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ADDRESSING THE COSTS AND COMITY CONCERNS OF INTERNATIONAL E-DISCOVERY

John T. Yip

Abstract: The volume of electronically stored information (ESI) is expanding rapidly. Under the Federal Rules of Civil Procedure, litigants may request electronic discovery (e-discovery) of many different forms of ESI. In 1978, the U.S. Supreme Court held that the party responding to an e-discovery request presumptively pays all e-discovery costs, including the costs of preserving, producing, and reviewing the requested ESI. Therefore, the rapidly increasing volume of ESI has substantially increased the costs of e-discovery for producing parties. In the 2003 case, *Zubulake v. UBS Warburg LLC*, the U.S. District Court for the Southern District of New York established a two-step test that allows a court to shift some of the e-discovery costs from the responding party to the requesting party. Since 2003, many federal district courts and some state courts have followed the two-step *Zubulake* test for conducting e-discovery in the United States. However, no court has yet established a test for cost-shifting in international e-discovery—conducting e-discovery on ESI located outside the United States. International e-discovery has unique costs and implicates concerns of national sovereignty. This Comment argues that courts should adopt a cost-shifting test for international e-discovery that starts with a comity analysis and then applies *Zubulake*'s two-step cost-shifting test. Furthermore, courts applying this test should enforce cost-shifting orders through an escrow system whereby the requesting party will deposit some of the shifted costs with the court for later disbursement to the producing party.

INTRODUCTION

The amount of electronically stored information (ESI) worldwide is increasing at a rapid rate.¹ In 2005, the total amount of ESI worldwide (the “digital universe”) was 130 exabytes.² In 2011, the digital universe expanded to over 1800 exabytes, enough data to fill 57.5 billion 32GB Apple iPads.³ Consistent with this rapid growth in ESI, *Law Technology News* reported that the total cost of e-discovery rose from \$2 billion in

1. See Rich Miller, ‘Digital Universe’ to Add 1.8 Zettabytes in 2011, DATA CENTER KNOWLEDGE (June 28, 2011), <http://www.datacenterknowledge.com/archives/2011/06/28/digital-universe-to-add-1-8-zettabytes-in-2011>.

2. *Id.* One exabyte is equal to one billion gigabytes. *Exabyte (EB) Definition*, SEARCHSTORAGE (Nov. 1998), <http://searchstorage.techtarget.com/definition/exabyte>.

3. Miller, *supra* note 1; see also *State of the Universe: An Executive Summary*, IDC (June 2011), <http://www.emc.com/collateral/demos/microsites/emc-digital-universe-2011/index.htm> (explaining the significance of IDC’s findings). The IDC website states the data in terms of zettabytes. *Id.* One zettabyte is equal to a thousand exabytes. *Zettabyte Definition*, SEARCHSTORAGE (May 2004), <http://searchstorage.techtarget.com/definition/zettabyte>. This Comment uses exabytes for consistency.

2006 to \$2.8 billion in 2009 and estimated that the total cost would rise ten to fifteen percent annually in 2010 and 2011.⁴

Electronic discovery (e-discovery) begins when one of the parties in a lawsuit requests that the other party produce certain ESI that is relevant to the requesting party's claims or defenses.⁵ Many forms of ESI are discoverable in federal district courts.⁶ As a general rule, the producing party pays the costs of preserving, finding, and sending the ESI to the requesting party.⁷ Due to the high volume of available ESI, discovery requests can pose a burden for producing parties.⁸ In one case, the cost of complying with an e-discovery request was \$249,000.⁹ In another case, the cost to restore, search, and produce data in archived electronic backup tapes was around \$274,000.¹⁰ Twenty-five percent of large-cap businesses¹¹ in the United States and the United Kingdom anticipate an increase in their e-discovery budgets for 2011,¹² notwithstanding improvements in e-discovery tools and technologies.¹³

4. George Socha & Tom Gelbmann, *Climbing Back: Revenue Climbing Back for EDD Industry*, LAW TECH. NEWS (Aug. 1, 2010), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202463900292>.

5. FED. R. CIV. P. 26(b).

6. FED. R. CIV. P. 34 advisory committee's note (2006) ("Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases.").

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

8. FED. R. CIV. P. 26 advisory committee's note (2006).

9. *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 570 (N.D. Ill. 2004).

10. *Zubulake v. UBS Warburg LLC (Zubulake III)*, 216 F.R.D. 280, 283 (S.D.N.Y. 2003). The exact amount, \$273,649.39, "includes \$165,954.67 to restore and search the tapes and \$107,694.72 in attorney and paralegal review costs." *Id.* The cost of complying with e-discovery requests remains high in recent cases. *See, e.g.,* *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, No. 11-2316, 2012 WL 887593, at *1 (3d Cir. Mar. 16, 2012) (\$365,000); *Moore v. Publicis Groupe*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 607412, at *21 (S.D.N.Y. Feb. 24, 2012) (\$550,000); *Gen. Elec. Co. v. Wilkins*, No. 1:10-cv-00674 LJO JLT, 2012 WL 570048, at *5-6 (E.D. Cal. Feb. 21, 2012) (\$2,000,000 to search and host over 400 backup tapes).

11. *Fulbright's Litigation Trends Survey: A Little Less Litigation; More Regulation*, FULBRIGHT & JAWORSKI L.L.P. (Oct. 18, 2011), http://www.fulbright.com/index.cfm?fuseaction=news.detail&article_id=9902&site_id=286 (defining a "large-cap" business as a business with "\$1 billion or more in gross revenues").

12. *Id.*

13. *See* Jason Krause, *When Is an E-Discovery Burden an Undue Burden?*, LAW TECH. NEWS (June 1, 2010), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202458961735> ("I find that technology has made the cost of e-discovery perhaps 30 percent cheaper, but we are forced to handle 70 percent more volume than in the past," says David Kessler, partner with Drinker Biddle in Philadelphia. "Once we started to get a handle on e-mail and other file types, audio files, social media, and other discoverable types of data began coming into play.").

Federal district courts address the high costs of e-discovery in the United States by shifting some e-discovery costs to the requesting party under the two-step test articulated in *Zubulake v. UBS Warburg LLC*.¹⁴ The first step of the *Zubulake* test is to examine the ESI's "accessibility."¹⁵ Although the original *Zubulake* case described accessibility in terms of the data storage format,¹⁶ some post-*Zubulake* cases have framed accessibility in terms of the overall cost to the producing party.¹⁷ The Federal Rules of Civil Procedure (FRCP) state that ESI is inaccessible if it creates an "undue burden or cost" for the producing party.¹⁸ If the court finds the ESI accessible, then the producing party must bear the costs of e-discovery.¹⁹ However, if the court finds the data inaccessible, it will continue on to the second part of the *Zubulake* test, which requires considering and balancing seven factors related to the cost and significance of the e-discovery request.²⁰ One of three results will occur: the court might allow e-discovery at the producing party's expense;²¹ the court might not allow e-discovery;²² or, the court might allow e-discovery with some restrictions, such as requiring that the requesting party pay some or all of the e-discovery costs.²³

Few federal courts have addressed the costs of conducting e-discovery on ESI outside the United States (international e-discovery), even though international e-discovery involves additional costs.²⁴ When

14. *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309 (S.D.N.Y. 2003); *see also Zubulake III*, 216 F.R.D. at 284 (describing the two steps of the *Zubulake* test).

15. *Zubulake I*, 217 F.R.D. at 318.

16. *Id.*

17. *See, e.g., OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 476–77 (N.D. Cal. 2003) ("Accessibility turns largely on the expense of production."); *W.E. Aubuchon Co. v. Benefirst, LLC*, 245 F.R.D. 38, 43 (D. Mass. 2007) (finding data "not reasonably accessible" because retrieval of the data would involve "undue burden or cost").

18. FED. R. CIV. P. 26(b)(2)(B).

19. *Zubulake I*, 217 F.R.D. at 324.

20. *Id.*; *see also infra* Part II.A.

21. *See, e.g., Xpedior Creditor Trust v. Credit Suisse First Bos. (USA), Inc.*, 309 F. Supp. 2d 459, 467 (S.D.N.Y. 2003).

22. *See, e.g., Wood v. Capital One Servs., LLC*, No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *13 (N.D.N.Y. Apr. 15, 2011).

23. *See, e.g., Zubulake III*, 216 F.R.D. 280, 291 (S.D.N.Y. 2003).

24. A few courts have addressed the costs of international e-discovery. *See, e.g., U & I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667, 677 (M.D. Fla. 2008); *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 496 (E.D. Pa. 2005). For information on the additional costs of international e-discovery, see DATICON ELEC. EVIDENCE DISCOVERY, INC., REDUCING THE RISK AND COST OF INTERNATIONAL AND MULTI-LINGUAL EDISCOVERY CASES (2009).

addressing international ESI, American courts rarely limit discovery on grounds of cost,²⁵ rarely use cost-shifting,²⁶ and often compel producing parties to hand over ESI even though doing so would violate foreign blocking statutes.²⁷ Courts that have considered the use of cost-shifting to date did not provide general criteria for determining when cost-shifting is appropriate.²⁸ Consequently, courts have not settled on the proper analysis for determining the appropriateness of cost-shifting in international e-discovery.

The FRCP govern discovery in federal district courts generally, regardless of whether the discovery request involves ESI in the United States or in a foreign country.²⁹ However, international e-discovery sometimes implicates foreign laws and international treaties, such as the Hague Convention.³⁰ Although the 2006 amendments to the FRCP specifically addressed e-discovery, they did not address issues unique to international e-discovery.³¹

This Comment addresses the lack of clarity regarding international e-discovery standards by proposing a test for analyzing comity concerns

25. See, e.g., *AccessData Corp. v. ALSTE Techs. GmbH*, No. 2:08cv569, 2010 WL 318477, at *2 (D. Utah Jan. 21, 2010) (“[T]he costs of transmitting information and electronic documents ought to be relatively minimal.”).

26. There are a few cases that allowed cost-shifting. See, e.g., *U & I Corp.*, 251 F.R.D. at 677; *Quinby v. WestLB AG*, 245 F.R.D. 94, 111 (S.D.N.Y. 2006) (involving an e-discovery request that includes some foreign ESI); *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 496.

27. Blocking statutes “restrict cross-border discovery of information intended for disclosure in foreign jurisdictions” THE SEDONA CONFERENCE, FRAMEWORK FOR ANALYSIS OF CROSS-BORDER DISCOVERY CONFLICTS: A PRACTICAL GUIDE TO NAVIGATING THE COMPETING CURRENTS OF INTERNATIONAL DATA PRIVACY AND E-DISCOVERY 18 (Aug. 2008), available at <https://thesedonaconference.org/publication/Framework%20for%20Analysis%20of%20Cross-Border%20Discovery%20Conflicts>. For a sampling of cases where an American court ordered discovery despite a blocking statute, see *Munoz v. China Expert Tech., Inc.*, No. 07 Civ. 10531(AKH), 2011 WL 5346323 (S.D.N.Y. Nov. 7, 2011) (ordering e-discovery despite a Chinese blocking statute); *Sofaer Global Hedge Fund v. Brightpoint, Inc.*, No. 1:09-CV-01191-TWP-DML, 2010 WL 4701419 (S.D. Ind. Nov. 12, 2010) (ordering e-discovery despite a French blocking statute); *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010) (ordering e-discovery despite a Malaysian blocking statute).

28. *U & I Corp.*, 251 F.R.D. at 677 (allowing cost-shifting based on unique facts of the case); *Quinby*, 245 F.R.D. at 111 (allowing cost-shifting under *Zubulake* without stating whether *Zubulake* is appropriate for foreign ESI); *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 496 (allowing cost-shifting under FRCP 45 without articulating factors for determining whether cost-shifting would be appropriate in the future).

29. See FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts . . .”).

30. See Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 1, Mar. 18, 1970, 23 U.S.T. 2555.

31. FED. R. CIV. P. 26 advisory committee’s note (2006).

and cost-shifting in such cases. Part I describes the high costs of e-discovery. Part II explains the *Zubulake* test in general. Part III describes international e-discovery and surveys the ways in which courts have addressed the costs of international e-discovery. Part IV proposes a cost-shifting approach for international e-discovery, advocates the use of “total cost” accessibility instead of “format” accessibility, and discusses a way to enforce cost-shifting orders. Finally, Part V applies the test from Part IV to the facts of *In re Automotive Refinishing Paint Antitrust Litigation*³² as an example of how the test would operate in litigation.³³

I. THE HIGH VOLUME OF DISCOVERABLE ESI OFTEN MAKES E-DISCOVERY EXPENSIVE FOR THE PRODUCING PARTY

E-discovery tends to be expensive due to the large volume of potentially discoverable ESI.³⁴ FRCP 26(b)(1) states that a party may obtain via discovery “any nonprivileged matter that is relevant to any party’s claim or defense”³⁵ The FRCP allows for broad discovery,³⁶ and electronic data is generally no less discoverable than paper documents.³⁷ Businesses store much of their data in electronic form.³⁸ Examples of discoverable ESI include “word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases.”³⁹ The high volume of discoverable ESI increases the three main e-discovery costs of preservation, production, and review.

A. *Preserving ESI Can Disrupt Business and Impose Costs on the Producing Party*

Parties have a duty to preserve evidence that “[they know], or reasonably should know, will likely be requested in reasonably

32. 229 F.R.D. 482 (E.D. Pa. 2005).

33. *Id.* at 483–86. In this case, the requesting party wanted a non-party headquartered in Europe to produce various ESI at high expense.

34. *See* Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 572 (N.D. Ill. 2004).

35. FED. R. CIV. P. 26(b)(1).

36. *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995) (“[T]he scope of discovery under the federal rules is broad . . .”).

37. *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002).

38. *See* SHIRA A. SCHEINDLIN & DANIEL J. CAPRA, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE 39–45 (Thomson/Reuters 2009).

39. FED. R. CIV. P. 34 advisory committee’s note (2006).

foreseeable litigation.”⁴⁰ In some instances, federal district courts may order a party to preserve potentially discoverable information.⁴¹ One district court noted in 2006 that preservation orders are becoming “increasingly routine.”⁴² Generally, a preservation order requires a party to retain ESI made by or prepared for persons who are likely to have relevant data.⁴³ However, standards for adequate preservation vary widely.⁴⁴

If the producing party fails to comply with a preservation order or to meet the party’s duty of preservation, a court may impose monetary sanctions under FRCP 37.⁴⁵ At trial, a court may also instruct the jury to infer that a party who destroyed ESI in violation of the preservation order did so because the ESI would have been unfavorable to that party.⁴⁶ In at least one case, the court dismissed a party’s claims entirely for failure to preserve ESI.⁴⁷

To satisfy the duty of preservation and comply with preservation orders, a party might have to stop or limit using devices storing the data, such as company computers, for the course of litigation.⁴⁸ This could disrupt the producing party’s business.⁴⁹ Usually, the producing party must pay for all the costs of preserving data during the course of the lawsuit, including the costs of backing up the data.⁵⁰ Because a preservation order might encompass numerous sources of ESI, such as

40. *Scott v. IBM Corp.*, 196 F.R.D. 233, 249 (D.N.J. 2000).

41. *See* SCHEINDLIN & CAPRA, *supra* note 38, at 160–63.

42. *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 370 (S.D.N.Y. 2006) (quoting *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 136 (2004)).

43. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

44. *Compare* Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (requiring a party to issue written litigation hold notice to ensure that its employees and others are preserving relevant ESI), *with* *Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, No. 08-CV-561S(F), 2011 WL 1549450, at *4 (W.D.N.Y. Apr. 21, 2011) (not requiring a written litigation hold).

45. FED. R. CIV. P. 37(b)(2)(A); *see also* *Mosaid Techs. Inc. v. Samsung Elecs. Co., Ltd.*, 348 F. Supp. 2d 332, 335 (D.N.J. 2004) (describing available sanctions against a party who failed to satisfy the duty of preservation). *But see* FED. R. CIV. P. 37(e) (“Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”).

46. *Zubulake IV*, 220 F.R.D. at 219–20.

47. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 963 (9th Cir. 2006).

48. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.442 (2004).

49. *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 372 (S.D.N.Y. 2006).

50. *Id.* at 373.

computers, computer networks, and backup storage devices,⁵¹ the costs of preserving the large volume of ESI may be “prohibitively expensive.”⁵² Moreover, the available sanctions for violating a preservation order could cause risk-averse producing parties to preserve more data than is necessary and spend money on servers and warehouses to hold the additional data.⁵³

B. Producing Large Volumes of ESI Is Expensive

Production of ESI includes restoring data on backup tapes,⁵⁴ searching the available ESI for responsive documents,⁵⁵ and handling any glitches that might arise.⁵⁶ The presumption is that the producing party must pay for the expenses of production.⁵⁷ The high volume of available ESI can make production costs very expensive for the producing party.⁵⁸

Some e-discovery requests require the producing party to provide the requesting party with ESI dating back several years.⁵⁹ Older data is often on backup tapes.⁶⁰ In one case, plaintiffs requested that the defendants give them e-mails spanning a period of seven years from 2500 separate backup tapes.⁶¹ The defendants objected on grounds that it would cost them \$1,500,000 to comply with the e-discovery request.⁶² The court found that the plaintiffs did not credibly rebut the defendants’ cost

51. MANUAL FOR COMPLEX LITIGATION, *supra* note 48, § 11.442.

52. *Id.*

53. See *E-Discovery: Avoid Over-Preservation and Reduce Risk of an “Unforced Error,”* METROPOLITAN CORP. COUNS., (Oct. 2011), <http://www.metrocorpocounsel.com/pdf/2011/October/24.pdf> (interviewing Howard Sklar, Senior Counsel, Reconnind Inc.).

54. See, e.g., *Zubulake I*, 217 F.R.D. 309, 314 (S.D.N.Y. 2003).

55. See, e.g., *id.*

56. See, e.g., *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 1:05-CV-657(DNH/RFT), 2007 WL 2687670, at *2 (N.D.N.Y. Sept. 7, 2007) (e-mails became separated from their attachments during e-discovery).

57. *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002).

58. See, e.g., *Major Tours, Inc. v. Colorel*, No. 05-3091(JBS/JS), 2009 WL 3446761, at *1 (D.N.J. Oct. 20, 2009) (discussing an e-discovery request that would have cost the producing party \$1,500,000).

59. See, e.g., *Zubulake I*, 217 F.R.D. at 313 (producing party had to produce e-mails from August 1999 to December 2001).

60. *Id.*; see also SCHEINDLIN & CAPRA, *supra* note 38, at 52–53.

61. *Major Tours, Inc.*, 2009 WL 3446761, at *1.

62. *Id.*

estimate and considered ways to alleviate the defendants' burden.⁶³

Because an e-discovery request usually asks for ESI related to certain matters, the producing party must search through the available ESI to find the responsive information.⁶⁴ Deloitte, a consulting and risk management company, found that many businesses are ill-prepared for handling e-discovery requests.⁶⁵ For example, a producing party might lack the technology necessary to read certain older electronic documents⁶⁶ and might have to hire an outside e-discovery vendor⁶⁷ or purchase special software.⁶⁸ A producing party might need months to complete production of the requested ESI.⁶⁹ As in the preservation context, courts may sanction producing parties under FRCP 37 for failing to comply with an order to produce ESI.⁷⁰

Further complicating matters, some producing parties encounter glitches during production. On one occasion, a glitch separated e-mails from their attachments.⁷¹ The producing party had to incur additional costs to match attachments to their respective e-mails.⁷² On another occasion, a technical glitch truncated portions of some e-mails.⁷³ The producing party thought that the e-mails were complete and turned them over to the requesting party.⁷⁴ Upon further review, the producing party discovered that the e-mails were incomplete and had to produce full

63. *Id.* at *3.

64. *Zubulake I*, 217 F.R.D. at 320 (“In order to search the tapes for responsive e-mails, UBS [the producing party] would have to engage in [a] costly and time-consuming process . . .”).

65. *E-discovery: Mitigating Risk Through Better Communication*, DELOITTE 2–7 (2010), available at http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FAS_ForensicCenter_us_fas-us_dfc/us_dfc/us_dfc_e_discovery_survey_final_061710.pdf.

66. *See, e.g.*, *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 424 (S.D.N.Y. 2002).

67. *See, e.g.*, *Capitol Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44, 51 (S.D.N.Y. 2009). There are many companies that specialize in assisting litigants with e-discovery. *E-Discovery Is Big Business*, WIRED (Jan. 29, 2006), <http://www.wired.com/techbiz/media/news/2006/01/70111>.

68. *See, e.g.*, *Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 600 (E.D. Wis. 2004).

69. *See, e.g.*, *Capitol Records, Inc.*, 261 F.R.D. at 48 (three months); *Bank of Am. Corp. v. SR Int'l Bus. Ins. Co.*, No. 05-CVS-5564, 2006 WL 3093174, at *2 (N.C. Super. Ct. Nov. 1, 2006) (ten to eleven months to complete e-discovery).

70. FED. R. CIV. P. 37(b)(2)(A).

71. *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 1:05-CV-657(DNH/RFT), 2007 WL 2687670, at *2 (N.D.N.Y. Sept. 7, 2007).

72. *Id.* at *12.

73. *Datel Holdings Ltd. v. Microsoft Corp.*, No. C-09-05535 EDL, 2011 WL 866993, at *1 (N.D. Cal. Mar. 11, 2011).

74. *Id.*

versions of the e-mails.⁷⁵ These examples illustrate how technical glitches can cost the producing party additional time and expense.

C. Reviewing the Information for Relevance and Privilege Causes the Producing Party to Incur Additional Costs

After a producing party has located ESI that is potentially relevant to the e-discovery request, it must review the ESI for relevance and privilege.⁷⁶ IT World, a technology news site, reported in 2008 that producing parties incur eighty percent of their e-discovery costs during review.⁷⁷ Courts sometimes instruct producing parties to determine what ESI is relevant by performing keyword searches, which can be quite broad.⁷⁸ As such, a keyword search could yield results that are privileged or not relevant to the case.⁷⁹ In *Wiginton v. CB Richard Ellis, Inc.*,⁸⁰ an e-discovery request required the producing party to perform searches using eight keywords.⁸¹ The search terms yielded 8660 results, of which only 567 were actually responsive to the discovery request.⁸² In such cases, the producing party must review the ESI for relevance and privilege prior to turning it over to the requesting party, which can be a time-consuming and costly process, or risk disclosure of privileged information.⁸³ The combined costs of preservation, production, and review can amount to over \$100,000.⁸⁴

75. *Id.* (“Defendant has agreed to produce some of the later portions of the ‘Re-auth’ email chain because they acknowledge that the discussions eventually shifted to business topics.”).

76. *Byers v. Ill. State Police*, 53 Fed. R. Serv. 3d (West) 740, *10 (N.D. Ill. 2002).

77. Ursula Talley, *Reduce Litigation Risk, Cut Costs with Proactive eDiscovery*, IT WORLD (Aug. 13, 2008, 3:18 PM), <http://www.itworld.com/tip/54250/reduce-litigation-risk-cut-costs-proactive-ediscovery> (“Eighty percent of eDiscovery cost, according to some analysts, is incurred during the legal review process.”).

78. *See, e.g.*, *Quinby v. WestLB AG*, 245 F.R.D. 94, 99 (S.D.N.Y. 2006). In *Quinby*, the plaintiff made an e-discovery request and proposed as keywords, “words that are very commonly used in the investment banking industry, such as ‘asset,’ ‘deal,’ ‘insurance’ and ‘risk’ . . . [and] even more commonly used words that could be present in practically any e-mail, including words such as ‘go,’ ‘her,’ ‘okay’ and ‘she’ . . .” *Id.* For a general overview of the strengths and weaknesses of keyword searches, see SCHEINDLIN & CAPRA, *supra* note 38, at 229–32.

79. *See* *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 571 (N.D. Ill. 2004).

80. 229 F.R.D. 568 (N.D. Ill. 2004).

81. *Id.* at 570.

82. *Id.* at 571.

83. *See, e.g.*, *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 432 (S.D.N.Y. 2002). *But see* FED. R. CIV. P. 26(b)(5)(B) (allowing a party to notify the other party that certain produced information is privileged and should be returned, sequestered, or destroyed).

84. *See, e.g.*, *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, No. 2:07-cv-1294, 2011 WL 1748620, at *3 (W.D. Pa. May 6, 2011). The two defendants each filed a Bill of Costs. *Id.* at *2.

II. SOME COURTS ADDRESS THE HIGH COSTS OF E-DISCOVERY BY SHIFTING SOME OF THOSE COSTS TO THE REQUESTING PARTY

In some cases, producing parties have objected to e-discovery requests on grounds of undue burden and expense.⁸⁵ The U.S. Supreme Court has only addressed the high costs of e-discovery once, in the 1978 case of *Oppenheimer Fund, Inc. v. Sanders*.⁸⁶ In that case, which involved securities fraud, the plaintiff requested that the defendant produce computer tapes that contained the names of people who bought a certain financial security.⁸⁷ Although the Court described a general presumption that the producing party should bear the costs of e-discovery,⁸⁸ it noted that courts may use “cost-shifting” to order the requesting party to pay for some or all of the costs of performing e-discovery in order to more equitably distribute costs.⁸⁹ The Court stated that a court may use cost-shifting to protect the producing party from “undue burden or expense.”⁹⁰ However, the Court did not articulate any criteria for determining whether the expenses in a particular case warrant cost-shifting.⁹¹ Although e-discovery is becoming increasingly important and the volume of ESI is rising rapidly, the Court has not addressed e-discovery cost concerns since the *Oppenheimer* decision in 1978.

After *Oppenheimer*, district courts were split on the proper analysis for cost-shifting.⁹² The U.S. District Court for the District of Columbia stated that it would be fairer to shift costs if a particular request was less likely to yield relevant results in *McPeek v. Ashcroft*.⁹³ In contrast, the U.S. District Court for the Southern District of New York applied an eight-factor test for cost-shifting in *Rowe Entertainment Inc. v. William*

One defendant, Hoosier, claimed \$143,007.05 in e-discovery costs. *Id.* at *3. The other defendant, DMS, claimed \$246,101.41 in e-discovery costs. *Id.*

85. See, e.g., *Zubulake I*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003).

86. 437 U.S. 340 (1978).

87. *Id.* at 344–45.

88. *Id.* at 358.

89. *Id.*

90. *Id.* (quoting FED. R. CIV. P. 26(c)).

91. *Id.* at 358–59.

92. Compare *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001) (using the marginal utility test, which stated, “[t]he more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense”), with *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (using an eight-factor test to determine when cost-shifting is appropriate).

93. 202 F.R.D. 31, 34 (D.D.C. 2001).

*Morris Agency, Inc.*⁹⁴

In 2003, Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York refined the eight-factor *Rowe* test in *Zubulake v. UBS Warburg LLC*.⁹⁵ *Zubulake* was a gender discrimination case in which the plaintiff sought e-discovery of responsive e-mails on the backup drives of five people.⁹⁶ The defendant objected on grounds that it would cost \$300,000 to comply with the e-discovery request.⁹⁷ After considering the facts, Judge Scheindlin developed a two-step test for determining when cost-shifting is appropriate.⁹⁸ First, the court asked whether the requested ESI was “accessible.”⁹⁹ Upon finding that the requested ESI was inaccessible,¹⁰⁰ the court applied seven weighted factors to decide whether to allow cost-shifting.¹⁰¹

The *Zubulake* test has influenced federal district courts across the country.¹⁰² The resulting body of case law refined the *Zubulake* test by specifying when cost-shifting is available and what types of costs may be shifted.¹⁰³ In 2006, Congress and the U.S. Supreme Court ratified the concept of e-discovery cost-shifting in an amendment to FRCP 26, which governs discovery.¹⁰⁴ The amendment addresses the high costs of conducting e-discovery on large volumes of ESI and permits courts to use cost-shifting for e-discovery of inaccessible sources.¹⁰⁵ Scholars

94. 205 F.R.D. 421, 429 (S.D.N.Y. 2002). The eight factors are:

(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data [sic] (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party. Each of these factors is relevant in determining whether discovery costs should be shifted in this case.

Id.

95. *Zubulake I*, 217 F.R.D. 309, 320–22 (S.D.N.Y. 2003).

96. *Id.* at 312–13.

97. *Id.* at 313.

98. *Id.* at 318 (“Thus, cost-shifting should be considered *only* when electronic discovery imposes an ‘undue burden or expense’ on the responding party.” (emphasis in original) (quoting FED. R. CIV. P. 26(c))).

99. *Id.*

100. *Id.* at 320.

101. *Id.* at 322.

102. *In re Veeco Instruments, Inc. Sec. Litig.*, No. 05 MD 1695(CM)(GAY), 2007 WL 983987, at * 1 (S.D.N.Y. Apr. 2, 2007) (“The major case of *Zubulake I*] . . . set forth a widely followed standard for determining when cost shifting is appropriate.”).

103. *See infra* Part II.B–C.

104. *See* FED. R. CIV. P. 26 advisory committee’s note (2006) (discussing changes to the discovery rules).

105. *See id.*

have observed that the 2006 amendments to FRCP 26 embraced the *Zubulake* test.¹⁰⁶

A. *The Zubulake Test Has Two Steps: The Initial “Accessibility” Analysis and the Subsequent Seven-Factor Balancing Test for Inaccessible Data*

In order for a court to apply the *Zubulake* test, the producing party must first object to the e-discovery request on grounds of undue burden or cost under FRCP 26.¹⁰⁷ Then, the court will apply the two-step *Zubulake* test to determine whether cost-shifting is appropriate.¹⁰⁸ After analyzing accessibility and the seven factors, the court may deny cost-shifting,¹⁰⁹ shift some of the costs,¹¹⁰ or deny a particularly burdensome e-discovery request.¹¹¹

The first step of the *Zubulake* test is the accessibility analysis.¹¹² The analysis begins with the general presumption that the producing party must pay for the costs of e-discovery.¹¹³ The *Zubulake* test allows cost-shifting for data that the court finds was “inaccessible” at the time the litigation commenced.¹¹⁴ Data is inaccessible if it creates an undue burden or expense for the producing party.¹¹⁵ Although a finding of inaccessibility is crucial to cost-shifting, courts have not agreed on a common standard for defining inaccessibility.¹¹⁶ In *Zubulake*, the court

106. See, e.g., SCHEINDLIN & CAPRA, *supra* note 38, at 313; Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 904 (2009).

107. FED. R. CIV. P. 26(b)(2)(B); FED. R. CIV. P. 26 advisory committee’s note (2006).

108. *Zubulake I*, 217 F.R.D. 309, 320 (S.D.N.Y. 2003) (“In order to search the tapes for responsive e-mails, UBS would have to engage in the costly and time-consuming process detailed above. It is therefore appropriate to *consider* cost shifting.” (emphasis in original)).

109. See, e.g., *Semsroth v. City of Wichita*, 239 F.R.D. 630, 640 (D. Kan. 2006).

110. See, e.g., *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 577 (N.D. Ill. 2004) (shifting seventy-five percent of the costs); *Zubulake III*, 216 F.R.D. 280, 291 (S.D.N.Y. 2003) (shifting twenty-five percent of the costs).

111. See, e.g., *Wood v. Capital One Servs., LLC*, No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *13 (N.D.N.Y. Apr. 15, 2011) (no e-discovery unless the requesting party agrees to bear all the costs of e-discovery, with an exception for class certification).

112. *Zubulake I*, 217 F.R.D. at 318–20.

113. *Id.* at 317.

114. See *id.* at 324; see also *Xpedior Creditor Trust v. Credit Suisse First Bos. (USA), Inc.*, 309 F. Supp. 2d 459, 465 (S.D.N.Y. 2003) (determining that it is appropriate to consider cost-shifting for ESI that had become inaccessible by the time the litigation commenced).

115. *Zubulake I*, 217 F.R.D. at 318.

116. Compare *id.* (defining inaccessibility based on the ESI’s storage format), with *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 476–77 (N.D. Cal. 2003) (defining inaccessibility based on the

reasoned that an accessibility determination should depend “primarily on whether [the ESI] is kept in an *accessible or inaccessible* format.”¹¹⁷ *Zubulake* listed five categories of data storage formats that existed in 2003 and identified three of them as “accessible” and the other two as “inaccessible.”¹¹⁸ Post-*Zubulake*, some courts followed *Zubulake* in defining accessibility in terms of the requested ESI’s format.¹¹⁹ Other courts interpreted accessibility in terms of the total cost to produce the requested ESI.¹²⁰ Courts are currently split on whether to use *Zubulake*’s “format” accessibility standard or the alternative “total cost” accessibility standard.¹²¹ Under either standard, courts would order the production of accessible data without cost-shifting and would continue to the second step of the *Zubulake* test for inaccessible data.¹²²

The second step of the *Zubulake* test is a seven-factor test that determines whether there will be cost-shifting.¹²³ The seven factors are:

- (1) The extent to which the request is specifically tailored to discover relevant information;

total cost of production).

117. *Zubulake I*, 217 F.R.D. at 318 (emphasis in original). The court’s use of the phrase “accessible format” to describe items that pass the accessibility step assumes that certain types of data are more “accessible” and therefore pose less of a burden to the producing party than other types of data. However, because the volume of requested ESI is a major driver of e-discovery costs, the producing party might have to incur high e-discovery costs for broad e-discovery requests, regardless of the ESI’s format. *See* *W.E. Aubuchon Co. v. BeneFirst, LLC*, 245 F.R.D. 38, 43 (D. Mass. 2007) (finding data in an “accessible” format nonetheless “inaccessible” because “retrieval would involve undue burden or cost”); *see also* *SCHEINDLIN & CAPRA, supra* note 38, at 313 (“The costs of processing such voluminous amounts of data to find the few nuggets that are relevant to a specific litigation . . . are staggering.”).

118. *Zubulake I*, 217 F.R.D. at 318–20. The three types of accessible data were “[a]ctive, online data,” “[n]ear-line data,” and “[o]ffline storage/archives.” *Id.* at 318–19. Active, online data includes hard drives, near-line data includes optical disks, and offline storage/archives include removable optical disks and magnetic tape media. *Id.* The two types of inaccessible data were “[b]ackup tapes” and “[e]rased, fragmented or damaged data.” *Id.* at 319–20.

119. Some courts still apply this “format” accessibility approach. *See, e.g.,* *Sundown Energy, L.P. v. Haller*, No. 10-4354, 2011 WL 5079329, at *4 (E.D. La. Oct. 26, 2011) (denying cost-shifting because the producing party asserted that an e-discovery request is costly but failed to show that the requested ESI is stored in an inaccessible format); *Canon U.S.A., Inc. v. S.A.M., Inc.*, No. 07-01201, 2008 WL 2522087, at *5 (E.D. La. June 20, 2008) (denying cost-shifting for e-discovery of ESI on a server because the ESI was in an active format).

120. *See, e.g., W.E. Aubuchon Co.*, 245 F.R.D. at 43 (finding ESI in an “accessible” format inaccessible because the e-discovery would create an “undue burden or cost”); *see also OpenTV*, 219 F.R.D. at 476–77 (“Accessibility turns largely on the expense of production.”).

121. *Compare Sundown Energy, L.P.*, 2011 WL 5079329, at *4 (applying format accessibility), with *W.E. Aubuchon Co.*, 245 F.R.D. at 43 (applying total cost accessibility).

122. *See* *Peskoff v. Faber (Peskoff I)*, 240 F.R.D. 26, 31 (D.D.C. 2007) (“[C]ost-shifting does not even become a possibility unless there is first a showing of inaccessibility.”).

123. *Zubulake I*, 217 F.R.D. at 322.

- (2) The availability of such information from other sources;
- (3) The total cost of production, compared to the amount in controversy;
- (4) The total cost of production, compared to the resources available to each party;
- (5) The relative ability of each party to control costs and its incentive to do so;
- (6) The importance of the issues at stake in the litigation; and
- (7) The relative benefits to the parties of obtaining the information.¹²⁴

To aid judges in making the cost-shifting determination, the *Zubulake* test groups the seven factors into three categories based on their relative importance: (1) the marginal utility test, (2) cost factors, and (3) other factors.¹²⁵

1. *The First Category of Factors, the Marginal Utility Test, Includes the Two Most Important Factors of the Zubulake Test*

The “marginal utility test,” which originated in *McPeek*,¹²⁶ includes the first two factors in the second step of the *Zubulake* test: (1) “[t]he extent to which the request is specifically tailored to discover relevant information,” and (2) “the availability of such information from other sources.”¹²⁷ These two factors are the most important in the *Zubulake* test because “[t]he more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense.”¹²⁸

The first factor centers on specificity.¹²⁹ Sometimes, a court will perform a sample search of the requested ESI to determine whether an e-discovery request is specific.¹³⁰ In a sample search, the court will have

124. *Id.*

125. *See id.* at 322–23. *Zubulake* separated the last two factors into separate groups, but subsequent cases have considered the two factors to be of similar weight. *See, e.g.,* *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 576 (N.D. Ill. 2004) (lumping the last two factors into a “remaining factors” category).

126. *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001). The *McPeek* version of the marginal utility test posited that it would be fairer to shift the costs to the requesting party if it is less likely that the request would generate relevant results. *See id.*

127. *Zubulake I*, 217 F.R.D. at 323.

128. *Id.* (quoting *McPeek*, 202 F.R.D. at 34).

129. *Id.*

130. *Id.* at 324. For a detailed explanation of how courts use sample searches to determine accessibility, see SCHEINDLIN & CAPRA, *supra* note 38, at 290–95.

the parties pick certain keywords.¹³¹ Then, the producing party will use these keywords to search specified sources of ESI and report back to the court how many results they found and how relevant those results were.¹³² The judge will then consider the results and determine whether the *Zubulake* test favors cost-shifting.¹³³ Sometimes, courts will narrow the scope of the discovery request before ordering cost-shifting.¹³⁴ Usually, courts favor cost-shifting if the e-discovery request is not specifically tailored to discover critical information.¹³⁵

The second factor focuses on availability.¹³⁶ If the requested information is already available to the requesting party, then the marginal benefit of additional e-discovery is low.¹³⁷ In one case, the court denied additional e-discovery when the court found that the producing party had already produced four hundred pages of e-mails.¹³⁸ Generally, courts favor cost-shifting if the requested information is available from other more accessible sources.¹³⁹

2. *The Next Three Factors, the Cost Factors, Weigh the Costs of E-Discovery Against the Benefits and Importance of the Request to the Requesting Party*

Factors three, four, and five of the *Zubulake* test address cost issues.¹⁴⁰ These cost factors take into account the total cost of e-discovery, as well as which party would be in a better position to bear those costs.¹⁴¹ Although courts give less weight to the cost factors than the two factors in the marginal utility test, the cost factors are more important than factors six and seven.¹⁴²

The third factor of the *Zubulake* test, and the most important cost factor, is “[t]he total cost of production, compared to the amount in

131. *See, e.g.*, *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 570 (N.D. Ill. 2004).

132. *Zubulake I*, 217 F.R.D. at 324.

133. *Id.*

134. *Quinby v. WestLB AG*, 245 F.R.D. 94, 106–07 (S.D.N.Y. 2006).

135. *Wiginton*, 229 F.R.D. at 572.

136. *Zubulake I*, 217 F.R.D. at 323.

137. *Wiginton*, 229 F.R.D. at 574.

138. *Wood v. Capital One Servs., LLC*, No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *6, *9 (N.D.N.Y. Apr. 15, 2011).

139. *Wiginton*, 229 F.R.D. at 574.

140. *Zubulake I*, 217 F.R.D. at 323.

141. *Id.*

142. *Id.*

controversy.”¹⁴³ Usually, this factor favors cost-shifting if the total cost of production significantly outweighs the amount in controversy.¹⁴⁴

The fourth factor of the *Zubulake* test, and the second most important cost factor, is “[t]he total cost of production, compared to the resources available to each party.”¹⁴⁵ This factor favors cost-shifting if one party is better able to pay the costs of production or when one party has significantly more assets than the other.¹⁴⁶

The fifth and least important cost factor of the *Zubulake* test is “[t]he relative ability of each party to control costs and its incentive to do so.”¹⁴⁷ One court stated that, “[i]n most cases, both parties will likely have the ability and desire to control costs.”¹⁴⁸ However, in one case, the court found that the producing party had a better ability to control costs because it controlled and had better knowledge of the database that held the requested ESI.¹⁴⁹ Usually, this factor favors cost-shifting if the requesting party is better able to control costs or has a better incentive to do so.¹⁵⁰

3. *The Last Two Factors of the Zubulake Test Consider Other, Less Important Factors*

The sixth factor of the *Zubulake* test is “[t]he importance of the issues at stake in the litigation.”¹⁵¹ This factor favors cost-shifting in cases that are not “unique or novel in nature.”¹⁵² So far, courts have found that the

143. *Id.* at 322–23.

144. *See, e.g.,* *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 478 (N.D. Cal. 2003) (finding that the total cost of production does not significantly outweigh the amount in controversy, which could potentially be “hundreds of thousands of dollars”); *Zubulake III*, 216 F.R.D. 280, 288 (S.D.N.Y. 2003) (finding that the total cost of production does not significantly outweigh the amount in controversy, which could be in millions of dollars).

145. *Zubulake I*, 217 F.R.D. at 322–23.

146. *See* *Xpedior Credit Trust v. Credit Suisse First Bos. (USA), Inc.*, 309 F. Supp. 2d 459, 466 (S.D.N.Y. 2003) (“CSFB USA alone had *net* revenues of \$5.7 billion in fiscal year 2002. Xpedior is a bankrupt corporation with virtually no assets . . . CSFB’s assets clearly dwarf Xpedior’s. This factor weighs against cost-shifting.” (emphasis in original)).

147. *Zubulake I*, 217 F.R.D. at 322–23.

148. *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 576 (N.D. Ill. 2004).

149. *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 478–79 (N.D. Cal. 2003).

150. *See Zubulake III*, 216 F.R.D. 280, 288 (S.D.N.Y. 2003) (finding that this factor is neutral because the requesting party is better able to control costs and does not have a better incentive to do so).

151. *Zubulake I*, 217 F.R.D. at 322–23.

152. *See Semsroth v. City of Wichita*, 239 F.R.D. 630, 640 (D. Kan. 2006) (citing *Zubulake III*, 216 F.R.D. at 289); *see also Zubulake I*, 217 F.R.D. at 321 (“For example, if a case has the potential for broad public impact, then public policy weighs heavily in favor of permitting extensive

sixth factor is neutral in cases involving intellectual property infringement¹⁵³ and gender discrimination,¹⁵⁴ on grounds that such cases are not unique.¹⁵⁵

The seventh factor of the *Zubulake* test is “[t]he relative benefits to the parties of obtaining the information.”¹⁵⁶ This factor is the least important because the requesting party has more to gain from e-discovery than the producing party.¹⁵⁷ Nevertheless, one court has found e-discovery to also help the producing party when the producing party could use the information produced for another lawsuit.¹⁵⁸

After analyzing the seven factors, the court will assess whether the factors favor cost-shifting.¹⁵⁹ Courts determine the amount of costs to be shifted based on “judgment and fairness” rather than a “mathematical consequence of the seven factors.”¹⁶⁰ Courts might deny cost-shifting,¹⁶¹ shift some of the costs,¹⁶² or deny a particularly burdensome e-discovery request.¹⁶³

B. Although Most Courts Will Consider Shifting Preservation and Production Costs, They Are Reluctant to Shift Review Costs

Some courts have discussed the possibility of shifting ESI preservation costs.¹⁶⁴ One court noted that cost-shifting may be an appropriate alternative to complete denial of a preservation request

discovery. Cases of this ilk might include toxic tort class actions, environmental actions, so-called ‘impact’ or social reform litigation, cases involving criminal conduct, or cases implicating important legal or constitutional questions.”)

153. *OpenTV*, 219 F.R.D. at 479.

154. *Zubulake III*, 216 F.R.D. at 289.

155. *OpenTV*, 219 F.R.D. at 479 (stating that “there is no indication that this case presents novel issues”); *Zubulake III*, 216 F.R.D. at 289 (stating that the case “does not present a particularly novel issue”).

156. *Zubulake I*, 217 F.R.D. at 322–23.

157. *Id.* at 323.

158. *Xpedior Creditor Trust v. Credit Suisse First Bos. (USA), Inc.*, 309 F. Supp. 2d 459, 466–67 (S.D.N.Y. 2003). The seventh factor was neutral in that case. *Id.* at 467.

159. *Zubulake III*, 216 F.R.D. at 289.

160. *Id.*

161. *See, e.g., Semsroth v. City of Wichita*, 239 F.R.D. 630, 640 (D. Kan. 2006).

162. *See, e.g., Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 577 (N.D. Ill. 2004); *Zubulake III*, 216 F.R.D. at 291.

163. *See, e.g., Wood v. Capital One Servs., LLC*, No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *13 (N.D.N.Y. Apr. 15, 2011).

164. *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 373 (S.D.N.Y. 2006); *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 436 (W.D. Pa. 2004).

where the requesting party “seeks the preservation of information that is likely to be of only marginal relevance but is costly to retain.”¹⁶⁵ Another court noted that cost-shifting may be appropriate when ordering a non-party to preserve ESI.¹⁶⁶

The *Zubulake* court articulated the cost-shifting test¹⁶⁷ and subsequently applied the seven factors in a later ruling.¹⁶⁸ Since then, many courts have followed the *Zubulake* court in shifting production costs.¹⁶⁹ Courts generally will consider shifting the costs of restoring and searching ESI.¹⁷⁰ However, the producing party is responsible for paying the costs of rectifying any unexpected glitches that arise during the course of e-discovery.¹⁷¹

Even though analysts have estimated that eighty percent of e-discovery costs are review costs,¹⁷² most courts will not shift review costs.¹⁷³ One reason for this is that the producing party can decide for itself how it wants to review the ESI and how much to spend on review costs prior to turning the ESI over to the requesting party.¹⁷⁴ Nevertheless, the general rule against shifting review costs is not absolute.¹⁷⁵ In *Major Tours, Inc. v. Colorel*,¹⁷⁶ the court made an exception that allows cost-shifting for review costs in situations in which the requesting party insists on the retrieval of redundant information.¹⁷⁷

165. *Treppel*, 233 F.R.D. at 373.

166. *Capricorn Power Co.*, 220 F.R.D. at 436.

167. *Zubulake I*, 217 F.R.D. 309, 317–23 (S.D.N.Y. 2003).

168. *Zubulake III*, 216 F.R.D. 280, 284–89 (S.D.N.Y. 2003).

169. *See e.g., In re Veeco Instruments, Inc. Sec. Litig.*, No. 05 MD 1695(CM)(GAY), 2007 WL 983987, at *1 (S.D.N.Y. Apr. 2, 2007) (“The major case of *Zubulake* . . . set[s] forth a widely followed standard for determining when cost shifting is appropriate.”).

170. *See Major Tours, Inc. v. Colorel*, No. CIV. 05-3091(JBS/JS), 2009 WL 3446761, at *6 (D.N.J. Oct. 20, 2009); *Zubulake III*, 216 F.R.D. at 290.

171. *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 1:05-CV-657(DNH/RFT), 2007 WL 2687670, at *12 (N.D.N.Y. Sept. 7, 2007).

172. Talley, *supra* note 77.

173. *See, e.g., Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 577 (N.D. Ill. 2004); *Zubulake III*, 216 F.R.D. at 290; *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 432 (S.D.N.Y. 2002).

174. *See Zubulake III*, 216 F.R.D. at 290.

175. *See Major Tours, Inc.*, 2009 WL 3446761, at *6.

176. No. CIV. 05-3091(JBS/JS), 2009 WL 3446761 (D.N.J. Oct. 20, 2009).

177. *Id.* at *6 (“If plaintiffs request a review of the March 2006 tapes they shall pay all retrieval costs, including the cost of defendants’ relevancy and privilege review. This is equitable given the redundancy of the March 2006 tapes.”).

C. *Courts Generally Refuse to Shift Costs for Parties that Intentionally Engage in Costly or Dilatory Discovery Practices*

In general, courts do not want the producing party to create its own burdens and then expect the court to shift that burden to the requesting party.¹⁷⁸ Therefore, courts will not allow cost-shifting for a party that intentionally makes previously accessible data inaccessible to “create[] its own burden or expense.”¹⁷⁹ Courts will also not allow cost-shifting for a producing party that fails to perform e-discovery searches, fails to provide documents from a certain relevant time period, or fails to preserve data.¹⁸⁰ One court denied cost-shifting when the producing party asked for cost-shifting after it had incurred e-discovery costs.¹⁸¹ Generally, producing parties will provide the court with cost estimates prior to commencing e-discovery to help the court determine whether there should be cost-shifting in advance.¹⁸²

D. *Courts Have Identified Some Advantages and Disadvantages of Cost-Shifting*

Courts have identified three main disadvantages of cost-shifting in e-discovery: it could undermine the public policy of resolving lawsuits on their merits,¹⁸³ it could limit economically disadvantaged plaintiffs’ access to justice,¹⁸⁴ and it could encourage defendants to create needless costs for themselves, thereby triggering cost-shifting analysis.¹⁸⁵ The court in *Zubulake* recognized those disadvantages and therefore limited cost-shifting to situations in which “electronic discovery imposes an

178. See *Peskoff v. Faber (Peskoff IV)*, 251 F.R.D. 59, 62–63 (D.D.C. 2008); *Quinby v. WestLB AG*, 245 F.R.D. 94, 104–05 (S.D.N.Y. 2006).

179. See *Quinby*, 245 F.R.D. at 104.

180. *Peskoff IV*, 251 F.R.D. at 62–63.

181. *Cason-Merenda v. Detroit Med. Ctr.*, No. 06-15601, 2008 WL 2714239, at *3 (E.D. Mich. July 7, 2008).

182. FED. R. CIV. P. 26(b)(2)(B) (“On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.”). Parties usually hold a pre-trial conference to discuss discovery issues. Fed. R. Civ. P. 26(f); see Michael D. Berman, *The Rule 26(f) Conference of the Parties*, in *MANAGING E-DISCOVERY AND ESI* 421–33 (Michael D. Berman et al. eds., 2011).

183. *Zubulake I*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003).

184. *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

185. *Semsroth v. City of Wichita*, 239 F.R.D. 630, 635 (D. Kan. 2006). The third disadvantage is less of a concern than the previous two because courts generally do not allow cost-shifting when the producing party creates needless costs for itself. See *supra* Part II.C.

‘undue burden or expense’ on the responding party.”¹⁸⁶ To mitigate the impact of the three disadvantages, parties could also discuss in a pre-trial conference whether to use a neutral third party, known as a special master, to mediate discovery disputes, allocate costs, and facilitate e-discovery.¹⁸⁷

Although there are some disadvantages to cost-shifting, courts have identified many advantages. First, it can protect producing parties from being unduly burdened by costly e-discovery.¹⁸⁸ Second, cost-shifting can allow requesting parties to access crucial documents even when e-discovery is too costly relative to its benefits to justify placing the entire burden on the producing party; the alternative would be outright denial of expensive discovery requests.¹⁸⁹ Third, cost-shifting can discourage requesting parties from making overly broad e-discovery requests,¹⁹⁰ which require the producing party to provide a lot of information, only some of which is relevant to the case.¹⁹¹ Finally, cost-shifting can prevent plaintiffs from using e-discovery as a tool to force the defendant to settle.¹⁹²

III. COURTS HAVE NOT SETTLED ON HOW TO ADDRESS THE COSTS OF INTERNATIONAL E-DISCOVERY

In general, FRCP 26 applies to all e-discovery requests in a federal district court regardless of the location of the ESI sought.¹⁹³ Therefore, FRCP 26 generally applies to international e-discovery, which is the discovery of ESI located outside of the United States.¹⁹⁴ Nonetheless, international e-discovery may implicate international treaties, such as the

186. *Zubulake I*, 217 F.R.D. at 318, 320. The *Zubulake* court modified the eight-factor test from *Rowe* partly because all the courts that applied the *Rowe* test granted cost-shifting even when doing so might prevent meritorious litigation. *Id.* at 320.

187. See Michael D. Berman, *Alternative Dispute Resolution of E-Discovery Issues*, in *MANAGING E-DISCOVERY AND ESI*, *supra* note 182, at 619, 619–21.

188. See *Zubulake I*, 217 F.R.D. at 318.

189. *Wood v. Capital One Servs., LLC*, No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *13 (N.D.N.Y. Apr. 15, 2011). In this case, the costs of e-discovery substantially outweigh the benefits, but the court nonetheless allowed e-discovery if the requesting party was willing to bear the costs. *Id.*

190. *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 430 (S.D.N.Y. 2002).

191. See *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 571 (N.D. Ill. 2004).

192. See *McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001).

193. See FED. R. CIV. P. 1 (defining the scope of the FRCP as governing “all civil actions and proceedings in the United States district courts”).

194. See *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 250 (S.D.N.Y. 2010) (applying the FRCP to an international discovery request).

Hague Convention, and foreign blocking statutes.¹⁹⁵ Furthermore, international e-discovery may involve additional costs, though courts have not settled on a way to address those costs.¹⁹⁶

A. Courts Usually Allow International E-Discovery, Subject to Some Restrictions

Courts have generally allowed international e-discovery, subject to a balancing of American interests with foreign interests.¹⁹⁷ American interests include enforcement of American laws and protection of American citizens from harm by foreign parties.¹⁹⁸ Foreign interests might include protecting foreign citizens from “intrusive discovery procedures”¹⁹⁹ and ensuring foreign bank confidentiality.²⁰⁰ In order to protect their interests, some foreign countries have passed “blocking statutes,” which restrict discovery.²⁰¹ France has enacted a blocking statute that prohibits international discovery unless the discovery is conducted pursuant to procedures specified in a treaty such as the Hague Convention, which the United States, France, and other countries have ratified.²⁰² Several countries, including China,²⁰³ Malaysia,²⁰⁴ the Netherlands,²⁰⁵ and Switzerland,²⁰⁶ have similar blocking statutes.

195. *See infra* Part III.A.

196. *See infra* Part III.B–C.

197. *See, e.g.*, *Munoz v. China Expert Tech., Inc.*, No. 07 CIV. 10531 (AKH), 2011 WL 5346323, at *1–2 (S.D.N.Y. Nov. 7, 2011); *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 452 (C.D. Cal. 2007); *see also* *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 544 (1987) (describing the balancing analysis).

198. *See* *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 527 (indicating protection of American citizens from harmful foreign products and compensation of Americans injured by harmful foreign products as American interests to consider); *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 213–14 (E.D.N.Y. 2007) (naming prevention of terrorist funding as an important American interest).

199. *See* *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 527.

200. *See* *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 157 (S.D.N.Y. 2011) (“China’s multitude of criminal and civil regulations on the subject also evidence its strong interest in bank confidentiality.”).

201. *See, e.g.*, *Strauss*, 242 F.R.D. at 220 (describing French blocking statute).

202. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 526 n.6 (citing French and English language versions of the French blocking statute).

203. *Tiffany (NJ) LLC*, 276 F.R.D. at 150 (describing Chinese blocking statutes).

204. *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458 (RJS)(THK), 2010 WL 808639, at *4 (S.D.N.Y. Mar. 8, 2010).

205. *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093FMCJXC, 2007 WL 2080419, at *11 (C.D. Cal. May 29, 2007).

206. *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 531–32 (D.N.J. 2009).

In certain circumstances, however, U.S. courts will authorize e-discovery of ESI located abroad notwithstanding the prohibitions of the relevant nation's blocking statute. In *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*,²⁰⁷ a 1987 case in which American plaintiffs sued two corporations owned by the French government, the U.S. Supreme Court established a five-factor test, known as the comity analysis, to determine whether an American court should allow international discovery despite an applicable blocking statute.²⁰⁸ The five factors are:

- (1) the importance to the . . . litigation of the documents or other information requested;
- (2) the degree of specificity of the request;
- (3) whether the information originated in the United States;
- (4) the availability of alternative means of securing the information; and
- (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.²⁰⁹

The Court derived the five factors from a draft of what is now § 442 of the Restatement (Third) of Foreign Relations Law of the United States.²¹⁰ In *Société Nationale Industrielle Aérospatiale*, the Court stated that any comity analysis should include the five factors but did not characterize the factors as exclusive.²¹¹ Since 1987, many lower federal courts have applied the five *Société Nationale Industrielle Aérospatiale* factors when performing a comity analysis.²¹²

207. 482 U.S. 522 (1987).

208. *Id.* at 544 n.28.

209. *Id.*

210. *Id.*; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987) (articulating the five-factor comity analysis).

211. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544 n.28 (“While we recognize that § 437 of the Restatement may not represent a consensus of international views on the scope of the district court’s power to order foreign discovery in the face of objections by foreign states, these factors are relevant to any comity analysis . . .”). The Second Circuit subsequently added two factors: “hardship of compliance and good faith.” *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 211 (E.D.N.Y. 2007) (citations omitted). However, the Second Circuit approach still places more weight on the fifth factor of the original comity analysis, which balances American interests and foreign interests, than on any of the subsequently added two factors. *Id.*

212. See *SEC v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 329 (N.D. Tex. 2011) (applying the five factors in a case involving international e-discovery of computer records and e-mails and citing other cases that have applied the five-factor test).

Though courts usually conduct international discovery under the FRCP, they sometimes proceed under the Hague Convention,²¹³ which requires a judicial authority of the United States to request permission from another signatory country before ordering discovery in that country.²¹⁴ As a treaty made under the authority of the United States, the Hague Convention is constitutionally part of the supreme law of the United States.²¹⁵ However, the U.S. Supreme Court ruled in *Société Nationale Industrielle Aérospatiale* that the Hague Convention is neither applicable to all cases of international discovery nor the only way to conduct discovery on documents or data in a foreign country.²¹⁶ The Court noted that the treaty's express purpose is to "improve mutual judicial co-operation in civil or commercial matters," and the treaty does not expressly purport to control international discovery.²¹⁷ Therefore, the Court concluded that the Hague Convention is only applicable if a court finds it to be so based on the facts of the case, sovereign interests, and the likelihood that resorting to the Convention's procedures will prove effective.²¹⁸ Since *Société Nationale Industrielle Aérospatiale*, few lower courts have ordered discovery under the Hague Convention.²¹⁹ Many courts find the Hague Convention's method of international discovery slow and expensive, and therefore likely to result in additional costs for the producing party.²²⁰

In sum, items and data located outside the United States are generally discoverable in an American court to the same extent as domestically-

213. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 30; *see also* Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 160–61 (S.D.N.Y. 2011) (ordering the use of the Hague Convention for discovery).

214. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 30, art. 2.

215. U.S. CONST. art. VI, cl. 2.

216. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 533–34 (1987).

217. *Id.* at 534.

218. *Id.* at 544 (articulating this three-factor test); *see* *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 528–29 (D.N.J. 2009) (applying the three-factor test). However, some cases apply the five-factor comity analysis to determine whether to proceed under the FRCP or the Hague Convention. *See, e.g.*, *SEC v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 329–30 (N.D. Tex. 2011) (applying the five factors plus the two added factors from the Second Circuit).

219. THOMAS MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE* 52–53 (2008) ("[I]n the majority of cases the Hague Convention is held not to apply.").

220. *See Schindler Elevator Corp.*, 657 F. Supp. 2d at 530 ("It has been the experience of this and many other courts that utilization of Hague procedures are slow and cumbersome and usually take far longer than discovery procedures under the Federal Rules.").

housed information.²²¹ Federal district courts apply the five-factor comity test from *Société Nationale Industrielle Aérospatiale* to decide whether to allow discovery despite foreign blocking statutes.²²² The Hague Convention provides another set of rules for conducting international discovery.²²³ Courts use a three-factor test to determine whether to conduct international discovery under the FRCP or the Hague Convention.²²⁴ To date, however, few courts have elected to apply the Hague Convention's discovery provisions.²²⁵

B. International E-Discovery Has Unique Costs, Including Costs Associated with the Transportation and Transmission of ESI, Translation, and Blocking Statute Fines

E-discovery entails preservation, production, and review costs no matter where the requested ESI is located.²²⁶ In addition to the usual costs of e-discovery, however, international e-discovery may entail unique expenses associated with transmitting or transporting the ESI to the United States,²²⁷ translating the ESI into English,²²⁸ and incurring monetary fines from foreign governments for violations of foreign blocking statutes.²²⁹

Transmitting or transporting the ESI to the United States can be very

221. See MAIN, *supra* note 219, at 52–53.

222. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544 n.28 (articulating the five-factor comity analysis); see also *Trueposition, Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012, at *2–7 (E.D. Pa. Mar. 6, 2012) (applying five-factor comity analysis plus the two factors from the Second Circuit to allow discovery despite French blocking statute); *Devon Robotics v. DeViedma*, No. 09-CV-3552, 2010 WL 3985877, at *4–6 (E.D. Pa. Oct. 8, 2010) (applying five-factor comity analysis to allow discovery despite Italian blocking statute).

223. See Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 30.

224. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544.

225. See MAIN, *supra* note 219, at 52–53.

226. See *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446, 452 (C.D. Cal. 2007) (involving preservation and production of server log data located in the Netherlands).

227. See *United States ex rel. McBride v. Halliburton Co.*, 272 F.R.D. 235, 240–41 (D.D.C. 2011) (denying additional e-discovery in part because of the high costs of transporting or transmitting the data). But see *AccessData Corp. v. ALSTE Techs. GmbH*, No. 2:08CV569, 2010 WL 318477, at *2 (D. Utah Jan. 21, 2010) (“[T]he costs of transmitting information and electronic documents ought to be relatively minimal.”).

228. DATICON ELEC. EVIDENCE DISCOVERY, INC., *supra* note 24, at 5.

229. See *The French Supreme Court Applies the 1980 Blocking Statute for the First Time and Strengthens the Conditions Under Which Evidence To Be Used in Foreign Litigation Can Be Obtained in France*, GIBSON DUNN (Jan. 17, 2008), <http://www.gibsondunn.com/publications/Pages/FrenchSupremeCourtApplies1980BlockingStatute.aspx>.

expensive, especially if there is a lot of data to transmit or transport.²³⁰ Parties might need to incur expenses in encrypting collected ESI and making a backup copy of the ESI, in case the data is lost during transportation.²³¹ Although one federal district court opined that transmission costs for ESI “ought to be relatively minimal,”²³² another district court denied an e-discovery request entirely when the court found that the request would have required the producing party to ship or transmit the data to the United States at great expense.²³³

ESI in a foreign country is sometimes in a language other than English,²³⁴ and it is costly to translate the data.²³⁵ In one case, the plaintiffs requested a variety of electronic documents from a non-party European trade association.²³⁶ The trade association objected, stating that “many of the documents . . . may be written in a variety of languages, necessitating an expensive and time-consuming process of translation.”²³⁷ Ultimately, the court granted international e-discovery but required the requesting party to pay the producing non-party’s e-discovery expenses.²³⁸

For the most part, American courts have ordered discovery despite foreign blocking statutes.²³⁹ This creates a dilemma for producing parties. On one hand, complying with the American court’s discovery order could mean that the producing party would have to violate a foreign blocking statute, which could result in fines and/or jail time.²⁴⁰ On the other hand, not complying with the American court’s discovery order would subject the producing party to sanctions in the American

230. See *United States ex rel. McBride*, 272 F.R.D. at 240–41.

231. See Bryan S. Kim, *E-Discovery Challenges on Global Matters*, PwC (Mar. 2011), http://www.pwc.com/en_US/us/forensic-services/publications/assets/compliance-week-edisc-article.pdf.

232. *AccessData Corp.*, 2010 WL 318477, at *2.

233. See *United States ex rel. McBride*, 272 F.R.D. at 240–41.

234. DATICON ELEC. EVIDENCE DISCOVERY, INC., *supra* note 24, at 5.

235. *Id.*

236. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 484–85 (E.D. Pa. 2005).

237. Opposition of Non-Party Conseil Européen De L’Industrie Des Peintures, Des Encres D’Imprimerie Et Des Couleurs D’Art to Plaintiffs’ Motion to Compel Response to Subpoena at 13, *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482 (E.D. Pa. 2005) (No. 10-MD-1426) [hereinafter Opposition of CEPE].

238. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 496.

239. See *Trueposition, Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012, at *2–7 (E.D. Pa. Mar. 6, 2012) (allowing discovery despite French blocking statute); *Devon Robotics v. DeViedma*, No. 09-CV-3552, 2010 WL 3985877, at *4–6 (E.D. Pa. Oct. 8, 2010) (allowing discovery despite Italian blocking statute).

240. See GIBSON DUNN, *supra* note 229.

court.²⁴¹ Thus, monetary fines from a foreign country may be an additional cost of conducting international e-discovery.²⁴²

C. Few Courts Have Addressed the Costs of International E-Discovery

Courts have seldom addressed the costs of international e-discovery. In one case, a federal district court summarily rejected a producing party's objection that international e-discovery is too costly, observing that "the costs of transmitting information and electronic documents ought to be relatively minimal."²⁴³ Another federal district court dismissed a producing party's objection that international e-discovery is unduly expensive after finding that the producing party had inflated the cost estimates.²⁴⁴ There are, however, two illustrative cases in which courts addressed the costs of international e-discovery.²⁴⁵

In one case, the court denied a burdensome international e-discovery request altogether.²⁴⁶ In *United States ex rel. McBride v. Halliburton Co.*,²⁴⁷ McBride, a *qui tam*²⁴⁸ plaintiff, sued Halliburton for inflating costs on invoices and thereby overcharging the U.S. government for services Halliburton provided during the Iraq War.²⁴⁹ After conducting one round of e-discovery, which cost Halliburton \$650,000, McBride sought to conduct another round of e-discovery.²⁵⁰ Halliburton objected on grounds of undue burden and expense.²⁵¹ Some of the requested files were located outside the United States, so Halliburton would have had to

241. FED. R. CIV. P. 37(b)(2)(A); *see also* *United States v. Vetco Inc.*, 691 F.2d 1281, 1291 (9th Cir. 1981) ("Possible criminal liability in Switzerland does not preclude enforcement and sanctions.").

242. *See* GIBSON DUNN, *supra* note 229.

243. *AccessData Corp. v. ALSTE Techs. GmbH*, No. 2:08CV569, 2010 WL 318477, at *2 (D. Utah Jan. 21, 2010).

244. *Columbia Pictures Indus. v. Bunnell*, CV 06-1093FMCJCX, 2007 WL 2080419, at *8 (C.D. Cal. May 29, 2007).

245. *United States ex rel. McBride v. Halliburton Co.*, 272 F.R.D. 235 (D.D.C. 2011); *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482 (E.D. Pa. 2005).

246. *United States ex rel. McBride*, 272 F.R.D. at 243.

247. 272 F.R.D. 235 (D.D.C. 2011).

248. BLACK'S LAW DICTIONARY 1368 (9th ed. 2009) (defining a "*qui tam* action" as "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive").

249. *United States ex rel. McBride*, 272 F.R.D. at 236.

250. *Id.* at 241.

251. *Id.* at 240.

ship or electronically transmit the data from abroad.²⁵² The additional search would have involved records from thirty-five custodians, and it would have taken two to ten days to collect the data from each custodian.²⁵³ The court denied the entire request for additional e-discovery because the court found that Halliburton had already provided some information at great expense, and that McBride had failed to show what the additional information would add to the case.²⁵⁴

In re Automotive Refinishing Paint Antitrust Litigation involved allegations of price fixing against several manufacturers of automotive paint.²⁵⁵ During discovery, the plaintiffs demanded ESI from a foreign, non-party trade association, Conseil Européen de l'Industrie des Peintures, des Encres d'Imprimerie et des Couleurs d'Art (CEPE).²⁵⁶ CEPE objected on grounds of undue expense.²⁵⁷ CEPE argued that the request covered a broad range of documents, electronic files, and e-mail from 1990 to 2005 and would require CEPE to contract with experts to produce the ESI.²⁵⁸ Furthermore, CEPE's files were in languages other than English, so CEPE would incur translation costs by complying with the request.²⁵⁹ The court allowed cost-shifting and ordered the plaintiffs to compensate CEPE for production costs.²⁶⁰ A few other courts have ordered cost-shifting for international e-discovery, but did not explain how the comity concerns and unique costs of international e-discovery affect the cost-shifting analysis.²⁶¹

IV. COURTS SHOULD APPLY THE *ZUBULAKE* TEST WITH A PRELIMINARY COMITY ANALYSIS AND ADOPT AN ESCROW SYSTEM

Although courts have allowed cost-shifting for international e-discovery on a variety of grounds,²⁶² none of those courts have

252. *Id.*

253. *Id.*

254. *Id.* at 241.

255. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 484 (E.D. Pa. 2005).

256. *Id.* at 485. CEPE's English name is "European Council of the Paint, Printing Ink and Artists' Colours Industry." *Id.* at 483.

257. *Id.* at 495.

258. Opposition of CEPE, *supra* note 237, at 12–13.

259. *Id.* at 13.

260. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 496.

261. *See, e.g., U & I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667, 677 (M.D. Fla. 2008); *Quinby v. WestLB AG*, 245 F.R.D. 94, 100, 111 (S.D.N.Y. 2006).

262. *See generally, e.g., U & I Corp.*, 251 F.R.D. 667; *Quinby*, 245 F.R.D. 94; *In re Auto.*

considered the comity concerns implicated by international e-discovery requests.²⁶³ Furthermore, none of those courts have articulated a framework to guide courts when they analyze requests to shift the costs of international e-discovery.²⁶⁴ Therefore, there is currently no approach that adequately addresses both the comity concerns and the unique costs of international e-discovery.

This Comment's approach addresses both the comity concerns and the unique costs of international e-discovery. First, courts should address comity concerns by prefacing the *Zubulake* test in international e-discovery cases with a comity analysis. Second, they should address cost concerns by extending the *Zubulake* test to all e-discovery, allowing cost-shifting for certain unique costs of international e-discovery, and defining "accessibility" in terms of total cost instead of storage format. Third, to effectuate cost-shifting, courts should adopt an escrow system whereby the requesting party deposits a portion of the shifted costs with the court.

A. Courts Should Preface the *Zubulake* Test with a Comity Analysis

When evaluating international e-discovery requests, courts should consider international politics, sovereign interests, and international comity concerns. Some foreign countries have enacted blocking statutes to limit the discovery that American courts can order within their territory.²⁶⁵ Although blocking statutes are not absolute bars to international e-discovery,²⁶⁶ they reflect the interests of foreign countries.²⁶⁷ Foreign countries may also assert their interests through other means, such as through privacy laws.²⁶⁸ Courts should recognize foreign interests by applying the five-factor comity analysis used in

Refinishing Paint Antitrust Litig., 229 F.R.D. 482.

263. See generally, e.g., *U & I Corp.*, 251 F.R.D. 667; *Quinby*, 245 F.R.D. 94; *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482.

264. See generally, e.g., *U & I Corp.*, 251 F.R.D. 667; *Quinby*, 245 F.R.D. 94; *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482.

265. See, e.g., *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 150 (S.D.N.Y. 2011) (Chinese blocking statutes); *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 220 (E.D.N.Y. 2007) (French blocking statute).

266. *Strauss*, 242 F.R.D. at 220 ("[C]ourts in [the Second Circuit] have already examined the French bank secrecy law and blocking statute, and denied their applicability to preclude discovery.").

267. See *Tiffany (NJ) LLC*, 276 F.R.D. at 157 ("China's multitude of criminal and civil regulations on the subject also evidence its strong interest in bank confidentiality.").

268. See THE SEDONA CONFERENCE, *supra* note 27, at 10–13 (describing the European Union's Data Protection Directive).

Société Nationale Industrielle Aérospatiale.²⁶⁹

Starting with the comity analysis allows courts to address as a preliminary matter the special concerns that arise when a party is compelled to disclose information located in a foreign state. The comity analysis allows courts to determine the potential negative effects of an international e-discovery request on foreign relations.²⁷⁰ It would be difficult to conduct international e-discovery without the cooperation, or at least the tacit acquiescence, of the foreign country where the requested ESI is located.²⁷¹ As such, courts should consider the totality of the circumstances for any particular international e-discovery request, including the likely impact on relations with the relevant foreign nation. In some situations, the court might determine that an e-discovery request so violates international comity that the request should be denied or should be granted only subject to court-ordered modification.²⁷²

The comity analysis would also allow courts to narrow the international e-discovery request. For example, if e-discovery in the United States has already established certain key facts and the requesting party only needs limited foreign documents, then the court and the parties could agree to narrow the e-discovery request. An international e-discovery request with a narrower scope is more likely to pass the

269. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987). *Société Nationale Industrielle Aérospatiale* suggested that the purpose of the five-factor comity analysis is to perform a “more particularized analysis of the respective interests of the foreign nation and the requesting nation” *Id.* at 543–44. Although a foreign nation’s interests might be better expressed and stronger when that nation has a blocking statute, the U.S. Supreme Court did not expressly require that there be a blocking statute before a court may apply the five-factor comity analysis. *See id.* The U.S. Supreme Court indicated that a court may apply the five-factor comity analysis when determining the “scope of the district court’s power to order foreign discovery in the face of objections by foreign states.” *Id.* at 544 n.28.

270. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987). One factor of the comity analysis is whether “compliance with the request would undermine important interests of the state where the information is located.” *Id.*

271. *See Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 523–24 (N.D. Ill. 1984) (explaining that discovery could lead to bitter disputes between judges of different countries and stating that there should be constructive cooperation “[w]here the involvement of two judicial systems genuinely is required”); *see also Regulatory Cooperation in International E-Discovery*, LAW360 (Dec. 2, 2009), <http://www.ropesgray.com/files/Publication/bacd6451-1c43-4223-b53b-3d625f511d8e/Presentation/PublicationAttachment/3c2487b3-4a52-4076-9286-3f574e7c565d/Regulatory%20Cooperation.pdf> (describing a situation where IRS cooperation with Swiss authorities facilitated the execution of an otherwise contentious e-discovery request).

272. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 cmt. a (1987) (“Given the difficulty in obtaining compliance, and the resistance of foreign states to discovery demands originating in the United States, it is ordinarily reasonable to limit foreign discovery to information necessary to the action—typically, evidence not otherwise readily obtainable—and directly relevant and material.”).

comity analysis²⁷³ and is also more likely to result in less, or even no, cost-shifting against the requesting party.²⁷⁴

Finally, the comity analysis promotes judicial economy. Instead of considering and deciding comity concerns and cost-shifting matters in separate proceedings, the court can consider both by prefacing the *Zubulake* cost-shifting analysis with a comity analysis in cases involving international e-discovery.

B. Courts Should Extend the Zubulake Cost-Shifting Test to All Discoverable ESI, Generally Allow Cost-Shifting for Transmission and Transportation Costs, and Define "Accessibility" in Terms of Total Costs Instead of Storage Format

Domestic e-discovery and international e-discovery share many similarities. Both involve the general steps of preservation, production, and review.²⁷⁵ Both can have high costs due to the large volumes of available ESI.²⁷⁶ Courts already shift costs for e-discovery of ESI in the United States.²⁷⁷ Few courts have considered cost-shifting for international e-discovery even though international ESI has additional e-discovery costs.²⁷⁸ The similarities between e-discovery of ESI in the United States and international e-discovery make cost-shifting appropriate in international e-discovery. Courts should extend the *Zubulake* test to international e-discovery instead of creating a separate test for allocating the costs of international e-discovery.

1. Extending the Zubulake Test to All E-Discovery Promotes Fairness and Judicial Economy

There is currently no consensus as to the proper test for cost-shifting

273. *See id.* § 442(1)(c). The second factor of the comity analysis, "the degree of specificity of the request[.]" favors international e-discovery for a narrower request.

274. *See Zubulake I*, 217 F.R.D. 309, 322–23 (S.D.N.Y. 2003). The most dispositive factor of the *Zubulake* seven-factor test, "[t]he extent to which the request is specifically tailored to discover relevant information," disfavors cost-shifting for more specific requests.

275. *See Erica M. Davila, International E-Discovery: Navigating the Maze*, 8 U. PITT. J. TECH. L. POL'Y 1, 33 (2008) ("Due to the sheer volume of ESI, the same considerations that courts must consider domestically in determining whether a discovery request is reasonable must be considered with international ESI, including the accessibility of the data and the cost to collect, review, and produce enormous volumes of ESI.").

276. *See id.*

277. *See Zubulake I*, 217 F.R.D. at 324.

278. *See supra* Part III.B–C.

in international e-discovery.²⁷⁹ Courts could remedy this in one of two ways. They could design a separate cost-shifting test for international e-discovery, or they could extend the *Zubulake* test to international e-discovery. Adopting a separate test for international e-discovery would not be ideal. Two distinct tests would necessarily differ, with one being more likely to result in cost-shifting. Producing parties would have an incentive to store data, whenever possible, in the location covered by the test more likely to result in cost-shifting.

Applying the *Zubulake* test to all e-discovery, regardless of the ESI's location, would promote fairness by preventing parties from gaining unfair advantages through strategic placement of ESI. At the same time, transnational businesses can make business decisions with more certainty and uniformity. Under this Comment's approach, a transnational business would know that the *Zubulake* test applies even when the requested ESI is neither entirely international nor entirely domestic, such as when the business stores relevant data online or on the cloud.²⁸⁰ If there is a separate test for cost-shifting in international e-discovery, transnational businesses might not know which standard would apply until the discovery stage of litigation.

Another benefit of extending the *Zubulake* test to all e-discovery is that it would promote judicial economy. In *Quinby v. WestLB AG*,²⁸¹ the plaintiff made an e-discovery request for some data located in the United States and some data located in England and Germany.²⁸² The court in that case applied the *Zubulake* test and considered cost-shifting for the entire e-discovery request, including the international e-discovery portion, in the same motions proceeding.²⁸³ Promoting judicial economy

279. See *U & I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667, 677 (M.D. Fla. 2008) (allowing cost-shifting based on the unique facts of the case); *Quinby v. WestLB AG*, 245 F.R.D. 94, 101–02 (S.D.N.Y. 2006) (applying *Zubulake* cost-shifting test to an e-discovery request that involved both domestic and foreign ESI without explaining why *Zubulake* is appropriate for international e-discovery); *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 496 (E.D. Pa. 2005) (shifting costs under FRCP 45 without articulating criteria for future cost-shifting determinations).

280. See Doug Austin, *eDiscovery Trends: The Challenges of International eDiscovery*, EDISCOVERY DAILY BLOG (June 23, 2011), <http://www.ediscoverydaily.com/2011/06/ediscovery-trends-the-challenges-of-international-ediscovery.html> (“Thanks to the widespread use of cloud computing and other types of online storage, the physical location of ESI sought in eDiscovery is not always easy to pinpoint. Information transmitted electronically in an email or text message, can pass through any number of phone lines and routers, to many servers and client machines around the globe, so determining the location of a message can become virtually impossible.”).

281. 245 F.R.D. 94 (S.D.N.Y. 2006).

282. Second Supplemental Affidavit of Lori Carey at 2–3, *Quinby*, 245 F.R.D. 94 (No. 04 Civ. 07406 (WHP) (HBP)).

283. *Quinby*, 245 F.R.D. at 101–11.

results in cost-savings for the parties and for society as a whole.²⁸⁴ Because applying the *Zubulake* test to international e-discovery would promote fairness and judicial economy, courts should extend the *Zubulake* test to all e-discovery.

2. *Courts Should Allow Cost-Shifting for Transmission and Transportation Expenses and for the Costs of Court-Ordered Translation but Not for Blocking Statute Fines*

As discussed above, the three additional costs of international e-discovery are transmission and transportation costs, translation costs, and foreign blocking statute fines.²⁸⁵ Cost-shifting is generally appropriate for transmission and transportation costs and for the costs of court-mandated translations. However, cost-shifting is inappropriate for discretionary translation expenses and for foreign blocking statute fines.

a. *Courts Should Allow Cost-Shifting for Transmission and Transportation Expenses*

Courts should allow shifting of transmission and transportation costs because such costs are part of the production process.²⁸⁶ Production, in the discovery context, involves making a requested item available to the requesting party for inspection and review.²⁸⁷ For ESI located outside of the United States, the producing party must transmit or transport the ESI to the United States so that the requesting party can have access to the ESI.²⁸⁸ Courts generally allow cost-shifting for production costs.²⁸⁹

284. BLACK'S LAW DICTIONARY 923 (9th ed. 2009) (defining "judicial economy" as "[e]fficiency in the operation of the courts and the judicial system; esp., the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources"). *Black's Law Dictionary* gives the example of consolidating two cases in a trial, which is analogous to the situation here of consolidating cost-shifting determinations for two or more sets of ESI in a single proceeding. *Id.*

285. *See supra* Part III.B.

286. *See* Scott Fischer et al., *Gathering, Reviewing, and Producing ESI: An Eight-Stage Process*, in *MANAGING E-DISCOVERY AND ESI*, *supra* note 182, at 340 (describing how producing parties generate a "production set" for the requesting party). For more information on the process of transmission, see David Garrett, *Conducting E-Discovery in Europe: Practice Pointers for Corporate Counsel*, STROZ FRIEDBERG (2009), http://www.strozfriedberg.com/files/Publication/e6a85ed0-7d28-4457-a755-06e842ba2058/Presentation/PublicationAttachment/27e1777c-67e2-41ea-93f0-0d03020883be/DGarrett_Intl%20Ediscovery%20Article%20v2.pdf.

287. BLACK'S LAW DICTIONARY 1328 (9th ed. 2009) (defining "produce" as "[t]o provide . . . in response to subpoena or discovery request"); *see also* FED. R. CIV. P. 34(a)(1) (describing production generally).

288. *See* United States *ex rel.* McBride v. Halliburton Co., 272 F.R.D. 235, 240 (D.D.C. 2011)

Therefore, because transmission and transportation are production costs, courts should consider shifting such costs to the requesting party if they pose an undue burden or expense to the producing party.²⁹⁰

b. Courts Should Consider Shifting Translation Costs for Court-Ordered Translations but Not for Discretionary Translations

Courts should only consider shifting translation costs when the court orders translation. Translation costs are similar to review costs in that parties incur them after the data has been produced.²⁹¹ Courts do not generally shift review costs because the parties determine for themselves how they want to review data.²⁹² In the case of translation, there are two primary reasons not to shift costs. First, holding each party responsible for its own translation costs allows each party to control the accuracy of its own translations and to perform more thorough translations of key documents.²⁹³ Second, shifting the costs of translation would be inappropriate under the “total cost” approach to accessibility, because the requesting party generally cannot cause the producing party to incur undue translation costs.²⁹⁴ Absent a court order requiring translation, the producing party does not need to translate any documents at all.²⁹⁵

(“Since the defendants employ persons overseas, this data collection may have to be shipped to the United States, or sent by network connections with finite capacity . . .”).

289. See, e.g., *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 433 (S.D.N.Y. 2002).

290. See *Zubulake I*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003).

291. See *In re P.R. Elec. Power Auth.*, 687 F.2d 501, 504–09 (1st Cir. 1982); see also *DATICON ELEC. EVIDENCE DISCOVERY, INC.*, *supra* note 24, at 2 (describing translation cost as “cost . . . of multi-lingual review”).

292. See *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 577 (N.D. Ill. 2004); *Zubulake III*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003); *Rowe Entm’t, Inc.*, 205 F.R.D. at 432.

293. For example, parties may choose to translate through human or machine translators. Some machine translators, such as Google Translate, are free, but they are less accurate and thorough than human translators. For more information on how parties translate ESI, see Chris Wilen, *Foreign Language e-Discovery – An Introduction*, DISCOVERY RESOURCES (June 16, 2011), <http://www.discoveryresources.org/technology-counsel/foreign-language-e-discovery-%E2%80%93-an-introduction/>.

294. FED. R. CIV. P. 26(b)(2)(B); see *infra* Part IV.B.3 (advocating “total cost” accessibility approach to *Zubulake*).

295. See *In re P.R. Elec. Power Auth.*, 687 F.2d at 506 (stating that there is no authority for courts to order translation); see also *Nature’s Plus Nordic A/S v. Natural Organics, Inc.*, 274 F.R.D. 437, 439, 441 (E.D.N.Y. 2011) (stating that while courts do not have authority to order a producing party to provide translations, a producing party should produce any documents that have already been translated into English); *In re Fialuridine (FIAU) Prods. Liab. Litig.*, 163 F.R.D. 386, 387 n.2 (D.D.C. 1995) (citing two cases where courts have denied a plaintiff’s motion to compel defendant to produce English translations of documents in a foreign language). *But see* *Stapleton v. Kawasaki*

Therefore, in situations where the court does not order the producing party to translate documents in a foreign language to English for the benefit of the requesting party, there is no need to consider cost-shifting.²⁹⁶ Leaving each party in control of translation costs allows each party to control its own costs of litigation.

c. Courts Should Not Shift Blocking Statute Fines

Cost-shifting is not appropriate for blocking statute fines.²⁹⁷ The purpose of cost-shifting is to address undue burdens or expenses incurred by the producing party in producing documents for the requesting party.²⁹⁸ By choosing to store ESI in a foreign country, a party willingly subjects itself to applicable foreign laws, including foreign blocking statutes. As a result, foreign blocking statute fines are not undue burdens. In addition, cost-shifting would require the requesting party, who has not violated a blocking statute, to pay some or all of a fine imposed on the producing party.²⁹⁹ Thus, cost-shifting could incentivize producing parties to be less careful in addressing blocking statutes, resulting in more blocking statute violations and harming foreign relations.

Where courts are concerned that blocking statute fines may be overly burdensome, they may adopt remedial measures other than cost-shifting. Employing the preliminary comity analysis,³⁰⁰ courts should consider

Heavy Indus., Ltd., 69 F.R.D. 489, 490 (N.D. Ga. 1975) (admonishing the producing party for failure to translate documents from Japanese to English and requiring the producing party to reimburse the requesting party's translation costs).

296. The parties have discretion to translate. The general rule is that parties pay for their own costs of litigation. See *In re P.R. Elec. Power Auth.*, 687 F.2d at 506. *In re Puerto Rico Electric Power Authority* stated in a footnote that when one party has no resources to translate a key document, a court might issue a translation order. *Id.* at 509 n.2. However, the court stated that the producing party could receive reimbursement. *Id.* In situations where there is a translation order, such as the hypothetical one from *In re Puerto Rico Electric Power Authority*, the court should apply the cost-shifting test advocated in this approach, namely a comity analysis followed by the two-step *Zubulake* test.

297. See Pierre Grosdidier, *The French Blocking Statute, the Hague Evidence Convention, and the Case Law: Lessons for French Parties Responding to American Discovery*, HAYNES & BOONE, LLP 31–32 (Aug 22 2011), http://www.haynesboone.com/files/Uploads/Documents/Attorney%20Publications/French_Blocking_Statute_08-24-11.pdf (discussing blocking statute fines).

298. See FED. R. CIV. P. 26(b)(2)(B).

299. Although producing parties might face situations where they have to produce ESI and incur a blocking statute fine or not produce ESI and incur a sanction from an American court, the decision is one for the producing party. The requesting party generally has no control over where the producing party stores information, so it would be unfair to shift costs.

300. See *supra* Part III.A.

whether a certain international e-discovery request is likely to result in foreign blocking statute fines³⁰¹ and then weigh the request's costs and benefits accordingly.³⁰² In addition, American diplomats can negotiate with foreign diplomats for more favorable international e-discovery laws.³⁰³

3. *Courts Should Modify the Zubulake Test to Consider Total Relevant Costs Rather Than Focusing on Costs Associated with ESI Format*

To determine whether an e-discovery request poses an undue burden or expense, the *Zubulake* court focused primarily on the costs associated with the requested ESI's format.³⁰⁴ However, courts should also consider other relevant costs in the accessibility step of the *Zubulake* test.³⁰⁵ Doing so would comport with the language of FRCP 26, render the test adaptable to changing technological standards, and promote fairness.

In 2006, FRCP 26 was amended to address the costs of e-discovery.³⁰⁶ The 2006 Amendment to FRCP 26 frames "accessibility" in terms of "substantial burden and cost."³⁰⁷ This amendment validates the federal district courts' common post-*Zubulake* approach, which treats

301. American courts and foreign courts have procedural and jurisprudential differences that add uncertainty to an American court's evaluation of whether a particular international e-discovery request is likely to result in blocking statute fines. Nonetheless, American courts should generally consider the text of the blocking statute, the foreign interests the blocking statute seeks to protect, and any related statutes or cases that give additional meaning to the blocking statute when determining whether a request is likely to result in foreign blocking statute fines.

302. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987) (articulating the five-factor comity analysis that balances American interests with foreign interests and weighs the request's pros and cons).

303. *See Société Nationale Industrielle Aérospatiale*, 482 U.S. at 552 (Blackmun, J., concurring in part and dissenting in part) ("It is the Executive that normally decides when a course of action is important enough to risk affronting a foreign nation or placing a strain on foreign commerce. It is the Executive, as well, that is best equipped to determine how to accommodate foreign interests along with our own.").

304. *Zubulake I*, 217 F.R.D. 309, 318–20 (S.D.N.Y. 2003). The court noted that the producing party must incur additional costs to restore ESI on backup tapes. *Id.* at 320. The court did not mention what factors, other than storage format, are relevant for determining accessibility.

305. For example, the relevant costs of the production stage could include, among other costs, the costs of restoring ESI and searching for responsive data. *See supra* Part I.B. Relevant costs in the context of international e-discovery could also include transmission and transportation costs and certain translation costs. *See supra* Part IV.B.2.

306. FED. R. CIV. P. 26 advisory committee's note (2006).

307. *Id.* ("[S]ome sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.").

accessibility as a matter of total cost, not just costs associated with ESI data format.³⁰⁸

Analyzing accessibility in terms of total relevant costs allows courts to continue applying the *Zubulake* test even if the prevailing technological standards change. The five categories of data storage formats recognized in the *Zubulake* test do not capture all the ESI in the digital universe. One early e-discovery case that illustrated this was *OpenTV v. Liberate Technologies*,³⁰⁹ a case that involved the e-discovery of software source code,³¹⁰ which is not in one of the five categories of storage formats discussed in *Zubulake*.³¹¹ In recent years, some companies have started storing their ESI in the “cloud,”³¹² and future technological innovations will usher in new modes of electronic data storage. Because cost-shifting is only suitable for inaccessible data, defining accessibility in terms of total relevant cost allows for cost-shifting for ESI in a wide variety of digital formats, including formats yet to be invented.

Furthermore, the “total cost” accessibility approach promotes fairness better than *Zubulake*’s “format” accessibility approach. In a recent case, the plaintiffs requested that the defendants produce ESI in archived e-mail accounts and shared network drives at a cost of \$1,900,000.³¹³ Under a strict application of the “storage format” accessibility approach, cost-shifting would not be available because the data was stored in “accessible” formats.³¹⁴ However, under the “total cost” accessibility approach, the court would probably find that the exorbitant \$1,900,000 cost of e-discovery creates an undue burden or expense for the

308. See, e.g., *Semsroth v. City of Wichita*, 239 F.R.D. 630, 634 (D. Kan. 2006) (stating that the producing party has the burden of showing that the requested ESI is not accessible based on “undue burden or cost”); *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 476–77 (N.D. Cal. 2003) (noting that “[a]ccessibility turns largely on the expense of production”); *Xpedior Creditor Trust v. Credit Suisse First Bos. (USA), Inc.*, 309 F. Supp. 2d 459, 465 (S.D.N.Y. 2003) (finding data in an accessible storage format to be “inaccessible” due to the high costs of reconstructing the data).

309. 219 F.R.D. 474 (N.D. Cal. 2003).

310. See *id.* at 477 (“While the source code at issue in this case is not ‘backed up’ in the manner of the e-mails at issue in the *Zubulake* cases, it is similarly expensive and time consuming to make it available in a usable form for discovery.”).

311. *Zubulake I*, 217 F.R.D. 309, 318–20 (S.D.N.Y. 2003).

312. See James Berriman & Jack Notarangelo, *eDiscovery in the Cloud: A Nightmare Scenario*, CLOUDBOOK (2010), <http://www.cloudbook.net/resources/stories/ediscovery-in-the-cloud-a-nightmare-scenario>.

313. *Thermal Design, Inc. v. Guardian Bldg. Prods., Inc.*, 08-C-828, 2011 WL 1527025, at *1 (E.D. Wis. Apr. 20, 2011).

314. See *Zubulake I*, 217 F.R.D. at 318–20. Indeed, the court in *Zubulake I* refused to shift the costs of conducting e-discovery on “archived e-mails on optical disks.”

producing party, meaning that the ESI is inaccessible and that cost-shifting is available.³¹⁵ The “total cost” accessibility approach is therefore fairer in that it allows courts to consider cost-shifting for all burdensome e-discovery requests, regardless of the ESI’s storage format.³¹⁶

C. Courts Should Adopt an Escrow System for Enforcing Cost-Shifting Orders

Once a court orders cost-shifting, it should ensure that the requesting party actually reimburses the producing party for the shifted portion of the costs. Without a way to enforce cost-shifting, plaintiffs can file lawsuits intended to harass a defendant, request large volumes of ESI, cause the defendant to conduct e-discovery, and then fail to pay for shifted costs afterwards. The court could dismiss the lawsuit, but the defendant would have already incurred the e-discovery costs and would not be able to recoup them. Currently, the FRCP do not set forth a mechanism to enforce cost-shifting. To enforce cost-shifting, the courts should develop an escrow system with three steps: deposit, production, and reconciliation. This escrow system should apply to both domestic and international e-discovery.

First, the deposit step would require the requesting party to deposit a percentage of the shifted e-discovery costs with the court upon the granting of the e-discovery request.³¹⁷ Second, the court would notify the producing party of receipt of the deposit and order the producing party to commence e-discovery. Third, and lastly, once the producing party has turned over the requested ESI to the requesting party, the court would release the deposited funds to the producing party and require the requesting party to reconcile the balance and pay the producing party the remaining sum of the shifted costs. This escrow approach would allow the producing party to at least recover some of the e-discovery costs

315. See *Xpedior Creditor Trust v. Credit Suisse First Bos. (USA), Inc.*, 309 F. Supp. 2d 459, 465–66 (S.D.N.Y. 2003) (finding data that would cost around \$400,000 to produce to be “inaccessible” under the “total cost” accessibility approach).

316. In the *Thermal Design, Inc.* case, the court denied the expensive e-discovery request altogether. *Thermal Design, Inc.*, 2011 WL 1527025, at * 1, *3. A court applying the “total cost” accessibility variation of the *Zubulake* test could reach the same conclusion. See *Wood v. Capital One Servs., LLC*, No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *3, *8, *13 (N.D.N.Y. Apr. 15, 2011) (denying an e-discovery request that would cost the producing party \$5,000,000 to process, review, and produce the ESI).

317. In a slightly different context, a federal district court used a similar approach that required a party to deposit some money with the court registry for future disbursement to an e-discovery vendor. See *Peskoff IV*, 251 F.R.D. 59, 63 (D.D.C. 2008).

even if the requesting party is later unwilling or unable to pay for the remaining shifted costs in the reconciliation stage.

V. APPLYING THE PROPOSED COST-SHIFTING APPROACH TO THE FACTS OF *IN RE AUTOMOTIVE REFINISHING PAINT ANTITRUST LITIGATION* DEMONSTRATES THE APPROACH'S ABILITY TO RESOLVE INTERNATIONAL E-DISCOVERY DISPUTES

As described previously, the plaintiffs in *In re Automotive Refinishing Paint Antitrust Litigation* made an e-discovery request against a non-party trade association in Belgium named CEPE.³¹⁸ CEPE objected on grounds of undue burden and cost.³¹⁹ Although CEPE was a non-party, at least one federal district court has concluded that the *Zubulake* test was applicable to non-parties as well.³²⁰ This section will assume that CEPE's assertions regarding the burden of the discovery request were factually accurate.³²¹

In the actual case, the court ordered the requesting party, the plaintiffs, to compensate CEPE for production costs under FRCP 45 because CEPE was a non-party.³²² The court stated the general proposition from the FRCP 45 advisory committee's note is that courts should protect non-parties from significant discovery expenses.³²³ Non-parties are not involved in litigation and therefore "should not be forced to subsidize an unreasonable share of the costs of a litigation."³²⁴ Although the court in *In re Automotive Refinishing Paint Antitrust Litigation* applied FRCP 45, the court did not set forth criteria for when cost-shifting is appropriate for international e-discovery requests. Also, the court did not explain what constitutes "significant expenses" or "an unreasonable share of the costs."³²⁵ The proposed approach, involving a preliminary comity analysis, the "total cost" accessibility approach, and application of the seven *Zubulake* cost-shifting factors, sets forth criteria

318. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 485 (E.D. Pa. 2005).

319. *Id.*

320. *See Couch v. Wan*, CV F 08-1621 LJO DLB, 2011 WL 2971118 (E.D. Cal. July 20, 2011).

321. *See* Opposition of CEPE, *supra* note 237, at 2, 13. CEPE asserted that they were a small non-profit organization headquartered in Brussels, Belgium, and that any relevant ESI they might have would be in Brussels.

322. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 496; *see also* FED. R. CIV. P. 45(c).

323. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 496.

324. *Id.*

325. *Id.* (citation omitted).

that would not only protect CEPE from significant discovery expenses but would also address the unique costs and sovereignty concerns of international e-discovery.

A. *The E-Discovery Request Presented in In re Automotive Refinishing Paint Antitrust Litigation Passes the Comity Analysis*

The preliminary step under the proposed approach, before a court continues to the *Zubulake* test, is the five-factor comity analysis.³²⁶ The court in *In re Automotive Refinishing Paint Antitrust Litigation* found that “the requested information is relevant and directly pertains to [the Plaintiffs’] antitrust claims against Defendants,”³²⁷ so the first factor,³²⁸ “the importance to the . . . litigation of the documents or other information requested[.]” probably favors discovery. Nonetheless, the court found that the international e-discovery request was too broad,³²⁹ so the second factor, “the degree of specificity of the request,”³³⁰ disfavors discovery. The information did not originate in the United States, and there was no indication that the information was obtainable through means other than international e-discovery.³³¹ Therefore, the third and fourth factors, “whether the information originated in the United States” and “the availability of alternative means of securing the information,”³³² respectively, favor discovery. Because CEPE did not raise an objection based on Belgium’s sovereign interests, the fifth factor appears to favor discovery.³³³ On the whole, then, the requested ESI would be discoverable under the proposed comity analysis.

B. *The Requested Data Would Be Inaccessible Under the “Total Cost” Accessibility Step of the Zubulake Test*

The first step of the *Zubulake* test looks at whether the requested ESI is accessible.³³⁴ This Comment advocates a “total cost” accessibility

326. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987).

327. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 496.

328. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544 n.28.

329. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 496.

330. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544 n.28.

331. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 484.

332. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544 n.28.

333. See *id.*

334. *Zubulake I*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

standard that takes into account all relevant costs of the particular stage of e-discovery.³³⁵ The e-discovery request asks for the production of ESI, so the court should consider all relevant production costs. Based on the facts provided by CEPE, the e-discovery request “demand[ed] documents from 1990 through [2005]” and covered “electronic files and e-mail (including archived backup files).”³³⁶ The broad scope of the e-discovery request, which covered fifteen years, would likely generate a high volume of potential results and cause CEPE to incur high e-discovery expenses.³³⁷ Therefore, producing the requested ESI would likely pose an undue burden to CEPE, and the court would therefore consider the ESI inaccessible.

C. *The Seven-Factor Test Favors Shifting Most or All of the Costs in In re Automotive Refinishing Paint Antitrust Litigation*

The second step of the *Zubulake* test determines whether there should be cost-shifting when inaccessible data is sought.³³⁸ Applying this step of the test, the court would first look at the two marginal utility factors.³³⁹ The first factor of the *Zubulake* test takes into account the specificity of the request.³⁴⁰ As the request in *In re Automotive Refinishing Paint Antitrust Litigation* covers fifteen years,³⁴¹ the court would probably not find it insufficiently specific and would favor cost-shifting.³⁴² The second factor of the *Zubulake* test considers “[t]he availability of [the] information from other sources.”³⁴³ CEPE noted that “plaintiffs have had ample alternative opportunities to take discovery concerning any matters that may affect the U.S. market.”³⁴⁴ Court filings for this case confirm that the court had already granted a discovery request that the plaintiffs had filed against the defendants.³⁴⁵ Thus, the

335. *See supra* Part IV.B.3.

336. *See* Opposition of CEPE, *supra* note 237, at 12.

337. *See In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 495 (E.D. Pa. 2005); Opposition of CEPE, *supra* note 237, at 12–13.

338. *Zubulake I*, 217 F.R.D. at 324.

339. *Id.* at 323.

340. *Id.* at 322.

341. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 496.

342. *See Zubulake I*, 217 F.R.D. at 323.

343. *Id.* at 322.

344. *See* Opposition of CEPE, *supra* note 237, at 13.

345. *See In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482; Memorandum & Order, *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482 (E.D. Pa. 2005) (No. 10-MD-1426).

second factor favors cost-shifting.³⁴⁶ As both factors in the marginal utility test favor cost-shifting, the court would likely shift costs.

Next, the court would assess the less important cost factors.³⁴⁷ The third factor in the *Zubulake* test is “[t]he total cost of production, compared to the amount in controversy.”³⁴⁸ This case involved multiple defendants and was an antitrust action that could result in an award of treble damages, so the amount in controversy was likely high.³⁴⁹ However, it is likely that the total cost of production for CEPE was also high, though perhaps not as high as the amount in controversy. The third factor, therefore, is either neutral or slightly disfavors cost-shifting. The fourth factor in the *Zubulake* test is “[t]he total cost of production, compared to the resources available to each party.”³⁵⁰ In some instances, this factor might discourage courts from shifting costs against plaintiffs with fewer resources.³⁵¹ The facts of the case did not mention the resources available to the plaintiffs, but CEPE was a small non-profit trade association with eight employees.³⁵² As such, this factor probably favors cost-shifting under the fourth factor. The fifth factor in the *Zubulake* test is “[t]he relative ability of each party to control costs and its incentive to do so.”³⁵³ This factor favors cost-shifting because the plaintiffs could have controlled costs by requesting ESI from a shorter span of years but decided not to do so.³⁵⁴ Two of the three “cost factors” thus favor cost-shifting.

Last, the court would consider the least important “other factors.”³⁵⁵ Factor six of the *Zubulake* test is “[t]he importance of the issues at stake in the litigation.”³⁵⁶ The antitrust suit is relatively important as it involves an alleged international price-fixing scheme that could affect the U.S. market for automotive paint and hurt consumers.³⁵⁷ However,

346. See *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 574 (N.D. Ill. 2004) (“If the information is available from another source, the marginal utility from the e-discovery is low, and would support cost-shifting.”).

347. See *Zubulake I*, 217 F.R.D. at 323.

348. *Id.* at 322.

349. See Clayton Act, 15 U.S.C. § 15(a) (2006).

350. *Zubulake I*, 217 F.R.D. at 322.

351. See *Xpedior Credit Trust v. Credit Suisse First Bos. (USA), Inc.*, 309 F. Supp. 2d 459, 466 (S.D.N.Y. 2003).

352. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 496 (E.D. Pa. 2005).

353. *Zubulake I*, 217 F.R.D. at 322.

354. See *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 496.

355. See *Zubulake I*, 217 F.R.D. at 323.

356. *Id.* at 322.

357. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 484.

antitrust suits are likely not “novel.”³⁵⁸ Other courts have found that this factor is neutral in gender discrimination and securities manipulation cases, as such cases are insufficiently “novel.”³⁵⁹ Hence, this factor is likely neutral. Factor seven is “[t]he relative benefits to the parties of obtaining the information.”³⁶⁰ The e-discovery request would benefit the requesting party by providing them with a lot of information from a period of fifteen years that might possibly help them with their lawsuit.³⁶¹ However, the e-discovery request would not benefit CEPE, and CEPE vehemently objected to the request.³⁶² Due to the disproportionate benefit to the requesting party, this factor would favor cost-shifting.

In sum, five of the seven *Zubulake* factors would favor cost-shifting. Because CEPE is located in Belgium,³⁶³ the shifted costs would have likely included transportation or transmission costs. After determining the percentage of costs to shift to the plaintiff, the court should require the plaintiffs to deposit a certain portion of the shifted costs with the court under the escrow system proposed above.³⁶⁴ Once CEPE produced the requested ESI to the court’s satisfaction, the court would release the deposited funds to CEPE and require the plaintiffs to pay the remaining sum of shifted costs.

The proposed approach is preferable to the court’s analysis in *In re Automotive Refinishing Paint Antitrust Litigation*. First, the inclusion of the comity analysis addresses the foreign relations and sovereignty concerns of international e-discovery. Second, applying the *Zubulake* test would allow the court to determine whether to shift costs in a consistent manner, rather than using different criteria from case to case. Third, the escrow system would ensure that the one producing ESI actually receives reimbursement for shifted costs.

358. There is a body of antitrust law, which includes some cases that involved alleged foreign antitrust conspirators similar to *In re Automotive Refinishing Paint Antitrust Litigation*. See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (case involving conspiracy among vitamin companies, including some foreign companies).

359. *Xpedior Creditor Trust v. Credit Suisse First Bos. (USA), Inc.*, 309 F. Supp. 2d 459, 466 (S.D.N.Y. 2003) (involving securities manipulation); *Zubulake III*, 216 F.R.D. 280, 289 (S.D.N.Y. 2003) (involving gender discrimination).

360. *Zubulake I*, 217 F.R.D. at 322.

361. *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. at 496.

362. *Id.* at 485.

363. *Id.* at 484.

364. See *supra* Part IV.C.

CONCLUSION

Courts should address international comity concerns raised by international e-discovery requests through a preliminary comity analysis, address the costs of international e-discovery through the *Zubulake* test for cost-shifting, and enforce cost-shifting orders through an escrow system. Although existing law lacks an integrated framework that addresses both the international comity and cost concerns associated with international e-discovery, this Comment's approach addresses both. The preliminary comity analysis would allow courts to weigh the sovereign interests of the United States and the foreign country that houses the data and would prevent needless negative impact on international relations. Cost-shifting under *Zubulake* would protect producing parties from unduly burdensome international e-discovery requests, promote consistent results for situations involving domestic ESI and foreign ESI, and further judicial economy by allowing courts to determine cost-shifting for ESI in a variety of locations in the same motions proceeding. Moreover, defining the accessibility step of *Zubulake* in terms of total costs would allow the courts more flexibility in situations involving new technological developments and unique circumstances. Finally, the escrow system for all e-discovery realizes the benefits of the *Zubulake* test by requiring the requesting party to post some of the shifted e-discovery costs prior to the production of ESI and ensuring that the producing party actually receives at least some of the shifted costs. By adopting this approach to e-discovery, courts can better address the comity concerns and costs of international e-discovery consistently.