

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
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.

-----X

November 21, 2012

9:31 a.m.

Videotaped deposition of GREGORY
S. CARPENTER, Ph.D., held at the offices
of Quinn Emanuel Urquhart & Sullivan LLP,
51 Madison Avenue, New York, New York,
pursuant to Agreement, before Theresa
Tramondo, a Notary Public of the State of
New York.

Job No: 27811

1 Carpenter

2 having worked at a book publisher, in order
3 to provide an opinion with respect to
4 activities in the book publishing industry?

5 A. I need to be aware of the context
6 and understand some of the tickers, but no,
7 you don't need to have worked in the book
8 publishing industry to offer an expert
9 opinion as I'm doing here.

10 Q. Before you offer any advice on
11 marketing, the first thing you need to do is
12 understand how the industry works, right?

13 A. The first thing you need to do is
14 understand how marketing works.

15 Q. Does it matter at all if you
16 understand how the industry works, or you
17 just feel you can give an opinion because you
18 understand marketing, it doesn't matter what
19 industry you're marketing, or if you're
20 understanding generally applies here?

21 MS. CENDALI: Objection to form.

22 You can answer.

23 A. My view is the first thing before
24 one can offer marketing advise, is you need
25 to understand how marketing operates, how

1 Carpenter

2 consumers react, how organizations develop
3 strategies to develop some sort of consumer
4 reaction. That varies. Those particular
5 strategies that are effective vary from
6 context to context. Yes. What works in
7 automobiles is different than what might work
8 for some brands, in coffee, for example. So
9 you need to understand those differences, the
10 meaningful dimensions of those differences to
11 make recommendations about what works and
12 what wouldn't work, yes.

13 Q. So if you don't understand the
14 differences between one industry and another,
15 then with respect to the industry you're
16 opining about, if you don't understand
17 differences between that industry and any
18 other industry, then you're really not
19 capable of giving an opinion in that
20 industry, are you?

21 MS. CENDALI: Objection.

22 Q. I mean, any marketing person knows
23 that, don't they?

24 MS. CENDALI: Objection.

25 A. No, I disagree with that.

1 Carpenter

2 Q. You disagree, okay.

3 So you think no matter what
4 industry is on the table, you are capable of
5 providing an opinion with respect to various
6 issues in that industry, right?

7 A. With enough analysis, yes.

8 Q. And so you've not ever been
9 employed in the book publishing industry,
10 have you?

11 A. I've not.

12 Q. And you've not ever consulted for a
13 book publisher, have you?

14 A. I've provided executive seminars
15 for people in magazine publishing and media
16 and related businesses and many businesses
17 that have characteristics associated with
18 book publishing.

19 Q. Did you mention magazine
20 publishing?

21 A. I did.

22 Q. You gave a seminar?

23 A. I did.

24 Q. When?

25 A. I've given a number of them over

1 Carpenter

2 the years.

3 Q. I'm asking about the magazine
4 publishing, the one you say you gave?

5 A. And my answer is, I've given a
6 number of them over the years to companies in
7 that industry.

8 Q. Did you mention any of them in your
9 report?

10 A. I don't believe so, no.

11 Q. Well, why not?

12 MS. CENDALI: Objection.

13 Q. I want to know why you didn't
14 mention them in your report, if you gave
15 them?

16 A. I didn't mention any of my
17 consulting activities, except the ones that
18 are listed in my biography, but I believe
19 I've included my CV here which does not
20 include my outside consulting activities.

21 Q. You mentioned your consulting
22 activities, didn't you, in here?

23 A. I believe I mentioned a few of
24 them, yes.

25 Q. Well, you mentioned that you were

1 Carpenter

2 on the advisory board of the Terlato Wine
3 Group and Hamilton Consultants, right?

4 A. I did.

5 Q. You mentioned that you're
6 professional activities include consulting in
7 executive education on marketing strategy and
8 branding issues with Carnival Corporation;
9 you're on the page I'm on, right, that's page
10 1 of your report?

11 A. Correct.

12 Q. Coca-Cola, Cunard Lines, Dow
13 Chemical, the government of Mexico, General
14 Electric and Harley-Davidson, right?

15 A. Among others, it says here.

16 Q. Yes, I see those words.

17 Are any of those particular ones
18 that you mentioned book publishers?

19 A. No.

20 Q. And you knew that you were
21 providing an opinion about the book
22 publishing industry, did you not?

23 A. I did.

24 Q. You didn't think that it was
25 necessary or even important to add several

1 Carpenter

2 names of book publishers that you might have
3 provided executive education to?

4 A. I believe I said, magazine
5 publishers and media companies.

6 Q. Okay.

7 And you didn't put a magazine
8 company or a media company in the
9 qualifications in the background section of
10 your report either, did you?

11 A. I did not.

12 Q. In the discussion of opinion
13 section of your report, Section IV, do you
14 see where you have, I'm on page 3, "The
15 concept and value of brand," the very bottom?

16 A. Yes.

17 Q. That's your heading, IV-A?

18 A. Correct.

19 Q. So this is sort of a strategic
20 background section of your report, would you
21 call it?

22 A. I would call it conceptual
23 background about discussing the core ideas of
24 brand, why they're valuable and what the
25 brands are.

1 Carpenter

2 Starbucks and Harley-Davidson and others that
3 have helped them succeed in other industries.

4 Q. Many do, right?

5 A. Many do, yes.

6 Q. And many don't, right?

7 A. Well, the principles seem to be
8 very useful and applicable across many
9 industries in -- applied in many different
10 forms, yes.

11 Q. Provided that those principles are
12 applicable to the industry in discussion,
13 right?

14 A. I would -- no, I would disagree
15 with that. The principles are the
16 principles.

17 Q. All marketing principles are
18 applicable to all industries; is that what
19 you're saying?

20 A. That's what I'm saying, yes.

21 Q. The next brand you mention in your
22 discussion section is Lay's potato chips,
23 paragraph 16, correct?

24 A. Yes, I see that.

25 Q. And then the next one is Kettle,

1 Carpenter

2 "publishing label." I recognize it as an
3 imprint.

4 Q. So it's not a publishing house
5 brand, is it?

6 MS. CENDALI: Objection to form.

7 A. I'm not really sure exactly what
8 you're asking.

9 Q. How do you understand my client's
10 brand to be used in the book publishing
11 industry?

12 A. I'm not sure which brand you're
13 referring to.

14 Q. My client's brand in question in
15 this case, iBooks.

16 A. Oh, iBooks. IBooks is an imprint
17 used on books that are -- he publishes.

18 Q. To denote what?

19 A. Excuse me?

20 Q. To denote what?

21 MS. CENDALI: Objection.

22 A. To denote the name of the
23 publisher, I assume.

24 Q. Right.

25 So as far as you know, my client's

1 Carpenter

2 iBook's brand is the publishing label of my
3 client, correct?

4 MS. CENDALI: Objection.

5 A. I wouldn't say it's necessarily a
6 brand. As far as I know, it's an imprint
7 used by your client to denote the publisher
8 of the book.

9 Q. Right.

10 MR. RASKOPF: Mark this Exhibit 2.

11 (Carpenter Exhibit 2, book entitled
12 "Samurai," marked for identification, as
13 of this date.)

14 Q. Take a look at Exhibit 2.

15 (**RQ)MS. CENDALI: Just for the
16 record, I note that Exhibit 2 appears to
17 be an actual multipage published book of
18 some sort and the copy which is provided
19 to counsel for Apple in the deposition is
20 just a few pages of excerpt. That's
21 perfectly fine given the volume, but we
22 reserve our rights to ask for a copy of
23 the book, if you're going to question him
24 on.

25 MR. RASKOPF: Sure, of course, I

1 Carpenter

2 client's brand is located, right?

3 MS. CENDALI: Objection.

4 A. Well, excuse me.

5 MS. CENDALI: Go ahead.

6 A. I see the logo and the name
7 "iBooks"; I do see that, yes.

8 Q. But that doesn't tell you that my
9 client is the publisher of the book, does it?

10 A. This image on the back of the book,
11 of course, does not tell me that?

12 Q. Do any of these things in here tell
13 you that my client iBooks is the publisher of
14 the book?

15 MS. CENDALI: Objection.

16 A. Well, it appears on this page that
17 describes, it's printed in the United States
18 by J. Boylston & Company Publishers.

19 Q. Right.

20 A. So it -- the text seems to me to be
21 consistent with what I might think of as the
22 publisher. There may be some legal language
23 here with which I'm not familiar.

24 Q. This says J. Boylston & Company is
25 the publisher, right?

1 Carpenter

2 A. It does say that.

3 Q. It doesn't say that iBooks is the
4 publisher, right?

5 A. It does not.

6 Q. So when you earlier said that
7 iBooks is a publisher, that really isn't so,
8 is it? The brand is not being used to
9 designate a publisher, is it; it's been used
10 to designate an imprint, is it not?

11 MS. CENDALI: Objection.

12 A. I didn't actually call it a brand.
13 I said it was used -- being used by a
14 publisher as an imprint is what I believe I
15 said.

16 Q. Okay, you don't have to call it a
17 brand, that's fine.

18 But the designation is being used
19 as an imprint, not as a publisher's
20 designation, is it?

21 MS. CENDALI: Objection.

22 Q. In this particular book, is it?

23 MS. CENDALI: Objection.

24 A. Well, I see it being used here, as
25 I said, as an imprint. I'm not sure exactly

1 Carpenter

2 is the distinction that you're making between
3 the imprint and the publisher.

4 My understanding is that publishers
5 employ imprints, so that the imprints are
6 somehow related to the publishers that use
7 them.

8 Q. Your understanding that publishers
9 employ imprints; is that right? I just want
10 to be sure I understand what you said.

11 A. I believe that's what I said, yes.

12 Q. And so in this case the publisher
13 is J. Boylston and the imprint that
14 J. Boylston employed is iBooks, right?

15 A. That would appear to be consistent
16 with what I'm reading here, but again.

17 Q. After our discussion on that
18 subject, you now understand that, right?

19 MS. CENDALI: Objection.

20 A. I'm not sure I understand that. I
21 see what I read here on the text, on the
22 page, but I'm not completely sure of the
23 distinction that you're asking me to make.

24 Q. In your report, did you refer to a
25 single designation that was used as a

Carpenter

1
2 Q. You looked through the 43-page
3 report?

4 A. I did, yes.

5 Q. Is an imprint mentioned anywhere?

6 A. Well, there are names of
7 publishers, such as Random House, that also
8 have Random House imprints. So I would
9 say that there are some -- and Penguin is
10 also an imprint.

11 Q. You didn't mention any imprints
12 only, right, you mentioned some publishing
13 houses that might use their names to double
14 as imprints, right?

15 A. Well, in my view those would also
16 be imprints, but the focus of the report, of
17 course, is on iBooks and iPicturesbooks, but
18 those are the ones that are contained in the
19 report, yes.

20 Q. And you characterize Random House,
21 Penguin Putnam, Harper Collin, Holtzbrinck,
22 Time Warner and Simon & Schuster as leading
23 publishers, right?

24 A. I do.

25 Q. And you say that they are in a

1 Carpenter

2 small set of widely recognized publishers,
3 right?

4 A. I do.

5 Q. You don't mention anything about
6 what they might represent as imprints, do
7 you?

8 MS. CENDALI: Objection.

9 A. I don't discuss the specific role
10 of their imprints, but I do discuss, of
11 course, the fact that they're widely
12 recognized and have widely recognized
13 reputations and widely recognized brands.

14 Q. They're publishing houses; that's a
15 fair characterization, aren't they?

16 A. They're publishers -- publishing
17 houses, yes, with recognized brands and
18 recognized --

19 Q. These are publishing houses?

20 A. -- recognized their reputations.

21 MS. CENDALI: Mr. Raskopf, would
22 you please let the witness finish his
23 answer and stop interrupting him.

24 MR. RASKOPF: I thought the witness
25 was finished.

Carpenter

1
2 Q. So we can agree that these are
3 brands for publishing houses, right?

4 A. Recognized with significant
5 reputations and significant imprints, yes.

6 Q. Absolutely.
7 Are you familiar with any imprint
8 that is not also the name of a publishing
9 house?

10 A. Yes.

11 Q. Name one.

12 A. Well, I think if you look through
13 the list of imprints that these publishers
14 have including, for example, Viking, I
15 believe Viking is owned by one of these other
16 publishers, has the name of an imprint, it is
17 distinct from the publishing house that owns
18 it.

19 Q. As you sit here today, are you
20 testifying that Viking is not the name of a
21 publishing house, it's only the name of the
22 imprint?

23 A. I say it's the name of the imprint
24 that is owned by a larger publishing house.

25 Q. Your testimony is that Viking is an

Carpenter

1
2 paragraph 22 includes the discussion of
3 brands, and of course, imprints can acquire
4 the psychological associations of the meaning
5 into a brand. So there is, in fact, this
6 discussion of the role of imprints as roles
7 of brands in consumer's choice.

8 So I would disagree with your
9 characterization of my testimony -- in my
10 report, I should say.

11 Q. Does the term "niche imprint" have
12 any meaning to you?

13 A. I've not heard that specific term
14 before, so I would not be completely sure
15 what the person who is using it is intended
16 to convey -- intending to convey.

17 Q. So you've never heard of that term
18 before, "niche imprint"? That's all I want
19 to know.

20 A. I've heard of the term "niche" and
21 I've heard of the term "imprint," so I can
22 suspect what they might convey, but I've not
23 heard only that specific --

24 Q. Right. Not together, not those
25 words together. And that means you've not

1 Carpenter

2 ever heard of it ever used before in
3 connection with book publishing, right?

4 A. I've heard of the term "niche
5 publisher," so I understand some of the idea
6 associated with the niche strategy certainly.

7 Q. Right.

8 But you're not familiar with the
9 term "niche imprint," as opposed to "niche
10 publisher," right? All I want to know.

11 A. I said I was not familiar, I've not
12 heard that particular term before, so I'm not
13 completely sure of the words they're using to
14 convey that. I certainly heard the term
15 "niche publisher." I'm certainly familiar
16 with the term "niche strategy."

17 Q. I asked about "niche imprint."

18 Are you familiar with the term
19 "multilevel branding"?

20 A. Yes.

21 Q. When for the first time did you
22 hear of the term "multilevel branding"?

23 A. I couldn't say.

24 Q. It wouldn't have been when you read
25 Mike Shatskin's report, right?

1 Carpenter

2 that be fair to say?

3 A. That's fair to say.

4 Oh, excuse me, let me finish. Let
5 me add something. In addition to, of course,
6 preparing some of these chapters, so I would
7 say I have experience as an author of
8 chapters that have been, of course, published
9 in books, as well as an author of academic
10 articles which are published in academic
11 journals, but I've certainly published
12 chapters of my work in numerous volumes that
13 are listed in my CV, as well as having edited
14 two books that are also listed in my CV.

15 Q. You've written some articles?

16 A. Among chapters in editing books and
17 serving as a consultant or offering my
18 opinion to publishers in the process, yes.

19 Q. With respect to articles or other
20 chapters or whatever you would like call it,
21 but with respect to the content of certain
22 journals or books you've authored?

23 A. I've written chapters of books that
24 have been included in volumes that I have
25 edit and other people have edited. So I'm

1 Carpenter

2 experienced as an author, as an editor, and
3 as someone who has reviewed the works of
4 other people in the publishing process.

5 Q. But not as a marketer?

6 A. I've not been employed -- although,
7 the publisher does ask me to market the book,
8 so I have experience in thinking about
9 marketing my own books that I've edited, yes.

10 Q. Now, I want to go back, and if you
11 could, please, explain to me how multilevel
12 branding, a concept with which you are
13 familiar, applies to the book publishing
14 industry?

15 A. Sure.

16 So a publisher, to put it in the
17 context that you requested, a publisher has
18 to make decisions about how they're going to
19 brand the products they sell, the books they
20 sell, with the author, focusing primarily on
21 the author, focusing on the publishing
22 imprints, and who the target for that
23 activity will be; will it be those next to
24 them in the distribution system, the
25 distributors and resellers, or will it be the

1 Carpenter

2 THE VIDEOGRAPHER: The time is
3 12:05 p.m. and we're off the record.

4 (Discussion off the record.)

5 THE VIDEOGRAPHER: The time is
6 12:28 p.m. and we're back on the record.

7 Q. Good afternoon, Mr. Carpenter.

8 A. Good afternoon.

9 MS. CENDALI: Dr. Carpenter,
10 actually.

11 Q. Do you respond to the words
12 "Mr. Carpenter"?

13 A. I do. Dr. Carpenter is fine too.

14 Q. You're not a lawyer?

15 A. I'm not.

16 Q. And you're not a trademark lawyer?

17 A. No, I'm not.

18 Q. You've never been asked to give
19 advice concerning trademark law, have you?

20 A. I'm --

21 Q. Withdrawn.

22 Have you ever published any
23 articles on the subject of trademark law?

24 A. No.

25 Q. Have you ever conducted a consumer

1 Carpenter

2 survey designed to show whether there was a
3 likelihood of confusion between two products?

4 A. No.

5 Q. Do you have any advance degree in
6 consumer psychology?

7 A. I have a Ph.D. in marketing of
8 which consumer psychology is a significant
9 portion of the field, so.

10 Q. Your specialty is marketing
11 strategy?

12 A. Correct.

13 Q. How would you characterize
14 marketing strategy, what is that?

15 A. Marketing strategy is understanding
16 how consumers react to different marketing
17 strategies that firm's develop and implement.
18 So there is a significant portions of that
19 that involves understanding how consumers
20 react, which involve both the consumer
21 psychology, as well as other influences on
22 consumer choices.

23 Q. You make reference in your report
24 to the fact that you believe that Apple and
25 plaintiffs operate in different distribution

1 Carpenter

2 relatively complex question that I haven't
3 considered.

4 Q. Are you familiar with the concept
5 of confusion by affiliation in trademark law?

6 MS. CENDALI: Objection.

7 A. I've heard the term before.

8 Q. Did you apply it in your report?

9 MS. CENDALI: Objection.

10 A. I used the word "confusion," I
11 believe, not "confusion by affiliation."

12 Q. There is a section in your report
13 on -- that starts on page 37 called "Alleged
14 Confusion," right?

15 A. Correct.

16 Q. In that section, you use -- you
17 don't use the words "confusion by
18 affiliation," correct?

19 A. I believe that's correct, yes.
20 Actually, let me continue. I think what I'm
21 describing here, of course, is the e-mails,
22 which are offered as evidence of confusion,
23 but which in my view, just to be clear, based
24 on my report are, in fact, evidence that the
25 writers of the e-mails were not confused at

1 Carpenter

2 all and understood the source of the goods
3 they were writing about.

4 Q. Right. You said, there was no
5 confusion?

6 A. Right, exactly.

7 Q. What do you understand to be John
8 Colby's, that is to say my client's, sales
9 volume in the last three years?

10 A. Well, in the case of iBooks, it's
11 my understanding is the sales figures were
12 much smaller -- much, much smaller than in
13 the past. Under \$50,000 in 2009, \$53,000 or
14 so in 2010, 72,000 in 2011.

15 Q. That's of iBooks, right?

16 A. That's of iBooks, correct.

17 Q. What page are you on in your
18 report, where is that?

19 A. Page 23, paragraph 70.

20 And in the case of iPicturebooks,
21 as I recall, the sales figures were even
22 smaller. So in my view these are, of course,
23 very, very low sales figures, especially
24 compared to the past. There is a figure on
25 page 33, which shows the sales for

1 Carpenter

2 A. Yes.

3 Q. One of the four issues is whether
4 the trademark iBooks was or iBook was validly
5 assigned from Family Systems to Apple, right?

6 A. Well, they asked me to look at the
7 activities about that and not provide, of
8 course, a legal opinion.

9 Q. Right.

10 You were asked from a marketing
11 perspective?

12 A. Correct.

13 Q. That's your testimony, and that's
14 what you said in your report, that you were
15 providing input from a marketing perspective,
16 right?

17 A. Correct.

18 Q. What does marketing have to do with
19 whether a trademark assignment is valid?

20 MS. CENDALI: Objection.

21 A. Well, as I understand it, and not
22 being a lawyer, that one of the issues in
23 this trademark assignment is the transfer
24 of what the legal -- legally what is known as
25 "goodwill." In the marketing world, we don't

1 Carpenter

2 refer to it as "goodwill," but we have we
3 have a corresponding term for this entitled
4 "brand equity," which is the thoughts and the
5 associations that consumers link to a brand.
6 So we do understand and have expertise in
7 understanding how -- understanding the
8 concept of brand equity, and so I was asked
9 to look and see whether Apple engaged in
10 activities in which we transferred the brand
11 equity from Family Systems to Apple as a
12 result of the actions it took.

13 Q. And you think the brand equity in
14 the iBook mark, just so it's clear, that was
15 owned by Family Systems was transferred to
16 Apple?

17 A. Yes, that's my opinion.

18 Q. You base that on your expertise in
19 marketing, correct?

20 A. Correct.

21 Q. And you give some reasons in your
22 report for why you think that is so, right?

23 A. I do.

24 Q. Specifically in paragraph 16 of
25 your report, right?