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-civ-4060 (DLC) **DECLARATION OF** **JOHN T. COLBY, JR.**

JOHN T. COLBY, JR., hereby declares, under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the principal and direct or indirect owner of all Plaintiffs in this action. I make this declaration in opposition to the Motion for Summary Judgment of Defendant Apple Inc. I am over the age of 18, and the following statements are based upon my own personal knowledge.

My Background in Publishing

2. During my two days of deposition testimony in this litigation, I was never asked to discuss the extent of my experience in publishing, which informs my understanding of the industry, to share my experiencc with marketing electronic books, or to explain the series of decisions that led me to run my companies. Instead, in their motion papers seeking to throw out this lawsuit, Apple portrays me as a relative neophyte, a dilettante, and a failure as a publisher. They accuse me of engaging in underhanded conduct. These characterizations are false, and the

truth sheds light on the real nature of the publishing business and my companies' place within it. If I had been given the opportunity, I would have testified as follows.

3. I have spent my entire working life in the publishing industry, focused on the business of making and selling books. My experience ranges from being a senior financial officer at one of the largest book retailers in the world, to running my own independent publishing companies, which I have done for the past 20 years. A common thread running throughout my experience has been my ability to utilize available technology to streamline and organize publishing business data.

4. I grew up and went to high school in Glen Cove, Long Island, New York. I matriculated at Syracuse University.

5. In June 1977, during the summer between my freshman and sophomore years at Syracuse, I accepted an internship at the publisher Doubleday & Co., Inc. ("Doubleday"). The number two executive of HR, Peter Andresakis, offered the position to me based on an interview and invitation from my aunt, May Morse.

6. My aunt had started at Doubleday just before World War II, and eventually started working with John Sargent who was the company president and later chairman. John was responsible for a large part of the firm's growth from the 1960s through the 1980s, following the unexpected death of Frank Nelson Doubleday's son, Nelson Doubleday Sr., and thc rctirement of Douglas M. Black, chairman and former general counsel for Nelson Sr.

7. In June 1977, I started work at the Doubleday office in Garden City, just east of Manhattan on Long Island. (Doubleday's headquarters moved from Union Square in Manhattan to Garden City in 1910, to great fanfare.) I was the first summer intern, and I was assigned to the Cost and Royalty Department. I helped calculate author royalties on ancient

adding machines that were from the late 1940s, writing (posting) the results on author cards in either blue pencil for sales, or red pencil for returns.

8. The next summer, I was invited back to work in the same department. The following year, I was invited back to work in Doubleday's Corporate Finance Department. In this period, the publishing industry was going through a transition from manual accounting systems to mainframe-based systems. The challenge was converting systems that had been manual since 1896 to 1970s technology.

9. Doubleday's Corporate Finance Department was created on the recommendation of consultants who were closely aligned with the Harvard Business School. The corporate finance group (also including the tax department and research group) served as a hub of the sprawling Doubleday operation that then included manufacturing plants, warehousing, cash management, radio stations, book club operations, publishing operations, the seventh-largest bookshop chain in America (Doubleday Book Shops), a Mexican newspaper business, a multimedia group, and foreign distribution.

10. My first job in the Corporate Finance Department during my summers at Doubleday was to prepare an hourly wage study for businesses located in Nassau County to determine wage parity. My second job was to prepare a "copies-shipped study" by title to look at sales and returns of the Publishing Division, in order to determine seasonality or to discern other trends. As a result of these assignments, I quickly learned how to program Doubleday's mainframe computers to carry out data-processing tasks to support publishing operations and financial analysis. I found that my knowledge about programming at Doubleday had advanced beyond what I was learning at Syracuse.

11. In 1979, Doubleday was the largest book publisher in the world, with over 700 new titles published per year. That year, the company invested in a stake in the New York Mets. As it turned out, that was the high-water mark for Doubleday.

12. Upon completing my Bachelor of Science degree in finance at Syracuse, I started full-time work in the Book Club Division of Doubleday in June 1980. The book clubs, including the Literary Guild and Doubleday Book Club, were the most profitable division at Doubleday, and the most computerized in the company. I started as a budget analyst in the Planning and Reporting Department of the division. I helped feed data into the old IBM main frames, using punch cards, to forecast and track operating results for each club.

13. One of my specific responsibilities was to calculate member service participation from the day a new member entered the club to the day the member left the club. We referred to this as "member mortality."

14. We used a series of LaPlace Transforms to model membership over different curves. (Later I would develop this system in graduate school at Columbia University to model investment returns based on the Marxist Labor Theory of Value versus the capitalist Investment Theory of Value.) I worked for two years on budgets, sales forecasts, expense projections, and five-year plans, all within the IBM mainframes. Within these reports I learned a lot about title seasonality, profitability, response rates for both positive option and negative option clubs, pricing, branding, what colors work best in a catalog, and what magazines work best to acquire new members. All of this experience gave me an understanding of what titles have the most long-term value.

15. At this point in 1982, I wanted to either attend graduate school or enter the editorial training program. Unbeknownst to me, John Sargent, Doubleday's president, was

keeping an eye on me and wished to mentor me; he wanted me on a different track. In the end, I transferred to a full-time job in the Corporate Finance Department and went to graduate school at night. I embarked on an MA in economics at Queens College and attended classes at Columbia University. I would commute back to my office in Garden City to work on the mainframe, then home to Glen Cove, Long Island.

16. In 1983, I had the opportunity to transfer to the Publishing Division where I began work on a personal computer ("PC") to create a reporting system for the Publishing Group. Coming from a mainframe environment, a PC seemed like a toy to us, but it had the ability to do what we needed. I got it working and with help from our department created a system to present and analyze monthly operating results. I could interface with the mainframe to download title history to the PC. From there I developed the sales forecasts by title, using the book club models as well as a full income statement, organized by imprint. Here I was able to look at the sales trends of the great ANCHOR BIBLE and FOXFIRE series over a long time period. From this experience, I learned that the "backlist" titles – titles originally published in previous years, but still in print and available for sale – contributed consistent and reliable profitability to the Division.

17. Just after I completed this work, in 1984, the controller of the Doubleday Book Shop Division asked me to help develop the systems and operational structure for the bookstore chain in 1984. (The first Doubleday Book Shop Division opened in Penn Station in 1910, to make sure Doubleday had a brand presence in Manhattan after the main office moved from Union Square to Garden City.)

18. The Book Shop executive group was able to purchase a Honeywell minicomputer to run the Shops' accounting, inventory management and sales data, and installed

it on the top floor of 673 Fifth Avenue, overlooking St. Thomas' Church. I was their choice to get the minicomputer up and running. We started the conversion in early 1984 (technically a "parallel systems conversion"), and we completed it on time and under budget in 1985. Sales were about $19 million annually when I started and grew to just over $50 million per year when I left in 1990.

19. We streamlined cash receipts by direct credit card tape deposits to banks and American Express. We generated daily sales reports by shop by title. We designed a forecast system to show sales trends by shop per day by sales department. We polled and collected cash register data from over 110 registers chain-wide, and, what was most important, we could put daily "title copies sold" information into the hands of the great Sid Gross, chief of merchandising for the chain. Just knowing what books sold yesterday afternoon gave Sid and his group the information they needed to make sure we had inventory in stock so we could sell it. We could jobber orders overnight from Ingram Book Company (the long-established and biggest book wholesaler) knowing this data. One of our first successes was stocking Tom Clancy's HUNT FOR RED OCTOBER from Naval Institute Press. Sid purchased half of the two-thousand-copy first printing. When Sid saw it was selling, he jobbered more copies. As a result, the Shops had stock when no one else did. I learned many important lessons from my experience with the Doubleday Book Shop systems.

20. In 1986, Nelson Doubleday, the grandson of the company's founder, sold Doubleday to the German publishing giant Bertelsmann. Bertelsmann was interested in the manufacturing capacity of the firm (Doubleday printed its own books) and the Book Club Division. Although we did some discount analysis for the Bertelsmann publishing group president, Bertelsmann wasn't interested in maintaining a book shop chain. In 1990,

Bertelsmann sold Doubleday Book Shops, Inc., of which I was by then Chief Financial Officer and corporate secretary, to Barnes & Noble.

21. I attended the closing of that transaction on Friday, June 1, 1990, and then got married to my wife Betsy the day after, not knowing whether I would have a job when I returned from our honeymoon. The Book Expo trade show (it was called the ABA, for "American Booksellers Association" at that time) was in Las Vegas, Nevada that weekend, and I remember flying over it as we travelled to New Zealand.

22. Fortunately, Barnes & Noble needed me to help convert and transition the Doubleday Book Shops operation to the Barnes & Noble operation. This took more than a year, at the end of which I was just about the last former Doubleday Book Shop employee left at Barnes & Noble. Even though Barnes & Noble already had a CFO, I am proud of the fact that I showed Barnes & Noble how to cut 1% from their margin by bidding out credit card processing to banks rather than using the Visa/MasterCard/Citibank monopoly that everyone used at the time. Saving 1% on $1.2 billion in sales is unquestionably value added.

23. During this transitional period, my good friend, Doug Maxwell, who was at the time board president of the Glen Cove Boys & Girls Club, asked me to join the board as assistant treasurer to help the executive director put financial and investment controls into the Boys' Club operation. Reluctantly I agreed, and then began what was to be over fifteen years of service to the community where I grew up. I became treasurer then board president. I managed the investment portfolio until I resigned in 2006. Through that time of recession in the early 1990s and post nine-eleven, we had our ups and downs, but we maintained and grew our endowment. This helped serve over 500 underprivileged kids in the community, and the Club is vibrant to this day.

24. I left with a good severance package and a new job at Dorling Kindersley, now known as DK Publishing. I helped DK, based in London, start their United States publishing operation, with distribution from Houghton Mifflin. DK launched about 35 titles its first year, but what really interested me was how their multimedia group was adapting books to "work" on a computer platform. Microsoft had made a sizable investment in DK mainly to tap into its rich film and photo library. Programmers were writing code to make books appear on the screen and appear active to the reader in specific ways, such as seeing how a spider would build her web across certain points. It was painfully slow but I thought they were on to something. Much as Doubleday created ways to mass-merchandise books in the 1950s, it seemed to me the next logical step was to merchandise books on different media. The difficult part, it seemed to me, was organizing the list of titles.

25. In my opinion, DK was run by marketing people who had a hard time understanding patience and a long-term approach. They truly believed that the more money the company spent on advertising, the greater the return, as if there are no consequences from the expenditure or from the specific properties marketed. Unfortunately this was the mentality of people coming into the business, who had no other way than an MBA or "leveraged buyout" words to understand what publishing is about. I saw this coming and left to start my own firm in 1992. Sure enough, a few years later, DK overinvested in books associated with the George Lucas film Star Wars: The Phantom Menace, and their business foundered.

26. By late 1993, I had formed our Brick Tower Press imprint under the J.T. Colby & Company, Inc. entity. I named the imprint Brick Tower Press after the home that family friends built, which was attached to the old brick water tower on their property. When I

registered the trademark, the trademark examiner actually knew where the tower was, because he had lived in Glen Cove.

27. My wife, Betsy, wrote our first book, American Chef's Companion, and we started putting a list together one book at a time. We branched out into gardening and in mid-1995 we purchased the assets of a small UK publisher, New Guild, Ltd., which was known for maritime and military titles.

28. In 1994, I met with a developer of electronic books, Bernie Pobiak, who had developed a "key" device that would plug into the back of a PC to act like a combination lock to safely download ebooks. He wanted titles to fill what he called the "Internet Bookstore" and asked me to code some of our books for the project. I coded about three titles as a test and gave one away for a free download, THE CHOCOLATE COMPANION by Cynthia Shade Rogers. I was trying to develop a publishing strategy that would use what I learned from Doubleday and DK to create CD-ROM-based books or software that delivered books to customers. I was one of the original subscribers to America Online, using a 9600-baud modem to connect, in the days when any one member could email the entire AOL community.

29. One of the designers I hired to work on our cookbook series was doing freelance work for Byron Preiss Multimedia. I knew Byron Preiss as a book packager just like the early days of DK Publishing, and what interested me was how Byron's company handled large picture files for print production. At the time, there was only so much you could fit on a floppy disk.

30. I was generally aware of Byron Preiss and his companies during the time he owned Ibooks, Inc. In particular, I knew of Byron from hiring one of his freelancers and through their presence at trade shows (Comicon). Additionally, I was aware of Byron and his

companies from having seen media coverage in Publishers Weekly and other sources (Byron was always in the press with a new release or business deal), from seeing advertising depicting the ibooks and ipicturebooks imprints, and just generally speaking to others with knowledge of Ibooks., Inc.'s business.

31. Publishing had started moving into a digital world. It had already begun at the presses (as I recall, Arthur Hailey was the first Doubleday author to deliver a manuscript on a floppy disk, STRONG MEDICINE, published under the Dell imprint in 1984), but now it was creeping into the design and layout of the books themselves as well. Byron Preiss was doing a lot of work adapting great works of science fiction onto CD-ROM. Byron was unique in this, and a visionary. While DK had been working on digital spider webs, Byron was adapting fiction and art that went with the text.

32. I lost track of Byron until he stopped by my company's stand at the Book Expo Show in Los Angeles in 2003. Byron was interested in acquiring the rights to some of our maritime books for his ibooks imprint. I asked about Byron's online strategy.

33. I knew Byron co-wrote his book DRAGONWORLD with the author of I-ALIEN, Michael Reaves, and asked if there was any relation. I also knew that Doubleday author Isaac Asimov wrote a novel called <u>I, Robot</u>. The origin of the name iBooks was at that time nothing more than a curiosity to me. I do recall, as I testified in my deposition, that Byron and I discussed the way that the "I" in those two book titles stood for a sentient being. I remember this because, in that conversation, I told Byron that I had I inscribed in the limestone over our Manhattan fireplace the Latin words "Habent Sua Fata Libelli," which mean "Books have their own destiny." Byron was so pleased that I appeared to share his view that books have their own autonomous lives, that we parted from our meeting with a book deal for ibooks to publish <u>The</u>

Way of the Pirate, by Robert Downie. In sum, Byron never really told me what the "i" in ibooks stood for, but he certainly never said it meant "Internet." This would have shocked me given the general thrust of our conversation.

34. Soon thereafter, as Byron and I were discussing the contract for The Way of the Pirate, I discovered that Byron's younger daughter attended the same school as my kids, although mine are younger. In fact, the last time I saw Byron Preiss was at a school function.

35. Soon thereafter, I read in the New York Times about Byron's tragic death in a car accident in East Hampton, just after July 4, 2005. Byron left two children and his wife.

My Purchase of the ibooks Business

36. In its motion, Apple insinuates that the ibooks catalog, with its thousands of author contracts and its deep backlist, as well as the goodwill the brand has built up over the years with respect to certain genres, was worthless when I purchased the company. This is false. Again, I was never given the opportunity to explain the reasoning behind the acquisition or to explain the purchase price. If I had been, I would have testified as follows.

37. I waited until the fall of 2005 before I contacted the editor working on The Way of the Pirate book in order to see how Byron's company was doing. I learned that royalties owed to our author, Robert Downie, would not be able to be paid. On or about February 2006, because my company was an ibooks creditor as a result of the book deal, I received a notice from the bankruptcy trustee concerning the public sale of the company.

38. I couldn't believe that a publisher like Simon & Schuster, which had launched and/or distributed hundreds of Byron's titles, or Byron's distributor, Publisher's Group West, didn't quietly buy the company, given the value of its catalog and ongoing business. It didn't make sense. I called my attorney at Manatt Phelps to discuss what we could do. I began a

process of due diligence in order to evaluate the possibility of acquiring the company out of bankruptcy.

39. As my attorney and I navigated our way through Bankruptcy Court, I called my friend and colleague, Ken Lang, who was the long-time contracts manager for Doubleday & Company, just recently retired from William Morrow owned by Harper Collins. Ken and I made a trip to the trustee's office in Jericho not far from Garden City to start reviewing the contracts. Although there was an "inventory" of contracts produced by the trustee for public distribution, there wasn't enough information on the report to see exactly what the terms of the contracts were. The only way to see a horse is to visit the stable. And what a stable it was.

40. Byron through his packaging company (like DK) owned titles outright for terms the length of copyright. Hundreds of them, mostly out of print and off the radar. Byron licensed some to the big houses but only the print rights. He held the electronic rights in agreements that go back to the early 1980s. He was in the process of moving his packaged science fiction titles that he was known for to his ibooks imprint. Ken and I noticed that many of the science-fiction titles under contract were developed for Doubleday with the help of David Ballantine.

41. I realized that Byron was quietly assembling the old Doubleday list that I looked at when I was in the Book Club Division. He owned the art and the text. Minimum royalty payments, ebook rights that he wanted for his multimedia company, and long-term value. The other important clue in the pile of contract boxes in the trustee's office was that we were the only ones to look at them, other than the lawyer for the Isaac Asimov Estate and American Heritage.

42. Other publishing industry players apparently believed that Byron only licensed titles for short terms and certainly not length of copyright. This was true to a point, but they all missed the ball. They were so interested in solving short-term problems, they neglected the bigger picture. They were not unlike the new generation of publishing marketing "experts" I mentioned earlier. Also, we noticed many agreements with Byron's ipicturebooks entity (which was not for sale at that time, although we would end up acquiring it in late 2007).

43. I called my friend Rich Freese, president of Byron's ibooks distributor, Publisher's Group West, and asked him what was going on with the distribution of the books. He gave me a rundown on the titles and what he was doing with them. After I signed the appropriate agreements with the trustee before we made a bid, Rich released sales information by title, which I engineered into a forecast model to determine rate of sale, capital needed to replenish stock, and return rates by title. I believed the company was worth at least $500,000 just based on the ibooks catalog (based on actual and forecasted sales, existing inventory, and what Rich told me about what buyers thought about the list), but I didn't have enough sales information on the other aspects of the business – the long-term agreements for other rights -- to know how much more value there was. I decided to low-ball the bid, knowing what others did not know. We succeeded in purchasing ibooks for far less than what I thought it was worth at the time.

44. In the sale, I purchased all of ibooks, inc.'s assets, including its contracts with authors, its goodwill, and its trademarks. I intended to continue doing business as ibooks, with the same catalog, goodwill, and brand recognition, and I registered ibooks as a fictitious business name with the State of New York, because I did not own the ibooks corporate entity as

part of the bankruptcy sale. I also received all of ibooks, inc.'s business records in numerous boxes, as part of the purchase.

45. Three weeks after we closed, PGW's parent filed for bankruptcy. This development threw my forecasts out the window, and severely reduced the short-term value of the company. That said, because of my strategy in investigating and pursuing the purchase, I believe I still got an extremely favorable deal.

46. We issued a press release to announce our purchase of ibooks. Attached as Exhibit A is a copy of the press release, which was previously produced to Defendant. The release was picked up by various trade publications and websites. Attached as Exhibit B is a copy of the article that appeared in Publishers Weekly in connection with the press release.

Managing the Recovery from Bankruptcy

47. ibooks had suffered through a perfect storm. Byron, the creative founder, was gone, the company's distributor was in bankruptcy, and, without management, sales had gone into a free-fall. Royalties owed to authors had not been collected or organized. I had to take steps to get matters under control.

48. In early 2007, I worked diligently to transition distribution operations away from PGW to National Book Network, as I developed my own internal systems for running the business. Although all the records were there, and I had purchased all of the records previous internal systems did not organize the data in a useful way; there was no way to run comparisons of sales, or automate royalty reporting, etc.

49. I worked to keep ibooks authors and literary agents apprised of my efforts. My letters and emails have all been produced to Defendant.

50. After I transferred our ibooks business to NBN in 2007, I worked with some of the best sales people in the business. We launched the fall 2007 list and developed our catalog into 2008. I worked non-stop on the computer system I began writing in 1992 just after I left DK to manage the data I was building as I identified and organized sales information from prior years.

51. NBN for all their good intentions was not doing the job I expected, and certainly not doing the job that PGW was doing before their collapse. I found out that some new ibooks releases were not being presented to buyers. These are books where I had to invest large sums of capital to print and develop.

52. In 2010, I started moving ibooks titles to another distributor, Lightning Source Inc. ("LSI"), a division of Ingram Book Company, the largest wholesaler in the country, with whom I had worked over the years at Doubleday.

53. LSI could print only what I needed to sell while their title systems communicated faster with accounts than NBN's systems could. Ingram systems had priority over smaller accounts. I didn't have to hold inventory while the equipment for digital printing improved from one quarter to the next. Within a five-year span, the publishing business changed from an inventory-distribution business to an intellectual-property business. Byron was well ahead of the pack: Whoever holds the intellectual property rights holds the value. Now my companies own the rights, for the duration of copyright, to several thousand backlist titles that can be launched under our ibooks imprint, in print and electronically.

54. After bringing three entities out of bankruptcy in 2006 and 2007 and surviving the bankruptcy of PGW, who held a chunk of our saleable inventory, which took place

weeks after we acquired the other assets, I believe that putting together a list of books to sell and market by the fall of 2007 was a great accomplishment, of which I am still proud.

55. Since that time, we have recorded and cataloged over 6,000 author contracts, one at a time, organized and processed thousands of sales records to report royalties and earnings, organized and launched hundreds of digital editions of ebooks on Kindle and Nook and Overdrive, with their own unique sales and royalty reporting requirements. Meanwhile, we have managed to acquire new titles every year -- a milestone that demonstrates regular and consistent returns without spending money indiscriminately on marketing dollars or going into debt.

56. One of the ways we have controlled marketing expenditures is by relying on co-operative advertising with our distributors. The distributors promote our books, bearing our imprint, to consumers, wholesalers and retailers, and deduct the promotion and advertising costs from their payments to us. I was not asked to identify documents produced to Defendant that would have recorded payment of co-op advertising fees to my distributors. Had I been asked to do so, I would have said that the debit of co-op fees are recorded on the statements I receive from my distributors. In the case of Amazon, Amazon generates a credit based on sales volume that I would have to match dollar for dollar. The actual coop spending is twice as much as I would see on distributor statements. In any event, all of my distributor statements were produced to Defendant.

57. I call this fiscal responsibility, and I believe that anyone trying to second-guess and critique my strategy of controlled growth fails to understand either the publishing industry or the right way to nurture the long-term value of intellectual property.

The Capitalization of B in ibooks

58. Defendant's statements that "Plaintiffs recently changed their mark from 'ibooks' (all lower case) to copy Apple's distinctive 'iBooks' formulation (lower case 'i,' capital 'B'), in an apparent effort to create confusion," Def. Summ. Judg. Mem. at 3, are wholly inaccurate. I was never asked at my deposition or in the course of written discovery about the reasons for the two variations—ibooks and iBooks—of the IBOOKS mark. Had I been asked, I would have responded as follows:

59. Plaintiffs own the trademark IBOOKS, whether it appear as ibooks or iBooks. From its first use in September 1999 until September 2011, the mark on physical and electronic copies of our books appeared exclusively as ibooks. The critical elements of the mark's presentation are, and have been, a lower-case "i" and no separation between the "i" and the "books" elements. For example, the lower-case "i" appears inside the light bulb that is a signature element of the IBOOKS logo as it appears on the books we publish.

60. In or around June 2011, I noticed that Amazon.com ("Amazon") had begun listing the imprint as iBooks on most, if not all, of our titles. Upon learning of the capital "B" listing, I attempted to get Amazon to list the mark as ibooks. These attempts failed. This was unsurprising, as my earlier attempts to have Amazon change numerous mistakes in their ibooks listings were also unsuccessful.

61. I made the decision to shift some but not all books into thc markctplacc with the capital "B" formulation based on Amazon's apparent decision to list my titles as such. I value Amazon's judgments as a major retailer. Also, with the advent of Amazon's Kindle, I felt that more people would encounter my titles on Amazon and that consistency with Amazon listings was important. My decision to use the capital "B" formulation on certain titles was a

marketing experiment, to test Amazon's apparent preference, and was not motivated by any desire to imitate Apple.

62. Amazon has since changed the way it lists my titles from time to time. I continue to release some books using the capital "B" formulation.

63. I own the IBOOKS mark no matter whether and where the letters in that sequence are capitalized. I consider both spellings (upper-case "B" and lower-case "b") simply to be varying presentations of the same IBOOKS mark that Plaintiffs own and use.

64. Thus, the ibooks lowercase imprint was used consistently on the books from 1999 with the exception of 20 or so titles printed after September 2011. Also, we have consistently used the ibooks lowercase formulation on the catalogs and promotional material from 1999 to the present.

My January 29, 2010 Email to Apple

65. When I was questioned at my deposition about the email I sent to Apple on January 29, 2010, I was not asked what I meant when I wrote that I was interested in the "exclusive use" of my books on the iPad. Had Defendant's counsel followed up on this line of questioning, I would have explained that it was my position that if Apple wanted to use the name iBooks for its e-reading application, then the only books which should be available for use on that application should be electronic copies of the my ibooks books.

66. That concept is what I had in mind when I responded, in my deposition, that "the basis for my inquiry" was that I was "contacting Apple about selling my books via Apple's new app." (Individual Deposition of John T. Colby, taken July 20, 2012 ("Colby Dep.) 251:16-21.)

67. As I also testified in my deposition, it was my intention that Apple would understand that my January 29, 2010 email was notifying them that Apple was in fact infringing Plaintiffs' rights. (Colby Dep. 251:22-252:8.)

I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: Shelter Island, New York
January 25, 2013

J. T. Colby Jr.

John T. Colby, Jr.