

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAFE HAVEN WILDLIFE REMOVAL AND PROPERTY
MANAGEMENT EXPERTS LLC,
Petitioner,

v.

MERIDIAN WILDLIFE SERVICES LLC,
Patent Owner.

IPR2023-01340
Patent 9,943,073 B2

Before LYNNE H. BROWNE, MICHAEL L. WOODS, and
AMEE A. SHAH, *Administrative Patent Judges*.

BROWNE, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

Petitioner, Safe Haven Wildlife Removal and Property Management Experts LLC, filed a Petition (Paper 1, “Pet.”) requesting *inter partes* review of claims 1–3 of U.S. Patent No. 9,943,073 B2 (Ex. 1001, “the ’073 patent”). Patent Owner, Meridian Wildlife Services, LLC, filed a Preliminary Response (Paper 9, “Prelim. Resp.”). Pursuant to our authorization (Ex. 1020), Petitioner filed a Reply to Patent Owner’s Preliminary Response (Paper 10, “Prelim. Reply”) and Patent Owner filed a Sur-Reply to Petitioner’s Reply (Paper 11, “Prelim. Sur-Reply”).

Under 35 U.S.C. § 314(a), an *inter partes* review may not be instituted unless the information presented in the Petition and any response thereto shows “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” Considering the Petition, the arguments presented in the Preliminary Response, the Preliminary Reply, and the Preliminary Sur-Reply, as well as all supporting evidence, we determine that the information presented in the Petition does not establish that there is a reasonable likelihood that Petitioner would prevail in challenging any one of claims 1–3 of the ’073 patent as unpatentable. Pursuant to § 314, we deny institution of an *inter partes* review as to the challenged claims of the ’073 Patent.

II. BACKGROUND

A. *Real Parties in Interest*

Petitioner identifies itself as the real party-in-interest in this proceeding. Pet. 2. Patent Owner identifies itself as the real party-in-interest. Paper 4, 1.

B. Related Matters

The parties identify *Safe Haven Wildlife Removal and Property Management Experts, LLC v. Meridian Wildlife Services, LLC d/b/a Meridian Bird Removal, Inc.*, 7:21-cv-00577-EKD (W.D. Va.) as a civil litigation involving the '073 patent. Pet. 3; Paper 4, 1.

We identify IPR2022-01253 (U.S. Patent No. 10,251,374) as a related matter.

C. The '073 patent

The '073 patent relates to “the live capture of flying vertebrates in an indoor setting.” Ex. 1001, 1:16. Specifically, the '073 patent “relates to a more humane flying vertebrate capture system” that “can be deployed, repositioned, and lowered for capture much quicker and easier than nets directly attached to the roof or rafters, thus allowing for a much higher chance of recovering the flying vertebrate without harm.” *Id.* at 1:45–52. The system of the '073 patent is shown in Figure 1, reproduced below.

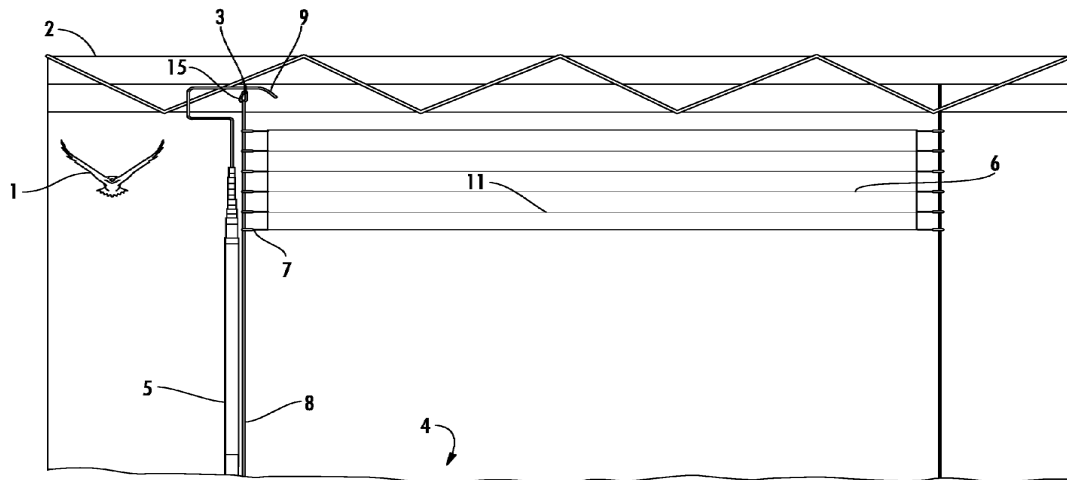


FIG. 1

Figure 1 shows bird 1 flying around ceiling 2 of a large warehouse building having rafters 3 with adjustable poles 5 in their extended position

sitting on floor 4, capture net 6 mounted on height adjustable poles 5, such as telescoping poles, hook 9 attached to rafter 3, and rope 8 on each pole running through pulley 15 and lengthened to pull net 16 together to the desired tension. *Id.* at 4:28–40.

The method for safe live capture of a flying vertebrate is shown in Figure 4, reproduced below.

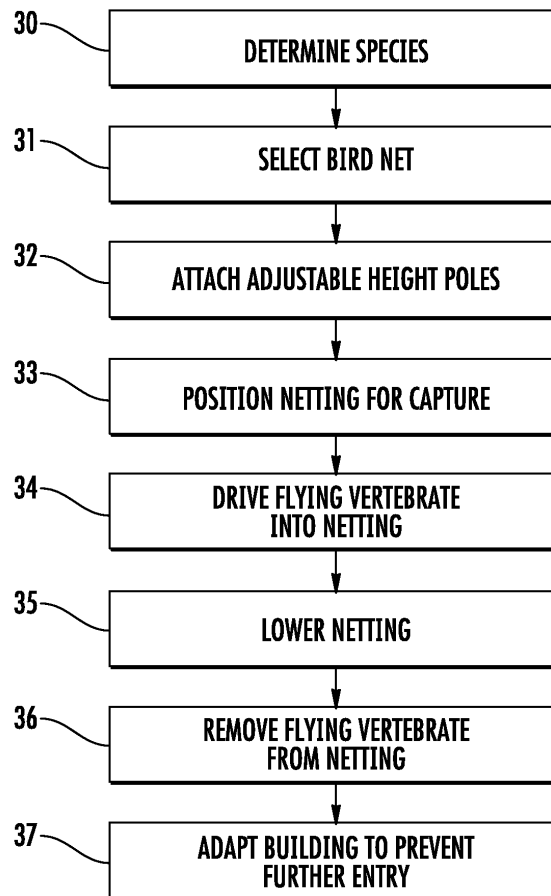


FIG. 4

Figure 4 depicts the steps of determining the species of the vertebrate by visual inspection of the vertebrate in the location and in the building (30), selecting a bird netting with pockets (31), attaching height adjustable poles to the netting (32), positioning the netting for capture (33) so the vertebrate

can easily fly or be chased into the netting, or get stuck in one of the pockets (34), lowering the netting after capture (36) to remove the vertebrate from the netting (36) and release into the wild, and adapting the building to prevent the species from further entry such as by closing doors, using repellants, and eliminating attractants (37). *Id.* at 4:47–64.

D. Illustrative Claim

Petitioner challenges claims 1–3 of the '073 patent. Pet. 5. Claim 1, reproduced below, is the sole independent claim.

1. A method for the safe live capture of a flying vertebrate that is inside a large building comprising:

- a) determining the species of flying vertebrate;
- b) selecting bird netting having netting pockets;
- c) attaching a plurality of adjustable height support poles to the netting, the poles comprising:
 - i. a hook for attaching the poles overhead;
 - ii. a pulley attached to an upper portion of the pole; and
 - iii. a rope attached to the pulley, the rope having devices to attach the bird netting to the rope;
- d) positioning the netting for capture based on the species of flying vertebrate and their flight characteristics utilizing the height adjustable poles to raise the netting;
- e) driving the flying vertebrate or waiting for the flying vertebrate to fly into the netting pockets;
- f) lowering the netting using the height adjustable support poles; and
- g) removing the flying vertebrate from the netting.

Ex. 1001, 5:13–6:12.

E. Asserted Grounds of Unpatentability

Petitioner asserts one Ground, under which claims 1–3 are “unpatentable as being obvious over Bird Barrier Video in view of Kunz and/or Albanese and/or Sheldon under 35 U.S.C. § 103.” Pet. 5, 23. Based on Petitioner’s use of “and/or,” we understand Petitioner to assert the following multiple grounds of unpatentability:

Ground	Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1-1	1–3	103	Bird Barrier Video, ¹ Kunz ²
1-2	1–3	103	Bird Barrier Video, Albanese ³
1-3	1–3	103	Bird Barrier Video, Sheldon ⁴
1-4	1–3	103	Bird Barrier Video, Kunz, Albanese
1-5	1–3	103	Bird Barrier Video, Kunz, Sheldon
1-6	1–3	103	Bird Barrier Video, Albanese, Sheldon
1-7	1–3	103	Bird Barrier Video, Kunz, Albanese, Sheldon

F. Evidence

In support of its proposed ground(s), Petitioner relies on the Declaration of Michael J. Chamberlain, Ph.D. (“Dr. Chamberlain”) in IPR2022-01253 (Ex. 1013), the petition for *inter partes* review of U.S. Patent No. 10,251,374 (IPR2022-01253, Ex. 1012), and U.S. Patent No. 117,729, issued August 8, 1871, to Bebout (Ex. 1018, “Bebout”).

¹ Bird Barrier, *Mist Kit Assembly and Use*, YouTube (Aug. 19, 2014) (Ex. 1003) (“Bird Barrier Video”). Petitioner also submits a transcript and screenshots of the Bird Barrier Video (Ex. 1004).

² ECOLOGICAL AND BEHAVIORAL METHOD FOR THE STUDY OF BATS 1–28 (Thomas H. Kunz ed., 1988) (Ex. 1009) (“Kunz”).

³ Gene Albanese et al., *An Inexpensive Elevated Mist Net Apparatus*, 24 N. AM. BIRD BANDER 129–134 (1999) (Ex. 1010) (“Albanese”).

⁴ William G. Sheldon, *A Method of Mist Netting Woodcocks in Summer*, 31 BIRD-BANDING 130–135 (1960) (Ex. 1011) (“Sheldon”).

Throughout the Petition, Petitioner relies on “admissions” from Exhibits Ex. 1012 and Ex. 1013 as if these exhibits are prior art in this proceeding. *See e.g.*, Pet. 23 (“As admitted by [Patent Owner], ‘Bird Barrier Video demonstrates installing a “mist net kit” configured for catching birds within a building.’ Ex. 1012, at 47”); *id.* at 24 (“[Patent Owner] and Dr. Chamberlain represented that ‘Bird Barrier Video discloses positioning nets “at a height above the floor of the enclosed building based on the species of animal being relocated.”’ Ex. 1012, at 70; *see also* Ex. 1013 ¶ 204 (stating the same)”).

Patent Owner contends that Dr. Chamberlain’s Declaration (Ex. 1013) is hearsay and that Petitioners “reliance on Dr. Chamberlain’s prior Declaration is both impermissible and misguided.” Prelim. Resp. 42. Patent Owner contends that Dr. Chamberlain has provided a Declaration “in which he confirms that he was ‘unaware of the [Petitioner’s] Petitions until being informed of their existence by counsel for [Patent Owner],’ has ‘never provided testimony in support of the [Petitioner’s] Petitions,’ and was ‘never asked by [Petitioner] (or its counsel) to do so.’” *Id.* at 42 (citing Ex-2001 ¶ 3). Patent Owner contends further that “Dr. Chamberlain testifies that he has ‘never been engaged by [Petitioner], compensated by [Petitioner], or otherwise provided consulting services for [Petitioner].’” *Id.*

In addition, Patent Owner contends that “Dr. Chamberlain also testifies that he is ‘unwilling to participate in a deposition or otherwise sit for cross-examination in relation to any of my prior testimony that has been (or will be) submitted by [Petitioner] in support of the [its] Petitions” and that “Dr. Chamberlain confirms that his “contractual obligations to [Patent Owner] constrain [him] from participating in . . . cross-examination.” Prelim. Resp. 43 (citing Ex. 2001 ¶ 4). Thus, according to Patent Owner,

“the Board may not consider Dr. Chamberlain’s testimony in Ex-1013 as cited in the Petition.” *Id.*

For the reasons discussed in Section III.E below, we deny institution of this proceeding on the merits. As we deny institution on the merits, we do not address Patent Owner’s arguments that Dr. Chamberlain’s Declaration is inadmissible.⁵

III. ANALYSIS

A. *Level of Ordinary Skill in the Art*

In determining the level of skill in the art, we consider the type of problems encountered in the art, the prior art solutions to those problems, the rapidity with which innovations are made, the sophistication of the technology, and the educational level of active workers in the field. *Custom Accessories, Inc. v. Jeffrey-Allan Indus. Inc.*, 807 F.2d 955, 962 (Fed. Cir. 1986); *Orthopedic Equip. Co. v. U.S.*, 702 F.2d 1005, 1011 (Fed. Cir. 1983).

Petitioner contends that “a POSA⁶ ‘would have had at least either (i) at least a bachelor’s degree in the study of wildlife management or wildlife ecology or (ii) two or more years of field experience trapping flying animals,’” quoting the definition of a POSA adopted by the Board at the

⁵ We note that neither the petition in IPR2022-01253 nor Dr. Chamberlain’s Declaration qualify as prior art in this proceeding, at the very least because they were not publicly accessible before the critical date of the ’073 Patent. 35 U.S.C. §102(a). When the IPR2022-01253 petition and Dr. Chamberlain’s Declaration (Exs. 1012, 1013) are cited to support Petitioner’s assertions based on the prior art that forms the basis of the challenge in this proceeding, we consider them to the same extent that we consider any other evidence in support of Petitioner’s challenge. When, however, these exhibits are cited as the only support for Petitioner’s assertions, we consider Petitioner’s assertions to be unsupported attorney argument.

⁶ Person of ordinary skill.

institution stage in IPR2022-01253. Pet. 22 (quoting Ex. 1014, 9). Patent Owner does not challenge this definition of the level of skill at this time. *See generally* Prelim. Resp.; Prelim. Sur-Reply.

For purposes of this Decision, we adopt Petitioner’s proposal as reasonable and consistent with the prior art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (the prior art may reflect an appropriate level of skill in the art).

B. Claim Construction

We apply the same claim construction standard used in district court actions under 35 U.S.C. § 282(b), namely that articulated in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). *See* 37 C.F.R. § 42.100(b) (2021). In applying that standard, claim terms generally are given their ordinary and customary meaning as would have been understood by a person of ordinary skill in the art at the time of the invention and in the context of the entire patent disclosure. *Phillips*, 415 F.3d at 1312–13. “In determining the meaning of the disputed claim limitation, we look principally to the intrinsic evidence of record, examining the claim language itself, the written description, and the prosecution history, if in evidence.” *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 469 F.3d 1005, 1014 (Fed. Cir. 2006) (citing *Phillips*, 415 F.3d at 1312–17). If the specification “reveal[s] a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess[,] . . . the inventor’s lexicography governs.” *Phillips*, 415 F.3d at 1316 (citing *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002)).

In the Petition, Petitioner “does not propose any constructions for this proceeding.”⁷ Pet. 22.

Patent Owner contends that “[w]hen a patentee explicitly defines a claim term in the patent specification, the patentee’s definition controls.” *Id.* (quoting *Martek Biosciences Corp. v. Nutrinova, Inc.*, 579 F.3d 1363, 1380 (Fed. Cir. 2009)). Specifically, Patent Owner contends that a definition of “determining the species of flying vertebrate” (limitation 1a) “is clearly provided in the ’073 patent’s specification: As used herein, the term ‘*determining the species*’ refers to observing the flying vertebrate *and* having an expert, a guide book, or the like, for determining what kind of flying vertebrate needs to be captured.” Prelim. Resp. 21 (quoting Ex. 1001, 3:58–61). Patent Owner contends further that the “specification provides a pair of important definitions: . . . the term ‘*positioning the netting for capture*’ (in limitation 1d) refers to placing the bird net in an upper position wherein the flying vertebrate can fly into the netting” and “the term ‘*flight characteristics*’ (also in limitation 1d) refers to the flying vertebrate, *once it has been identified, one can determine how it flies*. e.g. a bat flies in a different pattern than a sparrow. That flight pattern can then be used to place the netting in relationship to the position of the flying vertebrate.” Prelim. Resp. 23 (citing Ex. 1001, 3:37–39, 3:65–4:3).

As explained in Section II.E below, we find that for reasons unrelated to the definitions of limitations 1a and 1d proffered by Patent Owner,

⁷ We note that in accordance with the Consolidated Trial Practice Guide, Petitioner is not required to propose any claim constructions in the Petition. We do not address Patent Owner’s arguments to the contrary. Prelim. Resp. 13–17. Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

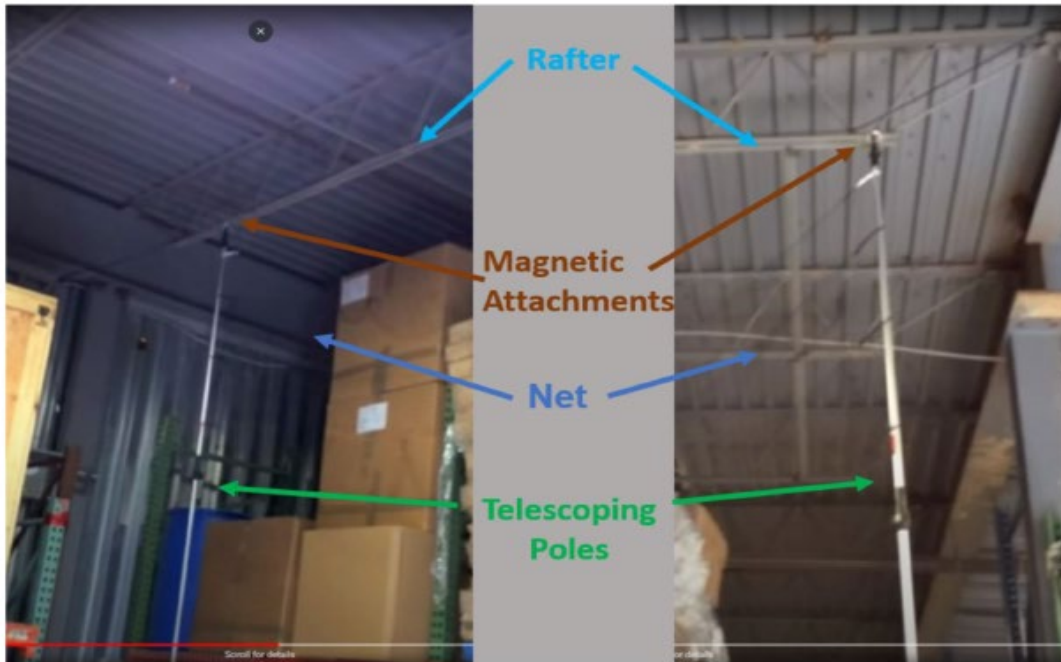
Petitioner’s arguments and evidence do not demonstrate a reasonable likelihood of showing that the challenged claims are unpatentable. Thus, we do not construe expressly any language of the challenged claims. *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (noting that “we need only construe terms ‘that are in controversy, and only to the extent necessary to resolve the controversy’”) (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)).

C. Overview of the Asserted Prior Art

1. Bird Barrier Video

According to Petitioner, Bird Barrier Video (Ex. 1003) was uploaded to YouTube on August 29, 2014. Pet. 9. Petitioner also submits a transcript and screenshots of the Bird Barrier Video (Ex. 1004). *Id.* at 9 n.3. Bird Barrier Video discloses the use of mist nets suspended between telescoping poles. *See, e.g.*, Ex. 1004, Figs. 11–13; *see also* Ex. 1003, 0:19–0:37. The telescoping poles include a magnetic portion for attaching to a rafter in the ceiling. *See* Ex. 1003, 1:03–1:59; Ex. 1004, Figs. 8, 11, 13, 14. The net includes pockets for capturing birds. Ex. 1004, Figs. 6, 15; Ex. 1003, 0:10–0:37.

Petitioner submits two annotated snapshots of the Bird Barrier Video (Pet. 11–12), copies of which we reproduce below:



Ex. 1003, at 1:49 (right) & 1:59 (left) (annotated)



Ex. 1003, at 2:11 (annotated)

According to Petitioner, these snapshots depict the telescoping poles holding a net and attached to a rafter of the ceiling by magnetic attachments.

2. *Kunz*

Kunz is the first chapter of a book titled, “Ecological and Behavioral Methods for the Study of Bats.” Ex. 1009. Chapter one is titled, “Capture Methods and Holding Devices” and discusses that “[m]ethods used and the success of capturing flying bats will depend mostly upon their flight speed and maneuverability, and the habitats being sampled.” *Id.* at 1.⁸

According to Kunz, the most commonly used devices for capturing flying bats are mist nets, preferably with four shelves, a mesh size of 36 mm, and made of 50 or 70 denier/2 ply nylon, as they are “inexpensive, lightweight, compact, and easily transported and erected in the field.” *Id.* at 6–7.

Kunz states that “[m]ist nets may be deployed successfully at almost any site where bats are expected to fly.” *Id.* at 8. According to Kunz, “[b]ats can be netted at openings to caves, mines, and buildings, where bats regularly exit and enter,” as well as in attics. *Id.* Figure 3, reproduced below, depicts various placements of mist nets:

⁸ Our Decision cites to the native page numbers of Kunz and the other cited art.

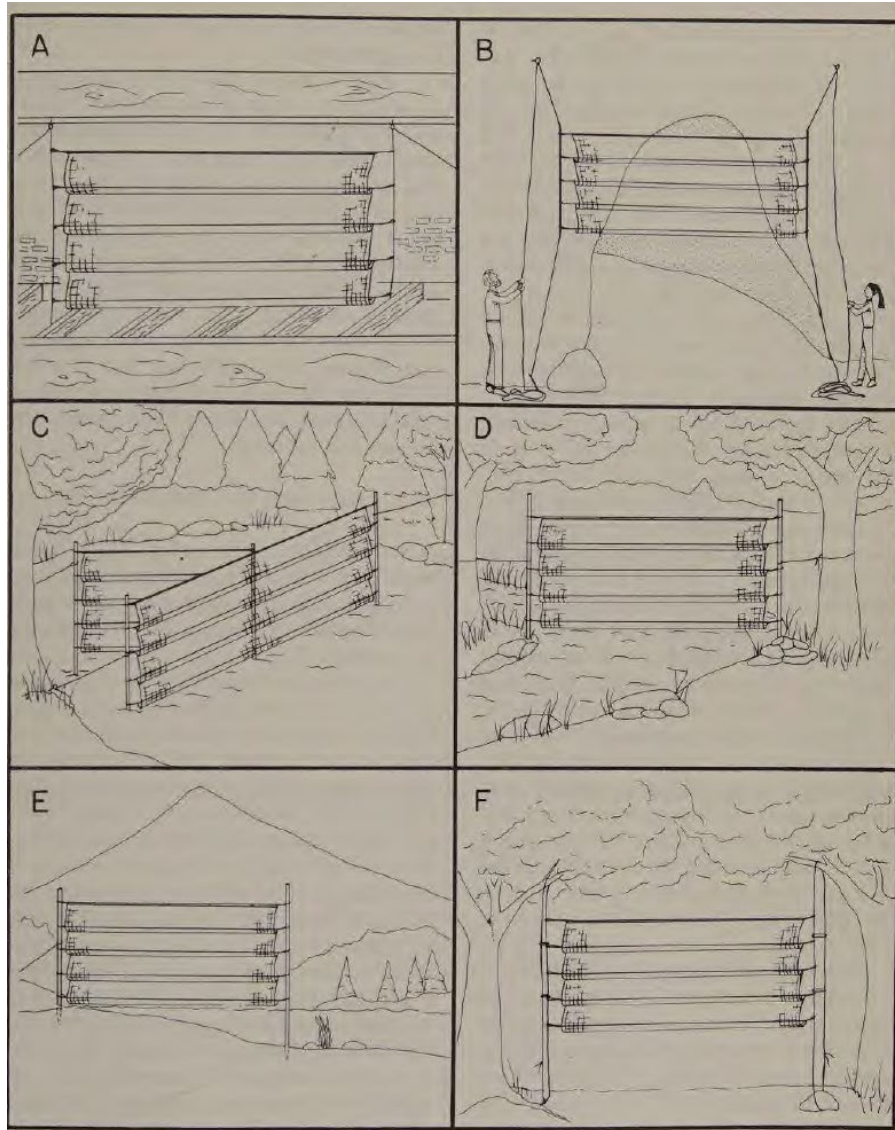


Figure 3 depicts placement and configuration of mist nets for capturing bats in an attic of a building (A), at a cave entrance (B), over a pond (C), over a stream (D), at the edge of a lake (E), and on a forest trail (F). *Id.* at 9.

Kunz further discusses canopy net systems including using poles to allow nets to be raised to considerable heights, such as a pole system that uses sailboat masts and a series of ropes and pulleys whereby each end of the net is attached to the mast. *Id.* at 15.

3. Albanese

Albanese is an article titled “An Inexpensive Elevated Mist Net Apparatus.” Ex. 1010. According to Albanese, “[t]o sample birds that spend all or part of their life cycle in the higher vegetation strata of these habitats, it is necessary to elevate mist nets.” *Id.* at 129. Albanese describes “a simple, elevated mist net system of inexpensive materials” that “is quick and simple to operate for a single individual” and “also proved safe to captured birds” *Id.* We reproduce Figure 1 of Albanese, below:

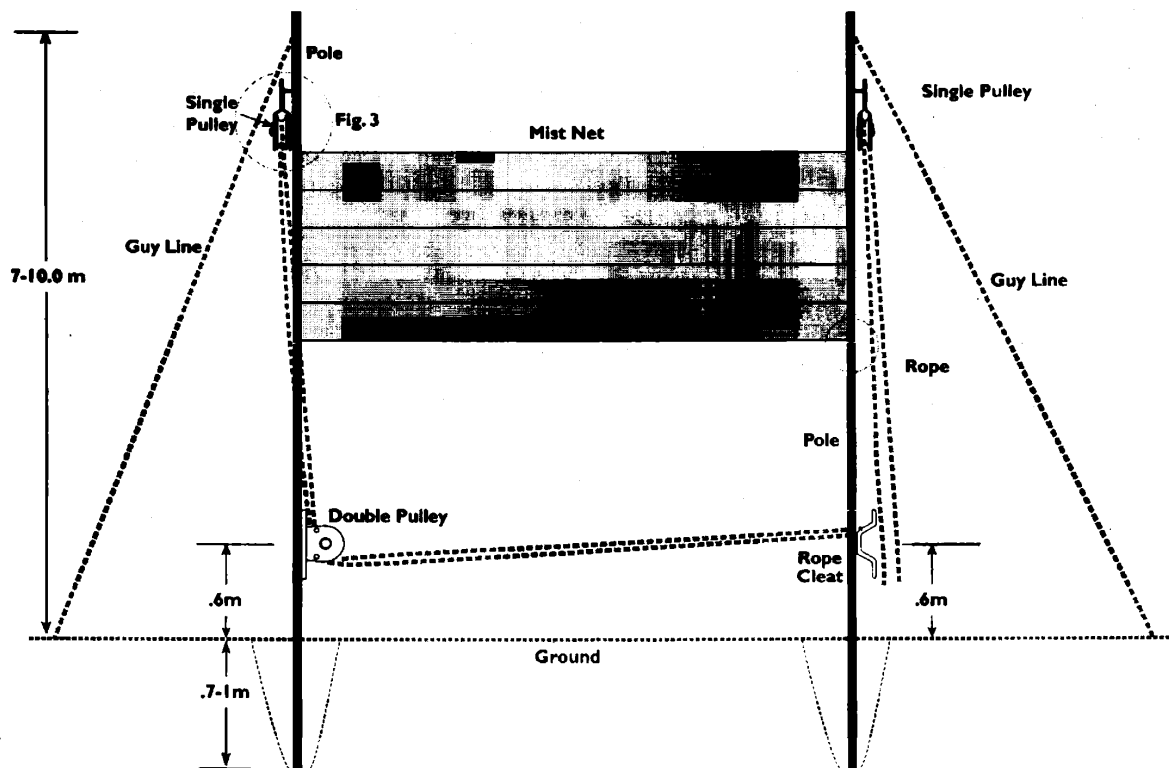


Figure 1. Diagram of elevated mist net apparatus. Diagram is not to scale

Figure 1 depicts an elevated mist net apparatus. *Id.* at 130. Albanese describes “a system that elevates a single net to a height of 8.5 m.” *Id.* at 129. In Figure 1, “[t]hree attached 3 m lengths of [electrical metallic tubes (EMT)] constitute the poles for each side of the elevated net system.” *Id.* at

130. Albanese's system uses single pulleys positioned at the top of each pole.

4. *Sheldon*

Sheldon is an article titled "A Method of Mist Netting Woodcocks in Summer." Ex. 1011. Sheldon describes a technique of capturing American woodcocks (*Philohela minor*) with Japanese mist nets. *Id.* at 130.

According to Sheldon, "[p]lacement of nets was determined by observation of the flight paths of incoming birds." *Id.* at 134.

D. *Principles of Law*

A petition must show how the construed claims are unpatentable under the statutory grounds it identifies. 37 C.F.R. § 42.104(b)(4).

Petitioner bears the burden of demonstrating a reasonable likelihood that it would prevail with respect to at least one challenged claim for a petition to be granted. 35 U.S.C. § 314(a).

A claim is unpatentable under § 103(a) if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations, including (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of skill in the art; and (4) when in evidence, objective indicia of non-obviousness (i.e., secondary considerations).⁹ *Graham v. John Deere Co.*, 383 U.S. 1,

⁹ Patent Owner does not present any objective evidence of nonobviousness at this stage of the proceeding.

17–18 (1966). We analyze the asserted grounds with these principles in mind.

E. Alleged Obviousness of Claims 1–3 Based on the Combined Teachings of Bird Barrier Video in Combination with Kunz and/or Albanese and/or Sheldon

Petitioner contends that claims 1–3 are unpatentable over Bird Barrier Video in combination with Kunz and/or Albanese and/or Sheldon. Pet. 23–38. Patent Owner disputes Petitioner’s contentions. Prelim. Resp. 24–46.

1. Petitioner’s Assertions re Claim 1

a) Preamble of claim 1: A method for the safe live capture of a flying vertebrate that is inside a large building comprising:

Petitioner asserts that “[t]o the extent the preamble is a limitation, Bird Barrier Video discloses a method for the safe live capture of a flying vertebrate that is inside a large building.” Pet. 23. Petitioner asserts further that “as shown by the video, the building is large.” *Id.* (citing Ex. 1004, 1:59–2:19).

b) Limitation 1a: determining the species of flying vertebrate; and

Limitation 1.d: positioning the netting for capture based on the species of flying vertebrate and their flight characteristics utilizing the height adjustable poles to raise the netting;

Petitioner asserts that “[i]n Bird Barrier Video, two men use height adjustable poles to raise a mist net so that the net is placed in a position to capture a targeted bird.” Pet. 24 (citing Ex. 1003, 1:44–2:11). Petitioner asserts further that “Kunz is directed to using mist nets to capture a specific species of vertebrate - bats. Kunz thus teaches a method of net capture that is based on determining a particular species.” *Id.* at 25. In addition,

Petitioner asserts that “Albanese teaches that different species of flying vertebrates tend to fly at different heights above the ground” and that “Sheldon discloses a technique of capturing a particular species of bird (American woodcocks) with a Japanese mist net.” *Id.* at 26–27 (citing Ex. 1010, 133; Ex. 1011, 130).

Turning to its reasoning in support of the proposed combinations, Petitioner asserts that

If the Board determines that these limitations are not expressly or inherently taught by Bird Barrier Video, it would have been obvious for a POSA to modify the system of Bird Barrier Video with the teachings of Kunz, Albanese or Sheldon to include determining the species of flying vertebrate and positioning the netting for capture based its flight characteristics.

Pet. 27. Specifically, Petitioner asserts that “each of Kunz, Albanese and Sheldon disclose placing a mist net between two poles at a height where a particular species of bird is expected to fly.” *Id.* Based on these assertions, Petitioner reasons that a person of ordinary skill “would be motivated to combine those references with the teachings of Bird Barrier Video to increase the chances of capturing a targeted bird within a large building.” *Id.*

c) Limitation 1b: selecting bird netting having netting pockets;

Petitioner asserts that “Bird Barrier Video’s method . . . requires selecting bird netting having pockets.” Pet. 28 (citing Ex. 1003, 0:18–0:37). Petitioner asserts further that “[p]ockets are formed in the mist net of Kunz by ‘[p]roperly adjusted vertical spacing of net loops and shelf-cords,’” that “‘pockets’ are formed in the mist net of Albanese via precise positioning of its shower curtain pins,” and that “Sheldon likewise teaches this element.” *Id.* (citing Ex. 1009, 8; Ex. 1010, 132; Ex. 1011, 132).

d) Limitation 1c: attaching a plurality of adjustable height support poles to the netting, the poles comprising:

Petitioner asserts that “Bird Barrier Video’s method further requires attaching a plurality of adjustable height support poles to the netting.”

Pet. 28 (citing Ex. 1003, 0:37–0:58).

e) Limitation 1ci: a hook for attaching the poles overhead;

Petitioner asserts that “Bird Barrier Video fails to expressly disclose a hook for attaching the poles overhead. Instead, the poles in Bird Barrier Video are secured to overhead magnetic surfaces via adjustable magnetic heads.” Pet. 29 (citing Ex. 1003, 1:03). Petitioner reasons that “using hooks instead of magnetic heads would have been obvious to a POSA as there is no material difference between hooks and magnetic connectors in this regard, and the use of hooks on the ends of poles to attach the poles to an overhead structure is commonly used in various fields.” *Id.* (citing Ex. 1018).

f) Limitation 1cii: a pulley attached to an upper portion of the pole;

Petitioner asserts that “Bird Barrier Video fails to expressly disclose a pulley attached to an upper portion of the pole.” Pet. 29. Petitioner reasons that attaching a pulley to an upper portion of the pole would have been obvious to a person of ordinary skill “because affixing nets to pulley systems to enable the nets to be raised and lowered has been ubiquitous in many fields for years (*e.g.*, football field-goal nets).” Pet. 30. Petitioner also asserts that “Kunz discloses that mist nets can be secured to poles using ‘a rope’ and a ‘pulley’ as evidenced by Kunz Figures 3(B) and 7” and that “Albanese’s net apparatus includes a pulley attached to an upper portion of a pole.” *Id.* (citing Ex. 1009, 9, 14; Ex. 1012, 66–67; Ex. 1013 ¶ 195). In addition, Petitioner asserts that “Sheldon likewise discloses using pulleys

attached to the upper portions of the poles that are used to raise and lower the mist net.” *Id.* at 32.

g) Limitation 1ciii: a rope attached to the pulley, the rope having devices to attach the bird netting to the rope;

Petitioner asserts that “[f]or at least the reasons discussed above with respect to Limitation [1cii], this limitation is rendered obvious by Bird Barrier Video in view of Kunz and/or Albanese or Sheldon.” Pet. 33. Petitioner reasons that “it would have been ‘an obvious design choice to a POSA to replace the loops with removable connectors (e.g., carabiners) providing the same functionality.’” *Id.* (citing Ex. 1012, 66; Ex. 1013 ¶¶ 194–95).

h) Limitation 1e: driving the flying vertebrate or waiting for the flying vertebrate to fly into the netting pockets;

Petitioner asserts that “Bird Barrier Video, Kunz, Albanese and Sheldon all necessarily teach ‘waiting for the flying vertebrat[e] to fly into the netting pockets,’ as the nets are specifically designed for such purpose.” Pet. 33. Specifically, Petitioner asserts that “Bird Barrier Video teaches that after its net is setup and attached to a rafter, the net is ‘ready to catch the target birds,’” that “Albanese similarly teaches waiting for flying vertebrates to fly into netting pockets,” and that “Sheldon also teaches this element.” *Id.* at 33–34 (citing Ex. 1003, 1:59; Ex. 1010, 129; Ex. 1011, 134). Petitioner asserts further that “Kunz teaches that its net system is designed to capture bats when they fly into the nets.” *Id.* at 34 (citing Ex. 1009, 8).

i) *Limitation 1f: lowering the netting using the height adjustable support poles;*

Petitioner asserts that “Bird Barrier Video shows the net being lowered using height adjustable support poles.” Pet. 35 (citing Ex. 1003, 2:19–3:01, Figs. 16–17).

j) *Limitation g: removing the flying vertebrate from the netting.*

Petitioner asserts that “Bird Barrier Video shows and discusses that the captured bird should be quickly removed from the netting to reduce the risk that the bird will be injured or killed.” Pet. 35 (citing Ex. 1003, 2:19). Petitioner asserts further that “Kunz likewise contains a section specifically discussing the removal of captured bats from the nets discussed therein, as does Albanese.” *Id.* (citing Ex. 1009, 10–11; Ex. 1010, 133).

2. *Dependent Claims 2 and 3*

a) *Claim 2: The method according to claim 1 which comprises the additional step [of] adapt[ing] a building to prevent further entry by the determined species of flying vertebrate.*

Petitioner asserts that Kunz teaches that “often bats can be captured if the perimeters of roosts are either partially or completely surrounded by one or more nets.” Pet. 36 (quoting Ex. 1009, 10). Based on this assertion, Petitioner reasons that it would have been obvious to a person of ordinary skill “to modify the method of Bird Barrier Video to include the additional step of adapting a building to prevent further entry by the determined species of flying vertebrate, as taught by Kunz” and that a person of skill “would be motivated to do so to limit the number of birds entering the building.” *Id.* at 36. “Specifically, adapting a building to prevent further flying vertebrate entry assists in keeping vertebrates out of indoor spaces, which is the

ultimate objective of any system designed to minimize birds in particular spaces.” *Id.* at 36–37.

b) Claim 3: The method according to claim 1 wherein the poles are telescoping poles.

Petitioner asserts that “[f]or at least the reasons discussed above with respect to Limitation [1 c], this limitation is disclosed by Bird Barrier Video.” Pet. 28.

3. *Reasoning in Support of the Proposed Modification(s)*

a) Petitioner’s Assertions

Petitioner provides general reasoning in support of the proposed combination(s). Pet. 38. Specifically, Petitioner reasons that because Kunz, Albanese, Sheldon, and Bird Barrier Video “all pertain to mist nets hung between two poles that can be raised and lowered, and they all focus on the common goal of capturing birds, a POSA would have been motivated to combine them to arrive at the claimed invention.” *Id.* (citing *KSR*, 550 U.S. at 417).

b) Patent Owner’s Response

(1) Alleged Failure to Meet the Particularity Requirement

Patent Owner contends that Petitioner fails to meet the particularity requirement of 35 U.S.C. § 312(a)(3) as “it is unclear what exactly in Kunz, Albanese, and/or Sheldon is being combined with the Bird Barrier Video (or not), how the disclosures are being combined (with the Bird Barrier Video or the other references), and what the specific motivations for each of the combinations would be.” Prelim. Resp. 9. Patent Owner asserts that although Petitioner suggests that it is asserting a single invalidity ground,

Ground 1, Petitioner’s proposed combination encompasses “seven unique combinations.” Prelim. Resp. 8.

(2) *Limitations 1a and 1d*

Patent Owner contends that the proposed combinations do not meet limitations 1a and 1d because “[t]he Petition fails to identify any portion of the Bird Barrier Video that it alleges to disclose ‘determining the species of flying vertebrate.’” Prelim. Resp. 26 (citing Pet. 24–25). Patent Owner asserts that “[t]he Bird Barrier Video discloses positioning its net assembly by ‘walk[ing] the completed net assembly to a target location near where the bird activity has been observed’—nothing more.” *Id.* (citing Ex. 1004, 1:15–1:44). According to Patent Owner, “the positioning of netting in the Bird Barrier’s Video’s method is entirely agnostic as to the *species of flying vertebrate*.” *Id.* Patent Owner responds further that “[a]t no point does the Bird Barrier Video disclose or suggest that a species of flying vertebrate should be determined before placing its netting or otherwise factored into the placement of the netting.” *Id.*

(3) *Alleged Failure to Articulate Reasoning With Rational Underpinning*

Patent Owner contends that the Petition fails to provide sufficient motivation for combining Kunz, Albanese, or Sheldon (or a combination of these references) with Bird Barrier Video. Prelim. Resp. 29. Patent Owner contends further that “the Petition lacks sufficient particularity with respect to exactly how these references are combined” and that “the Petition plainly fails to establish that a POSA would have been motivated to combine Kunz, and/or Albanese, and/or Sheldon with the Bird Barrier Video to arrive at Claim 1.” *Id.* at 30 (citing *id.* at 8–12).

4. *Analysis*

Based on the current record, we agree with Patent Owner, that the Petition does not adequately explain why it would have been obvious to a person of ordinary skill in the art to determine the species of flying vertebrate (as required by limitation 1a) and position the netting for capture based on the species of flying vertebrate (as required by limitation 1d). All of the references relied upon assume the species of flying vertebrate. Specifically, Bird Barrier Video assumes that the flying vertebrate is a bird. *See generally*, Ex. 1003; *see also* Ex. 1004. Albanese and Sheldon (which specifically applies to American woodcocks) also assume that the flying vertebrate is a bird. *See generally*, Ex. 1010, *see also* Ex. 1011. Kunz assumes the flying vertebrate is a bat. *See generally*, Ex. 1009. Although, Kunz mentions birds, it does so in the context of setting its mist nets so as to *not* catch birds. Ex. 1009, 30. Thus, none of these references suggest that the method described therein pertains to a type of flying vertebrate other than the type of flying vertebrate described. In the absence of any explanation as to why a person of ordinary skill in the art would need to determine the species of flying vertebrate, Petitioner's assertion that a person of ordinary skill "would be motivated to combine [Kunz, Albanese, and Sheldon] with the teachings of Bird Barrier Video to increase the chances of capturing a targeted bird within a large building" lacks rationale underpinning. Pet. 27.

We also determine that Petitioner does not sufficiently explain why a person of ordinary skill in the art would be motivated to replace Bird Barrier Video's magnetic connectors with hooks as required by limitation 1ci. Ex. 1001, 6:1. Petitioner contends that "using hooks instead of magnetic heads would have been obvious to a POSA as there is no material difference

between hooks and magnetic connectors in this regard, and the use of hooks on the ends of poles to attach the poles to an overhead structure is commonly used in various fields. Pet. 29 (citing Ex. 1018, “Bebout”). Petitioner, however, does not explain how Bebout’s teachings would lead a person of ordinary skill in the art to modify or replace Bird Barrier Video’s magnetic heads with hooks. *See generally*, Petition. Further, we do not agree with Petitioner’s assertion that there is no material difference between magnetic heads and hooks. For example, we understand that Bird Barrier Video’s magnetic head requires a magnetic surface, whereas hooks do not. Conversely, we understand hooks to require a structure that provides something for the hook to hook on to, whereas magnetic heads do not. Thus, it is not necessarily true that both a magnetic head and a hook have the same functionality such that a skilled artisan would find it obvious to replace one with the other.

Further, Petitioner’s general contention that because Kunz, Albanese, Sheldon, and Bird Barrier Video “all pertain to mist nets hung between two poles that can be raised and lowered, and they all focus on the common goal of capturing birds, a POSA would have been motivated to combine them to arrive at the claimed invention,” (Pet. 38) is generic and conclusory, and does not clarify sufficiently which teachings from each reference it combines to account for all the limitations of claim 1. As Patent Owner correctly notes, “[d]emonstrating that a reference is analogous art or relevant to the field of endeavor of the challenged patent is not sufficient to establish that one of ordinary skill would have had reason to combine its teachings with other prior art in the manner set forth in the claim.” Prelim. Resp. 36 (quoting *Johns Manville Corp. v. Knauf Insulation, Inc.*, IPR2018-00827, Paper 9 at 10 (PTAB Oct. 16, 2018) (informative) (citing *Securus*

*Techs., Inc. v. Global Tel*Link Corp.*, 701 F. App'x 971, 977 (Fed. Cir. 2017) (unpublished) (“a broad characterization of [prior art references] as both falling within the same alleged field . . . without more, is not enough for [Petitioner] to meet its burden of presenting a sufficient rationale to support an obviousness conclusion”)). Moreover, as Patent Owner also correctly notes, “[m]ere compatibility of the references is likewise not sufficient.” *Id.* (quoting *Johns Manville Corp*, IPR2018-00827, Paper 9 at 11 (citing *Personal Web Techs., LLC v. Apple, Inc.*, 848 F.3d 987, 993 (Fed. Cir. 2017))). Similar to *Personal Web Techs.*, Petitioner’s “reasoning seems to say no more than that a skilled artisan, once presented with the two references, would have understood that they could be combined.” 848 F.3d at 993.

For the foregoing reasons, Petitioner has not demonstrated a reasonable likelihood of establishing obviousness of independent claim 1 based on Bird Barrier Video and/or Kunz and/or Albanese and/or Sheldon. Claim 2 depends from claim 1, and Petitioner relies on the same faulty reasoning for challenging this dependent claim as relied on in its challenge of independent claim 1. Pet. 35–36. Claim 3 also depends from claim 1 and relies on inadequate reasons as explained above. *Id.* at 36. Accordingly, Petitioner has not demonstrated a reasonable likelihood of establishing obviousness of claims 2 and 3 based on Bird Barrier Video and/or Kunz and/or Albanese and/or Sheldon.

5. Summary

On the record before us, Petitioner has not demonstrated a reasonable likelihood of establishing obviousness of claims 1–3 based on Bird Barrier Video and/or Kunz and/or Albanese and/or Sheldon. Because we deny

institution on the merits, we do not address Patent Owner's arguments that the proposed combination lacks particularity. Prelim. Resp. 8–13.

IV. CONCLUSION

Because we determine that the information presented in the record does not establish there is a reasonable likelihood that Petitioner would prevail with respect to at least one challenged claim of the patent '073 patent, we do not institute an *inter partes* review.

V. ORDER

In consideration of the foregoing, it is hereby
ORDERED that the Petition is denied, and no trial is instituted.

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