

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MERIDIAN WILDLIFE SERVICES LLC,
Petitioner,

v.

SAFE HAVEN WILDLIFE REMOVAL AND PROPERTY
MANAGEMENT EXPERTS LLC,
Patent Owner.

IPR2022-01253
Patent 10,251,374 B2

Before NEIL T. POWELL, MICHAEL L. WOODS, and
AMEE A. SHAH, *Administrative Patent Judges*.

WOODS, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request on Rehearing of
Decision Denying Institution
37 C.F.R. § 42.71(d)

I. INTRODUCTION

a. Background

Petitioner, Meridian Wildlife Services LLC, filed a Petition for *inter partes* review of claims 1–16 (the “Challenged Claims”) of U.S. Patent No. 10,251,374 B2 (Ex. 1001, “the ’374 patent”). Paper 1, (“Pet.”). Patent Owner, Safe Haven Wildlife Removal and Property Management Experts LLC, filed a Preliminary Response (Paper 8, “Prelim. Resp.”). With our permission, Petitioner filed a Reply to the Preliminary Response (Paper 9, “Reply”) and Patent Owner filed a Sur-Reply to the Reply (Paper 10, “Sur-Reply”).

In our decision on institution (Paper 11, “Dec.” or “Decision”), we determined that Petitioner failed to show a reasonable likelihood of prevailing with respect to any of the challenged claims and denied institution of *inter partes* review.

Petitioner filed a timely Request for Rehearing in which it asks that we institute *inter partes* review of the challenged claims. Paper 12, 1 (“Reh’g Req.” or “Request”).

For the reasons that follow, we *deny* Petitioner’s Request.

b. Asserted Grounds

Petitioner asserts that the Challenged Claims are unpatentable based on the following grounds (Pet. 1):

Ground	Claims Challenged	35 U.S.C. §	References
A	6–14	103	Brugh ¹
B	1–16	103	Brugh, Kunz ²
C	1–16	103	Bird Barrier Video, ³ Kunz

Petitioner also relies on the Declaration of Mr. Michael J. Chamberlain (Ex. 1004). *See, e.g.*, Pet. 6 (“As confirmed by Petitioner’s expert, Dr. Chamberlain . . .”).

In its Request, Petitioner seeks institution under Grounds A and B. *See* Reh’g Req. 2–15.

c. Standard for Rehearing

The party filing a request for rehearing of a decision to institute has the burden of showing a decision should be modified, and the request for rehearing must specifically identify all matters the party believes the Board misapprehended or overlooked and the place where each matter was previously addressed in its papers. 37 C.F.R. § 42.71(d). “When rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” *Id.* § 42.71(c)).

¹ Brugh, U.S. Patent Application Publication No. 2017/0238524, published Aug. 24, 2017 (Ex. 1008, “Brugh”), issued as US Patent No. 9,943,073 B2 on Apr. 17, 2018

² Ecological and Behavioral Method for the Study of Bats (Thomas H. Kunz, 1998). Ex. 1010 (“Kunz”).

³ Bird Barrier, *Mist Kit Assembly and Use*, YouTube (Aug. 19, 2014). Ex. 1009 (“Video” or the “Bird Barrier Video”).

II. ANALYSIS

In its Request, Petitioner argues that the Board misapprehended Petitioner’s arguments and evidence under Grounds A (Brugh) and B (Brugh and Kunz). *See* Reh’g Req. 2–15.

We address each of Patent Owner’s arguments separately, below.

a. Ground A: Claims 6–14 as Unpatentable over Brugh

Petitioner presents four separate sub-arguments under its general argument that the Board misapprehended Petitioner’s arguments and evidence under Ground A. *See* Reh’g Req. 2–13. We address each of those arguments separately, below.

- i. The Board misapprehended the argument that it would have been obvious to place at least one of Brugh’s nets proximate to a perimeter wall (and additional areas) “in response to observing flight patterns in those locations,” overlooked testimony confirming that a POSA would observe birds flying proximate to a perimeter wall, and misapplied the law of obviousness*

Nested within this first sub-argument, Petitioner presents numerous sub-arguments, which we address in-turn, below.

First, Petitioner contends that “it was self-evident that a [person having ordinary skill in the art (“POSA”)] following Brugh’s teaching would eventually observe birds or other flying vertebrates flying along a perimeter wall.” Reh’g Req. 2–3. Petitioner argues that it provided evidence to support a finding that a flying animal would fly along the perimeter wall. *See id.* at 3. In support of this argument, Petitioner cites to the testimony of the *inventor of the ’374 patent*, Mr. Tolley. *See id.* at 3–4.

We disagree with Petitioner.

The Petition *did not* cite sufficient evidence to support a finding that a bird would have flown along the interior perimeter of an interior wall. *See, e.g.,* Dec. 19 (“Petitioner provides no evidence that bats or other flying animals are likely to fly or roost along *the inner perimeter of a structure* such that a POSITA would have found it obvious to place a net along the perimeter of a wall within a building.”). Petitioner’s attempt to cite the *inventor’s (Mr. Tolley’s) expert testimony* is equally unavailing. *See* Reh’g Req. 4. We disagree with Petitioner’s assertion that Mr. Tolley’s testimony supports Petitioner’s obviousness challenge.

Petitioner’s argument gives no credit to the inventor’s discovery.

Mr. Tolley, the inventor, testified that he “spent countless hours monitoring bird flights and patterns within Walmart’s facilities and other indoor structures, focusing not only on where birds typically roosted in the facilities, but also where and how they flew within the enclosures . . . and experimenting [on] various placements of nets based on [his] observations.” Ex. 2001 ¶ 16. We do not find Petitioner’s citation to the inventor’s testimony, in which the inventor testifies to having “spent countless hours” working on his discovery, to support Petitioner’s argument that the inventor’s discovery would have been obvious based on Brugh.

Petitioner also argues that the Board ignored common sense, as “at some point a POSA necessarily would have observed some species of flying animal near some perimeter walls within some building.” Reh’g Req. 4; *see also id.* at 7 (“Accounting for common sense in the obviousness inquiry is of particular importance when—as is the case here—‘the limitation in question

[is] unusually simple and the technology particularly straightforward.”
(internal citation omitted)).

Petitioner’s second argument is unavailing.

“[W]hile ‘common sense’ can be invoked, even potentially to supply a limitation missing from the prior art, it must still be supported by evidence and a reasoned explanation.” *Arendi S.A.R.L. v. Apple Inc.*, 832 F.2d 1355, 1363 (Fed. Cir. 2016).

As explained above, Petitioner discounts the inventor’s discovery, in which he spent “countless hours” before discovering that birds fly along the perimeter wall of a building’s interior. *See* Ex. 2001 ¶ 16. We are not persuaded that the inventor’s discovery was merely “common sense,” and if it was, Petitioner should have submitted some evidence to support such a finding. *See Arendi*, 832 F.2d at 1363. As explained in our Decision, Petitioner did not. *See, e.g.*, Dec. 19 (“Petitioner provides no evidence that bats or other flying animals are likely to fly or roost along *the inner perimeter of a structure*”). A request for rehearing under 37 C.F.R. § 42.71(d) is not an opportunity for Petitioner to simply *reargue* issues we previously addressed.

Petitioner also argues that its expert, Dr. Chamberlain, “clearly explained that a POSA would place Brugh’s capture net proximate to a perimeter wall whenever a POSA observed birds flying near such a wall—*precisely as Brugh instructs.*” *Id.* at 5 (citing Ex. 1004 ¶ 75 (citing Ex. 1008 ¶¶ 15, 45)).

Petitioner’s third sub-argument is also not persuasive.

Brugh *does not* “instruct” that birds fly near the perimeter wall. *See* Ex. 1008 ¶¶ 15, 45. Furthermore, we did not overlook or misapprehend

Petitioner’s argument or Dr. Chamberlain’s testimony. As explained in our Decision, “Petitioner’s reason that a skilled artisan would have placed a net ‘along a perimeter wall . . . *in response to observing flight patterns in those locations*’ is not supportable.” Dec. 18 (citing Pet. 16–17 (citing Ex. 1008 ¶¶ 15, 45; Ex. 1004 ¶ 75)).

Finally, Petitioner also argues that we erred in “discount[ing] entirely” the testimony of its expert, Dr. Chamberlain. Reh’g Req. 6.

Petitioner’s fourth sub-argument is not persuasive.

As explained in our Decision, Dr. Chamberlain’s testimony that birds would fly along the inner perimeter of a building is not supported by evidence. Dec. 18–19. As such, his testimony is entitled to little weight. *See Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 9 (Aug. 24, 2022) (precedential) (denying institution and holding that a declaration is entitled to little weight when it contains an exact restatement of the petition’s arguments without any additional supporting evidence or reasoning); *see also* 37 C.F.R. § 42.65(a) (“Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.”); *see also Upjohn Co. v. Mova Pharm. Corp.*, 225 F.3d 1306, 1311 (Fed. Cir. 2000) (“Lack of factual support for expert opinion to factual determinations, however, may render the testimony of little probative value in a validity determination.”) (quotation omitted); *see also Carella v. Starlight Archery & Pro Line Co.*, 804 F.2d 135, 138 (Fed. Cir. 1986) (“Although in some circumstances unsupported oral testimony can be sufficient to provide prior knowledge or use, it must be regarded with suspicion and subjected to close scrutiny.”).

For the foregoing reasons, Appellant does not show that the Board overlooked or misapprehended any arguments under this subheading. *See* 37 C.F.R. § 42.71(d).

ii. *The Board misapprehended evidence that flying vertebrates are likely to fly proximate to a perimeter wall*

Petitioner also argues that we overlooked Tuttle as evidence that “flying vertebrates are likely to fly proximate to a perimeter wall.” *See* Reh’g Req. 8. Petitioner submits that Tuttle “provided clear evidence that flying vertebrates are likely to fly near perimeter walls.” *Id.* Petitioner explains that “[i]f a flying vertebrate roosts in ‘cavities between walls,’ the flying vertebrate must necessarily fly proximate to those very walls to reach that location.” *Id.*

Petitioner’s argument is not persuasive. A request for rehearing under 37 C.F.R. § 42.71(d) is not an opportunity for Petitioner to simply reargue issues we previously addressed. We addressed Tuttle in our Decision and did not find it to support Petitioner’s position.

As explained in our Decision,

The evidence, however, does not support a finding that a flying animal would roost or fly along the perimeter of a wall within a building. For example, Tuttle (Ex. 1018), which Dr. Chamberlain cites to (Ex. 1004 ¶ 30), discloses that for bats that roost in buildings, the likely roosting sites are “[t]ile roofs, attics, and cavities between walls . . . and any place that is dark or dimly lit and protected from frequent disturbance” (Ex. 1018, 81). As persuasively argued by Patent Owner, Petitioner provides no evidence that bats or other flying animals are likely to fly or roost along *the inner perimeter of a structure* such that a POSITA would have found it obvious to place a net along the perimeter of a wall within a building. *See* Prelim Resp. 36–37

(citing Ex. 2001 ¶ 51) (emphasis added). Having weighed the parties' competing testimony, we credit Mr. Tolley's testimony that "Brugh does not teach a POSA that there would be any advantage of positioning one or more nets along a perimeter wall . . . [and that] there is no discussion at all about flight characteristics dictating placement of a net along the walls of an enclosure." Ex. 2001 ¶ 51.

Dec. 19.

For the foregoing reasons, Appellant does not show that the Board overlooked or misapprehended any arguments under this subheading. *See* 37 C.F.R. § 42.71(d).

- iii. *The Board misapprehended Petitioner's argument that placing at least one of Brugh's capture devices along a perimeter wall would "shrink the area" where a bird is able to fly*

Petitioner argues that the "Board misapprehended Petitioner's argument as impermissible hindsight stemming 'solely from the '374 Patent' because it was not 'taught by the cited art.'" Reh'g Req. (citing Dec. 19–20). Petitioner explains that "neither Petitioner nor Dr. Chamberlain relied on the '374 Patent in explaining this argument." *Id.* (citing Pet. 17; Ex-1004 ¶ 76); *see also id.* at 11 ("It is again self-evident that placing one of Brugh's capture devices along a perimeter wall creates an area where a bird can no longer fly"). Petitioner reiterates that its expert, "Dr. Chamberlain[,] testified that . . . a POSA would have found it 'a matter of basic geometry' to reduce the area in which a bird can fly by arranging at least one of Brugh's capture devices along a perimeter wall and at least three in additional locations." *Id.* at 10 (citing Ex. 1004 ¶ 76). Petitioner argues that "it is common sense that Brugh's capture devices are oriented to intersect a bird's flight path." *Id.* at 12.

Petitioner's argument is not persuasive.

We addressed this argument in our Decision along with the particular testimony cited by Petitioner. A request for rehearing under 37 C.F.R. § 42.71(d) is not an opportunity for Petitioner to simply reargue issues we previously addressed.

As explained in our Decision,

. . . Petitioner's reason that placing a net along a perimeter wall "would effectively shrink the area in which the vertebrate is able to fly and thereby improve the likelihood of capture" is based on impermissible hindsight. Pet. 17 (citing Ex. 1004 ¶ 76); *see also* Ex. 1004 ¶ 76 (testifying that "flying vertebrate [would have] fewer escape routes along the perimeter.") Impermissible hindsight occurs when a person of ordinary skill in the art is imbued with knowledge taught *only* by the inventor of the challenged patent. *See W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1553 (Fed. Cir. 1983).

Upon reviewing the record, Petitioner relies on impermissible hindsight, as its reasoning stems *solely* from the '374 patent. *Id.* The '374 patent describes an advantage of its system that improves animal capture as "the space the animal could escape during an attempted capture is greatly lessened due to the arrangement of the perimeter net system and trapping net system." Ex. 1001, 3:5–9. The prior art cited by Petitioner, on the other hand, does not teach the placement of nets along the perimeter and within an enclosure for reducing escape routes, thereby improving the capturability of flying animals.

Dec. 19–20.

For the foregoing reasons, Petitioner does not show that the Board overlooked or misapprehended any arguments under this subheading. *See* 37 C.F.R. § 42.71(d).

iv. The Board failed to account for bias in the testimony of Patent Owner's Founder and CEO Derek Tolley

Petitioner argues that the “Board’s analysis was tainted further by crediting the testimony of an interested party—Patent Owner’s Founder and CEO Derek Tolley.” Reh’g Req. 12 (citing Dec. 19; Ex. 2001 ¶¶ 1, 5, 11, 13, 15). Petitioner argues that the “Board was obligated to account for Mr. Tolley’s bias in weighing his testimony, which it did not[.]” *Id.* at 13 (citation omitted).

Petitioner’s argument is not persuasive.

Petitioner presumes we did not consider the fact that Patent Owner’s expert, Mr. Tolley, is the inventor of the ’374 patent. We considered this fact but, nevertheless, found Mr. Tolley’s testimony more persuasive than Dr. Chamberlain’s testimony. *See, e.g.*, Dec. 18 (“Weighing the parties’ arguments and evidence, Petitioner has not shown sufficiently that it would have been obvious to modify Brugh to arrive at a ‘perimeter net’ located at or proximate to the perimeter.”). As explained above, Dr. Chamberlain did not provide sufficient evidentiary support for his testimony that birds would fly along the inner perimeter of a building. As such, Dr. Chamberlain’s testimony was afforded little weight. 37 C.F.R. § 42.65(a)

b. Ground B: Claims 1–16 as Unpatentable over Brugh and Kunz

Petitioner argues that the “Board’s analysis was similarly misguided under Ground B.” Reh’g Req. 13. Petitioner argues that the “Board discounted Kunz’ [sic] disclosure as failing to teach ‘that bats tend to roost at or proximate to *the perimeter wall within a building.*’” *Id.* at 14 (citing Dec. 44).

Petitioner’s argument is not persuasive. A request for rehearing under 37 C.F.R. § 42.71(d) is not an opportunity for Petitioner to simply reargue issues we previously addressed.

As explained in our Decision, Kunz does not teach that bats roost proximate to the perimeter wall within a building.

Specifically, our Decision explains,

Although Kunz discusses netting bats at “*openings* to caves, mines, and buildings” (Ex. 1010, 8 (citing Fig. 3A) (emphasis added)) and capturing bats “if the perimeters of roosts are either partially or completely surrounded by one or more nets” (*id.* at 10 (citing Figs. 4E, 4F)), Kunz makes no assertions or statements that bats tend to roost at or proximate to *the perimeter wall within a building.*

Dec. 28.

Furthermore, Petitioner cites to page 44 of our Decision (*see* Reh’g Req. 14), yet, our Decision was only 40 pages long. As such, we do not identify any error on this page of our Decision.

c. Summary

For the foregoing reasons, we deny Petitioner’s Request.

III. OUTCOME OF THE DECISION ON REHEARING

Claim(s)	35 U.S.C. §	Reference(s)/Basis	Denied	Granted
6–14	103	Brugh	6–14	
1–16	103	Brugh, Kunz	1–16	
Overall Outcome			1–16	

IV. ORDER

For the reasons given, it is

ORDERED that Petitioner’s Request for Rehearing is *denied*.

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PETITIONER:

Christopher Kelly
Warren Thomas
Alexander Gabanic
MEUNIER CARLIN & CURFMAN LLC
ckelly@mcciplaw.com
wthomas@mcciplaw.com
mgabanic@mcciplaw.com

Siraj Abhyankar
ALSTON & BIRD LLP
shir.abhyankar@alston.com

PATENT OWNER:

Preston Heard
Ana Friedman
WOMBLE BOND DICKINSON (US) LLP
Preston.heard@wbd-us.com
ana.friedman@wbd-us.com

Carl Massey
MASSEY LAW, PLLC
carl@masseyip.com