

1 COLLEEN BAL, State Bar No. 167637
 2 CHARLES TAIT GRAVES, State Bar No. 197923
 3 WILSON SONSINI GOODRICH & ROSATI
 4 Professional Corporation
 5 One Market Plaza
 6 Spear Tower, Suite 3300
 7 San Francisco, California 94105-1126
 8 Telephone: (415) 947-2000
 9 Facsimile: (415) 947-2099
 10 Email: cbal@wsgr.com
 11 tgraves@wsgr.com

12 Attorneys for Defendants
 13 Google Inc. and Richard Robinson

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN JOSE DIVISION

17 BE IN, INC., a New York corporation)

18 Plaintiff,)

19 v.)

20 GOOGLE, INC., a California corporation,)
 21 RICHARD ROBINSON, an individual, and)
 22 DOES 1 through 3, inclusive,)

23 Defendants.)
 24)
 25)
 26)
 27)
 28)

CASE NO.: 5:12-CV-03373 LHK

**NOTICE OF MOTION, MOTION,
 AND MEMORANDUM OF POINTS
 AND AUTHORITIES IN SUPPORT
 OF GOOGLE’S MOTION TO
 DISMISS PLAINTIFF’S THIRD
 AND FOURTH CAUSES OF
 ACTION**

1 **TABLE OF CONTENTS**

2 **Page**

3 **FACTUAL BACKGROUND** 3

4 **ARGUMENT** 4

5 **I. LEGAL STANDARD** 4

6 **II. PLAINTIFF’S TRADE DRESS CLAIM SHOULD BE DISMISSED** 5

7 **A. Plaintiff Does Not Allege the Trade Dress Claim with the Required**

8 **Specificity**..... 7

9 **B. Plaintiff Does Not and Cannot Allege the Elements of a Trade Dress Claim**..... 9

10 **1. Plaintiff Must Allege Secondary Meaning Because It Alleges**

11 **Infringement of A Product Design** 9

12 **a. Plaintiffs Has Not Alleged Facts Supporting Secondary**

13 **Meaning**..... 11

14 **b. Plaintiff’s Own Allegations Refute The Existence of**

15 **Secondary Meaning**..... 12

16 **2. Plaintiff Does Not and Cannot Allege Likelihood of Confusion** 16

17 **III. THE COPYRIGHT CLAIM SHOULD BE DISMISSED** 18

18 **A. Plaintiff Does Not Meet the Registration Requirement** 18

19 **1. A Copyright Claim Cannot Be Maintained For A Work That Has**

20 **Not Been Deposited With the Copyright Office** 18

21 **2. Plaintiff’s Copyright Application Does Not Cover the External**

22 **Content of the CamUp Website** 20

23 **B. Plaintiff Does Not Allege the Copyright Claim with the Required**

24 **Specificity**..... 21

25

26

27

28

1 **TABLE OF AUTHORITIES**

Page(s)

2 **CASES**

3

4 *Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941 (N.D. Cal. 2003)..... 12

5 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) 2, 4, 6, 12, 15

6 *Autodesk, Inc. v. Dassault Sys. Solidworks Corp.*, 685 F. Supp. 2d 1001 (N.D. Cal. 2009)..... 11, 12, 16

7

8 *Autodesk, Inc. v. Dassault Systemes Solidworks Corp.*, No. C 08-04397 WHA, 2008 WL 6742224 (N.D. Cal. Dec. 18, 2008) 5, 9

9 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696 (9th Cir. 1990) 4

10 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) 2, 4, 6

11 *Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) 4

12 *Braun Inc. v. Dynamics Corp. of Am.*, 975 F.2d 815 (Fed. Cir. 1992) 12,14

13 *Burke –Parsons-Bowlby Corp. v. Appalachian Log Homes, Inc.*, 871 F.2d. 590 (6th Cir. 1989) 14

14 *Calyx Tech., Inc. v. Ellie Mae, Inc.*, 2004 WL 2075446 (N.D. Cal., Sept. 3, 2004)..... 15

15 *Carter-Wallace, Inc. v. Procter & Gamble Co.*, 434 F.2d 794 (9th Cir. 1970) 12, 15

16 *Castaline v. Aaron Mueller Arts*, No. C 09-02543 CRB, 2010 WL 583944 (N.D. Cal. Feb. 16, 2010) 6

17 *Chestang v. Yahoo, Inc.*, No. 2:11-cv-00989-MCE-KJN, 2011 WL 4543218 (E.D.Cal. Sept. 28, 2011) 22

18 *Clicks Billiards, Inc. v. Sixshooters,Inc.*, 251 F.3d 1252 (9th Cir. 2001) 5, 17

19 *Co-Rect Products, Inc. v. Marvy! Advertising Photography, Inc.*, 780 F.2d 1324 (8th Cir. 1985) 14

20 *Coles v. Wonder*, 283 F.3d 798 (6th Cir. 2002) 19

21 *Cosmetic Ideas, Inc. v IAC/Interactivecorp*, 606 F.3d 612 (9th Cir. 2010) 19

22 *Docmagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119 (N.D. Cal. 2010) 9, 10

23 *Filipino Yellow Pages, Inc. v. Asian Journal Publ’ns, Inc.*, 198 F.3d 1143 (9th Cir.1999) 11

24 *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1379 (9th Cir. 1987) 13, 16

25 *Fund of Funds Ltd. V. First Am. Fund of Funds, Inc.* (S.D.N.Y. 1967) 14

1	<i>Funky Films, Inc. v. Time Warner Entm't Co.</i> , 462 F.3d 1072 (9th Cir. 2006).....	22
2	<i>Geoscan, Inc. of Texas v. Geotrace Tech., Inc.</i> , 226 F.3d 387 (5th Cir. 2000).....	19
3	<i>Heptagon Creations, Ltd. v. Core Group Marketing LLC</i> , No. 11 Civ. 01794 (LTS) (AJP), 2011 WL 6600267 (S.D.N.Y. Dec. 22, 2011).....	10
4	<i>ID7D Co., Ltd. v. Sears Holding Corp.</i> , No. 3:11cv1054(VLB), 2012 WL 1247329 (D.Conn. Apr. 13, 2012).....	6, 8, 17
5	<i>Int'l Union of Operating Eng'rs, Local 150, AFL-CIO v. Team 150 Party, Inc.</i> , No. 07 C 3972, 2008 WL 4211561 (N.D. Ill. Sept. 5, 2008).....	21
6	<i>Inwood Labs., Inc. v. Ives Labs., Inc.</i> , 456 U.S. 844 (1982).....	11
7	<i>Kema v. Koperwhats</i> , No. C-09-1587 MMC, 2010 WL 3464708 (N.D. Cal. Sept. 1, 2010).....	4
8	<i>Kodadek v. MTV Networks, Inc.</i> , 152 F.3d 1209 (9th Cir. 1998).....	18, 19, 22
9	<i>L.A. Gear v. Thom Mc An</i> , 12 U.S.P.Q. 2d 1001 (S.D.N.Y. 1989), <i>aff'd in part, rev'd in part</i> , 988 F.2d 1117 (Fed. Cir. 1993).....	13, 16
10	<i>Levi Strauss & Co. v. Blue Bell, Inc.</i> , 778 F.2d 1352 (9th Cir. 1985).....	11
11	<i>Mana Prods., Inc. v. Columbia Cosmetics Mfg., Inc.</i> , 65 F.3d 1063 (2 nd Cir. 1995).....	15
12	<i>Mattel, Inc. v. MGA Entm't, Inc.</i> , 782 F. Supp. 2d 911 (C.D. Cal. 2011).....	13, 16
13	<i>Nat'l Lighting Co., Inc. v. Bridge Metal Indus., LLC.</i> , 601 F. Supp 2d 556 (S.D.N.Y. 2009).....	6
14	<i>Obodai v. Youtube, Inc.</i> , 840 F. Supp. 2d 714 (S.D.N.Y. 2011).....	19, 20, 22
15	<i>Reed Elsevier, Inc. v. Muchnick</i> , ___ U.S. ___, 130 S. Ct. 1237 (2010).....	19
16	<i>Salt Optics, Inc. v. Jand, Inc.</i> , No. SACV 10-0828.....	5, 6, 7, 8, 9, 22, 23
17	<i>SG Services, Inc. v. God's Girls Inc.</i> , 2007 WL 231543 (C.D. Cal., May 9, 2007).....	9
18	<i>Shaw v. Lindheim</i> , 919 F.2d 1353 (9th Cir. 1990).....	22
19	<i>Sleep Science Partners v. Lieberman</i> , No. 09-04200 CW, 2010 WL 1881770 (N.D. Cal. May 10, 2010).....	5, 7, 8
20	<i>Smith & Hawken, Ltd. v. Gardendance, Inc.</i> , No.C04-1664 SBA, 2004 WL 2496163 (N.D. Cal. Nov. 5, 2004).....	6, 7, 9, 16, 17, 18
21	<i>Sprewell v. Golden State Warriors</i> , 266 F.3d 979 (9th Cir. 2001).....	4
22	<i>Stephen W. Boney, Inc. v. Boney Servs., Inc.</i> , 127 F.3d 821 (9th Cir. 1997).....	9
23	<i>Stuart Hall Co., Inc. v. Ampad Corp.</i> , 51 F.3d 780 (8 th Cir. 1995).....	14
24	<i>The Jumpitz Corp. v. Viacom Int'l, Inc.</i> , 2010 WL 3238953 (S.D. Cal, Aug. 13, 2010).....	9

1	<i>Thomas v. Walt Disney Co.</i> , 2008 WL 425647 (N.D. Cal. Feb. 14, 2008).....	5
2	<i>Treat, Inc. v. Dessert Beauty</i> , No. 05–923–PK, 2006 WL 2812770 (D. Or. May 5, 2006).....	6
3	<i>Two Pesos, Inc. v. Taco Cabana, Inc.</i> , 505 U.S. 763 (1992)	14
4	<i>Urban Group Exercise Consultants, Ltd. v. Dick’s Sporting Goods, Inc.</i> , No. 12 Civ. 3599(RWS), 2012 WL 3240442 (S.D.N.Y. Aug. 7. 2012)	6
5	<i>Wal-Mart Stores, Inc. v. Samara Brothers, Inc.</i> 529 U.S. 205 (2000).....	5, 9, 10, 11
6	<i>Yurman Design, Inc. v. PAJ, Inc.</i> , 262 F.3d 101 (2d Cir. 2001)	10
7		
8	STATUTES	
9	§ 2	14
10	15 U.S.C. §1052(f)	14, 15
11	17 U.S.C. § 408(b)(1) & (2)	18, 19
12	17 U.S.C. §408(c).....	20
13	17 U.S.C. § 410(a).....	20
14	17 U.S.C. § 411(a).....	18, 19, 20, 21
15	§ 43(a)	14
16	§ 408(a)	19
17	RULES	
18	37 CFR 202.20(c)(2)(viii)	20
19	Federal Rule of Civil Procedure 12(b)(6)	1, 4
20	Rule 411(a)	21
21	MISCELLANEOUS	
22	1 J. Thomas McCarthy, <i>McCarthy on Trademarks and Unfair Competition</i> § 8:1 (4th ed. 1996)	5
23	2-7 M. Nimmer & D. Nimmer, <i>Nimmer on Copyright</i> § 7.17[2][b].....	19
24	<i>Accord Walker & Zanger</i> , 549 F.Supp.2d at 1173-74	10, 11, 13, 14
25	<i>McCarthy On Trademarks and Unfair Competition</i> , §12:46.....	15
26	<i>McCarthy on Trademarks</i> at §8:7.25	7
27	RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 16 cmt. a (1995).....	5
28	<i>Torres-Negron</i> , 504 F.3d at 158.....	20

1 **NOTICE OF MOTION AND MOTION**

2 **PLEASE TAKE NOTICE** that on January 3, 2013, at 1:30 p.m. in Courtroom 8, 4th
3 Floor, United States District Courthouse, 280 South First Street, San Jose, CA 95113, before the
4 Honorable Lucy H. Koh, Defendant Google Inc. will and hereby does move to dismiss Plaintiff Be
5 In, Inc.’s causes of action for alleged trade dress and copyright infringement.

6 **RELIEF SOUGHT:** Google seeks dismissal of Plaintiff’s causes of action for (1) trade
7 dress infringement; and (2) copyright infringement, under Federal Rule of Civil Procedure
8 12(b)(6). Plaintiff has not adequately alleged the elements of a trade dress claim or adequately
9 identified the claimed trade dress. With respect to the copyright infringement claim, Plaintiff has
10 not sought to register the work at issue or sufficiently alleged the scope of its claim.

11 This motion is based upon the Memorandum of Points and Authorities, the Declaration of
12 Charles Tait Graves and Exhibits attached thereof, the Proposed Order, and any other
13 information and argument before the Court at the hearing.

14 **INTRODUCTION**

15 In June 2011, Google launched Google+, a social networking platform. Google+
16 includes a feature called “Hangouts” that allows users to video chat with multiple other users. A
17 year later, Plaintiff Be In, Inc. initiated this action, asserting claims based on alleged similarity
18 between Hangouts and Plaintiff’s video chat website, CamUp. Plaintiff launched CamUp in
19 March 2011. Plaintiff does not claim that CamUp *ever* attracted a significant user base, much
20 less that it had attracted a substantial number of users in the three months before Google
21 launched Google+ in June 2011. By this motion, Google respectfully requests that the Court
22 dismiss two of Plaintiff’s causes of action for failure to state a claim: (1) trade dress
23 infringement, and (2) copyright infringement. Plaintiff alleges these claims solely against
24 Google, and not Google’s co-defendant Richard Robinson. With respect to both of these claims,
25 Plaintiff vaguely asserts that Google’s Hangouts product mimics the “look and feel” of the
26 CamUp website. Both claims should be dismissed.

27 Plaintiff fails to state a trade dress infringement cause of action because it does not
28 sufficiently allege at least two of the three required elements of a trade dress claim for product

1 design: distinctiveness by acquired “secondary meaning” and likelihood of confusion. With
2 respect to the first element, trade dress in a website is protectable only if it has become so
3 distinctive and well-known that it has acquired what is known as “secondary meaning.”
4 Secondary meaning is acquired only when a substantial segment of the consuming public has
5 learned to associate the unique, non-functional appearance of the website with a single source
6 (here, Plaintiff), just as consumers might learn to associate a brand name with a unique supplier.
7 But Plaintiff has come nowhere close to alleging that a substantial segment of consumers had
8 learned to associate Plaintiff with the claimed trade dress of its new website during the three
9 months between the website’s introduction in March 2011 and Google’s release of Hangouts in
10 June 2011. Here, Plaintiff alleges only that it introduced the CamUp website at a trade show in
11 Austin, Texas. It does not allege a dollar spent on advertising or marketing, a dollar earned from
12 sales, any significant user adoption, or any consumer association of the mundane appearance of
13 the CamUp website with Plaintiff. Given the absence of a massive media blitz, a unique website
14 design, or widespread consumer adoption of CamUp between March 2011 and June 2011,
15 Plaintiff cannot plausibly allege secondary meaning as a matter of law based on a website
16 available for only three months.

17 After the Supreme Court’s decisions in *Twombly* and *Iqbal*, courts routinely dismiss trade
18 dress claims –especially those asserting rights in product design as Plaintiff asserts here – for
19 failure to allege the acquisition of secondary meaning. The Amended Complaint at issue here is
20 particularly lacking in any facts to support Plaintiff’s claim that it owns any protectable rights in
21 the appearance of its website; indeed, the facts that it does allege underscore its failure to have
22 acquired secondary meaning. For this reason alone, its trade dress claim must be dismissed.

23 Plaintiff’s trade dress claim fails for the independent reason that it has failed to allege
24 facts to support a likelihood of confusion with Google’s Hangouts product. Its bare bones
25 recitation of the element is insufficient to plead an adequate claim for relief.

26 Plaintiff’s copyright claim is also defective. First, Plaintiff does not meet the requirement
27 under Section 411 of the Copyright Act that a work be registered prior to initiation of an action
28 for alleged infringement of the work, because the application that Plaintiff submitted to the

1 Copyright Office just before filing suit does not encompass the appearance of the CamUp
2 website. At best, the application covers only the underlying source code for the website.
3 Plaintiff does not (and cannot) allege that Google infringes that source code, because Google
4 could never have had access to that code. Second, Plaintiff fails to identify the aspects of the
5 CamUp website that it alleges are infringed by Google, or to distinguish between the subject
6 matter of its copyright and trade dress allegations.

7 Google therefore respectfully requests that Plaintiff's trade dress and copyright
8 infringement claims be dismissed.

9 **FACTUAL BACKGROUND**

10 Plaintiff alleges that it creates and markets online social media platforms that allow
11 groups of people to interact through chat and webcams. Amended Complaint ¶ 1. Plaintiff
12 operates a website called CamUp, which is located at <www.camup.com>. *Id.* ¶ 2. CamUp
13 allows individuals to join a video chat by webcam and share online media, such as video, in a
14 video chat room. *Id.* ¶ 2. Plaintiff "officially unveiled" its CamUp website in March 2011 at the
15 South by Southwest festival in Austin, Texas. *Id.* 23. Plaintiff alleges that it "has won awards
16 and accolades and received extensive media coverage for its innovation and creativity in
17 developing the CamUp platform." *Id.*, ¶2. However, it only identifies a single award, from a
18 venture capital firm, for being an innovative start up. *Id.*, ¶26. It asserts receiving "extensive
19 media coverage," but does not provide any factual allegations to support the supposed extensive
20 media. It does not allege any advertising, promotion, or other publicity for CamUp. Nor does it
21 allege rapid user adoption (or any user adoption at all by June 2011).

22 In June 2011, Google launched a social networking product called Google+. *Id.* ¶ 33.
23 Google+ includes a feature called Hangouts, which allows users to chat with up to nine people.
24 *Id.* Plaintiff alleges that Google's use in Hangouts of "several video chat screens directly
25 underneath a main screen containing video or other media" replicates the "overall look and feel
26 of the CamUp platform." *Id.* ¶ 38. Plaintiff does not allege any other similarity between CamUp
27 and Google+.

1 Plaintiff alleges that it submitted an application to the Copyright Office for registration of
2 “inter alia, the CamUp web video platform” on June 22, 2012. *Id.* ¶ 49. The application is
3 identified with the Copyright Office as No. 1-779959021. *Id.* Plaintiff does not otherwise
4 identify the claimed copyrighted work, or the alleged infringing aspects of Google+, anywhere in
5 its Complaint.

6 Plaintiff claims to hold proprietary rights in the unregistered trade dress of CamUp.
7 According to Plaintiff, the trade dress is defined by the following elements: (1) a large window
8 containing media; (2) placement of logos on top left; (3) white and gray color palette; (4) several
9 windows underneath the large window that contain webcam images of participants in the video
10 web-chat; and (5) rectangular boxes containing chat and playlist features surrounding the large
11 window of media. *Id.* ¶ 53.

12 ARGUMENT

13 I. LEGAL STANDARD

14 Dismissal under Rule 12(b)(6) for failure to state a claim “can be based on the lack of a
15 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
16 theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A motion to
17 dismiss should be granted if a plaintiff fails to plead enough “factual content to allow a court to
18 draw the reasonable inference that the defendant is liable for the alleged” misconduct; facts
19 merely consistent with a defendant’s liability are not sufficient. *Ashcroft v. Iqbal*, 556 U.S. 662,
20 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57, 570 (2007)). A plaintiff
21 that pleads no more than conclusory assertions of the elements of the cause of action does not
22 meet this standard. *Id.* Moreover, although allegations of material fact are taken as true, legal
23 conclusions, conclusory statements, unwarranted deductions of fact, and unreasonable inferences
24 need not be. *Id.*; *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

25 In deciding a motion to dismiss, a court may consider “documents whose contents are
26 alleged in a complaint and whose authenticity no party questions, but which are not physically
27 attached to the pleading.” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on*
28 *other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *Kema v.*

1 *Koperwhats*, No. C-09-1587 MMC, 2010 WL 3464708, at *2 (N.D. Cal. Sept. 1, 2010) (on
2 motions to dismiss, court may consider documents whose authenticity is not contested and (1)
3 are not attached to complaint but whose content is alleged in complaint or (2) any document
4 upon which complaint necessarily relies, “regardless of whether the document is referenced in
5 the complaint”). A copyright application, including the material deposited with the Copyright
6 Office as part of the application, is properly considered on a motion to dismiss a copyright
7 infringement claim. *See, e.g., Thomas v. Walt Disney Co.*, 2008 WL 425647, at *2 n.1 (N.D.
8 Cal. Feb. 14, 2008) (considering copyright deposit on motion to dismiss).

9 **II. PLAINTIFF’S TRADE DRESS CLAIM SHOULD BE DISMISSED**

10 “Trade dress refers to the ‘manner in which the goods or services are presented to
11 prospective purchasers . . .’ to indicate the creator of the dress.” *Salt Optics, Inc. v. Jand, Inc.*,
12 No. SACV 10-0828 DOC (RNBx), 2010 WL 4961702, at *4 (C.D. Cal. Nov. 19, 2010) (quoting
13 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 16 cmt. a (1995)). Trade dress protects only
14 those non-functional, aesthetic aspects of a product or its packaging that signify to consumers the
15 unique source or manufacturer of the product, just as a brand name would. *See Wal-Mart Stores,*
16 *Inc. v. Samara Brothers, Inc.* 529 U.S. 205, 210-13 (2000). The Ninth Circuit has explained that
17 protectable trade dress denotes product source, not mere decoration or aesthetics:

18 [T]he elements making up the alleged trade dress must have been used in such a
19 manner as to denote product source. Thus, a product feature whose only impact is
20 decorative and aesthetic, with no source-identifying role, cannot be given exclusive
rights under trade dress law.

21 *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1262 (9th Cir. 2001) (citing 1 J. Thomas
22 McCarthy, *McCarthy on Trademarks and Unfair Competition* § 8:1 (4th ed. 1996)).

23 In order to allege a viable claim for trade dress infringement, the plaintiff must (1) allege
24 each of the elements of the cause of action, and (2) clearly identify the claimed trade dress to
25 give the defendant sufficient notice of its claim. *Sleep Science Partners v. Lieberman*, No. 09-
26 04200 CW, 2010 WL 1881770, at *3 (N.D. Cal. May 10, 2010) (“Without an adequate definition
27 of the elements comprising the website’s ‘look and feel’, [defendant] is not given adequate
28 notice”; granting motion to dismiss); *Autodesk, Inc. v. Dassault Systemes Solidworks Corp.*, No.

1 C 08-04397 WHA, 2008 WL 6742224, at *5 (N.D. Cal. Dec. 18, 2008) (“Autodesk must provide
2 more detail and clarify the total appearance of the product that Autodesk claims is the trade dress
3 at issue”; granting motion to dismiss); *Salt Optics*, 2010 WL 4961702, at *5 (“[A] mere
4 cataloguing of a website’s features does not give defendants adequate notice of a plaintiff’s trade
5 dress claim”; granting motion to dismiss).

6 In the post *Twombly* and *Iqbal* era, courts frequently dismiss trade dress claims for failure
7 to identify the claimed trade dress with the required specificity or to plead facts sufficient to
8 support the required elements. See, e.g., *Castaline v. Aaron Mueller Arts*, No. C 09-02543 CRB,
9 2010 WL 583944, at *3-4 (N.D. Cal. Feb. 16, 2010) (dismissing trade dress claim for failure to
10 allege secondary meaning); *Smith & Hawken, Ltd. v. Gardendance, Inc.*, No. C04-1664 SBA,
11 2004 WL 2496163, at *3-4 (N.D. Cal. Nov. 5, 2004) (dismissing trade dress claim for failure to
12 explain “the nature, scope or elements making up its allegedly protectable ‘trade dress’” and for
13 failure to adequately allege secondary meaning); *Urban Group Exercise Consultants, Ltd. v.*
14 *Dick’s Sporting Goods, Inc.*, No. 12 Civ. 3599(RWS), 2012 WL 3240442, at *7 (S.D.N.Y. Aug.
15 7, 2012) (dismissing trade dress claim for lack of identification and failure to allege secondary
16 meaning); *ID7D Co., Ltd. v. Sears Holding Corp.*, No. 3:11cv1054(VLB), 2012 WL 1247329, at
17 *7 (D.Conn. Apr. 13, 2012) (dismissing trade dress claim for failure to allege secondary meaning
18 or likelihood of confusion); *Nat’l Lighting Co., Inc. v. Bridge Metal Indus., LLC.*, 601 F. Supp
19 2d 556, 562 (S.D.N.Y. 2009) (dismissing trade dress claim for failure to provide “a precise
20 expression of the character and scope of the claimed trade dress”); *Treat, Inc. v. Dessert Beauty*,
21 No. 05–923–PK, 2006 WL 2812770, at *15 (D. Or. May 5, 2006) (granting motion to dismiss for
22 failure to identify claimed trade dress or to plead secondary meaning).

23 Here, Plaintiff’s trade dress claim should be dismissed because it neither identifies with
24 the required specificity what aspects of the CamUp website it contends are protected under trade
25 dress law nor sufficiently alleges the elements of the claim.

1 **A. Plaintiff Does Not Allege the Trade Dress Claim with the Required**
2 **Specificity**

3 A deficient description of claimed trade dress impairs a defendant’s ability to respond to
4 the claim and hinders a court’s ability to assess whether the plaintiff has adequately pleaded the
5 elements of a trade dress claim (namely, that the trade dress is distinctive, nonfunctional, and
6 there exists a likelihood of confusion). *Smith & Hawken, Ltd.*, 2004 WL 2496163, at *3 (finding
7 claim “wholly deficient” where defendants offered “no explanation as to the nature, scope, or
8 elements” of trade dress, thus providing “no facts . . . that would allow the Court to determine
9 whether [the trade dress was] distinctive, whether [it was] nonfunctional or whether there
10 exist[ed] a likelihood of confusion”; granting motion to dismiss). And, in cases like this one
11 involving both trade dress and copyright claims, an inadequate trade dress description fails to
12 make “clear to what extent [the] purported trade dress falls within the scope of copyright.” *Sleep*
Science Partners, 2010 WL 1881770, at *5.

13 A trade dress plaintiff must plead all of its claimed trade dress, not merely a subset of it.
14 Merely listing some features of the purported trade dress – and thereby leaving open the
15 possibility that enumerated components are only a subset of the claimed trade dress – does not
16 suffice. *Id.* at *3 (trade dress description insufficient where plaintiff described trade dress as
17 “includ[ing]” the listed features because such language suggests components are only some
18 among many and raises a question of whether plaintiffs intends to redefine trade dress later in
19 litigation); *Salt Optics*, 2010 WL 4961702, at *5 (trade dress description insufficient where
20 components were listed “by way of illustration, not by limitation”).

21 Moreover, website “look and feel” claims are viewed with particular “caution” since “the
22 elements comprising a website’s overall ‘look and feel’ can be more difficult to pin down.” *See*
23 *Salt Optics*, 2010 WL 4961702, at *5; *see McCarthy on Trademarks* at §8:7.25 (“Hazy and
24 indefinite references to the protectable and allegedly infringed aspect of trade dress in a Web site
25 as its ‘look and feel’ fall far short of the exactitude that is required.”). Accordingly, to satisfy its
26 pleading requirement, a plaintiff cannot simply list certain components of the asserted website,
27 but must instead explain how these elements combine to create a protectable “look and feel.”
28 *See Salt Optics*, 2010 WL 4961702, at *5 (“[A] mere cataloguing of a website’s features does not

1 give defendants adequate notice of a plaintiff’s trade dress claim” where plaintiffs described
2 elements with some detail but did not explain how they combined “to create the website’s
3 protectible ‘look and feel’”). For instance, in *Sleep Science Partners*, the plaintiff alleged the
4 defendant infringed its trade dress in its website’s look and feel, but merely catalogued website
5 features without explaining how those features combined to create a protectable trade dress. On
6 this basis, the court dismissed the trade dress claim. *Sleep Science Partners*, 2010 WL 1881770,
7 at *3. As the court noted in *ID7D*, “[t]he issue is not just *which* features are distinctive, but also
8 *how* they are distinctive.” *ID7D*, 2012 WL 1247329, at *10; *see also id.* at *9 (“[A] plaintiff’s
9 inability to explain to a court exactly which aspects of its product design(s) merit protection may
10 indicate that its claim is pitched at an improper level of generality, *i.e.*, the claimant seeks
11 protection for an unprotectable style, theme or idea.”) (citation omitted).

12 Here, Plaintiff’s identification of its trade dress fails to provide sufficient notice of what it
13 claims as its trade dress and what aspect(s) of Google’s Hangouts feature allegedly infringe the
14 claimed trade dress. As in *Sleep Science Partners* and *Salt Optics*, Plaintiff’s infringement
15 claims are premised on the “look and feel” of a website. Plaintiff alleges in particular that
16 Google’s Hangouts “attempts to replicate the *overall look and feel* of the CamUp platform.”
17 Complaint ¶38 (emphasis added). But it is unclear what Plaintiff means by the “overall look and
18 feel” of its “platform” and whether that is limited to the five elements of claimed trade dress
19 Plaintiff lists later in the complaint. *See id.* at ¶53 (identifying (1) a large window containing
20 media, (2) rectangular boxes containing chat and playlist features surrounding the window, (3)
21 placement of logos on top left, (4) white and gray palette, and (5) several windows underneath
22 the large window containing webcam images). Even if the claimed trade dress were limited to
23 those elements, Plaintiff has not explained how the enumerated elements combine to create
24 protectable trade dress.

25 The deficiency is exacerbated in Plaintiff’s complaint because it also never identifies
26 what aspects of the Hangouts feature allegedly infringe Plaintiff’s trade dress rights.
27 Notwithstanding Plaintiff’s allegation that Google infringes “several elements” of its claimed
28 trade dress and the “overall look and feel” of the CamUp website, the only aspect of Google’s

1 website that Plaintiff identifies as infringing is “the inclusion of several video chat screens
2 directly underneath a main screen containing video or other media.” *Id.* ¶38. It is unclear
3 whether that is the entirety of the alleged infringement. Google therefore does not know the
4 scope of Plaintiff’s claim – either what Plaintiff purportedly seeks to protect or what is alleged to
5 infringe. This failure to fully identify the claimed trade dress impedes the Court’s ability to
6 evaluate the claim and Google’s ability to defend against it. *See Autodesk*, 2008 WL 6742224, at
7 *5; *Smith & Hawken*, 2004 WL 2496163, at *3.

8 There is no justification for Plaintiff’s failure to fully identify its claimed trade dress.
9 Plaintiff possesses all of the information that it needs to identify the non-functional aspects of
10 CamUp that it asserts to be source-identifying. For this reason alone, the trade dress claim
11 should be dismissed. *See, e.g., Salt Optics*, 2010 WL 4961702, at *6.

12 **B. Plaintiff Does Not and Cannot Allege the Elements of a Trade Dress Claim**

13 To state a claim for trade dress infringement, a plaintiff must allege facts demonstrating
14 that: “(1) the trade dress is inherently distinctive or has acquired distinctiveness through
15 secondary meaning; (2) there is a likelihood that the public will be confused by the infringing
16 use; and (3) the trade dress is non-functional.” *Docmagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp.
17 2d 1119, 1139 (N.D. Cal. 2010) (*citing Stephen W. Boney, Inc. v. Boney Servs., Inc.*, 127 F.3d
18 821, 828 (9th Cir. 1997)). Plaintiff cannot and does meet any of these required elements.

19 **1. Plaintiff Must Allege Secondary Meaning Because It Alleges** 20 **Infringement of A Product Design**

21 Plaintiff alleges that Google infringes its *product design*, namely the design of the
22 CamUp website, as opposed to the packaging or “dressing” of a product. *See, e.g., The Jumpitz*
23 *Corp. v. Viacom Int’l, Inc.*, 2010 WL 3238953, at *7 (S.D. Cal, Aug. 13, 2010) (alleged trade
24 dress infringement of website analyzed as product design); *SG Services, Inc. v. God’s Girls Inc.*,
25 2007 WL 231543, at *9-10 (C.D. Cal., May 9, 2007) (same). A plaintiff seeking protection of
26 trade dress in a product design cannot rely on claimed inherent distinctiveness (*i.e.*, that its
27 intrinsic nature serves to identify a particular source), but must instead allege and prove the
28 acquisition of secondary meaning. Plaintiff has not done so.

1 In *Wal-Mart Stores*, the Supreme Court considered whether a plaintiff asserting trade
2 dress protection for a product design could ever meet the first element concerning the
3 distinctiveness of the claimed trade dress by asserting that the trade dress was inherently
4 distinctive or whether a plaintiff must instead allege distinctiveness acquired through secondary
5 meaning. The Court determined that a plaintiff asserting trade dress for product design could
6 only meet the distinctiveness element by alleging secondary meaning. *Wal-Mart Stores*, 529
7 U.S. at 212-14, 16; *Docmagic*, 745 F. Supp. 2d at 1140 n.7 (“Because [plaintiff] is alleging trade
8 dress in its product design, rather than product packaging, it is not permitted, as a matter of law,
9 to allege that its trade dress is inherently distinctive; to satisfy the first element of a trade dress
10 claim it must allege secondary meaning.”).

11 The *Wal-Mart* Court reasoned that trade dress in product design could never be
12 inherently distinctive because consumers are not accustomed to associating product design with a
13 unique source for a product. Even in unusual products, consumers expect aspects of claimed
14 trade dress to be part of the function of the product itself:

15 In the case of product design, as in the case of color, we think consumer
16 predisposition to equate the feature with the source does not exist. Consumers are
17 aware of the reality that, almost invariably, even the most unusual of product
designs . . . is intended not to identify the source, but to render the product itself
more useful or more appealing.

18 *Wal-Mart Stores*, 529 U.S at 213. The Court found that a plaintiff must establish secondary
19 meaning before it can have a protectable trade dress in product design otherwise plaintiffs may
20 try to use trade dress law to deprive the public of useful articles and to obtain a monopoly over
21 functional, non-creative elements of a product design. *See id.*¹

22
23 ¹*Accord Walker & Zanger*, 549 F.Supp.2d at 1173-74 (“[C]ourts exercise particular caution
24 when extending protection to product designs because such claims present an acute risk of
25 stifling competition” due to the fact that “granting trade dress protection to an ordinary product
26 design create[s] a monopoly in the goods themselves.” (internal quotation marks omitted));
27 *Heptagon Creations, Ltd. v. Core Group Marketing LLC*, No. 11 Civ. 01794 (LTS) (AJP), 2011
28 WL 6600267, at *7 (S.D.N.Y. Dec. 22, 2011) (“Courts are particularly cautious about trade dress
claims in product design cases because ‘almost invariably, even the most unusual of product
designs . . . is intended not to identify the source of the product, but to render the product itself
more useful or appealing.’” (quoting *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 114-15 (2d
Cir. 2001))).

1 capitalist for being an “innovative start up.” *Id.*, ¶26. Plaintiff’s bare assertions do not satisfy its
2 obligation to plead facts supporting its trade dress claim. *See Ashcroft v. Iqbal*, 556 U.S. 662,
3 678 (2009) (“Threadbare recitals of the elements of a cause of action, supported by mere
4 conclusory statements, do not suffice.”); *AccuImage Diagnostics Corp. v. Terarecon, Inc.*, 260 F.
5 Supp. 2d 941 (N.D. Cal. 2003) (dismissing trade dress claim where plaintiff failed to plead with
6 specificity how reports at issue were unique and inherently distinctive). For this reason alone, its
7 trade dress claim should be dismissed. And unless Plaintiff can demonstrate the ability to allege
8 real facts supporting the acquisition of secondary meaning, it should not be granted leave to
9 amend its defective claim (which it has already amended once). *See DeSoto v. Yellow Freight*
10 *Sys.*, 957 F.2d 655, 658 (9th Cir.1992) (leave to amend properly denied where amendment would
11 be futile).

12 **b. Plaintiff’s Own Allegations Refute The Existence of Secondary**
13 **Meaning**

14 Plaintiff’s failure to plead secondary meaning is emphasized by the facts it *does* plead,
15 which affirmatively refute the existence of secondary meaning. Thus, Plaintiff has not only
16 failed to allege secondary meaning, it simply cannot.

17 ***Short Duration of Use.*** Plaintiff alleges that it publicly released the CamUp website
18 about three months before Google released the alleged infringing Hangouts feature. Amended
19 Complaint ¶¶ 23, 33. This short duration of time underscores Plaintiff’s failure to have
20 adequately pleaded secondary meaning. Since acquisition of secondary meaning is what
21 distinguishes public domain trade dress from protectable trade dress, Plaintiff must allege
22 acquisition of secondary meaning *before Google’s use began*. *Carter-Wallace, Inc. v. Procter &*
23 *Gamble Co.*, 434 F.2d 794 (9th Cir. 1970) (affirming trial court’s finding of no secondary
24 meaning prior to use by defendant); *Braun Inc. v. Dynamics Crop. Of Am.*, 975 F.2d 815, 826
25 (Fed. Cir. 1992) (“[A] claim of trade dress infringement fails if secondary meaning did not exist
26 before the infringement began.”). In other words, Plaintiff must plead facts demonstrating that
27 “a mental association by a substantial segment of consumers and potential consumers between
28 the alleged [trade dress] and a single source of the product” was acquired in the three months

1 after CamUp’s introduction in March 2011, before Google introduced the alleged infringing
2 Hangouts feature in June 2011. *Walker & Zanger, Inc.*, 549 F. Supp. 2d at 1179. Plaintiff does
3 not even attempt to meet this requirement, and for that reason alone, the Court need go no further
4 to dismiss its trade dress claim.

5 Even if CamUp’s claimed trade dress remained unaltered during the three-month period
6 (which Plaintiff never alleges), Plaintiff could hardly have acquired distinctiveness in that brief
7 period. *Mattel, Inc. v. MGA Entm’t, Inc.*, 782 F. Supp. 2d 911, 1006 (C.D. Cal. 2011) (“To
8 establish secondary meaning, the duration of a mark’s use must be more than a relatively short
9 period.” (internal citation and punctuation omitted). In case after case, courts have found even
10 several years’ worth of advertising and exclusive use insufficient to build secondary meaning.²
11 *See, e.g., First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1379, 1383 (9th Cir. 1987) (millions
12 of dollars-worth of advertising over five years insufficient to establish secondary meaning where
13 advertising did not seek to engender consumer identification of source with claimed trade dress);
14 *Braun Inc.*, 975 F.2d at 826 (Fed. Cir. 1992) (“While not impossible, it is difficult for a product to
15 acquire secondary meaning during an 18-month period.”); *Burke –Parsons-Bowlby Corp. v.*

16
17 ² Only in exceptional circumstances is secondary meaning found in less than a year. Nothing
18 Plaintiff has alleged suggests any such circumstances; to the contrary, its pleading demonstrates
19 that Plaintiff cannot plausibly allege secondary meaning. By contrast, *L.A. Gear v. Thom Mc An*,
20 12 U.S.P.Q. 2d 1001 (S.D.N.Y. 1989), *aff’d in part, rev’d in part*, 988 F.2d 1117 (Fed. Cir.
21 1993) is a case often cited for the extraordinarily short time (5 months) in which secondary
22 meaning was established before the defendant began offering a competing shoe. In *L.A. Gear*,
23 (1) the plaintiff held the fourth largest market share in branded athletic footwear, (2) it used a
24 specific shoe design as its “signature shoe” for 1988 by focusing the vast majority of
25 promotional and advertising efforts on that shoe; (3) it spent over \$4M on television
26 commercials, running in 35 different markets, “at a frequency rate designed to have every
27 household with a television set in the markets view the advertisement from three to nine times”;
28 (4) it distributed advertisements for the shoe on hundreds of billboards (at a cost of \$700 to
\$800,000), in full page magazine and print advertisements, and in point of purchase
advertisements in stores, (5) every advertisement featured the design of the shoe; (6) plaintiff
sold over 4 M pairs of the shoe; (7) consumer survey evidence demonstrated consumer
recognition of the shoe design; and (8) the shoe also garnered significant media attention through
television news reporting and magazine articles. *Id.* at 1003, 1008-10. Under these exceptional
circumstances, the court found that “despite the short [5 month] time frame, a substantial
segment of the relevant consuming public became aware of the association between the trade
dress and L.A. Gear.” *Id.* at 1010. Plaintiff here alleges nothing close to the advertising and
promotional effort that would be required to allege the acquisition of secondary meaning within a
3-month time period.

1 *Appalachian Log Homes, Inc.*, 871 F.2d. 590, 596 (6th Cir. 1989) (citing with approval decision
2 finding that three years of use “was insufficient to prove that the mark had acquired secondary
3 meaning.”); *Co-Rect Products, Inc. v. Marvy! Advertising Photography, Inc.*, 780 F.2d 1324,
4 1332 (8th Cir. 1985) (ten months insufficient to establish secondary meaning); *Walker & Zanger*,
5 549 F. Supp. 2d at 1117-1118 (plaintiff’s five-year period of exclusive use and extensive
6 advertising insufficient to establish secondary meaning where “advertising emphasizes design
7 product traits, but fails to draw attention to these features as source identifiers.”); *cf. Fund of*
8 *Funds Ltd. V. First Am. Fund of Funds, Inc.*, (S.D.N.Y. 1967) (“This is a rare case in the sense
9 that plaintiffs have managed to acquire secondary meaning in a relatively short [three years]
10 period of time.”). Plaintiff’s allegations of alleged trade dress use come nowhere close to even
11 the facts presented in these cases, which were insufficient to establish secondary meaning.

12 As a point of reference, the Lanham Act provides a presumption of secondary meaning
13 for marks for which federal registration is sought. The presumption is obtained only after *five*
14 *years of substantially exclusive and continuous use* of a mark. 15 U.S.C. §1052(f). The five-
15 year presumption applicable to federal registrations is relevant in determining whether trade
16 dress has acquired secondary meaning. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768
17 (1992) (addressing protectability of unregistered trade dress; “[T]he general principles qualifying
18 a mark for registration under § 2 of the Lanham Act are for the most part applicable in
19 determining whether an unregistered mark is entitled to protection under § 43(a).”); *Stuart Hall*
20 *Co., Inc. v. Ampad Corp.*, 51 F.3d 780, 790 (8th Cir. 1995) (comparing plaintiff’s exclusive and
21 continuous use of trade dress for more than five years against five-year federal registration
22 presumption). The five-year statutory presumption dwarfs Plaintiff’s three months of use here,
23 with little to no advertising, promotion or publicity and no allegations demonstrating any
24 significant user adoption.

25 **No Exclusive Use.** Plaintiff underscores its failure to acquire distinctiveness in the
26 claimed trade dress by asserting rights in purely mundane or generic aspects of its website which
27 consumers would not naturally view as identifying source. *See* Complaint ¶ 52 (alleging rights
28 in white and gray color palette, placement of logo at top left of screen, a large window

1 containing media, and several windows underneath the large window); *Carter-Wallace, Inc.*, 434
2 F.2d at 802 (“Another factor militating against a finding of secondary meaning in plaintiff’s
3 slogans is their lack of exclusivity”); 15 U.S.C. §1052(f) (statutory presumption for federal
4 registration applies only after five years of “substantially exclusive” use).

5 Plaintiff does not and cannot assert exclusive use of the claimed trade dress. The website
6 design elements that it asserts are well-known and ubiquitous on the Internet, and therefore
7 unlikely to be protectable at all. *See McCarthy On Trademarks and Unfair Competition*, §12:46
8 (“[W]hen used in the sense of trademark significance, secondary meaning is properly conceived
9 as the opposite of genericness.”); *Mana Prods., Inc. v. Columbia Cosmetics Mfg., Inc.*, 65 F.3d
10 1063, 1070 (2nd Cir. 1995) (“[W]here it is the custom in a particular industry to package products
11 in a similar manner, a trade dress done in that style is likely to be generic.”). Plaintiff has not
12 asserted (and cannot assert) the type of exclusive use of distinctive elements that causes
13 consumers to associate particular appearance with a particular source. *Cf. Calyx Tech., Inc. v.*
14 *Ellie Mae, Inc.*, 2004 WL 2075446, at *1-*3, (N.D. Cal., Sept. 3, 2004) (plaintiff adequately
15 alleged secondary meaning where it had been using its unique screen displays for over ten years,
16 distributed copies of the software at about 60 trade shows per year, spent more than \$1 million in
17 promotion, product was in widespread use, there was evidence of actual confusion, and the
18 screen images were indicators of source to consumers).

19 ***De Minimis Advertising and Promotion.*** As noted, Plaintiff purports to rely on
20 “extensive media coverage” but provides no facts to support that allegation. Complaint ¶54;
21 *Iqbal*, 556 U.S. at 678. The only publicity it alleges is a single trade show in Austin, Texas,
22 which by itself could hardly establish secondary meaning. *Cf. Calyx Tech., Inc.*, 2004 WL
23 2075446, at *1-*3 (plaintiff adequately alleged secondary meaning where it alleged, among other
24 things, promotion of software at about 60 trade shows per year for over ten years). Moreover,
25 Plaintiff does not allege that the trade dress for which it seeks protection was even in use at the
26 time of the Austin trade show, much less that it was stressed or featured in any way. *See First*
27 *Brands*, 809 F.2d at 1383 (affirming finding of no secondary meaning where five-year
28 advertising campaign had not stressed the color and shape of the antifreeze jug so as to develop

1 secondary meaning); *Autodesk*, 685 F. Supp. 2d at 1014 (“[T]he ads must *feature* in some way
2 the trade dress itself.”) (original emphasis, citation omitted). This complete failure to advertise
3 and promote the claimed trade dress is yet another reason why Plaintiff has not and cannot allege
4 acquired secondary meaning.

5 ***De Minimis Sales/Customers.*** Plaintiff does not allege a large customer following or
6 extensive sales of CamUp-related services; indeed, it does not allege any customers or users at
7 all as of June 2011. *Cf. L.A. Gear*, 12 U.S.P.Q. 2d at 1010-11 (secondary meaning established
8 during five months of use where plaintiff’s multi-million dollar media blitz resulted in sales of
9 over 4 million athletic shoes). This too demonstrates why Plaintiff has not and cannot allege
10 acquired secondary meaning.

11 **No Consumer Association.** Finally, the “true test” of secondary meaning is the success
12 of the effort to create it. *Mattel*, 782 F. Supp. 2d at 1004. But Plaintiff does not allege facts
13 demonstrating that a substantial segment of consumers has actually come to associate a white
14 and gray color palette, placement of logo at the top left of a computer screen, a large window
15 containing media with several windows below it, or the “overall look and feel” of the CamUp
16 website with Plaintiff. Indeed, Plaintiff does not and cannot even allege that a substantial
17 segment of consumers became aware of or visited the CamUp website during the relevant three-
18 month period, much less that they would have come to associate the mundane and commonplace
19 website design claimed by Plaintiff with Plaintiff.

20 In short, Plaintiff has not and cannot allege that it acquired secondary meaning in the
21 claimed trade dress prior to Google’s use of it. Plaintiff’s trade dress claim should therefore be
22 dismissed. *See, e.g., Smith & Hawken*, 2004 WL 2496163, at *3 (dismissing trade dress claim).

23 **2. Plaintiff Does Not and Cannot Allege Likelihood of Confusion**

24 Plaintiff has also failed to allege likelihood of confusion. This is an independent reason
25 to dismiss its trade dress claim. “Likelihood of confusion exists when customers viewing the
26 [trade dress] would probably assume that the product or service it represents is associated with
27 the source of a different product or service identified by a similar [trade dress].” *Clicks Billiards*,
28 251 F.3d at 1265 (internal quotation marks omitted). Factors relevant to asserting likelihood of

1 confusion include: (1) actual confusion, (2) defendant’s intent in adopting the trade dress, (3) the
2 similarity of the trade dress, (4) similarity of goods and marketing channels, and (5) the strength
3 of the trade dress. *See id.* At the pleading stage, plaintiff must allege something more than the
4 bare assertion that there is a likelihood of confusion. *See, e.g., Smith & Hawken*, 2004 WL
5 2496163, at *3 (granting motion to dismiss).

6 For instance, in *Smith & Hawken*, the court found that plaintiff had failed to adequately
7 allege likelihood of confusion where plaintiff pleaded only that the defendant’s product “causes
8 confusion to consumers and retailers,” and it dismissed the complaint. *Id.* at *3. The same
9 outcome was warranted in *ID7D*, where, with respect to likelihood of confusion, the plaintiff
10 conclusorily alleged that defendant had “used and continues to use derivatives, and/or colorable
11 imitations of Plaintiff’s Trade Dress in direct competition with Plaintiff ... in a manner that is
12 likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such
13 goods” without “further factual enhancement.” *ID7D*, 2012 WL 1247329, at *11. The court
14 noted in particular that the plaintiff had failed to provide facts concerning the strength of the
15 claimed trade dress, the proximity of the products in the marketplace, evidence of actual
16 confusion, defendant’s intent in adopting its trade dress or the sophistication of the relevant
17 consumer group. *Id.*

18 Similar reasoning and result apply here. Plaintiff alleges that “Google knowingly created
19 and is deliberately using screens in its Google+ Hangouts platform that are confusingly similar to
20 CamUp,” (Complaint ¶ 55), and that the “Hangouts platform is confusingly similar to the trade
21 dress of the CamUp website, and is likely to cause confusion or mistake, or to deceive users as to
22 affiliation, connection, or association,” *id.* ¶ 56. But Plaintiff adds nothing to bring these bare
23 assertions to the level of plausible allegations of likely confusion. It does not allege any
24 instances of actual confusion, does not make factual assertions as to the strength of the trade
25 dress or the channels of trade, and does not sufficiently identify which features of Google’s
26 Hangouts are supposedly confusingly similar to the claimed trade dress.

27 For this independent reason, its trade dress claim is fatally defective and should be
28 dismissed. *See Smith & Hawken*, 2004 WL 2496163, at *3.

1 **III. THE COPYRIGHT CLAIM SHOULD BE DISMISSED**

2 **A. Plaintiff Does Not Meet the Registration Requirement**

3 In order to bring a claim for copyright infringement, Plaintiff must have first submitted a
4 copyright application to the U.S. Copyright Office for the specific work that it claims Google
5 infringes. 17 U.S.C. § 411(a); *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1211 (9th Cir.
6 1998). The application must include a deposit of actual copies of the work sought to be
7 registered. 17 U.S.C. § 408(b)(1) & (2). Plaintiff has not met these requirements. As discussed
8 in greater detail below, with the exception of two or three web pages plainly not at issue here, the
9 only work that Plaintiff deposited with the Copyright Office – and thus the only work for which
10 it has sought registration – appears to be the source code underlying the CamUp website. But
11 Plaintiff does not (and could not) allege infringement of its source code, since Google has never
12 had access to that code.³ Instead, Plaintiff vaguely alleges copyright infringement of the
13 appearance or content of the CamUp website (*see* Complaint ¶¶ 38, 50), but it has not sought
14 registration for the appearance or content of the website. Plaintiff’s copyright infringement
15 claim must therefore be dismissed.

16 **1. A Copyright Claim Cannot Be Maintained For A Work That Has Not**
17 **Been Deposited With the Copyright Office**

18 The Copyright Act provides that “no action for infringement . . . shall be instituted until
19 registration of the copyright claim has been made in accordance with this title.” 17 U.S.C. §
20 411(a). It is well-settled law that registration of the work at issue is a prerequisite to filing a
21 lawsuit, and courts must dismiss actions based on unregistered works. *Reed Elsevier, Inc. v.*
22 *Muchnick*, ___ U.S. ___, 130 S. Ct. 1237, 1241 (2010) (Section 411(a) of the Copyright Act
23 “requires copyright holders to register their works before suing for copyright infringement.”);
24 *Kodadek*, 152 F.3d at 1211 (“Copyright registration is not a prerequisite to a valid copyright, but
25 it is a prerequisite to a suit based on a copyright.”). In the Ninth Circuit, filing an application

26 _____
27 ³ The code is not available to a viewer of CamUp’s website through the use of the “view
28 source” command or otherwise.

1 alone (and not actual receipt of a registration certificate) is sufficient to meet the Section 411(a)
2 registration requirement. *See Cosmetic Ideas, Inc. v IAC/Interactivecorp*, 606 F.3d 612 (9th Cir.
3 2010).

4 The application for registration, however, must include a “copy” or “copies” of the work
5 to be registered. 17 U.S.C. § 408(b)(1) & (2); *see also* § 408(a) (deposit must be submitted
6 “together with” the application form and fee). This required submission to the Copyright Office
7 of copies of the work is known as the deposit requirement.

8 A party that fails to satisfy the deposit requirement cannot maintain a copyright lawsuit
9 with respect to the claimed work. *Kodadek*, 152 F.3d at 1213 (infringement action “foreclosed”
10 where plaintiff failed to meet deposit requirement; granting summary judgment to defendant);
11 *Coles v. Wonder*, 283 F.3d 798, 802 (6th Cir. 2002) (granting summary judgment to defendants);
12 *Geoscan, Inc. of Texas v. Geotrace Tech., Inc.*, 226 F.3d 387, 393 (5th Cir. 2000) (“[W]e hold
13 that at the time of the filing of this suit in July 1998, although [plaintiff] had filed an application,
14 paid a fee, and made a deposit with the Copyright Office, the deposit was not a complete copy of
15 the original source code, thus [plaintiff] had not fulfilled all the statutory formalities necessary to
16 register is copyright and have ‘ownership’ in its software for the purposes of a copyright
17 infringement claim.”); *Obodai v. Youtube, Inc.*, 840 F. Supp. 2d 714 (S.D.N.Y. 2011) (granting
18 motion to dismiss for failure to meet section 411(a) requirement where plaintiff did not submit
19 work-in-suit with copyright application); 2-7 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §
20 7.17[2][b] (“It has been held on occasion that the deposit failed to satisfy the registration
21 requirements. The result in those circumstances is to disallow the registering party from filing
22 suit for infringement.”).

23 The deposit copies are a necessary part of the copyright application because the
24 Copyright Office needs to examine them to determine the copyrightability of the work. *See* 17
25 U.S.C. § 410(a). A defect in the deposit is therefore necessarily material to the registration
26 decision. *Torres-Negron*, 504 F.3d at 158 (“[S]ubmission of something other than a ‘copy’ to
27 satisfy the deposit copy requirement cannot be classified as an ‘immaterial’ mistake because the
28 failure to submit a valid copy would affect the Copyright Office’s issuance of a certificate.”).

1 **2. Plaintiff’s Copyright Application Does Not Cover the External**
2 **Content of the CamUp Website**

3 Plaintiff’s copyright infringement claim must be dismissed because Plaintiff has not
4 satisfied the Section 411(a) registration requirement. Plaintiff alleges that it submitted an
5 application for copyright registration on June 22, 2012. Amended Complaint ¶ 49. Plaintiff
6 alleges generally that Google copied “the text, selection, arrangement, editing and compilation of
7 Be In’s CamUp video chat platform” (¶50), and in the preceding paragraphs incorporated by
8 reference into the copyright infringement claim, Plaintiff alleges that Google infringes the
9 appearance of its website, including the use of “several video chat screens directly underneath a
10 main screen containing a video or other media.” *Id.* ¶ 38. Plaintiff does not and cannot allege
11 that Google infringes the underlying source code for Plaintiff’s website. Nor does or can it
12 allege that Google had access to such code; the code it is not viewable by a website visitor.

13 Under Copyright Office rules, a registration for an online work, such as a website, “will
14 extend only to the copyrightable content of the work *as received in the Copyright Office and*
15 *identified as the subject of the claim.*” United States Copyright Office Circular 66: Copyright
16 Registration for Online Works, at 1 (July 2012) (“Copyright Office Circular 66”), *available at*
17 <http://www.copyright.gov/circs/circ66.pdf> (emphasis in original);⁴ *see Obodai*, 840 F. Supp. 2d
18 at 716. The Copyright Office emphasizes that deposit of only the web programming code for a
19 website, without screen shots of the web pages themselves, *will only register the underlying code*
20 *and not the content appearing on the website:*

21 For a claim in a computer program that establishes the format of text and graphics on the
22 computer screen when a website is viewed (such as a program written in html),
23 registration will extend to the entire copyrightable content of the computer program code.

24 ⁴ The Registrar of Copyright divides types of works into administrative classes and
25 determines for each class of work what type of deposit is required. 17 U.S.C. §408(c). Under
26 this classification system, websites are online works. *See* Copyright Office Circular 66 at 1.
27 Copyright Office Circular 66 sets forth the deposit requirements for online works. *See id.* at 3
28 (“The deposit regulations of the Copyright Office do not specifically address works transmitted
online. Until the regulations are amended, and under the authority granted the Copyright Office
by 37 CFR 202.20(c)(2)(viii),” the deposit requirements are as set forth in Copyright Office
Circular 66).

1 It will not, however, extend to any *website* content generated by the program that is not
2 present in the identifying material received and that is not described on the application.

3 Copyright Office Circular 66 at 1 (emphasis in original).

4 Thus, because Plaintiff did not submit a copyright application for the appearance of
5 content of its CamUp website, its June 22, 2012 application is insufficient to meet the Rule
6 411(a) copyright registration requirement. Except for two or three screens of web pages not at
7 issue here,⁵ Plaintiff’s copyright deposit contained the underlying web programming code only.
8 *See* Declaration of Charles Tait Graves (“Graves Declaration”), Exh. B. The deposited web
9 pages are plainly not at issue here; they comprise a login screen and a screen that appears to
10 show the participants in a virtual room. *Id.* The deposited web pages do not depict the general
11 appearance of the CamUp website or “several video chat screens directly underneath a main
12 screen containing a video or other media” alleged by Plaintiff. *See* Amended Complaint ¶ 37.
13 Notably, Plaintiff’s copyright application form likewise fails to claim the content appearing on
14 the website. *Compare* Graves, Exh. A (Plaintiff’s application form) *with Int’l Union of*
15 *Operating Eng’rs, Local 150, AFL-CIO v. Team 150 Party, Inc.*, No. 07 C 3972, 2008 WL
16 4211561, at *2 (N.D. Ill. Sept. 5, 2008) (copyright registration claimed “computer program code
17 (HTML) and text and photos on website”).

18 In short, Plaintiff has not applied for registration of the aspects of the CamUp website
19 that it seeks to protect. It therefore cannot meet the Section 411(a) registration requirement for
20 purposes of asserting that Google’s website infringes the appearance or content of the CamUp
21 website. Plaintiff’s copyright claim must be dismissed. *Kodadek*, 152 F.3d at 1213; *Obodai*,
22 840 F. Supp. 2d at 716-17.

23 **B. Plaintiff Does Not Allege the Copyright Claim with the Required Specificity**

24 “To state a claim for copyright infringement, a plaintiff must plausibly allege ‘(1)
25 ownership of a valid copyright, and (2) copying of constituent elements of the work that are

26 _____
27 ⁵ The web pages submitted by Plaintiff are the first two pages and the last page of Plaintiff’s
28 copyright deposit, attached as Exhibit B to the Graves Declaration. The intervening twenty-eight
pages all appear to be web programming code. It is unclear whether the first two pages of the
deposit would actually be shown on screen as a single web page or two separate web pages.

1 original.” *Salt Optics*, 2010 WL 4961702, at *6 (quoting *Funky Films, Inc. v. Time Warner*
2 *Entm’t Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006)). As with the trade dress claims discussed
3 above, a plaintiff is required to allege enough factual content so that a court can reasonably infer
4 that defendant is liable for copyright infringement. *See id.* at *6-7; *Chestang v. Yahoo, Inc.*, No.
5 2:11-cv-00989-MCE-KJN, 2011 WL 4543218, at *3 (E.D.Cal. Sept. 28, 2011) (finding
6 “plaintiffs’ scant factual allegations” inadequate to plead copyright claim). For example, a
7 plaintiff must clearly identify which portions of its website the defendant has allegedly infringed.
8 *Salt Optics*, 2010 WL 4961702, at *6.

9 Plaintiff does not allege which elements of the copyrighted work are supposedly
10 infringed by the Hangouts feature. Plaintiff’s vague averments that Google supposedly copied
11 “text” or “selection and arrangement” does not provide any notice to Google of what is actually
12 at issue in the case. *See Salt Optics, Inc.*, 2010 WL 4961702, at *6 (dismissing vague copyright
13 claim); *Chestang*, 2011 WL 4543218, at *3. Plaintiff’s only allegation which provides any
14 insight as to the specific features at issue is its mention of Hangouts’ inclusion of “several video
15 chat screens directly underneath a main screen containing a video or other media,” Amended
16 Complaint ¶38, but it is not clear as to which claim—copyright or trade dress—this allegation is
17 applicable.

18 This failure to identify the subject matter of the copyright claim is particularly acute here
19 where Plaintiff also purports to allege a trade dress infringement claim. Courts “should not
20 ‘expand the scope of the Lanham Act to cover cases in which the Federal Copyright Act provides
21 an adequate remedy.’” *Salt Optics*, 2010 WL 4961702, at *7 (quoting *Shaw v. Lindheim*, 919
22 F.2d 1353, 1364-65 (9th Cir. 1990)). Though it is possible for a complaint to properly allege
23 both copyright and trade dress infringement claims, where a court is unable “to delineate
24 between the facts alleged in support of [a] trade dress claim and the facts alleged in support of [a]
25 copyright claim,” the court cannot “conduct a proper preemption analysis.” *Id.* Thus, where as
26 here a plaintiff asserts both trade dress and copyright infringement claims and it is unclear which
27 facts are intended to support each of the claims, both claims are properly dismissed. *Id.* at *6-7
28 (“Plaintiff needs to delineate more clearly which facts it alleges in support of its trade dress claim

1 and which facts it alleges in support of its copyright claim”; dismissing both claims). Google
2 respectfully requests that outcome here.

3 **CONCLUSION**

4 For the foregoing reasons, Google respectfully requests that this Court dismiss Plaintiff’s
5 Third and Fourth Causes of Action.

6
7 Dated: September 4, 2012

WILSON SONSINI GOODRICH & ROSATI

8 By: */s/ Colleen Bal*

Colleen Bal

9 *Attorneys for Defendants*

10 Google Inc. and Richard Robinson

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28