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**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 31  
CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Briles Rivet Corporation

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Serial No. 75/053,459

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Edward M. Prince of Alston & Bird and William W. Haefliger,  
Esq. for applicant.

Chad M. Smith, Trademark Examining Attorney, Law Office 104  
(Sidney Moskowitz, Managing Attorney).

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Before Walters, Chapman and Bucher, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

On January 31, 2001, the Board affirmed the refusal to register in this case under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. 1051, 1052 and 1127, on the ground that the subject matter of the application, shown below is *de jure* functional in connection with "rivets."



On February 28, 2001, applicant requested reconsideration of the Board's decision. Applicant contends that the Board erred in reaching its conclusion because it "incorrectly interpreted facts and overlooked other facts."

Applicant contends that the Examining Attorney erred in concluding that "the mere existence of a patent on the design feature forecloses any discussion of the other *Morton-Norwich* elements, in particular, the existence of alternative designs." Applicant goes on to state that because the Examining Attorney did not discuss the alternative designs, "it appeared that the examining attorney accepted applicant's contention that there were alternative designs"; and that "for the first time in the prosecution of this case, the Board, in its decision, challenges and discusses the alternative designs, ultimately claiming that there was insufficient evidence to satisfy the Board's inquiry concerning these design[s]."

Applicant's contention regarding the *Morton-Norwich* factors considered by the Examining Attorney and the consideration of those factors by the Board on appeal is not well taken. While admitting that "the Board need not find that the Examining Attorney's rationale was correct in order to affirm the refusal to register," applicant

essentially argues that, because the Examining Attorney based his decision principally on the existence of a prior patent, before the Board can consider the other evidence in the record, it must remand the application to the Examining Attorney and ask him to consider the evidence differently. Clearly, this is not the case. In affirming the refusal to register, the Board considered only the evidence in the record. Based on our own review of the evidence in the record and the fact that our conclusion was based on more than the existence of the utility patent, it was unnecessary for the Board to consider the legal question of whether the existence of a prior utility patent is, alone, sufficient to warrant a finding of *de jure* functionality. Nor did we find it necessary to remand the application to the Examining Attorney during our consideration of the appeal.

Finally, we find applicant's additional arguments in its request for reconsideration to be, essentially, a rearguing of the case.

For the reasons stated in our opinion of January 31, 2001, we stand by our decision affirming the refusal to register in this case on the ground that the subject matter of the application is *de jure* functional under Sections 1,

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2 and 45 of the Trademark Act. The request for reconsideration is, accordingly, denied.