Spoliation: when do you have to preserve documents and what happens if you don't?

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In *Micron Technology v. Rambus, 2009-1263* (Fed. Cir., May 13, 2011), and its companion decision, *Hynix v. Rambus*, Nos. 2009-1299, -1347(Fed. Cir. May 13, 2011), the Federal Circuit has provided a little more guidance to businesses and lawyers regarding how to evaluate when a dispute is such that litigation has become reasonably foreseeable, triggering a duty to preserve documents. Once **spoliation** has occurred, courts must then determine what is an appropriate sanction. The Court of Appeals Federal Circuit (CAFC) provided guidance to evaluate whether a dispositive sanction (invalidating patents here) is appropriate against a spoliator. The following is a short synopsis of what the CAFC had to confront:

A federal district court in California determined Rambus did not commit **spoliation** by destroying documents in a patent dispute. The Federal District Court in Delaware, however, evaluating the same set of facts, ruled that the shredding of documents amounted to **spoliation**. Hence, this is the conflict the CAFC had to tackle. It was no small event – *nine tons of paper* were destroyed with advice of counsel. Rambus' position was that there was no duty to preserve documents because, at the time the documents were destroyed, it did not believe litigation was imminent. Micron was successful in convincing the CAFC that Rambus had been planning litigation against the named manufacturers it believed were violating its patents. The Delaware court found that litigation was foreseeable by late 1998. Judge Robinson thus sanctioned Rambus by ruling certain of its patents were unenforceable against Micron and dismissed the action. Some have noted that the judge's sanction seemed far too harsh.

On May 13, 2011, the CAFC addressed the conflict in the two district court decisions and affirmed the Delaware District Court decision that Rambus had spoliated documents. In so ruling, the CAFC held that **spoliation** is "the destruction or material alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Micron Technology, Case No. 2009-1263 at *12. The CAFC ruled spoliation is governed by an "objective standard" regarding whether a "reasonable party in the same factual circumstances would have reasonably foreseen litigation." Id. While calling it objective, the court ruled that reasonable foreseeability "is a flexible fact specific" determination that should be applied to permit the court to exercise the discretion to confront the "myriad factual situations inherent in the spoliation inquiry." Id. Meanwhile Rambus' stock price fell like Sonny Liston in his memorable encounter with Muhammad Ali in 1965.*

So, how does a company or its counsel know that litigation is foreseeable? The CAFC set forth five elements to be examined:

1. **Was the destruction of documents part of a long established policy or an attempt to bury the bad stuff?**

Most large corporations have document retention policies that call for the destruction of documents on a regular basis motivated by general business needs. The CAFC noted that when destruction is done as part of this general business policy, it is more unlikely to be seen as **spoliation**.

2. **Was there evidence of development of litigation strategy to address the dispute?**

The dispute in this case was infringement of patents. Incidentally, the CAFC found the patents at issue were valid, despite **spoliation** and the declaration of patent invalidity as a sanction was not supported, remanding to Delaware for further proceedings. **Spoliation** is not limited to patent cases. Your dispute may be with a cheating spouse or a busted subcontractor bid. Evaluation into whether either side may have been considering a law suit was the motivation to shred. Could the famous 18.5-minute gap in the Nixon-Watergate audio tapes have amounted to spoliation? In the right context it may have constituted spoliation. The court has to determine whether burying the bad stuff was the real motivation for the destruction as opposed to a routinely scheduled arrival of the local shredding service at your door.

3. **Were steps taken in furtherance of litigation?**

The CAFC agreed with the Delaware court that Rambus had developed a litigation readiness plan. Rambus argued that contingencies existed that prohibited litigation. Internal memos, (obviously not shredded) indicated Rambus was not interested in settling and would push for high royalty rates for its patents which inevitably would trigger litigation. If there truly was bad faith why would Rambus have produced these jewels as opposed to destroying them? Rambus argued the high rates were just the start of a process of negotiation to determine the royalty rate. The California court bought Rambus' argument that contingencies first had to be overcome, making litigation not foreseeable. The Federal Circuit, in a closely watched decision where a single judge could have swayed the result 180 degrees, commented that "it would be inequitable to allow a party to destroy documents it expects will be relevant in an expected future litigation, solely because contingencies exist, where the party destroying documents fully expects those contingencies to be resolved." *Hynix,* Case No. 2009-1299 at *15. The CAFC found that litigation was reasonably foreseeable and remanded that case for further proceedings.

4. **What was the determining factor regarding whether litigation would occur?**

The Federal Circuit ruled that it is "more reasonable for a party (in the patent owner's) position ... to foresee litigation that does in fact commence, than it is for a party in the manufacturers' position ... ." Micron Technology, Case No. 2009-1263, at *22. It held Rambus' decision was "the determining factor" regarding whether litigation would occur, therefore litigation was foreseeable.

5. **What was the relationship between the parties?**

"[W]hen parties have a business relationship that is mutually beneficial and that ultimately turns sour, sparking litigation, the litigation will generally be less foreseeable than would litigation resulting from a relationship that is not mutually beneficial or is naturally adversarial." Rambus was seeking a license for its RDRAM with manufacturers. The court found that factor, did not make litigation concerning SDRAM any less likely, because the relationship in that context was not mutually beneficial. The issue of mutual benefit can be quite dicey and complex to define.

What Does the Court Use as a Sanction After Spoliation Is Determined?

1. **Was there bad faith?**

Spoliation is not enough. It is important to establish whether the spoliator intended to impair the ability of the adversary to defend itself, or in a different context, impair the ability of the adversary to prosecute a claim against the spoliator. Because the district court failed to give a reason for concluding that Rambus' acts were carried out in bad faith, other than the fact that **spoliation** occurred, the court sent it back since the analysis was "too sparse" to determine whether the "applicable exacting standard" had been applied. Given the record, did the CAFC really believe that either manufacturer held back any evidence of bad faith that wasn't produced in the first case? The likelihood of new evidence of bad faith being found was virtually nil. Neither manufacturer held back damning evidence of bad faith. So where does the judge look for bad faith since this exhaustive process had been going on for years? Will the trial court simply point out things in the record not highlighted as evidence of bad faith in order to stand by Judge Robinson's earlier ruling? Will the California court view the same evidence and draw a different conclusion? Will there be another appeal over a conflict between the district courts to a different panel in the CAFC? These are just some of the questions that pertain to this issue.

2. **Was there prejudice?**

The party claiming prejudice by **spoliation** has a burden of providing "plausible, concrete suggestions as to what [the destroyed] evidence might have been." This is a tough one. You destroyed it but I have to show what I haven't seen, that would have swung things my way. Obviously, this is not easy to accomplish. But if bad faith is shown, things get easier for the victim. The burden shifts, leaving the spoliator with a "heavy burden" of showing a "lack of prejudice" to its adversary. So, the biggest chore for the victim is to win the bad faith inquiry and make the spoliator prove a lack of prejudice. The Federal Circuit left this to the district court on remand. Other than to demonstrate documents were destroyed, there is not a shred of evidence of prejudice. If there was any piece of evidence that demonstrated prejudice, it would have been in the record. When confronted with the chore to point out prejudice, Judge Robinson may have a tough time demonstrating her ruling wasn't wrong the first time.

3. **A dispositive sanction requires more than prejudice and bad faith**

To justify a dispositive sanction, such as invalidating patent rights, is a "harsh sanction" imposed only in "egregious situations," and which is not warranted even in "the presence of bad faith and prejudice, without more," Judge Robinson said. The judge must now consider "(1) the degree of fault of the party

who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future." *Micron*, Case No. 2009-1263, at *30. The Federal Circuit obviously considering the sanction of patent invalidity was too harsh. She was directed on remand and to "select the least onerous sanction corresponding to the willfulness of the destructive act and prejudice" suffered by Micron. *Id*. The Federal Circuit warned Judge Robinson that if she should once again find under this analysis that a dispositive sanction is appropriate, versus an adverse inference or jury instruction, preclusion of evidence, which is the usual sanction, she must justify why "only dismissal" would "vindicate the tri-fold aims of: (1) deterring future spoliation of evidence, (2) protecting the defendants' interests, and (3) remedying the prejudice defendants suffered as a result of Rambus' actions." Id. at 30-31.

What About Your Document Retention Policy?

The Federal Circuit has now provided more guidance, albeit fuzzy, to deal with **spoliation**. This ruling will hold great sway in state courts as well. This is due to the fact that the states usually follow the federal rules in similar contexts. A word to the wise: if you or your client are developing a document retention or destruction plan, there shouldn't be a hint of litigation in the air. Ignoring this fact may subject your company or your client to sanctions. This case is essential reading before embarking on such a program. Please contact us if you are considering starting a document destruction program.