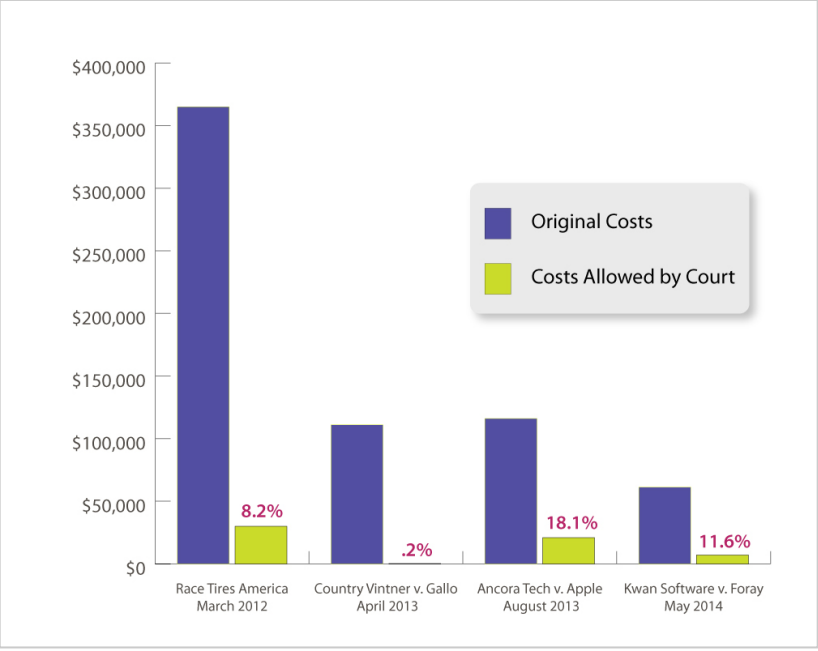
The Section 1920 Blues: Courts "Literally" Limiting Recovery of eDiscovery Costs

By Laura Ewing-Pearle, CEDS
Assistant Director – Client Services

With another federal court and another district court interpreting 28 U.S.C. § 1920(4) very literally and affirming ***Race Tires America***, parties need to find a way to keep their technology costs low. Just last month in the Northern District of California, Judge Susan Illston reduced an eDiscovery award for "costs for exemplification and the costs of making copies"[i] from $61,312 to $7,106.65 – a reduction of 88%. The December 2013 decision by the Eleventh Circuit Court of Appeals in ***CBT Flint Partners LLC v. Return Path Inc. et al***[ii] overturned an eDiscovery costs award of $318,135 for the combined defendants. Following the Fourth Circuit's decision in April 2013 in ***The County Vintner v. Gallo***[iii], in which the court sliced an $111,047 eDiscovery bill to $218, clients should be nervous – particularly since both courts still affirmed the need for complete and thorough productions, including metadata. *Race Tires* was again cited this past January 2014 in ***Chicago Board Options Exchange, Inc. v. Int'l Securities Exchange, LLC***[iv], in which the Court denied recovery under §1920 for collection, culling, searching, hosting, or creating a document database.



In reviewing eleven decisions specifically focused on recovering costs under §1920 over the last 14 months, only three facts are clear:

1. If you actually copy paper documents, or copy documents onto a CD, you can recover your copying costs.

2. If you collect electronic files and process those files correctly in order to preserve and copy the metadata, you will not be able to recover those costs, nor any costs for coding the documents or for hosting/"storing".

3. §1920 should be revised to reflect the realities of 21st century documents.

Understanding what is recoverable requires a patient search of individual court dockets. Woe to those in New Jersey and Iowa who cannot get simple OCR and endorsements recovered. Courts from WD Texas to ND California[v] have rejected all costs out of hand for lack of clarity in bills. Even costs for the ubiquitous "Bates numbering" are recoverable or non-recoverable depending on the court.

If the FRCP can be amended to keep pace with the existence and proliferation of electronic documents, surely §1920 can as well. Title 28 U.S. Code §1920 states that "a judge or clerk of any court may tax as costs" certain litigation expenses, including dockets fees, fees for witnesses, and more. The text of §1920(4) is brief: "Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." Note that the rule states "any materials", not just "paper" or even "documents." Although §1920 was ultimately modified in 2008, the Report of the Judicial Conference Committee on Court Administration recommended expanding the definition from *papers* to *materials* to reflect "the increasing use of technology" in 2003. A more precise definition with certain expansions is overdue. Because working with originals can create inadvertent spoliation issues, the original copying of the native collection prior to review should be considered making copies and therefore covered. Copying metadata from the original source is key to accurate production as well, and should also be included in §1920.

Despite my support for greater recovery of costs for the victor, don't expect any Congressional movement on this issue soon. For the foreseeable future, limited cost recovery is a reality. So, what can a responding party do to keep their costs low while complying with the court?

Best Practices and Cooperation

The Sedona Conference's Cooperation Proclamation, an industry-wide effort "to facilitate cooperative, collaborative, transparent discovery" (recently updated May 2014; see https://thesedonaconference.org for details), offers more than a balanced approach to discovery; it also makes good business sense. Judges are increasingly quoting from the principles of cooperation and proportionality in their opinions, and they are requiring parties to try to reach agreement in their 26(f) conferences rather than litigate eDiscovery requests. I recommend having your own ESI (Electronically Stored Information) Agreement drafted and ready to submit at the outset of litigation. This letter can include preservation parameters (i.e., back-up tapes will not be preserved or searched), as well as data collection and production specifications (i.e., file inclusion or exclusion lists, production of .xls files as natives). If you provide file inclusion lists upfront, you collect less data and therefore process and pay for less data. Cooperation is the best way to protect your client.

Cost Containment: Use a Predictable Model

Budgeting for eDiscovery costs with a trusted and knowledgeable service provider can help reduce overall spend. A good vendor should understand how to save its client money and should be informed and insightful about developments in case law that impact eDiscovery. The goal should not be to maximize vendor profit; the goal should be to establish a long-term partnership that keeps client costs down and keeps the client out of the headlines.

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[i] ***Kwan Software Engineering, Inc. v. Foray Technologies, LLC,*** No. C 12-03762 SI, (N.D. Cal. May 8, 2014) [Original case filed July 18, 2012, Case No: 5:2012cv03762]

[ii] ***CBT Flint Partners v. Return Path LLC***, 737 F.3d 1320 (Fed. Cir. 2013)

[iii] ***Country Vintner of N. Carolina, LLC v. E. & J. Gallo Winery, Inc.,*** 718 F.3d 249 (4th Cir. Apr. 29, 2013)

[iv] ***Chicago Board Options Exchange, Inc. v. Int'l Securities Exchange, LLC[iv]***, 2014 WL 125937 (N.D. Ill. Jan. 14, 2014)

[v] See ***Structural Metals, Inc. v. S & C Elec. Co.***, Civil Action No. SA–09–CV–984–XR, 2013 WL 3790450 (W.D. Tex. Jul. 19, 2013); ***Ancora Tech. Inc. v. Apple, Inc***. Case No. 11–CV–06357 YGR, 2013 WL 4532927 (N.D. Cal. Aug. 26, 2013)