

1 Andrew D. Skale (SBN 211096)
 askale@mintz.com
 2 Justin S. Nahama (SBN 281087)
 jsnahama@mintz.com
 3 MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO P.C.
 3580 Carmel Mountain Road, Suite 300
 4 San Diego, CA 92130
 Telephone: (858) 314-1500
 5 Facsimile: (858) 314-1501

6 Attorneys for Plaintiff
 HANGINOUT, INC.

7
 8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA

11 HANGINOUT, INC.. a Delaware
 corporation.

12 Plaintiff.

13 vs.

14 GOOGLE, INC.. a Delaware
 15 corporation.

16 Defendant.

Case No. 3:13-cv-02811-AJB-NLS

**DECLARATION OF JUSTIN
 MALONE IN SUPPORT OF
 PLAINTIFF HANGINOUT, INC.’S
 MOTION FOR PRELIMINARY
 INJUNCTION**

Date: March 13, 2014

Time: 2:00 p.m.

Courtroom 3B

The Honorable Anthony Battaglia

19
 20 I, JUSTIN MALONE, DECLARE AS FOLLOWS:

21 1. I am the founder and CEO of Hanginout, Inc. (“Hanginout”). I have
 22 personal knowledge of the facts set forth in this declaration and could and would
 23 competently testify as to the same.

24 2. As founder and CEO of Hanginout, I am readily familiar with
 25 Hanginout’s business operations, including the research, marketing, and product-
 26 development of Hanginout’s social-media based platforms and iTunes applications
 27 (“app”).
 28

1 3. Hanginout developed the HANGINOUT interactive video-response
2 platform and apps to give users the ability to easily build and publish engaging video
3 profiles.

4 4. One of the HANGINOUT application’s distinguishing features is a
5 question and answer capability giving users the unique ability to field questions from
6 other users, by recording and publishing video responses, then sharing them from
7 anywhere at any time.

8 5. The Hanginout Pro application also provides real-time analytic solutions
9 that analyze website demographics, usage, and audience interests.

10 6. Hanginout adopted the HANGINOUT logo and word mark in November
11 2008. Attached as **Exhibit 1** is a true and correct copy of a Wayback Machine
12 screen capture retrieved from archive.org on January 15, 2014, depicting Hanginout’s
13 November 2008 use of the Hanginout logo. “Archive.org” alleges to provide a
14 method of viewing content on a domain page’s webpage as it existed at various points
15 in the past. On information and belief, the website is run by the Internet Archive, a
16 501(c)(3) non-profit that was founded in 1996 to build an Internet library, with the
17 purpose of offerings permanent access to historical collections that exist in digital
18 format.

19 7. Hanginout began developing its social-media based platforms with an
20 ultimate goal of providing celebrities, politicians, businesses, and everyday people
21 with a platform to organize their social media connections and connect with others
22 through a highly-interactive video question and answer (“Q&A”) format.

23 8. In early 2009, we began creating a free mobile platform allowing
24 consumers to engage each other through interactive video and empower brands to
25 engage their consumers in a more compelling, interest-driven way.

26 9. By March 2010, to promote our product, Hanginout began partnering
27 with celebrities and professional athletes to create HANGINOUT profiles for its
28

1 interactive social-media platform. Attached as **Exhibit 2** is a true and correct copy of
2 a screen capture of a Hanginout Facebook promotion with NFL athlete Shawne
3 Merriman, from the day of the first video shoot.

4 10. From March 2010 through the present, the following non-exhaustive list
5 of celebrities and public figures have created Hanginout accounts and published
6 content on the HANGINOUT platform:

- 7 • Kassim Osgood (NFL)
- 8 • Shawne Merriman (NFL)
- 9 • Mitchie Brusco (X-Games)
- 10 • DJ Chuckie (DJ)
- 11 • Eric Griggs (Music Producer)
- 12 • Miles McPherson (Pastor, The Rock Church, former San Diego
13 Charger)
- 14 • Mike Hill (ESPN)
- 15 • Daphne Joy (Actress/Model)
- 16 • Jessica Burciaga (Model)
- 17 • Amanda Cerny (Model)
- 18 • Da Internz (Music Producers)
- 19 • Belmont Lights (Band)

20
21 11. In March and April 2011, consumers began registering HANGINOUT
22 Profiles and endorsing the product on social-media platforms such as Twitter and
23 Facebook. Attached as **Exhibit 3** is a true and correct copy of the Hanginout
24 endorsements on Twitter that announced the release of our beta and demo platforms.

25 12. From April 1, 2011 to April 20, 2011, we invited hundreds of contacts to
26 register profiles for the HANGINOUT Platform.

27 13. On May 4, 2011, Hanginout began its broader marketing campaign for
28

1 its Q&A video platform. Hanginout launched several social-media advertising
2 initiatives to promote the application. For example, a preview of the HANGINOUT
3 platform was posted on LinkedIn. Attached as **Exhibit 4** is a true and correct copy of
4 the May 4, 2011 LinkedIn announcement regarding the HANGINOUT platform.

5 14. On May 4, 2011, a YouTube video was uploaded explaining the
6 HANGINOUT platform and an overview of its general capabilities. Attached as
7 **Exhibit 5** is a true and correct copy of the Promotional YouTube video for the
8 HANGINOUT platform on a CD. Exhibit 5 can also be seen at:

9 http://www.youtube.com/watch?v=BWo_x5YviAM&list=FLhZUDGwy0dK7qAClds
10 [Huidg&index=3](http://www.youtube.com/watch?v=BWo_x5YviAM&list=FLhZUDGwy0dK7qAClds)

11 15. On May 23, 2011, Tech Cocktail endorsed Hanginout's "Interactive
12 Video Q&A Platform" on Facebook. Attached as **Exhibit 6** is a true and correct copy
13 of the Tech Cocktail endorsement on Facebook.

14 16. On the same day, Tech Cocktail released an online article endorsing the
15 HANGINOUT platform. Attached as **Exhibit 7** is a true and correct copy of the May
16 23, 2011 Tech Cocktail Article.

17 17. By the end of May 2011, over 200 customers had registered for and used
18 Version 1.0 of the HANGINOUT Q&A platform. Presently, there are nearly 8,000
19 registered customers.

20 18. On June 1, 2011, Hanginout, Inc. was officially formed as a corporation.
21 I assigned the rights and goodwill in the HANGINOUT brand to the company.

22 19. On June 9, 2011, Hanginout released another YouTube video detailing
23 some key elements of the HANGINOUT platform with celebrities including NFL
24 athlete Shawne Merriman. Attached as **Exhibit 8** is a true and correct copy of the
25 Promotional YouTube video for the HANGINOUT platform on a CD. Exhibit 8 can
26 also be seen at:

27 <http://www.youtube.com/watch?v=18sSmlp9IJY>

1 20. On October 24, 2011, San Diego Mayoral candidate Carl DeMaio utilized
2 HANGINOUT to create a “virtual town hall” for his campaign. Attached as **Exhibit**
3 **9** is a true and correct copy of Carl DeMaio’s website utilizing the HANGINOUT
4 platform on a CD. Exhibit 9 can also be seen at:
5 <http://www.thecampaignsolutionsgroup.com/virtual-townhall/>

6 21. On April 10, 2012, Hanginout offered the Hanginout Pro Application to
7 provide additional capabilities to its existing customers. The Hanginout Pro
8 application permitted users to build an interactive profile to receive questions and
9 publish video response instantly. Attached as **Exhibit 10** is a true and correct copy of
10 the AppAnnie overview of the Hanginout Pro Application.

11 22. On, July 6, 2012, working with Hanginout, popular professional
12 skateboarder Mitchie Brusco launched an application utilizing the HANGINOUT
13 platform to stay in touch with his friends and fans. Attached as **Exhibit 11** is a true
14 and correct copy of the App Details for Mitchie Brusco’s HANGINOUT App.

15 23. ESPN ran an article about the Mitchie Brusco application and
16 HANGINOUT platform on July 19, 2012, in conjunction with the upcoming X-
17 Games. Attached as **Exhibit 12** is a true and correct copy of the ESPN article.

18 24. On September 16, 2012, Hanginout officially launched the
19 HANGINOUT iOS App in the iTunes Application Store. Apple chose to feature the
20 HANGINOUT App.

21 25. On September 18, 2012, iSnoops endorsed the HANGINOUT platform.
22 Attached as **Exhibit 13** is a true and correct copy of iSnoops endorsement.

23 26. On September 28, 2012, AppAnnie ranked the HANGINOUT
24 Application fourth in the United States and first in Sweden in the featured social-
25 media category. Attached as **Exhibit 14** is a true and correct copy of the September
26 28, 2012 AppAnnie rankings.

27 27. On November 1, 2012, celebrity and recording artist Sean “Puff Daddy”
28

1 Combs wished me happy birthday on Twitter while referencing the HANGINOUT
2 app. Attached as **Exhibit 15** is a true and correct copy of the Twitter message from
3 Sean Combs.

4 28. As part of Hanginout's efforts to police its Mark, Hanginout learned that
5 the Mark HANGOUT (Reg. No. 3857338) existed. Hanginout filed a petition to
6 cancel the HANGOUT registration. The petition was granted and the HANGOUT
7 registration was canceled on May 6, 2013. Attached as **Exhibit 16** is a true and
8 correct copy of the USPTO Cancellation Notice for the HANGOUT Mark.

9 29. I consistently monitored Google Analytics Reports ("Google Reports")
10 from October 2012 through December 23, 2013, to monitor traffic through the
11 HANGINOUT iOS Application.

12 30. Attached as **Exhibit 17** is the Google Analytic Report for Hanginout's
13 Audience Overview between September 15, 2012 and December 23, 2013.

14 31. Attached as **Exhibit 18** is the Google Analytic Report for Hanginout's
15 International usage between September 15, 2012 and December 23, 2013.

16 32. Attached as **Exhibit 19** is the Google Analytic Report for Hanginout's
17 United States usage between September 15, 2012 and December 23, 2013.

18 33. Attached as **Exhibit 20** is the Google Analytic Report for Hanginout's
19 California usage between September 15, 2012 and December 23, 2013.

20 34. The Google Analytic Reports confirm that the Hanginout Application
21 was viewed over 1,000,000 times since October 2012; viewed by consumers in 112
22 countries throughout the world; and viewed by consumers throughout the United
23 States with the largest quantity of consumers in California, specifically Los Angeles
24 and San Diego counties.

25 35. Since the HANGINOUT platform's September 12, 2012 launch through
26 December 23, 2013, the HANGINOUT Application was viewed 1,047,549 times.
27 Additionally, 87.5 percent of visitors have returned to view the app.
28

1 36. As of December 23, 2013, the HANGINOUT Application was viewed
2 by at least one consumer in 112 countries. The U.S. ranks highest among all these
3 countries. As of December 23, 2013, the top five states with the most visits are
4 California (29,985 visits), New York (7,056 visits), Florida (3,506 visits), Michigan
5 (2,701 visits) and Texas (2,629 visits).

6 37. As a result, of the 29,985 visits from California consumers, the three
7 cities with the most visits were Los Angeles (4,456 visits), Carlsbad (4,191 visits) and
8 San Diego (3,726 visits). In total, there were 347 California cities with at least one
9 Application view.

10 38. On December 17, 2013, the USPTO Publication & Issue Review was
11 completed for the Hanginout applications, with a publication date of January 21,
12 2014. Attached as **Exhibit 21** is a true and correct copy of the USPTO's Notice of
13 Publications for Hanginout's Serial Nos. 85674801 and 85674799.

14 39. Attached as Exhibit 22 is a true and correct copy of Google's Official
15 Blog article introducing +Hangouts.

16 40. Attached as **Exhibit 23** is a true and correct copy of an AppAnnie
17 printout detailing the release and upgrade dates of Google's "Hangouts" Application.
18 AppAnnie collects information on applications (apps that can be downloaded on
19 "smart devices" such as smart phones), and provides statistics for those applications.

20 41. Attached as **Exhibit 24** is a true and correct copy of the screen capture
21 for the top Google search-engine results for "What is Google Hangouts," retrieved
22 January 17, 2014.

23 42. On April 26, 2013, Google filed a federal trademark application to
24 register the mark "Hangouts," Application Serial No. 85916316. Attached as **Exhibit**
25 **25** is a true and correct copy of Google's Application for "Hangouts."

26 43. On July 30, 2013, the USPTO suspended Google's Hangouts
27 application because of the HANGINOUT mark. Attached as **Exhibit 26** is a true and
28

1 correct copy of the USPTO's Suspension Notice for Google's "Hangouts"
2 application.

3 44. Attached as Exhibit 27 is a true and correct copy of the Google
4 announcing its "Hangouts on Air" Q&A Platform.

5 45. In 2012, the Hanginout App was downloaded on iTunes 8,691 times, the
6 Hanginout Pro 288 times and Hanginout with Mitchie Brusco 522 times. In 2013,
7 downloads continued with the Hanginout App receiving 1,419 downloads, Hanginout
8 Pro 75, and Hanginout with Mitch Brusco 1,174. Attached as Exhibit 28 is a true
9 and correct screen capture, retrieved January 21, 2014, of iTunes' 2012 and 2013
10 download statistics for the Hanginout App, Hanginout Pro, and Hanginout with Mitch
11 Brusco App.

12 46. Attached as Exhibit 29 is a true and correct copy of Google's trademark
13 list, obtained from google.com.

14 47. Attached as Exhibit 30 is a true and correct copy of a video with
15 celebrity Leon Walker utilizing the HANGINOUT platform.

16 48. Attached as Exhibit 31 is a true and correct copy of Google's
17 description of its Hangouts platform, also located at
18 www.google.com/+/learnmore/hangouts/.

19 I declare under penalty of perjury under the laws of the United States of
20 America, that the foregoing is true and correct.

21 Executed this 22th day of January, 2014, at San Diego, California.

22
23 
24 JUSTIN MALONE

25 25581948v.3