

EXHIBIT B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

J.T. COLBY & COMPANY, INC. d/b/a
BRICK TOWER PRESS, J. BOYLSTON &
COMPANY, PUBLISHERS LLC and IPICTUREBOOKS
LLC,

Plaintiffs,

- against -

APPLE, INC.,

Defendant.

Case No. 11-CV-4060 (DLC)

ECF CASE

EXPERT REPORT OF STEPHEN M. NOWLIS

largest producers of smartphones, in the “respondent’s consciousness.”³⁹ Immediately after causing respondents to think about “smartphones” (and likely Apple, maker of the popular IPHONE line of smartphones), Dr. McDonald instructed respondents to picture the word “iBooks” in Apple’s distinctive formulation. Thus, the screener question likely caused the respondents to think more about Apple and Apple products than they would have if they had not been thinking about “smartphones” just before being asked about “iBooks.” This flaw in Dr. McDonald’s methodology likely inflated the rate of confusion.

3. Dr. McDonald Failed to Ask Generally Accepted Questions for Testing Confusion.

50. The most widely accepted survey methodology for testing confusion is called an *Eveready* survey. In a typical *Eveready* survey, respondents are shown the product at issue, are asked “Who makes or puts out” the product, are given the opportunity to explain the reason for the answer (*i.e.*, “Why do you say that?”), and then are asked a series of questions to determine whether the company that “makes or puts out” the product is sponsored by or affiliated with any other companies.⁴⁰ If the stated reasons for a response show that answer is due to the infringing element, then the survey respondent providing that answer is counted as confused.

51. However, Dr. McDonald did not follow this method. Instead, Dr. McDonald asked respondents: “If, on [the] page [of an electronic book], you see the word ‘iBooks’ what company or companies would you think had made the book available?”⁴¹ By using this question instead of the standard *Eveready* approach, Dr. McDonald’s survey likely led respondents to

³⁹ Prof. Diamond (2011) warns about order effects in “Reference Guide on Survey Research,” in *Reference Manual on Scientific Evidence*, 3rd edition, Federal Judicial Center, The National Academies Press (hereinafter, “Diamond, Reference Guide”).

⁴⁰ See Swann, pp. 56-57.

⁴¹ McDonald Report, p. 11.

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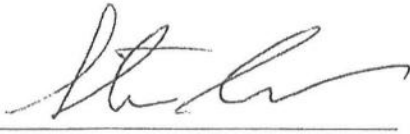
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Printed in the U.S.A.

81. In short, the copy of *The Raven Deception* that was shown to survey respondents was what consumers would find on a shelf at a bookstore.

82. The second reason that I selected *The Raven Deception* is because it did not contain other information that would suggest that a particular third party was the source of the

conclusion that there is not a likelihood of reverse confusion between Plaintiffs' alleged iBooks mark and Apple's iBooks mark.



Stephen M. Nowlis, Ph.D.

10-26-2012

Date

APPENDIX C

**HARDCOVER BOOK SURVEY
Screeners**

INTERVIEWER INSTRUCTION:

PLEASE READ EACH QUESTION EXACTLY AS WRITTEN AND ALLOW THE RESPONDENT SUFFICIENT TIME TO ANSWER BEFORE PROCEEDING TO THE NEXT QUESTION. DO NOT CHANGE THE WORDING OF ANY QUESTION.

Hello, I'm _____. We are a marketing and public opinion research firm, and we are conducting a consumer survey. For this survey, we would like to ask you a few questions. We are not selling anything, and I would like to assure you that there is no right or wrong answer. If you do not know the answer to a question or do not have an opinion, please say so. This is strictly a confidential survey.

S1. Before I begin, I need to make sure that I am getting a representative sample of adults. Could you please tell me your age... (READ CATEGORIES IF NECESSARY) (CIRCLE ONE NUMBER)

<i>END INTERVIEW/INELIGIBLE</i>	Under age 18	1
<i>ASK S2</i>	Age 18 to 34	2
	Age 35 to 54	3
	Age 55 or older.....	4

S2. RECORD GENDER (CIRCLE ONE NUMBER):

Male	1
Female.....	2

S3. CHECK AGE/GENDER QUOTA (CIRCLE ONE NUMBER)

<i>END INTERVIEW/INELIGIBLE</i>	Quota filled/closed	1
<i>ASK S4</i>	Quota open/available	2

HARDCOVER BOOK SURVEY
Main Questionnaire

INTERVIEWER INSTRUCTION:

PLEASE READ EACH QUESTION EXACTLY AS WRITTEN AND ALLOW THE RESPONDENT SUFFICIENT TIME TO ANSWER BEFORE PROCEEDING TO THE NEXT QUESTION. DO NOT CHANGE THE WORDING OF ANY QUESTION.

INTERVIEWER CHECK THAT YOU ARE USING THE APPROPRIATE CELL OF 1 OR 2 FOR THIS RESPONDENT

PART I. RESPONDENT INSTRUCTIONS

- A. Please be seated at this table. If you normally wear contact lenses or eyeglasses when you read a book, please put them on now if you are not already wearing them. (CHECK BOX.)

I read A

- B. I would like to show you a book, and then I will ask you a few questions about it (CHECK BOX.)

I read B.....

(Note this was pre-assigned in the program based on age and gender)

- C. REMOVE BOOK LABELED "C-1" OR "C-2" FROM ENVELOPE C-1 OR C-2 AND HAND TO THE RESPONDENT (CHECK BOX.)

I confirm that I removed the book labeled "C-1" or "C-2" from Envelope C-1 or C-2 and handed it to the respondent.....

- D. Please look at or browse this book the way you normally do when you are deciding whether to buy a book. (CHECK BOX.)

I read D

- E. Take as long as you would like, to look at or browse this book, and then tell me when you are finished. (CHECK BOX.)

I read E and waited until the respondent said he/she was finished.....