

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ASM IP HOLDING B.V.,  
Petitioner,

v.

KOKUSAI ELECTRIC CORPORATION,  
Patent Owner.

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Case IPR2019-00369  
Patent 7,808,396

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Before KRISTINA M. KALAN, MICHELLE N. WORMMEESTER, and  
SHELDON M. McGEE, *Administrative Patent Judges*.

McGEE, *Administrative Patent Judge*.

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

## I. INTRODUCTION

### A. *Background*

ASM IP Holding B.V. (“Petitioner”) filed a Petition requesting an *inter partes* review of claims 1–10 of U.S. Patent No. 7,808,396 (Ex. 1001, “the ’396 patent”). Paper 2 (“Pet.”). Kokusai Electric Corporation (“Patent Owner”) filed a Preliminary Response to the Petition. Paper 7 (“Prelim. Resp.”).

We have jurisdiction under 35 U.S.C. § 314, 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). Upon consideration of the Petition, the Preliminary Response, and the evidence of record, we determine Petitioner has failed to show a reasonable likelihood that it would prevail in showing the unpatentability of at least one of the challenged claims. Accordingly, we decline to institute an *inter partes* review of the ’396 patent.

### B. *Related Proceedings*

The parties identify the following proceeding as involving the ’396 patent: *Hitachi Kokusai Electric Inc. v. ASM International, N.V.*, No. 5:17–cv–06880 (N.D. Cal.). Pet. 73; Paper 5, 1 (Patent Owner’s Mandatory Notices).

### C. *The ’396 Patent (Ex. 1001)*

The ’396 patent, titled “Substrate Processing Apparatus,” issued on October 5, 2010. Ex. 1001, at [54], [45]. The ’396 patent relates to “a substrate processing apparatus capable of reliably informing a running state of the apparatus.” *Id.* at [57].

Figure 3 of the '369 patent, reproduced below, illustrates an exemplary substrate processing system:

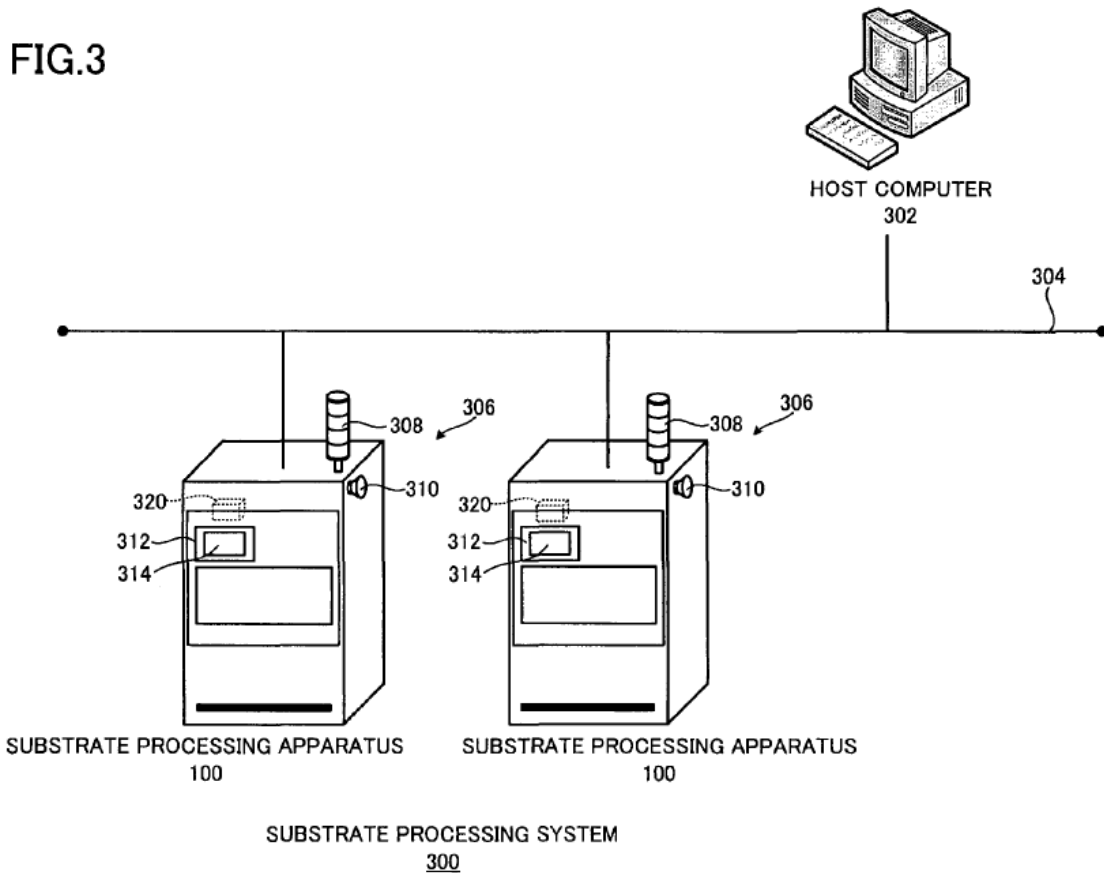


Figure 3 depicts a substrate processing system 300 containing multiple substrate processing apparatuses 100. *Id.* at Fig. 3, 7:26–28. Each apparatus 100 contains—as signal indicator 306—signal tower 308 and buzzer 310, which “operate to indicate an operation state of the substrate processing apparatus 100 to the outside.” *Id.* at 7:34–39. “[S]ignal tower 308 has light sources that are LEDs or bulbs [which] are layered as a plurality of stages (for example, four stages), and the light sources emit lights different in color from one another (for example, red, green, yellow, and blue).” *Id.* at 7:40–43. “[B]uzzer 310 is capable of making (operating) sounds such as a continuous sound, an intermittent sound, voice, and a

melody at a predetermined sound pressure level.” *Id.* at 7:48–50. “The signal tower 308 and the buzzer 310 are capable of outputting the operation state (for example, light-on, blinking, making sound, and the like) to a predetermined device that is connected thereto as an output value.” *Id.* at 7:51–54.

Apparatus 100 also contains “[a] user interface device (UI device) 312 [which] is provided integrally.” *Id.* at 7:55–56. UI device 312 contains a panel or display 314, which “displays an operation state (light-on, blinking, making sound, etc.) that indicates an operation condition under which the signal indicator 306 operates and that the signal indicator 306 satisfies the operation condition.” *Id.* at 7:55–67.

Figure 8 of the ’369 patent, reproduced below, illustrates an input screen 318, which may be provided on display 314 of apparatus 100:

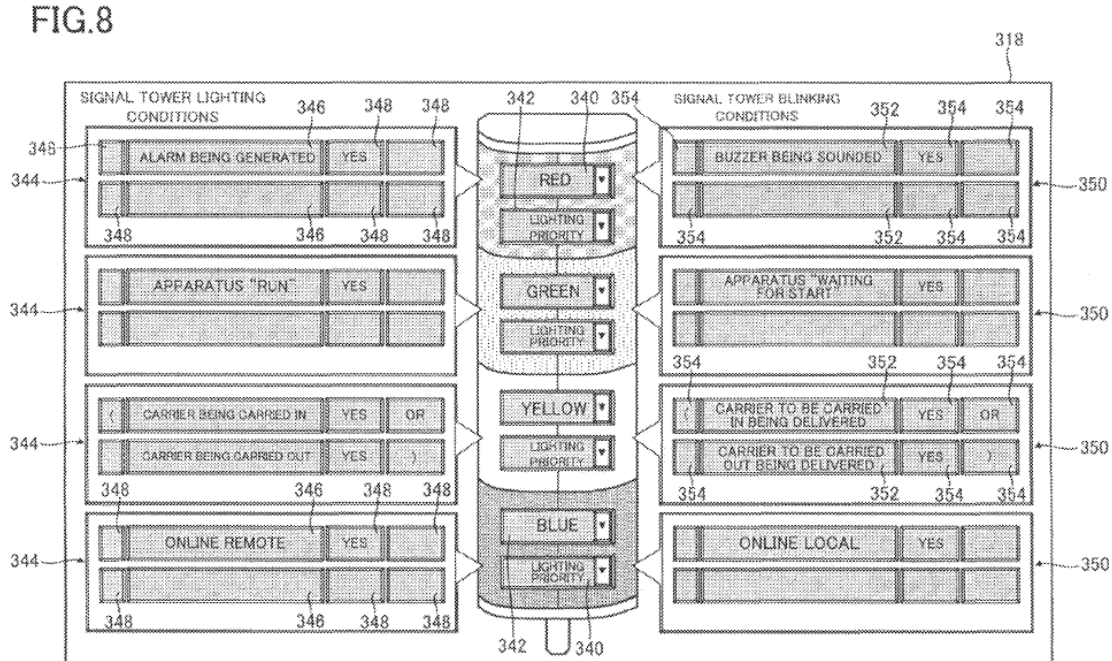


Figure 8 depicts “a first input screen 318 which is an operation screen displayed on the display unit 314 of the UI device 312. The user operates on

the first input screen 318 to set an operation condition of the signal tower 308.” *Id.* at 10:5–8. As depicted in Figure 8, the user may set lighting and blinking conditions of the signal tower 308 in the first input screen. *Id.* at 10:9–11.

Figure 8 illustrates: “At a central part of the first input screen 318, a plurality of [e.g., four] color distinction input sections 340” which “are used for setting light emission colors of the signal towers 308 by selection among four colors, for example (e.g., red, green, yellow, and blue, etc.).” *Id.* at 10:12–17. Figure 8 also depicts “priority setting input sections 342 . . . corresponding to the color distinction input sections 340 [which] are displayed below<sup>[1]</sup> the color distinction input sections 340.” *Id.* at 10:17–21. Figure 8 also illustrates input sections 344 for entering the lighting condition, i.e., an operation condition, “corresponding to the color distinction sections 340” which “are used for setting light emission colors of the signal [indicator] tower 308.” *Id.* at 10:14–15, 28–31.

*D. Challenged Claims of the '396 patent*

Of challenged claims 1–10, claims 1, 9, and 10 are independent. Representative claim 1 is reproduced below:

1. [a] A substrate processing apparatus comprising a signal indicator for indicating a running state, comprising:
  - [b] a plurality of signal indicators operating under any one of a plurality of operation conditions, and
  - [c] a display unit for displaying the operation conditions of the signal indicators, the operation conditions being set independently in advance of being displayed, wherein
  - [d] the display unit displays whole operation causes which corresponds to the signal indicators and

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<sup>1</sup> The bottom portion of the signal tower that is identified as “BLUE” appears to mislabel sections 340 and 342.

[e] displays with a different color the operation cause which corresponds to the operation of the signal indicator among the whole operation causes.

*Id.* at 18:50–61 (bracketing and formatting added).

*E. Asserted Grounds of Unpatentability*

Reference(s)	Basis	Claim(s) Challenged
Kang <sup>2</sup> in view of Tencor, <sup>3</sup> and further in view of Rusnica <sup>4</sup>	§ 103	1–3 and 6–8
Kang in view of Tencor, and further in view of Rusnica and Eryurek <sup>5</sup>	§ 103	4 and 5
Tencor	§ 103	9
Kang in view of Tencor	§ 103	10

Petitioner relies on the declaration of Dr. Alexander Glew (Ex. 1003) in support of its contentions.

## II. ANALYSIS

*A. Claim Construction*

We apply the same claim construction standard that is applied in civil actions under 35 U.S.C. § 282(b), which is articulated in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). *See* Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board, 83 Fed. Reg. 51,340 (Oct. 11, 2018)

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<sup>2</sup> KR 2003-0058863, published July 7, 2003 (Ex. 1006).

<sup>3</sup> Tencor® P-20h Long Scan Profiler Operations, Rev. F, no publication date provided (Ex. 1005).

<sup>4</sup> US 5,859,885, issued January 12, 1999 (Ex. 1007).

<sup>5</sup> US 7,079,984, issued July 18, 2006 (Ex. 1008).

(applicable to *inter partes* reviews filed on or after November 13, 2018). Petitioner asserts that a *Phillips*-type construction is appropriate for this proceeding. Pet. 4. Under *Phillips*, claim terms are afforded “their ordinary and customary meaning.” *Phillips*, 415 F.3d at 1312. “[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.” *Id.* at 1313. Only terms that are in controversy need to be construed, and then only to the extent necessary to resolve the controversy. *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

Petitioner provides several proposed claim constructions, none of which are challenged by Patent Owner. Pet. 4–18; *see generally* Prelim. Resp. For purposes of this Decision, however, we determine that no claim terms require an explicit construction.

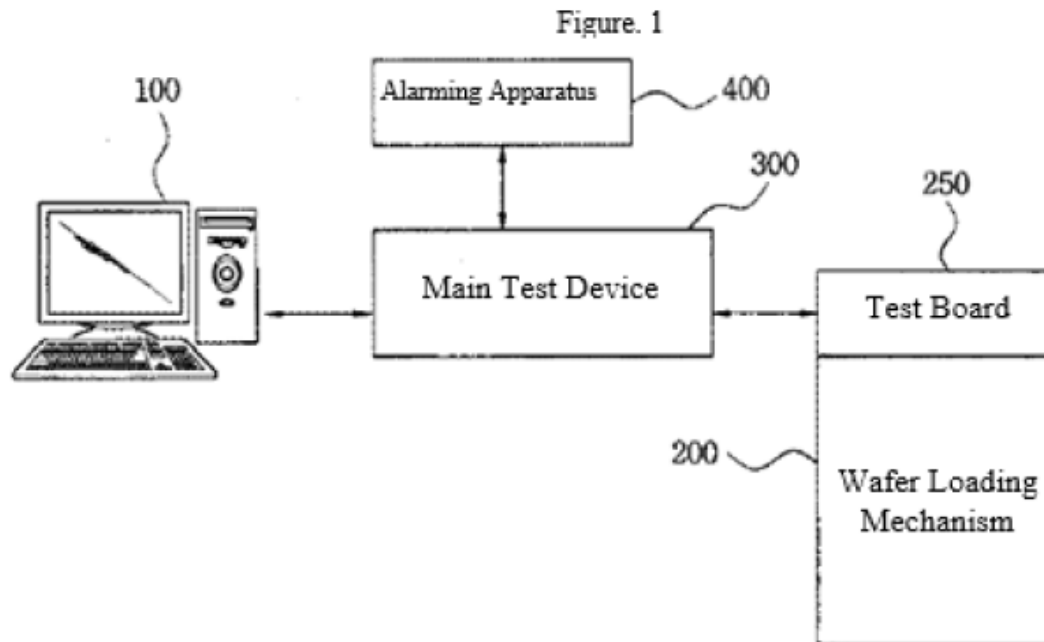
*B. Asserted Obviousness based on Kang, Tencor, and Rusnica*

Petitioner asserts that claims 1–3 and 6–8 of the ’369 patent are unpatentable as obvious over the combined disclosures of Kang, Tencor, and Rusnica under 35 U.S.C. § 103. Pet. 22–51. Patent Owner opposes, contending that Petitioner failed to establish that Tencor was “publicly accessible,” and therefore available as a prior art printed publication. Prelim. Resp. 4–19. Patent Owner also alleges that Tencor and Rusnica are non-analogous art. *Id.* at 19–29.

*1. Overview of Kang (Ex. 1006)*

Kang is directed to “an alarming apparatus of a wafer burn-in system, wherein various error states occurring in the wafer burn-in process can be

detected more accurately.” Ex. 1006, Abstract. Kang’s wafer burn-in process purports to secure “the reliability and productivity of the semiconductor device” at an early stage in development. *Id.* at 2. Figure 1 of Kang, reproduced below, illustrates “the overall configuration of the general wafer burn-in system.” *Id.* at 1.



Kang’s Figure 1 depicts workstation 100, wafer loading mechanism 200, test board 250, main test device 300, and alarming apparatus 400—each of which are “independent individual devices . . . connected with each other in a prescribed connection method to perform the wafer burn-in process.” *Id.*

Kang’s workstation 100 “is a means to control the implementation of the wafer burn-in process by entering the conditions and commands for the implementation of the . . . process,” and provides those conditions and commands to the main test device 300. *Id.* “The wafer loading mechanism (200) performs the function of transferring the wafer to be tested to the test



board (250) . . . loading and aligning them[,] and the function of unloading those wafers which have been tested.” *Id.* After testing, “the alarming apparatus (400) receives the test result signal provided by the main test device (300) . . . and generates a prescribed alarm informing the error state of the wafer in accordance with the test result signal received so that the on-site operator can recognize this.” *Id.*

## 2. Overview of Tencor (Ex. 1005)

Tencor is Revision F of an Operations Manual with a copyright date of 1996, for the Tencor® P-20h Long Scan Profiler. Ex. 1005, 1, 2. Tencor purports to “describe[] in detail the operation of the Tencor P-20h Long Scan Profiler,” and “is intended as a tutorial and general operating guide for individuals who will use the P-20h to inspect and analyze sample surfaces.” *Id.* at 12. In a section entitled “Signal Light Tower Option” (*id.* at 241–242), Tencor contains the following depiction of a “Signal Light Tower Configuration Editor Utility Window” as Figure 12-3:

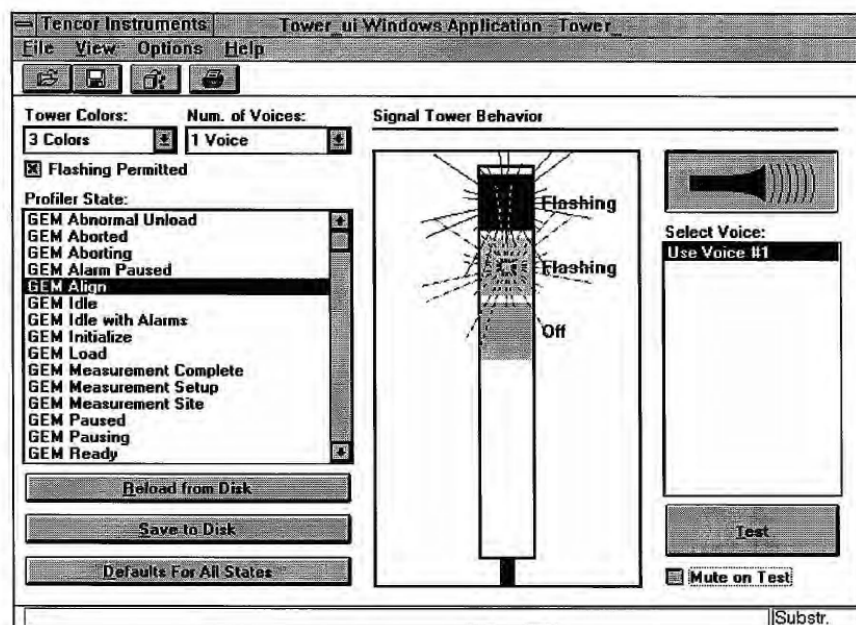


Figure 12-3 Signal Light Tower Configuration Editor Window

Tencor's Figure 12-3 depicts a "Profiler State" in one portion of the screen, and "Signal Tower Behavior" including flashing lights and voice icons in other portions of the screen. *Id.* at 242.

3. *Overview of Rusnica (Ex. 1007)*

Rusnica "relates generally to a display system for understanding the status of a complex process and its components, and more particularly, to a system that presents a large quantity of information in a manner that is readily absorbed and easily understood." Ex. 1007, 1:8–12. Rusnica discloses using "multiple levels of color coding to ease operator assimilation of the information and make it readily understandable." *Id.* at 19:8–10.

4. *The Alleged Prima Facie Case*

Petitioner asserts that claims 1–3 and 6–8 of the '369 patent are unpatentable as obvious over the combined disclosures of Kang, Tencor, and Rusnica under 35 U.S.C. § 103. Pet. 22–51. For example, regarding claim 1, Petitioner alleges that Kang discloses limitation [a] a "substrate processing apparatus comprising a signal indicator for indicating a running state" (*id.* at 22–25), and limitation [b] "a plurality of signal indicators operating under any one of a plurality of operation conditions" (*id.* at 25–26).

Regarding the "display unit" limitations [c], [d], and [e] recited in claim 1, however, Petitioner relies on the teachings of Kang, Tencor, and Rusnica to allege prima facie obviousness. *Id.* at 26–39. Specifically, regarding the limitation [c] requiring "a display unit for displaying the operation conditions of the signal indicators, the operation conditions being set independently in advance of being displayed," Petitioner acknowledges that Kang "does not expressly state that the operating conditions setup with

workstation (100) are afterwards ‘displayed’ on workstation (100), for example, to confirm the setup,” but that “displaying those entered operating conditions on workstation (100) after setup would have been highly obvious, if not inevitable.” *Id.* at 27–28. According to Petitioner, Kang’s workstation “would display data after it is entered” because the workstation contains a computer monitor and doing so “would have desirably and predictably allowed a user to confirm the data were entered correctly and to allow the user to edit such data.” *Id.* at 28. Petitioner then turns to Tencor to “confirm[] that displaying set operating conditions on a setup screen was a known, desirable, and predictable prior art teaching.” *Id.* at 28–31. Petitioner specifically points to Tencor’s disclosure of “[a] ‘Signal Light Tower Configuration Editor Utility window’ (hereinafter, the ‘Tower UI’) [that] is displayed on the video monitor.” *Id.* at 29. Petitioner’s annotated version of Tencor’s Tower UI as depicted in Figure 12–3 (*id.*) is reproduced below:

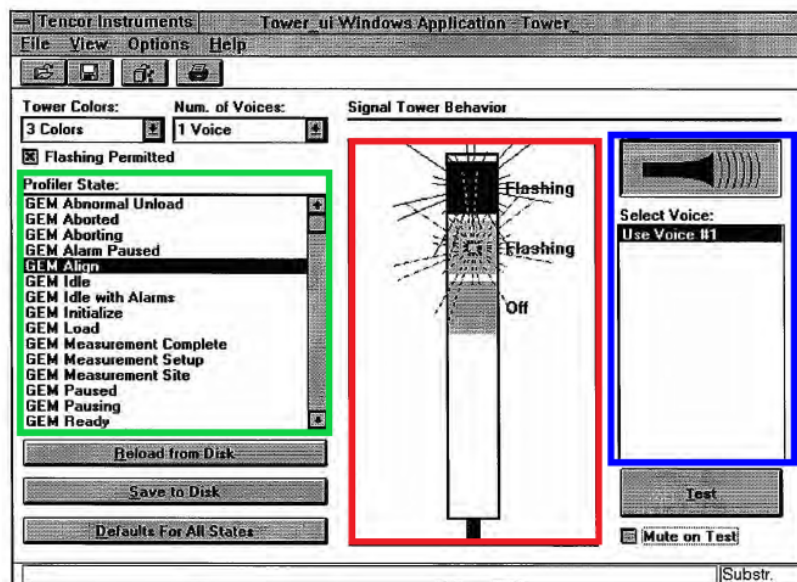


Figure 12-3 Signal Light Tower Configuration Editor Window  
TOWER UI

Petitioner’s annotated Tower UI of Tencor depicts possible running states in a green box, “a virtual representation of the signal light tower” in a red box, and “a ‘two-state button’ for ‘voice custom control’ of the ‘tower voice’” in a blue box. *Id.* at 30. According to Petitioner, “the Tower UI allows a user to define and display ‘the behavior of the signal tower’—how the Tencor substrate processing apparatus responds with lights and voice—for each Profiler State.” *Id.* Petitioner asserts that Tencor’s “Profiler States” “are operation conditions because they are predetermined conditions for operating the signal indicators (the tower lights and tower voice) based on the running states of the semiconductor processing apparatus.” *Id.*

Regarding the limitation [d] that “the display unit displays whole operation causes which correspond[] to the signal indicators,” Petitioner relies on the combined teachings of Kang and Tencor (*id.* at 32–35), asserting that “the combined apparatus of Kang and Tencor incorporating Tencor’s display unit (video monitor, which displays the Tower UI) displays whole operation causes . . . and meets this limitation.” *Id.* at 34–35.

Regarding the limitation [e] that “the display unit . . . displays with a different color the operation cause which corresponds to the operation of the signal indicator among the whole operation causes,” Petitioner relies on the combined teachings of Kang, Tencor, and Rusnica. *Id.* at 35–39.

Patent Owner alleges that Petitioner failed to establish that Tencor is available as a prior art printed publication (Prelim. Resp. 4–19), and that Tencor and Rusnica are non-analogous art (*id.* at 19–29).

Thus, before we consider the underlying merits of Petitioner’s obviousness challenge, we must first address whether Petitioner has made a sufficient threshold showing that Tencor was “publicly accessible,” thereby

qualifying as a “printed publication” in accordance with the statute governing *inter partes* review. 35 U.S.C. § 311(b).

5. *Analysis of Whether Tencor is a Printed Publication*

Our governing statutes provide “[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).

“The decision whether a particular reference is a printed publication ‘must be approached on a case-by-case basis.’” *In re Cronyn*, 890 F.2d 1158, 1161 (Fed. Cir. 1989) (quoting *In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986)). “Whether a reference qualifies as a printed publication under § 102 is a legal conclusion based on underlying fact findings.” *Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 772 (Fed. Cir. 2018) (citing *Jazz Pharm., Inc. v. Amneal Pharm., LLC*, 895 F.3d 1347, 1356 (Fed. Cir. 2018)). “One such fact question is public accessibility.” *Acceleration Bay*, 908 F.3d at 772. “Because there are many ways in which a reference may be disseminated to the interested public, ‘public accessibility’ has been called the touchstone in determining whether a reference constitutes a ‘printed publication’.” *In re Hall*, 781 F.2d at 898–99.

Both our reviewing court and its predecessor have articulated the standard for determining whether a reference is deemed “publicly accessible”: “A given 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.”

*Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir. 2006) (citing *In re Wyer*, 655 F.2d 221, 226 (CCPA 1981)).

Here, Petitioner asserts that Tencor qualifies as prior art under 35 U.S.C. § 102(b). Pet. 18. Specifically, Petitioner states that “Tencor is a manual providing operating instructions for a product called the P-20H Long Scan Profiler (‘the P-20H’), originally made by Tencor Instruments,” which “bears a copyright date of 1996—well before the ’396 patent’s § 102(b) date.” *Id.* at 19. Petitioner avers that “[c]ustomers purchasing the P-20H were given copies of Tencor,” that additional copies were made available to such “customers of the product upon their request,” and that those customers “were interested persons and persons of ordinary skill in the art.” *Id.* (citing *Orion IP, LLC v. Hyundai Motor Am.*, 605 F.3d 967, 974–75 (Fed. Cir. 2010)).

Petitioner asserts further that, “in 1997, Tencor’s website (*see* Ex. 1021) allowed website users to request ‘more information about technical manuals on disk’ for ‘Surface Profiling and Film Stress Measurement Systems.’” *Id.* Furthermore, Petitioner avers “Tencor is not marked confidential . . . and KLA-Tencor did not otherwise mark the P-20H manual as confidential.” *Id.*

Petitioner also provides webpages from the Internet Archive which purport to show that the P-20h product “was available on the semiconductor resale market before September 2005,” and avers that “[i]f a customer sold a product, KLA-Tencor did not restrict the customer from including product manuals with the product.” *Id.* at 20 (citing Exs. 1016–1020).

Finally, Petitioner asserts “skilled artisans were aware of the P-20H by September 2005” because “in a 2001 journal article on etching in

semiconductor devices, the authors describe using a ‘Profiler P20H™ from Tencor.’” *Id.* (citing Ex. 1023, 2). Petitioner also avers a 2005 Ph.D. dissertation “directly referenced Tencor.” *Id.* (citing Ex. 1024, 180, 191).

Patent Owner alleges four deficiencies in Petitioner’s assertions regarding Tencor’s availability as prior art (Prelim. Resp. 5–6):

- 1) Petitioner fails to establish that “persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence could have obtained the *Tencor Manual*”;
- 2) “Petitioner’s purported evidence regarding resellers of the P-20h surface profiler does not support a finding that the *Tencor Manual* was publicly accessible”;
- 3) The dissertation and journal article evidence relied on by Petitioner fails to cite to or reference the Tencor Manual; and
- 4) Petitioner failed to properly “authenticate the majority of the documents relied upon” to establish that Tencor was publicly accessible.

Patent Owner also discusses these alleged deficiencies at length at pages 6–18 of its Preliminary Response.

After considering the facts of this case, we find that Petitioner has not established that Tencor was publicly accessible. It follows that Petitioner has failed to meet its burden to prove that Tencor is a “printed publication” under 35 U.S.C. §§ 102 and 311(b). Our reasoning follows.

Petitioner has reasonably established that the P-20h Profiler *product* was available for sale as early as 1996. *See, e.g.*, Ex. 1009 ¶ 4. However, it is not enough for Petitioner to establish that a product was available to the

public. Rather, the critical inquiry is whether the document itself was publicly accessible. *Bruckelmyer*, 445 F.3d at 1378 (“A given *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.” (emphasis added)).

Patent Owner is correct (Prelim. Resp. 7) that Petitioner’s Declarant, Mr. Brian Crawford, does not testify that the specific Tencor Operations Manual relied upon in this proceeding (Ex. 1005) “was itself publicly accessible such that it could have been requested by interested members of the public (*e.g.*, non-customers who had not purchased a very expensive P-20h long scan profiler), or that the manual was otherwise accessible or distributed to the public.” Rather, Mr. Crawford testifies that it was KLA-Tencor’s practice to “provide product manuals to *customers* along with the corresponding products associated with the manuals *purchased by those customers*.” Ex. 1009 ¶ 6 (emphasis added). Our reviewing court has held, however, that “[t]he proponent of the publication bar must show that prior to the critical date the reference was sufficiently accessible, *at least to the public interested in the art*, so that *such a one* by examining the reference could make the claimed invention without further research or experimentation.” *Hall*, 781 F.2d at 899 (emphasis added). Providing evidence that Tencor was provided to customers does not satisfy Petitioner’s burden of demonstrating that Tencor was available to an audience that includes “at least the public interested in the art” (*id.*) because, on this preliminary record, there is insufficient evidence to establish that other members of the interested public, such as potential customers or non-



customers, could have located it upon exercising reasonable diligence. *Wyer*, 655 F.2d at 226; *cf. L-3 Commc'ns Holdings, Inc. v. Power Survey, LLC*, Case IPR2014-00836, slip op. at 9, 10 (PTAB Nov. 26, 2014) (Paper 9) (determining that the petitioner had shown a manual was a printed publication when, not only did a declaration show that the manual was “distributed at least 201 times” in the relevant time period, but the declarant stated (1) that the corporate entity “did not restrict its customers’ use or dissemination” of the manual and (2) that the corporate entity’s “practice was to provide user manuals to potential customers or others (not just purchasers of the product) upon request”).

We find Petitioner’s reliance (Pet. 19) on the *Orion IP, LLC v. Hyundai Motor America* case (605 F.3d 967 (Fed. Cir. 2010)) to be misplaced because the facts of that case are distinguishable from those before us here. For example, in *Orion IP*, our reviewing court determined that an electronic parts catalog associated with the Bell & Howell IDB2000 system qualified as prior art “because it was accessible to those interested in the business of auto parts” before the critical date. *Id.* at 975. The court relied on testimonial evidence that demonstrated the catalog acted as a direct mail piece to car dealers and served as a demonstration piece for potential customers, that it was “used[] by upwards of 150 to 200 salespersons,” with a former manager testifying “that he personally demonstrated the IDB2000 system, in accordance with the nine steps outlined in the . . . reference, hundreds of times.” *Id.* at 974–75. In this case, there is no evidence of such dissemination to “persons interested and ordinarily skilled in the subject matter or art,” such as potential or non-customers. *See Bruckelmyer*, 445 F.3d at 1378.

The cost of the P-20h Profiler product also weighs heavily against finding the Tencor Operations Manual was “publicly accessible.” Here, we agree with Patent Owner (Prelim. Resp. 10–12) that, if Petitioner’s evidence can be accepted at face value,<sup>6</sup> it suggests that “a person interested and ordinarily skilled in the art would have had to pay at least \$65,000 for a P-20h surface profiler,” with “[t]he most logical assumption [being] that a new P-20h surface profiler would have cost at least the same, if not more.” *See* Ex. 1016, 23. Providing Tencor only to those individuals that are able to purchase a product at such high expense significantly diminishes Tencor’s accessibility to the general public interested in this art.

Patent Owner is also correct that Petitioner’s webpage evidence, purportedly allowing a website user to request a product manual, weighs against a finding that Tencor was publicly accessible. Prelim. Resp. 7–8; *See* Ex. 1005; Ex. 1022.<sup>7</sup> Specifically, it is not readily apparent from Petitioner’s evidence whether a given website user would have even known about, much less been able to successfully request, the *particular* document before us as Tencor, i.e., Revision F of the Tencor Operations Manual for the P-20h long scan profiler. *See supra* n.3. Here, Tencor does not appear to be one of the documents listed on the website that were available for request, and Petitioner does not sufficiently establish whether users could have successfully requested literature that was not expressly listed on the

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<sup>6</sup> For reasons explained *infra*, we are not persuaded that Exhibit 1016 is sufficiently authenticated. We nevertheless discuss the contents of this Exhibit for completeness.

<sup>7</sup> As discussed *infra*, we also are not persuaded that Petitioner has sufficiently authenticated the “Literature Request Form” filed as Exhibit 1022. Therefore, even if Tencor were expressly listed in the Exhibit, we would still find Tencor was not publicly accessible.

website. *See* Ex. 1022 (Literature Request Form that fails to identify Tencor as a document available by request).

Furthermore, the presence of a “copyright notice” (Ex. 1005, 2) including a statement requiring “the express written permission of Tencor Instruments” for reproduction and transmission weighs against a finding that Tencor was publicly accessible. *See In re Klopfenstein*, 380 F.3d 1345, 1351 (Fed. Cir. 2004) (“Where professional and behavioral norms entitle a party to a reasonable expectation that the information [] will not be copied, we are more reluctant to find something a ‘printed publication.’”); *Microsoft Corp. v. Corel Software, LLC*, Case IPR2016-01083, slip op. at 12–16 (PTAB Dec. 1, 2016) (Paper 14) (explaining how a manual’s copyright notice prohibiting its reproduction “suggests that if [the manual] was distributed at all, it was only in a restricted and limited fashion to persons who acquired the underlying . . . product,” and how such copyright notice was insufficient to establish public accessibility of the manual); *see also Stryker Corp. v. Karl Storz Endoscopy-America, Inc.*, Case IPR2015-00677, slip op. at 18–19 (PTAB Sept. 2, 2015) (Paper 15) (stating that a copyright notice “does not establish when a document was publicly accessible under patent law”).

Petitioner’s position regarding the possible resale of a P-20h profiler product also does not sufficiently demonstrate that Tencor was publicly accessible. Pet. 20. Petitioner discusses several webpages that purport to demonstrate that several used P-20h products were “available on the semiconductor equipment resale market before September 2005.” *Id.* Petitioner, however, does not provide persuasive evidence establishing that any such products were actually sold, much less that the particular document

before us as Tencor (Ex. 1005) was provided with any potentially resold equipment. Even further, Patent Owner appears correct that the two used P-20h products listed for sale have a “vintage” of January 1995. Prelim. Resp. 13–14; Ex. 1016, 23. *See supra*, n.6. Tencor, however, has a copyright date of 1996. Ex. 1005, 2. Petitioner has not explained how a customer purchasing a vintage 1995 P-20h product would have received, or otherwise been able to obtain, a revision of a manual with a 1996 copyright notice, or whether such revision would have even been relevant to a vintage 1995 machine.

We also are not persuaded by Petitioner’s statement (Pet. 20) that “skilled artisans were aware of the P-20H by September 2005” weighs in favor of finding Tencor was publicly accessible. We first note that Petitioner appears to improperly focus on *product* awareness, not the accessibility of the Tencor reference at issue in this proceeding. *See id.*; Ex. 1023, 2 (“Etch rate of aluminum and selectivity over photoresist were measured with a step-height measurement *instrument* Profiler P20H™ from Tencor.” (emphasis added)). We furthermore agree with Patent Owner (Prelim. Resp. 15–16) that the dissertation evidence advanced by Petitioner refers to a manual that is distinct from Tencor. *See* Ex. 1024, 99, 191 (referring to a “Re[f]erence” Manual for the Tencor product, not the “Operations” Manual); *see also* Ex. 1005, 12 (listing “Related Manuals” provided with the P-20h product including the “Tencor P-20h Long Scan Profiler Reference Manual” and the “Tencor P-20 SECS Interface Manual”).

Finally, we agree with Patent Owner (Prelim. Resp. 17–18) that Petitioner has failed to sufficiently authenticate some of the evidence upon which it relies, namely several webpages filed as Exhibits 1015–1022. Here,

we note Federal Rule of Evidence 901 requires the proponent to produce evidence “sufficient to support a finding that an item is what the proponent claims it is.”

Applying the concept of website printout authentication to *inter partes* review proceedings before the Board, we have stated that “[t]o authenticate printouts from a website, the party proffering the evidence must produce some statement or affidavit from someone with knowledge of the website . . . for example a web master or someone else with personal knowledge would be sufficient.” *EMC Corp. v. Personalweb Techs, LLC*, Case IPR2013-00084, slip. op. at 45–46 (PTAB May 15, 2014) (Paper 64) (quoting *St. Luke’s Cataract & Laser Inst., P.A. v. Sanderson*, No. 8:06-CV-223-T-MSS, 2006 WL 1320242, at \*2 (M.D. Fla. May 12, 2006)); *see also Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007) (citing with approval *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 782–83 (C.D. Cal. 2004) (“Printouts from a web site do not bear the indicia of reliability demanded for other self-authenticating documents under [Federal Rule of Evidence] 902. To be authenticated, some statement or affidavit from someone with knowledge is required . . . .”)).

Here, Petitioner fails to provide testimonial evidence of a witness with personal knowledge of the content on the websites relied upon, and thus the associated webpage printouts. Rather, Petitioner provides a declaration of Petitioner’s counsel (Ex. 1013) that attests how the printouts themselves were generated, as well as an unexecuted declaration from the Internet Archive (Ex. 1014). We agree with Patent Owner (Prelim. Resp. 17–18)

that such declarations fall short of authenticating the relied upon Exhibits 1015–1022.

For these reasons, Petitioner has failed to establish that Tencor was, in fact, publicly accessible at the time of the invention of the '396 patent. Thus, Petitioner has not established that Tencor qualifies as a “printed publication” under 35 U.S.C. §§ 102(b) and 311(b).

It follows, then, that Petitioner has not demonstrated a reasonable likelihood of prevailing on its contentions that claims 1–3 and 6–8 are unpatentable over Kang, Tencor, and Rusnica. Pet. 22–51.

*C. Remaining Asserted Obviousness Grounds*

The remainder of Petitioner’s obviousness grounds rely—either completely or in part—on the disclosure of Tencor. Pet. 52–73.

As discussed in Section II.B.5 above, however, Petitioner has not established that Tencor was publicly accessible at the time of the invention of the '396 patent. Thus, Petitioner has not sufficiently shown that Tencor is available as a “printed publication” as required by the statute governing *inter partes* review. 35 U.S.C. § 311(b).

For this reason, Petitioner fails to demonstrate a reasonable likelihood of prevailing on its remaining contentions. *See* Pet. 52–73.

### III. CONCLUSION

For the reasons discussed above, we conclude that Petitioner has failed to demonstrate a reasonable likelihood that it would prevail in showing that at least one claim of the '396 patent is unpatentable.

#### IV. ORDER

In consideration of the foregoing, it is hereby

ORDERED that, pursuant to 35 U.S.C. § 314(a), an *inter partes* review is denied.

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Patent 7,808,396

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