Shifting the E-Discovery Solution: Why *Taniguchi* Necessitates a Decline in E-Discovery Court Costs

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Abstract

The amount of electronically stored information in the United States doubles every 18–24 months, and 90 percent of U.S. corporations are currently engaged in some kind of litigation. These factors, combined with the new way we store our information, have turned discovery into a complicated and expensive process.

In response, parties have attempted to pass these costs off to the non-prevailing party as court costs under 28 U.S.C § 1920 ("Section 1920"), which enumerates six items that can be awarded as court costs. The U.S. Courts of Appeals are split regarding the interpretation of Section 1920. If the statute is interpreted broadly, a variety of e-discovery tasks, ranging from hiring outside counsel to creating litigation-related databases, can be properly awarded as costs. If the statute is read more narrowly, however, courts will limit the type of e-discovery costs that can be awarded under the language of the statute, which will reduce e-discovery court costs.

This Comment will describe the current state of the circuit split and discuss the various approaches to interpreting Section 1920. This Comment will then describe the *Taniguchi v. Kan Pacific Saipan, Ltd.* case in detail and analyze how the case's dicta might affect the e-discovery court costs debate. Finally, this Comment will propose a judicial test for interpreting Section 1920 in a uniform manner. This Comment ultimately urges the U.S. Supreme Court to intervene and mandate such a test.

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I. INTRODUCTION

In England, the loser pays.[1] At the end of English litigation, the non-prevailing party is responsible for all of the prevailing party's litigation-related expenses and fees.[2] The United States, however, follows the "American Rule," whereby each party is generally responsible for its own costs.[3] Exceptions to the "American Rule"[4] are found in 28 U.S.C. § 1920[5] ("Section 1920"), which enumerates six types of costs that a court can require a non-prevailing party to pay.[6]

1. *See* Herbert M. Kritzer, *"Loser Pays" Doesn't*, LEGAL AFFAIRS (Nov.–Dec. 2005), http://bit.ly/VDVym1. The rationale for England's system is to encourage fairness and efficiency, and to discourage plaintiffs from filing frivolous lawsuits. *Id.*

2. *See id.* Canada also uses this model. *Id.*

3. *See id.*

4. *See* BLACK'S LAW DICTIONARY 98 (9th ed. 2009) (defining the American Rule as "[t]he general policy that all litigants, even the prevailing one, must bear their own attorney's fees").

5. 28 U.S.C. § 1920 (2006 & Supp. II 2008).

6. *See id.* The statute includes:

> (1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Id. Attorney fees may also be awarded in certain situations, although these costs are not included in Section 1920. *See*, *e.g.*, 42 U.S.C. § 1988(b)–(c) (2006) (awarding attorney and expert fees in civil rights cases).

Requiring the non-prevailing party to pay fees to the prevailing party has become increasingly desirable, especially because American court costs have increased astronomically since 2000.[7] In addition to negligible Section 1920 costs typically awarded to the prevailing party[8] at the end of the litigation—costs such as clerk fees and printing fees, among other things—U.S. federal courts are now awarding costs for various e-discovery processes.[9] The United States' court costs model is designed to encourage settlements and allow parties with limited resources to file lawsuits, even when they are unsure about their chances of prevailing.[10] But by awarding costs beyond those contemplated by Section 1920,[11] courts have disrupted a common expectation in litigation and have turned their backs on a major tenant of our legal system.

The court costs problem begins with discovery, a familiar stage of litigation in which parties exchange information about the lawsuit at hand.[12] Electronic discovery, or e-discovery, is a recent term coined to express the modern reality that the majority of information used in discovery is stored electronically.[13] With the rise of technology, companies and individuals alike have used e-mail, hard drives, databases, and clouds to store their important documents.[14] When litigation looms, the electronically stored information (ESI) must be sifted through, sorted, and provided to the opposing party.[15] Discovery production has changed

7. *See*, *e.g.*, Race Tires Am., Inc. v. Hoosier Racing Tire Corp. (*Race Tires I*), No. 2:07-cv-1294, 2011 WL 1748620, at *3, *12 (W.D. Pa. May 6, 2011) (awarding over $367,000 in e-discovery costs alone), *aff'd in part*, *vacated in part*, 674 F.3d 158 (3d Cir. 2012).

8. *See* BLACK'S LAW DICTIONARY, *supra* note 4, at 98 (defining the "American Rule" and by its inclusion suggesting that awarding little or no costs to either party is standard practice).

9. *See*, *e.g.*, Race Tires Am., Inc. v. Hoosier Racing Tire Corp. (*Race Tires II*), 674 F.3d 158, 171 (3d Cir. 2012) (finding that file conversion during e-discovery applies under Section 1920(4)), *cert. denied*, 133 S. Ct. 233 (2012); BDT Products, Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 420 (6th Cir. 2005) (finding that electronic imaging during e-discovery applies under Section 1920(4)), *abrogated by* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).

10. *See* W. Russell Taber III, *Bending the American Rule: 'Pullman' Decision Allows Third-Party Litigation Expenses in Tennessee*, TENN. B.J., Aug. 2010, at 10, 10–11, *available at* http://bit.ly/18BpxRi.

11. *See Race Tires I*, 2011 WL 1748620, at *4 (noting that "the court has wide latitude to award costs, *so long as* the costs are enumerated in 28 U.S.C. § 1920") (emphasis added).

12. *See* BLACK'S LAW DICTIONARY, *supra* note 4, at 533 (defining discovery as "compulsory disclosure, at a party's request, of information that relates to the litigation").

13. *See The Basics: What Is E-Discovery?*, COMPLETE DISCOVERY SOURCE, http://bit.ly/Xr8L1m (last visited Sept. 3, 2013).

14. *See id.*

15. *See id.*

from pulling files from a cabinet[16] to hiring outside counsel[17] and experts[18] to use advanced search technology.[19]

The amount of ESI in the United States doubles every 18–24 months,[20] and 90 percent of U.S. corporations are currently engaged in some kind of litigation.[21] These factors, combined with the new way we store our information,[22] have turned discovery into a complicated and expensive process.[23]

To manage the large costs associated with e-discovery, parties can attempt to shift or limit their expenses.[24] One method of shifting e-discovery costs is through Section 1920.[25] Recall that Section 1920 only allows courts to "tax"[26] six kinds of expenses as court costs.[27] Federal

16. *See Race Tires I*, 2011 WL 1748620, at *6 (suggesting that "[t]he terms ['exemplification' and ['copying' originated in and were developed in the world of paper") (quoting Kellogg Brown & Root Int'l, Inc. v. Altanmia Commercial Mktg. Co., No. H-07-2684, 2009 WL 1457632, at *4 (S.D. Tex. May 26, 2009))).

17. *See* Jeff Blumenthal, *Drinker Biddle Law Firm Starts Up E-Discovery Subsidiary*, PHILA. BUS. J. (Oct. 12, 2012, 6:00 AM), http://bit.ly/YadNA4 (noting that "[m]ost large law firms have e-discovery practices"). This raises the question: whether hiring outside counsel is necessary to effectively engage in e-discovery. *See* Ralph Losey, *Can High School Students Review E-Discovery Documents?*, LAW TECH. NEWS (July 23, 2012), http://bit.ly/Yb82Sv (describing an experiment in which high school students performed work comparable to that of professional e-discovery review services).

18. *See E-Discovery Is Big Business*, WIRED (Jan. 29, 2006), http://bit.ly/K9cqj5 (noting that the e-discovery market is worth close to $2 billion and growing at an annual rate of 35 percent).

19. *See*, *e.g.*, *Revolutionary Predictive Coding*, RECOMMIND, http://bit.ly/13JQEt6 (last visited Sept. 3, 2013) (offering services of predictive coding, a process mixing human review with advanced software).

20. *See* Ben Kerschberg, *The Demise of Electronic Discovery's Per-Gigabyte Price Model*, FORBES (Sept. 12, 2011, 9:36 AM), http://onforb.es/qDlgfF.

21. *See E-Discovery Is Big Business*, *supra* note 18.

22. *See id.* (crediting the increase of e-discovery to the "inexpensive abundance of data storage").

23. *See*, *e.g.*, *Race Tires I*, No. 2:07-cv-1294, 2011 WL 1748620, at *3, *12 (W.D. Pa. May 6, 2011) (taxing over $360,000 in e-discovery costs alone), *aff'd in part*, *vacated in part*, 674 F.3d 158 (3d Cir. 2012).

24. *See*, *e.g.*, FED. R. CIV. P. 26(b)(2)(B) (allowing a party to not produce ESI that is "not reasonably accessible because of undue burden or cost"); *id.* 26(c)(1) (providing protective orders to exclude discovery that would lead to "annoyance, embarrassment, oppression, or *undue burden or expense*") (emphasis added); Kerschberg, *supra* note 20 (suggesting that new pricing models could drive down e-discovery costs). Methods of shifting or managing e-discovery costs other than through Section 1920 are outside the scope of this Comment.

25. 28 U.S.C. § 1920 (2006 & Supp. II 2008).

26. The statute and this Comment use the legal term "tax," meaning the process of examining and assessing the costs of a case. *See* BLACK'S LAW DICTIONARY, *supra* note 4, at 1598 (defining taxation of costs as "the process of fixing the amount of litigation-related expenses that a prevailing party is entitled to be awarded," not the common definition of paying the Internal Revenue Service).

27. 28 U.S.C. § 1920.

Rule of Civil Procedure 54(d)(1)[28] ("Rule 54") allows courts to award these court costs to the prevailing party.[29]

Together, Section 1920 and Rule 54 create a method for shifting expenses and, more importantly, awarding e-discovery costs to the opposing party. The prevailing party submits a bill of costs to the court,[30] and the judge will decide which expenses are allowable as costs under Section 1920.[31] Then, the non-prevailing party is responsible for the taxed costs.[32]

Shifting costs using this method may be effective for parties because courts have generally interpreted Section 1920(4) broadly to include certain e-discovery tasks.[33] The U.S. Courts of Appeals, however, are split over how far judges should go in applying Section 1920(4) to e-discovery costs. The Sixth and Seventh Circuits interpret the statute broadly,[34] while the U.S. Court of Appeals for the Third Circuit interprets it narrowly.[35] There are many complicated tasks associated with e-discovery[36] and not all of them should be awarded as court costs under the language of Section 1920. As the court in *In re Ricoh Company, Patent Litigation*[37] ("*Ricoh*") aptly noted, "whether a

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

29. *See id.* ("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.").

30. *See* 28 U.S.C. § 1920 (instructing that "[a] bill of costs shall be filed in the case").

31. *See id.* (instructing that "upon allowance, [a bill of costs shall be] included in the judgment or decree").

32. *See* FED. R. CIV. P. 54(d)(1) ("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."). Section 1920 is a statute that "provides otherwise."

33. *See In re* Ricoh Co., Patent Litig., 661 F.3d 1361, 1365 (Fed. Cir. 2011) ("In the era of electronic discovery, courts have held that electronic production can constitute 'exemplification' or 'making copies' under section 1920(4)."). *See*, *e.g.*, *Race Tires II*, 674 F.3d 158, 171 (3d Cir. 2012) (finding that file conversion during e-discovery applies under Section 1920(4)), *cert. denied*, 133 S. Ct. 233 (2012); BDT Products, Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 420 (6th Cir. 2005) (finding that electronic scanning and imaging during e-discovery applies under Section 1920(4)), *abrogated by* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).

34. *See BDT Products*, 405 F.3d at 420; Cefalu v. Vill. of Elk Grove, 211 F.3d 416, 429 (7th Cir. 2000).

35. *See Race Tires II*, 674 F.3d at 171. The Eleventh Circuit has applied Section 1920(4) narrowly, but has not ruled directly on the issue. *See* Arcadian Fertilizer, L.P. v. MPW Indus. Servs., Inc., 249 F.3d 1293, 1297 (11th Cir. 2001) (using a narrow definition of "exemplification").

36. *See*, *e.g.*, *In re* Online DVD Rental Antitrust Litig., No. M 09-2029 PJH, 2012 WL 1414111, at *1 (N.D. Cal. Apr. 20, 2012) (demonstrating the use of TIFF, or Tagged Image File Format, conversions in e-discovery).

37. *In re* Ricoh Co., Patent Litig., 661 F.3d 1361 (Fed. Cir. 2011).

particular expense falls within the purview of Section 1920, and thus must be taxed in the first place, is an issue of statutory interpretation."[38]

Interpreting Section 1920 in the context of e-discovery costs is especially difficult because the U.S. Supreme Court has provided little guidance on the issue.[39] The U.S. Supreme Court has not ruled directly on applying Section 1920(4) to e-discovery costs, but in May 2012, the Court endorsed a narrow reading of another portion of Section 1920 and the statute as a whole in *Taniguchi v. Kan Pacific Saipan, Ltd*.[40]

Using Section 1920 to limit e-discovery costs may sound like a perfect solution to the problem of burdensome e-discovery expenses, at least for prevailing parties. The reality, however, is that courts have gone too far in expanding Section 1920(4) to encompass e-discovery costs.[41] Section 1920 should continue as a tool to shift costs, but courts should limit the statutory interpretation analysis to specifically adhere to the text of the statute.

This Comment will argue that only minimal e-discovery costs should be taxable under Section 1920(4). Part II of this Comment will describe the current state of the circuit split regarding Section 1920(4). Part III will review the *Taniguchi* case, which found that Section 1920 should be interpreted narrowly and that court costs should be minimal.[42] Part III will also explain how the dicta and policy concerns in *Taniguchi* apply to the issue of interpreting e-discovery costs under Section 1920. Part IV will analyze *Taniguchi*'s impact on e-discovery jurisprudence and propose a test for use in future cases, focusing on the statute's language and the policy of the American Rule. This Comment will suggest that the U.S. Supreme Court explicitly limit the reading of Section 1920(4).[43] Parties should avoid using Section 1920(4) as a tool to limit e-discovery costs and should instead organize their ESI, anticipate litigation, and utilize procedural techniques.

38. *Id.* at 1364.

39. *But see* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012) (providing guidance on a separate provision in Section 1920).

40. Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012) (interpreting 28 U.S.C. § 1920(6) and noting that "taxable costs are limited by statute and are modest in scope," suggesting a narrow interpretation for Section 1920 as a whole).

41. *See*, *e.g.*, *Race Tires I*, No. 2:07-cv-1294, 2011 WL 1748620, at *3, *12 (W.D. Pa. May 6, 2011) (affirming taxable e-discovery costs of over $367,000).

42. *See Taniguchi*, 132 S. Ct. at 2006 (describing court costs as minimal).

43. Alternatively, Congress could amend the statute a second time to create more specific language in Section 1920. This Comment, however, cautions against amending the statute because of the difficulties of naming e-discovery processes in the statute due to the continuously advancing nature of technology.

II. BACKGROUND: THE E-DISCOVERY TAXABLE COST DEBATE

Section 1920 enumerates a list of items that can be taxed as costs to the non-prevailing party.[44] Congress chose to restrict court costs by specifically listing only six items in the taxable costs statute.[45] One of the six items, found in Section 1920(4), allows costs for "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case."[46] Courts have found that certain types of e-discovery tasks[47] are taxable because they fall within the language of Section 1920(4).[48]

The different tasks involved in e-discovery occur during the three main stages of the e-discovery process: collection, review, and processing.[49] The parties' first step, collection, is to search for relevant ESI on computers, networks, databases, and other storage devices.[50] Next, during the review stage,[51] the parties evaluate the ESI to determine if a party must produce and disclose the information.[52] Finally, the parties process the ESI during the third stage and present it to opposing counsel in the agreed-upon format.[53] Tasks from each of the three stages of e-discovery may be included in a bill of costs[54] and will be taxed if the

44. *See* 28 U.S.C. § 1920 (2006 & Supp. II 2008) (including only six items).

45. *See id.* (evidencing the intent to limit taxable courts by outlining specific and limited items that can be taxed).

46. *Id.* § 1920(4).

47. The different "tasks" of e-discovery include activities from each of the three stages as well as activities within the same stage. For example, conversion of a file's format and document imaging may both fall under the production stage of ESI, but are two distinct types of e-discovery that courts have taxed as costs.

48. *See*, *e.g.*, *Race Tires II*, 674 F.3d 158, 171 (3d Cir. 2012) (finding that file conversion during e-discovery applies under Section 1920(4)), *cert. denied*, 133 S. Ct. 233 (2012); BDT Products, Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 420 (6th Cir. 2005) (finding that electronic scanning and imaging during e-discovery applies under Section 1920(4)), *abrogated by* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).

49. *See* NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY, at xiv (2012), *available at* http://bit.ly/I2zFvE.

50. *See id.*

51. *See id.* (noting that the review stage makes up 73 percent of costs). The first two stages are expensive because most parties choose to buy software, pay in-house employees, or hire vendors and outside counsel to complete these tasks. *Id.*

52. *See id.* (noting that privileged information must not be produced).

53. *See id.* A simple example of the processing stage is converting a Microsoft Word document into a PDF so the opposing party can easily access the information. *See The Basics: What Is E-Discovery?*, *supra* note 13. The degree of difficulty in and price associated with converting documents is dependent on the requested format.

54. *See*, *e.g.*, *Bill of Costs*, U.S. CTS., http://1.usa.gov/UYMjQf (last visited Sept. 3, 2013) (providing an example of a bill of costs).

judge determines these costs are appropriate under the language of Section 1920(4).[55]

The Judicial Administration and Technical Amendments Act[56] changed Section 1920(4)'s language in 2008 to reflect the realities of modern discovery processes.[57] The amendment changed the language, "copies of papers," in Section 1920(4) to "copies of any materials."[58] The current provision allows for "[f]ees for exemplification and the costs of making copies *of any materials* where copies are necessarily obtained for use in the case."[59]

The amendment is responsible for "making [ESI] coverable in court costs."[60] Congress's intent was to update Section 1920(4) to reflect the modern realities of communication and file storage.[61] Congress may have amended the statute to signal its general support of larger court costs.[62] More likely, however, Congress was simply updating the language of the statute to reflect the shift from paper to ESI.[63] Nothing in the legislative history of the amendment demonstrates a view on how large or minimal court costs should be,[64] so the policy arguments in *Taniguchi* are particularly persuasive.[65]

The troublesome trend of applying Section 1920(4) to e-discovery costs can be visualized in four distinct stages. In the first stage, beginning in 2000 and lasting a decade, courts saw an increase in taxable e-discovery cost cases and began applying the language of Section

55. 28 U.S.C. § 1920 (2006 & Supp. II 2008) ("A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.").

56. Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 6, 122 Stat. 4291, 4292 (2008).

57. *See* 154 CONG. REC. H10270–71 (Sept. 27, 2008) (statement of Rep. Lofgren) (reflecting this motivation for amending Section 1920(4)).

58. Judicial Administration and Technical Amendments Act § 6.

59. 28 U.S.C. § 1920(4) (emphasis added).

60. *See* 154 CONG. REC. H10271 (Sept. 27, 2008) (statement of Rep. Lofgren).

61. *See id.* at H10271–72 (noting that the bill's inclusion of ESI would increase the efficiency of the judicial branch).

62. *See, e.g.*, *In re* Ricoh Co., Patent Litig., 661 F.3d 1361, 1365 (Fed. Cir. 2011) (reasoning that the purpose of the amendment was to reflect the idea that all ESI can be recoverable as costs). *But see Race Tires II*, 674 F.3d 158, 170 (3d Cir. 2012) (emphasizing that even with the amendment, the statute still requires the materials to be copied), *cert. denied*, 133 S. Ct. 233 (2012).

63. *See* Mann v. Heckler & Koch Def., Inc., No. 1:08cv611 (JCC), 2011 WL 1599580, at *9 (E.D. Va. Apr. 28, 2011) ("[The amendment] perhaps indicates legislative openness towards taxation of copies of things besides paper, but it still requires *copying*.").

64. *See*, *e.g.*, 154 CONG. REC. H10270–71 (Sept. 27, 2008) (statement of Rep. Lofgren).

65. Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2006 (2012) (describing court costs as minor).

1920(4) to e-discovery tasks.[66] In 2011, an unprecedented award of e-discovery court costs of over $367,000 in *Race Tires American, Inc. v. Hoosier Racing Tire Corp.* ("*Race Tires I*")[67] sparked the second stage: rapid growth of e-discovery court costs through the application of Section 1920(4) to e-discovery costs.[68] The third stage commenced in 2012 when the Third Circuit attempted to put a stop to excessive court costs[69] by remedying the lower court's decision in *Race Tires I* with *Race Tires of America, Inc. v. Hoosier Racing Tire Corp.* ("*Race Tires II*").[70] The fourth stage is yet to come, but undecided courts will likely limit Section 1920(4) by following the textualist approach of *Race Tires II*. Eventually, if Congress does not intervene first, the U.S. Supreme Court should decide the issue and echo the preference for minimal court costs articulated in *Taniguchi*.[71]

A. Stage One: The Realization of 2000–2010

Beginning in 2000, federal courts ruled on the issue of taxable e-discovery costs with increasing frequency.[72] Courts previously interpreted the language of Section 1920(4) during a time of paper documents[73] and thus the language of the statute was less disputed. As

66. *See*, *e.g.*, Hecker v. Deere & Co., 556 F.3d 575, 591 (7th Cir. 2009) (reading conversion of computer data into readable format into the statute); BDT Products, Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 416, 420 (6th Cir. 2005) (reading electronic scanning and imaging into the statute), *abrogated by* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).

67. Race Tires Am., Inc. v. Hoosier Racing Tire Corp. (*Race Tires I*), No. 2:07-cv-1294, 2011 WL 1748620 (W.D. Pa. May 6, 2011) (affirming a "significant" award of costs attributable to e-discovery), *aff'd in part, vacated in part*, 674 F.3d 158 (3d Cir. 2012).

68. *See* John M. Barkett, *Un-taxing E-Discovery Costs: Section 1920(4) After* Race Tire Amer. Inc. *and* Taniguchi, ASS'N CERTIFIED E-DISCOVERY SPECIALISTS, June 2012, at 1, 2, *available at* http://bit.ly/1ajSn9Q (suggesting that *Race Tires I* sparked a "tsunami" of broad decisions).

69. *Race Tires II*, 674 F.3d 158 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 233 (2012).

70. *See id.* at 171 (reducing the U.S. District Court for the Western District of Pennsylvania's award of e-discovery costs).

71. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2006 (2012).

72. *See, e.g.*, Cefalu v. Vill. of Elk Grove, 211 F.3d 416, 429 (7th Cir. 2000). In 2000, the U.S. Court of Appeals for the Seventh Circuit became the first court of appeals to decide the taxable e-discovery costs issue. The rise in popularity of these cases was likely due to the increase in ESI at the time. *See* Wendy R. Liebowitz, *Digital Discovery Starts to Work*, NAT'L L.J., Nov. 4, 2002, at 1, 4 (estimating that 93 percent of all information generated was in digital form in 1999).

73. *See Race Tires I*, No. 2:07-cv-1294, 2011 WL 1748620, at *6 (W.D. Pa. May 6, 2011) ("The terms ['']exemplification' and ['']copying' originated in and were developed in the world of paper. One issue is how to apply these § 1920 terms to the world of electronically stored information." (quoting Kellogg Brown & Root Int'l, Inc. v. Altanmia Commercial Mktg. Co., No. H-07-2684, 2009 WL 1457632, at *4 (S.D. Tex. May 26, 2009))), *aff'd in part*, *vacated in part*, 674 F.3d 158 (3d Cir. 2012).

ESI became more prevalent,[74] litigation emerged to test the boundaries of what could be considered an "exemplification" or a "copy" in this new age of technology.[75] The following cases provide a broad sweep of the taxable e-discovery costs debate during the early years and are by no means an exhaustive list of cases that decided the issue.

In 2000, the U.S. Court of Appeals for the Seventh Circuit decided the first major case on e-discovery taxable costs. In *Cefalu v. Village of Elk Grove*,[76] the court expanded the applicability of Section 1920(4) by using a broad definition of the term "exemplification" in the statute.[77] The court reasoned that "exemplification" should include illustrative aids in situations where such aids are necessary to convey information.[78] The court discounted the narrow definition of "exemplification" found in Webster's Dictionary and instead used a common definition.[79] The court concluded that creating a multimedia presentation during discovery might be taxable under the broader, common definition of "exemplification."[80] The court remanded the case for the lower court to determine if the presentation could be taxable under Section 1920(4).[81]

Alternatively, in *Kohus v. Toys "R" Us, Inc.*,[82] the U.S. Court of Appeals for the Federal Circuit defined "exemplification" narrowly, noting that Congress chose the phrase "exemplification" and did not use a broader phrase, such as "demonstrative evidence," in Section 1920(4).[83] The *Kohus* court rejected costs associated with a video exhibit because the exhibit fell outside the court's definition of "exemplification."[84]

In 2005, the U.S. Court of Appeals for the Sixth Circuit expanded Section 1920(4) by broadly interpreting the words "copies" and "exemplification."[85] In *BDT Products, Inc. v. Lexmark International,*

74. *See* Kerschberg, *supra* note 20 (noting that "the amount of electronically stored information . . . now doubles every 18–24 months").

75. *See* James M. Evangelista, *Polishing the "Gold Standard" on the E-Discovery Cost-Shifting Analysis:* Zubulake v. UBS Warburg, LLC, 9 J. TECH. L. & POL'Y 1, 2 (2004) (estimating that 95 percent of all documents created in 2004 were created electronically).

76. Cefalu v. Vill. of Elk Grove, 211 F.3d 416 (7th Cir. 2000).

77. *See id.* at 427 (embracing "the more expansive definition of 'exemplification'").

78. *See id.* at 428.

79. *See id.* at 427.

80. *See id.* at 429.

81. *See Cefalu*, 211 F.3d at 429 (vacating the denial of an award of costs and remanding to determine if the presentation constitutes exemplification).

82. Kohus v. Toys "R" Us, Inc., 282 F.3d 1355 (Fed. Cir. 2002).

83. *See id.* at 1359.

84. *See id.* (ruling that a video exhibit could not be taxed under Section 1920(4) because a court cannot "exceed the limits of this statute").

85. *See* BDT Products, Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 420 (6th Cir. 2005), *abrogated by* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).

Inc.,[86] the court affirmed an award of costs that included expenses from electronic scanning and imaging.[87] The Sixth Circuit found that the district court had reasonably interpreted the statute because electronic scanning and imaging can be considered "copying."[88] In the reasoning, the court gave deference to the lower court's "broad" discretion.[89] The decision also suggested that the large size of the lawsuit justified a bigger award of costs.[90]

"Copies" under Section 1920(4) was further interpreted broadly in *Hecker v. Deere & Co.*,[91] a 2009 decision from the Seventh Circuit.[92] The case reasoned that "converting computer data into [a] readable format" constituted making a copy, but the court did not reference a definition.[93] Instead, the court ruled that the costs of the conversion were taxable because the lower court did not abuse its broad discretion in interpreting Section 1920.[94]

B. Stage Two: The Frenzy of 2011

In 2011, the prevailing trend of reading Section 1920(4) broadly continued at an even more rapid pace.[95] In *Race Tires I*, the U.S. District Court for the Western District of Pennsylvania affirmed the Clerk of Court's award of over $367,000 in e-discovery costs,[96] sparking a rush of similar decisions.[97]

Race Tires I recognized that "e-discovery has become a necessary and sometimes costly function of civil litigation."[98] The court relied on persuasive precedent that described e-discovery tasks as necessary because the average lawyer cannot complete such technical tasks.[99]

86. BDT Products, Inc. v. Lexmark Int'l, Inc., 405 F.3d 415 (6th Cir. 2005), *abrogated by* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).

87. *See id.* at 416, 420.

88. *See id.* at 420.

89. *See id.*

90. *See id.*

91. Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009).

92. *See id.* at 591.

93. *See id. Cf.* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2003 (2012) (using Webster's Dictionary to define "interpretation").

94. *See Hecker*, 556 F.3d at 591.

95. *See* Barkett, *supra* note 68 (suggesting that *Race Tires I* sparked a "tsunami" of broad decisions).

96. *Race Tires I*, No. 2:07-cv-1294, 2011 WL 1748620, at *3, *12 (W.D. Pa. May 6, 2011), *aff'd in part*, *vacated in part*, 674 F.3d 158 (3d Cir. 2012).

97. *See*, *e.g.*, *In re* Aspartame Antitrust Litig., 817 F. Supp. 2d 608 (E.D. Pa. 2011) (similarly interpreting Section 1920(4) broadly and taxing a large award of costs).

98. *See Race Tires I*, 2011 WL 1748620, at *1.

99. *See id.* at *8 (relying on reasoning from CBT Flint Partners, LLC v. Return Path, Inc., 676 F. Supp. 2d 1376, 1380–81 (N.D. Ga. 2009)). The *CBT Flint Partners* case was

Furthermore, the *Race Tires I* decision noted that other courts have found that third-party vendors and electronic scanning of documents are the "modern-day equivalent[s] of exemplification and copies of paper."[100] Ultimately, the court taxed the fees paid to a third-party vendor for creating electronic documents for discovery.[101]

After *Race Tires I*, the U.S. District Court for the Eastern District of Pennsylvania continued expanding the breadth and quantity of court costs. In *In re Aspartame Antitrust Litigation,*[102] the court granted awards of $120,364, $195,398, and $194,375 to the three defendants.[103] The court demonstrated a strong preference for e-discovery technology, especially in complex cases, arguing that ESI lends efficiency and cost-effectiveness to lawsuits.[104] The court ultimately granted the three defendants costs for tasks ranging from "the creation of a litigation database" to imaging hard drives and keyword searches.[105] The court focused on the second half of Section 1920(4)[106] to justify these awards, arguing that these tasks were necessary and essential under Section 1920(4).[107]

Notably, *In re Aspartame* "dr[e]w the line" at an e-discovery program that was for the mere convenience of counsel.[108] The court reasoned that the program, a document review tool, went beyond the essential tasks of keyword searching and filtering and therefore was not "necessary" under Section 1920(4).[109]

In the same year, the U.S. District Court for the Eastern District of Virginia in *Mann v. Heckler*[110] also addressed the issue presented in *In re Aspartame*[111] of whether the creation of documents could constitute copies. In *Mann*, the court described scanning as "more akin to copying" than conversions and drew a useful distinction between "copying" and

later vacated by the Federal Circuit. *See* CBT Flint Partners, LLC v. Return Path, Inc., 654 F.3d 1353 (Fed. Cir. 2011).

100. *Race Tires I*, 2011 WL 1748620, at *7 (quoting Brown v. McGraw-Hill Cos., Inc., 526 F. Supp. 2d 950 (N.D. Iowa 2007)).

101. *See id.* at *11.

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

103. *See id.* at 623.

104. *See id.* at 615.

105. *See id.*

106. "[W]here the copies are necessarily obtained for use in the case." 28 U.S.C. § 1920 (2006 & Supp. II 2008).

107. *See In re Aspartame*, 817 F. Supp. 2d at 615 ("Searchable documents are essential in a case of this complexity and benefit all parties.").

108. *See id.* at 616.

109. *See id.*

110. Mann v. Heckler & Koch Def., Inc., No. 1:08cv611 (JCC), 2011 WL 1599580, at *1 (E.D. Va. Apr. 28, 2011).

111. *See In re Aspartame*, 817 F. Supp. 2d at 615 (allowing costs for the *creation* of a litigation database).

"creating."[112] The *Mann* court did not allow costs for a litigation database that created electronically searchable documents[113] because the court did not view creation as "copying."[114] The distinction between "scanning," or converting paper documents to ESI, and "creating" electronic documents is one potential way to delimit the contours of the definition of "copy."

Mann additionally decided the issue of whether certain paper copies could be taxed.[115] The court reasoned that copies made merely for the convenience of parties did not meet the "necessary" test in Section 1920(4).[116] The *Mann* court refused to tax $2,303 in copying costs incurred by an outside vendor because the defendant could not prove that the copies were "necessary."[117] The court further clarified that for outside copies to be necessary, they must be furnished to the court or counsel, or be used as a court exhibit.[118]

C. Stage Three: The Wisdom of 2012

After the *Race Tires I* district court decision, Race Tires of America appealed on the issue of which e-discovery expenses were taxable costs.[119] On appeal, the Third Circuit significantly reduced the giant *Race Tires I* cost award.[120] *Race Tires II* shaped the circuit split over the interpretation of Section 1920(4) because it was the first time a U.S. court of appeals limited e-discovery tasks using the language of the statute. Moreover, *Race Tires II* addressed the issue using a structured and reasonable approach, making its logic easy to follow.

The *Race Tires II* court began its analysis with the text of Section 1920(4) and explicitly applied definitions to the e-discovery tasks in the case.[121] More often than not, prior to *Race Tires II*, courts applied the language of Section 1920(4) based on what they *felt* constituted a "copy" or an "exemplification."[122] Such analysis creates potential for

112. *See Mann*, 2011 WL 1599580, at *8 (crediting this distinction to Fells v. Virginia Dep't of Transp., 605 F. Supp. 2d 740 (E.D. Va. 2009)).

113. *See id.* at *9 ("[F]ederal courts cannot 'exceed the limitations explicitly set out in [Section 1920] without plain evidence of congressional intent'" (citing *Fells*, 605 F. Supp. 2d 740)).

114. *See id.*

115. *See id.* at *6.

116. *See id.*

117. *See Mann*, 2011 WL 1599580, at *1, *7.

118. *See id.* at *6.

119. *Race Tires II*, 674 F.3d 158, 163 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 233 (2012).

120. *See id.* at 171.

121. *See id.* at 166.

122. *See*, *e.g.*, *Mann*, 2011 WL 1599580, at *8 (describing scanning as "more akin to copying" but failing to explain why).

irreconcilable discord between the jurisdictions. A structured, common method of interpretation is needed to promote consistency in future Section 1920 decisions.

The *Race Tires II* majority reduced the cost award by limiting the number of e-discovery tasks that constituted "copies" under Section 1920(4).[123] In its reasoning, the Third Circuit used Webster's Dictionary to define a "copy" as an "imitation, transcript, or imitation of an original work."[124] Based on this definition, the court disallowed costs for expenses arising out of keyword searches in the collection stage because no imitations were made.[125] The court ruled that these tasks did not constitute copies.[126]

The court did find, however, that two processes—the scanning of documents to create digital copies and the conversion of files to the agreed upon format—could be considered "copying" under the plain meaning of the word.[127] The court affirmed the portion of the district court's cost award that was incurred by these tasks.[128] The Third Circuit's plain definition of "copies" appropriately encompasses some e-discovery tasks while not abusing Section 1920(4).[129] As a result of the court's limitation, e-discovery costs fell from over $367,000 awarded by the district court to a more reasonable award of $30,370.[130]

The *Race Tires II* decision is significant because of its potential impact on the future of the taxable e-discovery costs debate. By employing a specific approach to the issue, *Race Tires II* provided a roadmap for other courts to decide similar issues in the same straightforward manner. The first case after *Race Tires II* notably declined to follow the Third Circuit's reasoning, and instead placed a greater emphasis on the broad discretion the lower courts have in interpreting Section 1920.[131] The *Race Tires II* decision, however, could

123. *See Race Tires II*, 674 F.3d at 171.

124. *Id.* at 166 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 405 (3d ed. 1993)).

125. *See id.* at 167.

126. *See id.*

127. *See id.* at 160.

128. *See Race Tires II*, 674 F.3d at 160 (noting that the expenses for these activities "amount[ed] to approximately $30,000 of the more than $365,000 in electronic discovery charges taxed in this case").

129. *See id.* at 167. The Comment's author argues that abuse of the statute occurs when courts expand Section 1920(4) beyond its textual meaning and intended purpose.

130. *See id.* at 171–72.

131. *See In re* Online DVD Rental Antitrust Litig., No. M 09-2029 PJH, 2012 WL 1414111, at *1 (N.D. Cal. Apr. 20, 2012) (noting that although *Race Tires II* was well-reasoned, the lower court's broad construction of the statute was appropriate and there was no reason to disrupt it).

persuade other courts to make decisions that narrowly and correctly interpret Section 1920(4).

Hoosier Racing Tire Corporation, the party in *Race Tires II* whose award of costs was reduced by $95,210,[132] petitioned for a writ of certiorari on June 14, 2012.[133] The U.S. Supreme Court denied the request on October 1, 2012.[134] Because vast differences exist among the Courts of Appeals regarding the interpretation of Section 1920(4), however, the taxable e-discovery cost issue is ripe for U.S. Supreme Court review.

III. THE U.S. SUPREME COURT WEIGHS IN: THE *TANIGUCHI* DECISION

The Third Circuit may have restrained Section 1920(4),[135] but without a U.S. Supreme Court directive, other circuits are free to continue in the same, unrestricted manner.[136] The U.S. Supreme Court has never ruled directly on the issue of taxable e-discovery costs under Section 1920(4). In May 2012, however, the Court provided insight through *Taniguchi v. Kan Pacific Saipan, Ltd*. In *Taniguchi*, the Court demonstrated a preference for a narrow interpretation of Section 1920 and supported a policy of minimal court costs.[137]

The *Taniguchi* Court interpreted a separate provision of the statute, 28 U.S.C. § 1920(6).[138] The issue was whether costs associated with translating the language of documents were taxable under Section 1920(6), which allows costs for "compensation of interpreters."[139] In its reasoning, the Court defined "interpretation" using Webster's Dictionary and common usage.[140] The Court concluded that "interpretation" included only oral translation, so the written translations of documents were not taxable as costs under the statute.[141]

The *Taniguchi* Court's dicta and policy concerns[142] are transferable to the broader e-discovery issue in future cases. For example, the Court

132. *See Race Tires II*, 674 F.3d at 171.

133. *See* Petition for Writ of Certiorari, Hoosier Racing Tire Corp. v. Race Tires Am., Inc., No. 11-1520 (U.S. June 14, 2012), 2012 WL 2363410.

134. Hoosier Racing Tire Corp. v. Race Tires Am., Inc., 133 S. Ct. 233 (2012) (mem.).

135. *See Race Tires II*, 674 F.3d at 171 (limiting the interpretation of the language of 1920(4)).

136. *But see* Barkett, *supra* note 68 (arguing that other courts will likely follow the reasoning in *Race Tires II*).

137. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2004, 2006 (2012).

138. *See id.* at 2000 (interpreting 28 U.S.C. § 1920(6)).

139. *See id.*; 28 U.S.C. § 1920(6) (2006).

140. *See Taniguchi*, 132 S. Ct. at 2003–04.

141. *See id.* at 2005.

142. *See id.* at 2006 (commenting on taxable costs in general under Section 1920, not limited to translation costs).

described taxable costs in general as "relatively minor, incidental expenses" that are narrow in scope.[143] As evidence for this conclusion, the Court cited the entire statute, 28 U.S.C. § 1920, and did not specifically limit the description to Section 1920(6),[144] suggesting that all court costs should be minimal.

The Court's preference for minimal court costs was partially based on the burden and inequity of requiring the non-prevailing party to bear exorbitant costs.[145] Such large costs could discourage a party from bringing a lawsuit or punish a party for extensive discovery requests.[146] Smaller, incidental taxable costs may prevent these unfavorable policy concerns.[147]

In the wake of *Taniguchi*, federal courts should acknowledge that the vast application of Section 1920(4) to e-discovery costs will inevitably decline.[148] Scholars have argued that the U.S. Supreme Court, whether intentionally or not, endorsed the Third Circuit's *Race Tires II* rationale with the *Taniguchi* decision.[149] Ideally, other courts will follow the *Race Tires II* reasoning because the U.S. Supreme Court endorses its approach.

The U.S. Supreme Court's message in *Taniguchi* may not have been forceful enough to curb the e-discovery tsunami, however. *Taniguchi* may have suggested an endorsement of *Race Tires II*,[150] but the U.S. Supreme Court did not create binding e-discovery precedent. For real change, the Court must specifically mandate a uniform test for interpreting Section 1920(4).

IV. THE TIMES THEY ARE A-CHANGIN'

Outside the Third Circuit, courts have referenced the well-reasoned *Race Tires II* decision to support a narrow reading of Section 1920(4).[151]

143. *See id.*
144. *See id.*
145. *See Taniguchi*, 132 S. Ct. at 2006–07.
146. *See id.* at 2007.
147. *See id.* (suggesting that plaintiffs with limited resources might be "unjustly discouraged" from bringing actions because of high costs (citing Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967))).
148. *See* Barkett, *supra* note 68, at 7 (arguing that the *Race Tires II* rationale "likely will be" followed by other circuits).
149. *See id.* at 8.
150. *See id.*
151. *See*, *e.g.*, Finnerty v. Stiefel Labs., Inc., 900 F. Supp. 2d 1317, 1321 (S.D. Fla. 2012) (reducing e-discovery taxable costs in part and noting that under *Race Tires II*, not "all steps that lead up to the production of copies of materials are taxable"); Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc., No. 5:09-CV-326-BR, 2012 WL 3202677, at *2 (E.D.N.C. Aug. 3, 2012) (deciding that "[b]ecause the Third Circuit's

Because some courts have ignored the guidance of both *Race Tires II* and *Taniguchi*,[152] U.S. Supreme Court action remains necessary to return court costs to their rightful small size. As such, the U.S. Supreme Court should harmonize the lessons of *Taniguchi* with the federal jurisprudence of taxable e-discovery costs to create a uniform judicial test.

A. Recommendation: A Judicial Test

The e-discovery taxable costs cases vary widely in their reasoning, but no majority approach has surfaced.[153] A judicial test following a single interpretation of "copy" and "exemplification" would help to streamline future decisions. Looking solely at the text of Section 1920(4), costs can be awarded for "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case."[154] The use of the word "and" in the provision shows that the rule applies to both "exemplification" and "copies."[155] The conjunction also shows that the two terms are intended to be distinct. An additional requirement exists if the item is a copy: that the copy be "necessarily obtained for use in the case."[156]

The following test derives solely from the textual construction of Section 1920(4). The first prong of the test determines if the item is an exemplification *or* a copy. If the item is an exemplification, it should be taxed as a court cost. If the item is a copy, then the second prong of the test determines if the copy was necessarily obtained. Finally, the necessity must relate to the item's use in the case.[157]

The language of Section 1920(4) seems straightforward, but vast differences in the rule's application[158] reveal that room for discrepancies exists. To prevent further distortion of Section 1920(4), the U.S.

opinion is well-reasoned and thorough . . . the court adopts the reasoning of *Race Tires America* and will follow its analysis").

152. *See*, *e.g.*, *In re* Online DVD Rental Antitrust Litig., No. M 09-2029 PJH, 2012 WL 1414111, at *1 (N.D. Cal. Apr. 20, 2012) (deciding the issue after *Race Tires II* and *Taniguchi*).

153. *See*, *e.g.*, *Race Tires II*, 674 F.3d 158, 171 (3d Cir. 2012) (reasoning that costs associated with keyword searches and collection of ESI are copies), *cert. denied*, 133 S. Ct. 233 (2012); *In re Online DVD Rental,* 2012 WL 1414111, at *1 (reasoning that costs associated with professional creation of visual aids can be taxed under broad construction of Section 1920(4)).

154. 28 U.S.C. § 1920(4) (Supp. II 2008).

155. *See id.*

156. *Id.*

157. *See id.*

158. *See*, *e.g.*, *Race Tires II*, 674 F.3d at 171 (applying a narrow definition of "copies" under Section 1920(4)); Cefalu v. Vill. of Elk Grove, 211 F.3d 416, 427 (7th Cir. 2000) (applying a broad definition of exemplification under Section 1920(4)).

Supreme Court must both endorse this test and demonstrate how to use it.

B. The Proposed Test at Work

In demonstrating how to use the proposed test, the U.S. Supreme Court should clearly explain its two prongs. First, the Court must articulate how to define the two contested terms in the provision,[159] "exemplification" and "copies."[160] Second, the Court must limit the discretion available in interpreting the second half of Section 1920(4), which requires a "copy" to be "necessarily obtained for use in the case."[161]

1. Defining Terms: Exemplification and Copies

The U.S. Supreme Court must narrowly define the words "exemplification" and "copies" to reduce taxable e-discovery costs.[162] Following the reading of "interpretation" in *Taniguchi*[163] and "copies" in *Race Tires II*,[164] Section 1920, in its entirety, should be interpreted using a plain meaning approach.

The proposed test is based on the principle that the language of a statute is the proper starting point for all statutory interpretation.[165] Furthermore, the proposed test incorporates dicta from *Taniguchi* out of deference to the U.S. Supreme Court's sound reasoning.

The U.S. Supreme Court defined "interpretation" in *Taniguchi* using a plain meaning approach.[166] *Race Tires II* used common usage to define "copies."[167] The textual integrity canon of statutory interpretation directs courts to "interpret the same or similar terms in a statute . . . the

159. *See Race Tires II*, 674 F.3d at 171 (applying a narrow definition of copies under Section 1920(4)); *Cefalu*, 211 F.3d at 427 (applying a broad definition of exemplification under Section 1920(4)). The terms are contested because courts disagree about how to interpret them.

160. *See* 28 U.S.C. § 1920(4) (Supp. II 2008).

161. *Id.*

162. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2004, 2006 (2012) (implying a goal of minimal court costs by describing them as minor).

163. *See id.* at 2004.

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

165. *See* KATHARINE CLARK & MATTHEW CONNOLLY, A GUIDE TO READING, INTERPRETING AND APPLYING STATUTES 1 (2006), *available at* http://bit.ly/1aorlOB ("The language of the text of the statute should serve as the starting point for any inquiry into its meaning.").

166. *See Taniguchi*, 132 S. Ct. at 2004.

167. *See Race Tires II*, 674 F.3d at 166 (using Webster's Dictionary to define "copies").

same way."[168] Thus, the proposed test follows the methods employed by *Race Tires II* and *Taniguchi*, two very sensible cases. The proposed test begins with the text of Section 1920(4) and uses a reputable dictionary to ascertain the plain and common meaning of each word.[169]

The *Taniguchi* Court explicitly and repeatedly noted that taxable costs should be relatively minor.[170] By declining to limit this statement to costs under Section 1920(6),[171] the U.S. Supreme Court applied the reasoning to the statute as a whole. The suggested test reflects this concern by proposing that taxable costs be curtailed. Narrowly defining the terms in Section 1920(4) achieves the goal of curbing taxable costs.

2. Exemplification

The taxable e-discovery costs cases have interpreted the definition of "exemplification" in a number of ways.[172] First, courts have blended the meaning of "exemplification" with the meaning of "copies" in the statute, finding no significant difference between the two terms.[173] Other courts have chosen clear stances on what constitutes an "exemplification." *Cefalu,* for example, defined "exemplification" very broadly, as anything that "furthers [an] illustrative purpose of an exhibit."[174] *Kohus*, alternatively, did not consider a video exhibit an "exemplification" because the language Congress used in Section 1920(4) would have been broader if they intended such an expansive use of the term.[175]

With these approaches and the *Taniguchi* policy in mind, the U.S. Supreme Court should first reject the notion[176] that "exemplification" and "copies" are synonymous under Section 1920(4). If Congress had meant to convey a single, broad category of copies, the language would reflect

168. *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 368 (2010).

169. *See id.* at 357 (describing the codified canon of interpretation that instructs the interpreter to follow the dictionary definition of terms).

170. *See Taniguchi*, 132 S. Ct. at 2006.

171. *See id.*

172. *See*, *e.g.*, BDT Products, Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 420 (6th Cir. 2005) (failing to distinguish exemplification from copies), *abrogated by* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012); Cefalu v. Vill. of Elk Grove, 211 F.3d 416, 428 (7th Cir. 2000) (using a broad definition of exemplification).

173. *See*, *e.g.*, *BDT Products*, 405 F.3d at 420 (taxing costs under "exemplification and copies of papers" without choosing one or distinguishing between the two terms).

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

175. Kohus v. Toys "R" Us, Inc., 282 F.3d 1355, 1359 (Fed. Cir. 2002).

176. *See BDT Products*, 405 F.3d at 420 (failing to distinguish between "exemplification" and "copies").

that desire with a single, broad word.[177] The distinct language, which uses an "and" to separate the two terms, shows that the two words are unique.[178]

The broad definition of "exemplification" used in *Cefalu* seems to conform most closely to the plain meaning approach of statutory interpretation. In *Taniguchi* and *Race Tires II*, the statutory language was defined using Webster's Dictionary.[179] "Exemplification" is defined by Webster's as: "a) the act or process of exemplifying; b) example, case in point."[180] Unfortunately, the first definition provided is unrevealing and the second definition is very broad. Although the plain meaning approach adheres to the method utilized in *Taniguchi* and *Race Tires II*,[181] the broad dictionary definition of "exemplification" conflicts with the policy preference for minimal costs articulated in *Taniguchi*.[182]

The U.S. Supreme Court should instead employ the third approach to defining "exemplification" using the narrow definition in *Kohus*.[183] Logically, Congress did not intend to shift costs of producing any "example"[184] because almost all evidence used in court could constitute an "example" of a point a party is trying to convey. Such a reading would yield the absurd result of making the non-prevailing party responsible for the costs of every point made by both parties at trial. Not all examples should constitute taxable costs under the language of Section 1920(4) because inequitable court costs would result. The U.S. Supreme Court has expressed a belief in minimal court costs, and Section 1920 limits court costs to only six items. The broad *Cefalu* definition of "exemplification" would expand court costs beyond their intended purpose.

Finally, "exemplification" is distinguishable from "translation," the term defined in *Taniguchi*. Unlike "translation," "exemplification" is a legal term with a legal definition.[185] Black's Law Dictionary defines "exemplification" as "[a]n official transcript of a public record,

177. *See Race Tires II*, 674 F.3d 158, 165 (3d Cir. 2012) ("We, however, do not think the terms [copies and exemplification] are interchangeable or synonymous."), *cert. denied*, 133 S. Ct. 233 (2012).

178. *See* 28 U.S.C. § 1920(4) (Supp. II 2008).

179. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2003 (2012); *Race Tires II*, 674 F.3d at 166.

180. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 437 (Frederick C. Mish et al. eds., 11th ed. 2007).

181. *See Taniguchi*, 132 S. Ct. at 2003; *Race Tires II*, 674 F.3d at 166.

182. *See Taniguchi*, 132 S. Ct. at 2006.

183. *See* Kohus v. Toys "R" Us, Inc., 282 F.3d 1355, 1359 (Fed. Cir. 2002) (arguing that the definition of "exemplification" should be narrow).

184. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 180, at 437 (defining exemplification as an example).

185. *See* BLACK'S LAW DICTIONARY, *supra* note 4, at 653.

authenticated as a true copy for use as evidence."[186] The definition in Black's Law Dictionary is more analogous to the narrow definition of "exemplification" in *Kohus*.[187] The definition also fits squarely within the goal of minimal court costs promoted in *Taniguchi*[188] because the requirements that an exemplification be "official" and "authorized"[189] naturally limit what can be considered. The judicial test proposes use of Black's Law Dictionary's definition of "exemplification" in the future because the meaning limits court costs and adheres to the specific language of the statute.

3. Copies

A second point of contention[190] in federal courts is how to interpret the definition of "copies" as used in Section 1920(4).[191] Defining "copies" in the e-discovery context is particularly difficult because of the technical processes involved.[192] Recall that e-discovery involves three distinct stages: collection, review, and processing.[193] Courts have interpreted "copies" to include actions from each of the three stages.[194] The following table demonstrates some e-discovery costs that have been interpreted as "copies" under Section 1920(4). The table also identifies the stage of e-discovery during which each cost is likely incurred.[195]

186. *Id.*

187. *See Kohus*, 282 F.3d at 1359 (declining to tax a video exhibit because the phrase "exemplification" was limited by Congress).

188. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2006 (2012) (using a plain meaning approach to the definition and articulating that taxable costs should be minor).

189. *See* BLACK'S LAW DICTIONARY, *supra* note 4, at 653.

190. *See*, *e.g.*, *Race Tires II*, 674 F.3d 158, 165 (3d Cir. 2012) (interpreting copies narrowly under Section 1920(4)), *cert. denied*, 133 S. Ct. 233 (2012); BDT Products, Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 420 (6th Cir. 2005) (arguing that a broad reading of copies under 1920(4) is reasonable), *abrogated by* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).

191. *See* 28 U.S.C. § 1920(4) (Supp. II 2008).

192. *See, e.g.*, *In re* Online DVD Rental Antitrust Litig., No. M 09-2029 PJH, 2012 WL 1414111, at *1 (N.D. Cal. Apr. 20, 2012) (deciding whether TIFF, or Tagged Image File Format, conversion costs were copies).

193. *See* PACE & ZAKARAS, *supra* note 49.

194. *See*, *e.g.*, *Race Tires II*, 674 F.3d at 171 (finding that file conversion, which likely occurred during processing, applied under Section 1920(4)); *In re* Aspartame Antitrust Litig., 817 F. Supp. 2d 608, 615 (E.D. Pa. 2011) (finding that keyword searches, which likely occurred during review, applied under Section 1920(4)).

195. Note: These determinations are made by the Comment's author and not by courts.

Allowed as Costs under "Copies"	**Stage of E-Discovery**
Electronic scanning and imaging[196]	Processing
Creation of a litigation database[197]	Reviewing
Keyword searches[198]	Collection
Scanning and conversion to agreed-upon format[199]	Processing

Consistent with the *Taniguchi* and *Race Tires II* method of defining statutory terms,[200] the proposed test utilizes Webster's Dictionary. Webster's Dictionary defines "copy" as "an imitation, transcript, or reproduction of an original work."[201] Similar to "exemplification," "copy" is found both in Webster's Dictionary and Black's Law Dictionary. Unlike the distinct definitions for "exemplification," however, the definitions of "copy" are constructively the same in both sources. Black's Law Dictionary defines "copy" as "[a]n imitation or reproduction of an original."[202]

Because the definition of "copies" is generally understood in a single way, the U.S. Supreme Court cannot promote policy preferences simply by choosing one definition over the other. Instead, the Court must draw a line through the broad definition of "copy" to further the *Taniguchi* policy of taxing only minimal costs.[203]

One way to draw a line through the definition of copies is to determine in which stage of e-discovery each submitted item in a bill of costs occurs. The proposed test assumes that "copies" and

196. *See* BDT Products, Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 416, 420 (6th Cir. 2005), *abrogated by* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).

197. *See In re Aspartame*, 817 F. Supp. 2d at 615.

198. *See id.*

199. *See Race Tires II*, 674 F.3d at 167.

200. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2003 (2012) (using Webster's Dictionary); *Race Tires II*, 674 F.3d at 166 (same).

201. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 180, at 276.

202. BLACK'S LAW DICTIONARY, *supra* note 4, at 385.

203. *See Taniguchi*, 132 S. Ct. at 2004, 2006 (using a plain meaning approach to the definition and articulating that taxable costs should be minor).

"exemplifications" are not often made in the first stage of e-discovery, collection. In this stage, parties sort through ESI[204] but likely do not need to make copies.[205] In the second stage—review[206]—the parties may make copies of relevant documents.[207] Information irrelevant to the case, however, does not fall under the language of Section 1920(4). The majority of copies are likely made during the final stage of e-discovery: processing. Processing involves formatting information for the opposing party,[208] such as converting a document. Many copies are likely produced during this stage.

A second way to draw a line through the broad definition of "copies" is to characterize the disputed copy as either a scan or a creation.[209] In *Mann*, the court found that actually "creating" ESI during discovery, such as preparing a litigation database, does not constitute making a copy because the document or item did not previously exist.[210] A scan, on the other hand, duplicates an existing paper or digital document.[211]

Because of *Taniguchi*'s articulated goal of keeping court costs minimal,[212] the proposed test combines the two line-drawing mechanisms to twice restrict the broad definition of "copies." If the suspect copy occurs during the collection or review stages of e-discovery, the district courts should analyze whether the copy is a scan or a creation of something new. If the copy occurs during the final stage of e-discovery—processing—the extra determination of scan or creation is not necessary because there is a larger likelihood that the item is a true copy.

Whenever a federal court believes an e-discovery task is a "copy," it should first determine in which stage the task occurs. Unless the copy occurs in the processing stage, the court should next ensure the copy is an actual scan and not a creation of something new. Using the above

204. *See* PACE & ZAKARAS, *supra* note 49.

205. *See In re* Aspartame Antitrust Litig., 817 F. Supp. 2d 608, 615 (E.D. Pa. 2011) (finding that keyword searches, which likely occurred during collection, were taxable copies). The Comment's author disagrees with this conclusion, instead reasoning that searching through existing documents yields no copies.

206. *See* PACE & ZAKARAS, *supra* note 49.

207. *See In re Aspartame*, 817 F. Supp. 2d at 615 (finding that the creation of a litigation database, which likely occurred during the review stage, constituted "copying"). The party most likely copied relevant documents onto the database. The cost of creating the database itself, however, should not be seen as a copy.

208. *See* PACE & ZAKARAS, *supra* note 49.

209. *See* Mann v. Heckler & Koch Def., Inc., No. 1:08cv611 (JCC), 2011 WL 1599580, at *8 (E.D. Va. Apr. 28, 2011) (utilizing this distinction).

210. *See id.*

211. *See id.* (utilizing this view of a scan).

212. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2004, 2006 (2012).

chart as an example, keyword searches may occur during the collection stage. Such searches, however, do not look for anything specific, but rather only locate existing documents. As such, these keyword searches are not "copies" as contemplated by Section 1920(4). They are more similar to creation because the software for the keyword search is something introduced to the party's ESI. If a district court bases its determination on these characteristics of copies, such vast discrepancies in the application of the language will be reduced.

4. Limiting Discretion: How to Demonstrate "Necessarily Obtained For Use"

After providing narrow definitions for "exemplification" and "copies," the Court should next attempt to limit the breadth of the second requirement of the statute. Under Section 1920(4), the second requirement provides that the copy must be "necessarily obtained for use in the case."[213]

An overall theme in ruling on the necessity requirement is that reviewing courts defer to the lower courts' determination of necessity.[214] The proposed test will focus on this theme while considering the various ways taxable e-discovery costs cases have applied the necessity requirement.

Many courts have interpreted the necessity requirement and agree that the determination is based on more than just one party's assertion of what is necessary.[215] Under the language of Section 1920(4), a court must decide if a disputed copy was necessary for use in a case.[216] The party in *Ricoh* argued that a "copy" does not actually have to be used in a trial or record to meet the necessity requirement.[217] The *Mann* court described the necessity of use requirement as requiring that the copies be furnished to the court or counsel, or be used as a court exhibit.[218] Finally, the *Cefalu* court determined necessity based on whether the copy

213. 28 U.S.C. § 1920(4) (Supp. II 2008). Note that the language of the statute seems to exclude exemplification from these two requirements. *Id.* (noting "where *the copies* are necessarily obtained") (emphasis added).

214. *See*, *e.g.*, Hecker v. Deere & Co., 556 F.3d 575, 591 (7th Cir. 2009) (emphasizing this discretion in its reasoning); BDT Products, Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 420 (6th Cir. 2005) (making a determination based on the discretion of the district court), *abrogated by* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).

215. *See Race Tires I*, No. 2:07-cv-1294, 2011 WL 1748620, at *4 (W.D. Pa. May 6, 2011), *aff'd in part*, *vacated in part*, 674 F.3d 158 (3d Cir. 2012).

216. *See* 28 U.S.C. § 1920(4).

217. *See In re* Ricoh Co., Patent Litig., 661 F.3d 1361, 1367 (Fed. Cir. 2011).

218. *See* Mann v. Heckler & Koch Def., Inc., No. 1:08cv611 (JCC), 2011 WL 1599580, at *6 (E.D. Va. Apr. 28, 2011).

was "vital to the presentation of the information, or . . . merely a convenience or, worse, an extravagance."[219]

The *Cefalu* reasoning provides the most logical way to apply the necessity requirement while generally reducing e-discovery court costs. The case's high bar for meeting the necessity test adheres to the U.S. Supreme Court's reminder in *Taniguchi* that taxable court costs should be minimal.[220] By requiring that the copy be "vital" and not just "reasonably necessary,"[221] the proposed test will reduce the e-discovery tasks that can apply under Section 1920(4).

The proposed test does not determine whether the copy was actually used in the litigation. Textually, Section 1920(4) requires "use in the case" and not specifically "use at trial." A "case" is much more expansive[222] than a specific trial.[223] Much of the information provided to the opposing party during discovery is never seen at trial. Requiring the use of the copy in a trial would frustrate the purpose of Section 1920(4), which intends to tax certain copies as court costs.[224] If copies had to be used in trial, many legitimate copies would be excluded from an award of court costs.

Keeping in mind the desired policy of lowering court costs, the U.S. Supreme Court should instruct district courts to determine necessity based on *Cefalu's* standard: whether the copy was "vital to the presentation" of the information of the case.[225] The limited, strict language of the test avoids overindulgence in using Section 1920(4) to tax every e-discovery task. Furthermore, by clarifying that the use requirement applies to the whole life cycle of the case and not just the trial, the U.S. Supreme Court will award costs for copies that are appropriate under 1920(4).

Finally, the Court should emphasize that the phrasing of the statute ties the necessity requirement to the copy itself and not to the associated fee. The necessity requirement asks only whether the copy itself is "necessarily obtained for use in the case,"[226] and not whether the fees or tasks were necessary. In other words, if the copy is necessary, the price of making the copy can be taxed. If a party hires outside counsel to search through their ESI, for example, the costs of hiring the firm may be

219. *See* Cefalu v. Vill. of Elk Grove, 211 F.3d 416, 428–29 (7th Cir. 2000).
220. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2006 (2012).
221. *See id.* (suggesting this language).
222. *See* BLACK'S LAW DICTIONARY, *supra* note 4, at 243 (defining a case as "[a] civil or criminal proceeding, action, suit, or controversy at law or in equity").
223. *See id.* at 1644–45 (defining a trial as "[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding").
224. *See* 28 U.S.C. § 1920(4) (Supp. II 2008).
225. *See* Cefalu v. Vill. of Elk Grove, 211 F.3d 416, 428–29 (7th Cir. 2000).
226. 28 U.S.C. § 1920(4).

necessary for discovery compliance. The determination of whether the firm costs are necessary, however, is irrelevant. Only the tasks themselves matter to the necessity requirement. By clarifying the text of Section 1920(4), the Court will further limit the lower courts' discretion in applying Section 1920(4).

In sum, the proposed test has two prongs. First, the test suggests using standard, narrow definitions of the two key words of Section 1920(4), "exemplification" and "copies." "Exemplification" should be defined using Black's Law Dictionary and the broad, common definition of "copies" should be limited using e-discovery task characterizations. Second, the proposed test urges the U.S. Supreme Court to limit the discretion in applying the second half of Section 1920(4), the necessity requirement. Under the proposed test, the necessity requirement is limited to vital copies and the use requirement only requires use in the case, not the trial. By interpreting the language of Section 1920(4) in a narrow manner, the proposed test ultimately reduces e-discovery court costs awards.

V. WHAT TO EXPECT IN STAGE FOUR

The U.S. Supreme Court rejected the opportunity to decide the issue of e-discovery taxable costs by denying certiorari in the *Race Tires II* case. Thus, Supreme Court action is unlikely to occur in the near future. Instead, more federal Courts of Appeals will rule directly on the issue. Given the detailed and well-respected reasoning[227] in *Race Tires II*, some undecided circuits will follow the Third Circuit's narrow interpretation. The numerous interpretational approaches to Section 1920(4) make the future difficult to predict. The only guarantee is that e-discovery taxable costs cases will continue to occur, and probably will do so more frequently as technology and the use of e-discovery continue to advance.

Taniguchi is unlikely to sway many courts on the e-discovery issue until the U.S. Supreme Court expressly connects the decision to e-discovery. Perhaps when more circuits have made a determination and the split becomes more pronounced, the U.S. Supreme Court will recognize the importance of intervention. Until then, federal judges' varied perceptions of what constitutes a "copy" in the technical context of e-discovery will continue to shape court costs awards.

227. *See*, *e.g.*, Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc., No. 5:09-CV-326-BR, 2012 WL 3202677, at *2 (E.D.N.C. Aug. 3, 2012) (reasoning that "[b]ecause the Third Circuit's opinion is well-reasoned and thorough . . . the court adopts the reasoning of *Race Tires America* [*Race Tires II*] and will follow its analysis").