

1 Joseph E. Addiego III (CA State Bar No. 169522)  
 DAVIS WRIGHT TREMAINE LLP  
 2 505 Montgomery Street, Suite 800  
 San Francisco, California 94111  
 3 Telephone: (415) 276-6500  
 Facsimile: (415) 276-6599  
 4 Email: joeaddiego@dwt.com

5 William E. Wallace III (Pro Hac Vice Application Pending)  
 Stephen M. Nickelsburg (Pro Hac Vice Application Pending)  
 6 Roni E. Bergoffen (Pro Hac Vice Application Pending)  
 CLIFFORD CHANCE US LLP  
 7 2001 K Street, N.W.  
 Washington, D.C. 20006  
 8 Telephone: (202) 912-5045  
 Facsimile: (202) 912-6000  
 9 Email: William.Wallace@CliffordChance.com

10 Attorneys for Plaintiff  
 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. CV12-03373-LHK
	)	
16 Plaintiff,	)	
	)	<b>PLAINTIFF, BE IN, INC.'S OPPOSITION</b>
17 v.	)	<b>TO DEFENDANT'S MOTION TO</b>
	)	<b>DISMISS BE IN'S THIRD AND FOURTH</b>
18 GOOGLE, INC., a California corporation,	)	<b>CAUSES OF ACTION; MEMORANDUM</b>
19 RICHARD ROBINSON, and DOES 1 through	)	<b>OF POINTS AND AUTHORITIES IN</b>
20 3, inclusive,	)	<b>SUPPORT THEREOF</b>
	)	
21 Defendants.	)	Hearing Date: January 3, 2013
	)	Hearing Time: 1:30p.m.
	)	Courtroom: 8, 4th Floor
	)	Judge: Hon. Lucy H. Koh

TABLE OF CONTENTS

Page

ISSUES TO BE DECIDED..... 1

INTRODUCTION..... 1

FACTUAL BACKGROUND ..... 3

ARGUMENT ..... 6

    I.    LEGAL STANDARD ..... 6

    II.   BE IN’S TRADE DRESS INFRINGEMENT COUNT STATES A VALID CLAIM FOR GOOGLE’S COPYING OF THE CAMUP PLATFORM ..... 7

        A.    Be In Has Alleged its Trade Dress Claim with the Required Specificity..... 7

        B.    Be In Adequately Alleged That its Trade Dress Acquired Secondary Meaning ..... 9

            1.    The Amended Complaint Includes More Than a Conclusory Allegation of Secondary Meaning..... 9

            2.    Be In Does Not Need to Allege Evidence of Every Secondary Meaning Factor ..... 11

        C.    Be In Has Properly Alleged That There Is a Likelihood of Confusion.... 13

    III.  BE IN’S COPYRIGHT INFRINGEMENT COUNT STATES A VALID CLAIM FOR GOOGLE’S COPYING OF THE CAMUP PLATFORM ..... 15

        A.    Be In Has Satisfied the Copyright Registration Requirement..... 16

        B.    Be In Has Sufficiently Alleged the Scope of its Copyright Claim..... 17

CONCLUSION ..... 19

DAVIS WRIGHT TREMAINE LLP

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**CASES**

	<b><u>Page</u></b>
<i>AMF, Inc. v. Sleekcraft Boats</i> , 599 F.2d 341 (9th Cir.1979) .....	14
<i>Art Attacks Ink, LLC v. MGA Entm't Inc.</i> , 581 F.3d 1138 (9th Cir. 2009).....	13
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009) .....	7
<i>Balistreri v. Pacifica Police Dep't</i> , 901 F.2d 696 (9th Cir.1988).....	6
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007) .....	6
<i>Blue Nile, Inc. v. Ice.com, Inc.</i> , 478 F.Supp.2d 1240 (W.D. Wash. 2007) .....	18
<i>Bottlehood, Inc. v. Bottle Mill</i> , No. 11-cv-2910-MMA (MDD), 2012 WL 1416272 (S.D. Cal. Apr. 23, 2012).....	9
<i>Branch v. Tunnell</i> , 937 F.2d 1382 (9th Cir. 1991) .....	6
<i>Cahill v. Liberty Mut. Ins. Co.</i> , 80 F.3d 336 (9th Cir. 1996) .....	7
<i>Calyx Tech., Inc. v. Ellie Mae, Inc.</i> , No. C 04-01640 SI, 2004 WL 2075446 (N.D. Cal., Sept. 3, 2004) .....	8, 11
<i>Chestang v. Yahoo, Inc.</i> , No. 2:11-cv-00989-MCE-KJN, 2011 WL 4543218 (E.D.Cal. Sept. 28, 2011).....	18
<i>Church &amp; Dwight Co., Inc. v. Mayer Lab., Inc.</i> , No. C-10-4429 EMC, 2011 WL 1225912 (N.D. Cal. Apr. 1, 2011) .....	14
<i>Conference Archives v. Sound Images, Inc.</i> No. 3:2006-76, 2010 WL 1626072 (W.D. Pa. Mar. 31, 2010) .....	16, 18
<i>Cont'l Lab. Prod., Inc. v. Medax Int'l Inc.</i> , 114 F.Supp.2d 992 (S.D. Cal. 2000).....	12
<i>Co-Rect Products, Inc. v. Marvy! Advertising Photography, Inc.</i> , 780 F.2d 1324 (8th Cir. 1985).....	13
<i>Dita, Inc. v. Mendez, et al.</i> , No. CV 10-6277 PSG (FMOx), 2010 WL 5140855 (C.D. Cal. Dec. 14, 2010) .....	14

**TABLE OF AUTHORITIES**

DAVIS WRIGHT TREMAINE LLP

		<u>Page</u>
1		
2	<i>Facebook, Inc. v. Power Ventures, Inc.</i> , No. C 08-5780 JF (RS), 2009 WL 1299698	
3	(N.D. Cal. May 11, 2009) .....	17
4	<i>First Brands Corp. v. Fred Meyer, Inc.</i> , 809 F.2d 1378 (9th Cir. 1987) .....	11
5	<i>Galiano v. Institute of Governmental Studies at Univ. of Cal. at Berkeley</i> , 2008 WL 415594	
6	(N.D. Cal. 2008) .....	6
7	<i>Givenchy S.A. v. BCBG Max Azria Grp.</i> , No. CV 10-8394-GHK (SHx), 2012 WL 3072327	
8	(C.D. Cal. Apr. 25, 2012) .....	<i>passim</i>
9	<i>ID7D Co., Ltd. v. Sears Holding Corp.</i> , No. 3:11cv1054(VLB), 2012 WL 1247329	
10	(D. Conn. Apr. 13, 2012) .....	12, 15
11	<i>Innospan Corp. v. Intuit, Inc.</i> , No. C 10-04422 WHA, 2010 WL 5017014	
12	(N.D. Cal. Dec. 3, 2010) .....	14, 15
13	<i>L.A. Gear v. Thom McAn</i> , 12 U.S.P.Q. 2d 1001, (S.D.N.Y. 1989), <i>aff'd in part, rev'd in part</i> ,	
14	988 F.2d 1117 (Fed. Cir. 1993) .....	12
15	<i>Mier v. Owens</i> , 57 F.3d 747 (9th Cir.1995) .....	6
16	<i>Morgan Creek Prod., Inc. v. Capital Cities/ABC, Inc.</i> , No. CV-89-5463-RSWL(JRX),	
17	1991 WL 352619 (C.D. Cal. Oct. 28, 1991).....	12
18	<i>Rodesh v. Discronics</i> , 8 F.3d 29, 1993 WL 385481 (9th Cir. 1992).....	2, 15
19	<i>Salt Optics, Inc. v. Jand, Inc. et. al.</i> , No. SACV 10-0828, 2010 WL 4961702	
20	(C.D. Cal. Nov. 19, 2010).....	8, 18
21	<i>Salt Optics, Inc. v. Jand, Inc. et. al.</i> , No. 8:10-cv-00828-DOC-RNB	
22	(C.D. Cal. Mar. 4, 2011) .....	8, 9
23	<i>Sleep Sci. Partners v. Lieberman</i> , No. 09-04200 CW, 2010 WL 1881770	
24	(N.D. Cal. May 10, 2010) .....	3, 8, 18
25	<i>Smith &amp; Hawken, Ltd. v. Gardendance, Inc.</i> , No.C04-1664 SBA, 2004 WL 2496163	
26	(N.D. Cal. Nov. 5, 2004).....	11, 15
27	<i>Solid Host, NL v. Namecheap, Inc.</i> , 652 F.Supp.2d 1092 (C.D. Cal. 2009) .....	2, 9, 10
28		

TABLE OF AUTHORITIES

Page

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Thomas v. Walt Disney Co.*, 2008 WL 425647 (N.D. Cal. Feb. 14, 2008) .....7

*Thompson Medical Co. v. Pfizer, Inc.*, 753 F.2d 208 (2d Cir. 1985) .....12

*Webceleb Inc. v. Procter & Gamble*, No. 10cv2318 DMS (NLS),  
2012 WL 460472 (S.D. Cal. Feb. 13, 2012) .....14, 15

**RULES**

Federal Rule of Civil Procedure 12(b)(6) .....6

**STATUTES**

17 U.S.C. § 411(a).....16

DAVIS WRIGHT TREMAINE LLP

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**OPPOSITION TO DEFENDANT’S MOTION TO DISMISS  
BE IN’S THIRD AND FOURTH CAUSES OF ACTION**

Be In, Inc. (“Be In”) respectfully submits this Opposition to Defendant Google, Inc’s (“Google”) Motion to Dismiss Be In’s Third And Fourth Causes Of Action (“Mot. Dismiss”).

**ISSUES TO BE DECIDED**

(1) Whether the Court should deny Defendant Google’s Motion to Dismiss Be In’s trade dress infringement claim because (a) Be In has sufficiently alleged its trade dress claim with the required specificity, (b) Be In has sufficiently alleged that its trade dress has acquired secondary meaning, and (c) Be In has sufficiently alleged that there is a likelihood of confusion.

(2) Whether the Court should deny Defendant Google’s Motion to Dismiss Be In’s copyright infringement claim because (a) Be In has satisfied the registration prerequisite for filing its copyright claim, and (b) Be In has sufficiently alleged its copyright claim with the required specificity.

**INTRODUCTION**

Be In is an innovative start up that, through years of research, investment, and testing, developed CamUp, an online social media platform that creates chat rooms for sharing and discussing media content in real time video chats. Google representatives saw Be In’s product at the South by Southwest Festival (“SXSW”) in March 2011. Be In shared its product and marketing ideas, including the idea to link CamUp to Google’s YouTube with a “Watch With Your Friends” button, in a meeting with Google’s Richard Robinson (“Mr. Robinson”) in May 2011.

In June 2011, Google released Google+ Hangouts (“Hangouts”), a media-sharing video chat room substantially similar to CamUp. Later that summer (after Be In’s meeting with Mr. Robinson), Google added a “Watch With Your Friends” button linking Hangouts to YouTube. Be In contacted Google to seek an explanation for the apparent copying and attempted to reach a resolution, but Google rebuffed Be In. With no other option to protect its rights, Be In sued Google and Mr. Robinson for theft of trade secrets, civil conspiracy, and trademark and copyright infringement.

1 Google now asks the Court to dismiss Be In's trademark and copyright infringement  
2 claims, which are Counts three and four of Be In's Amended Complaint ("Amended Complaint").<sup>1</sup>  
3 The Court should deny Google's Motion for the following reasons.

4 First, Be In has alleged its trade dress claim with specificity, including the specific  
5 elements that constitute its trade dress, the factors that support a finding that the trade dress has  
6 acquired secondary meaning, and the factors that support a finding of likelihood of confusion —  
7 each of which is an issue of fact. *See Givenchy S.A. v. BCBG Max Azria Grp.*, No. CV 10-8394-  
8 GHK (SHx), 2012 WL 3072327, at \*4 (C.D. Cal. Apr. 25, 2012); *Rodesh v. Discronics*, 8 F.3d 29  
9 (9th Cir. 1992). Be In's trade dress allegations identify five specific elements, all of which  
10 interact to create a particular visual impression. Am. Compl. ¶ 53. Be In does not allege a vague  
11 or open-ended list of elements, which is the principal pleading flaw animating the cases upon  
12 which Google relies. Be In also has alleged multiple factors that support a finding of secondary  
13 meaning, including the manner in which CamUp was introduced to the market, the substantial  
14 recognition that it already has received, and Google's apparent intentional copying of CamUp's  
15 identifying features. *Id.* ¶¶ 1, 2, 12, 23, 25, 26, 32, 54, 55, 59. Further, Be In has alleged multiple  
16 factors and provided pictures supporting a finding of likelihood of confusion, including the  
17 confusing similarity of the sites, the similarity of the business, and the evidence of copying. *Id.* ¶¶  
18 1, 7, 12, 38, 55-57.

19 Google's Motion attempts to isolate these factors and demands even more detail for each.  
20 Be In is not required to try its entire case in its Complaint. These allegations, individually and as a  
21 whole, are more than sufficient to state a claim for trade dress infringement. *See, e.g., Givenchy*,  
22 2012 WL 3072327, at \*2, 4–5, 7 (C.D. Cal. 2012); *Solid Host, NL v. Namecheap, Inc.*, 652  
23 F.Supp.2d 1092, 1107 (C.D. Cal. 2009) (plaintiff was “not required to adduce evidence to survive  
24 a motion to dismiss.”).

25 Second, Google's contention that Be In has not met the deposit requirement for its  
26 copyright claim, Mot. Dismiss at 18–21, is based on an incomplete version of Be In's deposit. Be

27 \_\_\_\_\_  
28 <sup>1</sup> Google did not move to dismiss Be In's theft of trade secrets and conspiracy claims,  
(Counts one and two) which will proceed to discovery regardless of the outcome of the instant  
motion.

1 In deposited eleven documents in connection with its CamUp copyright registration, including  
2 images of the CamUp webpage that is the subject of Be In's copyright claim. *See* Declaration of  
3 Ha-Thanh Nguyen ("Nguyen Decl."), Ex. A at \*36, 37, 41, 44. The document that Google cites  
4 contains only three of the eleven deposited documents, and does not include the relevant webpage  
5 images. *See* Declaration of Charles Tait Graves ("Graves Decl."), Ex. B. Google's argument is  
6 based on a false premise.

7 Third, Google's arguments that Be In's copyright claim is insufficiently specific and that it  
8 overlaps with Be In's trade dress claim ignores the allegations of the Amended Complaint. Be  
9 In's copyright claim specifically seeks redress for Google's copying of images from the CamUp  
10 website that show its original "text, selection, arrangement, editing, and compilation" incorporated  
11 in the copyright deposit (of which Google apparently lacked a complete version). *See* Am.  
12 Compl. ¶¶ 38, 49; Nguyen Decl., Ex. A. In any event, to the extent there is overlap between the  
13 copyright and trade dress claims, Be In may pursue both claims in the alternative. *See Sleep Sci.*  
14 *Partners v. Lieberman*, No. 09-04200 CW, 2010 WL 1881770, at \*5 (N.D. Cal. May 10, 2010).

15 For these reasons, Be In respectfully requests that the Court deny Google's Motion to  
16 Dismiss.

### 17 **FACTUAL BACKGROUND**

18 The allegations of the Amended Complaint, which are to be taken as true on a Motion to  
19 Dismiss, clearly provide notice of the facts supporting Be In's claims. Be In is an innovative start  
20 up that creates and markets online social media platforms. Am. Compl. ¶ 1. Through years of  
21 research, investment, and testing, Be In developed CamUp, an online social media platform that  
22 allows several users to join a video chat by webcam and share online media such as videos in a  
23 dedicated video chat room. *Id.* ¶ 1–2, 21–23. In April 2011, Be In won the 2011 MIPTV  
24 Connected Creativity Ventures startup competition and was voted by a panel of top venture  
25 capitalists as the best and most innovative startup of the year. *Id.* ¶ 26.

26 Be In officially unveiled CamUp to the public during the March 2011 SXSW Festival in  
27 Austin, Texas and made the product available at [www.camup.com](http://www.camup.com). *Id.* ¶ 23. At all relevant times,  
28



1 CamUp has had a copyright notice on its website stating “© [year] CamUp – Project Your World.  
2 Product of BE IN Inc. All Rights Reserved.” *Id.* ¶ 24.

3 Google representatives, including Marissa Mayer, Vice President of Consumer Products  
4 and Local Services, and several Google engineers, visited Be In’s booth at SXSW to learn more  
5 about the CamUp product. *Id.* ¶ 25. On May 12, 2011, the Co-Founder and Vice President of  
6 Business Development of Be In met with Mr. Robinson, Google UK’s Head of Business Markets.  
7 *Id.* ¶ 27. During that meeting, Be In shared its confidential plans and strategies for the application  
8 of CamUp in certain business sectors, and presented the idea to link CamUp to YouTube with a  
9 “Watch with your friends” button. *Id.* ¶¶ 28–29. Mr. Robinson was extremely enthusiastic about  
10 the CamUp product and expressed interest in determining how best to integrate CamUp with  
11 Google Docs and other collaboration. *Id.* ¶ 30. He also indicated that he would put Be In in touch  
12 with individuals from YouTube to explore further possibility of using the technology on its  
13 platform. *Id.*

14 Be In attempted to follow-up with Mr. Robinson, but notwithstanding his enthusiasm Mr.  
15 Robinson refused to respond to any of Be In’s follow-up correspondence. *Id.* ¶¶ 6, 30, 31.  
16 Thereafter, Be In noticed a dramatic spike in user traffic to its CamUp web site that it believes  
17 came from Google employees studying the CamUp site. *Id.* ¶ 32.

18 In June 2011, one month after meeting with Be In and two months after Google engineers  
19 visited the Be In SXSW booth, Google launched Hangouts, an online social media platform with a  
20 virtually identical visual appearance to CamUp’s video chat platform. *Id.* ¶¶ 33–38. In addition,  
21 on or around August 18, 2011, Google added a feature where a user can click on the “Watch with  
22 your friends” button on any YouTube page. *Id.* ¶ 34.

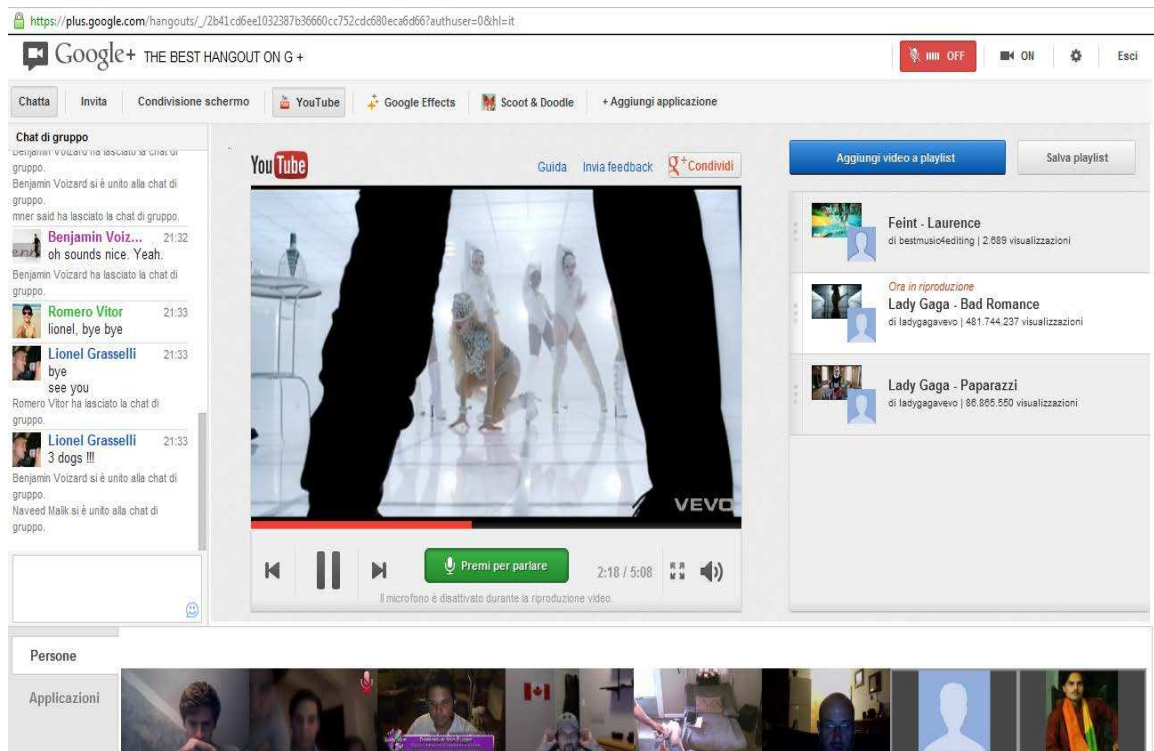
23 The Hangouts feature copies several elements of Be In’s proprietary trade dress. *Id.* ¶ 38.  
24 Hangouts attempts to replicate the overall look and feel of the CamUp platform, specifically the  
25 inclusion of several video chat screens directly underneath a main screen containing video or other  
26 media. *Id.* The Amended Complaint includes screen shots showing the substantial similarity  
27 between the CamUp and Hangouts platforms. *Id.*

28

1 **CamUp Screenshot**



15 **Google+ Hangouts Screenshot**



1  
2 On June 28, 2012, Be In filed its initial Complaint. On August 16, 2012, Be In filed its  
3 Amended Complaint asserting claims against Google for misappropriation of trade secrets, civil  
4 conspiracy, copyright infringement, and trade dress infringement. On September 4, 2012, Google  
5 filed its Motion to Dismiss. Google does not seek to dismiss Be In's first or second causes of  
6 action for misappropriation of trade secrets and civil conspiracy. Google only seeks to dismiss Be  
7 In's third and fourth causes of action for copyright and trade dress infringement, arguing that (1)  
8 Be In has failed to allege its trade dress claim with the required specificity, (2) Be In has failed to  
9 properly allege that its trade dress has acquired secondary meaning, (3) Be In has failed to  
10 properly allege that there is a likelihood of confusion, (4) Be In has not satisfied the registration  
11 prerequisite for filing its copyright claim, and (5) Be In has not alleged its copyright claim with  
12 sufficient particularity. Google is wrong on all counts.

## 13 ARGUMENT

### 14 I. LEGAL STANDARD

15 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is based on the  
16 allegations in the pleading, which are taken as true for the purposes of the motion. *See Bell*  
17 *Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). A Rule  
18 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Dismissal is  
19 proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient  
20 facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696,  
21 699 (9th Cir. 1988).

22 The Court must construe the facts and draw all reasonable inferences from them in favor of  
23 the nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.1996); *Mier*  
24 *v. Owens*, 57 F.3d 747, 750 (9th Cir.1995). On a motion to dismiss, "the plaintiff's complaint is  
25 liberally construed." *Galiano v. Institute of Governmental Studies at Univ. of Cal. at Berkeley*,  
26 2008 WL 415594 (N.D. Cal. 2008). The Court may consider "documents whose contents are  
27 alleged in the complaint and whose authenticity no party questions, but which are not physically  
28 attached to the pleadings." *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991). "A copyright

1 application, including the material deposited with the Copyright Office as part of the application is  
2 properly considered on a motion to dismiss a copyright infringement claim.” *Thomas v. Walt*  
3 *Disney Co.*, 2008 WL 425647, at \*2 n.1 (N.D. Cal. Feb. 14, 2008) (considering copyright deposit  
4 on motion to dismiss).

5 **II. BE IN’S TRADE DRESS INFRINGEMENT COUNT STATES A VALID CLAIM**  
6 **FOR GOOGLE’S COPYING OF THE CAMUP PLATFORM**

7 Be In’s fourth cause of action challenges Google’s knowing and willful copying of Be In’s  
8 source-identifying trade dress for the CamUp platform. Am. Compl. ¶¶ 52–60. Google contends  
9 that this claim should be dismissed because Be In purportedly (1) has not provided adequate notice  
10 of the scope of the claimed trade dress, (2) has not adequately alleged that CamUp’s trade dress  
11 has a secondary meaning, or (3) has not adequately alleged that Hangouts creates a likelihood of  
12 confusion.

13 These arguments seek to impose a heightened pleading requirement that is contradicted by  
14 even the cases Google cites in support of its Motion. Be In has adequately alleged its trade dress  
15 infringement claim and need not make any further evidentiary showing at the motion to dismiss  
16 phase.

17 **A. Be In Has Alleged its Trade Dress Claim with the Required Specificity**

18 Google mischaracterizes Be In’s trade dress claim as an indefinite list of website  
19 characteristics, which it contends provides insufficient notice of either the scope of the claim, or  
20 how such characteristics combine to create an overall look and feel. Mot. Dismiss at 6–9. To the  
21 contrary, the Amended Complaint identifies five specific elements that combine, as depicted in the  
22 Amended Complaint, to create a protectable look and feel, leaving no doubt as to the scope of Be  
23 In’s trade dress. *See* Am. Compl. ¶¶ 38, 53.

24 Be In alleges that its trade dress “is defined by the following non-functional elements of  
25 the CamUp website and social media platform that, as a whole, are protectable: (1) large window  
26 containing media – typically video, but it could also contain music and pictures; (2) rectangular  
27 boxes containing chat and playlist features surrounding the large window of media; (3) placement  
28 of logos on top left; (4) similar white and gray color palette; and (5) several windows underneath

1 the large window of media that contain webcam images of participants in the video web-chat, all  
2 of which interact to create a particular visual impression.” *Id.* ¶ 53. The Amended Complaint also  
3 includes screen images showing the overall look and feel created by these combined elements. *Id.*  
4 ¶ 38. Be In does not leave open the possibility that unspecified aspects of the CamUp platform  
5 comprise the trade dress.

6 Such a specific listing of screen image characteristics is sufficient to state a claim for trade  
7 dress infringement. *See Calyx Tech., Inc. v. Ellie Mae, Inc.*, No. C 04-01640 SI, 2004 WL  
8 2075446, at \*2–3 (N.D. Cal., Sept. 3, 2004). In *Calyx Tech*, the plaintiff supported a claim that  
9 another web site infringed its trade dress with allegations that the trade dress included “selection  
10 of text, placement of texts, fonts, placement of fields, and use of color” of “unique screen images  
11 of the software program.” *Id.* This Court rejected defendant’s argument that a more detailed  
12 description was required, and found sufficient plaintiff’s identification of “the specific screen  
13 images and elements that compose the overall appearance that form the allegedly protected trade  
14 dress.” *Id.* These are precisely the elements included in the description of the infringed trade  
15 dress in Be In’s Amended Complaint. *See Am. Compl.* ¶¶ 38, 53.

16 Google principally relies on *Salt Optics, Inc. v. Jand, Inc. et. al.*, No. SACV 10-0828, 2010  
17 WL 4961702 (C.D. Cal. Nov. 19, 2010) and *Sleep Science Partners*, No. 09-04200 CW, 2010 WL  
18 1881770 (N.D. Cal. May 10, 2010) in arguing that greater detail is required. *See Mot. Dismiss at*  
19 8. But *Salt Optics* and *Sleep Science* dismissed claims based on a feature that is not present here  
20 — allegations that are open-ended and indefinite. *See Salt Optics*, 2010 WL 4961702 at \*5 (C.D.  
21 Cal. Nov. 19, 2010) (“*Salt Optics I*”) (granting dismissal of a complaint that “states that its trade  
22 dress allegations are offered ‘by way of illustration, not by limitation’”); *Sleep Sci.*, 2010 WL  
23 1881770 at \*3 (N.D. Cal. 2010) (“Notably, Plaintiff employs language suggesting that these  
24 components are only some among many, which raises a question of whether it intends to redefine  
25 its trade dress at a future stage of litigation.”). Indeed, after the *Salt Optics I* decision, the court  
26 refused to dismiss plaintiff’s amended complaint because plaintiff removed the “by way of  
27 illustration, not [by] limitation” disclaimer and provided a “fixed list of the elements alleged to  
28 comprise the website’s overall ‘look and feel.’” *Salt Optics, Inc. v. Jand, Inc. et. al.*, No. 8:10-cv-

1 00828-DOC-RNB, at \*3–4 (C.D. Cal. Mar. 4, 2011) (“*Salt Optics II*”) (attached as Nguyen Decl.,  
2 Ex. C).

3 Be In’s Amended Complaint does not attempt to hold open the trade dress description with  
4 “by way of illustration” language or any other means. Moreover, and contrary to Google’s  
5 arguments, Mot. Dismiss at 8–9, Be In has alleged how the characteristics of its trade dress  
6 combine to create an overall website look and feel. Specifically, Be In’s Amended Complaint  
7 shows how the enumerated elements of its website “interact to create a particular visual  
8 impression,” including text and images juxtaposing the look and feel of CamUp to Hangouts. Am.  
9 Compl. ¶¶ 38, 53. These allegations are similar to the amended allegations that the court found  
10 adequate in *Salt Optics II*, stating that plaintiff’s amended complaint synthesized these elements  
11 “through a combination of written explanation and graphic images,” including “juxtaposed images  
12 of Plaintiff’s website and Defendant’s website,” which the court found “[o]f particular use.” *Salt*  
13 *Optics II* at \*3–4. Be In’s clear and specific allegations provide sufficient notice of the scope of  
14 its trade dress claim.

15 **B. Be In Adequately Alleged That its Trade Dress Acquired Secondary Meaning**

16 Ignoring nearly all of the Amended Complaint’s allegations relating to secondary meaning,  
17 Google mischaracterizes Be In’s allegation of secondary meaning as consisting of a single  
18 sentence, and contends that it is inadequate. *See* Mot. Dismiss at 11–12. Assuming the role of  
19 fact finder, Google also contends that Be In’s allegations weigh against a finding of secondary  
20 meaning. To the extent allegations of secondary meaning are required at all — and a number of  
21 courts have held that they are not (*see Solid Host, NL v. Namecheap*, 652 F.Supp.2d 1092, 1107–  
22 08 (C.D. Cal. 2009) (“[A] plaintiff asserting ownership of a common law trademark need not  
23 specifically allege the existence of secondary meaning in order to survive a motion to dismiss”  
24 (collecting cases)); *see also Bottlehood, Inc. v. Bottle Mill*, No. 11-cv-2910-MMA (MDD), 2012  
25 WL 1416272, at \*5 (S.D. Cal. Apr. 23, 2012) (“Plaintiff does not have to plead secondary  
26 meaning to survive a motion to dismiss.”)) — the Amended Complaint includes at least ten  
27 allegations relating to secondary meaning.

28

1                   **1. The Amended Complaint Includes More Than a Conclusory Allegation**  
2                   **of Secondary Meaning**

3                   A variety of factors are relevant to a finding of secondary meaning, including but not  
4                   limited to: (1) direct consumer testimony; (2) survey evidence; (3) the exclusivity, manner, and  
5                   length of use; (4) the amount and manner of advertising; (5) the amount of sales and number of  
6                   customers; (6) the established place in the market; (7) proof of intentional copying by defendant;  
7                   and (8) unsolicited media coverage of the product. *Givenchy*, 2012 WL 3072327 at \*4. In  
8                   addition, “the existence of secondary meaning may be inferred from evidence relating to the  
9                   nature and extent of the public exposure achieved by the designation, or from proof of intentional  
10                  copying.” *Solid Host*, 652 F.Supp.2d at 1107 (citations and internal quotation marks omitted).  
11                 This inquiry is “inherently factual, with the relevant factors to be weighed by a jury.” *Givenchy*,  
12                 2012 WL 3072327 at \*5.

13                 Far from a single conclusory allegation of secondary meaning, the Amended Complaint  
14                 alleges the following facts:

- 15                 • Be In’s “trade dress has a secondary meaning, which is evidenced in part by  
16                 the awards and accolades and extensive media coverage Be In has received  
17                 for its innovation and creativity in developing the CamUp platform.” Am.  
18                 Compl. ¶ 54.
- 19                 • Be In “engaged in the business of creating and marketing online social  
20                 media platforms,” and that “Google markets Google+, which includes a  
21                 feature called Hangouts, which purports to serve a similar function as  
22                 CamUp.” *Id.* ¶¶ 1, 12.
- 23                 • Be In “won awards and accolades and received extensive media coverage  
24                 for its innovation and creativity in developing the CamUp platform.”  
25                 *Id.* ¶ 2.
- 26                 • Be In “won the 2011 MIPTV Connective Creativity Ventures startup  
27                 competition and was voted by a panel of top venture capitalists as the best  
28                 and most innovative startup of the year.” *Id.* ¶ 26.

- 1 • Be In participated in the 2011 SXSW conference, which Be In used to  
2 market its CamUp platform. *Id.* ¶¶ 23, 25.
- 3 • Google personnel attempted to plagiarize the CamUp trade dress: “CamUp  
4 website visits were from Google employees who logged on with the intent  
5 of studying the CamUp site in connection with their improper launch of  
6 Google+ and the Hangouts feature.” *Id.* ¶ 32.
- 7 • Google knowingly and intentionally copied screens from the CamUp  
8 platform. *Id.* ¶¶ 55, 59.

9 Each of these facts, individually and together, adequately allege that Be In’s trade dress has  
10 acquired secondary meaning. *See Calyx Tech*, 2004 WL 2075446 at \*2–3 (N.D. Cal. 2004)  
11 (holding that where a plaintiff “has plead several elements that could establish secondary  
12 meaning,” more detailed allegations are not required, and distinguishing cases that found lack of  
13 secondary meaning “after some form of fact finding, which has not yet occurred in this case”).

14 Google cites only one case, *Smith & Hawken, Ltd. v. Gardendance, Inc.*, No.C04-1664  
15 SBA, 2004 WL 2496163 (N.D. Cal. Nov. 5, 2004), in which a California court granted a motion to  
16 dismiss based on an insufficient allegation of secondary meaning. *See Mot. Dismiss* at 16. *Smith*  
17 *& Hawken* is distinguishable, however, because the plaintiff (a maker of lawn and garden  
18 products, including torches) included only the bare allegation that the “torches have secondary  
19 meaning,” without any “explanation as to the nature, scope or elements making up its allegedly  
20 protectable ‘trade dress’ ... [or description of] the Torch.” *Smith & Hawken*, 2004 WL 2496163 at  
21 \*3. In contrast, Be In's Amended Complaint adequately pleads secondary meaning through at  
22 least the allegations discussed above, while providing an express description and images of the  
23 elements that combine to create the CamUp trade dress. *See Am. Compl.* ¶¶ 1, 2, 12, 23, 25, 26,  
24 32, 38, 53, 54, 55, 59.

## 25 2. Be In Does Not Need to Allege Evidence of Every Secondary Meaning 26 Factor

27 Google next contends that the facts Be In alleges do not support a finding of secondary  
28 meaning. *See Mot. Dismiss* at 11–16. “Whether a particular trade dress has acquired secondary



1 meaning is a question of fact.” *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1383 (9th  
2 Cir. 1987); *see also Givenchy*, 2012 WL 3072327, at \*4 (C.D. Cal. 2012); *Calyx Tech*, 2004 WL  
3 2075446 at \*2–3 (N.D. Cal. 2004) (collecting cases). Google’s invitation to weigh the allegations  
4 and evidence is improper at the motion to dismiss stage.

5 Google’s factual arguments regarding particular factors (the duration and exclusivity of use  
6 of CamUp, and the quantity of sales and advertising, *see* Mot. Dismiss at 12–16) ignores that “the  
7 plaintiff need not make a showing on each factor, as no factor is dispositive, and a trier of fact  
8 typically weighs the factors to determine whether the plaintiff has met his burden” of proving  
9 secondary meaning. *Givenchy*, 2012 WL 3072327 at \*2 (noting that “courts disfavor” summarily  
10 deciding trade dress cases, even at the summary judgment phase); *see also Morgan Creek Prod.,*  
11 *Inc. v. Capital Cities/ABC, Inc.*, No. CV-89-5463-RSWL(JRX), 1991 WL 352619, at \*7 (C.D.  
12 Cal. Oct. 28, 1991) (noting that the secondary meaning factors “are by no means exhaustive”);  
13 *Thompson Medical Co. v. Pfizer, Inc.*, 753 F.2d 208, 217 (2d Cir. 1985) (noting that “no single  
14 factor is determinative, and every element need not be proved”) (internal quotation marks  
15 omitted); *ID7D Co., Ltd. v. Sears Holding Corp.*, No. 3:11cv1054(VLB), 2012 WL 1247329, at \*8  
16 (D. Conn. Apr. 13, 2012) (same). In fact, certain factors, such as intentional copying, which Be In  
17 has expressly alleged, provide particularly strong support for secondary meaning. *See* Am.  
18 Compl. ¶¶ 55, 57, 59; *see also L.A. Gear Inc.*, 12 U.S.P.Q.2d 1001, 1009 (S.D.N.Y. 1989) *aff’d in*  
19 *part, rev’d in part*, 988 F.2d 1117 (Fed. Cir. 1993) (“It is well settled that intentional copying  
20 provides strong support for a finding of secondary meaning”).

21 Google heavily relies upon the argument that a three month period between CamUp’s  
22 official unveiling and the release of Hangouts is too short to establish secondary meaning. *See*  
23 Mot. Dismiss at 12–14. But “[t]here is no talismanic number of months or years that establishes  
24 when an unregistered trademark or trade dress can obtain secondary meaning. Length of time is  
25 merely one additional piece of evidence to be weighed with all others in determining the existence  
26 of secondary meaning.” *Cont’l Lab. Prod., Inc. v. Medax Int’l Inc.*, 114 F.Supp.2d 992, 1004  
27 (S.D. Cal. 2000) (internal quotation marks omitted) (noting that a “mark or design can obtain  
28 secondary meaning in a short period of time”). A “relatively short time frame is not dispositive as

1 a party is not precluded as a matter of law from demonstrating that secondary meaning can be  
2 acquired within a few months. Indeed in this day of modern communications it is frequently the  
3 case that a particular product or name becomes familiar to many consumers overnight.” *L.A.*  
4 *Gear*, 12 U.S.P.Q.2d at 1010. Likely for this reason, Google does not cite a single case in which  
5 a court dismisses a trade dress claim for failure to allege secondary meaning based solely on a  
6 short duration of use. Rather, the cases recognize that “the length of time that a mark is used is  
7 only one factor to be considered.” *Co-Rect Products, Inc. v. Marvy! Advertising Photography,*  
8 *Inc.*, 780 F.2d 1324, 1332 (8th Cir. 1985).

9 The other factors that Google focuses upon, including whether or not Be In alleged any  
10 number of sales, advertising, and consumer association, likewise present factors that a fact finder  
11 may weigh in favor or against a finding of secondary meaning, but do not support the dismissal of  
12 a complaint.<sup>2</sup> In short, Be In has sufficiently alleged secondary meaning and Google's factual  
13 arguments are subjects for further proceedings.

14 **C. Be In Has Properly Alleged That There is a Likelihood of Confusion**

15 Google's inaccurate characterization of Be In's Amended Complaint also infects its  
16 argument that Be In has failed to properly allege likelihood of confusion. Google contends that  
17 the Amended Complaint includes only a single allegation. *See* Mot. Dismiss at 16–17. Contrary  
18 to this contention, the Amended Complaint is replete with allegations supporting a finding of  
19 likelihood of confusion.

20 Be In's Amended Complaint includes at least the following allegations relevant to these  
21 factors:

- 22 • Be In alleged likelihood of confusion: “The Google+ Hangouts platform is  
23 confusingly similar to the trade dress of the CamUp website, and is likely to  
24 cause confusion or mistake, or to deceive users as to affiliation, connection,  
25 or association.” Am. Compl. ¶ 56.

26  
27 <sup>2</sup> Although Google appears to describe actual consumer association as the “true test” of  
28 secondary meaning, Mot. Dismiss at 16, “the Ninth Circuit has unequivocally stated that ‘direct  
survey evidence of purchaser perception is not required.’” *Givenchy*, 2012 WL 3072323, at \*4  
(quoting *Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1145-46 (9th Cir. 2009)).

- 1 • Be In alleged that it “engaged in the business of creating and marketing  
2 online social media platforms,” and that “Google markets Google+, which  
3 includes a feature called Hangouts, which purports to serve a similar  
4 function as CamUp.” *Id.* ¶¶ 1, 12.
- 5 • Be In alleged substantial similarity between the two social media networking  
6 platforms. *Id.* ¶¶ 7, 38.
- 7 • Be In provided screen shots showing the substantial similarity. *Id.* ¶ 38.
- 8 • Be In alleged facts of Google's bad faith intent to copy its trade dress:  
9 "Google knowingly created and is deliberately using screens in its Google+  
10 Hangouts platform that are confusingly similar to CamUp with willful and  
11 callous disregard to Plaintiff's rights to enforce its trade dress," and "Google  
12 has knowingly and willfully copied Plaintiff's source-identifying trade dress  
13 of the elements of the CamUp platform." *Id.* ¶¶ 55, 57.

14 These allegations, individually and collectively, satisfy Be In’s burden of pleading. The  
15 Court should reject Google’s invitation to weigh the evidence at this stage.

16 Dismissal of pleadings on the ground that likelihood of confusion is impossible from the  
17 face of the complaint is “highly unusual.” *Dita, Inc. v. Mendez, et al.*, No. CV 10-6277 PSG  
18 (FMOx), 2010 WL 5140855, at \*5 (C.D. Cal. Dec. 14, 2010) (denying motion to dismiss).  
19 California courts have consistently held consumer confusion to be “a factual determination turning  
20 on an array of factors that cannot be made at this [motion to dismiss] stage.” *Church & Dwight*  
21 *Co., Inc. v. Mayer Lab., Inc.*, No. C-10-4429 EMC, 2011 WL 1225912, at \*20 (N.D. Cal. Apr. 1,  
22 2011). These factors include but are not limited to eight “*Sleekcraft*” factors: “(1) strength of the  
23 mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5)  
24 marketing channels used; (6) type of goods and the degree of care likely to be exercised by the  
25 purchaser; (7) defendant’s intent in selecting the mark; and (8) likelihood of expansion of the  
26 product lines.” *Givenchy*, 2012 WL 3072327 at \*5 (citing *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d  
27 341, 348–49 (9th Cir.1979)); *see also Innospan Corp. v. Intuit, Inc.*, No. C 10-04422 WHA, 2010  
28 WL 5017014, at \*3 (N.D. Cal. Dec. 3, 2010) (denying motion to dismiss trademark infringement

1 claim on grounds that plaintiff sufficiently pleaded likelihood of confusion where the complaint  
2 described several factors under *Sleekcraft*). For example, in *Webceleb Inc. v. Procter & Gamble*,  
3 the Court rejected defendant’s motion to dismiss argument that plaintiffs had not sufficiently  
4 alleged likelihood of confusion without analyzing plaintiff’s allegations or weighing the *Sleekcraft*  
5 factors because the “argument was inappropriate for resolution on a motion to dismiss.” No.  
6 10cv2318 DMS (NLS), 2012 WL 460472, at \*3 (S.D. Cal. Feb. 13, 2012). Like secondary  
7 meaning, likelihood of confusion “is a fact question for trial.” *Rodesh v. Discronics*, 8 F.3d 29,  
8 1993 WL 385481, at \*5 (9th Cir. 1992).

9 Google’s further contention that Be In’s likelihood of confusion allegation is insufficient  
10 because Be In has not alleged instances of actual confusion is mistaken. *See* Mot. Dismiss at 17.  
11 “[A]ctual confusion is not necessary to a finding of likelihood of confusion.” *Givenchy*, 2012 WL  
12 3072327, at \*7 (C.D. Cal. 2012). Be In “does not have to establish at this stage that [actual]  
13 confusion exists, merely that confusion is plausible based on the allegations in the complaint.”  
14 *Innospan*, 2010 WL 5017014, at \*3 (N.D. Cal. 2010).

15 Finally, the two cases upon which Google relies to support its contention that Be In has not  
16 sufficiently alleged likelihood of confusion, *Smith & Hawken* and *ID7D*, involve very different  
17 facts. In *Smith & Hawken*, the court dismissed the counterclaim plaintiff’s trade dress claim  
18 because the plaintiff provided only one conclusory allegation that copying of defendants’ torch  
19 design “causes confusion to consumers,” without alleging any facts relevant to any of the  
20 *Sleekcraft* factors or even describing the product at issue. 2004 WL 2496163 at \*3 (N.D. Cal.  
21 2004). In *ID7D*, the Connecticut court dismissed the trade dress claim because the plaintiff  
22 provided only one conclusory allegation that the defendant “used and continues to use . . .  
23 imitations of Plaintiff’s Trade Dress . . . in a manner that is likely to cause confusion.” 2012 WL  
24 1247329 at \*8 (D. Conn. 2012). In contrast to the bare conclusory allegations in *Smith & Hawken*  
25 and *ID7D*, Be In has provided a number specific allegations related to likelihood of confusion,  
26 which is more than sufficient to support its claim.

27  
28

1                   **III. BE IN'S COPYRIGHT INFRINGEMENT COUNT STATES A VALID CLAIM**  
2                   **FOR GOOGLE'S COPYING OF THE CAMUP PLATFORM**

3                   Google's arguments for dismissal of Be In's copyright claim first, are based on an  
4 incomplete copy of Be In's Copyright Office deposit and, second, seek to impose a heightened  
5 pleading standard on this claim. *See* Mot. Dismiss at 18–23. Both of these arguments should fail.

6                   **A. Be In Has Satisfied the Copyright Registration Requirement**

7                   Google contends that Be In cannot assert a copyright claim because Be In's copyright  
8 application covers only CamUp's source code and a few web pages — not the CamUp webpage  
9 with video chat screens directly underneath a main screen containing a video or other media. *Id.*  
10 at 19–20. However, the purported copy of Be In's deposit that Google relies upon is incomplete.  
11 "Exhibit B" attached to Google's Motion to Dismiss shows only three of the eleven documents  
12 that Be In actually deposited with the Copyright Office. *See* Graves Decl., Ex. B. The complete  
13 deposit, attached as Exhibit A of Nguyen Declaration, does cover the subject matter of Be In's  
14 copyright claim, including the external appearance of the site.

15                   The complete deposit shows that Be In did satisfy the requirement of Section 411(a) of the  
16 Copyright Act that a copyright be registered before an action for infringement may be instituted.  
17 *See* 17 U.S.C. § 411(a). Be In satisfied its registration requirement on June 22, 2012, by filing a  
18 copyright application, which attached a deposit of eleven separate documents, including all  
19 relevant images showing the text, selection, arrangement, editing, and compilation of the CamUp  
20 web video chat platform that is the basis for Be In's claim. *See* Nguyen Decl., Ex. A, at \*36, 37,  
21 41, 44. Be In then filed its Complaint and Amended Complaint on June 28, 2012 and August 16,  
22 2012, respectively. Since the filing of the Amended Complaint, the U.S. Copyright Office has  
23 granted the CamUp site full registration (Reg. No. TX-7-567-462, effective date of 6/22/2012)  
24 demonstrating the U.S. Copyright Office's determination that the entirety of Be In's deposited  
25 works constitutes copyrightable subject matter.<sup>3</sup> *See* Nguyen Decl., Ex. B.

26  
27 <sup>3</sup> *See Conference Archives v. Sound Images, Inc.* No. 3:2006-76, 2010 WL 1626072, at \*10  
28 (W.D. Pa. Mar. 31, 2010) ("If the application constitutes copyrightable subject matter, then the Register must issue a certificate of registration to the applicant. If the Register determines that 'the material deposited does not constitute copyrightable subject matter or that the claim is invalid

1 Be In presumes that the incomplete copy of the copyright deposit that Google relies upon  
2 was the result of a Copyright Office error in processing Google’s request for a copy of the  
3 document. Google’s arguments based on that incomplete document are simply mistaken. Be In  
4 properly registered its copyright in advance of filing this lawsuit and Google’s defective  
5 registration argument should be rejected.

6 **B. Be In Has Sufficiently Alleged the Scope of its Copyright Claim**

7 Google’s final arguments are that Be In’s copyright infringement allegations are  
8 insufficiently specific and impermissibly overlap with its trade dress infringement claim. *See* Mot.  
9 Dismiss at 21–23. Google is wrong for two reasons.

10 First, the allegations of the Amended Complaint provide clear notice of Be In’s copyright  
11 claim, including:

- 12 • the specific elements of its copyrighted work that Google violated: “Google  
13 had access to and willfully copied the text, selection, arrangement, editing,  
14 and compilation of Be In’s CamUp web video chat platform resulting in its  
15 substantially similar Google+ Hangouts feature.” Am. Compl. ¶ 50.
- 16 • an image depicting the infringing aspects of Google+ Hangouts. *Id.* ¶ 38.
- 17 • the allegation that Be in “submitted an application to the United States  
18 Copyright Office for registration of copyright, comprising, inter alia, the  
19 text, selection, arrangement, editing, and compilation of the CamUp web  
20 video chat platform, on June 22, 2012. The copyright office assigned the  
21 application as No. 1-779959021.” *Id.* ¶ 49.

22 Be In’s allegations are more than sufficient to give Google adequate notice of Be In’s  
23 copyright claim. In any event, “[t]here is no requirement that copyright claims must be pled with  
24 particularity,” as Google appears to seek. *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-5780  
25 JF (RS), 2009 WL 1299698, at \*4 (N.D. Cal. May 11, 2009) (denying motion to dismiss  
26 copyright claims). Accordingly, “complaints simply alleging present ownership by plaintiff,  
27

28 \_\_\_\_\_  
for any other reason, then the Register must refuse registration and notify the applicant of the  
reasons for refusal.”).

1 registration in compliance with the applicable statute and infringement by defendant have been  
2 held sufficient under the rules.” *Id.* (holding that “Facebook need not allege the exact content  
3 that Defendants are suspected of copying at this stage of the proceedings.”). Be In has  
4 sufficiently pleaded its copyright infringement claim.

5 The cases Google relies upon involve a complete pleading failure and do not support the  
6 dismissal of Be In’s claim. *See* Mot. Dismiss at 22 (citing *Chestang v. Yahoo, Inc.*, 2011 WL  
7 4543218 (E.D. Cal. Sept. 28, 2011) and *Salt Optics*, 2010 WL 4961702 (C.D. Cal. 2010)). In  
8 *Chestang*, the court dismissed the copyright claim because the plaintiff alleged that defendant was  
9 selling infringing ringtones, but failed even to “identify the copyrighted material at issue” or any  
10 of the “particular lyrics [that] were allegedly used in the ringtones.” No. 2:11-cv-00989-MCE-  
11 KJN, 2011 WL 4543218, at \*3 (E.D. Cal. Sept. 28, 2011). Similarly, in *Salt Optics*, the court  
12 dismissed the copyright claim because the plaintiff alleged that its copyright registration included  
13 all “text(s), photograph(s), selection, arrangement and compilation of the Salt Website and rights  
14 related to the Salt Catalogs,” but made “no attempt to identify which portions of the website or  
15 catalog it accuses Defendants of infringing.” 2010 WL 4961702, at \*6 (C.D. Cal. Nov. 19, 2010)  
16 (internal quotation marks omitted and emphasis added). In contrast to both cases, Be In’s  
17 Amended Complaint provides clear notice of the copyrighted material Be In seeks to protect.  
18 Specifically, Be In juxtaposed the unique text, selection, arrangement, editing, and compilation of  
19 the particular images seen on pages 36, 37, 41, and 44 of Be In’s copyright registration deposit,  
20 with the “substantially similar” image copied in the Hangouts image seen in the Amended  
21 Complaint. *See* Nguyen Decl., Ex. A, at \*36, 37, 41, 44; Am. Compl. ¶ 38. Such pleadings are  
22 sufficient.

23 Finally, Google asks the Court to dismiss the trade dress and the copyright claims because  
24 common facts may support both claims. *See* Mot. Dismiss at 22. Google concedes, however, that  
25 “it is possible for a complaint to properly allege both copyright and trade dress infringement  
26 claims,” as it must. *Id.* Parallel claims under the Copyright Act and Lanham Act are “not *per se*  
27 impermissible.” *Sleep Sci.*, 2010 WL 1881770, at \*4 (N.D. Cal. 2010) (collecting cases). In  
28 particular, “courts have concluded that a website’s ‘look and feel’ could constitute protectable

1 trade dress that would not interfere with copyright interests.” *Id.* (citing *Conference Archives, Inc.*  
 2 *v. Sound Images, Inc.*, No. 3:2006-76, 2010 WL 1626072, at \*14–21 (W.D. Pa. Mar. 31, 2010);  
 3 *Blue Nile*, 478 F.Supp.2d 1240, 1243 (W.D. Wash. 2007)). Further, to the extent there is any  
 4 overlap between Be In’s trade dress and copyright claims, Be In may plead its claims in the  
 5 alternative at this stage. *Id.*

6 **CONCLUSION**

7 Be In has alleged more than sufficient facts to support its trade dress and copyright claims  
 8 against Google. These allegations provide Google fair notice of the claims and the grounds upon  
 9 which they rest. Be In’s claims against Google are plausible on their face and satisfy the pleading  
 10 standards of *Iqbal* and *Twombly*. For all of these reasons, Be In respectfully requests that  
 11 Google’s Motion to Dismiss be denied.

12 Dated: September 25, 2012

13 Respectfully submitted,

14 DAVIS WRIGHT TREMAINE LLP

15 By: /s/ Joseph E. Addiego III  
 16 Joseph E. Addiego III

17 CLIFFORD CHANCE US LLP  
 18 William E. Wallace III (Pro Hac Vice application pending)  
 19 Stephen M. Nickelsburg (Pro Hac Vice Application Pending)  
 20 Roni E. Bergoffen (Pro Hac Vice Application Pending)

21 Attorneys for Plaintiff  
 22 BE IN, INC, a New York Corporation