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 BE IN, INC., a New York corporation

DAVIS WRIGHT TREMAINE LLP

11
 12 IN THE UNITED STATES DISTRICT COURT
 13 THE NORTHERN DISTRICT OF CALIFORNIA
 14 SAN JOSE DIVISION

15 BE IN, INC.,)	Case No. CV-03373-LHK
)	
16 Plaintiff,)	FIRST AMENDED COMPLAINT FOR
)	COPYRIGHT INFRINGEMENT, TRADE
17 v.)	DRESS, MISAPPROPRIATION OF
)	TRADE SECRETS, AND CIVIL
18 GOOGLE, INC., a California corporation,)	CONSPIRACY
19 RICHARD ROBINSON, and DOES 1 through)	
20 3, inclusive,)	
)	
21 Defendants.)	Demand for Jury Trial

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 24 Plaintiff, BE IN, INC. ("Be In" or "Plaintiff"), by and through its counsel, for its First
 25 Amended Complaint against Defendants, GOOGLE, INC. ("Google") and RICHARD
 26 ROBINSON, alleges as follows:
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NATURE OF THE ACTION

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2 1. Be In incorporated in 2008 in the State of New York and is engaged in the business
3 of creating and marketing online social media platforms that provide the means for groups of
4 people to interact through chat and webcam.

5 2. Be In maintains the CamUp website (www.camup.com) which allows several
6 individuals to join a video chat by webcam, and share online media such as videos in a dedicated
7 video chat room. Be In has won awards and accolades and received extensive media coverage for
8 its innovation and creativity in developing the CamUp platform.

9 3. Google is a large, multinational corporation providing Internet-related products and
10 services including its ubiquitous search engine, and its recently released social media platform,
11 Google+.

12 4. Representatives from Be In met with Richard Robinson ("Mr. Robinson"), Google's
13 Head of Business Markets (UK), in London in May 2011, to discuss the possibility of a business
14 collaboration between Google and Be In. At this meeting, and after Google agreed to prevent any
15 unauthorized use or disclosure of confidential information provided from Be In to Google, Be In
16 provided a live demonstration of its CamUp product, and proposed that a "Watch with your
17 friends" button be embedded within all YouTube¹ pages, allowing users to initiate a CamUp
18 session directly from YouTube. The "Watch with your friends" button had not been launched,
19 shared, or released to the public at any time prior to this May 2011 meeting. Mr. Robinson
20 requested and was provided documents including Be In's confidential business and marketing
21 strategy for monetizing the CamUp product and "Watch with your friends" button.

22 5. At no time during or after the May 2011 meeting did Mr. Robinson indicate that
23 Google was independently developing a product or feature that was identical to CamUp. Nor did
24 he indicate that Google had independently determined to embed a "Watch with your friends"
25 button for any of its products or services on YouTube pages. To the contrary, he expressed great
26 interest in Be In's CamUp product and business and marketing strategy.

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28 _____
¹ Google owns YouTube.

FACTS

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2 21. In 2009, Be In developed the first version of their online social media platform,
3 called GigIn. GigIn allowed six individuals to simultaneously collaborate in a virtual music studio
4 through webcam or chat.

5 22. In 2010, the second version of the platform was introduced, this time allowing up to
6 ten individuals to connect and view the same media.

7 23. In 2011, the latest version of the platform was introduced to the public under the
8 name CamUp. Following a period of private Beta testing, CamUp was officially unveiled in
9 March 2011, at the South By Southwest Festival in Austin, Texas ("SXSW") and made available
10 at www.camup.com.

11 24. At all relevant times, CamUp has had a copyright notice on its website stating "©
12 [year] CamUp - Project Your World. Product of BE IN Inc. All Rights Reserved."

13 25. While at SXSW, representatives from Google, including Marissa Mayer, Vice
14 President of Consumer Products and Local Services, and several Google engineers, visited Be In's
15 booth to learn more about the CamUp product.

16 26. In April 2011, Be In won the 2011 MIPTV Connected Creativity Ventures startup
17 competition and was voted by a panel of top venture capitalists as the best and most innovative
18 startup of the year.

19 27. On May 12, 2011, Joseph D'Anna, Co-founder and CEO of Be In, and Nik Miskov,
20 VP of Business Development of Be In, met with Mr. Robinson of Google in London to discuss the
21 CamUp product and possibilities for a business collaboration between Be In and Google. In
22 advance of this meeting, Be In and Google Ireland executed a non-disclosure agreement.

23 28. During the meeting, Be In shared its confidential trade secrets regarding plans and
24 strategies for potential applications of CamUp in certain business sectors. Mr. D'Anna identified
25 YouTube as the most logical area where partnership between the two companies could be
26 achieved.

27 29. At this meeting, Be In presented its idea to have a CamUp "Watch with your friends"
28 button appear at the bottom of all YouTube pages with text that read "Watch with your friends on

1 CamUp." This button would allow users to initiate an instant CamUp session from the YouTube
2 page itself. Be In also disclosed its design concept for the location and language of the button and
3 drew a mocked-up proposal of the button. Be In also shared its proprietary business plan and
4 strategy for monetizing CamUp and the integration of CamUp with YouTube.

5 30. At the meeting, Mr. Robinson was extremely enthusiastic about the CamUp product,
6 and expressed interest in determining how best to integrate CamUp with Google Docs, as well as
7 possible collaboration in the education space. Mr. Robinson also indicated that he would put Be
8 In in touch with individuals from YouTube to explore further possibility of using the technology
9 on its platform.

10 31. Mr. Miskov sent follow-up correspondence to Mr. Robinson, but received no
11 response.

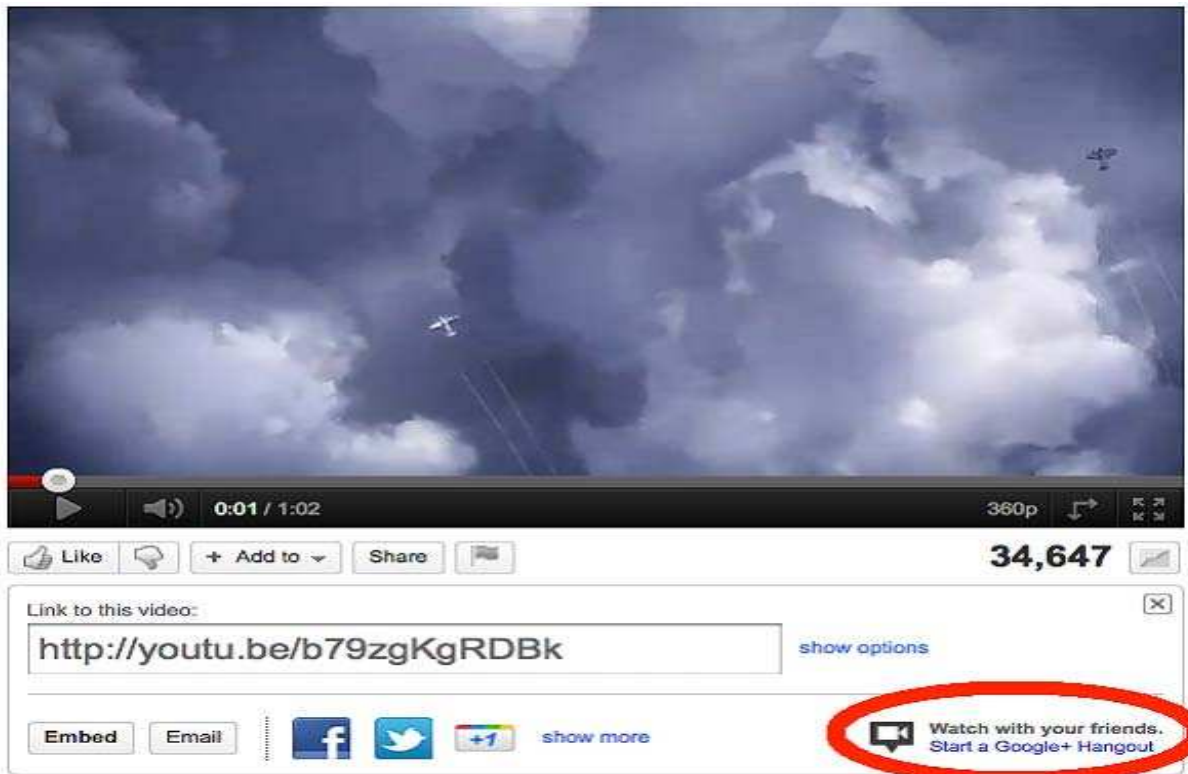
12 32. Subsequent to the May 2011 meeting, Be In noted a dramatic spike in user traffic to
13 the CamUp site. Upon information and belief, certain of these CamUp website visits were from
14 Google employees who logged on with the intent of studying the CamUp site in connection with
15 their improper launch of Google+ and the Hangouts feature.

16 33. In or around June, 2011, Google launched Google+, a social networking platform
17 that represents Google's attempt to compete with Facebook. Google+ includes a feature called
18 Hangouts, which allows users to video chat with up to nine people.

19 34. In addition, on or around August 18, 2011, Google added a feature where a user can
20 click on the "Watch with your friends" button on any YouTube page.

21 35. This Hangouts "Watch with your friends" button was an identical copy of the
22 CamUp button proposed by Be In at the May 2011 London meeting. Below is a screen shot
23 showing the similarities between Be In's mocked-up proposal for a "Watch with your friends"
24 button to be included in YouTube and Google's Hangouts "Watch with your friends" button,
25 which was actually embedded in YouTube (circled in red for convenience):
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36. The proposal and screen shots include identical language. Be In's proposed CamUp button stated "Watch with your friends on CamUp," whereas Google's Hangouts button states "Watch with your friends. Start a Google+ Hangout."

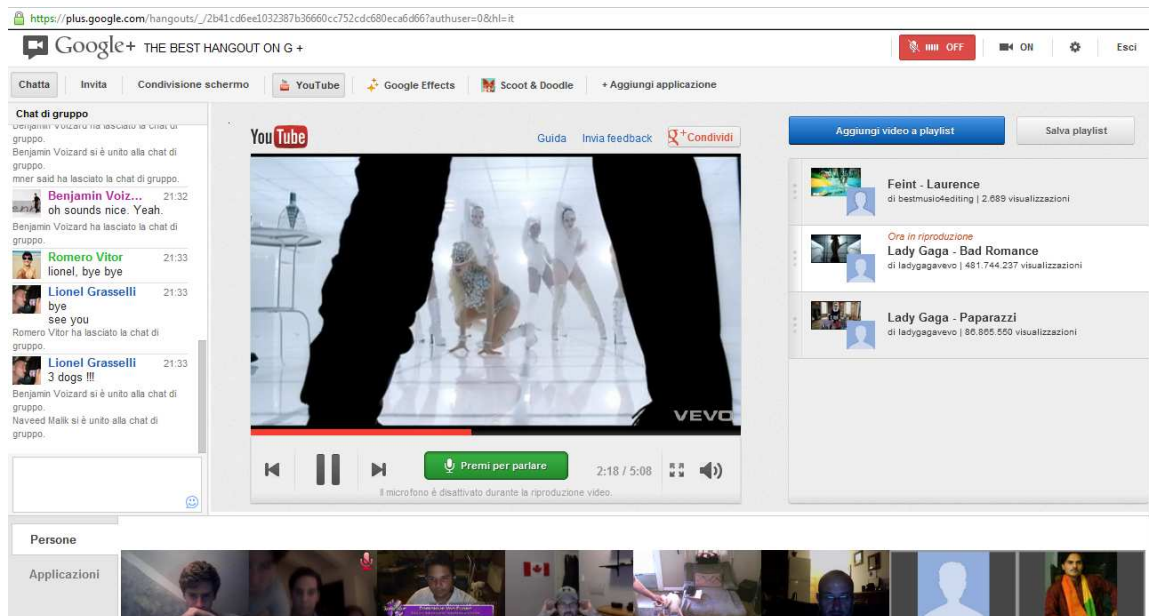
37. The above screen shot of the YouTube video with the Hangouts "Watch with your friends" button was captured shortly after the release of the button. Google has since altered its "Watch with your friends" button to remove the identical language that Be In proposed during the May 2011 meeting. However, the language is still viewable as a pop-up to users who hover the mouse-pointer over the button.

38. The Google+ Hangouts feature also includes several elements of Be In's proprietary trade dress. Hangouts attempts to replicate the overall look and feel of the CamUp platform, specifically the inclusion of several video chat screens directly underneath a main screen containing video or other media. Below are screen shots showing the substantial similarity between the CamUp and Hangouts platforms.

1 CamUp Screenshot



16 Google+ Hangouts Screenshot



FIRST CAUSE OF ACTION: MISAPPROPRIATION OF TRADE SECRETS

39. Be In incorporates by reference paragraphs 1 through 38 as if fully set forth herein.

40. Be In's confidential proprietary idea to include a CamUp "Watch with your friends" button under each YouTube video, proposed design location and language of the button, and business plan and strategy for implementing and monetizing these spontaneous video chats, are trade secrets under the California Uniform Trade Secrets Act, Cal. Civ. Code § 3426, et seq. ("CUTSA"), in that these trade secrets are information that derive independent economic value to Be In, and are the subject of reasonable efforts to maintain their secrecy. *See* Cal. Civ. Code § 3426.

41. Google and Mr. Robinson have acquired, disclosed, or used Plaintiff's trade secrets through improper means by utilizing Be In's idea to include a CamUp "Watch with your friends" button under each YouTube video, replicating the proposed location and language of the button, and utilizing Be In's business plan and strategy for implementing and monetizing these video chats.

42. Defendants' actions have damaged Plaintiff by denying Plaintiff any revenue from the implementation of CamUp through the YouTube site. In addition, Google's profits from utilizing its Hangouts feature through YouTube should be disgorged. Plaintiff has suffered and continues to suffer irreparable harm, loss and/or damages in an amount in excess of \$75,000.00.

SECOND CAUSE OF ACTION: CIVIL CONSPIRACY

43. Be In incorporates by reference paragraphs 1 through 42 as if fully set forth herein.

44. Google, Mr. Robinson, and John Does Nos. 1-3 formed and operated a conspiracy to misappropriate Plaintiff's trade secrets. Plaintiff provided its trade secrets to Mr. Robinson who, upon information and belief, transmitted or communicated these trade secrets to Google and John Does Nos. 1-3.

45. Google, Mr. Robinson, and John Does Nos. 1-3 in fact misappropriated Plaintiff's trade secrets in furtherance of this conspiracy.

1 46. By virtue of the Defendants' unlawful and intentional acts in furtherance of a
2 conspiracy to misappropriate Plaintiff's trade secrets, Plaintiff has suffered, and continues to
3 suffer, irreparable injury and damages in an amount in excess of \$75,000.00.

4 **THIRD CAUSE OF ACTION: COPYRIGHT INFRINGEMENT**

5 47. Be In incorporates by reference paragraphs 1 through 46 as if fully set forth herein.

6 48. At all relevant times, Plaintiff has maintained ownership in its copyrighted CamUp
7 product.

8 49. Plaintiff submitted an application to the United States Copyright Office for
9 registration of copyright, comprising, *inter alia*, the text, selection, arrangement, editing, and
10 compilation of the CamUp web video chat platform, on June 22, 2012. The copyright office
11 assigned the application as No. 1-779959021.

12 50. On information and belief, Google had access to and willfully copied the text,
13 selection, arrangement, editing, and compilation of Be In's CamUp web video chat platform
14 resulting in its substantially similar Google+ Hangouts feature.

15 51. As a result of this instance of unauthorized copyright infringement, Plaintiff has
16 suffered, and continues to suffer, irreparable injury and damages in an amount in excess of
17 \$75,000.00.

18 **FOURTH CAUSE OF ACTION: FEDERAL UNFAIR COMPETITION;
19 TRADE DRESS INFRINGEMENT**

20 52. Be In incorporates by reference paragraphs 1 through 51 as if fully set forth herein.

21 53. Plaintiff has enforceable rights in its proprietary trade dress. This trade dress is
22 defined by the following non-functional elements of the CamUp website and social media
23 platform that, as a whole, are protectible: (1) large window containing media – typically video, but
24 it could also contain music and pictures; (2) rectangular boxes containing chat and playlist features
25 surrounding the large window of media; (3) placement of logos on top left; (4) similar white and
26 gray color palette; and (5) several windows underneath the large window of media that contain
27 webcam images of participants in the video web-chat, all of which interact to create a particular
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1 visual impression. The benefit of these elements could practically be duplicated by the use of
2 alternative designs making them non-functional.

3 54. This trade dress has a secondary meaning, which is evidenced in part by the awards
4 and accolades and extensive media coverage Be In has received for its innovation and creativity in
5 developing the CamUp platform.

6 55. On information and belief, Google knowingly created and is deliberately using
7 screens in its Google+ Hangouts platform that are confusingly similar to CamUp with willful and
8 callous disregard to Plaintiff's rights to enforce its trade dress.

9 56. The Google+ Hangouts platform is confusingly similar to the trade dress of the
10 CamUp website, and is likely to cause confusion or mistake, or to deceive users as to affiliation,
11 connection, or association.

12 57. Google has knowingly and willfully copied Plaintiff's source-identifying trade dress
13 of the elements of the CamUp platform described above.

14 58. These acts constitute trade dress infringement in violation of Section 43(a) of the
15 Lanham Act, 15 U.S.C. § 1125(a).

16 59. Upon information and belief, unless enjoined by an Order of this Court, Google will
17 continue to use screens that it knowingly and intentionally copied from Plaintiff's CamUp
18 platform, and will knowingly and intentionally continue to copy additional screens from CamUp
19 in future versions of Google+ Hangouts.

20 60. By virtue of Google's intentional and unlawful conduct, Plaintiff has suffered, and
21 continues to suffer, irreparable injury and damage to its business reputation and goodwill. By
22 reason of this intentional and unlawful conduct, Google has caused, is causing, and, unless such
23 acts and practices are enjoined by the Court, will continue to cause irreparable harm and damages
24 to Plaintiff in an amount in excess of \$75,000.00, and for which Plaintiff is entitled to injunctive
25 relief and monetary damages.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant judgment against Google, Mr. Robinson, and Does 1 through 3 on the counts detailed above and issue the following relief:

1. Preliminary injunction prohibiting Google from using its Hangouts button on YouTube videos;
2. Permanent injunction prohibiting Google from using its Hangouts button on YouTube videos;
3. Preliminary injunction prohibiting Google from utilizing or maintaining its Hangouts feature on Google+;
4. Permanent injunction prohibiting Google from utilizing or maintaining its Hangouts feature on Google+;
5. An accounting of any and all profits of Google attributable to its infringing acts;
6. Monetary damages adequate to compensate Plaintiff for Defendants' acts of trade secret misappropriation, civil conspiracy in furtherance of trade secret misappropriation, copyright infringement and trade dress infringement, including actual and punitive damages and lost profits, in an amount greater than \$75,000.00;
7. Attorney's fees;
8. Pre-judgment and post-judgment interest;
9. Costs of suit herein incurred; and

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