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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:

LOOPNET, INC.
Subpoena Enforcement Matter

COSTAR GROUP, INC., a Delaware corporation
and COSTAR REALTY INFORMATION, INC., a
Delaware corporation

vs.

LOOPNET, INC., a California corporation

MISCELLANEOUS ACTION
Case No. CV 05-80294 - Misc. VRW (JL)

**NOTICE OF MOTION AND MOTION TO
COMPEL LOOPNET TO RESPOND TO
SUBPOENA**

Date: June 28, 2006
Time: 9:30 a.m.
Courtroom: F, 15th Floor
Judge: Hon. James Larson

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on June 28, 2006 at 9:30 a.m., or as soon thereafter as counsel
4 may be heard, in the above-entitled Court located at 450 Golden Gate Avenue, San Francisco,
5 California before the Honorable James Larson, CoStar Group, Inc. and CoStar Realty Information, Inc.
6 (collectively, "CoStar") will move to compel LoopNet, Inc. ("LoopNet") to respond to a valid subpoena
7 issued by the Clerk of this Court.

8 CoStar has sought, through a subpoena issued by the Clerk of this Court under the Digital
9 Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(h), to obtain information identifying the
10 individuals who are directly infringing CoStar's copyrights. Loopnet's response to the DMCA
11 subpoena was evasive and inadequate and CoStar seeks an order from the Court compelling Loopnet to
12 provide an adequate response.

13 CoStar bases this Notice and Motion, the attached Memorandum of Points and Authorities, the
14 attached Declarations of Frank Simuro and Thomas J. Perrelli, the pleadings and records on file with
15 this Court, all matters of which this Court may take judicial notice, and such evidence and argument as
16 may be presented at the hearing on this motion.

17 Dated: May 19, 2006

COBLENTZ, PATCH, DUFFY & BASS LLP

18
19 By: Jeffrey G. Knowles / gem
20 Jeffrey G. Knowles
21 Attorneys for CoStar Group, Inc. and CoStar
22 Realty Information, Inc.
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MEMORANDUM OF POINTS AND AUTHORITIES

CoStar Group, Inc. and CoStar Realty Information, Inc. (collectively, "CoStar") respectfully file this motion to compel LoopNet, Inc. ("LoopNet") to respond to a valid subpoena issued by the Clerk of this Court.

INTRODUCTION

CoStar and LoopNet both operate services providing commercial real estate information, *i.e.*, information about commercial real estate properties that can be accessed and used by real estate brokers and other real estate professionals. CoStar provides its information by investing enormous resources (over \$60 million a year), researching a vast array of information about commercial properties throughout the United States and traveling the country taking photographs of the buildings in its database. LoopNet does none of this. LoopNet simply enables and encourages its subscribers to post real estate listings -- including photographs from whatever source -- to the LoopNet website, after which the unverified information and photographs can be accessed, reproduced and disseminated by other LoopNet subscribers. In many cases, the photographs on LoopNet's website have been unlawfully copied directly from CoStar's website. That is the crux of the dispute between CoStar and LoopNet.

This is not, however, a suit against LoopNet for facilitating copyright infringement. Rather, CoStar has sought, through a subpoena issued by the Clerk of this Court under the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(h), to obtain information identifying the individuals who are directly infringing CoStar's copyrights, including those LoopNet subscribers who unlawfully post CoStar's copyrighted photographs onto the LoopNet website ("uploaders"), and those LoopNet subscribers who infringe CoStar's copyrights by further reproducing and distributing those photographs without CoStar's authorization ("downloaders").

CoStar's DMCA subpoena was properly served on LoopNet over four months ago, in December 2005. Since then, LoopNet has engaged in a strategy of delay and evasion. Indeed, LoopNet's initial

1 “response” to the subpoena consisted of nothing more than copying and producing back to CoStar
2 thousands of pages of documents that CoStar had just given to LoopNet to identify the specific CoStar
3 photographs being infringed. Now, after months of gamesmanship, LoopNet has refused to provide any
4 information about infringing downloaders, somehow claiming that it does not “maintain documents”
5 identifying those infringing LoopNet subscribers.
6

7 LoopNet’s carefully worded and evasive denials are not credible. First, the DMCA does not
8 limit LoopNet’s obligation to simply handing over a pre-existing document with the name and address
9 of the infringer. Rather, it requires LoopNet to produce information that is available to it, including
10 data accessible on LoopNet’s computer servers. Second, LoopNet plainly collects and maintains
11 information identifying infringers. The photographs at issue are physically stored on LoopNet’s
12 computer servers. For subscribers to even view listings (including photographs) on the LoopNet
13 website, LoopNet requires that they first register with LoopNet and login with a unique username and
14 password. LoopNet further provides its subscribers with advanced tools to make better use of the
15 information and photographs on the LoopNet website -- tools that result in additional reproduction and
16 dissemination of CoStar’s copyrighted photographs. The very existence of many of these features
17 belies any LoopNet claim that it cannot identify infringers. Indeed, as discussed below, as to one
18 feature (ProspectLink), LoopNet actually advertises that it can provide subscribers with comprehensive
19 summaries of everyone to whom they have e-mailed a particular property listing (and infringing
20 photograph). To provide this information, LoopNet necessarily must possess responsive information
21 regarding the identities of infringers.
22
23

24 LoopNet does not deny -- nor could it credibly deny -- that it regularly receives and maintains
25 information in the form of computer server logs (and similar information) from which it readily could
26 ascertain the identities of the LoopNet subscribers who are infringing CoStar’s copyrighted
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1 photographs. LoopNet operates incredibly sophisticated databases. Its business simply could not
2 operate without access to the information requested by the subpoena.

3 LoopNet has resisted CoStar's subpoena not because the information is not available to
4 LoopNet, but because LoopNet's business depends upon its subscribers posting property listings,
5 including infringing photographs, to the LoopNet site. Since LoopNet does not do any of its own
6 research, subscriber postings are LoopNet's only source of property listings. Thus, it is not in
7 LoopNet's business interests for CoStar to enforce its copyrights against infringing LoopNet users.
8 That, however, is not a proper basis to refuse or delay a valid subpoena.
9

10 CoStar respectfully requests that the Court direct LoopNet to respond to the subpoena.
11 Alternatively, in the event that LoopNet continues with its implausible contention that it cannot identify
12 infringing LoopNet downloaders, CoStar requests that it be permitted to take a deposition of LoopNet's
13 technical personnel to probe the veracity of such claims.
14

15 BACKGROUND

16 *Costar*

17 CoStar is the leading provider of information services to commercial real estate professionals in
18 the United States. Real estate brokers, investors, lenders, appraisers -- anyone involved in the world of
19 commercial real estate -- can subscribe to CoStar to obtain access to the CoStar's suite of services and
20 to the most comprehensive database of information about commercial real estate. Declaration of Frank
21 Simuro, dated May 4, 2006, submitted herewith ("Simuro Decl."), ¶ 3.
22

23 CoStar invests millions of dollars each year to maintain the commercial real estate industry's
24 largest research organization. Simuro Decl. ¶ 7. CoStar's research team is comprised of hundreds of
25 professionals (research analysts and field researchers) who make more than six million phone calls and
26 drive more than two million miles each year to build, maintain and update database featuring over 35
27 billion square feet of commercial space. *Id.*
28

1 A critically important part of CoStar's database is its professionally-taken photographs. CoStar
2 photographers travel to and take pictures of commercial properties in markets throughout the United
3 States. CoStar maintains and constantly upgrades more than one million digital images of the
4 commercial properties. Simuro Decl. ¶¶ 7-8.

5
6 ***Loopnet***

7 LoopNet is an Internet-based real estate listing service. Its website contains listings for
8 commercial properties for sale or lease. LoopNet's business model differs greatly from that of CoStar.
9 Rather than doing its own research, taking its own photographs or verifying the information on its
10 website, LoopNet instead depends upon its subscribers to upload listings and photographs to its servers.

11 As a consequence of its business model, LoopNet's website is often littered with photographs
12 that are infringing copies of photographs owned by others, including CoStar. But LoopNet does not
13 merely provide a place to post photographs. LoopNet additionally provides its subscribers with a wide
14 variety of tools to allow them to disseminate property listings, create reports and track exposure of
15 listings that have been posted. These functionalities directly result in LoopNet subscribers further
16 reproducing and disseminating infringing copies of CoStar's copyrighted photographs.

17 This is not the first time CoStar has had to commence proceedings because of infringement
18 through LoopNet's website. In 1999, after finding hundreds of its photographs on LoopNet's website,
19 CoStar sued LoopNet for direct and secondary copyright infringement. The Fourth Circuit ultimately
20 held that LoopNet was not a direct copyright infringer, *id.*, and the parties settled their dispute with
21 respect to secondary copyright infringement. There was never any doubt, however, that LoopNet
22 subscribers who upload or download copyrighted photographs through LoopNet's servers violate the
23 copyright laws. *E.g., Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005); *A&M*
24 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *BMG Music v. Gonzalez*, 430 F.3d 888
25 (7th Cir. 2005). Because LoopNet ultimately produced information about infringing LoopNet
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1 uploaders, this motion addresses LoopNet's refusal to provide any information at all about infringing
2 LoopNet downloaders, *i.e.*, those LoopNet subscribers who further disseminate and reproduce CoStar's
3 copyrighted photographs.

4 ***The Digital Millennium Copyright Act***

5 The DMCA was enacted by Congress in 1998 to address the problem of widespread copyright
6 infringement over the Internet. Virtually any copyrighted work can now be put in a digital format, and
7 then can be copied and distributed worldwide instantaneously. This can be a great benefit, but also
8 leaves copyrighted works susceptible to "massive piracy." S. Rep. No. 105-190, at 8 (1998).

9 Section 512(h) of the DMCA, 17 U.S.C. § 512(h), addresses one common problem facing
10 copyright owners when their works are unlawfully disseminated over the Internet: identifying the
11 individuals violating their copyrights. Individuals committing infringement on the Internet -- such as by
12 posting or downloading photographs -- are generally able to hide their identity from anyone except the
13 operator of the website that the individuals are using to commit the infringement. One important object
14 of the DMCA was to avoid disputes between copyright owners and providers of online services by
15 giving copyright owners a means to quickly identify infringing users. Without this information,
16 copyright owners cannot deal directly with the individuals violating their copyrights.

17 By statute, a DMCA subpoena requires an Internet service provider to respond with
18 "information sufficient to identify the alleged infringer of the material described in the notification to
19 the extent such information is available to the service provider." 17 U.S.C. § 512(h)(3). In most cases,
20 such information would be a name, address, phone number, and email addresses; in other cases, if that
21 information was not available, it might be an Internet Protocol ("IP") address and related server data,
22 which can be used by a copyright owner to track down an infringer.¹
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27 ¹ For instance, if LoopNet did not know the real world identities of its subscribers (which it plainly does), from the IP
28 address, date and time, CoStar could track down the identity of the infringer. IP addresses are, in essence, numeric locators.
Internet service providers are assigned blocks of IP addresses. Thus, with a LoopNet-provided IP address for an infringer,
CoStar could determine which Internet service provider was providing Internet access to the infringer. With the same

1 ***The Instant Subpoena***

2 In the fall of 2005, CoStar found over 1700 of its copyrighted photographs on LoopNet's
3 website. The photographs had been posted without authorization and were available to LoopNet's
4 subscribers to further reproduce and disseminate, in violation of the Copyright Act. On October 28,
5 2005, CoStar sent to LoopNet a notification, setting forth in detail each specific infringement. The
6 notice included some 4000 pages of documentation, including copies of the infringing photographs
7 obtained from LoopNet's website. On December 27, 2005, CoStar sought and obtained from the Clerk
8 of this Court a DMCA subpoena to compel LoopNet to provide information identifying the LoopNet
9 subscribers violating CoStar's copyrights.
10

11 As required by statute, CoStar's request was accompanied by a detailed list of the material being
12 infringed, 17 U.S.C. § 512(c)(3)(A)(iii), and a sworn declaration by CoStar that the information sought
13 would "only be used for the purpose of protecting rights under [the DMCA]." 17 U.S.C. §
14 512(h)(2)(C). The subpoena's terms in relevant part provide as follows:
15

16 For each of the CoStar photographs which were previously identified . . .
17 and which are listed in the accompanying DMCA notification, you are
18 directed to expeditiously provide information sufficient to identify
19 the individual(s) who have infringed CoStar's copyrights by uploading or
20 downloading the photograph.

21 "Downloading" shall mean copying, transferring, or obtaining from any
22 server owned or operated by LoopNet a digital copy of one or more of
23 CoStar's photographs, including, but not limited to, in connection with
24 the use of (a) the LoopNet listing service, or (b) any LoopNet product or
25 service that utilizes photographs from the LoopNet Listing service,
26 including, but not limited to, (1) the LoopNet Prospect List lead
27 generation service, (ii) the LoopNet Email Alert service, (iii) the LoopNet
28 Personalized ListingLink service, (iv) the LoopNet Customer Marketing
29 Email service, and (v) any LoopNet Saved Property Folders.

30 Declaration of Thomas J. Perrelli, dated May 3, 2006, submitted herewith ("Perrelli
31 Decl."), Ex. 1 (Subpoena, Schedule A).

32 information, that Internet access provider would be able to determine which of its customers was using that account, on that
33 date and precise time. This is a common method of determining the real world identity of an otherwise anonymous online
34 infringer. Simuro Decl. ¶ 17.

