



IP Watch™

Intellectual Property Law Alerts from Ober|Kaler's IP Group

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Again?**

**Intellectual Property
Group**

E. Scott Johnson, Chair
Royal W. Craig
Jonathan M. Holda
Anthony F. Vittoria
James B. Wieland
Cynthia Blake Sanders
Christopher F. Lonegro
Jed R. Spencer
Kyle E. Conklin

Carlyle C. Ring, Jr.
(Counsel)

Don't Lose Your Hard-Earned Intellectual Property Rights When They Matter Most

Anthony F. Vittoria
410-347-7692
afvittoria@ober.com

- ***Don't destroy documents regarding your IP or anticipated litigation until after speaking with your attorney***
- ***Engage knowledgeable counsel early in any dispute involving IP***

Imagine that a court rules that you cannot enforce your company's hard-earned intellectual property rights. You are shocked because you thought you had done everything right. You carefully researched the chances of obtaining the patent, copyright or trademark that is the core of your company's assets. You filed a professionally prepared application with the Patent and Trademark Office and it had granted the application. And you took all of the necessary steps to ensure the validity and enforceability of your company's intellectual property rights, including making sure other entities are not infringing those rights. So, what happened and how do you avoid this result?

A recent decision by the United States District Court in Delaware illustrates that, even if you have a strong case regarding your company's intellectual property, those rights can be forfeited if your company does not follow the rules and laws regarding the preservation of evidence. The case is *Micron Technology, Inc. v. Rambus, Inc.*, 2009 WL 54887 (D.Del. Jan. 9, 2009) and at issue were Rambus' patents that were worth hundreds of millions of dollars in potential revenue. The federal court ruled that Rambus could not enforce its valid patent rights against Micron Technology because Rambus had destroyed documents relating to its patents.

In civil lawsuits in the United States, the parties are required to exchange documents and information — both good and bad — to the other party in a pre-trial process called discovery. Because of the requirement to turn over relevant documents, it has long been the law, in both the federal and the state courts, that parties to litigation have an obligation to preserve, and not destroy (or "spoliate"), documents that may be relevant to the case. Importantly, this requirement kicks in *before* litigation is actually initiated, commencing at the time that litigation is first "reasonably anticipated." Without this early requirement, parties may simply wait to file suit until after they have destroyed all of their harmful documents. This is precisely what the federal court found that Rambus had done in its lawsuit with Micron Technology. Because of the egregiousness of Rambus' conduct, the Court held that the appropriate sanction was the dismissal of Rambus' claims. However, courts can impose lesser sanctions — including adverse jury instructions and the award of monetary sanctions — for the intentional or negligent "spoliation" of evidence.

Adding another layer of complexity, Congress recently amended the Federal Rules of Civil Procedure — the Rules that govern litigation in our federal courts — to take into consideration electronically stored information, such as e-mails, spreadsheets and computer programs. Most states have followed suit. Those amendments require the Courts to treat electronic documents in the same manner as they treat traditional paper documents. This means that your company could be subject to sanctions if it fails to, for example, shut-off the automatic delete function on its e-mail server after litigation was first reasonably anticipated.

It is imperative that your company seek and retain legal advice as soon as you believe your intellectual property is being infringed. Early engagement of knowledgeable counsel helps to avoid these "traps for the unwary" and allows your company to enforce its rights to their fullest extent.

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