

1 The opinion in support of the decision being entered today was *not* written
2 for publication and is *not* binding precedent of the Board
3

4 UNITED STATES PATENT AND TRADEMARK OFFICE
5

6
7 BEFORE THE BOARD OF PATENT APPEALS
8 AND INTERFERENCES
9

10
11 *Ex parte* DIRK ZIMMER and SARINA GENSIERSKY
12

13
14 Appeal 2007-1229
15 Application 10/325,333
16 Technology Center 3700
17

18
19 Decided: August 14, 2007
20

21
22 *Before:* TERRY J. OWENS, JENNIFER D. BAHR, and LINDA E.
23 HORNER¹, *Administrative Patent Judges.*
24

25 HORNER, *Administrative Patent Judge.*
26

27
28 DECISION ON APPEAL
29

30 STATEMENT OF CASE

31 Appellants appeal under 35 U.S.C. § 134 (2002) from a final rejection
32 of claims 1, 2, and 6-8. We have jurisdiction under 35 U.S.C. § 6(b) (2002).
33 An Oral Hearing was conducted on July 17, 2007.

¹ This appeal was heard on July 17, 2007. Administrative Patent Judge Stuart S. Levy participated on the panel at the hearing. Judge Levy has since retired from the Board, and Judge Bahr has been substituted in his place on this panel.

1 We AFFIRM.

2 Appellants invented

3 a unitary flexible package for enclosing and containing in a sealed
4 condition one or more compressible products in both a compressed
5 and uncompressed condition. The package comprises a first closure
6 member capable of sealing the package in a first closed condition
7 defining a first volume, and a second closure member capable of
8 sealing the package in a second closed condition defining a second
9 volume, the second volume being greater than the first volume.

10

11 (Specification 3).

12 The only independent claim under appeal reads as follows:

13 1. A unitary flexible package, (10) said package enclosing and
14 containing in a sealed condition one or more products (100) in an
15 initially compressed condition, **characterized in that** said
16 package comprises: a first closure member, (12) said first closure
17 member in the form of an adhesive tape sealing said package
18 (10) in a first closed condition defining a first volume, said
19 adhesive tape comprising a line of weakness to permit rupture
20 and opening of said first closure member, wherein said one or
21 more products expand upon opening of said first closure
22 member, said package further comprising a second closure
23 member (14), said second closure member sealing said package
24 (10) in a second closed condition defining a second volume,
25 said second volume being greater than said first volume.

26

27 The Examiner rejected claims 1, 2, 6, and 8 under 35 U.S.C. § 103(a)
28 (2004) as being unpatentable over Lizio in view of Kim. The Examiner
29 rejected claim 7 under 35 U.S.C. § 103(a) as being unpatentable over Lizio
30 in view of Kim and Miller.

31

1 The prior art relied upon by the Examiner in rejecting the claims on appeal
2 is:

3	Lizio	US 3,208,587	Sep. 28, 1965
4	Miller	US 3,827,625	Aug. 06, 1974
5	Kim	US 5,054,618	Oct. 08, 1991

6
7 The Examiner contends (Answer 3) that Lizio teaches the first closure
8 being cut or severed, but does not specifically indicate that the severing is
9 along a line of weakness. To overcome this deficiency of Lizio, the
10 Examiner turns to Kim for a teaching of a bag having an adhesive closure,
11 with the closure being severable along a line of weakness. The Examiner's
12 position is that it would have been obvious to apply the teaching of a line of
13 weakness to the first closure in Lizio, because doing so allows for easier and
14 controlled severing of the closure for access to the bag.

15 Appellants contend (Br. 4) that the first closure member (32, 42, or
16 46) does not seal the package as required by the claim, and (Br. 5) that Kim's
17 disclosure of an adhesive with a line of weakness does not make up for the
18 deficit of Lizio. It is argued (*id.*) that in Lizio, compressed articles 22,
19 packaged in their compressed condition will not expand upon opening of the
20 so-called "first closure member." Appellants assert (Br. 6) that Lizio goes to
21 great lengths to ensure that its second closure member remains sealed so as
22 to keep articles 22 free of contamination and allow the same to retain their
23 sterilized characteristics. Appellants submit (*id.*) that since the compressed
24 articles of Lizio will have no room to expand upon opening of the so-called
25 "first closure member", the disclosure of Lizio falls outside the scope of the
26 claims. Appellants contend (Br. 7) that an artisan would be loath to place

1 Kim's lines of weakness on Lizio's first closure members for fear that they
2 would prematurely break. Appellants additionally contend (*id.*) that

3 By applying the teachings of Kim, the “second closure
4 member” (16) will indeed comprise an adhesive closure, but
5 that adhesive closure may further comprise “spaced perforated
6 punch lines” While the perforated punch lines might make
7 the “second closure member” (16) of Lizio easier to rupture, the
8 resulting holes would facilitate the communication with and
9 contamination by the surrounding atmosphere of the container
10 that is steadfastly avoided by Lizio.

11
12 With regard to the rejection of claim 7 under 35 U.S.C. § 103(a) as
13 being unpatentable over Lizio in view of Kim and Miller, the Examiner
14 contends (Answer 4) that Miller suggests having a package closure of re-
15 sealable adhesive material. Appellants contend (Br. 8) that

16 Applicants believe that there is no need to address the propriety of the
17 application of Miller as a secondary reference to a claim that is
18 narrower in scope than claim 1

19
20 and contend that Lizio teaches away from the proposed combination because
21 Lizio goes to great lengths to ensure that the second closure member remains
22 sealed, so as to keep the articles 22 free from contamination and retain their
23 sterilized characteristics.

24
25 **ISSUE**

26 With respect to the rejection of claims 1, 2, 6, and 8 under 35 U.S.C.
27 § 103(a) as being unpatentable over Lizio in view of Kim, the issue
28 presented is whether the teachings and suggestions of Lizio and Kim would
29 have suggested the limitations of these claims. The issue turns on whether
30 the prior art would have suggested providing Lizio with a closure severable

1 along a line of weakness as taught by Kim, and whether Lizio teaches or
2 suggests expanding the products in the package upon opening of the first
3 closure member. With regard to the rejection of claim 7 under 35 U.S.C.
4 § 103(a) as being unpatentable over Lizio in view of Kim and Miller, the
5 issue turns on whether Miller would have suggested a resealable second
6 closure.

7

8

FINDINGS OF FACT

9 We find that the following enumerated findings are supported by at
10 least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d
11 1422, 1427, 7 USPQ2d 1152, 1156 (Fed. Cir. 1988) (explaining the general
12 evidentiary standard for proceedings before the Office).

13

1. Appellant invented

14

15

16

17

18

19

20

21

22

23

(Specification 3).

24

From our review of Lizio, we make the following findings of fact:

25

26

27

2. “This invention relates to a package and more particularly to a
novel compression type package and method of forming the same to
contain and maintain a compressible material therein in its

1 compressed condition and for subsequent expansion therein.” (Lizio,
2 col. 1, ll. 13-17).

3 3. Another object of the invention is to provide a compression
4 type package and method of making the same of a flexible
5 construction which when completely closed is capable of
6 maintaining sterility whereby surgical dressings and like
7 materials may be packaged in their compressed condition,
8 sterilized, and subsequently permitted to expand to their
9 expanded usable condition, all within the sterile compression
10 type package.

11
12 (Lizio, col. 1, ll. 53-60).

13 4. “FIG. 4 is a view similar to FIG. 3 illustrating the details of the
14 compression-type package with the material therein expanded from its
15 compressed condition.” (Lizio, col. 2, ll. 27-29).

16 5. “The container 12 may be said to be divided into two parts, one
17 of which is a material containing portion 18 and the other an
18 expansion chamber portion 20.” (Lizio, col. 2, ll. 66-68).

19 6. “[T]he articles 22 of FIG. 9 are loosely packed in boxes or bags
20 in their normal fully expanded condition.” (Lizio, col. 3, ll. 5-7).

21 7. “FIG. 10 illustrates the same number of sanitary napkins 22 of
22 FIG. 9 after the same are compressed for compression packing in the
23 flexible container 12 of the compression package 10.” (Lizio, col. 3,
24 ll. 11-13).

25 8. Immediately after the articles 22 are put into their compressed
26 condition as shown in FIG. 10, a restraint or opposing force
27 must be applied to them. This is accomplished by folding the
28 flexible container 12 as close as possible to conform to the
29 compressed articles 22 therein so that the walls of the container
30 12 will be in substantially the shape and size of the articles 22

1 immediately after they are placed into their compressed
2 condition.

3
4 (Lizio, col. 3, ll. 50-57).

5 9. During the operation of folding close and bending the open end
6 16 in the manner as shown in FIG. 3, the same may be sealed
7 by the application of glue or any other convenient adhesive
8 placed within and along the bend of the edge 28 thereof. The
9 glue or adhesive placed at the edge 28 now serves to completely
10 close the interior of the container 12 from communication with
11 an [sic] contamination by the surrounding atmosphere.

12
13 (Lizio, col. 4, ll. 10-19).

14 10. “After the container 12 is sealed at 28, the expansion chamber
15 portion 20 is now in condition to be reduced in size.” (Lizio, col. 4, ll.
16 23-25).

17 11. “Thereafter, securing tapes or other sealing means 32 may be
18 applied to releasably hold the fold wrapped expansion chamber
19 portion 20 in position about the material containing portion 18.”

20 (Lizio, col. 4, ll. 36-39).

21 12. However, when it becomes necessary to use the articles 22, the
22 tapes or securing means 32 are then cut or severed. The fold
23 wrapped expansion chamber portion 20 is unwrapped from
24 about the integral portion 18 and positioned upright as in FIG.
25 3, a position which the container 12, by its very body, will
26 normally assume if left unattended.

27
28 (Lizio, col. 4, ll. 47-53).

29 13. “The folds 24 can be pinched slightly to break their tension
30 against the compressed articles 22 contained in the portion 18, or the

1 compression package 10 may be inverted momentarily to break the
2 tension and force of the folds 24.” (Lizio, col. 4, ll. 59-63).

3 14. “Because the tension and opposing force of the folds 24 has
4 been broken and relieved, the articles 22 will bloom and expand
5 upward into the now open coextensive communication with the
6 chamber 20 as shown in FIG 4.” (Lizio, col. 4, ll. 71-74).

7 15. Once again, it has been found that when the compression
8 package 10 is subjected to a sterilizing process, the heat and
9 moisture applied to the compressed articles 22 contained
10 therewithin causes such articles to bloom or expand rapidly
11 upward into the chamber 20. Because the tension of the folds
12 24 has been broken, the expanding articles 22 are no longer
13 restricted from blooming upward into the co-extensive
14 communicating expansion chamber portion 20. In order to
15 permit the adequate expansion or blooming of the articles 22
16 and to prevent the rupture or tearing of the walls of the
17 container 12 during the expansion of such articles, the
18 expansion chamber 20 is made of such size and shape that it
19 will have sufficient room to accommodate the fully expanded
20 articles without affecting the seals provided at the end 14 or the
21 edge 28.

22
23 (Lizio, col. 5, ll. 3-18).

24 16. When it is desired to permit the compressed articles 22 to
25 bloom or expand again to their normal condition, the
26 compression package 100 of FIG. 5 is positioned on any
27 convenient surface with its end 14 now serving as the bottom.
28 A restraining tear tab 42 secured in place over the fold rolled
29 zig-zag folded structure 36 of the expansion chamber portion 20
30 is manually pulled free. The fold 36 is manually lifted and
31 straightened until it assumes the position as shown in FIG. 3.
32 The fold lines 24 are pinched or the container 12 is shaken to
33 reduce the tension of such fold lines on the compressed articles
34 22. Thereafter, the articles 22 are permitted to expand formally

1 from their containing portion 18 upward into the now
2 contiguous co-extending communicating portion 20.

3
4 (Lizio, col. 5, l. 67-col. 6, l. 6).

5 From our review of Kim, we make the following findings of fact:

6 17. The present invention is directed to a tear strip opening feature
7 for containers, and more particularly to a container including a
8 continuous sealing tape provided with a novel and improved
9 form of tear strip opening device.

10
11 (Kim, col. 1, ll. 13-17).

12 18. “If desired, the tape may be provided with perforated punch
13 lines or other lines of weakness along the edges of the tear strip to
14 facilitate easy removal of the tear strip for opening the
15 container. (Kim, col. 1, ll. 22-26).

16 19. “In order to open the container, the tear band is gripped at one
17 end and pulled upwardly.” (Kim, col. 1, ll. 45-47).

18 20. “The band 14 is disposed within spaced perforated punch lines
19 18 (FIG. 1, 6), whereas the thread 15 is located below a single
20 perforated punch line 18' (FIG. 7).” (Kim, col. 3, ll. 26-29).

21 21. “When it is later desired to open the package, the band 14 or
22 thread 15 is freed-up at the free end of the tape 13 and pulled away
23 from the package to tear the sealing tape and thereby open the
24 package.” (Kim, col. 3, ll. 59-63).

25 From our review of Miller, we make the following findings of fact:

26 22. “The present invention relates to an improved release paper for
27 pressure sensitive adhesive which is characterized by an improved

1 ability to adhere to pressure sensitive adhesive.” (Miller, col. 1,
2 ll. 4-7).

3 23. FIG. 3 shows the use of a tape of the kind shown in FIG. 5 on a
4 carton. The carton comprises a rectangular tube and end
5 closures formed of flaps in known manner. A laminate of the
6 type generally shown in FIG. 5 is heat sealed between
7 overlapping flaps 15 and 16. When the carton is opened, the
8 pressure sensitive coated sheet 17 remains adhered to flap 15
9 and the release sheet 18 is adhered to flap 16. This arrangement
10 has the advantage that the contents of the package do not have
11 to pour past the pressure sensitive adhesive to which crumbs
12 may cling.

13
14 (Miller, col. 3, ll. 13-23).

15
16 24. “The pressure sensitive adhesive used in layer 13 is of a well
17 known type.” (Miller, col. 3, ll. 24-25).

18 25. “The release material used in layer 5 also represents a well
19 known category of materials.” (Miller, col. 3, ll. 41-42).

20
21 PRINCIPLES OF LAW

22
23 “Section 103 forbids issuance of a patent when ‘the differences
24 between the subject matter sought to be patented and the prior art are such
25 that the subject matter as a whole would have been obvious at the time the
26 invention was made to a person having ordinary skill in the art to which said
27 subject matter pertains.’” *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727,
28 1734, 82 USPQ2d 1385, 1391 (2007). The question of obviousness is
29 resolved on the basis of underlying factual determinations including (1) the
30 scope and content of the prior art, (2) any differences between the claimed
31 subject matter and the prior art, (3) the level of skill in the art. *Graham v.*

1 *John Deere Co.*, 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966). *See also*
2 *KSR*, 127 S.Ct. at 1734, 82 USPQ2d at 1391 (“While the sequence of these
3 questions might be reordered in any particular case, the [*Graham*] factors
4 continue to define the inquiry that controls.”) The Court in *Graham* further
5 noted that evidence of secondary considerations, such as commercial
6 success, long felt but unsolved needs, failure of others, etc., “might be
7 utilized to give light to the circumstances surrounding the origin of the
8 subject matter sought to be patented.” 383 U.S. at 18, 148 USPQ at 467.

9 In *KSR*, the Supreme Court emphasized “the need for caution in
10 granting a patent based on the combination of elements found in the prior
11 art,” *id.* at 1739, 82 USPQ2d at 1395, and discussed circumstances in which
12 a patent might be determined to be obvious without an explicit application of
13 the teaching, suggestion, motivation test.

14 In particular, the Supreme Court emphasized that “the principles laid
15 down in *Graham* reaffirmed the ‘functional approach’ of *Hotchkiss*, 11
16 How. 248.” *KSR*, 127 S.Ct. at 1739, 82 USPQ2d at 1395 (citing *Graham*,
17 383 U.S. at 12, 148 USPQ at 464 (emphasis added)), and reaffirmed
18 principles based on its precedent that “[t]he combination of familiar
19 elements according to known methods is likely to be obvious when it does
20 no more than yield predictable results.” *Id.* The Court explained:

21 When a work is available in one field of endeavor, design incentives
22 and other market forces can prompt variations of it, either in the same
23 field or a different one. If a person of ordinary skill can implement a
24 predictable variation, § 103 likely bars its patentability. For the same
25 reason, if a technique has been used to improve one device, and a
26 person of ordinary skill in the art would recognize that it would
27 improve similar devices in the same way, using the technique is
28 obvious unless its actual application is beyond his or her skill.

1 *Id.* at 1740, 82 USPQ2d at 1396. The operative question in this “functional
2 approach” is thus “whether the improvement is more than the predictable use
3 of prior art elements according to their established functions.” *Id.*

4 The Supreme Court made clear that

5 [f]ollowing these principles may be more difficult in other cases than
6 it is here because the claimed subject matter may involve more than
7 the simple substitution of one known element for another or the mere
8 application of a known technique to a piece of prior art ready for the
9 improvement.

10

11 *Id.* The Court explained,

12 [o]ften, it will be necessary for a court to look to interrelated teachings
13 of multiple patents; the effects of demands known to the design
14 community or present in the marketplace; and the background
15 knowledge possessed by a person having ordinary skill in the art, all
16 in order to determine whether there was an apparent reason to
17 combine the known elements in the fashion claimed by the patent at
18 issue.

19

20 *Id.* at 1740-41, 82 USPQ2d at 1396. The Court noted that “[t]o facilitate
21 review, this analysis should be made explicit. *Id.* (citing *In re Kahn*, 441
22 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006)) (“[R]ejections on
23 obviousness grounds cannot be sustained by mere conclusory statements;
24 instead, there must be some articulated reasoning with some rational
25 underpinning to support the legal conclusion of obviousness”). However,
26 “the analysis need not seek out precise teachings directed to the specific
27 subject matter of the challenged claim, for a court can take account of the
28 inferences and creative steps that a person of ordinary skill in the art would
29 employ.” *Id.* at 1741, 82 USPQ2d at 1396. The Supreme Court’s opinion in
30 *United States v. Adams*, 383 U.S. 39, 40, 148 USPQ 479, 480 (1966) is

1 illustrative of the “functional approach” to be taken in cases where the
2 claimed invention is a prior art structure altered by substituting one element
3 in the structure for another known element. *KSR*, 127 S.Ct. at 1734, 82
4 USPQ2d at 1391. “The Court [in *Adams*] recognized that when a patent
5 claims a structure already known in the prior art that is altered by the mere
6 substitution of one element for another known in the field, the combination
7 must do more than yield a predictable result. 383 U.S., at 50-51.” *KSR*, 127
8 S.Ct. at 1740, 82 USPQ2d at 1395. Ultimately the *Adams* Court found the
9 combination at issue *not* obvious to those skilled in the art because, although
10 the elements were known in the prior art, they worked together in an
11 *unexpected* manner.

12 The [*Adams*] Court relied upon the corollary principle that when the
13 prior art teaches away from combining certain known elements,
14 discovery of a successful means of combining them is more likely to
15 be nonobvious. *Id.*, at 51-52, 86 S.Ct. 708. When *Adams* designed
16 his battery, the prior art warned that risks were involved in using the
17 types of electrodes he employed. *The fact that the elements worked*
18 *together in an unexpected and fruitful manner supported the*
19 *conclusion that Adams’s design was not obvious to those skilled in the*
20 *art.*

21 *KSR*, 127 S.Ct. at 1740, 82 USPQ2d at 1395 (emphasis added).

22 The Federal Circuit recently concluded that it would have been
23 obvious to combine (1) a mechanical device for actuating a phonograph to
24 play back sounds associated with a letter in a word on a puzzle piece with
25 (2) an electronic, processor-driven device capable of playing the sound
26 associated with a first letter of a word in a book. *Leapfrog Ent., Inc. v.*
27 *Fisher-Price, Inc.*, 485 F.3d 1157, 1161, 82 USPQ2d 1687, 1690-91 (Fed.
28 Cir. 2007) (“[a]ccommodating a prior art mechanical device that

1 accomplishes [a desired] goal to modern electronics would have been
2 reasonably obvious to one of ordinary skill in designing children’s learning
3 devices”). In reaching that conclusion, the Federal Circuit recognized that
4 “[a]n obviousness determination is not the result of a rigid formula
5 disassociated from the consideration of the facts of a case. Indeed, the
6 common sense of those skilled in the art demonstrates why some
7 combinations would have been obvious where others would not.” *Id.* at
8 1161, 82 USPQ2d at 1687 (citing *KSR*, 127 S.Ct. 1727, 1739, 82 USPQ2d
9 1385, 1395 (2007) (“The combination of familiar elements according to
10 known methods is likely to be obvious when it does no more than yield
11 predictable results”). The Federal Circuit relied in part on the fact that
12 Leapfrog had presented no evidence that the inclusion of a reader in the
13 combined device was “uniquely challenging
14 or difficult for one of ordinary skill in the art” or “represented an unobvious
15 step over the prior art.” *Id.* (citing *KSR*, 127 S.Ct. at 1740-41, 82 USPQ2d at
16 1396).

17 The person of ordinary skill in the art is a hypothetical person who is
18 presumed to know the relevant prior art. *Custom Accessories, Inc. v.*
19 *Jeffrey-Allan Indus., Inc.*, 807 F.2d 955, 962, 1 USPQ2d 1196, 1201 (Fed.
20 Cir. 1986). In determining this skill level, the court may consider various
21 factors including “type of problems encountered in the art; prior art solutions
22 to those problems; rapidity with which innovations are made; sophistication
23 of the technology; and educational level of active workers in the field.” *Id.*
24 (cited in *In re GPAC*, 57 F.3d 1573, 1579, 35 USPQ2d 1116, 1121 (Fed. Cir.

1 1995)). In a given case, every factor may not be present, and one or more
2 factors may predominate. *Id.* at 962-63, 1 USPQ2d at 1201.

3
4
5 ANALYSIS

6 We begin with the rejection of claims 1, 2, 6, and 8 under 35 U.S.C.
7 § 103(a) as being unpatentable over Lizio in view of Kim. From the use of
8 the transitional phrase "characterized in that" in claim 1, we find the
9 language to be open-ended. As a result, we find that the language in claim 1
10 "wherein said one or more products expand upon opening of said first
11 closure member" is not limited to expansion immediately upon opening of
12 the first closure member. Rather, claim 1 is broad enough to encompass the
13 one or more products expanding after opening of the first closure member
14 32, 42, or 46 (fact 12); unfolding of the expansion chamber 20 (*id.*), and
15 releasing of the tension on the folds 24 (facts 13-16).

16 With this claim construction in mind, we find that Lizio describes
17 expanding one or more of said products upon opening of said first closure
18 member 32, 42, or 46. In addition, from the description in Lizio (facts 11
19 and 12) that the sealing means 32 releasably hold the fold wrapped
20 expansion chamber 20 in position around material containing portion 18, and
21 the securing means 32 is cut or severed when the user is ready to use the
22 articles, we find that Lizio describes sealing means 32 that are strong enough
23 to seal the package in compressed form, but are also releasable by cutting or
24 severing when the user is ready to access the contents of the package.
25 Because the sealing means 32 both seal the package and are releasable when
26 needed, we find that an artisan would have been led to provide a line of

1 weakness on the sealing means 32 of Lizio as taught by Kim (facts 20 and
2 21), as a combination of familiar elements according to known methods,
3 yielding a predictable result. *See KSR* at 1739. This is supported by the
4 description in Kim (fact 18) that the perforated punch lines or other lines of
5 weakness facilitate easy removal of the tear strip for opening the container.
6 Thus, we find that the teachings and suggestions of Lizio and Kim would
7 have suggested the subject matter of claim 1, as advanced by the Examiner
8 and amplified by our comments.

9 We are not persuaded by Appellants' contention (Br. 6) that since the
10 articles of Lizio will have no room to expand upon opening of the so-called
11 first closure member, the disclosure of Lizio falls outside the scope of the
12 claims. As we found in facts 11-14, when the releasable sealing means 32
13 are cut or severed, the expansion chamber is unfolded and the tension of the
14 folds is broken, the compressed articles will bloom and expand upwardly
15 into expansion chamber 20. As described in fact 15, the size and shape of
16 the expansion chamber is such that it will accommodate the fully expanded
17 articles 22 without affecting the seals at end 14 or edge 28.

18 Nor are we persuaded by Appellants' contention (Br. 7) that an artisan
19 would be loath to place Kim's lines of weakness on Lizio's closure members
20 for fear that they would prematurely break. As we found, *supra*, from the
21 description (facts 11-12) that the sealing means 32 releasably hold the fold
22 wrapped expansion chamber 20 in position around material containing
23 portion 18, and the securing means 32 is cut or severed when the user is
24 ready to use the articles, we find that Lizio describes having sealing means
25 32 that are strong enough to seal the package in compressed form, but are

1 also releasable by cutting or severing when the user is ready to access the
2 contents of the package. Because Lizio teaches securing tapes 32 that are
3 sealing means and are releasable by cutting or severing, we find that an
4 artisan would have been led to make the sealing means strong enough to
5 keep the wrapped package in a compressed form, while being able to release
6 the sealing tape when needed. Thus, we find that an artisan would have
7 been motivated to put lines of weakness on the sealing means 32 of Lizio to
8 provide easier severing of the closure, as advanced by the Examiner
9 (Answer 3).

10 From all of the above, we are not convinced of error on the part of the
11 Examiner in rejecting claims 1, 2, 6, and 8 under 35 U.S.C. § 103(a) as being
12 unpatentable over Lizio in view of Kim. Accordingly, we hold that the
13 teachings and suggestions of Lizio and Kim would have suggested the
14 subject matter of claims 1, 2, 6, and 8. The rejection of claims 1, 2, 6, and 8
15 under 35 U.S.C. § 103(a) is sustained.

16 Turning to claim 7, we find from facts 24 and 25 that Miller describes
17 the pressure sensitive adhesive to be of a well-known type and that the
18 release material also represents a well-known category of material. From
19 this description of Miller, we agree with the Examiner (Answer 4) that in
20 view of Miller's description of providing a package closure of re-sealable
21 adhesive material, it would have been obvious to an artisan to have applied
22 the teaching of a re-sealable adhesive closure to the package of Lizio. We
23 are not persuaded by Appellants' contention that there is no need to address
24 the propriety of the application of Miller as a secondary reference to a claim
25 that is narrower in scope than claim 1. From our findings, *supra*, with

1 respect to the teaching and suggestions of Lizio, Kim, and Miller, we agree
2 with the Examiner that the teachings and suggestions of the prior art
3 considered as a whole would have suggested to an artisan the subject matter
4 of claim 7.

5 We are not persuaded by Appellants' contention (*id.*) that Lizio
6 teaches away from the proposed combination because Lizio goes to great
7 lengths to ensure that the second closure member remains sealed. Lizio
8 describes having the contents remain free of contamination. However, once
9 the package is opened and some of the products have been removed, an
10 artisan would have been motivated to make the second closure 28 re-sealable
11 to prevent contaminants from entering the package and contaminating the
12 remainder of the products. “The Court [in *Adams*] recognized that when a
13 patent claims a structure already known in the prior art that is altered by the
14 mere substitution of one element for another known in the field, the
15 combination must do more than yield a predictable result. 383 U.S., at 50-
16 51.” *KSR*, 127 S.Ct. at 1740, 82 USPQ2d at 1395. Here, we find that
17 making the second closure of Lizio re-sealable would have been a
18 predictable result in view of the description in Miller that the pressure
19 sensitive adhesive and release material were well known in the art.

20 From all of the above, we are not convinced of any error on the part of
21 the Examiner is rejecting claim 7 under 35 U.S.C. § 103(a) as being
22 unpatentable over the combined teachings and suggestions of Lizio, Kim,
23 and Miller. The rejection of claim 7 is sustained.

24

1

CONCLUSION OF LAW

2

3

4

5

6

DECISION

7

8

9

10

11

12

AFFIRMED

13

14

15

16

17 hh

18

19

20

21

22

23

THE PROCTER & GAMBLE COMPANY
INTELLECTUAL PROPERTY DIVISION - WEST BLDG.
WINTON HILL BUSINESS CENTER - BOX 412
6250 CENTER HILL AVENUE
CINCINNATI, OH 45224