

HOW MUCH DO I OWE YOU FOR THAT COPY? DEFINING AWARDS UNDER 28 U.S.C. § 1920(4)

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Both rules and statutes allow some prevailing parties to recover certain expenses incurred during litigation. Specifically, Federal Rule of Civil Procedure Rule 54(d) excludes additional fees being awarded to prevailing parties, other than attorney’s fees, “[u]nless a federal statute, these rules, or a court order provides otherwise.”¹ Such a statute exists for “the costs [of] copies of any materials where the copies are necessarily obtained for use in the case.”² A circuit split has developed regarding what constitutes such costs within e-discovery. This Note will discuss the circuit split in light of the recent textual amendment to the statute, offer a recommendation of which costs to include in the award, and pose other possible solutions to the growing cost of electronic discovery.

I. INTRODUCTION

Every year, more and more discovery becomes digitized. Additionally, parties increasingly ask for production of discoverable material through an electronic medium. Data and information are no longer kept using hard

1. FED. R. CIV. P. 54.
2. 28 U.S.C. § 1920(4) (2012).

copies but are maintained on web-servers and backup disks. Thus, “[w]here the universe of potentially relevant written communications was once a box of internal memos, today it may be a million e-mails or more.”³ Now, “[l]ess than 1% of business information is created on paper. Instead, 99% of the world’s information initially exists as a data file.”⁴

As the retention of data and the mode of discovery have become increasingly digital, the ability to generate enormous amounts of discovery has proliferated. In fact, in 2012, a Fortune 500 company reported creation of approximately 100 million e-mails each month.⁵ For litigants, tools like the ability to keyword search or organize information into categorized spreadsheets allow for much larger requests to be processed than would have previously been possible. Compared to the time of producing traditional discovery, the tools of electronic media allow parties to find important information in a fraction of the time.⁶ What would have taken several months for young associates and paralegals to review can now be accomplished by one person in a few minutes with the right words and a properly prepared set of data.

The ability to search through e-discovery comes with added costs, including such things as additional electronic storage. But the additional cost of e-discovery is an appropriate price to pay for most litigation, especially as the number of documents continues to grow due to the retention power for litigants. Rather than having lawyers and paralegals going through boxes of documents, e-discovery documents can be processed through search engines. Additionally, with the capability of developing electronically stored information (ESI), litigants can share documents for review throughout litigation as the database continues to develop. Thus, e-discovery can be more effective and efficient while also being more cost-efficient compared to traditional discovery.⁷

Because of the many topics that constitute e-discovery, a vast array of issues can be addressed. One of the major concerns regarding the landscape of e-discovery is what amounts to discoverable material. Due to the difference in the nature of electronic data versus conventional paper records, this issue has persisted as the ability to retain more information electronically has increased. Though the topic continues to develop, this

3. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., NAVIGATING THE HAZARDS OF E-DISCOVERY: A MANUAL FOR JUDGES IN STATE COURTS ACROSS THE NATION 7 (2d ed. 2012), available at http://iaals.du.edu/images/wygwam/documents/publications/Navigating_eDiscovery_2nd_Edition.pdf.

4. *Id.* at 10 (quoting Robert D. Brownstone, *Preserve or Perish; Destroy or Drown—eDiscovery Morphs Into Electronic Information Management*, 8 N.C. J. L. & TECH. 1, 2 (2006)).

5. *Id.*

6. *Id.* at 7.

7. *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).

Note assumes the discovery in question fits the criteria necessary to be regarded as discoverable because information fits within § 1920(4). Instead, this Note is concerned with what is actually considered recoverable in regards to e-discovery under FRCP 54 and § 1920(4). Rather than discuss whether something is discoverable, the focus will be on whether some portion of e-discovery can be recovered as a tax cost by the prevailing party. Therefore, the assumption will be that the material being evaluated for tax cost is discoverable.

Additionally, this Note will not consider whether something is “necessarily obtained for use in the case.”⁸ The inquiry of whether the particular request fits within this category “is a factual determination to be made by the district court.”⁹ Further, courts have determined that the basis for determining if something fits within such a category is based on whether the producing party reasonably believes the documents will be used for trial preparation.¹⁰ Only then is information considered “necessarily obtained” for use in the case. Therefore, it will be assumed the courts rightly determine whether something falls within the purview of § 1920(4). The concern of this Note is to determine what actually is within the categories of taxable costs under § 1920(4).

The development of the thesis will start with the inherent limitations for recovering e-discovery costs of Rule 54 through the language of the Rule and § 1920. This will include the history of the statute and the progression of its wording to the current amendment. Particular interest will be given to the most recent change in the statute that has caused the circuit split. Next, the Note will discuss the key phrase of § 1920(4) and offer reasons why a narrow interpretation of the statute provides the proper reading. It will also apply the narrow interpretation in specific areas of consideration for recovery costs of e-discovery. Part IV demonstrates how the narrow interpretation of § 1920(4) adheres to recent Supreme Court decisions, the history of the statute, and the language of the statute itself. Part IV also offers practical advice regarding litigants’ ability to recover costs under § 1920(4), as well as strategic ways to increase the available recoverable costs.

II. THE LIMITATION OF RULE 54 BY § 1920

Under FRCP 54(d)(1), “[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be

8. 28 U.S.C. § 1920(4) (2012).

9. *Rundus v. City of Dallas*, 634 F.3d 309, 316 (5th Cir. 2011) (quoting *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5th Cir. 1993)).

10. *Id.* at 316 (quoting *Fogleman v. ARAMCO*, 920 F.2d 278, 285–86 (5th Cir. 1991)).

allowed to the prevailing party.”¹¹ But, the courts are limited in their ability to determine what “costs . . . should be allowed.”¹² In regards to what possible costs can be recovered, the limitation on what qualifies as a cost is determined by federal statute. Section 1920 of the Cost Act provides that the “judge or clerk of any court of the United States may tax as costs” a list of possible items.¹³ Rule 54(d)(1) allows costs to be given to the prevailing party.¹⁴ It is a general principle of statutory construction that the general rule must be interpreted by the specific.¹⁵ Since § 1920 is a statute that outlines the various costs to be recovered, it is used to interpret what is recoverable within Rule 54. Thus, §1920(4) limits and defines Rule 54.

Courts have a strong presumption to award the costs outlined in these statutes.¹⁶ But they still retain discretionary authority of actually choosing to tax a particular item to the losing party.¹⁷ Thus, courts are given deference in their determination of whether to tax a particular cost.¹⁸ In contrast, what constitutes the taxable costs associated with the proceeding litigation is determined by statutes. The determination of whether something is a taxable cost is based on *de novo* review.¹⁹ Therefore, only items included within the statute are allowed to be awarded by courts as part of recovery costs.

Originally, courts in the United States used the English principle of “total reimbursement . . . to the prevailing litigant.”²⁰ The reason for total reimbursement was to make the party totally whole.²¹ Additionally, before the adoption of the federal rules, federal courts allowed recovery based on the governing state law.²² Because of the use of governing state law, the Supreme Court noted, “there was great diversity in practice among the courts and [] losing litigants were being unfairly saddled with exorbitant fees for the victor’s attorney.”²³ But with the adoption of the Federal Rules

11. FED. R. CIV. P. 54.

12. *Id.*

13. 28 U.S.C. § 1920.

14. FED. R. CIV. P. 54.

15. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987).

16. Steven C. Bennett, *Are E-Discovery Costs Recoverable by a Prevailing Party?*, 20 ALB. L.J. SCI. & TECH. 537 (2010).

17. *Crawford Fitting*, 482 U.S. at 441.

18. *El Camino Res., Ltd. v. Huntington Nat. Bank*, No. 1:07-cv-598, 2012 WL 4808741 at *2 (W.D. Mich. May 3, 2012).

19. *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012).

20. 10 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2665 (3d ed. 1998).

21. *Id.*

22. *Crawford Fitting*, 482 U.S. at 445.

23. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 251 (1975).

of Civil Procedure, the taxable costs were standardized amongst the federal courts.²⁴

Congress put forth specific allowances for tax costs recoverable in federal courts. The possible expenses that a losing party may be taxed are provided by Congress in 28 U.S.C. § 1920.²⁵ The history of the Cost Act, as the statute is known, was summarized by the Supreme Court in *Alyeska Pipeline*: “The 1853 Act was carried forward in the Revised Statutes of 1874 and by the Judicial Code of 1911.”²⁶ Its substance, without any apparent intent to change the controlling rules, was also included in the Revised Code of 1948 as 28 U.S.C. §§ 1920 and 1923(a).²⁷ Thus, the statute controls what can and cannot be taxed by courts.

Prior to 2008, § 1920(4) allowed for recovery of tax costs of “fees for exemplification and *copies of papers*.”²⁸ Even though this statement clearly included paper copies, courts prior to 2008 extended the meaning to include copies obtained through e-discovery.²⁹ In 2008, Congress amended the statute and redefined these costs to include “fees for exemplification and *the costs of making copies of any materials*.”³⁰ This amendment was made by Congress “to include expenses associated with new courtroom technologies.”³¹ This cleared up the discussion of whether or not costs for copying materials is electronic, but it did not end the division of what is actually included in the recovery.³²

Courts have differed over what the substantive change in awarding costs is under this amendment.³³ As stated above, the change clearly allows non-paper copies to be recovered. Now, the issue is whether the change from “copies of papers” to “costs of making copies” expands what is included in discoverable materials related to the disposition of the case.³⁴ The amendment to § 1920(4) was a limited amendment.³⁵ But just how limited the changes were has become the source of the circuit split regarding § 1920(4). In order to better understand what the likely

24. FED. R. CIV. P. 54.

25. *Crawford Fitting*, 482 U.S. at 440.

26. *Alyeska Pipeline*, 421 U.S. at 255.

27. *Id.*

28. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10 (Mar. 18, 2003) [hereinafter REPORT OF THE PROCEEDINGS] (emphasis added), available at <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2003-03.pdf>.

29. See *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012).

30. Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110–406, 122 Stat. 4291 (2008) (emphasis added).

31. REPORT OF THE PROCEEDINGS, *supra* note 28, at 10.

32. *Id.*

33. See *Race Tires Am.*, 674 F.3d 158.

34. REPORT OF THE PROCEEDINGS, *supra* note 28, at 10.

35. *Id.* at 9–10.

understanding of the statute is, a brief understanding of the words used therein is helpful.

Beginning with the language of Rule 54(d)(1), the prevailing party should recover “costs—other than attorney’s fees.”³⁶ By using “costs” and not “expenses” the recoverable awards do not include all that could be recovered. Instead, “the concept of taxable costs under Rule 54(d) . . . represents those expenses, including, for example, court fees that a court will assess against a litigant.”³⁷ Of particular importance is the understanding that “costs are allowed in favor of the winning party against the losing party to provide at least partial indemnification of the expenses incurred in establishing the claim or defense.”³⁸ This does not include everything that could be recovered, as the Rule specifically points out that some things, including “attorney’s fees,” are not within these costs.³⁹

In the alternative, the Rule could have used the broader term “expenses,” which “include[s] all the expenditures actually made by a litigant in connection with the action.”⁴⁰ As noted above, this was not chosen by the courts in a stark break from English litigation principles where the losing party paid everything in connection with the suit. Rather, costs are a subset within expenses that refer to a smaller amount usually determined by the court clerk.⁴¹ Indeed, “§ 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).”⁴² Thus, when the Rule and § 1920(4) use the term “costs,” it implies a limitation within the possible recoverable expenses.

Section 1920 states that “any court of the United States may tax as costs the following . . . [f]ees.”⁴³ Fees are a subset of costs, which are a category of expenses.⁴⁴ The meaning of “fees” entails “those amounts paid to the court or one of its officers for particular charges that typically are delineated by statute.”⁴⁵ Typical fees paid to the court include such items as docket fees, clerk’s and marshal’s charges, and witness fees.⁴⁶ By using the term “fees,” Congress limited possible costs of Rule 54(d) to those fees listed in § 1920. Of those possible costs listed in § 1920, any litigant seeking an award under § 1920(4) is limited to the fees or costs entailed

36. FED. R. CIV. P. 54(d)(1).

37. WRIGHT ET AL., *supra* note 20, § 2666.

38. *Id.*

39. FED. R. CIV. P. 54(d)(1).

40. WRIGHT ET AL., *supra* note 20, § 2666.

41. *See* Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 655–56 (7th Cir. 1981).

42. Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 441–42 (1987).

43. 28 U.S.C. § 1920(4).

44. WRIGHT ET AL., *supra* note 20, § 2666.

45. *Id.*

46. *Id.*

therein.⁴⁷ This limitation on recovery implies a narrow understanding of what is actually covered in this section.

According to the standard rules of statutory construction, “the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.”⁴⁸ Additionally, courts must construe statutes in such a way as to “give effect to every clause and word of a statute” if possible.⁴⁹ Since § 1920(4) allows for costs of both “[f]ees for exemplification” as well as “the costs of making copies,” the proper understanding is that both are distinct categories from which e-discovery costs can be determined.⁵⁰ Therefore, each should be dealt with separately by the courts in determining how to construe each in regards to recovery costs.

Courts that have differentiated between the two terms have reached divergent rulings on what the terms mean.⁵¹ Beginning with “exemplification,” courts have given different meanings to the word that generally fall into two categories—narrow or broad.⁵² Many of the rulings discussing exemplification were based on the pre-2008 version of § 1920(4). But the only significant change between the amendment and the original version of § 1920(4) is in “the costs of making copies.”⁵³ Throughout the history of the statute, Congress has kept the same language in regards to “[f]ees for exemplification.”⁵⁴

Under a narrow interpretation of “exemplification,” courts have followed the *Black’s Law Dictionary* meaning of the term. *Black’s Law Dictionary* defines “exemplification” as “[a]n official transcript of a public record, authenticated as a true copy for use as evidence.”⁵⁵ Based on this definition, “[s]ection 1920(4) speaks narrowly . . . suggesting that fees are permitted only for the physical preparation and duplication of documents, not the intellectual effort involved in their production.”⁵⁶ A major reason for a narrow reading of the word is that a broader definition is likely to “swallow up” the meaning of the term.⁵⁷

47. See 28 U.S.C. § 1920 (allowing courts to tax costs that include the fees of § 1920(4)).

48. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 165 (3d Cir. 2012) (quoting *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir.2003)).

49. *Id.* at 165 (quoting *Tavarez v. Klingensmith*, 372 F.3d 188, 190 (3d Cir. 2004)).

50. 28 U.S.C. § 1920(4).

51. See *Race Tires*, 674 F.3d at 166.

52. See *id.* at 166.

53. 28 U.S.C. § 1920(4).

54. *Id.*

55. BLACK’S LAW DICTIONARY 653 (9th ed. 2009).

56. *Romero v. City of Pomona*, 883 F.2d 1418, 1428 (9th Cir. 1989) *overruled in part on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990).

57. *Id.* at 1428.

In contrast, other courts have opted for a more expansive understanding of the idea of exemplification. One possibility is to define exemplification as the extent to which it was reasonable to furnish “real assistance” to the court.⁵⁸ Additionally, the Seventh Circuit has stated that an item fits in this category “so long as the means of presentation furthers the illustrative purpose of an exhibit.”⁵⁹ The court was willing to extend the definition to a point that there could be “no limits inherent in the term ‘exemplification’ that would permit a court to award costs.”⁶⁰ Though this is likely superfluous language, it undergirds the idea that exemplification can go beyond the very limited scope outlined above.

Between the two understandings of the word, the narrow definition protects the generally narrow understanding of what entails the costs associated with § 1920. But regardless of the choice of definition, it is likely that the issue of what constitutes e-discovery will not rest on “exemplification” primarily because a requirement inherent in either a broad or narrow definition is the use of the material in the courtroom. Since most material procured through e-discovery never makes it into the courtroom setting, it is unlikely that litigants will opt for exemplification as the avenue of recovery. Instead, most courts determine the recovery costs based on the second option in § 1920(4) for “costs of making copies of any materials.”⁶¹

III. UNDER § 1920, WHAT CONSTITUTES “MAKING COPIES OF MATERIALS” FOR E-DISCOVERY?

With the amendment to the Cost Act in 2008, Congress changed the assessment of costs from paper copies to that of “materials.”⁶² Materials “plainly signifies that § 1920(4)’s allowance for copying costs is not limited to paper copying.”⁶³ Therefore, it is no longer necessary that the copied item be a physical document. Rather, the “copies of any materials”⁶⁴ should qualify as “an imitation, transcript, or reproduction of an original work”⁶⁵ of any item that is focused towards discovery. Thus, the major issue is what constitutes a “copy” and then what is included within the “making” of the copy. It is on this point that most of the litigation focuses.

58. *Summit Tech., Inc. v. Nidek Co.*, 435 F.3d 1371, 1375 (Fed. Cir. 2006).

59. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 166 (3d Cir. 2012) (quoting *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 428 (7th Cir. 2000)).

60. *Cefalu*, 211 F.3d at 428.

61. 28 U.S.C. § 1920(4).

62. Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110–406, 122 Stat. 4291 (2008).

63. *Race Tires Am.*, 674 F.3d at 166.

64. 28 U.S.C. § 1920(4).

65. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 504 (Philip B. Gove ed., 1971).

To date, no case has centered on what is meant by the phrase “making copies of materials” in regards to § 1920(4). Therefore, it is best to follow regular statutory construction rules. The Supreme Court states that “[w]hen terms used in a statute are undefined, we give them their ordinary meaning.”⁶⁶ The ordinary meaning of “making copies of any materials” could be viewed in either a broad or narrow way. Broadly, the phrase would include everything necessary to making the copy. Narrowly, the phrase would allow recovery for only a limited part of the production. For example, a narrow definition would be the equivalent of printing a twenty-page document at Kinko’s using the self-service copiers at five cents per page. The broad definition would be the equivalent of asking the Kinko’s employee to copy the twenty-page document and being charged one dollar per page. Either definition is a viable option from the ordinary meaning of the phrase since both include “the costs of making copies.”⁶⁷

Some state statutes using the phrase “making copies of materials” allow for the broad understanding. For example, a Nebraska statute allows for recovery of the cost of making copies of electronic data where “the actual cost of making the copies available shall include the reasonably calculated actual cost of the computer run time, any necessary analysis and programming, and the production of the report in the form furnished to the requester.”⁶⁸ This statute offers a broad understanding of the phrase that includes the labor involved as well as the physical resources.

In contrast, a New Jersey statute allows for the recovery of costs to equal “the institution’s usual rate charged to its customers for reproducing copies, including copies produced by reader-printer reproduction processes. Photographs, films, and other materials shall be reimbursed at actual cost.”⁶⁹ Additionally, one court stated, “photocopy expenses are taxable only ‘if the costs were reasonably necessary to the maintenance of the action.’”⁷⁰ The court would not allow the entire charge of the items photocopied to be awarded since it was clear that not all of the documents met the standard noted. Because the party seeking the award had not kept clear records (and it would seem impractical to do so) the court awarded them 50% of the costs incurred as “a somewhat crude method of accounting for non-necessary copies” because it was close enough and they reviewed the district court only for abuse of discretion.⁷¹

66. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

67. 28 U.S.C. § 1920(4).

68. NEB. REV. STAT. § 84-712(3)(b)(iii) (2000).

69. N.J. STAT. ANN. § 17:16S-1(b)(2) (1977).

70. *Summit Tech., Inc. v. Nidek Co.*, 435 F.3d 1371, 1378 (Fed. Cir. 2006) (quoting *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 100 (1st Cir. 1990)).

71. *Id.* at 1378.

Also, in a local rule similarly worded to § 1920(4), the Tenth Circuit outlined the costs of making “necessary copies of briefs, appendices, or other records.”⁷² The rule states that such costs “are taxable at the actual cost, but no more than 50 cents per page.”⁷³ Since the maximum allowance stands at fifty cents per page, the implication from the wording of the rule is the copies of the materials would only be the low cost of printing or copying the materials. Instead of including everything that necessarily went into the copy, only the limited cost of producing the copies is included. Thus, the three examples illustrate a narrow way of viewing the phrase that does not include the labor involved in making the copies.

A. *The Race Tires America Approach to § 1920(4)*

In determining what Congress deems to be part of the “making of copies” in § 1920(4), the *Race Tires America* court presented five broad categories.⁷⁴ The five categories are as follows: collecting and preserving ESI; processing and indexing ESI; keyword searching of ESI for responsive and privileged documents; converting files to an “easily-searchable file format”;⁷⁵ and scanning paper documents to create electronic images.⁷⁶ By dealing with these, the court outlined the possible categories available under a broad definition of § 1920(4). But holding to a narrow understanding of the taxable costs available to it, the court only allowed recovery of the final two categories listed above.

First, the court allowed for the costs of converting files to an easily searchable format. This replicates the general way that traditional discovery used § 1920(4). In regards to ESI, if both parties agree to produce documents in a specific format, whatever format chosen should be allowed as a reasonable copy of the material. Thus, changing a document into a TIFF format is deemed to be “making copies”⁷⁷ by every court that has examined the issue.⁷⁸ This is because most courts look to an analogous situation between making a paper copy and the copy of electronic material. Changing the e-discovery material into a different format would be the equivalent of making photocopies or carbon copies of the material. Thus, this type of file conversion should be allowed under § 1920(4) as it clearly has an analogous action in traditional discovery.

72. 10TH CIR. R. 39.1.

73. *Id.*

74. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 167 (3d Cir. 2012).

75. *Johnson v. Allstate Ins. Co.*, No. 07-cv-0781-SCW, 2012 WL 4936598, at *4 (S.D. Ill. Oct. 16, 2012).

76. *Race Tires America*, 674 F.3d 158.

77. 28 U.S.C. § 1920(4) (2012).

78. *See Johnson*, No. 07-cv-0781-SCW, 2012 WL 4936598, at *4.

The second part of e-discovery that the *Race Tires America* court allowed recovery for was the scanning of paper documents to create electronic images.⁷⁹ The court was able to find a clear analogy to making paper copies. Scanning a paper document in order to create an electronic image is simply altering the format of the discoverable material to adhere to the request of the opposing party. Alternatively, there would have been no question if the opposing party had requested paper copies of all the material that was scanned.⁸⁰ Nor, it seems, would there have been an issue with the party asking for hard copies of these items if they were in a digital format originally.⁸¹

According to the *Race Tires America* court, the key takeaway for litigants going forward is that the basic principle of § 1920(4) is still intact. The expansion with the change in phrasing from “paper copies” to “making copies of any material” has made the format of the end copy moot. If the item is duplicated for the opposing party then the duplication of that item is a recoverable tax cost.

The remaining three categories outlined by the *Race Tires America* court were not allowed to be recovered. First, the collecting and preserving of ESI could be considered part of the “costs of making copies” § 1920(4). This is due to the requirements inherent in e-discovery. One of the major differences between traditional paper discovery and e-discovery is the opportunity for the destruction of material in the course of ordinary business. Electronically stored data is constantly being overwritten in order to make room for more information to be stored. Additionally, there can be automatic deletion of the electronically stored information. In contrast, paper records are stored and disposed of mechanically. When discovery requires information to be retained that would be discarded, it is much easier to stop the destruction of paper documents. Electronic discovery requires experts to alter the automated deletion.

Additionally, the collection of the data presents two similar problems. Traditional paper records are kept in storage, and the discovery is linked to particular pieces of paper. In contrast, electronic information is constantly being overwritten. This presents the problem of recovery and collection since the old data must be recovered underneath the newer records. Rather than appointing junior associates and paralegals to wade through documents, the collection of e-discovery often requires experts in technology to find the data and recover it.

Finally, litigants face issues in collection of e-discovery versus paper documents when defining what the proper item to recover is. In traditional

79. *Race Tires Am.*, 674 F.3d at 166.

80. *Id.*

81. *Id.*

paper discovery, the file requested by the opposing party corresponded to a particular document, or group of documents, that the producing party retains in a known file. Typically, the final document would be the only version to appear in storage. In contrast, e-discovery generally allows for the recovery of many, sometimes thousands, of copies of the same document. With each collaboration and save of the document, a file is created that could be recovered as part of discoverable information. Therefore, determining which documents are the necessary ones presents unique requirements for collection.

The court in *Race Tires* did not allow for recovery of collecting and preserving ESI because it was not close enough to what it considered the “costs of making copies.”⁸² Rather, it was a step in the process of actually copying the material. Such a holding appears to give no added grounds to what was allowed under the previous statutory instruction.⁸³ Yet, the change in phrase of the 2008 amendment § 1920(4) indicates some type of expansion to the statute through the inclusion of the word “making.” In an attempt to bring in e-discovery costs, Congress did not simply change “paper copies” to copies of any material. Instead, they inserted the possibility of including additional costs that encompass costs associated with the copying of the material. As stated above, the issue then falls to where the line should be drawn in determining what constitutes those costs that are for “making copies” and what are costs incidental to doing litigation in the digital age.

Processing and indexing ESI concerns the cataloguing of the e-discovery for use in litigation. In order for e-discovery to be more efficient than traditional paper discovery, the discoverable information must be ordered in such a way as to allow a searcher to quickly and accurately find the information needed. This process must be done by someone with knowledge in the electronic field beyond the typical lawyer, such as IT professionals. Again, the court in *Race Tires* did not allow recovery of these costs. The reasoning was the same as that given above, processing and indexing ESI does not seem to fall within the traditional meaning of copying.

Finally, part of a broader interpretation of “the costs of making copies” could include searching for “responsive and privileged documents.”⁸⁴ As the phrase sounds, this entails the effort required through keyword searching by litigants to either provide relevant documents or exclude documents based on a claimed privileged. Such costs were not included

82. 28 U.S.C. § 1920(4).

83. See REPORT OF THE PROCEEDINGS, *supra* note 28 at 10.

84. *Race Tires Am.*, 674 F.3d at 167.

within the costs by the court in *Race Tires* because they were efforts done in order to prepare to make copies rather than make copies themselves.⁸⁵

The narrow understanding provided by the court in *Race Tires America* offers a better alternative because it draws a clear line in the area of e-discovery. The line drawn is the same as previous versions of § 1920(4). The change in language for the newest amendment clearly allows e-discovery costs to be recovered. But only those items that are the electronic version of traditional copying costs are allowed. By limiting the costs to the narrower definition, the awards given are much smaller, which is in keeping with the scope and history of the statute itself.⁸⁶

IV. NARROWLY INTERPRETING § 1920(4) CORRESPONDS TO RECENT SUPREME COURT DECISIONS, THE HISTORY OF THE STATUTE, AND THE LANGUAGE OF THE STATUTE ITSELF

The Supreme Court has noted several concerns in evaluating whether something is included within § 1920. Emphasis is placed on the fact that determining fees “should not result in a second major litigation.”⁸⁷ Instead, the “essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection.”⁸⁸ Therefore, it would appear that the Court is looking for simple calculations and simple results based on the nature of the Cost Act.

Further, the recent Supreme Court decision regarding the continuing interpretation of FRCP 54(d) and § 1920(6) in regards to “compensation of interpreters”⁸⁹ shows a possible trend towards a narrow interpretation of what is encompassed in the court’s taxable cost. The Court “rejected the view that ‘the discretion granted by Rule 54(d) is a separate source of power to tax as costs expenses not enumerated in § 1920.’”⁹⁰ This reinforces the boundaries on recovery in *Crawford Fitting* by showing that § 1920 defines the term ‘costs’ as used in Rule 54(d).⁹¹

At issue in *Taniguchi* was whether the term “interpreter” included someone who translated written communications.⁹² Though several definitions of “interpreter” could include a broader interpretation that encompasses written communication, this did not establish that the word is

85. *Id.* at 169.

86. *See supra* Part II.

87. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

88. *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011).

89. 28 U.S.C. § 1920(6) (2012).

90. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2001 (2012) (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987)).

91. *Id.*

92. *Id.* at 2000.

ordinarily understood that way.⁹³ The definition opted for in interpreting the statute was that it requires oral translation, a narrow definition.⁹⁴ Based on the traditional and ordinary meaning of the term, the Court held that “compensation of interpreters” is limited to the cost of oral translation and does not include the cost of document translation.”⁹⁵

The Court’s reasoning was based mainly on the “narrow scope of taxable costs [that] . . . are limited to relatively minor, incidental expenses.”⁹⁶ This point is made in regards to the difference between an interpreter of oral communication and a translator of written communication. Such costs represent a fraction of the overall expenses for litigants.⁹⁷ Since such costs are limited by statute and necessarily modest in scope, the ordinary meaning of the terms should be interpreted accordingly.⁹⁸

Finally, the Court showed concern about costs being “too burdensome and possibly unfair, especially for litigants with limited means.”⁹⁹ The focus on policy concerns is important since § 1920 is designed to handle similar concerns. The aim of the statute is to allow recovery of costs to winning litigants. It is not meant to be used as a stick that deters litigants from suits. Nor is it meant to completely reimburse the producing party. Instead, it is meant to allow parties to request necessary discovery for which they bear the possible burden of reimbursement.

Other recent Supreme Court decisions have reached similar conclusions. First, the Court in *Fox v. Vice* awarded attorney’s fees to the defendant but only in regards to the frivolous claims.¹⁰⁰ This is the somewhat middle ground between awarding all fees regardless of the actions of the losing party and the requirement that the entire suit be frivolous in order to recover costs. The Court determined that a proper equitable balance was struck between the needs of the party in defending the suit as well as the possibility of crushing costs to the losing party. Thus, attorney’s fees were awarded only in regards to the frivolous claims; the fees for non-frivolous claims were not recovered.¹⁰¹ Allowing a more expansive option would provide windfalls to some defendants because the defendant would be able to recover additional funds since the suit included

93. *Id.* at 2003.

94. *Id.* at 2004.

95. *Id.*

96. *Id.* at 2006

97. *Id.*

98. *Id.*

99. *Id.*

100. *Fox v. Vice*, 131 S. Ct. 2205, 2211 (2011).

101. *Id.* at 2218.

frivolous claims.¹⁰² The holding connotes an inherent limit in what is recoverable under similar cost shifting scenarios.

Second, in *Astue v. Ratliff*, the Court held that the recovering of attorney fees through statute was subject to a prior debt of the litigant because the award was to the prevailing party under 28 U.S.C. § 2412(d). The transitive verb “award” that could be of use in working through the “making” idea has a specific meaning in the litigation context.¹⁰³ Further, the plain meaning of the word “award” in subsection (d)(1)(A) is that the court shall “give or assign by . . . judicial determination to the ‘prevailing party’ attorney’s fees in the amount sought and substantiated under, *inter alia*, subsection (d)(1)(B).”¹⁰⁴ This shows the strong equitable sense that the Court opts for. Simply having a meaning readily available among the possible definitions of a term does not mean that the Court will allow them. Instead, concern is given to the burden on future litigants who could be dissuaded out of fear of such costs.

Finally, in *Arlington v. Murphy*, the Court determined that expert fees were not part of the awardable attorney’s fee.¹⁰⁵ Because the awarding power in question existed under the spending power, the Court was required to ask if a school official would understand that they were going to have to pay for these experts.¹⁰⁶ Further, the use of the term “costs” does not generally include expert fees.¹⁰⁷ Using the term “costs” rather than “expenses” “strongly suggests that §1415(i)(3)(B) was not meant to be an open-ended provision.”¹⁰⁸ As shown above, this implies the inherent limitation on such statutes as § 1920(4).¹⁰⁹

Taking the recent Supreme Court cases as a whole, the interpretation of statutes awarding various costs to prevailing parties are construed in a limited fashion in order to preserve the idea of an open court—a hallmark of the American justice system.

A second point for opting for a narrow interpretation of the § 1920(4) is based on the history of use. Prior to the digital age, the costs rejected by the court in *Race Tires* would not have been taxable.¹¹⁰ Thus, prior to the amendment in 2008, § 1920 was understood to permit “only . . . the physical preparation and duplication of documents, *not* the intellectual

102. *Id.* at 2215.

103. *Astrue v. Ratliff*, 130 S. Ct. 2521, 2526 (2010) (quoting BLACK’S LAW DICTIONARY 125 (5th ed.1979)).

104. *Id.*

105. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006).

106. *Id.* at 298.

107. *Id.* at 297.

108. *Id.*

109. *See supra* Part II.

110. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 169 (3d Cir. 2012).

effort involved in their production.”¹¹¹ With the change in wording, Congress meant to expand the viable mediums to recover costs, not the efforts included in producing them.

Finally, in regards to the court not being heavily involved in the determination of costs, parties have the ability to handle this through contracts.¹¹² Rather than relying on the rough and tumble legal system to provide division of costs, litigants involved in cases with cost-heavy e-discovery can determine how they wish the costs to be allocated. Such agreements are generally given great deference by courts.¹¹³

*A. Courts Opting for a Broader Interpretation Do Not Adhere to the
General Traditional Understanding of § 1920 and Its Policy
Rationales*

In contrast to the narrow interpretation expressed above, some courts have opted for a broader understanding of what is taxable in regards to e-discovery. The taxable costs include the costs of producing the copies requested by the opposing party as part of the copying costs. Courts that have opted for a broader understanding of costs rely on the fact that generally the copying required in e-discovery requires services that lawyers are not trained or capable of providing.¹¹⁴ Further, the collection, processing, and creation of the e-discovery documents, is “the 21st Century equivalent of making copies.”¹¹⁵ Due to the necessary connection with these items, recovery of discovery costs should include the additional costs of converting, processing, and extracting the data required for e-discovery.¹¹⁶

Second, the use of specialized companies in the preparation of e-discovery can save both sides money.¹¹⁷ This is possible through the pooling of resources by both parties. Such services may be necessary in extensive electronic discovery.¹¹⁸ Due to the increasing complexity of cases involving massive amounts of discoverable information, using such resources allows discovery to be more efficient and cost-effective.¹¹⁹ Further, using electronic discovery in such instances “allows parties to

111. *Id.* (emphasis added) (quoting *Romero v. City of Pomona*, 883 F.2d 1418, 1428 (9th Cir. 1989)).

112. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

113. *See id.*

114. *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).

115. *Id.*

116. *Comrie v. IPSCO Inc.*, No. 08-CV-3060, 2010 WL 5014380 (N.D. Ill. Dec. 1, 2010).

117. *See CBT Flint Partners*, 676 F. Supp. 2d at 1381.

118. *Id.*

119. *In re Aspartame Antitrust Litig.*, 817 F. Supp. 2d 608, 615 (E.D. Pa. 2011).

‘save costs associated with manually producing, handling, storing, and delivering thousands (and often millions) of pages of hard-copy documents.’”¹²⁰ Thus, the use of such companies is part of the overall goal of making discovery possible for more litigants because it reduces the costs of litigation.

Additionally, as the amount of material available through e-discovery increases, a premium is placed on the ability to decipher what is actually necessary for discovery. The use of a third-party vendor to cull out unnecessary documents can drastically reduce the size of responsive documents. Thus, courts opting for broader awards using § 1920(4) allow for costs like de-duplication, keyword searches, data extraction, and processing because all are part of the process in determining what should be produced in regards to discovery requests.¹²¹ Also, since “technical support [is] necessary to complete these tasks,” the court awarded those additional costs.¹²² The assumption is simple—because all of the previously mentioned processes were part of “making copies of materials” as well as being able to reduce the final costs of litigation, the winning party should be able to recover them.

Similar to a narrow reading of § 1920(4) in regards to e-discovery recovery, a broad reading promotes an equitable resolution to cases. The section states that “any court of the United States *may* tax as costs” the list of available options.¹²³ Based on the optional nature of §1920, courts are allowed deference in choosing whether or not to administer the results. Allowing for the possibility of a larger e-discovery recovery would be better supported through the broader reading of the section. Courts would then have greater ability to allow for equitable recovery based on the situational need. Additionally, the enormous burden and expense of electronic discovery are well known. Taxing particular costs encourages litigants to use restraint in discovery because both parties could bear the cost of their requested production. By allowing this broader reading, courts would be able to better curtail possibly burdensome e-discovery costs.

The major issues that the courts opting for a broader interpretation of recoverable costs under § 1920(4) encounter are how to link the expansion of costs with the general understanding of taxable costs and where to stop the allowing of costs associated with the copying of material. Few cases opting for a broader interpretation attempted to distinguish the costs awarded. Instead, most courts determined that the costs should be

120. *Id.* (quoting *United States Bankr. v. Dorel Indus.*, No. A-08-CA-354, 2010 WL 3064007, at *4 (W.D. Tex. Aug. 2, 2010)).

121. *Id.*

122. *Id.*

123. 28 U.S.C. § 1920 (2012) (emphasis added).

recovered and that the amount was proper based on the nature of the case.¹²⁴ There is simply little evidence showing how the courts link this broad interpretation to a historically narrow statute.

The second major issue with a broad interpretation of § 1920(4) is drawing a line at a specific point when determining what is not part of “the cost[] making copies of any materials.”¹²⁵ It is possible to avoid the issue by claiming that the issue is fact sensitive. Yet, this option gets courts no closer to a unified principle of costs which is what the goal of the Cost Act has always been.¹²⁶

Other courts have sought to lay out boundaries. For example, the court in *In re Aspartame* decided to draw the line at a specific e-discovery program.¹²⁷ The reason the court gave was it “exceed[ed] necessary keyword search and filtering functions.”¹²⁸ The issue with this type of ruling is that the technology considered necessary today would have been considered unnecessary five years ago and will be obsolete five years in the future. Therefore, the holding of the court does not allow for future courts to be able to determine what is necessary and what is not. This brings the court back to the same issue as the courts opting for fact sensitive analysis shown above to be antithetical to the nature of the Cost Act.

The Court’s recent decision in *Taniguchi* shows a tendency to narrowly limit statutes dealing with litigation recovery costs. As noted above, the Court chose a narrow interpretation of what is included within the word “interpreters.”¹²⁹ Since the history of the Cost Act has been towards narrow compensation, this likely points to a continued narrow reading of § 1920(4) and possible e-discovery costs. Based upon the recent Court’s decisions, the plain meaning of the statute, and the history of the Cost Act, courts should adopt the narrow definition outlined in *Race Tires America*.

Even with a narrow reading of § 1920(4) in regards to e-discovery, greater importance needs to be put on the Rule 26(f) conference. If e-discovery is likely to become an issue during litigation, such conferences should include a detailed understanding of how e-discovery will proceed. Though issues may arise in regards e-discovery, it is clear a detailed outline in the beginning of the litigation may stop major issues from developing.

124. See *Summit Tech., Inc. v. Nidek Co. Ltd.*, 435 F.3d 1371, 1381 (Fed. Cir. 2006).

125. 28 U.S.C. § 1920 (4).

126. See WRIGHT, *supra* note 20 at 4.

127. See *In re Aspartame Antitrust Litig.*, 817 F. Supp. 2d 608, 616 (E.D. Pa. 2011).

128. *Id.*

129. See *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997 (2012).

B. Litigants Can Maximize E-Discovery Recoverability Through Contracting and Detailing E-Discovery Production

Even with a narrow reading of § 1920(4), parties are able to contract broader costs. *In re Ricoh* presents the option decided by the parties of using a particular format. Rather than opting for hard copy production or conversion to TIFF, the losing party required all e-mails be produced in native format using a particular company.¹³⁰ The court held that this reproduction would fall within § 1920(4) regardless of the contract.¹³¹ The court further notes, “[*Crawford*] does not set maximum costs around which private parties may not contract.’ If parties can exceed the allowable costs under section 1920 by contract, we see no reason why in light of *Crawford* they cannot likewise limit the allowable costs under section 1920 by contract.”¹³² Because of this, the court in *In re Ricoh* altered the amount recoverable holding that the contract controlled and the costs must be split rather than the recovering party gaining back all costs. In *Summit*, the court changed the award under § 1920(4) in regards to the recovering party’s “internal copy costs” by over half to account, in part, for the “agreed-upon rate of 15 cents per page” copying cost contracted for by the parties.¹³³

It should be noted that the decision in *In re Ricoh* of honoring the contract was likely aided by the fact that the losing part was the one who required the more expensive option. Had it been the recovering party’s decision, it is likely an opportunity for the court to reduce the amount to be recovered to something more reasonable. In such a case, the court could choose a cost equal to converting the files to a TIFF format, or some other readily used format, in order to achieve an equitable solution within § 1920(4).

Regardless of whether or not the parties choose to contract or follow the narrow interpretation of § 1920(4), litigants wishing to recover costs should keep detailed records. This is because “[t]he burden is on the prevailing party to establish the amount of compensable costs and expenses to which they are entitled.”¹³⁴ Thus, for a party to recover costs under § 1920(4), documentation must show the amount that should be recovered.

Additionally, a list of costs and expenses must be adequately detailed, identifying the purpose of each expenditure.¹³⁵ It is not necessary to track

130. *In re Ricoh Co., Ltd. Patent Litig.*, 661 F.3d 1361, 1364–65 (Fed. Cir. 2011).

131. *Id.* at 1365.

132. *Id.* at 1366 (quoting *Monsanto Co. v. David*, 516 F.3d 1009, 1017 (Fed. Cir. 2008)).

133. *Summit Tech., Inc. v. Nidek Co.*, 435 F.3d 1371, 1379 (Fed. Cir. 2006).

134. *In re Ricoh*, 661 F.3d at 1367 (alteration in original) (quoting *English v. Colo. Dep’t of Corr.*, 248 F.3d 1002, 1013 (10th Cir. 2001)).

135. *English v. Colo. Dep’t of Corr.*, 248 F.3d 1002, 1013 (10th Cir. 2001).

and identify each page of discovery and its relevance to litigation.¹³⁶ But generic references such as “transcript,” “publication,” and “document production” are inadequate descriptions for deciding cost recoverability.¹³⁷ Also, it is not enough to have someone testify as to a rough estimate of what the costs were.¹³⁸ Finally, no serious effort at precision will lead the court to determine that these costs should not be awarded.¹³⁹ This puts the burden in the proper place because the party wishing to recover has the ability to protect the records needed to recover.

Instead, “a bill of costs must represent a calculation that is reasonably accurate under the circumstances.”¹⁴⁰ The court requires documents to look through. The proper filing format should separate costs of production into roughly similar categories as those described and followed in *Race Tires America*. Though it requires more thorough analysis, such differentiation will aid in cost determination and can be easily implemented at the beginning of litigation. Thus, parties seeking recovery under § 1920(4) should adequately label and categorize costs of litigation production.

V. CONCLUSION

In conclusion, the narrow interpretation stated in the recent *Race Tires America* opinion offers the best analysis of § 1920(4).¹⁴¹ Historically, the Cost Act has been interpreted narrowly to award costs and fees that pertain to specific items necessary in litigation. The current version of § 1920(4) is no exception. Rather than allowing recovery of most things pertaining to e-discovery cost, the statute should be read in such a way as to limit the costs recovered. The costs should be limited to those portions of e-discovery that can be readily analogized to traditional copying of paper. Therefore, processes such as the conversion of electronic information into an easily-searchable format and the scanning of images to create electronic documents should be the limits of what is allowed to be recovered under § 1920(4) in regards to “the costs of making copies of any materials.”¹⁴²

*Preston Register**

136. *Summit Tech., Inc.*, 435 F.3d at 1378.

137. *Fabi Constr. Co. v. Sec’y of Labor*, 541 F.3d 407, 414 (D.C. Cir. 2008).

138. *Summit Tech., Inc.*, 435 F.3d at 1379.

139. *Id.*

140. *Id.*

141. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012).

142. 28 U.S.C. § 1920(4) (2012).

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