

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.T.COLBY & COMPANY, INC. d/b/a/)	
BRICKTOWER PRESS, J. BOYLSTON &)	
COMPANY, PUBLISHERS LLC and)	Case No. 11 Civ. 4060 (DLC)
IPICTUREBOOKS LLC,)	
)	
)	
Plaintiffs,)	CORRECTED REBUTTAL REPORT OF
PLAINTIFFS')	
)	EXPERT, JACOB JACOBY, Ph.D.
-against-)	
)	
APPLE, INC.,)	
)	
Defendant.)	

I. PERSONAL INFORMATION

1. My full name is Jacob Jacoby. I reside at 160 West 66th Street, New York, New York 10023. A description of my qualifications and credentials is provided as Appendix A attached hereto.

2. A copy of my Curriculum Vita is provided in Appendix B. Additionally, information responsive to the U.S.C. Rule 26 (Fed. R. Civ. P.) requirements that I indicate my trial and deposition testimony during the past four years is provided in Appendix C.

II. CIRCUMSTANCES LEADING TO THIS REBUTTAL REPORT

3. I was contacted on September 27, 2012 by counsel for the plaintiffs, Colby et al., (“Colby”). Counsel requested that I evaluate the September 2012 “Book Survey Report” authored by Dr. Deborah Jay of the Field Research Corporation describing a survey designed,

respondents' survey experiences from the way consumers would actually encounter the "iBooks" or "ibooks" imprint within books.

10. **Problems with the Test Protocol: It did not Provide a Fair Test of What I Understand to be the Critical Question and, as a Result, was Biased toward Finding No Confusion.** Dr. Jay's survey addresses the question: "Do people pay attention to the name of the publisher when asked, in an artificial test-like situation, to 'browse this page the way you normally do when you are deciding whether to buy a book'." While many people may not pay attention to the identity of a book publisher when asked to give a perfunctory review of a webpage, I question whether that is the issue that needed to be addressed. In my opinion, the critical question to be addressed is: "What do relevant consumers think when they come across the name iBooks? Would they think it came from, was affiliated with, or put out with the authorization of Apple?" As a consumer psychologist with 45 years of professional experience, I am of the opinion that while point-of-sale confusion may occur, it is post-sale confusion that is more likely.¹ Dr. Jay's survey did nothing to test the likelihood of post-sale confusion.

11. Note that earlier questions of "Part I. Respondent Instructions" -- specifically, Questions C, G, H and I -- all informed the respondent that they would be looking at a *page* on the Amazon.com or BarnesandNoble.com web site. As used in these questions, the word *page* is not leading; that is, it does not lead respondents to pay attention to certain elements on the page or lead respondents away from paying attention to other elements on that page. In contrast, Question J abruptly changes the focus from *the page* to *the book*. (Specifically, Question J told respondents they would be asked questions "*about the book* described on the page," not about the

¹ My own experience when shopping for books generally (as opposed to shopping for series with which I already am familiar), which I suspect mirrors that of many other book purchasers, is to buy a book because of its content, author or title, and only afterward -- either at point of purchase or sometime later -- pay attention to the name of the publisher.

questionnaire. Immediately afterward, the respondent is asked Q1a designed to assess confusion as to source: “*Now, for my very first question. What company or companies do you think printed, released or put out this book?*” If the person answered “iBooks” (or “Ibooks” or “ibooks”) that would be a “right answer.” If the person answered “Argosy Press,” that would be a “wrong answer.” So there are right and wrong answers. Moreover, having twice been told “there are no right or wrong answers,” there is little incentive for the respondents to engage in the cognitive effort to remember the details of what they saw and respond accordingly.

17. **Problems with the Questionnaire: Failure to Ask an Appropriate Question to Assess Likely Confusion as to Affiliation, Connection, or Association.** While respondents may not have thought Apple was the source of the book, it is quite possible that they thought Apple had some business affiliation, connection, or association with the source of the book. In my experience, the typical question designed to get at confusion as to affiliation, connection, or association is worded something like the following: *Do you think the company that printed, released or put out this book ... does have a business connection, association or affiliation with another company; does not have a business connection, association, or affiliation with another company; or have you no thoughts about this?* By specifying *a business connection, association, or affiliation with another company*, the question is clear and unambiguous about what is being asked.

18. In marked contrast to the question provided in Paragraph 17, *supra*, consider Question 2a posed by Dr. Jay: *Now, with respect to the company or companies that printed, released or put out this book... Do you think... they have made or put out other things, besides books, they have not made or put out other things, besides books, or, ... do you have no opinion?* In her description of the Survey Design and Approach (see page 10) as well as in her