

EXHIBIT J

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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DEPOSITION OF STEPHEN M. NOWLIS

Friday, December 14, 2012

New York, New York

9:30 a.m.

Reported by:
Maureen Ratto, RPR, CCR, CLR
Job No: 27929

1 NOWLIS

2 95% confidence level and if you have a
3 error of .01, meaning 10%, then you
4 have a 90% confidence level. So 90%
5 you're pretty sure and 95% most people
6 would say they're sure. This is a
7 generalization, there can be exceptions
8 to this.

9 Q. Dr. Nowlis, why did you include
10 this permission question in your study
11 in this case?

12 A. Because I was testing for
13 Likelihood of Confusion and this was
14 one of the ways that I did it.

15 Q. What is your understanding of
16 the issue to which the permission
17 question in your study was directed?

18 A. Well, my permission or approval
19 question was getting at this idea of
20 sponsorship, whether they thought
21 another company had sponsored the use
22 of this term.

23 Q. Have you used this question
24 before in other trademark studies?

25 A. I believe that I have. I don't

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2 believe I've done Likelihood of
3 Confusion surveys for other matters but
4 as far as I know none of those have
5 ever been produced, in certain cases
6 because I did a study and the results
7 weren't what somebody wanted to see so
8 they -- you know, they didn't produce
9 them. But as far as I know, I don't
10 think that any of my Likelihood of
11 Confusion surveys have ever been
12 produced.

13 Q. And how many Likelihood of
14 Confusion studies have you done?

15 A. Three or four prior to this I
16 would say, roughly.

17 Q. Any for Apple?

18 A. No.

19 Q. How about secondary meaning
20 studies, have you done any secondary
21 meaning studies?

22 A. Yes.

23 Q. How many, roughly?

24 A. Two or three, maybe.

25 Q. Have any of those been produced?

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2 A. Whether someone would be
3 confused due to impressions of
4 affiliation.

5 Q. What do you mean by "impressions
6 of affiliation"?

7 A. Whether they think the companies
8 were affiliated.

9 Q. Do you own any Apple products?

10 A. Yes.

11 Q. What do you own?

12 A. I have an iPhone and I have an
13 iPad and I have Apple earphones.

14 Q. So is it fair to say that you're
15 pretty familiar with Apple products?

16 A. I think I'm fairly familiar with
17 them.

18 Q. If you had to ascribe a noun to
19 the iPhone, what would that noun be?
20 An iPhone is a what?

21 MS. CENDALI: Objection. You
22 can answer.

23 A. An iPhone is a device.

24 Q. Can you be more specific?

25 A. Well, you said to give you a

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2 buy something I think it says,
3 "sending," it takes five seconds, and
4 then it will say "Your sample has now
5 been received on your Nook. You may
6 now open it and look at it. I think
7 they use the word "sending" but I'm not
8 sure.

9 Q. How would you describe the
10 business of Apple?

11 MS. CENDALI: Objection.

12 A. I would say Apple is a -- in a
13 very general sense, a computer company
14 -- well, a computer company that sells
15 -- that sell phones, they sell
16 computers, they sell iPads, so I guess
17 I would call it a computer company.

18 Q. Do you consider Apple to be a
19 book publisher?

20 A. No.

21 Q. From the data generated from
22 your study, is it your opinion that
23 consumers consider Apple to be a book
24 publisher?

25 A. No.

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2 Q. So is it your opinion that
3 consumers don't consider Apple to be a
4 book publisher, am I saying it right?

5 A. You are correct. They do not
6 see it as a book publisher.

7 Q. How about a company that prints
8 books? Do consumers consider Apple to
9 be a company that prints books?

10 A. No.

11 Q. A company that releases books?

12 A. No.

13 Q. A company that puts out books?

14 A. No.

15 Q. A company that sells books?

16 A. A company that sells books? I
17 did not ask that question. I asked the
18 questions you were talking about
19 before, prints, releases or puts out.

20 Q. So you're not able to answer the
21 question? Is that --

22 A. Sell books? I mean, is it --
23 you can say they -- yeah, they sell
24 books and they distribute books through
25 the -- their bookstore, but they don't

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2 print, release or put out. That's what
3 people -- how people responded in my
4 survey.

5 Q. My question was not necessarily
6 what Apple does but what consumers
7 think of Apple as doing.

8 So do you think consumers
9 perceive Apple as a company that sells
10 books?

11 MS. CENDALI: Objection.

12 A. I -- I never asked consumers
13 that, so I'm not quite sure how -- how
14 they would respond to that question.

15 Q. Well, you also didn't ask them
16 if Apple published books but you were
17 able to answer my question about
18 publishing?

19 MS. CENDALI: Objection.

20 A. In my opinion, when my questions
21 about prints, releases or puts out were
22 questions about publishing. So I
23 believe I did ask that question.

24 Q. What does "puts out" mean to
25 you?

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2 A. Puts out, I'm not quite sure
3 what you want me to tell you.

4 Q. Can you try?

5 A. I can't give you more than that.
6 It means "puts out" and respondents
7 were free to interpret that however
8 they wanted.

9 Q. You chose the words?

10 A. Right.

11 Q. Was your thought process that
12 "puts out," means physically puts a
13 product on a shelf someplace?

14 A. No. I'm sorry. I see what
15 you're saying. Puts out would be some
16 sort of an indicator of the source of
17 the book. They have something to do
18 with the source of the book.

19 Q. Could that term encompass sales?

20 MS. CENDALI: Objection.

21 Q. Or selling?

22 A. Could that term encompass
23 selling of the book? No. That -- that
24 would have been a separate question.

25 Q. So puts out, then, in your mind,

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2 Q. How many times?

3 A. Boy, I'm really not sure. I'm
4 going to take a guess, 30 times. I
5 really don't know.

6 Q. How many in trademark cases?

7 A. I'm not sure.

8 Q. Can you give a rough number?

9 A. I wish I could help you. I just
10 honestly don't know.

11 Q. And you consider your study in
12 this case to be a rebuttal study? Is
13 that correct?

14 A. I wrote a rebuttal report and as
15 part of my report I conducted a study,
16 so those are one in the same.

17 Q. So back to my earlier question
18 of if you've ever done a rebuttal study
19 before, what is your answer?

20 A. Okay. I think what you mean is
21 when I wrote a rebuttal report did I
22 include in that a survey? Is that what
23 you are getting at?

24 Q. Yes.

25 A. Fair enough. I don't recall.

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2 Q. Is it possible that you never
3 have?

4 A. That is possible. I simply
5 don't remember right now.

6 Q. What did you set out to prove or
7 disapprove in designing your study?

8 MS. CENDALI: Objection.

9 A. My study was designed to examine
10 issues of Likelihood of Confusion.

11 Q. For what mark?

12 A. For iBooks. Again, it was done
13 as a rebuttal to the prior survey, to
14 point out what I thought were flaws
15 with the original survey and had to do
16 what I thought was a more proper way of
17 examining the issues.

18 Q. By "original survey," do you
19 mean the survey of Dr. Susan McDonald?

20 A. Yes.

21 Q. Okay. Did anyone assist you in
22 creating the questions for your study?

23 A. No.

24 Q. When was your first
25 communication with counsel about this

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1
2 examination to see whether those seven
3 people are included among the 66 in
4 Table 1?

5 A. Yes. You can do that analysis.

6 Q. But without doing that analysis,
7 one is not able to simply add 66 and
8 seven and say "73 respondents commented
9 or named iBooks"?

10 A. You are correct.

11 Q. How did you come up with the
12 words "puts out"?

13 A. I thought it was the right thing
14 to do.

15 Q. Have you used it before?

16 A. I -- I'm not sure. I think I
17 probably have. I also looked at what
18 other people have done and I thought it
19 made sense to do that in this case as
20 well.

21 Q. Can you name for me a study you
22 looked at that used the words "puts
23 out," the words "puts out"?

24 A. Not now, I can't, no. I've seen
25 it used before, though, a number of

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2 A. I was asked to provide a
3 rebuttal report to Dr. McDonald.

4 Q. Were you asked to conduct a
5 study?

6 A. No.

7 Q. You've testified that you've
8 submitted a number of, you know,
9 roughly, 30 rebuttal reports prior to
10 this one. Is that right?

11 A. That was a guess.

12 Q. A guess, of course.

13 A. I'm guessing.

14 Q. And, am I correct, forgive me,
15 that you didn't recall the number of
16 those that involved a study as well or
17 was there a number?

18 A. You are correct, you really
19 don't recall if I've done a survey as
20 part of a rebuttal report prior to
21 this.

22 Q. What about Dr. McDonald's report
23 made you -- caused you to do a study?

24 A. Because I thought that her
25 methodology was very flawed, which I

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2 Q. If you could look, please, on
3 page 35 of your report, and the
4 reproduction there, do you see how
5 iBooks, Inc., first appears on this
6 page?

7 A. It first appears as "An original
8 publication of ibooks" -- all lower
9 case -- "Inc." -- lower case, period.

10 Q. But yet, you avoided the word
11 "published" in your questions to
12 respondents, despite iBooks appearing
13 here as an original publication of
14 iBooks, Inc. Is that right?

15 MS. CENDALI: Objection.

16 A. I did because I didn't want to
17 do a reading test.

18 Q. What do you mean by "a reading
19 test"?

20 A. A reading test is where you ask
21 somebody, for example, "What's the
22 brand of this product," and they look
23 at the package and they say, "Oh, the
24 brand is Poland Springs." So I didn't
25 want to do a reading test.

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2 carefully analyzing that.

3 Q. But you carefully analyzed
4 Dr. McDonald's original report. Is
5 that right?

6 A. Absolutely.

7 Q. Is your study a probability
8 study?

9 A. It is a likelihood of confusion
10 study.

11 Q. Is it a probability study,
12 though?

13 MS. CENDALI: Objection.

14 A. I'm not sure what you mean by
15 "probability study"?

16 Q. Have you heard that term before,
17 "probability study"?

18 A. I've heard of it but I think it
19 can mean different things. That's why
20 I'm not quite sure what you mean by
21 that.

22 Q. Well, what is your understanding
23 of the term or the various meanings
24 that the term can have?

25 MS. CENDALI: Objection.

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2 A. Where -- a probability study
3 could be examining probabilities. I
4 mean, you could -- where you would
5 measure some degree of error perhaps.
6 I mean, that term, itself, can mean
7 different things so, again, it's hard
8 for me to give you a clear answer,
9 again, without some context. It's sort
10 of like saying "What is a survey?" I
11 mean, I can give you a sort of very
12 general response but I'm not quite sure
13 where you're getting at.

14 Q. How about in the area of
15 statistics, what does "probability
16 study" mean to you?

17 A. Where you would try to identify
18 the opinions of people around some
19 confidence error.

20 Q. Did you do that in your study in
21 this case?

22 A. In my study, what I did was I
23 compared the results of my test group,
24 minus my control group as a way to
25 determine any potential confusion.

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2 Q. So that's not a probability
3 study, the way you defined it in terms
4 of statistics? Is that right?

5 A. Well, again, in my opinion we're
6 in an ambiguous situation here. If I
7 was reviewing a paper, The Journal of
8 Marketing Research and somebody said,
9 "I did a probability study." We would
10 respond to that author, "Well, what do
11 you mean by that? I mean, that's a
12 very broad term. What exactly did you
13 do?"

14 Then if they came back and said,
15 "Well, I had this, and I conducted this
16 and so on and so on."

17 Well, we'd say, "Oh, okay, we
18 see where you're getting at."

19 It's just such an ambiguous term
20 without context it's hard for me to say
21 "yes" or "no" without knowing what
22 other additional information is needed.

23 Q. If an expert in statistics were
24 reviewing your study the way you review
25 the papers of your -- your students,

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2 would that statistical expert consider
3 your study to be a probability study?

4 MS. CENDALI: Objection.

5 A. They would consider it to be a
6 study with a test group and a control
7 group.

8 Q. So is that a yes to a
9 probability study or a no to a
10 probability study? Which is it?

11 A. I'm not quite sure what they
12 would say. If I said, "I did a
13 probability study."

14 They would say "What do you mean
15 by that?"

16 "Well, I had a test group and a
17 control group."

18 "Oh, okay. I see what you
19 mean."

20 If I said I did a probability
21 study but I didn't have a control group
22 or my interpretation was to do this,
23 that or the other thing they may say,
24 "Oh, I know what you mean by that term.
25 I think that term in and of itself has

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2 meaning to -- that everybody would
3 immediately know what that means.

4 Q. You did a mall intercept study,
5 right, a mall intercept study, correct?

6 A. Yes.

7 Q. Have you ever done a mall
8 intercept study that you would consider
9 to be a probability study as that term
10 is used in the statistics field?

11 MS. CENDALI: Objection.

12 A. The mall intercept studies that
13 I've done prior to this, from what I
14 can recall, they were all the same type
15 of design, where we had a test group
16 and a control group and we could get at
17 the difference between those to give us
18 confidence in the results. That was
19 sort of a way of getting at the error
20 by removing the error from the test
21 group by using the control group.

22 Q. In general, are you able to
23 answer the question of whether mall
24 intercept studies are considered to be
25 probability studies in general, not

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2 yours in particular, but just in
3 general?

4 MS. CENDALI: Objection.

5 A. Again, I think it depends what
6 we mean by a, quote/unquote,
7 probability study. I -- I don't think
8 that that term by itself -- I know -- I
9 think -- I'm trying to get at this and
10 that you think there is a technical
11 meaning that everybody ascribes to it,
12 I don't think that's true. As I
13 mentioned before, I review a lot of
14 papers and I don't think I've seen
15 people just say, "Oh, probability
16 study," and everybody say "I know what
17 you mean." They would give more
18 detail. They would say what they did
19 and, "Oh, okay, I know what they're
20 talking about now."

21 Q. Well, in terms of what you did
22 in your study, what is the probability
23 that any one of the respondents in your
24 study was selected for inclusion in
25 your universe?

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2 MS. CENDALI: Objection.

3 A. What is the probability that
4 they were included in the universe?
5 Well, I screen for people and I only
6 screen for people that would be in the
7 universe. There were other people that
8 didn't match the screening that were --
9 that were not -- that did not become
10 part of the survey. I don't know how
11 many people were screened and they say,
12 "Well, you can't be apart of this
13 study," and moved on. Is that the
14 question you're asking me?

15 Q. So am I understanding you, then,
16 that you don't know what the
17 probability is or is it that there's no
18 way of knowing what the probability is
19 of an individual selected for inclusion
20 in your universe?

21 MS. CENDALI: Objection.

22 A. Well, the universe that I
23 considered, we went through my
24 screening questions and exactly what
25 they were. What percentage of that, of

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2 the entire population, I don't know
3 what those numbers are. I don't know
4 if anybody would be able to identify
5 that. Is it 10%? 20%? I'm not sure.
6 I didn't want to get everybody. I
7 wanted to get the relevant consumers to
8 answer the question.

9 Q. How would you define "the
10 universe" for your study?

11 A. Well, I mean, I -- I screen
12 based on a certain criteria and those
13 screening criteria would give us the
14 universe. So we can go through my
15 screener and you'll see what I screened
16 on and that would be my universe.

17 Q. In your own words as the person
18 who designed the study, how would you
19 define "the universe"? Feel free to
20 refer back to your report, but in your
21 definition, what is your definition of
22 "universe" in your study?

23 MS. CENDALI: Objection.

24 A. And, again, I try to be as
25 careful as I can in these things and

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2 give you exactly what I did, so I don't
3 misstate something so we can go through
4 my survey and that would be fine. And
5 I screened based on different criteria,
6 I screened for people who would be
7 likely to buy a paperback or hardback,
8 who would buy a biography, history,
9 science fiction or comic or graphic
10 novel, people who would buy a book at a
11 shopping mall, airport, bookstore or
12 flea market. I didn't include people
13 who worked at the mall. I didn't
14 include other people.

15 So the universe would be the
16 people that fit this criteria. I guess
17 you could call these in a general
18 sense, people who buy physical --
19 certain kinds of physical books through
20 brick-and-mortar stores.

21 Q. And these were anybody in the
22 country?

23 A. Yes. This was done -- this was
24 done at malls throughout the country.

25 Q. But not everywhere around the

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2 country, it was only in certain malls,
3 correct?

4 A. True. Those malls were meant to
5 represent the U.S. population.

6 Q. So what is the probability that
7 a book buyer living in Omaha, Nebraska,
8 was included in your study?

9 MS. CENDALI: Objection.

10 A. The probability that a book
11 buyer in Omaha, Nebraska? I don't
12 recall -- I don't think -- I don't
13 think I used malls in Omaha, Nebraska,
14 but let me double check so I can make
15 sure that I can give you the most
16 accurate response I can.

17 I did not include Omaha,
18 Nebraska. Again, this is what is survey
19 does, this is why it's a typical
20 survey. We don't -- it's -- this
21 happens all the time with the election,
22 say, 50 million people vote. We don't
23 survey all 50 million people. We
24 survey a sample of those 50 million
25 people and that allows us to

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2 extrapolate for the population. It's
3 the same thing I did here.

4 So by looking at the malls that
5 I did, which were across the country,
6 this would then allow me to extrapolate
7 for other people who didn't participate
8 in the survey, but we know based on
9 survey principles they would likely
10 have the same opinion.

11 Q. So is the answer to my question
12 zero?

13 MS. CENDALI: Objection.

14 A. Could you remind me of your
15 question again?

16 Q. What the probability was that a
17 book buyer in Omaha, Nebraska, was
18 selected for inclusion in your study's
19 universe, in your study?

20 A. Yeah. They -- they would --
21 they did not participate in it but
22 their opinions would likely be the same
23 as the result that I got, if I had
24 surveyed them. That's a basic
25 statistical principle. We all do that.

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2 I don't know of any survey that -- that
3 surveys every single person in the
4 population. I've never seen that
5 before.

6 Q. On page 17, of your report,
7 paragraph 14 -- sorry, paragraph 40 --
8 so this is Exhibit No. 1, page 17,
9 paragraph 40.

10 MS. CENDALI: Page 17?

11 THE WITNESS: 4,0.

12 THE REPORTER: 40 or 14?

13 MS. BOGDANOS: Sorry. I said the
14 wrong number first. Sorry. I misspoke
15 myself. So Exhibit 1, page 17,
16 paragraph 40.

17 Q. You have a criticism of
18 Dr. McDonald here that she chose to
19 show the word iBooks in the same text
20 the rest of the online questionnaire.

21 A. Yes.

22 Q. Could you explain that criticism
23 to me, please?

24 A. Okay. The criticism would be
25 that it is, again, extremely important,

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2 So I said would they buy
3 paperback or hardcover and what type of
4 book would you buy? And then, where
5 would you purchase a book? So, I'm
6 sorry, your question was, would they
7 buy electronic books?

8 MS. BOGDANOS: Could we have the
9 question read back, please?

10 (Whereupon, a portion of the
11 proceedings is read back by the
12 reporter.)

13 A. Right. I don't exclude for
14 that. In other words, if it says do you
15 read digital books you're not allowed
16 to be in it. You are, in part of the
17 -- this survey, if you read physical
18 books, and we know from research that
19 the Pew Study that people have been
20 talking about, that I believe there is
21 an 88% overlap between people who buy
22 hardback or paperback books and who
23 read electronic books. So because we
24 know there's a big overlap, there's a
25 very, very, you know, large percentage

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2 of people that would read electronic
3 books that would also be included in my
4 study.

5 Q. There's no question in your
6 study, though, that asks, specifically,
7 about reading electronic books, is
8 there?

9 A. There is not.

10 Q. Nor is there a question in your
11 study that asks about purchasing
12 electronic books, is there?

13 A. There is not. But -- right. I
14 didn't exclude -- in other words, I
15 didn't exclude those people. They were
16 allowed to be part of my survey.

17 Q. Did you consider readers of
18 electronic books to be relevant to your
19 universe?

20 MS. CENDALI: Objection.

21 A. Well, the universe was defined,
22 as I did here, because these would be
23 the people that would be most, you
24 know, relevant for the book that I
25 showed them.

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2 However, we can extrapolate from
3 these results two people who would also
4 buy electronic books because we know
5 from research that there is a big
6 overlap between them.

7 (Nowlis Exhibit 6, a project of
8 the Pew Research Center, a study
9 entitled "The Rise Of E-Reading" was
10 received and marked on this date for
11 identification.)

12 Q. Dr. Nowlis have you ever seen
13 what's been marked as Exhibit 6 before
14 today?

15 A. Yes.

16 Q. What is it?

17 A. This is a study, a project of
18 the Pew Research Center and this study
19 is entitled, "The Rise Of E-Reading"
20 and it says, "21% of Americans have
21 read an e-book," and it goes on. I'll
22 stop there.

23 Q. You testified before that -- I
24 don't have your exact number committed
25 to memory, I apologize, a number in the

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2 80% -- that 88% of people who read
3 print books also read electronic books?

4 A. My memory from the study, if my
5 memory serves me right is that there
6 was an 88% overlap between those two
7 groups.

8 Q. Well, let's take a look at page
9 3 of Exhibit 6, the middle paragraph,
10 the paragraph that begins "Those who
11 have taken the plunge," and you see the
12 second sentence and after the colon in
13 the second sentence it says, "88% of
14 those who read e-books in the past 12
15 months also read printed books"?

16 A. I do.

17 Q. So that does not mean that 88%
18 of those who read hardback, you know,
19 paper books, printed books, also read
20 e-books, so the converse is not
21 necessarily true, correct?

22 A. I suppose. It -- it's possible
23 but that's how I interpret that, that
24 there is an overlap between the two
25 groups of 88%. That's my interpretation

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2 of that. In other words, say, a huge
3 overlap. In other words, there are
4 very few people that only read one type
5 or the other.

6 Q. If you could take a look,
7 please, at page 4 of the Pew report,
8 the bottom of the page there is a
9 heading "The prevalence of e-book
10 reading is markedly growing but printed
11 books still dominate the world of book
12 readers." Do you see that?

13 A. I do.

14 Q. And it goes on to say "72% of
15 American adults had read a printed book
16 and 11% listened to an audio book in
17 the previous year compared to 17% of
18 the adults who have read an e-book."
19 Do you see that?

20 A. Yes.

21 Q. Does that change your opinion?
22 Does that change your testimony about
23 the overlap that you perceive or
24 understand between e-books and printed
25 books?

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2 A. No. And it also supports my
3 earlier point that you asked me about
4 before, about why did I pick a printed
5 book for my study and this shows 72% of
6 the adults have read a printed book,
7 which is by far the most common kind of
8 book.

9 Q. Is it possible that someone
10 who's a reader of an e-book might
11 respond differently to the stimulus in
12 your study than someone who is a reader
13 exclusively of printed books?

14 MS. CENDALI: Objection.

15 A. Again, anything is possible. I
16 try to live in the world of probable
17 and because in this case there is such
18 a great overlap amongst the -- both
19 people, they -- that read both types,
20 so if somebody is going to read a
21 printed book, they're also going to
22 read an electronic book, and I see no
23 reason why they would respond
24 differently if they read both kinds of
25 books.

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2 source question then?

3 A. Just a -- I mean that the way
4 that I asked the questions, these are
5 different angles, I'm trying to get at
6 the same underlying construct of
7 confusion. There is three different
8 ways of doing that to give a consumer
9 the full ability to point out confusion
10 if it exists.

11 Q. Let's talk about the first two
12 for now. And I'm trying to understand
13 your understanding of the difference
14 between "source confusion" and
15 "affiliation confusion."

16 So if someone -- if someone
17 answered "yes" to Question 2-A of your
18 study, did they think that the company
19 or companies that printed, released or
20 put out this book have made or put out
21 other things besides books. And let's
22 say that that person in answering
23 Question 2-B identified an iPad or
24 iPhone or an Apple product. Then, what
25 that person is expressing is an

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2 understanding that the same company put
3 out both the book that they were shown
4 and the Apple product the they named.
5 Is that right?

6 MS. CENDALI: Objection.

7 A. It would be that the same
8 company that has the, in this case, the
9 iBooks mark, imprint, whatever we're
10 going to call it, is affiliated with
11 Apple because Apple sells the same
12 products.

13 Q. But I'm not understanding where
14 you get the concept of "affiliation"
15 from a set of answers that says that
16 the company that made -- that printed,
17 released or put out this book, also
18 makes or puts out other things besides
19 books.

20 A. Right.

21 Q. I don't understand where the
22 second company enters that picture. To
23 me it sounds like the same company and
24 two different kinds of products. Could
25 you enlighten me?

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2 MS. CENDALI: Objection.

3 A. Well, I mean we can go through
4 the question word for word if maybe
5 that would help.

6 Q. Okay.

7 A. So the question is now "With
8 respect to the company or companies
9 that printed, released or put out this
10 book, do you think they have made or
11 put out other things besides books," so
12 I'm having trouble understanding your
13 question because it seems pretty clear
14 to me if they said okay,
15 hypothetically, they could say, okay,
16 what company put this out, it's iBooks,
17 also they put out an iPad. Okay. So
18 that's an interpretation of they're --
19 they've affiliated the product that
20 Apple put out, its iPad would be
21 affiliated with iBooks in this case.

22 Q. So it's a product affiliation
23 question?

24 MS. CENDALI: Objection.

25 A. I mean it's affiliated in the

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2 sense that this is a company that puts
3 out these products so you're
4 affiliating with a company through its
5 products.

6 Q. Have you ever encountered any
7 other form of affiliation question in
8 any cases in which you've worked as a
9 survey expert?

10 A. I'm really not sure. I may
11 have, I may not have. I don't -- I
12 can't tell you right now.

13 Q. Do you read articles or other
14 writings on survey evidence in
15 trademark litigation? Are you up on
16 the literature in the field?

17 MS. CENDALI: Objection.

18 A. Literature, meaning do I follow
19 legal opinion?

20 Q. No. Scholarly articles,
21 scientific pieces, just written work
22 concerning trademark surveys for
23 litigation?

24 MS. CENDALI: Objection to the
25 form. You can answer.

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2 A. Yes. And I cited that
3 throughout my report. I have many
4 citations to -- you know, there is a
5 book Trademark and Deceptive
6 Advertising Surveys, which I cite many
7 times.

8 Q. Is that Jerry Swan's book?

9 A. These are different chapters
10 from different authors. I don't
11 remember if Jerry Swan is the editor --
12 edited it or not, but different
13 chapters are by different people so he
14 did not write the whole book. I think
15 he wrote a chapter.

16 Q. So in the different chapters
17 that you cite, or in any writings with
18 which you're familiar that you haven't
19 cited, where do you find support for
20 the type of affiliation question that
21 you asked, as being an affiliation
22 question as opposed to a question that
23 tells you more about the source of the
24 product?

25 MS. CENDALI: Objection.

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2 Overbroad.

3 A. My understanding is that this
4 question was asked in the original
5 Eveready case?

6 Q. And my question is: In what
7 writings or other literature concerning
8 trademark surveys for litigation have
9 you seen this type of affiliation
10 question presented as a proper way of
11 measuring Lanham Act affiliation?

12 MS. CENDALI: Objection.

13 A. I don't think I could point
14 something out to you right now.

15 Q. Have you ever seen a different
16 variety of affiliation question in any
17 of the writings that you've read?

18 A. I believe that I have.

19 Q. Now, if a respondent in your
20 study thought that there was another
21 company involved in some way, but that
22 it wasn't the company that actually,
23 you know, printed, released or put out
24 the book, is there a question in your
25 study to get at that perception?

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2 its own separate company, and it's
3 plain they don't think of Apple as a
4 book publisher as the -- the data from
5 your study shows that, correct?

6 A. Yes.

7 Q. So where in your study -- let me
8 withdraw that.

9 How does your study capture, if
10 at all, the perception a respondent may
11 have that iBooks is the publishing arm
12 of Apple in my hypothetical?

13 MS. CENDALI: Objection.

14 A. Well, again, there's different
15 -- there's three different questions.
16 If there's some subtlety in those
17 components and in who owns what and how
18 one is related to the other, they have
19 three different ways of getting at
20 confusion, right? Maybe they -- maybe
21 they thought they received permission
22 or approval from the parent to -- to,
23 you know, house the distributor. Maybe
24 they thought it was put out by the --
25 the big company.

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2 Q. -- where instead of the name
3 being "iBooks," the name was "Apple,"
4 and if someone simply said, "Apple,"
5 which means they read it on the page --

6 A. Right.

7 Q. -- but then in asking the what
8 else besides books, they thought Apple
9 -- they thought the company that had
10 printed, released or put out the book,
11 had made or put out --

12 A. Right.

13 Q. -- if that person, then, named
14 technology items or said, "iPhone,
15 iPad, iTunes devices," that would give
16 you more information as to what they
17 meant by Apple?

18 MS. CENDALI: Objection.

19 A. Yes. Just like they would in my
20 test, the same idea, they would then be
21 able to say "iPad, iPhone," or
22 whatever, and that would give us more
23 information.

24 Q. And it gives more information
25 about the company that put out the

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2 book?

3 MS. CENDALI: Objection.

4 A. It gives more information about
5 the products that that company puts out
6 so you would be affiliated through
7 those products.

8 Q. If in your study, a respondent
9 thought that iBooks, Inc., or that
10 iBooks was the publishing arm of Apple,
11 and they don't think of Apple as a book
12 publisher, if they are asked with
13 respect to the company or companies
14 that printed, released or put out this
15 book -- and so this is really going
16 back to the answer they gave to
17 Question 1, and so if they had named
18 iBooks -- and so it's really asking
19 with respect to iBooks, and with
20 respect to this book-making company
21 that you -- you've named or book
22 releasing or book printing or all the
23 words there, do you think they made or
24 put out other things besides books?

25 Now, if Apple, if iBooks, excuse

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2 testimony, but do you consider that the
3 words "printed, released, or put out"
4 embody the notion of publishing?

5 A. Yes. I think that's a fair
6 statement.

7 Q. Okay. And your data show, do
8 they not that, consumers don't think of
9 Apple as a book publisher, and we've
10 been down this path, correct?

11 A. Yes.

12 Q. Okay. So moving on from
13 question No. 1, which is the source
14 question in your study, right?

15 A. Yes.

16 Q. Okay.

17 A. Once, again, people had the
18 opportunity to say anything they want.

19 Q. Okay.

20 A. They could have said, "Apple,"
21 they could have said whatever --
22 anything they wanted.

23 Q. Okay. Now, do you think it's a
24 reasonable statement that if people
25 consider company A to be a subsidiary

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2 respondents who might think that iBooks
3 is a subsidiary of Apple but that the
4 two companies are separate, though
5 related?

6 MS. CENDALI: Objection.

7 A. No. That is not what -- that is
8 not what it was designed to test.

9 Q. Is it your understanding as a --
10 as a survey expert in trademark cases,
11 that such a perception on the part of a
12 respondent, that that indicates
13 confusion?

14 MS. CENDALI: Objection.

15 A. Such a response, would --
16 meaning in what response?

17 Q. I'm going back to my earlier
18 question about the perception in the
19 minds of respondents.

20 MS. BOGDANOS: Maybe -- maybe we
21 can have that question read back.

22 THE REPORTER: Which question?
23 The last question?

24 MS. BOGDANOS: No. The -- a
25 little bit more back. The question