Keywords: Spoliation, attorney-client privilege, crime-fraud exception

General: Spoliation is the destruction or material alteration of evidence in pending or reasonably foreseeable litigation.

Micron Technology Inc. v. Rambus Inc.
98 U.S.P.Q.2d 1693 (Fed. Cir. 2011).

I. Facts

In 1990, the founders of Rambus developed a new technique for improving the speed of computer memory. They proceeded to file patent applications on the technique, formed Rambus to commercialize the technology, and began licensing the technology, RDRAM, to memory chip manufacturers. In 1992, Rambus learned of a competing technology, SDRAM, and began altering claims of their pending patent applications to read on the SDRAM chips. Rambus developed a strategy of licensing RDRAM to memory chip manufacturers, and demanding licensing fees from the manufacturers of SDRAM (generally the same companies).

In January 1998, Rambus began focusing on the licensing and litigation strategy. In February 1998, Karp, the head of intellectual property for Rambus, met with outside counsel to discuss licensing and royalty rates. The outside counsel advised Karp that based on the proposed royalty "you're not going to have a licensing program, you're going to have a lawsuit on your hands." Karp responded by indicating that Rambus needs to get "battle-ready." In October 1998, Karp advised Rambus executives that he was planning to assert Rambus's patents in the first quarter of 2000. In December 1998, Karp drafted a "nuclear winter" memo outlining plans to sue Intel and SDRAM manufactures. The memo noted that claim charts for Micron devices had already been completed.

In July 1998, Karp presented a document retention policy, including a slide entitle "Before Litigation: A Document Retention/Destruction Policy." The policy stated that destruction of relevant evidence need not stop until the commencement of litigation. However, the policy urged employees to keep documents that would "help establish conception and prove that Rambus had IP." In addition, the policy stated that email backup discs would be erased after three months. Rambus proceeded to erase 1269 discs, but left one which contained evidence to support a priority date. In April 1999, Karp instructed the prosecution counsel to discard material associated with patent prosecution (drafts, notes, etc.).

In June 1999, the first patent in suit issued. Karp was instructed to prepare for litigation by October 1999. Specifically, the Rambus CEO instructed Karp to be "ready for litigation with 30 days notice," and to "organize the 1999 shredding party." On August 26, 1999, Rambus held the "shredding party" it had planned, destroying between 9,000 and 18,000 pounds of documents.

On August 18, 2000, Rambus sought a licensing agreement with Micron, prompting Micron to file a DJ action asserting invalidity, non-infringement, and unenforceability. In November 2007, the district court found that Rambus had engaged in spoliation because Rambus could reasonably foresee litigation by December 1998, and engaged in a "shred party" in August 1999. Accordingly, the district court found Rambus's patents unenforceable.

II. Issue

1) Was litigation reasonably foreseeable before the "shred party" of August 1999?
2) Did the district court properly determine that dismissal was the appropriate sanction for the finding of spoliation?

3) Was the district court justified in piercing the attorney-client privilege under the crime-fraud exception?

III. Holding

1) Yes. Based on the totality of the circumstances, litigation was reasonably foreseeable prior to the destruction of documents.
2) No. The district court failed to apply the proper standard for bad faith, and failed to analyze the factors associated with dismissal.
3) Yes. Sufficient evidence was presented to support the district court's finding that Rambus violated California law by destroying the documents prior to litigation.

IV. Discussion

Spoliation is the destruction or material alteration of evidence in pending or reasonably foreseeable litigation. This is an objective standard, asking whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.

1)
The fact that Rambus was getting "battle ready" in early 1998 indicated that they were already preparing for litigation. Furthermore, the document retention policy was presented to the employs as part of the litigation preparation process, not as part of a general housekeeping policy. In addition, the document retention policy stated that destruction of relevant and discoverable evidence did not need to stop until the actual commencement of litigation. However, employees were instructed to look for helpful documents to keep, including documents that would help establish conception and prove that Rambus had IP. Moreover, email backup discs (except the helpful one) were erased. "Taken together, the implementation of a document retention policy as an important component of a litigation strategy makes it more likely that litigation was reasonably foreseeable."

Furthermore, the fact that Rambus amended the claims to read directly onto the SDRAM chips provides evidence that Rambus was preparing for litigation. On June 24, 1999, Karp was instructed to prepare for litigation by October 1999. On June 27, 1999, Rambus developed a strategy to be ready for litigation with 30 days notice, and organized the "shred party." In addition, based on the "nuclear winter" memo of December 1998, it was clear that if RDRAM did not become a market leader, Rambus would sue the manufacturers of SDRAM. There is also evidence that the offered royalty rate would result in a lawsuit. "Rambus's preparations for litigation prior to the [shred party], including choosing and prioritizing manufacturers to sue, selecting forums in which to bring suit within a planned time fame, creating claim charts, and including litigation as an essential component of its business model, support the district court's decision that Rambus reasonably foresaw litigation."

2)
Dismissal should not be imposed unless there is clear and convincing evidence of both bad-faith spoliation and prejudice to the opposing party. Bad-faith may be found if the spoliating party "intended to impair the ability of the potential defendant to defend itself." In the present case, the district court applied a "knew or should have known" standard in its bad-faith analysis. Therefore, there was no finding that Rambus intended to impair the defendant's ability to defend itself. "Prejudice to the opposing party requires a showing that the spoliation materially affects the substantial rights of the adverse party and is prejudicial to the presentation of the case." If the spoliating party has demonstrated bad-faith, the spoliating party must demonstrate that the destroyed evidence is not prejudicial. In the present case, the issue of prejudice was not reached because the bad-faith finding was overturned. The Federal Circuit instructed the district court to consider three-factors to determine whether the case should be dismissed: "1) deterring future spoliation of evidence; (2) protecting the

defendants' interests; and (3) remedying the prejudice defendants suffered as a result of Rambus's actions."

3)
The California Penal Code states that "every person who, knowing that any book, paper, record, instrument in writing or other matter or thing is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor." In the present case, Rambus violated the California Penal Code by knowingly destroying documents that would likely be produced in litigation.

V. Conclusion

Rambus engaged in spoliation by shredding documents and deleting emails in preparation for litigation.