

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SERVICENOW, INC.,
Petitioner,

v.

HEWLETT-PACKARD CO.,
Patent Owner.

Case IPR2015-00707
Patent 7,925,981 B2

Before RAMA G. ELLURU, JAMES B. ARPIN, and
CHRISTOPHER L. CRUMBLEY, *Administrative Patent Judges*.

Opinion for the Board filed by ARPIN, *Administrative Patent Judge*.

Opinion Dissenting filed by CRUMBLEY, *Administrative Patent Judge*.

ARPIN, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

A. Background

ServiceNow, Inc. (“Petitioner”) filed a Petition (Paper 1, “Pet.”) to institute an *inter partes* review of claims 1, 22, and 23 (the “challenged claims”) of Patent No. US 7,925,981 B2 to Pourheidari *et al.* (Ex. 1001, “the ’981 patent”), pursuant to 35 U.S.C. §§ 311–319. Pet. 1. Hewlett-Packard Company (“Patent Owner”) filed a Preliminary Response (Paper 11, “Prelim. Resp.”). We have jurisdiction under 35 U.S.C. § 314,¹ which provides that an *inter partes* review may not be instituted “unless . . . 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).

Petitioner relies upon the following references, declaration, and affidavit in support of its ground for challenging claims 1, 22, and 23 of the ’981 patent:

Exhibit	Description
1002	Declaration of Tal Lavian Ph.D.
1004	BEA Systems, Inc., Introducing BEA WebLogic Collaborate (dated July 2001) (“Introducing Collaborate”)
1005	BEA Systems, Inc., Administering BEA WebLogic Collaborate (dated July 2001) (“Administering Collaborate”)
1006	BEA Systems, Inc., Programming BEA WebLogic Collaborate Management Applications (dated July 2001) (“Programming Collaborate”)
1008	David Fox <i>et al.</i> , Web Publisher’s Construction Kit with HTML 3.2 (1996) (“Fox”)
1009	Kenn Scribner <i>et al.</i> , Applied SOAP: Implementing .NET XML Web Services (2001) (“Scribner”)

¹ See Section 6(a) of the Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 116 Stat. 284, 300 (2011).

Exhibit	Description
1011	BEA Unveils Comprehensive Web Services Strategy and Support For Widest Range of Web Services Standards in the Industry, PR Newswire, Feb. 26, 2001
1013	BEA and Gauss Interprise Announce Strategic Relationship, Canadian Corporate Newswire, Aug. 27, 2001
1014	Affidavit of Christopher Butler, dated January 15, 2015 (including Exhibit A (BEA WebLogic Screen Shots)) (“the Butler Affidavit”)

Exhibits 1004–1006 are referred to collectively as the “Collaborate References.” Pet. 20.

Petitioner asserts that the challenged claims are unpatentable on the following ground (Pet. 4, 21–60):

Claims	Ground	References
1, 22, and 23	35 U.S.C. § 103(a)	Collaborate References and Fox

For the reasons set forth below, we determine that, on this record, Petitioner fails to demonstrate a reasonable likelihood of prevailing in showing the unpatentability of any of the challenged claims. Accordingly, we *deny* institution of *inter partes* review as to any of the challenged claims of the ’981 patent.

B. Related Proceedings

Petitioner was sued for infringement of the ’981 patent by Patent Owner: *Hewlett-Packard Co. v. ServiceNow, Inc.*, Case No. 14-CV-00570BLF (N.D. Cal. filed Feb. 6, 2014). Pet. 1. Petitioner has filed a petition seeking covered business method review of the ’981 patent (CBM2015-00077) and petitions to review several of Patent Owner’s other patents – Patent Nos. US 6,321,229 B1 (IPR2015-00523); US 7,392,300 B2

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(IPR2015-00631); US 7,610,512 B2 (IPR2015-00699); US 7,890,802 B2 (IPR2015-00702); and US 7,945,860 B2 (IPR2015-00716).²

C. The '981 Patent

The '981 patent, entitled “Systems and Methods for Managing Web Services Via a Framework of Interfaces,” relates to a web service management system comprising service managed objects. Ex. 1001, col. 3, ll. 41–43. The Specification discloses that managed objects are “management representations of a resource,” that implement “managed object interfaces 130 to provide a common set of basic management capabilities.” *Id.* at col. 7, ll. 25–35. Figure 1A, depicting an embodiment of a web service management system, is reproduced below:

² As with the '981 patent, Patent No. US 7,945,860 B2 (Ex. 1003, “the '860 patent”) was filed on May 14, 2003. Petitioner relies upon the Collaborate References and Fox in its challenges to claims of the '860 patent in IPR2015-00716.

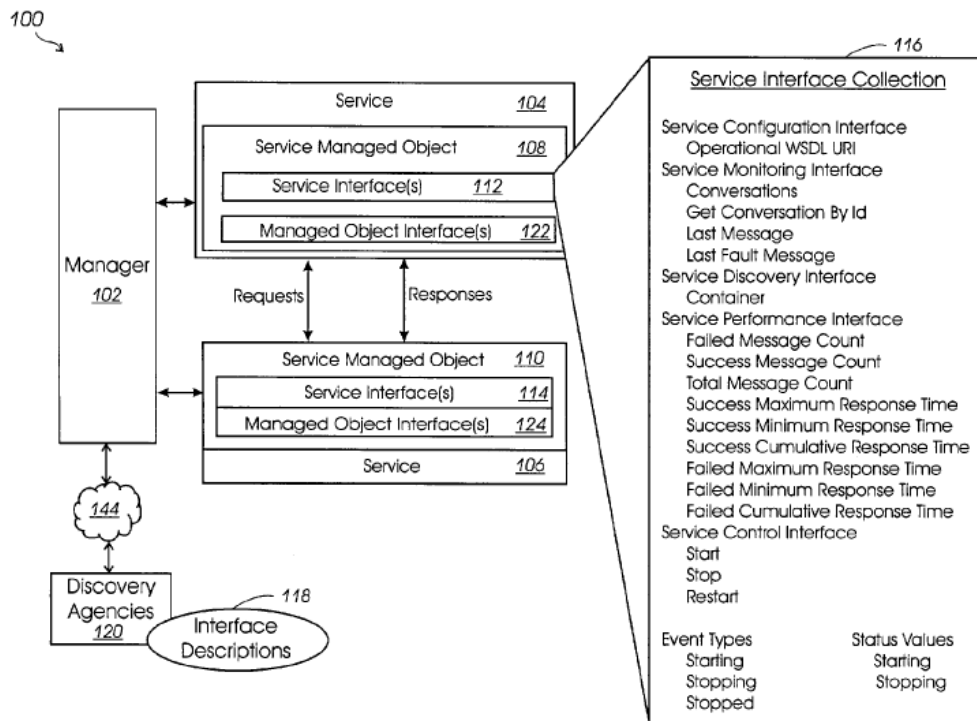


FIG. 1A

Id. at Fig. 1A.

In Figure 1A, web service management system 100 has service managed objects 104, 110 that have service interfaces 112, 114 that allow manager 102 to access information regarding the state of services 104, 110.

Id. at col. 4, ll. 51–60. In this embodiment, the Specification describes that:

Service managed objects 108, 110 represent the management features of resource(s) that perform services 104, 106. Interfaces in one or more categories can be included in service interfaces 112, 114 for each service managed object 108, 110. Service interfaces 112, 114 can allow manager 102 to access information regarding the state of services 104, 106, as well as to control the operation of services 104, 106.

Id. at col. 4, ll. 51–60 (emphases added).

Service managed objects “can be considered managed objects 128.”

Id. at col. 7, ll. 28–29. The Specification explains that a “[m]anaged object

128 implements managed object interfaces 130 to provide a common set of basic management capabilities that allow manager 102 to monitor and/or control the underlying resource(s) represented by managed objects 128 through various features such as attributes, operations, and event notifications.” *Id.* at col. 7, ll. 30–35. Figure 1B, depicting an embodiment of a managed object interface collection for the web service management system of Figure 1A, is reproduced below:

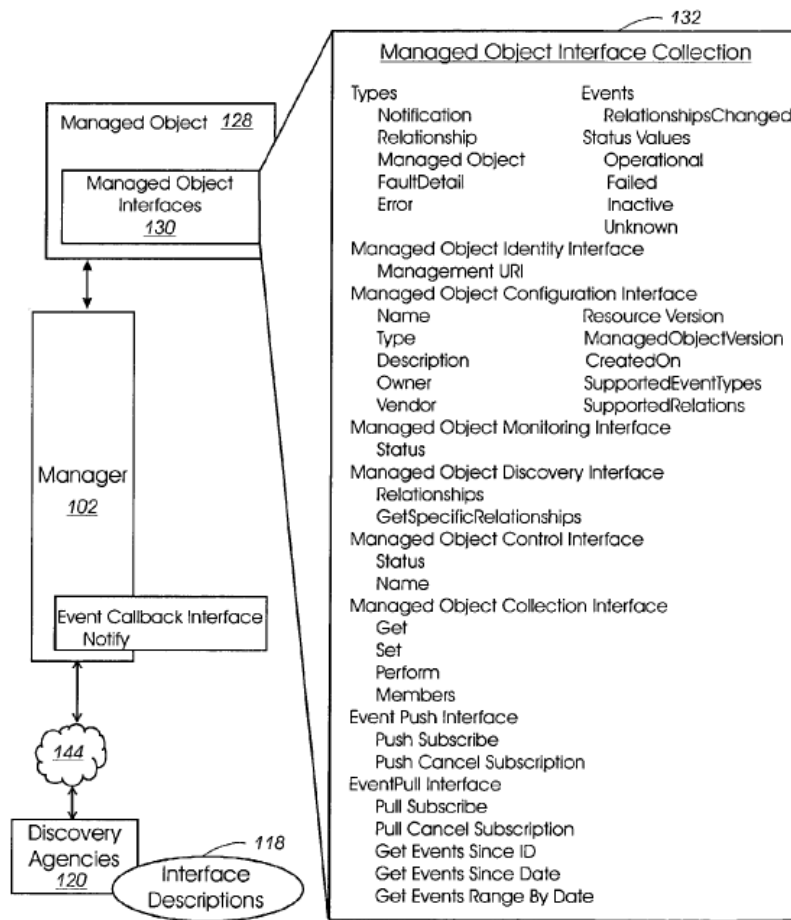


FIG. 1B

Id. at Fig. 1B. Figure 1B depicts Managed Object Interface Collection 132.

Managed Object Configuration Interface of Managed Object Interface Collection 132 can include several attributes regarding the configuration of associated managed object 128, such as Name, Type, Description, Owner, Vendor, Resource Version, Managed Object Version, Created On, Supported Event Types, and Supported Relations. *Id.* at col. 8, ll. 36–40. Supported Relations can represent an attribute that returns a list of the relations supported by managed object 128. *Id.* at col. 9, ll. 10–11. Relations in the returned list may be used in relationships managed object 128 has with other managed objects. “For example, managed object 128 can support relations such as Contains, [Contained In], Depends On, Depended Upon, and Corresponds To.” *Id.* at col. 9, ll. 14–16. As depicted in Figure 1B, other features can be included in Managed Object Interface Collection 132.

D. Illustrative Claim

Petitioner challenges claims 1, 22, and 23 of the '981 patent. Claims 1 and 22 are independent, while claim 23 depends directly from claim 22. Claim 1 is directed to a system for managing a web service; claim 22 is directed to a computer program product tangibly embodied in a computer storage readable medium, comprising a service interface and a managed object interface.

Claim 1 is illustrative and is reproduced below:

1. A system for managing a Web service, comprising:
a computer processor; and

a service managed object executable on the computer processor, wherein:

the service managed object is associated with the Web service and includes at least one interface configured to allow a manager to access management features for the Web service;
and

the at least one interface is configured to provide a list of conversations associated with the Web service.

Ex. 1001, col. 19, ll. 34–43 (claim 1).

E. Claim Construction

Each of Petitioner and Patent Owner proposes a construction for various claim terms, including “Web service,” “managed object,” and “service managed object.” Pet. 11–20; Prelim. Resp. 27–31. We, however, do not construe any term at this time because no term needs to be construed expressly for purposes of this Decision.

II. ANALYSIS

A. Overview

Petitioner argues that claims 1, 22, and 23 of the ’981 patent are rendered obvious by the combinations of references described above. *See supra* Section I.A. Petitioner has the burden to establish in its Petition a reasonable likelihood of success, including, among other things, making a threshold showing that the Collaborate References are “printed publications” within the meaning of 35 U.S.C. §§ 102(b) and 311(b). 35 U.S.C. § 314(a); *see* 37 C.F.R. § 42.108(c); *Apple, Inc. v. DSS Tech. Mgmt., Inc.*, Case IPR2015-00369, slip op. at 4–5, 9–11 (PTAB Aug. 12, 2015) (Paper 14). For the reasons set forth below and on this record, Petitioner does not satisfy its burden.

B. Asserted Grounds

1. Prior Art and Printed Publications

Petitioner argues that each of the Collaborate References is a printed publication that may be asserted properly as a basis for a ground of unpatentability in its Petition because each Collaborate Reference was published more than one year before the filing date (May 14, 2003) of the '981 patent. Pet. 22; *see* 35 U.S.C. § 312(a)(3)(A); 37 C.F.R. § 42.104(b)(2). Patent Owner disagrees, and contends that Petitioner fails to demonstrate that the Collaborate References are prior-art, printed publications. Prelim. Resp. 12–23.

“Public accessibility” is the touchstone in determining whether a reference is a “printed publication.” *In re Hall*, 781 F.2d 897, 898–99 (Fed. Cir. 1986); *see, e.g., L-3 Commc’n. Holdings, Inc. v. Power Survey, LLC*, Case IPR2014-00832, slip op. at 11–12 (PTAB Nov. 14, 2014) (Paper 9) (applied reference not shown to be publicly accessible); *C&D Zodiac, Inc. v. B/E Aerospace, Inc.*, Case IPR2014-00727, slip op. at 20–22 (PTAB Oct. 29, 2014) (Paper 15) (applied reference shown to be publicly accessible). “A reference is publicly accessible ‘upon a satisfactory showing that such document has been 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.’” *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008) (quoting *SRI Int’l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008)). The status of a reference as a printed publication is a legal question “based on underlying factual determinations.” *Id.*

[W]hether information is printed, handwritten, or on microfilm or a magnetic disc or tape, etc., the one who wishes

to characterize the information, in whatever form it may be, as a ‘printed publication’ . . . should produce sufficient proof of its dissemination or that it has otherwise been available and accessible to persons concerned with the art to which the document relates and thus most likely to avail themselves of its contents.

In re Wyer, 655 F.2d 221, 227 (CCPA 1981). As noted above, Petitioner expressly argues that the Collaborate References qualify as prior art because they were published more than one year prior to the filing date of the ’981 patent. Pet. 3, 22.

a. The Wayback Machine Service

In support of Petitioner’s argument that the Collaborate References were available for download more than one year prior to May 14, 2013, Petitioner submits an affidavit of Christopher Butler, Office Manager of Internet Archive, San Francisco, CA, which is the creator of the Wayback Machine service. Ex. 1014, 1. Attached to the Butler Affidavit is Exhibit A, which includes “true and accurate copies of printouts of the Internet Archive’s records of the HTML files for the URL[’]s [of each of the Collaborate References] and the dates specified in the footer of the printout.” *Id.* Moreover, the Butler Affidavit explains how the date of the webpage can be determined from the URL. *Id.* In particular, Exhibit A includes printouts for the following URLs:

URL	Date
https://web.archive.org/web/20010829204911/http://e-docs.bea.com/wlintegration/v2_0/collaborate/interm/pdf.htm (Ex. 1014, 4–5 (emphasis added))	Aug. 29, 2001 ³

³ These dates were determined based on the explanation provided in the Butler Affidavit. Ex.1014, 1 (paragraph five).

URL	Date
https://web.archive.org/web/20010829205428/http://e-docs.bea.com/wlintegration/v2_0/collaborate/interm/sitemap.htm (Ex. 1014, 6 (emphasis added))	Aug. 29, 2001
https://web.archive.org/web/20020111212156/http://e-docs.bea.com/wlintegration/v2_0/collaborate/intro/index.htm (Ex. 1014, 7 (“Introducing Collaborate”) (emphasis added))	Nov. 1, 2002
https://web.archive.org/web/20010915203606/http://e-docs.bea.com/wlintegration/v2_0/collaborate/admin/index.htm (Ex. 1014, 8–10 (“Administering Collaborate”) (emphasis added))	Sep. 15, 2001
https://web.archive.org/web/20010915214820/http://e-docs.bea.com/wlintegration/v2_0/collaborate/devmgmt/index.htm (Ex. 1014, 11 (“Programming Collaborate”) (emphasis added))	Sep. 15, 2001
https://web.archive.org/web/20010915212456/http://e-docs.bea.com/wlintegration/v2_0/collaborate/devlog/index.htm (Ex. 1014, 11 (emphasis added))	Sep. 15, 2001

Initially, we note that, even relying on Exhibit A to the Butler Affidavit, the webpage for the Introducing Collaborate Reference was archived on November 1, 2002, less than one year prior to the May 14, 2003 filing date of the ’981 patent and, thus, fails to qualify as a prior-art, printed publication under 35 U.S.C. § 102(b), as argued by Petitioner.⁴ Pet. 3, 22.

Petitioner argues that:

In this case, the Internet Archive captured a webpage entitled “BEA WebLogic Collaborate 2.0: PDF” that includes download links to various documents (in PDF form), including the

⁴ Because each of Petitioner’s asserted grounds relies on a combination including all three of the Collaborate References, Petitioner would fail to establish a reasonable likelihood of success if any of the Collaborate References fails to qualify as a prior-art, printed publication.

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Collaborate References cited in this Petition. (Lavian Decl., Ex. 1002, ¶ 144; Butler Aff., Ex. 1014, Ex. A (BEA download page).) Based on the date of capture recorded by the Internet Archive, the page was publicly accessible through the web *by no later than August 29, 2001*. (Lavian Decl., Ex. 1002, ¶ 144.)

Pet. 23 (emphasis added). The webpage in Exhibit A to the Butler Affidavit, listing the Collaborate References and including our annotations, is reproduced below:

pdf files

Get Acrobat Don't have Adobe Acrobat Reader?
It's free! Get it from the [Adobe Web site](#).

PDF Documents

Getting Started

Introducing: [Introducing BEA WebLogic Collaborate](#)
Installing: [Installing BEA WebLogic Collaborate](#)
Migrating: [Migrating BEA WebLogic Collaborate to Release 2.0](#)
Samples: [Using BEA WebLogic Collaborate Samples](#)

Administering WebLogic Collaborate

Administering: [Administering BEA WebLogic Collaborate](#)
Administration: [BEA WebLogic Collaborate Administration Console Online Help](#)
Console: [Using BEA WebLogic Collaborate Security](#)

Working with Workflows

Creating Workflows: [Creating Workflows for BEA WebLogic Collaborate](#)
Tutorial: [Learning to Use BEA WebLogic Process Integrator](#)
Studio: [Using the BEA WebLogic Process Integrator Studio](#)
Worklist: [Using the BEA WebLogic Process Integrator Worklist](#)

Working with Business Protocols

RosettaNet: [Implementing RosettaNet for BEA WebLogic Collaborate](#)
cXML: [Implementing cXML for BEA WebLogic Collaborate](#)

Developing Applications

Management Apps: [Programming BEA WebLogic Collaborate Management Applications](#)
Messaging Apps: [Programming BEA WebLogic Collaborate Messaging Applications](#)
Logic Plug-Ins: [Programming BEA WebLogic Collaborate Logic Plug-Ins](#)
Log: [Writing to the BEA WebLogic Collaborate Log](#)

Reference

Glossary: [BEA WebLogic Collaborate Glossary](#)

PDF Tips

Printing and Graphics: These PDF files give you the option of printing the documents. It is better to print from the PDF files than from the HTML files.

004 ServiceNow, Inc.'s Exhibit 1014
https://web.archive.org/web/20010829204911/http://e-docs.bea.com/wlintegration/v2_0/collaborate/interm/pdf.htm

Petitioner further argues that

[this] download page was part of what BEA called its “e-docs Web Site” (edocs.bea.com), which the Collaborate References themselves describe as a central source of documentation about BEA’s products. (See Introducing

Collaborate, Ex. 1004, at vi (“The WebLogicCollaborate product documentation is available on the BEA Systems, Inc. corporate Web site.”); Administering Collaborate, Ex. 1005, at x (“From the BEA Home page, click on Product Documentation or go directly to the ‘e-docs’ Product Documentation page at <http://e-docs.bea.com>.”); *id.* at xi (“A PDF version of this document is available from the BEA WebLogic Collaborate documentation Home page . . . at <http://edocs.bea.com>.”).)

Pet. 23–24; *see also* Ex. 1006, 6 (“BEA product documentation is available at the following location: <http://e-docs.bea.com>.”).

Nevertheless, Petitioner fails to make the critical link between the alleged identification of the Collaborate References on the “download page” and the exhibits relied upon in support of its asserted grounds. Despite Petitioner’s arguments and assertion that this “page” was publicly accessible “by no later than August 29, 2001,” Petitioner fails to demonstrate Exhibits 1004–1006, which Petitioner relies upon in support of each of the asserted grounds, were publicly accessible through the webpages included in Exhibit A to the Butler Affidavit more than one year prior to May 14, 2003. *See* Pet. 23; Ex. 1002 ¶ 144. This failure goes hand-in-hand with Petitioner’s alleged failure properly to authenticate Exhibits 1004–1006. *See* Prelim. Resp. 6.

Patent Owner contends that the evidence available from the Wayback Machine service demonstrates that Exhibits 1004–1006 were not publicly accessible prior to May 14, 2003. Prelim. Resp. 12–23. In Exhibit 2001, Patent Owner submits screenshots depicting the URLs of the archived documents obtained by linking to the indicated documents on the “download page” of the Butler Affidavit’s Exhibit A. *Id.* at 9–10 (reproducing Ex. 2001, 1–3). Using the explanation for date determination provided in the

Butler Affidavit (Ex. 1014, 1), Patent Owner produced the following table indicating the dates on which each of Exhibits 1004–1006 was archived:

Ex. No.	URL of Wayback Machine Archive	Date of Capture
1004	https://web.archive.org/web/20041126061609/http://e-docs.bea.com/wlintegration/v2_0/collaborate/pdf/intro.pdf	11/26/04
1005	https://web.archive.org/web/20041126061916/http://e-docs.bea.com/wlintegration/v2_0/collaborate/pdf/admin.pdf	11/26/04
1006	https://web.archive.org/web/20030611035358/http://e-docs.bea.com/wlintegration/v2_0/collaborate/pdf/mgmtapps.pdf	6/11/03

Prelim. Resp. 11; *see also* Ex. 2002, 1–3 (dates provided by the Wayback Machine service). Patent Owner contends that the Wayback Machine service shows dates of capture for Exhibits 1004 and 1005 of November 26, 2004, and for Exhibit 1006 of June 11, 2003; each of these dates is after May 14, 2003. Prelim. Resp. 11–12. That the archived dates for Exhibits 1004–1006 vary is consistent with the varying archived dates noted above for the webpages identified in Exhibit A to the Butler Affidavit. Thus, on this record, we are not persuaded that Petitioner demonstrates that the evidence drawn from the Wayback Machine service is sufficient to show a reasonable likelihood that Exhibits 1004–1006 were printed publications that were prior art to the '981 patent.

b. The Dates on Exhibits 1004–1006 and the Download Instructions

Petitioner argues that each of Exhibits 1004–1006 includes the date “July 2001” on its face (*see, e.g.*, Ex. 1004, 1) and includes a copyright date of “2001” (*see, e.g., id.* at 2). Pet. 22. Further, as noted above, Petitioner

argues that each of Exhibits 1004–1006 indicates that the reference is available for download from BEA Systems, Inc. *Id.* at 23–24; *see, e.g.*, Ex. 1004, 6 (“The WebLogicCollaborate product documentation is available on the BEA Systems, Inc. corporate Web site.”).

Patent Owner contends that the date on the face of each exhibit, the copyright dates, and the indications of the availability of these references for download from BEA Systems, Inc. are inadmissible hearsay. Prelim. Resp. 13–15. To the extent that Petitioner relies on the date on the face of each exhibit and the indications of the availability of these references for download from BEA Systems, Inc. for the truth of that information, and considering that Petitioner has not established that any hearsay exception or exclusion applies, we agree with Patent Owner. *See Apple*, Case IPR2015-00369, slip op. at 6 (Paper 14).

In addition, as Patent Owner notes, each of Exhibits 1004–1006 includes the following statement restricting use and dissemination of the Collaborative References:

Restricted Rights Legend

This software and documentation is subject to and made available only pursuant to the terms of the BEA Systems License Agreement and may be used or copied only in accordance with the terms of that agreement. . . . This document may not, in whole or in part, be copied photocopied, reproduced, translated, or reduced to any electronic medium or machine readable form without prior consent, in writing, from BEA Systems, Inc.

Prelim. Resp. 20 (quoting Ex. 1004, 2; Ex. 1005, 2; Ex. 1006, 2). We consider the references as a whole and read the download instructions, cited by Petitioner, in view of the restrictions on use and dissemination that also are set forth in the references. We are persuaded that, read together, the

download instructions and the Restricted Rights Legends do not provide sufficient evidence that these references were publicly accessible.

At least one panel of the Board has determined that reliance on a copyright notice as evidence that a reference was a printed publication as of a particular date is inadmissible hearsay. *See Standard Innovation Corp. v. Lelo, Inc.*, Case IPR2014-00148, slip op. at 13–16 (PTAB Apr. 23, 2015) (Paper 41). We note, however, that, when determining the threshold issue of whether a reference is a printed publication for purposes of a decision on institution, a copyright notice has been accepted as prima facie evidence of publication.⁵ *See Ford Motor Co. v. Cruise Control Techs. LLC*, Case IPR2014-00291, slip op. at 7–8 (PTAB June 29, 2015) (Paper 44) (citing *FLIR Sys., Inc. v. Leak Surveys, Inc.*, Case IPR2014-00411, slip op. at 18–19 (PTAB Sept. 5, 2014) (Paper 9)). We are not bound by the determinations noted above, and, on this record, we are not persuaded that the presence of a copyright notice, without more, is sufficient evidence of public accessibility as of a particular date. *See, e.g., LG Electronics, Inc. v. Advanced Micro Devices, Inc.*, Case IPR2015-00329, slip op. at 10–13 (PTAB July 10, 2015) (Paper 13).

Consequently, on this record, we are not persuaded that Petitioner demonstrates that the dates on Exhibits 1004–1006, the download instructions, or both, is sufficient to show a reasonable likelihood that Exhibits 1004–1006 were publicly accessible more than one year prior to May 14, 2003.

⁵ “[A] notice of copyright . . . may be placed on publicly distributed copies from which the work can be visually perceived” 17 U.S.C. § 401(a) (emphasis added).

c. Petitioner's Declarants

Petitioner argues that, “[a]s explained by Dr. Lavian and in the accompanying ‘Affidavit of Christopher Butler’ from the Internet Archive, the Collaborate References were publicly available for download from BEA’s website no later than August 2001.” Pet. 22 (citing Ex. 1002 ¶¶ 142–47; Ex. 1014, 1). Patent Owner disagrees, and contends that Petitioner’s declarants’ testimony fails to demonstrate that they or anyone else used the identified webpages or the search engines identified by Dr. Lavian “to locate the Collaborate References in July 2001 or at any other time before May 14, 2003.” Prelim. Resp. 20–21.

Neither Mr. Butler nor Dr. Lavian testifies expressly that Exhibits 1004–1006 could have been downloaded prior to May 14, 2003. *See id.* at 21–22. As noted above, Mr. Butler merely testifies regarding the operation of the Wayback Machine service and to the accuracy of the printouts provided in Exhibit A. Ex. 1014, 1. Dr. Lavian testifies that the “download page” contains links to the Collaborate References (Ex. 1002 ¶¶ 147), and opines that he has “seen no evidence suggesting that a person of ordinary skill in the art would have *experienced difficulty* locating the Collaborate References from BEA’s website.” *Id.* (emphasis added). Nevertheless, Dr. Lavian does not testify that he downloaded Exhibits 1004–1006 from the download page before May 14, 2003, or that he is aware of anyone else who did. *See Dish Network L.L.C. v. Dragon Intellectual Property, LLC*, Case IPR2015-00499, slip op. at 10–11 (PTAB July 17, 2015) (Paper 7).

Consequently, on this record, we are not persuaded that Petitioner demonstrates that the testimony of Dr. Lavian (Ex. 1002) or Mr. Butler (Ex. 1014), or both, is sufficient to show a reasonable likelihood that Exhibits

1004–1006 were publicly accessible more than one year prior to May 14, 2003.

d. Press Releases Regarding BEA Activities in 2001

Finally, Petitioner alleges that “BEA Systems, Inc., the company that made the Collaborate References, was a well-known provider of web services products in the early 2000s” and notes that that the company claimed to have more than 11,000 customers worldwide by 2001. Pet. 24 (citing Ex. 1002 ¶ 148); *see* Ex. 1011, 1; Ex. 1013, 1. Patent Owner contends that Petitioner does not offer any testimony from BEA Systems, Inc. or from its customers attesting that the Collaborate References were provided or made available to BEA’s customers more than one year before May 14, 2003. Prelim. Resp. 13. Further, as noted above, each of Exhibits 1004–1006 bears a notice restricting its dissemination and the use of the described products to the terms of the BEA Systems Licensing Agreement. *E.g.*, Ex. 1004, 2. In view of this restriction, we are not persuaded that Petitioner’s evidence of the number of BEA’s customers prior to May 14, 2003 sufficiently demonstrates that Exhibits 1004–1006 had been “disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, [could] locate [them].” *Kyocera*, 545 F.3d at 1350. Thus, on this record, we are not persuaded that Petitioner demonstrates that the press releases (Exs. 1011 and 1013) discussing activities of BEA Systems, Inc. are sufficient to show a reasonable likelihood that Exhibits 1004–1006 were publicly accessible more than one year prior to May 14, 2003.

Consequently, on this record and for purposes of this Decision, we are

not persuaded that Petitioner has demonstrated a reasonable likelihood of prevailing in establishing that the Collaborate References are prior-art, printed publications.

2. *Obviousness of Claims 1, 22, and 23 over Collaborate References and Fox*

Petitioner asserts that claims 1, 22, and 23 are unpatentable under 35 U.S.C. § 103(a) over the Collaborate References and Fox. Pet. 21–60. Because we are not persuaded that Petitioner has demonstrated a reasonable likelihood that the Collaborate References are prior-art, printed publications (*see supra* Section II.B.1.), we are not persuaded that Petitioner has demonstrated a reasonable likelihood of showing that any of claims 1, 22, and 23 is unpatentable under 35 U.S.C. § 103(a) over the Collaborate References and Fox.

III. CONCLUSION

Petitioner fails to demonstrate that there is a reasonable likelihood of prevailing in its challenge to the patentability of claims 1, 22, and 23 of the '981 patent. Consequently, the Petition is *denied* as to each of the asserted grounds.⁶

⁶ The dissent differs from the majority on two basic issues: the sufficiency of the evidence presented in the Petition, considered in light of the evidence presented in the Preliminary Response, and the relevance of evidence presented at this stage of the proceeding to the decision to institute. With respect to the first issue, reasonable minds may differ as to the weight appropriately accorded to presented evidence. With respect to the second issue, the Petition represents Petitioner's case in chief. The possibility that Petitioner has or may obtain additional persuasive evidence regarding the public accessibility of the Collaborate References and that such evidence properly may be introduced into this case is speculative.

IV. ORDER

For the reasons given, it is

ORDERED that the Petition is *denied*, and no *inter partes* review is instituted.

CRUMBLEY, *Administrative Patent Judge, dissenting.*

I agree with the majority’s recitation of the facts, established by the present record. I also agree with the majority’s evaluation that the evidence submitted by Patent Owner casts doubt on Petitioner’s assertion that the Collaborate References are prior art to the ’981 patent. Where the majority and I part ways, however, is whether this record meets the “reasonable likelihood” standard for institution of an *inter partes* review. See Majority Opinion 19–20. Because I find that the information presented in the Petition and the Preliminary Response shows that there is a reasonable likelihood Petitioner would prevail, I respectfully dissent.

In an *inter partes* review trial, the petitioner bears the burden of establishing unpatentability of the challenged claims by a preponderance of the evidence. 35 U.S.C. § 316(e). This burden only applies at the conclusion of the trial and the close of the evidence; we do not require a petitioner to meet its ultimate burden based on the information in its petition alone. Rather, the statute speaks in general terms of whether *the record* as it stands at that time of the decision on institution – “the information presented in the petition . . . and any response” – shows that there is a reasonable likelihood of the petitioner prevailing. 35 U.S.C. § 314(a); see *Aruze Gaming Macau, Ltd. v. MGT Gaming, Inc.*, Case IPR2014-01288, slip op. at 6 (PTAB Feb. 20, 2015) (Paper 13). The legislative history of the America Invents Act indicates that the reasonable likelihood standard was intended to “require[] the petitioner to present a prima facie case,” akin to a District Court’s determination of “whether a party is entitled to a preliminary injunction.” See 157 Cong. Rec. S1375 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl). As the Supreme Court has noted in the preliminary injunction

context, “[a] party thus is not required to prove his case in full.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

The reasonable likelihood standard for instituting *inter partes* review is, therefore, not a *lower* standard of proof than a preponderance of the evidence, but instead asks whether the same preponderance standard is reasonably likely to be met *at a later time*. We must assess the persuasiveness of the petitioner’s evidence while “recognizing that [we are] doing so without all evidence that may come out at trial.” *New England Braiding Co. v. A.W. Chesterton Co.*, 970 F.2d 878, 883 (Fed. Cir. 1992). As such, we have required only a “threshold showing” of public availability in order to institute trial. *See Apple, Inc. v. DSS Tech. Mgmt., Inc.*, Case IPR2015-00369, slip op. at 5 (PTAB Aug. 12, 2015) (Paper 14). When petitioners have not come forward with *any* credible evidence establishing a key aspect of public availability, we have denied institution. *See id.* at 5–6 (no evidence thesis was indexed, cataloged, and shelved); *Actavis, Inc. v. Research Corp. Techs., Inc.*, Case IPR2014-01126, slip op. at 10–13 (PTAB Jan. 9, 2015) (Paper 21) (same); *Cisco Systems, Inc. v. Constellation Techs., LLC*, Case IPR2014-01085, slip op. at 7–9 (PTAB Jan. 9, 2015) (Paper 11) (noting “naked assertion,” unsupported by record, that reference was published).

The majority faults Petitioner for not establishing sufficiently that the Collaborate References were publicly available more than one year prior to the filing date of the ’981 patent. *See* Majority Opinion, Sections II.B.1.a–d. I agree that the record, as it currently stands, does not convincingly establish this fundamental aspect of Petitioner’s case. But the record does not convincingly establish the converse, either. In my view, the 2001 dates on

the cover pages of the Collaborate References (*e.g.*, Ex. 1004, 1), their 2001 copyright notices (*id.* at 2), and the August 29, 2001 Wayback Machine archive date for the BEA e-docs page (Ex. 1014, 4) are sufficient to make a “threshold showing” of public availability, similar to showings that we have found sufficient to institute trial in the past. *See LG Electronics, Inc. v. Advanced Micro Devices, Inc.*, Case IPR2015-00329, slip op. at 11–12 (PTAB July 10, 2015) (“the presence of a copyright notice, together with the listing of the reference in an IDS, may be taken as *some* evidence of public accessibility as of a particular date”) (emphasis added). While these showings are called into question by Patent Owner’s evidence, it is just that: an open question that we should permit the record, as developed during a full trial, to answer.

To require Petitioner to fully establish public availability at this stage of the proceeding also ignores the fact that, during trial, there are opportunities for a petitioner to introduce additional evidence. For instance, the Board has granted other petitioners’ motions to submit supplemental information under 37 C.F.R. § 42.123, in order to confirm the public availability of references upon which trial had been instituted. *Biomarin Pharm. Inc. v. Genzyme Therapeutic Prods. Ltd. P’shp*, Case IPR2013-00534, slip op. at 5–6 (PTAB Jan. 7, 2015) (Paper 78); *Valeo North America, Inc. v. Magna Elecs., Inc.*, Case IPR2014-01204, slip op. at 2–3, 5 (PTAB Apr. 10, 2015) (Paper 26); *Ford Motor Co. v. Paice LLC*, Case IPR2014-01415, slip op. at 2 (PTAB Apr. 27, 2015) (Paper 15). I see no reason why, in this case, Petitioner should not be afforded a similar opportunity, given that it has made a threshold showing in its Petition.

Finally, I consider premature the majority's determination that certain evidence supporting public availability – the dates on the face of each Collaborate Reference, their copyright dates, and the indications of the availability of these references for download from BEA Systems, Inc. – is inadmissible hearsay. *See* Majority Opinion, Section II.B.1.b. Our Rules set forth a specific procedure for making evidentiary rulings on the admissibility of evidence submitted during a preliminary proceeding: a party must object within a specified time after institution (37 C.F.R. § 42.64(b)(1)), the proffering party may respond by serving supplemental evidence (37 C.F.R. § 42.64(b)(2)), and the objecting party must preserve its objection by filing a Motion to Exclude (37 C.F.R. § 42.64(c)), which gives the proffering party the opportunity to file a responsive brief addressing admissibility. Significantly, each of these procedures takes place *after* the institution of trial.

At present, Patent Owner has asserted in its Preliminary Response that the dates are inadmissible hearsay; Petitioner has not had the opportunity to respond to these challenges and explain, for instance, whether a hearsay exception applies. It is premature to determine that the objected-to Collaborate References dates are inadmissible hearsay. At this stage of the proceeding, we are only tasked with determining whether Petitioner has a reasonable likelihood of carrying its burden at the close of the evidence, not with making admissibility rulings on that evidence.¹ *See HTC Corp. v.*

¹ The decision to exclude a copyright date as hearsay in *Standard Innovation Corp. v. Lelo, Inc.*, Case IPR2014-00148 (PTAB Apr. 23, 2015) (Paper 41), relied on by Patent Owner and cited by the majority, is procedurally distinguishable from the present case. That decision was a Final Written

Advanced Audio Devices, LLC, Case IPR2014-01158, slip op. at 21–22 (PTAB Jan. 24, 2014) (Paper 6) (finding pre-institution objection to authentication of exhibit premature).

Considering the evidence proffered by Petitioner — including the dates on each Collaborate Reference and the Wayback Machine archive date of the BEA e-docs site listing the Collaborate References (Ex. 1014, 4–5) — along with the evidence proffered by Patent Owner — including the later Wayback Machine archive dates on the Collaborate References themselves (Ex. 2002) — I would conclude that there is a reasonable likelihood that Petitioner may yet, during the course of an *inter partes* review trial, adduce evidence sufficient to prove that the Collaborate References were publicly available as of the critical date. I would then proceed to consider the merits of Petitioner’s unpatentability arguments, and determine whether institution of an *inter partes* review is justified. Because the majority’s decision does not do so, I respectfully dissent.

Decision rendered at the close of the evidence and following briefing on a Motion to Exclude.

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