

Exhibit 1 (Part 1 of 2)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.T. COLBY & COMPANY, INC. d/b/a BRICK
TOWER PRESS, J. BOYLSTON & COMPANY,
PUBLISHERS LLC and IPICTUREBOOKS LLC,

Plaintiffs,

-against-

APPLE, INC.,

Defendant.

Case No. 11-cv-4060 (DLC)

EXPERT REPORT OF MIKE SHATZKIN

I have been asked by the attorneys for Plaintiffs in this matter to review the Expert Report of Gregory S. Carpenter and evaluate the relevance of his opinions for the publishing world.

Mr. Carpenter demonstrates a complete lack of familiarity with publishing and how it works, with the result that his evidence is largely irrelevant and his conclusions largely flawed as they are applied to this particular case. The role and behavior of "brands" in book publishing is somewhat unlike the way they play out in other consumer goods. The publishing ecosystem does not primarily recognize a corporate branding source, but operates within a trifurcated branding structure: the author, the imprint or series grouping within the publishing house by which the title is published, and then the publisher. Creators, retailers, and end consumers all play various roles within the tri-level world of "book marketing." As a result, a more classical understanding and definition of brand and brand-building behavior does not adequately explain brands in publishing and, indeed, can well be misleading, as it is in Mr. Carpenter's report.

Specifically, this report will explain the following:

1. How the multi-level branding -- author, imprint or series, and publishing company -- emerged and how it works in the publishing business.
2. How the relatively recent shift in the industry, due to a trend toward book purchasing online and the rapid growth of digital or electronic/e-books, has moved the focus from business-to-business branding to building business-to-consumer brands.
3. How the iBooks brand could have capitalized on its legacy to build a valuable consumer franchise had Apple not adopted the same name.

4. How Mr. Carpenter's unfamiliarity with publishing and marketing within that industry result in misstatements and erroneous conclusions.

I have reviewed and considered the Amended and Supplemental Complaint and Jury Demand, Answer and Affirmative Defenses, the plaintiffs' iBooks sales figures, and examples of the plaintiffs' print and electronic books.

The facts I call upon in formulating my opinions have been gathered both anecdotally and systematically through approximately 50 years of participation in the book-publishing industry, the last 40 of them continuously. I have been an author and have worked with most of the major players in the industry as an author, agent, packager, or consultant.

Expertise, Background, and Compensation

I have been employed full time in the publishing business since 1973 and have worked in a part-time capacity in the industry since 1962, while completing my formal education. For the first six years of my continuous work in the industry, I worked for a book-distribution company owned by my family, which distributed books on behalf of about 100 small publishers from all over the world. I managed all sales and marketing. Since 1979, I have primarily been a consultant, but have also written, agented, and packaged books. Starting in the mid-1990s, I have organized industry education events -- conferences -- mostly around the subject of "digital change in book publishing." I have also been an expert speaker on this subject at industry events around the world, including in London, Milan, Montreal, Toronto, Sydney, Frankfurt, Copenhagen, and Amsterdam.

Since February, 2009, my blog -- The Shatzkin Files -- has been published at my web site, www.idealog.com on a regular basis, and the complete archive is located there. I have thousands of regular readers worldwide. A more complete statement of my qualifications and speeches can be found at the www.idealog.com site. Exhibit A of this report contains my summary biographical page from the Idea Logical Company web site.

I have not provided any expert testimony in the past four years.

For my work on this case, I am being paid \$500 an hour (\$600 per hour for deposition and trial-preparation time and for deposition testimony; and \$700 per hour for trial testimony).

Multi-Level Branding

For about 100 years, consumer book publishers in most of the world have reached consumers through what is called the "book trade" (hence: "trade publishers"), which is a network of bookstores and libraries and the wholesalers that help serve them. In addition, the most important marketing tools have been reviewers and radio and TV shows that wanted to feature "book authors" as part of their programming. Until relatively recently, every important city in the US had a newspaper that did its own book reviews and local TV and radio programs that were happy to air appearances with authors published by known publishing houses.

The Internet has had a lot to do with changing all of that. Newspapers have been famously challenged by online news sources, including their own online versions. Local TV and radio production is far less robust than it once was. And online purchasing of books has proven highly destructive to the bookstore network. Bookstore shelf space probably peaked ten years ago (although there are no precise industry figures on that or on most other subjects). Since then, the growth in online purchasing of print books, mostly through Amazon.com, and -- since late 2007 -- the migration of consumers from reading narratives in print to instead reading them on screens as ebooks -- has accelerated the decline of brick-and-mortar bookstores.* As a result, the trade that book publishers have depended on has been eroding: gradually and then suddenly. Since the arrival of the Kindle reading device in November, 2007, the pace of erosion has increased to the point where it can't be denied or ignored and, as a result, trade publishers have begun to recognize that if they are to survive, they must change as well. Digital books are growing inexorably, forcing publishers to rethink their strategies.

Today's book publishing was born in an environment where consumer branding was of little value to publishers. Consumers shopped at retailers. Retailers divided books into categories and book consumers, for the most part, chose from what the retailers they liked put on the shelves (in subject-defined store sections) where they were most interested in browsing.

The direct contact for publishers was not with consumers, but with gatekeepers: primarily bookstore/retailer buyers, book reviewers, and, to a somewhat lesser extent, those doing collection development (or buying) for libraries. To those people, the corporate brands mattered, but the characteristics that were important were usually not the same as what consumers would care about.

As all brand experts know, a key for brands is to deliver a consistent experience to their users. A consistent experience for a *reader* means a similar book: a consistent experience for a *gatekeeper* means a similar publishing procedure. To a consumer, it would undercut a brand's value to see a cookbook, a memoir, and a novel stamped the same way. But to a gatekeeper, if the publishing execution were similar -- consistent editorial quality, design sensibility, pricing approach, marketing effort -- the company's brand identity could be helpful, even if the subject matters and genres of the books were unrelated.

As publishing evolved in the century of trade dominance, publishers tended to become either "general trade houses" -- publishers who put out books on a wide variety of subjects -- or "niche" or "specialty" publishers who tended to confine their output to specific genres or topics. The general houses tended to become the biggest, although certain niche publishers like Harlequin for romance books, or Scholastic for books for school-age kids, also became quite large.

From the perspective of the biggest houses, such as Random House or Penguin, subject specificity was always a secondary concern. What they considered when they entertained a proposal for publication were two key questions: (1) Is this book *big* enough to be worthy of our company's efforts: Will it sell enough to be worth putting on our list?; and (2) Is this book *good*

enough to be a positive reflection on our brand to the gatekeepers we need to please consistently to be successful in business?

The big houses didn't need to worry about topical consistency. After all, for most of the past 100 years, the same book-review media and bookstore buyers would handle all topics and genres. They could ship in the same box from the publisher, and the retailer or reviewer would sort it out for the consumer.

Even before there was any formal awareness of branding among publishers, there was an instinctive understanding that authors were brands, because it was clear that readers, having read and liked one book by an author would be inclined to read another. Most authors automatically delivered the consistency of user experience that we now understand is critical to good branding, allowing the consumer to develop an expectation and have it fulfilled. Whether they understood they were doing it or not, publishers have cultivated authors as brands, both to their intermediaries and to the reading public, for as long as there have been publishers.

Between the level of branding afforded by the author and that associated with the publishing house's name, publishers also had branded "imprints" and "series." Imprints usually denoted a team of editors and marketers within a publishing house and were almost always intended to be B2B brands, communicating an editorial philosophy and marketing approach to the gatekeepers. Some imprints were created by preserving the name of a publishing company acquired by a larger one. That is how the Scribners imprint of Simon & Schuster started, as well as the Knopf and Crown imprints at Random House, and, for that matter, the Viking imprint at Penguin. Sometimes publishers created imprints to "brand" the output of a star editor. Series brands (Dummies, Hardy Boys) had both consumer identities and value with gatekeepers, but series creation was inherently limited to those circumstances where a formula could be replicated with commercial success across authors.

And so it developed that there were three levels of branding in publishing: the author, the imprint or series which operated *within* a publishing house, and the company name. Until recently, all of them were primarily employed to get publishers past the gatekeepers, although authors and series were recognized as having consumer value.

The Evolution To Direct Consumer Marketing

The decline of bookstores and book-review media and the concurrent rise of the Internet and social-interaction tools like Facebook and Twitter led publishers inexorably to the conclusion that direct contact with end users, which had never been an important component of book publishers' thinking, needed to be developed.** This was a jolting and disruptive change in thinking. It was something most publishers, and especially the biggest ones, had never done. It thus required big changes in orientation and workflow. But it also threatened publishers' trading partners -- their retailers -- because these retailers saw publishers now competing for the same consumer attention that they had heretofore depended upon the retail stores to provide.

Niche or genre publishers who had delivered a consistent content offering previously found themselves best positioned to change their businesses in this way. Romance and science-fiction

publishers were the most advantaged, because they had large numbers of consumers who read multiple titles from their lists. Romance readers already knew the company name and imprint “Harlequin.” Science fiction fans knew Tor and Baen. The consistency of the content experience they offered had, without any elaborate effort on their part, built brand awareness that translated into online power.***

The niche publishers, and the niche imprints of general publishers, quickly established themselves as viable consumer brands as measured by online success: getting website visitors, signing up consumers for email notifications of new publications, and, in some cases, being able to spawn new enterprises on the back of the customer base their content consistency had created for them.

One great example of that is from a niche publisher called Hay House in San Diego: a publisher of “mind body spirit” books. Hay House built email lists earlier than most publishers and has used them for years to promote its new titles in a much more cost-efficient way than most publishers have available to them. It also started doing events where its reader base paid fees to spend time with Hay House authors.

Indeed, events have become an important ancillary business for some niche publishers, building on the base of enthusiasts their publishing has delivered them. F+W Media, a private-equity financed rollup of “enthusiast” (*i.e.* vertical or niche) publishers, has a whole events business serving multiple opportunities created by its disparate communities to assemble for paid gatherings.

The major publishers have recently started to join this trend. Because they are determinedly “general” (and because they are built on publishing the biggest commercial books, the likelihood of commercial success, not topic or genre, must be the dominant criterion by which they make acquisition decisions), they tend not to have large lists within topic areas the way a specialty publisher like Hay House or F+W does. But they often do have lists in genres, particularly in science fiction and romance, which have been the two biggest genres in the inexorable and fast-paced ebook evolution.

The iBooks Brand

The iBooks imprint published a large number of titles primarily in the science-fiction genre (665), followed by graphic novels, horror, and fantasy, which have turned out to be of substantial interest on the Internet and have sold well as ebooks. Although the sales of iBooks overall were modest (5,689,950 units, with sales of science-fiction titles alone totaling 1,944,314 units), particularly compared to a big general publisher, its specialization in a genre that is characterized by customers who make many repeat purchases in the genre suggests the potential for a core audience that would recognize it as a publishing specialist. It is thus reasonable to surmise that were there no distractions suggesting that the iBooks brand meant something else (namely, Apple and/or Apple's iBooks/iBookstore), it is likely that the publishers of iBooks would have had the opportunity to build on that awareness to create a powerful niche brand in the digital space.

Mr. Carpenter's Fundamental Lack Of Industry Understanding And Flawed Conclusions

Against this industry-specific background, the many errors in Mr. Carpenter's report are made plain. Intended as a tool to understand the branding issues in this case, his report is simply not applicable to the world of publishing. Mr. Carpenter's fundamental misapplication of general branding principles results in erroneous and misplaced opinions and conclusions.

Mr. Carpenter writes that "creating consumer awareness and recognition requires significant investment by the brand owner." (Paragraph 9.) That is not true in publishing where almost no money is spent -- or has been spent -- creating consumer awareness and recognition of brands. Publishing brands are built on the awareness of what is being published under the author, imprint, series, or publishing-house name. This imputed value of the brand from the content it delivers has been the method of building brand awareness for book publishers throughout the history of publishing, from when it was basically strictly marketing to gatekeepers up to the current era where consumers have become direct targets.

Mr. Carpenter posits that "by selecting target customers, developing a unique value proposition to those target buyers, and delivering that value consistently, an organization can endow a brand with meaning and hence value." (Paragraph 11.) This actually turns publishing practice on its head. What happens is that publishers deliver a "value" -- a kind of book -- consistently under an author, imprint, series, or company brand. The audience *self-selects* around the content, and the value of the brand is created over time by the *experiences* readers and consumers have with the published books.

Mr. Carpenter states: "in working to build a brand that is recognized by consumers, companies need to engage in a variety of activities to educate consumers and create awareness of that brand." (Paragraph 12.) In fact, I am not aware of any publishing brands -- not Dummies, Harlequin, or others -- that have built their brands that way. Their brands were built on the strength and consistency and ubiquity of their content; other activities might have a brand-enhancing effect, but in publishing they are actually new-fangled exploitations of the brand, not efforts to build it.

Mr. Carpenter goes on to say: "Possible means of establishing brand recognition include advertising, marketing and other promotional activities; creating personal experiences in which consumers interact with the brand; and combinations of those methods." (Paragraph 12.) This has not been the history or experience of publishing. Advertising for brand building is virtually non-existent, as is brand-focused marketing. The creation of personal experiences for interaction is a recent development around new opportunities (such as live events); it has not been an established method for building awareness to sell books.

Mr. Carpenter writes that "Creating a brand requires educating buyers about the meaning of a brand, and continually educating new buyers as they enter the market." (Paragraph 14.) Again, this does not describe the reality in publishing. Publishers sell books. If a reader consumes enough books that deliver a consistent experience under the heading of an author, imprint, series,

or company, that heading becomes a brand with meaning. There are not, nor have there been, independent efforts in publishing to educate about brand meaning, and certainly no efforts to build brand awareness for people who haven't read any of the books.

Mr. Carpenter quotes from a book from The Free Press (a strong brand in intellectual and academic circles based on a consistent publishing output over the past 50 years, with no money spent on brand promotion *per se*) as follows: "Strong brands do not just happen. Rather, they result from the creation of winning brand strategies and brilliant executions [sic] from committed, disciplined organizations." (Paragraph 14.) This is not how Harlequin or Free Press built their brand. Their brands *did* "happen," because they were publishing books that consistently appealed to similar audiences.

Mr. Carpenter explains the difference between a "push" strategy and a "pull" strategy for sales of branded products. (Paragraphs 16 and 17.) He posits (perhaps correctly for industries other than publishing) that Lays sell potato chips by advertising heavily, in effect coercing the retailers to carry their product ("pull"), and that Kettle achieves sales by getting better placement with the retailer ("push"). These dual strategies do not exist contemporaneously within the publishing world. The presence of both strategies in publishing is illustrated only in the field's evolution, where it mirrors the shift publishers are being forced to deal with. To use Mr. Carpenter's terminology: publishing has always been primarily about "push," getting the retailer to influence the consumer; the internet and social media, by which publishers can now communicate with end users, gives them a start on "pull," influencing the consumer so that the retailer will want to capitalize on the publisher's marketing.

Mr. Carpenter's unfamiliarity with book publishing is further evidenced through his suggestion that because there are more than 100,000 imprints and establishing brand requires some critical mass, then no single imprint can have much recognition. (Paragraphs 19 and 20.) What he fails to take into account is that publishing is a niche business. Many readers specialize in what they consume. A science fiction reader isn't contemplating the offerings of 100,000 imprints; there might be three or five or at most 10 or 15 that produce the majority of the books they read. So the establishment of meaningful branding can take place within the niche audience far more readily than Mr. Carpenter's paradigm, which sees publishing as one big amorphous industry, would imply. His paradigm is akin to describing the difficulty of establishing the brand for a Cabernet Sauvignon as though it had to compete with all the possible brands under which people buy food and drink.

Mr. Carpenter's utter lack of grounding in publishing is illustrated through his building a straw horse about branding with the six largest consumer houses (often referred to in the trade as the Big Six) as examples.¹ (Paragraph 21.) He calculates the probability of gaining the same renown as they have achieved at approximately .008%. Here, though, the facts left out are more important than the facts included. A list of the brands that would work best for

¹ Even the way he describes them -- butchering their very identities -- underscores that he is an outsider. He refers to Penguin as Penguin Putnam, which it was called only briefly after Penguin acquired Putnam a decade or more ago. He refers to Holtzbrinck Publishing Holdings, which has been renamed Macmillan. He calls one of the companies Time Warner, which sold its publishing interests to Hachette about five years ago and is now called the Hachette Book Group USA.

direct-to-consumer efforts would include *none* of the Big Six houses he cited. Rather, they would include Harlequin for romance and Tor for science fiction, as discussed above. They would include Abrams and Rizzoli for art books. There are other players in romance (Ellora's Cave) and science fiction (Baen) that are relatively tiny players but, because of their consistent offering in a niche that has many repeat buyers, have more recognizable brand identities than the big corporate names with many consumers.

*Exhibit B: "Technology, curation, and why the era of big bookstores is coming to an end" (from *The Shatzkin Files*)

**Exhibit C: "Selling direct will become an essential capability for publishers to have" (from *The Shatzkin Files*)

*** Exhibit D: "Publishers, brands, and the change to btoc" (from *The Shatzkin Files*)

Opinions and Conclusions

The iBooks imprint has reached thousands of its niche readers. The records show that during the period when Byron Preiss owned and operated iBooks, it sold about 5 million units, of which nearly 2 million were in the science-fiction genre. Given the propensity of science-fiction readers to stick to their genre, it is reasonable to assume that many thousands, perhaps tens of thousands, of science-fiction readers purchased and read several iBooks titles and thus recognized the iBooks imprint.

In addition, iBooks published works by some very significant science-fiction authors, including Ray Bradbury and Arthur Clarke. This further supports the assumption that the imprint would have been known to science-fiction devotees, who pay attention to substantial, recognized authorship.

Because of its specialization, such a niche reader group is aware of authors and individual imprints within the genre -- more acutely so than is a general readership. The specialized nature of a genre, such as science fiction, results in a focused reader circle, attuned to the authors and publishers within the particular field.

As a result, at the time the entire industry turned its attention to consumer branding (which can't be assigned a precise date, but which started to happen in the later part of the first decade of the 21st century, and with accelerating speed after Kindle was launched in November 2007), the owners of iBooks would have found themselves with a strong foundation on which to promote iBooks directly to consumers as a science-fiction brand. They had big authors and a big backlist, and they had undoubtedly sold multiple titles to enough people -- many thousands, if not tens of thousands -- to enable that. As previously observed, publishing brands are defined by the content they publish. However, for iBooks, promotional efforts targeting end consumers did not make economic sense, because in the interim Apple had created such a strong (and overshadowing) alternative identity for the word iBooks.

I declare under penalty of perjury that, based upon the information available to me, to the best of my knowledge, the foregoing is true and correct. I reserve the right to supplement this report.

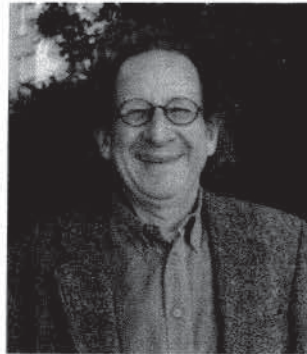
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About Mike Shatzkin



Mike Shatzkin, Founder & CEO of The Idea Logical Company

Mike Shatzkin has been involved in the publishing business for nearly 50 years. He has written or co-authored six books that have been published by established companies and just issued his first self-published ebook, a collection of two years of his blog posts called "The Shatzkin Files, Volume 1."

For the past two decades, he has been a thought leader and among the most prominent observers of the industry's transition to the digital era. He founded and leads The Idea Logical Company, a consulting firm working on strategic issues for

publishers and their trading partners and he is co-founder, with Michael Cader, of Publishers Launch Conferences. PLC stages industry education events exploring digital change from a global perspective.

Mike organized many industry conferences before PLC was organized and has spoken at industry gatherings across the globe. His work has appeared regularly in trade journals for decades. The client list of The Idea Logical Company has included all the top publishers in the US, many in the UK and elsewhere, leading wholesalers including Ingram, leading retailers including Barnes & Noble, and numerous suppliers of technology and other services to publishers including big systems providers (Klopotek and Publishing Technologies), specialized digital services (netGalley and Vook), and industry services and not-for-profits (BookScan, Copyright Clearance Center, and Book Industry Study Group.)

Mike's experience in publishing is as varied as it is long. Aside from his author credentials, he has been an editor, a production manager, a sales director, and has sold rights in many venues, including for Hollywood development. His early experience, including a stint as sales and marketing director for a distributor, was with lots of small publishers. Since he was engaged for several years by John Wiley starting in the mid-1980s, Mike has worked primarily with the world's largest houses as clients or on behalf of clients.

Mike's specialty is "change", particularly as it relates to digital strategy and the publishing supply chain.

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The Shatzkin Files

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Written by **Mike Shatzkin**
Foreword by **Michael Cader**

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