

EXHIBIT C

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 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 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 from a little while back, some respondents
3 answered the permission question, then,
4 thinking in terms of the written material in
5 the book and the author as being someone who
6 needed to give permission.

7 MS. CENDALI: Objection.

8 A I don't think people talked about the
9 written material in the book. There are some
10 people who said the author. I mean, I'm
11 confused about this because -- I'm not a
12 lawyer, but I understand there's a difference
13 between commercial speech and other forms of
14 speech. And this case, my understanding, is a
15 trademark case relating to commercial speech.

16 And the questions that I asked related to
17 what I believe are commercial speech. And we
18 did not ask questions about the inside of the
19 book. We asked about the book. And
20 respondents answered the way they answered.
21 That was just the way they answered.

22 Q Is the author someone who typically writes
23 a book?

24 A Well, authors sometimes write the book.
25 Sometimes they have people write the book for

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2 them and they are listed as the author. So
3 authors may or may not have written the book
4 themselves. Many authors have written the
5 book, but there are certainly instances of
6 books that are, for the most part, written by
7 somebody else but, nevertheless, the author is
8 named, sometimes in connection with
9 celebrities, sometimes for other reasons.

10 So the author, I think people often think
11 of the author as the person who wrote the book,
12 but the author doesn't always have to have
13 written the book.

14 Q Calling your attention to Pages 28 and 29,
15 of Volume I of Exhibit 1, and specifically to
16 Tables 10 and 11, in the first column it reads:
17 "Named specific authors or said, 'the author,'
18 or, 'the editor.'"

19 Do you see that?

20 A Yes.

21 Q What if someone had said, "the writer"?

22 MS. CENDALI: Objection.

23 A I would have to see if somebody even said
24 that. It's -- I don't know whether anybody
25 actually said that.

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2 Q So in -- I'm looking now in Volume II, and
3 the computer tabs -- I think this is
4 Appendix U, if memory serves. And it is
5 Table 33, Page 39.

6 You don't have a specific code, though, a
7 separate code for the word "writer"; is that
8 correct?

9 A Certainly not one that appears to be on
10 this table.

11 Q For those respondents who answered the
12 permission question, the Question 3 series in
13 your study, in terms of, say, copyright law,
14 their answers don't tell you anything about
15 approval of the name "iBooks," do they?

16 MS. CENDALI: Objection.

17 A The purpose of the sponsorship questions
18 are sponsorship of the product. The trier of
19 fact will determine any legal issues relating
20 to the use of the name. That is not a survey
21 question. It's very leading, very suggestive.

22 And the issue, I believe, if you look at
23 the standard format in Professor McCarthy's
24 treatise -- and, again, I don't use his exact
25 words because I'm a survey researcher and he is

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2 where we developed, helped develop the
3 questions for a community survey, even though
4 we didn't actually conduct the survey or
5 analyze the survey.

6 So we have sometimes developed questions.
7 And certainly sometimes an entity could retain
8 us to do one study, and then ask another entity
9 or another individual to do the study but still
10 use the questionnaire that we developed for the
11 study that we did, and yet they retained
12 another entity to do work.

13 I know we had done work in the high-tech
14 field where certain computer companies would
15 say: Here's the questions we ask when we work
16 with such and such. We want you to replicate
17 those questions. Field has replicated
18 questions that other entities did. I have no
19 doubt that some of those entities took the
20 questions that we asked and replicated them
21 using other entities for different reasons.
22 But whatever the reasons that -- actually, I
23 can give a good example because we developed
24 the first survey for the county -- it's sort of
25 a health inventory for the County of Los