

**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

Plaintiff,

v.

COMSCORE, INC., a Delaware corporation

Defendant.

CASE NO. 1:11-cv-5807

Judge Holderman

Magistrate Judge Kim

**COMSCORE'S OPPOSITION TO PLAINTIFFS'  
MOTION TO EXCLUDE DISPUTED DATA**

Defendant comScore, Inc. ("comScore") respectfully submits this brief in opposition to Plaintiffs' Motion to Exclude Disputed Data ("the Motion"). (Dkt. No. 268.)

**I. INTRODUCTION**

In order to have a full and fair opportunity to test Plaintiffs' claims and defend against them, comScore requires a full file list and list of internet browsing history from Plaintiff Jeff Dunstan's imaged hard drive. This Court has already determined that information on Dunstan's hard drive is relevant to this case. However, Plaintiffs have refused to provide full file listings and internet browser history information, claiming that is irrelevant and that any relevance is outweighed by Dunstan's privacy concerns. However, the information Plaintiffs seek to exclude is necessary to properly understand (1) whether the problems Dunstan claims he had with his computer were caused by comScore's software, (2) whether Dunstan's computer was functioning as a "facility through which an electronic communication service [was] provided," and (3) how Dunstan's computer was configured at the time he allegedly downloaded comScore's software.

Because the information Plaintiffs seek to exclude (the “Disputed Data”) is relevant to these issues, the Court should deny Plaintiffs’ Motion.

## **II. LEGAL STANDARDS**

Fed. R. Civ. P. 26(b)(1) allows parties to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things . . . .” The Court must limit the extent of discovery if it finds that “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Fed. R. Civ. P. 26(b)(2)(C)(iii).

## **III. ARGUMENT**

comScore provided three reasons why Dunstan’s computer is relevant to this case in its Motion to Compel the production of Dunstan’s hard drive:

- “comScore is entitled to test this allegation to determine if Dunstan’s alleged problems with his computer were due to outside factors, such as computer viruses or an outside overload on the system.”
- “Thus, comScore is entitled to inspect Dunstan’s computer to determine whether it was configured with special equipment or software to support Plaintiffs’ contention that it could perform as a ‘facility through which an electronic communication service is provided.’”
- “The configuration of Plaintiffs’ computers is also essential to their allegations regarding whether comScore’s software collects information in a way that exceeds the scope of the ULA.”

(Dkt. No. 226 at pp. 3 and 4.) The Court granted comScore’s motion to compel the production of an image of Dunstan’s hard drive, and entered a Protective Order regarding the same. (Dkt. No. 240.) After receiving the data pulled by comScore’s forensic computer experts, Elysium Digital, from Dunstan’s imaged hard drive in accordance with the Protective Order, Plaintiffs objected to

providing complete file listings, internet browsing history, and a list (but not content) of emails. The parties have, after a meet and confer process, agreed to limit the listing of emails to the January 1, 2010 to September 1, 2010 timeframe. (Ex. A, Nov. 8, 2013 Email from C. Givens to R. Bowland.)

Initially, comScore also proposed limiting the file listings and internet browsing history to only those files and internet browsing sessions that occurred before and shortly after Dunstan claims to have downloaded comScore's software. (Ex. A, Nov. 6, 2013 Email from R. Bowland to C. Givens.) However, after discussing this proposal with Elysium Digital, comScore realized that files and internet browsing history after Dunstan downloaded comScore's software were also relevant to Plaintiffs' claims in this case. (Ex. A, Nov. 8, 2013 Email from R. Bowland to C. Givens.) Therefore, comScore insisted on receiving the entire file list and browsing history, but Plaintiffs refused to provide this information and instead filed the Motion. (*Id.*)

#### **A. The Disputed Data is Relevant to Plaintiffs' Claims in this Lawsuit**

As discussed in its previous Motion to Compel, comScore requires the full file listing and Internet browsing history to test each one of these claims by Dunstan. First, it is obvious that files added before Plaintiffs' arbitrary time frame may still have been on Dunstan's computer in September 2010, and therefore be relevant. (Ex. B, Decl. of Elysium Digital at ¶ 7.) To the extent any of those files were downloaded from an internet source, the internet browsing history prior to Plaintiffs' time frame would also be relevant. (Ex. B, Decl. of Elysium Digital at ¶¶ 8, 11.) These files are relevant to the set-up of Dunstan's computer in September 2010, and therefore relevant to Plaintiffs' claims of computer problems and the configuration of Dunstan's computer in September 2010. The Court should order Plaintiffs' to produce this information to comScore.

Additionally, the full file listing and Internet browsing history after September 2010 is also relevant. In particular, files added after September 2010 may have changed or altered files added before September 2010. For example, (Ex. B, Decl. of Elysium Digital at ¶ 9.). Additionally, as the Court may know, there are commercially available software products which allow the complete removal of all or certain files on a computer's hard drive. (Ex. B, Decl. of Elysium Digital at ¶ 10.) If Dunstan used one of these programs, and the Court grants Plaintiffs' motion, comScore will have no way of knowing what the true configuration of Dunstan's computer was in September 2010. (*Id.*) The Court should also order Plaintiffs' to produce this information to comScore.

**B. Jeff Dunstan's Privacy Concerns Do Not Outweigh the Benefit of comScore Receiving the Information It Needs to Defend this Lawsuit**

Plaintiffs also argue that Dunstan's privacy concerns outweigh the value of the Disputed Data. However, as discussed above, the Disputed Data is necessary for comScore's investigation of Plaintiffs' claims regarding problems with Dunstan's computer, the configuration of Dunstan's computer with respect to electronic communications, and the configuration of Dunstan's computer related to Plaintiffs' specific claims. comScore is unable to obtain the information on Dunstan's computer without receiving these files, and comScore is entitled to test Plaintiffs' claims in this respect. Moreover, Plaintiffs cannot make these claims in their case and then hide behind vague claims of privacy in order to avoid discovery. Dunstan's computer, as discussed in comScore's previous Motion to Compel, goes to the heart of Plaintiffs' claims. Finally, Dunstan's privacy concerns are adequately addressed by the Court's Protective Order in this case. To the extent Plaintiffs choose to designate any of the information from Dunstan's hard drive, comScore and its experts will be obligated to protect the information from disclosure.

#### IV. CONCLUSION

For the foregoing reasons, comScore respectfully requests that the Court deny Plaintiffs' Motion to Exclude Disputed Data.

DATED: November 25, 2013

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*Attorneys for Defendant comScore, Inc.*

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of COMSCORE'S OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE DISPUTED DATA has been caused to be served on November 25, 2013 to all counsel of record via the Court's ECF filing system and via electronic mail.

*/s/ Robyn M. Bowland*

Robyn Bowland