

**EXHIBIT D**

1           IN THE UNITED STATES DISTRICT COURT  
2           FOR THE SOUTHERN DISTRICT OF NEW YORK

3           J.T. COLBY & COMPANY,           : Case Number  
4           INC. d/b/a BRICK TOWER        : 11-CV-40260  
5           PRESS; J. BOYLSTON &         : (DLC)  
6           COMPANY, PUBLISHERS LLC       :             
7           and IPICTUREBOOKS            :             
8           LLC,                            :             
9    :             
10           Plaintiffs,                   :             
11    :             
12           vs.                            :             
13    :             
14           APPLE, INC.,                  :             
15    :             
16           Defendant.                    :           

17    -   -   -  
18    October 2, 2012  
19    -   -   -

20    -   -   -  
21    Videotaped deposition of APPLE,  
22           INC., through HAL E. BORDEN, ESQUIRE, taken  
23           at the offices of Veritext National Court  
24           Reporting Company, 1801 Market Street, Suite  
25           1800, Philadelphia, Pennsylvania 19103,  
          beginning at 10:15 a.m., before LINDA ROSSI  
          RIOS, RPR, CCR and Notary Public.

26    -   -   -  
27    VERITEXT NATIONAL COURT REPORTING COMPANY  
28    MID-ATLANTIC REGION  
29    1801 Market Street - Suite 1800  
30    Philadelphia, Pennsylvania 19103

1 HAL E. BORDEN, ESQUIRE

2 in iBooks.

3 Q. Before January 27, 2010, did  
4 you have any personal knowledge with respect  
5 to the plaintiffs' use of the name iBooks?

6 A. Prior to that date, I was not  
7 aware of the plaintiffs' use of the name  
8 iBooks.

9 Q. Prior to January 27, 2010, did  
10 you have any personal knowledge or awareness  
11 of any predecessors in interest of the  
12 plaintiffs using the name iBooks?

13 A. Prior to that date, I was aware  
14 of abandoned trademark applications for  
15 iBooks and I believe one other mark,  
16 ibooksinc.com, if I remember correctly, that  
17 I learned at some point after January 27,  
18 2010, were being claimed as marks to which  
19 the plaintiffs have succeeded.

20 Q. Other than those of abandoned  
21 trademark registrations that you recall, was  
22 there any other source of your knowledge with  
23 respect to plaintiffs' or their predecessors  
24 in interest's use of the name iBooks?

25 MS. RAY: Objection. Caution on

1 HAL E. BORDEN, ESQUIRE

2 below or referenced.

3 Q. So is it fair to say that your  
4 knowledge or awareness of Apple's knowledge  
5 or awareness before January 27, 2010, is as  
6 the result of seeing an e-mail between Mr.  
7 Gundersen and Apple?

8 A. It's the result of either  
9 seeing such an e-mail or of seeing a  
10 reference to such an e-mail that would have  
11 made it clear that information was  
12 communicated.

13 Q. Without revealing the  
14 substance, did you ever have a conversation  
15 with Glenn Gundersen concerning plaintiffs'  
16 marks?

17 A. I don't recall.

18 Q. Without revealing the  
19 substance, did you ever have a conversation  
20 with anyone at Apple before January 27, 2010,  
21 regarding plaintiffs' marks?

22 A. I don't believe so.

23 Q. To the best of your knowledge,  
24 did Glenn Gundersen ever communicate verbally  
25 with anyone at Apple concerning plaintiffs'

1 HAL E. BORDEN, ESQUIRE

2 marks?

3 A. I don't know whether he did or  
4 not.

5 Q. And when I say "verbally," you  
6 understand I mean --

7 A. Orally.

8 Q. Yes. So if I had asked it as  
9 when I -- to the best of your knowledge, did  
10 Glenn Gundersen ever communicate orally with  
11 anyone at Apple concerning plaintiffs' marks?

12 A. I don't know. In the context  
13 of that question, prior to January 27th,  
14 speaking about the two applications and  
15 ancillary online information that I've been  
16 referring to.

17 Q. Can you describe with any  
18 greater specificity the, quote/unquote,  
19 ancillary online information that you  
20 referred to?

21 A. The extent to which I remember  
22 is that it was a description of Byron Preiss  
23 who was a founder or had other significant  
24 involvement in the applicant in question.

25 Q. Do you recall what it said

1 HAL E. BORDEN, ESQUIRE

2 about Byron Preiss?

3 A. I believe that it indicated  
4 that Byron Preiss had died and his company in  
5 question had gone into bankruptcy.

6 Q. Was this a news article?

7 A. I don't recall the context.

8 Q. Was it a bankruptcy filing?

9 A. I don't believe it was a  
10 bankruptcy filing.

11 Q. When you say "online  
12 information," was this information found  
13 through the Internet or was it found through  
14 a professional search database?

15 A. To the best of my recollection,  
16 it was found through the Internet.

17 Q. At that time, did you have an  
18 understanding that Byron Preiss and the  
19 bankruptcy, those facts related in that  
20 online source, referred to the same entity as  
21 were the applicants for the two abandoned  
22 registrations?

23 A. I believe so.

24 Q. That was an understanding you  
25 had then, just to clarify?

1 HAL E. BORDEN, ESQUIRE

2 registration work in connection with the  
3 iBooks' mark?

4 A. I don't recall.

5 Q. What elements of Tom La Perle's  
6 testimony with respect to Apple's knowledge  
7 or awareness of plaintiffs' marks prior to  
8 January 27, 2010, are you aware?

9 MS. RAY: Objection. But you  
10 can go ahead factually in terms of  
11 your understanding.

12 THE WITNESS: My understanding  
13 is that Tom La Perle indicated that  
14 Apple was aware of the two abandoned  
15 applications to which we referred as  
16 well as additional online information  
17 about the applicants.

18 BY MR. CHATTORAJ:

19 Q. Getting into the substance of  
20 the abandoned applications to which you have  
21 referred, do you know where that knowledge  
22 came from? What was the source of your  
23 information of the abandoned applications?

24 A. The fact that the abandoned  
25 applications existed would have come to me,

1 HAL E. BORDEN, ESQUIRE

2 did come to me through the results of a  
3 SAEGIS search.

4 Q. What information specifically?

5 A. I don't recall what information  
6 specifically I saw. A SAEGIS search will  
7 typically reveal information about the  
8 registration record including the mark, the  
9 goods and services covered, the owner.

10 Q. Does a SAEGIS search include  
11 the file history of that application?

12 A. A SAEGIS search would include a  
13 line by line summary of prosecution history,  
14 but would not include all of the documents  
15 filed with the PTO.

16 Q. At the time that you  
17 communicated to Glenn Gundersen the  
18 information you had discovered about the  
19 abandoned applications, had you reviewed the  
20 file history of either of those applications?

21 A. I don't recall.

22 Q. Had you reviewed any of the  
23 documents that have been filed at the PTO in  
24 connection with those applications?

25 A. I don't recall.



1 HAL E. BORDEN, ESQUIRE

2 Q. Has there ever been a time  
3 between that time and the present that you  
4 have reviewed any of the documents contained  
5 in the file history of those applications?

6 MS. RAY: Objection. Without  
7 revealing any privileged communications,  
8 you can go ahead and answer.

9 THE WITNESS: I don't recall.  
10 BY MR. CHATTORAJ:

11 Q. You don't recall whether you  
12 reviewed those documents with counsel?

13 A. I believe I reviewed those  
14 documents with counsel in preparation for  
15 this deposition. I don't recall prior -- I  
16 don't recall whether or not I reviewed them  
17 previously.

18 Q. Are there any documents that  
19 would reflect whether you reviewed those U.S.  
20 PTO filings previously?

21 A. Not to my knowledge.

22 Q. So, for example, it's  
23 impossible that you wrote an e-mail  
24 describing to Glenn Gundersen your review of  
25 the U.S. PTO filings. Right?

1 HAL E. BORDEN, ESQUIRE

2 MS. RAY: Objection. Calls for  
3 privilege grounds, but you can  
4 factually answer.

5 THE WITNESS: My recollection is  
6 that they did.

7 BY MR. CHATTORAJ:

8 Q. So with respect to United  
9 States trademarks, Dechert conducted a full  
10 search, not a preliminary search. Correct?

11 A. Correct.

12 Q. To the best of your  
13 recollection -- withdrawn.

14 A. If we could take a break  
15 relatively soon. If there's a natural break  
16 coming up for you, it doesn't have to be  
17 immediately.

18 Q. Certainly I'll ask you one more  
19 question and then we'll go off record.

20 What searches were carried out  
21 by Apple or on Apple's behalf in connection  
22 with the iBooks mark?

23 A. I don't understand the  
24 question.

25 Q. What databases were searched by

1 HAL E. BORDEN, ESQUIRE  
2 Apple or on Apple's behalf in connection with  
3 the iBooks mark?

4 MS. RAY: I'll object and  
5 caution the witness not to reveal any  
6 privileged communication, but  
7 factually you can answer.

8 THE WITNESS: I recall that the  
9 clearance searches in question  
10 encompassed SAEGIS database of  
11 trademark registrations and  
12 applications, Web searches via Google.  
13 I don't recall which, if any, other  
14 databases were searched.

15 BY MR. CHATTORAJ:

16 Q. Was more than one search  
17 carried out on SAEGIS?

18 A. I don't recall.

19 Q. Did you work with Betsy Yen to  
20 formulate search strategies for this search?

21 A. I believe I did.

22 Q. And were those search  
23 strategies implemented and carried out?

24 A. I believe they were.

25 MR. CHATTORAJ: We can go off

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(A recess was taken.)

- - -

VIDEOGRAPHER: The time is 1531.  
We are back on the video record.

MR. CHATTORAJ: We just went off  
the record so that Mr. Borden can  
consult with his counsel regarding a  
question of privilege. That was when  
there was a question pending.

BY MR. CHATTORAJ:

Q. I will repeat the question  
which was as follows: Is it fair to say that  
having seen the two abandoned applications  
and then the death of Byron Preiss and then  
the bankruptcy of the applicant, Apple  
believed that no use was being made of the  
iBooks mark by those entities or other  
entities that may have acquired their assets?

MS. RAY: I'll object and just  
caution the witness on privilege  
grounds, but I believe you can go  
ahead and answer that question.

THE WITNESS: Based on the

1 HAL E. BORDEN, ESQUIRE

2 existence of the two abandoned  
3 applications and the information about  
4 the applicant that you referenced, my  
5 understanding is that Apple had no  
6 knowledge of use of the marks that  
7 were the subject of those applications  
8 by the applicant or anyone else at  
9 that time, at the time of the search.

10 BY MR. CHATTORAJ:

11 Q. The search was in January 2010?

12 A. Correct.

13 Q. Did you have any direct contact  
14 with Apple employees in connection with the  
15 iBooks trademark clearance work? And if so,  
16 please identify them.

17 A. Not that I recall.

18 Q. So all communications were  
19 through Glenn Gundersen. Is that right?

20 A. All of the communications that  
21 I recall being aware of were through Glenn  
22 and not by me directly.

23 Q. Do you know who at Apple Glenn  
24 was communicating with concerning the iBooks  
25 trademark clearance work?

1 HAL E. BORDEN, ESQUIRE

2 being aware of searches beyond that  
3 which were described in the question.

4 BY MR. CHATTORAJ:

5 Q. So having discovered that the  
6 applicant had gone bankrupt, no one searched  
7 to see what became of the applicant or its  
8 mark after the bankruptcy. Right?

9 A. I don't recall searches of that  
10 nature.

11 Q. You've used the word  
12 "abandoned" several times in connection with  
13 the application by Byron Preiss' iBooks  
14 entity during your testimony today. What do  
15 you mean by that?

16 A. It's literally the status that  
17 the trademark office gives to an application  
18 that is not prosecuted through to registration.

19 Q. Does an applicant have to stop  
20 using a mark if it abandons its application  
21 to the trademark office?

22 MS. RAY: Objection.

23 THE WITNESS: No, not to my  
24 understanding.

25 BY MR. CHATTORAJ:

STATE OF NEW YORK )  
 )  
 COUNTY OF NEW YORK )

ss:

I wish to make the following changes, for the following reasons:

PAGE	LINE	
50	2	CHANGE FROM: Tommy
		CHANGE TO: Tom
		REASON: Transcription error.
51	11	CHANGE FROM: context
		CHANGE TO: contexts
		REASON: Transcription error.
129	2	CHANGE FROM: referred to
		CHANGE TO: Referred
		REASON: Clarification.
142	10	CHANGE FROM: I saw
		CHANGE TO: I saw a
		REASON: Transcription error.
144	18	CHANGE FROM: by trademark
		CHANGE TO: by a trademark
		REASON: Transcription error.
162	10	CHANGE FROM: was
		CHANGE TO: Were
		REASON: Clarification.
168	5	CHANGE FROM: search
		CHANGE TO: searched
		REASON: Transcription error.
174	16	CHANGE FROM: plurals on or off was set to on
		CHANGE TO: "plurals on or off" was set to "on"

REASON: Clarification.

180      15      CHANGE FROM: that

CHANGE TO: that,

REASON: Clarification.

180      17      CHANGE FROM: applications

CHANGE TO: applications,

REASON: Clarification.

211      11      CHANGE FROM: reviewed whether

CHANGE TO: reviewed. Whether

REASON: Transcription error.

Subscribed and sworn to before me

this 19th day of November, 2012.

  
\_\_\_\_\_  
Hal Borden