

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

vs.

No. 11-cv-4060 (DLC)

APPLE, INC.,

Defendant.

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VIDEOTAPED DEPOSITION OF E. DEBORAH JAY,
Ph.D, taken by Plaintiffs, pursuant to Agreement, at
the offices of Quinn Emanuel Urquhart & Sullivan
LLP, 51 Madison Avenue, New York, New York, on
Friday, November 30, 2012, commencing at 9:45 a.m.,
before Chandra D. Brown, a Registered Professional
Reporter and Notary Public within and for the State
of New York.

Job No: 27813

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2 received permission or approval to put out that
3 product.

4 Q And how about affiliation confusion?

5 A I believe, as measured in an Eveready
6 format, that they would believe that two
7 products are -- come from the same source, that
8 the makers, or the source of two products is
9 related or they come from -- so if you go to
10 the classic -- I ask the classic question,
11 sometimes described as the gold Standard, the
12 question in the Eveready where you ask
13 respondents were shown, I think they were lamps
14 and mini light bulbs, or actually two surveys
15 in the Union Carbide case, and they were asked
16 to name any other products put out by the
17 concern that put out the product that they were
18 shown.

19 So that's effectively the same question
20 that I asked to find out whether there was an
21 affiliation. So I asked the questions asked in
22 Union Carbide, and supplemented them with an
23 additional question which Professor McCarthy
24 sometimes refers to as the standard format
25 where you augment the Union Carbide formulation

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2 with one additional question about approval or
3 sponsorship. And I believe certainly
4 permission or approval is an easier term, are
5 easier terms for respondents to understand.

6 But, effectively, the approach I did
7 blends the well-established, repeatedly
8 reaffirmed formulation from the Union Carbide
9 case and augments it with an additional
10 question which Professor McCarthy describes as
11 the standard format for likelihood of confusion
12 surveys.

13 Q So is it your understanding, then, that
14 affiliation is really almost product
15 affiliation, affiliation of the one product
16 with some other brand or product?

17 MS. CENDALI: Objection to form.

18 Objection.

19 A No. The issue is whether two products
20 come from the same source and, therefore, they
21 are affiliated. And that was the formulation
22 credited in the Union Carbide: Do iPads come
23 from the same source as "Murder Through the
24 Ages"; do iPods come from the same source as
25 "The Stars My Destination."

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2 her survey on an iPhone, for example, which
3 would lead to an impermissible side-by-side
4 comparison. But I don't know, I just don't
5 know the answers to those questions.

6 Q How did you select the stimuli that you
7 used?

8 A In part based on the Complaint. So the
9 Complaint specifically said that the books
10 listed a number of books and indicated that
11 they were sold, or a number of -- I think the
12 Complaint talked about over a thousand
13 paperback and hardback books, and that they are
14 sold on the Amazon and Barnes & Noble website.

15 I actually tried to find some of the
16 titles listed in the Complaint in various
17 bookstores and could not find them. There is a
18 great book store in Menio Park, if you're ever
19 there, Kepler's, a fabulous book store.
20 There's also Books, Inc. I went to a number of
21 different bookstores, to the extent there were
22 brick-and-mortar bookstores, and was not able
23 to find -- I looked for the titles and -- but
24 what I was aware of is that the books were sold
25 on Amazon and -- on the Amazon website and the

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2 Barnes & Noble website.

3 So then I did various searches actually
4 with the iBooks and various permutations of the
5 imprint. And then I -- so I saw that I got the
6 most hits, as it were, on the capital "I",
7 lowercase "books," Inc., and then all lowercase
8 "ibooks incorporated," and so -- and I also
9 sorted -- if you do searches on the various
10 websites, you can sort -- after you search on
11 iBooks, for example, or iBooks Inc., you can
12 sort by relevant popularity, best seller.

13 So among the iBooks imprint, books that
14 have the iBooks imprint, I was looking for
15 popular books and books that were, as I said,
16 not necessarily bestsellers in the publishing
17 industry, but bestsellers among the books that
18 plaintiffs published.

19 So I did those searches, plus I also -- so
20 these books, at the time that I did the survey,
21 were among the most popular or the bestsellers
22 among those books published by plaintiffs.
23 They used the imprint the same way it was used
24 in the Complaint or the way it was used most
25 often on those websites. And, in fact, one of

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2 the books was a book that was mentioned in the
3 Complaint. I don't know whether it's
4 Yakubowski or Jakubowski, "Murder Through the
5 Ages, and his anthology was specifically
6 mentioned in the Complaint.

7 So I considered a lot of factors, but the
8 most important was to show the book, how it
9 is -- appears when it's -- when you're deciding
10 whether to purchase it on either the Barnes &
11 Noble or on the Amazon websites.

12 Q What would you describe your stimulus to
13 be?

14 Is it an advertisement, an offer of sale;
15 is there a noun that you would use?

16 MS. CENDALI: Objection.

17 A It's exactly what you would see at the
18 point of purchase when you're purchasing a book
19 on the Internet from the Amazon or the Barnes &
20 Noble website. That's what you would see at
21 the point of purchase.

22 Q Okay.

23 In your -- in the instructions in your
24 study, I think you describe it as a web page.

25 Is that right?

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2 people who purchased digital books tend to be
3 purchasers of a lot of books, and the majority
4 of them also purchase hardback and paperback
5 books. And the stimulus they would see would
6 be virtually the same had they been showed a
7 web page for a digital book.

8 I do find it completely unsupported that
9 Professor Jacoby claims that somehow purchasers
10 of digital books would be more likely to be
11 confused, because it doesn't appear that he's
12 read a lot about readers of digital books. PEW
13 Research Center has done extensive research,
14 and people who read digital books read more
15 books, on average, and they tend to purchase
16 and read books in multiple forms and not just
17 single forms.

18 So if I were to hypothesize, I would say
19 that readers of digital books are more
20 sophisticated. And, regardless, my universe
21 certainly includes people who read digital
22 books because the majority of people who read
23 digital books also purchased hardcover and
24 softcover books. And so to the extent that
25 they would be thinking about books, it's clear

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2 hardcover or softcover books.

3 How about the converse; have you seen data
4 showing what the percentage of people who buy
5 hardcover and softcover books, what percentage
6 of those also buy digital books?

7 A You can just look at the universe for
8 buying books. And I believe the recent surveys
9 have shown that about 72 percent of adults
10 purchased a hardcover or softcover book in the
11 last 12 months. So there's a large market for
12 hardcover and softcover books. About
13 17 percent of adults purchased digital books.
14 And based on data I've seen, is about
15 two-thirds of the people who purchase digital
16 books have also, or read softcover and
17 hardcover books.

18 But if you're going to the universe of
19 book buyers, no question, the largest universe
20 for books are people who buy hardcover and
21 softcover books. So many people who buy
22 hardcover and softcover books do not buy
23 digital books, but most people who buy digital
24 books also buy hardcover and softcover books.

25 So to the extent the universe includes

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2 people who buy hardcover and softcover books,
3 it would include people who buy digital books.
4 A lot of people would not buy digital books,
5 but that's merely because that's what the
6 universe is. If you want to project your data
7 to the majority of people who buy books in the
8 United States, it is hardcover and softcover
9 books.

10 Interestingly, if -- purchasers of
11 digital, or people who have Apple products were
12 more apt to be confused. I would have expected
13 some differences by age, but yet young people
14 were no more apt to mention Apple or an Apple
15 product than were middle-aged adults and,
16 rather than saying "older," let's just say
17 mature adults, and that difference simply did
18 not exist.

19 So I think I am ready for a break now.

20 Q Just one final question.

21 A Sure.

22 Q The PEW data, is that referenced anyplace
23 in your report?

24 A No. It's not referenced in my report.

25 I am a reader of PEW data. As I testified

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2 books were the bestsellers, you used sales data
3 from Barnes & Noble and Amazon.com respectively
4 for each stimulus?

5 A Well, however they determined when you do
6 a sort based on bestseller, yes.

7 Q Okay.

8 On your stimuli, you never called
9 respondents' attention to the iBooks name, did
10 you?

11 MS. CENDALI: Objection.

12 You can answer.

13 A As is proper in a trademark survey, we
14 didn't focus respondents' attention on any
15 particular part of the page. As you might
16 recall from the Louie Vuitton-Gucci case, that
17 a survey was specifically excluded in the
18 Second Circuit where -- no, it was not Gucci --
19 Louie Vuitton-Dooney & Burke, where the survey
20 done by, I believe, Mr. Reitter, R-E-I-T-T-E-R,
21 where the ad showed respondents a Coach purse,
22 pointed at the name, and then asked who made or
23 put out the purse. That was excluded -- was
24 considered by Judge Schiendlin.

25 If my memory is correct, it's been a long

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2 day, but I believe that that would be entirely
3 inappropriate. You do not focus, when you do a
4 survey in a trademark like confusion,
5 respondents' attention on any particular
6 portion of the product, of a label, of a page.

7 Rather, as we instructed, and I want to
8 get the instructions clear, we said we wanted
9 to show respondents a page in Instruction C.
10 I'm looking at deposition Exhibit 1, and it's
11 Appendix B.

12 So we showed respondents the page. We
13 asked people -- we told people: The page I'm
14 going to show you concerns a book sold on the
15 Amazon.com website. We told respondents to use
16 the keyboard or mouse to look at or browse this
17 page the way you normally do when you are
18 deciding whether to buy a book.

19 We told them to take as long as they would
20 like to look at or browse this page, and then
21 we told them we were asking them questions
22 about the book described on the page.

23 So we did not direct respondents'
24 attention to the top of the paper, the bottom
25 of page, any particular portion of the page.

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2 We allowed respondents to look at or browse the
3 page the way they normally do when they are
4 deciding whether to buy a book.

5 To do otherwise would be leading, would be
6 inappropriate, would be a reading test, and it
7 has been -- such methodologies would be
8 inappropriate. You want to replicate the
9 marketplace.

10 Q In Instruction J, the instruction reads:
11 "I would like to ask you a few questions about
12 the book described on the page," and then it
13 goes on.

14 Did you consider that instruction -- did
15 you consider a version of that instruction
16 perhaps that would have simply read: Now I
17 would like to ask you a few questions about the
18 page from the Amazon.com website?

19 It seems as though your other instructions
20 reference the page. And here, plainly the word
21 "page" is there as well. I'm not quibbling
22 with that. But you describe the questions as
23 asking a few questions about the book. This is
24 the first time in the instructions that you
25 kind of bring respondents in to the book

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2 companies named their camels Niles. That's
3 different than the current case. It's not the
4 same case.

5 Apple does not publish digital books, and
6 Apple does not publish hardcover or softcover
7 books, and I am not aware that plaintiffs make
8 computers or software for e-readers that allows
9 you to create or modify books.

10 Q Your testimony, however, was that it's
11 never proper or appropriate, no matter what the
12 products or what the context, to focus
13 respondents' attention on a particular element
14 of the stimulus.

15 Wasn't that right?

16 MS. CENDALI: Objection.

17 A I don't remember my exact testimony. I
18 know the last question in this survey, I asked
19 people -- I've only done that once, I've never
20 done it again that I can recall -- what the
21 name Niles means to you. And people said that
22 it was the name of the product. But I did not
23 focus people on anything when I asked the
24 source, sponsorship, or affiliation questions
25 in that survey, and I didn't do it in the

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2 survey in this case.

3 So I was talking about the source,
4 sponsor, and affiliation questions that are the
5 standard questions that I normally ask. I did
6 ask and I didn't find the information
7 particularly useful in that case. And
8 certainly after that case there was the Louie
9 Vuitton-Dooney & Burke case.

10 And so, again, pointing at the name on the
11 product was considered inappropriate. I have
12 not -- I don't recall doing that since. But
13 regardless, when I asked the source, sponsor,
14 and affiliation, I don't remember all the exact
15 questions I asked, I did not ask, when I asked
16 people who made or put out the product, ask
17 them to look at any particular part of the
18 product.

19 And when I showed respondent the name
20 Niles, it was on the animal itself. Unlike
21 showing the name e-books, that's not on any --
22 or iBooks -- on any product whatsoever. But
23 the last question was not the source, sponsor,
24 or affiliation question that -- it's different
25 because it's a different product, and there the

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2 issue really related to whether Niles was the
3 name of the camel or the source of the camel.
4 And clearly the source, sponsor, and
5 affiliation questions did not focus respondents
6 on the name Niles in that survey. And it was
7 entirely consistent with the way I have asked
8 the source, sponsor, and affiliation questions
9 in this case, and in other cases that have been
10 credited in Lanham Act cases.

11 Q If I could call your attention to Page 15
12 of your testimony in Peaceable Planet, which is
13 Exhibit 6.

14 And also, just so the record is clear, it
15 seems to me that this is actually your direct
16 examination in court. So this is not a
17 deposition but appears to be part of the court
18 transcript. Just so the record is clear on
19 that.

20 MS. CENDALI: Do we think this was from
21 2001, or you don't have a date for the court
22 testimony?

23 MS. BOGDANOS: I do not have a date for
24 the court testimony.

25 MS. CENDALI: But it says -- do you think