

## Rubik's Cube Design Not Functional

*Rubik's Brand Limited, v. Flambeau, Inc., et al.*,  
No. 17CV6559PGGKHP, 2021 WL 363704 (S.D.N.Y. Jan. 31, 2021)

By: Adam Reis & Nick Wheeler | February 12, 2021

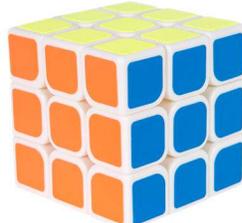
*A Magistrate Judge for the Southern District of New York recently issued a Report and Recommendation ("R&R") concluding that the color pattern of a traditional Rubik's cube was not functional and thus entitled to trademark protection.*

Rubik's Brand Limited ("RBL" or "Rubik's") sued Flambeau, Inc. ("Flambeau") alleging infringement of RBL's trademark registration on the design of the standard 3x3 Rubik's Cube puzzle by Flambeau's 3x3 puzzle cube call the "Quick Cube." The designs of the two cubes are depicted below:

Rubik's Cube



Quick Cube



Flambeau moved for summary judgment on all claims. In so doing, Flambeau challenged the validity of the registration in the Rubik's Cube's trade dress under the doctrine of functionality. Trademark functionality serves to preclude trademark protection of useful products, and it comes in two varieties: utilitarian and aesthetic.

Utilitarian functionality assesses: "(1) whether a particular feature or appearance is 'essential' to the use or purpose of a product; or (2) whether that feature or appearance affects the cost or quality of the product."<sup>1</sup> Essential means "dictated by the functions to be performed by the product." Flambeau argued that the Rubik's Cube design was essential because the combination of smaller cubes and colors allowed the puzzle to be manipulated and solved. But RBL's trade dress registration did not cover the general elements of a cube puzzle; rather, it was specifically limited to "a black cube ... with the color patches on each face being the same and consisting of the colors red, white, blue, green, yellow, and orange," and Flambeau failed to show the overall impression of these specific elements was essential to the use of the product. Regarding cost, Flambeau argued that the use of black plastic and colored stickers were the most cost-effective way to manufacture a cube puzzle, but Flambeau failed to offer any supporting evidence. Regarding quality, Flambeau argued that the specific colors chosen for the Rubik's Cube provided the best possible contrast for purposes of solving the cube. The Magistrate rejected this argument, noting it is speculation given the near infinite number of alternatives that could be used and that Flambeau offered no evidence that "solvability" was an appropriate metric for the quality of the product.

The Magistrate Judge also found Flambeau failed to satisfy the test for aesthetic functionality, which assesses whether acknowledging the contested trademark or trade dress would "put competitors at a significant non-reputation-related disadvantage."<sup>2</sup> As noted, because the registration was specific to a black base and specific color stickers, the Magistrate Judge found nothing about the registration that significantly hindered competitors.

After rejecting Flambeau's functionality arguments, the Magistrate Judge considered RBL's claims, ultimately recommending that the issue of likelihood of confusion be sent to a trial. In the end, Rubik's was saved by its decision to seek narrow protection on its trade dress. Nonetheless, this case highlights the increasing prevalence of trademark functionality.

<sup>1</sup> *Rubik's Brand Limited*, 2021 WL 363704, at \*6 (quoting *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 217, 219 (2d Cir. 2012)).

<sup>2</sup> *Id.* at \*11 (quoting *Christian Louboutin*, 696 F.3d at 221).