

**THIS OPINION WAS NOT WRITTEN FOR PUBLICATION**

The opinion in support of the decision being entered today  
(1) was not written for publication in a law journal and  
(2) is not binding precedent of the Board.

Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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***Ex parte*** RICHARD A. MARTIN

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Appeal No. 95-1744  
Application 08/216,543<sup>1</sup>

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ON BRIEF

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Before McCANDLISH ***Senior Administrative Patent Judge*** and  
MEISTER and CRAWFORD, ***Administrative Patent Judges***.

MEISTER, ***Administrative Patent Judge***.

**DECISION ON APPEAL**

Richard Martin (the appellant) appeals from the final  
rejection of claims 8-14 and 16. Claim 15 has been indicated as  
being allowable subject to the requirement that it be rewritten  
to include all the subject matter of the claims from which it

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<sup>1</sup>Application for patent filed March 23, 1994.

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depends. Claims 1-7 and 17-20, the only other claims present in the application, stand allowed.

We REVERSE.

The appellant's invention pertains to a nasal aspirator/irrigation device. Independent claim 8 is further illustrative of the appealed subject matter and reads as follows:

8. A nasal aspirator/irrigation device comprising:

a hollow body having a top portion and a bottom portion opposite said top portion;

a hollow capture chamber connected to said body bottom portion;

a nasal conduit connected to said body top portion, having a free end portion dimensioned to fit into a human nostril;

a vacuum-connection conduit connected to said body top portion remote from said nasal conduit;

a vacuum-control opening operatively defined in said body top portion, remote from said nasal conduit;

said device being dimensioned to fit in an adult human hand; and

wherein said nasal conduit free end has the general configuration of a hollow triangular prism and provides a comfortable, sealed, fit of said nasal conduit in a human nostril.

The references of record relied on by the examiner are:

Halstead	790,051	May 16, 1905
Lunas et al. (Lunas)	3,738,363	Jun. 12, 1973
McNeil et al. (McNeil)	4,828,546	May 09, 1989

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Exhibit A, an attachment to a declaration by Martin which was included with the prior art statement filed on March 23, 1994 (Paper No. 2),

Claims 8-14 and 16 stand rejected under 35 U.S.C. § 103 as being unpatentable over the combined disclosures of Exhibit A, Halstead, McNeil and Lunas. It is the examiner's position that

Exhibit A is the primary reference showing basically Applicant's structures recited by the claim with McNeil and Lunas (teaching threaded) showing a releasable capture chamber as recited by the claim [sic, claims 13 and 14]. The only distinction is the shape of the nasal inserted end which is considered a matter of obvious subjective design as stated in the previous Final Rejection. Again it is stated that what constitutes a comfortable fit is obviously a matter of design as to what constitutes a comfortable fit for a desired purpose and would accordingly be [sic, have been] obvious to a person of ordinary skill in the art. [Answer, page 4.]

We do not support the examiner's position. The examiner recognizes that in Exhibit A the nasal conduit free end does not have "the general configuration of a hollow triangular prism" as set forth in independent claim 8 but, nevertheless, seeks to dismiss the claimed configuration as a "matter of obvious subjective design." We must point out, however, that page 6 of the specification states that

the free end 16 of the nasal conduit 15 is constructed in a way such that it fits more appropriately into the vestibule of the human nose, providing a comfortable, sealed fit of the nasal conduit in a human nostril. The particular nasal conduit free end 16 construction illustrated in FIGURES 1 and 2 allows a greater area of

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negative pressure to be generated in the area of the valve region of the nose, and allows a better and more comfortable fit into the nose than the H.S. Martin structure [i.e., the structure of Exhibit A]. As seen in FIGURES 1 and 2, the free end 16 preferably has a configuration of a hollow triangular prism . . . .

In view of these expressly stated advantages, i.e., that a free end in the configuration of a hollow triangular allows a greater area of negative pressure to be generated and provides a sealed fit which is more comfortable than the free end of Exhibit A, the claimed provision of a hollow triangular prism cannot simply be dismissed as a "matter of subjective design" as the examiner proposes.

As to the examiner's assertion that "what constitutes a comfortable fit for a desired purpose" would have been obvious, obviousness under § 103 is a legal conclusion based on **factual evidence** (*In re Fine*, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988)). Accordingly, this bald assertion by the examiner, without evidence in support thereof, does not provide a sufficient factual basis for establishing the obviousness of the of the claimed configuration of the free end within the meaning of 35 U.S.C. § 103 (**see In re GPAC Inc**, 57 F.3d 1573, 1582, 35 USPQ2d 1116, 1123 (Fed. Cir. 1995) and *In re Warner*, 379 F.2d 1011, 1017, 154 USPQ 173, 178 (CCPA 1967), **cert. denied**, 389 U.S.

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1057 (1968)).

None of the other references relied on by the examiner (i.e., Halstead, McNeil and Lunas) even have a "nasal conduit free end," much less one being in "the general configuration of a hollow triangular prism" as set forth in independent claim 8.

In view of the foregoing, the decision of the examiner to reject claims 8-14 and 16 under 35 U.S.C. § 103 based on the combined teachings of Exhibit A, Halstead, McNeil and Lunas is reversed.

**REVERSED**

HARRISON E. McCANDLISH	)	
Senior Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
JAMES M. MEISTER	)	APPEALS AND
Administrative Patent Judge	)	INTERFERENCES
	)	
	)	
MURRIEL E. CRAWFORD	)	
Administrative Patent Judge	)	

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