

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

ANAI LEVIN  
and MICHAEL GRABARNICK,  
Junior Party,  
(Application 13/926,389)

v.

ANDREA PASTORIO and PAOLO BETTI  
Senior Party,  
(Patent 8,304,559)

---

Patent Interference No. 105,995  
(Technology Center 1600)

---

**ORDER – AUTHORIZING MOTION**  
**37 C.F.R. § 41.121(a)**

1           A telephone conference was held on 3 August 2015, at approximately 2:00  
2 p.m. at the request of junior party Levin. Levin sought to obtain authorization to  
3 file motions for judgment based on unpatentability of the Pastorio involved claims  
4 over the prior art. (*See* Order – Priority Times, Paper 146, at 1:5-7.) Gary  
5 Gershik and Norman Zivin were present for Levin. Anthony Figg and Danny  
6 Huntington were present for senior party Pastorio. Deborah Katz was present for  
7 the Board.

Interference 105,995

1 Authorization to file several motions arguing that all of Pastorio's claims are  
2 unpatentable over the prior art was deferred in the preliminary motions phase of  
3 the interference after Levin originally filed its list of proposed motions. (*See* Order  
4 – Motion Times, Paper 38, at 4:12-15; *see* Levin List of Proposed Motions, Paper  
5 21, at 3:3-4:8.) At the beginning of the priority phase, it was noted that Levin  
6 could renew its request to file these motions. (*See* Order – Priority Times, Paper  
7 146, at 1:5-7.) Levin now requests authorization to file a single motion based on  
8 grounds different than those previously presented. Specifically, Levin requests  
9 authorization to file a motion arguing the following grounds of unpatentability:

- 10 (1) anticipation by WO 2007/122440 A1 (WO '440);  
11 (2) obviousness over WO '440 alone or in view of US 6,013,761 to  
12 Zierer et al. and/or US 3,928,372 to Bochis et al.;  
13 (3) obviousness over CN 101250158 A in view of WO '440; and  
14 (4) anticipation by AU 2010100462 A4 (AU 2010100462 A4).

15 Levin's previous requests cited WO '440, in combination with several other  
16 references, as the basis for unpatentability. (*See* Levin List of Proposed Motions,  
17 Paper 21, at 3:3-4:8.) During the conference call, Levin indicated that even though  
18 ground (2) above recites additional references, it could be argued as obviousness  
19 over WO '440 alone. Levin's request to file a single motion arguing that WO '440  
20 either anticipates or alone renders obvious Pastorio's involved claims is  
21 GRANTED.

22 Neither CN 101250158 A nor AU 2010100462 A4 was asserted in Levin's  
23 originally proposed prior art motions. Levin argues that an attack on Pastorio's  
24 claims based on the Chinese reference of ground (3) is necessary to challenge a

Interference 105,995

1 portion of the asserted scope of Pastorio's claims depending on constructions of  
2 their terms. Whether the Board determines questions of patentability is  
3 discretionary. (*See* 35 U.S.C. § 135(a): "The Patent Trial and Appeal Board shall  
4 determine questions of priority of the inventions and may determine questions of  
5 patentability.") Levin's argument does not make it clear that the proceeding would  
6 be conducted in the most just, speedy, and inexpensive manner due to uncertainties  
7 about the scope of Pastorio's claims that would be asserted. *See* 37 C.F.R.  
8 § 41.1(b). Accordingly, Levin's request regarding CN 101250158 A is DENIED.

9 Similarly, Levin notes that its attack on Pastorio's claims based on the  
10 Australian reference of ground (4) is contingent on the dates of conception and  
11 reduction to practice determined for Pastorio. Because judgment in this  
12 interference may be entered if Levin, as junior party, fails to prove its priority case,  
13 without reaching Pastorio's priority case, the most just, speedy, and inexpensive  
14 priority proceeding is not achieved by consideration of this issue. Accordingly,  
15 Levin's request regarding AU 2010100462 A4 is DENIED.

16 Furthermore, it is noted that even if Levin is not accorded a chance to pursue  
17 its some of its arguments against the patentability of Pastorio's claims in this  
18 proceeding, other proceedings with the Office may provide opportunities.

19 It is ORDERED that Levin is authorized to file one motion, due in Time  
20 Period 11, asserting that the involved Pastorio claims are unpatentable over WO  
21 '440 alone under either 35 U.S.C. § 102 or § 103. Levin is not authorized to  
22 include any other grounds of unpatentability in this motion.

Interference 105,995

/Deborah Katz/  
*Administrative Patent Judge*

cc (via e-mail):

Attorney for Levin:

Gary J. Gershik  
Norman H. Zivin  
COOPER & DUNHAM, LLP  
[ggershik@cooperdunham.com](mailto:ggershik@cooperdunham.com)  
[nzivin@cooperdunham.com](mailto:nzivin@cooperdunham.com)

Attorney for Pastorio:

E. Anthony Figg  
R. Danny Huntington  
ROTHWELL, FIGG, ERNST & MANBECK, P.C.  
[efigg@rfem.com](mailto:efigg@rfem.com)  
[dhuntington@rfem.com](mailto:dhuntington@rfem.com)