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# Causation and Keywords

## A Case Study on the Use of Online Analytics Tools in Litigation

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### Abstract

*This article explores the use of online analytics tools in litigation involving consumer perception. The author served as a testifying expert for defendants in SLP Enterprises v. Solarna, LLC, in which the defendants were accused of breach of a settlement agreement that had resolved a prior trademark dispute. Through analysis of historical search engine results and Google AdWords, the author's opinion in the case demonstrated that the plaintiffs did not prove that defendants' use of the claimed terms caused economic harm to plaintiffs' online presence, and, therefore, no economic damages were awarded.*

*The purpose of this article is to illustrate the importance of proving causation in cases involving consumer perception, such as trademark infringement, and to provide readers with a framework for use of online analytics tools.*

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## I. INTRODUCTION

Online analytics tools can be crucial to case assessment and strategy in litigation involving harm to public perception and trademark infringement. Various causes of action look to consumer or public awareness or assessment of a matter, such as defamation, trademark infringement, certain right of publicity claims, and more. Yet these tools are often overlooked or not fully understood. This article relates to use of trademarks—specifically, the alleged breach of a contract that was agreed upon to resolve claims of trademark infringement. Despite the discrete focus of the case used to illustrate the tools in this article, these tools discussed can be applied when considering other such causes of action.

I am an intellectual property valuation and damages expert, specializing in the use of internet and social media analytics. My expertise includes internet, social media, and search engine optimization analysis in disputes involving trademark infringement, copyright infringement, and defamation. As a testifying expert, I use internet analytics tools frequently. This article will discuss a case in which my analysis of historic Google search results and AdWords were used to demonstrate that the defendants' use of the plaintiffs' claimed marks did not cause the economic damages sought.

The case discussed in this article, *SLP Enterprises v. Solarna*, was a breach of contract case arising out of a settlement agreement between the parties. The agreement had resolved the manner in which the parties used trademarks and other designations to advertise and sell sunglasses. Plaintiffs accused defendants of breaching the settlement agreement by using trademarks in violation of the terms set forth in the settlement agreement.<sup>1</sup>

I was retained by the defendants to respond to plaintiffs' expert analysis of economic damages, including the alleged use of plaintiffs' trademarks in defendants' internet advertising and marketing and the amount one of the plaintiffs would need to spend on marketing personnel in order to return to its claimed position in internet search results but for defendants' claimed breach of the agreement.

I was not asked to provide any opinions regarding liability. As discussed below, it is my understanding that defendants admitted to certain use of terms prohibited by the settlement agreement. Trial in the case—including my testimony—was limited to apportionment of damages.

In this article, I will discuss the background of the case as well as my analysis of Google search results and keyword use in conjunction with the claimed harm to plaintiffs. This case demonstrates the importance of understanding and evaluating internet analytical tools in matters of this nature, including the importance of careful analysis of causation even where, as here, the alleged trademark use had been demonstrated.

An understanding of the operation of internet analytics is crucial to the analysis of a case involving consumer confusion and use of trademarks, and counsel should undertake a multi-faceted approach from an early stage. This article pro-

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<sup>1</sup> Amended Complaint, *SLP Enters. v. Solarna, LLC*, Case No. 1884-CV-708-BLS1, Dkt. 12 (Mass. Super. Ct., Aug. 17, 2018).

vides a framework for understanding internet analytics tools and illustrates their use in the context of this case.

Section II provides the background for the case, including the parties' respective trademark use, prior dispute and settlement, and defendants' alleged breach of the settlement agreement. Section III discusses my analysis of plaintiffs' position in historic search engine results as well as defendants' use of Google AdWords. Section IV provides suggestions for use of these tools in litigation strategy.

## II. BACKGROUND

### a. The Plaintiffs<sup>2</sup>

My First Shades, Inc. ("MFS") is headquartered in Concord, Massachusetts and is the owner of trademarks relating to sunglasses, including "Unbreakable," "Unbreakable Frames," and "Unbreakable Sunglasses" (collectively the "MFS Designations").<sup>3</sup>

SLP Enterprises, LLC ("SLP") is headquartered in Concord, Massachusetts and sells sunglasses to retail stores or end-users over the internet. Pursuant to an exclusive license from MFS, SLP has the exclusive right to use the MFS Designations.<sup>4</sup> At the time of my analysis, the MFS Designations were used on or in connection with SLP's sunglasses, packaging, and advertising for sunglasses sales throughout the United States.

MFS owns United States trademark registrations for the MFS Designations including:

- UNBREAKABLE: Reg. No. 5,557,187,<sup>5</sup> on the Supplemental Register,<sup>6</sup> for "Sunglasses and component parts thereof and accessories, namely, earstems, nose pieces, foam strips, shields and lenses" in International Class 9, filed April 25, 2016 and claiming a date of first use in U.S. commerce of July 1, 2013;
- UNBREAKABLE SUNGLASSES: Reg. No. 5,582,440,<sup>7</sup> on the Supplemental Register, for "Sunglasses and component parts thereof and accessories, namely, earstems, nose pieces, foam strips, shields and lenses" in International Class 9, filed April 25, 2016 and claiming a date of first use in U.S. commerce of July 1, 2013;

<sup>2</sup> I will reference all Plaintiffs collectively throughout this article as "Plaintiffs," unless specific reference to My First Shades, Inc or SLP Enterprises, LLC is relevant.

<sup>3</sup> Amended Complaint, *supra* note 1, ¶ 2.

<sup>4</sup> *Id.* ¶ 4.

<sup>5</sup> U.S. Patent and Trademark Office ("USPTO") record available at *Trademark Status & Document Retrieval (TSDR)*, USPTO, [https://tsdr.uspto.gov/#caseNumber=87012669&caseType=SERIAL\\_NO&searchType=statusSearch](https://tsdr.uspto.gov/#caseNumber=87012669&caseType=SERIAL_NO&searchType=statusSearch) (last visited Sept. 12, 2023).

<sup>6</sup> The application was initially filed on the Principal Register but was amended to the Supplemental Register after MFS was unsuccessful in overcoming refusal on the basis that the mark was merely descriptive under Section 2(e)1 of the Trademark Act, 15 U.S.C. §1052(e)(1). See Response to Office Action, dated Jul. 24, 2018, U.S. Trademark App. No. 87/012,669, <https://tsdr.uspto.gov/documentviewer?caseId=sn87012669&docId=ROA20180724193314&linkId=6#docIndex=5&page=1>. Each of the registrations of MFS discussed herein encountered a similar refusal and was amended to the Supplemental Register.

<sup>7</sup> USPTO record available at *TSDR*, USPTO, [https://tsdr.uspto.gov/#caseNumber=87012693&caseType=SERIAL\\_NO&searchType=statusSearch](https://tsdr.uspto.gov/#caseNumber=87012693&caseType=SERIAL_NO&searchType=statusSearch) (last visited Sept. 12, 2023).

- UNBREAKABLE FRAMES: Reg. No. 5,613,889,<sup>8</sup> on the Supplemental Register, for “sunglasses and component parts thereof and accessories, namely, earstems, nose pieces, foam strips, shields and lenses” in International Class 9, filed January 29, 2018 and claiming a date of first use in U.S. commerce of July 1, 2013.

### b. The Defendants<sup>9</sup>

Solarna, LLC (“Solarna”) is headquartered in Boca Raton, Florida and sells adult sunglasses and adult prescription glasses to end-users over the internet. Solarna was formed in August of 2015 and began sales in the spring of 2016. Solarna operates the website [www.reks.com](http://www.reks.com).<sup>10</sup> Solarna’s co-founders George Granoff and Bernard Kossar also were named as defendants in this matter and were parties to the settlement agreement. Granoff also is a former employee of plaintiff SLP, the licensee of the MFS Designations.

Solarna owns the following U.S. trademark registration:

- BE UNBREAKABLE: Reg. No. 5,415,419,<sup>11</sup> on the Principal Register, for “Adult eyewear, namely, sunglasses, eyeglasses, and lenses, frames, and cases therefor” in International Class 9, filed August 24, 2016 and claiming a date of first use in U.S. commerce of May 6, 2016.

### c. Trademark Dispute and Settlement

In 2016, both MFS and Solarna commenced multiple trademark-related litigations that resulted in the settlement agreement at issue in the subsequent breach of contract litigation.

In June 2016, Plaintiffs sued Solarna in the United States District Court for the District of Massachusetts alleging trademark infringement, unfair competition, and unfair trade practices arising from the use of the MFS Designations.<sup>12</sup> That same month, SLP also sued former employee Granoff in Massachusetts Superior Court<sup>13</sup> for breach of fiduciary duty, breach of contract, and unfair trade practices.<sup>14</sup>

<sup>8</sup>USPTO record available at *TSDR*, USPTO, [https://tsdr.uspto.gov/#caseNumber=87774849&caseSearchType=US\\_APPLICATION&caseType=SERIAL\\_NO&searchType=statusSearch](https://tsdr.uspto.gov/#caseNumber=87774849&caseSearchType=US_APPLICATION&caseType=SERIAL_NO&searchType=statusSearch) (last visited Sept. 12, 2023).

<sup>9</sup> Defendants are referenced collectively as “Defendants” or “Solarna.” Separate discussion of the individual defendants is not pertinent to this article.

<sup>10</sup>*Intellectual Property*, REKS, <https://reks.com/intellectual-property/> (last visited Sept. 12, 2023).

<sup>11</sup>USPTO record available at *TSDR*, USPTO, [https://tsdr.uspto.gov/#caseNumber=87148956&caseType=SERIAL\\_NO&searchType=statusSearch](https://tsdr.uspto.gov/#caseNumber=87148956&caseType=SERIAL_NO&searchType=statusSearch) (last visited Sept. 12, 2023).

<sup>12</sup>Amended Complaint, *supra* note 1, ¶ 13.

<sup>13</sup>*Id.* ¶ 14.

<sup>14</sup>Around the same time, the parties were engaged in litigation regarding Solarna’s use and attempt to register REKS, which MFS claimed infringed its trademark RKS and related trademarks. MFS opposed Solarna’s trademark application before the USPTO Trademark Trial and Appeal Board. See Notice of Opposition, Dkt. 1, *My First Shades, LLC v. Solarna, LLC*, Case No. 91227517 (T.T.A.B. Apr. 26, 2016), <https://ttabvue.uspto.gov/ttabvue/v?pno=91227517&pty=OPP&eno=1>. Solarna then filed a declaratory judgment action against MFS in the United States District Court for the Southern District of Florida. See Motion to Suspend Proceeding in View of Pending Civil Action Pursuant To 37 C.F.R. § 2.117(A), Opposition, Dkt. 4, *My First Shades, LLC v. Solarna, LLC*, Case No. 91227517 (T.T.A.B. May 12, 2016), <https://ttabvue.uspto.gov/ttabvue/v?pno=91227517&pty=OPP&eno=4>. The RKS and REKS trademarks and related marks were included in the 2016 settlement agreement, but were not at issue in the later breach of contract litigation that is the subject of my article.

In addition, Granoff filed a suit against SLP in Palm Beach County Circuit Court.<sup>15</sup>

Separate from Solarna's current active trademark registration discussed above for BE UNBREAKABLE, Solarna previously applied to register BE UNBREAKABLE for "eyewear, namely, sunglasses, eyeglasses, and lenses, frames, and cases therefor,"<sup>16</sup> as well as UNBREAKABLE REKS SUNGLASSES<sup>17</sup> and UNBREAKABLE REKS,<sup>18</sup> both for "eyewear." Solarna expressly abandoned those earlier applications on August 16, 2016.<sup>19</sup> On August 24, 2016, Solarna filed the application that resulted in its active registration for BE UNBREAKABLE, Reg. No. 5,415,419.<sup>20</sup>

On August 16, 2016, following mediation, Plaintiffs and Solarna (and/or their predecessors in interest) signed a settlement agreement resolving the trademark dispute.<sup>21</sup> As noted above, this was the same day that Solarna requested the express abandonment of its prior trademark applications.

In the settlement agreement, Solarna agreed not to use as a trademark or register any UNBREAKABLE designation other than BE UNBREAKABLE.<sup>22</sup> The agreement allowed Solarna to use the word "unbreakable" to describe its products.<sup>23</sup> According to the complaint in the breach of contract action, Solarna agreed not to use "'Unbreakable' in any and all forms of a trademark in any manner whatsoever, including the marks 'Unbreakable', 'We Are Unbreakable', 'I Am Unbreakable', 'Unbreakable REKS Sunglasses' and 'Unbreakable REKS'. . . ."<sup>24</sup>

#### d. Alleged Breach by Solarna, Including Use of Keywords

Two years after the settlement agreement, in a complaint filed in Massachusetts Superior Court, Suffolk County on August 17, 2018, Plaintiffs alleged that Solarna used "unbreakable" and variations of the term in violation of the settlement agreement on its website; social media; advertising, marketing, and sales campaigns; and on packaging, labeling, and products.<sup>25</sup> Plaintiffs also alleged that Solarna "engaged in promotional and marketing campaigns with Google, Facebook, Instagram, and other sites wherein they specifically used and continue to use 'Unbreakable REKS Sunglasses' and 'Unbreakable REKS' marks and/or formative variations thereof in violation of the Settlement Agreement."<sup>26</sup>

According to the Amended Complaint, "[t]hrough the Solarna Parties' deliberate use of the Solarna Unbreakable marks and/or formative variations thereof in Solarna's Unbreakable campaign with Google, Facebook, Instagram, and Amazon, and in Metatags used for online advertising and sales for Solarna's sunglasses, the

<sup>15</sup> Amended Complaint, *supra* note 1, ¶ 14.

<sup>16</sup> U.S. Trademark Application Serial No. 86900285 (filed Feb. 8, 2016), [https://tsdr.uspto.gov/#caseNumber=86/900,285&caseSearchType=US\\_APPLICATION&caseType=DEFAULT&searchType=statusSearch](https://tsdr.uspto.gov/#caseNumber=86/900,285&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch).

<sup>17</sup> U.S. Trademark Application Serial No. 86818594 (filed Nov. 12, 2015), [https://tsdr.uspto.gov/#caseNumber=86/818,594&caseSearchType=US\\_APPLICATION&caseType=DEFAULT&searchType=statusSearch](https://tsdr.uspto.gov/#caseNumber=86/818,594&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch).

<sup>18</sup> U.S. Trademark Application Serial No. 86818518 (filed Nov. 12, 2015), [https://tsdr.uspto.gov/#caseNumber=86/818,518&caseSearchType=US\\_APPLICATION&caseType=DEFAULT&searchType=statusSearch](https://tsdr.uspto.gov/#caseNumber=86/818,518&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch).

<sup>19</sup> *Id.*

<sup>20</sup> U.S. Trademark Application Serial No. 86900285.

<sup>21</sup> Amended Complaint, *supra* note 1, ¶ 15.

<sup>22</sup> *Id.* ¶ 16.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* ¶ 29.

<sup>26</sup> *Id.* ¶ 30.

Solarna Parties have intentionally diverted potential sales and purchaser traffic from the SLP website, where SLP does a considerable amount of sales, to Solarna's website."<sup>27</sup> The Amended Complaint alleged that these actions caused loss of income, sales, and revenue to Plaintiffs.<sup>28</sup>

Unlike the 2016 litigation, the complaint filed in 2018 did not allege trademark infringement. Rather, the claims in the 2018 complaint were related to the claimed breach of the settlement agreement, including breach of contract, fraudulent inducement, violation of state consumer protection law, and fraud and deceit. The Amended Complaint requested various injunctive relief involving the use of "unbreakable" by Solarna, as well as monetary damages.

Solarna retained me to respond to Plaintiffs' expert reports calculating Plaintiffs' claimed damages in the matter. Prior to trial, a decision on summary judgment held that Solarna had breached the settlement agreement "by using the Solarna Unbreakable Designations,<sup>29</sup> or a formative variation, in advertising and marketing its REKS sunglasses."<sup>30</sup> Therefore, the only issue left for trial was the amount of damages.

A jury-waived trial on the case was held in March 2022.<sup>31</sup>

### III. OPINION AND TESTIMONY

During the trial, I testified that Plaintiffs' experts did not present support for their opinions that the alleged infringement caused economic damages, and therefore, there were no damages due in the matter. This article will focus on my opinion on the alleged damages associated with returning licensee SLP to the position it would have been in but for Defendants' claimed breach of the settlement agreement. My opinion and testimony also contained an analysis of the lost revenue and lost profits, rebutting Plaintiffs' damages experts, but that opinion is not the focus of this article.<sup>32</sup>

In addition to the traditional damages analysis, the Plaintiffs requested "costs associated with putting SLP in the position it would have been, but for Defendants' breach." At trial, I testified that there is no connection between the alleged breach and the claimed damages to justify an award of such costs.

Specifically, an expert for Plaintiffs opined on the amount SLP claimed it would need to hire an outside digital marketing firm or to build and maintain

<sup>27</sup> *Id.* ¶ 35.

<sup>28</sup> *Id.* ¶ 36.

<sup>29</sup> As defined in the Amended Complaint, the "Solarna Unbreakable Marks" are "Unbreakable," "We Are Unbreakable," "I Am Unbreakable," "Unbreakable REKS Sunglasses," and "Unbreakable REKS."

<sup>30</sup> Memorandum and Order on Motions for Award of Fees and Costs, Case No. 1884-CV-708-BLS1, Dkt. 79 (Mass. Super. Ct., June 30, 2022), available at [https://www.masscourts.org/eservices/searchresults.page?x=A-49zl\\*gcKTbzr38bERN-FN9mPCl\\*SjJxZNPt0pUZX2eMYyvRkTaHGeNkp-J3LBFHwmdlCclLMUZZ2pN540qK2rECfB2bE2w3cv4Gak2xjlkYSfuHAWqk0kAi1I5jXtzdLbNyxJzuNG5vB0bxirRcSDbmti7mxfPNnAgti4MiGThjS8PPBtjH3xz3eyI113C994-zhR4d2Q3I746eMKw&antiCache=1718893773651](https://www.masscourts.org/eservices/searchresults.page?x=A-49zl*gcKTbzr38bERN-FN9mPCl*SjJxZNPt0pUZX2eMYyvRkTaHGeNkp-J3LBFHwmdlCclLMUZZ2pN540qK2rECfB2bE2w3cv4Gak2xjlkYSfuHAWqk0kAi1I5jXtzdLbNyxJzuNG5vB0bxirRcSDbmti7mxfPNnAgti4MiGThjS8PPBtjH3xz3eyI113C994-zhR4d2Q3I746eMKw&antiCache=1718893773651).

<sup>31</sup> *Id.*

<sup>32</sup> My opinion noted that Plaintiffs' expert overestimated economic damages due to an aggressive assumption of Plaintiffs' anticipated revenue growth and profit margin. My opinion further noted that Plaintiffs had not accounted for other factors that may have led to lost sales aside from the claimed breach by Defendants. I provided an alternative calculation of lost revenues or profits in the event that Plaintiffs could prove that any lost revenues or profits were caused by Defendants' alleged breach of the settlement agreement.

its own digital marketing team to regain its prior claimed online presence. A key premise in Plaintiffs' claim for damages related to these marketing costs was that SLP had a dominant position in internet search results prior to Defendants' use of the terms at issue. They also claimed that Solarna used Google AdWords to bid and pay for top search results on the term "unbreakable," thereby decreasing SLP's claimed dominance. However, my investigation revealed that Plaintiffs did not dominate the search results either before or after Defendants allegedly used keywords containing Plaintiffs' mark and took other actions that Plaintiffs claimed were in breach of the settlement agreement.

In this case, I presented two main conclusions, one directed toward SLP's organic search results and the other toward Defendants' use of paid AdWords:

1. The historical organic search results did not show SLP in the top search results. Accordingly, SLP had not achieved the dominance Plaintiffs claimed. Therefore, there was no foundation for costs to return Plaintiffs to but-for dominance; and
2. Plaintiffs alleged that Solarna also benefited from its use of Google AdWords using the marks at issue. Analysis of Defendants' use of AdWords demonstrated that even if Defendants used those words to generate Google Ads, there were no profits or unjust enrichment. That is, Defendants' purchase and use of AdWords containing the marks did not result in damages.

In the next sub-sections of this article, I discuss my methodology for reaching both of these conclusions.

### a. Dominance in Search Results

Plaintiffs' expert concluded that SLP would need to spend a minimum of \$400,000 to \$500,000 to hire a qualified outside digital marketing firm to assist in regaining its online presence over a period of twelve to eighteen months. Alternatively, Plaintiffs' expert concluded that it would cost at least \$300,000 per year for SLP to build and maintain its own internal digital marketing team to regain its online presence, plus the costs of ad spending for Google Ad Words.

The primary assumption underlying these claimed costs for either an internal or external digital marketing team was that SLP had an advantageous or dominant position in internet search results in the first place. I opined that this assumption was flawed.

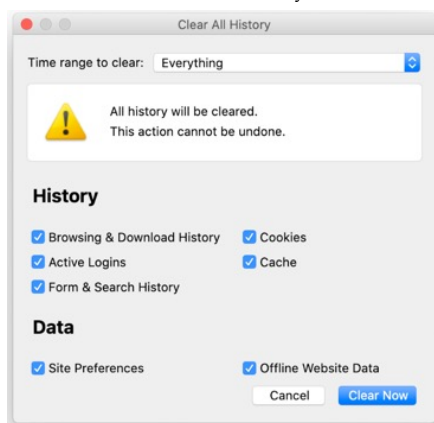
Plaintiffs did not provide analysis, proof, or supporting documents indicating SLP or MFS "dominated" internet search results prior to Defendants' alleged breach of the settlement agreement. Therefore, I performed my own investigation and analysis. My investigation, as described herein, indicates SLP did not dominate internet search results either before or after the alleged breach.

To begin my historical search engine results page ("SERP") investigation and analysis,<sup>33</sup> I launched the Firefox Browser version 72.0.2., navigated to google.com

<sup>33</sup>This historical SERP investigation is the best indication of what search results would have appeared during the

and cleared my browsing data. The purpose of clearing my browsing data before the start of my SERP Investigation is to avoid any bias based on my past browsing history as illustrated in Figure 1:<sup>34</sup>

**Figure 1**  
Clear All History



To investigate Plaintiffs’ claimed “dominance” of internet search results, I used Google’s Date Range function to obtain SERPs from relevant dates over the course of nearly seven years, including:

1. Plaintiffs’ claimed first use of the MFS Designations;<sup>35</sup>
2. Alleged first use of the MFS Designations by Defendants;
3. Effective Date of the settlement agreement;
4. End date of financial data produced by SLP in the case; and
5. Date I performed the investigation.

To use Google’s Date Range function to obtain SERPs from past dates I entered a search phrase, clicked the “Google Search” button, then clicked the “Tools” button located below the blue search icon as shown in Figure 2.

I then clicked on the “Any time” dropdown menu and entered each date in the “To” area and clicked “Go” as shown in Figure 3. This custom query provided SERPs prior to the date entered. In other words, my SERPs would not include results after the date entered.

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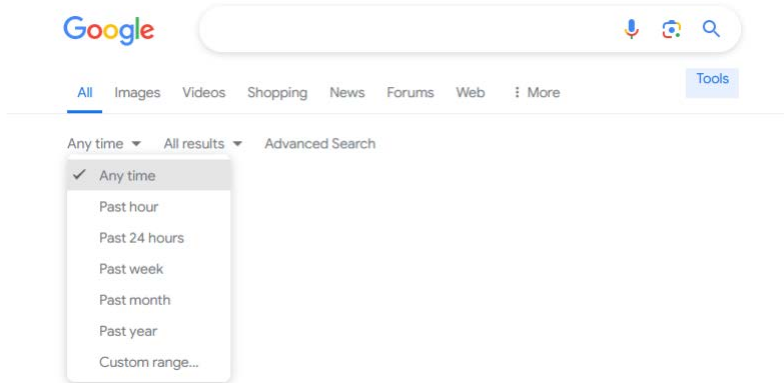
historic time period chosen.

<sup>34</sup>Doug Bania & Brian Buss, *The Comprehensive Guide to Economic Damages: Using Internet Analytic Tools for Valuation and Damages Calculations in Internet IP Infringement and Defamation Cases*, in BUSINESS VALUATION RESOURCES 561, 562–563 (5th ed. 2018).

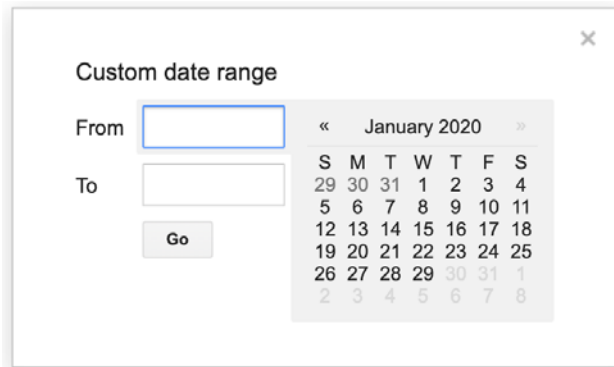
<sup>35</sup>Amended Complaint, *supra* note 1, ¶ 24 (Note: I am referring to the first paragraph 24 as the document has two paragraphs labelled #24.).



**Figure 2**  
Google Date Range Tool



**Figure 3**  
Google Custom Date Range Tool



Part of my review of the SERPs was to determine if an SLP-related website appeared within the top-three organic results. Research from the time of my expert report in this matter showed that the top three organic SERPs received a 56% to 75% click through rate (CTR), (meaning the ratio of users who click on a specific link to the number of total users who view the page) compared to the other results.<sup>36</sup> In other words, the top three websites listed in Google SERPs receive the

<sup>36</sup> CTR data is constantly fluctuating. For the purpose of this article, I have used the Internet Archive to access and cite to versions of the sources available around the time of my expert report in this case. See, e.g., *Google Organic CTR History*, ADVANCED WEB RANKING (Apr. 17, 2020), [https://web.archive.org/web/20200417045232/https://www.advancedwebranking.com/ctrstudy/] (last visited Oct. 16, 2023) (showing that the top three U.S. search results achieved a total of 56.05 percent. Note that the data at the time differentiated between desktop and mobile versions. The data used here relate to the desktop rankings.); Brian Dean, *WE ANALYZED 5 MILLION GOOGLE SEARCH RESULTS, Here's What We Learned About Organic Click Through Rate*, BACKLINKO (Aug. 27, 2019) [https://web.archive.org/web/20200130153154/https://backlinko.com/google-ctr-stats] (last visited Oct. 16, 2023) (showing the top three results in a "Google Organic CTR Breakdown by Position" to have achieved a total of 75.1 percent of CTR). See also Doug Bania, CLP, *Using Internet Analytic Tools for Valuation and Damages Calculations in Internet IP Infringement and Defamation Case*, in 2 THE COMPREHENSIVE GUIDE TO ECONOMIC DAMAGES 320–21 (7th ed. 2023). As of the writing of this article, the backlinko.com data showed the top three search results garnered a total of 54.4 percent of CTR. See Brian Dean, *WE ANALYZED 5 MILLION GOOGLE SEARCH RESULTS, Here's What We Learned About Organic Click Through Rate*, BACKLINKO (May 28, 2023), https://backlinko.com/google-ctr-stats (last visited Oct. 16, 2023); while the advancedwebranking.com data showed that the top three search results garnered a total of 69.26 percent of CTR. See

majority of the clicks for a specific Google search. Therefore, the top three organic SERPs would provide a snapshot of the “dominant” search results at any given time.

A study from Backlinko, a company founded by recognized search engine optimization (SEO) expert Brian Dean, showed at the time of my report that the top three organic SERPs had a 75% CTR.<sup>37</sup> Advanced Web Ranking, which provides software to track search rankings, has been tracking Google CTR since May 2014. The data continue to show that the top three SERPs typically account for over 50% of the CTR.<sup>38</sup> Therefore, if as claimed by Plaintiffs’ expert, SLP “dominated internet search results when consumers performed online searches for its Unbreakable marks for sunglass products,” an SLP-related website should have appeared in the top three search results during the past-period SERPs.

My SERP Investigation included a search for “Unbreakable,” “Unbreakable Frames,” and “Unbreakable Sunglasses” at the five points in time listed above. For example, excerpts of the results from 1) Plaintiffs’ claimed first use date for its marks; 2) the alleged first use date of the marks at issue by Defendants; and 3) the effective date of the settlement agreement are shown here at Figure 4:<sup>39</sup>

Figure 4  
Excerpt of SERP Analysis

SERP Analysis for the Unbreakable Designations			
Historic SERP Date	Search	SLP in Top #?	Top 3 Organic SERPs
Before 7/1/2013	Unbreakable	No	1. youtube.com - Unbreakable Trailer; 2. youtube.com - Unbreakable Trailer; 3. youtube.com - Unbreakable - Mr. Glass
Before 7/1/2013	"Unbreakable Frames"	No	1. miraflexglasses.net - Miraflex Glasses   Safe Glasses, Flexible Glasses, Children ...; 2. indiamart.com - Unbreakable Frame Glasses, Unbreakable Glass Frames ...; 3. eyewear-repair.com - To Frame Buyer's Guide - Eyewear Repair of Colorado
Before 7/1/2013	"Unbreakable Sunglasses"	No	1. sharperimage.com - Eyewear @ Sharper Image; 2. maximumeeyewear.com - Indestructible Hercules Sunglasses Global Vision ...; 3. youtube.com - glorify unbreakable - YouTube
8/14/2015	Unbreakable	No	1. youtube.com - Unbreakable - Trailer - YouTube; 2. youtube.com - Unbreakable - Trailer - YouTube; 3. youtube.com - Unbreakable - Mr. Glass / End Title - YouTube
8/14/2015	"Unbreakable Frames"	No	1. miraflexglasses.net - Miraflex Glasses   Safe Glasses, Flexible Glasses, Children ...; 2. americaneyeglassrepair.com - Unbreakable eyeglasses: Myths vs Facts   All American ...; 3. indiamart.com - Unbreakable Frame Glasses, Unbreakable Glass Frames ...
8/14/2015	"Unbreakable Sunglasses"	No	1. glorify.com - glorify unbreakable; 2. sharperimage.com - Eyewear @ Sharper Image; 3. maximumeeyewear.com - Indestructible Hercules Sunglasses Global Vision ...
8/16/2016	Unbreakable	No	1. youtube.com - Unbreakable Movie Trailer HD Best Quality - YouTube; 2. amazon.com - Unbreakable (Two-Disc Vista Series): Bruce ... - Amazon.com; 3. theguardian.com - Unbreakable   Film   The Guardian
8/16/2016	"Unbreakable Frames"	No	1. miraflexglasses.net - Miraflex Glasses   Safe Glasses, Flexible Glasses, Children ...; 2. americaneyeglassrepair.com - Unbreakable eyeglasses: Myths vs Facts   All American ...; 3. indiamart.com - Unbreakable Frame Glasses, Unbreakable Glass Frames ...
8/16/2016	Unbreakable Sunglasses	No	1. reks.com - REKS™ Optics Introduces the Perfect Stocking Stuffer ...; 2. reks.com - REKS™ Optics Unbreakable Sunglasses - REKS; 3. glorify.com - Sunglasses - glorify unbreakable

Google Organic SERP CTR Curve, ADVANCED WEB RANKING, <https://www.advancedwebranking.com/ctrstudy/> (last visited Oct. 16, 2023). The current data demonstrate the continuing importance of the top three SERP positions.

<sup>37</sup> See Brian Dean, WE ANALYZED 5 MILLION GOOGLE SEARCH RESULTS, Here’s What We Learned About Organic Click Through Rate, BACKLINKO (May 28, 2023), <https://backlinko.com/google-ctr-stats> (last visited Oct. 16, 2023).

<sup>38</sup> Google Organic SERP CTR Curve, ADVANCED WEB RANKING, <https://www.advancedwebranking.com/ctrstudy/> (last visited Jun. 7, 2024).

<sup>39</sup> Of note, I used quotation marks for “Unbreakable Frames” and “Unbreakable Sunglasses.” The purpose of the quotation marks is to instruct Google that I only wanted SERPs for the exact phrase as opposed to SERPs related to the individual words “Unbreakable” and “Frames.”

The SERP investigation results contained 20 different websites but *did not* include any SLP-related websites. Despite the availability of these tools to review Search Engine Results Pages over time, Plaintiffs' expert report did not include any equivalent investigation or review of past period SERPs. I opined in my report and subsequent trial testimony that Plaintiffs' foundational claim that SLP dominated internet search results for phrases related to the MFS Designations was both unsupported and incorrect.

Thus, my opinion was that any claim for damages related to amounts SLP may spend to return to its "but-for" dominance of internet search lacked foundation. SLP did *not* dominate internet search before or after the alleged breach of the settlement agreement. Because it never achieved a dominant position in search results, any actions by the Defendants could not have harmed or interfered with SLP's "dominance." Therefore, any monetary investment directed toward dominating internet search is unrelated to the Defendants' actions.

The discussion above addresses the conclusions of Plaintiffs' digital marketing expert. Plaintiffs retained a separate expert regarding monetary damages who also did not conduct any investigation or present conclusions regarding causation. For example, she provided conclusions regarding the claimed damages associated with expenses Plaintiffs allegedly incurred to mitigate the claimed harm by Defendants. Such damages were duplicative of the digital marketing expert's claimed damages to return Plaintiffs to the "dominant" search position and appeared to be based upon the same assumption regarding search results.

Plaintiffs' damages expert presented a forecast of the sales that would have taken place "but-for" Defendants' use of the marks in breach of the contract and calculated more than \$1.5 million in lost revenues. Without a causal basis, the court ruled in favor of Defendants on all claims seeking monetary damages and did not award any damages to Plaintiffs.

My opinion in this case illustrates the manner in which SERP history, with publicly-available tools, can be used to demonstrate public and consumer perception of companies, individuals, brands, and other indicia.

## b. Use of Google Ads

Plaintiffs' expert report also claimed that Solarna used Google AdWords to bid and pay for top search results positioning on "Unbreakable." Again, the report did not provide proof or supporting documents related to this claim. Therefore, I performed my own investigation of Solarna's use of Google Ads.

Typical Google SERPs include both organic results and paid results. Google organic search results generally appear because a website owner has optimized its webpage to appear when a Google user searches for a specific word or phrase. Although there is no charge by Google to the website owner for organic search results, normally, time and effort are needed to optimize the website through the use of SEO and other methods. Google paid results are achieved through Google's Ads program. A website owner has to sign up for and build Google Ads. Its search results then will appear along with organic results (generally set off by a designation

that they are “Sponsored”), but the website owner has to pay each time a Google user clicks on one of its ads.

I was provided Read-only access to Google Ads analytics for Solarna’s Reks Optics account. Google Ads analytics are available to the account owner that purchases those Google Ads. Here, Solarna provided me with the ability to view and analyze analytics for its Reks Optics page but not to manipulate the results or control its Google Ads.

I ran an “Ads & Extensions” report for the time period of August 16, 2016 (effective date of the settlement agreement) through February 12, 2020 (date I logged in and downloaded the report). An Ads & Extensions report contains text used for the Google Ads and text included in the various headlines and descriptions that accompany an ad.

The Ads & Extensions report showed that Solarna ran a total of 4,534 advertisements on Google Ads during the period studied. Of those ads, 1,932 did not contain text in the headline or description fields. These advertisements are considered video or picture advertisements, therefore could not be analyzed for use of the claimed marks as no text or link was provided.<sup>40</sup>

I further analyzed the 2,602 remaining advertisements to determine if they contained MFS Designations. Of the 2,602 advertisements containing text, 1,613 advertisements appeared to resemble the MFS Designations. I then added a filter to the 1,613 advertisements to exclude the phrases “Be Unbreakable” and “REKS – Be Unbreakable” because these two terms can undisputedly be used by Solarna according to the settlement agreement. This left 1,522 advertisements pertaining to the disputed MFS Designations involved in the case.

The 1,522 advertisements pertaining to Plaintiffs’ claimed MFS Designations cost Defendants a total of \$32,821 in pay-per-click fees. However, only 72 of the 1,522 advertisements generated conversions. I considered a conversion to be each sale the Google Ads generated. There were 585 conversions related to the 72 advertisements and the cost associated with these conversions was \$23,870.

According to conversations with Solarna’s Management, margins are roughly \$30 per unit for selling REKS sunglasses. Therefore, Solarna generated \$17,562 on the 585 conversions that resemble the MFS Designations.

I further noted that the costs associated with the 1,522 advertisements pertaining to Plaintiffs’ claimed designations was \$32,821. The costs associated with only the 72 advertisements that generated conversions was \$23,870. The Defendants were charged a pay-per-click fee each time someone clicked on the advertisement, whether the advertisement converted a customer or not.

Therefore, when considering either Defendants’ \$32,821 costs for all 1,522 advertisements containing Plaintiffs’ claimed designations or Defendants’ \$23,870 costs for only those 72 advertisements that generated conversions, based on \$17,562 in income generated by conversions, Solarna lost money by advertising with text that resembles Plaintiffs’ claimed designations.

Based on this analysis, Defendants did not benefit by advertising their sunglasses with text, video, or pictures that resemble the MFS Designations. I concluded that damages should not be available to the Plaintiffs in this scenario.

<sup>40</sup> Conservatively, my analysis included estimates regarding hypothetical assumed conversion rates for the video or picture advertisements, and concluded that Defendants lost money on these advertisements.

A summary of my review of Solarna's Google Ads is below:

**Figure 5**  
Solarna Google Ads Review

<b>Solarna Google Ads Review</b>	
<b>Ads With Text</b>	
Total Ads	4,534
Ads With Text	2,602
Ads Using MFS Designation*	1,522
Ads Using MFS Designations and Converted*	72
Transactions Related to the 72 Ads With Conversions*	585
*Exclude "Be Unbreakable"	
<b>Ads Without Text</b>	
Total Ads	1,932
Total Ads with Conversions	68
Transactions Related to the 68 Ads With Conversions	758
Note: Conversions = sales transactions	

My analysis of the profit margins associated with conversion of text-based ads is below:

**Figure 6**  
Solarna's Profit Margins from Ads with Text

<b>Ads With Text</b>	
<b>Analysis 1: Results for Text Ads with or without Conversion</b>	
Gross Margin	\$17,562
Less: Ad Cost	\$32,821
<b>Profit Margin (Loss)</b>	<b>(\$15,258)</b>
<b>Analysis 2: Results for Text Ads that Generated Conversions</b>	
Gross Margin	\$17,562
Less: Ad Cost	\$23,870
<b>Profit Margin (Loss)</b>	<b>(\$6,308)</b>

As noted above, I was able to analyze Solarna's Google Ads conversions based upon information accessible through Google Ads analytics tools, as well as basic data on the company's pricing and costs.

Based primarily upon the analyses of search engine results and Ad Words, I concluded that SLP achieved web sales without ever dominating search results. Similarly, Solarna achieved internet sales without dominating search results for the MFS Designations. Therefore, I concluded that dominant search results don't appear to be the sole factor in achieving web sales for either company. Use of the designations at issue does not appear to have resulted in high amounts of online sales for either party.

### c. Trial Court Ruling

The trial court ruled in favor of defendants on each claim seeking monetary damages.<sup>41</sup>

Defendants' use of the claimed marks was not at issue at trial. In fact, the court ruled on summary judgment that Defendants did in fact breach the settlement agreement by using prohibited marks.<sup>42</sup> My trial testimony, therefore, focused only upon the claimed damages in the matter, including my findings rebutting the "but-for" causation underlying the damages claimed by Plaintiffs.

After trial, both parties requested reimbursement of attorneys' fees, each claiming that it was the prevailing party. The court denied both parties' motions. Although it noted that "all of the parties 'prevailed' in some respect," the court held that neither was the "prevailing party" for purposes of fee shifting.<sup>43</sup>

## IV. CONCLUSIONS AND TAKEAWAYS

This case involved the breach of a settlement agreement regarding alleged trademark infringement, rather than trademark infringement itself. Nonetheless, the SLP case can provide important insights into causation and the internet analytics tools that can be used in the context of trademarks and related claims.<sup>44</sup>

Internet search analytics tools are widely available yet often overlooked or misunderstood. In cases involving claimed harm to consumer perception, reputational damage, or similar harms, it is crucial to understand and use these tools from an early stage in litigation. Notably, while certain internet analytics tools are publicly available and can be accessed with relative ease, they seem to be underutilized in initial case assessment that could help shape litigation strategy and settlement negotiations.

In this article, I have used the *MFS v. Solarna* case to show how the tools I used can provide important insight into causation and other aspects of such claims.

<sup>41</sup> The trial court also issued an order clarifying the manner in which the defendants may use the term "unbreakable." Order for Final Judgment, SLP Enters. v. Solarna, LLC, Case No. 1884-CV-708-BLS1, Dkt. 58 (Mass. Super. Ct., Apr. 20, 2022), available at [https://www.masscourts.org/eservices/searchresults.page?x=A-49z1\\*gcKTbzr38bERN-FN9mPCI\\*SjJxZNPt0pUZX2eMYyvrKtAHGeNkp-J3LBFHwmdlCclLMUZZ2pN540qK2rECfB2bE2VOF7ZXmN\\*woXzmMoKgYtNkYtSlCdxxLxOQOBw2lKGv6KDDQ1Htu9qmeCdm0AIBqulLHwMhJZp\\*M3ouUhlL-SxZpew\\*-pPNfBRhXrVPQ8CZGGMxHYu-hPcXg&antiCache=1718894232450](https://www.masscourts.org/eservices/searchresults.page?x=A-49z1*gcKTbzr38bERN-FN9mPCI*SjJxZNPt0pUZX2eMYyvrKtAHGeNkp-J3LBFHwmdlCclLMUZZ2pN540qK2rECfB2bE2VOF7ZXmN*woXzmMoKgYtNkYtSlCdxxLxOQOBw2lKGv6KDDQ1Htu9qmeCdm0AIBqulLHwMhJZp*M3ouUhlL-SxZpew*-pPNfBRhXrVPQ8CZGGMxHYu-hPcXg&antiCache=1718894232450).

<sup>42</sup> Decision and Order Regarding Parties' Cross Motions for Summary Judgment, SLP Enters. v. Solarna, LLC, Case No. 1884-CV-708-BLS1, Dkt. 33, at 6 (Mass. Super. Ct., Dec. 15, 2020), available at [https://www.masscourts.org/eservices/searchresults.page?x=A-49z1\\*gcKTbzr38bERN-FN9mPCI\\*SjJxZNPt0pUZX2eMYyvrKtAHGeNkp-J3LBFHwmdlCclLMUZZ2pN540qK2rECfB2bE2Ela54\\*fiNIFybpNXokCUEqMk5HouKLBfS9kljkbHqmy36wXDtGhCsyRB-dW6NtgUvQwdErmRhgfvvUJ3X86yEujkV5jTlXUlpf6aM52SFTZHQ1H83Vcmmw&antiCache=1718894300036](https://www.masscourts.org/eservices/searchresults.page?x=A-49z1*gcKTbzr38bERN-FN9mPCI*SjJxZNPt0pUZX2eMYyvrKtAHGeNkp-J3LBFHwmdlCclLMUZZ2pN540qK2rECfB2bE2Ela54*fiNIFybpNXokCUEqMk5HouKLBfS9kljkbHqmy36wXDtGhCsyRB-dW6NtgUvQwdErmRhgfvvUJ3X86yEujkV5jTlXUlpf6aM52SFTZHQ1H83Vcmmw&antiCache=1718894300036).

<sup>43</sup> Memorandum and Order on Motions for Award of Fees and Costs, SLP Enters. v. Solarna, LLC, Case No. 1884-CV-708-BLS1, Dkt. 79 (Mass. Super. Ct., June 30, 2022) available at [https://www.masscourts.org/eservices/searchresults.page?x=A-49z1\\*gcKTbzr38bERN-FN9mPCI\\*SjJxZNPt0pUZX2eMYyvrKtAHGeNkp-J3LBFHwmdlCclLMUZZ2pN540qK2rECfB2bE2w3cv4Gak2xjlkYSfuHAWqk0kAil15jXtzdLbNyxJzUNg5vBObxirRcSDbmti7mxfpNNAgti4MIGThjS8PPbtjH3xz3eyI113C994-zhR4d2Q3I746eMKw&antiCache=1718893773651](https://www.masscourts.org/eservices/searchresults.page?x=A-49z1*gcKTbzr38bERN-FN9mPCI*SjJxZNPt0pUZX2eMYyvrKtAHGeNkp-J3LBFHwmdlCclLMUZZ2pN540qK2rECfB2bE2w3cv4Gak2xjlkYSfuHAWqk0kAil15jXtzdLbNyxJzUNg5vBObxirRcSDbmti7mxfpNNAgti4MIGThjS8PPbtjH3xz3eyI113C994-zhR4d2Q3I746eMKw&antiCache=1718893773651).

<sup>44</sup> I also have testified and written previously about the failure to demonstrate damages in a trademark claim even when the defendant has infringed the mark. Doug Bania, *Can Trademark Infringement Be a Victimless Crime? The Stone Creek v. Omnia Case*, 1 INT'L J.L. & PUB. ADMIN. 41 (2018), <https://redfame.com/journal/index.php/ijlpa/article/view/3879>. While of course there are substantive differences between a claim of trademark infringement and a claim of breach of contract—even arising from an agreement governing the use of trademarks—many of the causation considerations are similar.

Based upon my experience in this and other cases, it is relatively common for internet experts to opine upon harm to consumer perception or the like without a firm basis in facts and evidence. A thorough internet investigation using tools like the ones discussed in this article will provide the necessary underlying facts in cases like this. Without causation, litigants face the risk that they will be unable to demonstrate economic harm and prove damages, even if there is infringement.

Parties should be careful not to overlook the importance of causation and the relationship to claimed damages, either for the original infringement or breach of an agreement like the one at issue here. The online analytics tools discussed in this article can be an important component of this consideration and should be taken into account early in the analysis of threatened or actual litigation.

In sum, my testimony in the SLP case discussed two tools on the important question of causation:

- **Historic Search Engine Results:** As noted above, analysis of the results pages of searches using particular keywords can be accessed using the search rankings at any given time. These provide a snapshot of the rankings generated for terms – such as a party’s claimed trademark – which can be helpful to indicate the historic perception associated with the use of the mark. This is the best indication of what a Google search user would have been shown when searching for the MFS Designations. In this case, the search engine results page directly addressed one party’s claimed dominance in search results. Notably, historic search engine results are relatively simple to obtain and are publicly available. They should be considered in evaluating claims involving consumer perception, reputation, and similar considerations, at every phase, from analysis of the strength of a case up until trial or settlement.
- **Google Ads:** Unlike the search engine results, Google Ads analytics like the ones used here require access to a given account. Accordingly, these analytics may not be readily available prior to the onset of litigation. However, analytics results should be discussed with your client if it is accused of infringement, or considered early in discovery if another party has access to relevant information.

As the *MFS v. Solarna* case demonstrates, it is crucial to demonstrate a link between the claimed breach and any monetary damages sought.

Understanding the tools discussed in this article and including them in the assessment of the case from the onset can help to strengthen the case or can avoid potential pitfalls.