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FEDERAL E-DISCOVERY

Guidance on Document Preservation, Spoliation



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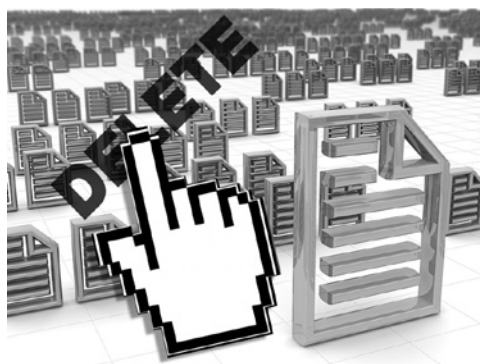
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The U.S. Court of Appeals for the Federal Circuit, in two concurrently issued opinions, addressed one of the most high-profile accusations of spoliation in recent years and considered whether a plaintiff's destruction of a massive collection of documents prior to litigation warranted the ultimate sanction of dismissal.

Although the conduct at issue in these cases was extreme, the circuit's analysis provides important guidance with respect to the document preservation duties of any party preparing to bring, or to defend, a lawsuit in federal court.

The two decisions—*Hynix Semiconductor Inc. v. Rambus Inc.* and *Micron Technology Inc. v. Rambus Inc.*¹—examined district court decisions from California and Delaware that reached opposite conclusions concerning spoliation of evidence on essentially the same facts.

Central to both cases was a question that has become especially vexing for courts and litigants alike in an era of rapidly evolving and expanding e-discovery obligations: When does the duty to preserve evidence



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in advance of litigation arise? The Federal Circuit's answer, which is an attempt to give more concrete meaning to the "reasonably foreseeable" standard that nearly all courts apply in this context, underscores the importance of implementing appropriate document preservation measures at the earliest stages of litigation planning.

Both *Hynix* and *Micron* arose from litigation concerning patents held by Rambus Inc. related to dynamic random access memory (DRAM) technology.

In the early 1990s, Rambus began licensing its intellectual property to manufacturers of computer memory chips. Initially, Rambus's DRAM technology (RDRAM) was in high demand among chip manufacturers. Over time, however, competing DRAM technologies emerged and large manufacturers threatened to move away from the Rambus platform.

Believing its founders' inventions were broad enough to encompass the primary com-

peting technology (SDRAM), Rambus pursued a two-prong business strategy: (1) licensing its original RDRAM technology to those manufacturers who continued to base their designs on it, and (2) preparing to demand large royalties and, if necessary, bring infringement suits against those who adopted the competing SDRAM technology.

The second prong of this strategy involved, according to internal Rambus documents, making the company "battle ready"—ready for litigation over the scope of its patents. To that end, Rambus in 1998 hired outside litigation counsel and began to outline plans for suing manufacturers who moved away from its original technology. Among other things, the company identified potential litigation targets and scenarios, and analyzed various contingencies to determine whether it would file suit against such targets. The company also put in place, for the first time since its founding in 1990, a document-retention policy.

The core of the Rambus document-retention policy was a mandate to destroy all paper and electronic documents that were more than three months old. Thus, in July 1998, Rambus magnetically erased more than 1,200 backup tapes on which it had been storing several years' worth of company e-mails.

Rambus also held two "shredding parties"—in September 1998 and August 1999—during which it destroyed vast quantities of paper

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documents. In the course of the second “shred day,” approximately 300 boxes, or “between 9,000 and 18,000 pounds of documents,” were destroyed.²

The document-retention policy was presented to Rambus employees in a document titled “BEFORE LITIGATION: A Document Retention/ Destruction Policy.” The policy stated that potentially relevant and discoverable evidence could be destroyed at any time prior to the actual commencement of litigation.

Despite the policy’s goal of destroying all documents based on age, Rambus employees were separately instructed to retain documents that could be helpful in future litigation, including documents that would help Rambus support its patent claims.

Consistent with this instruction, Rambus kept only one of its 1,269 e-mail backup tapes, from which it restored a document used to establish a priority date for its intellectual property.

Unusual Path to Appeal

Rambus filed its first lawsuit for patent infringement against a chip manufacturer in January 2000. That August, both Micron and Hynix—from which Rambus had demanded licensing fees for using SDRAM—brought declaratory judgment actions seeking determinations that Rambus’ asserted patents were invalid. Micron filed suit in the District of Delaware, while Hynix filed in the Northern District of California, and the cases proceeded on parallel tracks.

In each case, the district court held a bench trial on the issue of spoliation of evidence. The Delaware court found that Rambus had engaged in spoliation by destroying relevant, discoverable documents at a time when it had a duty to preserve them. As a sanction, the court concluded that Rambus’ patents were unenforceable against Micron, and thus did not need to reach the merits of the underlying suit.

The California court reached an opposite conclusion, holding that Rambus had not spoliated evidence because its duty to preserve did

not arise until late 1999 and after the second “shredding party.” The patent infringement claims were thereafter tried before a jury, which found for Rambus, awarding \$400 million in damages and requiring Hynix to pay significant royalties to Rambus going forward.

Both cases reached the Federal Circuit on appeals by Rambus and by Hynix, respectively. After hearing oral argument in April 2010, the circuit took the unusual step of ordering reargument, *sua sponte*, before a panel of five circuit judges.

On May 13, 2011, the panel concurrently issued opinions in both cases, resolving the split between the district courts.

The Federal Circuit’s decisions serve to remind litigants that the duty to preserve evidence can arise well before a lawsuit is actually filed, and even before litigation has become “imminent.”

The Decision

The primary question on which the California and Delaware district courts had diverged was, at what point did litigation become “reasonably foreseeable,” requiring Rambus to suspend the destruction of documents pursuant to its document-retention policy?

In answering this question, the Federal Circuit agreed with the Delaware court, and found that the standard the California court had applied in *Hynix*—and that Rambus had pressed on appeal—was too strict.

As an initial matter, the Federal Circuit affirmed that “a party can only be sanctioned for destroying evidence if it had a duty to preserve it,” and that such a duty did not arise until litigation was reasonably foreseeable.³

Reasonable foreseeability, the panel explained, is an objective yet fact-specific standard requiring the district court to exercise discretion. Moreover, the “mere existence of a potential claim or the distant possibility of litigation” is not enough to trigger a duty of preservation.⁴

Nevertheless, the circuit rejected Rambus’ position that reasonable foreseeability, in this context, would “require that litigation be imminent or probable without significant contingencies.”⁵ This “restrictive gloss,” the panel held, would extend “unnecessary generosity...to alleged spoliators.”⁶

So long as “the resolution of each contingency was reasonably foreseeable,” litigation itself could also be reasonably foreseeable.⁷ Moreover, the panel found that Rambus’ proposed interpretation of the standard was contrary to the weight of authority from numerous courts, including the Second Circuit.⁸ The proper standard, the Federal Circuit concluded, was “one of reasonably foreseeable litigation, without any additional gloss.”⁹

Applying this standard to Rambus’ conduct, the panel had no difficulty upholding the Delaware district court’s finding—which was reviewed for clear error—that litigation was reasonably foreseeable sometime before Rambus destroyed large volumes of potentially relevant documents in August 1999.

In reaching this determination, the panel highlighted five factors that set Rambus’ behavior apart from run-of-the-mill, innocent document retention/destruction:

1. Whereas “most document retention policies are adopted with benign business purposes,” the court found that “the *raison d’être*” for Rambus’ document retention policy was “to further [its] litigation strategy by frustrating the fact-finding efforts” of Rambus’ adversaries.¹⁰

2. Rambus already was on notice of potential patent infringement by particular manufacturers at the time it adopted and implemented its document retention policy.¹¹

3. Rambus took several steps toward litigation, including setting a time frame for filing complaints and prioritizing defendants and forums, prior to the second shredding party.¹²

4. When Rambus brought its first infringement case in January 2000, Rambus was the plaintiff and thus controlled the decision of

whether and when to file suit: “In other words, whether litigation was reasonably foreseeable was largely dependent on whether Rambus chose to litigate.”¹³

5. Rambus did not have a “longstanding and mutually beneficial relationship” with the DRAM manufacturers, which might have made litigation relatively less foreseeable in the ordinary course of business.¹⁴

Based on these considerations, the Federal Circuit affirmed the Delaware district court’s determination that Rambus had destroyed documents when it had a duty to preserve them, and reversed the contrary determination of the California district court.

Remand for Sanctions

Although it determined that Rambus had spoliated evidence, the Federal Circuit’s decision was not entirely a loss for the company because it left open the possibility that Rambus had not acted in bad faith and that dismissal was therefore an inappropriate sanction.

The Delaware court had conducted too cursory an analysis of this issue, and as a result the Federal Circuit held that it was unable to determine whether the district court had applied the “applicable exacting standard,”¹⁵ requiring a finding that the spoliator had intentionally destroyed evidence in order to disadvantage its adversary.

Accordingly, the circuit remanded both cases to the district courts for further fact-finding with regard to the issues of bad faith, prejudice, and appropriate sanctions, leaving open the possibility that the district courts may split again on the issue of what, if any, sanction to apply.

As U.S. Magistrate Judge Paul Grimm of the District of Maryland explained in detail in the *Victor Stanley II* case, the standards for determining appropriate sanctions across federal circuits are not uniform.¹⁶ For example, Third Circuit case law, which would apply in the *Micron* case, requires a showing of bad faith as a condition of applying any sanction for spoliation, whereas Ninth Circuit case law,

which would apply in *Hynix*, does not.¹⁷

Moreover, this aspect of the Court of Appeals’ decision was the subject of some internal disagreement in the panel. Judge Arthur J. Gajarsa dissented in part from both opinions, urging greater deference to the district courts in both cases, and was joined in his dissent in the *Hynix* case by Judge Pauline Newman.

Broader Implications

The specific conduct at issue in the Rambus cases was, in some respects, especially egregious.

Rambus’ motives were called into question by the facts that it did not have a document-retention policy in place until after the company contemplated suing manufacturers for patent infringement; that the policy it adopted was explicitly connected, in writing, to its litigation or “battle” strategy (as demonstrated by the “BEFORE LITIGATION” presentation); and that Rambus employees were instructed, notwithstanding the policy, to save documents that could be helpful to the company in litigation.¹⁸

Moreover, the sheer volume of documents that Rambus destroyed—and the fact that it did so a relatively short time before engaging in litigation—cast doubt on whether its purposes were benign.

Nevertheless, the Federal Circuit’s decisions serve to remind litigants that the duty to preserve evidence can arise well before a lawsuit is actually filed, and even before litigation has become “imminent.”

That a party’s decision to engage litigation may be contingent on one or more external events does not relieve the party of its obligation to preserve relevant documents if litigation is nonetheless reasonably foreseeable, based on an objective standard.

For prospective plaintiffs, moreover, the “reasonably foreseeable” standard may impose an especially strict burden and one that is not necessarily parallel to the burden of the defendant: it was “more reasonable for a party in Rambus’ position as a patentee to

foresee litigation that does in fact commence,” the court reasoned, than it would be “for a party in the manufacturers’ position as the accused.”¹⁹

Yet, the decisions also serve as a reminder that federal courts reserve the harshest sanctions, such as dismissal, for rare cases, and that even seemingly egregious conduct will not be found to warrant such sanctions without specific and careful findings of bad faith and prejudice to the non-spoliating party.

Whether Rambus’ destruction of documents in advance of patent litigation is one of those rare cases remains to be determined by the district courts in California and Delaware on remand.



1. *Hynix Semiconductor Inc. v. Rambus Inc.*, ___F.3d___, 2011 WL 1815978 (Fed. Cir. May 13, 2011); *Micron Technology Inc. v. Rambus Inc.*, ___F.3d___, 2011 WL 1815975 (Fed. Cir. May 13, 2011).

2. *Micron*, 2011 WL 1815975, at *14.

3. *Id.* at *6 (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (Scheidlin, J.)).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Hynix*, 2011 WL 1815978, at *6-7.

8. *Micron*, 2011 WL 1815975, at *6 (citing, inter alia, *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)).

9. *Id.*

10. *Id.* at *8.

11. *Id.* at *9.

12. *Id.* at *10.

13. *Id.* at *11.

14. *Id.*

15. *Id.* at *13.

16. *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497 (D. Md. 2010) (*Victor Stanley II*). For a discussion of *Victor Stanley II*, see H. Christopher Boehning and Daniel J. Toal, “Victor Stanley II Shows Need for Standard in Preserving ESI,” NYLJ, Oct. 5, 2010.

17. See *id.* at 544, 550. In this regard, the Second Circuit standards more closely resemble those of the Ninth Circuit. See *id.* at 543.

18. *Micron Technology Inc. v. Rambus Inc.*, 255 F.R.D. 135, 142 n.27 (D. Del. 2009).

19. *Micron*, 2011 WL 1815975 at *11.