

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GUANGDONG LAITU IMAGING TECHNOLOGY CO., LTD.,
Petitioner,

v.

REALLY RIGHT STUFF, LLC,
Patent Owner.

IPR2023-00853
Patent 8,398,037 B2

Before LYNNE H. BROWNE, SCOTT A. DANIELS, and
SEAN P. O'HANLON, *Administrative Patent Judges*.

O'HANLON, *Administrative Patent Judge*.

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

Dismissing as Moot Patent Owner's Motion for *Pro Hac Vice* Admission
37 C.F.R. § 42.10(c)

I. INTRODUCTION

A. Background

Guangdong Laitu Imaging Technology Co., Ltd. (“Petitioner”) filed a Petition for *inter partes* review of claims 1–8 and 15–28 of U.S. Patent No. 8,398,037 B2 (Ex. 1001, “the ’037 patent”). Paper 1 (“Pet.”), 1. Really Right Stuff, LLC (“Patent Owner”) filed a Preliminary Response. Paper 9 (“Prelim. Resp.”).

Institution of an *inter partes* review is authorized by statute only when “the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a). We have authority, acting on the designation of the Director, to determine whether to institute an *inter partes* review under 35 U.S.C. § 314 and 37 C.F.R. § 42.4(a). Institution is discretionary, even if the statutory requirements are satisfied. *See SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1356 (2018) (“§ 314(a) invests the Director with discretion on the question *whether* to institute review”). For the reasons set forth below, upon considering the Petition, Preliminary Response, and evidence of record, we conclude that the information presented in the Petition fails to establish a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any of the challenged claims. Accordingly, we decline to institute *inter partes* review.¹

¹ Because we deny institution of the Petition, we dismiss as moot Patent Owner’s pending motion for Stuart B. Leijon to appear *pro hac vice* in this proceeding (Paper 10).

B. Real Parties in Interest

Petitioner identifies itself, Super Photo Gear, LLC, and Desmond Photographic Distributors Inc. as real parties in interest. Pet. 79; Paper 5, 1; Paper 6, 1; Paper 7, 2. Petitioner further asserts that it operates under the name of Leofoto and Super Photo Gear, LLC operates under the name of Leofoto USA. Pet. 79; Paper 5, 1; Paper 6, 1; Paper 7, 2.

Patent Owner identifies itself as the sole real party in interest. Paper 8, 2.

C. Related Matters

The parties do not identify any matters related to the '037 patent. Pet. 79; Paper 8, 2.

D. The Challenged Patent

The '037 patent discloses a portable support apparatus, such as a tripod, for equipment. Ex. 1001, 1:10–11. The '037 patent explains that tripods for supporting equipment are designed to provide a balance between stability and low weight, considerations that are often in conflict. *Id.* at 1:21–32. Multi-stage tripods have legs with multiple segments that slide axially relative to each other and can be selectively locked at different positions to adjust the height of tripod. *Id.* at 1:39–44. The '037 patent explains that multi-stage tripods are relatively lightweight and stable, but may sacrifice height or footprint for stability. *Id.* at 1:49–51.

Figure 1 of the '037 patent, reproduced below, illustrates an embodiment of a tripod. Ex. 1001, 1:66–67.

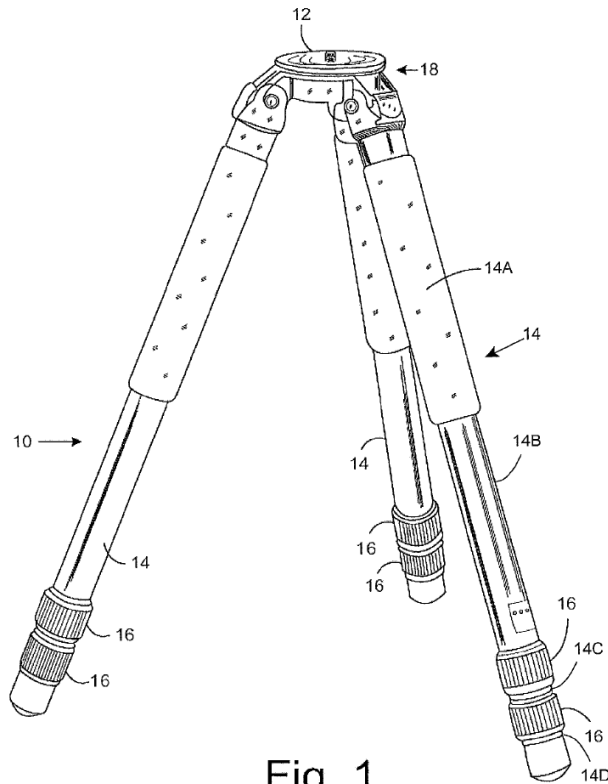


Fig. 1

Figure 1 depicts tripod 10 comprising platform 12 supported at an elevated position by legs 14. *Id.* at 2:54–57. The platform may be detachably mounted within apex 18, for example via a ring into which the platform is secured. *Id.* at 2:58–60. Each of the legs includes a plurality of telescoping sections 14A–14D that retract into each other in a nested position and may be extended by releasing locking mechanisms 16. *Id.* at 2:60–62, 3:16–25.

Figure 2 of the '037 patent shows an enlarged view of the upper portion of the tripod and is reproduced below. Ex. 1001, 2:1–2.

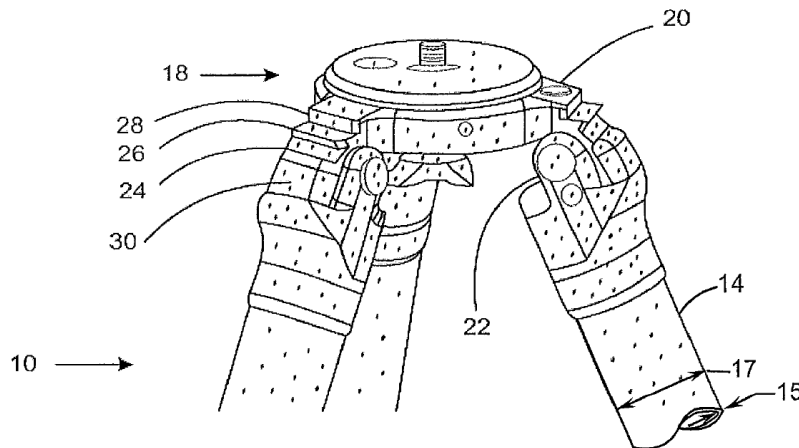


Fig. 2

Figure 2 shows each of legs 14 pivoting about a respective axis 22 proximate apex 18. *Id.* at 3:1–2. The pivot angle between each leg and the apex may be adjusted via graduated ratcheting surfaces 24, 26, 28 and angle stop 30. *Id.* at 3:55–57. The angle stop of each leg rests against a selected one of ratcheting surfaces 24, 26, 28, which prevents further pivoting of the respective leg. *Id.* at 3:57–61, 4:49–54.

E. Disclaimer of Claims 1–5 and 18–24

A “patent owner may file a statutory disclaimer under 35 U.S.C. [§] 253(a) in compliance with § 1.321(a) of this chapter, disclaiming one or more claims in the patent. No *inter partes* review will be instituted based on disclaimed claims.” 37 C.F.R. § 42.107(e). A disclaimer under 35 U.S.C. § 253(a) is “considered as part of the original patent” as of the date on which it is “recorded” in the U.S. Patent and Trademark Office (“Office”). 35 U.S.C. § 253(a). For a disclaimer to be “recorded” in the Office, the document filed by the patent owner must:

(1) Be signed by the patentee, or an attorney or agent of record;

(2) Identify the patent and complete claim or claims, or term being disclaimed. A disclaimer which is not a disclaimer of a complete claim or claims, or term will be refused recordation;

(3) State the present extent of patentee's ownership interest in the patent; and

(4) Be accompanied by the fee set forth in [37 C.F.R.] § 1.20(d).

37 C.F.R. § 1.321(a); *see also Vectra Fitness, Inc. v. TNWK Corp.*, 162 F.3d 1379, 1382 (Fed. Cir. 1998) (holding that a § 253 disclaimer is “recorded” on the date that the Office receives a disclaimer meeting the requirements of 37 C.F.R. § 1.321(a), and that no further action is required in the Office for a disclaimer to be “recorded”).

Here, Patent Owner filed a statutory disclaimer of claims 1–5 and 18–24 of the '037 patent. Prelim. Resp. 7; Ex. 2004. Based on our review of Exhibit 2004 and Office assignment records, we determine that a disclaimer of claims 1–5 and 18–24 of the '037 patent under 35 U.S.C. § 253(a) has been filed with the Office as of July 27, 2023. Although the disclaimer does not, on its face, indicate the extent of Patent Owner's interest in the '037 patent (*see* Ex. 2004, 2), Office assignment records indicate that Patent Owner owns the entire interest in the '037 patent. *See* Ex. 3001, 2. We also note that notice of the disclaimer was included in the September 12, 2023, Official Gazette, Volume 1514, No. 2 at 228. *See* Ex. 3002, 1. Based on the information in the public record, we find that the disclaimer complies with the above-listed requirements of 37 C.F.R. § 1.321(a).

Because claims 1–5 and 18–24 have been disclaimed under 35 U.S.C. § 253(a), in compliance with 37 C.F.R. § 1.321(a), we do not reach challenges to those claims. As a result, the remaining challenged claims are claims 6–8, 15–17, and 25–28 (“the challenged claims”).

F. The Challenged Claims

Petitioner challenges claims 6–8, 15–17, and 25–28 of the ’037 patent. Claims 6, 16, and 25 are independent. Claim 6 is illustrative of the challenged claims and is reproduced below.

6. A support having an apex selectively, detachably mountable to a platform for securing equipment to said platform, said apex comprising:
- (a) an attachment member selectively attachable to a said platform; and
 - (b) at least one warning member having a first state that indicates that said platform is securely engaged with said apex and a second state that indicates that said platform is not securely engaged with said apex.

Ex. 1001, 6:53–61.

G. Asserted Grounds of Unpatentability

The Petition relies on the following prior art references:

Name	Reference	Exhibit
Yang	US 2008/0224000 A1, published September 18, 2008	1004
Gitzo 2009	Gitzo Focus on Forever, 2009 Collection (January 2009)	1005
YouTube 1	Vincent Oliver photo-i, <i>Gitzo tripods</i> , YouTube video (September 19, 2008), available at https://www.youtube.com/watch?v=AEgbj5J5n9Q	1006

Name	Reference	Exhibit
YouTube 3	Gitzo Inspires, <i>Shooting Videos with a DSLR Camera - English</i> , YouTube video (February 18, 2010), available at https://www.youtube.com/watch?v=OB64XUTzEjI	1008

Petitioner asserts the following grounds of unpatentability:

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
16, 17	102 ²	Yang
6–8	102	Gitzo 2009
6–8	102	YouTube 1
6–8	102	YouTube 3
15	102	Gitzo 2009
15	103	YouTube 1, Yang
15	103	YouTube 3, Yang
25–28	103	Gitzo 2009, Yang

Pet. 19. Neither party submits the declaration testimony of any expert at this stage of the proceeding. Petitioner submits a declaration of its lead counsel, Howard H. Sheerin, regarding the origin of Exhibits 1001–1009. Ex. 1010.

² The application resulting in the '037 patent was filed prior to the date when the Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112–29, 125 Stat. 284 (2011), took effect.

II. ANALYSIS

A. Principles of Law

1. *Anticipation*

“Under 35 U.S.C. § 102 a claim is anticipated ‘if each and every limitation is found either expressly or inherently in a single prior art reference.’” *King Pharm., Inc. v. Eon Labs, Inc.*, 616 F.3d 1267, 1274 (Fed. Cir. 2010) (quoting *Celeritas Techs. Ltd. v. Rockwell Int’l Corp.*, 150 F.3d 1354, 1360 (Fed. Cir. 1998)). “Anticipation requires the presence in a single prior art disclosure of all elements of a claimed invention arranged as in the claim.” *Therasense, Inc. v. Becton, Dickinson & Co.*, 593 F.3d 1325, 1332 (Fed. Cir. 2010) (quoting *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983)).

A reference inherently discloses an element of a claim “if that missing characteristic is necessarily present, or inherent, in the single anticipating reference.” *Schering Corp. v. Geneva Pharm.*, 339 F.3d 1373, 1377 (Fed. Cir. 2003) (citing *Cont’l Can Co. USA, Inc. v. Monsanto Co.*, 948 F.2d 1264, 1268 (Fed. Cir. 1991)). “Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing *may* result from a given set of circumstances is not sufficient.” *Therasense*, 593 F.3d at 1332 (quoting *Cont’l Can*, 948 F.2d at 1269).

2. *Obviousness*

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 the

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, any objective evidence of nonobviousness.³ *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

3. Printed Publications

“[A]t the institution stage, the petition must identify, with particularity, evidence sufficient to establish a reasonable likelihood that the reference was publicly accessible before the critical date of the challenged patent and therefore that there is a reasonable likelihood that it qualifies as a printed publication.” *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 13 (PTAB Dec. 20, 2019) (designated precedential).

“To qualify as a printed publication, a reference ‘must have been sufficiently accessible to the public interested in the art.’” *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1348 (Fed. Cir. 2016) (quoting *In re Cronyn*, 890 F.2d 1158, 1160 (Fed. Cir. 1989)). “A reference will be considered publicly accessible if it was ‘disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it.’” *Id.* (quoting *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008)). For a reference posted to a website, there are

³ The parties have not directed us to any such objective evidence.

multiple ways that a petitioner could show that the reference was publicly accessible. For example, a petitioner could show that the website was indexed, through search engines or otherwise. *See id.* at 1349. A petitioner also could show that the record indicates that, despite a lack of indexing, the website was well known to the community interested in the subject matter of the reference. *See Voter Verified, Inc. v. Premier Election Sols., Inc.*, 698 F.3d 1374, 1381 (Fed. Cir. 2012) (“[T]he uncontested evidence indicates that a person of ordinary skill interested in electronic voting would have been independently aware of the Risks Digest as a prominent forum for discussing such technologies. And upon accessing the Risks Digest website, such an interested researcher would have found the Benson article using that website’s own search functions and applying reasonable diligence.”).

B. Level of Ordinary Skill in the Art

The level of ordinary skill in the art is “a prism or lens” through which we view the prior art and the claimed invention. *Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001). The person of ordinary skill in the art is a hypothetical person presumed to have known the relevant art at the time of the invention. *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995). In determining the level of ordinary skill in the art, we may consider certain factors, including: “(1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field.” *Best Med. Int’l, Inc. v. Elekta Inc.*, 46 F.4th 1346, 1353 (Fed. Cir. 2022) (citations omitted). “The patent’s purpose can also be informative.” *Id.*

Petitioner contends that a person having ordinary skill in the art at the time of the invention “would have had, through education or practical experience, at least the equivalent of a bachelor’s degree in mechanical engineering, or a related field, and would have understood the basics of designing and manufacturing tripod devices (e.g., screws, levers, rings, and other related hardware).” Pet. 32.

Patent Owner disagrees with Petitioner’s definition, arguing that “a lower level of skill is necessary to understand the mechanical functions of a tripod.” Prelim. Resp. 11. According to Patent Owner, “a hobbyist user of a tripod, such as a hunter or landscape photographer, would have the understanding of a person of ordinary skill in the art. Formal education or years of practical experience building equipment supports are unnecessary to understand the function of a tripod.” *Id.*

Neither of the parties provides the testimony of an expert witness or addresses the factors identified above. The challenged claims are directed to a support, such as a tripod, having an apex that is mountable to a platform and to which equipment to be supported by the tripod may be attached. Based on the teachings of the ’037 patent and the disclosure of the asserted references, we find that the lower level of skill proposed by Patent Owner to be more reasonable and for purposes of this Decision adopt it as our own. We note that we would reach the same conclusion to deny institution under either proposed standard.

C. Claim Construction

In an *inter partes* review, claims are construed using the same claim construction standard that would be used to construe the claims in a civil

action under 35 U.S.C. § 282(b), including construing the claims in accordance with the ordinary and customary meaning of such claims as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent. 37 C.F.R. § 42.100(b). “[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention” and “after reading the entire patent.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313, 1321 (Fed. Cir. 2005) (en banc). In addition to the specification and prosecution history, we also consider use of the terms in other claims and extrinsic evidence including expert and inventor testimony, dictionaries, and learned treatises, although extrinsic evidence is less significant than the intrinsic record. *Id.* at 1312–17. Usually, the specification is dispositive, and it is the single best guide to the meaning of a disputed term. *Id.* at 1315.

“The Board is required to construe ‘only those terms . . . that are in controversy, and only to the extent necessary to resolve the controversy.’” *Realtime Data, LLC v. Iancu*, 912 F.3d 1368, 1375 (Fed. Cir. 2019) (alteration in original) (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)).

Petitioner does not propose a definition of any claim term in a non-disclaimed claim. Pet. 33.

Patent Owner proffers definitions for two terms. Patent Owner argues that “[a]pex should be construed as ‘the structure of the tripod that joins the legs to each other and the rest of the tripod at the legs’ pivot points” (Prelim. Resp. 11) and “[e]quipment should be limited to devices that may be used either in conjunction with or independent of a support” (*id.* at 12).

For purposes of this Decision, and based on the record before us, we determine that no construction of any term is necessary.

D. Overview of the Asserted Prior Art

1. *Yang*

Yang relates to a tripod for a camera. Ex. 1004 ¶ 1. *Yang* discloses a tripod including a trigger-controlled opening and closing mechanism for adjusting leg opening angle, an inner expanding locking mechanism between tubes, and a telescopic central axis. *Id.* ¶ 3. Figure 1 illustrates an embodiment of the tripod and is reproduced below.

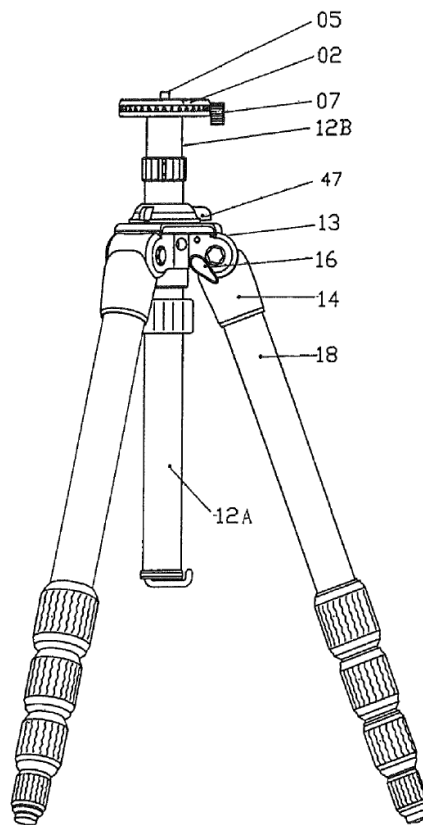


Figure 1 shows a tripod including turntable 2, tripod body 13, and tubes 18 installed on tube bases 14, which connect to the tripod body. *Id.* ¶ 27. The

central axis of the tripod consists of elevator lever 12A and elevator lever 12B that passes through the tripod body. *Id.*

Figures 6 and 7 illustrate a leg opening and closing mechanism for the tripod and are reproduced below.

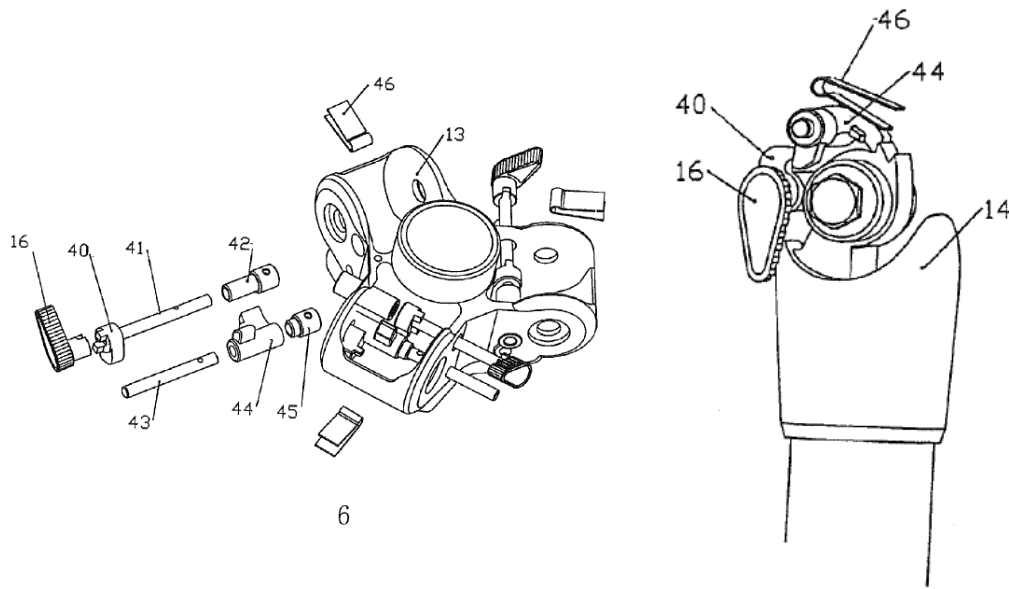


Figure 6 (left) and Figure 7 (right) show an opening and closing mechanism for adjusting the opening angle of the tripod legs. Ex. 1004 ¶ 28. The opening and closing mechanism for each leg includes tube base 14 with a ratch for engaging pawl 44, which is sheathed onto pawl axis 43. *Id.* Rocker 40 connects to handle 16 via handle axis 41. *Id.* In operation, rotation of handle 16 drives the rocker to push the pawl against the resistance of pawl spring 46 and disengage the pawl from the ratch. *Id.* ¶¶ 28–29. After disengaging the pawl from the ratch, the respective leg can be spread to a desired opening angle, and releasing the handle causes the pawl to engage with a tooth of the ratch to prevent the leg from opening further. *Id.* ¶ 29.

2. *Gitzo 2009*

Gitzo 2009 is a catalog for a line of camera support products including tripods, monopods, and heads. Ex. 1005, 10.⁴ *Gitzo 2009* states that its range of products “comprises a selection of traditional ‘all-purpose’ tripods and monopods alongside those we develop for very specific needs.” *Id.* at 14. A figure appearing on page 15 of *Gitzo 2009* illustrates an exemplary tripod and is reproduced below.



The figure above depicts a tripod from Gitzo’s Systematic product line. *Id.* at 15. *Gitzo 2009* states that Systematic tripods are “the strongest, most rigid tripods on the market” and “can be customised to respond to specific demands with interchangeable columns and other accessories.” *Id.* at 14. The Systematic tripod is described as a modular system that can be

⁴ Our citations to Exhibit 1005 refer to the pagination added by Petitioner in the lower right corner of each page.

transformed into different configurations and use a wide selection of accessories. *Id.* at 56.

A figure appearing on page 56 of Gitzo 2009 illustrates a view of the upper portion of a Systematic tripod and is reproduced below.



The figure above depicts the top platform of a Systematic tripod. Ex. 1005, 56. Gitzo 2009 states that its “platforms allow for a more solid connection of the head and reduced vibrations thanks to the safe lock techno polymer disc and a locking screw for the head.” *Id.* Gitzo 2009 discloses that its tripods also provide a variety of leg opening angles. *Id.* at 115.

3. *YouTube 1*

YouTube 1 is a series of screen captures from a YouTube-published video titled “Gitzo tripods.” Ex. 1006, 1. Figure SC3-1 is one such screen capture and is reproduced below.

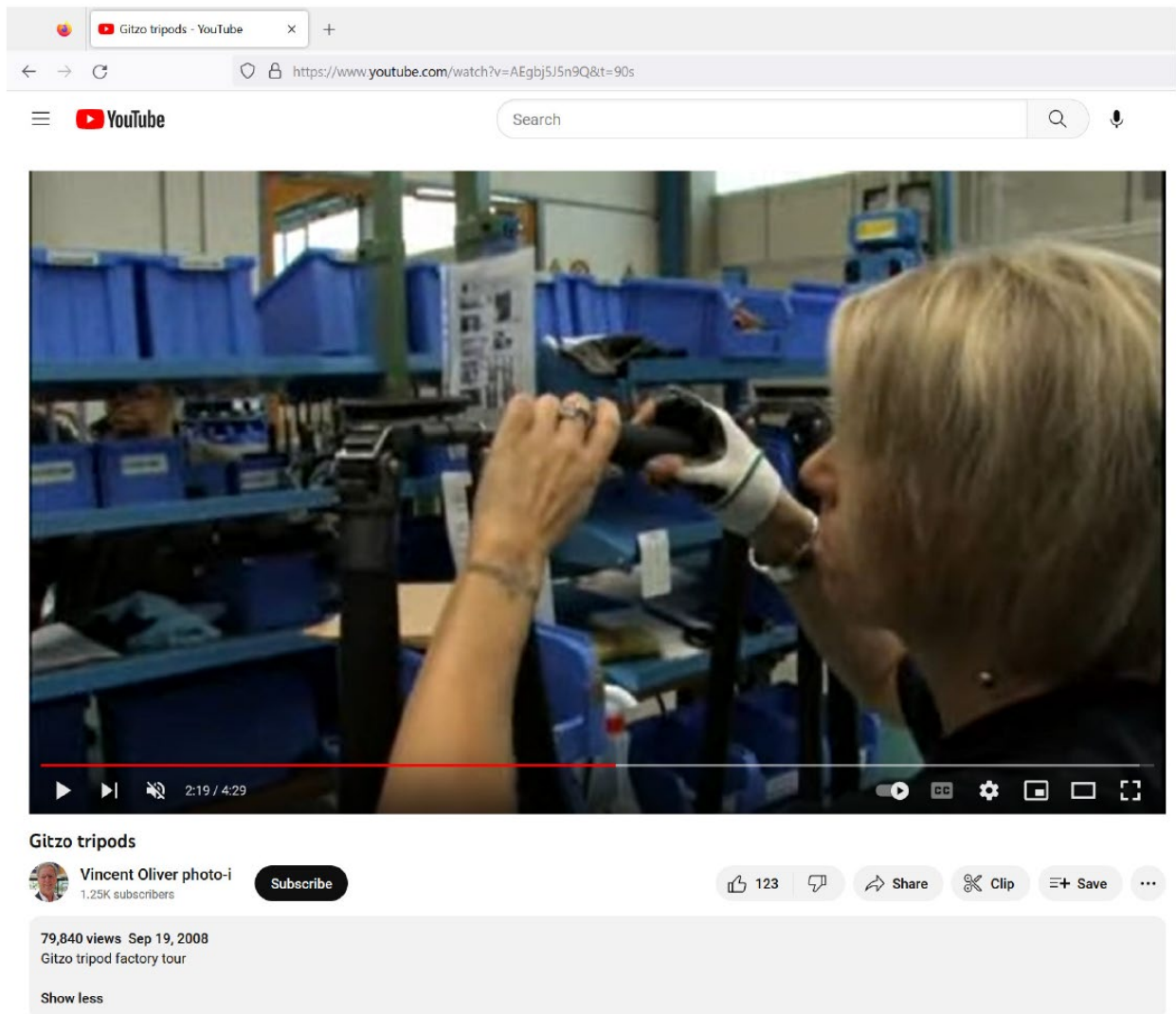


Figure SC3-1 of YouTube 1 is a screen capture of a video at time 2:19 showing a worker using a tool on an upper portion of a tripod. *Id.* at 3. The bottom of the figure shows a date of September 19, 2008, and a textual description stating “Gitzo tripod factory tour.” *Id.*

4. YouTube 3

YouTube 3 is a series of screen captures from a YouTube-published video titled “Shooting Videos with a DSLR Camera - English.” Ex. 1008, 1. Figure SC2 is one such screen capture and is reproduced below.

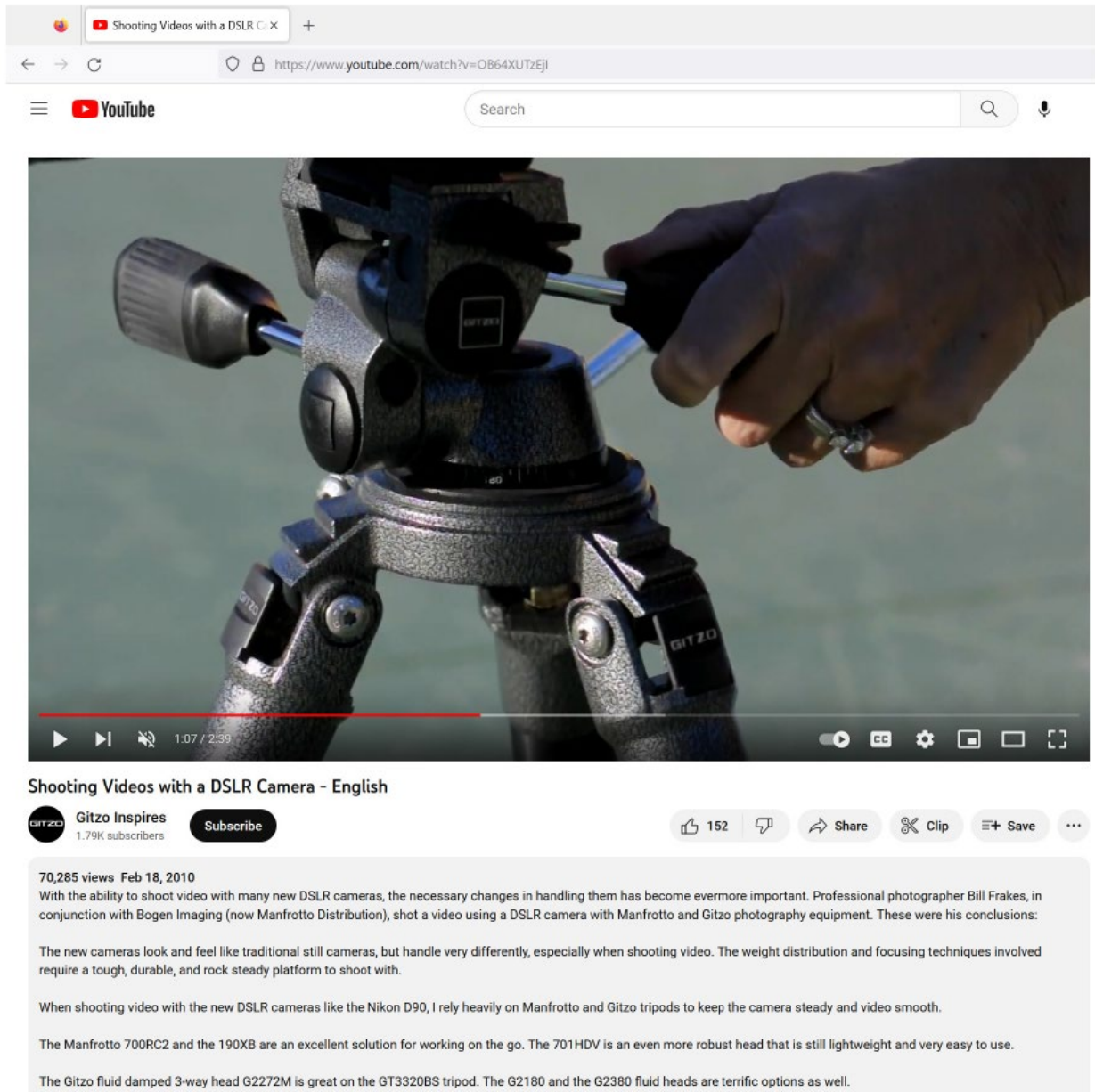


Figure SC2 of YouTube 3 is screen capture of a video at time 1:07 showing a tripod with “Gitzo” appearing on several surfaces. *Id.* at 2. The bottom of the figure shows a date of February 18, 2010, and a textual description stating, in relevant part, that “[t]he Gitzo fluid damped 3-way head G2272M is great on the GT3320BS tripod.” *Id.*

E. Prior Art Status and Admissibility of Gitzo 2009, YouTube 1, and YouTube 3

“A petitioner in an [*inter partes*] review may request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed publications.” 35 U.S.C. § 311(b). As noted above, it is Petitioner’s burden to establish, at the institution stage, that the references asserted in the petition qualify as printed publications. *Hulu*, Paper 29 at 13. We address Petitioner’s showing regarding Gitzo 2009, YouTube 1, and YouTube 3 below.

1. *Gitzo 2009*

Petitioner argues,

Gitzo 2009 is a printed publication as demonstrated by the declaration of [Petitioner’s lead counsel,] Howard H. Sheerin, who downloaded the Gitzo 2009 publication from Wikipedia.org (Gitzo webpage) as a PDF file, and then evaluated the “Document Properties” of the PDF file which shows a creation date of January 12, 2009 and a modification date of January 13, 2009.

Pet. 5 (citing Ex. 1010, 4–7). Petitioner asserts that “Mr. Sheerin downloaded a screen capture of the Gitzo.com website, as published on June 22, 2009, from the Internet Archive Wayback Machine accessed through archive.org” and argues that “[t]his screen capture clearly shows that the Gitzo 2009 collection catalog was available for download from the Gitzo.com website as early as June 22, 2009.” *Id.* at 6 (citing Ex. 1010, 8–10). Petitioner concludes that “[it is] reasonable that a person of ordinary skill in the art (POSITA) would be aware of and frequent the Gitzo website

since Gitzo was a large manufacturer of tripods and other camera equipment.” *Id.* at 7 (footnote omitted) (citing Ex. 1010, 2–3).

We are not persuaded that Petitioner has met its burden to establish that Gitzo 2009 is prior art. Notably, Petitioner does not submit any declaration testimony of a subject matter expert. Instead, Petitioner relies exclusively on the declaration testimony of its lead counsel, Mr. Sheerin, to support its assertions. Mr. Sheerin, however, does not assert that he is of ordinary skill in the art or otherwise qualified to provide testimony on the relevant art. *See generally* Ex. 1010. Thus, Petitioner’s assertions regarding what would be reasonable for an ordinarily skilled artisan (*see, e.g.*, Pet. 7 (citing Ex. 1010, 2–3)) amount to attorney argument rather than evidence. *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017) (“Attorney argument is not evidence.”).

Additionally, Mr. Sheerin relies heavily on “[t]he Gitzo Wikipedia webpage.” Ex. 1010, 2–5. We agree with Patent Owner (*see* Prelim. Resp. 17) that Mr. Sheerin’s reliance on such a website is ill-placed, as “[a]nyone can edit Wikipedia’s text, references, and images.” Ex. 2001, 2.

Petitioner’s reliance on the Internet Archive also fails to persuade us that Gitzo 2009 is prior art to the ’037 patent. Mr. Sheerin presents only blurry images of what appears to be a cover page and asserts that it “looks the same as the cover page of the PDF file downloaded from the Gitzo Wikipedia page.” Ex. 1010, 9–11. Such speculative statements about weak evidence are not probative of accessibility of Gitzo 2009 and fail to meet Petitioner’s burden. Furthermore, neither Petitioner nor Mr. Sheerin discusses the contents of the file asserted to be available via the Internet Archive or assert that the contents are the same as Gitzo 2009. *Id.*; Pet. 6–7.

Finally, Petitioner’s reliance on the file date listed in the “document properties” metadata of Gitzo 2009 fails to persuade us that Gitzo 2009 is prior art to the ’037 patent. Patent Owner presents evidence that such metadata can be modified. Prelim. Resp. 17 (citing Ex. 2003). And, as noted by Patent Owner (*see id.*), Petitioner does not submit testimony of any witness with knowledge of Gitzo 2009 or the Gitzo webpage. *See Fed. R. Evid.* (“FRE”) 901(b)(1).

Because Petitioner has not satisfied its burden to establish that Gitzo 2009 is prior art to the ’037 patent, Petitioner’s challenges based on Gitzo 2009 are not persuasive to demonstrate that the challenged claims are unpatentable.

2. YouTube 1 and YouTube 3

Petitioner appears to rely on “the publication date shown on the webpage of [each] YouTube video” to establish that YouTube 1 and YouTube 3 are prior art to the ’037 patent. Pet. 9; *see also* Ex. 1010, 11 (asserting YouTube 1 to have “a publication date of September 19, 2008”), 24 (asserting YouTube 3 to have “a publication date of February 18, 2010”). Petitioner argues that an ordinarily skilled artisan would have been able to locate YouTube 1 and YouTube 3 via “a search on the YouTube.com website for the keywords ‘Gitzo tripod.’” Pet. 10.

Patent Owner argues that YouTube 1 and YouTube 3 are hearsay because Petitioner offers these references to prove the depicted tripods were made by Gitzo and the dates the videos were made publicly available. Prelim. Resp. 13–14.

Petitioner argues that “the publication date shown on the webpage of a YouTube video is not hearsay because it is ‘computer generated’ when the video is uploaded rather than a date asserted by a person.” Pet. 9. Petitioner argues that “the publication date of a YouTube video is not hearsay under” FRE 807, the residual exception, “because YouTube videos are published by a ‘well-known, reputable compiler and publisher.’” *Id.* (citing *Ericsson Inc. v. Intell. Ventures I LLC*, IPR2014-00527, Paper 41 (PTAB May 18, 2015)). Petitioner argues that YouTube 1 and YouTube 3 are more probative than any other evidence it could obtain because,

[e]ven assuming the Petitioner were able to obtain human testimony as to the authenticity of the publication dates as well as accessibility, the publication of these references occurred approximately 14 years ago. Surely computer generated and digitally preserved evidence of publication and accessibility should be considered more reliable than the fading memory of any human testimony.

Id. at 12.

Patent Owner contends that Petitioner’s arguments that YouTube 1 and YouTube 3 are admissible under the residual hearsay exception are unpersuasive. Prelim. Resp. 14–22. Patent Owner argues that, rather than “offering any authenticating testimony from a declarant that would affirm the hearsay assertions, [Petitioner] offers the testimony of its attorney, Mr. Howard Sheerin, explaining the methods he undertook to locate the references.” *Id.* at 16 (citing Ex. 2010). However, Patent Owner contends, “Mr. Sheerin claims no authorship or ownership of the statements within the [YouTube] videos . . . but instead offers only conclusions that it would be unlikely that the declarants could be identified for examination.” *Id.* Patent Owner argues that Petitioner fails to satisfy the “second prong of FRE 807”

because “[Petitioner] offers only the conclusion that it is unlikely the declarants of each prior art reference could be identified or examined effectively to authenticate or give context to the hearsay assertions” and “offers no explanation as to why such testimony could not be obtained through reasonable efforts.” *Id.* at 18.

Hearsay is a statement that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. FRE 801(c). Such a statement includes a “written assertion.” *Id.* 801(a). Hearsay is not admissible unless an exception applies. *Id.* 802. The residual exception to hearsay provides:

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

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

Id. 807.

Petitioner argues that the asserted publication dates of YouTube 1 and YouTube 3 are not hearsay because they are computer-generated. Pet. 9.

However, Petitioner offers no evidence to support its assertion.⁵ We do not credit Petitioner’s conclusory assertion.

Petitioner relies exclusively on the residual exception to argue that the rule against hearsay does not prohibit admission of YouTube 1 and YouTube 3. Pet. 11–18. For the reasons discussed below, Petitioner fails to satisfy either of the requirements of the residual exception.

Regarding the first requirement of the residual exception, Petitioner argues that Gitzo 2009, YouTube 1, and YouTube 3 provide “circumstantial guarantees of trustworthiness for one another [because] they disclose the same or similar Gitzo tripod models.” Pet. 11 (citing Ex. 1010, 13–19, 22–23, 31–32). Continuing, Petitioner argues that each of these asserted references has a different publication source, which, Petitioner contends, establishes that these references are not “fake videos.” *Id.* at 11–12.

Patent Owner argues,

it is not necessarily the publishers who would be motivated to falsify evidence. Other parties who could be affected by the ‘037 patent may be motivated to do so, and without testimony to prove the videos are what [Petitioner] claims them to be, no verification of their authenticity can be made.

Prelim. Resp. 15. Patent Owner argues that, rather than “offering any authenticating testimony from a declarant that would affirm the hearsay assertions, [Petitioner] offers the testimony of its attorney, Mr. Howard Sheerin, explaining the methods he undertook to locate the references.” *Id.* at 16 (citing Ex. 2010). However, Patent Owner contends, “Mr. Sheerin

⁵ Although Petitioner cites an opinion issued by the Supreme Judicial Court of Massachusetts (*see* Pet. 9), the opinion does not address YouTube. Nor does Petitioner explain how the opinion is binding on the Board.

claims no authorship or ownership of the statements within the [YouTube] videos . . . but instead offers only conclusions that it would be unlikely that the declarants could be identified for examination.” *Id.*

We agree with Patent Owner that Petitioner has not met its burden of explaining how this requirement of the residual exception is met. Petitioner presents no evidence of a person with first-hand knowledge of the contents of YouTube 1 and YouTube 3. Rather, Petitioner relies solely on the unqualified testimony of its lead counsel, who testifies merely that the tripod parts displayed in the asserted references “appear to show the same ‘apex’ tripod part.” *See, e.g.*, Ex. 1010, 13–14. Such conclusory and cursory analysis fails to establish trustworthiness of the contents of these asserted references, including their asserted publication dates.

Regarding the second requirement of the residual exception, Petitioner argues that YouTube 1 and YouTube 3 are more probative than any other evidence it could obtain because,

[e]ven assuming the Petitioner were able to obtain human testimony as to the authenticity of the publication dates as well as accessibility, the publication of these references occurred approximately 14 years ago. Surely computer generated and digitally preserved evidence of publication and accessibility should be considered more reliable than the fading memory of any human testimony.

Pet. 12.

Patent Owner argues that Petitioner fails to satisfy the “second prong of FRE 807” because “[Petitioner] offers only the conclusion that it is unlikely the declarants of each prior art reference could be identified or examined effectively to authenticate or give context to the hearsay

assertions” and “offers no explanation as to why such testimony could not be obtained through reasonable efforts.” Prelim. Resp. 18.

We agree with Patent Owner that Petitioner has not met its burden of explaining how this requirement of the residual exception is met. Neither Petitioner nor Mr. Sheerin identify any efforts undertaken to identify other, non-hearsay evidence. *See* Pet. 12; Ex. 1010. Thus, Petitioner fails to apprise us that YouTube 1 and YouTube 3 are more probative than other references that could be found through reasonable efforts as required by FRE 807(a)(2).

Because Petitioner has not satisfied its burden to establish that YouTube 1 and YouTube 3 are admissible evidence, Petitioner’s challenges based on YouTube 1 or YouTube 3 are not persuasive to demonstrate that the challenged claims are unpatentable.

F. Asserted Anticipation of Claims 16 and 17 by Yang

Petitioner argues that claims 16 and 17 are anticipated by Yang. Pet. 51–54 We have reviewed Petitioner’s assertions and supporting evidence. For the reasons discussed below, and based on the record before us, we determine that Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that at least one challenged claim is anticipated by Yang.

Independent claim 16 recites, in relevant part, “an apex selectively, detachably mountable to equipment.” Ex. 1001, 7:18–20. Petitioner addresses this recitation by referring to its mapping for claim 1. Pet. 52. Petitioner’s mapping of the claim 1 recitations is not particularly clear. Instead of specifically identifying each component in Yang that it asserts to

satisfy the claim recitations, Petitioner largely refers to Yang's drawing figures. *See id.* at 35–38. Regarding the recited apex, Petitioner argues that “Yang discloses in FIG. 1 and 2, each [leg] at least partially supporting an apex selectively, detachably mountable to equipment and defining a supporting surface (turntable 2) for said equipment.” *Id.* at 35 (alteration in original) (citing Ex. 1004 ¶ 32). Petitioner does not here identify what component in Yang it maps to the recited apex or equipment. Regarding claim 2, however, Petitioner appears to map the ratch of Yang's tube base 14 to the recited apex. *See id.* at 40–41; *see also id.* at 54 (referencing claim 2 regarding the “first position” recitation of claim 16). Thus, as best we can understand, Petitioner maps Yang's ratch to the recited apex.

Patent Owner argues that Yang does not disclose an apex detachably mountable to equipment. Prelim. Resp. 23–24. Rather, Patent Owner argues, Yang's apex is mountable to an elevator system that is mountable to equipment. *Id.*

We agree that Petitioner does not explain adequately how Yang discloses the recited apex. Petitioner does not explain how the ratch of Yang's tube base 14, which Petitioner maps to the recited apex, is mountable to equipment. *See Pet.* 52 (citing *id.* at 35); *see also id.* at 40–41 (addressing how the apex, together with the angle stop, defines a plurality of fixed angular positions for the leg element as recited in claim 2), 54 (addressing the similar recitation of claim 16). As noted above, Petitioner merely asserts that Yang discloses “an apex selectively, detachably mountable to equipment” without identifying what in Yang it considers to be the apex or the equipment. *Id.* at 35. Petitioner's citation to Figures 1 and 2 and paragraph 32 of Yang does not clarify Petitioner's position. Petitioner's

conclusory treatment of the recited apex fails to satisfy its requirement to identify, “with particularity,” the grounds on which the claims are challenged and the evidence that supports such grounds. *See* 35 U.S.C. § 312(a)(3); *see also* 37 C.F.R. § 42.104(b) (specifying necessary elements of a petition for *inter partes* review). To the extent Petitioner intends to map Yang’s turntable 2 to the recited apex (*see* Pet. 35), Petitioner does not explain adequately how the turntable together with the pawl 44, which Petitioner maps to the recited angle stop (*see id.* at 38), defines a plurality of fixed angular positions for the leg element as recited in claim 16. *See id.* at 52 (citing *id.* at 41–43), 54 (citing *id.* at 38–41); *see also id.* at 38–41 (regarding similar recitations of claim 2); Prelim. Resp. 24–28 (addressing the recited angle stop); Ex. 1001, 7:22–26.

For at least these reasons, Petitioner has not shown sufficiently that Yang discloses an apex as recited in claim 16 and incorporated into its dependent claim 17. Therefore, Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that claims 16 and 17 are anticipated by Yang.⁶

G. Asserted Anticipation of Claims 6–8 by Gitzo 2009, YouTube 1, and YouTube 3

Notwithstanding our determination that Petitioner has not satisfied its burden to establish that any of Gitzo 2009, YouTube 1, and YouTube 3 is admissible prior art (*see* § II.E above), we nonetheless address the merits of Petitioner’s arguments based on these references.

⁶ Patent Owner provides additional arguments for claim 17 (*see* Prelim. Resp. 29–32), which we find persuasive.

Petitioner argues that claims 6–8 are anticipated by each of Gitzo 2009, YouTube 1, and YouTube 3. Pet. 55–69. We have reviewed Petitioner’s assertions and supporting evidence. For the reasons discussed below, and based on the record before us, we determine that Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that at least one challenged claim is anticipated by Gitzo 2009, YouTube 1, or YouTube 3.

Independent claim 6 recites, in relevant part, “at least one warning member having a first state that indicates that said platform is securely engaged with said apex and a second state that indicates that said platform is not securely engaged with said apex.” Ex. 1001, 6:58–61. Petitioner’s mappings of the claim 6 recitations are not particularly clear. Instead of specifically identifying each component in the asserted references that it asserts to satisfy the claim recitations, Petitioner largely refers to the drawing figures. *See* Pet. 55–68. Petitioner argues that “the [recited] ‘warning member’ is at least one of a ‘gap’ or a ‘screw.’” *Id.* at 59. Petitioner argues that Gitzo 2009 and YouTube 1 each “disclose[] two alternatives for the ‘first state’ indicating the platform is secure: 1) a smaller ‘gap’ in the retaining ring; or 2) a ‘screw’ for the retaining ring that ‘sticks in’ when tightened:” *Id.* at 63–64. Petitioner argues that Gitzo 2009 and YouTube 1 each “disclose[] two alternatives for the ‘second state’ indicating the platform is not secure: 1) a bigger ‘gap’ in the retaining ring; or 2) a ‘screw’ for the retaining ring that ‘sticks out’ when loosened.” *Id.* at 66–67.

Petitioner’s arguments regarding the recited first and second warning member states consist entirely of attorney argument without citation to any disclosure of the asserted references. Thus, Petitioner’s arguments appear to

be based on hindsight. *See* Ex. 1001, 4:25–40. Additionally, it is not clear from Petitioner’s annotated figures from Gitzo 2009 and YouTube 1 whether the components Petitioner asserts are screws are, in fact, screws. *See* Pet. 59–68. Similarly, we fail to see any difference between Petitioner’s asserted “gap small” and “gap big” in the annotated figures. *See id.* Indeed, Petitioner appears to rely on the same figure for Gitzo 2009, and we fail to see any difference between the figures relied upon for YouTube 1. *Compare id.* at 63–65, *with id.* at 66–68. Petitioner makes no showing whatsoever regarding YouTube 3. *See id.* at 59–68.

For at least these reasons, Petitioner has not shown sufficiently that Gitzo 2009, YouTube 1, or YouTube 3 discloses a warning member with first and second states as recited in claim 6 and incorporated into its dependent claims 7 and 8. Therefore, Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that claims 6–8 are anticipated by Gitzo 2009, YouTube 1, or YouTube 3.

H. Asserted Anticipation of Claim 15 by Gitzo 2009

Notwithstanding our determination that Petitioner has not satisfied its burden to establish that Gitzo 2009 is admissible prior art (*see* § II.E above), we nonetheless address the merits of Petitioner’s arguments based on this reference.

Petitioner relies on its showing regarding claim 6 and argues that claim 15 is anticipated by Gitzo 2009. Pet. 69–70. We have reviewed Petitioner’s assertions and supporting evidence. For the reasons discussed below, and based on the record before us, we determine that Petitioner does

not demonstrate a reasonable likelihood of prevailing in showing that claim 15 is anticipated by Gitzo 2009.

Claim 15 depends directly from claim 6 and further recites “where said platform is attachable to said attachment member at a selective height relative to said apex.” Ex. 1001, 7:15–17. Petitioner maps Gitzo 2009’s rapid column to the recited attachment member. Pet. 69. Although this challenge is captioned as relying only on Gitzo 2009, Petitioner also argues that Yang discloses an attachment member. *Id.* at 69–70.

The shortcomings of Petitioner’s treatment of independent claim 6 discussed in section II.G above apply to its dependent claim 15. For the same reasons, Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that claim 15 is anticipated by Gitzo 2009. Petitioner’s reliance on Yang also fails to establish a reasonable likelihood of prevailing in showing that claim 15 is unpatentable, as Petitioner has not explained how Yang discloses the recitations of parent claim 6 nor explained how Yang’s asserted teachings would be combined with Gitzo 2009.

For at least these reasons, Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that claim 15 is anticipated by Gitzo 2009.

I. Asserted Obviousness of Claim 15 Based on YouTube 1 or YouTube 3 in Combination with Yang

Notwithstanding our determination that Petitioner has not satisfied its burden to establish that YouTube 1 and YouTube 3 are admissible prior art (*see* § II.E above), we nonetheless address the merits of Petitioner’s arguments based on these references.

Petitioner argues that claim 15 is obvious in view of YouTube 1 in combination with Yang and in view of YouTube 3 in combination with Yang. Pet. 70. For the reasons discussed below, and based on the record before us, we determine that Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that claim 15 would have been obvious in view of the combinations of YouTube 1 and Yang or YouTube 3 and Yang.

Petitioner relies on its showing regarding claim 6 and argues that Yang's elevator lever 12A and elevator lever 12B are an "elevator column" type platform." Pet. 70 (citing Ex. 1004 ¶¶ 27, 32). Petitioner argues that "[t]his element is . . . well known and old" and "it would be obvious to one skilled in the art to use an 'elevator column' type platform with any tripod, including the Gitzo tripod shown in . . . YouTube1/YouTube3." *Id.*

The shortcomings of Petitioner's treatment of independent claim 6 discussed in section II.G above apply to its dependent claim 15. For the same reasons, Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that claim 15 would have been obvious in view of the combinations of YouTube 1 and Yang or YouTube 3 and Yang. Additionally, Petitioner's asserted rationale for combining the teachings of Yang with YouTube 1 and YouTube 3 consist entirely of attorney argument without citation to any expert testimony regarding the knowledge of an ordinarily skilled artisan or other evidence. Such conclusory assertions fail to establish persuasive reasoning to combine the teachings of the asserted references.

For at least these reasons, Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that claim 15 would have

been obvious in view of the combinations of YouTube 1 and Yang or YouTube 3 and Yang.

J. Asserted Obviousness of Claims 25–28 Based on Gitzo 2009 in Combination with Yang

Petitioner relies on Gitzo 2009 to disclose a platform substantially as recited in claims 25–28, and relies on Yang to teach a rotatable hook. Pet. 73–79. However, as explained in section II.E above, Petitioner has not satisfied its burden to establish that Gitzo 2009 is admissible prior art. Thus, Petitioner does not demonstrate a reasonable likelihood of prevailing in showing that claims 25–28 would have been obvious in view of the combination of Gitzo 2009 and Yang.

III. CONCLUSION

For the foregoing reasons, we are not persuaded that the Petition establishes a reasonable likelihood that Petitioner would prevail in any of its challenges to claims 6–8, 15–17, and 25–28 of the '037 patent.

IV. ORDER

In consideration of the foregoing, it is hereby:
ORDERED that the Petition is *denied*, and no trial is instituted; and
FURTHER ORDERED that Petitioner's *Pro Hac Vice* Motion to Admit Stuart B. Leijon Pursuant to 37 C.F.R. § 42.10(c) (Paper 10) is *dismissed as moot*.

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For PETITIONER:

Howard H. Sheerin
SILICON VALLEY IP LAW
sheerin@siliconvalleyip.com

Steven Rinehart
VESTED LAW LLP
srinehart@vestedlaw.com

For PATENT OWNER:

Kevin L. Russell
Susan D. Pitchford
CHERNOFF VILHAUER LLP
kevin@chernofflaw.com
sdp@chernofflaw.com
patent.docket@chernofflaw.com