

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

**GUANDONG LAITU IMAGING TECHNOLOGY CO., LTD. DBA
LEOFOTO,**
Petitioner,

v.

REALLY RIGHT STUFF, LLC,
Patent Owner.

INTER PARTES REVIEW No. 2023-00853
U.S. Patent No. 8,398,037
Equipment Support

PATENT OWNER PRELIMINARY RESPONSE
37 C.F.R. § 42.107

TABLE OF CONTENTS

I.	Introduction	6
II.	Legal Standard for Institution of <i>Inter Partes</i> Review	8
III.	Leofoto’s Petition Relies on Misconstrued Claim Terms.....	9
	(a) Standards for Claim Construction at IPR	10
	(b) The Person Having Ordinary Skill in the Art.....	11
	(c) Claim Terms.....	11
	1. “Apex”	11
	2. “Equipment”	12
IV.	Grounds for Denying Institution.....	13
	(a) Gitzo 2009 and the YouTube videos are Inadmissible Hearsay.....	13
	1. FRE 807(a)(1): Guarantees of Trustworthiness	15
	2. FRE 807(a)(2): Whether More Probative Evidence Could be Offered 18	
	3. Leofoto’s Other Arguments Related to Old FRE 807 Do Not Overcome the Inadmissibility Problems of Lack of Trustworthiness and Failure to Proffer More Probative Evidence.....	19
	4. Conclusion	21

(b) Yang is Missing Material Limitations in the Remaining Claims...	22
1. Claim 16.....	22
2. Claim 17.....	29
V. Conclusion and Request for Specific Relief.....	32
VI. Notices and certificates	34
(a) Notice of Discovery Agreement	34
(b) Certificate of Word count.....	34
(c) Certificate of Service	34

TABLE OF AUTHORITIES

Cases

<i>Bluegrass Dutch Tr. Morehead, LLC v. Rowan Cnty. Fiscal Ct.</i> , 734 F. App'x 322 (6th Cir. 2018).....	18
<i>Matter of Sterling Nav. Co. Ltd</i> , 444 F. Supp. 1043 (S.D.N.Y. 1977)	18
<i>McGinley v. Munchkin, Inc.</i> , No. 09-0257-CV-W-GAF, 2010 WL 1268053 (W.D. Mo. Apr. 2, 2010).....	25
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005)	10
<i>Valve Corp. v. Ironburg Inventions Ltd.</i> , 8 F.4th 1364 (Fed. Cir. 2021)	17
<i>Vitronics Corp. v. Conceptronic</i> , 90 F.3d 1956 (Fed. Cir. 1996).....	10

Statutes

35 U.S.C. § 102	9
35 U.S.C. § 103	9
35 U.S.C. § 253	7
35 U.S.C. § 311	9
35 U.S.C. § 314	8
35 U.S.C. § 316	9

Rules & Regulations

37 C.F.R. § 1.321	7
37 C.F.R. § 42.100	10
37 C.F.R. § 42.107	7
37 C.F.R. § 42.108	8
37 C.F.R. § 42.62	8, 13
FRE 801	13
FRE 802	13
FRE 803	15, 21
FRE 804	15, 21
FRE 807	passim

Secondary Authorities

FRE 807 Notes	14, 21
---------------------	--------

EXHIBITS

Exhibit	Description
2001	Wikipedia.org About Page
2002	Revision History of Gitzo's Wikipedia Page

2003	Microsoft Windows Support Community - Modifying a file date
2004	Statutory Disclaimer

I. INTRODUCTION

On April 14, 2023, Petitioner Guangdong Laitu Imaging Technology, Ltd., doing business as Leofoto (“Lefoto”), petitioned the Patent Trial and Appeal Board (the “Board”) to institute an *inter partes* review under 35 U.S.C. § 314. The challenged patent is United States Patent No. 8,398,037, entitled EQUIPMENT SUPPORT (the “’037 Patent”) owned by Really Right Stuff, LLC (“RRS”). The ‘037 Patent claims priority to Provisional Application Number 61/343,114, filed on April 23, 2010.

The ’037 Patent teaches several forms of equipment support (most commonly tripods) featuring inventive additions to improve their functionality. Leofoto challenges ‘037 Patent claims 1-8 and 15-28 based on five prior art references:

1. Yang et al., U.S. Patent Application Publication Number 2008/0224000, entitled TRIPOD FOR CAMERA (hereinafter “Yang”);
2. a catalogue displaying a collection of products from photographic equipment manufacturer Gitzo that Leofoto alleges were available in a 2009 catalogue (hereinafter “Gitzo 2009”);

3. a first YouTube video entitled *Gitzo Tripods*, posted by user “Vincent Oliver photo-i” on September 19, 2008 (hereinafter “YouTube 1”);¹
4. a second Youtube video entitled *Gitzo G1098 Tripod*, posted by user “PhotoVideoAu” on November 18, 2008 (“YouTube 2”);² and
5. a third YouTube video entitled *Shooting Videos with a DSLR Camera – English*, posted by user “Gitzo Inspires” on February 18, 2010 (“YouTube 3”).³

To streamline the *inter partes* review of the ‘037 Patent, on or about July 27, 2023, RRS filed a statutory disclaimer for claims 1-5 and claims 18-24 pursuant to 35 U.S.C. § 253(a); 37 C.F.R. § 42.107(e); and 37 C.F.R. § 1.321(a).

Notwithstanding the disclaimer, no admission regarding the validity of any disclaimed claims is intended. The only remaining claims at issue are thus claim 6-8, 15-16, 17, and 25-28. Based on the above-named prior art references, Leofoto’s challenges to the remaining claims are as follows:

- Claims 6-8 are anticipated by Gitzo 2009 or YouTube 1 or YouTube 3;
- Claim 15 is anticipated by Gitzo 2009 or rendered obvious in view of YouTube 1 or YouTube 3 in view of Yang;

¹ Available at <https://www.youtube.com/watch?v=AEgbj5J5n9Q&t=90s>

² Available at https://www.youtube.com/watch?v=Zh_Uuga-UEIa

³ Available at <https://www.youtube.com/watch?v=OB64XUTzEjI>

- Claims 16 and 17 are anticipated by Yang; and
- Claims 25-28 are obvious in view of Gitzo 2009 and in further view of Yang.

As RRS shows in this paper, IPR 2023-00853 should not be instituted because four of the five prior art references are inadmissible evidence of unpatentability, and the sole remaining reference, Yang, does not anticipate or render obvious the claims Leofoto asserts it against. At least Gitzo 2009 and the YouTube videos are inadmissible under the Federal Rules of Evidence (“FRE”), which are incorporated into IPR proceedings under 37 C.F.R. § 42.62.

Furthermore, Leofoto has not shown that the Yang reference sufficiently anticipates or renders obvious any other claim at issue either by itself or in combination with the other references. Accordingly, the PTAB should deny and dismiss Leofoto’s petition.

II. LEGAL STANDARD FOR INSTITUTION OF *INTER PARTES* REVIEW

An *inter partes* review (“IPR”) should not be instituted unless the petitioner is able to show that there is “a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims in the petition.” 35 U.S.C. § 314(a). *See also* 37 C.F.R. § 42.108(c) (setting forth the same standard). A petition for IPR is limited to arguments that could be raised regarding unpatentability under 35

U.S.C. §§ 102 (e.g., anticipation) and 103 (e.g., obviousness) and “only on the basis of prior art consisting of patents or printed publications.” 35 U.S.C. § 311(b).

If an IPR is instituted, the petitioner must show the unpatentability of each challenged claim by a preponderance of the evidence. 35 U.S.C. § 316(e). Thus, Leofoto must show at this stage that it has a reasonable likelihood of success in proving by a preponderance that one or more of the remaining claims at issue are unpatentable. It has not done so.

III. LEOFOTO’S PETITION RELIES ON MISCONSTRUED CLAIM TERMS

Some of Leofoto’s grounds for challenging the patentability of the remaining claims rely on misconstruction of claim terms. Namely, Leofoto construes “apex” to include parts of the legs of a tripod.

Although Leofoto also seeks to define “off-center support surface” recited in claims 3-4 of the ’037 Patent as “off-center relative to the pivot axis of the leg.” Petition, p.33. The need to define “off-center support surface” is rendered moot because of RRS’s disclaiming claims 3 and 4, but should it need definition, RRS disagrees with Leofoto’s proposed definition. RRS puts forth that a more consistent and accurate definition would be “off-center in relation to a circumference of the leg member” as it is described in claim 1.

“Equipment” should also be defined; though Leofoto has offered no explicit definition for “equipment,” Leofoto appears to rely on a construction broader than should be applied during IPR.

(a) Standards for Claim Construction at IPR

During IPR, the PTAB is to construe claims according to the *Phillips* standard as opposed to the United States Patent & Trademark Office’s usual broadest-reasonable-interpretation standard. *See Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005); 37 C.F.R. § 42.100(b). Under the *Phillips* standard, claims are given their ordinary meaning, which is the meaning a person having ordinary skill in the art would give them. *Phillips v. AWH Corp.*, 415 F.3d 1303. “The claims, of course, do not stand alone. Rather, they are part of ‘a fully integrated written instrument,’ consisting principally of a specification that concludes with the claims... For that reason, claims ‘must be read in view of the specification, of which they are a part.’” *Phillips*, 415 F.3d at 1315. (internal citations omitted). Accordingly, the specification is “highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.” *Vitronics Corp. v. Conceptronic*, 90 F.3d 1956, 1582 (Fed. Cir. 1996).

(b) The Person Having Ordinary Skill in the Art

Leofoto asserts that a person having ordinary skill in the relevant art is a person having a bachelor's degree in mechanical engineering or the equivalent through practical experience. RRS advances that a lower level of skill is necessary to understand the mechanical functions of a tripod. Rather, a hobbyist user of a tripod, such as a hunter or landscape photographer, would have the understanding of a person of ordinary skill in the art. Formal education or years of practical experience building equipment supports are unnecessary to understand the function of a tripod.

(c) Claim Terms

Claim 16 of the '037 Patent recites "an apex selectively, detachably mountable to equipment...." RRS asserts that each of "apex" and "equipment" should be construed as follows:

1. "Apex"

Apex should be construed as "the structure of the tripod that joins the legs to each other and the rest of the tripod at the legs' pivot points."

This construction is supported by appropriate reading of the claims of the '037 Patent. For example, claim 5 describes the leg members pivoting toward a position perpendicular to the apex, which means the apex itself isn't pivoting. *See also* '037 Patent, 3:1-2 ("each of the legs 14 preferably pivots about a respective

axis 22 proximate the apex 18.”). The specification states “the contact between the foot 80, which may be rubber for example, and the supporting surface inhibits slippage of the leg 14 regardless of the angle of the leg 14 relative to the apex 18.” *Id.* 5:53-57. If parts of the tripod legs are included in the apex, as Leofoto posits (see e.g., Petition, pp.40-41), then “the relative angle to the apex” is meaningless because the apex will have multiple relative angles. Lastly, claim 17 describes a “*fixed angular positions closest to the support surface.*” As discussed in greater detail in Part IV(b)(2) of this paper, this language would be rendered meaningless if Leofoto’s construction were adopted.

2. “Equipment”

Equipment should be limited to devices that may be used either in conjunction with or independent of a support, such as cameras, firearms, optics, etc.

This construction of equipment is supported by the idea that a tripod, one of the more common embodiments of the ‘037 Patent, is designed to support devices designed to independently operate as needed. A person of ordinary skill in the art is thus likely to give “equipment” an ordinary meaning that encompasses cameras, firearms, and optics. The construction is also supported by the specification, which gives as illustrative equipment “a camera, telescope, musical equipment, surveying

equipment, antenna, etc.” ‘037 Patent, at 1:12-16. *See also id.*, at 4:6-7 (“Tripods are often carried from one location to another with the equipment, e.g. a camera still attached.”).

IV. GROUNDS FOR DENYING INSTITUTION

(a) Gitzo 2009 and the YouTube videos are Inadmissible Hearsay

Leofoto offers Gitzo 2009 as a prior art reference. It is a catalogue that Leofoto purports was available in 2009 and contained the items listed therein at that time. Gitzo 2009, however, is hearsay. By default, hearsay is inadmissible in Board proceeding. FRE 802; 37 C.F.R. § 42.62. A statement is hearsay if it is made outside of testimony at the current trial or hearing (in this case the IPR proceedings) and is offered to prove the truth of the matter asserted in the statement. FRE 801(c).

A catalogue is essentially a list of items asserted to be available by the catalogue’s distributor, and Leofoto offers it to prove this exact assertion: that the items displayed in the catalogue were available to the public in 2009. Thus, Gitzo 2009 falls within the definition of hearsay.

Each YouTube video, including all metadata on each YouTube webpage, is likewise hearsay. YouTube 1 asserts at least that the items shown in the video are tripods assembled by Gitzo in their factory and that the video was available to the

public on Sept. 19, 2008. YouTube 2 asserts at least that the tripod shown is a Gitzo G1098 and that it was available to the public on November 18, 2008.

YouTube 3 asserts at least that the video subjects are using Gitzo tripods and equipment and that the video was available on February 18, 2010. Leofoto offers each of the YouTube videos as evidence to prove the statements they assert, as laid forth above. Accordingly, each of the YouTube videos and Gitzo 2009 are all hearsay.

Leofoto, recognizing the hearsay nature of its references, attempts to introduce them under the residual hearsay exception, FRE 807. *See* Petition, pp.11-18. Leofoto relies on the old FRE 807 in its analysis; FRE 807 was updated in 2019.⁴ The current FRE 807 permits the discretionary introduction of hearsay where:

- (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of the circumstances under which it was made and evidence, if any, corroborating the statement; and
- (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

⁴ FRE 807 was amended in 2019 “to fix a number of problems that the courts have encountered in applying it.” FRE 807 Advisory Committee Notes to 2019 Amendments [hereinafter “FRE 807 Notes”]. The old FRE 807 had four requirements for the discretionary admission of hearsay evidence: (1) there are equivalent circumstantial guarantees of trustworthiness, (2) the evidence is offered as evidence of material fact, (3) the hearsay evidence is more probative on the point for which it is offered than any other evidence that could be obtained through reasonable measures, and (4) admitting it is in the interests of justice.

FRE 807(a). Proper application of the current FRE 807 makes all four of these items inadmissible.

1. FRE 807(a)(1): Guarantees of Trustworthiness

The first prong of FRE 807 requires the Court to determine whether the offered evidence has sufficient guarantees of trustworthiness, and if not, the offered evidence is inadmissible. To this requirement, Leofoto argues that Gitzo 2009 and YouTube videos 1-3 have “equivalent circumstantial guarantees of trustworthiness”⁵ because they all disclose similar tripod models and are different independent publishers. Leofoto argues that, based on such circumstances, it is unlikely each purported declarant conspired to falsify the videos or Gitzo 2009. Yet, it is not necessarily the publishers who would be motivated to falsify evidence. Other parties who could be affected by the ‘037 patent may be motivated to do so, and without testimony to prove the videos are what Leofoto claims them to be, no verification of their authenticity can be made.

⁵ One edit made in the 2019 amendments to FRE 807 was to replace the phrase “equivalent circumstantial guarantees of trustworthiness,” which meant equivalent to those guarantees of trustworthiness inherent in the FRE 803 and 804 exceptions. The phrase was replaced with “sufficient guarantees of trustworthiness.” FRE 807 Notes. Accordingly, analyzing the indicia of trustworthiness no longer requires comparing them to the existing, enumerated hearsay exceptions of FRE 803 and 804. *Id.* Nevertheless, as discussed herein, FRE 803 and 804 are still necessary for a complete hearsay analysis.

Instead of offering any authenticating testimony from a declarant that would affirm the hearsay assertions, Leofoto offers the testimony of its attorney, Mr. Howard Sheerin, explaining the methods he undertook to locate the references. *See* Exhibit 1010, Declaration of Mr. Sheerin. Mr. Sheerin claims no authorship or ownership of the statements within the videos or the Gitzo 2009 catalogue but instead offers only conclusions that it would be unlikely that the declarants could be identified for examination. Even could they be identified, Leofoto continues, they would likely not be competent to give testimony because of the age of the references. *See* Petition, p.12. Yet, examining competence, memory, sincerity, and clarity are all primary motivations behind the rule against hearsay. Instead of being able to examine the declarants for their trustworthiness, the Board and RRS are left to assume both the veracity of the assertions and that those assertions were made by the declarants to whom Mr. Sheerin assigns them.

Furthermore, with respect to Gitzo 2009, Mr. Sheerin explains that he retrieved the PDF catalogue (Petitioner's Exhibit 1005) from a Wikipedia page about the manufacturer Gitzo and verified the PDF's trustworthiness by (1) comparing it to a screen capture of a catalogue cover stored on the Internet Archive and (2) checking the file creation date of the PDF. Exhibit 1010, pp.4-11. Mr.

Sheerin's authentication method is lacking for the purposes of FRE 807 because the guarantees of trustworthiness are thinner than they appear.

First, Wikipedia prides itself on being editable by any person. Exhibit 2001 ("Anyone can edit Wikipedia's text, references, and images. What is written is more important than who writes it").

Second, the name of the Wikipedia user who edited the page to add Gitzo 2009 is masked. That person is identifiable only as "Mliu92," and, again, Mliu92 has not been presented for testimony as to where this catalogue was sourced. Exhibit 2002.

Third, Mliu92 added the PDF file in 2017. *Id.* Though the file creation date is listed as 2009 according to Leofoto (Exhibit 1010, pp. 4-7), file creation dates may be able to be changed retroactively. *See* Exhibit 2003. Without testimony from some person with personal knowledge of that particular file, neither Leofoto nor RRS can verify whether this might have happened.

Fourth, the Internet Archive page that Leofoto points to (Exhibit 1010, pp.8-9) does not verify any of the contents of the Gitzo 2009 catalogue. It merely shows a similar looking cover. It is unclear whether the catalogue shown in the screenshot of the Internet Archive is the same catalogue as Gitzo 2009. In its petition, Leofoto argues that the Federal Circuit has previously taken judicial notice of archived

webpages. Petition, pp.6-7, but as mentioned above, the archived page in question shows none of the content of the catalogue it purports to show. Accordingly, judicial notice of the date of the website is not judicial notice of Gitzo 2009's availability or content at the time of the website.

Taken together, each guarantee of trustworthiness offered by Leofoto amounts to nothing more than speculation about the origins of the items in the assertions. Accordingly, Leofoto has failed to show under the first prong of FRE 807 that the references it presents as prior art are trustworthy.

2. FRE 807(a)(2): Whether More Probative Evidence Could be Offered

The second prong of FRE 807 requires to the Court to determine the offered testimony is more probative than any other evidence which could be offered, and if not, the offered evidence is inadmissible. Here, Leofoto offers only the conclusion that it is unlikely the declarants of each prior art reference could be identified or examined effectively to authenticate or give context to the hearsay assertions. Leofoto offers no explanation as to why such testimony could not be obtained through reasonable efforts. In *Matter of Sterling Nav. Co. Ltd*, 444 F. Supp. 1043, 1046 (S.D.N.Y. 1977), the Southern District of New York held that the residual hearsay exception requisites could not be met where the proponent did not make reasonable efforts to obtain other evidence. In *Bluegrass Dutch Tr. Morehead, LLC*

v. Rowan Cnty. Fiscal Ct., 734 F. App'x 322, 328 (6th Cir. 2018), the Sixth Circuit ruled that the residual hearsay exception did not apply where the plaintiff “had not explained why it could not have obtained ‘through reasonable efforts’ nonhearsay evidence.” These principles should apply to Leofoto and to this IPR. Leofoto has offered no explanation as to why it could not obtain non-hearsay evidence and accordingly the hearsay evidence should not be admitted.

Instead, Leofoto states only “[e]ven assuming the Petitioner [Leofoto] were able to obtain human testimony as to the authenticity of the publication dates as well as accessibility, the publication of these references occurred approximately 14 years ago.” Petition, p.12. This statement carries the implication that Leofoto has not undertaken the reasonable efforts necessitated by FRE 807(a)(2). Accordingly, Leofoto has failed to make a showing that it undertook reasonable efforts—or even any efforts—to obtain other, more trustworthy or probative evidence or even method of authentication for the references it does present.

3. Leofoto’s Other Arguments Related to Old FRE 807 Do Not Overcome the Inadmissibility Problems of Lack of Trustworthiness and Failure to Proffer More Probative Evidence.

Leofoto makes additional arguments based on its analysis under Old FRE 807. Although the new rule was adopted in 2019, the analysis remains broad and

case law regarding the previous rule is still applicable. See FRE 807 Advisory Committee Notes to 2019 Amendments.

Leofoto argues that Gitzo 2009 and YouTube 1-3 should be admitted because they are evidence of material facts. Though this analytical element was deleted in the 2019 amendments and may be moot to the Board's analysis, it remains unclear to RRS how the relevance to material fact weighs in favor of admission. Findings of material fact should be based on authentic, verifiable evidence rather than statements whose declarants' credibility and identity are left up to speculation. This factor also supports the contention that admission is not in the interests of justice.

Leofoto argues that admitting Gitzo 2009 and the YouTube videos is in the best interests of justice, because it believes the patent applicant wrongfully failed to disclose a single prior art reference to the examiner despite knowing of Gitzo tripods and such non-disclosure should not be rewarded. Petition, pp.12-14. These types of allegations are not subject matter for an IPR petition, which is limited to unpatentability under 35 U.S.C. §§ 102 and 103. Furthermore, Leofoto's accusations are based on speculation, and its allegations of deceit and indolence are unfounded and uncalled for.

Leofoto's stated plan to depose inventor Mr. Joe Johnson to "further authenticate and establish accessibility of all of the above prior art publications" (Petition, pp.14) is unlikely to lead to testimony for that purpose. There is no indication that Mr. Johnson was in any way involved in the creation of YouTube 1-3 or Gitzo 2009 and thus cannot testify to their accuracy. The same issue arises with Leofoto's plan to depose an employee of the Internet Archive "in order to further corroborate the publication date and public accessibility of [Gitzo 2009]." *Id.*

Lastly, the 2019 Amendments to the residual exception note that they are not intended to "alter the case law prohibiting parties from proceeding directly to the residual exception, without considering the admissibility of hearsay under Rules 803 and 804." FRE 807 Advisory Committee Notes to 2019 Amendments. Leofoto has not made any showing regarding admissibility under Rules 803 or 804, and accordingly its analysis is incomplete. Its application of FRE 807 was therefore premature and neither the YouTube videos nor Gitzo 2009 should be admitted under the residual hearsay exception.

4. Conclusion

For the reasons established in the subsections above, Leofoto has failed to show that Gitzo 2009 or any of the YouTube videos is an authentic, admissible

prior art reference. Furthermore, the Declaration of Mr. Howard Sheerin illustrates that Leofoto exercised little due diligence in its attempts to find custodians who could verify the authenticity of the references. Accordingly, Gitzo 2009 and the YouTube videos should be excluded from consideration regarding instituting this IPR. Such exclusion would render the challenges against all but claims 16 and 17 moot. For the reasons in the next section, however, Leofoto has failed to show that it has a reasonable likelihood of success on its challenges to claims 16 and 17.

(b) Yang is Missing Material Limitations in the Remaining Claims

Of the remaining claims 16 and 17, claim 16 is independent, and claim 17 depends on claim 16.

1. Claim 16

Claim 16 of the '037 Patent recites (with elements missing from Yang underlined):

A support comprising:

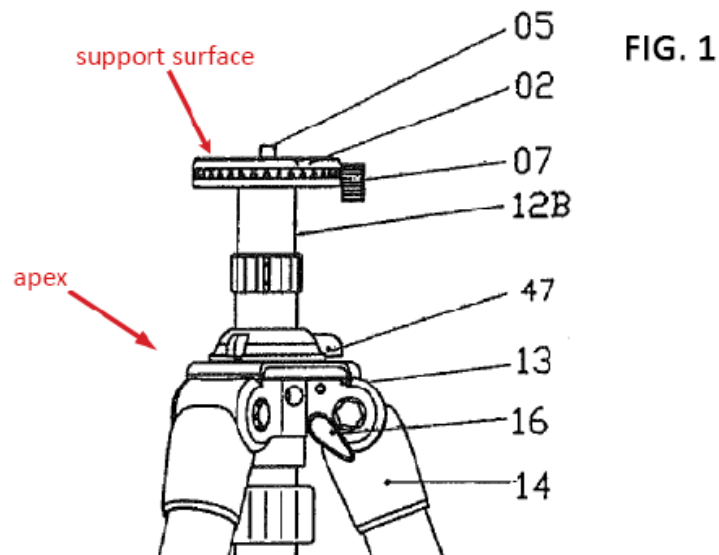
(a) at least one elongate leg element at least partially supporting an apex selectively, detachably mountable to equipment;

(b) a selectively releasable angle stop that, together with said apex, defines a plurality of fixed angular positions around a pivot axis at which angular rotation

of said at least one leg element around said pivot axis in a first direction is selectively, automatically inhibited; where

(c) said angle stop has a first position that permits manual rotation of said leg element in said first direction without said angle stop engaging with said apex in at least one of said fixed angular positions, and a second position where manual rotation of said leg element in a second direction causes said angle stop to automatically engage into a next sequential one of said fixed angular positions.

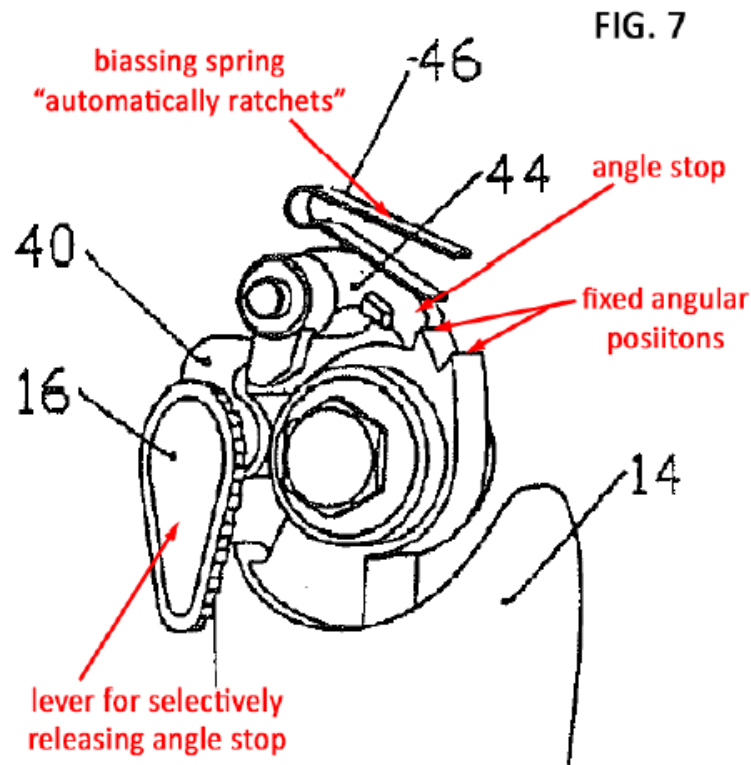
Leofoto argues that Yang fully anticipates this claim, but Yang is missing several material limitations of claim 16. First, Leofoto points to FIG. 1 and FIG. 2 of Yang to show that it discloses an “apex selectively, detachably mounted to equipment.” But Yang does not disclose an apex detachably mountable to equipment. Yang discloses an apex that is mountable to an elevation system (reference element 12B) with a support surface on top of the elevator (reference element 02, “turntable”):



(Image taken from Leofoto's Exhibit 1004 as annotated by Leofoto)

Accordingly, the apex is not mountable to “equipment” unless equipment is construed to include the elevator 12B. But as discussed in Part III(c)(2), such a construction is not an appropriate reading of “equipment.”

Second, Yang does not include a “selectively releasable angle stop that, together with said apex, defines a plurality of fixed angular positions around a pivot axis....” In Yang, the fixed angular positions are not defined by the apex in combination with the angle stop:



(Image taken from Leofoto's Exhibit 1004 as annotated by Leofoto)

Instead, the “fixed angular positions” are defined by what Yang calls the “teeth” of the “ratch” and the pawl (reference element 44 in the above, what Leofoto calls the “angle stop”). Neither of these parts are part of the apex, but are instead part of the leg. In *McGinley v. Munchkin, Inc.*, No. 09-0257-CV-W-GAF, 2010 WL 1268053, at *2 (W.D. Mo. Apr. 2, 2010) the district court held that to define is “to make or create.” The fixed angular positions Leofoto identifies are neither created nor made by the apex, just the leg and the pawl. In contrast, the fixed angular positions in the ‘037 Patent are “defined” by the apex (reference element 18 below):

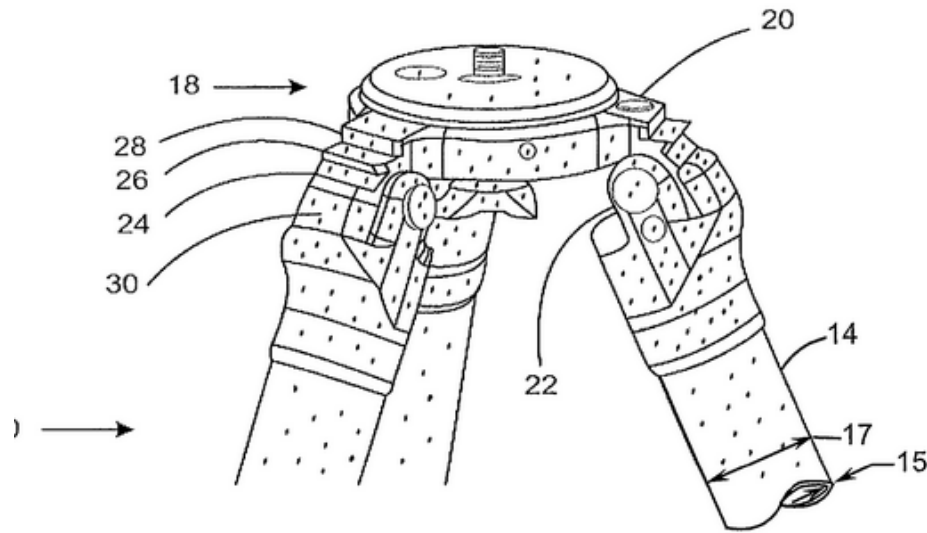


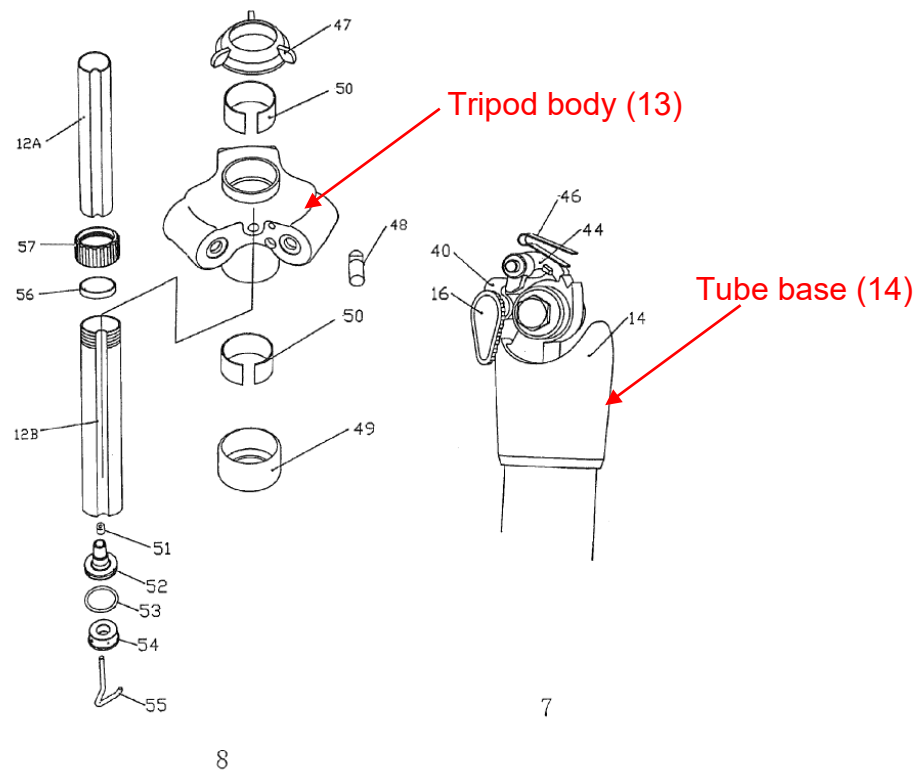
Fig. 2

(FIG. 2 of the '037 Patent)

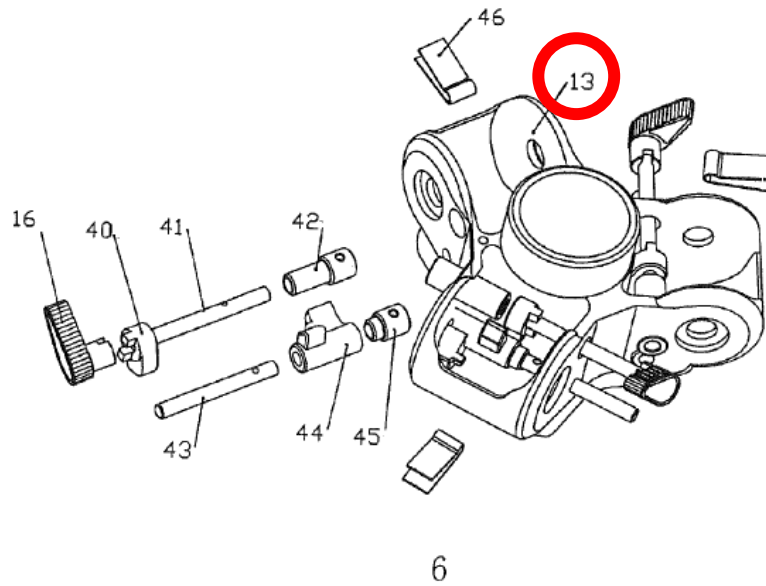
The fixed angular positions in the '037 Patent are identified in the above image as reference elements 24, 26, and 28. *See* '037 Patent, at 3:55-61. In other words, the system in Yang works in reverse when compared to claim 16 of the '037 Patent.

Yang itself precludes the idea that the ratch and teeth are part of the apex. *See* Yang, ¶ [0004] (“Ratches are provided to match with the pawls *on the tube base*.”); ¶ [0009](1) (“When need to close the tripod legs, rotate the *ratch on the tube base* around the pawl, so the legs can be retrieved to closing status.”); ¶ [0028] (“The ratch engaged with the pawl is *provided on the tube base 14*.”); ¶ [0029] (“the 1st teeth of the *ratch on the tube base 14* is limited by the pawl 44.”).;

¶ [0005] ("The tubes pass through the tube bases and connect with the tripod body."). Instead, the part of the device in Yang most akin to the apex of the '037 Patent ('037 Patent reference element 18) is the "tripod body" (Yang reference element 13). FIGS. 6-8 show the tube base (14) separate from the tripod body.



(Image taken from Leofoto's Exhibit 1004 but annotated by RRS)



(Image taken from Leofoto's Exhibit 1004 but annotated by RRS)

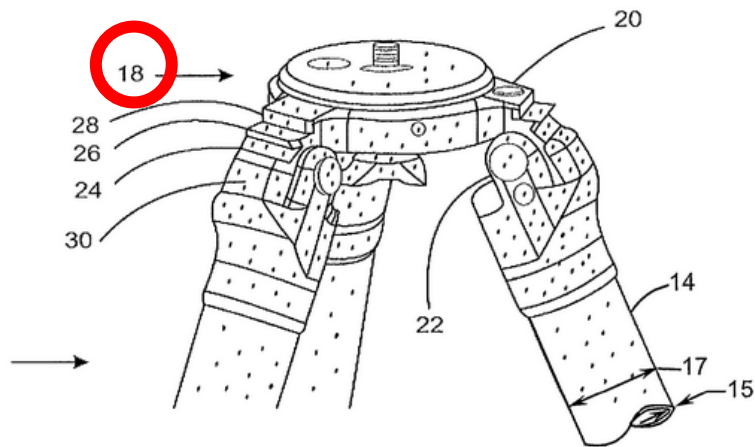


Fig. 2

(FIG. 2 of '037 Patent)

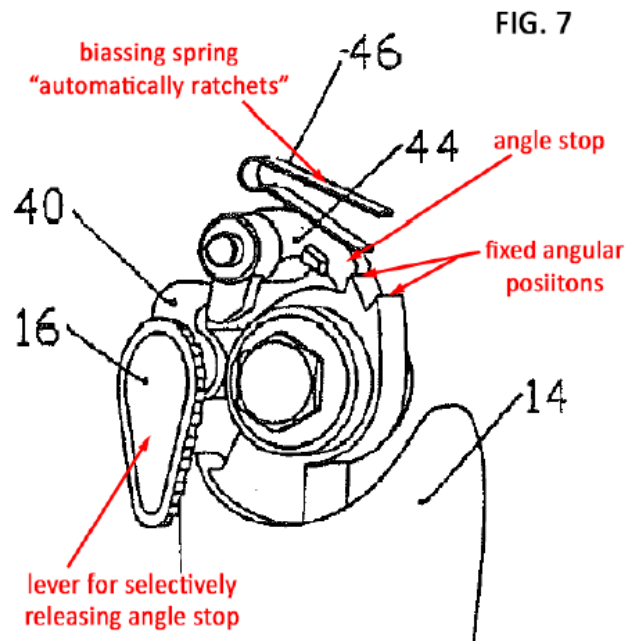
2. Claim 17

Claim 17 depends from claim 16, and therefore claim 17 is not be anticipated by Yang for the reasons stated above. Claim 17 also adds more material elements not present in Yang.

Claim 17 of the '037 Patent recites (with elements missing from Yang underlined):

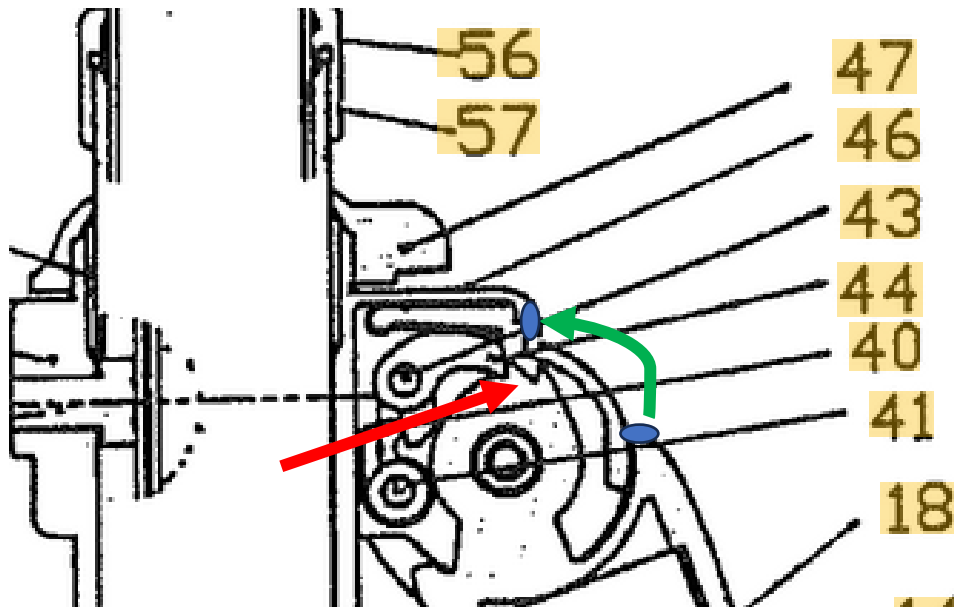
The support of claim 16 where said apex has a support surface for supporting said equipment, and said first position causes said angle stop to engage in only the one of said fixed angular positions closest to the support surface.

Leofoto concludes that claim 17 is anticipated by Yang because setting the tripod into the first position, meaning where the pawl is lifted away from the ratch teeth, permits a user to rotate the tripod legs outward and it will only engage on the final of the ratch teeth. In the image below, Leofoto has annotated the pawl from Yang as the angle stop and the ratch teeth as the fixed angular position.



(Image taken from Leofoto's Exhibit 1004 as annotated by Leofoto)

However, Leofoto's characterization is misleading. Yang only discloses two ratchet teeth and, per the drawing of Yang's FIG. 7, they share the same dimensions:



(Image taken from Leofoto's Exhibit 1004, but annotations from RRS)

In the above image of Yang FIG. 2, reference element 44 identifies the pawl, what Leofoto claims is equivalent to the angle stop of the '037 Patent. The red arrow identifies the ratch teeth, what Leofoto claims is equivalent to the fixed angular positions of the '037 Patent. But because the ratch teeth have the same dimensions, when the pawl is disengaged in the first position, it will disengage from both ratch teeth. Instead, the tripod leg will be able to rotate up along the path of the green arrow until the tube base engages with the tripod body along at the points identified by the dots. Accordingly, the tripod of Yang does not have the material limitation of *"said first position causes said angle stop to engage in only the one of said fixed angular positions closest to the support surface."*

As discussed above in Part III(b)(1) with respect to Leofoto's definition of "apex," the language "*the one of said fixed angular positions closest to the support surface*" would be rendered meaningless by construing "apex" to include the tube bases and ratch teeth. As the tube base of Yang rotates around the pivot points, which of the ratch teeth is closest to the support surface changes.

V. CONCLUSION AND REQUEST FOR SPECIFIC RELIEF

RRS has demonstrated that Leofoto has failed to present sufficient grounds for instituting IPR of U.S. Patent No. 8,398,037. Although RRS maintains that the claims were valid and duly issued, it has disclaimed claims 1-5 and 18-24 of '037 Patent.

Of the five prior art references asserted against the remaining challenged claims, four are inadmissible hearsay evidence. Leofoto asks the Board to admit them anyway under the residual exception, FRE 807, but Leofoto has failed to establish the requisite indications of trustworthiness and evidence that no other, more probative, prior art references are available. Leofoto has even failed to establish that it tried and failed to find more probative references. The remaining reference, Yang, fails to sufficiently anticipate or render obvious any claim it is asserted against. Accordingly, Leofoto's petition is fatally flawed and does not

IPR 2023-00853
Patent No. 8,398,037

demonstrate a reasonable likelihood that it will prevail with respect to any claim of the '037 Patent.

The Board should thus deny institution.

Respectfully Submitted,

Date: July 27, 2023

By: /Kevin L. Russell/
Kevin L. RUSSELL, Reg. No. 38292
Telephone No. (503) 227-5631
Facsimile No. (503) 228-4373

VI. NOTICES AND CERTIFICATES

(a) Notice of Discovery Agreement

Although RRS maintains the position that this IPR should not be instituted, the parties have agreed to the Option 2 mandatory initial disclosures under 37 CFR 42.51(a) and the AIA Trial Practice Guide in the event this trial be instituted. The parties will take discovery, and file all discovery as exhibits, as soon as practicable after institution.

(b) Certificate of Word count

Pursuant to 37 C.F.R. § 42.24, I certify that the word count of the above PATENT OWNER'S PRELIMINARY RESPONSE, excluding the table of contents, table of authorities, required certificates, and title page, contains 4,827 words.

(c) Certificate of Service

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that on the date below, I caused a true and correct copy of the foregoing PATENT OWNER'S PRELIMINARY RESPONSE, together with all exhibits filed therewith, to be served by Priority Mail on the persons below at the addresses below:

Howard Sheerin, Reg. No. 37,938
8711 E Pinnacle Peak RD.
Suite 289
Scottsdale, AZ 85255
sheerin@siliconvalleyip.com

IPR 2023-00853
Patent No. 8,398,037

Date: July 27, 2023

By: /Kevin L. Russell/
Kevin L. RUSSELL, Reg. No. 38292
Telephone No. (503) 227-5631
Facsimile No. (503) 228-4373