

## Postjudgment Cost Shifting: Electronic Discovery and 28 U.S.C § 1920(4)

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# POSTJUDGMENT COST SHIFTING: ELECTRONIC DISCOVERY AND 28 U.S.C. § 1920(4)

SAMANTHA J. KWARTLER<sup>†</sup>

The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, “discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter”<sup>1</sup>

## INTRODUCTION

The purpose of the Federal Rules of Civil Procedure is to “secure the just, speedy, and inexpensive determination of every action” brought in federal court.<sup>2</sup> Accordingly, the Rules permit the discovery of “any nonprivileged matter that is relevant to any party’s claim or defense.”<sup>3</sup> The idea behind this liberal discovery rule is that this information will allow parties to know their respective positions in a dispute and reach a resolution in a quick and efficient manner.<sup>4</sup>

Despite its benefits, however, liberal discovery in the modern information age certainly has its burdens.<sup>5</sup> Advancing technology has made the digitization of information commonplace

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<sup>1</sup> *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (quoting *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002)).

<sup>2</sup> See FED. R. CIV. P. 1.

<sup>3</sup> See FED. R. CIV. P. 26(b)(1).

<sup>4</sup> See Bennett B. Borden et al., *Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and Are Revitalizing the Civil Justice System*, 17 RICH. J.L. & TECH. 2 (2011), <http://jolt.richmond.edu/v17i3/article10.pdf>.

<sup>5</sup> See *id.* at 3.

and has led to an exponential growth in volumes of information.<sup>6</sup> The current technological landscape creates a problematic situation for parties litigating in the federal court system: The existence of more information means more information that is subject to discovery requests.<sup>7</sup> In effect, what would amount to thousands of paper documents in the predigitization era is equivalent to several million pages of electronically stored information (“ESI”) today.<sup>8</sup> The cost of finding, reviewing, and producing this immense volume of potentially relevant information has reached unprecedented heights and threatens the purposes of the justice system.<sup>9</sup>

Fortunately, there may be an outlet for litigants facing immense electronic discovery costs. Rule 54 provides that “[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.”<sup>10</sup> The corollary of this rule is 28 U.S.C. § 1920:

A judge or clerk of any court of the United States may tax as costs the following: (1) [f]ees of the clerk and marshal; (2) [f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) [f]ees and disbursements for printing and witnesses; (4) [f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) [d]ocket fees under section 1923 of this title; (6) [c]ompensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.<sup>11</sup>

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<sup>6</sup> See *id.* Part of the reason there is so much electronically stored information is that it is far easier to store this information than to dispose of it. See Andrew Mast, Note, *Cost-Shifting in E-Discovery: Reexamining Zubulake and 28 U.S.C. § 1920*, 56 WAYNE L. REV. 1825, 1830–31 (2010); see also Rowe, 205 F.R.D. at 429 (explaining that electronic “[i]nformation is retained not because it is expected to be used, but because there is no compelling reason to discard it”).

<sup>7</sup> See Borden et al., *supra* note 4, at 3.

<sup>8</sup> See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 564–70 (2010).

<sup>9</sup> See Borden et al., *supra* note 4, at 4; see also INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 5 (2008), available at [http://iaals.du.edu/images/wygwam/documents/publications/EDiscovery\\_View\\_Front\\_Lines2007.pdf](http://iaals.du.edu/images/wygwam/documents/publications/EDiscovery_View_Front_Lines2007.pdf) (stating that a “midsize” case could cost \$2.5 to \$3.5 million in the processing, review, and production of electronic information).

<sup>10</sup> See FED. R. CIV. P. 54(d)(1).

<sup>11</sup> 28 U.S.C. § 1920 (2012).

The statute operates as a grant and a limit upon a court's authority to award costs.<sup>12</sup> Under § 1920(4), prevailing litigants may file a bill of costs documenting their discovery expenses as “the costs of making copies of any materials.”<sup>13</sup> Thus, litigants face the possibility of bearing a portion of their adversaries' discovery costs.

Although § 1920 operates to limit taxable costs, in the electronic discovery context, these expenses can soar into the hundreds of thousands of dollars.<sup>14</sup> Such expenses accrue due to the complex nature of electronic discovery.<sup>15</sup> Discovery of ESI exponentially expands the materials a producing party must turn over.<sup>16</sup> The production of immense amounts of ESI comes at a price that may be disproportionate to the value of the controversy at issue.<sup>17</sup> Consequently, there is a risk of undermining the litigation system's fairness and efficiency.<sup>18</sup>

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<sup>12</sup> See *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2006 (2012); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441–42 (1987).

<sup>13</sup> 28 U.S.C. § 1920(4).

<sup>14</sup> In a recent electronic discovery taxation case, the prevailing litigant sought to recover \$243,453.02 in electronic discovery vendor costs. See *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1325 (Fed. Cir. 2013).

<sup>15</sup> See Robert E. Altman & Benjamin Lewis, Note, *Cost-Shifting in ESI Discovery Disputes: A Five Factor Test To Promote Consistency and Set Party Expectations*, 36 N. KY. L. REV. 569, 571 (2009); Mast, *supra* note 6, at 1830.

<sup>16</sup> Daniel M. Kolkey & Chuck Ragan, *Reevaluating the Rules for E-Discovery*, S.F. DAILY J., May 21, 2010, at 7. For instance, a producing party may need to produce daily conversations in the form of text messages, e-mails, and voicemails in addition to the traditional documentary evidence. *Id.* The Sedona Conference describes the following as electronically stored information that may be produced during discovery: “email, web pages, word processing files, audio and video files, images, computer databases, and virtually anything that is stored on a computing device—including but not limited to servers, desktops, laptops, cell phones, hard drives, flash drives, PDAs and MP3 players.” THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 1 (2d ed. 2007), available at <https://thesedonaconference.org/publication/The%20Sedona%20Principles>. The Sedona Principles are promulgated by the Sedona Conference to provide guidance on tipping point issues in complex litigation. See *About Us*, SEDONA CONF., <https://thesedonaconference.org/aboutus> (last visited Oct. 15, 2015).

<sup>17</sup> Kolkey & Ragan, *supra* note 16.

<sup>18</sup> *Id.*

While the issue has not gone unnoticed,<sup>19</sup> the courts disagree over which electronic discovery costs are taxable under § 1920(4) as “[f]ees for exemplification and the costs of making copies.”<sup>20</sup> Traditionally, many courts adopted a broad interpretation of the statutory language and taxed all or nearly all of a party’s electronic discovery costs.<sup>21</sup> However, since case law developments in 2012, many courts have turned away from such sweeping cost taxation. In 2012, the United States Court of Appeals for the Third Circuit addressed cost taxation under § 1920(4)’s “costs of making copies” language and adopted a strict narrow interpretation.<sup>22</sup> The Third Circuit, relying on the statutory background, held that only the narrowest interpretation of the statutory language is permissible and taxed only the costs associated with scanning and file conversion.<sup>23</sup> Three months later, the United States Supreme Court considered which costs are recoverable under § 1920(6) as “compensation of interpreters” and held that taxable costs are narrow in scope.<sup>24</sup> With this background in mind, the United States Court of Appeals for the Federal Circuit, applying the United States Court of Appeals for the Eleventh Circuit’s law, adopted a loose narrow interpretation of § 1920(4)’s “costs of making copies” language and taxed more electronic discovery services than the Third Circuit, further complicating the split of authority among the circuit courts.<sup>25</sup> It is the tension between these varying interpretations and the related electronic discovery services with

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<sup>19</sup> The increasing use of electronic discovery and its associated burden and expense has prompted various changes. One such change was the 2006 amendment to Federal Rule of Civil Procedure 34(a). *See* FED. R. CIV. P. 34(a) advisory committee notes (amended 2006) (noting that the exponential growth of recoverable information influenced the amendment). Another change was the adoption of Federal Rule of Evidence 502. *See* FED. R. EVID. 502 advisory committee notes (explaining the rule was adopted, in part, to address the proliferation of electronic information).

<sup>20</sup> 28 U.S.C. § 1920(4) (2012).

<sup>21</sup> *See infra* Part II.

<sup>22</sup> *See* *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 169 (3d Cir. 2012) (“The decisions that allow taxation of all, or essentially all, electronic discovery consultant charges, such as the District Court’s ruling in this case, are untethered from the statutory mooring.”).

<sup>23</sup> *See id.* at 171.

<sup>24</sup> *See* *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2006 (2012).

<sup>25</sup> *See* *CBT Flint Partners v. Return Path, Inc.*, 737 F.3d 1320, 1333 (Fed. Cir. 2013) (“Our application of section 1920(4) apparently differs from two circuits in one way—regarding the stage-one costs of imaging source media and extracting documents in a way that preserves metadata.”).

which this Note is concerned. To ensure uniformity among the courts and prevent abuse of the liberal discovery rules, this issue needs to be resolved.

This Note argues that the circuit courts should adopt a loose narrow interpretation of § 1920(4), like the Federal Circuit did in *CBT Flint Partners, LLC v. Return Path, Inc.*,<sup>26</sup> and tax only a limited number of the electronic discovery services rendered in document production. Part I of this Note examines § 1920(4)'s statutory history and its application in federal court. Part II discusses the varying approaches taken by each side of the circuit split. Finally, Part III argues for implementation of a loose narrow interpretation because it more appropriately comports with other provisions of the Federal Rules of Civil Procedure, encourages litigants to scrutinize their discovery requests, and minimizes the potential misuse of the adversarial system.

#### I. ELECTRONIC DISCOVERY AND COST SHIFTING IN THE FEDERAL COURTS

While the Federal Rules of Civil Procedure permit liberal discovery, in the modern information age where voluminous amounts of ESI exist, the costs associated with electronic discovery have reached unimaginable heights. Although parties may attempt to shift costs prior to trial, litigants may also seek to shift electronic discovery costs postjudgment pursuant to Federal Rule of Civil Procedure 54(d) and its corollary § 1920(4). The evolution of electronic discovery, amendments to the Federal Rules, and the statutory history of § 1920 all shed light on the electronic discovery costs that are properly taxable under the statute.

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<sup>26</sup> 737 F.3d 1320.

A. *Electronic Discovery and American Jurisprudence in General*

1. Historical Overview: The Rise of Electronic Discovery  
Creates a Problematic Situation

With the rapid computerization of the 1990s and the decrease in storage space costs in the 2000s, electronically stored documents began to remain solely in electronic form.<sup>27</sup> The computerized environment replaced traditional warehouse productions, which were limited by the manpower available to photocopy data.<sup>28</sup> Corporations embraced the changing landscape by implementing archival systems designed to recover lost data, which led to the existence of more potentially relevant documents.<sup>29</sup> As long as a plaintiff could demonstrate that the information was “reasonably calculated to lead to the discovery of admissible evidence,” the information could be subject to production pursuant to the liberal discovery standard under Federal Rule of Civil Procedure 26(b)(1).<sup>30</sup>

The Federal Rules of Civil Procedure intentionally permit liberal discovery. Liberal discovery rules allow parties to know their respective positions in a dispute and to reach a resolution in a quick and efficient manner.<sup>31</sup> Additionally, the rules operate to eliminate surprises and to assist parties in their preparation for trial.<sup>32</sup> While these considerations certainly support the “just” and “speedy” determination of actions in federal courts, liberal discovery in the modern information age undermines litigants’ ability to resolve disputes in an “inexpensive” manner and threatens the purpose of the Federal Rules of Civil Procedure.

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<sup>27</sup> See Vlad Vainberg, Comment, *When Should Discovery Come with a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523, 1532 (2010).

<sup>28</sup> See *id.*

<sup>29</sup> See *id.* at 1533.

<sup>30</sup> *Id.* at 1533 & n.52 (quoting FED. R. CIV. P. 26(b)(1)) (internal quotation mark omitted); Borden et al., *supra* note 4, at 3 (“The creation of more information means there is more available, and potentially relevant, information to a party’s claim or defense, and thus more information subject to discovery.”).

<sup>31</sup> See Borden et al., *supra* note 4, at 2.

<sup>32</sup> See Patrick T. Gillen, *Oppressive Taxation: Abuse of Rule 54 and Section 1920 Threatens Justice*, 58 WAYNE L. REV. 235, 238 (2012).

The increased costs associated with electronic discovery result primarily from the sheer volume of ESI that is created and stored.<sup>33</sup> The widespread use of computers, the Internet, smart phones, and other technologies creates vast amounts of electronic information.<sup>34</sup> In contrast to the physical space that paper documents took up in traditional discovery, electronic information is stored on electronic systems, which store large volumes of information at a low cost.<sup>35</sup> Despite the minimal costs associated with storing electronic information, the computerized environment lends itself to “tremendous restoration and processing expenses,” and, as a whole, electronic discovery is significantly more expensive than paper discovery.<sup>36</sup> Although intended to accomplish the same goals, electronic discovery differs from paper discovery in several ways: (1) volume and duplicability, (2) persistence, (3) dynamic and changeable content, (4) metadata, (5) environment, and (6) dispersion and searchability.<sup>37</sup> Such differences account for the vast disparity in costs between paper and electronic discovery.<sup>38</sup> When electronic discovery costs exceed the amount in controversy, there is a risk of misusing the litigation system.<sup>39</sup> Since requesting parties have nearly all the control over the scope and content of the request, requesting parties may use electronic discovery as a litigation tool.<sup>40</sup> The producing party must locate, search, and produce responsive documents so there is little incentive for a requesting party to narrow the scope of its request.<sup>41</sup> Consequently, requesting parties submit broad, costly requests as a tactic to entice the producing party to settle in order to avoid costs.<sup>42</sup>

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<sup>33</sup> Jacqueline Hoelting, Note, *Skin in the Game: Litigation Incentives Changing as Courts Embrace a “Loser Pays” Rule for E-Discovery Costs*, 60 CLEV. ST. L. REV. 1103, 1108 (2013).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1109.

<sup>36</sup> Vainberg, *supra* note 27; Altman & Lewis, *supra* note 15; Mast, *supra* note 6, at 1826 (“While litigation has moved from paper discovery to electronic discovery, the net effect of the move to electronic format has been to raise, not lower, discovery costs.”).

<sup>37</sup> THE SEDONA CONF., *supra* note 16, at 2–5.

<sup>38</sup> See Borden et al., *supra* note 4, at 4.

<sup>39</sup> Kolkey & Ragan, *supra* note 16; Hoelting, *supra* note 33, at 1112–13.

<sup>40</sup> See Hoelting, *supra* note 33, at 1111.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*



Traditionally, the “American Rule” presumes that the producing party bears its own costs in responding to discovery requests.<sup>43</sup> Unique challenges accompany the discovery of ESI, which result in higher costs than those associated with conventional discovery.<sup>44</sup> While postjudgment cost taxation under § 1920 is a new and developing option for litigants to remedy the burdensome expenses of electronic discovery, parties have also sought to shift costs through other avenues.<sup>45</sup> Federal Rule of Civil Procedure 26(c) permits a responding party to “invoke the district court’s discretion . . . to grant orders protecting [it] from ‘undue burden or expense’ in doing so, including orders conditioning discovery on the requesting party’s payment of the costs of discovery.”<sup>46</sup> In what has been considered the most influential electronic discovery decision, *Zubulake v. UBS Warburg LLC*,<sup>47</sup> the court announced an approach to cost shifting in electronic discovery. The *Zubulake* court articulated a strict cost-shifting standard: There could be no cost shifting unless the requested information was stored in an “inaccessible” form.<sup>48</sup> While *Zubulake* remains the dominant approach to cost shifting in electronic discovery, commentators have criticized its “inaccessibility” requirement as unduly restrictive.<sup>49</sup>

In short, the liberal discovery rules in the modern information age create immense burdens for parties litigating in the federal courts. Widespread use of computers and the digitization of information have led to the existence of massive volumes of potentially relevant information.<sup>50</sup> A litigant “may serve on any other party a request such within the scope of Rule 26(b)” under Federal Rule of Civil Procedure 34,<sup>51</sup> and a

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<sup>43</sup> Mast, *supra* note 6, at 1826. The American Rule is discussed further *infra* in Part I.C.2.a.

<sup>44</sup> Mast, *supra* note 6, at 1827.

<sup>45</sup> *Id.*

<sup>46</sup> *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003) (alteration in original) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)) (internal quotation mark omitted); FED. R. CIV. P. 26(c) (“The court may, for good cause, issue an order to protect a party or person from . . . undue burden or expense . . .”).

<sup>47</sup> 217 F.R.D. at 317–24.

<sup>48</sup> *See id.* at 324.

<sup>49</sup> Mast, *supra* note 6, at 1829.

<sup>50</sup> *See Borden et al., supra* note 4, at 3.

<sup>51</sup> FED. R. CIV. P. 34.

responding party must produce it, despite the associated cost, or face the possibility of sanctions under Federal Rule of Civil Procedure 37 for “fail[ing] to obey an order.”<sup>52</sup>

## 2. The Federal Rules of Civil Procedure Are Amended To Combat Electronic Discovery Issues

This problematic situation has not gone unnoticed. In 2006, amendments to the Federal Rules of Civil Procedure went into effect to combat electronic discovery issues and minimize costs.<sup>53</sup> Specifically, Rule 26 and Rule 34 underwent several seemingly modest changes to modernize the discovery framework in an attempt to account for the explosion of the use of ESI.<sup>54</sup>

First, Rule 26(a)(1)(B), now Rule 26(a)(1)(A)(ii), was amended to include ESI as part of the information that must be included in initial disclosures.<sup>55</sup> Second, Rule 26(b)(2)(B) was amended to permit a party to withhold discoverable information that is stored in a way that is “not reasonably accessible because of undue burden or cost,” subject to the requesting party’s right to file a motion to compel the disclosure of such material if “good cause” exists.<sup>56</sup> Third, Rule 26(f) was amended to include additional discussion points for litigants to consider when formulating a discovery plan.<sup>57</sup>

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<sup>52</sup> FED. R. CIV. P. 37(b)(2)(A) (“If a party . . . fails to obey an order to provide or permit discovery, . . . the court where the action is pending may issue further just orders.”).

<sup>53</sup> Letter from John G. Roberts, Jr., Chief Justice, United States Supreme Court, to J. Dennis Hastert, Speaker of the House of Representatives (Apr. 12, 2006), available at <http://www.supremecourt.gov/orders/courtorders/frcv06p.pdf>; see Borden et al., *supra* note 4, at 6; Mast, *supra* note 6, at 1826.

<sup>54</sup> See Borden et al., *supra* note 4, at 12. This Note only addresses relevant amendments.

<sup>55</sup> FED. R. CIV. P. 26(a)(1)(A)(ii); *cf.* FED. R. CIV. P. 26(a)(1)(B) (amended 2006); Letter from Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 23, 30–31 (May 27, 2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf> [hereinafter Report of the Civil Rules Advisory Comm.].

<sup>56</sup> FED. R. CIV. P. 26(b)(2)(B); *cf.* FED. R. CIV. P. 26(b)(2)(B) (amended 2006); Report of the Civil Rules Advisory Comm., *supra* note 55, at 50–53.

<sup>57</sup> FED. R. CIV. P. 26(f); *cf.* FED. R. CIV. P. 26(f) (amended 2006); Report of the Civil Rules Advisory Comm., *supra* note 55, at 31–33, 38–39 (adding three items for discussion: (1) issues about the preservation of discoverable information, (2) issues related to the disclosure or discovery of electronically stored information, and (3) issues pertaining to information that is requested or disclosed in discovery that is privileged or subject to work product protection).

Rule 34 was amended in two ways. First, Rule 34(a) was changed to include ESI as discoverable material.<sup>58</sup> Second, Rule 34(b) was amended to permit a requesting party to specify the form in which information is produced.<sup>59</sup> These amendments emphasize cooperation among litigants and provide an avenue through which parties must discuss potential electronic discovery issues before discovery begins.<sup>60</sup>

While the amendments recognize that ESI is an integral aspect of discovery, it is doubtful that these changes provide producing parties with adequate financial relief.<sup>61</sup> Since the Federal Rules do not define “good cause,” it is difficult for the courts to determine when the production of ESI is inappropriate.<sup>62</sup> Consequently, very few courts actually set production limitations or shift costs.<sup>63</sup> Moreover, “[t]he rules . . . do not dissuade requesting parties from making broad discovery requests and providing erroneous reasons why good cause exists.”<sup>64</sup> Thus, litigants are turning to postjudgment cost taxation under Federal Rule of Civil Procedure 54 and § 1920 as an avenue to avoid burdensome electronic discovery costs. However, a great deal of uncertainty exists surrounding the proper interpretation of § 1920 and the electronic discovery costs that are fairly taxable under its provisions.

*B. The Taxation of Costs: A Discussion of Federal Rule of Civil Procedure 54 and § 1920*

Over the past decade, Congress and the courts have taken steps to clarify the elusive § 1920. Such uncertainty exists because Congress did not define “exemplification” as it is used in § 1920(4) and it is unclear to what extent “copies” encompasses the production of ESI.<sup>65</sup> In determining whether prevailing litigants are entitled to any portion of their electronic discovery costs, the courts are looking to § 1920’s statutory history and

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<sup>58</sup> FED. R. CIV. P. 34(a); *cf.* FED. R. CIV. P. 34(a) (amended 2006); Report of the Civil Rules Advisory Comm., *supra* note 55, at 70–71, 80.

<sup>59</sup> FED. R. CIV. P. 34(b); *cf.* FED. R. CIV. P. 34(b) (amended 2006); Report of the Civil Rules Advisory Comm., *supra* note 55, at 71–72, 81.

<sup>60</sup> *See* Borden et al., *supra* note 4, at 16–17.

<sup>61</sup> Hoelting, *supra* note 33, at 1117.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1118; Vainberg, *supra* note 27, at 1565.

<sup>64</sup> Hoelting, *supra* note 33, at 1117.

<sup>65</sup> *Id.* at 1118–19.

jurisprudential developments for guidance. While our understanding of § 1920 has certainly developed, many issues surrounding § 1920 and electronic discovery remain unresolved. The information that is available provides a helpful background in understanding the contemporary issue.

### 1. The Evolution of Cost Taxation in the Federal Courts

The principles embodied in § 1920 first appeared in the Fee Act of 1853, which provided that “the following and no other compensation shall be taxed and allowed.”<sup>66</sup> The Act was the first piece of legislation outlining the costs allowable in federal court.<sup>67</sup> It was created in response to the diverse practices among the courts and the exorbitant fees awarded to prevailing parties.<sup>68</sup> Thus, the Act operated as a departure from the “English Rule,” which dictates that the losing party bears the burden of all legal fees, and pushed the courts to the American Rule.<sup>69</sup> The American Rule is “the general policy that all litigants, even the prevailing one, must bear their own attorney’s fees.”<sup>70</sup> Under the American Rule, courts generally do not have the discretion to shift litigation costs unless Congress has created a specific exception.<sup>71</sup> Congress included the principles embodied in the Fee Act in the Revised Judicial Code of 1948 as 28 U.S.C. § 1920.<sup>72</sup> Section 1920 “now embodies Congress’ considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party.”<sup>73</sup>

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<sup>66</sup> See Breana N. Meng, *Taxing Costs of Electronic Discovery—A Review*, 90 DENV. U. L. REV. ONLINE 163, 164–65 (2013); Act of Feb. 26, 1853, ch. 80, 10 Stat. 161.

<sup>67</sup> See *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2001 (2012).

<sup>68</sup> *Id.*; *Race Tires Am. v. Hoosier Racing Co.*, 674 F.3d 158, 164 (3d Cir. 2012).

<sup>69</sup> See *Race Tires*, 674 F.3d at 164.

<sup>70</sup> Jason L. Callaway, *Tethered to the Statute: How the Third Circuit’s Narrow Interpretation of 28 U.S.C. § 1920(4) Will Shape the Future of Cost-Shifting and E-Discovery for the Better*, 67 OKLA. L. REV. 191, 194–95 (2014) (quoting BLACK’S LAW DICTIONARY 98 (10th ed. 2014)). Courts apply the American Rule expansively to encompass most expenses of litigation, not just attorney fees. *Id.* at 194.

<sup>71</sup> See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 269 (1975).

<sup>72</sup> *Race Tires*, 674 F.3d at 164. The principles embodied in the Act were first transmitted through the Revised Statutes of 1874 and the Judicial Code of 1911 to the Revised Code of 1948. See *Taniguchi*, 132 S. Ct. at 2001. The statute was codified “without any apparent intent to change the controlling rules.” *Id.* (quoting *Alyeska Pipeline*, 421 U.S. at 255).

<sup>73</sup> *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987).

Section 1920 defines the term costs as it is used in Rule 54(d) and enumerates expenses that a federal court is permitted to tax as a cost under its discretionary authority.<sup>74</sup> Section 1920 provides, in relevant part: “A judge or clerk of any court of the United States may tax as costs . . . [f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.”<sup>75</sup> In turn, Federal Rule of Civil Procedure 54(d) provides in part: “Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.”<sup>76</sup> “The logical conclusion from the language and interrelation of these provisions is that . . . § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed against the losing party.”<sup>77</sup>

Although Congress used permissive language in the statute, the courts are only authorized to tax costs the statute encompasses.<sup>78</sup> “If Rule 54(d) grants courts discretion to tax whatever costs may seem appropriate, then § 1920, which enumerates the costs that may be taxed, serves no role whatsoever.”<sup>79</sup> Thus, § 1920 defines the term “costs” as used in Rule 54(d). “[Section] 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d).”<sup>80</sup> Federal Rule of Civil Procedure 54(d) grants the courts authority to tax costs listed in § 1920 but forbids them from awarding costs not included in the statute.<sup>81</sup> Since Congress did not define “exemplification” or explain what constitutes “cost[s] of making copies,” the courts are tasked with interpreting such phrases.<sup>82</sup>

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<sup>74</sup> See *Crawford*, 482 U.S. at 441–42; *Taniguchi*, 132 S. Ct. at 2006.

<sup>75</sup> 28 U.S.C. § 1920 (2012).

<sup>76</sup> FED. R. CIV. P. 54.

<sup>77</sup> *Crawford*, 482 U.S. at 441.

<sup>78</sup> See *id.* at 441–42.

<sup>79</sup> See *id.* at 441.

<sup>80</sup> *Id.* at 441–42.

<sup>81</sup> See *id.* at 441.

<sup>82</sup> Cf. *id.* at 440–41. In *Crawford*, the provision at issue was § 1920(3), which provides that “Fees and disbursements for printing and witnesses” are taxable costs under § 1920. *Id.* at 440. “The witness fee specified in § 1920(3) is defined in 28 U.S.C. § 1821.” *Id.* In contrast, there is no other statutory provision defining the words in § 1920(4).

While the link between Rule 54(d) and § 1920(4) is well established, the extent to which electronic discovery costs are taxable under this authority is uncertain.<sup>83</sup> Congress most recently amended the statute in 2008, when it substituted the word “materials” for “papers” in recognition of advancing technology.<sup>84</sup> The statute was specifically amended to account for costs related to electronic discovery.<sup>85</sup> The congressional record explains that the Judicial Administration and Technical Amendments Act of 2008 was “intended to improve the administration and efficiency of our Federal court system by replacing antiquated processes and bureaucratic hurdles with the necessary tools for the 21st century.”<sup>86</sup> Additionally, Representative Zoe Lofgren’s statement that the statutory amendment “mak[es] electronically produced information coverable in court costs” supports the conclusion that Congress’s intention was to permit the taxation of electronic discovery costs.<sup>87</sup> However, the scope of taxation remains unclear and the § 1920 language as amended “leaves for the courts the task of defining what constitutes ‘making copies’ for purposes of sifting the activities that go into producing electronic documents.”<sup>88</sup>

## 2. Section 1920 and Developments in the Case Law

### a. *The Supreme Court Adopts a Narrow Interpretation of Interpreter Costs Under § 1920(6)*

The Supreme Court’s 2012 decision in *Taniguchi v. Kan Pacific Saipan*,<sup>89</sup> provides helpful guidance on the proper interpretation of § 1920.<sup>90</sup> There, the Supreme Court considered whether the costs associated with translating written documents were taxable under § 1920(6), which provides, “A judge or

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<sup>83</sup> Hoelting, *supra* note 33, at 1119.

<sup>84</sup> Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 111-406, 122 Stat. 4291.

<sup>85</sup> *See id.* at 4292.

<sup>86</sup> 154 CONG. REC. 22,532 (2008).

<sup>87</sup> *Id.* at 22,824.

<sup>88</sup> *CBT Flint Partners v. Return Path, Inc.*, 737 F.3d 1320, 1326 (Fed. Cir. 2013).

<sup>89</sup> 132 S. Ct. 1997 (2012).

<sup>90</sup> *See id.* at 2000. While *Taniguchi* certainly provides helpful guidance on the proper interpretation of § 1920, the Court’s holding in this case pertained only to § 1920(6) and therefore, it is not directly applicable to the taxation of electronic discovery costs under § 1920(4). *Id.*

clerk . . . may tax as a cost . . . compensation of interpreters.”<sup>91</sup> The plaintiff, a professional baseball player in Japan, brought a personal injury action against the defendant resort owner for injuries he sustained while visiting the premises.<sup>92</sup> After the district court granted summary judgment in the defendant’s favor, the defendant sought to recover the costs it incurred in translating various documents from Japanese to English.<sup>93</sup> Despite the plaintiff’s objection, the district court awarded the costs to the defendant as “compensation of interpreters” under § 1920(6).<sup>94</sup> The Ninth Circuit affirmed the award of costs and plaintiff appealed to the Supreme Court.<sup>95</sup> The Court rejected a broad reading of the costs enumerated in the statute and held that the costs of translating documents were not fairly considered “compensation for interpreters” under the ordinary meaning of “interpreter.”<sup>96</sup> Although the word costs may be synonymous with expenses, the Court emphasized its decision to endorse a narrow scope of taxable costs and stated that “[t]axable costs are limited to relatively minor, incidental expenses.”<sup>97</sup>

*b. The Courts Define “Exemplification” as It Is Used in § 1920(4)*

Section 1920(4) provides that a judge or clerk may tax as a cost “[f]ees for exemplification.”<sup>98</sup> The courts are divided as to the meaning of “exemplification” and the costs that are recoverable under the provision.<sup>99</sup> The circuit split regarding the correct interpretation of “exemplification” is beyond the scope of this Note. However, a brief overview is useful for the purpose of demonstrating that electronic discovery costs fall outside the scope of “[f]ees for exemplification” and are more appropriately considered “costs of making copies.”

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<sup>91</sup> See *id.* Section 1920(6) provides that a judge or clerk may tax as costs “compensation of interpreter.” 28 U.S.C. § 1920(6) (2012).

<sup>92</sup> See *Taniguchi*, 132 S. Ct. at 2000.

<sup>93</sup> See *id.*

<sup>94</sup> See *id.*

<sup>95</sup> See *id.* at 2000–01.

<sup>96</sup> See *id.* at 2006–07.

<sup>97</sup> *Id.* at 2006.

<sup>98</sup> 28 U.S.C. § 1920 (2012).

<sup>99</sup> See *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 159 (3d Cir. 2012).

In 2002, in *Kohus v. Cosco, Inc.*,<sup>100</sup> the United States Court of Appeals for the Federal Circuit considered whether the plaintiff could recover the cost of a video exhibit as a “[f]ee[] for exemplification” under § 1920(4).<sup>101</sup> In determining the meaning of “exemplification,” the Federal Circuit applied the United States Court of Appeals for the Sixth Circuit’s narrow interpretation and concluded that exemplification meant “an official transcript of a public record, authenticated as a true copy for use as evidence.”<sup>102</sup> In applying this standard, the court concluded that the video exhibit’s cost was not taxable as a “[f]ee[] for exemplification.”<sup>103</sup> Conversely, in its 2000 decision, *Cefalu v. Village of Elk Grove*,<sup>104</sup> the United States Court of Appeals for the Seventh Circuit adopted a broad interpretation.<sup>105</sup> The defendants sought to recover the cost of a multimedia presentation system under § 1920(4) as a “[f]ee[] for exemplification.”<sup>106</sup> The court held that exemplification fees could be awarded under the statute for the cost of creating any exhibit “[s]o long as the means of presentation furthers the illustrative purpose of [the] exhibit.”<sup>107</sup>

Regardless of which interpretation is correct, it seems that the courts are in agreement that electronic discovery costs fall outside the type of costs that are fairly recoverable as “[f]ees for exemplification.”<sup>108</sup> In its 2013 decision, *Country Vintner of North Carolina, LLC v. E. & J. Gallo Winery*,<sup>109</sup> the United States Court of Appeals for the Fourth Circuit considered the appellant’s argument that extracting text and metadata constituted exemplification because those processes “illustrate by example [the] important features of the native files.”<sup>110</sup> The appellant also argued that loading ESI into a review platform

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<sup>100</sup> 282 F.3d 1355 (Fed. Cir. 2002).

<sup>101</sup> *Id.* at 1356.

<sup>102</sup> *Id.* at 1359.

<sup>103</sup> *Id.*

<sup>104</sup> 211 F.3d 416 (7th Cir. 2000).

<sup>105</sup> *See id.* at 428.

<sup>106</sup> *Id.* at 427.

<sup>107</sup> *Id.* at 428.

<sup>108</sup> *See Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 261–62 (4th Cir. 2013); *Kohus*, 282 F.3d at 1359 (stating that “[a] video obviously is not a copy of paper” in considering whether the costs of a video exhibit were recoverable under § 1920(4)).

<sup>109</sup> 718 F.3d 249.

<sup>110</sup> *Id.* at 261.



constituted exemplification because it “illustrates by example the important features of the ESI as if someone were seeing the ESI in its native computer environment.”<sup>111</sup> The court declined the invitation to adopt an interpretation of “exemplification” and instead held that none of the electronic discovery charges at issue qualified as “[f]ees for exemplification” under any conceivable definition.<sup>112</sup> Since this Note is concerned with electronic discovery costs, the remainder of this Note considers solely the proper interpretation of the “costs of making copies of any materials where the copies are necessarily obtained for use in the case.”<sup>113</sup>

*c. Taxable Electronic Discovery Costs are Limited to Those That Are “Necessarily Obtained for Use in the Case”*

Section 1920(4) refers to “the costs of making copies of any materials where the copies are necessarily obtained for use in the case.”<sup>114</sup> Thus, for an electronic discovery cost to be taxable, it must be considered a “cop[y],” and it must also be “necessarily obtained for use in the case.”<sup>115</sup> While the necessity analysis is inextricably intertwined with the rest of the statutory language, there is some guidance to be gleaned from the meaning of “necessarily obtained for use in the case” as it is used in § 1920(4).<sup>116</sup>

As one court stated, “before the Court can tax costs, it must find that the costs were necessarily incurred in the litigation, and this finding must be based on some proof of the necessity.”<sup>117</sup> The statute does not require that the copies be used at trial or in

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 262.

<sup>113</sup> *Id.* at 250.

<sup>114</sup> 28 U.S.C. § 1920 (2012).

<sup>115</sup> *Id.*

<sup>116</sup> See Steven C. Bennett, *Are E-Discovery Costs Recoverable by a Prevailing Party?*, 20 ALB. L.J. SCI. & TECH. 537, 546 (2010) (“The dividing line between ‘necessary,’ and ‘for the convenience of counsel,’ however, is not particularly well established.”).

<sup>117</sup> *Pioneer Natural Res. USA, Inc. v. Diamond Offshore Drilling, Inc.*, No. 05-0224, 2009 WL 4020563, at \*2 (E.D. La. Nov. 17, 2009).

papers filed with the court.<sup>118</sup> However, costs that accrue for the convenience of counsel are not necessarily obtained for use in the case and are not taxable.<sup>119</sup>

This discussion provides a useful background for addressing the contemporary issue. The 2006 amendments to the Federal Rules and § 1920(4)'s statutory developments were driven, in part, by the rising costs of electronic discovery. The case law offers some guidance in understanding Congress's intentions in drafting § 1920(4) but many issues remain unresolved. Specifically, the issue of which electronic discovery costs are properly recoverable as the "costs of making copies" lingers on and the courts have adopted different interpretations of the statutory language.

## II. THE COURTS ARE SPLIT REGARDING THE PROPER INTERPRETATION OF § 1920

Until recently, many district courts adopted a broad interpretation of § 1920(4)'s "costs of making copies" language and taxed nearly all of a prevailing litigant's costs. These courts relied on numerous policy considerations to justify their expansive reading of the statute. However, since the United States Court of Appeals for the Third Circuit's and United States Supreme Court's decisions announced in 2012, the broad interpretation has lost support among the courts. Both of these courts adopted a narrow interpretation of the "costs of making copies." Although it addressed the taxation of "compensation of interpreters," the Supreme Court's decision in *Taniguchi* has influenced the interpretation of § 1920(4)'s "cost[s] of making copies."<sup>120</sup> While only the Third, Fourth,<sup>121</sup> and Federal

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<sup>118</sup> See Judiciary and Judicial Procedure Act, ch. 646, 62 Stat. 955 (1948). The 1948 revision of the Judicial Code broadened the statutory language from "obtained for use on trials" to "obtained for use in the case." *Id.*

<sup>119</sup> See *Boykin Anchor Co. v. AT&T Corp.*, No. 5:10-CV-591-FL, 2014 WL 4798726, at \*4 (E.D.N.C. Sept. 26, 2014); *Tibble v. Edison Int'l*, No. CV 07-5359, 2011 WL 3759927, at \*7 (C.D. Cal. Aug. 22, 2011) (holding costs were necessary and not merely for the convenience of counsel because discovery requests were extremely extensive and costly). *But see* *Roehrs v. Conesys, Inc.*, No. 3:05-CV-829-M, 2008 WL 755187, at \*3 (N.D. Tex. Mar. 21, 2008) (refusing to tax costs for electronic imaging because digital versions were merely convenient for counsel to search and examine and were not necessary).

<sup>120</sup> See Jennifer Leland, *What Courts Consider When Deciding E-Discovery Cost Awards*, L.A. LAW., Oct. 2014, at 12; Preston Register, *How Much Do I Owe You for That Copy? Defining Awards Under 28 U.S.C. § 1920(4)*, 65 ALA. L. REV. 1087, 1099

Circuit—applying Eleventh Circuit law—have addressed the issue since the statute was amended in 2008, it appears that the courts are turning away from the formerly well-received broad interpretation.<sup>122</sup> It is certainly still possible that a circuit court may revive the broad interpretation, but for now it seems that the scales have tipped in favor of the narrow interpretation.<sup>123</sup>

A. *Early Interpretations Adopt a Broad Approach to the Taxation of Costs*

Prior to 2012, several courts adopted a broad interpretation of § 1920(4)'s "costs of making copies" and taxed all, or nearly all, of a prevailing litigant's electronic discovery costs. Courts found such an interpretation permissible in light of numerous policy considerations. One such consideration is the technical expertise required in modern electronic discovery.<sup>124</sup> Because the processes required to produce ESI are highly technical and beyond the expertise of the typical attorney, electronic discovery vendor services are an indispensable part of document production.<sup>125</sup> For example, in *Tibble v. Edison International*,<sup>126</sup> the prevailing litigant sought to recover the costs paid to an electronic discovery

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(2014) ("Further, the recent Supreme Court decision regarding the continuing interpretation of FRCP 54(d) and § 1920(6) in regards to 'compensation of interpreters' shows a possible trend towards a narrow interpretation of what is encompassed in the court's taxable cost.").

<sup>121</sup> In its 2013 decision, *Country Vintner of North Carolina, LLC v. E. & J. Gallo Winery, Inc.*, the United States Court of Appeals for the Fourth Circuit adopted the Third Circuit's approach from *Race Tires*. 718 F.3d 249, 260–61 (4th Cir. 2013).

<sup>122</sup> See, e.g., *Structural Metals, Inc. v. S & C Elec. Co.*, SA-09-CV-984-XR, 2013 WL 3790450, at \*9 (W.D. Tex. July 19, 2013) (finding persuasive the reasoning in *Race Tires* and adopting a narrow interpretation); *Plantronics, Inc. v. Aliph, Inc.*, C 09-01714 WHA (LB), 2012 WL 6761576, at \*17 (N.D. Cal. Oct. 23, 2012) (refusing to tax costs attributable to production, extraction, and metadata).

<sup>123</sup> David Herr & Steve Baicker-McKee, *Award of E-Discovery Costs*, 29 No. 4 FED. LITIGATOR 15 (April 2014).

<sup>124</sup> Doug Austin, *eDiscovery Trends: Is eDiscovery Malpractice More Widespread Than You Think?*, EDISCOVERY DAILY BLOG (July 6, 2011), <http://www.cloudnine.discovery.com/ediscoverydaily/ediscovery-trends-is-ediscovery-malpractice-more-widespread-than-you-think/>.

<sup>125</sup> See *id.*; *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009), *vacated*, 654 F.3d 1353 (Fed. Cir. 2011); Institute for the Advancement of the American Legal System, *Electronic Discovery: A View From The Front Lines* at 15 (2008), available at [http://iaals.du.edu/images/wygwam/documents/publications/EDiscovery\\_View\\_Front\\_Lines2007.pdf](http://iaals.du.edu/images/wygwam/documents/publications/EDiscovery_View_Front_Lines2007.pdf) (explaining that "hiring an e-discovery consultant is starting to look mandatory" because "[o]rganizations are afraid of discovery sanctions and their lawyers are afraid of malpractice suits").

<sup>126</sup> No. CV 07-5359 SVW, 2011 WL 3759927, at \*7 (C.D. Cal. Aug. 22, 2011).

vendor hired to produce ESI.<sup>127</sup> The requesting party sought documents over a decade old, which were deleted, fragmented, or stored on electronic media or network drives.<sup>128</sup> The court held that such costs were properly taxable under § 1920(4) due to the expertise required in unearthing the vast amount of computerized data sought by the requesting party in discovery.<sup>129</sup> Additionally, expert vendors promote efficiency and save costs so it is beneficial to encourage their use.<sup>130</sup> For example, in *Lockheed Martin Idaho Technologies Co. v. Lockheed Martin Advanced Environmental Systems*,<sup>131</sup> the prevailing litigant sought to recover \$4.6 million in costs for creating a litigation database.<sup>132</sup> The court held that such costs were recoverable because “it saved immense time for counsel who otherwise would have to sift through the documents by hand.”<sup>133</sup> Moreover, shifting vendor costs effectively limits a party’s unreasonable discovery requests.<sup>134</sup> Courts advanced these policy considerations to justify the taxation of immense costs, but courts opting for the narrow interpretation soon rejected such policy considerations as a sound justification.

#### *B. A Narrow Interpretation Gains Support in Recent Years*

While it is still possible that a circuit court may adopt a broad interpretation, the courts now appear to be split regarding which electronic discovery processes fit within the narrow interpretation. In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*,<sup>135</sup> the Third Circuit adopted an unduly strict narrow interpretation of § 1920(4)’s “costs of making copies.” Subsequently, in *CBT Flint Partners, LLC v. Return Path, Inc.*,<sup>136</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at \*6. The court did not indicate which portion of the statute’s language authorized the taxation.

<sup>130</sup> *See In re Aspartame Antitrust Litigation*, 817 F. Supp. 2d 608, 615 (E.D. Pa. 2011).

<sup>131</sup> No. CV-98-316-E-BLW, 2006 WL 2095876, at \*2 (D. Idaho July 27, 2006).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* The court did not specify which language under § 1920(4) authorized the taxation of such costs and simply stated that “these costs are recoverable under § 1920(4).” *Id.*

<sup>134</sup> *See CBT Flint Partners v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009), *vacated*, 654 F.3d 1353 (Fed. Cir. 2011).

<sup>135</sup> 674 F.3d 159 (3d Cir. 2012).

<sup>136</sup> 737 F.3d 1320 (Fed. Cir. 2013).

the Federal Circuit, applying Eleventh Circuit law, took the opportunity to determine which electronic discovery services are recoverable under § 1920(4). The *CBT Flint* court also adopted a narrow interpretation of § 1920(4)'s "cost of making copies" language but took a looser approach than the *Race Tires* court.<sup>137</sup>

### 1. The Third Circuit Adopts the Strict Narrow Approach

In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, the Third Circuit addressed whether electronic discovery vendor charges incurred in collecting, processing and producing ESI were taxable against a losing party as "[f]ees for exemplification [or] the cost of making copies of any materials."<sup>138</sup> In this case, plaintiff Race Tires alleged violations of the Sherman Act against defendant Hoosier Racing Tire Corporation and sought damages exceeding \$30 million.<sup>139</sup> Not surprisingly for a case of this nature and magnitude, "the parties engaged in extensive discovery of ESI."<sup>140</sup>

The district court issued a detailed Case Management Order ("CMO") instructing the parties on certain production formalities.<sup>141</sup> The CMO instructed the parties to agree upon a list of keyword search terms where the use of such terms would presumptively fulfill the parties' "obligation to conduct a reasonable search."<sup>142</sup> Additionally, the CMO ordered the parties to produce files in Tagged Image File Format ("TIFF"), accompanied by a cross reference or unitization file.<sup>143</sup> The CMO "identified certain metadata fields that had to be produced if reasonably available" and directed the parties to produce an extracted text file.<sup>144</sup>

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<sup>137</sup> *Id.* at 1326.

<sup>138</sup> *Race Tires*, 674 F.3d at 159. The court acknowledged the conflicting results among courts that had previously addressed the issue. *Id.*

<sup>139</sup> *See id.* at 160–61.

<sup>140</sup> *Id.* at 161.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* Tagged Image File Format ("TIFF") is "[a] widely used and supported graphic file format[] for storing bit-mapped images, with many different compression formats and resolutions." *See* THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 50 (3rd ed. 2010). Unitization is "[t]he assembly of individually scanned pages into documents." *Id.* at 52.

<sup>144</sup> *Race Tires*, 674 F.3d at 161. Metadata is "[d]ata typically stored electronically that describes characteristics of ESI, found in different places in different forms." THE SEDONA CONFERENCE GLOSSARY, *supra* note 143, at 34. The

To manage such complexities, both defendants in the case hired electronic discovery vendors to assist with the production of ESI.<sup>145</sup> The parties produced thousands of documents: Defendant Hoosier produced 430,733 pages of ESI, and defendant DMS produced 178,413 electronic documents.<sup>146</sup> Upon the conclusion of discovery, both defendants filed summary judgment motions, which were granted.<sup>147</sup>

Both defendants filed their Bills of Costs with the Clerk for the District Court pursuant to Federal Rule of Civil Procedure 54(d).<sup>148</sup> Race Tires “categorized the activities conducted by the vendors as follows: (1) preservation and collection of ESI; (2) processing the collected ESI; (3) keyword searching; (4) culling privileged material; (5) scanning and TIFF conversion; (6) optical character recognition (“OCR”) conversion; and (7) conversion of racing videos from VHS format to DVD format.”<sup>149</sup> Both defendants sought to recover electronic discovery costs under § 1920(4): Defendant Hoosier claimed \$143,007.05, and defendant DMS listed \$241,139.37.<sup>150</sup> The Clerk awarded Hoosier \$125,580.55<sup>151</sup> and granted DMS’s full request.<sup>152</sup> Consequently, Race Tires filed a Motion to Review Taxation of Costs in the district court.<sup>153</sup>

The district court held that the all of the electronic discovery vendor’s costs were taxable.<sup>154</sup> The court reasoned that “the steps the third-party vendor(s) performed appeared to be the electronic

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discovery of this data is important because “[s]ome metadata, such as file dates and sizes, can easily be seen by users[,] other metadata can be hidden or embedded and unavailable to computer users who are not technically adept.” *Id.* An extracted text file—a corollary to data extraction—is a file that contains text taken from an original electronic document. *Id.* at 12.

<sup>145</sup> *Race Tires*, 674 F.3d at 161.

<sup>146</sup> *Id.* at 162.

<sup>147</sup> *Id.* The Third Circuit affirmed the district court’s decision. *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 85 (3d Cir. 2010).

<sup>148</sup> *Race Tires*, 674 F.3d at 162; FED. R. CIV. P. 54(d)(1).

<sup>149</sup> *Race Tires*, 674 F.3d at 161–62.

<sup>150</sup> *Id.* at 162. Defendant DMS initially sought \$329,051.41, but upon Race Tire’s objection, DMS acknowledged its vendor’s invoices “were exceedingly confused and inconsistent” and that, as a result, DMS “mistakenly included duplicate invoices.” *Id.*

<sup>151</sup> *Id.* The Clerk reduced the amount because certain services “were not done by a third party, and therefore are part of the costs of litigating.” *Id.*

<sup>152</sup> *Id.* at 163.

<sup>153</sup> *Id.* Race Tires also filed a “Motion to Appoint Special Master Regarding E-Discovery Issues,” which the district court declined. *Id.*

<sup>154</sup> *Id.*

equivalent of exemplification and copying” and that “the requirements and expertise necessary to retrieve and prepare . . . e-discovery documents for production were an indispensable part of the discovery process.”<sup>155</sup> Further, the court concluded that the vendor’s charges were “necessarily incurred and reasonable.”<sup>156</sup> Race Tires appealed the district court’s taxation of costs.<sup>157</sup>

In conducting its analysis, the Third Circuit identified the following general categories of electronic discovery services: collecting and preserving ESI, processing and indexing ESI, keyword searching of ESI for responsive and privileged documents, converting native files to TIFF, and scanning paper documents to create electronic images.<sup>158</sup> The court held that only the scanning and conversion of native files to the agreed-upon format for production fall within the statute.<sup>159</sup> The court affirmed the district court’s award of \$20,083.51, representing the scanning and TIFF conversion Hoosier performed.<sup>160</sup>

The court announced many sound reasons to support its decision. First, the court criticized decisions that allow the taxation of all, or essentially all, electronic discovery vendor charges for being “untethered from the statutory mooring.”<sup>161</sup> The court voiced its disapproval of the policy reasons typically advanced in support of a broad interpretation:

Section 1920(4) does not state that all steps that lead up to the production of copies of materials are taxable. It does not authorize taxation merely because today’s technology requires technical expertise not ordinarily possessed by the typical legal professional. It does not say that activities that encourage cost savings may be taxed.<sup>162</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* The court made this conclusion, however, without analyzing each of the discrete services the vendors performed. *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 167.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* DMS’s electronic discovery vendor invoices did not disclose any charges for scanning or TIFF conversion. *Id.* at n.8.

<sup>161</sup> *Id.* at 169.

<sup>162</sup> *Id.* The court furthered acknowledged that extensive processing of electronically stored information is an indispensable part of production “[b]ut that does not mean that the services leading up to the actual production constitute ‘making copies.’” *Id.*

Second, the court reasoned that even in the predigital era of document production, numerous steps preceded the actual act of making copies but none would have been considered taxable because “Congress did not authorize taxation of charges necessarily incurred to discharge discovery obligations.”<sup>163</sup> Third, the court found the technical expertise argument unpersuasive as the narrow interpretation of § 1920(4) suggests fees are not permitted for the intellectual effort involved in producing the documents.<sup>164</sup> Fourth, the court held that equitable concerns, such as the expertise necessary to retrieve and prepare electronic discovery documents, could not justify an award of costs.<sup>165</sup> Finally, the court stated that litigants could protect themselves from undue burden or expense through Rule 26, which neither defendant attempted to do in this case.<sup>166</sup>

## 2. The Federal Circuit Adopts a Looser Interpretation of the Narrow Approach

In 2013, the Federal Circuit, applying Eleventh Circuit law,<sup>167</sup> took the opportunity to decide which electronic discovery costs are taxable under § 1920(4) as “costs of making copies.”<sup>168</sup> In *CBT Flint Partners, LLC v. Return Path, Inc.*,<sup>169</sup> plaintiff CBT Flint sued defendants Return Path and Cisco for patent infringement.<sup>170</sup> The district court granted the defendants’ summary judgment motions.<sup>171</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* The court explained this process as follows: First, paper files needed to be located. Once found, a document reviewer had to travel to the location to review those that may have been relevant. Then the documents had to be screened for privileged material. In the end, a large number of documents would have been processed to produce a smaller set of relevant documents. *Id.*

<sup>165</sup> *Id.* at 170.

<sup>166</sup> *Id.* at 170–71.

<sup>167</sup> Pursuant to 28 U.S.C. § 1295, the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction “of an appeal from a final decision of a district court of the United States . . . in any civil action arising under . . . any Act of Congress relating to patents.” 28 U.S.C. § 1295(a)(1) (2012). Since the appeal at issue here involves cost taxation under § 1920(4) and not the disposition of the patent claim, the Federal Circuit applied Eleventh Circuit law.

<sup>168</sup> *See CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320 (Fed. Cir. 2013).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 1324.

<sup>171</sup> *Id.*



Defendant Cisco moved to recover costs under § 1920, including \$243,453.02 in fees it had paid to its electronic discovery vendor.<sup>172</sup> In 2009, the district court granted Cisco's motion after noting "a division of opinion as to whether [electronic discovery] costs are recoverable under 28 U.S.C. § 1920."<sup>173</sup> The court concluded that the costs were recoverable and reasoned that the fees Cisco sought to recover were "the 21st Century equivalent of making copies," implicitly authorizing this recovery under § 1920(4).<sup>174</sup> Further, the court explained that such costs were taxable because the vendor's services were highly technical and beyond the expertise of attorneys or paralegals.<sup>175</sup> Policy considerations influenced the court's holding as well. The court recognized the "enormous burden and expense of electronic discovery" and that "[t]axation of these costs will encourage litigants to exercise restraint in burdening the opposing party with the huge cost of unlimited demands for electronic discovery."<sup>176</sup>

On appeal, the Federal Circuit reversed the summary judgment ruling and vacated the district court's order on costs because Cisco was no longer a prevailing party.<sup>177</sup> On remand, the district court granted summary judgment and entered an amended final judgment concluding that defendant Cisco and defendant Return Path were entitled to recover their costs.<sup>178</sup> Each party submitted a bill of costs: Cisco sought to recover \$243,453.02, and Return Path listed \$33,858.51 for electronic discovery.<sup>179</sup> The clerk taxed each party's costs in full.<sup>180</sup> CBT Flint then appealed.<sup>181</sup>

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<sup>172</sup> *Id.* Cisco labeled those fees "other costs" on its bill of costs. *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1324–25. Before computers revolutionized document production, courts interpreted § 1920(4) as referring to the cost of making physical copies of documents and taxed the cost of paper. *See, e.g., Roberts v. Charter Nat'l Life Ins. Co.*, 112 F.R.D. 411, 414 (S.D. Fla. 1986).

<sup>175</sup> *CBT Flint*, 737 F.3d at 1324.

<sup>176</sup> *Id.* at 1325.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* Before appealing, CBT submitted a motion to review the taxation of costs, which was denied. *Id.*

The court's central holding was that recoverable costs include "those costs necessary to duplicate an electronic document in as faithful and complete a manner as required by rule, by court order, by agreement of the parties, or otherwise."<sup>182</sup> The court elaborated, however, that "only the costs of creating the produced duplicates are included" and "preparatory or ancillary costs commonly incurred leading up to, in conjunction with, or after duplication" are not included.<sup>183</sup> For purposes of analyzing the document production process, the court broke the process into three stages: (1) copying hard drives; (2) database organization, indexing, decryption, de-duplication, filtering, analyzing, searching, and reviewing for responsive documents; and (3) copying documents onto memory media—such as DVDs or hard drives—for viewing.<sup>184</sup>

In analyzing stage one, the court held that imaging a source drive and extracting requested data embody procedures that are more akin to making copies than attorney and paralegal review and are thus properly taxable.<sup>185</sup> Next, the court concluded that none of the stage two activities were properly taxable.<sup>186</sup> The court reasoned that such processes are merely a part of the large body of discovery obligations pertaining to document review, which was not in Congress's contemplation in drafting § 1920(4).<sup>187</sup> In short, the court held that costs incurred for counsel's convenience are not recoverable.<sup>188</sup>

In responding to Cisco's argument that some of the costs were due to requests CBT Flint made, the court opined:

A litigant faced with what it views as overbroad discovery requests or vexatious discovery tactics—or even unduly fruitless or burdensome negotiations over discovery obligations—must pursue relief by other means, such as seeking court orders to

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<sup>182</sup> *Id.* at 1328.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 1328–29.

<sup>185</sup> *Id.* at 1329. This analysis is the main difference between the two narrow interpretations. The *Race Tires* court did not consider imaging a source file an appropriately taxable cost under § 1920(4). *Id.* at 1333.

<sup>186</sup> *Id.* at 1331.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* The court expressly stated that costs of acquiring and configuring a new data-hosting server were not recoverable. *Id.* Nor were costs of litigation support tasks like training in the use of document review software, or meetings or communications relating to the copying. *Id.*

limit the discovery when the problems arise or seeking reimbursement of costs or fees or payment of penalties afterwards under authority other than section 1920(4).<sup>189</sup>

Despite Rule 34(b)(2)(E)(ii)'s requirement that ESI be produced "in a reasonably useable form," and Rule 34(a)(1)(A)'s requirement that a party translate ESI into such form, the court concluded that the cost to decrypt was not recoverable.<sup>190</sup> Similarly, the court found that deduplication costs were not taxable because deduplication is performed before or after copying and is not the actual making of copies.<sup>191</sup>

Finally, the court turned its attention to stage three costs. Without objection from the parties, the court held that the costs of copying responsive documents to production media are recoverable under § 1920(4) as "costs of making copies."<sup>192</sup>

The *CBT Flint* court recognized that its application departed from the Third Circuit's holding in *Race Tires* in one way.<sup>193</sup> The *CBT Flint* court considered the costs associated with imaging a source drive and extracting requested data as properly recoverable as "costs of making copies" while the *Race Tires* court did not.<sup>194</sup> The court explained, "there is no good reason, as a

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<sup>189</sup> *Id.* Cisco argued that much of the keyword searching and data analysis the vendor performed was at CBT Flint's request. *Id.* The court made clear, however, that "the requester's demands for activities other than making copies does not bring those non-copying activities within the provision." *Id.*

<sup>190</sup> *Id.* The court reasoned that in a paper analogous case, if a party chose to store their documents in remote Tuva for safekeeping, the cost of retrieving the documents would not be taxable as a cost of making copies. *Id.*

<sup>191</sup> *Id.* at 1331–32.

<sup>192</sup> *Id.* at 1332. The *CBT Flint* majority opinion was not well received in its entirety. Judge O'Malley dissented regarding the majority's decision to tax stage one costs. There, Judge O'Malley explained that the majority fell astray in allowing policy considerations to influence its decision to shift the stage one costs. *Id.* at 1334–35 (O'Malley, J., dissenting). In doing so, the dissent contended that the majority improperly expanded § 1920(4). *Id.* First, Judge O'Malley explained that the Third and Fourth Circuits have agreed that initial imaging falls within the "prelude to duplication." *Id.* Permitting such taxation allows recovery for the cost of documents ultimately not produced, which is not authorized by the statute. *Id.* at 1336–37. Second, Judge O'Malley explained that the majority opinion also ignored the Supreme Court's admonition in *Taniguchi*. *Id.* at 1335. Judge O'Malley's third reason for dissenting was that the majority's approach created a complicated taxation process, which contravenes Congress's intent. *Id.* at 1336–37. Finally, Judge O'Malley opined that many other options exist to alleviate the majority's propensity to shift costs to the requesting party and to address increasing costs of electronic discovery. *Id.* at 1337–38.

<sup>193</sup> *Id.* at 1333.

<sup>194</sup> *Id.*

default matter, to distinguish copying one part of an electronic document (*i.e.*, the part that is visible when printed) from copying other parts (*i.e.*, parts not immediately visible) when both parts are requested.”<sup>195</sup>

While the *Race Tires* court and the *CBT Flint* court both adopted a narrow interpretation, the courts’ opinions diverged with respect to the electronic discovery services that are recoverable as “costs of making copies.” The *Race Tires* court opted for a strictly narrow interpretation and reasoned that litigants may avoid immense discovery costs by utilizing other means. Conversely, the *CBT Flint* court took a looser approach under the narrow interpretation and taxed additional electronic discovery processes. The different interpretations have created a lack of uniformity among the courts, and this inconsistency must be resolved to prevent injustice.

### III. RESOLVING THE ISSUE

As the case law develops, it appears more courts are opting to limit taxable costs, and for sound reasons. The policy considerations advanced as justification for the broad interpretation of “costs of making copies”—“expertise beyond the lawyer’s ken, cost savings, and controlling discovery”—have no basis in the statute’s language.<sup>196</sup> While the narrow interpretations of “costs of making copies” adopted by the United States Courts of Appeals for the Federal Circuit and the Third Circuit both have merit, the Third Circuit’s approach is too restrictive and compromises the fairness of the justice system. Even though the Federal Circuit’s decision further complicated an already uncertain area of law, it was the correct approach in light of the compelling policy considerations at play.

It is important to resolve this issue for several reasons. The strict narrow interpretation adopted by the Third Circuit prevents the prevailing litigant from securing adequate recovery of the hefty electronic discovery costs it expended in responding to discovery requests. Consequently, more litigants will opt to settle their cases to avoid bearing such expenses even if the case would have been resolved in their favor on the merits. The purpose of the justice system, and discovery in particular, is to

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<sup>195</sup> *Id.*

<sup>196</sup> Callaway, *supra* note 70, at 210.

uncover the truth. A case's disposition should not turn on a party's financial capabilities. While the courts must remain true to the statute and tax narrowly, it is more appropriate for the courts to adopt the loose narrow interpretation because it permits a prevailing litigant to recover a greater portion of its electronic discovery costs. This interpretation is legally sound and curtails the injustice that can result under the Third Circuit's approach.

A. *The Broad Interpretation Is Unpersuasive in Light of the 2012 Decisions*

As the Third Circuit explained in *Race Tires*, the broad interpretation of § 1920(4)'s "cost of making copies," which taxes all, or essentially all, electronic discovery services is "untethered from the statutory mooring."<sup>197</sup> The statute's language and statutory history does not authorize the taxation of all steps leading up to the production of copies.<sup>198</sup> In the predigital era of document production, numerous steps preceded the actual act of "making copies."<sup>199</sup> Yet none of those preparatory steps would have been considered taxable because "Congress did not authorize taxation of charges necessarily incurred to discharge discovery obligations."<sup>200</sup> Moreover, the Court's announcement that taxable costs under § 1920 are "modest in scope" casts a shadow of doubt upon the broad interpretation of § 1920(4)'s "cost of making copies" language.<sup>201</sup>

B. *Practical and Equitable Reasons Render the Loose Narrow Interpretation Better Suited To Address Contemporary Needs than the Strict Narrow Interpretation*

In its decision in *CBT Flint*, the Federal Circuit recognized that its holding departed from the Third Circuit's ruling in *Race Tires*.<sup>202</sup> The Federal Circuit defended its decision to tax imaging and extraction costs on two grounds.<sup>203</sup> First, the court reasoned

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<sup>197</sup> *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 169 (3d Cir. 2012).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2006 (2012).

<sup>202</sup> *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1333 (Fed. Cir. 2013).

<sup>203</sup> *Id.*

that these processes are more akin to “making copies” than to “attorney and paralegal review.”<sup>204</sup> Second, the court explained that there is no conceivable reason, “as a default matter, to distinguish copying of one part of an electronic document” from copying “other parts.”<sup>205</sup> While the majority opinion was met with a dissent that argued for the Third Circuit’s strict narrow interpretation, the dissent and the Third Circuit’s opinion in *Race Tires* overlook important considerations, which render their reasoning unpersuasive.

This Note posits a loose narrow interpretation, like the one adopted by the Federal Circuit in *CBT Flint*, is the proper approach to taxing costs under § 1920(4). A combination of practical reasons and policy considerations lead to this conclusion. While the policy reasons advanced in support of the broad interpretation have been met with criticism, they still have merit and justify the adoption of an approach somewhere between the over broad and strict narrow. Until Congress or the Supreme Court offers more guidance on this legal issue, the loose narrow interpretation must prevail.

#### 1. Utilizing Other Avenues To Avoid Costs Is Not a Guaranteed Fix

Federal Rule of Civil Procedure 26 allows a producing party to refuse to produce ESI because it would be “unreasonably burdensome and expensive when compared to the overall scope of the case, including the amount of possible awards.”<sup>206</sup> Pursuant to the 2006 amendments to Rule 26, the courts have discretion to shift production costs to the requesting party.<sup>207</sup> First, the rule requires the producing party to demonstrate that the information requested is “not reasonably accessible because of undue burden or cost.”<sup>208</sup> Second, even if the producing party meets its burden, the requesting party may then demonstrate that “good cause”

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> David M. Fuqua & Whitney L. Foster, *The Five Pillars of E-Discovery*, 61 FED’N. DEF. & CORP. COUNS. Q. 420, 434 (2011).

<sup>207</sup> See FED. R. CIV. P. 26; Hoelting, *supra* note 33, at 1116.

<sup>208</sup> See FED. R. CIV. P. 26(b)(2)(B).

exists to force the producing party to produce the ESI.<sup>209</sup> The advisory committee contemplated several factors that the courts may use in conducting the “good cause” analysis:

(1) [T]he specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessible sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.<sup>210</sup>

While the presumption remains that the producing party must bear the expense of complying with discovery requests, in the electronic discovery context,<sup>211</sup> cost shifting serves as one option for litigants facing costly requests.<sup>212</sup> However, a litigant may still be saddled with exorbitant production costs if opponent is able to demonstrate “good cause” exists.

In the seminal electronic discovery cost shifting case, the United States District Court for the Southern District of New York considered when cost shifting is appropriate.<sup>213</sup> Consistent with Rule 26, the *Zubulake* court held that cost shifting is only appropriate “when electronic discovery imposes an ‘undue burden or expense’ on the responding party.”<sup>214</sup> A burden or expense is undue when it “outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.”<sup>215</sup> However, under this inquiry, cost shifting is only

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<sup>209</sup> See *id.*

<sup>210</sup> See FED. R. CIV. P. 26 advisory committee notes (2006).

<sup>211</sup> See Altman & Lewis, *supra* note 15, at 573.

<sup>212</sup> See *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1334 (Fed. Cir. 2013) (O’Malley, J., dissenting); *In re Ricoh Co.*, 661 F.3d 1361, 1366–67 (Fed. Cir. 2011) (holding agreements to allocate costs are permissible and enforceable).

<sup>213</sup> See *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).

<sup>214</sup> See *id.* at 318. The court cautioned that “cost shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations.” *Id.* at 317. Further, the court explained that improper cost shifting will undermine the important public policy consideration of resolving disputes on the merits. *Id.* at 318. There is also a concern that improper cost shifting may deter litigants from filing potentially meritorious claims. *Id.*

<sup>215</sup> See *id.*

appropriate when the ESI is kept in an inaccessible format.<sup>216</sup> The “obvious negative corollary” to this rule is that there can be no cost shifting for ESI that is accessible.<sup>217</sup> Thus, from the producing party’s perspective, there is an incentive to downgrade ESI to an inaccessible format in hopes of obtaining a cost-shifting order.<sup>218</sup> Since inaccessible ESI is so costly to recover, the ultimate result is a more expensive electronic discovery process.<sup>219</sup>

Therefore, it seems that cost shifting is a permissible means by which litigants can seek to avoid immense production costs but there is no guarantee. The cost-shifting analysis depends on the facts of each case,<sup>220</sup> and it would be unwise to adopt an interpretation that relies on a litigant’s ability to shift costs through this avenue given the uncertainty and potential for abuse.

Litigants can also utilize Rule 26 conferences to prepare a discovery plan.<sup>221</sup> The rule’s purpose is “to make discovery less contentious, less costly, and less dependent on judicial supervision.”<sup>222</sup> Parties can use the conference to “narrow the range of information sought” or to agree on keyword searches.<sup>223</sup> Open and transparent discussions of this nature may lead to more effective discovery practices but the rule does not compel litigants to reach any agreements.<sup>224</sup> The rules merely require the parties to talk about electronic discovery and the conversations may ultimately be fruitless.<sup>225</sup>

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<sup>216</sup> See *id.* Electronically stored information may be considered inaccessible when it is erased, fragmented or damaged, or stored solely on backup tapes. See Altman & Lewis, *supra* note 15, at 574.

<sup>217</sup> See Mast, *supra* note 6, at 1839.

<sup>218</sup> See *id.*

<sup>219</sup> See *id.*

<sup>220</sup> Adian K. Felix, *E-Discovery: Shifting the Costs of Compliance*, A.B.A., [http://www.americanbar.org/groups/young\\_lawyers/publications/the\\_101\\_201\\_practice\\_series/e\\_discovery\\_shifting\\_the\\_costs\\_of\\_compliance.html](http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/e_discovery_shifting_the_costs_of_compliance.html) (last visited Oct. 15, 2015).

<sup>221</sup> See Fuqua, *supra* note 206, at 422.

<sup>222</sup> See *id.*

<sup>223</sup> See *id.* at 423.

<sup>224</sup> See Borden et al., *supra* note 4, at 16–17.

<sup>225</sup> See *id.* at 18.



Similarly, litigants can also take advantage of local rules in an attempt to avoid incurring extreme electronic discovery costs.<sup>226</sup> For example, the Northern District of Georgia Local Rule 16.2 directs litigants to, among other things, discuss potential limitations on electronic discovery.<sup>227</sup> Thus, parties have ample opportunity to discuss cost shifting and burdensome discovery.<sup>228</sup> However, in an adversarial system, the effectiveness of such discussion is doubtful. Even if a litigant can shift some of the costs to its adversary, the litigant could still be left to bear an unfair portion of the costs for the ESI.

Thus, the other avenues through which a litigant may attempt to minimize its discovery costs by shifting the costs to its adversary are not certain to be beneficial. If such measures are fruitless, or if the producing party does not seek pretrial cost shifting, the party could be left to bear an unfair portion of the cost attributable to producing the ESI, absent an appropriate postjudgment cost-shifting mechanism.

## 2. Equitable Considerations Tip the Balance in Favor of the Loose Narrow Approach

While cost shifting and conferences appear to alleviate some of the issues, it would be a mistake to consider those options a resolution. Even though it is possible to shift costs under Rule 26, a party bears a heavy burden in establishing its propriety.<sup>229</sup> For a party concerned about paying an electronic discovery vendor's bill, it would be a risk to rely on cost shifting.<sup>230</sup> As such, the strict narrow interpretation adopted by the Third Circuit has the potential to create problems for clients who lack a disposable source of funds.<sup>231</sup>

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<sup>226</sup> See *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1337 (Fed. Cir. 2013) (O'Malley, J., concurring in part and dissenting in part).

<sup>227</sup> N.D. GA. CIV. R. 16.2.

<sup>228</sup> See *CBT Flint*, 737 F.3d at 1337 (O'Malley, J., concurring in part and dissenting in part).

<sup>229</sup> See Callaway, *supra* note 70, at 216. For example, commentators have criticized the *Zubulake* approach as unduly restrictive. See Mast, *supra* note 6, at 1829.

<sup>230</sup> See Callaway, *supra* note 70, at 216–17.

<sup>231</sup> See *id.* at 215–17.

Under the strict narrow interpretation, a prevailing party will only be able to recover a minor portion of the expenses it expended in producing the ESI.<sup>232</sup> This situation creates a problem when the electronic vendor costs greatly exceed the amount in controversy in the suit.<sup>233</sup> In this situation, a would-be-prevailing litigant has no incentive to continue the litigation. A similar problem plagues litigants who cannot afford an electronic vendor. The volume of ESI and the complexity involved in producing such documents renders electronic discovery vendors a necessity.<sup>234</sup> The courts used this reasoning to justify the broad interpretation.<sup>235</sup> Although such reasoning has been met with criticism, if a litigant cannot afford an electronic discovery vendor, he or she may be faced with sanctions under Federal Rule of Civil Procedure 37 for failing to comply with a discovery request or a subsequent order to compel.<sup>236</sup> Accordingly, the strict narrow interpretation adopted by the Third Circuit leaves a prevailing party with no way to recover the immense fees expended on document production and could discourage parties from bringing or continuing a case for fear of facing discovery sanctions.

Individuals are entitled to their day in court regardless of their financial situation. Individual plaintiffs of ordinary means have no incentive to litigate their cases when even if they prevail, the electronic discovery costs will exceed the award. The loose narrow interpretation comports with the statutory history and Supreme Court precedent and puts individual plaintiffs in a better position when litigating a case. Under the loose narrow interpretation, prevailing litigants can recover the costs associated with imaging and extraction while it could not under the Third Circuit's interpretation of "costs of making copies." The taxation of these costs alleviates the burden of paying for costly electronic discovery and reduces a would-be-prevailing litigant's fear that its monetary recovery will be completely neutralized by electronic discovery expenses.

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<sup>232</sup> See *id.*

<sup>233</sup> See Kolkey & Ragan, *supra* note 16.

<sup>234</sup> See *supra* Part II.

<sup>235</sup> See *supra* Part II.

<sup>236</sup> See Callaway, *supra* note 70, at 215.

Since the Third Circuit's approach to resolving the issue remains uncertain, it would be unwise to adopt such a restrictive interpretation when it effectively eliminates individual plaintiffs' ability to participate in the adversarial system. Until these uncertainties are resolved, in the interests of fairness, the courts must adopt an approach that is both legally sound and conducive to average litigants' needs. The loose narrow interpretation allows litigants to recover a larger portion of their electronic discovery costs but remain "tethered to the statutory mooring."

#### CONCLUSION

To ensure fairness in the justice system, a uniform approach is needed in taxing costs under § 1920(4). As discussed above, electronic discovery's costly nature is a reality that impacts modern litigation. While it seems that a broad interpretation contravenes congressional intent and Supreme Court precedent, both of the narrow interpretations are in conformity. Thus, until the legal community receives further guidance on the issue, the better approach is the loose narrow interpretation, which fairly serves the justice system and litigants alike.