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PRACTICE TIP

What to Do with A Broken Blackberry?

Repair or Replace, There Is an Option

By Adam Schlagman

Given that the Blackberry has become something of a ubiquitous presence in the hands and pockets of many attorneys, and also given that these devices are far from bulletproof, a niche in the marketplace has emerged. It seems that not only do attorneys want a Blackberry, they also want "their" Blackberry, which presents something of a problem for those units that are out of warranty.

As anyone who has ever used one can attest, Blackberrys are easy to drop — and often do. In fact, the phrase "the Blackberry dunk," which is apparently rather common, refers to all the ones that have fallen into toilets while unabashedly being used there. And that's just the tip of the proverbial iceberg, as Blackberrys are dropped like clockwork every day around the world, resulting in broken screens. Or they're accidentally covered in beach sand, literally eaten by the family dog, getting the housing cracked, or virtually every other imaginable hazard that can befall a sensitive electronic instrument. Thus, the question of what to do — race

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The World Wide Witness: The Internet As a Trial Witness

By Michael Dockterman & John Luburic

When Toysrus.com, Toys "R" Us, Inc.'s Internet retail business, sued Amazon.com to end their Internet partnership for breach of contract, it faced a key strategic decision: Could it gamble on using its opponent's own Web site as a key trial witness? Toys "R" Us had to prove to the court that Amazon was violating its exclusivity rights under their contract. The only way to effectively do this was to show the court, live, what was happening in real time on www.amazon.com.

The decision was risky. There was a chance that the Amazon site would not show the violations. It also was not clear whether the live screenshots showing a particular violation — which, of course, would not have existed during the discovery phase of the lawsuit — could even be admitted as evidence.

In the end, however, Toys "R" Us was successful: The court not only allowed the use of the live Internet feed as a witness in the trial, but it also found in favor of Toys "R" Us, and on March 31, 2006, entered a judgment order terminating the contract. This article explores how, and why, Toys "R" Us decided to take this successful gamble.

THE CASE

In August 2000, Toys "R" Us signed a 10-year agreement with Amazon to become its exclusive retailer of toys, games and baby products. In 2003, however, Toys "R" Us began complaining that some of its competitors were also selling toys, games and baby products on Amazon.com. Amazon responded by stating that it read the term "exclusive" to mean that others could not sell the *specific* products which Toys "R" Us offered (although Amazon had been allowing them to do so by the hundreds), and if Toys "R" Us elected not to sell a *specific* item, Amazon could invite other merchants to its site to offer those products. Mediation in the summer of 2004 failed, and Toys "R" Us was left with no choice but to seek termination of the agreement.

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Internet Witness

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Immediately after the complaint was filed, Toys “R” Us asked for interim injunctive relief to prevent things from getting worse. The court took Amazon at its word and only prohibited it from allowing third parties to sell the same products that Toys “R” Us was offering until the meaning of “exclusivity” could be determined at trial. There was a real danger that the court’s preliminary injunction, which allowed scores of Toys “R” Us’ competitors to trade on the Toys “R” Us brand to draw traffic to their boutiques, would form the model for a permanent injunction that could destroy the value of the Toys “R” Us brand.

THE INTERNET IN COURT

It was this concern over potential harm to the Toys “R” Us brand that led to the unique, and perhaps unprecedented, decision to use Amazon’s own Web site as a witness at trial. By going live to www.amazon.com early and often during pre-trial hearings, and, most importantly, during the 3-month bench trial, Toys “R” Us hoped to show the court precisely what customers were seeing at that very moment: toys, games and baby products being sold by third-party retailers alongside the Toys “R” Us’ contractually exclusive assortment on Amazon.com.

The issue was not whether Toys “R” Us could find third parties selling the same product, but whether they would be found often enough, and in sufficient quantity, to show that Amazon’s new reading of the agreement — and the way it was implementing that interpretation — could not be what the parties originally intended. The strategy would call for Amazon either to admit the violations on its Web site, or to discredit this evidence and thus discredit itself. Either

Michael Dockterman is a partner with Wildman Harrold in Chicago and lead litigation counsel to Toys “R” Us. He can be reached at 312-201-2652 or dockterman@wildmanharrold.com. **John A. Luburic** is an associate with the firm.

conclusion supported the Toys “R” Us position that the agreement could not be enforced by a permanent injunction and must be terminated.

The pre-trial hearings seeking interim relief allowed Toys “R” Us to

However successful the tactic was during pre-trial hearings, using the Internet as a witness during trial presented additional challenges.

test its strategy. Using laptop computers, wireless modems, projectors and screens, Toys “R” Us took the court directly to the Internet and conducted searches — just like a customer sitting at home would. For example, by running a search for a “Magnadoodle” toy on www.amazon.com before the court, a list of search results appeared containing a Magnadoodle sold by Toys “R” Us and one sold by a third party. This same exercise was repeated several times in pre-trial hearings. It is perhaps an understatement to say that the court found it very persuasive to have a real-time search conducted on Amazon’s own Web site show third parties selling toys, games and baby products in violation of the court’s injunction.

IT WORKED IN REHEARSAL ...

However successful the tactic was during pre-trial hearings, though, using the Internet as a witness during trial presented additional challenges. For one, Amazon could have changed its search methodology and altered the appearance of its site to mask its violations. And, while Amazon loaded its site with thousands of competing toys, games and baby products, it was doing a better job of policing the exact duplicates that Toys “R” Us had been able to find during the injunction hearings. Finally, in terms of admissibility, courts typically restrict evidence to those matters that have

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A Solution For Today's Data-Intensive Litigation Workflows

By Michael Cammack

Bowman and Brooke LLP has 160 trial lawyers coast-to-coast in Minneapolis, Phoenix, Detroit, San Jose, CA, Los Angeles and Richmond, VA. Together, the firm defends corporations in products liability, toxic torts and other high-stakes litigation throughout all 50 states.

The nature of the firm's work — and litigation in general — is collaborative, and often dependent upon massive amounts of data. The explosion of documentary evidence brought on by compliance and electronic discovery obligations has made finding, organizing, analyzing and understanding case evidence more challenging than ever before.

With e-discovery, legal teams are liable to receive numerous images or files that need to go into a database. Those files can be quite large, which can ultimately cripple an outdated system. And teams often need to collaborate on data from multiple locations, which can present a challenge.

Lawyers and their staff travel; it's part of the profession. Being away from the office, however, doesn't stop client demands and deadlines. It is imperative that legal professionals are able to access information from anywhere, and that the database that allows them to work remotely has enough features in place to ensure security, control and speed.

Because of these increased demands, some of the traditional tools and workflows that legal profession-

Michael Cammack is the chief information officer for Bowman and Brooke LLP. The firm defends many corporations in products liability, toxic torts and other high stakes litigation throughout all 50 states. For more information, please visit www.bowmanandbrooke.com.

als have relied upon have become outdated. In fact, my firm has noticed that as the amount of data involved in our cases was increasing, our databases were slowing down. They just weren't performing the way we needed them to.

MULTIPLE WAYS TO COLLABORATE

Consequently, we began to search for a Web-based system that would allow our clients and outside counsel to collaborate on cases — a mobile system that would accommodate our attorneys' busy travel schedules with an enterprise-level database fast enough to handle the amount of data involved in today's cases.

Based on these challenges, and on our previous relationship with CT Summation, the solution we decided to implement was CT Summation Enterprise. The platform combines the Microsoft SQL Server database engine with the Summation interface with which we are familiar, so we can store, quickly search and review millions of documents per case.

Summation Enterprise addresses the challenges of three distinct populations within the firm:

1. In-house paralegals who need a robust tool that allows them to add documents and information, make changes and edits to that information, create production sets, and do a host of other daily, data-intensive tasks. They need this tool to be scalable so that it's not bogged down by massive amounts of images or files.
2. Outside clients, co-counsel and legal experts who need to see all or part of the data, but don't need to edit it. This group needs to conduct quick searches and access material as a reference via the Web.
3. Attorneys who work from various locations or travel extensively and need a mobile solution to collaborate with their teams.

The platform bundles CT Summation iBlaze with CT Summation WebBlaze to provide access to case information via traditional LAN, Web-browser and laptop implementations. It allows all members of the legal team to collaborate — no matter where they are — even if they are not connected to the Internet. And, the

firm administrator has full control over who can access the information, providing ample security.

With the CT Summation iBlaze component, users inside the traditional network firewall can collaborate on case evidence. We are working on installing Personal SQL on all our firm's laptops, and eventually we will migrate those cases needing laptop mobility to that system so users can take away all or part of the case. The CT Summation WebBlaze browser-based system allows users to access case information online.

Each case hosted in Summation Enterprise is comprised of several databases and collections of information, including:

- Case documents and related documents;
- Pleadings and papers;
- Deposition, hearing and trial transcripts; and
- Issues, events and the cast of characters aligned with the case.

iBlaze users can access all of these databases or other information from their desktop. They can search, review and annotate each to assimilate and collaborate on how all of the probative information interacts in the case. Critical documents can be flagged and correlated to issues, witnesses and importance to the case. The same is true for critical testimony embodied in transcripts. Links can be made between documents, testimony and events, and all can be associated with legal, factual or procedural issues in the case.

The firm is still working on WAN-related literacy issues that have prevented us from taking full advantage of Summation's SQL feature set in all offices. Due to these latency issues, we are still using Summation LG/iBlaze for our partners' mobility needs. Once the migration process is complete, however, a lawyer or paralegal can check out a mobile copy of the software and as much of the case information as he or she needs for the project at hand. New information can be added, and existing information can be augmented, analyzed and annotated while on the road. If the project is a deposition, the user can

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CT Summation

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connect to the court reporter to capture the deposition in real time. As the deposition streams into the computer, flags and annotations can be made with a tap on the spacebar or a click of the mouse. With simple advance setup, testimony can be flagged on-the-fly with automatic marking features. Upon return to the office, replication and synchronization utilities deliver this information to the entire case team moving forward.

Finally, any firm member who needs access to case information can log in to the case via WebBlaze. While the connection is made via a browser interface, the data is the same data as accessed by iBlaze, so collaboration is made in real time. Each user can be assigned rights and permissions that define or limit access to exactly that which the user needs to do his or her job, given his or her role in the case.

Summation Enterprise is also supported by a Professional Services group that offers enterprise-level systems support, consulting, and training services when needed.

Working with CT Summation's Professional Services team, we were able to plan our implementation process, migration strategy and training requirements for a smooth transition. By leveraging their expertise, we were able to coordinate a streamlined deployment. We migrated the cases that required the most active collaboration between our users without any downtime.

CT Summation has exceeded our needs and has also helped us find unexpected ways to cut costs. We were able to do a large coding project with previously retired PCs that would not run today's standard application. Using CT Summation's technology for the project eliminated the need to rent or purchase additional PCs.

SCALABILITY EQUALS STELLAR CLIENT SERVICE

Summation Enterprise gives us scalability, which means more people can be searching for, finding and reviewing documents or testimony at the same time — in much larger document collections.

Historically, document intensive cases meant managing paper ... and a lot of it. Technology has crawled forward in the past 10 years, so that much of this paper has been converted to images — and there is still

Each user can be assigned rights and permissions that define or limit access to exactly that which the user needs to do his or her job, given his or her role in the case.

a lot of that. However, businesses invest in computer technology for a reason — efficiency and effectiveness. Converting useful and compact digital information to paper or a paper-like format is wasteful.

Summation Enterprise allows users to keep large volumes of digital evidence digitally in native-file or near native-file formats. The information is captured, loaded and maintained in a legally defensible manner. This allows for the search and review of information in its source format — eliminating costly and time-consuming conversion projects. When a document must be redacted, CT Summation's petrification utility allows users to convert only those documents that need converting.

For example, a large automobile manufacturing client of ours had hired a major outsourced Web company to create a database for them. That Web company was charging our client for a number of things: converting and importing the PST files (the mobile format for reviewing e-mail files), processing them, and designing the data entry form and pick lists. The Web company also charged to house that database — to have a secure site where our staff could log in, view and objectively code that information.

A lot of time and effort went into creating this massive database, and ultimately the client spent around \$175,000 to do it.

Using Summation Enterprise, we were able to build a comparable database for this client for around \$6000. We were able to use Summation Enterprise's e-loader to load the PST files directly — we didn't have to outsource it. We didn't have to print, scan and import the e-mail because the core of the database is out-of-the-box. We then developed customized coding forms and used Summation WebBlaze to populate them.

The ability to use otherwise obsolete hardware also saved money. We resurected hardware that wouldn't have been able to keep up-to-speed with today's programs and functions, but worked for our purposes. We hooked up an extra monitor to each computer, which allowed us to use one screen to see the e-mail (Summation Enterprise shows the e-form, or the e-mail), and we used the other screen to code that e-mail.

Once we set up the database in-house, we exported a portion of what was being housed by the outside Web vendor on behalf of our client into Summation Enterprise. The client had used the outsourced database to winnow and sift the information to what could be useable in the future. Once the matter was closed, the relevant information was brought in-house, and with it the monthly bill for hosting that information. Now the firm is able to change things more quickly: It used to take a week or two before a change was made when the Web vendor hosted the database.

Being able to provide clients with this type of technology and service is invaluable. Not only were we able to save them money, but we've also saved ourselves time.



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Using Technology To Be Better, Faster And More Cost-Effective Than the Competition

By Rich Vasquez and Muffy Mallory

Superior representation during litigation involves more than persuasion, skill and mastery of the law. It means getting a favorable outcome while being better, faster and more cost-effective than the competition. One of the ways we have been able to achieve litigation success is by partnering with tech-savvy service providers. We have been able to strengthen our position and efficiency by working with a reporting firm that has access to the latest technology for exhibit bundling, on-demand Web access and transcript management. Other paralegals and attorneys in our firm have taken notice — as have the client and opposing counsel.

MORE THAN TRANSCRIPTS

Court-reporting agencies that merely provide a transcript have been viewed as a cost center by clients. Fortunately, some court-reporting agencies are more sophisticated, and offer a myriad of services to accelerate and enhance the value a law firm can provide to its clients. A subset of those agencies also brings in-depth knowledge of how attorneys can use legal technology to gain a competitive edge.

One recent complex business litigation case made this quite clear. We were in a case with six law firms, more than a dozen parties, and

Rich Vasquez is a partner, and **Muffy Mallory** is senior litigation paralegal at Morgan Miller Blair (www.mmblaw.com), a Law Corporation based in Walnut Creek, CA. Vasquez has more than 19 years of experience representing business and technology clients. Prior to joining Morgan Miller Blair in 2000, Mallory gained paralegal experience at Shearman & Sterling in New York, Kirkland & Ellis in Chicago and Pettit & Martin and Thelen Reid & Priest in San Francisco.

dozens of depositions scheduled over several months, some of which were double- and triple-tracked. We needed to partner with a reporting agency that was well-versed in technology, and able to respond to the demands of attorneys from high-profile firms and legal departments of the State of California. Enter Certified Reporting Services (Certified), a California-based reporting firm.

On the first day of depositions using Certified, we were delighted to get an e-mail alerting us that the rough transcript was available on its Web site, a RealLegal iBinder Web Repository. Once the final transcript was ready, it appeared there as well. This secure Web site enabled all of the authorized parties to see the transcripts as soon as they were available. In addition to viewing the transcripts, users are able to search text and metadata, open and zoom exhibits, search the content of OCR documents, and even discuss strategy in real-time via the iChat room. We checked the Web Repository daily and downloaded the latest materials to our litigation database.

The Web Repository was great for giving all parties on-demand access to the latest transcripts and exhibits, but what really made an impact were the RealLegal Publisher Bundles. Certified used its RealLegal Publisher software to create hyperlinks between transcript text (where exhibits were marked) and the actual scanned exhibits. The “bundle” was burned to a CD and sent to us. In the RealLegal Bundle Viewer, all of the transcripts are listed on one side and the marked exhibits are listed on the other side. This is a dream come true for anyone who has had to deal with deposition transcripts and the exhibits in hard copy. Publisher Bundles eliminate the need to keep dozens of binders of exhibits and transcripts on a shelf in a war room.

When a transcript is selected from the list, it opens in the E-Transcript Viewer and features a hyperlinked word list: Click on a word and it is highlighted in the transcript wherever it appears.

When it comes to transcript delivery, quicker is better. So when the transcripts came back quickly, fully

linked to the exhibits and ready to use, the legal team could get right to work. Underlined transcript text can be clicked on to instantly open the exhibit in its own viewer, select portions on the exhibits can be zoomed in on and pasted into a document, e-mail, or a presentation for trial. As with the transcript viewer; the exhibit viewer includes a word index for OCR documents. While the Web repository was also feature-rich, the Publisher Bundle provided the extended team with a cohesive and portable case.

Rather than waiting for days or weeks for the paper transcripts and exhibit, we received Publisher Bundles. If we needed a copy of the transcript — one that looked just like the one from the court reporter — it was easy to print from the CD. The page and line designations were always accurate, which is crucial when we need to attach testimony excerpts to briefs, or when we need to prepare a witness for trial.

MORE BENEFITS

Thanks to the high-tech services provided by Certified, we had our trial materials at the touch of a button. RealLegal iBinder and RealLegal Publisher Bundles are great time savers, which benefit not only our practice, but also ultimately our clients. We had to ask: “Can it get any better than this?” Surprisingly, it does.

After having exceeded our expectations on the transcript delivery end, Certified provided us with RealLegal Binder software to manage and summarize all of the materials. The software, which seamlessly integrates with the iBinder Web Repository and the Publisher Bundles, enabled the entire litigation team to annotate and issue code the transcripts and exhibits, create additional hyperlinks, search the entire project and generate summary reports.

The project trees in RealLegal Binder give instant access to everything in a case; all annotations, issues, saved searches, search groups, reports, transcripts and documents. It is modeled after the Microsoft Outlook interface (with which most people are familiar) and is very user-friendly.

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Better, Faster

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RealLegal Binder provides the ability to assign colors to particular terms or issues. If testimony or text is found in an exhibit that deals with an issue, it can be highlighted with the color assigned to that issue. Notes and chronology can also be attached to the passage. When “All Annotations” is clicked on in the project tree, a list of all the annotations, the deposition transcripts and exhibits that were annotated, the location of the annotation, the issue (with the color) and who created the annotation is provided. If one of those entries is clicked on, it will go directly to the highlighted text. The “Forward” and “Back” arrows on the toolbar make it very difficult to get lost.

One of the most valuable tools in RealLegal Binder is the ability to search the case and save the parameters for repeated use. The user defines the scope of the search (All Transcripts, All Documents, All Discovery, All Annotations, or any combination) and selects the search terms and any proximity parameters. All search hits are returned as reusable, printable and “e-mailable”

reports. If a term is found in an exhibit, the report shows the term as it appears in the document — as if it was a cropped snapshot of the actual document. Click on the exhibit number in the report and it goes to the document with the search term highlighted.

ALL ELECTRONIC: TECHNOLOGY AT TRIAL

Throughout this process, we were gaining an advantage by being more efficient and embracing technology to quickly pinpoint relevant materials. But when it came time for trial, we wondered how the judge would feel about our “bundled” transcripts and exhibits. Would he or she embrace the technology or would we revert to the hard-copy method of transcripts and trial exhibits? We happened to be in Contra Costa County Superior Court with Judge Terrence J. Bruiniers, who appreciates the positive impact technology has on legal proceedings.

This was a phase-one bench trial in which Judge Bruiniers was required to sift through vast amounts of deposition testimony. Less than a week before trial, we were informed that Judge Bruiniers wanted all filings in this matter to be electronic. That’s

where the RealLegal Publisher Bundles and RealLegal Binder software really became assets. Certified created a single Publisher Bundle disc with 128 hyperlinked transcripts and nearly 1500 exhibits, and worked directly with Judge Bruiniers to install RealLegal Binder and load all the hyperlinked transcripts on his laptop. These transcripts and exhibits served as Judge Bruiniers’ official record for the duration of this phase of the trial, and we plan to continue to use this technology for the jury phase.

As paperless initiatives in courtrooms spill over into the litigation practice, and vice versa, this collaboration among law firms, software providers and the court should become the standard. There is a clear premium on developing this type of synergy between law firms and their service providers as they discover and adopt technology that will help them be better, faster, and more cost effective than the competition.

In the final analysis, we are pleased to report that our three-tiered litigation “team” provided our firm with a competitive edge in a highly complex litigation; and in our business, that really counts.



Blackberry

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to the nearest store for a brand new Blackberry? Well, maybe not.

DOES IT PAY TO FIX?

BB Repair Shop (BB) in Houston is billing itself as the world’s only dedicated out-of-warranty Blackberry service facility. Since 1999, it claims to have supported more than 50,000 users and, with an ever-growing parts inventory currently in excess of \$1 million, the shop has both seen — and fixed — a very interesting array of problems.

But why fix a Blackberry is the logical question; why not just replace the unit? The answer is simple: because cell phone contracts created an expense add-on for Blackberry users. Being locked into a typical 2-year con-

tract, and having to buy a new device costs substantially more than repairing. But first, the out-of-warranty option had to exist. At BB, repairing a Blackberry costs approximately \$80-\$100 — with 24-hour turnaround to fix a unit. Since it can likely cost \$400 or more for a replacement, repair becomes a much more attractive option, especially since most repairs involve a relatively easy fix such as a new track wheel or LCD.

On a daily basis, dozens of problem Blackberrys arrive at BB from all around the world for 24-hour repair and are then shipped back out with a 90-day warranty. (The only exception to 24-hour turnaround involves situations such as a defective motherboard, or a unit set for observation regarding unique software that must be run to determine if the problem can be duplicated.)

Most orders are placed online at www.bbrepairshop.com, where the

customer receives order confirmation and instructions on where to ship the unit (with a recommendation to print out and include a copy of the order inside the shipment). Upon receipt of the order, the customer receives another e-mail confirming the shop has the unit and will ship it repaired within 24 hours, followed by a shipping confirmation order and tracking number. For turnarounds quicker than 24 hours, there is a modest surcharge — typically \$20.

Generally, the repair or replace question is an easy one with respect to handheld electronic devices; but as the technology becomes more and more expensive to replace, the answer is not as simple. This is particularly true if there is a viable alternative to the replacement of an otherwise perfectly good device.



Adam Schlagman is the Editor-in-Chief of *LJN’s Legal Tech Newsletter*. He can be reached at schlag@rcn.com.

TimeMap 4: Timeline Graphing For Lawyers

By David Narkiewicz

TimeMap from CaseSoft (www.casesoft.com) has always been one of the best timeline-graphing tool available to lawyers. The latest version, TimeMap 4, contains a number of significant improvements from the TimeMap 3 version that makes it even more powerful for lawyers. Lawyers and legal IT departments may also be familiar with the other software products in the CaseSoft arsenal: CaseMap, NoteMap, TextMap and DepPrep.

For those new to TimeMap, it is a software tool that takes user-entered facts, dates and times and instantly generates a proportional timescale. It automatically positions the fact boxes above the dates/times on which events occurred, or the user can manually move them to different positions. TimeMap also rescales the timeline and repositions the fact boxes as new boxes are entered.

TimeMap 4 is very easy to learn and a full 30-day trial version can be downloaded from www.casesoft.com.

Among the new features of TimeMap 4:

- Instant PowerPoint Slide Shows;
- Vertical timelines;
- 100-page timelines;
- Built-in PDFs;
- Title and Introduction Pages; and
- Templates.

CaseMap users can send selected sets of facts that have been entered in CaseMap into TimeMap and

David Narkiewicz is Assistant Chief Counsel in charge of litigation for the Commonwealth of Pennsylvania's Department of General Services in Harrisburg. *The views expressed in this article are solely those of the author and in no way represent the opinion of the Commonwealth of Pennsylvania and are not an official endorsement of any product.*

instantly create timelines of certain portions of a case. TimeMap also has an import feature that creates charts based on data from Excel spreadsheets, Access databases or litigation tools such as Summation and Concordance.

TimeMap can be used to graph important factual dates, such as when negotiations to enter into a contract are held, the actual signing date of the contract, the dates of alleged breaches and other important dates. TimeMap can also be used for creating a pre-trial schedule; inserting the dates when discovery answers are due, when depositions are scheduled, when discovery is to be concluded, when pre-trial motions are due and other relevant pre-trial dates.

SENDING TIME

One of the most useful new features of TimeMap 4 is the ability to send the timeline to PowerPoint, which in turn allows the creation of PowerPoint slide shows based on the TimeMap graphs. This feature is a significant improvement because with the use of a laptop and a projector, it's easy to show a timeline slide show to a judge and jury. Without this feature, new to version 4, it was cumbersome to try and show a timeline in court using TimeMap because it is not a presentation tool like PowerPoint.

Older versions of TimeMap could only create horizontal timeline graphs up to 20 pages wide; TimeMap 4 can now create up to 100 pages of timelines, horizontally or vertically. Of course, most cases will not need a 100-page timeline, but there may be some complicated cases where a lengthy timeline that is in graphical form could be extremely helpful in trial preparation, or for retrieving important facts during trial.

The new TimeMap 4 feature that allows the creation of vertical timelines is important because while most lawyers use the 8-1/2 x 11 inch page format, this change now permits them to graphically show a vertical timeline in a pleading or a brief that could not easily be done with horizontal timelines.

TimeMap 4 also has the ability to create PDFs of timeline graphs with-

out needing a full Adobe Acrobat license. This is a big money-saver on its own. Another nice feature of TimeMap 4 is the ability to include title and introduction pages with the timeline for a very professional look. By using the TimeMap 4 new template feature, it is even easier to create great-looking timeline visuals with minimal effort.

CONCLUSION

With a full 30-day trial version available from the CaseSoft site, there is no reason not to try out this tool. If purchased, the cost is \$199 per user license, and a year of support is \$50 per license. I have used TimeMap for trial presentations, for pre-trial case management, for office meetings and even for personal time management. If you want to graphically show events that have occurred on several dates or at many different times on a particular date, I don't believe there is a better tool than TimeMap 4. In addition, if you are not familiar with the other CaseSoft products, CaseMap, NoteMap, TextMap and DepPrep, then you may want to download and try them out also. In any event, I believe you will find TimeMap 4 very useful in your practice even if you are not a litigator.

[Editor's Note: As of May 16, 2006, TimeMap and all the CaseSoft products were acquired by LexisNexis. Further details on this acquisition will be forthcoming.]



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Internet Witness

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been shared with the other side during pre-trial discovery. Yet there was no way that Toys “R” Us could anticipate what would be on the Amazon site during trial in the fall when discovery closed at the end of June.

Just as importantly, Toys “R” Us also needed to win the argument that going live to the Internet during trial would not be unfair or surprising to Amazon. This was the most difficult legal hurdle. Toys “R” Us argued that if Amazon knew how its site was operating, it could not be “surprised” by a live visit and, therefore, the object of pre-trial discovery — apprising your opponent of the evidence to be used at trial — was met. On the other hand, if Amazon did not know what was happening on its own site, then how could the court expect a permanent injunction to work when there was no certainty that Amazon could comply? The court allowed Toys “R” Us to proceed with its unique strategy.

There was also the technological problem of bringing an Internet “witness” live to court each day and creating a record that would withstand appellate scrutiny. While architecturally inviting, the courthouse in Passaic County had older wiring that would not transmit the amount of data contained on the Amazon Web site relatively quickly. Without a sufficient hard line connection, the most efficient way to bring the Internet live into court each day was through the use of wireless modems. Toys “R” Us therefore equipped its laptop computers with wireless modems to connect to Amazon’s Web site, run its searches and “capture” the screenshots.

The ability to “capture” screenshots was critical to using the Internet as a witness. A trial simply could not be

conducted without the ability to show, capture, mark as an exhibit and then introduce into evidence each screenshot that was shown in court. Toys “R” Us relied on a program called “Snagit,” which saved

***A few minutes before
Toys “R” Us would ask
a witness about a
specific third-party
product, it would check
Amazon.com from a second
laptop in the courtroom
to see if the offending
product was still offered.***

each screenshot displayed in court in a matter of seconds. Each day after court was adjourned, Toys “R” Us would print and mark color copies of each screenshot and submit them to Amazon and the court. More than 100 of these “snagged” screenshots were moved into evidence during the course of the trial.

As for the risk that Amazon could change its site on a whim (as happened several times during the trial), each night Toys “R” Us scoured Amazon.com for violations of the interim orders and saved screenshots of third-party products it planned to use the next day. A few minutes before Toys “R” Us would ask a witness about a specific third-party product, it would check Amazon.com from a second laptop in the courtroom to see if the offending product was still offered. If so, Toys “R” Us would project the live image on a screen commanding one side of the room. Its counsel would ask the witness —

usually an Amazon executive — whether a simple search on www.amazon.com had returned both the Toys “R” Us product and the third-party product. The answer was always “yes,” despite the provisions of the agreement and the injunction that prohibited such sales. When an Amazon witness denied that identical screenshots reflected identical products despite the images before everyone’s eyes, testimony which seriously undermined Amazon’s overall credibility, Toys “R” Us would order the products and bring them into court, confirming what the Internet had shown but the human witnesses had denied. While Amazon’s CEO was on the stand, Amazon.com revealed that Amazon had posted more than 700 toys from Target, one of Toys “R” Us, Inc.’s biggest competitors, on the Amazon site (they were removed before the end of his testimony.) While another witness was discussing the importance of the Toys “R” Us brand, the Web site revealed that Amazon had posted adult-themed toys in its online toy store, incorrectly saying they were being offered for sale by Toys “R” Us they were taken off the site minutes after the witness left the stand.)

In the end, it was the Internet that showed the strategic alliance had to come to a close. The court found Toys “R” Us’ strategic decision to make its opponent’s own Web site a key (and recurring) witness “unique but invaluable,” and said the Internet “cannot be ignored as a tool for fact finding.” The lesson is plain: In e-commerce litigation, ignore the Internet at your own peril.



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