

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

COSTAR GROUP, INC, et al.,

No. C 05-80294 MISC VRW (JL)

Plaintiffs,

v.

LOOPNET, INC,

**ORDER DENYING MOTION TO  
COMPEL FURTHER RESPONSES  
TO SUBPOENA  
(Docket # 3)**

Defendants.

**Introduction**

All discovery in this case has been referred by the district court (Hon. Vaughn R. Walker) as provided by 28 U.S.C. §636(b) and Civil Local Rule 72. Plaintiff filed a motion to compel further responses to a subpoena for documents and for depositions of Defendant’s technical personnel. The motion came on for hearing. Appearing for Plaintiff were Steven Fabrizio and Jeffrey Knowles, COBLENTZ, PATCH, DUFFY & BASS. Appearing for Defendant was Kenneth Wilson and Michael Rubin, PERKINS COIE. The Court considered the moving and opposing papers and the arguments of counsel and hereby denies the motion.

**Factual Background**

CoStar Group, Inc. and CoStar Realty Information, Inc., collectively “CoStar,” is a Delaware corporation that collects and provides access to information regarding

**United States District Court**  
For the Northern District of California

1 commercial real estate properties throughout the United States. CoStar is a subscription  
2 service that provides access to a database of information for use by real estate  
3 professionals. The database includes information about properties totaling 35 billion  
4 square feet of commercial real estate. CoStar claims that a critical aspect of its database  
5 are the high-quality, professionally produced photographs, of which it has more than one  
6 million digital images available for online viewing. CoStar commissions and copyrights  
7 these photographs in order to post them on its website in order to facilitate property sales  
8 and to provide information to potential buyers.

9 LoopNet is also a real estate information website. However, rather than collecting its  
10 own information, it depends on subscribers to post information and photographs on the site.  
11 In order to accomplish this, LoopNet offers a variety of tools on its website that allow  
12 subscribers to disseminate property listings, create reports and track the exposure of  
13 postings that have been listed.

#### 14 **Legal Standard**

15 The Court has jurisdiction over this action under the Digital Millennium Copyright Act  
16 (“DMCA”). The DMCA contains a subpoena provision which allows a party with a good-faith  
17 belief that its copyrighted materials are being infringed to obtain from an Internet Service  
18 Provider (“ISP”) information sufficient to identify individuals who have infringed on its  
19 copyrighted material. 17 U.S.C. § 512(h). Under § 512 (h) of the DMCA, a copyright  
20 owner must submit three items with a request for a subpoena: (1) a “notification of claimed  
21 infringement” identifying the copyrighted work claimed to have been infringed and the  
22 infringing material or activity, and providing information reasonably sufficient for the ISP to  
23 locate the material; (2) the proposed subpoena directed to the ISP; and (3) a sworn  
24 declaration that the purpose of the subpoena is “to obtain the identity of an alleged infringer  
25 and that such information will only be used for the purpose of protecting” rights under the  
26 copyright laws of the United States. 17 U.S.C. §§ 512(h)(2)(A)-(C). Upon receipt of the  
27 subpoena, the ISP is “authorize[d] and order[ed]” to disclose to the copyright owner the  
28

1 identity of the alleged infringer. 17 U.S.C. 512(h)(3),(5); See also *RIAA, Inc. v. Verizon*,  
2 351 F.3d 1229, 1232 (D.C. Cir. 2003).

### 3 Procedural Background

4 On December 27, 2005, CoStar obtained a § 512(h) subpoena from the Clerk of the  
5 Court requesting from LoopNet information identifying the LoopNet subscribers infringing  
6 on CoStar's copyrights. This request was accompanied by a detailed list of the allegedly  
7 infringed materials, as required by 17 U.S.C. § 512(c)(3)(A)(iii), as well as the required  
8 sworn declaration that the information obtained under the subpoena would "only be used  
9 for the purpose of protecting rights under the DMCA." See Motion to Compel at 6; 17  
10 U.S.C. § 512(h)(2)(C).

11 The subpoena specifically sought the production of information sufficient to identify  
12 the party or parties who infringed on CoStar's copyrights by either uploading or  
13 downloading CoStar's photographs to or from LoopNet's website. The subpoena identifies  
14 "downloading" as "copying, transferring, or obtaining" from a LoopNet server a digital copy  
15 of one or more of CoStar's photos. See CoStar's Motion to Compel at 6. The subpoena  
16 makes specific reference to the LoopNet Listing service, as well as other LoopNet products  
17 utilizing photographs, such as the LoopNet ProspectList Lead Generator, LoopNet Email  
18 Alert service, LoopNet Personalized Listing Link Service, the LoopNet Customer Marketing  
19 Email service, and the LoopNet Saved Property Folders.

20 On March 1, 2006, LoopNet provided a response to the subpoena. However,  
21 CoStar maintains that this response only contained information regarding the identities of  
22 infringing *uploaders*, and that LoopNet continues to refuse to provide any information  
23 regarding infringing *downloaders*. Following CoStar's subsequent requests, LoopNet  
24 responded that it did not maintain documents that contain information that identifies users  
25 who saved, stored, emailed or created reports pertaining to any copyrighted photographs.

26 On June 20, 2006, amicus curiae Electronic Frontier Foundation ("EFF") submitted a  
27 brief to the Court in support of LoopNet. The brief describes the nature of LoopNet's  
28 operating systems and argues that the Court should adopt a six-part analysis in order to

1 protect LoopNet subscribers' First Amendment rights. See Amicus Curiae Brief of  
2 Electronic Frontier Foundation in Support of LoopNet.

### 3 **I. Current Motion to Compel**

4 Currently before the court is CoStar's Motion to Compel Further Responses to a  
5 DMCA Subpoena. CoStar claims that in the fall of 2005, it found 1700 photographs on  
6 LoopNet's website for which it holds the copyright. The crux of CoStar's motion relates to  
7 the use of the tools LoopNet makes available to create reports and to generate emails. It  
8 claims that these tools enable LoopNet subscribers to reproduce and disseminate  
9 copyrighted material taken from CoStar's website. LoopNet has been responsive regarding  
10 uploading infringers. CoStar's motion seeks to compel LoopNet to provide responsive  
11 information to identify infringing downloaders.

#### 12 **A. Technological Arguments**

13 The Digital Millennium Copyright Act provides an remedy for parties whose  
14 copyrights have been infringed to quickly identify infringing users without initiating a lawsuit.  
15 CoStar contends that LoopNet's response to the DMCA subpoena was evasive in its  
16 assertion that it does not maintain documents that would identify parties who have emailed,  
17 downloaded, saved, stored or created reports about any photographs to which CoStar held  
18 a copyright. CoStar points to LoopNet's website as essentially a data management site,  
19 which provides a variety of services aimed at tracking the usage and viewing patterns of  
20 subscribers, and allowing parties to track activity associated with properties they have  
21 listed. It would be anomalous, CoStar claims, for LoopNet not to be able to identify parties  
22 who have downloaded CoStar's photographs.

23 CoStar asserts that several tools offered by LoopNet not only make copyright  
24 infringement by users inevitable, but also provide a method by which LoopNet can monitor  
25 such activity. LoopNet advertises the ProspectLink function as being able to track people  
26 to whom a subscriber has emailed an advertisement, and thereby disseminated  
27 copyrighted materials. CoStar also posits that the LoopNet Email Alert service, the  
28 LoopNet Personalized ListingLink Service, the LoopNet Customer Marketing Email service,

1 and any LoopNet Saved Property Folders functions allow LoopNet to identify infringing  
2 users.

3 LoopNet responds by categorizing these accusations as “rank speculation” and  
4 “unsupported conjecture that is premised on inaccurate assumptions and a fundamental  
5 misunderstanding of how LoopNet’s system works.” See Opposition to CoStar’s Motion to  
6 Compel Further Response at 2. Ultimately, LoopNet maintains that it provided no  
7 identifying information regarding any downloaders “because it has no ability to identify such  
8 persons.” See Wilson Declaration at 14.

9 LoopNet also responds to CoStar’s concerns about its internet tools by explaining  
10 the basic functions of its website which are summarized here. Each of the functions CoStar  
11 mentions is connected with a Property Profile. See Declaration of Wayne Warthen in  
12 Support of LoopNet’s Opposition at 3. The Property Profile contains all the information for  
13 a given property advertised on LoopNet, including any potentially infringing CoStar photos.  
14 *Id.* Any email or notification generated with any of the functions available on the LoopNet  
15 site is either “hyperlinked” or “in-line linked” with the Property Profile. *Id.* Emails, notices,  
16 listings and other communications created with those tools did not contain, transmit,  
17 reproduce or disseminate an actual copy of a photograph. *Id.* Instead, they merely contain  
18 an “in-line link” displaying the infringing photograph within the email. *Id.* at 6. Therefore,  
19 LoopNet asserts that it cannot provide the sought after information regarding infringing  
20 parties as no copy of a photo was created, and therefore no infringement actually occurred  
21 with respect to those tools.

22 Moreover, LoopNet argues that it simply does not have the information that would  
23 identify the potential users even if transmitting a photograph using one of its tools  
24 constituted copyright infringement. LoopNet describes its Property Profiles as a virtual  
25 folder to which links are generated to some or all of the material therein when using  
26 LoopNet tools. However, LoopNet claims that it does not record the time at which a  
27 particular image was uploaded and placed in the file. Although it could provide information  
28 about which subscribers accessed the Property Profile itself, LoopNet maintains that it

1 cannot determine with certainty whether one of the infringing images was in the Property  
2 Profile at the time of access. Therefore LoopNet has no way of knowing if a particular  
3 viewer saw an allegedly infringing photo.

4 Further, LoopNet claims that simply viewing a site containing copyrighted photos  
5 does not constitute infringement. Based on the set-up of LoopNet's system and the  
6 language of CoStar's subpoena, in order to qualify as an infringing user, a viewer would  
7 have to take independent, affirmative steps to download a picture using a "right click" and  
8 "save" method. LoopNet asserts that it has no ability to identify any user that has taken  
9 such steps.

#### 10 **B. Technological Description of LoopNet's On-Line Tools.**

11 Both Wayne Warthen's affidavit accompanying LoopNet's Opposition, and Electronic  
12 Frontier Foundation's Amicus Curiae brief in support of LoopNet clearly and succinctly  
13 explain the manner in which images are used, stored and transmitted with the tools  
14 available on LoopNet's website. A boiled-down version of this explanation follows.

15 When one of LoopNet's tools is used to send an image as an attachment, the image  
16 itself is not sent, but rather a "link" is created within the email message. There are two  
17 basic types of links used in internet communication. The first is known as a "hyperlink." A  
18 hyperlink is a text link (generally in blue font) that appears on the viewer's screen. When  
19 the viewer "clicks" on a hyperlink, the web browser opens the image from its original  
20 location. The viewing computer simply accesses the picture from its original storage  
21 location, but no physical or digital copy of the image has been sent or created. Once the  
22 image is viewed, whether through email or while browsing the LoopNet website, a copy of  
23 the picture is stored on the viewing computer's temporary memory cache. This is an  
24 automatic process which enables the computer to display the image more rapidly in the  
25 future, as it is not required to load the picture anew if it is subsequently viewed.

26 The second type of link is known as an "in-line link." These function slightly  
27 differently from the hyperlink. When a person views a webpage, the link causes an image  
28

1 to appear automatically in the browser without the viewer “clicking” on the link. However,  
2 as with the hyperlink, the data remains in its original location and no copy of the image is  
3 transmitted. The only actual copy of the image that is made is on the viewing computer’s  
4 temporary “cache.”

5 CoStar indicated in its moving papers that it does not seek the identity of persons  
6 whose computers have created cache copies of their photographs when simply viewing a  
7 LoopNet webpage. Rather, CoStar seeks “identifying information for individuals who have  
8 engaged in copying, transferring, or obtaining from any server owned or operated by  
9 LoopNet a digital copy of one or more of CoStar’s infringed works.” See Reply in Support  
10 of CoStar’s Motion to Compel at 3. Therefore, the Court need not address whether “cache  
11 copies” infringe on CoStar’s copyrighted material.

## 12 **II. Wayne Warthen’s Declaration Provides Sufficient Information** 13 **Regarding LoopNet’s Operating Systems to Preclude Deposition.**

14 § 512(h) authorizes the courts to use the Federal Rules of Civil Procedure as  
15 necessary in the implementation and enforcement of subpoenas. The Rules authorize a  
16 deposition to “verify compliance with a document subpoena.” Reply in Support of CoStar’s  
17 Motion to Compel Further Responses at 10. In the alternative to granting a motion to  
18 compel, CoStar seeks permission to depose LoopNet’s technical personnel to determine  
19 whether the subpoena has been sufficiently answered.

20 LoopNet opposes this request, stating that “§ 512 does not allow for deposition  
21 under any circumstances.” See LoopNet’s Opposition to CoStar’s Motion to Compel at 19.  
22 LoopNet correctly points out that § 512(h) subpoenas are for the purpose of identifying the  
23 alleged infringer, not to inquire about the technical capabilities of a party.

24 While § 512(h)(6) allows for the use of the Federal Rules of Civil Procedure for  
25 remedies for noncompliance with a subpoena, there has been no non-compliance in the  
26 instant case. LoopNet has provided CoStar with all the available information identifying  
27 persons who have infringed on copyrighted materials. In the absence of noncompliance,  
28 the Court does not require a LoopNet employee to appear for deposition. Therefore,  
CoStar’s request is denied.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Conclusion**

Because LoopNet has produced all information in its possession that would identify individuals allegedly infringing on CoStar's copyrighted materials, CoStar's Motion to Compel Further Answers to the § 512(h) subpoena is denied.

CoStar's Motion to Depose LoopNet's technical personnel for the purpose of determining whether LoopNet complied with the subpoena is denied, as well, because LoopNet has complied with the § 512(h) subpoena.

IT IS SO ORDERED.

DATED: August 4, 2006

  
\_\_\_\_\_  
JAMES LARSON  
Chief Magistrate Judge

**United States District Court**  
For the Northern District of California