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 7 Google Inc. and Richard Robinson

8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN JOSE DIVISION

12 BE IN, INC., a New York Corporation, )  
 13 Plaintiff, )  
 14 v. )  
 15 GOOGLE INC., a California corporation; )  
 RICHARD ROBINSON, an individual, and Does )  
 16 1 through 3 inclusive, )  
 17 Defendants. )  
 18 )  
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Case No.: 5:12-cv-03373-LHK  
**[PROPOSED] ORDER RE MOTION  
 TO DISMISS**  
 Hearing Date: January 3, 2013  
 Hearing Time: 1:30 p.m.  
 Courtroom: 8, 4th Floor  
 Judge: Hon. Lucy H. Koh

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**ORDER ON MOTION**

On September 4, 2012, Defendant Google Inc. moved to dismiss Plaintiff's causes of action for trade dress infringement and copyright infringement, for failure to state a claim upon which relief can be granted.

Based on its review of the parties' submissions and after a hearing on the motion, the Court hereby orders as follows. Google's motion to dismiss is GRANTED.

1. Plaintiff has failed to allege a viable claim for trade dress infringement.
  - a. Plaintiff's has failed to adequately identify its claimed trade dress, including all of the components of the website that comprise its claimed trade dress and how those components combine to form protectable trade dress.
  - b. Plaintiff has failed to allege facts to support the required element of likelihood of confusion.
  - c. Plaintiff has failed to allege facts to support the required element of secondary meaning. Because Plaintiff has not articulated any facts in briefing or at oral argument demonstrating that it could adequately allege secondary meaning, amendment of the claim would be futile. Accordingly, the trade dress claim is dismissed WITH PREJUDICE.
2. Plaintiff has failed to seek a copyright registration for the work that is the subject of its copyright infringement claim, as required under 17 U.S.C. §411. Plaintiff's copyright infringement claim is therefore dismissed WITHOUT PREJUDICE to Plaintiff refiling the copyright infringement claim once it has met the registration requirement. In any refiled copyright infringement claim, Plaintiff must specifically identify the subject of the copyright infringement claim, including the aspects of the copyrighted work that it alleges Google infringes and the aspects of Google's product that it alleges infringe the copyrighted work.

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**IT IS SO ORDERED.**

DATED: \_\_\_\_\_, 2013.

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THE HONORABLE LUCY H. KOH  
United States District Court Judge