

EXHIBIT R

**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

someone who had also participated in Dr. McDonald's survey. Dr. McDonald's failure to ask these standard questions is another reason why the survey results are not meaningful.³⁵

48. *Finally*, Dr. McDonald offered no basis to support the demographics of the universe she selected, including whether the age and gender distributions accurately reflected the demographics of e-book purchasers. Instead, Dr. McDonald's survey universe was comprised of "roughly equal distribution of men and women in three broad age categories (18-35, 36-50 and 51+)."³⁶ It is unclear whether Dr. McDonald's universe is a representative sample of e-book purchasers.

2. Respondents Were Primed to Think of Apple.

49. A well-recognized principle of survey design is that question order can prime or lead respondents to answer in a particular way by improperly putting something in their minds. Thus, it is important to design a survey to avoid "order effects." Yet, Dr. McDonald designed the last screening question to ask if the respondent had "downloaded a digital book to a reading device of any kind, including a smartphone."³⁷ Right after this question, the respondent was asked the critical question on the main survey, *i.e.*, if "you see the word 'iBooks' what company or companies would you think had made the book available?"³⁸ The screener question thus prompted the respondent to think about a "smartphone," and likely placed Apple, one of the

³⁵ *See id.*

³⁶ McDonald Report, p. 10. It is my understanding that the demographics of book purchasers are similar to those of the U.S. population as a whole, and I used those demographics in my survey.

³⁷ McDonald Report, p. 9.

³⁸ *Id.*, p. 11.

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.