

TTAB

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application No. 76/464,504 for the
mark SMILEY BUDDIES published for opposition
in the Official Gazette of June 17, 2003 at page TM 344



11-20-2003

U.S. Patent & TMO/c/TM Mail RcptDt. #22

_____)	
FRANKLIN LOUFRANI,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91158053
)	
PANORAMA GLASS, L.L.C.,)	Serial No. 76/464,504
)	
Applicant.)	
_____)	

**ANSWER AND COUNTERCLAIM OF
APPLICANT, PANORAMA GLASS, LLC
TO NOTICE OF OPPOSITION**

ANSWER

COMES NOW the Applicant, Panorama Glass, LLC, and for its Answer
to Opposer Franklin Loufrani's *Notice of Opposition*, alleges and
states:

1. At page 1, line 3 of the *Notice of Opposition*, the Opposer
alleges that he obtained timely extensions of time to file the *Notice
of Opposition* in the instant proceeding. The Opposer never obtained
an extension of time. Extensions of time were granted to a U.K.
company named "Smiley World, Ltd." Notwithstanding, the *Notice of
Opposition* includes no allegation which would allow the Opposer to
benefit from Smiley World, Ltd.'s time extensions. The *Notice of*

Opposition fails to allege that Smiley World, Ltd. was named in the extensions by mistake. The *Notice of Opposition* also fails to allege privity between the Opposer and Smiley World, Ltd. The *Notice of Opposition* is out of time and should be dismissed.

2. Each and every allegation of the *Notice of Opposition* is denied unless specifically admitted below.

3. The allegations made in paragraph 1 of the *Notice of Opposition* are denied on the ground that the term "smiley" is not a name as alleged. The word "smiley" is merely descriptive of a facial image which is a significant feature of the Opposer's products.

4. The allegations made in paragraph 2 of the *Notice of Opposition* are denied because the term "smiley" is not a word mark as alleged.

5. The Applicant is without sufficient knowledge of the allegations made in paragraph 3 of the *Notice of Opposition* to either admit or deny the same. Said allegations are, therefore, denied, and the Applicant requires strict proof thereof.

6. Registration No. 2,566,529 is invalid (see Counterclaim set forth below), and the allegations of paragraph 4 of the *Notice of Opposition* are, therefore, denied.

7. In response to the allegations made in paragraph 5 of the *Notice of Opposition*, the Applicant asserts that the descriptive term "smiley" is merely descriptive of the facial image appearing on the Applicant's marbles, and that the fancy aspect of the Applicant's marbles mark resides in the name "buddies".

8. The allegations made in paragraph 7-10 of the *Notice of Opposition* are denied.

9. For its further defense, the Applicant incorporates the allegations set forth below in its Counterclaim.

WHEREFORE, the Applicant prays that the Opposer's *Notice of Opposition* be dismissed as out of time. The Applicant further prays that the opposition be denied, and that the Applicant's Application to Register "smiley buddies" (Serial No. 76/464,504) proceed to registration in the Principal Register.

**COUNTERCLAIM FOR CANCELLATION OF
USPTO TRADEMARK REGISTRATION NO. 2,566,529**

COMES NOW the Applicant, and for its Counterclaim against the Opposer, alleges and states:

10. All of the allegations set forth above are incorporated herein.

11. The Applicant is a seller in commerce of marbles, each having a significant feature comprising a facial image having an upward curving of the corners of the mouth. Webster's Third International Dictionary (1961) defines the word "smile" as follows:

"1: a change of facial expression involving a brightening of the eyes and an upward curving of the corners of the mouth with no sound and less muscular distortion of the features than in a laugh that may express amusement, pleasure, tender affection, approval, restrained mirth, irony, derision, or any of various other emotions." (Emphasis Added)

Webster's Third International Dictionary (1961) also defines the word "smiley" as follows:

"Exhibiting a smile."

The above referenced marbles sold by the Applicant exhibit a smile within the meaning of the dictionary definition of "smile". By virtue

of such exhibition, the Applicant's marbles are smiley within the meaning of the dictionary definition of that term. The Applicant, as a seller in commerce of smiley marbles, has a sufficient business interest in using that descriptive word to allege and does allege a likelihood of damage arising from the Opposer's registration of the word "smiley" under Class 28 in the United States Patent and Trademark Office, No. 2,566,529 pursuant to 15 U.S.C. § 1064.

12. The Opposer's Registration No. 2,566,529 for "smiley" should never have proceeded to final registration and is invalid on the ground that the word "smiley" is merely descriptive of a substantial feature of the Opposer's goods, and on the ground that the Opposer cannot properly appropriate or monopolize such descriptive word as a trademark.

13. The Applicant asserts and holds in common with others the right to utilize the common descriptive term "smiley" in relation to products such as the Applicant's marbles which bear facial images having mouths, having upturned corners, and the Applicant and such others have the right not to be harassed by any USPTO trademark registrant claiming an exclusive right to use of such descriptive term. In enforcement of such right, the Opposer's "smiley" registration should be canceled.

14. The word "smiley" was in the public domain prior to the Opposer's attempted appropriation and monopolization of that term, and such usage remains in the public domain. (See reference to Webster's Dictionary above, see attached Exhibit "A" which is a copy of a November 18, 1999 U.S. Postal Service press release announcing issuance of its "Celebrate the Century" collector's edition of stamps, such edition including stamps bearing the facial image at issue herein, the press release labeling such image with the descriptive

term "smiley"; and see Exhibit "B" which is a copy of an October 30, 1998, Associated Press article reporting that balloting conducted by the U.S. Postal Services had identified the smiley image as the symbol most reflective of the U.S.'s 1970s.) The public domain status of "smiley" warrants cancellation of the Opposer's registration.

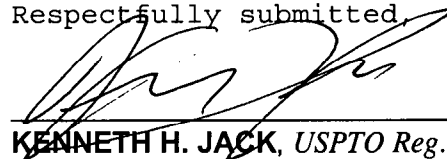
15. In order for a reasonable consumer to reach a correct conclusion regarding the nature of goods bearing the label "smiley", no imagination, thought, or perception on the part of the consumer is required. Instead, the word "smiley" immediately conveys to the consumer knowledge of the facial image at issue. Said status of the term "smiley" within the ordinary consumer's knowledge and perception warrants cancellation of the Opposer's registration of "smiley".

16. Request is hereby made that a \$300.00 cancellation petition fee be withdrawn from the Davis & Jack, L.L.C. Deposit Acct. No. 50-0550.

WHEREFORE, the Applicant, Panorama Glass, LLC, respectfully requests issuance of an order of cancellation of USPTO Registration No. 2,566,529 for "smiley" in International Class 28, and granting such other or further relief as is deemed just.

11/17/03
Date

Respectfully submitted,



KENNETH H. JACK, USPTO Reg. #37,644
Attorney for Applicant,
Panorama Glass, L.L.C.
dba Mega Marbles

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P.O. Box 12686
2121 West Maple
Wichita, KS 67277-2686
(316) 945-8251

bd1/Ans-Panorama03/03-2786

CERTIFICATE OF MAILING (37 C.F.R. 1.8a)

BOX TTAB Fee
Commissioner for Trademarks
2900 Crystal Dr.
Arlington, VA 22202-3513

Sir:

I hereby certify that the:

Answer and Counterclaim (original and one copy);
Power of Attorney (original, plus one copy);
Request for Withdrawal as Attorney (original,
plus one copy);
Entry of Appearance and Request for Notice
(original, plus one copy);

along with any paper(s) referred to as being attached or enclosed and this Certificate of Mailing are being deposited with the United States Postal Service on date shown below with sufficient postage as first-class mail in an envelope addressed to the:

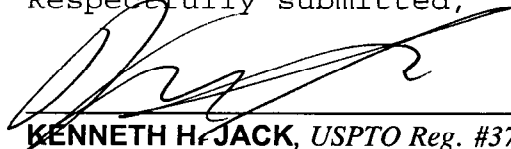
TTAB - FEE
Commissioner for Trademarks
2900 Crystal Dr.
Arlington, VA 22202-3513

and to:

Maren Coburn
Morgan & Finnegan, LLP
345 Park Ave.
New York, NY 10154

Dated: November 17, 2003.

Respectfully submitted,



KENNETH H. JACK, USPTO Reg. #37,644
Attorney for Applicant,
Panorama Glass, L.L.C.
dba Mega Marbles

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Celebrate The Century 1970s

Press Release

Technical Details Below

Date of Issue: November 18, 1999

'DECADE OF TRENDS AND TRIUMPHS' CELEBRATED ON NEW POSTAGE STAMPS HONORING 1970s

Smiley Face, "Sesame Street," Disco Music and Earth Day Among '70s Stamps Selected by Public

NEW YORK, N.Y.—Some of the most memorable trends and triumphs of the 1970s were remembered today when the U.S. Postal Service issued 15 "groovy" stamps during a ceremony held on the opening day of the Postage Stamp MEGA Event at Javits Center.

"The 1970s was a very colorful and memorable decade for this country," said James C. Tolbert, Jr., Executive Director of Stamp Services for the U.S. Postal Service, who dedicated the stamps. "Stamps take us back in time and help us relive moments in the past that we cherish – and beginning today, Americans around the nation will be able to capture those cherished memories of the 1970s through the issuance of these new Celebrate The Century stamps!"

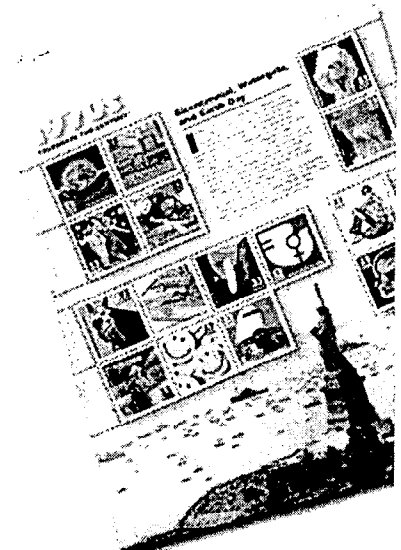
Joining Tolbert at the ceremony were Jackson Taylor, President, American Stamp Dealers Association; E. Lamb, Executive Director, American Philatelic Society; Diane M. Dayson, Superintendent, Statue of Liberty National Monument and Ellis Island; Karen Lustgarten, an expert on disco; and James A. Conno, Human Resources for the Postal Service, New York Metro Area.

The following subjects for the 1970s stamps were selected by the public during nationwide ballot in September 1998, as part of the Celebrate The Century stamp and education program: Smiley Face (Smiles), "Sesame Street," Disco Music, Earth Day Celebrated, the Bicentennial (U.S. Celebrates 200th Birthday), Women's Rights Movement, "All in the Family" (TV Series), "Monday Night Football," Pittsburgh Steelers (Steelers Win Four Super Bowls), Secretariat Wins Triple Crown, Jumbo Jets, VCRs (Television Entertainment), Medical Imaging, "Pioneer 10" and 1970s Fashion.

The Celebrate The Century commemorative stamp and education program honors some of the most significant people, places, events and trends of each decade of the 20th century.

The Citizens' Stamp Advisory Committee recommends all stamp subjects and designs to the Postmaster General for final approval. The committee also selected the stamps to honor the 1900s through the 1990s. During month-long balloting periods, the public selected the subjects for stamps commemorating each decade through the 1990s.

Each decade-specific ballot offered a total of 30 choices in five categories: People & Events, Art & Entertainment, Sports, Science & Technology and Lifestyle. The top two vote-getters in each category, along with the next five highest vote-getters overall, become stamps for a total of 15 stamps per decade.



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Custom-Framed Art Prints



postalartgallery.com

Exh. AU

The Celebrate The Century Collector's Edition offers the entire 150-stamp series, which will be a year. This unique millennium keepsake can be ordered toll free, at 1 800 STAMP-24. The 1980s scheduled to be issued in January 2000, and the 1990s in April 2000.

For more information on Celebrate The Century, to see images of the 1970s stamps or to order, visit the Postal Service's Website at www.usps.com/ctc. For news releases on all recent U.S. stamps, visit www.usps.com/news.

Following is descriptive text that appears on the gummed side of each stamp:

Smiley Face (America Smiles)

During the 1970s, the yellow smiley face became an omnipresent symbol of happiness and good, perky design appealed to all ages and appeared on everything from buttons and cookie jars to sleeping bags.

"Sesame Street"

Created for public TV by Children's Television Workshop, "Sesame Street" revolutionized children's television, combining entertainment and education. It helps children worldwide learn about letters, numbers along with others.

Disco Music

Powered by strong beats on records spun by disc jockeys, disco music got Americans dancing in. Dressed up in polyester and silk, people "boogied" at nightclubs beneath colored strobe lights and disco balls.

Earth Day Celebrated

The first nationwide Earth Day was held April 22, 1970. Celebrated with marches, speeches, plantings, cleanup projects, it raises awareness of environmental issues, promotes conservation efforts, and respect for the Earth.

Bicentennial (U.S. Celebrates 200th Birthday)

The United States of America celebrated its 200th birthday on July 4, 1976. Crowds of people gathered for a grand procession of sailing ships in New York Harbor, a naturalization ceremony in Chicago, and a parade from coast to coast.

Women's Rights Movement

The women's rights movement mobilized to secure women's equality, their political and economic empowerment, and respect for their human rights. The United Nations Development Fund (UNF) promoted these efforts worldwide.

"All in the Family" (TV Series)

Debuted in 1971, the innovative TV series "All in the Family" was the top-rated show five consecutive seasons. Prejudiced Archie, kindhearted Edith, and liberal Mike and Gloria lit verbal fireworks over previously taboo subjects.

"Monday Night Football"

First broadcast in September 1970, ABC's "Monday Night Football" brings a mix of sports and entertainment to prime-time television. The banter among the announcers is often one of the highlights of the show.

Pittsburgh Steelers (Steelers Win Four Super Bowls)

Winning four Super Bowls, the Pittsburgh Steelers dominated pro football in the second half of the 1970s. Their explosive offense and defense, including the "Steel Curtain," featured several future members of the Pro Football Hall of Fame.

Secretariat Wins Triple Crown

In 1973, two-year-old Secretariat was named Horse of the Year. In 1973, he won the coveted Triple Crown including the only less-than-two-minute Kentucky Derby victory and a 31-length Belmont Stakes.

Jumbo Jets

In 1970, Boeing introduced the world's first jumbo jet. These state-of-the-art airplanes greatly increased passenger capacity and flew some 6,000 miles without refueling, allowing for more convenient international travel.

VCRs Transform Entertainment

Videocassette recorders (VCRs) for home use took off with the introduction of Betamax and Video Cassette System (VHS) machines in the mid-1970s. VCR users can watch movies at home and record TV programs for later viewing.

Exh. A(2)

Medical Imaging

Medical imaging techniques advanced significantly with the development of ultrasound, CAT scan technology. These noninvasive procedures improved doctors' ability to see inside the human body.

"Pioneer 10"

Launched March 1972, "Pioneer 10" was the first spacecraft to travel to Jupiter and send back data images. Eleven years later, it became the first man-made object to leave the solar system.

1970s Fashion

Freedom and experimentation guided 1970s fashion. It was a time of leisure suits, bell-bottoms, jeans, miniskirts and hot pants, platform shoes, and long hair. Synthetic fabrics, such as polyester, were popular.

Chart of Technical Details**Celebrate The Century 1970s**

Issue: Celebrate The Century 1970-1979

Item Number: 554700

Denomination & Type of Issue: 33-cent Commemorative

Format: Water-activated Pane of 15 (15 designs)

Series: Celebrate The Century

Issue Date & City: November 18, 1999, New York, NY 10199

Illustrator: Kazuhiko Sano, Mill Valley, CA

Designer: Howard Paine, Delaplane, VA

Art Director: Howard Paine, Delaplane, VA

Typographer: Tom Mann, Vancouver, WA

Modeler: Joseph Sheeran

Manufacturing Process: Offset/Intaglio

Printer: Ashton-Potter (USA) Ltd. (APU)

Printed at: APU, Williamsville, NY

Press Type: Stevens Variable Size Security Press

Stamps per Pane/Coil: 15

Print Quantity: 90 million stamps

Paper Type: Non-phosphored

Gum Type: Water-activated PVA

Processed at: APU, Williamsville, NY

Colors: Black, Cyan, Magenta, Yellow, Intaglio Black (Back-Black)

Image Area: 1.075 x 1.075 in. / 27.31 x 27.31 mm

Overall Size: 1.225 x 1.225 in. / 31.12 x 31.12 mm

Full Pane Size: 9.000 x 7.500 in. / 228.60 x 190.50 mm

Plate Size: 60 stamps per revolution

Plate Numbers: N/A

Marginal Markings: N/A

Catalog Item Number: 554740 Full Pane - \$4.95

554762 Full Pane First Day Cancellation- \$6.95

554784 Press sheet - \$19.80

554778 Stamper Cards - \$7.00

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Exh. A(3)

Web posted Friday, October 30, 1998

Yellow smiley face tops Americans' choices for symbols of the 70s

WASHINGTON (AP) -- Asked to pick the symbols and events that best reflect the 1970s, Americans' top choice was the yellow smiley face. Have a nice day!

The popular children's television show "Sesame Street" finished second, trailing by nearly 100,000 votes in balloting sponsored by the Postal Service.

Americans across the country cast their ballots in post offices and via the Internet for the subjects to be portrayed on a set of 15 stamps to be issued next year.

Earth Day was third, followed by the disco dance craze and videocassette recorders.

Among the subjects that failed to get enough votes to become stamp subjects were the Watergate scandal, the oil shortage and the opening of China.

"The Smiley Face has endured over the years as a very simple, recognizable icon of hope and happiness," said Postmaster General William Henderson. "It is appropriate that we continue this friendly tradition on the nation's cards and letters, as we celebrate the 1970s on postage stamps."

The 1970s stamps will be part of the post office's Celebrate the Century series with stamp sets being issued to commemorate each decade of the century. The public will also be invited to pick subjects for the 1980s and 1990s.

The smiley face collected 469,867 votes, postal officials reported. "Sesame Street" got 378,785; followed by Earth Day, 366,626; disco, 365,221; and VCRs, 344,729.

The rest of the 15 stamps to be issued are: the nation's Bicentennial, 344,134; televised "Monday Night Football," 338,572; Pittsburgh Steelers football dynasty, 323,070; travel via jumbo jets, 320,147; new developments in medical imaging, 292,850;

Also, women's rights movement, 285,217; fashions of the 1970s, 284,555; Pioneer 10 spacecraft, 256,330; racehorse Secretariat, 251,370; television show "All in the Family," 209,752.

In February the public picked drive-in movies as the top stamp subject to commemorate the 1950s while in May they selected "man walks on moon" as the top subject of the 1960s.

Stamp subjects for the first five decades of the century were selected by postal officials.

Exh B(1)

Other subjects that failed to make the cut for the 1970s were the book and television show "Roots," the movie "The Godfather," public broadcasting, photorealism, "A Chorus Line," Spiral Jetty artwork in the Great Salt Lake, the growth of soccer leagues, the increasing popularity of tennis, the Oakland Athletics baseball team, jogging, citizens band radio and postmodern architecture.

EXH B(2)