

Amlaw Tech

SEPTEMBER 2004

The Art of Destruction

Rambus's "Shred Day" was a huge success, eliminating 2 million pages of documents and countless e-mails. But, as the company is discovering, sometimes it's better to keep rather than delete.

By M. Sean Royall

IN SEPTEMBER 1998 RAMBUS INC. began to implement its new "document retention" program. The program was inaugurated on a day that was proclaimed "Shred Day" by Rambus's senior executives. Employees were given burlap bags and were encouraged to clear their offices of all unneeded documents. Large industrial shredders were parked in the parking lot at Rambus's company headquarters. A "celebration" was held at the conclusion of the day for all employees. And when it was all said and done, an estimated 20,000 pounds (roughly 2 million pages) of Rambus business records had been destroyed, all in one day. Countless numbers of electronic files, including e-mails, were destroyed as well.

Today, Rambus is living with the consequences of those actions. In fact, the company could pay dearly for authorizing its employees to destroy massive quantities of documents. In the multibillion-dollar litigation battle in which Rambus is now engaged, the company's document destruction activities have the potential to be a deciding factor.

Of course, many companies have document retention programs, and such programs often result in the purging of

massive quantities of documents. Why then does Rambus face the potential of such severe legal consequences? The answer is that Rambus implemented its document retention program at a time when it anticipated future litigation.

In the post-Enron, post-Arthur Andersen world, companies are more sensitive than ever to the risks of document destruction. It is certainly well understood today that destroying relevant documents after learning of a government investigation can be a serious offense, punishable as a crime. Most companies are also quite aware that they could be subjected to court-imposed sanctions if they fail to advise employees to retain documents relevant to a pending lawsuit. What is less well understood, even today, is that companies can be penalized for destroying documents that are relevant not to litigation or investigations that are already pending, but to future litigation that the company can reasonably foresee or anticipate. In this regard, Rambus's recent travails should serve as a lesson.

RAMBUS is a Los Altos, California-

based technology firm that develops and licenses semiconductor-related designs. The company has never shown interest in manufacturing. Rather, Rambus makes money by licensing its proprietary designs to others, mainly semiconductor manufacturers, in exchange for royalties. The company is engaged in several

Clients should **hold onto** documents and e-mail if litigation is likely.

massive litigation battles, including suits pending before the Federal Trade Commission and various federal district courts. If successful, Rambus stands to collect literally billions of dollars in patent royalties from manufacturers of computer memory. Rambus's litigation opponents argue, among other things, that it deceived a standard-setting organization and dramatically enriched the value of its patent portfolio.

Earlier this year, Rambus prevailed in its initial battle with the FTC staff, but the litigation is pending on appeal before the five-member commission. Meanwhile, Rambus continues to press claims of patent infringement against several memory manufacturers. These companies have all contested the validity and enforceability of Rambus's patents and, in countersuits, have alleged violations of the antitrust laws. The most advanced of these cases involves German memory maker Infineon Technologies, AG.

It has always been well understood that Rambus's proprietary memory architecture, a so-called synchronous memory design, is covered by patents. Until recently, what was less well-known, if known at all, was that Rambus believed its patent rights extended broadly enough to cover any type of synchronous memory. In the early 1990s, just as Rambus was launching its business, a semiconductor industry group known as JEDEC began developing its own "open" standard for synchronous memory. JEDEC's membership roster read like a virtual who's who of the semiconductor and computer worlds. Rambus itself was a member of JEDEC from late 1991 through mid-1996. Like many standards organizations, JEDEC has rules relating to the disclosure of intellectual property. In the ongoing litigation, Rambus is accused of having violated these rules by concealing patent-related information.

The allegation, in a nutshell, is that Rambus misled JEDEC into believing that the organization's standards would be free of the company's patent claims. However, after JEDEC's standards became widely adopted, Rambus began to demand royalties from makers of JEDEC-compliant memory.

Rambus denies that it engaged in any improper conduct, and further denies that it had any duty as a JEDEC member to disclose the scope of its patent rights. This much seems clear, however. As early as 1992, and continuing for years after Rambus withdrew from JEDEC in 1996, Rambus worked with its patent attorneys to secure the broadest possible patent coverage over JEDEC's synchronous memory standards. By 1998, memory manufacturers were beginning

to produce chips based on the JEDEC standards, and in the same time frame Rambus executives and employees were privately discussing the possibility of suing the makers of these products. To some within Rambus, patent litigation of this type seemed inevitable.

AGAINST this backdrop, Rambus, in mid-1998, began to develop and implement the company's "document retention" program. That responsibility was assigned to Rambus's vice president for

If a company expects litigation, it has a **duty to preserve** evidence.

intellectual property, who worked together with an outside law firm in developing a basic records policy and a slide presentation to be used in training sessions with Rambus employees. Neither the policy nor the slide presentation, however, directed employees to retain documents or e-mails that might be relevant to future litigation concerning JEDEC-related patents. Moreover, Rambus did not keep any inventory of the materials that were destroyed by company employees, outside lawyers, or others pursuant to this program. Precisely what was destroyed remains unclear.

Wrongful destruction of evidence is sometimes referred to as "spoliation," and spoliation can be a basis for court-imposed sanctions, including, in extreme cases, the dismissal of litigant's claims or the imposition of a default judgment. Courts often define spoliation as "the willful destruction of evidence or the failure to preserve evidence for another's use in pending or future litigation." A company that authorizes document destruction without knowing of a potential future litigation will not be found liable for spoliation simply because it is subsequently determined that materials relevant to later, unforeseen litigation were destroyed. On the other hand, most courts hold that once a company

reasonably anticipates future litigation, it has a duty to preserve evidence that may be relevant to the anticipated litigation. When a company violates this duty by willfully destroying relevant documents, it could easily be sanctioned, the severity of the sanctions depending in part on the presence or absence of bad faith.

For Rambus, document destruction first surfaced as a legal issue in the context of its private litigation against Infineon. In the aftermath of a jury trial ending in June 2001, Infineon moved for sanctions against Rambus based on assorted allegations of litigation misconduct, including allegations of wrongful document destruction. After reviewing the proof, the trial judge concluded that Rambus had destroyed documents at least in part for the purpose of getting rid of evidence that might be relevant to anticipated litigation surrounding the company's JEDEC-related patents. This finding was only one of several grounds supporting the imposition of a \$7 million-plus attorneys' fees sanction against Rambus. Rambus later appealed the trial court's litigation misconduct ruling, but did not appeal the court's specific finding of improper document destruction.

In late 2002, Rambus's document destruction activities again became the focal point of a legal motion, this time in the FTC proceeding. In a motion for default judgment filed with an FTC administrative law judge, the agency's staff argued that Rambus's document retention program was implemented in bad faith, with the purpose of avoiding or minimizing legal liability. The FTC staff further argued that, when taken together, the breadth of the destruction and the absence of any inventory created serious risk of a miscarriage of justice. In lieu of a trial based on an incomplete record, the FTC staff asked for a default judgment against Rambus. The FTC judge denied that relief but did conclude that Rambus had engaged in intentional spoliation of evidence. On that basis, the FTC judge imposed lesser sanctions in the form of rebuttable adverse inferences—certain facts adverse to Rambus were presumed true at trial unless proven false. One such presumption was that Rambus knowingly failed to disclose relevant

patent information to JEDEC.

After a trial in the FTC proceeding, Rambus's document-destruction troubles appeared to be subsiding. In a February 2004 posttrial ruling, the FTC judge expressed discomfort with Rambus's document destruction but found no clear proof that any materials directly relevant to the disposition of the case had been destroyed. (The FTC staff contends that this is hardly surprising given the absence of any record showing what materials were purged.)

Then came the most dramatic ruling to date. In the Rambus-Infineon patent suit, now on remand to the district court after an earlier Federal Circuit appeal, Infineon filed new motions seeking access to privileged communications between Rambus and its lawyers concerning the development and implementation of the company's document retention policy. On May 18, 2004, after reviewing a number of Rambus's privileged communications in camera, the judge in that case granted Infineon's motion, a ruling that Rambus has since appealed.

In support of his decision to pierce the attorney-client privilege, the Infineon judge determined that Rambus's defense that it adopted and implemented its document retention policy for wholly legitimate purposes "simply does not square with the record." The judge also observed that documents reviewed in camera "contradict" assertions made by Rambus in the FTC proceeding. In the judge's words, Rambus's document retention program "was set up for what, on the record to date, rather clearly appears to have been an impermissible purpose—the destruction of relevant, discoverable documents at a time when Rambus anticipated initiating litigation to enforce its patents against already identified adversaries." The recent Infineon ruling also signals the potential for additional sanctions against Rambus, including "outright dismissal" of its case.

Since this ruling was made public, the FTC staff has filed its own motion asking the commission to reopen the record in that proceeding so that the FTC may consider any formerly privileged materials that Rambus is required to produce to Infineon.

At this stage, the full extent of the consequences flowing from Rambus's

document destruction is difficult to predict. However, there is at least a possibility that Rambus's document destruction could mean the difference between feast or famine for the company.

Even if one accepts Rambus's claim that its patents are perfectly valid and enforceable and that it did nothing at all to violate the antitrust laws, the possibility that prelitigation document destruction could nonetheless result in such a dramatic reversal of fortune is all the more notable.

WHILE it is certainly possible that document destruction, in the end, will not be a deciding factor in Rambus's litigation, most companies would nevertheless prefer to avoid the kinds of document-related legal problems that have befallen Rambus. In this regard, the following suggestions may be worthy of consideration.

1. Before implementing a records policy, conduct a careful inventory of all pending litigation matters, as well as any known issues or disputes that could lead to future litigation or government investigations.

2. Take careful steps to ensure that all documents relevant to pending litigation are preserved. Certainly all documents that fall within the scope of pertinent court orders and discovery requests should be preserved. In fact, it would be unwise for a company to destroy any documents known to be relevant to a pending litigation unless the company's lawyers have specifically authorized the destruction.

3. As to potential future litigation matters, the best advice is to proceed cautiously. Companies are not under an obligation to preserve every type of document that could be relevant in a future litigation matter. However, companies have been sanctioned for destroying records that are known to be relevant to issues or disputes about which the company is presently contemplating, or specifically foresees, litigation. Companies must decide when such concerns warrant special efforts to retain documents.

4. The fact that a company is involved in pending litigation or anticipates future litigation does not necessarily mean that

it cannot implement a document retention policy. But the existence or expectation of litigation does significantly complicate the process. The key is to maintain close consultation with attorneys who are knowledgeable about both the issues in litigation and the legal implications of document destruction. It is also important to provide careful training and supervision to employees with regard to which materials they are free to discard and which they must be careful to preserve.

Document destruction has a perfectly legitimate role to play in the administrative life of any business. Yet this alone should not be taken as a license to

A recent decision in the Rambus case could lead to **sanctions** against the company.

destroy documents haphazardly. Wise companies approach document destruction in the same manner they approach other company policies, with discretion and due consideration of the legal consequences. As Rambus's experience shows, the legal consequences of document destruction can be significant when litigation is on the horizon. Other companies should take heed to learn from Rambus's mistakes.

M. Sean Royall is a partner in the Dallas office of Los Angeles's Gibson, Dunn & Crutcher. He cochairs the firm's antitrust and trade regulation practice group. Royall had served as deputy director of the bureau of competition at the Federal Trade Commission and was directly involved in the FTC's litigation against Rambus Inc.

This article is reprinted with permission from the September 2004 edition of AMLAW TECH. © 2004 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact American Lawyer Media, Reprint Department at 800-888-8300 x6111. #020-09-04-0001