



SPRING 2022 E-NEWSLETTER

At Digital Mountain, we assist our clients with their electronic discovery, digital forensics, cybersecurity, and data analytics needs. For this E-Newsletter, we discuss the business trends and cost explosion in eDiscovery.

Courts Weigh eDiscovery Costs Carefully

Questions surrounding eDiscovery costs as taxable costs started showing up in the early to mid-2000s, with *Race Tires Amer. Inc. v. Hoosier Racing Tire Corp.*, (2011 WL 1748620 W.D. Pa. May 6, 2011), serving as a catalyst for courts to address the issue of what eDiscovery charges are allowed under the exemplification allowance of 28 U.S.C. §1920(4). Regarding eDiscovery costs, one of the early questions was what eDiscovery services constitute, as Section 1920(4) reads, “exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case”? Now, as the costs for eDiscovery rise with the growth of data subject to eDiscovery, the question is not just what services, but how much service?



Breaking the Cost Barrier

How much eDiscovery does it take to crush your opponent? The answer is that it could be massive amounts. In *Motorola Solutions, Inc., et al. v. Hytera Communications Corporation Ltd., et al.* (No. 1:17-cv-01973. US Dist. Court, N.D. Illinois, Eastern Division, 2021), Motorola produced the equivalent of 44,655,356 pages of ESI at a billed cost of \$1,786,214.24 inclusive of all eDiscovery services, much to the dismay of losing party Hytera. Hytera argued that the supporting declaration of Motorola’s eDiscovery expert witness includes a per-page rate when the services provided were done at a per-gigabyte rate, as well as other objections that they felt should invalidate the costs. In the end, the court saw fit to award Motorola its full cost for eDiscovery, as the presiding judge saw the experience, methodology, and standard practices used to calculate the costs as reasonable.

Getting Clear on What Counts

In *Murphy, et al., v. Precision Castparts Corp., et al.* (No. 3:16-cv-00521-SB. US Dist. Ct., D. Oregon. 2021), the defendants prevailed in part on a Motion for Summary Judgment, and then filed for costs, including \$168,069 for “Active Hosting Services” from a provider as part of their eDiscovery costs. According to the Order, hosting services were not taxable costs of eDiscovery because they “do not include the costs of creating the produced duplicates,” but rather include

only "preparatory or ancillary costs commonly incurred leading up to, in conjunction with, or after duplication[,]" (ibid). This is a position that we have seen the Ninth Circuit uphold in numerous cases.

A decision from the Seventh Circuit demonstrates how closely judges are looking at the vendor bills to determine the taxability of costs. *Harris Brumfield, Trustee for Ascent Trust v. IBG LLC, et al.* (No. 10 C 715. US Dist. Ct., N.D. Illinois, Eastern Division 2022) is an action in which the plaintiff filed for various eDiscovery costs that did not meet the judge's test for taxable costs, including, "gathering, preserving, processing, searching, culling and extracting of ESI," "document production database and materials for access to confidential client documents via web-based search tool," and "miscellaneous costs" billed by eDiscovery providers but were not specifically itemized. In the view of Judge Kendall, none of those services amounted to exemplification or making copies.

Their Lips Are Sealed

Not everything can be found in official court records. In fact, when it comes to requests to protect privileged information, the courts tend to start from a position of keeping confidential data sealed – and that includes the costs for eDiscovery services. Judge Koh agreed in *GPNE Corp. v. Apple, Inc.*, (No. 12-CV-02885-LHK, N.D. Cal. 2015) to grant Apple's request to keep certain eDiscovery service costs sealed at Apple's request. Apple petitioned the court to seal the cost amounts because they didn't want to reveal the specific arrangements Apple had come to with their eDiscovery vendor, stating "reveal sensitive and confidential information regarding Apple's financial relationship with its e-discovery vendor," (ibid). The court agreed, allowing Apple to submit a redacted set of invoices in their application for costs.

Whether you're dealing with large volumes of data, smaller but essential data, or just need to protect the data and the provider's rate information, we recommend consulting with an experienced, trusted eDiscovery provider, like Digital Mountain, for your eDiscovery needs. We can help properly plan your eDiscovery case budget for your organization.

Please direct questions and inquiries about electronic discovery, digital forensics, cybersecurity, and data analytics to info@digitalmountain.com.

UPCOMING INDUSTRY EVENTS

ADFSL CONFERENCE ON DIGITAL FORENSICS, SECURITY AND LAW

Virtual: May 23-25, 2022

NETDILIGENCE CYBER RISK SUMMIT

Philadelphia, PA: June 1-3, 2022

INTERNATIONAL CONFERENCE ON DIGITAL FORENSICS AND INVESTIGATION

San Francisco, CA: June 2-3, 2022

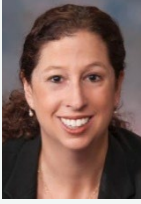
RSA CONFERENCE 2022

San Francisco, CA & Virtual: June 6-9, 2022

BLACK HAT USA 2022

Las Vegas, NV: August 6-11, 2022

[Click here to see more upcoming events and links.](#)



Digital Mountain, Inc. Founder and CEO, Julie Lewis, will be presenting at various upcoming industry events. Please send requests for speaker or panel participation for her to marketing@digitalmountain.com.

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