

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

MERIDIAN WILDLIFE SERVICES LLC,  
Patent Owner.

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IPR2023-01341  
Patent 10,154,663 B2

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

SHAH, *Administrative Patent Judge*.

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

## I. INTRODUCTION

Safe Haven Wildlife Removal and Property Management Experts LLC (“Petitioner”) filed a Petition for *inter partes* review of claims 1–3 of U.S. Patent No. 10,154,663 B2 (Ex. 1001, “the ’663 patent”). Paper 1 (“Pet.”). Meridian Wildlife Services, LLC (“Patent Owner”) filed a Preliminary Response. Paper 9 (“Prelim. Resp.”). Pursuant to our authorization (Ex. 1021), Petitioner filed a Reply to Patent Owner’s Preliminary Response (Paper 10 (“Reply”)) and Patent Owner filed a Sur-reply to Petitioner’s Reply (Paper 11 (“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.” Moreover, a decision to institute under 35 U.S.C. § 314 may not institute on fewer than all claims challenged in the petition. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359–60 (2018); *see also* 37 C.F.R. § 42.108(a) (“When instituting . . . review, the Board will authorize the review to proceed on all of the challenged claims and on all grounds of unpatentability asserted for each claim.”). The Board determines whether to institute a trial on behalf of the Director. 37 C.F.R. § 42.4(a) (2022).

Considering the Petition, the Preliminary Response, the Reply, the Sur-reply, and the evidence of record, for the reasons set forth below, we determine that Petitioner has not demonstrated that a reasonable likelihood that at least one of the challenged claims is unpatentable. Accordingly, we do not institute *inter partes* review.

## II. BACKGROUND

### A. RELATED MATTERS

Patent Owner has asserted infringement of the '663 patent in *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.) (the "'577 litigation"). Pet. 2; Paper 4. Although not identified by either party, the '663 patent is being asserted in the '577 litigation along with U.S. Patent 9,943,073, which is challenged in IPR2023-01340. We also identify IPR2022-01253 (U.S. Patent No. 10,251,374) as a related matter.

### B. REAL PARTIES-IN-INTEREST

In its section addressing real party-in-interest, the Petition states "[t]he real party-in-interest is Safe Haven Wildlife Removal and Property Management Experts LLC." Pet. 2.

Patent Owner states "[t]he sole real party-in-interest in this proceeding is: Meridian Wildlife Services, LLC." Paper 4, 1.

### C. OVERVIEW OF THE '663 PATENT

The '663 patent relates to a "bird capture net which allows the use of quickly adjusting the height for capture and release," including "height adjustable poles attached to bird netting." Ex. 1001, code (57). According to the '663 patent, it "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 1:51–58. The system of the ’663 patent is shown in Figure 1, reproduced below.

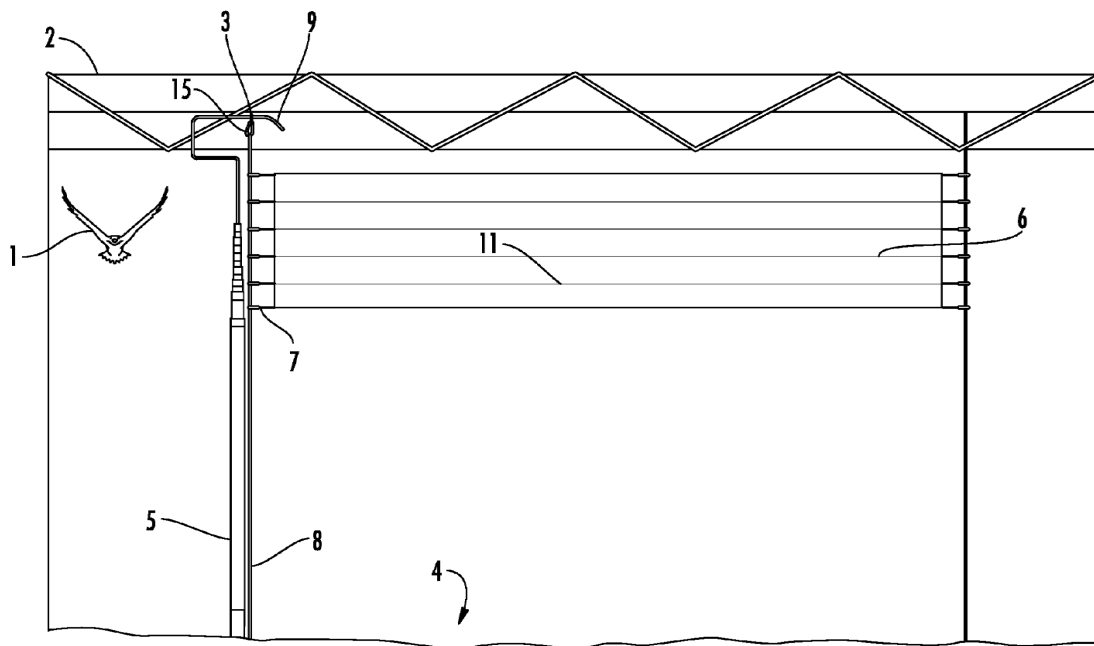


**FIG. 1**

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 4:34–46.

Figure 2, reproduced below, depicts the invention’s height adjustable pole. Ex. 1001, 2:28–29.

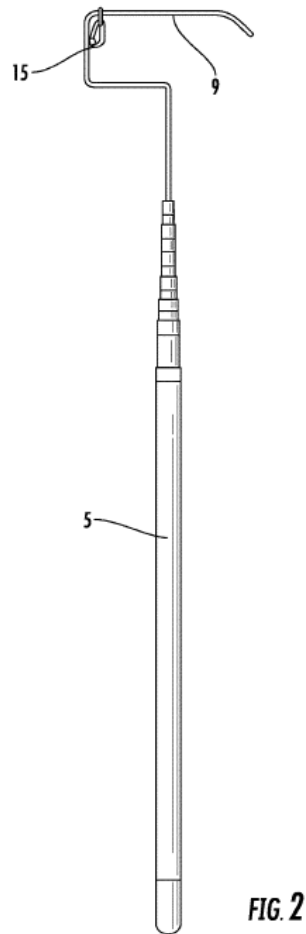


Figure 2 illustrates pole 5 telescoped into its lowest position when collapsed with pulley 15, shown in an upper position around hook 9. *Id.* at 4:47–50

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

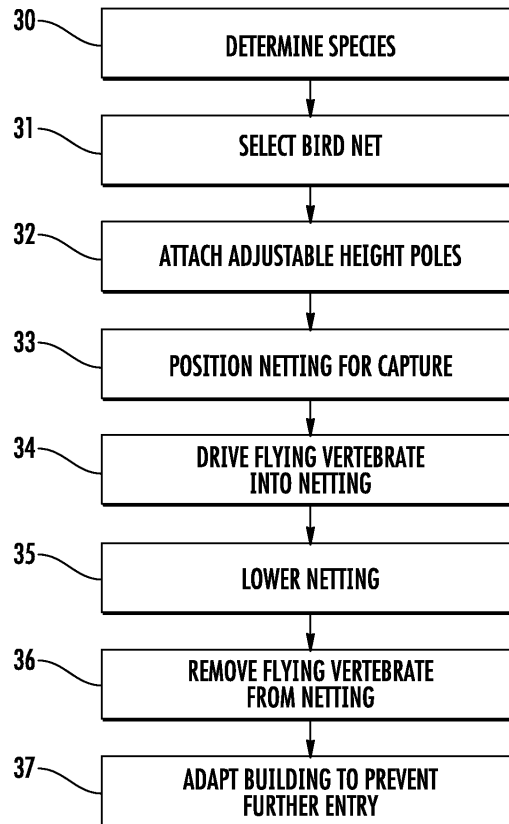


**FIG. 4**

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 4:53–5:3.

D. ILLUSTRATIVE CLAIM

Of the challenged claims, claim 1 is independent. Each of claims 2 and 3 depends directly from independent claim 1. Claim 1 is illustrative and is reproduced with certain reformatting:<sup>1</sup>

1. A device for repeated quick set up for safe live capture of a flying vertebrate indoors in a large building having a floor and a ceiling supported by rafters or beams comprising:

a) bird netting capable of catching and holding the flying vertebrate when it flies into the bird netting; and

b) a plurality of adjustable height vertical support poles attached to the netting, the poles for sitting on the floor and comprising:

i. a hook positioned at a top of each pole of the plurality of poles configured to attach the plurality of poles overhead to the ceiling by attachment over the top of one of the ceiling rafters and the ceiling beams;

ii. a pulley attached to an upper portion of at least one pole of the plurality of poles; and

iii. a rope attached to the pulley, the rope having attachment devices to attach the bird netting to the rope, wherein the rope is configured to raise the entire bird netting to the upper portion of the plurality of poles in a deployed position to capture the flying vertebrate.

Ex. 1001, 5:20–6:17.

E. ASSERTED GROUNDS OF UNPATENTABILITY

Petitioner challenges the patentability of claims 1–3 under Ground 1 as “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. 4, 22. Based

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<sup>1</sup> Although the Petition uses the identifiers [1.0], [1.1], [1.2], [1.2.1], [1.2.2], and [1.2.3] to label the different portions of claim 1, we use the ’663 patent’s designations.

on Petitioner’s use of “and/or,” we understand Petitioner to challenge the patentability of claims 1–3 on the following multiple grounds:

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

F. EVIDENCE

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

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<sup>2</sup> The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”), amended 35 U.S.C. § 103, effective March 16, 2013. Because the ’663 patent has an effective filing date after the effective date of the applicable AIA amendments, we refer to the AIA version of § 103.

<sup>3</sup> 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.

<sup>4</sup> ECOLOGICAL AND BEHAVIORAL METHOD FOR THE STUDY OF BATS 1–28 (Thomas H. Kunz ed., 1988). Ex. 1009 (“Kunz”).

<sup>5</sup> Gene Albanese et al., *An Inexpensive Elevated Mist Net Apparatus*, 24 N. AM. BIRD BANDER 129–134 (1999). Ex. 1010 (“Albanese”).

<sup>6</sup> 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 “acknowledgements” of “admissions” from Exhibits 1012 and 1013 as if these exhibits are prior art in this proceeding. *See e.g.*, Pet. 23 (“Meridian and Dr. Chamberlain have acknowledged [that Bird Barrier Video’s device has a bird netting with pockets]. *See* Ex. 1012, at 47 . . . ; *see also* Ex. 1013, at ¶ 152 (stating the same”)), 29 (“As further admitted by Meridian and Dr. Chamberlain, ‘[i]t would have been obvious. . . Ex. 1012, at 66–67 (citations omitted); *see also* Ex. 1013, at ¶ 195 (stating the same)’”).

Patent Owner contends that Exhibit 1013 (Dr. Chamberlain’s Declaration) is hearsay and that Petitioners “reliance on Dr. Chamberlain’s prior declaration is both impermissible and misguided.” Prelim. Resp. 29. 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.* (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.*

Additionally, 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. 30 (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.3 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.<sup>7</sup>

### III. ANALYSIS

#### A. LEGAL STANDARDS

In an *inter partes* review, the Petitioner has the burden of showing there is a reasonable likelihood that Petitioner would prevail with respect to at least one of the claims challenged in the Petition. 35 U.S.C. § 314. That burden never shifts to the patentee. *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015).

A patent claim is unpatentable under 35 U.S.C. § 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 legal question of obviousness is resolved on the basis of

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<sup>7</sup> 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 ’663 Patent. 35 U.S.C. §102(a). When the related petition and 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, the related petition and declaration are cited as the only support for Petitioner’s assertions, we consider Petitioner’s assertions to be unsupported attorney argument.

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 ordinary skill in the art; and (4) when in evidence, objective evidence of obviousness or nonobviousness.<sup>8</sup> *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17–18 (1966). One seeking to establish obviousness based on more than one reference also must articulate sufficient reasoning with rational underpinnings to combine teachings. See *KSR*, 550 U.S. at 418.

To show obviousness, it is not enough to merely show that the prior art includes separate references covering each separate limitation in a challenged claim. *Unigene Labs., Inc. v. Apotex, Inc.*, 655 F.3d 1352, 1360 (Fed. Cir. 2011). “This is so because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.” *KSR*, 550 U.S. at 418–419.

On the other hand, an obviousness analysis “need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 550 U.S. at 418; accord *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1259 (Fed. Cir. 2007). However, a petitioner cannot satisfy its burden of proving obviousness by employing “mere conclusory statements.” *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1380 (Fed. Cir. 2016). Instead, a petitioner must articulate a reason why a person of ordinary skill in the art would have combined or modified

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<sup>8</sup> The record does not include allegations or evidence of objective indicia of obviousness or nonobviousness.

the prior art references. *In re NuVasive, Inc.*, 842 F.3d 1376, 1382 (Fed. Cir. 2016); *see also Metalcraft of Mayville, Inc. v. The Toro Co.*, 848 F.3d 1358, 1366 (Fed. Cir. 2017) (“In determining whether there would have been a motivation to combine prior art references to arrive at the claimed invention, it is insufficient to simply conclude the combination would have been obvious without identifying any reason why a person of skill in the art would have made the combination.”); *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1073 (Fed. Cir. 2015) (“[O]bviousness concerns whether a skilled artisan not only *could have made* but *would have been motivated to make* the combinations or modifications of prior art to arrive at the claimed invention.”) (citing *InTouch Techs., Inc. v. VGO Commc’ns, Inc.*, 751 F.3d 1327, 1352 (Fed. Cir. 2014)).

We analyze the challenges presented in the Petition in accordance with the above-stated principles.

“At the outset, a party must file a petition to institute review, 35 U.S.C. § 311(a), that identifies the challenged claims and the grounds for challenge with particularity, [35 U.S.C.] § 312(a)(3).” *SAS Inst.*, 138 S. Ct. at 1351; *see also* 37 C.F.R. § 42.104(b) (specifying necessary elements of a petition). Under 35 U.S.C. § 314(a), an IPR can be instituted only if there is a reasonable likelihood that the petitioner would prevail with respect to at least one of the claims challenged in the petition. 35 U.S.C. § 314(a). Even when a petitioner demonstrates a reasonable likelihood as to at least one claim, however, institution of an IPR remains discretionary. *SAS Inst.*, 138 S. Ct. at 1351 (“§ 314(a) invests the Director with discretion on the question *whether* to institute review”); *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016) (“First of all, the [U.S. Patent and Trademark Office] is permitted, but never compelled, to institute an IPR proceeding”

(citing 35 U.S.C. § 314(a))). As explained in our Trial Practice Guide Update, “[t]he Director’s discretion is informed by 35 U.S.C. §§ 316(b) and 326(b), which require the Director to ‘consider the effect of any such regulation [under this section] on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings instituted under this chapter.’” Consolidated Trial Practice Guide (Nov. 2019) at 56.<sup>9</sup>

“Because the Board’s practice, in light of *SAS*, is to institute on all grounds asserted in a petition, the Board may consider whether a lack of particular[ity] as to one or more of the asserted grounds justifies denial of an entire petition.” *Adaptics Ltd. v. Perfect Co.*, IPR2018-01596, Paper 20 at 17 (PTAB March 6, 2019) (designated informative). For example, in *Adaptics*, the Board found that the petition contained voluminous or excessive grounds and that “the Petition fail[ed] to specify what Petitioner regard[ed] as the difference(s) between [the references] and the challenged claims.” *Id.* at 18–20 (citing *Graham*, 383 U.S. at 17 (requiring that the differences between the prior art and the claims at issue be ascertained as part of an obviousness analysis)). More specifically, the Board found that “Petitioner’s ‘catch-all’ ground attempt[ed] to require Patent Owner to address whether each and every claim limitation [was] taught not only by each of [two primary references], but by each of these references in combination with one or more of the other references asserted in the proceeding.” *Id.* at 20–21. Accordingly, the Board concluded that “Petitioner’s ‘catch-all’ ground [was] not reasonably bounded in scope and unduly burdensome for both Patent Owner and the Board to address.” *Id.* at 21.]

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<sup>9</sup> Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

## B. LEVEL OF ORDINARY SKILL

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 POSA<sup>10</sup> ‘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 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.; 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).

## C. CLAIM CONSTRUCTION

In this *inter partes* review, we apply the same claim construction standard used in district court actions under 35 U.S.C. § 282(b). 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

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<sup>10</sup> The terms “POSA,” “POSITA,” and “skilled artisan” refer to a person of ordinary skill in the art.

context of the entire patent disclosure. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc). “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).

Petitioner initially states that it “does not propose any constructions for this proceeding.” Pet. 22.

Patent Owner argues that (a) Petitioner fails to sufficiently identify how the challenged claims are to be construed, and (b) “[t]he amendments and arguments made during prosecution of the ’663 patent reveal that the phrase ‘configured to raise the entire bird netting’ in Claim 1 [limitation b.iii] must be construed to require the capability to raise the entire bird netting to prevent the netting from blocking activities on the floor of the building it is used in.” Prelim. Resp. 9–15 (citing Ex. 1002, 21).

As explained below in Section III.E.3, we find that, for reasons not related to limitation b.iii of claim 1, Petitioner’s arguments and evidence do not demonstrate a reasonable likelihood of establishing that the challenged claims are unpatentable. Thus, we do not find it necessary to 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)).

D. OVERVIEW OF CITED ART AND EVIDENCE

1. Overview of Bird Barrier Video – Exhibits 1003, 1004

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. The net hangs from the rafter and need not be secured at the bottom Ex. 1004, 1.

Petitioner submits snapshots of the Bird Barrier Video (Ex. 1004), copies of which we reproduce below.



**Figure 8 – Screenshot at 1:03**

Figure 8, taken at time 1:03 of the Bird Barrier Video, shows a closeup of the magnetic portion that screwed onto the threaded tip of the telescoping pole and the loop of the net attached to the pole. Ex. 1004, 1, 6.



**Figure 10 – Screenshot at 1:44**

Figure 10, taken at time 1:44 of the Bird Barrier Video, depicts the net with the telescopic poles, attached to the bottom of the rafter by the magnetic portion, and hanging in position to catch birds. Ex. 1004, 1, 7.



**Figure 14 – Screenshot at 2:11**

Figure 14, taken at time 2:11 of the Bird Barrier Video, shows a closer view of the magnetic portion attached to the bottom of the ceiling rafter. Ex. 1004, 9.

## 2. Overview of Kunz – Exhibit 1009

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 21.<sup>11</sup>

Methods used and the success of capturing bats in roosts will depend upon the type of roost, the number of bats present, the dispersion of bats within the roost, their physiological state (active vs. torpid), their age and reproductive condition (pregnant or lactating), their alertness to visual, auditory, or olfactory

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<sup>11</sup> Our Decision cites to the Exhibit page numbers, rather than the native page numbers of the book, of Kunz.

stimuli, and the location and access[i]bility of bats to the investigator.

*Id.* Kunz's purpose is to "review methods used to capture bats that are applicable to ecological and behavioral research." *Id.* at 22.

One method is the use of hand nets with adjustable-length handles that "are most commonly used to capture roosting bats[;] they can also be used successfully to capture bats in flight as they depart from small openings in buildings and caves . . . and at predictable feeding sites." *Id.* at 24–25.

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 26–27. Longer nets may require net poles in the middle. *Id.* at 27. Several short nets may be used in a stack or butted end-to-end configuration. *Id.*

"Mist nets may be deployed successfully at almost any site where bats are expected to fly." *Id.* at 28. "Strategies of net placement have a major influence on capture success," with the most successful sites being "near roosts, at water holes, and across trails that are used as flyways." *Id.* "Bats can be netted at openings to caves, mines, and buildings, where bats regularly exit and enter," as well as in attics. *Id.* "Appropriate spacing and horizontal tension on shelf cords can be maintaining on high nets by tying bet loops to net poles before the net is raised." *Id.* Examples of methods of setting net poles for multiple nets are illustrated in Figures 3 and 4. *Id.* at 30. We reproduce Figure 3 of Kunz, below:

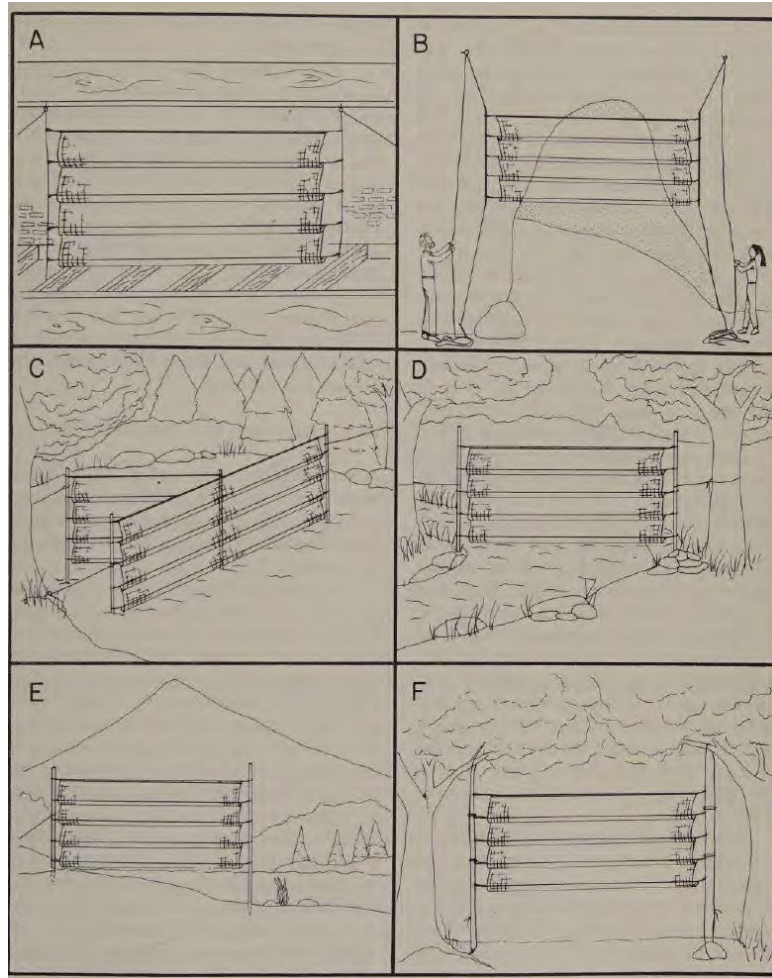


Figure 3 depicts placement and configuration of mist nets for capturing bats in an attic of a building (A), at a cave entrance (B), over a pond (C), over a stream (D), at the edge of a lake (E), and on a forest trail (F). *Id.* at 29.

We further reproduce Figure 4 of Kunz, below:

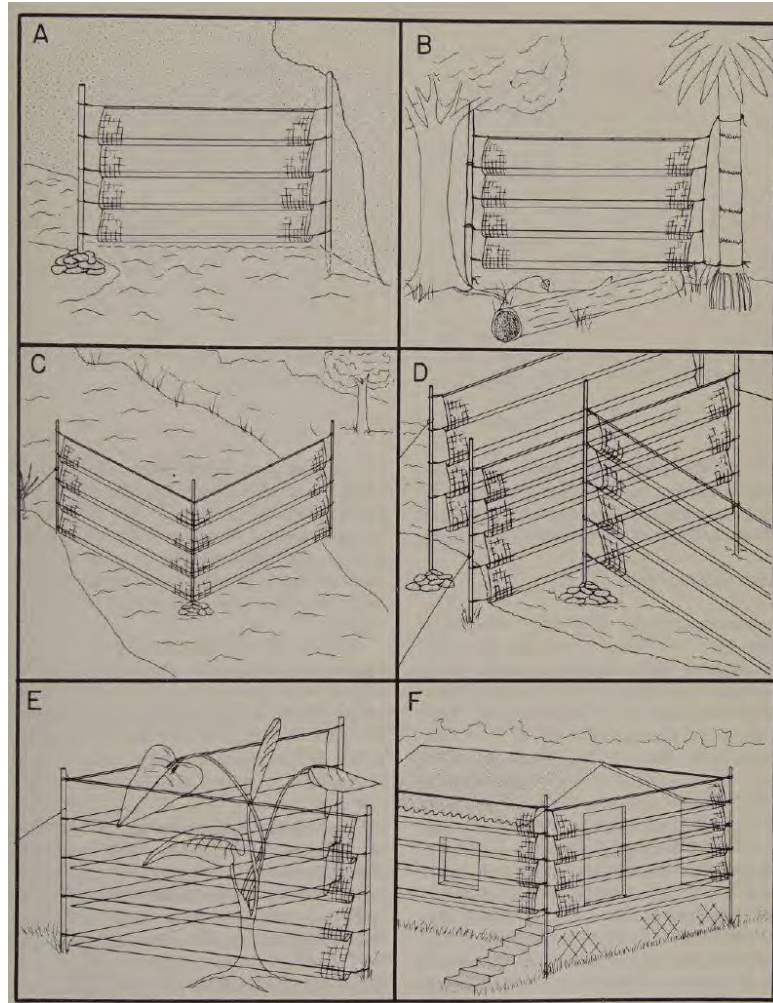


Figure 4 depicts multiple net configurations and alternative pole uses for setting mist nets to capture bats using large rocks and crevices in rock ledges to anchor the poles (A), using ropes as poles (B), using a V-net configuration of the nets with poles anchored in a soft substrate or with larger rocks (C), using a T-net configuration with a high net and a low net (D), as a foliage roost partially surrounding by a net (E), and partially surrounding a building by nets (F). *Id.* at 31.

Kunz provides that “[n]et poles can be stabilized by placing large stones at the base of each pole, by bracing them against rock ledges (Fig. 4 A), [] by inserting one end of the pole deep into a soft, sandy or muddy substrate,” or “anchored to bat traps set in shallow water where one

or more mist nets can be extended out from the trap.” Ex. 1009, 30. 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 35.

### 3. Overview of Albanese – Exhibit 1010

Albanese is an article titled “An Inexpensive Elevated Mist Net Apparatus.” Ex. 1010, 1.<sup>12</sup> 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.* 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:

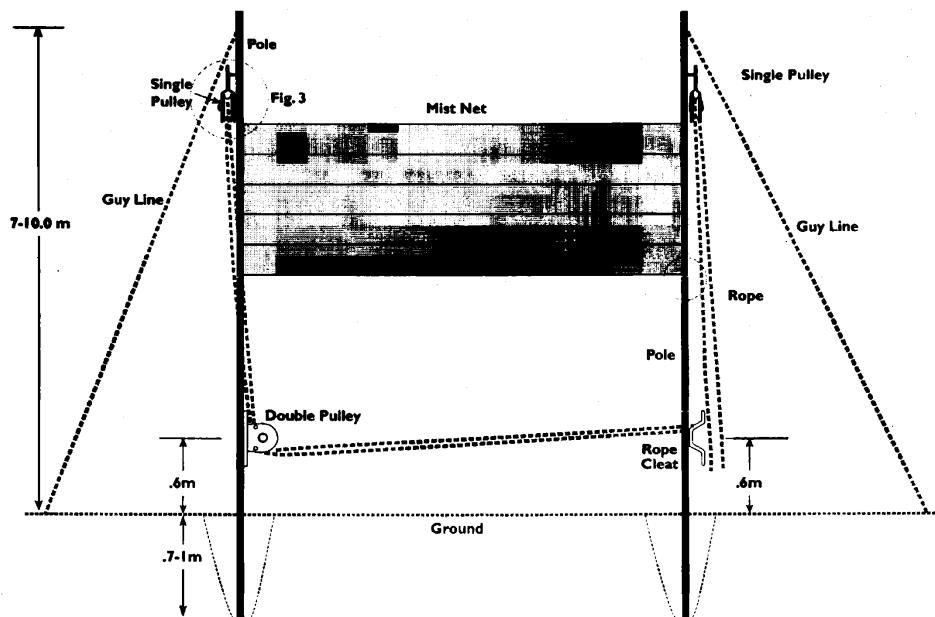


Figure 1. Diagram of elevated mist net apparatus. Diagram is not to scale

<sup>12</sup> Our Decision cites to the Exhibit page numbers of Albanese, rather than the native page numbers of the article.

Figure 1 depicts an elevated mist net apparatus. *Id.* at 2. Albanese describes “a system that elevates a single net to a height of 8.5 m.” *Id.* at 1. 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 2.

We also reproduce Figure 2 of Albanese, below:

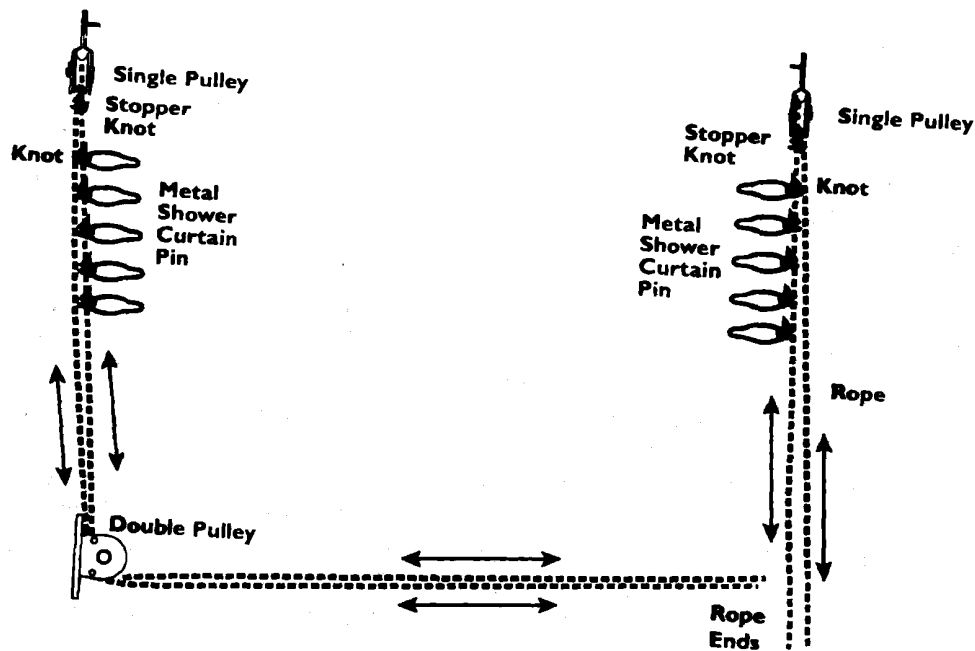


Figure 2. Diagram of rope layout and assemblage.

Figure 2 depicts rope layout and assemblage for the elevated mist net apparatus. *Id.* at 3. According to Albanese, “[t]he premise of the system is for the rope to glide uninterrupted through the pulleys.” *Id.* “Shower curtain pins tied into the rope carry the net up and down.” *Id.* at 4.

Albanese directs the user to, *inter alia*, “attach single pulleys positioned at the top of each pole (Fig. 1)”; “[s]lide the shower curtain pins of the completed rope assemblages onto the poles to which they correspond, and feed the end of the rope into the attached single pulleys”; “[a]ttach the double pulley and rope cleat onto the poles”; “[a]ttach the loops of the mist

net to the shower curtain pins on the rope assemblage (Fig. 3) of the erected pole, and walk the mist net out in the direction that you want the mist net placed”; “[a]ttach the mist net to the shower curtain pins on the rope assemblage of the second pole”; and “[s]tring the rope through the double pulley using the correct rope schematic (Fig. 2).” *Id.* “By pulling on the two correct rope ends, the operator can raise and lower the mist net.” *Id.*

To erect the mist net, Albanese directs the user to, for each pole, dig a small hole, place the pole into the hole, fill the hole with rocks, pile dirt around the base of the pole, and “stomp down dirt and rocks, as they will settle in a few days.” Ex. 1010, 132.

#### 4. Overview of Sheldon – Exhibit 1011

Sheldon is an article titled “A Method of Mist Netting Woodcocks in Summer.” Ex. 1011, 1.<sup>13</sup> Sheldon’s purpose is “to describe a technique of capturing American woodcocks (*Philohela minor*) with Japanese mist nets during the summer months in central Massachusetts.” *Id.* According to Sheldon, “[p]lacement of nets was determined by observation of the flight paths of incoming birds.” *Id.* at 5. We reproduce Figure 1 of Sheldon, below:

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<sup>13</sup> Our Decision cites to the Exhibit page numbers of Sheldon, rather than the native page numbers of the article.

FIGURE 1  
WOODCOCK MIST NET ERECTED

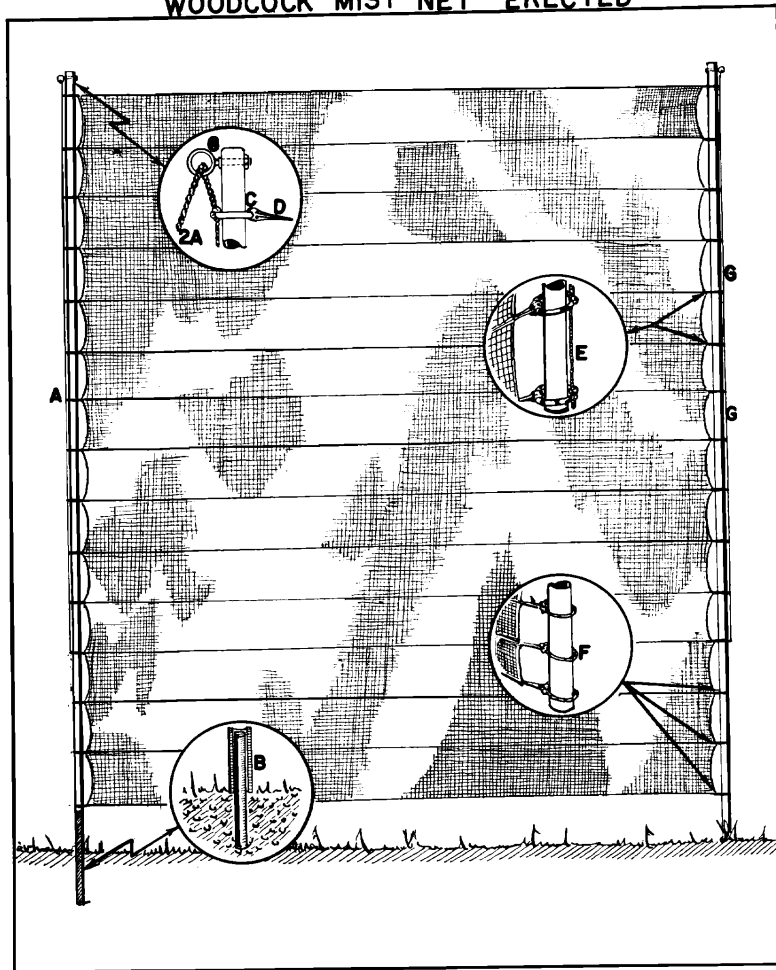


Figure 1 depicts erected mist nets. *Id.* at 2–3. Sheldon discloses using “aluminum television aerial poles which come in ten-foot sections [with a one-inch] inside diameter,” wherein “[e]ach pole was placed on a pipe (Figure 1B),” which is “driven 2’ in the ground at each pole site.” *Id.* at 2. According to Sheldon, “the top net was first tied to the poles and the top tier of the next net was tied to overlap the bottom tier of the net above it.” *Id.* at 2–3. Figure 1C and D show that “[t]he loops of each net were tied to heavy rubber bands which in turn were tied to rings of 2” inside diameter which slipped up and down the poles.” *Id.* at 3.

We also reproduce Figure 2 of Sheldon, below:

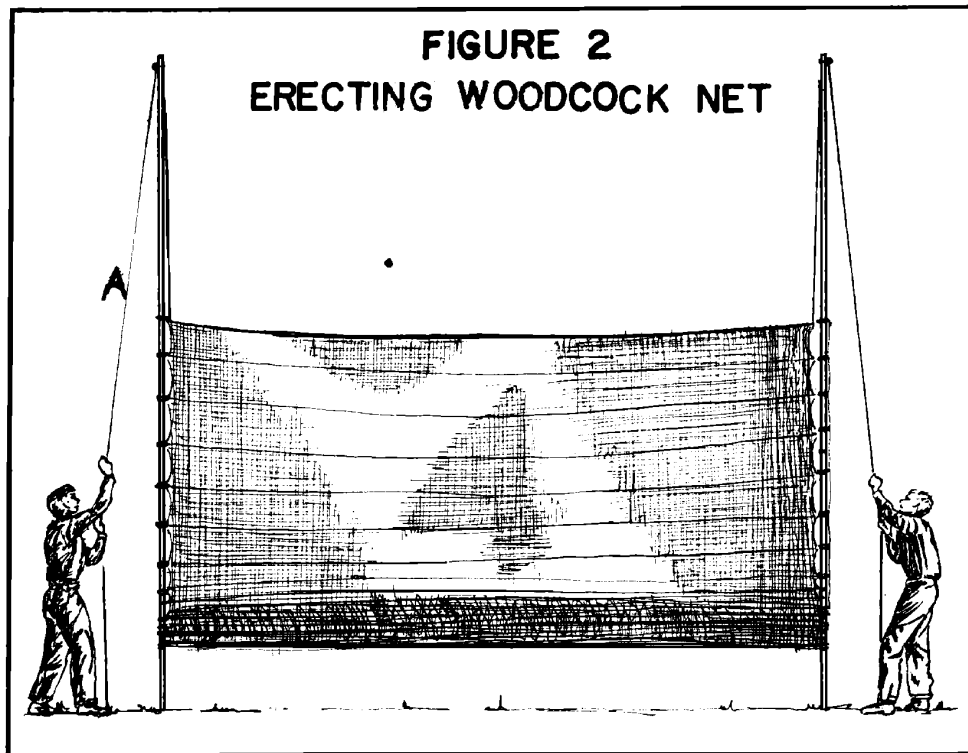


Figure 2 depicts erecting a woodcock net. Ex. 1011, Fig. 2.

According to Sheldon, “[a] heavier string was tied to the top ring and run through an eye bolt or pulley at top of pole and down to ground (Figure 1-2A and Figure 2A).” *Id.* at 132, 134. As shown in Figure 2, “[t]he operator pulled the nets up much as one pulls a flag up a flagpole.” *Id.* at 134.

E. ALLEGED OBVIOUSNESS OVER BIRD BARRIER VIDEO IN COMBINATION WITH KUNZ AND/OR ALBANESE AND/OR SHELDON (ALL GROUNDS).

Petitioner challenges claims 1–3 as unpatentable under 35 U.S.C. § 103 over Bird Barrier Video in combination with Kunz and/or Albanese and/or Sheldon. Pet. 22–36.

1. Petitioner's Arguments and Evidence

a) Independent Claim 1

- i. *A device for repeated quick set up for safe live capture of a flying vertebrate indoors in a large building having a floor and a ceiling supported by rafters or beams comprising:*

Petitioner asserts that Bird Barrier Video's device having a mist net for catching birds inside a building meets this limitation. Pet.23 (citing Ex. 1003, 0:10–1:44. 2:19–3:01); Ex. 1012, 47.

- ii. *Limitation a - bird netting capable of catching and holding the flying vertebrate when it flies into the bird netting; and*

Petitioner contends that Bird Barrier Video's device having "bird netting with pockets, which catch and hold the flying vertebrate when it flies into the bird netting" teaches this limitation. Pet. 23–24 (citing Ex. 1003, 0:18–0:37; Ex. 1012, 57<sup>14</sup>; Ex. 1013 ¶ 152). Petitioner also asserts that Kunz discloses pockets formed by "[p]roperly adjusting vertical spacing of net loops and shelf-cords." Pet. 24 (citing Ex. 1009, 28). Petitioner further contends that Albanese's mist net discloses p pockets capable of catching and holding a flying vertebrate "via precise positioning of its shower curtain pins." *Id.* (citing Ex. 1010, 4). Finally, Petitioner posits that "Sheldon likewise teaches this element" in disclosing that "[t]o catch woodcocks, the pockets must be deep enough to drop at least half the vertical depth of the tier immediately below." *Id.* (citing and quoting Ex. 1011, 3).

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<sup>14</sup> Our Decision cites to the Exhibit page numbers of the petition filed in IPR2022-01253.

*iii. Limitation b - a plurality of adjustable height vertical support poles attached to the netting, the poles for sitting on the floor and comprising:*

Petitioner contends that Bird Barrier Video teaches the device having a plurality of vertical support poles attached to the netting. Pet. 24 (citing Ex. 1003, 0:37–0:58; Ex. 1012, 57; Ex. 1013 ¶ 152). Petitioner acknowledges that the Bird Barrier Video poles “do not sit on the floor,” but asserts that “it would be obvious to place them on the floor if needed to capture a bird in a lower location.” *Id.*

Petitioner argues that Kunz, Albanese, and Sheldon each teaches a configuration where the net poles are “effectively ‘sitting on’ the ground.” Pet. 24–28 (citing Ex. 1009, 30, Fig. 3; Ex. 1010, Fig. 1; Ex. 1011, Fig. 1). Specifically, Petitioner asserts that Kunz teaches that its poles are stabilized by “inserting one end of the pole deep into a soft, sandy or muddy substrate,” and “Albanese and Sheldon similarly feature net poles secured to the ground, effectively ‘sitting on’ the ground.” *Id.* at 25. Petitioner contends that “[i]t would have been obvious to a POSA to modify the device of Bird Barrier Video to include adjustable height vertical support poles for sitting on a floor . . . for increased stabilization of the netting system.” *Id.* at 28 (citing Ex. 1009, 30).

*iv. Limitation b.i - a hook positioned at a top of each pole of the plurality of poles configured to attach the plurality of poles overhead to the ceiling by attachment over the top of one of the ceiling rafters and the ceiling beams;*

Petitioner contends that “Bird Barrier Video teaches a magnetic head positioned at a top of each pole configured to attach each pole overhead to

the ceiling via attachment to ceiling rafters's device," but acknowledges that it "fails to expressly disclose poles including a hook configured to attach to the ceiling via attachment over the top of one of the ceiling rafters and the ceiling beams." Pet. 28 (citing Ex. 1003, 1:03–1:59; Ex. 1004, Figs. 8, 11, 13, 14). Petitioner argues that "using hooks instead of magnetic heads would have been obvious to a POSA" because "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). Specifically, Petitioner asserts "it would have been an obvious and easily implemented design choice to a POSA to replace the magnetic heads with another known attachment means providing the same functionality, such as a 'hook'". *Id.* at 28–29 (quoting Ex. 1012, 76 (citing "Ex. 1004 ¶ 195) and citing Ex. 1013 ¶ 194.

*v. Limitation b.ii - a pulley attached to an upper portion of at least one pole of the plurality of poles;*

Acknowledging that Bird Barrier Video does not disclose a pulley attached to the pole, Petitioner firstly contends that "doing so would have been obvious to a POSA 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. 29.

Petitioner secondly contends that "Kunz discloses that mist nets can be secured to poles using 'a rope' and a 'pulley'". *Id.* at 29 (citing Ex. 1009, 29, 34, Figs. 3(b), 7; Ex. 1012, 76–77; Ex. 1013 ¶ 195). Petitioner asserts that "[i]t would have been obvious to a POSA to modify the Bird Barrier Video's mist net kit to include the rope/pulley/cleat/connector arrangement

disclosed in Kunz . . . . to allow for easy adjustment of the mist net position.” *Id.* (quoting Ex. 1012, 76–77 (alterations in original) and also citing Ex. 1013 ¶ 195).

Thirdly, Petitioner contends that “Albanese’s net apparatus includes a pulley attached to an upper portion of a pole.” Pet. 29; *see also id.* at 30–31 (citing Ex. 1010, 2, Figs. 1, 2). Further, Petitioner contends 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 31–32 (citing Ex. 1011, 3, Fig. 2). Petitioner asserts that, similar to the reasoning regarding Kunz, a POSA would have modified the “Bird Barrier Video’s mist net kit to include the rope/pulley/cleat/connector arrangement disclosed in Albanese or Sheldon to facilitate raising and lowering the mist next position.” *Id.* at 32.

*vi. Limitation b.iii - a rope attached to the pulley, the rope having attachment devices to attach the bird netting to the rope, wherein the rope is configured to raise the entire bird netting to the upper portion of the plurality of poles in a deployed position to capture the flying vertebrate.*

Petitioner asserts that “[f]or at least the reasons discussed above with respect to limitation b.ii, this limitation is rendered obvious by Bird Barrier Video in view of Kunz and/or Albanese or Sheldon.” Pet. 33. Specifically, Petitioner contends that “Kunz, Albanese, and Sheldon each disclose a rope/pulley system that is configured to raise the bird netting to an upper, deployed position to capture flying vertebrates.” *Id.* In particular, Petitioner asserts that Kunz discloses netting attached to the rope with net loops and shower curtain rings, Albanese discloses shower curtain pins attaching its

rope to each mist net loop, and Sheldon's netting is attached to a rope used to raise the netting and having attachment devices. *Id.* (citing Ex. 1009, 32; Ex. 1010, 4; Ex. 1011, Fig. 2). As with limitation b.ii, Petitioner argues that "[i]t would be obvious to modify Bird Barrier Video's mist net kit to include the rope/pulley system of Kunz, Albanese or Sheldon to facilitate raising and lowering the mist net position, which necessarily requires the claimed attachment devices." *Id.*

b) Dependent claims 2 and 3

*i. Claim 2 - "The device according to claim 1 further comprising at least one bird capture pocket in the bird netting."*

Petitioner relies on the reasons discussed above in Section III.E.1.a.ii regarding limitation a. Pet. 33.

*ii. Claim 3 - "The device according to claim 1 wherein the attachment devices are carabiners."*

Petitioner acknowledges that [n]one of the references cited herein expressly disclose a 'carabiner' per se as the attachment device." Pet. 34. However, Petitioner contends that "although the mist net in Bird Barrier Video is secured to the poles by loops, and it would be 'an obvious design choice to a POSA to replace the loops with removable connectors (e.g., carabiners) providing the same functionality.'" *Id.* (quoting Ex. 1012, 76 and citing Ex. 1013 ¶¶ 194–195). Petitioner further alleges that "the use of carabiners to attach netting to structures is common in the prior art." *Id.* (citing Ex. 1019, 3:34–35. Fig. 1).

c) Motivation to Combine Bird Barrier Video with  
Kunz, Albanese, and/or Sheldon

Petitioner further contends 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. 35 (citing *KSR*, 550 U.S. at 398; *Tyco Healthcare Grp. LP v. Ethicon Endo-Surgery, Inc.*, 774 F.3d 968, 978 (Fed. Cir. 2014)).

2. Patent Owner’s Response

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. 6, 16–25. Patent Owner asserts that although Petitioner states that it is asserting a single invalidity ground, Ground 1, Petitioner proposed combination encompasses “seven unique combinations.” Prelim. Resp. 4–5. Patent Owner argues:

With respect to each of the seven possible combinations of references, 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.

*Id.* at 6; *see also id.* at 8 (arguing that “[f]or each limitation in the challenged claims, the Petition’s arguments leave it unclear how and why Kunz,

Albanese, and/or Sheldon are being combined with the Bird Barrier Video (individually or in various combinations with one another).”).

Regarding limitation b.iii, Patent Owner argues that the limitation does not merely require “raising and lowering the mist net position, which necessarily requires the claimed attachment devices,” as argued by Petitioner, but “requires the claimed device to be ‘configured to raise *the entire* bird netting to the upper portion of the plurality of poles’”. *Id.* at 6–7. Patent Owner contends that Petitioner fails to address this limitation. *Id.* at 7. Patent Owner also contends that “it is unclear which references are being relied on for this feature and why those references would be combined with the Bird Barrier Video (or one another).” *Id.* (citing Pet. 33).

Patent Owner also argues that Petitioner fails to establish sufficient motivation to combine Bird Barrier Video, Kunz, Albanese, and/or Sheldon. Prelim. Resp. 7–8. Specifically, Patent Owner asserts that neither Petitioner’s “‘common goal of capturing birds’ nor the use of a mist net between poles is a specific reason that a POSA would have modified the Bird Barrier Video,” nor are they reasons “that would specifically lead to modifications of the Bird Barrier Video satisfying each of the limitations where the Petition relies on all four cited references,” limitations a, b, b.i, b.ii, and b.iii. *Id.*

### 3. Analysis

Even assuming, *arguendo*, that the Bird Barrier Video teaches at least independent claim 1’s device that is “for repeated quick set up for safe live capture of a flying vertebrate indoors in a large building having a floor and a ceiling supported by rafters or beams” and comprises “bird netting capable of catching and holding the flying vertebrate when it flies into the bird

netting,” Petitioner has not provided adequate reasoning with rational underpinning demonstrating how or why a person of ordinary skill in the art would have modified Bird Barrier Video to, at least, have a plurality of poles for sitting on the floor and a hook positioned at a top of each pole configured to attach the poles overhead to the ceiling by attachment over the top of a ceiling rafter and beam, as recited in claim 1’s limitations b and b.i.

Regarding limitation b, Petitioner acknowledges that Bird Barrier Video does not disclose or suggest that its poles are “for sitting on the floor.” Pet. 24. Petitioner contends “it would be obvious to place them on the floor if needed to capture a bird in a lower location.” *Id.* Yet, the claim requires that the poles are for “sitting on the floor,” and not simply “to place” on the floor. Petitioner does not explain, nor does Bird Barrier Video show, the structure of Bird Barrier Video’s poles such that they can be “for sitting on the floor.” Moreover, Petitioner’s reasoning presumes that the net disclosed in the Bird Barrier video, which is suspended from the ceiling, would be incapable of capturing low-flying birds, yet the record does not support such a finding.

Petitioner then appears to rely on some combination of Bird Barrier Video with Kunz and/or Albanese and/or Sheldon to teach this limitation. Pet. 24–27; Prelim. Resp. 6 (arguing that it is unclear how the references are combined). Petitioner contends that Kunz and/or Albanese and/or Sheldon teach(es) securing net poles to the ground to offer stabilization. Pet. 25. However, each of Kunz, Albanese, and Sheldon relates to outdoor use with poles that are placed *in* the ground to offer stability. *See id.* at 24–25. As Petitioner points out, Kunz’s “[n]et poles can be stabilized by . . . *inserting one end of the pole deep into a soft, sandy or muddy substrate.*”. *Id.* at 25 (quoting Ex. 1009, 30) (emphasis added). Albanese’s poles are placed or

pushed *into* a hole in the ground, the hole then being filled with rocks and/or dirt. Ex. 1010, 4, Fig. 1. Sheldon's poles are placed *into* a pipe that is driven *into* the ground. Ex. 1011, 2, Fig. 1.

Furthermore, because there is no ceiling in the outdoor locations taught in Kunz, Albanese, or Sheldon, it is logical that these references would teach a net secured into the ground. The indoor location described in the Bird Barrier Video, however, provides a ceiling to conveniently suspend the nets. *See* Ex. 1004, 7–8; *see also* Prelim. Resp. 16, 23 (arguing the outdoor capture techniques of Kunz, Albanese, and Sheldon would not be combined with Bird Barrier Video's indoor capture technique). We are not persuaded that a person of ordinary skill in the art would have also secured these nets to the ground such that the poles are "sitting on the floor." Petitioner's rationale that placement on the ground would "provide stability" presumes that the Bird Barrier Video nets, which are suspended from the ceiling, are instable; yet, the record does not support such a finding.

Regarding limitation b.i, Petitioner acknowledges that although Bird Barrier Video "discloses a magnetic head positioned at a top of each pole configured to attach each pole overhead to the ceiling via attachment to ceiling rafters," it does not disclose a hook configured to attach each pole to the ceiling by attachment over the top of one of the ceiling rafters and the ceiling beams. Pet. 28. Petitioner contends it would have been obvious to use a hook instead of Bird Barrier Video's magnetic head because "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" and "it would have been an obvious and easily implemented design choice to a POSA to replace the magnetic heads with another known attachment means providing the

same functionality, such as a ‘hook’ . . . .” *Id.* (quoting citing Ex. 1012, 76 and citing Ex. 1013 ¶ 194). Yet, there is no evidence or technical reasoning to support this contention.

Petitioner refers to a patent regarding “improved rafter hooks” and provides the conclusion that “it would have been an obvious design choice to a POSA to replace the magnetic heads with another known attachment means providing the same functionality, such as a hook.” Pet. 28–29 (citing Ex. 1018 and quoting Ex. 1012, 66; Ex. 1013 ¶ 194). Petitioner does not explain how “improved rafter hooks” would lead one to modify or replace Bird Barrier Video’s magnetic heads with hooks positioned at the top of each pole configured to attach the poles to the ceiling by attachment over the top of the rafter and beams. Nor does Petitioner provide an explanation of how Bird Barrier Video’s poles or magnetic heads would be modified to incorporate a hook as claimed.

As to replacing the magnetic heads with hooks, Petitioner presents the conclusion from a Petition in a previous *inter partes* review that there is no material difference between Bird Barrier Video’s magnetic heads attached to a flat underside of a ceiling or a ceiling beam or rafter (*id.*) without evidence or explanation when we see material differences between the functionality of a magnetic head and that of a hook. *See* Prelim. Resp. 6 (arguing that the Petitioner offers no support). For example, there is no explanation or evidence regarding the differences between attachment by a magnetic head that requires a flat bottom surface comprised of a magnetic material and a hook that does not require either of these things. *See, e.g.,* Ex. 1004, 6, Fig. 8 (depicting a flat, magnetic head) *and* Ex. 1001, 3:39–41; 4:43, Figs. 1–3 (describing and depicting a hook over the top). If the rafter or beam did not have a flat bottom surface, Bird Barrier Video’s magnetic head

may not attach whereas a hook would. Similarly, if the rafter or beam was made of a non-magnetic material, such as wood, plastic, stone, or concrete, the magnetic heads would also not attach, but a hook would. 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.

Regarding dependent claim 3, Petitioner presents a similar contention that “although the mist net in Bird Barrier Video is secured to the poles by loops, . . . it would be ‘an obvious design choice to a POSA to replace the loops with removable connectors (e.g., carabiners) providing the same functionality.’” Pet. 34 (quoting Ex. 1012, 76; Ex. 1013 ¶¶ 194–95 and citing Ex. 1019, 3:34–35, Fig. 1). Yet, there is no evidence or reasoning to support this conclusion. For example, there is at least one material difference between Bird Barrier Video’s fixed loops (Ex. 1004, 1, 6) and a removable carabiner, such as one being fixed and the other removable, that Petitioner does not address.

Petitioner’s 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 are combined 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. 22 (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.* at 22–23 (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.

#### 4. Conclusion

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. 33. Claim 3 also depends from claim 1 and relies on inadequate reasons as explained above. *Id.* at 34. 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 and that the Chamberlain Declaration is inadmissible. Prelim. Resp. 4–9, 29–33 (citing Ex. 2001; Fed. R. Evid. 801, 802; 37 C.F.R. § 42.62).

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 ’663 patent, we do not institute an *inter partes* review

V. ORDER

Upon consideration of the record before us and for the reasons given, it is:

ORDERED that the Petition is *denied* as to all challenged claims of the ’663 patent and no trial is instituted.

IPR2023-01341  
Patent 10,154,663 B2

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