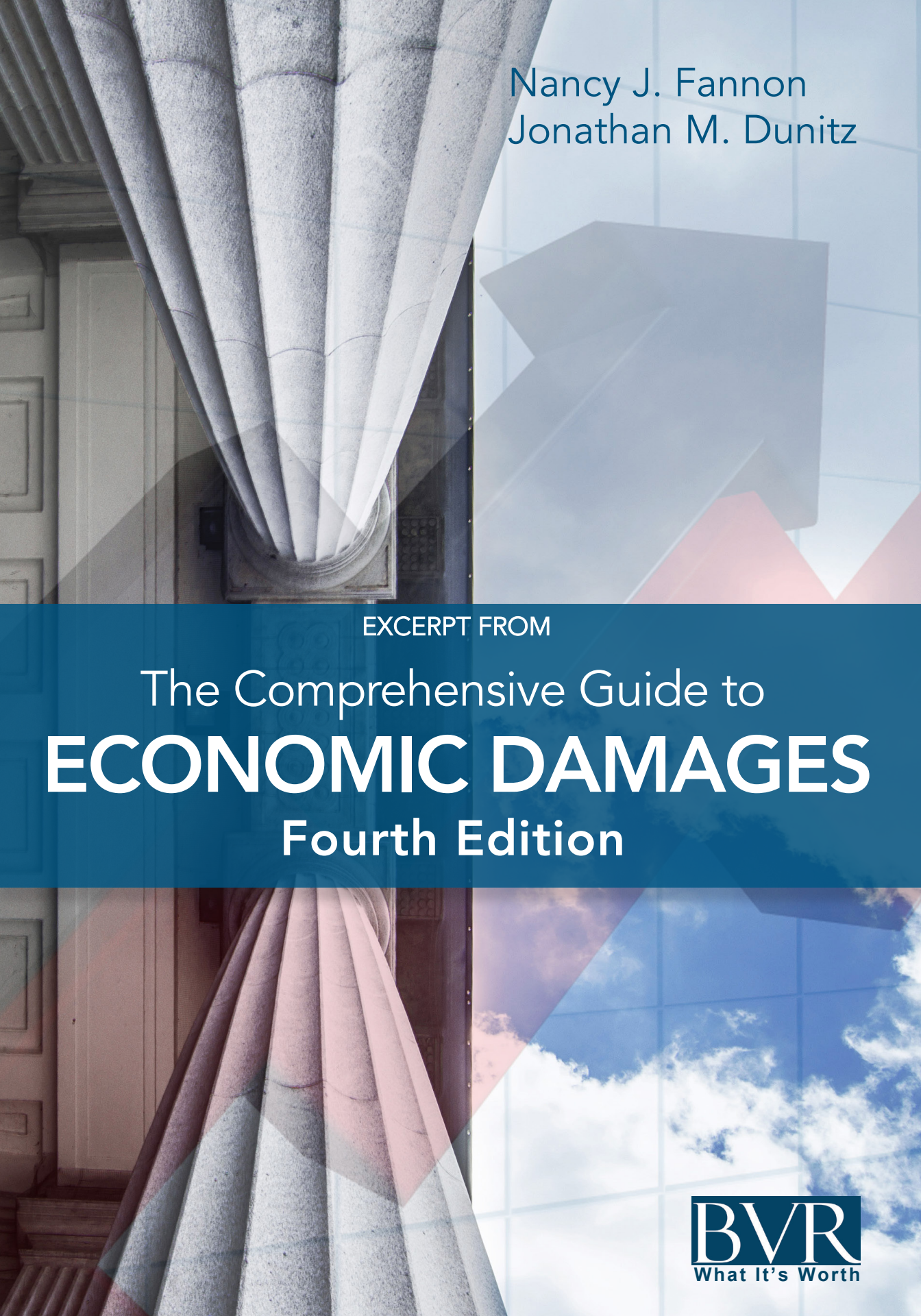

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Jonathan M. Dunitz

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Chapter 29.
Using Internet Analytic Tools for Valuation and Damages Calculations in Internet IP Infringement and Defamation Cases

By Doug Bania and Brian Buss

1.0 Introduction

Use of the Internet and social media has become an increasingly essential element of conducting business in the United States and globally, which in turn raises new issues for calculating damages and performing valuations. With almost every business now using the Internet and social media to conduct business, cases of Internet IP infringement, IP misuse, and defamation have increased and evolved. Before the rise of these new media, cases of infringement and defamation typically occurred in print or on television and were visually obvious. Today, however, infringement and misuse via Internet can be hidden in metadata or keywords and may not be visually obvious. Such misuse was usually also geographically constrained to the area or region where the actual misuse occurred or was broadcast. In the world of traditional media, the number of people who would have been exposed to a billboard, sign, or even a television show could only be estimated at best. Today, Internet infringement has the possibility of being seen by anyone in the world, and a social media post can immediately go viral.

This chapter describes the ways in which Internet and social media analytics can be used to accurately measure and quantify the spread, awareness, and impact of IP misuse. In doing so, it explores the overlap between Internet and social media analysis and intellectual property analysis and provides examples showing the use of the data as part of traditional valuation and damages analyses.

This chapter begins with a brief discussion of four concepts key to understanding effective Internet use and analysis that valuation experts will want to clarify for clients, judges, jurists, or mediators: *search, optimization, social media,* and *analytics.* It then discusses the principles and readily available tools that analysts can use to uncover facts essential to determining whether clients have a defensible case for legal action and to what financial damages they may be entitled.

2.0 Key Concepts of Internet and Social Media Analysis

Internet and social media analysis assignments begin with the process of educating the audience (i.e., client or trier of fact) about how important the Internet has become to the success of a business. The client and participants in a possible court case need to understand that the Internet is no longer primarily a source of information and entertainment but a serious business platform. Most businesses have at least a website, and a rapidly increasing number utilize a combination of websites and social media to promote their business and connect with customers. The Internet has replaced the Yellow Pages as the first place potential customers turn to find a product or service, and the plethora of books, publications, and websites offering Internet and social media-oriented advice to business owners is testimony that the Internet has become an essential part of virtually every company's advertising.

Among the jaw-dropping statistics related to the use of the Internet and social media are the following:

- In 1999, there were 280 million Internet users; latest statistics indicate this number has grown to nearly 3.2 billion.[1]
- Through the second quarter of 2015, e-commerce generated over $317 billion in U.S. retail sales, or 7% of all retail sales.[2] Latest estimates suggest that this figure will grow to over $430 billion by 2017.[3]
- In 2014, mobile commerce accounted for 25% of sales; as of August 2015, mobile commerce sales have accounted for approximately 30% of e-commerce in the United States.[4]

1 At internetlivestats.com/internet-users/, accessed Aug. 27, 2015.
2 "Quarterly Retail E-Commerce Sales 2nd Quarter 2015," *U.S. Census Bureau News,* U.S. Department of Commerce, Aug. 17, 2015.
3 Statista.com, "U.S. Retail E-Commerce Sales From 2010 to 2018," statista.com/statistics/272391/us-retail-e-commerce-sales-forecast/, accessed Aug. 28, 2015.
4 Internet retailer Mark Brohan, "Mobile Commerce Is Now 30% of All U.S. E-Commerce," posted Aug. 18, 2015.

- In 2012, 81% of businesses that have blogs considered their blogs an important asset to their business, and 93% of online experiences began with a search engine.[5]
- In 2014, over $7.4 billion in advertising revenue was generated via social media advertising, $4.9 billion of which came from mobile users. By 2020, these figures are expected to reach $21.2 billion and $19.7 billion, respectively.[6]

The Internet and social media have changed the way businesses communicate with customers, promote products, and interact with other businesses. Rather than relying on traditional media outlets, businesses can create text, images, videos, advertisements, and consumer messages and publish all of them for free. Websites and social media pages are the new storefront, and search and social media users are today's foot traffic. Commerce takes place on computers, tablets, and mobile phone screens, and tracking all of this activity has become a key component of analyzing, quantifying, and valuing today's business activities.

2.1 Search

If one thinks of the Internet as the new corner store, search is the new equivalent of foot traffic. It is thereby important to stress to an audience that successfully employing search tools to reach customers requires building websites based on specified keywords and incorporating the same keywords throughout a company's website and multiple social media platforms. Accordingly, it is helpful to explain to the trier of fact the basics of how search engines crawl Web pages and index websites based on keywords. An analogy is that the Internet can be compared to a huge library and that keyword searches on such search engines as Google, Bing, and Yahoo are the new card catalogs that users employ to find their desired information. For example, Google employs Web crawlers called Googlebots to continuously explore the Internet, finding publicly available websites and scanning and collecting the keywords and phrases they use. According to Google, its Googlebots have spent over one million computing hours to find and index trillions of pages on the Internet.[7]

But despite the expanded opportunities that search engines can offer a business, there are also ways in which rivals can take advantage of how those results are presented to potential customers to unfairly compete and infringe upon a business's intellectual property. At the beginning of each assignment, therefore, it is important to review

5 Eric Siu, "24 Eye-Popping SEO Statistics," searchenginejournal.com, posted April 19, 2012.
6 "Social Media Advertising," statista.com/outlook/220/109/social-media-advertising/unites-states#, accessed Aug. 28, 2015.
7 "Inside Search: Crawling & Indexing," Google.com.

Internet search results for specific words, phrases, or registered marks related to a client's business. (See Exhibit 1 for the steps to take to clear the Web browser and eliminate any user biases from influencing the observed search results.)

Exhibit 1. Steps for Clearing Recent History on Web Browser (Firefox v. 40.0.2)

1. Launch Firefox Web Browers
2. Click on History > Clear Recent History
3. Time range to clear: Everything
4. Click on Details to expose the options
5. Check boxes:
   - Browsing & Download History
   - Form & Search History
   - Cookies
   - Cache
   - Active Logins
   - Offline Website Data
   - Site Preferences
6. Click the Clear Now button
7. Type in the keyword or phrase you are analyzing into Search Engine

***Note**: When using Google, you can click on Search tools and modify your search location by zip code*

This analysis enables an analyst to identify whether a business is benefiting from search-derived site traffic, if the business or its competitors are using paid search, which terms are associated with the business, and if competitors are appearing in the same search results. As discussed later, each of these observations provides useful facts and background for valuations and damages calculations.

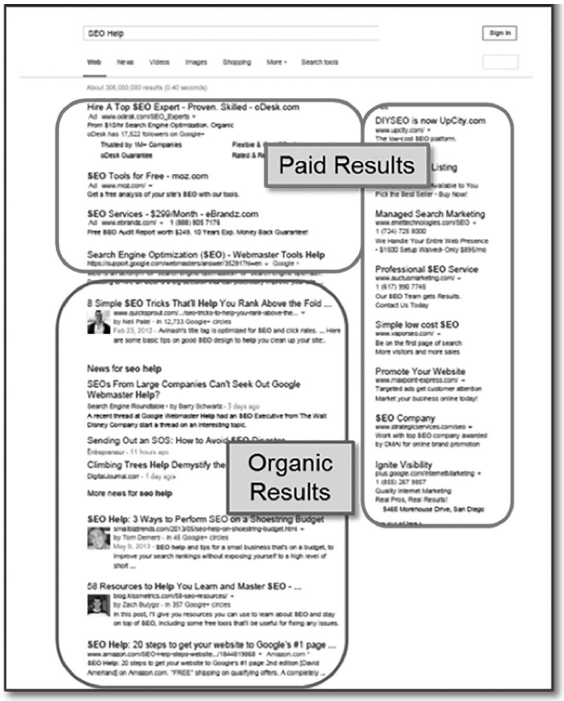
2.2 Optimization

The next major point to communicate to an audience is the importance of first-page search results. When an Internet user types in a search term in the form of a keyword or phrase, the first-page results that appear (as shown in Exhibit 2) include both paid and organic results, the latter of which the search engine produces based on the relevance of the website to the user's search terms.

Available statistics indicate that approximately 60% of users' organic clicks go to the top three search results and that very few search users scroll past the first page.[8] We also find it important to clarify that first-page organic search results don't happen by accident and that successful business owners do all they can to appear on the first page of Internet search results by optimizing their website with keywords and phrases that

8 "120 Awesome Marketing Stats, Charts & Graphs," hubspot.com.

Exhibit 2. Typical Google Search Results Page



best match the search topics their potential customers are likely to use in search queries. Purchasing a domain name and populating the website with content are only the first steps in promoting a business online; the next is engaging in search engine optimization (SEO) to climb the long ladder to the first page of search results.

Given that first-page organic search results are difficult to achieve, businesses may choose to pay a fee to have the website included in the paid results on the first page and thereby drive traffic to their website. Pay-per-click programs such as Google AdWords provide users with tools for creating advertisements that will appear in relevant keyword search results as paid advertisements. Because these advertisements appear based on Internet search users' own queries, they are less intrusive than online banner ads or pop-up ads and typically appear above and to the right of the organic search results. Although many Internet users recognize the difference between organic and paid search results, some paid results nonetheless receive a lot of traffic and may cost an Adword user just a small fraction of the profits resulting from user click-throughs that lead to sales.

The selection of words and phrases used in the website is a key strategic decision for website owners because, to benefit from search engines, a website developer must properly code a site with keywords that are relevant to the content of their website in

order to provide a match to an Internet user's search query and include their website in search results. In addition to using selected words and phrases in the website's viewable content, a business has a better chance of ranking high in search results by categorizing those keywords and phrases through the use of *metadata* (i.e., data about data) in the back-end coding areas of each Web page.[9] It is this metadata that tells the Googlebots what the keywords are about and increases the chances that Googlebots will find the website and that the site will appear on the first page of search results.[10]

Because website developers can select any keywords they wish, however, optimization also offers opportunities for rival businesses to include keywords that may intentionally or unintentionally infringe upon another business's intellectual property, such as trademarks or brand messages. A thorough review of optimization strategies and practices involves a combination of interviewing website managers, examining HTML code, and understanding accepted SEO best practices. Therefore, a review of a business's SEO activities provides useful facts and data points for any valuation or damages calculation.

2.3 Social Media

Today, successful businesses also develop relationships with their customers by educating them through social media rather than blatantly trying to sell them something. Social media have evolved from posting family photos and uploading pet videos to use of these platforms by businesses to interact with current and potential customers regularly.

Social media platforms such as Twitter, YouTube, and Facebook allow businesses to build a dedicated following of targeted customers and educate their followers about their products and services. A 2013 *MIT Sloan Management Review* report on what it terms *social business*, for instance, found that use of social media as a marketing and promotional tool by business is increasing and is being integrated into many different business functions. Among its findings:

- Over 85% of respondents indicated that social business is either "important" or "somewhat important" for the "marketing/branding/reputation management" areas of their organization.
- 65% reported that social business is either "important" or "somewhat important" to the "marketing brand/reputation risk" objectives of their organization.

9 "Google Webmaster Tools," Google.com.
10 "Google Search Engine Optimization Starter Guide, 2010," Google.com.

- 35% responded that use of social business in "driving brand affinity" had increased within their organization in the last 12 months.[11]

Companies often pay various platforms to place advertisements related to their products on the social media pages of likely customers. Although social media offer businesses an increasingly powerful marketing and promotional tool, their use can also be a double-edged sword for businesses if these platforms are used to generate or disseminate negative feedback or to disparage or siphon traffic from a business. Thus, savvy businesses not only use social media to get their desired messages out, but also carefully monitor messages posted by others, both positive and negative. Reviewing a business's social media activity and the posts and comments made by social media users about the business can provide useful insight into the demand for a product or service, the effectiveness of marketing initiatives, and possible explanations for changes in financial performance.

2.4 Analytics

Businesses can use three readily available types of tools to measure and fine-tune why visitors are coming to the website and what they do after they get there. These Internet analytics provide analysts with data and information to use in conducting their valuation and damages analyses.

- *Site traffic source tools* provide a useful way to understand demand, including which search terms are driving traffic to a business's website, why customers are visiting the site, what pages they visit after clicking through to a site, and if the visits resulted in any transactions.
- *Competitor traffic source tools* such as Spyfu.com and others reveal a competitor's organic and paid search engine optimization strategies.
- *Internet and social media advertising tools* help businesses and analysts quantify the costs of driving traffic to a website and their return on marketing investment.

Internet analytics are a useful source of data regarding a variety of business activities. For example, clients inquiring about the value of their trademark or brand name may be surprised to learn that very few search users are using the registered term in search queries or are clicking through to the company's website after a search. Analytics are the tools by which users can quantify how many visitors are arriving at a website and

11 David Kiron, Doug Palmer, Anh Nguyen Phillips, and Robert Bergman, "Social Business: Shifting Out of First Gear," *MIT Sloan Management Review Research Report,* July 16, 2013.

track what those visitors do after they get to the website, both of which are useful information for evaluating product demand and the contribution of trademarks to overall profitability.

In short, it is important for analysts to understand that the audience for a valuation analysis or damages calculation may not fully understand the new world of business on the Internet and social media. These concepts thus typically need to be fully explained to the analyst's audience before the analyst can make use of the data and observations gained from these tools in a valuation. Therefore, analysts should take the time to understand and teach these concepts before plunging into the calculations.

3.0 How to Use the Tools: Incorporating Internet and Social Media Data and Information Into Your Valuation and Damages Analyses

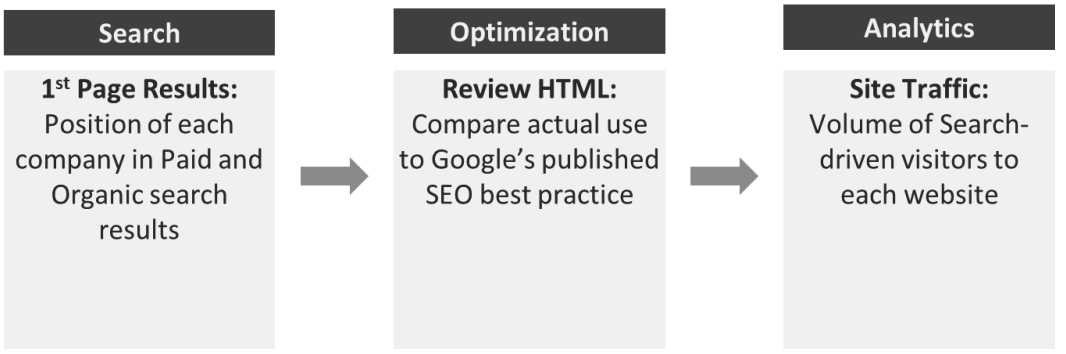
It is important to note that these tools do not replace the existing valuation and damages methodologies but are supplemental tools that can be used to gather more facts and data to leverage as part of the classic accepted methodologies. They offer analysts relatively easy and inexpensive tools to explore who is coming to a website and why in order to provide a precise understanding of what is driving traffic at a website, whether infringing names or trademarks are being used to redirect traffic, and whether the infringing use is leading to customer transactions.

3.1 Identifying IP Misuse

These tools can serve as a powerful aid in the determination of how trademark infringement has occurred on the Internet and social media. As previously mentioned, Internet infringement, unlike misuse on a billboard or TV, may not be visually obvious to users. Therefore, the challenge in presenting a defensible case that a client's competitor is guilty of IP infringement or misuse is to provide persuasive evidence that such infringement was deliberate and strategic rather than accidental. Although it is not likely that someone would use a famous person's image by mistake, sometimes determining intentional use requires a little more investigation. As shown in Exhibit 3, this may begin with a simple Web search to determine the extent to which a competitor may have unfairly used the client's IP to enhance their own search results, followed by employing readily available optimization best practices and analytics to determine whether that infringing use was strategic rather than accidental.

Although each of these steps contributes useful information and observations, combining all three can yield the analysis needed to make a determination of intentional versus unintentional use.

Exhibit 3. Combining Key Tools to Develop the Analysis of Intent and Harm



Take, for example, the case of two competing companies, here called "Plaintiff" and "Defendant," which had operated in nonoverlapping geographies for many years. However, as both businesses evolved into offering online retail distribution and services, their businesses began to overlap and compete for customers outside their home geography. When the Defendant started using the Plaintiff's registered trademark in a seeming attempt to drive traffic to its site, the authors of this chapter were hired to investigate whether and how the trademark was being misused.

As shown in Exhibit 4, our initial Web search using the Plaintiff's trademark revealed that, although the first paid and the first organic search results led to the Plaintiff's own website, the second and third organic results led instead to the Defendant's site, and that the fifth, sixth, and eighth organic results led to the Defendant's social media accounts. This combination of website and social media results was creating the perfect conditions for the Defendant to eventually take over the first organic search result position. The net effect of these results was the cannibalization of the Plaintiff's search traffic.

To determine whether these rankings resulted from strategic actions on the part of the Defendant, we analyzed the Defendant's website's HTML code and compared those findings to Google's publically published best-practice SEO tactics. Because a website's HTML code is publically available, we did not have to go through the legal discovery process to obtain access to the information. Exhibit 5 shows the steps for analyzing HTML and metadata.

As shown in Exhibit 6, this allowed us to "read" the site's code to investigate its SEO strategies.

Google and other sources regularly publish best practices for optimizing a website. These publications are intended to aid website developers in achieving optimal search

Exhibit 4. Search Results for 'Plaintiff'

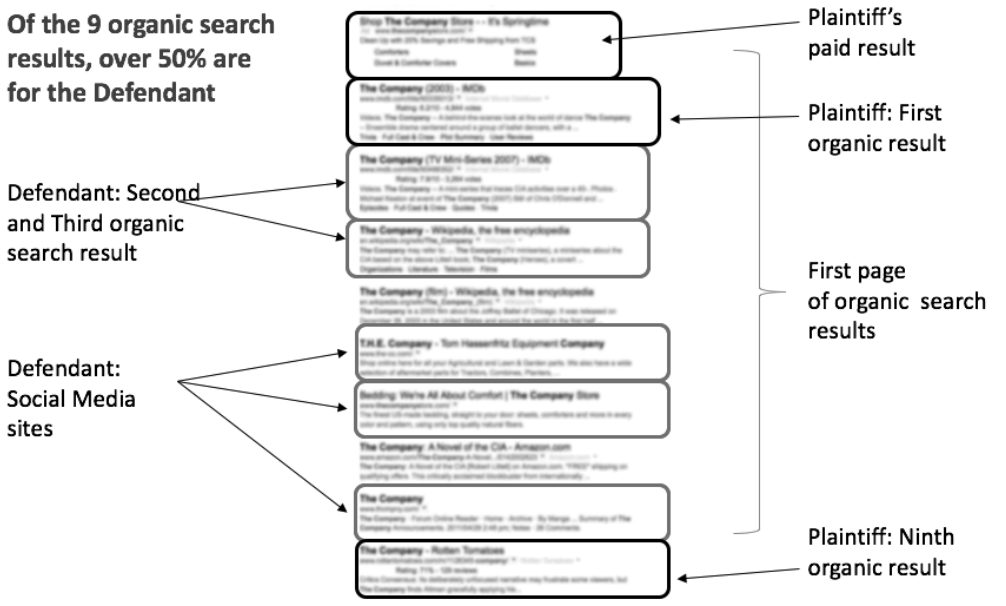


Exhibit 5. Steps for Analyzing HTML and Metadata

1. Launce Firefox web browser (version 40.0.2)
2. Type in the URL of the website you are analyzing
3. Click on Tools > Web Developer > Page Source to reveal html code
4. From here you can perform keyword searches, including a search for the term analytics to determine if the site is tracking visitors

results. In this case, the Defendant followed nine different recommended best practices but used another company's name when doing so, thereby demonstrating that the infringing use followed Google's recommended tactics and hence was intentional and strategic.

3.2 Supplementing, Not Replacing, Accepted Valuation Methodologies

Although the calculation of damages related to the Internet and social media are based on newly available forms of information, it still rests on traditional methods of calculating damages or business valuation. Depending on the facts of a given case, valuation

Exhibit 6. Evidence of IP Infringer's Strategic Use of Best-Practice SEO Tactics

Tactic	Use at Maryland.com	Likely Result
Use key terms in Title Tag	<title>Plaintiff, Sales and Structure Designs</title>	The title tag "Plaintiff" alerts both the search engines and the user as to the topic of that particular page
Use key terms in the URL	http://www.sample.com/about-plaintiff	This URL contains the keywords "Plaintiff" which provides users and search engines more information about the page
Use key terms in the Description	meta name="description" content=";Plaintiff has been selling since 1972. Click here to find out more about sales, structure and ." />Plaintiff	The description meta tag provides the search engines a summary of what the page is about
Use key terms in the Keywords	<meta name="keywords" content="sales, structure, Plaintiff, green supplies, Plaintiff, Sample Company, samplecompanuy" />	If a search engine finds specific key terms throughout the content of the website and in the keyword meta tags, that website will likely be ranked higher in search results
Use key terms in Title Tag	<title>Plaintiff, Sales and Structure Designs</title>	The title tag "Plaintiff" alerts both the search engines and the user as to the topic of that particular page
Use key terms in the URL	http://www.sample.com/about-plaintiff	This URL contains the keywords "Plaintiff" which provides users and search engines more information about the page
Use key terms in the Description	meta name="description" content=";Plaintiff has been selling since 1972. Click here to find out more about sales, structure and ." />Plaintiff	The description meta tag provides the search engines a summary of what the page is about
Use key terms in the Keywords	<meta name="keywords" content="sales, structure, Plaintiff, green supplies, Plaintiff, Sample Company, samplecompanuy" />	If a search engine finds specific key terms throughout the content of the website and in the keyword meta tags, that website will likely be ranked higher in search results

calculations may be based on *cost*, *income,* or *market* methodologies, as outlined in Exhibit 7.

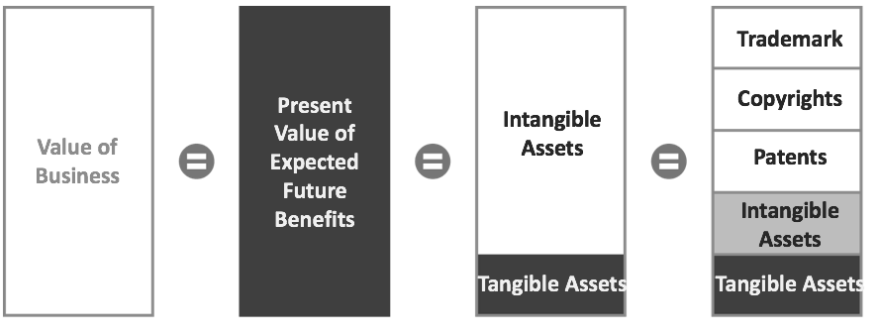
A major point to keep in mind when making calculations utilizing Internet or social media data is that the value of IP depends in part on the resources required to generate economic benefits from that IP. When analyzing or valuing IP or calculating the impact of IP misuse, we need to understand all the resources that create value for a business, of which IP is only one. For example, a trademark cannot generate value without the contribution and use of other tangible and intangible resources, as represented in Exhibit 8. The same is true for a celebrity endorsement, copyright, or patent. Thus the key to IP valuation is *apportionment*, the process of identifying the economic benefits derived from the use of an IP asset.

Exhibit 7. Standard and Internet IP Valuation Methodologies

Analysis of the financial / economic impact of IP Assets on the Internet will employ one or more of these methodologies

	Standard Methodologies	Internet IP Methodologies
Cost Approach	Cost to replace or replicate	• Relief from pay per click • Value of impressions
Income Approach	Present Value (PV) of future benefits • Discounted cash flows (DCF) • Relief from Royalty • Lost Profits / Unjust Enrichment	PV of • Additional Site Visits / Traffic • Additional online transaction or customer inquiries
Market Approach	Study of transactions • Guideline companies • Guideline transactions • Industry benchmarks	• Comparable Pay Per Click • Hypothetical license/transaction

Exhibit 8. Considerations in the Apportionment of the Value of IP



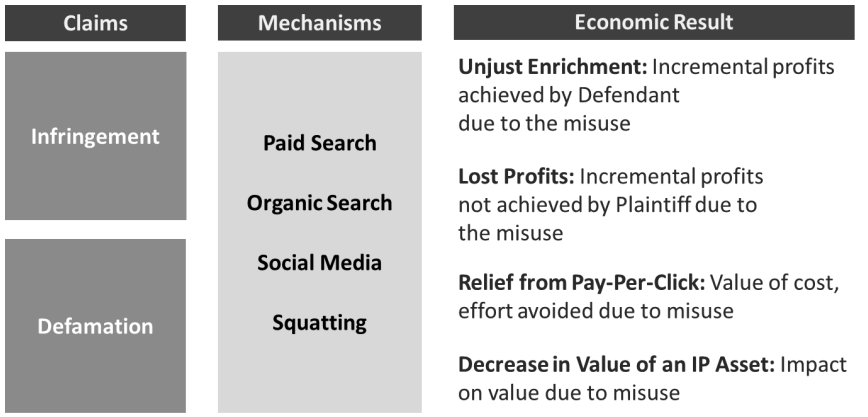
Business Value > Value of IP Assets owned by the Business

Apportionment: Identify the portion of future benefits derived from use of the IP Assets

An analysis of Internet-related damages, therefore, must first focus on the asset or assets involved. For trademarks and brands, for instance, one should determine whether the misuse is visible or hidden in metadata or whether negative or defamatory comments are tied to a brand. For copyrights, one examines whether the infringing use drives traffic or is buried on a nontransactional page. For example, in one copyright infringement case in which a relationship-driven company was accused of using infringing product description text on its website, Google analytics demonstrated that customers rarely visited the page containing the infringing text. The infringing company conducted sales through its sales reps, not online, and therefore the contribution of the copyright to sales was very low.

Regardless of the asset type (trademark, copyright, name and likeness, domain name), the claimed harm in Internet cases typically occurs through one of four mechanisms, whose economic results can typically be measured in one or more of four ways. As shown in the Internet damages matrix in Exhibit 9, these mechanisms are paid search, organic search, social media, and so-called "domain name squatting" (the bad-faith registration of an Internet domain name using another's trademark).[12] When asked to measure and quantify the economic result of infringement or defamation, an analyst can employ four measurement methods based on the cost, income, and market approaches of valuation analysis: unjust enrichment,[13] lost profits,[14] relief from pay-per-click, and decrease in the value of the IP asset.

Exhibit 9. Internet Damages Matrix



The following case studies in which the authors of this chapter were involved demonstrate some of the ways in which Internet and social media analytics can provide information necessary to document and value IP infringement and misuse.

3.3 Using Internet Analytics to Support an Unjust Enrichment Calculation

In the sample case illustrated in Exhibit 10, we used Google analytics to measure traffic driven by trademark[15] search results, which allowed us to follow the path of each visitor and calculate the number of those visitors who eventually made a purchase. Then, following accepted methods to conduct a financial analysis of IP, we used financial ratios to determine the incremental profit achieved from these search-driven purchases, which represent the incremental profit or unjust enrichment achieved from misuse of the trademark.

12 www.icann.org/resources/pages/cybersquatting-2013-05-03-en, accessed Aug. 27, 2015.
13 The unjust enrichment remedy is discussed in detail in Chapters 30-32.
14 Lost profits methodologies are discussed in detail in Chapters 10-11.
15 See Chapter 28 for an in-depth discussion of trademark damages.

Exhibit 10. Determining Unjust Enrichment Due to Online Trademark Infringement

Unjust Enrichment Profits: Traffic at Defendant's Website

Monthly visits due to searches using TM	**25,000**
Ratio: Visitors who purchased	**25%**
TM search purchases	**6,250**
Average e-commerce purchase	**$250**
Incremental revenue	**1,562,500**
Ratio: Incremental profit margin	**15%**
Incremental profit per month	**234,375**

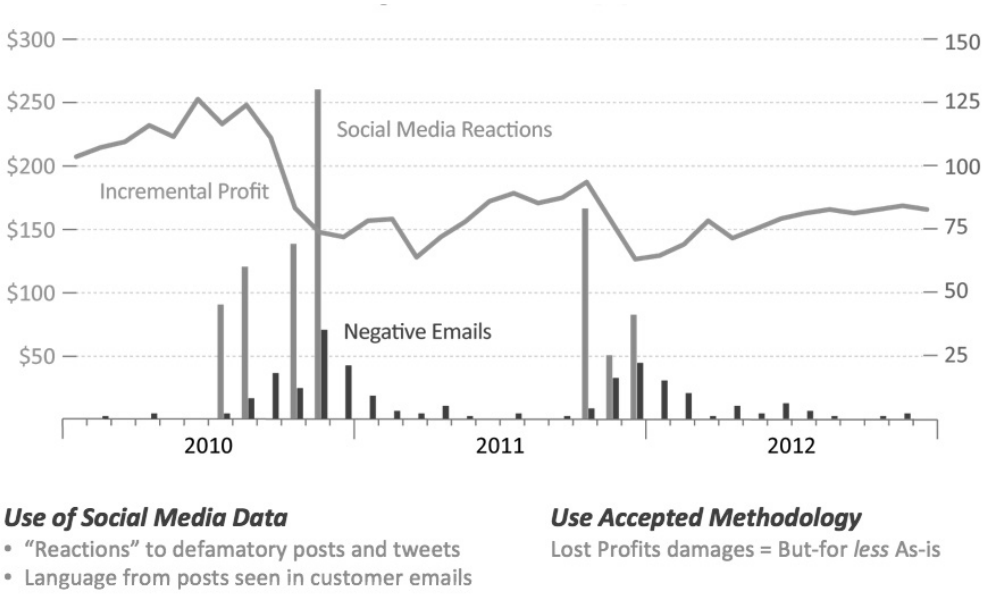
The calculation of incremental profit per month then required further analysis to determine whether 100% of the calculated incremental profit should be apportioned to use of the trademark. This was done by assessing the contribution to overall profits made by all of the different assets and resources employed by the business.

3.4 Using Social Media Analytics to Support Lost Profits

In this sample case, we analyzed social media activity to determine the financial impact of defamatory comments made about a company by its former executive and spokesperson in blogs, Facebook, and Twitter. We began by researching and counting the number of reactions to the former executive's posts, which included likes, comments, shares, retweets, and the like—i.e., actions that represented more than a view or impression. We also found that many of the defamatory comments made by the former executive were later reflected in customer feedback emails received by the company. In Exhibit 11, the light-blue bars represent the number of social media reactions to posts made by the former executive and the dark-blue bars the number of negative emails received by the company; the green line represents the company's monthly profits. These results allowed us to proceed to a typical lost profits calculation using a "before-and-after" methodology and to demonstrate through analysis of social media activity the correlation between as-is performance and the defamation.

In this case, the analysis was as direct as finding social media posts related to a business and tabulating social media user reactions to the defamatory posts. These counts were then combined with a traditional lost profits analysis to provide a more thorough calculation of damages.

Exhibit 11. Use of Social Media Data to Support Accepted IP Valuation Method



3.5 Using Google Analytics to Defend Against a Celebrity Name and Likeness Claim

In this case, a celebrity's estate accused a company of using the celebrity's name and likeness on its website and social media without permission. The damages expert hired by the estate had calculated damages in the tens of millions based on a traditional analysis that simply compared the fame of the celebrity to that of other paid celebrity endorsers appearing in person and in television commercials promoting different types of products. In this case, however, the actual infringement consisted only of the use of stock photos on a website and Facebook page. The company's counsel needed a methodology to counter the damages claim made by the estate.

To this end, Google analytics allowed us to measure the actual impact of this IP misuse. The data gathered by using those analytics indicated that traffic to the company's website had actually declined during the period the celebrity's name and likeness were used on the site. As shown in Exhibit 12, the top 50 search terms that drove nearly 50% of traffic to the company's website did not include the celebrity's name. Searches of the celebrity's name led to only 45 site visits, or less than a half of one percent of the traffic to the company's website. In addition, the company's website was a business-to-business site, not one where visitors could purchase products.

The demonstrated decline in visits countered the notion that the company had benefited from use of the celebrity's photo. To further support the claim of minimal benefit, analytics provided an actual count of the small number of visitors to the company's site based

Exhibit 12. Analysis of Search-Term and Web-Traffic Data Regarding Impact of Infringed Celebrity Name and Likeness

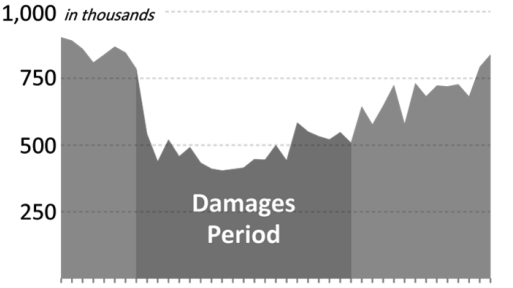
Search Term Analysis

Top 50 search terms did not include Celebrity's name

Top 50 search terms yielded 49% of total site visits during the Damages Period

Search terms using Celebrity's name resulted in a total of 45 visits during the Damages Period, less than (0.004%)

Monthly Page Views at Defendant's Website



Data demonstrating decline in Website traffic during Damages Period

on searches for the celebrity's name, a result that would have cost the company only a few hundred dollars had they employed a pay-per-click search advertising campaign. Employing the above search-term and Web-traffic data provided by analytic tools, we were then able to counter the overblown calculation resulting from a market approach toward damages with a more precise and credible calculation based on a cost approach, using actual site traffic data during the period of misuse and what we have termed a *relief from pay-per-click* analysis that determined the actual price it would have cost the infringer to replicate the site visits achieved.

3.6 Using Analytics to Support a Celebrity Endorsement Relief From Pay-Per-Click Claim

In another case, a company had hired a celebrity to promote and endorse a soon-to-be-launched product and then failed to compensate the celebrity for his actions, leading the celebrity to seek compensation for the social media promotional activities he had undertaken on behalf of the company. Again, we determined that a classic market approach based on a review of endorsement fees paid by comparable companies was not adequate to determine the amount of reasonable compensation for this celebrity endorser's efforts and instead conducted a cost approach, using a relief from pay-per-click methodology to estimate the cost of replicating the impact of the celebrity's promotional activities.

In this case, the celebrity had a large Facebook following and his own YouTube channel, which he had previously used to promote other products. The celebrity's Facebook posts and YouTube videos promoting the product all achieved a substantial number of views and impressions. For this case, the relief from pay-per-click calculation provided

an indication of the cost of search-based advertising that the company would have had to invest to obtain the same number of views and impressions. In other words, the celebrity's promotional activities and the awareness they created relieved the company from spending an equivalent amount on search and social media advertising.

The number of views and impressions resulting from the celebrity's promotional activities was collected from a review of each post and video created by the celebrity featuring the product. The Google pay-per-click (PPC) rate of 75 cents was determined by creating an Adwords campaign based on the celebrity's name. The Google AdWords rate of 75 cents per click-through charged to users of paid searches that employed the celebrity's name was also greater than the rate charged for either the product name or the names of comparable celebrities. (Google Search and YouTube advertising function similarly and typically use similar click-through rates.) Facebook similarly charges advertisers for the number of visitors who have viewed and reacted to ads appearing alongside a Facebook user's page; reactions are charged a higher rate than views, which Facebook calls impressions. The combination of charges for views and impressions on Facebook represents the number of users who have seen or reacted to the promotional message on Facebook. These are costs avoided by the company, who otherwise would have needed to pay Facebook to obtain an equivalent number of views and impressions. Facebook advertising rates for impressions and clicks were obtained by creating an equivalent Facebook advertising campaign based on the celebrity's followers and Facebook users who had "liked" the celebrity's Facebook page. As shown in Exhibits 13 and 14, we multiplied the relevant advertising rate by the number of video views, post-impressions, and post-reactions to calculate the amount of advertising the company would have needed to spend in order to achieve the same number of impressions achieved by the celebrity's activities.

In this final case example, the company had benefited from the social media-based promotional activities undertaken by the celebrity, which had achieved a substantial number of views and impressions and the resulting awareness for the company's product. Rather than relying on estimates of the celebrity's influence, the relief from pay-per-click calculation provided a direct measurement of the impact of the celebrity's activities by qualifying the amount the company would have otherwise have needed to spend to replace that awareness.

4.0 Conclusion

These cases and others like them prove the value of incorporating Internet and social media tools in valuation analyses and damages calculations. As more and more business activity occurs online and through social media, valuation analysts unfamiliar

Exhibit 13. Analyzing YouTube Video Views

YouTube
4 videos posted on the CELEBRITY's channel received over 2 million views

Total viewership (an active response), multiplied by the Google AdWord rate

YouTube Activities	Viewers
CELEBRITY Presents PRODUCT at CES	454,134
CELEBRITY comes to the CNET stage (CNET)	96,462
CELEBRITY Calls Name	1,188,608
CELEBRITY in Las Vegas introduces PRODUCT	372,067
Total YouTube Impressions	2,111,271
$Value / Impression	$0.75
Value of YouTube Activities	**1,583,453**

Exhibit 14. Analyzing Facebook Responses and Impressions

Facebook
Reactions are Likes, Comments and Shares

A Reaction is an "active" response to the Celebrity's post, and is more valuable than a view

Likes for CELEBRITY's Facebook page	Likes	Cost	
Impression Price ($/1000 impressions)	34,714,592	$0.16	
Click Price ($/Click)		$0.75	

Reactions to Posts Involving the Products	Likes	Comments	Shares
Visit www.product.com make sure to like!	28,921	7,432	657
CELEBRITY Presents PRODUCT	17,528	1,425	412
CELEBRITY in Vegas Introducing PRODUCT . . .	18,256	312	514
Total	64,705	9,169	1,583

Value of Activity	Count	Cost	Value ($)
Net Page Likes	34,649,887	$0.00016	5,544
Post Likes	64,705	$0.75	48,529
Other Reactions	10,752	$0.75	8,064
Value of Facebook Impressions			**62,137**

with these business analysis tools may find themselves left behind. Furthermore, we have found that the incorporation of search results analysis, Internet analytics tools, optimization tactics analysis, and social media activities analysis provides additional facts and information that can set an analysis apart from and sometimes even counter those of other experts and professionals using more traditional tools.

As with any relatively new way of gathering facts and data, educating one's audience of its significance and usefulness is always a crucial first step. Thus, none of these Internet and social media analysis tools should be used without providing a thorough explanation of the growing importance of the Internet and social media for businesses and the mechanics of online marketing and business. Analysts using these tools should offer their audience the background information necessary to enable them to understand and interpret the facts and figures being used.

Furthermore, it is important to remember that obtaining facts, data, and analytics from Internet and social media sites is just one step of an assignment. Each case has a unique context, and each valuation or damages calculation requires a review of all the available facts, data, and information. A high volume of search-driven site traffic from use of a registered mark or term may not always indicate that the use was improper, for instance, or that it was responsible for 100% of the calculated damages. Savvy analysts need to understand the limits of their calculations, make appropriate judgments, and consider other factors that may be influencing the data.