

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
IPICTURES LLC,

Plaintiffs,

vs.

Civil Action
No. 11-cv-4060 (DLC)

APPLE, INC.,

Defendant.

-----)

VIDEOTAPED DEPOSITION OF

JACOB JACOBY, Ph.D.

New York, New York

Thursday, December 6, 2012

Reported by:

SHAUNA STOLTZ-LAURIE

Ref: 8576

1 Jacoby

2 Q. And why wouldn't you want people
3 with atypical or higher levels of knowledge?

4 MS. BOGDANOS: Objection.

5 A. You wouldn't want them to distort
6 the findings, but if -- to take this as a
7 concrete example, if we're talking about
8 universe of people who publish books, we'd
9 want to have both print -- prospective
10 purchaser of print and prospective purchaser
11 of electronic books tested.

12 Q. Well, again, would that be the case
13 -- wouldn't your view as to how necessary
14 that was depend in part upon how many
15 electronic books Plaintiffs actually have
16 sold?

17 MS. BOGDANOS: Objection.

18 A. No. I think you notice the issue
19 is not how much of a product is sold; it's
20 how many minds, you know, are affected. If
21 -- and it should be in the sample in proper
22 proportion. So if you take a look at this
23 category, you -- there are three levels of
24 purchasers. There are people who purchase
25 only print books, people who purchase only

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2 whole word by itself, like "phone," like
3 "book," like "pad," that would have an
4 initial cap as the part of the -- the second
5 part of the term.

6 Q. Okay, and I appreciate what you're
7 saying on the second part of the term, and
8 we're going to get a to "lit" and talk about
9 that in a moment.

10 A. Okay.

11 Q. But I'm just talking about, you
12 know, in light of, as we discussed, the --
13 the importance for confusion, that in light
14 of the fact that for confusion to be
15 actionable, it must be shown to be found to
16 be caused by the allegedly infringing action,
17 not by something else, as we discussed, would
18 you agree that it would be important to use a
19 control with "i" with something else in order
20 to filter out the people who might say Apple
21 just because they think, oh, "i" means Apple?

22 A. Yes.

23 Q. Fair enough.

24 Now, here you criticize Dr. Nowlis
25 not for using an "i" but for using "i" with

1 Jacoby

2 your assumption, correct?

3 A. Correct.

4 Q. Okay. So now would you agree that
5 "lit", similar to "pad" and "phone" and "MAC"
6 and "tunes," is a one-syllable word that
7 shares many of the same attributes as the
8 one-syllable word "books"?

9 MS. BOGDANOS: Objection.

10 A. I don't agree it shares many of the
11 same. It doesn't have any letters in common.
12 There may be one syllable, but it doesn't
13 have a B, an O, a K or an S. So no, I don't
14 agree it has many characteristics in common.
15 One syllable is three letters as opposed to
16 five letters.

17 Q. What control would you have used if
18 you were designing a survey?

19 A. I haven't given it a thought.

20 Q. Is it fair to say that you would
21 not have used "ebooks" as a control, because
22 that would not control for the "i" and was a
23 generic?

24 A. Yes.

25 MS. BOGDANOS: Objection.

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knows is a funnel approach: You go through the general down to the more specific. And I don't think her survey, which could have drilled down further, did so, which would have -- which could have yielded a tremendous amount of relevant information.

Q. Are you -- you mentioned earlier that you're familiar with an expert named Itamar Simonson?

A. Very.

Q. And are you aware that he has written in the past that it's important for a respondent to not be deprived of contextual clues that would help make the respondent have information to be able to answer a question?

MS. BOGDANOS: Objection.

A. Yes. I'm not familiar that he wrote that. I don't agree with everything Itamar writes. In fact, some of the things he writes are very different from what he says in the courtroom.

Q. Fair enough.

But do you agree that a survey

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1
2 expert should not deprive respondents of
3 contextual clues that might be helpful to
4 them one way or the other in assessing
5 confusion?

6 A. I do.

7 MS. BOGDANOS: Objection.

8 (Discussion off the record.)

9 Q. Now -- now, in your report,
10 paragraph ten again that we're still talking
11 about, Exhibit 3, you say at the end of that
12 paragraph "I am of the opinion that while
13 point of sale confusion may occur, it is post
14 sale confusion that is more likely." Do you
15 see that?

16 A. I do.

17 Q. What is your basis for your view
18 that point of sale confusion is more likely?

19 A. No. I think I said post sale is
20 more likely.

21 Q. Forgive me.

22 What is the basis for your view
23 that post sale confusion is more likely than
24 point of sale confusion?

25 A. My own experience, and the way I

1 Jacoby

2 right?

3 A. Yeah.

4 Q. Okay.

5 A. I think that would have been more
6 appropriate.

7 Q. Well, suppose they had asked who
8 makes the book available? What do you feel
9 about asking it that way?

10 A. Barnes & Noble makes it available.
11 Amazon makes it available. I mean it's too
12 ambiguous.

13 Q. What do you mean that it's too
14 ambiguous?

15 A. Many people make the book
16 available. Many independent parties are
17 involved in this distribution chain or in
18 the supply chain, beginning to the publisher,
19 the supply chain being the author at the very
20 beginning, he makes it available. The
21 publisher, the printer, the distributor, the
22 retailer. I think that's just too broad.

23 Q. So if they had used -- using the
24 word who makes it -- who -- using the phrase
25 who would -- who makes it available would be

1 Jacoby

2 too broad, because that could include
3 distributors or other people, not the
4 publisher; is that right?

5 A. It could include Barnes & Noble
6 brick and mortar retail outlet, they make it
7 available.

8 Q. Fair enough.

9 Now, are you aware in both the Jay
10 and Nowlis surveys respondents were given the
11 opportunity to name multiple companies in
12 response to the question who printed,
13 released or put out the book?

14 A. Let me look at the questions.
15 (Reading).

16 They were told they could answer
17 more than one, yes.

18 Q. Okay. Now, you in your rebuttal
19 reports you also criticize question two of
20 Dr. Jay and Dr. Nowlis's surveys; is that
21 right?

22 A. Yes, I do.

23 Q. But as we've discussed, they use
24 the same question formulation that was asked
25 in the Union Carbide EverReady case, right?

1 Jacoby

2 that there. I would say in answer to your
3 earlier question, which I think was more
4 properly phrased, the screeners have two
5 overall purposes, number one, to identify
6 individuals who are members of the relevant
7 universe, assuming you have a defined
8 universe. Now, we don't have a universe
9 definition here; we just have questions. And
10 then the second purpose is once you get to
11 people who are members of the relevant
12 universe, to eliminate those who are
13 atypical, which is something we spoke about
14 earlier, people who might be in the
15 publishing industry.

16 And I think you have those kinds of
17 questions here. (Perusing document) Yeah,
18 question S7: "Do you work for a company that
19 prints releases, puts out or sells books?"

20 Also, "work in marketing research
21 or advertising research" is pretty standard,
22 because they may be familiar with the
23 research procedures. See, you've got two
24 over-arching objectives: Get the proper
25 universe of people, and from that get rid of

1 Jacoby

2 people who are atypical.

3 Q. So in terms of the questions that
4 get rid of people who are typical, that
5 Dr. Jay and Dr. Nowlis used, I take it you
6 don't have any objections to that portion of
7 their -- their survey reports. They followed
8 pretty standard methodology in asking those
9 questions. Right?

10 A. Not correct.

11 MS. BOGDANOS: Objection.

12 A. There is one question that I did
13 have a problem with, and I called it silly.

14 Q. Okay. But let me -- let me take it
15 a step at a time.

16 You would agree that it's important
17 to screen out professional survey-takers who
18 may have taken a survey in the recent past,
19 for example.

20 A. Well, I wouldn't call them --

21 MS. BOGDANOS: Objection.

22 A. -- professional survey-takers, but
23 yes.

24 (Discussion off the record.)

25 Q. Okay. But you would agree that you

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2 would normally screen out people who had
3 recently done a survey, right?

4 A. Not necessarily done a survey.

5 Q. Taken a survey?

6 A. No. Or taken, or whichever. I
7 think if they took a survey on automobile
8 parts in the past two months, it should not
9 exclude them from taking a survey on books
10 and computers. I -- I exclude people who
11 have taken a survey on the topic under
12 consideration. I see no reason to exclude
13 people who may have taken a political poll in
14 the past few months.

15 Q. I see.

16 But you would not want to include
17 people who had taken a survey on -- in the
18 same general industry as the current one; is
19 that right?

20 A. That -- yes.

21 Q. And you would ask questions to try
22 to screen those people out.

23 A. Yes.

24 Q. And you would also ask questions to
25 screen out people who work in marketing or

1 Jacoby

2 advertising, because they may not be typical,
3 right?

4 MS. BOGDANOS: Objection.

5 A. Marketing research or advertising
6 research, correct.

7 Q. And is it also common to screen out
8 -- screen out respondents who work in the
9 industry being studied?

10 A. Yes.

11 Q. Because those people would be
12 atypical, too, and that could affect the
13 results, right?

14 MS. BOGDANOS: Objection.

15 A. Yes.

16 Q. Is it common practice to find out
17 if a respondent wears glasses or contact
18 lenses so that they can see the stimulus?

19 A. If you --

20 MS. BOGDANOS: Objection.

21 A. If you have them read things or
22 watch things on a monitor, yes.

23 Q. Okay. And so Dr. Jay and Dr.
24 Nowlis in their -- in their screening
25 questions screened for these types of things,