

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JT COLBY AND COMPANY, INC., D/B/A
BRICK TOWER PRESS, J. BOYLESTON AND
COMPANY PUBLISHERS, LLC, AND
IPICTUREBOOKS, LLC,

Plaintiffs,

-against-

Index No.
11-CV-4060 (DLC)

APPLE, INC.,

Defendant.

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VIDEOTAPED DEPOSITION OF

MIKE SHATZKIN

New York, New York

December 4, 2012, 9:35 a.m.

Reported By:

Nicole Sesta

Ref: 8575

1 M. Shatzkin

2 court reporter.

3 A Okay.

4 Q Also note that we have a court
5 order in place today. So that the objections
6 will simply consist of the word objection. If
7 your counsel is going to instruct you not to
8 answer I'm sure he'll do that.

9 A Okay.

10 Q Can you think of any reason why
11 you're not able to testify today, is there any
12 medication that you're on that might affect you?

13 A No, no.

14 Q Is it correct that you're here
15 today to testify as an expert witness on behalf
16 of the plaintiffs in the lawsuit between JT
17 Colby and Apple?

18 A Yes.

19 Q What did you do to prepare for
20 this deposition?

21 A I read a bunch of material, the
22 complaint, depositions by Rich Freese and John
23 Colby, I think. And I read the expert
24 testimony, the expert report and then the
25 deposition from the branding, I'm sorry, the

1 M. Shatzkin

2 name jumped out of my mind, the branding expert
3 from Apple.

4 Q Would that be Professor Carpenter?

5 A Yes, Professor Carpenter. And I
6 had my staff help me massage some numbers to
7 analyze some of the data out of the sales
8 records of iBooks. I would say that's pretty
9 much what I did to prepare for this, prepare to
10 write the report that you have and prepare for
11 this testimony.

12 Q You mentioned the expert report of
13 Professor Carpenter, was that just one report or
14 was there more than one?

15 A I'm recalling one.

16 Q You also mentioned deposition
17 transcripts of Mr. Freese and Professor
18 Carpenter, are those the only deposition
19 transcripts that you reviewed, and excuse me Mr.
20 Colby?

21 A Think I read something from Mr.
22 Colby. But those would be the only ones.

23 Q You mentioned having your staff
24 help you with numbers. Who on your staff helped
25 you with that?

1 M. Shatzkin

2 my ability up to the time I wrote the report
3 yes.

4 Q You're being compensated in
5 connection with your work in this case, correct?

6 A Yes.

7 Q How much are you being paid?

8 A \$500 an hour for the work done so
9 far, \$600 an hour during deposition time, and
10 \$700 an hour if we go to trial.

11 Q How many hours have you spent so
12 far in connection with this case?

13 A Roughly 25.

14 Q Do you know how many hours you
15 spent reviewing materials in connection with
16 this case?

17 A Well, I would say that that 20
18 hours is probably let's guess eight reviewing
19 materials, eight writing and editing, and four
20 conferring with counsel. I mean that would be
21 sort of a rough break down but probably close to
22 accurate.

23 Q Had you ever heard of any of the
24 plaintiffs in this case before you were
25 contacted by Mr. Freese?

1 M. Shatzkin

2 A Yes, sure.

3 MR. RASKOPF: Objection.

4 A Yes. Wait a minute. Plaintiffs,
5 no, actually if iBooks is a plaintiff I had
6 heard of iBooks. I had not heard of Mr. Colby.

7 Q Had you heard of JT Colby and
8 Company?

9 A No.

10 Q Before this case?

11 A No.

12 Q Had you heard of Brick Tower Press
13 before this case?

14 A No.

15 Q Had you heard of J. Boyleston and
16 Company before this case?

17 A No.

18 Q Had you heard of iPicturebooks?

19 A Yes.

20 Q And in what context did you hear
21 of iPicturebooks?

22 A Very aware of it. I'm in the
23 business and I'm aware of what goes on in the
24 business, and I knew Byron Preiss and I knew
25 what Byron Preiss did. So I was aware of iBooks

1 M. Shatzkin

2 and I was aware of iPicturebooks when they were
3 new.

4 Q Do you recall roughly when that
5 was?

6 A Late 1990s.

7 Q Had you ever met Mr. Raskopf
8 before this case?

9 A No.

10 Q Had you ever worked with his law
11 firm before this case?

12 A No.

13 Q Have you heard of Allegaert Berger
14 & Vogel?

15 A No, I haven't heard them.

16 Q You said you had heard of iBooks
17 and iPicturebooks before. Have you ever done
18 any work for either of those entities?

19 A No.

20 Q Had you ever done any work for Mr.
21 Preiss?

22 A No.

23 Q Have you ever heard of a company
24 called Byron Preiss Visual Publications?

25 A Yes.

1 M. Shatzkin

2 Q I understand we have only a few
3 minutes left on the tape. We might as well take
4 a break.

5 A Okay.

6 THE VIDEOGRAPHER: The time
7 is 11:00 a.m., and we're going off
8 the record.

9 (Recess taken.)

10 THE VIDEOGRAPHER: The time
11 is 11:24 a.m., and this begins
12 tape number two.

13 Q Mr. Shatzkin, we're going to mark
14 as Exhibit 3 a copy of your expert report.

15 (Exhibit 3, Mr. Shatzkin's
16 expert report, marked for
17 identification, as of this date.)

18 Q Is this the report that you
19 prepared in connection with the Colby and Apple
20 litigation?

21 A Sure looks like it.

22 Q Looking at page 2 of Exhibit 3, at
23 the top of the page, in the second paragraph, it
24 starts, "I have reviewed."

25 A Yes.

1 M. Shatzkin

2 Q It says, "I have reviewed and
3 considered the amended and supplemental
4 complaint and jury demand, answer and
5 affirmative defenses, the plaintiffs iBooks
6 sales figures and examples of the plaintiffs'
7 print and electronic books." Do you see that?

8 A Yes.

9 Q What sales figures did you look
10 at?

11 A We looked at a spreadsheet that, I
12 believe, was the sales reporting or compilation
13 of the sales reporting by Simon & Schuster for
14 the several-year period during which they
15 distributed iBooks.

16 Q Do you know what period that was?

17 A Off the top of my head, like
18 around 2000 to 2004, something like that.

19 Q Did you look at any other sales
20 figures other than the ones you just mentioned?

21 A Not that I remember, no.

22 Q You also mentioned in your report
23 examples of the plaintiffs print and electronic
24 books. Do you recall what books you looked at?

25 A Exactly which titles, no.

1 M. Shatzkin

2 Q Do you recall how many?

3 A Four, six.

4 Q Did you look at any web sites in
5 connection with your report?

6 A No.

7 Q Did you conduct any research in
8 connection with your report?

9 MR. RASKOPF: Objection to
10 the form.

11 A No. Well, except, as discussed
12 earlier, the manipulation of the data from the
13 sales reporting to make it more informative,
14 that you could call that research. But it
15 wasn't -- in other words, it wasn't looking at
16 other information, but it was doing something to
17 existing information to make it more meaningful.

18 Q That was what you called the
19 number crunching that Ms. Flannery did?

20 A That Katherine Flannery did.
21 That's right.

22 Q The sales figures that you looked
23 at, were those for iBooks only or for iBooks and
24 iPicturebooks?

25 A I believe both of them were in

1 M. Shatzkin

2 there, but my focus was on iBooks. I believe
3 Katherine actually sorted numbers for both of
4 them, but my focus was on the iBooks.

5 Q Did you conduct any consumer
6 surveys in connection with your report?

7 A No.

8 Q Did you review any marketing
9 materials for iPicturebooks or iBooks?

10 MR. RASKOPF: Objection to
11 the form.

12 You may answer.

13 A I don't think so.

14 Q You mentioned publicity earlier.
15 Did you review what you would consider publicity
16 materials?

17 A No.

18 Q No materials as to just iBooks or
19 iBooks and iPicturebooks?

20 MR. RASKOPF: Objection to
21 the form.

22 You may answer.

23 A I'm sorry, what?

24 Q Let me break it down a little bit.
25 Did you review any marketing materials with

1 M. Shatzkin

2 respect to iBooks?

3 A I didn't review any marketing
4 materials that I can recall at all.

5 Q Same question: Did you review any
6 marketing materials with respect to
7 iPicturebooks?

8 A No.

9 Q Did you review any publicity
10 materials with respect to iPicturebooks?

11 A Note that I recall.

12 Q Did you review any Wikipedia
13 entries?

14 A No.

15 Q Did you review any media articles
16 or coverage?

17 A No.

18 Q Did you do any Google or other
19 internet searching with respect to iBooks or
20 iPicturebooks?

21 A No.

22 Q And other than what you listed in
23 your report in that second paragraph at the top
24 of page two, do you recall reviewing anything
25 else in connection with your report?

1 M. Shatzkin

2 A No.

3 Q Looking at the next paragraph,
4 starts, "The facts I call upon."

5 A Uh-huh.

6 Q Is it fair to say that that's a
7 reference to your general experience?

8 A Yes. It is fair to say that.

9 Q Did you make any assumptions in
10 preparing your report and formulating your
11 opinions?

12 A Well, some of what might be my
13 expert opinions could be characterized as
14 assumptions, but they're assumptions based on --
15 they're informed assumptions. They're
16 assumptions based on a lot of history over a
17 long period of time. But yes, in that context,
18 I did make assumptions.

19 Q Did you make any assumptions
20 regarding the existence of any facts that you
21 relied on?

22 A I don't quite understand that.

23 MR. RASKOPF: Note my
24 objection to the form of the
25 question.

1 M. Shatzkin

2 published books or whether it was some originals
3 or not. I don't know.

4 Q Do you know how many new titles
5 iBooks publishes each year?

6 A No.

7 Q Do you know how many iBooks has
8 published overall?

9 A I know in these documents that I
10 know what their output was for a period of time
11 that I examined, which was approximately 2000 to
12 2004 that we talked about earlier. For that
13 period we did tally titles, and so I know in a
14 general sense. I cannot recall. But I have
15 known and expressed opinions about but I don't
16 remember the numbers at the moment.

17 Q I believe you said that you had
18 reviewed a report by Professor Carpenter,
19 correct?

20 A Yes.

21 Q Was it just one report by him?

22 MR. RASKOPF: Objection.

23 Asked and answered.

24 A I recall one. Oh no, no, there
25 was a second one. That's right. I did see a

1 M. Shatzkin

2 has spawned companies that really don't have
3 much presence except on the internet because
4 it's a big enough market to support that.
5 That's well understood by people who are working
6 the digital revolution.

7 Q In your report when you say which
8 have turned out to be of substantial interest on
9 the internet and sold well as ebooks, were you
10 talking about genre fiction generally or the
11 books published by iBooks in particular?

12 A No, I was actually talking about
13 the genres in which they publish, not iBooks
14 itself. I don't think I ever knew or do know
15 how those books have sold on the internet,
16 iBooks books particularly have sold on the
17 internet.

18 Q Looking in the next line you say,
19 "Although the sales of iBooks overall were
20 modest ([REDACTED] units) with sales of science
21 fiction titles alone totally [REDACTED] units,"
22 do you see that?

23 A Uh-huh.

24 Q Looking at that and doing the
25 math, is it fair to say that 34 percent of the

1 M. Shatzkin

2 total units were science fiction books?

3 MR. RASKOPF: Objection to
4 the form.

5 A That certainly would be the
6 calculation, yes.

7 Q And you view that as being
8 primarily science fiction?

9 MR. RASKOPF: Objection to
10 the form of the question.

11 A I actually am not looking at it
12 from that perspective. What you're
13 characterizing is the percentage of the total
14 output that was one thing or another. What I
15 was looking for was a critical mass of output in
16 any area. So, in other words, whether
17 approximately [REDACTED] science fiction units
18 were sold, whether that was [REDACTED] out of [REDACTED]
19 [REDACTED] or out of [REDACTED] or out of [REDACTED]
20 is not as important to me as they sold [REDACTED]
21 units. What's selling [REDACTED] units meant to
22 me is that there are likely to be tens of
23 thousands of people who have bought more than
24 two or three of these books.

25 That's what I was looking for.

1 M. Shatzkin

2 Was there a foundation of awareness which would
3 have constituted a building block for expanding
4 the brand using internet techniques. So it
5 wasn't so much the percentage because obviously
6 the person who bought a gardening book whether
7 there's one of them or a thousand of them is not
8 going to be aggregatable into a science fiction
9 community. So I wasn't worrying about those
10 people, whether there were a lot of them or a
11 little of them. What I was worrying about was
12 was there enough to constitute some brand
13 awareness. That's the [REDACTED] number was much
14 more important to me than the ratio.

15 Q You say you were looking at
16 whether it was likely that there were people who
17 bought two or three or more books?

18 A Right.

19 Q Do you know for a fact that there
20 are people who bought two or three or more
21 books?

22 A No.

23 Q You said that somebody who is
24 interested in gardening books is not going to be
25 aggregatable into science fiction, correct?

1 M. Shatzkin
2 many books in the same genre and repeat what
3 they do, and because I know that iBooks had a
4 lot of very, very highly branded authors, I
5 intuit, I believe as an expert that the
6 likelihood is that fans of science fiction
7 having discovered an iBook, however it is they
8 found it shopping in a store that carried it,
9 would easily find others and be attracted to
10 others. So it's an expert opinion. It's not
11 something that I can point to a survey to
12 demonstrate.

13 Q Do you know whether any of the
14 things you've talked about is likely to happen
15 had happened prior to 2010?

16 MR. RASKOPF: Objection to
17 the form of the question.

18 Q Customers discovering their books
19 and --

20 A I'm sorry?

21 Q Do you know whether prior to 2010
22 customers had discovered books published under
23 the iBooks imprint?

24 MR. RASKOPF: Objection to
25 the form of the question.

1 M. Shatzkin

2 Q And come to recognize it?

3 MR. RASKOPF: Objection to
4 the form of the question. You may
5 answer.

6 A That was actually the point to
7 this paragraph, which was one, approximately 2
8 million units of iBooks science fiction were
9 sold to an unknown number of people. And I am
10 positing that a significant number of those
11 people had several, and those people would know
12 iBooks and would have from the sales that took
13 place in the time period that I was analyzing
14 it. That's the basis of the opinion.

15 Q And that time period was 2000 to
16 2004, correct?

17 A Approximately, yes.

18 Q But you don't know for a fact
19 whether there were repeat customers who had two
20 or three or more iBooks science fiction books?

21 MR. RASKOPF: Objection to
22 the form. Asked and answered.

23 A No.

24 Q We're going to go off the record
25 for a minute while we set up a spreadsheet for

1 M. Shatzkin

2 the witness to look at.

3 THE VIDEOGRAPHER: The time
4 is 2:16 p.m. and we're going off
5 the record.

6 (Recess taken.)

7 THE VIDEOGRAPHER: The time
8 is 2:20 p.m. and we're back on the
9 record.

10 (Exhibit 9, CD-Rom, marked
11 for identification, as of this
12 date.)

13 Q We've marked as Exhibit 9 a disk
14 containing a spreadsheet that was produced to us
15 by plaintiffs. My understanding is the file
16 name is iBooks trade master file BISAC. We've
17 loaded that on a laptop for the witness to look
18 at.

19 MR. RASKOPF: This is
20 Exhibit 9.

21 Q Mr. Shatzkin, have you seen this
22 spreadsheet before?

23 A Yes, I think I have.

24 Q Is this the spreadsheet that you
25 talked about earlier that contained sales data

1 M. Shatzkin

2 that as you recall was from 2000 to 2004?

3 A Yes, I believe it is.

4 Q Did anyone explain this
5 spreadsheet to you in terms of what data it
6 contained or how it worked?

7 A I don't think so, no. We didn't
8 have any need to understand every column. We
9 were looking for very, very specific information
10 and we were able to -- actually Katherine was
11 able to find what I asked her to find without
12 much help from me or anybody else.

13 Q Looking at the spreadsheet it
14 looks like there's an initial column that was
15 numbers; is that correct?

16 A Okay, yes, the numbers on the far
17 left, yes.

18 Q It looks like there's a next
19 heading that says ISBN?

20 A ISBN, yes.

21 Q What does ISBN stand for?

22 A International standard book
23 number.

24 Q Is that the unique number assigned
25 to a book?

1 M. Shatzkin

2 correct? In other words, there's six rows that
3 have Battlestar Galactica in the title?

4 A Yes.

5 Q Looking at that it looks like
6 three of them have the same ISBN number, which
7 would be 743413261.

8 A I see two of them with 261. I see
9 one with 621, which might be a typo, yes.

10 Q Looking at the two that have --

11 A I see two that have 261, the top
12 two, that are both 2299.

13 Q You said that when you looked at
14 this you were counting the numbers of books,
15 where books had the same title did you count
16 each time the title appeared?

17 A I don't know.

18 Q Where a book had -- where the same
19 ISBN number was listed, do you know if that was
20 counted?

21 A I don't know.

22 Q Was this the only spreadsheet that
23 you looked at containing sales data for the
24 plaintiffs?

25 A I think so.

1 M. Shatzkin

2 Q Do you know whether it showed
3 sales data for both iBooks and iPicturebooks?

4 A I know that it did. We sorted out
5 the iPicturebooks.

6 Q When you say you sorted out --

7 A We didn't tally them. We were
8 looking for science fiction and our
9 understanding was that there wasn't any science
10 fiction in iPicturebooks.

11 Q So you weren't addressing any
12 sales levels for iPicturebooks in your report,
13 correct?

14 A That's right.

15 Q Does the spreadsheet identify when
16 any particular sales have occurred?

17 A I don't really remember. I don't
18 know. I can't remember whether there was more
19 than one spreadsheet that we added together for
20 the time period or whether there was only one
21 spreadsheet that covered the entire time period.
22 I really don't recall. We got a bunch of
23 information. I knew what I wanted. I knew I
24 wanted to extract a small subset of what the
25 spreadsheet contained, and I gave my colleague

1 M. Shatzkin
2 the information I needed so she could extract
3 what I wanted to extract. I didn't really pour
4 over the spreadsheets themselves myself.

5 MS. RAY: Counsel, our
6 understanding is that there was
7 only one spreadsheet produced to
8 us as material the witness
9 considered.

10 MS. BOGDANOS: That's
11 correct.

12 MS. RAY: If there was
13 another spreadsheet -- so our
14 understanding is correct, there
15 was no other spreadsheet?

16 MS. BOGDANOS: Correct.

17 Q In directing your colleague to
18 tally numbers of science fiction units sold, did
19 you do any independent investigation to confirm
20 the numbers that you derived from the
21 spreadsheet?

22 A No. Under both meanings of that
23 question, that I can conjure, the answer would
24 be no to both of them.

25 Q You testified that your

1 M. Shatzkin

2 understanding is that the sales data covered the
3 period 2000 to 2004, correct?

4 A Approximately.

5 Q Approximately. To the best of
6 your knowledge have you reviewed any sales data
7 for any time period after 2004?

8 A I can't recall. I seem to know
9 anecdotally that the numbers have not been
10 nearly -- were not nearly as robust after the
11 Simon & Schuster period. Whether I know that by
12 seeing numbers or whether I know that by asking
13 questions and being told that I can't really
14 recall, but I didn't try to analyze it.

15 Q Looking at this spreadsheet of
16 sales data do you know whether these sales were
17 made to distributors or to end customers?

18 A Well, there were two components
19 and don't ask me to find them because I won't be
20 able to, which were shipments out and returns.
21 So the shipments out and returns were all
22 transactions conducted with intermediaries. The
23 number that I just gave you, the 1,900,000, or
24 whatever, was a net number. That is it was the
25 shipments out with returns subtracted.

1 M. Shatzkin

2 A No.

3 Q I think we're done with the
4 spreadsheet. Let's take a quick break and get
5 the laptop out of the way.

6 THE VIDEOGRAPHER: The time
7 is 2:32 p.m. and we're going off
8 the record.

9 (Recess taken.)

10 THE VIDEOGRAPHER: The time
11 is 2:34 p.m. and we're back on the
12 record.

13 Q We're going to mark as Exhibit 10
14 a November 27, 2012 printout of the search
15 results for iBooks on Amazon.com?

16 (Exhibit 10, Amazon.com
17 results, marked for
18 identification, as of this date.)

19 Q Mr. Shatzkin, have you ever looked
20 up iBooks on Amazon?

21 A No.

22 Q On any web site?

23 A No.

24 Q Looking on the left-hand side of
25 this printout, which is of the first 12 of 849

1 M. Shatzkin

2 is I assume this is a recently recent search. I
3 don't know about how much of the original iBooks
4 output was cleared for distribution at the
5 moment or even whether that process is an
6 ongoing process. So in other words, if you ran
7 the same search three months from now would it
8 yield the same numbers or would more books come
9 back into play. So no, it doesn't really change
10 my opinion about anything.

11 Q And as you said the spreadsheet
12 you looked at, your understanding was it covered
13 2000 to 2004, correct?

14 A Yes, approximately.

15 Q So you wouldn't know what the
16 numbers would reflect, for example, for 2008,
17 correct?

18 A That's right, I would not know.

19 Q You wouldn't know what the numbers
20 would reflect for 2009?

21 A That's right.

22 Q Or for 2010?

23 A Yes.

24 Q Or for 2012?

25 A Right.

1 M. Shatzkin

2 sold to intermediaries rather than consumers by
3 iBooks. They didn't really have a means that
4 I'm aware of for direct consumer sales.

5 Q Do you know whether they have a
6 means today for direct to consumer sales?

7 A I don't know.

8 Q Do you know what portion of the
9 iPicturebooks sales were hard copies as opposed
10 to ebooks?

11 A No.

12 Q Do you know what portion of the
13 iPicturebooks sales were online as opposed to in
14 other outlets?

15 A No.

16 Q Do you know what portion, if any,
17 of iPicturebooks sales were directly to
18 consumers?

19 A No.

20 Q Looking at the amended complaint,
21 turning to page six, paragraph 15, looking at
22 that paragraph it says, "The iBooks print books
23 include a large number of famous books from
24 well-known authors, many of them focused on
25 history." Do you see that? Does that affect

1 M. Shatzkin

2 your opinion at all that iBooks focused on
3 science fiction?

4 A No.

5 Q Why not?

6 A For the reason I stated earlier,
7 which is that from my perspective the publishing
8 they did outside of science fiction for the
9 purposes of my opinion about whether they had
10 brand equity in science fiction, publishing
11 outside of science fiction was noise. It was
12 not meaningful. What was meaningful was how
13 much publishing they did within science fiction.

14 Q That again was based on the sales
15 numbers that you looked at?

16 A That's right. Sales numbers which
17 also -- and the output numbers. In other words,
18 the sales were one component and a number of
19 titles published was another component of it.

20 Q Do you know how many titles iBooks
21 has published in the science fiction genre?

22 A All I know is in the summary that
23 is in this report, whatever it was, 178 titles
24 or 560, I can't remember, 600 titles, [REDACTED]
25 or something of that nature. That's the four

1 M. Shatzkin

2 A I'm not aware of any.

3 Q Do you know whether iBooks uses
4 Facebook or Twitter?

5 A I don't know.

6 Q Do you know whether it makes any
7 use of social media whatsoever?

8 A I don't know.

9 Q Do you know whether with respect
10 to the -- withdrawn. Do you know whether the
11 plaintiffs have done anything with the iBooks
12 imprint to put it in direct contact with
13 consumers?

14 MR. RASKOPF: Objection to
15 the form.

16 A I don't know.

17 Q Have you made any inquiry as to
18 whether the iBooks imprint has made any effort
19 to be in touch with its consumers?

20 MR. RASKOPF: Note my
21 objection to the form.

22 A I'm trying to remember how I know
23 that. The current owner of iBooks is a
24 bookstore guy and has not probed in that
25 direction, but I can't remember why I know that.

1 M. Shatzkin

2 I'm not aware of them making any efforts to go
3 direct to consumer.

4 Q When you say a bookstore guy what
5 do you mean by that?

6 A I mean that his background is in
7 bookstores and his belief is in bookstores. So
8 in the continuum or in the evolution of industry
9 thought moving from bookstore dependent to
10 bookstore independent, he tends to be more
11 behind the curve than ahead of the curve based
12 on his background.

13 Q I believe you said that you had
14 not looked at any web sites in connection with
15 your report, correct?

16 MR. RASKOPF: Objection to
17 the characterization of the
18 witness' prior testimony. You may
19 answer.

20 A I don't recall looking at any web
21 sites to prepare for this, no.

22 Q Do you know whether there is any
23 active web site for iBooks?

24 MR. RASKOPF: Objection to
25 the form of the question. You may

1 M. Shatzkin

2 answer.

3 A I don't know. Kind of hard for
4 them to have one I guess if they didn't have one
5 before or the iBooks store opened. I'm not sure
6 what they do if they have one now.

7 Q You talked earlier about community
8 building, do you recall that?

9 A Community?

10 Q Community building.

11 A Yes.

12 Q Do you know whether any of
13 plaintiffs have engaged in community building
14 with respect to iBooks?

15 MR. RASKOPF: Objection to
16 the form. You may answer.

17 A I'm not aware of any such efforts,
18 no.

19 Q Do you know whether any of
20 plaintiffs have engaged in search engine
21 optimizations with respect to iBooks?

22 A No, I don't know.

23 Q Do you know whether they've
24 collaborated with other publishers or imprints
25 with respect to iBooks?

1 M. Shatzkin

2 A No, I don't know.

3 Q Do you know if they have
4 collaborated with other web sites?

5 A I don't know.

6 Q For example, Library Thing which
7 you mentioned?

8 A I have no idea whether they have
9 collaborated or not.

10 Q Do you know if they have
11 collaborated with Good Reads at all?

12 A I don't know.

13 Q Do you have any information about
14 what volume of traffic the plaintiffs' web site
15 gets?

16 A No, I don't even know if they have
17 a web site.

18 Q Have you ever seen any marketing
19 materials for plaintiffs' iBooks books?

20 MR. RASKOPF: Objection to
21 the form. You may answer.

22 A I don't think so.

23 Q I understand that earlier you used
24 both the terms marketing and advertising. Are
25 those two different things in your mind?

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2 A Depending on how one defines
3 marketing, advertising could be a subset of
4 marketing. Publicity is marketing. Advertising
5 is marketing and other things are marketing.
6 Some people break out publicity and advertising
7 as if they were separate from marketing. It's a
8 nuanced view of how to define these things. I
9 don't think there's a textbook definition that
10 says it's one or the other.

11 Q Would you understand marketing as
12 including publicity and advertising?

13 A I would, yes.

14 Q Do you know whether plaintiffs do
15 any advertising for their iBooks imprint?

16 A I don't know.

17 Q Do you know if they do any
18 advertising for iPicturebooks?

19 A I don't know.

20 Q Do you know whether there are any
21 fan sites for any of the iBooks or
22 iPicturebooks?

23 A I don't know.

24 MS. RAY: Let's take a
25 break.

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2 absence of sales is not an argument, only the
3 presence of sales is an argument. So I was
4 working from what I knew sales had been, not
5 from what sales were not.

6 Q Is it fair to say that your
7 opinion as to whether there were any brand
8 equity in the iBooks name among science fiction
9 book purchasers is based on the number of units
10 of science fiction books that you saw reflected
11 on the spreadsheet that you looked at?

12 MR. RASKOPF: Objection to
13 the form of the question.

14 A Yes, it's fair to say that.

15 Q Is there any other basis for that
16 opinion?

17 MR. RASKOPF: Objection to
18 the form of the question.

19 A No. Actually, that's not quite
20 right. The other element that is a basis for
21 that opinion is the author list, but primarily
22 it was about the number of units sold.

23 Q When you say the author list what
24 do you mean by that?

25 A I mean the illustrious names,

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2 science fiction names, that iBooks published on
3 its list.

4 Q When you refer to the author list
5 would that include authors such as Arthur C.
6 Clark?

7 A That's exactly right.

8 Q Do you know whether iBooks, the
9 imprint, published any first editions of any
10 books by Arthur C. Clark?

11 A I have no idea.

12 Q Do you know whether titles that
13 iBooks published that were authored by Arthur C.
14 Clark were also available from other publishers
15 at the same time?

16 A I don't know.

17 Q So is it fair to say that you
18 don't know as to any of the authors published by
19 iBooks Inc. whether it was a unique source for
20 those titles at the time it published them?

21 A That's right, I don't know.

22 Q If you turn to page 33. Actually,
23 it may make sense to look first at page 32,
24 paragraph 95. At the bottom it states, "The
25 below figure shows the sales of the iBooks

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2 imprint for the priced period through the Colby
3 period." It refers to a table on the next page
4 and then paragraph 96 refers to another table.
5 And you looked at this when you looked at the
6 Carpenter report?

7 A Yes.

8 Q Did these tables affect your
9 opinion one way or the other?

10 A No.

11 Q Why not?

12 A Because, why not. It's sort of
13 hard to address that from a negative, but maybe
14 the simple thing to do is to say that the low
15 bars on the right, as far as I know, did not
16 subtract anything from the high bars on the
17 left. So, in other words, they didn't reduce
18 the evidence on which I based my opinion. They
19 just simply failed to give additional evidence
20 to support my opinion.

21 Q And that evidence being the number
22 of books sold as reflected on the spreadsheet
23 that you looked at that you believe were
24 categorized as science fiction?

25 A That's right.

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2 MR. RASKOPF: Note my
3 objection to the form of the
4 question.

5 A No.

6 Q Looking at page one of your
7 report, the numbered paragraphs at the bottom
8 when you say this report will explain the
9 following, in number one when you refer to
10 multi-level branding, that's what you just
11 talked about authors, imprints, or series in
12 publishing companies; is that correct?

13 A Uh-huh.

14 Q And number two refers to trend
15 towards book purchasing online and a focus on
16 business to consumer brands, correct?

17 A Uh-huh.

18 Q Is it your opinion that iBooks is
19 a business to consumer brand?

20 MR. RASKOPF: Objection to
21 the form of the question.

22 A It is my opinion something is
23 not -- you cannot say, well, I guess you can say
24 it is or isn't a consumer brand. In some level
25 anything that's ever bought by a consumer is a

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2 consumer brand. The question is whether it's a
3 consumer brand on which some commercial value
4 can be built. If there are six people that know
5 about it, it would be pretty hard. If there are
6 thousands of people that would know about it it
7 would be somewhat easier. If there millions of
8 people that know about it then you're Harlequin
9 and you build a world scale enterprise on it.

10 It is my opinion that iBooks was
11 recognized as a legitimate science fiction
12 publisher by a substantial number of science
13 fiction book consumers, and that that created a
14 foundation on which can be built upon.

15 Q That again is based on the sales
16 numbers?

17 A Yes.

18 Q In paragraph three where you say
19 how the iBooks brand could have capitalized on
20 its legacy, do you see that, to build a valuable
21 consumer franchise? Is it your opinion that it
22 ever did capitalize on that legacy?

23 MR. RASKOPF: Objection to
24 the form of the question.

25 A I'm not aware of any specific

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2 steps that were taken to capitalize on that
3 legacy in the manner which say I would have done
4 it.

5 Q Looking at page two of your
6 report, number four at the top, you refer to
7 misstatements and erroneous conclusions by
8 Professor Carpenter, correct?

9 A Uh-huh.

10 Q Are those -- are your opinions as
11 to the misstatements and erroneous conclusions
12 that you believe Professor Carpenter reached set
13 forth at pages six, seven, and eight of your
14 report?

15 A Certainly -- that certainly does
16 seem to be a list of them. Whether it's the
17 whole list of them I'm not sure, but it does
18 seem to be the section in which I gathered that
19 particular batch of information.

20 Q Do you have any other opinions
21 about Professor Carpenter's expert reports,
22 whether his original report or his rebuttal
23 report, that are not set forth in your report?

24 A I can't even really begin to
25 answer that question. Probably. I mean I have

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2 Q You talked about there being
3 opportunities for push strategy both online and
4 in retail stores. Do you know whether with
5 respect to iBooks or iPicturebooks any effort
6 has been made to engage in a push strategy,
7 either online or in bookstores?

8 A I don't know.

9 Q Looking at page eight in your
10 report under opinions and conclusions, in the
11 first paragraph you say, "The iBooks imprint has
12 reached thousands of its niche readers." What
13 is the basis for that statement, is that the
14 sales records you looked at?

15 MR. RASKOPF: Asked and
16 answered.

17 A Interpretation of the sales
18 records.

19 Q In the next paragraph you refer to
20 very significant science fiction authors
21 including Ray Bradbury and Arthur Clarke,
22 correct? Do you consider those authors as being
23 brands?

24 A Sure, they are. All authors are
25 brands. Some are better known than others.

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2 Q Do you know whether at any point
3 in time iBooks has been the only source for
4 Arthur C. Clark books?

5 A No.

6 Q In the last paragraph on page
7 eight in the first line you say, "At the time
8 the entire industry turned its attention to
9 consumer branding." Do you see that?

10 A Uh-huh.

11 Q You say there is no precise date
12 but you reference November 2007, the
13 introduction of the Kindle and is that the
14 Amazon ereader?

15 A That's the Amazon ebook ereader,
16 yes.

17 Q Do you know whether iBooks turned
18 its attention to consumer branding?

19 A I see no evidence that they have.

20 Q If we take a short break we may be
21 close to done.

22 THE VIDEOGRAPHER: The time
23 is 4:09 p.m. and we're going off
24 the record.

25 (Recess taken.)

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2 proposition, and they need to understand the
3 environment or climate in which they are
4 introducing that, and what words are the best to
5 use.

6 There's definitely a marketing
7 component to all those things, or Net Galley,
8 things like that. Sometimes it includes
9 figuring out who might write about it or in some
10 more conventional aspects of marketing
11 publicity.

12 Q We mentioned your blog earlier. I
13 think it's called the Shatzkin File?

14 A That's right.

15 Q Do you know how many blog entries
16 you've done?

17 A It will be four years in February.
18 I would say probably about between 3 and 400.

19 Q Do any of your blog entries
20 discuss iBooks?

21 A No.

22 Q Do any of your blog entries
23 discuss any of the plaintiffs?

24 A No.

25 Q Do any of your blog entries

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2 discuss Byron Preiss?

3 A No.

4 Q Have you been asked to give any
5 opinion in this case about whether there is
6 likely to be confusion between the iBooks
7 imprint and Apple's iBooks software application?

8 MR. RASKOPF: Objection to
9 the form of the question.

10 A I don't think I've been
11 specifically asked that question.

12 Q Do you have any opinion?

13 A Yes.

14 Q What is your opinion?

15 A I think it would be inevitable
16 that there would be confusion.

17 Q What's the basis for that opinion?

18 A The names are the same. The ebook
19 world is new and still confusing to a lot of
20 people and I think that the power of Apple is
21 such that to the extent that there's any
22 awareness of iBooks it is likely in this day and
23 age to be thought of as the Apple ebook format,
24 rather than anything else.

25 Q Have you done any research

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2 or that in any way, in my opinion, denigrates
3 his abilities. It is normal that people outside
4 the publishing business are stymied by the
5 massive number of very, very small commercial
6 projects that we in the publishing business
7 handle as a routine of our day-to-day lives.

8 Q You talked earlier about niche
9 imprints. Is it fair to say that iBooks, that
10 the iBooks imprint to the extent it has a brand
11 is a niche imprint?

12 MR. RASKOPF: Objection to
13 the form of the question.

14 A I would say it is fair to say that
15 iBooks has the foundation to capitalize on brand
16 equity within the science fiction fantasy niche.
17 When you cross the line of having something that
18 qualifies as a niche imprint or a strong brand
19 is a separate question, but since my premise is
20 that publishing brands are built on the
21 knowledge of consumers who have purchased and
22 read something that gives the brand identity, I
23 think that iBooks did enough to qualify on that
24 basis and if the right strategies were employed
25 they would have -- employed and able to use the

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2 brand -- they would have a real opportunity to
3 turn that into something that would be a long
4 way from being Harlequin, but would be on its
5 way to being something like Harlequin or Baen or
6 Tor or Orbit.

7 Q You talked about crossing the line
8 to having a brand. Is it your opinion that
9 iBooks at any point crossed that line?

10 MR. RASKOPF: Objection to
11 the form.

12 A You're asking me to generate a
13 characterization. I'm just simply not
14 comfortable saying when the lines got drawn. I
15 go back to what I said, which is that they have
16 a foundation of knowledgeable people in what
17 strikes me as sufficient number to make a real
18 play for a science fiction brand.

19 It's not a dozen people. It's
20 probably thousands and it may be tens of
21 thousands of people who consumed enough books so
22 if -- remember if it was 50,000 people, we're
23 living in a country of 300 million people. So
24 whether it be 50,000 of them and you and I may
25 never meet one with those odds, but if we could

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2 meet those 50,000 people and say do you know
3 iBooks they'd say I read an Arthur Clarke book,
4 and then I read something by someone I didn't
5 know because these people who read 5, 10, 20, 40
6 science fiction books a year, as I said earlier,
7 are not reading them from 500 publishers.
8 They're coming from a dozen publishers. They
9 would remember iBooks.

10 Q Is it your opinion that iBooks has
11 made a play to capitalize on those people who
12 have bought books in the past?

13 MR. RASKOPF: Objection to
14 the form of the question.

15 A I have not seen the evidence of
16 it.

17 Q I'd like to show you what we've
18 marked to save time as Exhibit 14, a book called
19 Plantepedia by Maggie Stuckey. We've marked as
20 Exhibit 15 Glide Path by Arthur C. Clarke.
21 We've marked as Exhibit 16 Arthur C. Clark's
22 Venus Prime 5. We've marked as Exhibit 17 a
23 book called Voodoo Moon Trilogy by Cheri Scotch.
24 We've marked as Exhibit 18 the Dawn of Amber by
25 Robert Zelazny. We've mark as Exhibit 19 Dorian