

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

MIKE HARRIS and JEFF DUNSTAN,
individually and on behalf of a class of
similarly situated individuals,

Plaintiffs,

v.

COMSCORE, INC., a Delaware corporation,

Defendant.

Case No. 1:11-cv-5807

Hon. James F. Holderman

Magistrate Judge Young B. Kim

PLAINTIFFS' MOTION TO EXCLUDE DISPUTED DATA

Pursuant to the Protective Order Governing Production of Plaintiff Jeff Dunstan's Hard Drive entered by this Court on October 23, 2013, (Dkt. 240) (the "Protective Order"), Plaintiffs Mike Harris and Jeff Dunstan ("Plaintiffs"), by and through their undersigned counsel, respectfully request that certain data be excluded from production to Defendant comScore, Inc. ("comScore"). Specifically, Plaintiffs seek to exclude from production the entire listing of files and Internet browsing history from Jeff Dunstan's ("Dunstan") imaged hard drive outside the time period between January 1, 2010 and September 30, 2010 (the "2010 Time Period")¹ because such data is irrelevant to the claims asserted in this case, and the potential privacy concerns for Dunstan vastly outweigh any possible benefit that comScore could derive from the information. In further support of this motion, Plaintiffs state as follows:

¹ As explained further *infra*, on November 6, 2013, Plaintiffs suggested this timeframe to ensure that comScore obtained files from Dunstan's hard drive leading up to (8 months preceding) and immediately after OSSProxy's installation (September 25, 2010). Plaintiffs believe in good-faith that this period allows comScore to meaningfully evaluate the condition of Dunstan's computer. (Declaration of Chandler Givens ("Givens Decl."), a copy of which was filed contemporaneously with this motion, at ¶ 8.)

1. The Protective Order required comScore to designate an expert to perform a search and examination of an imaged copy of Mr. Dunstan’s hard drive, and then retrieve certain data from it. (Protective Order at ¶ 3–4.) The expert then had to provide a copy of that data (the “Retrieved Data”) to Plaintiffs’ counsel, without comScore or its counsel seeing it. (*Id.* at ¶ 4–5.) After reviewing the Retrieved Data, the Parties were required to meet and confer to attempt to resolve any potential objections that Plaintiffs’ counsel had about producing the Retrieved Data. (*Id.* at 6.) In the event that the Parties couldn’t resolve such issues, the Protective Order provided that Plaintiffs could file a motion to exclude information in dispute. (*Id.*)

2. comScore designated Michael Perry (“Mr. Perry”) of Elysium Digital, LLC to search and retrieve data from Dunstan’s hard drive pursuant to comScore’s requests. Mr. Perry extracted files from the hard drive² and provided a copy of the Retrieved Data to Plaintiffs’ counsel along with a summary report explaining what information had been collected. (Givens Decl., ¶ 2.) The summary says that the Retrieved Data falls into seven categories: (1) File Listings (which is divided into e-mail listings, (i.e., the subject line and to/from lines from all e-mails), and a list of every file on Dunstan’s hard drive), (2) Windows Registry, (3) Windows Registry – Extracted Data, (4) Event Logs, (5) Event Logs – Extracted Data, (6) Internet History, and (7) Log Files (which also includes a log file generated by anti-virus/malware software run by Mr. Perry). (Perry Report at 2–4.) None of the categories of Retrieved Data were limited in any respect (e.g., by date range).

² The Protective Order required comScore’s expert to conduct a “search,” (Dkt. 240 at ¶ 3,) and an “examination,” (*id.* at ¶ 5,) of Dunstan’s hard drive. However, it appears that Mr. Perry didn’t “search” for anything, and instead extracted without limitation “all email files,” “all files,” and “[a]ll Windows event logs.” (Initial Report of Michael Perry (“Perry Report”), at 2–3, a copy of which is attached to the Givens Decl. as Exhibit A.)

3. The Parties met and conferred via telephone on November 5th. (Givens Decl., ¶ 5.) During the call, Plaintiffs explained that Dunstan’s File Listings and Internet History outside the 2010 Time Period weren’t relevant to this case because they had no bearing on his claims whatsoever, given that comScore’s software was installed in late September 2010. (*Id.* at ¶ 6.) In addition, while Plaintiffs agreed that, in principle, Windows Registry, Event Logs, and Log Files might be relevant to develop an understanding of the operations of Dunstan’s computer, data outside of the 2010 Time Period had no relevance because Dunstan only had comScore’s software installed in late September 2010, and he removed the software using an anti-virus program before the end of the month. (*Id.*)

4. Notwithstanding their objections, and in an effort to be reasonable, Plaintiffs agreed to provide data from five of the seven categories without any date restrictions: Windows Registry, Windows Registry—Extracted Data, Event Logs, Event Logs—Extracted Data, and Log Files (“Uncontested Data”). (*Id.* at ¶ 9.) And, per the Protective Order, Plaintiffs’ counsel produced the Uncontested Data to comScore.³ (*Id.* at ¶ 12.)

5. Regarding the e-mail listings (i.e., part of the larger category of File Listings), and pursuant to Plaintiffs’ request, comScore agreed to have Mr. Perry re-examine the hard drive and only extract e-mail listings from the 2010 Time Period, and then re-send that extracted data to Plaintiffs’ counsel. (*Id.* at ¶ 11.) Plaintiffs have yet to receive the newly extracted e-mail listings, and the Parties have agreed that once that revised data is produced, Plaintiffs’ counsel will review them for potentially sensitive or privileged information and provide it to comScore (with redactions and a privilege log, if necessary) within a few days following their receipt of it. (*Id.*)

³ Because several of these files also include information revealing Dunstan’s Internet browsing history outside of the 2010 Time Period, those files are being withheld pending the Court’s ruling on this Motion. (*Id.*)

6. With respect to the File Listings and Internet History, Plaintiffs don't object to producing information from within the 2010 Time Period subject to a review for potentially sensitive or privileged information. Thus, the only portion of the Retrieved Data in dispute is the non-e-mail File Listings and Internet History outside of the 2010 Time Period (the "Disputed Data").

7. The Disputed Data isn't discoverable for at least two reasons. First, the files aren't relevant to this case, and comScore can't explain why they would be. Second, the burden on Dunstan's privacy that would result from producing the Disputed Data vastly outweighs any possible benefit of such discovery for comScore.

8. In terms of relevance, and pursuant to Fed. R. Civ. P. 26(b)(1), parties may obtain discovery only of information that is "relevant to any party's claim or defense." comScore stated in its Motion to Compel ("comScore's Motion"), that it needed to inspect Dunstan's hard drive to verify that he downloaded OSSProxy, whether OSSProxy (rather than something else on his computer) caused the problems of which he complains, whether those problems occurred, and whether anti-virus software was used to remove the software. (Dkt. 226 at 2.) But because Dunstan's downloading of OSSProxy, resulting computer problems, and use of the third-party anti-virus software all occurred in and were limited to September 2010, the Disputed Data—all of which falls outside the 2010 Time Period—is simply not relevant to his claims. (Givens Decl., ¶ 6.)

9. On November 8, 2013, comScore offered a new but wholly unpersuasive explanation for wanting information outside the 2010 Time Period. In an e-mail, comScore claimed that "post-September 2010 activity may have affected the pre-September 2010 files and information collected, and therefore the post-September 2010 activity is necessary for

understanding the functionality of the computer in September 2010.” (Nov. 8, 2013 e-mail from Ms. Bowland, a true and accurate copy is attached to the Givens Decl. as Exhibit D.) Plaintiffs believe that comScore’s position is untenable for at least two reasons:

a. First, with respect to Dunstan’s Internet History files, comScore already conceded that his “pre- and post-September 2010 activity” was not relevant to his claims. As such, comScore previously indicated that it only needed Dunstan’s “browsing history *just before*, during, and *just after* the removal of comScore’s software [because such information] is relevant to Plaintiffs’ claims, in that some of them depend on a panelist’s activities online.” (Exhibit D to the Givens Decl.) (emphasis added.) Plaintiffs agree—to the extent any Disputed Data could possibly be relevant, it would be Internet activity “*just before*, during, and *just after*” OSSProxy’s activation, i.e., the 2010 Time Period. (Givens Decl., ¶ 8.) comScore’s new explanation does not account for its sudden change in position, and Plaintiffs fail to understand how Dunstan’s other online activity (i.e., well before and after his installation of OSSProxy) has any bearing on his claims. The reality is that it has none and comScore certainly hasn’t explained the rationale.

b. Second, comScore’s abstract statement that post September 2010 files *may* have affected the computer’s pre September 2010 functionality is nonsensical. Even assuming comScore can conjure up a justification for that statement (Plaintiffs fail to even understand it), then it should be required to articulate a way to limit its request to files relevant to showing the computer’s functionality—rather than plucking all of Dunstan’s Internet browsing history from his hard drive. Furthermore, comScore has repeatedly stated during meet and confers that its primary focus in assessing Dunstan’s Internet history is to search for the existence of unidentified “viruses.” (Givens Decl., ¶

7.) To that end, Mr. Perry already conducted a scan of Dunstan’s hard drive for viruses and malware, and produced a report showing the same.⁵ Thus, and as before, Plaintiffs fail to understand what else comScore could possibly glean from these files.

10. In terms of Dunstan’s privacy, and even if the Disputed Data *were* relevant to any present claims or defenses, under Fed. R. Civ. P. 26(b)(2)(C), this Court may limit the extent of discovery where “the burden . . . of the proposed discovery outweighs its likely benefit” As indicated in their Response in Opposition to comScore’s Motion to Compel, (Dkt. 233), Plaintiffs have serious privacy concerns about permitting comScore to comb unrestricted through Dunstan’s Internet browsing history spanning several years⁶—indeed, protecting Dunstan from that kind of invasive access is exactly what this case is about. And this Court already recognized the validity of those concerns. (October 16, 2013 Transcript, a copy of which is attached to the Givens Decl. as Exhibit G, at 7:9–25 (“I think the more persuasive argument is that we need to somehow protect the privacy interests of Mr. Dunstan. While he has made some claims about the software damaging or harming his computer and harming his right to privacy, you know, it doesn’t mean that the entire hard drive should be exposed to the world, so to speak.”).) As far as Plaintiffs are concerned, there is no probative value to Dunstan’s Internet and/or e-mail history outside of the 2010 Time Period, and any use comScore might extract from it (i.e., to harass or embarrass him) is outweighed by the high costs to his privacy.

⁵ Mr. Perry’s anti-virus/malware search of Dunstan’s hard drive did turn up traces of malware. (MBAM-log-2013-10-30 (09-25-44).txt, a true and accurate copy is attached as Exhibit F to the Givens Decl.). Not surprisingly—at least from Plaintiffs’ perspective—one of the files detected was the same photo editing software that Dunstan originally downloaded (PhotoCutterSetup.exe) and was bundled with comScore’s software, which was reported as harmful “Adware.” (*Id.*)

⁶ For example, Mr. Perry’s extraction yielded over 2,400 Internet search queries performed by Mr. Dunstan. (Givens Decl., at ¶ 4.)

11. The remaining Disputed Data is comprised of a listing of every single file on Plaintiffs' hard drive. This data includes things like the names of documents, photos, images downloaded from the Internet, and files that also reveal Dunstan's Internet browsing history. (Givens Decl., at ¶ 4.) For the same reasons listed above, Plaintiffs shouldn't have to produce such data from outside of the 2010 Time Period. It is not relevant to Dunstan's claims and would only invade his privacy only for the sake of doing so.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order (1) excluding from production to comScore file listings and Internet browsing history from Dunstan's hard drive dated outside the 2010 Time Period, and (2) for such further relief as this Court deems just and proper.

Respectfully submitted,

MIKE HARRIS and **JEFF DUNSTAN**,
individually and on behalf of a class of
similarly situated individuals,

Dated: November 11, 2013

By: s/ Benjamin S. Thomassen
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CERTIFICATE OF SERVICE

I, Benjamin S. Thomassen, an attorney, hereby certify that on November 11, 2013, I served the above and foregoing ***Plaintiffs' Motion to Exclude Disputed Data***, by causing true and accurate copies of such paper to be filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system, on this 11th day of November 2013.

s/ Benjamin S. Thomassen
