

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
SUSAN SCHWARTZ MCDONALD

New York, New York

December 12, 2012, 9:56 a.m.

Reported By:

Nicole Sesta

Ref: 8606

1 S. Schwartz McDonald
2 so-called publisher or source of a book, I felt
3 it was impossible to attach myself and my survey
4 to any particular scenario.

5 Q Are you done with your answer?

6 A I believe so, yes.

7 Q I believe you stated in that
8 answer that showing an actual book or web site
9 listing offering one of plaintiff's books for
10 sale would not do justice to the purchasing
11 experience; is that what you said?

12 A To I believe the encounter, is the
13 way I described it, between a consumer and a
14 brand or a consumer and a product in the book
15 purchasing environment, particularly with an eye
16 to an understanding how both in the first
17 instance and in subsequent occasions post sale a
18 consumer might come to experience the source of
19 a book.

20 Q Why wouldn't showing someone an
21 actual book or an actual listing from Amazon or
22 Barnes & Noble reflect how a consumer would
23 encounter the mark?

24 MR. RASKOPF: Asked and
25 answered.

1 S. Schwartz McDonald

2 A I don't know about the last time
3 you bought a book, but for me it involved
4 handling a bunch of books. It involved walking
5 through a bookstore. They're hard to find but I
6 still frequent them when I can. It involves a
7 particular kind of mission. It involves an
8 attraction between a consumer and a book, not
9 just being handed a book out of context, not
10 necessarily based on interest or anything else
11 here's a book. You can do that with a tube of
12 toothpaste. You can do that with a can of
13 tomato sauce. You can't do that with a book.

14 Q Why not?

15 A Because it doesn't come close to
16 approximating the first interaction that a
17 consumer has, nor does it come close the second,
18 the third, the fourth consumers if we're talking
19 about printed books. Consumers them again and
20 again and again. My MO is after I've read a
21 book to go back to the forward to look at
22 acknowledgements. I mean I don't want to
23 represent my style of reading books as
24 everyone's. It's a point. It's very
25 individual. A person can open a book many

1 S. Schwartz McDonald

2 times.

3 The shopping becomes sort of a
4 transition into the reading. Books are
5 experienced. They're not just purchased. It's
6 even more complicated than talking about post
7 sale confusion, which clearly book buying
8 introduces as a very real possibility in a way
9 you never see in toothpaste and shampoo. Once
10 people own those products they very seldom look
11 at the trademark or look at the box again, and
12 in fact as we know they almost never look at
13 them in the way that these trademark surveys
14 require them to look at it. So I have to say my
15 view is that all these Lanham Act surveys are
16 conceptual to one degree or another. They're
17 hypotheticals of construct, the construct that's
18 all they are. In this case because of books,
19 because of the importance of post sale
20 confusion, because when a person picks up a book
21 their first instinct is not to look for the
22 publisher, nothing that happened in Dr. Jay's
23 survey or Dr. Nowlis' survey represents book
24 buying at all.

25 Q What about your survey replicates

1 S. Schwartz McDonald

2 at all book buying?

3 A It doesn't. What it does is it
4 replicates an experience. It picks a moment.
5 It picks the moment when a consumer becomes
6 aware that there is something in a book that
7 identifies it, in a digital book in particular,
8 that identifies it as iBooks. It doesn't. I
9 freely concede this. It doesn't tell you how
10 often that occurs and it doesn't tell you the
11 moment it occurs. It could occur in the first
12 opening. It could occur on the second reading.
13 It could occur based on the appreciation of the
14 consumer for the book, and that kind of
15 revisiting as I described, very sincerely as
16 something that happens when you go back.

17 I'm not stipulating as to when in
18 the book experience it occurs, but it is
19 absolutely something that can occur and nothing
20 that happened in the research that your experts
21 did replicates that market condition at all.

22 Q I'm moving to strike as
23 nonresponsive any comments about our experts. I
24 didn't ask you about our experts. I'm asking
25 you, you admit that when someone purchases a