above; and
4. The bond provided for in section 337(g)(3) (19 U.S.C. § 337(g)(3)) shall be in the amount of 600 percent of the entered value of the cube puzzles in question.

Order

Accordingly, it is hereby ORDERED THAT--

1. Cube puzzles that infringe Ideal's common-law trademark in its Rubik's Cube puzzle are excluded from entry into the United States;
2. 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;
3. The public interest factors enumerated in section 337(d) do not preclude issuance of the orders referred to above;

4. The articles ordered to be excluded from entry into the United States pursuant to paragraphs 1 and 2 above are entitled to entry under bond in the amount of 600 percent of the entered value of said articles during the presidential review period provided for in section 337(g)(2) (19 U.S.C. § 1337(g)(2));
5. Notice of this Action and Order be published in the Federal Register and that copies of this Action and Order and the opinions issued in connection therewith be served upon each party of record to this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the Secretary of the Treasury;
6. The Commission may amend this Order in accordance with the procedure described in section 211.57 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 211.57).

By order of the Commission.



Kenneth R. Mason
Secretary

Issued: December 30, 1982

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

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VIEWS OF CHAIRMAN FCKFS AND COMMISSIONER HACCAPT 1/

I. Procedural Background

On November 17, 1981, complainant Ideal Toy Corp. (Ideal) 2/ filed a complaint with the Commission alleging violations of section 337. The Commission issued a notice of investigation which was published in the Federal Register on December 29, 1981 (46 F.R. 62964). An investigation was instituted to determine whether there is a violation of section 337 in the unauthorized importation of certain cube puzzles into the United States, or in their sale, by reason of (1) infringement of complainant Ideal's common-law trademark, (2) false designation of origin by copying complainant's trade dress (hereinafter false representation), and (3) passing off of respondents' cube puzzles as those of complainant, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically

1/ The following abbreviations are used in these views: ALJ = Administrative Law Judge; RD = recommended determination; IA = Investigative Attorney; TR = transcript of evidentiary hearing before the ALJ; CTP = transcript of oral argument before the Commission; CY=complainant Ideal's exhibit; IABV = investigative attorney's brief on violation; IARI = investigative attorney's brief on industry; IPHE = Ideal's post Commission hearing brief; IAPHR = Investigative attorney's posthearing brief.

2/ Ideal is a Delaware corporation with its principal place of business in Queens, New York. Ideal is a domestic toy manufacturer which sells a full line of toys, games, and puzzles in the United States, including the cube puzzles at issue.

operated, in the United States. Ideal sought a permanent exclusion order and orders to cease and desist. Ideal also requested a temporary exclusion order but later waived this request. On March 16, 1982, the notice of investigation was amended to add 16 additional respondents. A total of 112 respondents have been named in this investigation.

Ideal has entered into settlement agreements with the following thirteen respondents: Robert S. Koons and Associates, Rand International, Korvettes, Inc., F.W. Woolworth Co., Sears Roebuck & Co., John W. Hansen Co., Chadwick Miller, Inc., Henry Wedemeyer, Inc., Chinese Arts and Crafts, Inc., Imperial Merchandise Co., Inc., Mark Metzner, Inc., PMJ Trading, Ltd., and Vanguard Jewelry Corp. The Commission issued notices 3/ requesting comment on the proposed terminations of the thirteen respondents on the basis of settlement agreements. The comment periods have expired for all 13 respondents and all 13 respondents have been terminated from this investigation. 4/

On June 4, 1982, complainant Ideal submitted a list of 80 respondents against whom it would not attempt to prove section 337 violations. Those respondents are included in the list of respondents in the PD for whom dismissal is recommended. 5/ We agree with the ALJ's recommendation to dismiss these respondents.

3/ 47 F.R. 37310; 47 F.R. 39743; 47 F.R. 47704; 47 F.R. 51021; 47 F.P. 53148.

4/ After the briefing and vote by the Commission in this investigation, Ideal filed a joint motion (No. 112-36c) to terminate Global Imports as a respondent from this investigation. Because of the short time period left in the investigation, however, the Commission was not able to terminate Global Imports as a respondent because there was no time in which to offer the settlement agreement for comment in accordance with Commission rule § 210.51.

5/ RD at 60 and 61.

The proceeding before the ALJ was held intermittently from May 24, 1982, to July 27, 1982. Only respondents P.G. Continental, 6/ Robert S. Hong, and Maruwa Gain Corp. 7/ participated in the proceeding before the ALJ. In addition to these three respondents, the ALJ found nine other respondents to be in violation of section 337. These respondents are: Continental Variety, Whole Yean, Inc., Eurasia Merchandise, Inc., Global Imports, Mecca Electronics Industries, Inc., Plawner Toy Mfg. Corp., Sajra Distributors, Coaster Co., Ltd., and Sharer Enterprises Co., Ltd. 8/ On September 27, 1982, the ALJ certified the investigation to the Commission, with a recommendation that there is a violation of section 337. On November 18, 1982, the Commission held a public hearing at which complainant Ideal, respondents P.G. Continental, Maruwa Game Corp., Robert S. Hong, and the Commission investigative attorney appeared.

Ideal has sued several respondents in Federal courts. Ideal Toy Corporation v. Plawner Toy Manufacturing Corp., 685 F.2d 78 (3rd Cir. 1982); Ideal Toy Corporation v. Chinese Arts & Crafts, 530 F. Supp. 375 (S.D.N.Y. 1981); and Ideal Toy Corporation v. P.G. Continental, Docket No. C-81-2416

6/ Respondent P.G. Continental (PG) is a California corporation which imports a variety of toys into the United States, including the cube puzzles at issue.

7/ Respondents Maruwa Gain Corp. and Robert S. Hong (collectively "Maruwa") are Taiwanese trading companies which deal in various merchandise including the cube puzzles at issue.

8/ We also note that the ALJ determined that respondents Atco Electronics, Ltd., Dajere, Inc., Pan Lon International Inc., Price King, Inc., Jack Stern d/b/a Worldwide Discount, Supreme Import-Export D-M Sale Corp., Neat Things Importing Ltd., and Otto International Corp. committed unfair acts in this case but the record does not establish that they were importers of cube puzzles. RD at 49. It is not clear from the record whether these parties were or were not first purchasers.

(N.D. Cal. 1982). All three of these cases involved preliminary injunctions, and as of this time, no full trial on the merits has been held. 9/

II. Unfair Acts

A Common-law trademark

A trademark is defined in the Lanham Act as any word, name, symbol, or device, or any combination thereof, adopted and used by a manufacturer or a merchant to identify his goods and to distinguish them from those manufactured or sold by others. 10/ This is also the traditional definition of a common-law trademark. 11/ A trademark indicates origin or ownership, guarantees quality or constancy, and entitles the owner to advertise goods bearing the mark. 12/

Ideal claims a common-law trademark in the appearance of its cube. 13/ Ideal's cube puzzle (called "Rubik's Cube" by Ideal) is a six-sided cube made

9/ In Ideal Toy Corp. v. Plawner Toy Mfg. Corp., supra, the court granted a preliminary injunction limited to imitations of Ideal's six specific colors on a dark grid background and Ideal's packaging consisting of a transparent plastic container on a black base. In Ideal Toy Corp. v. P.G. Continental, supra, the court denied Ideal's motion for a preliminary injunction on the grounds that it had failed to show either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards Ideal. In Ideal Toy Corp. v. Chinese Arts & Crafts, Inc., supra, the court issued a preliminary injunction, but the case was settled before it went to trial. The court found that the black-based cubes and packaging marketed by defendant were confusingly similar to Ideal's cube and packaging.

10/ 15 U.S.C. § 1127.

11/ 3 R. Callmann, Unfair Competition, Trademarks, and Monopolies, § 65 at 2 (hereinafter Callman).

12/ 3 R. Callman, supra, § 65 at 3.

13/ Although patented by Erno Rubik in Hungary, Ideal and the Hungarian companies, Polytechnica y Polyservetsekiza and its agent, Konsumex, do not have any patent rights in the United States to the cube puzzle. RD at 4. CX 39.

of black plastic. On each side there are nine smaller cubes, called "cubies." In the regular or less expensive version of the cube, the outer face of all the cubies on each side of the cube are covered with an adhesive square of the same color when the puzzle is in the starting position. The colors used are red, blue, yellow, green, orange and white. These colors appear against a black grid pattern formed by the black plastic background.

In the deluxe model of the Ideal cube, the same general colors are used but the hues are different from those in the regular model. The colored squares in the deluxe cube are made of plastic and are inserted and glued into the black cubies. In addition, the black background grid is thicker than on the regular cube, the colored sides are slightly raised, and the cube is slightly larger than the regular cube. The expensive version is sold only in a limited distribution network consisting of gift and stationery stores and similar outlets.

The regular cube was sold and the deluxe cube is presently sold in packages which have a cylindrical black plastic base and a cylindrical clear plastic cover through which the cube may be seen. The base and the cover are sealed together by a strip of black and gold tape on which the name "Rubik's Cube" appears. Ideal's regular cubes are presently sold in a square black and green box covered on two sides by clear plastic through which the cube can be seen.

A few respondents sell cube puzzles in packages which are identical to Ideal's packages. Respondents also market their cubes in other packages, including packages which have clear dome-shaped tops and black plastic

bottoms. Ideal challenges only the packages that are virtually identical to Ideal's packages. 14/

The alleged trademark in the design of the cube puzzle consists of the solid colors red, blue, yellow, green, orange and white, with the same color on the outer faces of all cubies on each side of the cube, with a square of color appearing against the black plastic on each cubie. According to Ideal, this creates a distinctive grid background. This is the way the puzzle looks in the starting position and the way the cube looks when the puzzle is solved. The player rotates sections of the puzzle and "scrambles" the colors. The colors must be unscrambled to solve the puzzle. It is sold in the starting position so that the purchaser will know that the puzzle can be solved.

The respondents market a number of different cube puzzles, some of which are identical to Ideal's cube. Ideal alleges first that the puzzles identical to its Rubik's Cube infringe Ideal's common law trademark.

Although some of the respondents' cubes may have the same black-background, some respondents vary one or two colors on the sides of the cube by substituting other colors for the colors on Ideal's cube, e.g., purple for blue. Additionally, other cube puzzles have the same colored squares but different background colors, e.g., white, blue, and grey. Ideal also alleges that cubes puzzles which vary one or two colors on the side of the cube or which have different background colors infringe Ideal's trademark because they form a grid pattern which is confusingly similar to the black grid background

of Ideal's cubes. 15/ There are a number of other cube puzzles sold by respondents that have flowers, fruits, colored circles, etc., on them, but these puzzles are not challenged by Ideal.

In order to prove that it has a common-law trademark, Ideal must show (a) that it has a right to use the mark, (b) that the mark is inherently distinctive or has acquired a secondary meaning, (c) that the mark has not acquired a generic meaning, and (d) that the mark is not primarily functional. To prove infringement of that trademark, Ideal must prove there is a likelihood of confusion among consumers who see competing products with a similar appearance. For protection under section 337, a common-law trademark must meet these same criteria. 16/

1. Ideal's right to use the mark

A person claiming a trademark must establish that he has a right to identify his product by the mark. Prior use by another without abandonment may bar this right.

A U.S. firm, Logical Games, was the first company to sell cube puzzles in the United States having the appearance of the Rubik's Cube puzzle. Logical Games obtained 3,000 cube puzzles from the Hungarian companies, Polytechnica y Polyservetsekiza and its agent, Konsumex. These Hungarian companies obtained the rights to the cube puzzles from Erno Rubik, the Hungarian inventor of the cube puzzle.

Although Logical Games was the first company to sell and advertise the cube puzzles in the United States in 1979, Logical Games did not acquire any

15/ We note that this is the first time that Ideal has claimed that cubes with other background colors infringe Ideal's Rubik's Cube, supra note 9.

16/ Certain Novelty Glasses, Inv. No. 337-TA-55, USITC Pub. 991 (1979).

trademark rights to the design of the cube puzzles from the Hungarian companies. We find that any trademark rights obtained by Logical Games by first use in the United States flow back to the Hungarian companies. There is a presumption that in the absence of express or implied acknowledgement or transfer by the foreign manufacturer of rights in the United States, all rights to the trademark are in the foreign manufacturer. 17/ Since Logical Games did not obtain any rights from Konsumex but Ideal did, 18/ Ideal has the rights to the trademark. 19/

Thus, we conclude that if Konsumex obtained any trademark rights in the United States through the sale of cube puzzles by Logical Games, Ideal purchased these trademark rights from Konsumex. 20/ Further, if Konsumex did not obtain any trademark rights in the United States, Ideal began to establish its own trademark when it began to advertise and sell the cubes in the United States. 21/

2. Inherent distinctiveness

If a mark is "inherently distinctive" because it is fanciful, arbitrary or a unique mark in relation to other marks within the field, courts have inferred from the mark itself that it serves to identify the product as coming

17/ Hank Thorp, Inc. v. Minilite, Inc., 474 F. Supp. 228, 236 (D. Del. 1979), citing with approval, McCarthy, Trademarks and Unfair Competition (hereinafter McCarthy) §16.15; Bakker v. Steel Nurse of America, Inc., 176 USPQ 447 (TTAB 1972). See also Roger & Gallet v. Janmarie, Inc., 245 F.2d 505 (CCPA 1957).

18/ In September of 1979 Ideal entered into a contract with Konsumex giving Ideal all trademark rights to the design of the cube puzzle. CX 70.

19/ Rogers v. Ercona Camera Corp., 277 F.2d 94 (D.C. Cir. 1960); Spencer v. VDO Instruments, Ltd. 232 F.Supp. 735 (E.D. Mich. 1964).

20/ CX 70.

21/ RD at 17.

from a single source. 22/ Consequently, the courts have not required proof of secondary meaning.

A fanciful mark is a mark which is invented for the sole purpose of functioning as a trademark, e.g., "Kodak." 23/ Although the primary function of the colors on the cube puzzle is to act as a trademark, they have an additional purpose: the colors distinguish the sides of the cube.

An arbitrary mark consists of a symbol which is in common usage, but which, when used with the goods or services in issue, neither suggests nor describes any ingredient, quality or characteristic of those goods or services. 24/ In the case of colors, this means that they should be arbitrarily applied in such a way so as not to suggest a characteristic of the goods, e.g., colors applied to packaging. The colors applied to the cube puzzle are not arbitrary because they have a function to distinguish the cubies to allow people to solve the puzzle. 25/

22/ McCarthy § 15:1; In re Days-Ease Home Products Corp., 197 USPO 566 (TTAR 1977); In re International Playtex Corp., 153 USPO 337 (TTAR 1967).

23/ McCarthy § 11:3.

24/ Id. at 11:01.

25/ This is not inconsistent with our conclusion that the cube puzzle is nonfunctional. The question of whether a mark is fanciful or arbitrary versus de jure functional is a question of degree. According to In re Morton-Norwich Products Inc., 671 F.2d 1332, 1338-40 (CCPA 1982) (hereinafter Morton-Norwich), functionality must be determined in light of the competitive necessity to copy. The number of alternatives is an important factor in making this determination. Whether a mark is fanciful or arbitrary involves a different question, viz., whether the sole purpose of the mark is to act as a trademark. Although there are a number of alternatives to the square color patches used by Ideal on its cube puzzle, their sole purpose is not to function as a trademark.

The premise that to be inherently distinctive the sole purpose of the mark must be to act as a trademark could be argued to be contrary to the statement by Judge Rich in Morton-Norwich that: "a design can be inherently distinctive (the usual trademark law meaning of the word 'arbitrary') and still be 'functional'." However, we believe that the colors on this cube, although not de jure functional, are functional enough so that the cube cannot be considered arbitrary or fanciful. Morton-Norwich, supra, at 1343.

Further, the design of Rubik's Cube is not inherently distinctive because it is not unique in the field of cube puzzles. Other puzzles use colors to distinguish the sides of the cube puzzle, although the patches may be circular rather than square and the background may be clear rather than black. Since the design of Rubik's Cube is not unique, it cannot be considered inherently distinctive. 26/

3. Secondary meaning

To establish secondary meaning, a manufacturer must show that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself. 27/ Secondary meaning may be proven by evidence of an association between the mark and the seller in the minds of a substantial number of the buyer group. 28/ Because the design of Rubik's Cube is very eye-catching and thus intrinsically a strong mark, 29/ it requires less evidence of secondary meaning. 30/ The

26/ In In re Days-Ease Home Products Corp., supra, the Trademark Trial and Appeals Board held that a container for a liquid drain cleaner was distinctive because it was unique in its field:

The question of "inherently distinctive" obviously must be determined in relation to the goods for which registration is sought, the uniqueness of the container's configuration in this field, which would condition the reaction of purchasers to the shape, and what would be the anticipated reaction of the average purchaser to this shape. 197 USPO at 568.

In re International Playtex Corp., supra, cited with approval, Morton-Norwich, supra, at 1343; and In re McIlHenny, 278 F.2d 953, 957 (CCPA 1960).

27/ Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 102 S.Ct. 2182, 214 USPQ 1, 4, note 11 (1982), citing, Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 118 (1938).

28/ McCarthy § 15:11.

29/ This was not the case in our recent investigation, Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108, USITC Pub. 1305 (1982), where the subject vacuum bottles were a very weak mark, and therefore, required strong evidence of secondary meaning.

30/ McCarthy at § 11:24; Mother's Restaurants, Inc. v. Mother's Bakery, Inc., 498 F.Supp. 847, 210 USPQ 207 (W.D.N.Y. 1980); McGregor-Doniger, Inc. v. Drizzle, Inc., 599 F.2d 1126, 202 USPO 81 (2d Cir. 1979).

burden of proof in proving secondary meaning is upon the party trying to establish legal protection for the mark. 31/

Surveys are one means of demonstrating secondary meaning. 32/ In this investigation Ideal presented as direct evidence of secondary meaning surveys conducted by Dr. Helfgott (hereinafter the Helfgott surveys). 33/ The Helfgott surveys are quota surveys. 34/ Dr. Helfgott's target universe was men and women in five age groups, starting with age 15. A quota was set for the number of people in each group to be interviewed and the quota was filled by selecting as interviewees random passers-by in suburban shopping malls in the New York City area. 35/

Respondents offered a survey by Mr. Russick (hereinafter the Russick survey). 36/ This survey is a modified probability survey rather than a true random sample because the interviews were made in "clustered households," i.e., six predesignated households in a cluster or sample area, and because the sampling areas were based on 1970 U.S. census data rather than more recent census data. Mr. Russick's target universe included all non-institutionalized adults who were 18 years or older and resided in the Minneapolis-St. Paul metropolitan area.

Although the ALJ noted several possible sampling and nonsampling

31/ McCarthy § 15:11.

32/ RD at 20; *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803 (8th Cir. 1969); Manual for Complex Litigation, § 2-713; *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F.Supp 670, 137 USPO 413 (S.D.N.Y. 1963).

33/ CX 59-61, 284-285.

34/ Quota surveys are frequently used in proving secondary meaning because of their low cost. These types of surveys have been accepted by the courts. TR 750, 993-994. See McCarthy at § 32:48; *Boehringer Ingelheim v. Pharmadyne Laboratories*, 522 F.Supp. 1040 (DNJ 1980).

35/ RD at 21.

36/ PG Exs. 32, 33 and 35.

errors, 37/ she determined that one nonsampling error--a leading question--fatally flawed the Helfgott surveys presented by Ideal.

Specifically, she determined that the use of "brand name" in the Helfgott surveys made them completely unreliable because: "[i]f any of these people understood brand name to refer to a single source, or a single manufacturer or firm, the question itself contained the conclusion that the cube came from a single source." 38/

We disagree with this finding of the ALJ. The questions in the Helfgott surveys were modeled on those used in the Zippo case, in which the court found secondary meaning based on the surveys which asked "[h]ere is a cigarette lighter, without guessing, can you tell me what brand of lighter you are certain this is?" Zippo Mfg. Co. v. Rogers Imports, Inc., supra note 127, at 687. The Zippo court's analysis of the survey evidence has been cited with approval by the Advisory Committee Notes to Federal Rule of Evidence No. 703. Further, as the ALJ has stated, both complainant's expert, Dr. Helfgott, and respondents' expert, Mr. Russick, testified that people understand the term "brand name" to be equivalent to the term "name." Finally, both the Third Circuit and the U.S. District Court for the Southern District of New York relied on the same surveys without criticizing the use of "brand name" in the surveys. 39/ Thus, the use of "brand name," should not invalidate the Helfgott surveys.

37/ A sampling error measures the extent to which the sample estimates may differ from a complete count of all persons in the target universe. Nonsampling errors are other errors, including undercoverage, respondent and enumerator errors, processing errors, nonresponse errors, and possible editing errors. RD at 23 and 25.

38/ RD at 27

39/ Ideal Toy Corp. v. Plawner Mfg. Corp., supra; Ideal Toy Corp v. Chinese Arts & Crafts, Inc., supra. See CTR at 66.

Dr. Helfgott conducted six surveys: a preliminary survey on July 30, 1981, 40/ followed by a survey in August 1981 which contained 3 studies 41/, a second survey in January 1982, 42/ and three surveys in May 1982. 43/ In August of 1981, Dr. Helfgott in survey A(1) and (2) found that 33 percent of the interviewees identified black-based cubes as Rubik's Cubes. In Study B, out of six cubes, approximately 40 percent of the interviewees identified Ideal's cube puzzle as Rubik's Cube. 44/ In a subsequent survey in May of 1982, 72 percent of the interviewees identified Ideal's cube puzzle as Rubik's Cube. 45/ These surveys demonstrate that, at least in the New York City area, a significant percentage of consumers identified Ideal's black-based cube as Rubik's Cube or as coming from a single source.

There are two major problems with the Russick survey offered by the respondents. First, as Mr. Russick admitted in his testimony, interviewees who stated that Rubik's Cubes come from many companies may have been confused as to whether companies meant "manufacturers" or "retail stores". The most important flaw in the Russick survey, however, is that there were a large number of tabulation errors; the response circled by the interviewers on the questionnaire sheet was inconsistent with the interviewees' comments. 46/ Even though the comments indicated that the interviewee thought that there was one original Rubik's Cube and "other imitations," the interviewer circled as a

40/ CX 61.

41/ CX 60.

42/ CX 59.

43/ CX 284, 285, 289.

44/ CX 60.

45/ CX 285.

46/ The comments of the interviewees, for example, were as follows: "'The' Rubik's Cube [sic] comes from one, but there are many imitations" and "Not the original. There is one original--made by Rubik, but there are other facsimiles." For further comments, see RD at 31 and 32.

response that Rubik's Cube comes from a number of companies when these comments appear to show just the opposite.

Despite these flaws, the ALJ's finding of secondary meaning was based on the comments contained in the Russick survey and on the tabulation that showed that a number of people identified Ideal's cube as coming from a single company. The ALJ concluded on this basis that a significant number of people identified Ideal's cube as coming from one source.

We believe that the errors associated with the Russick survey, especially the error involving tabulation, invalidate the conclusion offered by the respondents that the Russick survey demonstrates that a significant number of people believe that the black-based puzzle manufactured by Ideal, i.e., Rubik's Cube, comes from more than one source. We, however, agree with the ALJ that the Russick survey, especially the comments by the interviewees, indicates secondary meaning for Rubik's Cube in the Minneapolis-St. Paul area, and that there is a presumption of secondary meaning throughout the United States. 47/

In addition to both the Helfgott surveys and the Russick survey, there is evidence of meticulous copying, over 2 million dollars in advertising, and 15 million units of sales to date. Although this is "circumstantial" evidence of secondary meaning, when such evidence is combined with the direct evidence of consumer surveys and the fact that the mark is intrinsically a strong mark,

47/ RD at 35 and 36. *White Tower System, Inc. v. White Castle System of Eating Houses Corp.*, 90 F.2d 67, 33 USPQ 573 (6th Cir. 1937). See also, *Travelodge Corp. v. Siragusa*, 228 F.Supp. 238 (N.D. Ala. 1964), aff'd, 352 F.2d 516 (5th Cir. 1965); *Pike v. Ruby Foo's Den, Inc., of Maryland*, 232 F.2d 683, 109 USPQ 78 (D.C. Cir. 1956); *Food Fair Stores, Inc. v. Lakeland Grocery Corp.* 301 F.2d 156, 133 USPQ 127 (4th Cir. 1962); 3 R. Callmann, supra, at 326.

we believe that Ideal has established secondary meaning in its Rubik's Cube puzzle.

4. Genericness

A generic name of a product, i.e., the name of a product or service itself, e.g. "Aspirin," can never function as a trademark to indicate origin. 48/ To be considered generic, the mark must serve to identify the product itself rather than indicating that it comes from one source.

The Helfgott surveys (August 1981 (A (3) and B)) and January 1982 (B) demonstrate that the term Rubik's Cube is not generic. In a Survey A (3) conducted in August 1982 interviewees were shown a dice puzzle and only 17 percent identified it as a Rubik's Cube in comparison to 37 percent of the interviewees that identified a black-based cube as Rubik's Cube. 49/ In Study B, 200 interviewees were shown six different cube puzzles, 50/ e.g., dice and fruit cube puzzles, and asked to identify each. Approximately, forty percent correctly identified the Ideal cube as "Rubik's Cube" as compared to the next highest of five percent that called the white-based cube a "Rubik's Cube." If there was no answer, interviewees were then told that one was a "Rubik's Cube" and asked which one. After this question, a total of 61 percent correctly identified the Ideal cube as Rubik's Cube, as compared with the next highest response for the white cube of 5 percent. 51/ In study B conducted in January 1982, 200 interviewees again were shown six cubes including a black-based cube identical to Rubik's Cube. Sixty-three percent of the interviewees identified

48/ McCarthy at §12:1.

49/ CX 60.

50/ CX H-M.

51/ CX 60.

the black-based cube as Rubik's Cube. Nine percent identified a white-based cube as Rubik's Cube, and the next highest percent was 3 percent for the fruit, octagon, and numbers cubes, respectively. 52/ We believe these surveys demonstrate that consumers identify Rubik's Cube as being the source of the black-based cube and not the generic name of cube puzzles in general because a substantial number of consumers did not identify the dice or fruit cubes as being Rubik's Cube.

We determine that the conclusion of both the Helfgott surveys and the comments made during the Russick survey 53/ indicate Rubik's Cube is identified with one source, i.e., the black-based puzzle, and therefore, has not become generic.

5. Functionality

In order to determine functionality, courts look to "the need to copy those articles, which is more properly termed the right to compete effectively." 54/ The Court of Customs and Patent Appeals has recently redefined "functionality" in Morton-Norwich, supra. In that case, the court distinguished between de facto and de jure functionality, the latter being operative to prevent a design from being protected as a trademark. The court noted that functionality is "always in reference to the design of the thing under consideration (in the sense of its appearance) and not the thing itself." 55/ The court defined "functional" as referring to "utilitarian" as opposed to "aesthetic." The court went on to state that an examination

52/ CX 59.

53/ We have relied on the comments in the Russick survey to establish a lack of genericness because the comments are direct evidence by consumers that Rubik's Cube is not a generic term. See RD at 31 and 32.

54/ Morton-Norwich, supra at 1339.

55/ Id. at 1338.

into de jure functionality is "not to the mere existence of utility, but to the degree of design utility." 56/

The court referred to the following factors which aid in determining superiority: (1)" the existence of an expired utility patent which disclosed the utilitarian advantage of the design sought to be registered as a trademark was evidence that it was functional", 57/ (2) whether "the originator of the design touted its utilitarian advantages through advertising"; 58/ (3) whether there were a number of other alternatives to the design features available; 59/ (4) whether the particular design results from a comparatively simple or cheap method of manufacture. 60/ Thus, the court concluded: "[t]he question is whether appellant's plastic spray bottle is de jure functional; is it the best or one of a few superior designs available?" 61/ The court concluded that utilitarian means "superior in function (de facto) or economy of manufacture," which superiority is to be determined "in light of competitive necessity to copy." 62/

We determine that the overall appearance of Ideal's Rubik's Cube is nonfunctional. When the Morton-Norwich criteria are examined, it is clear that the design of Rubik's Cube is not functional. There are no utility patents disclosing the utilitarian advantage of the design sought to be registered as a trademark. In fact, the original Hungarian patent covering Professor Rubik's invention itself suggests the use of illustrations or

56/ Id.

57/ Id. at 1341 (emphasis in the original).

58/ Id.

59/ Id.

60/ Id.

61/ Id.

62/ Id.

numbers rather than colors. 63/ Ideal's advertising does not tout the utilitarian advantages of its design. There are also numerous alternatives available to the design adopted by Ideal including colored circles, triangles, or a clear plastic-based cube. Finally, there are no indications that Ideal's particular design results from a comparatively simple or cheap method of manufacturing. We, therefore, conclude that a trademark in the design of Ideal's Rubik's Cube would not impair competition in the United States by depriving other companies of various alternatives. As the Commission stated in Certain Novelty Glasses, supra, "[t]he design alternatives for amusing the user are limited only by the imagination of the creator. . . ." USJTC Pub. 991 at 7,8. 64/

Respondents argue that square color patches on a black grid background is "one of a few superior designs available" 65/ However, the fact that a design feature substantially increases the marketability of the goods does not prove functionality if its value "lies only in the demand for goods associated with a particular source rather than goods of a particular design." 66/

The object of the puzzle is to rearrange the puzzle so as to return it to its starting position. 67/ Thus, the cube faces must be distinguishable, but not necessarily by the use of square solid-color panels. 68/ The fact that

63/ CX 39.

64/ This opinion is consistent with Ideal v. Plawner, supra, and Ideal v. Chinese Arts & Crafts, Inc., supra, where it was found that there were a wide variety of possible ways to decorate the cube. These alternatives are exemplified by the physical exhibits of cube puzzles in this case. CX: H, I, K, L, R, T-Z, AA-BB-3.

65/ See RD at 39 and 40 for a summary of respondents' arguments.

66/ SK & F Co. v. Premo Pharmaceutical Laboratories, Inc., 625 F.2d 1055, 1063 (3d Cir. 1980) (quoting Restatement of Torts §742 (1938)). See also Vuitton et Fils S.A. v. J. Young Enterprises, Inc., 644 F.2d 769, 774 (9th Cir. 1980).

67/ TR. 1079-1980.

68/ TR. 1103, 1137.

the use of color and square patches may make the cubies slightly more distinguishable and, therefore, the puzzle slightly easier to solve than a puzzle using colored circles, dice, or fruit does not establish that the square colored patches are functional. The cube has 43,252,003,274, 489,856,000 (43 quintillion) possible combinations. 69/ It is unlikely, if not impossible, that it could be solved by trial-and-error. The solution must to a degree be planned prior to being completed. Compared with the degree of difficulty of the puzzle itself, the increase in difficulty because of the use of dice versus colors or colored circles rather than colored squares is minimal. Further, the use of colored squares to distinguish the sides of the cube does not enhance or facilitate the actual solution of the puzzle. 70/ Therefore, there is no evidence that square color patches on a black background is one of the superior designs available.

6. Likelihood of confusion

In determining the likelihood of confusion, the major consideration is whether a substantial number of reasonable buyers are likely to be confused by similar marks. 71/ The Commission has adopted the following considerations in the determination of likelihood of confusion: 72/

69/ CX 54.

70/ IABV at 16. This fact is also why the use of symmetrical designs on the cubies, such as square color patches, rather than asymmetrical designs such as dice or fruit, does not cause the color patches to be functional even though additional moves are required to solve a puzzle with asymmetrical designs. See CTR at 78 and 79.

71/ McCarthy § 23.1; Scott v. Mego International Inc., 213 USPO. 824, at 833 (D. Minn. 1981); Sears, Roebuck & Co. v. Johnson, 219 F.2d 590 (3d Cir. 1955).

72/ Coin-Operated Audio-Visual Games and Components Thereof (Games I), Inv. No. 337-TA-82, USITC Pub. No. 1160 (1981) at 8-9.

- (1) the degree of similarity between the designation and the trademark in:
 - (a) appearance;
 - (b) pronunciation of the words used (this concept is used in connection with tradenames);
 - (c) verbal translation of the designs or pictures involved; and
 - (d) suggestion.
- (2) the intent of the actor in adopting the design;
- (3) the relation in use and manner of marketing between the goods and services marketed by the actor and those marketed by the other; and
- (4) the degree of care likely to be exercised by purchasers. 73/ 74/

The ALJ determined that respondents' black-based cubes infringe Ideal's trademark but respondents' white-based cubes do not. We agree with the ALJ as to the black-based cubes, but disagree as to the white-based cubes.

Complainant's black-based and respondents' black-based cubes are virtually identical. 75/ Further, as to intent, there is evidence of widespread copying, including evidence of copying by respondents PG, Dajere, Inc., Eurasia Merchandise Inc., Otto International Corp., Robert S. Hong. & Co., Ltd., Sharer Enterprises Co., Ltd., Continental Supply Inc., Price King, Inc., and Supreme Import-Export D-M Sale Corp., and by numerous other companies that are not respondents to this investigation. 76/

73/ The courts have considered essentially the same factors in deciding likelihood of confusion. *Scarves by Vera, Inc. v. Todo Imports Ltd. Inc.*, 544 F.2d 1167 (2d Cir. 1976); *Roto-Rooter Corp. v. O'Neal*, 513 F.2d 44 (5th Cir. 1975); *Polaroid Corporation v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961).

74/ Other factors mentioned in the cases are the "strength" of the mark and the relative nature of the products involved. *Continental Motors Corp. v. Continental Aviation Corp.*, 375 F.2d 857 (5th Cir. 1967); *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225 (3rd Cir. 1978).

75/ CX: C,N, JJJ, SSS, UUU, FFFF-1, KKKKK- UUUU.

76/ See IPHB at 2-3 and Exhibit 1.

Ideal's and respondents' cube puzzles are also marketed in the same channels to the same type of retail outlets. Further, a purchaser is not likely to take significant measures to assure what brand he is buying. 77/ In addition, there is evidence of actual confusion in the marketplace. 78/ There are letters in evidence which show that customers were confused when returning defective infringing cubes to Ideal. 79/ Further, Mr. Weintraub, Ideal's Senior Vice President of Manufacturing, testified that about 50 percent of the approximately 15,000 cube puzzles returned to Ideal as defective Pubik's Cubes puzzles were, in fact, not authentic Rubik's Cube puzzles but rather imitations thereof. 80/ Finally, the Helfgott surveys demonstrate that numerous black-based cubes made by respondents were identified as Rubik's Cube.

We find that the size of cube puzzles is immaterial and that respondents' key chain puzzles are confused with Ideal's Rubik's Cube. This finding is supported by the survey evidence submitted by Ideal demonstrating that 69 percent of a representative sample correctly identified a small version of Ideal's "RUBIK'S CUBE" as a "RUBIK'S CUBE" puzzle notwithstanding its smaller size. 81/ We determine, therefore, that consumers

77/ IABV at 45-45.

78/ Actual confusion is strong proof of a likelihood of confusion. McCarthy § 23:2.

79/ Tr. 40, 94, 103, 629-630.

80/ Id. 507.

81/ Tr. 796, CX 284. It should be noted, however, that there is no evidence that respondents have imported 4 by 4 cubes or that consumers are likely to confuse 4 by 4 cubes with Ideal's Rubik's Cube which is a 3 by 3 cube. Ideal also introduced no evidence that its 4 by 4 cube had achieved secondary meaning; this cube puzzle is trademarked under a different word mark "Rubik's Revenge," than Ideal's 3 by 3 cube.

are likely to confuse the respondents' black-based cubes with Ideal's black-based cubes. 82/

With regard to respondents' white-based cubes, we find that consumers are likely to confuse the white-based cubes with Ideal's black-based Rubik's Cube. The ALJ concluded that there is no likelihood of confusion with the white-based cube, because Logical Games has the right to the white-based cubes since at the same time that Ideal began to sell black-based cubes in the United States, Logical Games began to sell white-based cubes. However, when the Helfgott surveys are examined, we believe that the white-based cube in and of itself has never attained secondary meaning. 83/ It is the acquisition of secondary meaning rather than priority of use that determines the senior user of the mark. 84/ Consumers have identified the white-based cube as "Rubik's Cube," not Logical Games word mark "The Magic Cube." Further the importers, unlike Logical Games, adopted their marks after Ideal had adopted its

82/ The fact that respondents label their packaging does not detract from a finding of likelihood of confusion with the cube puzzles. In a Helfgott survey taken in May of 1982, 54 percent of those interviewed mistakenly identified a cube puzzle prominently marked as a "P.G. Co." cube as a "Rubik's Cube," whereas only 12 percent were able to correctly identify it as a "P.G. Co." cube puzzle. CX 285. The results of the survey are confirmed by the fact that consumers have mistakenly returned a prominently marked PG cube puzzle to Ideal for credit or replacement. CX 000. These surveys indicate that consumers see through the packaging to the cube itself.

Further, we find that labeling is not a defense to likelihood of confusion in this case. RD at 46 and 47. In accord, McCarthy § 23:15H; Harlequin Enterprises Limited v. Gulf & Western Corp., 644 F.2d 946, 949 (2d Cir. 1981); Truck Equipment Service Company v. Fruehauf Corporation, 536 F.2d 1210, 1221 (8th Cir.), cert. denied, 429 U.S. 861 (1976); Levi Strauss & Co. v. Blue Bell Inc., 632 F.2d 817, 822 (9th Cir. 1980); T&T Manufacturing Co. v. A.T. Cross Co., 449 F. Supp. 813, 822 (D.R.I. 1978), aff'd, 587 F.2d 533 (1st Cir. 1978), cert. denied. 441 U.S. 908 (1979). See also Teledyne Industries, Inc. v. Windmere Products, Inc., 433 F. Supp. 710, 739 (S.D. Fla. 1977).

83/ CX 59, 60, 61, 284, 285, 289.

84/ McCarthy §16:13, Restatement of Torts § 717, comment F (1938).

black-based mark and after it had achieved secondary meaning by sales throughout the United States.

As the secondary meaning of Ideal's black-based cube and the strength of the mark increased, the likelihood of confusion with the white-based cube also increased. The first Helfgott surveys indicate that there was very little likelihood of confusion when only 5 percent of the people identified the white-based cube as Rubik's Cube. 85/ However, the secondary meaning for the black-based cube was also relatively low, between 30-40 percent. In Study A conducted in January 1982, as the secondary meaning of the black-based cube increased to 66 percent the likelihood of confusion with the white-based cube increased to 15 percent. 86/ By May of 1982, the secondary meaning of the black-based cube had risen to 75 percent and the likelihood of confusion with the white-based cube to 56-58 percent. 87/

We determine that Ideal presently has the only property right to a trademark in the design of a cube puzzle, and it is not apparent from the surveys that the white-based cube ever achieved secondary meaning. 88/ We

85/ CX 60.

86/ CX 59.

87/ CX 284.

88/ Respondents' expert, Dr. Haber, also admitted that consumers would be likely to confuse white-base and blue-based cubes with Ideal's black-based cube. Tr. 1097-1099. Additionally, respondents as second comers, have a duty to dress their cube puzzles so as to avoid all confusion with complainant's Rubik's Cube puzzle. *Commerce Foods Inc. v. PLC Commerce Corp.*, 504 F. Supp 190, 193 (S. D. N.Y. 1980). There is also evidence that many respondents at first copied the design of Ideal's Rubik's Cube and then inched away from the design. A general principle of trademark law is that a party that has engaged in unfair competition should be required to keep a safe distance away from the margin line and avoid all likelihood of confusion. *Chevron Chemical Co. v. Voluntary Purchasing Groups*, 659 F.2d 695, 702 (6th Cir 1981), cert. denied, 102 S.C. 2947 (1982); *American Rice Inc. v. Arkansas Rice Growers Cooperative Assn.*, 532 F.Supp. 1376, 1391 (S.D. Texas 1982). See also *Kimberly Knitwear, Inc. v. Kimberly Stores, Inc.*, 331 F. Supp. 1339 (W.D. Mich. 1971).

conclude that a substantial number of consumers at the present time are likely to confuse white-based cubes and other cubes which have six colors made of square patches on a color background which form a grid pattern with Ideal's Rubik's Cube. We, therefore, find that in addition to the black-based cubes, white, grey and blue background cubes are confusingly similar to Ideal's black-based cubes. 89/

B. False Representation

Having established a case of trademark infringement for its cube puzzle, Ideal has also proved a violation of section 43(a) of the Lanham Act for false representation of the source of manufacture.

We determine that respondents PG and Plawner 90/ have simulated Ideal's trade dress in order to represent their product as the product of Ideal. 91/ Ideal's trade dress consists of a cylindrical black plastic base and a cylindrical clear plastic cover through which the cube may be seen. The base and the cover are sealed together by a strip of black and gold tape with the name "Rubik's Cube" appearing on the tape. The trade dress does not include the cube itself.

We determine that at least parts of Ideal's packaging, i.e., the black plastic base and the black and gold tape, are fanciful, and therefore,

89/ We do not find that Ideal is estopped from making this argument because of its statement in Ideal v. Chinese Arts and Crafts, supra, that black and white-based cubes are different puzzles. At the time of that decision in 1981, Ideal's secondary meaning was not as strong as it is presently and, therefore, consumers were not as likely to confuse white-based cube puzzles with black-based cube puzzles. See discussion, supra, at 12-13 with regard to the Helfgott surveys.

90/ The ALJ determined that the packages sold by respondents PG and Plawner, respectively, are virtually identical to each other and to Ideal's original package for its Rubik's Cube, which is now used only on its deluxe model. Ideal Phys. Exs. MMM, YYY, and FFF, B, and C, RD at 45.

91/ McCarthy § 277.

inherently distinctive because their sole purpose is to act as a trademark, that is, to distinguish the Ideal product. Although the cylindrical clear plastic cover also has an additional purpose of allowing people to view the cube puzzle, this is not true of the rest of Ideal's package. Ideal's entire package also is not de jure functional because there are numerous alternatives to Ideal's packaging. For example, the present dome-shaped container of PG and the packaging of the Aggie puzzle which uses red and white tape around the base of its puzzle are such alternatives.

As to likelihood of confusion, Ideal only challenges packages which are virtually identical to its packages. 92/ We believe that consumers would be likely to confuse PG's original packaging and the Plawner packaging with the Ideal packaging because they have the same black plastic base and substantially similar black and gold tape sealing the plastic cylinder to the black plastic base. Therefore, a violation has been established for these packages sold by PG and Plawner.

C. Passing off

The ALJ determined that all respondents who sold cube puzzles identical to Ideal's cube puzzles have engaged in passing off. We disagree. However, we determine that certain respondents 93/ have engaged in passing off because of additional evidence which indicates their intent to enable distributors to pass off respondents' puzzles as those of Ideal.

An essential element of passing off is that one is engaged in an intentional act that leads the customer to believe he is buying the goods of

92/ CTR at 24.

93/ P.G., Plawner, Pan Lon International, Dajere, Inc., and Eurasia Merchandise, Inc.

another. 94/ This requires "real proof that defendant subjectively and knowingly intended to confuse buyers". 95/

A manufacturer or distributor is liable for enabling dealers to pass off their products as those of another, because these manufacturers or distributors are contributing to the confusion and deception of the ultimate buyers. 96/ Manufacturers and importers who sold identical cubes in substantially similar packaging to retailers are passing off because this indicates an intent to enable these retailers to pass off respondents' puzzles as those of Ideal. Thus PG and Plawner have engaged in passing off because they have sold identical cube puzzles in packaging which is substantially similar to Ideal's. Further, respondents Pan Lon International and Dajere, Inc. used the trademark "Rubik's Cube" on invoices and respondent Eurasia Merchandise Inc. used the trademark "Rubik's Cube" on a brochure entitled "Tips for Solving Wonderful Puzzle (Rubik's [sic] Cube)." 97/ The use of Ideal's trademark "Rubik's Cube" in their sales and advertising indicates an intent by these respondents to aid retailers in passing off their puzzles as those of Ideal, or that these respondents have actually engaged in passing off to certain retailers who were unaware that Ideal sells the only "Rubik's Cube" puzzle.

F. Domestic industry

In order for the Commission to find a violation of section 337, complainant must comprise an "industry . . . in the United States." We

94/ McCarthy § 25:1.

95/ Id.

96/ McCarthy § 25:2.

97/ IPHB, Exhibit 1.

determine that the nature and significance of Ideal's operations in the United States are such that Ideal constitutes "an industry . . . in the United States" for purposes of section 337. 98/

In the present case, Ideal employs up to 200 people 99/ 100/ in Newark, New Jersey in an operation which includes quality control, repair, and packaging of cube puzzles that Ideal imports from various overseas sources. When the cube puzzles arrive at the Newark facility, each lot of cubes is subjected to an inspection process in which a certain percentage of cubes within the lot are randomly selected for testing. 101/ As a result of this initial quality control inspection, Ideal has rejected 1,000,000 cubes out of the 16,000,000 cubes sold by Ideal. 102/

98/ Commissioner Haggart refers generally to her Additional Views in Certain Miniature, Battery-Operated, All Terrain, Wheeled Vehicles, Inv. No. 337-TA-122 (Oct. 1982) (hereinafter Toy Trucks) which specifically addressed the issue of domestic industry. In reaching her decision in the instant case, Commissioner Haggart has applied the two-step process described therein. She has first looked at the nature of the domestic activity in the context of the characteristics of the cube puzzle industry. She has then compared the extent of such domestic activities with the total production process in order to determine whether sufficient production activities are performed in the United States. Utilizing this analysis and in light of the facts of this case, she has concluded that Ideal's domestic activities are sufficient to constitute "an industry . . . in the United States."

99/ This figure includes both part-time and full-time employees. TR 493.

100/ Up to January of 1982, Ideal employed approximately 700 people in packaging, repair, quality control, and molding of cube puzzles and their components. TR 492-493, TR 571-574. As a result of the decreases in their sales, Ideal laid off approximately 500 people. TR 571-574. While not relevant to our determination, we note that Ideal has represented that, if given relief, it will return some of its production activities to the United States and increase its employment in the United States. TR 574-576; CHT at 40-42.

101/ The cubes are inspected to determine whether the cube labels are torn, whether the cubes can be twisted easily, and whether they break apart if dropped from a prescribed height. TR 496-497.

102/ TR 505.

Subsequent to leaving the initial quality control line, those lots with less than 1 percent defective cube puzzles are visually inspected before packaging. 103/ Those lots with 1-3 percent defective cube puzzles are subjected to extensive quality control inspection before packaging. 104/

Ideal's quality control continues well after its Rubik's Cube puzzles leave the quality control line. 105/ In addition, Ideal conducts age, 106/ drop and shake, 107/ and life testing. 108/ Thus, because of this extensive quality control operation, virtually every cube is inspected in the United States. 109/

Ideal also conducts some repair activities in the United States. 110/ In

103/ TR 498.

104/ TR 496-497.

105/ For example, Ideal spot checks its cube puzzles during its packaging operation. TR 499-500. Ideal also tests random samples of packaged cube puzzles and again randomly checks for defective cube puzzles in its warehouses.

106/ Age testing consists of cycling hot and cold air in chambers in which cubes are placed for a number of hours.

107/ Drop tests are performed by dropping cartons of cube puzzles from a prescribed height. Shake tests are performed by placing cartons of cube puzzles on a machine which shakes the cartons in such a way as to simulate the motion of a truck. These tests are performed to determine whether cubes will look like a new product after being shipped to the retail shelves.

108/ Life tests are performed by employees and machines that twist and turn the cube puzzles for several hours. These tests are performed to make sure that cubes can continually turn and not wear out and that the labels will not blister.

109/ TR at 549. We note that Ideal's extensive quality control activities are distinguishable from the complainant's random testing done in Toy Trucks, supra. The bulk of complainants quality control in Toy Trucks was performed in Hong Kong and the additional quality control performed in the United States amounted to sampling that would be expected of any commercial purchaser. Thus, the Toy Trucks complainants in their warehouse would only inspect randomly selected packages of the toy trucks to determine their operability. In contrast, Ideal performs extensive quality control in the United States as described in this opinion.

110/ The repair activities in the instant investigation are performed in conjunction with Ideal's quality control and are therefore distinguishable from the repair activities performed in Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. No. 1126 (Jan. 1981) which occurred subsequent to distribution.

order to repair the cube puzzles found to be defective through Ideal's extensive quality control procedure, ten full-time employees are employed and they have repaired over 500,000 cube puzzles. 111/

In addition to quality control, Ideal also packages its Rubik's Cube in its Newark, New Jersey facility. 112/ 113/ All of Ideal's packaging material for its deluxe cube, including the molding of the clear plastic cylinders for the deluxe cubes, and instruction sheets for its regular cube are produced in Newark, New Jersey. 114/

Furthermore, Ideal has expended approximately \$200,000 on the production of molds in the United States, 115/ and has manufactured molds for use by its manufacturing facilities overseas. 116/ Ideal has also spent an additional \$50,000 in the United States to improve the design and materials of its cube puzzles and to lower its costs. 117/

111/ TR 574.

112/ The packaging process for Ideal's regular cube puzzle consists of placing an instruction sheet into the box, folding the box around the cube puzzle and shrink wrapping the boxed cube puzzle. Ideal's deluxe cube puzzles are packaged by placing it on a black base in a clear plastic cylinder which is then sealed with black and gold tape. TR 502.

113/ The packaging done by Ideal in the instant case is distinguishable from that in Toy Trucks, supra. The vast majority of the toy trucks arrived in the United States in blister packs. The only packaging done in the United States was the packaging of the toy trucks in boxes with other accessories. Ideal packages almost all of its cube puzzles in the United States. Further, those parts of Ideal's operations regarding related products, such as Rubik's Game and Rubik's Revenge, are not included in our definition of industry.

114/ TR 503.

115/ TR at 553.

116/ TR at 491.

117/ TR 554; RD at 46.

We find that Ideal's domestic activities are of the appropriate nature 118/ and are significant enough to conclude that their domestic business activities constitute an "industry . . . in the United States." 119/

The significance of Ideal's operations is evidenced by the value added in the United States by Ideal's quality control, packaging and repair operations. Ideal has testified that the imported cost of the cube is approximately \$1.00 and that an additional \$.92 of value is added to the cube puzzle by the quality control, packaging, and repair activities performed in the United States. 120/ We believe that this is significant because approximately 50 percent of the value of the cube puzzle is added by production activities in the United States. 121/

118/ Commissioner Haggart notes respondents' argument that packaging in the instant case is nothing more than advertising and promotion and therefore cannot be properly considered in determining the value of Ideal's activities in the United States. However, because Ideal's packaging is integrally related to its quality control and consequently to the production process, she believes that, under the facts of this case, Ideal's packaging activities in the United States should be considered in determining the domestic industry.

119/ Commissioner Haggart refers to her Additional Views in Toy Trucks, supra at 43, where she lists relevant activities in determining the nature and sufficiency of a complainant's activities in the United States.

120/ Most of the \$.92 is the cost of American Labor. CTR at 27-29.

121/ Commissioner Haggart notes that neither advertising, promotion nor sales has been included in this calculation. The ALJ has expressed concern that "[i]f the Commission protects domestic advertising and merchandising of foreign imports as a domestic industry in themselves, [section 337] could become a forum for disputes principally between one foreign importer and another." RD at 52. Commissioner Haggart agrees. See Certain Airtight Cast-Iron Stoves, supra, at 10 and Toy Trucks, supra, note 29 at 10. Nor has she considered return on investment as the IA has suggested. IABI note 3 at 4. The ALJ's reasoning with regard to domestic advertising and merchandising of foreign imports is equally applicable to return on investment.

G. Efficient and economic operation

We determine that the domestic industry is efficiently and economically operated. 122/ The facts that Ideal's cube puzzles have been on allocation 123/ and that the repair and packaging could be done more cheaply abroad does not compel a contrary conclusion. Allocation is a standard practice in the toy business. 124/ Further, if Ideal expanded its production to fill current demand, and then demand fell, Ideal could be left with warehouses full of cube puzzles. 125/ The failure to increase production in this situation does not establish that a domestic industry is not efficiently and economically operated.

As to the argument that Ideal's entire operations could be operated more cheaply abroad, section 337(a) provides that the Commission must determine whether the effect or tendency of the unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. It is irrelevant whether Ideal's cube puzzle could be more cheaply produced abroad, so long as it is efficiently and economically operated in the U.S.

Since the ALJ concluded that Ideal had automated "about as much of its domestic industry as it can", 126/ we conclude that the domestic industry is efficiently and economically operated.

122/ RD at 52.

123/ Ideal's cube puzzles have been on allocation in that Ideal could not produce enough cube puzzles to satisfy the demand for the product and, therefore, retailers were allocated only limited numbers.

124/ RD at 53.

125/ Id. at 53.

126/ Id. at 52.

H. Injury

Ideal established that over two million infringing cubes were imported since February, 1981. 127/ Ideal lost accounts, including Sears Roebuck, Macy's, J.C. Penney, Mervyn's, and K-Mart. 128/ Sears alone purchased 350,000-400,000 imported cubes and K-Mart also purchased several hundred thousand cubes. 129/ About twenty additional accounts also cancelled some of their orders for Ideal's cube puzzles. 130/

With regard to lost sales, Ideal's Vice President of Sales testified that Ideal had lost numerous sales to substantially similar imported cubes. Ideal's Vice President also testified that respondent Plawner had sold its cubes to Sears Roebuck and PG had sold its cubes to J.C. Penney and Mervyn's and, therefore, orders with Ideal were cancelled. 131/

Even though Ideal was on allocation, there was testimony that customers would wait to buy a cube with Ideal's trademark. 132/ It is apparent from the vast number of imports and the lost accounts that Ideal was substantially injured by the infringing imports. Further, the record does demonstrate that the imported cube puzzles were sold at a lower price than Ideal's cube puzzles and that Ideal's price reduction was caused in part by the low priced imports. 133/

127/ CX 186, 196, 198, 200-201, 206, 210-211, 229, 234, 236-240, 243-249, 251-254, 256-257, 261, 263-265, 268, 272, 274, 278, 281, 282.

128/ RD at 57.

129/ TR 689.

130/ Id. 618.

131/ Id. 619. Ideal's Vice President for Sales also substantiated his testimony on lost sales by naming in a confidential portion of the record specific persons that he talked with at various retailers. Id. 691.

132/ Id. 120.

133/ Id. at 104,629

Ideal is the owner of an exclusive trademark right in the design of the Rubik's Cube. Therefore, each sale of an infringing item is usually a sale that should have gone to Ideal, and once such a sale is made, it is irretrievably lost to complainant. 134/ In addition, although not directly applicable to section 337, the federal courts in cases involving injunction proceedings have determined that, in a trademark infringement case, a substantial likelihood of confusion, in and of itself, constitutes irreparable injury to a plaintiff. 135/ Thus, it does not matter that Ideal did not suffer a loss or had increasing profits, so long as it lost profits to the imported cubes. Ideal's witnesses estimated that its profit was approximately \$1.00 a cube. 136/ Thus, on the Sears account alone, Ideal lost approximately \$350,000 to \$400,000. We think this fact evidences substantial injury to Ideal by the imported infringing cubes. 137/

As to tendency to substantially injury, I agree with the ALJ that the record contains numerous advertisements and offers to sell by foreign companies. Further, the advertising demonstrates the capacity for foreign companies to continue to export substantial quantities of cubes to the United States at prices below those charged by Ideal. 138/ I do not think that these offers and advertisements can be considered speculative. I, therefore, conclude that the unfair imports have a tendency to substantially injure Ideal.

134/ Coin Operated Audio-Visual Games and Components Thereof, Inv. No. 337-TA-87, USITC Pub. 1160 (1981) at 25-26.

135/ Matter of Vuitton et Fils S.A., 606 F.2d 1, 4 (2d Cir. 1979); Omega Importing Corp. v. Petri-Kine Camera Company, 451 F.2d 1190, 1195 (2d Cir. 1971).

136/ RD at 50, TR 23, 70, 139-140.

137/ Commissioner Haggart determines only that there is present substantial injury and, therefore, does not reach the issue of tendency to substantially injure.

138/ RD at 50.

IV. Remedy

We determine that the appropriate remedy is a general exclusion order directed at all imported infringing cube puzzles having 3 by 3 by 3 cubies, using squares of at least four of the following six colors, red, green, white, orange, yellow or blue, on each cubie, which against the plastic background of the cube puzzle form a grid pattern, with the color on each side of the cube in the starting position contrasting with the color on each of the other sides of the cube puzzle. The plastic background can be any color including black, white, blue, or grey.

This case satisfies the criteria for a general exclusion order set forth in Certain Airless Spray Paint Pumps, Inv. No. 337-TA-90 (1981). Ideal has proven a widespread pattern of unauthorized use of the proprietary right in issue and certain business conditions from which one might infer that foreign manufacturers other than the respondents may attempt to enter the U.S. market with infringing articles. This widespread pattern of unauthorized use is manifest from the number of respondents against which complainant has proved its case. Furthermore, the infringing imports number in the millions and often enter the U.S. in relatively small lots. To require institution of separate investigations against each of these importers would be contrary to and defeat the purpose of the statute. 139/

As to proof of business conditions, Ideal has proven an established demand for the articles in question and an established marketing and distribution network for potential foreign manufacturers. There is also little cost involved in retooling or creating the facilities to produce the

articles in question, and there is a large number of foreign manufacturers with the capability to produce large quantities of cube puzzles. Soon after complainant's original cube had proved commercially successful, there was a large influx of imported cubes. The very low average cost per unit of these goods and the relatively insignificant amount of technological skill involved in the production and packaging process indicate potential ease of market entry. 140/ 141/

V. Public Interest

None of the parties has alleged that there are any public interest factors which would preclude a remedy in this case under section 337(d). Neither is there any other information available showing that imposition of a remedy would adversely affect the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, or U.S. consumers. Therefore, we determine that issuance of an exclusion order is not precluded by consideration of the public interest.

VI. Bonding

We have determined that a bond of 600 percent of respondents' entered value is appropriate. We find that this bond is reasonable because it is basically the difference between the wholesale import price and the domestic price, and offsets the competitive advantage of the unfair acts here.

140/ Id. at 5.

141/ Both IA and Ideal have asked for cease and desist orders directed at importers of infringing cube puzzles. We find that this is not the appropriate case for the issuance of cease and desist orders. It is not at all clear from the record how many companies import cubes, which importers have inventories of cubes, or how many cubes they have. It is also unclear whether the seven importer respondents import 100 percent of the infringing cube puzzles or 10 percent, and how many cube puzzles they have in inventory.

VIEWS OF COMMISSIONER PAULA STERN

I determine that a violation of section 337 has not been demonstrated in this investigation. 1/ I find that Ideal's operations do not constitute a domestic industry for purposes of section 337 and that the requisite injury to any domestic industry, if one existed, has not been demonstrated. I concur with the majority in their views regarding the procedural background, and the issues of trademark, false representation, passing off, and efficient and economic operation. I do not reach the issues of relief, the public interest or bonding.

I. Domestic Industry

I disagree with the majority's conclusion that a domestic industry exists in this case. In Certain Miniature Battery-Operated, All-Terrain Wheeled Vehicles, Inv. No. 337-TA-122 (1982) (Toy Trucks), the Commission determined that complainants which imported toy trucks from Hong Kong were not a domestic industry under section 337 based on "the nature and significance of complainants' business activities in the United States" which relate to the toy trucks. 2/ In that case, complainants prepared engineering drawings, performed some quality control, packaged some of the toy trucks, and were involved in warehousing, advertising, and sales distribution of toy trucks in the United States. In this case, we have the same general set of facts: Ideal imports the cube puzzles and only performs quality control, repairs, and

1/ The following abbreviations are used in these views: PD = recommended determination; TR = transcript of evidentiary hearing before the ALJ; CTR = transcript of oral argument before the Commission; MRI = respondent Maruwa's brief on industry, efficient and economic operation, and injury; MPFB = respondent Maruwa's post-hearing brief.

2/ Toy Trucks, at 6.

packaging in the United States. 2A/ The nature of Ideal's business activities is identical to the business activities performed by the complainants in Toy Trucks.

I wish to note further that this case is not like Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126 (1981). In Cast-Iron Stoves, the domestic industry consisted of numerous establishments that installed and repaired the stoves. It was in essence a type of industry which transformed the subject product.

Moreover, in Stoves and another case, Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, USITC Pub. 1199 (1982), both installation and repair services were physically related to the product itself. These activities are not those expected of any commercial purchaser. When these types of activities are combined with significant value added in the United States, the article could be considered as transformed into a U.S. product. Thus, the product at least in part is a U.S. product. If this standard is not maintained, however, and protection is extended to purely imported products, the requirement for a U.S. industry in section 337 becomes meaningless. Section 337 becomes a forum in which importers battle importers. I do not believe that this was the intent of Congress. 3/

In this case, the molding of the component parts of the cube puzzles and the assembly work are done entirely abroad--in Taiwan, Hong Kong or Korea. When the cube puzzles enter the United States, they have stickers on them

2A/ Ideal did spend approximately \$200,000 for the production of molds for the production of component parts for the subject cubes. Some of these molds were shipped abroad, and it is also clear that an additional number of molds were made abroad for production of cube puzzles abroad. Additionally, no new molds are being produced. TR 491.

3/ See MBI at 13-14.

stating "Made in Hong Kong," or "Made in Taiwan" or "Made in Korea." All of the significant operations in the production process are done abroad and not by Ideal in the United States.

Mr. Weintraub, Ideal's Vice President of Manufacturing, testified that it would take \$15 to \$20 to make the entire cube in the United States. 4/ Mr. Weintraub also admitted that quality control and packaging could be done offshore. Consequently, there is nothing to prevent Ideal from eventually moving all of its operations offshore and then ceasing any domestic operations. Indeed, Ideal's process of moving its operations offshore to control labor costs might very well dictate such an eventual move.

Further, Ideal's packaging activities are an extension of its marketing and advertising activities and, in these circumstances, should not be considered in determining the nature and significance of Ideal's activities in the United States. 5/ Ideal's Vice President for Marketing described the selection of a package design thus:

[W]e wanted to be certain that the product was as visible on the shelf as possible. The initial package was designed to try to give the product a certain shelf presence. The sales force felt that we might improve that

And we wanted to find a way to create a package which is as strong in shelf presence or stronger than the one that we initially had And we did that with the cardboard package or the window box it came from our sales department and our financial department. Because we were looking for ways to reduce the cost of the product, and also to try to improve its display on the mass market shelves . . . 6/

This indicates that Ideal's package is primarily advertising.

As respondent Maruwa stated regarding packaging:

4/ TR 569.

5/ It is important to note that the industry we are examining produces cube puzzles and not packages.

6/ TR 39, 42.

In Complainant's packaging activities, no value is added to the puzzle itself, or value preserved. The packaging operations are not part of any production process for the cube puzzle itself. The 15 cents per cube spent on packaging (TR 520) is advertising and marketing.

This should be contrasted with cases where packaging is an integral, necessary part of the production process, such as packaging of delicate instruments in protective packaging, coating metals with substances to retard reactions with other elements, or placing gases or liquids in containers. In such cases, the packaging protects or adds value to the product, or even in some cases, is necessary to make it possible to offer the product. With the Complainant's cube puzzle, this is not the case. The cube is shipped unpackaged from complainant's vendors, and clearly needs no packaging to preserve its value. Complainant's packaging is advertising and marketing. 7/

When quality control, repair and packaging are examined, the value added to Ideal's cube puzzle in the United States is minimal and when packaging is omitted, the value added is de minimis. 7A/

I can find no rational way to distinguish this investigation from the Toy Trucks investigation. Although more quality control and packaging are done in the United States, the same type of domestic activities are performed in this case as were performed in the Toy Trucks case. I, therefore, conclude that Ideal should not be considered a domestic industry under section 337.

II. Injury

Had I found complainant's business activities which relate to the subject cubes to constitute a domestic industry, I would have determined that the unfair acts do not have the effect or tendency of substantially injuring the domestic industry. I agree with the ALJ's well reasoned conclusion that there

7/ MPHB at 17.

7A/ Excluding packaging, the value added in the United States is approximately .7 percent.

has not been a showing of an effect of substantial injury. 8/ Both Ideal's sales and profits have increased markedly since the importation of similar cube puzzles at lower prices. 9/

There is no indication of price suppression or depression. Ideal's purchasers have been on allocation during most of its production of Rubik's Cube, and the imported cube puzzles sell for a lower price than Ideal's cube puzzles. Ideal, therefore, cannot argue that every sale of an imported puzzle was a sale lost to Ideal, because some purchasers might not have waited or have bought a cube puzzle at a higher price. This conclusion is supported by the fact that Ideal could not establish how many cube puzzles were imported using Ideal's color pattern. 10/ The record does not permit one to segregate out those competing cube puzzles with Ideal's color pattern from others with designs of flowers, fruit, or numbers which Ideal never even challenged as infringing its trademark.

Although Ideal's Vice President of Sales testified at the hearing before the ALJ that Ideal had lost sales, 10A/ the ALJ ordered him to produce any documentary evidence to back up his statements. 11/ Ideal failed to produce any documents to substantiate this testimony. The ALJ also determined that Ideal had not established either a loss of goodwill or a reduction of employment because of the unfair imports. Although a price reduction by Ideal

8/ See Dissenting Opinion of Commissioner Paula Stern, Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof, Inv. No. 337-TA-82, USITC Pub. 1138 (1981).

9/ RD at 54 and 56.

10/ Id. at 56.

10A/ It is important to distinguish between lost sales and lost accounts (lost customers). It is not clear from the record that, even though Ideal may have lost specific sales, they have lost entire accounts of major purchasers. TR 618, 619, 689-691.

11/ TR 636-637, 640.

may arguably have been caused in part by the unfair imports, Ideal made a corresponding cut in costs by changing its packaging from a plastic cylinder to a cardboard box, enabling it to retain its profit margin of \$1.00. 12/ As noted above, this packaging decision was also based on reasons unrelated to cost.

Therefore, I agree with the ALJ that:

The continuous rise in Ideal's sales and profits and its inability to meet current demand for cube puzzles prevent Ideal from showing substantial injury to the domestic industry at this time caused by imports of cubes similar to Ideal's Rubik's Cube. 13/

I also base my decision on Ideal's inability to show that it was the imported cubes which infringe its design that injured Ideal and its corresponding inability to demonstrate that the injury was not caused by the competing cubes with alternative designs.

While I agree with the ALJ regarding present injury, I disagree with her conclusion that there is a tendency to substantially injure the domestic industry. I believe the information relied upon by the ALJ is too speculative.

For example, the ALJ found that Ideal "estimates" that sales will dip and that "eventually" Ideal will be able to meet demand. The ALJ also stated that it is "possible" that the saturation point for cubes would occur later if imported cubes were not available and that Ideal's total sales "might" have been greater over a longer period. 14/ There is no hard evidence that sales will decline and that Ideal will be able to meet demand, and there is no evidence of when that will happen or what its impact would be. These

12/ RD. at 55.

13/ Id. at 57.

14/ Id. at 58.

statements are guesses by the ALJ and are not supported by facts on the record. Therefore, I do not find a tendency to substantially injure the domestic industry in this investigation.

