

Sound Unseen Ltd. v. Vanderhorst, 77 USPQ2d 1585 (WIPO 2005)

**77 USPQ2D 1585**  
**Sound Unseen Ltd. v. Vanderhorst**  
**World Intellectual Property Organization**

**No. D2005-0636**  
**Decided August 18, 2005**

**Headnotes**

**TRADEMARKS AND UNFAIR TRADE PRACTICES**

**[1] Acquisition, assignment, and maintenance of marks — In general (§305.01)**

**Infringement; conflicts between marks — Defenses —In general (§335.1001)**

Once U.S. Patent and Trademark Office has determined that mark is registrable, that determination

will not be disturbed in proceeding brought pursuant to Uniform Domain Name Dispute Resolution Policy; in present proceeding, panel will defer to PTO's determination that complainants' federally registered "Apple Bottoms" marks have acquired sufficient distinctiveness, are not merely descriptive or generic, and qualify for federal trademark protection, since that determination is implicit in PTO having issued corresponding registrations.

**[2] Infringement; conflicts between marks — Likelihood of confusion —Particular marks — Confusion likely (§335.0304.03)**

Protections afforded under Uniform Domain Name Dispute Resolution Policy are not limited to registered marks; in present proceeding, respondent's "missapplebottom.com", "missapplebottoms.com", "msapplebottom.com", and "msapplebottoms.com" Internet domain names are sufficiently similar to complainants' "Apple Bottoms" trademarks to cause confusion, since disputed domain names are formed by appending generic term, specifically "Miss" or "Ms," to, and/or deleting letter "s" from, complainants' registered mark, and such minor variations do not confer requisite and sufficient distinctiveness on domain names to avoid user confusion, since complainants acquired sufficient common law trademark rights in their marks as of date on which respondent registered its domain names, and since resulting confusion would undoubtedly cause Internet users intending to access complainants' Web site, but who reach site through any of disputed domain names, to incorrectly believe that affiliation of some sort exists between complainants and respondent.

**[3] Acquisition, assignment, and maintenance of marks — Acquisition through use — Priority of use (§305.0503)**

**Infringement; conflicts between marks — Defenses —Fair use (§335.1003)**

**Infringement; conflicts between marks — Willful (§335.11)**

Respondent in Internet domain name dispute resolution proceeding does not have rights and legitimate interests in “missapplebottom.com”, “missapplebottoms.com”, “msapplebottom.com”, and “msapplebottoms.com” domain names for display and ratings of naked female buttocks, even though display of pornographic imagery does not, without more, demonstrate bad faith registration of domain names, since respondent's illicit actions in establishing “free community web site” for posting and ranking of imagery through domain names that he knew would, and was clearly calculated to, cause confusion with complainants' “Apple Bottoms” marks constituted pattern of abusive domain name registration, since registrations were devised to exploit likely and highly anticipated typographical errors by users, since respondent undoubtedly received increased Internet traffic because of these actions, and since timing of registrations, which were obtained three months after date on which complainants launched clothing business and started using “Apple Bottoms” mark, was opportunistic, and cannot constitute bona fide commercial or fair use sufficient to legitimize any rights or interests that respondent might have in domain names.

**[4] Infringement; conflicts between marks — Willful (§335.11)**

Respondent's registration and use of “missapplebottom.com”, “missapplebottoms.com”, “msapplebottom.com”, and “msapplebottoms.com” Internet domain names was in bad faith, since it amounted to nothing more than opportunistic exploitation of user confusion for respondent's own benefit, by way of increased Internet traffic he would not have otherwise attained, and to detriment of complainants, who own registered “Apple Bottoms” marks.

**Case History and Disposition**

Administrative proceeding pursuant to Uniform Domain Name Dispute Resolution Policy of Internet Corporation for Assigned Names and Numbers, in which complainants Sound Unseen Ltd., Apple Bottoms LLC, and Cornell Haynes, p/k/a “Nelly,” seek transfer of disputed domain names “missapplebottom.com”, “missapplebottoms.com”, “msapplebottom.com”, and “msapplebottoms.com” from respondent Patrick Vanderhorst to complainants. Transfer granted.

**Attorneys:**

Silver & Freedman, St. Louis, Mo., for complainants.

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Patrick Vanderhorst, Atlanta, Ga., pro se.

**Opinion Text**

**Opinion By:**

Michaelson, panelist.

***1. The Parties***

The Complainants are Sound Unseen, Ltd.; Apple Bottoms, LLC; and Cornell Haynes p/k/a “Nelly”, all located in St. Louis, Missouri, United States of America; represented by Silver & Freedman, PLC, United States of America (hereinafter simply and collectively the “Complainant”, unless where specifically referenced).

The Respondent is Patrick Vanderhorst, of Atlanta, Georgia, United States of America; represented pro se.

***2. The Domain Names and Registrar***

The disputed domain names are <missapplebottom.com>, <missapplebottoms.com>, <msapplebottom.com>and <msapplebottoms.com>, all of which are registered with Tucows Inc.

***3. Procedural History***

The Complaint was brought pursuant to the Uniform Domain Name Dispute Resolution Policy (the

“Policy”), which was adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on August 26, 1999, and approved on October 24, 1999, and in accordance with the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”) as approved on October 24, 1999, and by the World Intellectual Property Organization Supplemental Rules for Uniform Domain Name Dispute Resolution Policy in effect as of December 1, 1999 (the “Supplemental Rules”).

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) in email and hardcopy form on June 17, 1995, along with Annexes 1-11. An amended Complaint was received by the Center on July 1, 2005. All subsequent references to the Complaint shall be to the amended version.

Pursuant to paragraph 4(d) of the Policy, the Complainant selected the Center as the ICANN approved administrative dispute resolution service provider to administer this proceeding. Through the Complaint, the Complainant requested a single member panel.

After receiving the Complaint, the Center, in accordance with paragraph 5 of the Supplemental Rules, determined whether that Complaint fully complied with the formal requirements of the Rules and the Supplemental Rules. In that regard, on June 20, 2005, the Center requested confirmation from the Registrar of information set forth in the Complaint relative to the disputed domain names; specifically, contact and registrant information for each of the disputed domain names, as well as whether the Registrar received a copy of the Complaint from the Complainant. The Center also requested the Registrar to specify: (a) whether the Policy applies to the disputed domain names, (b) whether the registrant has submitted, in its registration agreements, to the jurisdiction at the location of the principal office of the registrar for court adjudication of disputes concerning or arising from the use of the domain names, (c) the language of each registration agreement, and (d) whether the domain names will remain “locked” during the proceeding.

Subsequently, on June 20, 2005, the Registrar provided its response to the Center through which the Registrar specified name and contact information pertinent to each of the disputed domain names, to the extent present in its WhoIS database; confirmed that Tucows Inc. is the registrar of each such name; and stated that: (a) it had not received a copy of the Complaint, (b) the Policy applied to each of the disputed domain names, (c) the language of the underlying registration agreement for each name is

English and (d) all the names were then held in a “Registrar Locked” status pending the resolution of this administrative proceeding. The Registrar also informed the Center that the Respondent, through the registration agreements, had submitted to the jurisdiction at the location of the principal office of the Registrar for court adjudication of disputes concerning or arising from the use of any of the disputed domain names.

On July 4, 2005, the Center notified the Respondent of the filing of the Complaint, including an indication that the Center was forwarding a complete copy of the Complaint, by courier, facsimile and email (the latter two being without the Exhibits), to the Respondent. Specifically, the Center separately provided its notice along with the Complaint, by email, to the Respondent’s domain name registrant, technical, administrative and zone contacts as set forth in the WhoIS record for each of the

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disputed domain names. The Complaint and its accompanying documents, and all subsequent communications associated therewith, were provided in the preferred manners and to the addresses as mandated by paragraphs 2(a), 2(b) and 4(a) of the Rules.

Hence, the notification to the Respondent having occurred on July 4, 2005, under paragraph 4(c) of the Policy, this administrative proceeding is deemed to have commenced on that date.

Having reviewed the Complaint and all preceding and succeeding correspondence between the Center and the Registrar, in detail, the Panel agrees with the determination of the Center that the Complaint and its handling met the requirements of the Rules and the Supplemental Rules.

The Respondent was then provided with a 20 calendar day period, expiring on July 24, 2005, to file its Response with the Center and serve a copy of the Response on the Complainant.

The Center received a Response in email form on July 23, 2005, and in hard-copy form on July 25, 2005. In an email letter dated July 25, 2005, the Center notified the parties that it received the Response.

Thereafter and pursuant to the Rules and Supplemental Rules, by e-mail letter dated July 29, 2005, the Center contacted the undersigned, Mr. Peter L. Michaelson, requesting his service as a Sole Panelist for this dispute. On August 1, 2005, Mr. Michaelson accepted and returned, by facsimile to the Center, a fully executed Statement of Acceptance and Declaration of Impartiality and Independence. The Center, through an e-mail letter dated August 2, 2005, notified the parties of the appointment of Mr. Michaelson as Sole Panelist.

Based on the deadline set forth in paragraph 15 of the Rules, a decision was to be issued by the Panel to the Center on or before August 16, 2005. However, due to time conflicts experienced by the Panel, the Center, upon the Panel's request, extended the due date to August 23, 2005.

This dispute concerns four domain names, specifically: <missapplebottom.com>, <missapplebottoms.com>, <msapplebottom.com>and <msapplebottoms.com>.

The language of this proceeding is English.

#### *4. Factual Background*

A copy of the WhoIS registration records for all of the disputed domain names appears in Annex 1 to the Complaint. As indicated on these records, the Respondent registered the disputed domain names as follows: <missapplebottom.com>on November 13, 2003; and <missapplebottoms.com>, <msapplebottom.com>and <msapplebottoms.com> all on November 16, 2003.

#### *A. Complainant's "APPLE BOTTOMS" Marks*

The Complainant Sound Unseen owns two federal trademark registrations and one pending federal trademark application for its marks that contain the term "Apple Bottoms", either by itself and with and without an accompanying logo and on which this dispute is based. The Complainant has provided, in Annex 4 to the Complaint, hard-copy printouts of the entries in the USPTO (United States Patent and Trademark Office) Trademark Electronic Search System (TASS) and Trademark Applications and Registrations Retrieval (TARR) databases for these marks. These registrations and the application are

as follows:

(a) APPLE BOTTOMS (stylized with logo)

United States registration 2,887,665; registered: September 21, 2004

filed: January 6, 2003 (intent to use)

This mark was registered for use in connection with “women’s clothing, namely jeans, pants, sweaters, blouses, blazers, skirts, tops, jackets, dresses, suits, swim wear, and active wear, namely sweat pants, sweat shirts, warm-up suits, shirts, shorts, track pants, tights, jackets, caps, hats, socks, jerseys, and leotards” in international class 25. The registrant claims first use and first use in commerce of the mark in conjunction with these goods commenced as of July 1, 2003.

(b) APPLE BOTTOMS (block letters)

United States registration 2,887,664; registered: September 21, 2004

filed: January 6, 2003 (intent to use)

This mark was registered for use in connection with “women’s clothing, namely jeans, pants, sweaters, blouses, blazers, skirts, tops, jackets, dresses, suits, swim wear, and active wear, namely sweat pants, sweat shirts, warm-up suits, shirts, shorts, track pants, tights, jackets, caps, hats, socks, jerseys, and leotards” in international class 25. The registrant claims first use and first use

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in commerce of the mark in conjunction with these goods commenced as of July 1, 2003.

(c) APPLE BOTTOMS JEWELS (block letters)

United States pending application serial no.: 78/341,339

filed: December 16, 2003 (intent to use) published for opposition: October 12, 2004

Notice of Allowance issued: January 4, 2005

This mark, which is still pending, was filed for use in connection with “jewelry” in international class 14; and “women’s clothing, namely jeans, pants, sweaters, blouses, blazers, skirts, tops, jackets, dresses, suits, swimwear, and activewear, namely sweat pants, sweat shirts, warm-up suits, shirts, shorts, track pants, tights, jackets, caps, hats, socks, jerseys, and leotards” in international class 25. According to the TARR database entry provided by the Complainant, the Complainant has not yet

filed a Statement of Use for this mark.

The Complainant Sound Unseen also claims ownership of various common law marks, specifically “THE SEARCH FOR MISS APPLEBOTTOMS”, “MISS APPLEBOTTOMS” and variations thereof, which are discussed in detail below.

For ease of reference, all these marks will be collectively referred to hereinafter as simply the APPLE BOTTOMS Marks.

### *B. The Complainant and its activities*

Complainant Cornell Haynes, publicly known as (p/k/a) “Nelly” since at least 1994, is a three time Grammy award winning rap/hip-hop recording artist and actor who has achieved world-wide recognition. He has performed as Nelly in every major city throughout the United States of America, and in more than 22 countries throughout the world. This summer, along with Burt Reynolds, Chris Rock and Adam Sandler, he will star in the upcoming feature film “The Longest Yard.” In Annex 2 to the Complaint, the Complainant has provided copies of various materials that provide biographical information about Nelly, including information about Nelly’s albums which have been released and sold world-wide.

To illustrate Nelly’s fame, the Complainant performed searches of the word “Nelly” using three major international Internet search engines: Google, Yahoo, and MSN. In each case — the results of which are shown in the search results provided in Annex 3 to the Complaint, all of the first “hits” and the vast majority of “hits” for “Nelly” (both on the right side where “unfiltered” search engine results appear, and on the left side where advertisements appear) pointed directly to Complainant Nelly.

Nelly has authorized the creation and merchandising of certain clothing bearing (or otherwise making use of) the Nelly trademark. In 1997, Nelly launched a successful men’s clothing line, VOKAL. Subsequently, Nelly launched the Apple Bottoms clothing line (through affiliate, Complainant Apple Bottoms, LLC) in 2003.

The Complainant specifically notes “that as Nelly is known for publicly boasting his love of women’s curves, Nelly conjured the clothing line’s name, ‘Apple Bottoms,’ and coined that name as a phrase,

with an eye toward paying tribute to the female figure”. This apparently was the inception of the APPLE BOTTOMS Marks. Today, Apple Bottoms clothing enjoys world-wide brand and product name recognition. Apple Bottoms’ 2004 domestic sales reached tens of millions of dollars; sales for 2005, are conservatively projected to exceed \$50,000,000.00. The Complainant has substantially used those marks continuously since approximately July of 2003.

Further, the Complainant operates a website whose primary address is “www.applebottoms.com” where Apple Bottoms merchandise is advertised, promoted and sold, and where information is also provided regarding both the APPLE BOTTOMS Marks and Nelly. The Complainant registered that domain name in 2002, and has maintained an active website at that address ever since. In Annex 5 to the Complaint, the Complainant has provided a copy of its current home page for that site.

The Complainant has spent considerable time, effort and money advertising and promoting the APPLE BOTTOMS Marks throughout the United States of America and the world. Apple Bottoms clothing has also been marketed and promoted by Nelly himself in a variety of media. The largest of such promotions is “The Search for Miss Apple Bottoms”

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(the “Search”). The Search, a national contest and television event, has followed and chronicled Nelly’s search for and selection of young women to represent the Apple Bottoms clothing line. The Search began in 2003, and stopped in six cities; Los Angeles, Atlanta, Miami, Houston, New York and St. Louis. The 2003/2004 finals of the Search were held in Las Vegas with six women competing to earn the title “Miss Apple Bottoms.” In addition to wide-spread media coverage, portions of the Search were broadcast internationally over MTV’s sister channel, VH1. The Search, set to tour again in 2005, will visit more cities and is anticipated to generate increased media attention than its predecessor.

The Complainant believes that it has developed considerable goodwill in its APPLE BOTTOMS Marks. As indicated in the search results appearing in Annex 6 to the Complaint, cursory AltaVista and Google searches using the words “Apple Bottoms” produces a display of primary listings for the Apple

Bottoms clothing line. Similar results, as indicated in the search results provided in Annex 7 to the Complaint, appear for a Google search using the words “Miss Apple Bottoms”. These latter results also include primary listings related to the Search.

The Complainant did not authorize or consent to the Respondent’s registration of the disputed domain names, nor did the Complainant have any prior knowledge of the Respondent’s intent to register those names.

### *C. The Respondent and his activities*

The Respondent registered all four disputed domain names approximately 1 1/2 years after the Complainant registered its domain name and some three months after the Complainant commenced doing business under its APPLE BOTTOMS Marks.

Three of the four disputed domain names resolve to the Respondent’s websites which display, catalogue, rate and compare images of naked female buttocks submitted and posted by website users. The purported purpose of these sites is described in each of their corresponding home pages — hard copies of which appear in Annex 8 to the Complaint. With specific reference to the “www.missapplebottom.com” site, the express purpose, as stated on its home page, is:

“Rate My Apple Bottom is a rating/voting site in which females are rated on their apple bottom...” These sites use various phrases including “find the best amateur ass online,” and “rate my apple bottom” to promote their rating and other activities.

The Respondent established his “www.missapplebottom.com” site in 2003, and states that, since that date, that site has always been an image rating site, specifically through which “posterior of females are voted on”. Since then to the present, that site has developed a user community of over 7000 members with 40,000 unique visitors per month. Further, to date, the Respondent has expended over US \$10,000 of his own personal money in maintaining and running the site, and specifically for dedicated server hosting fees, domain registrations, designs and programming cost.

The Respondent states that the “www.missapplebottom.com” site has always been a freely run site, i.e., without any charge ever having been made for user access. A member script is merely used to

maintain user names and images in a database used by that site. Though that site contains advertising banners, those banners only link to other sites (e.g., pixelbin.com) which the Respondent owns.

The fourth disputed domain name points to another of the Respondent's websites which, suffice it to say and as evidenced by the print-outs provided in Annex 9 to the Complaint, displays pornographic imagery involving female buttocks and apples.

Lastly, the Respondent states, in light of home pages, WhoIS printouts and other materials provided in Annex 1 to the Response, other domain names exist which incorporate the term "Apple Bottom" including, e.g., <applebottomgirls.net>, <applebottoms.net>and <applebottomsclothing.com>. Though an examination of the information appearing in Annex 1 seems to indicate that the corresponding owners of these three names are offering all of the names for sale.

#### *D. Interactions between the parties*

In early February 2005, the Complainant discovered that the Respondent applied for Federal registration of the mark "MISS APPLE BOTTOM INTERNET CONTEST"(Federal trademark serial no.: 78/350,230;

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filed on an intent-to-basis on January 10, 2004). At that time, the Complainant also discovered that the Respondent owned and operated a website which resolved through <missapplebottom.com>.

Consequently, on February 18, 2005, the Complainant, through its counsel, sent a "cease and desist" letter to the Respondent which, inter alia, requested that Respondent immediately and affirmatively abandon his trademark application and transfer the domain name <missapplebottom.com> to the Complainant. A copy of all the correspondence between Complainant's counsel and the Respondent appears in Annex 10 to the Complaint.

Respondent replied, by his own letter dated February 21, 2005, which stated, in pertinent part:

"As of August 2004, I no longer have interest in the pending trademark for the Miss Apple Bottom ~

Internet Contest. The pending trademark will enter abandonment within the next 3 to 6 months. I do however still hold legal ownership of Missapplebottom.com and I do not see this site nor its contents as being in direct correlation with Apple Bottoms, LLC, Nelly or any activities of which he has taken place. I will continue ownership and activity on the miss apple bottom domain name.”

On March 1, 2005, the Complainant’s counsel responded by repeating its prior demands and additionally requesting transfer of the domain name <missapplebottoms.com> —which apparently counsel had since discovered that the Respondent had also registered.

Subsequently, on March 4, 2005, the Respondent replied to the March 1, 2005 letter, stating that he will issue a formal response within the next 2-3 weeks.

To date, the Complainant’s counsel received nothing further from the Respondent.

Moreover, sometime after the Complainant’s counsel first contacted the Respondent, the Respondent placed a notice, on at least one of his websites, which read:

“Legal crap: this site is not affiliated, related to, nor endorsed by any musician or clothing company. Use common sense.”

A copy of the “About Us” page, from the Respondent’s “www.msapplebottoms.com” site, which contains this notice appears in Annex 11 to the Complaint.

## *5. Parties’ Contentions*

### *A. Complainant*

#### *(i) Identical or Confusingly Similar*

For various reasons, the Complainant contends that the disputed domain names are either identical or at least confusingly similar to the Complainant’s APPLE BOTTOMS Marks.

First, the Complainant states that it has valid rights to all its marks, including both its Federally registered marks and those at common law, with those rights being sufficient to satisfy paragraph 4(a)(i) of the Policy. That paragraph simply requires that a complainant “has rights” in its mark being asserted,

which the Complainant contends includes rights under common law marks. The Complainant notes that various UDRP panels have accepted that ownership of a common law trademark is sufficient to satisfy the criteria as to ownership of trademark rights set out in paragraph 4(a)(i) of the Policy, citing to *Oficial National al Registrului Comertului v. Kurtyan Consulting S.r.l.*, WIPO Case No. DRO2004-0001 and *Colegio Oficial de Registradores de la Propiedad y Mercantiles de Espana v. Mariscal y Rivaya*, WIPO Case No. D2001-0571.

Given this, the Complainant contends that the disputed domain name <missapplebottoms .com>, with exception of its top level domain (“ .com”), is identical to the Complainant’s common law mark “MISS APPLE BOTTOMS”. Such extensions are to be ignored when assessing similarity between the domain name and the mark, citing to *Consitex S.A. v. Mr. Hugo Bazzo*, WIPO Case No. D2003-0520.

As to the other disputed domain names, the Complainant contends that each of those names is simply a slight variation of the mark “MISS APPLE BOTTOMS”, with none of the variations, such as the deletion of the letter “s” and/or the abbreviation of “Miss” to “Ms”, being sufficient to adequately distinguish the resulting name from the mark. In determining whether a domain name is identical or confusingly similar to a mark, the Complainant notes that numerous UDRP panels have held that the addition or deletion of a letter, prefix or suffix, which does not have a relevant distinguishing function, creates no difference between that domain name on the one hand, and a complainant’s trademark on the other, citing to, e.g.: *Deutsche Telekom AG v.*

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Vision Computer S.L., WIPO Case No. D2001-1240; *Singapore Airlines Limited v. Hotel Price and Patricia de la Torre*, WIPO Case No. D2001-0595; *Buy Owner International, Inc. v. Tri-Star Realty*, WIPO Case No. D2002-0408; and *Oxygen Media, LLC v. Primary Source*, WIPO Case No. D2000-0362. Hence, the Complainant concludes that each of those names is confusingly similar to the Complainant’s mark.

Second, the Complainant contends that the Respondent has engaged in typosquatting by registering various permutations of the “MISS APPLE BOTTOMS” trademark which contain slight typographical

differences from each other and from the mark so as to divert unsuspecting Internet users, who seek the Complainant's site but inadvertently misspell the Complainant's mark, to the Respondent's site instead, hence generating increased traffic for the latter. Citing to *Media West-LCJ, Inc., Gannett Kentucky Limited Partnership, Gannett, Co., Inc. v. John Zuccarini, RaveClub Berlin*, WIPO Case No. D2003-1022, the Complainant contends that the alteration of one letter in a domain name is insufficient to avoid confusion, and typosquatting has been expressly found to result in confusion where one letter has been added, deleted or changed from a trademark and registered as a domain name.

Lastly, even apart from considering the Complainant's common law mark, the Complainant contends that all the disputed domain names, being minor variations of the Complainant's federally registered mark APPLE BOTTOMS, i.e., by the addition of "Ms" or "Miss" to and/or deletion of the letter "s" from that mark, are confusingly similar to that mark.

Hence, the Complainant believes that, for each of the disputed domain names, it has satisfied the identity/confusing similarity requirement in paragraph 4(a)(i) of the Policy.

### *(ii) Rights or Legitimate Interests*

The Complainant contends that, for several reasons, the Respondent has no rights or legitimate interests in any of the disputed domain names pursuant to paragraph 4(a)(ii) of the Policy.

First, the Complainant states that its marks existed and were well-known and publicized prior to the dates (November 13 and 16, 2003) on which the Respondent registered the disputed domain names. Hence, the Respondent undoubtedly knew of those marks and, in spite of that knowledge, intentionally registered, for his own personal and commercial gain, names which were confusingly similar or identical to those marks. The Complainant cited to *Motorola, Inc. v. NewGate Internet, Inc.*, WIPO Case No. D2000-0079, where the panel stated:

"While (as the respondent correctly points out) many adult sex sites are perfectly legal and constitute bona fide offerings of goods or services, the use of somebody else's trademark as a domain name (or even as a meta-tag) clearly does not constitute a "bona fide" offering of goods or services when the Website owner has no registered or common law rights to the mark, since the only reason to use the

trademark as a domain name or meta-tag is to attract customers who were not looking for an adult sex site, but were instead looking for the products or services associated with the trademark. Such use of a trademark can create customer confusion or dilution of the mark, which is precisely what trademark laws are meant to prevent. And actions that create, or tend to create, violations of the law can hardly be considered to be ‘bona fide’.”

Hence, the Complainant appears to contend that since the Respondent’s service offerings made through its websites, are predicated on the illicit use of the Complainant’s marks, and as such as was designed to exploit user confusion and divert users away from the Complainant’s site to those of the Respondent, such offerings, can not qualify as being “*bona fide*” under paragraph 4(c)(i) of the Policy. Thus, the Respondent can not satisfy that paragraph of the Policy. See also *AltaVista Co. v. Saeid Yomtobian*, WIPO Case No. D2000-0937.

Second, the Complainant contends that the Respondent, in its normal course of business, has never been commonly known by any of the Complainant’s APPLE BOTTOMS Marks. In that regard, the Complainant has been unable to locate any public record or other indication that the Respondent has been or is known as “Apple Bottoms” or “Miss Apple Bottoms” in the normal course of its business. Moreover, none of the disputed domain names consists of the Respondent’s legal name nor a name that it is commonly identified with the Respondent. Moreover, the Respondent is neither a subsidiary of nor affiliated with the

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Complainant in any way. The Respondent does not have, and never has had, a license or any other authorization from the Complainant to use any of the Complainant’s APPLE BOTTOM Marks.

Lastly, the Complainant states that since the Respondent’s use of the disputed domain names is intended to misleadingly divert users to the Respondent’s websites and tarnish the Complainant’s APPLE BOTTOMS Marks, such use can not constitute legitimate non-commercial or fair use as to fall under paragraph 4(c)(iii) of the Policy.

*(iii) Registered and Used in Bad Faith*

The Complainant contends that, for several reasons, the Respondent has registered and is now using all the disputed domain names in bad faith under general proscription inherent in paragraph 4(a)(iii) of the Policy as well as in contravention of the specific provisions of paragraph 4(b)(iv).

First, the Complainant contends that the Respondent's bad faith is shown by its having registered and then using the disputed domain names to intentionally attract users for commercial gain by creating a likelihood of confusion as to source or affiliation with the Complainant's APPLE BOTTOMS Marks. Moreover, not only do the names themselves cause user confusion but also the Respondent incorporated those marks into various meta-tags used on pages within its websites. Since meta-tags are indexed by Internet search engines as links to pages, such usage aggravates user confusion and diversion.

Second, the Complainant contends that the Respondent's actions in having registered four domain names that are all confusingly similar to the Complainant's mark APPLE BOTTOMS but slightly differ from each other, such as by a letter, constitutes typosquatting and hence also evidences bad faith.

Third, the Complainant, citing to *Taco Bell Corporation v. Michael Pelley*, WIPO Case No. D2000-0850, contends that bad faith is further shown by the Respondent having registered the disputed domain names, which are either identical or confusingly similar to the Complainant's marks, when those marks were highly distinctive, widely publicized and broadly recognized.

Lastly, the Complainant contends that the Respondent acted in bad faith by virtue of "pornquatting", i.e., taking advantage of a well-known trademark to attract Internet users to a pornographic website. Where a disputed domain name directs a user to a pornographic website, an UDRP panel may infer an intention that the domain name was registered and used in bad faith. See, *Ty, Inc. v. O.Z. Names* WIPO Case No. D2000-0370; *Six Continents Hotels, Inc. v. Seweryn Nowak*, WIPO Case No. D2003-0022; and *Perlier S.p.A. v. Mr. Stanley Filoramo*, WIPO Case No. D2003-0848.

Thus, the Complainant believes that the Respondent has registered and is now using all the disputed domain names in bad faith.

## *B. Respondent*

### *(i) Identical or Confusingly Similar*

The Respondent counters the Complainant's assertions under paragraph 4(a)(i) of the Policy.

First, the Respondent states that, as evidenced by a listing in an Internet-based encyclopedia (specifically "wikipedia" and accessible at <http://eng.wikipedia.org/wiki>) —a copy of the salient web page containing this listing appears in Annex 2 to the Response, the term "Apple Bottom" is a urban slang term in the US which is used to describe the posterior of a female bottom. That term is widely used throughout US urban cities and online in the adult video and website industry. Hence, the Complainant should not get "the rights to any and all domains that use the term".

Consequently, the Respondent appears to allege that since the term is not original to the Complainant but rather is used by the Complainant consistent with its common meaning, that term can not confer trademark rights onto the Complainant sufficient to invoke paragraph 4(a)(i) of the Policy.

Second, the Respondent states that while the Complainant sells clothing with the mark "APPLE BOTTOMS", the Respondent uses the disputed domain name <missapplebottoms.com> for a different purpose: an image rating site. Over the past two years, no one has ever confused the Respondent's website and its content with the Complainant's "Apple Bottoms" clothing line.

Third, the Respondent notes, with reference to the materials as discussed above that appear in Annex 1 to the Response, that various other

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domain names contain the term "Apple Bottom".

### *(ii) Rights or Legitimate Interests*

The Respondent asserts, contrary to the Complainant's view, that he indeed does have rights and

legitimate interests in the disputed domain names.

First, the Respondent states that such interests are proven simply from the fact that since 2003, his “www.missapplebottom.com” website remains a free site with currently over 7000 members and 40,000 unique visitors per month.

Second, the Respondent states that it does not redirect users or traffic to pornographic websites for profit. Moreover, the Respondent states that he has the right to post pornographic images to his site.

Lastly, the Respondent states that before he was contacted by the Complainant, he had fully developed the “www.missapplebottom.com” site. That site, including its meta-tags, does not mention the Complainant’s marks, name or company.

### *(iii) Registered and Used in Bad Faith*

The Respondent contends that none of its actions evince bad faith registration and use.

First, the Respondent states that he is not porn-squatting inasmuch as none of the Respondent’s websites, resolvable through the disputed domain names, contain any “advertising or paid sections”. In that regard, the Respondent contends that “merely having adult images on a website does not constitute porn-squatting”.

Second, the Respondent states that he never registered any of the disputed domain names with an intention to profit from their use or sale. The Respondent, notes as discussed above, that he has expended over US \$ 10,000 to date in connection with its to develop a “free user community site for new users missapplebottom.com”.

Lastly, the Respondent specifically denies that his actions meet any of the four illustrative criteria, indicative of bad faith, delineated in paragraphs 4(b)(i)-(iv) of the Policy.

## *6. Discussion and Findings*

### *A. Identical or Confusingly Similar*

Paragraph 4(a)(i) of the Policy requires that a disputed domain name be “identical or confusingly similar to a trademark or service mark in which complainant has rights”. This devolves into two requirements that must both be met by every complainant under the Policy, namely that: (a) a complainant has rights in a trademark or service mark, and (b) the disputed domain name is identical or confusingly similar to that trademark or service mark.

Consequently, a complainant must show, as a threshold matter, that it has rights in a trademark or service mark. A failure to prove such rights is therefore fatal to its cause. See, e.g., *National Sports Services Inc. v. Global Media Resources S.A.*, National Arbitration Forum Case No. FA335580; and *Continental Design and Management Group v. Technet, Inc.*, National Arbitration Forum Case No. FA096564.

### *1. Trademark/service mark validity*

While the Complainant contends it has such rights by virtue of its federal registrations and common law usage, the Respondent rebuts that contention by essentially claiming that term “Apple Bottoms” is a commonly-understood slang word and thus not susceptible to registration as a trademark or service mark.

Questions of trademark invalidity, as Respondent raises by virtue of claiming that the term “Apple Bottoms” is slang and hence generic or highly descriptive and thus not susceptible to registration as a federal trademark/service mark, are clearly not within the purview of any UDRP proceeding and are best left for adjudication before a proper tribunal — of which an UDRP panel is not.

UDRP panels cannot and hence do not assess the validity of any federally registered mark. Instead, such panels must, of necessity, accord significant deference to decisions of that government body, namely the US PTO, which, in the first instance, not only possesses the requisite expertise to properly assess such issues but also the federal statutory mandate to do so. It is simply not within the purview of any UDRP panel — given the very limited and focused jurisdiction afforded to any such panel under the Policy — to evaluate and review the judgment of the US PTO on such questions. Moreover, even apart from those rather fundamental jurisdictional concerns, the summary and rather abbreviated nature of UDRP proceedings totally precludes the establishment of a fully developed factual record as well as an

extensive factual inquiry

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which an UDRP panel would otherwise need to undertake for it to fully determine invalidity, let alone here involving issues of descriptiveness and genericness. See, e.g., this Panel's prior rulings in *Register.com, Inc. v. Wolfgang Reile a/k/a RWG Internet and Marketing Rightway Gate Inc, et al*, National Arbitration Forum Case No. FA208576 [70 USPQ2d 1351]; *United States Office of Personnel Mgmt. v. MS Tech. Inc.*, National Arbitration Forum Case No. FA 198898 [70 USPQ2d 1333]; and *Lake at Las Vegas Joint Venture v. Principal Equiti, Inc.*, WIPO Case No. D2002-0758.

[1] Hence, once the US PTO has made a determination that a mark is registerable, as it has here by issuing a registration for the term "Apple Bottoms", then, this Panel, like any other UDRP panel, is simply not empowered to nor should it disturb that determination.

To the extent Respondent wishes to challenge the US PTO's determination that any of Complainant's federally registered "APPLE BOTTOMS" Marks has acquired sufficient distinctiveness upon which registration can be based, the Respondent may well have appropriate administrative and/or judicial avenues available to it to do so, such as by filing an action in the US PTO to cancel that registration or alternatively instituting federal litigation. Absent Respondent having done so and attained a final ruling holding that such a mark is indeed merely descriptive or generic and thus not susceptible of registration — which, at least from the record before this Panel, the Respondent has yet to do, this Panel will simply defer, as it must, to the US PTO's determination implicit in its having granted corresponding registrations, i.e., that each of Complainant's federally registered APPLE BOTTOMS Marks has acquired sufficient distinctiveness and hence is not merely descriptive or generic, and thus qualifies for federal trademark protection and enjoys all the rights afforded thereby.

## *2. Considerations under paragraph 4(a)(i)*

[2] The Panel finds that confusion is likely to arise as a result of the Respondent's use of any of the disputed domain names.

The disputed domain names are formed by having either appended a generic term, specifically "Miss" or "Ms" to and/or deleting the letter "s" from the Complainant's registered mark "APPLE BOTTOMS".

It is now very well-established in UDRP precedent, including numerous decisions previously rendered by this Panel, that minor variations, such as adding short letter or number groups or even generic words to a mark, are each insufficient in and of itself, when used in forming a domain name that results from modifying the mark, to confer requisite and sufficient distinctiveness to that name to avoid user confusion. "Miss" and "Ms" are certainly two such generic words. See, e.g., *Napster, Inc. v. Giovanni Vinscani*, WIPO Case No. D2005-0531; *Caesars Entertainment, Inc. v. Nova Internet Inc.*, WIPO Case No. D2005-0411; *Lockheed Martin Corporation v. The Skunkworx Custom Cycle*, WIPO Case No. D2004-0824 [74 USPQ2d 1486]; *Lockheed Martin Corporation v. Deborah Teramani*, WIPO Case No. D2004-0836 and *National Collegiate Athletic Association v. Dusty Brown*, WIPO Case No. D2004-0491 [72 USPQ2d 1319]. This result follows from a simple comparison of each of the disputed domain names against the Complainant's marks.

Nowhere does the Policy contain a restriction that specifically limits its reach to only registered marks. Therefore, given the apparent inclusive nature of the Policy, whether the Complainant has rights to an unregistered mark and hence a protectable interest under the Policy, lies with national trademark law that governs the Respondent's actions that are the subject of the Complaint. Under American law, rights accrue in unregistered, so-called "common law", marks as a result of usage, though limited by geographic and product/service markets in which the mark is used. As evidence of this, one need turn no further than to §43 of the Lanham Act (15 U.S.C. §1125(a)) which states, in pertinent part: "Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof ... (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person ... shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act."

Consequently, numerous panels including this one, when faced with unregistered marks, have upheld their protectable status in the United States under the Policy. In that regard, when faced with this issue, the panel in *Brooklyn Institute of Arts and Sciences v. Fantastic Sites, Inc.*, National Arbitration Forum Case No. FA 95560 held: “ICANN dispute resolution policy is broad in scope in that the reference to a trademark or service mark in which the complainant has rights means that ownership of a registered mark is not required, unregistered or common law trademark or service mark rights will suffice to support a domain name complaint under the policy”. See, e.g., *True Blue Productions, Inc. v. Chris Hoffman*, WIPO Case No. D2004-0930 [73 USPQ2d 1512]; *AT&T Corp. v. Roman Abreu d/b/a Smartalk Wireless*, WIPO Case No. D2002-0605, *Peter Frampton v. Frampton Enterprises, Inc.*, WIPO Case No. D2002-0141; *America Online, Inc. v. John Deep d/b/a Buddy USA Inc.*, National Arbitration Forum Case No. FA 96795; *Missing Children Minnesota v. Run Yell Tell, Ltd.*, National Arbitration Forum Case No. FA 95825; *Mike Warner 2001 v. Mike Larson*, National Arbitration Forum Case No. FA 95746, *CMG Worldwide Inc. v. Naughty Page*, National Arbitration Forum Case No. FA 95641; *Home Properties v. SMSOnline*, National Arbitration Forum Case No. FA 95639; and *Bridal Rings Company v. Yemenian*, National Arbitration Forum Case No. FA 95608. Furthermore, the panel in *United States Postal Service v. Consumer Info. Org.*, National Arbitration Forum Case No. FA 95757 held: “The UDRP does not discriminate between registered and unregistered marks.” In *Exario Network Inc. v. THE DOMAIN NAME YOU HAVE ENTERED IS FOR SALE*, AF-0536, (eResolution,), the panel recognized: “It is well established that a complainant need not own a registered trademark to invoke the policy. It is sufficient that a complainant have rights in an unregistered trademark.” In that regard, also see *Sand Hill Wholesale of Ohio v. Hatton*, National Arbitration Forum Case No. FA 95970, and *David Taylor Cadillac/Buick Co. v. Spider Works, Ltd.*, National Arbitration Forum Case No. FA 95832. Similarly, see *American Home Products Corp. v. Healthy Futures*, WIPO Case No. D2000-0454; *Cho Yong Pil v. ImageLand, Inc.*, WIPO Case No. D2000-0229; *SeekAmerica Networks, Inc. v. Tariq Masood and Solo Signs*, WIPO Case No. D2000-0131; and *Bennett Coleman & Co. Ltd. v. Steven S Lalwani and Bennett Coleman & Co. Ltd. v. Long Distance Telephone Company*, WIPO Case Nos.

D2000-0014 and D2000-0015

The record clearly shows that the Complainant has developed wide-spread, world-wide recognition in his music persona as “Nelly” and, in connection with that persona, started using and promoting its common law APPLE BOTTOMS marks on July 2003, sufficiently well in advance of the dates November 13 and 16, 2003, on which the Respondent registered those names so as to have developed enforceable common law rights in those marks in the United States of America.

Having found that the Complainant acquired sufficient common law trademark rights, the Panel finds that confusion unquestionably and inevitably arises —and in fact is so intended — as a result of the Respondent’s use of the disputed domain names as an address to direct Internet users, who would otherwise seek the Complainant’s website for information relating to the Complainant’s line of women’s clothing, to the Respondent’s pornographic websites instead, which have absolutely no connection with the Complainant or its clothing line. Moreover, the Panel can conceive of no situation where confusion would not likely arise when and if any third-party not affiliated with the Complainant, and to which the Respondent were to transfer any of the disputed domain names, were ever to use that name with a website offering information concerning women’s clothing or the Complainant’s clothing line in particular.

Such confusion would undoubtedly cause Internet users intending to access Complainant’s website, but who reach a website through any of the disputed domain names, to think that an affiliation of some sort exists between Complainant and Respondent, when, in fact, no such relationship would exist at all. See, e.g., *True Blue Productions*, cited supra; *Am. Family Life Assurance Company of Columbus v. defaultdata.com*, National Arbitration Forum Case No. FA 123896 ; *AT&T Corp*, cited supra; *Pfizer Inc. v. Order Viagra Online*, WIPO Case No. D2002-0366; *L.F.P., Inc. v. B and J Props.*, National Arbitration Forum Case No. FA 109697; *Frampton*, cited supra; *Spence-Chapin Servs. to Families and Children v. Wynman*, National Arbitration Forum Case No. FA 100492; *MPL Communications*

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v. LOVEARTH.net, National Arbitration Forum Case No. FA 97086; *Meijer, Inc. v. Porksandwich Web*

*Servs.*, National Arbitration Forum Case No. FA 97186; *MPL Communications v. IWebAddress.com*, National Arbitration Forum Case No. FA 97092; *American Home Prods. Corp. v. Malgioglio*, WIPO Case No. D2000-1602; *Surface Protection Industries, Inc. v. The Webposters*, WIPO Case No. D2000-1613; *Dollar Fin. Group, Inc. v. VQM NET*, National Arbitration Forum Case No. FA 96101; *eBAY Inc. v. G L Liadis Computing, Ltd. and John L. Liadis d/b/a G L Liadis Computing Ltd.*, WIPO Case No. D2000-1463; *Treeforms, Inc. v. Cayne Indus. Sales Corp.*, National Arbitration Forum Case No. FA 95856.; See also *The Pep Boys Manny, Moe and Jack of CA v. E-Commerce Today, Ltd.*, AF-0145 (eResolution).

Therefore, the Panel finds that each of the four disputed domain names sufficiently resembles the Complainant's APPLE BOTTOMS Marks as to cause confusion. Hence, the Complainant has shown sufficient similarity between its marks and those names under paragraph 4(a)(i) of the Policy.

### ***B. Rights or Legitimate Interests***

The Panel believes that the Respondent has yet to provide any basis that would legitimize any claim he has to any of the disputed domain names and moreover is extremely unlikely to ever be in a position to legitimately make such a claim.

[3] The display of pornographic imagery on a web page, without more, no matter how offensive, repulsive or antithetical to contemporary society mores — and some of Respondent's imagery certainly falls within that rubric — does not as such constitute bad faith under the Policy. While such displays may invoke and potentially violate national laws, the application of all such laws, in those instances, is clearly well beyond the narrow and focused purview of the Policy and hence presents issues on which this Panel will simply not opine. However, bad faith under the Policy may very well arise where a domain name, which infringes on the mark of another by virtue of being identical or confusingly similar to that mark, is used by a respondent as an instrumentality to intentionally link and direct unsuspecting users, who seek information on a good or service associated with that mark, to a pornographic site instead. In such instances, those users would not be exposed to a respondent's pornographic content but for that linkage. See *Motorola Int.*, cited supra. The association that inevitably and directly results in the users'

minds — however erroneous — between the pornography and the mark can cause significant and irreparable injury to the reputation of the mark and its Complainant owner — injury so severe that the only practical remedy is to break the link by transferring the domain name from the Respondent to the Complainant, either voluntarily or, more often than not, through institution and successful prosecution of an UDRP administrative proceeding.

While the Respondent here may have intended, in his mind, to establish a legitimate “free community web site” for posting and ranking of imagery, however justifiable that motivation might facially be it is far outweighed by the Respondent’s illicit actions in having chosen to do so through a domain name which he knew would and was clearly calculated to cause confusion with the Complainant’s APPLE BOTTOMS marks.

This view is reinforced by the fact that the Respondent registered not just one such domain name but four names all of which were very slight variations on each other. It is eminently clear to this Panel that the Respondent’s actions constituted a pattern of abusive domain name registration. At their core, such registrations, with their linkage to the Respondent’s pornographic website, were devised to intentionally exploit likely and highly anticipated typographical errors made by users who sought to type a domain name, given current naming conventions, that closely follows the Complainant’s mark APPLE BOTTOMS and hence would lead them to the Complainant’s website, but, owing to their inadvertent errors, were linked and directed instead to the Respondent’s sites. This action constitutes cybersquatting which the Policy specifically targets for elimination.

While the Respondent, owing to a lack of commercial advertising on his site, may not have received direct pecuniary benefits from his actions, nevertheless, but for those actions, his sites undoubtedly received increased Internet traffic than those sites would otherwise have received.

Further, no credible evidence exists within the record before this Panel that would legitimize any use to which the Respondent made of the disputed domain names.

In that regard, the fact that the Respondent registered those names within a rather short time, some three months (November 13 and 16, 2003), after the date (July 1, 2003) on which the Complainant launched his clothing line and started using what was to become its registered mark APPLE BOTTOMS, strikes this Panel as far more than just coincidental. Given the widespread notoriety which the Complainant had garnered for his entertainment persona over nearly ten years, clearly he leveraged that notoriety in promoting his APPLE BOTTOMS clothing line. Obviously, this effort succeeded inasmuch as sales of that line increased from presumably zero at July 1, 2003, when the line was publicly launched, to tens of millions of dollars in 2004, and, based on forecasts, likely reaching at least US \$ 50 Million in 2005.

Given this, it simply stands to reason that the Respondent was well aware of the Complainant's activities under its now registered marks and its widespread public recognition of APPLE BOTTOMS branded clothing line when the Respondent registered all the disputed domain names just three months after the Complainant commenced those activities.

Consequently, the Respondent's opportunistic use of the disputed domain names, which, at its essence, relies on instigating and exacerbating user confusion by linking unsuspecting Internet users who seek information on goods carrying the Complainant's APPLE BOTTOMS Marks, through those names, to the Respondent's pornographic website instead, at the very least tarnishes those marks and the Complainant's reputation. Thus, such use can not and will not constitute *bona fide* commercial or fair use sufficient to legitimize any rights and interests the Respondent might have in any of those names. See, e.g., *Register.com, Inc. v. Wolfgang Reile a/k/a RWG Internet et al* National Arbitration Forum Case No. FA208576 [70 USPQ2d 1351]; and *True Blue Productions, Lockheed v. Teramani, Leiner Health Servs. Corp.*, and *Frampton*, all cited supra.

Accordingly, the Panel is not persuaded that the Respondent has any rights or legitimate interests or, based on current facts provided to the Panel, is likely to acquire any rights or legitimate interests in any of the disputed domain names under any provision of paragraph 4(c) of the Policy.

Thus, the Panel finds that the Respondent has no rights or legitimate interests in any of the disputed domain names within Paragraph 4(a)(ii) of the Policy.

### *C. Registered and Used in Bad Faith*

[4] The Panel believes that the Respondent's actions constitute bad faith registration and use of all the disputed domain names.

It simply defies reason to think that the Respondent, upon learning of the Complainant's clothing line, and appreciating the resulting widespread recognition which the mark APPLE BOTTOMS would quickly attain, had absolutely no intention of misappropriating some of that recognition for his own ends — specifically as a means of substantially increasing the number of visitors to his websites than he would otherwise attract. Unsuspectingly, those additional visitors, upon being directed to the Respondent's website would be exposed to the Respondent's pornographic imagery — none of which has any apparent connection to the Complainant or its clothing line. The inevitable viewer confusion resulting from the re-direction clearly injures the Complainant, tarnishing its marks and damaging its reputation.

The Panel views the Respondent's acts as amounting to nothing more than opportunistic exploitation of inevitable Internet user confusion for the Respondent's own benefit, by way of increased Internet traffic he would not have otherwise attained, and to the Complainants' detriment. These acts constitute, by their very illegality, bad faith under the general requirement of paragraph 4(a)(iii) of the Policy as well disruption of the Complainant's business under paragraph 4(b)(iii) of the Policy. See, *Napster*, *Caesars Entertainment*, *Pelmorex* and *Lockheed v. Teramani*, all cited supra; *True Blue Productions, Inc. v. Chris Hoffman*, WIPO Case No. D2004-0930; *Caesars World, Inc.*; and *Park Place Entertainment Corporation v. Japan Nippon*, WIPO Case No. D2003-0615; and *Infospace.com, Inc. v. Tenenbaum Ofer*, WIPO Case No. D2000-0075.

Hence, the Panel views the Respondent's actions as constituting bad faith registration and use in violation of paragraph 4(a)(iii) as well as paragraphs 4(b)(iii) and 4(b)(iv) of the Policy.

## *7. Decision*

Accordingly, under paragraphs 4(i) of the Policy and 15 of the Rules, the Panel grants the relief sought by the Complainant.

The disputed domain names <missapplebottom.com>, <missapplebottoms.com>, <msapplebottom.com>and <msapplebottoms.com> are all ordered transferred to the Complainant.

**- End of Case -  
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