

EXHIBIT D



A SURVEY TO MEASURE POTENTIAL SOURCE CONFUSION ASSOCIATED WITH iBOOKS

IN RE: J.T. COLBY & COMPANY, INC. D/B/A BRICK TOWER PRESS,
J. BOYLSTON & COMPANY, PUBLISHERS LLC AND IPICTUREBOOKS LLC v. APPLE, INC.,
CASE NO. 11-CIV-4060,
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Conducted by
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II. SURVEY DESIGN RATIONALE

A. Methodological Background

A few basic experimental design protocols have been used over the past six decades to produce statistics that courts have considered illustrative of “likelihood of confusion” in the broader market. What is, by now, an acknowledged “standard” approach involves selection of a stimulus that can plausibly represent market exposure; manipulation of that stimulus using a proper experimental control; and then calculation of a net “likelihood of confusion” percentage by subtracting Control responses from Test responses. Experimental surveys are, of course, little “laboratories.” Typically, though, a “likelihood of confusion” survey statistic is extrapolated to the marketplace without *specific* adjustment for the relationship between survey exposure and real world exposure (*i.e.*, the frequency with which any given consumer would be likely to experience the mark or message precisely as represented in the survey stimulus). Only in the context of damage calculations is frequency or breadth of marketplace exposure introduced directly into the calculations.

The appetite to improvise in Lanham Act survey designs has been limited by an understandable desire to replicate approaches previously deemed valid. Thus, experts avail themselves of court-approved methodologies whenever possible in order to avoid doing battle over “settled” issues of survey science. However, in this particular circumstance, where one of the world’s largest brands has squared off against one of its smaller competitors (in a market environment undergoing significant transformation), a more customized approach is required to characterize Plaintiffs’ predicament. There is nothing routine about the implications of brand encroachment and collision visited here upon Plaintiffs by Apple.

To explain why, it is necessary to describe (a) a brief history of these two brands leading up to the point at which their divergent paths crossed, and (b) how the path forward for Plaintiffs might ultimately have been charted, had Apple not misappropriated the iBooks brand for its own growing family of “i” marks. Because the court will have more detailed chronologies at its disposal, this account is sketched in broad marketing strokes, consistent with my professional mandate in this case.

III. SURVEY DESIGN

A. Objectives and Basic Design Considerations

The objective of my survey was to prove or disprove the ingoing hypothesis that the presence of the word “iBooks” on the “page” of a digital book containing information about the book would lead a significant percentage of digital-book consumers to infer that Apple had played a role in making the book available. I chose to focus only on the digital-book market because the survey aims to be both reflective of the present and also *forward-looking*: electronic consumption is driving the growth and direction of the book market, and any healthy publishing brand must develop or, be prepared to develop, in that emerging landscape. Apple is, of course, one of the companies that have sculpted that landscape. The world of digital reading is the point of intersection where Plaintiffs’ iBooks and Apple’s iBooks naturally confront one another.

I did not contrive a *particular* cover page as a stimulus, nor did I make assumptions about what specific information would be present on that page other than “iBooks” (or the Control, “eBooks”), in order not to evoke a scenario that would be unduly narrow or inappropriately specific. *Among the vast array of possibilities, the only fixed idea was the presence of “iBooks” or “eBooks,” with all else left equally to the imagination of respondents.*

My survey design was guided by methodological standards required to produce results that can be considered valid and statistically reliable. Those standards require that the universe be properly defined and the sampling frame representative of the universe; the sampling procedures, relevant, transparent, and unbiased; the experimental survey design, scientifically correct; the questions clear, non-biased, and appropriately framed to meet the objectives; and the analysis, properly performed and interpreted.

The survey was designed by me and implemented under my direction between August 30 and September 4, 2012 by staff members of National Analysts Worldwide, the 80-person business research and marketing consultancy I lead.