

This Opinion is Not a
Precedent of the TTAB

Mailed: August 14, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Amanda Field d/b/a Republic Yoga
—

Serial No. 87562426
—

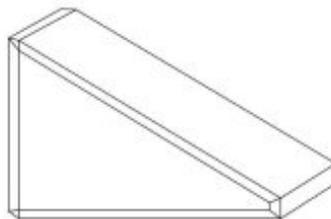
Leela Madan of Madan Law PLLC,
for Amanda Field d/b/a Republic Yoga.

Saima Makhdoom, Trademark Examining Attorney, Law Office 101,
Ronald R. Sussman, Managing Attorney.

—
Before Mermelstein, Pologeorgis and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Amanda Field d/b/a Republic Yoga (“Applicant”) seeks registration on the Supplemental Register of the design mark described in the Application as “a three-dimensional configuration of a triangular block which has beveled edges” (“Applicant’s Mark”) in the form shown immediately below:



for “yoga blocks” in International Class 28.¹

The Examining Attorney refused registration under Trademark Act Sections 23(c) and 45, 15 U.S.C. §§1091(c) and 1127, on the ground that Applicant’s Mark, as applied to the goods identified in the application, consists of a functional, and therefore unregistrable, three-dimensional configuration of the goods.

When the refusal was made final, Applicant appealed and requested reconsideration. After the request for reconsideration was denied, the appeal was resumed. Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

I. Background and Summary of the Record

Applicant submitted the following specimen² of use in connection with the Application:

Applicant’s →
Goods



“Best Yoga Blocks
Single Wedge \$15
Single Block \$15
Pair of Best Yoga Blocks Wedges \$25

Purchase online or in studio
We are in beta phase so please
don’t photograph or share online.
However send pics and feedback
to RepublicYogaStudios@gmail.com”

¹ Application Serial No. 87562426 filed on August 9, 2017, under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere of June 2016 and first use in commerce since at least as early as July 22, 2017.

² Specimen submitted on August 9, 2017 at TSDR 1. Page references to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page references, if applicable.

With the first Office Action, the Examining Attorney submitted the following Internet evidence in support of the refusal:

1. A “Foam Yoga Wedge” of a third party offered for sale on the website YOGA DIRECT³;
2. A “Hugger Mugger Cork Wedge” of a third party, as well as foam yoga wedges of other third parties, offered for sale on the AMAZON.COM website⁴;
3. The results of a Google “yoga wedge exercise” images search disclosing numerous third party yoga wedges offered for sale on the website HEALIOHEALTH⁵;
4. A “Wedge-Shaped Yoga Block” of a third party offered for sale on the website GAIAM⁶; and
5. A blog posting regarding the practice of yoga on the website SUNSHINEYOGA.COM⁷ – with relevant passages stating as follows:

Practicing yoga will eventually mean performing weight-bearing exercises where all of a person’s body-weight comes to rest on the hands or toes. ... The yoga wedge was designed for the transition to these more difficult, weight bearing exercises by providing lift and support that allows users to add length and flexibility to their poses. ... [W]edges are just one tool for ensuring good form. ...

Yoga practitioners often come into class suffering from some sort of joint or muscle pain they are hoping to work out. ... A yoga wedge can be used to alleviate some of this pain by supporting the body’s weight without putting too much stress or pressure on the wrists. The wedge, utilized in this manner can provide stability to the pose and relieve some of the strain placed on joints like the wrist.

Responding to the first Office Action, Applicant made the following Internet evidence of record:

³ Office Action of November 16, 2017 at TSDR 5-7.

⁴ *Id.* at TSDR 8-15.

⁵ *Id.* at TSDR 16-21.

⁶ *Id.* at TSDR 22-23.

⁷ *Id.* at TSDR 24-25.

1. Postings on Applicant's REPUBLIC YOGA website describing several ways in which Applicant instructs yoga practices, with and without the use of a yoga block⁸ – with relevant passage stating as follows:

BEST YOGA BLOCKS/Restorative Yoga - 50 minutes of deep relaxation and Yoga using the Best Yoga Blocks system. Targeting fascial release, foam rolling, and breath work to be included. Good for injured and those in pain.

2. The results of a Google “yoga wedge” images search disclosing numerous third party yoga wedges offered for sale (URL and access date not provided)⁹;
3. Postings on Applicant's REPUBLIC YOGA website describing the philosophy of yoga and aspects of Applicant's yoga business (access date not provided)¹⁰; and
4. A listing, including pictures, of numerous third party yoga wedges offered for sale (URL and access date not provided)¹¹

With the Final Office Action, the Examining Attorney made the following evidence

Internet of record:

1. Foam and cork yoga wedges third parties offered for sale on the website YOGAACCESSORIES.COM¹²;
2. A blog posting regarding the practice of yoga on the website HUGGER MUGGER YOGA PRODUCTS titled “Use a Yoga Wedge in Dog Pose”¹³ – with relevant passages stating as follows:

⁸ Office Action Response of May 16, 2018 at TSDR 12. Applicant's webpage evidence submitted during prosecution includes the Internet URL to its source but not the access date; and sometimes neither information is provided. *See Safer Inc. v. OMS Invs. Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) and *In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018) (applying the *Safer* rule to evidence submitted by examining attorneys and applicants in ex parte cases); *see also* 37 C.F.R. § 2.122(e)(2) (internet materials admissible in inter partes proceedings if “the date the internet materials were accessed and their source (e.g., URL) are provided.”). However we are considering this evidence for whatever probative value it may have, since the Examining Attorney did not object to its admissibility. *In re Mueller Sports Medicine, Inc.*, 126 USPQ2d 1584, 1586-87 (TTAB 2018).

⁹ *Id.* at TSDR 13.

¹⁰ *Id.* at TSDR 14.

¹¹ *Id.* at TSDR 15.

¹² Office Action of June 4, 2018 at TSDR 5-6.

¹³ *Id.* at TSDR 7-13.

Bodyworkers tell me that they're seeing increasing numbers of hand and wrist problems in people who practice yoga. ... [T]he weight bearing can take a toll. ... Wrist and hand problems arise because we often let our weight collapse into the heels of our hands. ... I ... like using a yoga wedge (in cork or foam) to train my students' hands to take the weight evenly.

I usually tell students, especially if they already are feeling strain in their hands and wrists, to practice with a yoga wedge for at least a few months. This gives them the time to build strength in their arms and train their hands so that when they stop using a wedge, healthy weight distribution will be a habit.

The yoga wedge is a great tool for teaching your arms how to build strength and stability.

6. A blog posting titled "Yoga Wedges and Their Uses" regarding the practice of yoga on the website SUNSHINEYOGA.COM¹⁴ – with relevant passages stating as follows:

Made from lightweight foam, the wedge is designed to provide stability and support so that yoga practitioners do not compromise the technique of each pose. The foam wedge, which is soft and scratch proof, has a tapered edge for better gripping and adjustable support.

* * *

A foam wedge provides users with one more way of reducing stress and improving support and posture, which is what yoga is all about. Made from lightweight, dense foam, the wedge is an inexpensive way to overcome pose difficulties and alleviate pain during sessions. As highly recommended as the yoga wedge is, users will still appreciate the support it provides after experimenting with one for the first time.

7. A "Hugger Mugger Cork Wedge" of a third party, as well as foam yoga wedges of other third parties, offered for sale on the AMAZON.COM website¹⁵;

¹⁴ *Id.* at TSDR 14-16. This is a fuller copy of the blog post that the Examining Attorney provided with the Office Action of November 16, 2017 at TSDR 24-25.

¹⁵ *Id.* at TSDR 17-24. This appears to be the same (or a similar) product offering as what the Examining Attorney provided with the Office Action of November 16, 2017 TSDR 8-15.

8. The text (without the drawings) from U.S. Patent Appln. No. 12/011003 (20090192028) filed January 24, 2008, titled “Yoga comfort System Wedge”¹⁶ – with relevant passages stating as follows:

Abstract

A yoga comfort system wedge is provided constructed of medium density, high quality, closed cell foam materials and adhesives comprised of layers and septums which create uniquely flexible prop. The construction forms a triangularly shaped yoga, fitness, or therapeutic device in the form of a flexible wedge which allows users to achieve or maintain certain poses, stretches, exercises or therapeutic positions while improving tactile comfort and aiding range of motion. Said device has advantages over traditional types of yoga, meditation, fitness, or therapy devices. The invention allows for users with specific physical limitations to comfortably modify and maintain desired poses or exercises which would not ordinarily be possible, while at the same time provides for the advanced user to practice their highly skilled activities with greater comfort and ease.

Independent Claims:

1. A yoga comfort system wedge in the preferred embodiment comprising a construction and fabrication of selected materials, size, shape, and two different angled surfaces, which provide tactile comfort and a flexible shape when used as a yoga prop.
2. A yoga comfort system wedge in the preferred embodiment whose materials’ density and softness, coupled with its size, shape, and flexibility, provide tactile comfort and bodily placements not possible from yoga wedges or yoga blocks made of rigid materials or other types of props.

¹⁶ *Id.* at TSDR 25-31. The manner in which the Examining Attorney procured and made of record the text (without the drawings) of this patent application was highly unorthodox. Having only the text, but not the drawings, of the cited patent makes our consideration of this evidence less than optimal; such that we cannot give the patent the full evidentiary weight it otherwise might deserve. *In re Howard Leight Indus., LLC*, 80 USPQ2d 1507, 1509 (TTAB 2006) (“A prior patent ... has vital significance in resolving the trade dress claim.”) (quoting *TrafFix Devices Inc. v. Mktg. Displays Inc.*, 532 U.S. 23, 58 USPQ2d 1001, 1005 (2001)). Further, since “the Board does not take judicial notice of records residing in the Patent and Trademark Office[.]” *In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1767 (TTAB 2016) (declining to give judicial notice of an issued U.S. patent), we cannot, and did not, procure a copy of the full patent from Office Records.

Background

Embodiments of the present invention relate to apparatuses that constitute a yoga comfort system. More particularly, those embodiments relate to a yoga comfort system wedge.

Yoga assistance devices, called yoga props, such as blocks, wedges, bolsters, and folded blankets or mats are used to facilitate entrance into postures and to provide general cushioning and support.

[I]t is desirable to have a system of apparatuses that accommodates the user's physical and/or health limitations, allowing the user to comfortably and conveniently maintain postures, as well as positions or exercises ... One such apparatus is a yoga comfort system wedge.

Summary of the Invention

By design, yoga comfort system wedges are versatile therapeutic devices in that they can also be configured for use as a comfortable block or supportive bolster, expanding the versatility of a single yoga prop design. Using yoga comfort system wedges in lieu of various conventional yoga props simplifies the use and need for multiple yoga props.

9. A blog posting entitled "How-To Guides for Well-being: Yoga Wedge: Uses" on the website ROLLINGS AND HARMONY¹⁷ – with relevant passages stating as follows:

Yoga Wedges provide support in poses when we can't quite get our hands or feet flat on tile floor. This is usually due to stiff ankles and wrists. By placing a yoga wedge under our hands and feet we improve our stability within the pose and it allows us to achieve proper alignment without undue stress and strain on those joints.

10. The results of a Bing "what shape are yoga wedge" images search disclosing numerous third party yoga wedges made of cork or foam.¹⁸

Requesting reconsideration in response to the Final Office Action, Applicant made the following evidence of record:

¹⁷ *Id.* at TSDR 32-34.

¹⁸ *Id.* at TSDR 35.

1. The results of a Google “yoga blocks” images search disclosing numerous third party yoga wedges offered for sale (URL, but not access date, provided)¹⁹;
2. The results of a product search on the website ALIBABA disclosing numerous third party yoga blocks and wedges offered for sale (URL, but not access date, provided)²⁰;

In the Denial of Applicant’s Request for Reconsideration, the Examining Attorney made the following additional evidence of record:

1. The text and drawings from U.S. Patent No. US9199113B1 issued December 1, 2015, titled “Yoga Prop and Method of Use”²¹;
2. A blog posting entitled “10 Creative Ways to Use Props in Your Practice” on the website YOGA JOURNAL²² – with the relevant passage stating as follows:

Not only do props help you find more space, freedom and stability in your poses, they're also great teaching tools with endless uses if you get creative.
3. The text and drawings from U.S. Patent No. US7318794B2 issued January 15, 2008, titled “Yoga Blocks”²³;
4. The text and drawings from U.S. Patent Application No. US20120214653A1 abandoned February 18, 2011, titled “Yoga Block”²⁴;
5. A blog posting entitled “Yoga Blocks, Bricks & Wedges – the What, How & Why ...” on the website YOGA MATTERS²⁵ – with the relevant passage stating as follows:

The Yoga Matters Cork Wedge

The cork wedge is designed with rounded edges for comfort and is perfect for supporting the heels in downward dog or placed under the wrists to ease any discomfort. It does this by changing the angle of the wrists, which changes the way weight is being distributed through your structure.

¹⁹ Request for Reconsideration of December 4, 2018 at TSDR 9.

²⁰ *Id.* at TSDR 10.

²¹ Refusal of Request for Reconsideration of December 27, 2018 at TSDR 4-9.

²² *Id.* at TSDR 10-13.

²³ *Id.* at TSDR 14-19.

²⁴ *Id.* at TSDR 20-25.

²⁵ *Id.* at TSDR 26-28.

6. A blog posting entitled “How to Use a Yoga Brick” on the website LOVE TO KNOW.²⁶

II. Applicable Law and Discussion

It is a bedrock principle of trademark and trade dress law that protection is not given to product designs that are functional:

The requirement of nonfunctionality in trademark and trade dress law is concerned with whether the particular shape or feature claimed to be a trademark or trade dress contributes to a utilitarian purpose.

There are two main rationales underlying the functionality bar ...:

- (1) Implementation of a key principle of free competition in United States law: there is only one source of exclusive rights in functional and utilitarian features—utility patent law; and
- (2) Preserving free and effective competition by ensuring that competitors can copy features that they need to compete effectively.

J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:63 (5th ed. 2019).

Functional matter is prohibited registration on the Supplemental Register²⁷ under Trademark Act Section 23(c), 15 U.S.C. § 1091(c), which provides:

For the purposes of registration on the supplemental register, a mark may consist of any trademark, symbol, label, package, configuration of goods, name, word, slogan, phrase, surname, geographical name, numeral, device, any matter that as a whole is not functional, or any combination of any of the foregoing, but such mark must be capable of distinguishing the applicant’s goods or services.

There are two theories under which claimed trade dress can be denied trademark protection as being functional. “Utilitarian functionality” considers whether a

²⁶ *Id.* at TSDR 29-33.

²⁷ *See also* Trademark Act Section 2(e)(5), 15 U.S.C. § 1052(e)(5) (prohibiting registration on the Principal Register of matter which, “as a whole, is functional”).

product feature ... is essential to the use or purpose of the article or if it affects the cost or quality of the article.” *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214USPQ 1, 4 n.10 (1982). “Aesthetic functionality” considers whether “a design’s ‘aesthetic value’ lies in its ability to ‘confe[r] a significant benefit that cannot practically be duplicated by the use of alternative designs ...’ The ‘ultimate test of aesthetic functionality ... is whether the recognition of trademark rights would significantly hinder competition.” *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1166 (1995) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17, Comment c, pp. 175-76 (1993)). Here, the Examining Attorney’s refusal to register Applicant’s Mark on the Supplemental Register is grounded only upon utilitarian functionality under the *Inwood Labs* test. Thus, we confine our consideration to utilitarian functionality.

The determination of utilitarian functionality is a question of fact and depends on the totality of the evidence presented in each case. *In re Udor U.S.A. Inc.*, 89 USPQ2d 1978, 1979 (TTAB 2009). Key factors for assessing utilitarian functionality include: (1) the existence of a utility patent that discloses the utilitarian advantages of the design sought to be registered; (2) advertising by the applicant that touts the utilitarian advantages of the design; (3) the availability of alternative designs; and (4) whether the design results from a comparatively simple or inexpensive method of manufacture. *In re Becton, Dickinson & Co.*, 675 F.3d 1368, 102 USPQ2d 1372, 1377 (Fed. Cir. 2012); *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 213 USPQ 9, 15-16 (CCPA 1982). There is no requirement that all four of the *Morton-Norwich* factors

weigh in favor of functionality in order to support a refusal under this doctrine. *In re N.V. Organon*, 79 USPQ2d 1639, 1646 (TTAB 2006).

Before we consider each of the *Morton-Norwich* factors in view of the evidence of record, we pause to mention the Supreme Court's discussion, in *TrafFix*, 58 USPQ2d at 1006, of the third factor, the availability of alternative designs wherein the Court said:

It is proper to inquire into a "significant non-reputation-related disadvantage" in cases of [a]esthetic functionality, the question involved in *Qualitex*. Where the design is functional under the *Inwood* formulation there is no need to proceed further to consider if there is a competitive necessity for the feature[, and consequently] ... [t]here is no need ... to engage ... in speculation about other design possibilities.... Other designs need not be attempted.

However, subsequent to *TrafFix*, our primary reviewing court, the Court of Appeals for the Federal Circuit, in *Valu Eng'g, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 61 USPQ2d 1422, 1427 (Fed. Cir. 2002), opined on whether the availability of alternative designs remains a factor when considering whether a product design should be granted trademark protection in view of utilitarian functionality considerations:

[W]e conclude that the [Supreme] Court merely noted that once a product feature is found functional based on other considerations [e.g., the cost or quality of the device] there is no need to consider the availability of alternative designs, because the feature cannot be given trade dress protection merely because there are alternative designs available. But that does not mean that the availability of alternative designs cannot be a legitimate source of evidence to determine whether a feature is functional in the first place.

We therefore will consider whether alternative designs are available for the “three-dimensional configuration of a triangular block which has beveled edges” Applicant seeks to register as a trademark.

A. Whether a Utility Patent Exists that Discloses the Utilitarian Advantages of the Design Sought to be Registered

Applicant contends that the product design sought to be registered has never been covered by a utility patent.²⁸ The Examining Attorney made of record: (1) the text (without the drawings) from U.S. Patent Appln. No. 12/011003 (20090192028) titled “Yoga comfort System Wedge” (the “003 Application”); (2) the entirety of U.S. Patent No. US9199113B1 titled “Yoga Prop and Method of Use” (the “113 Patent”); (3) the entirety of U.S. Patent No. US7318794B2 issued January 15, 2008, titled “Yoga Blocks” (the “794 Patent”); and (4) the entirety of U.S. Patent Application No. US20120214653A1 abandoned February 18, 2011, titled “Yoga Block” (the “653 Application”).

Neither the ‘113 Patent, the ‘794 Patent, nor the ‘653 Application is relevant, because each discloses entirely different structures than the product design now before us. Our reading of the Abstract, Independent Claims, Background and Summary from the ‘003 Application indicates this patent application might have been most relevant to our functionality analysis. However, since the Examining Attorney did not make the drawings of this patent application of record, and we do not take judicial notice of the entire patent application, the most we can say is that the text of

²⁸ 9 TTABVUE 11-12.

the patent application is only moderately informative as to the first *Morton-Norwich* factor – which we treat as neutral.

B. Whether Applicant’s Advertising Touts the Utilitarian Advantages of the Design Sought to be Registered

While not made of record, Applicant’s Brief recites the following passage from Applicant’s website:

Best Yoga Blocks Concept came out of a yoga teacher’s observing and adjusting individuals after a decade of teaching. **She saw a need for a prop that was shaped like a triangle, rather than a rectangle – the common conventional yoga prop. The human body makes more triangular spaces than others, and in a variety of poses, there is a need to fill in that gap to stabilize joints and create a safe environment for supported yoga poses and practice.** The wedge system is incredibly adaptable, and useful for more than just yoga poses. It is a design that crosses over into foam roller therapy, Myofascial release therapy, and physical therapy.²⁹

This quotation in Applicant’s Brief has no evidentiary value, except to the extent that it may serve as an admission against interest. *Cf. Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (citing *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”)).

After providing this quotation from its website, Applicant then seeks to distance herself from the meaning of the text as mere puffery, citing *In re Weber-Stephen Prods. Co.*, 3 USPQ2d 1659, 1665 (TTAB 1987). In *Weber-Stephen*, which we find inapposite, the Examining Attorney cited to portions of the applicant’s advertising materials touting the utilitarian advantages of the round shape of applicant's grill

²⁹ 9 TTABVUE 11 (emphasis added).

bowl configuration sought to be registered. The Board, however, “[could not] say that these statements necessarily indicate that the shape of applicant’s involved grill bowl is functionally superior to other grill bowls which are round but which nevertheless have shapes which differ from the shape of applicant’s grill bowl.” *Id.* Here, on the other hand, the quoted statement from Applicant’s website clearly touts the functional superiority of a triangle shaped yoga prop over a rectangle – the common conventional yoga prop. This is more than mere puffery. It is Applicant describing in her own words the need for and uses of a triangular yoga prop.

Additionally, we have considered the specimen submitted with the Application, describing Applicant’s product as “Yoga Blocks Wedges.” We further have considered a posting on Applicant’s website describing one of several ways in which Applicant instructs yoga practices with the use of a yoga block, as follows: “BEST YOGA BLOCKS/Restorative Yoga - 50 minutes of deep relaxation and Yoga using the Best Yoga Blocks system. ... Good for injured and those in pain.”

Collectively, we find that Applicant’s advertising of its services touts the utilitarian advantages of a wedge yoga prop to stabilize joints and create a safe environment for supported yoga poses and practice, and in the practice of yoga if the person is injured or in pain. We thus weigh the second *Morton-Norwich* factor in favor of a finding of utilitarian functionality.

C. Whether Alternative Designs are Available

Both Applicant and the Examining Attorney made of record third-party yoga props in triangular (wedge), block and rectangular configurations, made of either

foam or cork. However, the several blog posts also made of record by the Examining Attorney from SUNSHINEYOGA.COM, HUGGER MUGGER YOGA PRODUCTS, SUNSHINEYOGA.COM, ROLLINGSANDHARMONY.COM and YOGAMATTERS.COM particularly discuss the utilitarian usefulness of the wedge yoga prop design to help yoga practitioners alleviate strain, pain, stiffness or discomfort in their wrists or ankles, achieve pose stability and support, build arm strength, and train their hands for proper weight distribution and improve posture.

Applicant argues that the third-party block and rectangular yoga props made of record and which are “available in the marketplace ... would achieve the same ‘function’ as Applicant’s design” or “that can be said to be functionally equivalent and in the same price range as the Applicant’s yoga triangles.”³⁰ Applicant does not explain in its Brief how this functional design equivalence is achieved, nor does Applicant provide any evidence to support its argument. In fact, as noted above, Applicant’s advertising itself touts the advantages of the triangular shape in the practice of yoga.

Based on the evidence made of record, we find that a yoga prop in the wedge shape shown in the drawing of the Application provides superior utilitarian benefits in the practice of yoga over block or rectangular shaped designs, and is certainly “essential to the use or purpose of the article” under *Inwood*, 214 USPQ at 4 n.10. We therefore weigh the third *Morton-Norwich* factor in favor of a finding of utilitarian functionality.

³⁰ 9 TTABVUE 13-14.

D. Whether the Design sought to be Registered Results from a Comparatively Simple or Inexpensive Method of Manufacture

In Applicant's Brief, Applicant discusses the selling price points for yoga props as well as the acquisition costs for such items whether buying them in pairs or in bulk. Applicant also discusses the large number of potential suppliers for these items and the various materials from which yoga props can be made.³¹ Missing from Applicant's discussion is whether the wedge shape of its product (and proposed mark) "affects the cost or quality of the article" under *Inwood*, 214 USPQ at 4 n.10. The Examining Attorney does not discuss this *Morton-Norwich* factor at all. We therefore find the fourth *Morton-Norwich* factor irrelevant to our analysis and treat it as neutral.

III. Conclusion

Because the Examining Attorney did not make the drawings of the '003 patent application of record, it is unclear whether a utility patent or patent application (active or expired) exists that discloses the utilitarian advantages of Applicant's yoga wedge design. Applicant's advertising does tout the utilitarian advantages of the wedge design, and there do not appear to be alternative designs available that would work as well for the practice of yoga. There was no relevant evidence or argument as to whether Applicant's yoga wedge design results from a comparatively simple or inexpensive method of manufacture. After considering each of the *Morton-Norwich* factors in view of the evidence of record, we find that the Examining Attorney made a prima facie showing that Applicant's Mark is functional within the meaning of

³¹ 9 TTABVUE 15-16.

Trademark Act Section 23(c), which Applicant did not rebut with the evidence and argument Applicant submitted.

Decision: The refusal to register Applicant's Mark on the ground of utilitarian functionality is **affirmed**.