



Computer-Generated Exhibits in Intellectual Property Litigation: Types and Uses

INTRODUCTION

Jurors understand and remember information that they can imagine, assimilate, and believe. The "proximity" of information is a significant part of that process; in trying to absorb a presentation, a jury may have to take several mental steps before understanding is achieved. When deliberating, the jury will only regard those facts and arguments that have made it through each of those steps into their cognition. Then, the jurors will create a story from that data, and the resulting narrative drives the verdict. **These findings, from the world of social science, are of particular relevance to litigators who practice in the field of Intellectual Property. The intricate fact patterns, complicated devices, and sophisticated ideas which are staples in IP litigation are difficult to convey in the best of circumstances.** At trial, the rules of evidence, and the time constraints often imposed by a trial judge, narrow the means available to educate the jury. One method that is available, and used with increasing creativity and effect, is the computer-generated exhibit and demonstrative. **Information presented visually creates a mental image, and is more readily believed than information conveyed in a less direct manner**, such as words alone. And, critically, visual information is easier to remember. Several types of electronic displays useful to IP litigators, all of which are finding increasing acceptance from the bench and bar, are discussed here.

TYPES OF COMPUTER-GENERATED EVIDENCE AND DEMONSTRATIVES

- **Images**

Any document, photograph, diagram, chart or graph is susceptible to electronic presentation if it has been scanned, or copied, into a computer. For trial purposes, these imaged documents are as trustworthy as their paper counterparts, as they are "encrypted," preventing their alteration. **The electronic version offers notable advantages to the paper. When displayed on a large monitor or screen, the entire jury can view the exhibit**

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at the same time, meaning that everyone is both seeing the item, and hearing the explanation, simultaneously. And, readily-available trial presentation software enables the attorney to focus the jury on a particular part of the exhibit through the use of call-outs, blow-ups, or highlighting. In the deliberation room, it will be the clauses of the patent, or portions of the diagram emphasized by the lawyer that the jurors remember and picture as they reach their decision.

- **Animated Images**

It is often useful to reveal facts or arguments in segments so as not to overwhelm the ability of the jurors to assimilate information. Electronic presentations make this possible through animation. An example would be a PowerPoint demonstration, which animates along with a lawyer's closing statement, disclosing his or her most compelling arguments one bullet-point at a time. Or, **the litigator can use animation to slowly build a chart, timeline, or graph, adding information in manageable amounts, so the jury follows the logic of the exhibit. This is particularly useful during an expert's testimony regarding complex theories and findings.**

Animations can also be used to illustrate a device or process in action, if that is necessary to understand the subject of the litigation. Computer-generated drawings, producing images in motion, can depict the subject of a witness's testimony. Thus, the workings of an engine, the details of a chemical reaction, or the transmission of information through the World-Wide-Web, can be depicted not as static renderings, but with movement and flow.

- **3-D Animation**

Flat images are rarely adequate to depict the intricate inventions at issue in many IP cases. It is not always possible to show the actual device to the jury because of size, or because the item at issue is imbedded in a larger object. **3-D animation can give jurors a glimpse of the mechanics beneath the surface, from different vantage points, and enlarged, if necessary.** Thus, the inner workings of a computer can be made visible, by causing the computer shell to fade to transparent. If necessary, the relevant component part could rotate on the screen, so that the jury would see the object from every angle. The part could also be further deconstructed so that every element was exposed and explained.

- **Re-Creation Animations**

These are created by processing data through a

computer program. One familiar form of this animation is the vehicle accident reconstruction. For this type of demonstrative, known data – such as the length of skid marks, the speed and mass of the vehicle, or the condition of the road – is entered into a program, which then determines the remaining details, and depicts the collision as it likely happened. **These animations are equally useful in IP litigation, to explain scientific principals, or elucidate other complex phenomenon.**

- **Simulation Animations**

Experts often rely on these animations to produce models, to test their hypotheses, and to predict outcome. The results are then used as the basis of their opinions. To produce the animation, mathematical formulas and scientific principals are entered into the computer, which then generates the model, and simulates what would have to happen if certain assumptions are made.

CONCLUSION

As court systems modernize, and judges become comfortable with high-tech evidence presentations, **attorneys are increasingly using technology to their advantage. In the words of Judge Jack Weinstein of the Eastern District of New York, “One does not have to be a futurist to predict correctly that automation tools will overtake and rapidly change traditional methods used by lawyers, judges and court managers.”**

The electronic evidence and demonstratives described above are among the types available to IP litigators. Each raises evidentiary issues, which are best discussed and resolved before trial. Certainly, early disclosure should prevent exclusion on the basis of unfair surprise . It will additionally give all sides the time to conduct discovery of their opponents' exhibits, allowing for a full opportunity to establish the appropriate evidentiary foundation – or to craft the necessary objections.

[Go to top](#)

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