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HANGINOUT, INC.

8
9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 HANGINOUT, INC., a Delaware
corporation,

12 Plaintiff,

13 vs.

14 GOOGLE, INC., a Delaware
corporation,

15 Defendant.

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

**PLAINTIFF HANGINOUT, INC.'S
FIRST AMENDED COMPLAINT
FOR:**

- 1) **TRADEMARK INFRINGEMENT;**
2) **FEDERAL UNFAIR
COMPETITION; AND**
3) **STATUTORY AND COMMON
LAW UNFAIR COMPETITION**

[JURY DEMANDED]

Courtroom 3B
The Honorable Anthony J. Battaglia

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21 Hanginout, Inc. (“Hanginout” or “Plaintiff”) brings this suit for trademark
22 infringement, federal unfair competition, and common law unfair competition against
23 Google, Inc. (“Google” or “Defendant”) and alleges as follows:

24 **THE PARTIES**

25 1. Hanginout is a Delaware corporation with its principal place of business
26 at 2712 Jefferson Street, Carlsbad, CA 92008.

1 **FACTUAL ALLEGATIONS**

2 **Hanginout's Background and Products**

3 9. Hanginout is a San Diego based technology company that has
4 developed, produced, owns, and commercialized mobile-video based communication
5 products.

6 10. Hanginout was formally founded in 2011, but developed its products at
7 least as early as approximately 2009.

8 11. Hanginout adopted the HANGINOUT logo and word mark in
9 connection with its social media services as early as November 2008.

10 12. Hanginout developed an interactive video-response platform with real-
11 time analytic solutions under the brand HANGINOUT. The platform analyzes
12 website demographics, usage, and audience interests. The platform enable users to
13 more effective develop, promote, and sell their brands by engaging, educating, and
14 entertaining their customers.

15 13. The HANGINOUT application is a novel social-media application that
16 gives users the ability to easily build and publish personal video profiles
17 complimented with a video publishing tool to create mobile video content.

18 14. Utilizing the HANGINOUT application, a user can explore, find and
19 follow interesting people, celebrities and personalities, ask them questions and
20 receive instant personal video responses (Hanginout's "Q&A" capability).

21 15. The HANGINOUT application also gives users the unique ability to
22 field questions from anyone in the application, record and publish responses, and
23 share them from anywhere at any time.

24 16. In March 2010, Hanginout partnered with celebrity and professional
25 athlete Shawne Merriman to shoot a HANGINOUT promotional video.

26 17. In March 2010, Hanginout's Facebook profile was uploaded containing
27 the HANGINOUT Mark.

1 video content to engage in social networking” in IC 038.

2 24. The application been published by the USPTO, meaning that the USPTO
3 has found the mark HANGINOUT to be inherently descriptive for the services
4 identified. That is because, in fact, HANGINOUT is a valid and protectable mark,
5 and a mark that is inherently distinctive.

6 **Google Launches Google Hangouts**

7 25. On information and belief, on June 28, 2011, Google’s official blog
8 contained an announcement for the Google+ project, noting that its new messaging
9 platform “+Hangouts” was beginning a field trial.

10 26. On information on belief, on May 15, 2013, Google officially launched
11 its new messaging platform titled “Hangouts.” On information and belief, Google’s
12 first use date of the “Hangouts” mark is on or after May 15, 2013.

13 27. Prior to first use by Google, Hanginout’s HANGINOUT app had
14 received hundreds of thousands of viewers from hundreds of countries and every state
15 in the United States (most of which returned for additional visits), was downloaded
16 across the United States, received widespread celebrity media attention, and was
17 featured by Apple in the iTunes application portal. Hanginout’s offering of the
18 HANGINOUT services in both Southern California and the entire United States
19 through its website and downloadable app has been continuous and resulted in
20 substantial goodwill and valid and protectable trademark rights nationwide prior to
21 Google’s first use.

22 28. On information and belief, Google’s “Hangouts” is a social-media based
23 video-chat service that enables both one-on-one and group chats. Hangouts can be
24 accessed through the Gmail or Google+ websites, or through mobile applications
25 available for Android and iOS.

26 29. On April 26, 2013, Google filed an application to register the mark
27 “Hangouts,” Application Serial No. 85916316.

1 30. Google’s “Hangouts” mark is nearly identical to Hanginout’s
2 HANGINOUT mark in appearance, sound and meaning.

3 31. On information and belief, mirroring Hanginout’s products, Google’s
4 “Hangouts” trademark application sought to cover nearly identical mobile-video
5 based communication products including:

- 6 a. “Downloadable software for publishing and sharing digital media and
7 information via global computer and communication network; instant
8 messaging software; communications software for electronically
9 exchanging voice, data, video and graphics accessible via computer,
10 mobile, wireless, and telecommunication networks; computer software
11 for processing images, graphics, audio, video, and text; computer
12 software development tools; computer software for use in developing
13 computer programs; video and audio conferencing software” (IC 009);
- 14 b. “Telecommunications services, namely, electronic transmission of data
15 and digital messaging via global computer and communication
16 networks; providing online forums, chat rooms and electronic bulletin
17 boards for transmission of messages among users in the field of general
18 interest; digital multimedia broadcasting services over the Internet,
19 namely, posting, displaying, and electronically transmitting data, audio
20 and video; providing access to computer databases in the fields of
21 general interest; instant messaging services; voice over ip (VOIP)
22 services; video and audio conferencing services conducted via the web,
23 telephone, and mobile devices; communications by computer terminals;
24 local and long distance telephone services; mobile telephone
25 communication services” (IC 038)
- 26 c. “Entertainment services, namely, providing temporary use of non-
27 downloadable interactive multiplayer and single player games played via
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1 global computer and communication networks” (IC 041);

2 d. “Providing temporary use of on-line non-downloadable software for
3 publishing and sharing digital media and information via global
4 computer and communication networks; Providing temporary use of on-
5 line non-downloadable software development tools; Providing
6 temporary use of on-line non-downloadable software for use as an
7 application programming interface (API); Providing a web hosting
8 platform for others for organizing and conducting meetings, social
9 events and interactive text, audio, and video discussions; Providing an
10 on-line network environment that features technology that enables users
11 to share data; computer software consulting; application service provider
12 (ASP) services featuring computer software for transmission of text,
13 data, images, audio, and video by wireless communication networks and
14 the Internet; application service provider (ASP) services featuring
15 computer software for electronic messaging and wireless digital
16 messaging” (IC 042).

17 32. Just as Hanginout’s app is available at the iTunes store, Google’s
18 “Hangouts” app is also available at the iTunes store. By offering virtually identical
19 services under a virtually identical mark, Google has passed off its services as those
20 of the senior user, Hanginout.

21 33. On July 30, 2013, the U.S. Patent and Trademark Office suspended
22 Google’s Hangout application because of the HANGINOUT mark. The suspension
23 notice is attached hereto as **EXHIBIT C**.

24 34. The suspension notice concluded that if the HANGINOUT mark
25 registers, Google may be prevented from receiving a trademark registration for
26 “Hangouts” based on likelihood of confusion with the HANGINOUT mark.

27 35. On or around September 12, 2013, Google introduced its “Live Q&A for
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1 Hangouts On Air,” mirroring the HANGINOUT Q&A platform’s capabilities.

2 36. Google continues to aggressively market its Hangouts product.

3 37. Hanginout is informed and believes, and based thereon alleges, that
4 Google has advertised Google’s Hangouts to replicate Hanginout’s products’
5 capabilities. For example, Google has described its product capabilities as:

- 6 a. “Bring your conversations to life with photos, email, and video calls for
7 free.”
- 8 b. “Turn any Hangout into a live video call with up to 10 friends or simply
9 search for a contact to start a voice call from your computer.”
- 10 c. “Hangouts work the same everywhere- computers, Android, and Apple
11 devices – so nobody gets left out.”

12 **FIRST CAUSE OF ACTION**

13 **TRADEMARK INFRINGEMENT**

14 **(15 U.S.C. § 1125 *et seq.*)**

15 38. Hanginout incorporates by reference all other paragraphs contained in
16 this Complaint.

17 39. Hanginout’s HANGINOUT marks are inherently distinctive.

18 40. Hanginout’s HANGINOUT marks have achieved market penetration
19 throughout the United States and, at a minimum, in California.

20 41. Hanginout substantially used its HANGINOUT marks in commerce
21 before Google used the HANGOUTS mark. Its market penetration was prior to
22 Google’s first use of the infringing HANGOUTS mark.

23 42. Google’s HANGOUTS mark is identical or substantially similar in
24 sound, appearance and meaning to Hanginout’s HANGINOUT marks, with the same
25 order of “hang” and “out.”

26 43. Google has used the HANGINOUT marks or confusingly similar
27 variations of them, in connection with the sale, offering for sale, distribution or
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1 advertising of goods and/or services that are related to and directly compete with
2 Hanginout's services.

3 44. The use of the HANGOUTS mark by Google is likely to cause
4 confusion with Hanginout's HANGINOUT mark for reasons including, but not
5 limited to:

- 6 a. The HANGINOUT mark is inherently distinctive;
- 7 b. HANGINOUT and HANGOUTS are nearly identical in sight, sound and
8 meaning, Google simply substituting one form of "Hang" for another,
9 using the same ordering without any spacing, and making it plural;
- 10 c. The HANGOUTS and HANGINOUT platforms offer virtually identical
11 Q&A capabilities in addition to other similar social-media based
12 services;
- 13 d. Both Google and Hanginout use overlapping marketing channels
14 including iTunes (where both have an app for download under the
15 subject trademarks) and social-media outlets;
- 16 e. There is a low degree of consumer care or attentiveness about how the
17 social-media based services are utilized because they are free and easy to
18 download through often small smart phone screens;
- 19 f. Google launched its Q&A platform mirroring the HANGINOUT Q&A
20 platform's capabilities after it received its suspension notice from the
21 USPTO in relation to its HANGOUTS application, making its use of a
22 similar trademark for virtually identical services deliberate and
23 intentional;
- 24 g. Evidence of actual confusion exists and continues to permeate
25 Hanginout's marketing efforts, with consumers indicating a lack of
26 appreciation for the differences between the two trademarks; and
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1 h. Google intends to directly compete with Hanginout in the social-media
2 arena.

3 45. Google's wrongful use of the HANGINOUT marks constitutes
4 trademark infringement of Hanginout's HANGINOUT marks, has caused significant
5 confusion in the marketplace, and is likely to cause both confusion and mistake,
6 along with being likely to deceive consumers.

7 46. Google's infringement of Hanginout's marks was willful and with
8 knowledge that such its use of the "Hangouts" mark would or was likely to cause
9 confusion and deceive others.

10 47. As a direct and proximate result of Google's trademark infringement,
11 Hanginout has been damaged within the meaning of 15 U.S.C. § 1125 *et seq.*

12 48. Hanginout has suffered damages in an amount to be established after
13 proof at trial.

14 49. Hanginout is further entitled to disgorge Google's profits for its willful
15 sales and unjust enrichment.

16 50. Hanginout's remedy at law is not adequate to compensate for injuries
17 inflicted by Google. Thus, Hanginout is entitled to temporary, preliminary and
18 permanent injunctive relief.

19 **SECOND CAUSE OF ACTION**

20 **FEDERAL UNFAIR COMPETITION**

21 **(15 U.S.C. § 1125 *et seq.*)**

22 51. Hanginout incorporates by reference all other paragraphs contained in
23 this Complaint.

24 52. Google has committed acts of unfair competition under 15 U.S.C. §
25 1125 *et seq.*, including the practices and conduct referred to above. Not only does the
26 conduct alleged constitute trademark infringement, but the content and promotion of
27 the Google "Hangouts" itself purposefully attempts to heighten the likelihood that
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1 consumers will be confused and an inaccurate appearance of affiliation created. For
2 example, Google arranged its Q&A platform to mirror HANGINOUT's Q&A
3 platform.

4 53. As a direct and proximate result of Google's wrongful acts, Hanginout
5 has suffered and continues to suffer substantial pecuniary losses and irreparable
6 injury to its business reputation and goodwill. As such, Hanginout's remedy at law is
7 not adequate to compensate for passinjuries inflicted by Google. Accordingly,
8 Hanginout is entitled to temporary, preliminary and permanent injunctive relief.

9 54. By reason of such wrongful acts, Hanginout is and was, and will be in
10 the future, deprived of, among others, the profits and benefits of business
11 relationships, agreements, and transactions with various third parties and/or
12 prospective business relationship. Google has wrongfully obtained profit and
13 benefits instead of Hanginout. Hanginout is entitled to compensatory damages and
14 disgorgement of Google's said profits, in an amount to be proven at trial.

15 **THIRD CAUSE OF ACTION**

16 **STATUTORY (Cal. B&P 17200 *et seq.*) AND COMMON LAW UNFAIR**
17 **COMPETITION**

18 55. Hanginout incorporates by reference all other paragraphs contained in
19 this Complaint.

20 56. By offering virtually identical services under a virtually identical mark,
21 Google has passed off its services as those of the senior user, Hanginout.

22 57. Google has committed acts of unfair competition, including the practices
23 and conduct referred to in this Complaint. These actions constitute unlawful, unfair
24 or fraudulent business acts or practices, and/or unfair, deceptive, untrue or misleading
25 business practices. The actions were done in connection with sales or advertising.

26 58. As a direct and proximate result of Google's wrongful acts, Hanginout
27 has suffered and continues to suffer substantial pecuniary losses and irreparable
28

1 injury to its business reputation and goodwill. As such, Hanginout's remedy at law is
2 not adequate to compensate for injuries inflicted by Google. Accordingly, Hanginout
3 is entitled to temporary, preliminary and permanent injunctive relief.

4 59. By reason of such wrongful acts, Hanginout is and was, and will be in
5 the future, deprived of, among other damages, the profits and benefits of business
6 relationships, agreements, and transactions with various third parties and/or
7 prospective business relationship. Google has wrongfully obtained profit and
8 benefits instead of Hanginout. Hanginout is entitled to compensatory damages and
9 disgorgement of Google's said profits, in an amount to be proven at trial.

10 60. Such acts, as alleged above, were done with malice, oppression and/or
11 fraud, thus entitling Hanginout to exemplary and punitive damages.

12 WHEREFORE, Plaintiff demands the following relief for each cause of action
13 unless otherwise noted:

- 14 1. A judgment in favor of Hanginout and against Google on all counts;
- 15 2. A preliminary and permanent injunction from trademark infringement
16 and unfair business practices by Google;
- 17 3. Damages in an amount to be determined at trial;
- 18 4. Google's unjust enrichment and/or disgorgement of Google's profits;
- 19 5. Trebling of damages for willful infringement and unfair competition;
- 20 5. Exemplary and punitive damages (except as to relief for Cal. B&P
21 17200 *et seq.*);
- 22 6. Pre-judgment interest at the legally allowable rate on all amounts owed;
- 23 8. Costs and expenses;
- 24 9 Attorney's fees and other fees under, among others, 15 U.S.C. § 1117(a)
25 *et seq.* as an exceptional case;
- 26 10. Restitution; and
- 27 11. Such other and further relief as this Court may deem just and proper.

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Dated: January 28, 2014

MINTZ LEVIN COHN FERRIS GLOVSKY
AND POPEO PC

By /s/Ben L. Wagner, Esq.

Andrew D. Skale, Esq.

Ben L. Wagner, Esq.

Justin S. Nahama, Esq.

Attorneys for Plaintiff

HANGINOUT, INC.

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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial as to all issues that are so triable.

Dated: January 28, 2014

MINTZ LEVIN COHN FERRIS GLOVSKY
AND POPEO PC

By /s/Ben L. Wagner, Esq.

Andrew D. Skale

Ben L. Wagner

Justin S. Nahama

Attorneys for Plaintiff
HANGINOUT, INC.

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CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On January 28, 2014, I filed a copy of the following document:

PLAINTIFF HANGINOUT, INC.’S FIRST AMENDED COMPLAINT FOR:

- 1) TRADEMARK INFRINGEMENT;**
- 2) FEDERAL UNFAIR COMPETITION; AND**
- 3) STATUTORY AND COMMON LAW UNFAIR COMPETITION**

[JURY DEMANDED]

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- | | |
|--------------------|---|
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Executed on January 28, 2014, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

/s/Ben L. Wagner
Ben L. Wagner, Esq.

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