

In the Supreme Court of Ohio

Crutchfield, Inc.,	:	
	:	Case No. 2015-0386
	:	
Appellant,	:	
	:	Appeal from the Ohio
v.	:	Board of Tax Appeals
	:	
Joseph W. Testa,	:	
Tax Commissioner of Ohio,	:	
	:	BTA Case Nos. 2012-926,
Appellee.	:	2012-3068, 2013-2021

JOINT MOTION TO SUPPLEMENT THE RECORD ON APPEAL – EXHIBITS C-F

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BEFORE THE OHIO BOARD OF
TAX APPEALS
STATE OF OHIO



CRUTCHFIELD, INC.,

CASE NOS.: 2012-A-926
2012-A-3068
2012-A-2021

Appellant,

V.

JOSEPH W. TESTA,
TAX COMMISSIONER OF OHIO,

Appellee.

Oral deposition of

PROFESSOR JOSEPH G. TUROW, taken at
the law offices of Hangley Aronchick
Segal Pudlin & Schiller, One Logan
Square, 27th Floor, Philadelphia,
Pennsylvania, on Friday, October 17,
2014, commencing at approximately
9:15 a.m., before Joanne Rose, a
Registered Professional Reporter,
Certified Realtime Reporter and
Notary Public, pursuant to notice.

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31 EXAMINATION INDEX

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37

1 PROFESSOR JOSEPH G. TUROW,
2 having been duly sworn, was examined
3 and testified as follows:

4 DIRECT EXAMINATION

5 BY MS. MESIROW:

6 Q. Can you just state your
7 name for the record.

8 A. Sure. Joseph Turow.

9 Q. And what is your
10 occupation?

11 A. I'm a professor at the
12 University of Pennsylvania in
13 communication.

14 Q. And have you been retained
15 by the Department of Taxation, Ohio
16 Attorney General's Office?

17 A. Yes.

18 Q. And in what capacity have
19 we...

20 A. You've asked me to write a
21 report about how -- whether and how I
22 think the company Crutchfield relates
23 to its position in Ohio, how it --
24 the extent to which it is actively

1 working in a presence in Ohio.

2 (Discussion off the
3 record.)

4 BY MS. MESIROW:

5 Q. Now, we've stipulated to
6 your credentials as an expert in this
7 area. But if you can open the
8 binder --

9 A. Sure.

10 Q. -- in front of you and turn
11 to Exhibit 39.

12 A. Yes, ma'am.

13 Q. Take a look at that, and
14 can you tell me what that is?

15 A. This is the report that I
16 wrote about Crutchfield.

17 Q. And on the first page of
18 your report where it -- I direct your
19 attention to the very first
20 paragraph, the Introduction.

21 A. Yes.

22 Q. And does that set forth
23 what we have engaged you to do in
24 this case?

1 A. Exactly.

2 Q. And so, I guess, you know,
3 let's walk through some of these
4 bullet points.

5 The first one, The
6 evolution of retail selling.

7 A. Which is what I did, the
8 evolution of retail selling from
9 activities.

10 The notion of how -- what
11 Crutchfield is doing now can be
12 contextualized historically, and how
13 it continues, some of the really
14 important forms of retail selling
15 that have existed in the last 100
16 years.

17 Q. Well, let's delve into that
18 one.

19 In your report what
20 portions of your report relate to
21 that?

22 A. I would say from Page 3
23 through Page 6, beginning of Page 7.

24 Q. So can you give me sort of

1 a synopsis of how you see this
2 evolution.

3 A. Sure. Historically, people
4 came into -- people sold in stores,
5 of course, in Ohio.

6 But what I'm arguing here
7 is that the greater similarity is to
8 door-to-door salesmen who would come
9 into Ohio, or any other locality, and
10 sell to people based upon knocking on
11 their door, going into their home,
12 finding out about them as they worked
13 in the home.

14 And I cite some evidence
15 about how they used casing, as it
16 were, the home to find out about the
17 people they were dealing with and
18 selling them particular products
19 based upon that.

20 That idea, that paradigm,
21 I would argue is similar to what is
22 going on today with companies like
23 Crutchfield who come into the home in
24 a different way, but it has

1 functional similarity to that kind of
2 presence.

3 They go into a person's
4 computer. The person let's them in,
5 of course, most of the time. And
6 then they present them with products
7 based upon an iterative understanding
8 of what that person is interested in.

9 Meaning there is an
10 interaction that takes place, often
11 in realtime, often data are stored,
12 shared, taken without permission.

13 And then, as a consequence,
14 certain kinds of products are shown
15 to the person in a variety of ways
16 and that sometimes ends up in a sale.
17 The notion is that it's functionally
18 equivalent to the traveling
19 salesperson.

20 Q. And back in the days of the
21 traveling salesperson, could people
22 request a traveling salesperson to
23 call on them?

24 A. They could, and probably

1 did sometimes, yes.

2 Q. Okay. So there's another
3 -- so the traveling salesman as I --
4 so by being in the consumer's home
5 could gather information --

6 A. Yeah.

7 Q. -- and that's the paradigm?

8 A. And there are examples of
9 that, sitting there and gathering
10 information. The whole idea was to
11 be sensitive to the nature of the
12 client.

13 And the client often meant
14 looking at how the person was moving,
15 what the person's environment was,
16 what kind of furniture they had, and
17 certain kinds of data.

18 Now, I would argue that on
19 the Internet you can even get much
20 more particular about the person's
21 data, and learn a lot more about the
22 person's behavior today.

23 With predictive analytics,
24 you can create notions of the

1 person's personality,
2 characteristics.

3 You can understand how that
4 person is trending in terms of
5 loyalty to the company. There are
6 far more things that a person could
7 do -- a company can do today than a
8 person could do back then.

9 Q. So, from the days of the
10 door-to-door salesman, how else has
11 the whole -- the evolution of selling
12 and marketing evolved?

13 A. Well, that's the
14 fundamental comparison I would make.
15 But there are some fascinating
16 directions that the world is taking
17 in terms of loyalty.

18 Companies are very
19 interested in loyalty and the ways in
20 which they practice loyalty, though,
21 have changed drastically.

22 And online companies have
23 learned how to do that, how to give
24 people certain kinds of rewards and

1 interest them in certain kinds of
2 products, figure out where they are
3 and get back to them.

4 And we see that as a very
5 important way in which retail is
6 taking place.

7 No retailer today can deal
8 without being online in one way or
9 another.

10 Q. And what tools do the
11 online retailers employ to cement
12 these relationships or encourage
13 loyalty?

14 A. They employ the tool, of
15 course, of a website, that is
16 increasingly personalized.

17 They use certain
18 technologies involving cookies and
19 pixels that try to figure out and
20 store and relate to how a person --
21 what a person does online, and on
22 that site.

23 But also, elsewhere, that
24 can then -- a person can be

1 recontacted where that person goes to
2 other places online. And those are
3 the fundamental ones that I've
4 noticed here.

5 But there are also ways
6 that a company can set up reward
7 practices and encourage sales that
8 way, that they get points for doing
9 certain things, encourage people to
10 write reviews, which are part of the
11 process of encouraging people to --
12 and other people to like things.

13 So one can spin this out in
14 a whole variety of ways.

15 Q. I believe we've gotten on
16 that point one.

17 Okay. Also, in bullet one,
18 you talk about converging of
19 information, about individual
20 shoppers.

21 A. Yes.

22 Q. What do you mean by that?

23 A. What I mean is that
24 companies can take information they

1 have from a variety of sources, their
2 own information and also third-party
3 sources.

4 If they have physical
5 stores and people frequent those
6 stores, more and more those companies
7 can use data about their purchases in
8 the stores or purchases on the phone.

9 If a person calls the phone
10 and they have compatible databases,
11 which more and more companies do,
12 they can use that information to
13 interact with a person online, or
14 vice versa.

15 If you look at something
16 online and you're calling up the 800
17 number, a sophisticated firm -- and
18 there's evidence that Crutchfield
19 does this, so it's not explicit --
20 will know who you are based upon
21 that, and be able to talk to you in
22 terms of what you're doing online
23 while you're on the phone.

24 Q. So, let's say, I'm a

1 consumer and I've been online looking
2 at different items on the Crutchfield
3 site. I might even get a Crutchfield
4 catalog. And decide, gee, I want
5 more information. I want to call
6 them.

7 A. Yes.

8 Q. How might -- you know, how
9 might that work?

10 A. In the way I would
11 understand the typical situation,
12 okay -- I don't know -- I don't know
13 about Crutchfield -- but the company
14 would find out what catalog you're
15 using.

16 Q. Is that like by use of a
17 source code of some kind?

18 A. They probably would have a
19 code on the mailing or even the name
20 of the catalog, it depends on how
21 specific their catalog is. They
22 would ask you about that.

23 They would ask you what
24 page you're on, what you're looking

1 at, or where on the website you are.

2 And if they have
3 information about you, they might use
4 that information to help you figure
5 out what you want, to upsell you.

6 That is, we notice that you
7 bought moccasins a year and a half
8 ago. Would you consider buying new
9 ones? Or, you know, things like
10 that, which is part of the way that
11 companies sell in this interactive
12 world.

13 If they -- if -- in the --
14 in the newest forms, they actually
15 will know what you're doing online at
16 the same time that you're talking to
17 them, and so they can help you if you
18 have a problem with the online site.

19 Q. Is this like with live
20 chat?

21 A. Well, that can be
22 happening, too. But, I mean, even on
23 the phone, they can -- in the best
24 scenarios, companies can actually see

1 that this is going on and help you.

2 Because, otherwise, it's very

3 confusing.

4 Q. And this can be very

5 helpful to the consumer?

6 A. Oh, terribly helpful.

7 Yeah.

8 Q. Okay. Let's look at bullet

9 point number two on the first page of
10 your report.

11 It says, "The extent to
12 which and the way in which the new
13 approaches to selling via the web,
14 e-mail, and mobile apps provide a new
15 way for a retailer to establish a
16 physical presence in the state."

17 A. Uh-huh.

18 Q. Are you aware that the term

19 "physical presence" may have
20 connotations in a tax environment?

21 A. Yeah, I'm aware of that.

22 I'm not a lawyer, so I don't know
23 about the legal nuances of that term.

24 And later on, I noticed

1 this yesterday, because I went back
2 and looked, I talk about functional
3 physical presence, the functional
4 equivalent to a physical presence.

5 And that's really what I'm
6 talking about here. That we're in a
7 new world. And my -- as a
8 non-attorney, as a non-lawyer, I
9 really do believe that the law, as
10 well as other institutions, has to
11 respond to the new world.

12 And this is a -- what we
13 have now is a -- is an advance, an
14 evolution in the way in which
15 marketing takes place with respect to
16 people's geographical positions and
17 locations.

18 Q. So we did not ask you to
19 give an opinion as to --

20 A. That term may have been
21 used, but no one asked me as an
22 attorney to give an opinion.

23 Q. Okay. So when you talk
24 about a functional -- you say later

1 in the report you talk about a
2 functional physical presence.

3 Can you discuss a little
4 bit more about what your concept of
5 that is?

6 A. Yes. What I mean is that
7 the -- the key that I'm coming from
8 and the way in which I'm relating to
9 the analogy, as it were, that I'm
10 using with the salesperson, the
11 door-to-door salesperson, has to do
12 with interactivity.

13 And the notion -- and it's
14 a spectrum of relationship between a
15 company and an individual in the
16 selling process and the creation of
17 relationship over selling. Okay.

18 And so I would say that an
19 iterative set of interactions in the
20 way -- in the world that I've been
21 describing, more and more becomes,
22 and I would argue is already, at the
23 point of being the functional
24 equivalent to the door-to-door

1 salesperson.

2 That the company that
3 establishes a relationship with you
4 over -- you know, over an electronic
5 process even, in which it learns a
6 lot about you, it goes back and forth
7 with you, finds out about you,
8 through what you tell them and what
9 you don't even know is going on,
10 completes the sale in this manner, it
11 can do it across a variety of
12 channels, that this is a functionally
13 equivalent to acting within your
14 geographical location.

15 Q. All right. So, aside from
16 this functional physical presence, to
17 your knowledge, how else are these
18 Internet retailers present?

19 Is there --

20 A. Well, there are -- and this
21 gets into Ashkan's territory, which I
22 totally agree with. There are ways
23 in which there is a physical
24 transformation of the -- of the

1 computer, as it were.

2 That that's physical in the
3 sense if you're changing the person's
4 website look, you're inserting things
5 into the person's computer, either
6 temporarily or not; you're having a
7 situation where there are ways in
8 which other companies can, in fact,
9 learn about your client, as it were,
10 so that they can help you reach that
11 person on other sites.

12 All of these things take
13 place in an interactive -- an
14 iteratively interactive way which
15 relate to the computer. And to that
16 extent, there is a kind of presence
17 within the computer by the company,
18 which is systematic. It's a system.

19 And that's why I cite the
20 Soverain case, which, again, I'm not
21 a lawyer, but it made a lot of sense
22 to me. That what the judge was
23 saying --

24 MR. BERTONI: I'm going to

1 object to this witness telling us
2 what a case means.

3 THE WITNESS: Well, I'm
4 just telling you what I read.

5 MR. BERTONI: Well, that's
6 -- I'm objecting. It's beyond the
7 scope of your expertise.

8 And if you want to present
9 him on legal issues, I'll feel free
10 to pursue that on cross.

11 MS. MESIROW: No, no, no.
12 That's not why we're here.

13 BY MS. MESIROW:

14 Q. When you talk about the
15 physical ways that you they learn
16 about you, what kind of technologies
17 are you talking about that are
18 employed?

19 Are you talking about
20 cookies?

21 A. Well, the physical ways.
22 I'm talking about cookies, I'm
23 talking about pixel tags. Those are
24 the fundamental ones in this era that

1 people are talking about and
2 remarketing from that standpoint.

3 Also, and they're used for
4 basic ways of interacting with
5 customers, or shoppers, essentially.

6 Q. And right now we're still
7 talking generally. We'll delve into
8 what you have found with regard to
9 Crutchfield.

10 The third bullet point,
11 "How retailers are able to identify
12 the location, shopping habits and
13 other demographic information
14 relating to visitors of their
15 website."

16 A. Yes. Similar to what I've
17 been talking about, right, until now.
18 Location having to do with the IP
19 address, if they're interested.
20 Shopping habits having to do with
21 what you've been doing on their site.

22 And sometimes they might
23 buy (sic) other kinds of material
24 about what you buy. And, also, they

1 know what you've bought offline.

2 And demographic information

3 having to do with your gender,

4 potentially your age, and your

5 income, things of that sort.

6 Q. And then we did briefly

7 talk about the tools used.

8 A. Yeah.

9 Q. Okay. So, if you turn the
10 page. Let me see. I don't want to

11 belabor some of these things that

12 we've already touched on. We've

13 talked about cookies and tracking

14 tools.

15 Okay. Let's get to the
16 last two bullet points. Whether for

17 the 2005 through 2012 period at

18 issue, which is through June of

19 2012 --

20 A. Yeah.

21 Q. -- the use of cookies and

22 other data tracking and technological

23 tools enabled Crutchfield as an

24 out-of-state retailer to establish,

1 maintain and grow a market in Ohio.

2 A. Yes. To me, that's quite
3 clear.

4 Q. So let's begin with what
5 did you find with respect to
6 Crutchfield in particular?

7 A. Well, that would be on the
8 Pages 14 to 25.

9 Q. Okay.

10 A. And so I'm looking at my
11 notes here. And, as you can see, I
12 cited testimonies, as well as some
13 literature that I found in a variety
14 of places, including public relations
15 issues from the company itself.

16 Q. Okay. But let's turn to
17 Page 14.

18 A. Yeah.

19 Q. And, I believe, if you
20 begin on Page 13, this is where you
21 express your opinions regarding
22 Crutchfield's activities.

23 A. Yeah.

24 Q. Okay. So, on Page 14, the

1 first bullet point that supports your
2 opinions, you say that "During this
3 tax period Crutchfield was a leading
4 Internet seller."

5 A. Yes. And I report some
6 findings to that effect from Internet
7 Retailer about its 2008 web sales,
8 that it was ranked 16th among
9 electronics and computer retailers,
10 and 105th among top 500 Internet
11 retailers, according to that journal.

12 Q. Okay. So they weren't --

13 A. They have a big interest in
14 this. They're not a babe in the
15 woods company that, gee, let's sell
16 stuff online. I mean, this is a
17 company that makes a lot of its money
18 in this way.

19 Q. Okay. What's your next
20 bullet point there?

21 A. "Crutchfield showed a
22 fundamental interest in using
23 technology to interact with its
24 customers directly and individually

1 at their location."

2 They, themselves, called
3 themselves the nation's first
4 integrated marketer, you know, and
5 that's what I was talking about
6 earlier, about catalog, call and
7 Internet.

8 That is the ability to
9 integrate all of these activities,
10 learn about your consumer, your
11 customer that way, and deal with it,
12 sell based on that.

13 And I cite Mr. McCartney
14 to that effect, that they integrate
15 those data.

16 And they talk about -- he
17 talks about personalized services
18 using the cookies from that
19 standpoint, and how that is used and
20 how looking at particular items then
21 sort of personalizes how they treat
22 you online.

23 Q. So I believe here in your
24 report you quote from his deposition,

1 saying that if a user viewed certain
2 car products or car-focused products,
3 then the next time that viewer went
4 to the Crutchfield home page, that
5 user may see different products
6 related to that previously shown
7 interest?

8 A. Yes, which is an
9 increasingly interesting way of
10 relating to consumers. It's
11 perfectly logical, but it is that
12 iterative relationship that I was
13 talking about. The iterative
14 interactions and learning about the
15 customer.

16 Q. And this is similar to if,
17 either in a department store or
18 door-to-door sales, if the
19 salesperson has visited and the
20 shopper has shown an interest in
21 certain kind of items, that seller
22 may say, hey, I know that you like X,
23 Y and Z, here let me show you some
24 other things --

1 A. Exactly.

2 Q. -- in that line?

3 A. And increasingly companies
4 are using digital media in the stores
5 for that purpose.

6 You know, it's not too far
7 out to figure that they're going to
8 actually learn what companies do
9 when -- what you've done online when
10 you walk into the store. That's --
11 people are talking about that.

12 Q. All right. Let's try --
13 and I find all that fascinating, but
14 let's sort of focus on what we know
15 about Crutchfield now.

16 A. The world of retailing is
17 fascinating.

18 Q. So what else? I'm looking
19 at other things in your report here
20 under that second bullet point --

21 A. Yes.

22 Q. -- about personalized
23 services.

24 A. Well, I talk about the

1 interactive product recommender,
2 which, again, allows you to identify
3 -- you're interacting and then it
4 stores stuff, and allows you to -- it
5 says, "Users can make notes on their
6 system, revise their list of
7 components, add items to their online
8 cart for purchase, or contact a
9 knowledgeable Crutchfield Sales
10 Advisor for advice."

11 Again, this idea of helping
12 you to customize, keeping that stuff
13 in their system, and also allowing
14 you to interact with someone, in this
15 case, through a telephone line, or
16 maybe even online.

17 Q. I mean, there's nothing
18 unusual about a seller wanting to
19 assist a customer and choosing the
20 right product?

21 A. Not at all. That's what
22 business like this is about.

23 Q. Okay. Now, let's go to on
24 Page 15 of your report, the third

1 bullet point that you mention --

2 A. Yes.

3 Q. -- in forming your opinion.

4 A. "Crutchfield hired several
5 key firms known to help online firms
6 with various stages of data mining."

7 And I give examples of
8 that. A number of companies I list
9 and then later in other bullets
10 specify particulars.

11 For example, Claritas,
12 which is an interesting case, because
13 Claritas uses geodemographic -- it's
14 owned by Nielsen. It uses
15 geodemographic categories in terms of
16 how it targets people.

17 And so it's -- it's an
18 interesting case of Claritas saying
19 that Crutchfield has access to their
20 database. So, presumably, they
21 worried about these sorts of things.

22 Q. Now, this is something that
23 Claritas offers, correct --

24 A. Yes.

1 Q. -- to customers?

2 Do you know whether

3 Crutchfield --

4 A. Yes. They listed

5 Crutchfield among the clients in this

6 press release.

7 Q. Okay. And then what other

8 companies do you mention?

9 A. I mention Coremetrics sold
10 its Livemark service to Crutchfield.

11 And, as it says here, they
12 -- "provides us with the ability to
13 see complete customer profiles and
14 respond to groups of customers in a
15 personalized way for optimum
16 response." That's a quote.

17 And they agreed to help to
18 store some of the stuff and use data
19 elements that would end up helping
20 them segment their customers and
21 learn more about them.

22 Q. And I don't know if you
23 were here yesterday when there was
24 some testimony regarding

1 segmentation.

2 Were you here for that?

3 A. No, I wasn't.

4 Q. So, in your view, what is
5 valuable about being able to engage
6 in segmentation?

7 A. Segmentation is a process
8 of trying to construct particular
9 categories about members of your
10 audience, so that you can then target
11 them based upon what you know about
12 them as a cohort, as a group, and
13 people like them.

14 So not only can -- if you
15 segment people, for example, as
16 people who are in the 35- to 54-year-
17 old group, not only can you then ask,
18 well, what is common about 35- to
19 54-year-olds, but if you have that
20 and some more information about these
21 people, you can even find look-alikes
22 online, buy them from other
23 companies.

24 That is, people who fit

1 those profiles, who may act like the
2 people that you know act in a certain
3 way, and those can be the people you
4 target as well.

5 Q. So you mean if you were
6 going to be looking for prospects?

7 A. Yes, exactly. It's part of
8 prospecting.

9 Q. But even if you're not
10 using it for that, even if you're
11 just using it --

12 A. Well, then the idea is you
13 can target people based upon
14 specificities. And, frankly, more
15 and more companies are moving away
16 from segments to people, to
17 individuals, and they go back and
18 forth between segments and
19 individuals.

20 But if you -- you know, the
21 idea is to try to actually learn as
22 much as you can about a particular
23 person, and then automate the
24 processes so it's not incrementally

1 more expensive to actually speak to
2 that particular person's interests.

3 Q. It just becomes -- the
4 technology allows them to become more
5 granular --

6 A. Exactly.

7 Q. -- in how they do this?

8 If you look on Page 17,
9 your next bullet point, about the
10 next company.

11 A. "OwnerIQ and Google for
12 advertising that reached out to
13 change the screen content of laptop,
14 desktop or mobile devices of
15 prospects based on specific data
16 about them."

17 And this was just an
18 example of Google allowing
19 Crutchfield to be part of a trial,
20 whereby, Google would help them find
21 particular individuals that they
22 could target based upon specific
23 knowledge of the types of people.

24 Q. Do you know how that

1 worked?

2 A. Well, I'm assuming that
3 they -- that what Google did is, it
4 asked them what kinds of people do
5 you want, and because Google has such
6 a rich database of individuals, they
7 can then follow those people and
8 target them with particular ads based
9 upon that.

10 Q. Now, I believe I'm looking
11 for --

12 A. And OwnerIQ was about
13 retargeting or remarketing, which is
14 simply the idea of finding a person
15 who showed up on the Crutchfield
16 website somewhere else on the web,
17 and sending an ad to that person
18 based upon what Crutchfield knows
19 that person looked at or knows what
20 they want that person to see.

21 Q. Now, I know that you have
22 seen the deposition testimony of Jay
23 McCartney.

24 And, I guess, just in

1 retargeting -- when you say
2 "retargeting" and "remarketing," are
3 you using those terms
4 interchangeably?

5 A. The trade does, yes.

6 Q. Okay. And I believe -- I
7 don't know if you recall
8 Mr. McCartney talking about a variety
9 of companies that they used for
10 retargeting.

11 A. I -- yeah, I remember that.
12 I don't remember the specifics, to be
13 honest.

14 Q. Do you know how these -- do
15 they have certain networks that
16 they're retargeting?

17 A. Well, Criteo is used.
18 aCerno is used. These companies have
19 web networks. That's why they use
20 several of them. They have different
21 web networks.

22 And, in other words, there
23 are millions of websites out there.
24 And Criteo may have its own; aCerno

1 may have others.

2 And they have access to
3 being able -- if you show up on a
4 particular site, they can show you
5 something you've left in your
6 shopping cart, for example, that they
7 want you to see.

8 Q. So, if they're part of the
9 Criteo network and you go to another
10 website on that Criteo network, that
11 would increase the chances of your
12 seeing --

13 A. Yes.

14 Q. -- a Crutchfield product?

15 A. But, as I point out,
16 Mr. McCartney also said they simply
17 send an e-mail to people as well. If
18 you abandon your shopping cart.

19 Abandoning a shopping cart
20 is one of the major reasons that
21 companies don't sell to people who go
22 on the web and are looking at
23 products.

24 They go online, they look

1 at the product. Maybe they don't
2 like the shipping cost. Maybe they
3 get cold feet about putting their
4 numbers in, their credit card
5 numbers, and so they -- they leave.

6 And so what Mr. McCartney
7 was saying was that they use e-mail
8 to get back those people and say,
9 hey, you know, you forgot to...

10 Q. And these are people that
11 have registered on the Crutchfield
12 site?

13 A. Right.

14 Q. I mean, it's not --

15 A. Yes. They have to know
16 their e-mail addresses.

17 Q. So they know them. It's
18 not like they go looking for their
19 e-mail addresses?

20 A. Presumably not.

21 Q. Okay. Yes. The abandoned
22 shopping cart and things like that.

23 And is that a form of
24 personalization as well?

1 A. I would argue it is. You
2 have to -- if Joe Turow went on a
3 Crutchfield site decided not to buy
4 some speakers and then ended up
5 getting an e-mail, that's a
6 personalization to me.

7 Q. If you look in your report
8 where you have your table starting on
9 Page 20.

10 A. Yes, ma'am.

11 Q. And maybe let's just talk
12 about what you mean by the digital
13 retailing ecosystem.

14 A. Digital retailing ecosystem
15 is the system -- the set of
16 organizations that relate to
17 companies that are buyers and
18 sellers. They can't exist in a
19 vacuum. No company can sell by
20 itself. No company can distribute by
21 itself.

22 And in the Internet world,
23 there are companies that stand
24 between the sellers and the customer

1 that help this process along.

2 Q. So in the data extraction
3 field.

4 A. These are companies that
5 help firms to figure out what these
6 people are doing. They take out, as
7 it were, data points about people.

8 Q. And did you see companies
9 that Crutchfield engaged to assist in
10 this?

11 A. Well, the -- in what I'm
12 talking about in terms of the
13 companies that have help with
14 remarketing, for example, that goes
15 on.

16 But Crutchfield itself, of
17 course, in setting up the website, in
18 setting up what they do, employed
19 companies to help them figure out how
20 to store data, how to do all of this.

21 I don't have all the names
22 of the companies that did this, but
23 it would be -- some companies can do
24 it totally in-house, but many

1 companies will contract for other
2 people to figure out how do we -- how
3 do we track people on the site, what
4 do we do, and that type of thing.

5 Q. So -- okay. Well, maybe as
6 we get through this. In the --

7 A. I'm sorry.

8 Q. Like, if Crutchfield
9 engaged somebody to do retargeting --

10 A. Yes.

11 Q. -- like Criteo or whatever,
12 are they also extracting data?

13 A. They're taking the data
14 that -- well, what they're doing is,
15 they're putting a pixel on the --
16 yes, so they're extracting data and
17 trying to see what you're doing, and
18 trying to see what you're doing, and
19 then finding out where you're going.

20 Q. Because they need that
21 data --

22 A. Yes.

23 Q. -- in order to do their
24 service, correct?

1 A. Yes. Uh-huh.

2 Q. Data analysis, what kind
3 of...

4 A. Well, that has to do with
5 who are these people, what are they
6 doing, how do we understand.
7 Companies will actually employ other
8 companies to figure out how to
9 understand their customers.

10 I don't have a particular
11 example of that here, except maybe
12 Google helped Crutchfield do this in
13 that beta test. But companies do
14 this all the time.

15 They have to figure out, at
16 least they feel they have to figure
17 out, as much as they can about the
18 trends in their customer activities.

19 Q. But data analysis can be
20 something fairly simple --

21 A. It could be.

22 Q. -- or something very
23 sophisticated?

24 A. Anything from Google

1 Analytics to a very, very
2 sophisticated activity.

3 Q. Could you look at Exhibit 5
4 in that binder. It will be up here
5 (indicating).

6 A. All right. Yes.

7 Q. And what is that exhibit;
8 do you know?

9 A. Well, it says, Desktop Site
10 Conversion.

11 Q. From Omniture?

12 A. Oh, okay.

13 Q. Does Omniture do data
14 analytics?

15 A. Yes. They can help the
16 company analyze various aspects of
17 site visits and the relationship that
18 people have.

19 For example, they'll
20 test -- one thing that Omniture does
21 very often is they'll do A/B testing.

22 So they will test whether a
23 site that looks a certain way will
24 get more people to click on certain

1 things than a site that does
2 something another way.

3 Q. But we didn't see A/B
4 testing with respect to Crutchfield,
5 in particular, from Omniture?

6 A. I didn't it.

7 Q. Okay. I just want to make
8 that clear because I'm sure counsel
9 will.

10 A. But they will also -- as
11 you can see, they have -- they help
12 you figure out what the conversion is
13 at certain times.

14 These are aggregate data it
15 seems. But it helps the company know
16 what's going on on their site.

17 Q. So if you want to see how
18 do we compare from last year?

19 A. Yes.

20 Q. And if conversion rates go
21 down, what might that indicate to a
22 company?

23 A. Well, it could -- there's
24 so many things it could mean.

1 It could mean that their
2 products are not as interesting to
3 people. It could mean their website
4 is not as interesting to people. It
5 could mean they're not personalizing
6 things as well as they ought to.

7 There are lots of
8 explanations for that, and I'm sure
9 Omniture can help you figure that
10 out.

11 Q. All right. That's a form
12 of an analysis?

13 A. Uh-huh.

14 Q. Data implementation.

15 A. Yeah.

16 Q. I'm sorry. I'm back at
17 Page 20 of your report.

18 A. Oh, my.

19 Q. Your report is at 39.

20 A. Okay.

21 Q. Exhibit 39.

22 A. We are on Page 20.

23 Q. Back to your tables.

24 A. Okay. I have to say these

1 are categories.

2 Q. This is very generic?

3 A. Right. They're not
4 specific to what Crutchfield was
5 doing.

6 What I was trying to
7 explain is that we're in a very --

8 Q. This is the environment?

9 A. -- very complicated world
10 here, where it's not -- it's no
11 longer just the seller -- it never
12 really was --

13 Q. No.

14 A. -- but the seller and the
15 buyer.

16 It's a very complicated
17 area that involves this kind of
18 iterative interrelationship that does
19 have a kind of strong correlate to
20 physical retailing in a particular
21 place.

22 Q. So, with implementation,
23 we're talking about, like, ad
24 placements, retargeting kind of

1 things?

2 A. Yes. Data implementation,
3 yes.

4 Q. Okay. So those are the
5 broad ones. And --

6 A. And these are -- Table 2 is
7 the roles that companies play.
8 Sometimes more than one role they'll
9 take on in this ecosystem.

10 So you'll have a retailer
11 like Crutchfield, who is also a
12 publisher, right, because they
13 produce things for the web and put it
14 online.

15 They may also be an
16 advertiser. They may also distribute
17 coupons, but they may hire someone
18 else to do it for them. So there are
19 a variety of activities, roles that a
20 company can play in this ecosystem.

21 The more, I would argue --
22 and this gets sociological -- the
23 more roles that a company takes on,
24 the more leverage it has within the

1 ecosystem.

2 But it -- but they -- these
3 are all the various -- many, many,
4 many of the various activities that
5 companies take -- take on.

6 Q. So, as marketing becomes
7 more reliant on technological tools,
8 it's like -- it's difficult to find
9 somebody who is a master of all?

10 A. Yes.

11 Q. There's specialization?

12 A. Yes. eCoupons, for
13 example, which, in the physical
14 world, never really was done just by
15 the store.

16 For example, if we talk
17 about supermarkets or other kinds of
18 retailers, as a whole, ecosystem in
19 the physical world.

20 That is moving to the
21 virtual world with a whole new set of
22 companies, as well as some of the old
23 ones that are dealing with this in
24 very personalized ways now, which are

1 interesting.

2 So it's a different -- it's
3 a new world with continuities and
4 differences from the old one.

5 Q. And, again, nothing
6 nefarious necessarily?

7 A. Not at all.

8 Q. Nothing necessarily
9 nefarious about it. This is just
10 another -- as marketing has evolved,
11 this is the way --

12 A. Now, I would -- there are
13 privacy aspects to it --

14 Q. Sure.

15 A. -- and there are larger
16 social considerations that I write
17 about.

18 But from the standpoint of
19 what we're dealing here, we're
20 talking about how companies reach out
21 and interact with and learn about
22 their customers in a new -- in the
23 21st century.

24 Q. If a company such as --

1 well, we won't say Crutch -- but,
2 let's say, there's an Internet
3 catalog company that generates
4 hundreds of millions of dollars of
5 sales in a particular geographical
6 locale, say, a state like Ohio,
7 without salespeople, I mean, to what
8 extent is the use of these tools
9 helpful to them?

10 A. They're critical.

11 I mean, what companies have
12 been learning to do is that you can
13 lower your sales force in any area,
14 and reach out to places in the world
15 that you've never sold before, and do
16 it effectively and with amazing
17 technological skill, because of
18 these -- because of these
19 technologies, because of these
20 affordances.

21 It's a -- it's a world in
22 which the ability to reach out across
23 borders has been made possible. At
24 the same time, that you can interact,

1 as I say, in an iterative way with
2 the customer as if you were sitting
3 there.

4 Q. So, in reviewing your
5 opinions about Crutchfield and its
6 activities in Ohio, in your -- as set
7 forth in your report, is there
8 anything -- any of these, you know,
9 conclusions, your opinions, are they
10 still the same today as they were
11 when you submitted your report?

12 A. Yes, they are.

13 MS. MESIROW: I have
14 nothing further on direct.

15 MR. BERTONI: Okay. I have
16 some questions.

17 I would just like to fill
18 up my coffee, so we can go off the
19 record.

20 (Discussion off the
21 record.)

22 CROSS-EXAMINATION

23 BY MR. BERTONI:

24 Q. We're talking here, aren't

1 we, about one of the earliest forms
2 of human interaction, the retail
3 sale. Correct?

4 A. Absolutely.

5 Q. And enshrouded in mist --

6 A. Well, you know, people have
7 done -- yes. I mean, if we go back
8 to the Bible, you can read about it.

9 Q. And probably before that,
10 too, with barter and trading.

11 A. I'm sure that's true, yeah.

12 Q. And is it true that over
13 time communication relating to the
14 selling activity has changed?

15 A. Yes.

16 Q. So, initially, it may have
17 been one person speaking to another
18 person, maybe at the mouth of a cave,
19 and the distribution network was to
20 go into the cave and take something
21 and hand it to the person you sold it
22 to. Correct?

23 A. Yes.

24 Q. Development of currency

1 over time, correct?

2 A. Yes.

3 Q. And what we're talking
4 about today is, in fact, one step in
5 an evolutionary process in which
6 human communication relating to
7 retail transactions has changed with
8 changing technology, right?

9 A. Absolutely.

10 Q. And changing human ideas of
11 where to live and what community
12 means as well, right?

13 A. Presumably. Though, I
14 don't -- the linkage one would have
15 to draw in interesting ways. I'm not
16 sure that one -- the causal links are
17 complex.

18 Q. Certainly, I'm not asking
19 you to describe the causative
20 relationship.

21 But, in fact, the means of
22 communication often are in some way
23 evolving with notions of whether
24 people live close together or far

1 apart?

2 A. So, when people move to the
3 suburbs, supermarkets started having
4 bigger parking lots.

5 Q. And so you have an initial
6 retail sale that involved people
7 speaking to each other.

8 And I don't know if you
9 were here for Professor Goldman's
10 testimony --

11 A. No.

12 Q. -- but he's testified to
13 this at other times as well.

14 The difference between a
15 mediated and a non-mediated
16 communication. Does that make sense
17 to you?

18 A. Yes.

19 Q. In a mediated
20 communication, the people are not in
21 the room together. There's some
22 technology, or they may be in the
23 room, but there may be some
24 technology or some device between

1 them that helps the communication
2 chain.

3 A. Yeah. The technologically
4 mediated communication is a feature
5 that really began to take on life in
6 the 20th century.

7 Q. And one mediated
8 communication would involve the Pony
9 Express. That could have been an
10 early way to mediate communication.
11 Right?

12 A. The mail.

13 Q. The U.S. mail, which began
14 on horseback.

15 And now it's fair to say
16 the U.S. mail is a highly evolved,
17 complicated system, correct?

18 A. Yes.

19 Q. And you're familiar with
20 mail order marketing?

21 A. I was a mailman at one
22 point.

23 Q. Okay.

24 A. But yes, I do.

1 Q. So the mail order system
2 has not just -- there's not a --
3 correct me if I'm wrong, but there's
4 not a straight line. If I put a
5 letter in the mail to you -- let's
6 say, you're a retailer and you're
7 selling stereo equipment.

8 A. Yes.

9 Q. If I put a letter in the
10 mail to you with my order, is there a
11 mail route that is as the crow flies
12 to you or is the mail system more
13 complex than that?

14 A. It's complex. As a person
15 who sends a letter, I have no idea
16 how the mail gets there. It just
17 does. I hope it gets there.

18 Q. You hope it gets there.

19 And are you familiar with
20 what a mail hub is?

21 A. Well, I worked in a mail
22 hub, yes.

23 Q. And what is a mail hub?

24 A. It's an area -- it's a

1 station where most, particularly with
2 a ZIP code, where it will take the
3 mail that's going to a variety of ZIP
4 codes in the area and then distribute
5 it from that area.

6 Q. And is it true that
7 oftentimes, if you worked in a hub,
8 there is a transitional process where
9 the mail may sometimes be stored at
10 the hub, even for a short amount of
11 time, in the process of it being
12 sorted and destination routed; is
13 that right?

14 A. Yes.

15 Q. It doesn't fly through
16 with, you know, greased fingers that
17 allow it to -- it pauses, right?

18 A. Yes.

19 Q. And that's true today, and
20 it was true in the early days of the
21 United States mail, after the Pony
22 Express, as we became more complex in
23 our transportation methods. Right?

24 A. Yes.

1 Q. And the way that the mail
2 gets from you as an individual to its
3 ultimate end recipient involves a
4 number of steps, right?

5 A. Yes.

6 Q. One of the steps is writing
7 down information on some physical
8 medium that will reflect your
9 thoughts and interests that are going
10 to be communicated to the retailer,
11 right?

12 A. Depending on who initiates
13 the interaction.

14 Q. Okay. Let's talk about a
15 consumer-initiated interaction.

16 And in a mail order
17 setting what -- we'll talk about the
18 second piece, but it involves --
19 let's presume for our analysis that a
20 catalog was sent to the consumer --

21 A. Yes.

22 Q. -- through the U.S. mail
23 and we'll follow that route.

24 I can tell you that, you

1 know, one of the early mail order
2 companies, L.L. Bean, started sending
3 catalogs out in the early 1900s.

4 And so, let's say, this is
5 a recipient of an L.L. Bean catalog.
6 The recipient would have to look at
7 the catalog, decide if there was a
8 product that was of interest, and
9 then fill out an order form of some
10 kind?

11 A. Yes.

12 Q. Correct?

13 A. Yes.

14 Q. And then the recipient
15 would have to put in a form of
16 payment for that order, correct?

17 A. Uh-huh. Yes.

18 Q. And one thing that's
19 common, from then to today, is that
20 a customer order has those
21 characteristics. It has information
22 about what the consumer wants to
23 order and a way of paying for it.
24 Right?

1 A. Yes.

2 Q. And, today, there are very
3 diverse ways of funding an order
4 using various technologies, things
5 like PayPal, things like credit
6 cards, right?

7 A. Yes.

8 Q. And at some point checks
9 came into effect as well, where you
10 could have money in deposit in some
11 location and then write a check
12 reflecting the amount, correct?

13 A. Yeah. The checks preceded
14 the credit cards.

15 Q. They did.

16 And all of those reflect a
17 way for the consumer to be able to
18 access their funds and present it in
19 a way that the retailer can accept
20 and retain those funds, correct?

21 A. Yes.

22 Q. And so the consumer fills
23 out the order form, places it in the
24 envelope, presumably with a payment

1 form, and then the consumer next then
2 has to get the letter into the U.S.
3 mail system, right?

4 A. Yes.

5 Q. Now, there are ways of
6 getting it into the U.S. mail,
7 correct?

8 You can go down to the post
9 office and put it in a slot. That's
10 one way, right?

11 A. Yes.

12 Q. Another way would be to put
13 it in your mailbox that's sitting
14 outside and put the flag up, right?

15 A. I never do that, but that's
16 okay. Yes.

17 Q. Yeah. I live in rural
18 Maine and that's sort of -- it's a
19 morning gathering of the community to
20 put your mail in the thing.
21 Anyway...

22 A. That's an RFD. That really
23 began around the time you're talking
24 about.

1 Q. Yeah.

2 A. Late 19th century.

3 Q. And the mailbox, the
4 mailbox it serves as a place for the
5 mediated communication to take a step
6 towards reaching the retailer.

7 It is a device that's used.
8 It both allows mail to go out and
9 also receives mail.

10 A. It's a vehicle.

11 Q. It's a vehicle.

12 And, in some respects, as
13 we look at today, with the
14 e-commerce, we have more
15 sophisticated vehicles like a
16 mailbox, an electronic one.

17 For example, your e-mail
18 system is an electronic mailbox that
19 allows, at least the electronic
20 equivalent of, a place to both
21 receive and send communications?

22 A. In a far more iterative,
23 realtime, and complex transactional
24 manner, which makes all the

1 difference in the world.

2 Q. Well, we'll talk about --
3 we'll reiterate iterative any number
4 of times.

5 A. Okay.

6 Q. But functionally, from the
7 point of view of function, it
8 certainly does replicate the function
9 of a mailbox in a physical sense,
10 right?

11 A. Though, the entire process
12 of mailing a catalog and getting it
13 back has comparisons to what we're
14 talking about.

15 Q. It's all a matter of
16 communicating information. Right?

17 It's all a matter of
18 getting information from the retailer
19 to the consumer and then the consumer
20 getting information back?

21 A. On a spectrum of
22 interactivity, yes.

23 I guess what I'm driving at
24 is, there is -- it's a question of we

1 go from a one-to-one talking to a
2 person to a rather primitive exchange
3 across small distances, to somewhat
4 more complex exchanges across large
5 distances, to what we're talking
6 about now, which is a highly complex
7 system, which, at this end, is much
8 more comparable to the one-to-one.

9 We're talking about a
10 qualitative difference.

11 Q. And we'll get to that.

12 A. Yeah.

13 Q. Because I think -- isn't
14 it fair to say that the entire
15 evolutionary process, in some
16 respects, has harkened back to the
17 one-on-one.

18 That it's no longer Og and
19 Nog selling, you know, a particularly
20 smooth stone. It's now people who
21 may not even know each other trying
22 to engage in commerce.

23 A. But you're making my point
24 exactly.

1 Q. Well, allow me to ask the
2 questions and then we can each draw
3 our own conclusions from them.

4 A. Fine.

5 Q. Now, if the evolutionary
6 process involves an attempt to sort
7 of reach out to a wider audience, to
8 engage in interaction with people who
9 may not be physically proximate,
10 there are certain technologies that
11 have come into existence between, you
12 know, the days of Og and Nog and
13 today.

14 And one of those is the
15 telephone, right?

16 A. Uh-huh. Yes.

17 Q. And the telephone -- we
18 just talked about the mail system.
19 That was one.

20 The telephone is another
21 one?

22 A. Yes, it is.

23 Q. There's a device that sits
24 in a consumer's home, let's say. The

1 phone is often there.

2 A. Yes.

3 Q. And that device is the
4 consumer's link to the information
5 network that allows them to
6 communicate both far and near, right?

7 A. Yes.

8 Q. And there needs to be a
9 similar device, or at least a device
10 of similar functionality, maybe
11 bigger scale, at the other end when
12 someone tries to place a telephone
13 call, correct?

14 A. Yes.

15 Q. Just like when you place
16 your letter in the mailbox and put
17 your little flag up, it will be
18 entrusted to this network of mail
19 delivery.

20 And the recipient has to
21 have a similar, at least functionally
22 similar, place to receive mail.
23 Correct?

24 A. Yes.

1 Q. And the telephone works
2 much that same way.

3 There has to be a device
4 that's compatible with the
5 information network on the other end,
6 correct?

7 A. Yes.

8 Q. And the consumer makes the
9 decision as to whether they want to
10 have a mailbox, right?

11 A. Yes.

12 Q. And the consumer makes the
13 decision as to whether they want to
14 have a telephone?

15 A. Yes.

16 Q. They make those decisions
17 because they allow the individual to
18 participate in communications that
19 are more than immediately or
20 geographically proximate, right?

21 A. Uh-huh. Yes.

22 Q. And so sales, I would
23 think, went from mail order, then the
24 next step, probably, in the

1 evolutionary process, was a telephone
2 sale?

3 A. If we're talking about that
4 direct marketing channel.

5 Q. Yes. Let's focus on the
6 direct marketing channel.

7 It's fair to say, right,
8 that people, to this very day, are
9 still engaging in the door-to-door
10 peddling?

11 A. Not in the way of Fuller
12 Brush, but Avon and people like that.

13 Q. That's right.

14 I mean, there are these --
15 whether they're these -- I won't call
16 them pyramid schemes. But there are
17 these retail channels where people
18 speak face-to-face. They carry the
19 product with them. They accept --

20 MS. MESIROW: Home parties.

21 BY MR. BERTONI:

22 Q. Home parties.

23 A. Yes.

24 Q. Things of that nature.

1 And there are also people
2 that have come to my door selling
3 things, in addition to, you know,
4 proselytizing.

5 So one would argue that the
6 face-to-face thing is almost -- it's
7 almost an ideal.

8 It's almost an Aristotelian
9 sort of ideal, that all these other
10 communication modalities are trying
11 to replicate in some way trying to
12 get close to that one-on-one
13 interaction; is that right?

14 A. That's a complicated
15 question.

16 Because if you look at the
17 history of peddling, for example, and
18 people who have actually studied the
19 history of peddling in Europe, there
20 are lots of tensions around face-to-
21 face selling that people who don't
22 engage in it, customers, as well as
23 the sellers, would rather not have to
24 do.

1 Q. And those difficulties,
2 correct me if I'm wrong, relate to
3 the physical proximity of the peddler
4 and the consumer, the entry of the
5 seller into the consumer's space?

6 A. They relate to concerns
7 about discrimination. They relate to
8 concerns about, yeah, things that
9 have to do with the specific
10 knowledge that the person who is
11 selling may have about the person who
12 is purchasing.

13 Q. Also, the fact that the
14 seller can stick their foot in the
15 door, in the sort of proverbial
16 sense, and intrude in a way that
17 isn't possible by mail, by telephone,
18 or online?

19 A. Well, I have actually seen,
20 not in the U.S. so much, but
21 certainly, in England, signs on mail
22 slots that say, No commercial mail,
23 do not put any commercial mail in the
24 slot.

1 And, apparently, it's legal
2 to ask for that in the UK. It would
3 not be acceptable in the United
4 States.

5 Q. I think you'd have to
6 agree, though, that it's easier to
7 discard a piece of commercial mail
8 that comes in than to physically
9 eject a peddler from your home?

10 That's fair to say, right?

11 A. Yeah, if they got in.

12 Q. Yeah, if they got in.

13 And even if they didn't,
14 there's a degree of intrusiveness
15 when someone comes into your home
16 physically and seeks to engage you in
17 a commercial conversation at a time
18 of their choosing, right?

19 A. That's why some communities
20 outlawed peddlers. And, today, I've
21 read about certain communities
22 actually requiring licenses from
23 people who go door-to-door.

24 Q. And isn't it true that the

1 things that are really modern-day
2 analogs of peddling or the things
3 that are most often regulated and
4 controlled -- I'll give you an
5 example, outbound telemarketing.

6 When telemarketers will
7 call you affirmatively at a given
8 hour to press you to buy something,
9 that's a close analog to the peddler,
10 isn't it?

11 A. It's a -- it's a
12 disturbance.

13 Q. It's a disturbance.

14 And so there's a degree of
15 disturbance that occurs in retail
16 activity, far more intense, and at
17 the intensest end of the spectrum,
18 when there's a person standing in
19 front of you pressing you to buy
20 something, right?

21 A. Far more than what?

22 Q. Right. Let's talk about a
23 car salesman, for example, as an
24 example. And the unique pressures

1 and tactics that are used in a
2 one-on-one situation. The ability,
3 for example, to play what's known as
4 good cop/bad cop, for example.

5 A. Yeah. Well, if you're
6 asking me to compare that with what
7 goes online, there are correlates to
8 that as well. I mean, we can get
9 into it.

10 Q. We'll get to that.

11 A. Yeah.

12 Q. But I'm just -- I'm
13 talking --

14 A. Because you said more than.
15 I mean you were making a comparison.

16 Q. Well, let's talk -- let me
17 pull back.

18 Because what I was saying
19 is that there are certain aspects to
20 the in-person solicitation that are
21 intrusive into a person's life.

22 A. Yes.

23 Q. And there are varying
24 degrees of intrusiveness --

1 A. Yes.

2 Q. -- with regard to all
3 manner of communication with regard
4 to retail selling, right?

5 A. Yes.

6 Q. The least intrusive, it
7 would seem to me, would be a retail
8 selling experience where the consumer
9 is the one who initiates
10 communications with the seller,
11 rather than the seller coming to the
12 retailer's -- to the consumer's home.

13 The consumer gets in the
14 car and drives to the local mall and
15 goes to the store of their choosing
16 and engages in a discussion about
17 purchasing. Right?

18 A. But you just said that if
19 you go to a car dealer and that
20 person drives you crazy, you've
21 initiated that experience.

22 Q. You have.

23 And so you've initiated
24 that experience, but it's the

1 one-on-one, face-to-face pressure
2 that distinguishes most of the
3 regulated conduct than, say, the
4 non-physical interference?

5 A. See, I would -- I think
6 that we'd have to go -- and this is a
7 very complicated subject, because it
8 is not -- I don't think it's as
9 simple as that. I think it has to do
10 with the particular context.

11 I would argue -- now I
12 don't know if you want to go into it.
13 You want to talk now about the
14 electronic world?

15 Q. Well, not yet. I'm trying
16 to set a predicate for it.

17 MS. MESIROW: I'm trying to
18 see where this is going. I'm trying
19 to understand.

20 BY MR. BERTONI:

21 Q. I'm trying to set a
22 predicate, but let me -- I'm asking
23 the questions here.

24 A. I understand.

1 Q. I know you're a professor.

2 A. Because you're saying
3 compared to.

4 Q. Well, let's pull back and
5 let me just ask some questions.

6 A. Go ahead.

7 Q. And, hopefully, that will
8 speed us along.

9 A. That's fine.

10 Q. So we've talked about the
11 use of technology both at the
12 consumer end and at the seller's end.
13 We talked about the mailboxes. We
14 talked about the telephone. And
15 today we have computers.

16 A. Yes.

17 Q. And that's evolved, so that
18 there are other devices that are also
19 computers, but maybe not called that,
20 like phones, and tablets.

21 A. Yes.

22 Q. And we all use them.

23 And they serve, in terms of
24 communication, the very

1 intermediating function that the mail
2 system would have and the telephone
3 system would have. They're a part of
4 that, right?

5 A. They could be, yes.

6 Q. They could be.

7 If you, as a consumer, make
8 the affirmative decision to connect
9 your device to one of these
10 intermediating technological
11 connections, like the Internet,
12 that's your choice.

13 And once it's there, it
14 becomes an analog to, say, a
15 telephone in terms of those
16 communications?

17 A. And/or to a face-to-face
18 car dealership example that you
19 just...

20 Q. We'll talk about that.
21 Because your -- as I understand it --

22 A. Yes.

23 Q. -- it's your position that
24 it's the nature of the information

1 exchange --

2 A. It's --

3 Q. Let me finish and you tell
4 me if I'm right or wrong. And then
5 if I'm wrong, we'll talk about that.

6 A. I understand. Yes.

7 Q. It's the nature of the
8 information exchange, not the medium
9 of that exchange, that underlines
10 whether or not we have what you
11 referred to as the functional
12 equivalent of a physical presence?

13 A. I would argue that the
14 medium affords an opportunity to have
15 the complex kinds of interactions
16 that I've been talking about.

17 Q. And so let's talk about
18 complex interactions in
19 communication. Because communication
20 can involve all of the senses, right?

21 A. It can.

22 Q. It can.

23 And so one thing that a
24 peddler has are eyes to see body

1 language. And body language is a
2 physical way of communicating, right?

3 A. Yes.

4 Q. And the seller in a
5 peddling situation can also look at
6 other kinds of reactions, physical
7 reactions, like a flushing of the
8 skin when blood flow is increased, a
9 blinking of the eye when pressure is
10 placed on a consumer.

11 They can see those and
12 respond. You have data that is
13 coming from the person you're
14 speaking to, and that data can be
15 used by the recipient of the data to
16 engage in an appropriate iterative
17 response, right?

18 A. Yes.

19 Q. And it's one of the things
20 that I learned as a lawyer.
21 Unconsciously, one of the things that
22 I would do when speaking to people is
23 mimic their body language.

24 I found myself when

1 speaking to partners in my office,
2 putting my hands in the same place
3 that theirs were and scratching my
4 head at the same time.

5 That's a natural
6 communicative process, right? You
7 see it and imitate to create a bond,
8 right?

9 A. I don't know that, but I'll
10 take your word for it.

11 Q. Okay. So there's a --
12 there's a richness of visual data
13 that comes in from a peddler entering
14 into a home and having a face-to-face
15 conversation with someone, right?

16 A. That's true.

17 Q. And there are ways,
18 potentially, in these intermediated
19 communications, that are distant,
20 that are not physically in the same
21 room, to try to reach a place where
22 that data can be -- at least maybe
23 not all of it, but some of it, can be
24 achieved a data transfer, right?

1 A. That's the idea.

2 Q. You have, for example,

3 Skype.

4 Are you familiar with

5 Skype?

6 A. Yes.

7 Q. And so Skype is a -- can be

8 used for audio only, but also visual

9 interaction?

10 A. Yes.

11 Q. And so, from the point of

12 view of the senses, a Skype

13 conversation, with two people looking

14 at each other, even though they may

15 be thousands of miles apart, gives

16 you visual data that is not available

17 in non-video communications, right?

18 A. Yes.

19 Q. Okay. And then there are

20 other senses that come into play when

21 it comes to the peddler's activities

22 in someone's home. There's the

23 auditory sense.

24 And telephones provide that

1 auditory sense, don't they, when you
2 communicate over distance?

3 A. Yes.

4 Q. You can hear intonation.

5 A. Yes.

6 Q. You can hear a consumer's
7 voice quivering or wavering when
8 they're talking.

9 It provides a rich feed of
10 auditory information that may not
11 have the visual analog to go with it,
12 but at least provides you an auditory
13 set of cues and signals?

14 A. Yes.

15 MR. BERTONI: Can we go off
16 the record.

17 (Discussion off the
18 record.)

19 BY MR. BERTONI:

20 Q. Now, on the auditory
21 spectrum, that auditory data does not
22 transfer in the ordinary course over
23 Crutchfield's website, does it?

24 A. Not now.

1 Q. Not now.

2 A. It will.

3 Q. It might in the future.

4 And a lot of what you
5 talked about in your report was kind
6 of -- this is what professors are
7 supposed to do, they're visionaries.
8 They look at trends and they project.

9 A. I was doing both.

10 Q. You were doing both.

11 But we'll talk about what
12 is and what isn't. Because we're
13 looking at a historical period --

14 A. Yes.

15 Q. -- 2005 to 2012.

16 And so, during that tax
17 period, Crutchfield's website did not
18 have an ability to communicate
19 auditory information back to
20 Crutchfield from its customers,
21 right?

22 A. That's correct.

23 Q. And visual information, the
24 things --

1 A. But let me -- may I?

2 Q. You certainly may.

3 A. That's not quite true.

4 Q. Okay. Well, explain how it
5 isn't.

6 A. Because the whole point of
7 the interactivity that Crutchfield is
8 proud of is that you can actually be
9 online, call the call center, and
10 input an auditory element into the
11 activity.

12 Q. All right. Let me ask --
13 that's a very good clarification,
14 because it leads me to the following
15 -- it's almost a preliminary
16 question.

17 We had Mr. Soltani testify
18 yesterday. And you were here for
19 part of that?

20 A. Just part, yes.

21 Q. But you've sat through his
22 testimony in these cases before. I
23 don't think anything yesterday came
24 as a surprise to you.

1 He didn't talk about
2 telephone communications, and he had
3 a concept that was called a virtual
4 presence.

5 Do you remember that?

6 A. I understood what he was
7 saying.

8 Q. Okay. And so, for him, a
9 virtual presence existed without any
10 consideration of whether there was
11 some telephone call going on at the
12 same time, right?

13 A. But that's not what I was
14 referring to.

15 Q. Well, I'm not asking what
16 you were referring to.

17 A. No, but you --

18 Q. I'm asking first about
19 whether you heard his testimony and
20 whether I'm accurately characterizing
21 it.

22 A. Ashkan did not mention
23 telephone --

24 MR. FAUSEY: Objection.

1 You had a witness here that
2 you could ask that. You asked it
3 four times yesterday of this witness.

4 He's not going to say what
5 Ashkan said. Ashkan was here to say
6 what Ashkan said.

7 MR. BERTONI: I'm trying --
8 I'm trying to understand --

9 MS. MESIROW: I don't know
10 that he was there for all of that,
11 either.

12 MR. BERTONI: Well, if
13 he -- if he feels uncomfortable in --
14 with the concept of virtual presence,
15 doesn't understand it -- I'm trying
16 to understand -- I mean...

17 THE WITNESS: I don't use
18 that term in my --

19 MR. FAUSEY: He didn't use
20 that term.

21 BY MR. BERTONI:

22 Q. I know. But I'm trying --
23 you've got two reports.

24 One ends with saying

1 there's a functional equivalent of
2 physical presence and the other one
3 says there's a virtual presence.

4 MR. FAUSEY: Right.

5 MS. MESIROW: Okay. And
6 you can cross him --

7 BY MR. BERTONI:

8 Q. And it's been a long time
9 since I -- since I took epistemology,
10 but I don't understand. And so --

11 A. Well, I can explain what I
12 meant by a functional physical
13 presence. I've already done that.

14 Q. Is it different than the
15 virtual presence?

16 A. I have no idea.

17 MR. FAUSEY: Objection.

18 MS. MESIROW: That's --
19 yeah, he's not --

20 THE WITNESS: I have no --
21 that's not a term I use.

22 BY MR. BERTONI:

23 Q. And that's fine.

24 A. Yeah.

1 Q. Virtual presence is not
2 something you would use to describe
3 what goes on here?

4 A. It's not a term I did use.
5 If I used it, I'd have to think it
6 through.

7 Q. Okay.

8 A. And I'm not prepared to do
9 it right now.

10 Q. Okay. And that's fair
11 enough.

12 A. Yeah.

13 Q. So it's very possible that
14 it means the same thing or it could
15 mean something very different?

16 A. I'd have to think it
17 through.

18 Q. Okay. And what we're
19 talking about here is -- and I
20 apologize if I was confusing about
21 it.

22 But I thought I asked --
23 let's hold off on somebody who is
24 both online and on the telephone at

1 the same time. Okay. Just hold on.

2 A. Yes, except for the fact
3 that you brought it up.

4 Q. Well, no. I asked about
5 online communications whether they
6 provided an auditory sense.

7 If I was unclear, let me
8 restate the question.

9 A. Okay.

10 Q. No telephone. Two
11 computers.

12 A. Yes.

13 Q. One at Crutchfield, one in
14 the consumer's home.

15 A. Right.

16 Q. There's no auditory
17 communication going on, correct?

18 A. Not now.

19 Q. Not now.

20 There may be in the future?

21 A. Yes.

22 Q. There may be matter
23 transmitted?

24 A. And may I also say -- and I

1 don't have direct evidence, but I
2 would bet that some of this exists.

3 It is quite possible, if
4 you go on Google, it will say push to
5 call. And if your computer allows
6 for this, you might actually connect
7 to someone through the Internet on a
8 telephone-type line.

9 Q. It's -- well --

10 A. I don't know if that
11 happened right then during the
12 period, but it is not out of the
13 question of activities by retailers
14 to do things like that.

15 Q. First of all, we're focused
16 on what happened and speculating is
17 not going to get us there.

18 A. Right.

19 Q. The second thing is,
20 there's no dispute I think that you
21 can engage a computer to function
22 like a telephone, right?

23 A. Exactly.

24 Q. I mean, you can use Skype.

1 That is, at least in functionality --

2 A. Yes.

3 Q. -- is much like a
4 telephone. You can do voice over IP.

5 And you know what voice
6 over IP is, right?

7 A. Skype is voice over IP.

8 Q. Skype is voice over IP.

9 And it has an
10 intermediating technology between the
11 caller and the recipient that's
12 different from what the telephone
13 companies provide, correct?

14 A. It works in a somewhat
15 different way, yes. It's a digital
16 process.

17 Q. It travels potentially
18 through different pipes, right?

19 A. Yeah. That's -- that's a
20 -- it travels in a different way, not
21 necessarily through different pipes.

22 Q. It may be the same pipes,
23 but it's a different technology,
24 right?

1 A. Yeah.

2 Q. And just like a telephone
3 and just like the mail, the consumer
4 when they communicate through Skype
5 or VoIP technology, sends their data
6 out into the world.

7 And there isn't a straight
8 line feed, right, between a
9 communicator over VoIP and the
10 recipient? Right?

11 A. No.

12 Q. There are -- there are
13 places --

14 A. Packets.

15 Q. There are packets of data.
16 Sometime those packets of data are
17 stored in certain places for periods
18 of time, right?

19 A. I would hope not.

20 Q. Well, when network traffic
21 is congested, are you saying that
22 there's no buffering of data at
23 various locations?

24 A. Yeah. Minuscule seconds,

1 hopefully.

2 Q. But seconds --

3 MS. MESIROW: Dave, can I
4 just ask where are we going with
5 this? Because I'm trying to decide
6 whether this really relates to what
7 he did.

8 MR. BERTONI: If you really
9 need an explanation from me, I'm
10 happy to give it.

11 MS. MESIROW: I do.

12 MR. BERTONI: Can we go off
13 the record. Well, actually, let's
14 stay on the record.

15 The entire theory that Ohio
16 has is that an Internet transaction
17 is a modern proxy for face-to-face
18 peddling.

19 MS. MESIROW: Well, that's
20 not our entire theory, but that's --

21 MR. BERTONI: But it's a
22 large part of the theory.

23 MS. MESIROW: That's one of
24 our theories.

1 MR. BERTONI: And I'm
2 systematically showing that they are
3 different. They are substantially
4 different.

5 And we've already
6 established through this witness that
7 two modes of communication, visual
8 data and auditory data, things that
9 are inherent in the one-on-one
10 peddling transaction, are not
11 available here.

12 And it's important to us,
13 if part of your theory is to convince
14 a fact finder that what we have here
15 is a -- the functional equivalent --
16 and we'll get into what that means --
17 of someone sitting in your living
18 room peddling a product to you, and
19 significant aspects of that function
20 are missing, then I think your
21 analogy falls apart.

22 MR. FAUSEY: But what
23 you're talking about with him right
24 now is Skype and VoIP.

1 MR. BERTONI: Because these
2 are --

3 MR. FAUSEY: That has
4 nothing -- that has nothing to do
5 with the report he prepared. He
6 didn't talk about Skype. He's not an
7 expert on Skype.

8 He report -- you know, the
9 analogy that you said that you're
10 attacking is door-to-door versus
11 online and now you're talking to him
12 about telephone communications, mail
13 communications.

14 MR. BERTONI: I don't
15 understand this.

16 Can we go off the record.

17 (Discussion off the
18 record.)

19 BY MR. BERTONI:

20 Q. So we were just talking
21 about the fact that there are ways
22 of transmitting auditory information
23 that are similar to the ways that
24 auditory information would go to a

1 peddler, but communicating it across
2 state lines. Right?

3 A. Yes.

4 Q. And there are ways to
5 communicate visual information across
6 state lines, similar to the visual
7 information that a peddler would
8 have?

9 A. Right.

10 Q. And in the Internet website
11 that Crutchfield had during the time
12 period, there was no means of
13 communicating that information
14 strictly through its website, right?

15 A. But there were means of
16 communicating other types of
17 information the peddler could not
18 know that would make -- give you more
19 information than the peddler could
20 possibly ever have.

21 Q. But certainly, there are
22 categories of information, we've
23 talked about them, visual and
24 auditory being an example that I

1 gave, that are unique to the peddler
2 as opposed to this website, right?

3 A. And there are, conversely,
4 aspects of information that a company
5 can learn about you and use about you
6 that are unique, and maybe even more
7 important than what the peddler could
8 know.

9 Q. It's up to the retailer --
10 and I'm not a retailer. And you're
11 not either, right?

12 A. No.

13 Q. And so it's up to the
14 retailer to decide what information
15 is important and what works, right?

16 A. I know by reading trade
17 press, interviewing people in the
18 retail market about this stuff. And
19 they would much rather have the
20 ability to track a person through
21 behavioral targeting than have a
22 person knock on the door. I
23 guarantee you.

24 Q. Well, you know that

1 Crutchfield does not track
2 individuals using behavioral
3 targeting, right?

4 A. Well, they certainly do
5 remarketing, which has elements of
6 that.

7 Q. On an aggregate basis or an
8 anonymous basis, right?

9 A. No, not anonymous at all.

10 Q. So your testimony is
11 that --

12 A. Marketing is not anonymous.

13 Q. Your testimony is that
14 online marketing from Google is
15 done --

16 A. Not Google.

17 Q. I mean by Crutchfield, is
18 done on a non-anonymous basis with
19 retargeting?

20 A. Remarketing takes place on
21 a non-anonymous basis from the
22 standpoint of Crutchfield.

23 Q. Okay.

24 A. Yes, from the standpoint of

1 Crutchfield.

2 Q. So you --

3 A. And certainly, in the

4 e-mail sector for sure.

5 Q. In the e-mail sector,

6 that's right.

7 And consumers provide that

8 information, the e-mail address, and

9 Crutchfield sends to that?

10 A. But that -- that's

11 irrelevant. You're now saying it has

12 to do with volition.

13 Q. First of all, I'm not

14 saying anything. We're off track.

15 I'll withdraw the question.

16 Let me get back to my

17 questions.

18 A. Okay.

19 Q. So there certainly is

20 information that each of the

21 modalities of communication that we

22 provide to engage in a retail

23 transaction: mail, phone, Internet,

24 all of those have different bundles

1 of information that the marketer can
2 get about the consumer, correct?

3 A. Say that again.

4 Q. Each modality of inter --
5 of commerce, whether face-to-face,
6 telephone, mail, or over the
7 Internet, allows the direct marketer
8 access to different kinds of
9 information?

10 A. No. They're very
11 overlapping and interconnected.

12 Q. They are.

13 A. Yeah.

14 Q. But there are certain kinds
15 of information that are unique to
16 each one?

17 A. If you're saying that a
18 voice modulation is information that
19 I can't get through a catalog, that's
20 true.

21 Q. Correct.

22 And part of understanding
23 -- it seems to me part of the
24 underpinning of your opinion is,

1 closely analyzing the kinds of
2 information that come through web
3 advertising, for example, and
4 assessing that information and
5 comparing it to information that
6 would be obtained face-to-face,
7 right?

8 A. No. Now, let me -- let me
9 get clear about what I'm saying.

10 What I am saying -- and I'm
11 not a lawyer and so don't -- this is
12 not coming out of any legal
13 precedents.

14 What I'm saying is that, if
15 you look at the history of marketing
16 over the last century, going into the
17 next century, there have been
18 decisions about interactivity, which
19 may have been incorrect, from my
20 standpoint, in terms of whether a
21 person who sends a catalog is really
22 interacting with a customer in the
23 same way that a salesperson in the
24 store or in a home does. Okay.

1 But what we have here is a
2 spectrum, from the person-to-person
3 activity to the situation where now a
4 company can scarf up large amounts of
5 data and respond to a person,
6 directly or indirectly, in that way.

7 What I am saying is that
8 we, in the 21st century, are in a
9 retail environment where that should
10 be seen as equivalent to what a
11 person is doing in a physical
12 location.

13 Q. And equivalency is what I'm
14 focusing on. Because equivalency is
15 a -- is a mushy term for me. And
16 things can be different, yet
17 equivalent.

18 And what I think you've
19 established already is that certainly
20 the kinds of information that are
21 obtained from a website interaction
22 by Crutchfield during the time period
23 are different in terms of that -- the
24 nature of the information received.

1 A. Richer.

2 Q. Potentially richer, but
3 certainly not richer when it comes to
4 visual information about the
5 consumer.

6 A. But I would argue, and a
7 lot of retailers would, that the
8 information they are gathering now is
9 richer than what you could possibly
10 get through a phone call or even in a
11 -- or a catalog interaction.

12 Q. We can leave to the
13 successful retailers -- and you and I
14 are not -- the judgments about what
15 data is valuable or not.

16 A. I talk to them all the
17 time.

18 Q. I represent them.
19 So you're not an expert on
20 that, are you? Do you want me to --
21 do we want to go there?

22 A. Expert on what?

23 Q. On --

24 MS. MESIROW: Let's calm

1 down.

2 BY MR. BERTONI:

3 Q. All right. You're not
4 going to debate here how to engage in
5 e-commerce and the impact of --

6 A. I read about that all the
7 time, sir.

8 Q. But you're not here for
9 that purpose.

10 MS. MESIROW: Okay. Okay.

11 THE WITNESS: I go to
12 industry meetings. I talk to
13 industry meetings.

14 BY MR. BERTONI:

15 Q. I understand. And so do I.
16 So let's put aside this issue.

17 What we're talking about,
18 and what I understood your testimony
19 to be limited to, is looking at
20 e-commerce and determining what kinds
21 of information are obtained --

22 A. Yes.

23 Q. -- what kind of
24 communication goes on, and then

1 examining it in light of other ways
2 of extracting information from
3 consumers.

4 A. And all I'm saying is that,
5 in today's era, the information
6 gathered and the trajectory of that
7 information is richer than the kind
8 of stuff you're talking about.

9 Q. And by richer, more
10 complex?

11 A. More complex, more
12 iterative, and more -- and with a
13 greater ability to predict what a
14 person might be interested in.

15 Q. And when it comes to that
16 judgment --

17 A. Yes.

18 Q. -- you'll agree with me
19 that, if it was a simple formula, a
20 simple decision, about what
21 information is useful to making a
22 sale, that we wouldn't have
23 struggling businesses coming into
24 existence, large ones?

1 MS. MESIROW: Objection.

2 MR. BERTONI: Well, I know.

3 But he's making an argument that this
4 sort of richness, which is not the
5 same kind of information, is somehow
6 better or more useful to a marketer
7 of any kind.

8 And my dad made pizzas and
9 sold them across the counter.

10 I'd tell you that his
11 information about knowing his
12 customers, knowing where they live,
13 knowing their children, going to
14 church with them, was more important
15 than knowing what kind of television
16 they owned.

17 MS. MESIROW: And in the
18 pizza business that might be so,
19 but...

20 MR. BERTONI: Every
21 business -- right. Every business --
22 we're not here to debate the relative
23 merits of information.

24 But he's introducing an

1 opinion here about how suddenly today
2 the information may be different, but
3 it's richer, which suggests to me
4 better. But that's far afield.

5 MS. MESIROW: Well, then
6 ask him what he means by richer.

7 MR. BERTONI: I did.

8 BY MR. BERTONI:

9 Q. So we'll certainly agree
10 that it's different, a different mix
11 of information?

12 A. Yeah. What I am saying,
13 too, is that, in the 21st century, to
14 not understand that the rules of
15 business have fundamentally changed
16 is simply putting your head in the
17 ground.

18 Q. Well, technology has
19 changed.

20 But let me ask you this
21 question. One of the things that you
22 focus on is information about the
23 consumer.

24 And you're familiar with

1 the Internet alone, that mediated
2 path of communication, is not the
3 only channel of commerce that
4 involves obtaining information about
5 potential customers from a variety of
6 sources to determine who to sell
7 product to, right?

8 A. That's right.

9 Q. Some of the things you've
10 talked about, for example, the idea
11 of going to a third party to get
12 information about people who have
13 certain characteristics, demographic
14 characteristics, certain shopping
15 habits, certain spending habits,
16 certain characteristics that might
17 make them a better customer, that's
18 been used by mail order sellers for a
19 long time, right, to determine who to
20 mail catalogs to?

21 A. Scoring, exactly.

22 Q. And that's also been used
23 by telemarketers to reach out to
24 customers to place telephone calls,

1 right?

2 A. Yes, it has.

3 Q. Some businesses, for
4 example, will determine whether there
5 are children in a household. They'll
6 go to third parties and tell us --
7 give us the names of people who have
8 children between a certain age?

9 A. Right.

10 Q. So that this kind of
11 gathering of information about
12 customers is not unique to the
13 Internet.

14 A. No.

15 Q. It may be richer today
16 because of the ability to gather
17 information from a wide variety of
18 sources and process it with greater
19 technology, computer power, and all
20 that.

21 But that informs both
22 Internet marketing and also mail
23 order marketing, right?

24 A. Mail order marketing is

1 using -- I mean, the two are merging.

2 And, I mean, there still are
3 companies that sell data to catalog
4 companies in their own ways and
5 stuff.

6 But there are situations
7 where you can bring the data from
8 your online activities and your app
9 activities to your physical catalog
10 activities.

11 Q. Right.

12 Data is data. And whatever
13 it is and whatever source it comes
14 from, whether it comes from computer
15 activity, whether it comes from
16 buying goods at your local grocery
17 store, which may track your activity
18 with a card.

19 A. They do.

20 Q. Some of them -- a lot of
21 them have abandoned it, but some do.

22 Whether it comes from your
23 Department of Motor Vehicles.

24 A. Uh-huh.

1 Q. All those sources of
2 information assist not just Internet
3 marketing, but all kinds of marketing
4 when it comes to figuring out who
5 your most likely customers will be,
6 right?

7 A. Yes.

8 Q. And there are different
9 ways to reach out to customers as
10 we've talked about.

11 There's still people
12 engaging in face-to-face commerce,
13 whether it's a peddler or retail
14 store, correct?

15 A. Yes.

16 Q. There are still people
17 engaging in telephone marketing,
18 whether it's outbound or receiving
19 calls, right?

20 A. Yes.

21 Q. And you know Crutchfield
22 takes orders by telephone, right?

23 A. Of course.

24 Q. And there's also people who

1 engage in e-mail marketing?

2 A. Yes.

3 Q. And they send e-mails to

4 potential prospects.

5 When it comes to e-mail,

6 though, do you know -- one of the

7 questions that has come up in these

8 cases is whether e-mails are sent to

9 a specific targeted audience or not.

10 Are you familiar with

11 practices like that where e-mails are

12 targeted to specific demographics,

13 for example?

14 A. Yeah.

15 Q. Has there been a change in

16 practices with regard to targeting,

17 that from traditional mail order to

18 the Internet, comparing catalog

19 mailings to e-mail promotion?

20 A. In the -- at the cutting

21 edge, certainly.

22 Q. And isn't it true that

23 e-mail marketing is less expensive

24 to engage in on a per communication

1 basis than mailing a catalog?

2 A. Yes.

3 Q. And isn't it true that, in
4 fact, in the use of e-mail, it is
5 less critical, rather than more
6 critical, to identify a limited
7 number of people to whom to promote
8 to?

9 A. If you don't want people to
10 see the stuff is spam, you better be
11 careful.

12 Q. Right.

13 A. But in a first pass, you're
14 right.

15 Q. And so, in part, we saw, as
16 you've been studying e-commerce over
17 time, that, initially, because it was
18 less expensive, marketers tended to
19 flood the market with e-mails in a
20 way they don't today, right?

21 A. Yes.

22 Q. In reaction to catalogs,
23 which -- are you familiar with the
24 cost of mailing and the cost of

1 catalogs?

2 A. Yes.

3 Q. Some catalogs cost \$4 each

4 to print, right?

5 A. Yes.

6 Q. So a company is going to be

7 very careful about investing that

8 money.

9 And postage as well, to get

10 to someone who may or may not be

11 interested in their product?

12 A. Yeah. I'm not sure where

13 that's going.

14 Q. Well, where it's going is

15 that I'm trying to understand this

16 nature of information.

17 We have the communications

18 methods that we talked about, and

19 then the other part of retail selling

20 is knowing your customer.

21 Is it fair to say that

22 those are the two things we're

23 focusing on in this entire endeavor?

24 A. Right.

1 Q. It's how you talk to your
2 customer, the means, and how you
3 learn about your customer?

4 A. But you seem to think that
5 I think that cataloging is not the
6 equivalent of -- of physical
7 retailing.

8 I think that if I were --
9 if I were a judge, I would say that,
10 in today's world, the catalog is also
11 subject to the same rules.

12 MS. MESIROW: That's not
13 part of the report.

14 THE WITNESS: Okay. That's
15 fine.

16 MS. MESIROW: It's not in
17 his report.

18 THE WITNESS: It's not in
19 my report, but...

20 MR. BERTONI: It doesn't
21 matter.

22 THE WITNESS: I just think
23 that it's not -- that this is a world
24 that has changed to such an extent

1 from the time that all of this
2 started, that we have to rethink the
3 values that we're talking about.

4 BY MR. BERTONI:

5 Q. Right. And so let me see
6 if I understand this.

7 That what we're talking
8 about is a world in which less and
9 less people communicate face-to-face
10 and technology is --

11 A. Fewer and fewer people are
12 communicating face-to-face and
13 companies are finding ways to create
14 businesses that have the functional
15 equivalence of presence while not
16 really -- while not really being
17 there.

18 Q. In part, have you noticed
19 a trend of people not -- of more
20 customers not wanting to deal with
21 a human being, of choosing ways of
22 doing commerce that don't involve --

23 A. It's a mixed bag. 95
24 percent of sales still take place in

1 a physical store. That's why Amazon
2 is starting -- one of the reasons
3 Amazon is actually starting to try
4 out some stores, aside from the
5 warehouse issue.

6 The physical store is still
7 the core of most commerce. However,
8 at the edges, and these are very
9 important edges in a country like the
10 United States, other forms of
11 commerce are still -- have to be
12 taking place.

13 And, as I said, the stores
14 themselves are very active in the
15 digital space, because people find
16 out about things and they learn about
17 their customers iteratively online.

18 Q. And when we're talking
19 about the store transaction, it then
20 drives attention to other aspects of
21 the physical sales process. A
22 peddler will often carry samples of
23 goods, for example.

24 And is it fair to say that,

1 given what you've seen, that it's
2 still important to consumers to be
3 able to look at something and hold it
4 and judge its quality?

5 A. That's often why stores are
6 so important.

7 Q. And that's something that
8 is not available, at least now.
9 Maybe in the future there will be 3-D
10 printers and things.

11 But, at least during the
12 tax period, you'd have to basically
13 either know the product from some
14 other place or you'd have to buy it,
15 effectively, sight unseen?

16 A. Well, what companies do, of
17 course, is they have reviews. And
18 that is an attempt to take care of --
19 to make a customer feel better and
20 know the product more.

21 Another thing that
22 companies will implicitly encourage
23 is for customers to go to Best Buy,
24 for example, look at the stuff in

1 Best Buy, it's called showrooming,
2 and then come back and purchase it
3 online at a possibly lower price.

4 So there are ways to take
5 care of that issue, though, it
6 certainly is an issue.

7 Q. Right.

8 And, certainly, the Best
9 Buys of the world are not happy about
10 competing with companies that tell
11 consumers go look at this product, go
12 talk to one of Best Buy's
13 salespeople, and then come buy it
14 from us cheaper?

15 A. Yes.

16 Q. That's right, right?

17 A. Yes.

18 Q. And so we then have -- just
19 to sort of round this out, we've got
20 the modalities of communication and
21 then the information acquisition
22 process.

23 And in the Internet website
24 process, there's information that you

1 can get directly from the user,

2 correct?

3 A. Yes.

4 Q. And, in fact, when the user
5 initiates a communication to a
6 website by visiting it, they provide
7 information immediately, correct?

8 A. Hopefully.

9 Q. Though, we saw -- I think
10 you may be familiar with this, but
11 there was something that we saw in
12 testimony yesterday that showed that
13 the browser identification is
14 provided.

15 You're familiar with that?

16 A. Uh-huh.

17 Q. You have to say yes or no
18 for the court reporter.

19 A. Yes.

20 Q. And the operating system in
21 the computer that are being used are
22 provided?

23 A. They'll look at it
24 sometimes.

1 Q. They'll look at it.

2 A. Yeah.

3 Q. And that has to do, in part
4 at least, with telling the server how
5 it needs to give the information
6 back?

7 A. That's Ashkan territory,
8 but yes.

9 Q. Okay. And if you're
10 examining that, that's one way of
11 collecting information. Your report
12 is full of information collection
13 techniques.

14 A. Yes.

15 Q. And one is you collect the
16 information that comes in when a
17 consumer visits?

18 A. Yes.

19 Q. It may not be rich. It
20 could be just the IP address?

21 A. The first instance, yes.

22 Q. The first instance.

23 And then later, if there
24 are ways to associate that

1 information with a person's identity,

2 then --

3 A. Yes.

4 Q. -- it becomes richer?

5 A. Right.

6 Q. And then, if you're able to
7 go to third parties, who might have
8 that person's e-mail address, and you
9 tell them here's the name, can you
10 give me an e-mail address, they may
11 be able to help you find an e-mail
12 address and, therefore, your
13 information is even richer?

14 A. Exactly.

15 Q. And so there's information
16 that you can get directly from the
17 consumer and information that you can
18 get from a third party, correct?

19 A. And, by the way, the
20 consumer may not even be happy that
21 you've done this, because they may
22 not even know.

23 Q. Well, that's right.

24 And there was a degree of

1 happiness in mail order as well,
2 right?

3 A. If the person doesn't want
4 the material.

5 Q. Right.

6 They'd get a catalog and
7 wonder why they got it, right?

8 A. Yes.

9 Q. And is it true that, from
10 your experience, in seeing the
11 evolution of this, that the Internet
12 brought home certain issues about
13 information collection that the
14 consumers may have been oblivious to
15 in the mail order age, like
16 profiling?

17 A. That's probably true, yes.

18 Q. And so you have information
19 that the consumer gives to the
20 retailer and that information can
21 include name and address, when
22 they're registering with a site or
23 placing an order, right?

24 A. Uh-huh. Yes.

1 Q. Yes.

2 And it can also include
3 when they initiate communication,
4 information about their browser?

5 A. Yes.

6 Q. And the browser is a
7 technological intermediary between
8 the consumer and the retailer,
9 correct?

10 A. Yes.

11 Q. And the browser and the
12 computer function as tools that the
13 consumer uses to engage in
14 communication with the retailer?

15 MS. MESIROW: I'm sorry. I
16 missed some of that.

17 MR. BERTONI: Can you read
18 the question back, please.

19 (The court reporter read
20 back the following:

21 "Q. And the browser and
22 the computer function as tools that
23 the consumer uses to engage in
24 communication with the retailer?")

1 THE WITNESS: Now, the
2 answer is yes, but at the same
3 time -- and in the era we're dealing
4 with, but they're also encouraging
5 you to phone if you have an issue.

6 So you're ignoring that
7 Crutchfield itself prides itself on
8 the interactivity of all these media.

9 BY MR. BERTONI:

10 Q. And I don't -- I don't --
11 you're exactly right. They do. I'm
12 not quibbling with that. I was just
13 focusing on this modality of
14 communication.

15 There is no -- I'm not
16 going to dispute the fact that
17 consumers have other ways to
18 communicate and do so --

19 A. At the same time.

20 Q. -- at the same time.

21 And I'm not sure how often
22 that happens. Do you know?

23 A. I don't know.

24 Q. Let's say it happens. We

1 don't need to quantify it.

2 But a consumer has a series
3 of options in which it may choose to
4 communicate with a third-party
5 retailer like Crutchfield?

6 A. Yes.

7 Q. And if there's a phone on
8 the consumer's desk and a computer on
9 the consumer's desk, it's the
10 consumer's choice --

11 A. Yes.

12 Q. -- as to how it wishes to
13 communicate. Some people are not
14 comfortable online.

15 A. Yes.

16 Q. My parents were afraid of
17 the Internet, and so -- but they pick
18 up a phone.

19 A. Yes.

20 Q. It's all the consumer's
21 choice as to what tool he or she
22 uses --

23 A. Right.

24 Q. -- to reach, right?

1 A. Yes.

2 Q. And so when it comes to the
3 use of a web browser, the consumer
4 then chooses to pursue the
5 communication through the web
6 browser, correct?

7 A. Okay.

8 Q. And the web browser
9 provides information to the server to
10 permit that communication to occur,
11 right?

12 A. Yes. That's more Ashkan
13 territory.

14 Q. Okay. And then, in
15 response to that, the retailer then
16 communicates back to the consumer?

17 Let's forget about the
18 technical niceties.

19 A. It's an interactivity.

20 That's --

21 Q. It's a conversation, right?

22 A. You can -- you're using the
23 word "conversation," and that implies
24 a lot of things that I would agree

1 with. Yes, a conversation.

2 Q. A conversation can be many
3 things and let's agree on that.

4 If I pick up the phone and
5 call a retailer, well, that's --
6 everyone will say that's a
7 conversation if I ask questions --

8 A. Yes.

9 Q. -- and the retailer
10 responds, it's two people exchanging
11 information?

12 A. Yes.

13 Q. And there may be -- if we
14 define a conversation as an exchange
15 of information --

16 A. Yes.

17 Q. -- then we have to put
18 limits on that or else everything is
19 a conversation, right? If you
20 exchange letters?

21 A. It depends on what -- see,
22 you're -- you're now backing away
23 from what you would --

24 Q. No. I'm asking --

1 A. Your point was very similar
2 to what I was saying.

3 Q. Well, I'm trying -- I'm
4 trying to understand what you mean by
5 a conversation.

6 A. You brought the word up.

7 Q. Well, it's in your report.

8 A. Okay. Could you tell me
9 where?

10 MS. MESIROW: Yes.

11 BY MR. BERTONI:

12 Q. Hold on a minute. Hold on
13 a minute. I'll tell you where in a
14 minute. I'm asking the questions.

15 A. Okay.

16 Q. Is it the instantaneous
17 nature of the communication that
18 makes the difference here in terms of
19 the functional equivalency of a
20 physical presence?

21 A. It is the ability to do --
22 again, we're talking about a spectrum
23 here, from the -- from the lack of
24 any kind of -- from, say, somebody

1 sending a catalog to someone to a
2 point that's very much similar to a
3 transaction of a peddler talking in
4 realtime.

5 So, yes, if we want to talk
6 about what's happening now and what
7 will happen in the future, we're
8 talking about the realtime
9 capabilities --

10 Q. So, is it your opinion --

11 A. -- the possibility of
12 realtime interaction.

13 Q. So, is it your opinion
14 that, in fact, what is going on
15 between the browser and the server,
16 and their intermediating
17 communications is, in fact, a
18 conversation?

19 A. That is a technical term of
20 handshake, for example. People use
21 that analogy. That's not what I'm
22 interested in.

23 Q. Okay. All right.

24 A. I'm more interested --

1 Q. I'm just curious.

2 A. I'm more interested in the
3 data flows about the person and what
4 the company does with those data
5 flows and use them in ways that
6 accelerate, enable the selling
7 process.

8 Q. Let me ask you a question,
9 then. Does it matter whether the
10 information is obtained from the
11 consumer or from a third party to
12 determine whether there is a
13 functional physical presence in the
14 state?

15 A. No. Because, in the end,
16 it lends to this iterative activity
17 that I discussed.

18 Q. So that if I have a --

19 A. There's privacy
20 implications, obviously.

21 Q. Clearly.

22 So, but from your point of
23 view, if Crutchfield were not
24 collecting information directly from

1 the consumer, but, in fact, in a
2 constant feed with some third party
3 telling information about the
4 consumer, that it had obtained
5 potentially elsewhere --

6 A. Right.

7 Q. -- then you'd still have
8 this functional presence?

9 A. The next person --

10 MS. MESIROW: Well...

11 THE WITNESS: The next
12 time --

13 MR. BERTONI: Let him
14 answer the questions.

15 MS. MESIROW: No. That's
16 why the objection.

17 MR. BERTONI: You can
18 object. But I'd rather you not sort
19 of explain or editorialize on the
20 objection.

21 MS. MESIROW: Well, I'd
22 rather you not testify either. But I
23 mean...

24 MR. BERTONI: I'm entitled

1 to ask leading questions of this
2 witness.

3 MS. MESIROW: But his
4 opinion was not into -- and you tried
5 to do this yesterday a lot. You're
6 trying to get them to talk.

7 You're trying to parse the
8 opinion they've rendered about these
9 particular facts into all these other
10 hypothetical situations. Like, with
11 Ashkan, you were saying, well, at
12 what point?

13 MR. BERTONI: Well, that's
14 what -- expert testimony is about
15 applying principles to facts. That's
16 what experts do.

17 They have a generally
18 applicable principle. Is this A or
19 B? And then they apply it to a
20 nuanced factual scenario.

21 One of the elements of
22 his -- of what I gleaned from his
23 report is that information collection
24 is part of what generates a

1 functional presence, whatever, and

2 I'm still not sure what that means.

3 But, hopefully, I will be

4 clearer by the end of today.

5 THE WITNESS: I didn't say

6 "functional presence." I said it's

7 functional to it.

8 BY MR. BERTONI:

9 Q. Okay. It's equivalent to?

10 A. Yeah.

11 Q. Let's be very -- I'm sorry.

12 I don't mean to --

13 A. It function -- it has --

14 what was the term I used? But it

15 functions as if it's a physical

16 presence. It's not a functional

17 presence.

18 Q. All right. Got it.

19 So it's as if, but it is

20 not a physical presence, but is --

21 A. It functions --

22 Q. -- like one?

23 A. -- in such a way that it is

24 a physical presence.

1 Q. You don't need to be --

2 A. It's like a physical

3 presence.

4 Q. So that you don't need to

5 be --

6 MR. BERTONI: Because he
7 used the word "physical presence"

8 here, so let's not quibble on that.

9 THE WITNESS: Okay.

10 BY MR. BERTONI:

11 Q. So it's a way to get all
12 the benefits of a physical presence
13 without a physical presence? Is that
14 the theory?

15 A. That's the statement.

16 MS. MESIROW: Maybe not
17 all.

18 MR. BERTONI: Can you --
19 please.

20 THE WITNESS: That's the
21 statement.

22 BY MR. BERTONI:

23 Q. Okay.

24 A. And I'm arguing -- and, in

1 fact, yes, I'm saying that -- yes.

2 Q. That's correct, right?

3 A. Yeah.

4 Q. Okay. So now we have --
5 we've talked about these different
6 modalities. And I want to turn to
7 your report specifically, because I
8 have some questions about that.

9 Now, just so I'm clear,
10 Pages 1 through the middle of Page 13
11 is your general statement of the
12 evolution of retail selling over
13 time. Is that right?

14 A. Yes, sir.

15 Q. That's not Crutchfield
16 specific?

17 A. No.

18 Q. And there's information in
19 that part of the report that talks
20 about -- there's information that has
21 nothing to do with what Crutchfield
22 does, right?

23 A. Yes.

24 Q. It could be information --

1 A. I assume.

2 Q. You assume.

3 This is not meant to be a
4 narrative of Crutchfield.

5 A. Not Crutchfield specific,
6 yes.

7 Q. Okay. And then, from Page
8 13 on, there's some pages dealing
9 with Crutchfield specifically.

10 A. Yes.

11 Q. And am I correct that that
12 ends at the top of Page 24?

13 A. Well, Page -- I would say
14 Page --

15 MS. MESIROW: 25.

16 THE WITNESS: Well, Page --
17 I would say Page 20.

18 MS. MESIROW: Yeah, Page
19 20. Before the --

20 MR. BERTONI: Am I looking
21 at a different version of this?

22 THE WITNESS: -- the web.

23 MR. BERTONI: Can you give
24 me a minute?

1 (Discussion off the
2 record.)

3 BY MR. BERTONI:

4 Q. So the discussion of
5 Crutchfield ends right above the
6 little spider web?

7 A. Yes, exactly.

8 Q. It's like a little spider
9 tracker that Spiderman would put on
10 there?

11 A. Exactly.

12 Q. Okay. And what comes
13 afterwards is just a table reflecting
14 the digital ecosystem. Some things
15 here may be what Crutchfield does,
16 some not.

17 But it describes what
18 modern e-commerce can, at least from
19 your point of view, be broken down to
20 by function?

21 A. Tables 1 and 2.

22 Q. Tables 1 and 2.

23 MR. BERTONI: I'd like to
24 take a break.

1 (A break was taken from
2 11:01 a.m. to 11:16 a.m.)

3 BY MR. BERTONI:

4 Q. Let's go to the report.
5 That's where we were and I'll try to
6 wrap up.

7 A. Okay.

8 Q. So I talked to you about
9 what part of the report deals
10 generally with historical
11 information, not Crutchfield
12 specific.

13 And then there's
14 Crutchfield specific information, and
15 that begins on Page 13. Right?

16 A. Yes.

17 Q. And in connection with this
18 opinion, are you relying in any way
19 on the opinions of any other experts
20 in reaching this conclusion?

21 A. Not at all.

22 Q. Mr. Soltani, you're not
23 relying on any of the work that --

24 A. We didn't talk -- I didn't

1 talk to --

2 Q. Well, let me finish my
3 question just so the record is clear.

4 So this is your independent
5 analysis of information, right?

6 A. It is.

7 Q. And in connection with
8 that, you've set forth in this
9 document the information you relied
10 upon to reach your conclusion?

11 A. In general and in
12 particular, yeah.

13 Q. And when you talk on Page
14 13 about your opinion regarding
15 Crutchfield's activities during 2005
16 through 2012, was it your intention
17 to set forth accurate information
18 regarding Crutchfield and its
19 activities during that period?

20 A. That was my intention.

21 Q. And are you aware, sitting
22 here today, of any information in the
23 description of Crutchfield's
24 activities in this part of your

1 report that is inaccurate?

2 A. Absolutely not.

3 Q. And the next question I
4 have is trying to understand the
5 relationship between described
6 activities and your conclusion.

7 A. Uh-huh.

8 Q. I want to walk through
9 those to maybe get a sense of the
10 principle that you're applying here.

11 A. Uh-huh.

12 Q. So the first bullet point,
13 on Page 14, "During that period
14 Crutchfield was a leading Internet
15 seller."

16 That fact alone, would that
17 be enough to support your conclusion
18 that -- and let me use your word
19 correctly.

20 A. Yes.

21 Q. Is it functional presence?

22 A. No. Where was that term?

23 MS. MESIROW: Where are you
24 looking?

1 BY MR. BERTONI:

2 Q. Functional equivalent --

3 A. Yes.

4 Q. -- of physical presence?

5 A. Yes.

6 Q. Would that be enough to
7 create a functional equivalent of
8 physical presence?

9 A. No.

10 Q. And bullet point two.

11 A. But do you want me to
12 explain why?

13 Q. No. I'm just trying to
14 understand. And this is how I'm
15 going to try to do it.

16 The next bulleted
17 paragraph, Crutchfield having a --
18 "shows a fundamental interest in
19 using technology to interact with its
20 customers directly and individually
21 at their location."

22 That alone, that interest
23 in technology would not be -- or
24 would be enough to create a

1 functional equivalent of a
2 physical presence?

3 A. The interest not, but what
4 I say in those paragraphs are more
5 than just the interest. They
6 actualize that interest.

7 Q. Okay. And so the language
8 in that paragraph, describing the
9 actualization of that interest, is
10 what's described in that paragraph
11 and the following paragraph, right
12 before the next bullet point --

13 A. Yes.

14 Q. -- is that enough to create
15 a functional equivalent of physical
16 presence?

17 A. Yes.

18 Q. So without even looking at
19 the balance of the bullet points,
20 that would be enough?

21 A. Yes.

22 Q. And if you look at the next
23 bullet point.

24 A. Uh-huh. Yes.

1 Q. "Crutchfield hired several
2 key firms known to help online firms
3 with various stages of data mining."

4 That bullet point alone,
5 would that be sufficient to create a
6 functional equivalent of a physical
7 presence?

8 A. No. That is the -- that is
9 part and parcel of what comes up in
10 the next bullet.

11 Q. And the next bullet, would
12 that be, in and of itself, enough to
13 create a functional equivalent of a
14 physical presence?

15 A. If it were actualized the
16 way it says, yes. What I don't have
17 there is actually how Claritas did it
18 for Crutchfield.

19 But it seems quite clear
20 that if -- if, as the press release
21 suggests, Crutchfield used
22 geodemographic targeting in ways that
23 the press release suggests, then,
24 yes, it would be enough.

1 Q. And you don't know whether
2 Crutchfield did or didn't?

3 A. What I know is that
4 contracts specify that companies
5 can't just say things in press
6 releases without the permission of
7 companies.

8 So it is highly, highly
9 likely that Crutchfield accepted its
10 inclusion in that press release.

11 Q. And you do not know whether
12 Crutchfield engaged in the activities
13 that are set forth in that press
14 release?

15 A. I don't know, but I would
16 bet.

17 Q. Well, whether you'd bet or
18 not, we're not here to place --

19 A. Okay.

20 Q. -- we're not here to
21 gamble. This is a --

22 A. No. What I'm saying is
23 that I've seen in contracts, I
24 believe even in Crutchfield

1 contracts, where they will say you
2 can't -- you know, we have to have
3 permission on any kind of press
4 releases.

5 Q. I understand that.

6 And contracts can also have
7 a series of options in terms of
8 performance that may not -- may or
9 may not ultimately be undertaken,
10 correct?

11 A. Can be.

12 Q. You've seen contracts, I'm
13 sure, that have a palette of
14 different services that are
15 obtainable from a vendor, and it may
16 turn out that the recipient of
17 services says we'd like A and B, but
18 not C and D, right?

19 MS. MESIROW: Well, I mean,
20 if you're asking a legal --

21 MR. BERTONI: Well, he's
22 making prognostications about what
23 happened and I'm just trying to
24 confirm --

1 MS. MESIROW: No. He's
2 just saying if they did this.

3 MR. BERTONI: If. But he
4 doesn't know.

5 MS. MESIROW: No, he
6 doesn't know.

7 MR. BERTONI: Okay.

8 BY MR. BERTONI:

9 Q. You don't know?

10 A. I don't for sure know.

11 Q. Well, you don't know?

12 A. I don't know.

13 Q. And the next paragraph,
14 Coremetrics.

15 A. Yes.

16 Q. Do you know the sentence
17 that you quote Coremetrics and then
18 you put -- is that your bracketing of
19 Livemark?

20 A. Yes, it is. Because
21 Livemark was a service of
22 Coremetrics, and so in the context of
23 that statement they were talking
24 about Livemark.

1 Q. So that's your judgment
2 they were talking about --

3 A. No, no. That is what they
4 were talking about. I just didn't
5 want to -- I didn't want to -- I was
6 trying to contextualize the
7 statement.

8 Q. Okay. That was your effort
9 to contextualize that sentence, which
10 didn't specifically include the word
11 "Livemark"?

12 A. The prior sentence and the
13 context of the paragraph did.

14 Q. And that bullet point
15 alone, would that be enough to create
16 a functional equivalent of physical
17 presence?

18 A. Yes.

19 Q. And the next bullet point,
20 would that be enough?

21 A. Yes.

22 Q. Okay. And the next one,
23 Crutchfield Engagements.

24 Do you see that?

1 A. Uh-huh.

2 Q. Is that bullet point, on

3 its own enough, to create a

4 physical --

5 A. Well, I would argue, yes.

6 And, you know, you tested me on this

7 before. As a non-lawyer reading that

8 case, I would argue that yes.

9 Q. So this is your attempt to

10 read a legal decision and apply it to

11 this case?

12 A. It's an -- yes. It's an

13 attempt to explain why I believe what

14 the judge said, as a layperson,

15 totally associates what my point is.

16 Q. So that -- you're not --

17 you have no law degree, right?

18 A. My mother wishes I did, but

19 I do not have a law degree.

20 Q. My mother wished I was a

21 doctor.

22 MS. MESIROW: Mothers.

23 BY MR. BERTONI:

24 Q. And you're not here --

1 MR. BERTONI: Are you
2 relying upon his analysis of this
3 case?

4 MS. MESIROW: No, I'm not.

5 BY MR. BERTONI:

6 Q. Okay. So --

7 A. As a layperson, I read it
8 and said, gee, this is very much
9 similar to what I'm talking about.

10 Q. It's a layperson's reading
11 of a case and I trust that -- did you
12 engage in comprehensive legal
13 research?

14 A. No. No, not at all.

15 Q. And do you know whether
16 that decision -- what the predecessor
17 decisions might be in terms of that
18 field?

19 A. I've read a bit about it,
20 but I can take your point.

21 Q. Okay. So that you're not
22 relying on the Soverain case for
23 any --

24 A. Not at all. Not at all.

1 Q. And the next bullet point,
2 "As an Internet retailer, Crutchfield
3 has a direct and continuing business
4 through an affiliate located there."

5 A. I found that in one of the
6 press releases, that CardinalCommerce
7 was headquartered in Cleveland, Ohio.
8 I did -- I found that and figured it
9 was an important point to put.

10 Q. Do you know whether
11 CardinalCommerce has offices
12 elsewhere?

13 A. It just said it was
14 headquartered in Cleveland, Ohio.

15 Q. And do you know whether
16 CardinalCommerce provided services
17 for Crutchfield in Cleveland, Ohio?

18 A. Well, they used the Bill Me
19 Later payment option.

20 Q. Do you know where that
21 activity took place?

22 A. I have no idea -- what do
23 you mean by that?

24 Q. Well, you've indicated the

1 company has a headquarters in Ohio,
2 correct?

3 A. Yes.

4 Q. Are you familiar with
5 companies that have offices in
6 different states?

7 A. Yes, I am.

8 Q. Do you know whether
9 CardinalCommerce has offices
10 elsewhere?

11 A. I have no idea.

12 Q. Do you know whether they
13 have computer servers in other
14 states?

15 A. I have no idea.

16 Q. Do you know where any
17 aspect of the Bill Me Later
18 functionality actually took place?

19 A. It's findoutable.

20 Q. I'm not asking whether it's
21 findoutable. I'm asking you if you
22 know.

23 A. No, I don't know.

24 Q. And is it your position

1 that in this paragraph, the
2 significant fact is that it has a
3 headquarters in Ohio?

4 A. I thought it was useful to
5 know because there was an element of
6 presence. I just put that in for
7 your information.

8 Q. Under your theory of
9 functional equivalent --

10 A. It's not --

11 Q. -- does having a
12 relationship with a vendor located in
13 the State of Ohio, at least in part,
14 create a functional equivalent?

15 A. No. It doesn't have to,
16 no.

17 Q. Does it, though?

18 A. It can, but no. The very
19 presence doesn't have to.

20 Q. And is it your position, in
21 your analysis of all this marketing
22 talk, that functional equivalent of
23 physical presence includes
24 consideration of service providers

1 and where they are located?

2 A. That's not my focus, no.

3 Q. Is that important?

4 MS. MESIROW: And, if I
5 may, it's not Ohio's position.

6 MR. BERTONI: Okay. All
7 right.

8 MS. MESIROW: If that
9 helps.

10 MR. BERTONI: That does
11 help. That does help.

12 BY MR. BERTONI:

13 Q. So, looking back over the
14 bullet points that we've just gone
15 through, your position might change,
16 your conclusion might change, if some
17 or all of those turned out to be
18 incorrect, right, factually?

19 A. No. Well, if all of them
20 turn out to be incorrect, I would
21 say -- in other words, if we had a
22 situation where Crutchfield had a
23 website that was totally unresponsive
24 to the interactivity with customers,

1 and simply a dummy kind of situation
2 where you went there and everything
3 was lost, then I would say that
4 nothing -- that you're right.

5 But -- so, yes, if
6 everything I wrote is totally shown
7 to be invalid, then I would argue
8 that...

9 Q. What about if -- well,
10 we've walked through this because
11 what I'm trying to understand is now,
12 the next step in this process --

13 A. Yeah.

14 Q. -- is, if I'm a company
15 that wants to control where it has a
16 functional physical presence -- and
17 in your study of commerce, by the
18 way, have you had any chance to
19 examine whether retailers at times
20 moderate their activity to try to
21 avoid taxes?

22 Is that something that --

23 A. I don't -- that's not a
24 specialty of mine.

1 Q. That's not a specialty of
2 yours?

3 A. Not at all.

4 Q. So what I'm asking in the
5 context of your opinion is guidance.
6 There are governing principles here
7 and I want to apply them and know how
8 they apply.

9 A. My principles, is that what
10 you're saying?

11 Q. Your principles.

12 A. Yes.

13 Q. They're not legal
14 principles.

15 A. Not legal principles.

16 Q. These are your principles.

17 A. Yes.

18 Q. This is Professor Turow's
19 guide to functional equivalence of
20 physical presence.

21 A. Right, exactly.

22 Q. That's what we're talking
23 about.

24 As that guide, if I am a

1 website that does nothing other than
2 put cookies on a web -- on an
3 individual user's computer and those
4 cookies do nothing other than
5 facilitate a shopping cart
6 functionality, if that's all they do,
7 does that cross us into the
8 functional equivalent of physical
9 presence?

10 A. I would argue that it's --
11 it's -- again, if we talk about the
12 spectrum, I would say yes, it has
13 this ability to do it because the
14 stuff is stored.

15 I mean the way Crutchfield
16 does it, they store the data in the
17 shopping cart. If you come back
18 later, it might still be there, that
19 kind of thing, yes.

20 Q. They store the data on
21 their servers in Virginia, right?

22 A. Yeah. But you're missing
23 the point about that. It has nothing
24 to do with Virginia.

1 Q. Well, I'm not -- okay.

2 Answer. But I have a different
3 point.

4 A. Yeah.

5 Q. But go ahead.

6 A. It's about interactivity.

7 Q. Okay.

8 A. It's about --

9 Q. So it doesn't matter where
10 it's stored?

11 A. No. It doesn't matter.
12 It's about interactivity. It's about
13 -- that's my whole point. I don't
14 understand how you haven't gotten
15 that by now.

16 Seriously, it's about --
17 it's about the -- because I've said
18 it so often. It's about the -- the
19 iterative --

20 Q. I feel like I'm in school.

21 A. Right.

22 -- the iterative
23 interactivity with people. It has
24 nothing to do with where it's stored.

1 And I think --

2 Q. Well, that's fascinating.

3 A. Yeah. Well, why is that

4 fascinating?

5 Q. Well, it's fascinating

6 because -- well, we'll go as an

7 offline conversation.

8 A. Yeah.

9 Q. But we, as lawyers, have to

10 correlate our theories with legal

11 doctrine.

12 A. Right. You specifically

13 not allowed me to do that because I'm

14 not a lawyer.

15 Q. Well, you're not -- and you

16 haven't -- you're not presented for

17 that. I'm not allowed to talk to you

18 about that.

19 MS. MESIROW: No. No.

20 THE WITNESS: They don't

21 want me to do that.

22 BY MR. BERTONI:

23 Q. And so I what I need to

24 know -- and why maybe I'm not hearing

1 you is because I find it straining
2 credulity.

3 A. Yes.

4 MR. FAUSEY: Is there a
5 question?

6 MR. BERTONI: Let's go.
7 All right. Well, he had a chance to
8 criticize and insult me.

9 I have never been lectured
10 by a witness before.

11 MS. MESIROW: Never?

12 MR. FAUSEY: If you can't
13 handle your witness...

14 MS. MESIROW: He didn't
15 mean it.

16 MR. BERTONI: All right.
17 Let's go off the record.

18 (Discussion off the
19 record.)

20 THE WITNESS: The only
21 thing I've been saying about this is
22 that the core of my argument here has
23 to do with interactivity and,
24 particularly, what I called iterative

1 interactivity.

2 The ability to know about a
3 person, respond to that person, learn
4 about that person, respond to that
5 person, which involves a give and
6 take that we see on the -- in the
7 case of Crutchfield.

8 BY MR. BERTONI:

9 Q. Okay. And so now I think I
10 finally understand. It took me -- it
11 took me a while.

12 A. Okay.

13 Q. It doesn't matter -- the
14 issue of where any one thing is
15 located doesn't pertain?

16 A. Not in the way I'm talking
17 about it.

18 Q. Okay. And so that whether
19 something is stored or recorded on a
20 magnetic drive or tape in Ohio or in
21 Virginia doesn't matter to your
22 analysis?

23 A. No, it doesn't.

24 Q. And your analysis doesn't

1 analyze the nature of physical
2 presence and whether zeros and ones
3 on a computer drive constitute
4 physicality, does it?

5 A. I can argue -- I can agree
6 with arguments that make that, some
7 of what Ashkan has been saying. But
8 that's not the core of what I'm
9 talking about.

10 Q. And it's not your
11 expertise, either?

12 A. No.

13 Q. I can spend some time
14 talking to you about how data --

15 A. No. That's not my area.

16 Q. And so that's not your
17 area.

18 So, in essence, it seems to
19 me that the overarching principle
20 that I take from this is that, at
21 some point, there is a level of
22 interactivity --

23 A. Yes.

24 Q. -- that effectively ought

1 to be seen as physical face-to-face
2 interaction, from the point of view
3 of -- maybe not legally, but from the
4 point of view of marketing analysis?

5 A. Yes. And from the point of
6 view of being real in the 21st
7 century.

8 Q. Right.

9 And so what you're
10 saying -- let me then ask you this
11 question. So your point is that
12 technology has come so far that the
13 special qualities that may adhere in
14 a face-to-face solicitation by a
15 peddler, and we talked about some of
16 those, looking --

17 A. Yes.

18 Q. -- hearing. Those don't
19 matter anymore?

20 A. No, not at all. That's
21 not --

22 Q. Well, I'm asking.

23 MS. MESIROW: No.

24 MR. BERTONI: I'm testing

1 his opinion.

2 THE WITNESS: That's not
3 what I'm saying.

4 BY MR. BERTONI:

5 Q. Okay. So what is it?

6 A. I'm saying that technology
7 has gone so far that the kinds of
8 data, the kinds of information, if
9 you want to put it in those terms,
10 that companies have now in realtime,
11 and back and forth, back and forth,
12 as I said, not using that word
13 "iterative" again, have gotten to the
14 point where it is functionally
15 equivalent, that is, it has
16 characteristics that make it -- I
17 don't want to say the word "rich"
18 again, but make it as useful and more
19 useful to the company than having, as
20 I said, that peddler there.

21 And that in the 21st
22 century the way in which people
23 decide how to categorize where a
24 transaction takes place has to take

1 that into account.

2 Q. And, obviously, you'll
3 agree that every seller has to engage
4 in their own independent analysis of
5 whether for their particular business
6 a dataset about their customers,
7 however obtained, is richer than
8 another dataset it might obtain under
9 different circumstances?

10 That's left to the
11 retailer?

12 A. Well, what I would say is
13 that we are in a transitional era
14 where retailers are trying the best
15 they can, knowing that in five years
16 it will be better, and in ten years
17 it will be better still.

18 And my argument is that, at
19 this point in time, it is upon us to
20 make a decision of how we are going
21 to treat these transactions, these
22 interactions. At a certain point a
23 society has to stay to itself, what
24 are we doing?

1 Q. Well, let me ask you that
2 question. Because one part of a
3 sales transaction we haven't talked
4 about is product delivery.

5 A. Yes.

6 Q. In a retailer store and
7 potentially even in a face-to-face
8 peddling scenario, the product may be
9 exchanged in person?

10 A. Or not.

11 Q. Or not.

12 But that's one -- how does
13 that factor in to your analysis of
14 the functional equivalent?

15 A. It does, because, frankly,
16 the -- I'm not arguing that it all
17 has to take place online. All right.
18 I'm not -- not at all.

19 As I pointed to
20 Crutchfield, they understand quite
21 clearly that this is a
22 multi-dimensional product -- or
23 project.

24 And the fact that it's

1 delivered through the postal service
2 or UPS or FedEx is part of the whole
3 iterative dimension.

4 The way in which a person
5 wants to have it delivered, the kinds
6 of shipping the person will pay for,
7 all of that can be factored into the
8 kinds of things you show a person and
9 how you show it to them.

10 Q. Does every online retailer
11 that places cookies for analytic
12 purposes have a functional physical
13 presence in the location of every
14 shopper to whom those cookies are
15 delivered?

16 A. If the cookies are used in
17 the way I said, that I suggested, for
18 the purpose of learning about the
19 person and transacting with them, I
20 would say yes.

21 Q. And we talked about a
22 product selection wizard. Do you
23 remember that a little bit?

24 A. Yeah.

1 Q. That product selection
2 wizard, that's something that
3 involves going to the retailer,
4 communicating with them certain
5 characteristics of the kind of
6 product you want, correct?

7 A. Yes.

8 Q. And then the retailer,
9 using whatever processes, it could be
10 a human being, who is really smart
11 about these things, or it could be a
12 computer, right?

13 A. Yes.

14 Q. Who decides what product
15 best meets your characteristics?

16 A. Exactly.

17 Q. The wizard has a set of
18 data points that it asks for and then
19 uses those to respond, right?

20 A. Uh-huh.

21 Q. And that's -- you have to
22 say yes or no.

23 A. Yes.

24 Q. And that's something that

1 can be done over the phone also?

2 A. Yes.

3 Q. Right?

4 A. This, as I understand it,
5 gets stored as well. So when you
6 come back, you can look at it and
7 compare other things.

8 And so it's not just simply
9 a dummy situation where it happens
10 and goes away.

11 Q. Right. Yeah. Yeah.

12 It's like telling your
13 shopkeeper what you have at home and
14 what you like and having them keep a
15 record of it?

16 A. Exactly.

17 Q. And sometimes it can be
18 just the savvy shopkeeper who
19 remembers customers by face?

20 A. That's terrific, exactly.

21 Q. Okay.

22 A. Was there a question in
23 that?

24 Q. Yeah. No, there isn't.

1 So let me -- I'm just
2 wrapping up. That was I took a
3 pause. I just want to make sure I've
4 covered everything I wanted to.

5 MR. BERTONI: Could we go
6 off the record.

7 (A break was taken from
8 11:38 a.m. to 11:42 a.m.)

9 BY MR. BERTONI:

10 Q. Hopefully, I just have a
11 little bit more. So a couple of
12 wrap-up areas.

13 Are you aware in your --
14 any of your work here if Crutchfield
15 during the tax period -- and you know
16 what I'm referring to, right?

17 A. Yes.

18 Q. -- had any promotions
19 targeted solely to Ohio residents?

20 A. I am not aware of that.

21 May I also --

22 Q. Well, that's my question.
23 You have a lawyer who will ask you
24 whatever he wishes to or she wishes

1 to ask in this case.

2 A. I see.

3 Q. So that the answer is no,

4 you're not?

5 A. No.

6 Q. And under your theory, does

7 Crutchfield have a functional

8 equivalent of physical presence in

9 every state that it transacts

10 business?

11 A. Yes.

12 Q. And in every country where

13 it transacts business?

14 A. Yes.

15 Q. And who is your employer?

16 A. University of Pennsylvania,

17 the Annenberg School for

18 Communication.

19 Q. And are you aware that the

20 University of Pennsylvania has online

21 classes?

22 A. Through -- yes. They have

23 them through Coursera, yes.

24 Q. What is Coursera?

1 A. It's a -- it's a
2 large-scale teaching enterprise that
3 is generally not for credit, but Penn
4 I guess owns part of. I haven't
5 taught a class through that. I know
6 people who have.

7 Q. Does it charge for those
8 classes?

9 A. I don't think so, no.

10 Q. Now, let's assume --

11 A. It's huge.

12 Q. You don't know one way or
13 another?

14 A. I'm pretty -- they do not
15 charge for those classes.

16 Q. Do you know whether they
17 offer online credits to students?

18 A. Some of the schools at Penn
19 for non-Coursera stuff may, in fact,
20 have online courses. I don't know.
21 Penn State would. Penn is less
22 likely to, but there may some
23 schools.

24 Q. There may be.

1 A. Yeah.

2 Q. And so I want to apply some

3 of your thinking to an online class

4 from a university like Penn.

5 A. Okay.

6 Q. If a person residing in the

7 State of Ohio took an online class

8 from Penn, would Penn have the

9 functional equivalent of a physical

10 presence in Ohio?

11 MR. FAUSEY: I'm going to

12 object.

13 We provided him as an

14 expert in marketing, in particular,

15 Internet marketing.

16 BY MR. BERTONI:

17 Q. Penn markets over the

18 Internet, does it not?

19 MS. MESIROW: It's a

20 university.

21 MR. BERTONI: It doesn't

22 matter whether it's a university.

23 This is allowable testimony.

24 MR. FAUSEY: He didn't do a

1 report on whether Penn -- it would be
2 subject to a physical presence.

3 MR. BERTONI: Analysis
4 of -- you can object for the record.
5 I'm almost done.

6 MS. MESIROW: Yeah.

7 BY MR. BERTONI:

8 Q. In your opinion, is the
9 delivery of an online course to a
10 person located in Ohio by the
11 University of Pennsylvania, would
12 that create --

13 A. Not if it doesn't fit the
14 iterative nature. But if it has the
15 iterative descriptive, you know, back
16 and forth data, and all that kind of
17 stuff, I would say yes.

18 Q. Okay.

19 A. But it is possible that it
20 wouldn't do that. It would just
21 simply say, here's the stuff, do what
22 you want with it.

23 Q. But if they use cookies,
24 for example, and collect information?

1 A. If they use cookies to
2 iteratively -- if they used it, took
3 it, dealt with it, customized for it,
4 all the things that Crutchfield does,
5 then I would say yes.

6 Q. And do you know whether the
7 University of Pennsylvania uses
8 Akamai?

9 A. I have no idea.

10 Q. You have no idea.
11 You never looked at that?

12 A. (Indicating.)

13 Q. Do you take a position
14 on -- we've talked about this
15 iterative process.

16 A. Yes.

17 Q. Do you take a position on
18 where that process takes place
19 physically?

20 A. In what sense?

21 Q. Well, you've got a consumer
22 in one location, let's say, a
23 consumer in Ohio.

24 A. Yes.

1 Q. And you have a retailer in
2 Virginia.

3 A. Right.

4 Q. And they're engaged in this
5 iterative process of communication.

6 A. Yes.

7 Q. Is there a specific
8 physical location that you believe is
9 associated with that communication in
10 the way that a face-to-face
11 conversation would have a physical
12 location?

13 A. Well, my only point was
14 that if the receiver, the person who
15 is transacting, the buyer, let's call
16 it, or the shopper, is in the State
17 of Ohio, then that person -- then it
18 takes place partly in the State of
19 Ohio.

20 Q. But if we're talking
21 about -- if you look at a peddler
22 going into someone's house, you can
23 say that the iterative communication
24 has a physical place. It occurs --

1 A. That's why I said it's
2 functional to a physical presence.

3 Q. So you're not taking a
4 position on whether that iterative
5 online interaction takes place in any
6 one specific --

7 A. Well, I would say that it
8 takes place in Ohio, yes.

9 Q. And why?

10 A. Because the person who is
11 purchasing is there, because the
12 company is retrieving and sending
13 information to there.

14 It is very much an
15 interaction with someone who happens
16 at that point to be in Ohio.

17 Q. But isn't it also true that
18 there are characteristics of this
19 that are analogous to the customer
20 visiting the retailer's location?

21 The customer initiating the
22 communication -- I don't want to use
23 driving, I don't like analog -- but
24 going to the server in Virginia,

1 right?

2 A. Well, I think there are
3 elements of being in Virginia as
4 well, but I think certainly a lot of
5 it takes place in Ohio.

6 And because partly, if only
7 because there are things that are put
8 on the person's computer that the
9 company needs in order to complete
10 the system that I've been talking
11 about.

12 Q. I thought you told me it
13 didn't matter whether there was
14 something placed on the computer or
15 not.

16 A. No. I said that's not my
17 expertise. But there are -- there
18 are cookies, for example, and pixel
19 tags and customized browser looks
20 that do take place within the State
21 of Ohio on the person's computer.

22 Q. All right. So now we're
23 opening up -- I mean, this is a --

24 A. Well, technology is not the

1 -- I'm not into the technology of it,
2 but I know -- I could talk about some
3 of that. But I know what happens.
4 You don't have to know the
5 technology.

6 Q. Well, in this instance, a
7 customer sends a request to the
8 outside company to send it data,
9 correct? Send me information?

10 A. Sometimes, yeah.

11 Q. When you put in a web
12 address --

13 A. Yeah, exactly.

14 Q. -- you're saying send me
15 information?

16 A. If you do that, yes.

17 Q. And, in addition to saying
18 send me information, you're saying
19 here's my choice of vehicle to get
20 that information --

21 A. Okay. But that's -- yeah.

22 Q. Well, let me finish.

23 -- and that choice of
24 vehicle has its own information needs

1 in order to function, correct?

2 A. The choice of vehicle

3 meaning the browser?

4 Q. The browser.

5 A. Yes, it does.

6 Q. It's why a server needs to
7 know what browser is approaching it,
8 so it knows how to deliver content?

9 A. I'm not sure I understand
10 why you're asking me this.

11 Q. Well, leave it to the
12 lawyers to understand that.

13 So that the customer --

14 A. Yeah.

15 Q. All the information on the
16 customer's computer is information
17 that is in response to the customer's
18 request?

19 A. Not necessarily at all.

20 MS. MESIROW: No.

21 BY MR. BERTONI:

22 Q. So that -- I'm not saying
23 whether it's consciously requested.

24 When I pick up the

1 telephone, there may be things
2 happening that I don't know about,
3 for example.

4 A. But we discussed data that
5 the company will use that is attached
6 to your cookie that you don't even
7 know the company has.

8 Q. Well, are you saying that
9 Crutchfield didn't disclose to
10 consumers on its website its use of
11 cookies?

12 A. No. I'm saying that the
13 particular knowledge that Crutchfield
14 has about you is not disclosed to you
15 necessarily.

16 Q. Well, the customer,
17 though -- are you saying that there's
18 something that Crutchfield does in
19 terms of putting information on a
20 computer that is not disclosed in its
21 privacy policy?

22 A. Privacy policies are
23 impenetrable.

24 Q. Whether they're

1 impenetrable or not --

2 MS. MESIROW: Okay. This
3 is getting argumentative.

4 THE WITNESS: No. The
5 privacy policy, in general, says what
6 Crutchfield can do. It does not get
7 into the particulars of exactly the
8 kinds of data and exactly the
9 third-party people who are getting
10 that data and what they are doing.

11 So that, yes, while, in
12 general, I can try to attribute
13 activities if I read the privacy
14 policy. It is almost impossible to
15 know exactly what Crutchfield will do
16 and what data they will collect based
17 on a privacy policy.

18 This is true with
19 Crutchfield and just about every
20 other retailer.

21 BY MR. BERTONI:

22 Q. If I go to shop on your
23 website, a retailer's website --

24 A. Right.

1 Q. -- and cookies are needed
2 to create the shopping cart
3 functionality --

4 A. Yes.

5 Q. And, by the way, do you
6 know whether shopping cart
7 functionality can work without
8 cookies?

9 A. They can't, as far as I can
10 tell, or something like cookies.

11 MR. FAUSEY: Objection.

12 THE WITNESS: But, again,
13 this is --

14 MR. BERTONI: I'm just
15 asking. Please.

16 MR. FAUSEY: It's way past
17 the scope of direct. It's way past
18 his expertise. You had a guy to ask
19 that question to. In fact, you've
20 had two. Now you're on a guy who is
21 not -- that it's not his expertise.

22 MR. BERTONI: We're talking
23 about exchange of information.

24 MR. FAUSEY: You're talking

1 about --

2 MR. BERTONI: I'm wrapping
3 up right now. Let me finish this
4 line of interrogation.

5 BY MR. BERTONI:

6 Q. When a customer comes to
7 the Crutchfield website, whether the
8 customer knows or doesn't know that a
9 cookie is required to operate its
10 shopping cart, it's expecting that
11 functionality, isn't it?

12 A. But the answer is, a person
13 who is going to a shopping cart --

14 Q. The answer is yes or no.

15 A. What you're asking -- let
16 me be sure what you're asking in the
17 question.

18 If I go to a shopping cart
19 and I want to check out, I'm
20 expecting that I can check out, is
21 what you're telling me?

22 Q. Yes.

23 A. And the answer is yes, of
24 course.

1 MR. BERTONI: Okay. I have
2 no further questions on cross.

3 MS. MESIROW: Can we take a
4 break?

5 MR. BERTONI: Yeah, we can.

6 (A break was taken from
7 11:52 a.m. to 12:01 p.m.)

8 REDIRECT EXAMINATION

9 BY MS. MESIROW:

10 Q. I believe Mr. Bertoni was
11 asking you some questions about and
12 toward the end --

13 MS. MESIROW: I probably
14 should have asked you this off the
15 record, because I wanted to get the
16 question exactly right.

17 I believe you asked -- and
18 jump in if I'm wrong -- whether if a
19 shopper initiates, you know, goes to
20 the Crutchfield website, does it need
21 cookies to have the shopping
22 experience?

23 Is that correct?

24 MR. BERTONI: I asked,

1 generally speaking, whether you could
2 shop without -- whether you could
3 have a shopping cart functionality
4 without --

5 THE WITNESS: The cart. It
6 was about the cart.

7 BY MS. MESIROW:

8 Q. If a shopper comes to
9 Crutchfield, or generally even, do
10 you need third-party cookies --

11 A. No.

12 Q. -- in order to --

13 A. No.

14 Q. No.

15 So you don't need
16 Coremetrics or Omniture --

17 A. No.

18 Q. -- cookies, or anything
19 like that --

20 A. You don't need --

21 Q. -- tracking you --

22 A. No.

23 Q. -- in order to have the
24 full shopping experience?

1 A. Right.

2 Q. Can you talk to me a little

3 bit about the difference -- I'm

4 trying to remember the context.

5 Some of the analogies --

6 you know, we were talking analogies

7 between the door-to-door salesman and

8 the online shopping experience.

9 A. Yes.

10 Q. Can you talk to me or

11 discuss a little bit for us the

12 difference between the active

13 gathering of information and passive

14 collection of information.

15 A. To me, they're both active.

16 One is known by the person. Is that

17 what you mean?

18 Q. The known and unknown.

19 A. And one is not known by the

20 person. The known would be, for

21 example, registration, to be able to

22 log in.

23 An unknown circumstance

24 would be if a publisher or a third

1 party -- but let's stick with the
2 publisher, for example -- we're
3 looking at what the person was
4 clicking on, and then store those
5 data and made some conclusions about
6 the person's interest based on that.

7 Q. Okay. Now, if a shopper
8 was contacting Crutchfield strictly
9 via telephone, would they be aware of
10 any -- I mean, is there anything
11 going on there that the shopper would
12 not be aware of, as far as tracking
13 information or gathering?

14 A. It's unlikely if it's
15 literally just about the telephone.
16 Now, there may, to be honest, be a
17 situation where they have data about
18 the person's previous -- if the
19 person gives a name, and if the
20 person has shopped on the phone
21 before.

22 But in the interactive
23 nature of Crutchfield, they may even
24 be able to know what you looked at

1 online. So there is a possibility of
2 knowing more.

3 Q. But, let's say, it's your
4 first time.

5 A. They wouldn't know.

6 Q. But the shopper wouldn't --
7 the shopper would be aware of
8 whatever it is, whatever data
9 collecting Crutchfield is doing on
10 the telephone call, would they not?

11 I mean, assuming that you
12 must tell someone if you're
13 recording.

14 A. Of course, they would ask
15 you a question, what are you
16 interested in? You would say it. It
17 would have to be that, yes.

18 Q. And do you see any
19 qualitative difference between the
20 consumer knowingly giving information
21 and sharing information and the sorts
22 of data that is collected without it
23 being explicitly --

24 A. I do in the sense --

1 putting aside privacy issues --

2 Q. Right.

3 A. -- and all those things.

4 But I do, because what's going on is
5 a person may think that there's a lot
6 less known about him or her than
7 actually is.

8 And the choices that pop up
9 may not even appear to you to be
10 relevant to what you think you've
11 told the company through your
12 searches, or through your log-in, but
13 actually are quite a bit more nuanced
14 because of what they have learned
15 about you.

16 Q. I just want to look at the
17 privacy policy.

18 And I believe you were
19 asked a series of questions about --
20 and one question was --

21 MS. MESIROW: And, David,
22 please, correct me if I'm wrong. We
23 can go back to the court reporter.

24 BY MS. MESIROW:

1 Q. -- does every Internet
2 retailer that uses third-party
3 cookies have a functional equivalent
4 of a physical presence in an area?

5 MR. BERTONI: Words to that
6 effect. I don't remember.

7 BY MS. MESIROW:

8 Q. Or words to that effect.

9 A. I would say in the context
10 of interactivity. That is a
11 really -- but given that that's why a
12 person uses third-party cookies in
13 order to be able to learn about the
14 person and then go back to that
15 person, that would be, yes.

16 Q. And so what types of
17 third-party cookies are you
18 discussing?

19 A. Well, for purposes here, I
20 was really talking about remarketing
21 with aCerno, for example, Criteo.

22 Q. So the retargeting?

23 A. Yes.

24 Q. And data collection and

1 analysis-type cookies?

2 A. Yes.

3 MS. MESIROW: Okay. I

4 don't believe I have anything

5 further.

6 RE CROSS-EXAMINATION

7 BY MR. BERTONI:

8 Q. To follow-up on that

9 question. What about first-party

10 cookies; does every retailer who uses

11 first-party cookies have a functional

12 equivalent of a physical presence?

13 A. Again, it comes down to

14 interactivity and the kind of

15 continual interactivity or iterative

16 interactivity that I said.

17 I can possibly imagine a

18 situation where that might not be the

19 case, but it's not easy. So the

20 answer --

21 Q. So tell me what that case

22 would be.

23 A. I was -- I was thinking and

24 then I was saying no, that's probably

1 iterative interactivity, too.

2 If you're looking at a
3 cookie to say -- let's say, I go to
4 New York Times, or I go to
5 Crutchfield, and the cookie sets a
6 sense of what I like on the site, so
7 when I come back again, it will look
8 like it.

9 I would say, yes, that's a
10 case of the kind of interactivity I
11 am talking about, very basic, but
12 that's the way it is. Or even if it
13 says, Welcome, Joseph Turow.

14 Q. That's enough?

15 A. It is a beginning of a
16 conversation that reflects the kinds
17 of stuff I was talking about.

18 Q. And so that would be enough
19 to create a functional equivalent of
20 a physical presence?

21 A. I would say that it is --
22 it usually doesn't stop there, but it
23 is -- it is part -- it would be
24 iterative, so it could be a back and

1 forth.

2 The more iterative it is,
3 the more likely I think that one has
4 to say yes.

5 Q. So it would be enough?

6 MS. MESIROW: Objection.

7 That's not what he said.

8 MR. BERTONI: Well, I'm
9 trying to draw a line here.

10 BY MR. BERTONI:

11 Q. So the cookie itself is
12 not -- the placement of a first-party
13 cookie is, in and of itself, not
14 enough to create a functional
15 equivalent of presence?

16 A. If the first-party cookie
17 is used to create a transactional
18 relationship, the answer is yes, it
19 is enough.

20 Q. Okay. Now, you talked
21 about information that is known and
22 unknown in terms of collection.

23 When we looked at that
24 first communication from the end

1 user, does the identity of the user's
2 computer and browser, is that
3 information that the consumer --
4 falls into the category of
5 information that is unknowingly
6 collected from the consumer or
7 knowingly?

8 A. I -- this is totally my
9 opinion and I have no surveyed data
10 to back this up. But I doubt that
11 most people have a clue that a
12 person's IP address is collected, for
13 example.

14 Q. Or the kind of computer
15 they're using potentially, right?

16 A. Right.

17 Q. And when you call a
18 retailer and, let's say, it has a
19 caller ID system, is that unknowingly
20 or knowingly collected?

21 A. Sometimes people know that
22 they know. They'll -- it will show
23 up. They'll -- the way the person
24 will react to them, depending on the

1 marketer, implies that they know who
2 you are.

3 But, in general, they do
4 not make it clear that they know who
5 you are for reasons one can get into.

6 Q. It sounds to me that one
7 reason you wouldn't do that is you
8 don't want people to know that
9 you've --

10 A. Quite possible.

11 Q. You don't want them to know
12 that you are aware of their telephone
13 number?

14 A. Yes, that's quite possible.

15 Q. And the telephone number
16 has an area code that will provide
17 information about that consumer,
18 right?

19 A. Increasingly, that's
20 useless.

21 Q. As people get mobilized,
22 and so forth, but traditionally, at
23 least --

24 A. Historically.

1 Q. Historically, it would give
2 you some -- and, let's say, it's an
3 increasingly less reliable bit of
4 information.

5 But it could give you, for
6 example, a sense as to what state the
7 person was calling from?

8 A. It was useful more -- 20
9 years ago more than today. But,
10 hypothetically, you're right.

11 MR. BERTONI: I have no
12 further questions.

13 (Witness excused.)

14 (The deposition concluded
15 at 12:11 p.m.)

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WITNESS CERTIFICATION

I hereby certify that I
have read the foregoing transcript of
my deposition testimony, and that my
answers to the questions propounded,
with the attached corrections or
changes, if any, are true and
correct.

DATE PROFESSOR JOSEPH G. TUROW

PRINTED NAME

File # 11270

Crutchfield, Inc.
vs.
Joseph W. Testa

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DEPOSITION ERRATA SHEET

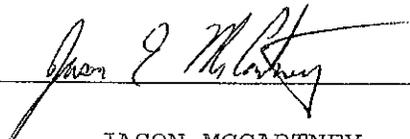


Job No. 25536
Case Caption: Crutchfield v Testa
Deposition Date: August 13, 2014

DECLARATION UNDER PENALTY OF PERJURY

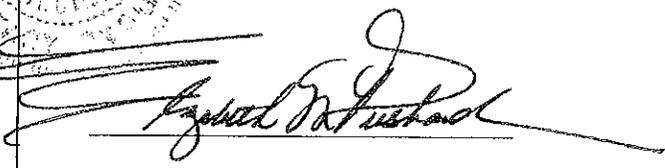
I declare under penalty of perjury that I have read the entire transcript of my Deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET, hereof, with the understanding that I offer these changes as if still under oath.

Signed on the 28th day of Aug., 2014.



JASON MCCARTNEY

Subscribed to and sworn before me this 28th day of August, 2014, in Charlottesville, Va.



Notary Public

Notary Public

My commission expires: 2/28/15, 2015

Notary Public Registration No. 187862

DEPOSITION ERRATA SHEET

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Page No. 39 Line No. 10 Change to: tags would
be Acerca, Dotomi and Owner IQ

Reason for change: Spelling of company name.

Page No. 66 Line No. 13 Change to: Crutchfield
is Andy Stevenson.

Reason for change: spelling of name

Page No. 66 Line No. 15 Change to: Who is
Andy Stevenson?

Reason for change: spelling of name

Page No. 66 Line No. 21 Change to: Did you
ever work with Mr. Stevenson

Reason for change: spelling of name

Page No. 80 Line No. 8 Change to: functionality
through three Custom Insight report

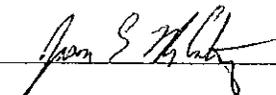
Reason for change: incorrect word

Page No. 87 Line No. 18 Change to: Right below
Andy Stevenson's contact

Reason for change: spelling of name & incorrect word

Page No. 133 Line No. 8 Change to: modeling
technique, CHAID, which is a statistical

Reason for change: corrected word

SIGNATURE:  DATE: 8/28/14

JASON MCCARTNEY

DEPOSITION ERRATA SHEET

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Page No. 137 Line No. 7 Change to: tell other

co-ops how much mailing we do from

Reason for change: incorrect word

Page No. 155 Line No. 18 Change to: To purchase

pay-per-click advertising from

Reason for change: incorrect word

Page No. 155 Line No. 20 Change to: Pay-per-click

advertising would be if

Reason for change: incorrect word

Page No. 157 Line No. 14 Change to: Yes, I

would

Reason for change: incorrect word

Page No. 14 Line No. 21 Change to: 2003

Reason for change: incorrect year, type

Page No. _____ Line No. _____ Change to: _____

Reason for change: _____

Page No. _____ Line No. _____ Change to: _____

Reason for change: _____

SIGNATURE: Jason E. McCartney DATE: 8/28/14

JASON MCCARTNEY

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DEPOSITION ERRATA SHEET

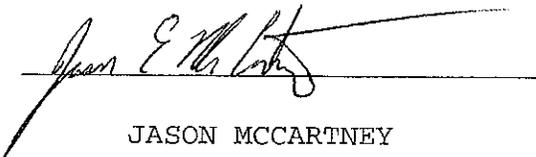


Job No. 25537
Case Caption: Crutchfield v Testa
Deposition Date: August 13, 2014

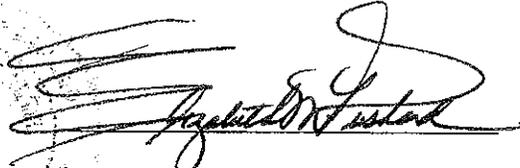
DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my Deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET, hereof, with the understanding that I offer these changes as if still under oath.

Signed on the 28th day of Aug., 2014.


JASON MCCARTNEY

Subscribed to and sworn before me this 28th day of August, 2014, in Charlottesville, Va.



Notary Public

My commission expires: 2/28, 2015

Notary Public Registration No. 187862

DEPOSITION ERRATA SHEET

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Page No. 180 Line No. 10 Change to: From Shopzilla,
it would be pay-per-click

Reason for change: incorrect words

Page No. 238 Line No. 24 Change to: this appears
to be an agreement with Experian to

Reason for change: corrected spelling of company name

Page No. 239 Line No. 18 Change to: talks
about Experian services.

Reason for change: corrected spelling of company name

Page No. 239 Line No. 23 Change to: services that
you could obtain from Experian?

Reason for change: Spelling

Page No. 239 Line No. 25 Change to: that we
get from Experian.

Reason for change: Spelling

Page No. 240 Line No. 1 Change to: In what way
does Experian -- how does

Reason for change: Spelling

Page No. 240 Line No. 18 Change to: Do you still
use Experian for these

Reason for change: Spelling

SIGNATURE: Jason E. McCartney DATE: 8/28/14

JASON MCCARTNEY

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DEPOSITION ERRATA SHEET

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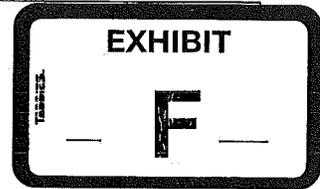
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JASON MCCARTNEY

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DEPOSITION ERRATA SHEET

Job No. 25537
Case Caption: Crutchfield v Testa
Deposition Date: August 13, 2014



DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my Deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET, hereof, with the understanding that I offer these changes as if still under oath.

Signed on the 29 day of Aug., 2014.

RICHARD L. STAVITSKI

Subscribed to and sworn before me this 29th day of August, 2014, in ALBEMARLE COUNTY.

Notary Public

My commission expires: 9/30/18, 2018

Notary Public Registration No. 7593433



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DEPOSITION ERRATA SHEET

Page No. 39 Line No. 2 Change to: Yes, we do
instead of Yes we to.

Reason for change: Stenographer mistake

Page No. _____ Line No. _____ Change to: _____

Reason for change: _____

Page No. _____ Line No. _____ Change to: _____

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SIGNATURE: _____ DATE: _____

RICHARD L. STAVITSKI

1	DEPOSITION ERRATA SHEET
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24	SIGNATURE: _____ DATE: _____
25	RICHARD L. STAVITSKI

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Joint Motion to Supplement the Record – Exhibits C-F was sent via the Court’s electronic filing system and by U.S. mail to counsel of record for Appellee Tax Commissioner, Daniel W. Fausey and Christine T. Mesirow, Assistant Attorneys General, State of Ohio, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215–3428, on this 21st day of May, 2015.

s/ Edward J. Bernert
Edward J. Bernert (0025808)
One of the Attorneys for Appellant
Crutchfield, Inc.