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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

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

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. Loopnet's response to the DMCA subpoena was evasive and inadequate and CoStar seeks an order from the Court compelling Loopnet to provide an adequate response.

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

Dated: May 19, 2006

COBLENTZ, PATCH, DUFFY & BASS LLP

By: Jeffrey G. Knowles / gem
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Attorneys for CoStar Group, Inc. and CoStar
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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
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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 *Loopnet*

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

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

18 This is not the first time CoStar has had to commence proceedings because of infringement
19 through LoopNet's website. In 1999, after finding hundreds of its photographs on LoopNet's website,
20 CoStar sued LoopNet for direct and secondary copyright infringement. The Fourth Circuit ultimately
21 held that LoopNet was not a direct copyright infringer, *id.*, and the parties settled their dispute with
22 respect to secondary copyright infringement. There was never any doubt, however, that LoopNet
23 subscribers who upload or download copyrighted photographs through LoopNet's servers violate the
24 copyright laws. *E.g., Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005); *A&M*
25 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *BMG Music v. Gonzalez*, 430 F.3d 888
26 (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

The Instant Subpoena

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

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

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

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

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

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

1 ***LoopNet's Response***

2 After LoopNet first obtained an extension from CoStar, LoopNet's initial response to the
3 subpoena demonstrated that LoopNet had no intention of making a good faith effort to comply. When
4 it finally "responded" in January, 2006, LoopNet did not provide *any* information about the identities of
5 its infringing subscribers. LoopNet simply copied and sent back to CoStar the very same 4,000 pages
6 of documentation that CoStar had sent to LoopNet in October of 2005. Perrelli Decl. ¶ 6. That was the
7 sum total of LoopNet's effort at compliance, and speaks volumes about the genuineness of LoopNet's
8 compliance efforts.

9
10 CoStar advised LoopNet that its response to the subpoena was unacceptable, *see* Perrelli Decl.,
11 Ex. 2 (Jan. 23, 2006 letter), but LoopNet reiterated its refusal to provide responsive information. While
12 acknowledging it possessed specific documents identifying the individuals who had unlawfully
13 uploaded the photographs to its website, LoopNet took the position that it had no obligation to provide
14 such information to CoStar. Perrelli Decl., Ex 3 (Jan. 30, 2006 e-mail). CoStar again demanded
15 compliance with the subpoena. Perrelli Decl., Ex. 4 (Feb. 6, 2006 letter).

16
17 It was not until March 1, 2006 that LoopNet provided any substantive information in response to
18 the subpoena -- but, even then, LoopNet's response was limited to information concerning infringing
19 *uploaders*. LoopNet continued to refuse to provide any information with respect to *downloaders* --
20 individuals who had further reproduced or distributed CoStar's copyrighted photographs through the
21 LoopNet system. LoopNet initially asserted that it "does not collect or maintain this information." *See*
22 Perrelli Decl., Ex. 3 (Jan. 30, 2006 e-mail). In response, CoStar pointed out specific features of the
23 LoopNet site indicating that LoopNet in fact did collect responsive information. Perrelli Decl., Ex. 4 at
24 2 (citing "The Saved Property Folders feature," "The Custom Marketing Email feature," "The
25 Professional Quality Reports feature," and "The Exposure Reports feature"). LoopNet then replied with
26 an evasive denial: "LoopNet does not have documents that would identify the individuals who
27
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1 downloaded the images at issue.” See Perrelli Decl., Ex. 5 (March 1, 2006 e-mail) (emphasis added).

2 Following another exchange of correspondence, LoopNet came up with a more carefully worded, but
3 equally evasive -- and equally implausible -- denial:

4 [LoopNet] does not maintain information that would identify persons who download purported
5 infringing photographs. Specifically, LoopNet does not maintain documents that would identify
6 users who have saved or stored purportedly infringing photographs; it does not maintain
7 documents that would identify users that e-mailed purportedly infringing photographs; and it
8 does not maintain documents that would identify users who created reports which incorporated
9 purportedly infringing photographs.

10 Perrelli Decl., Ex. 6 (March 14, 2006 e-mail) (emphasis added).

11 From LoopNet’s initial response (simply regurgitating the 4000 pages of material CoStar had
12 previously sent to LoopNet) to its implausible and evasive denials -- it has been clear from the start that
13 LoopNet will just prolong this game unless and until ordered to produce whatever downloader
14 information it has. Accordingly, CoStar sought permission from the Court to file this motion to compel.
15 The Court authorized the filing of this motion by order of April 6, 2006.

16 ***LoopNet Clearly Maintains Information to Identify Infringers***

17 LoopNet is in the business of maintaining large amounts of information in electronic form and
18 providing access to such information to its customers. LoopNet’s business -- as demonstrated by its
19 own marketing -- is not just about maintaining information for subscribers to review; it is also about
20 keeping track of what its subscribers review, download and otherwise use, because such information is
21 valuable to the real estate brokers and others who use LoopNet’s service. Indeed, LoopNet boasts in its
22 marketing materials about all of the different ways in which it maintains information on its servers so
23 that customers can know what listings they have saved or emailed in the past, how often the listings
24 they have posted have been viewed, and what reports they have generated in the past. See Simuro
25 Decl., Ex. 1-13. It would be incredible for LoopNet to claim (and, in fact, LoopNet’s carefully worded
26 “denials” studiously avoid claiming) that LoopNet has no information on its computer servers that
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1 LoopNet could access to identify those LoopNet subscribers who have reproduced or disseminated
2 CoStar's copyrighted photographs.²

3 Accompanying this motion is a declaration from Frank Simuro. Mr. Simuro is the Senior Vice
4 President of Information Systems at CoStar and has significant experience in operational efficiency and
5 database technologies. He manages many aspects of CoStar's complex database systems and is
6 generally knowledgeable about how companies that operate large databases for access by customers
7 maintain information.

8 Mr. Simuro has reviewed LoopNet's publicly available website and the statements made by
9 LoopNet therein. As Mr. Simuro explains, it is highly likely that LoopNet has information on its
10 servers that would enable LoopNet to determine the identities of (or, at a minimum, that would assist
11 CoStar in identifying) the individuals who have infringed CoStar's copyrighted photographs.

12 As Mr. Simuro's declaration explains, a company that provides computer database services
13 generally does not simply maintain information that has been posted to the database. Just as Westlaw
14 maintains records of how its subscribers use particular databases (and thus, for example, can provide
15 subscribers with prior searches made by the subscriber and prior search results), database companies
16 invariably retain substantial amounts of information about how their subscribers are accessing
17 information. Such information is used not only to provide customer services (like research trails), but
18 also for a host of administrative and other purposes. Simuro Decl. ¶ 14.

19 There is no doubt that LoopNet collects this information. It could not operate if it did not do so.
20
21 When a LoopNet subscriber logs on and requests information from the database -- such as by

22
23
24
25 ² If that were in fact true, it would mean that LoopNet is ineligible for any of the "safe harbors" from copyright claims
26 provided by the DMCA. Subject to the provisions of 17 U.S.C. § 512(c), the DMCA provides a safe harbor for service
27 providers "hosting" infringing materials on their servers. However, in order to be eligible for any DMCA safe harbor at all,
28 a service provider must adopt and reasonably implement a policy to terminate "repeat infringers." 17 U.S.C. § 512(i). To
the extent LoopNet cannot identify any infringing downloaders, it cannot possibly reasonably implement the repeat infringer
policy required as a threshold for DMCA safe harbor. *E.g., Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004); *In re
Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 659 (N.D. Ill. 2002), *aff'd* 334 F.3d 643 (7th Cir. 2003); *Corbis Corp. v.
Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1101-02 (W.D. Wash. 2004).

1 downloading a photograph, creating a report that includes a photograph, or e-mailing a listing
2 containing a photograph to a prospect -- LoopNet knows precisely which subscriber is doing so, either
3 by the name of the subscriber who has logged in, the IP address (which can be used to identify the
4 user), or both. Simuro Decl. ¶¶ 13, 19.

5
6 Moreover, belying its evasive subpoena responses, LoopNet's advertising to its customers
7 certainly suggests that LoopNet not only maintains this information but also uses it to offer advanced
8 features to its subscribers. LoopNet touts that it provides real estate brokers not simply with a place to
9 post listings and photographs, but with information about the people who are interested in those listings
10 (and photographs). LoopNet sells itself as a service that enables its subscribers to create reports and
11 disseminate information -- all on, through or using LoopNet's computer servers. Simuro Decl. ¶ 11.

12
13 Indeed, LoopNet advertises a service called "ProspectList Lead Generation." Mr. Simuro
14 describes this service at paragraph 16 of his declaration. This feature allows LoopNet users to send
15 copies of commercial property listings (complete with infringing photographs) to prospects who may be
16 interested in commercial real estate of different kinds. LoopNet makes a point of promoting that this
17 feature allows users to create full-color emails with photographs. See [http://www.loopnet.com](http://www.loopnet.com/xNet/MainSite/Marketing/PremiumMembership.aspx?Feature=CustomMarketingEmails)
18 [/xNet/MainSite/Marketing/PremiumMembership.aspx?Feature=CustomMarketingEmails](http://www.loopnet.com/xNet/MainSite/Marketing/PremiumMembership.aspx?Feature=CustomMarketingEmails) (LoopNet's
19 system "automatically format[s] [each email] to include a full-color property photo and a highlighted
20 link to your email address"). This feature is operated and controlled by LoopNet's servers, and the e-
21 mails sent by LoopNet subscribers are created on those servers.

22
23 In explaining the benefits of the "ProspectList" feature, LoopNet affirmatively touts to
24 subscribers both that it maintains information about all prospects to whom a particular listing has been
25 sent and that it can provide the sending subscriber with a summary of all such e-mails. Simuro Decl.,
26 Exs. 3, 12. Thus, LoopNet keeps track of precisely where the illegal copies of CoStar's photographs on
27 its servers have been sent and who has sent them. Simuro Decl., Ex. 12 (providing instructions for
28

1 LoopNet subscribers wanting to “review a list of all members to whom you have already sent a
 2 ProspectList email for this listing”). The very existence of this advertised feature means that of course
 3 LoopNet possesses information responsive to the subpoena. Each LoopNet subscriber who sends an e-
 4 mail listing containing a copyrighted CoStar photograph is an infringer. LoopNet knows who those
 5 subscribers are and could -- but refuses to -- identify them.³

ARGUMENT

I. LOOPNET’S RESPONSE TO THE DMCA SUBPOENA IS EVASIVE AND INADEQUATE

9 LoopNet’s evasive denials are an inadequate response to the subpoena. LoopNet does not
 10 appear to dispute that its subscribers have reproduced and disseminated CoStar’s copyrighted
 11 photographs without authorization. Nor does LoopNet appear to dispute that all of this unauthorized
 12 activity occurred over the LoopNet service and on, through or using LoopNet’s servers. Rather,
 13 LoopNet appears to argue that it has no obligation to identify the infringers -- which LoopNet readily
 14 can do from information on its own servers -- because (so LoopNet claims) it does not “maintain
 15 documents” reflecting the information that CoStar seeks.

17 But, under the DMCA, CoStar is entitled to any information that might identify individuals
 18 infringing CoStar’s copyrights, including if such information is not in “document” form or is not
 19 “maintained” by LoopNet in a form that immediately reflects the real world identity of the infringers.
 20 CoStar is entitled to any information that LoopNet has “to the extent such information is *available* to
 21 [LoopNet].” 17 U.S.C. § 512(h)(3) (emphasis added). Because DMCA subpoenas necessarily relate to
 22 infringement occurring on computer servers and over the Internet, in almost every case, information
 23 responsive to a subpoena will not be documents or information neatly organized in some memorandum
 24

26 ³ LoopNet also promotes to its customers that it maintains information concerning the “exposure” of particular listings and
 27 thus particular photographs. See Simuro Decl., Ex. 4. LoopNet provides its subscribers with “Exposure Reports” that
 28 “[m]onitor the exposure your listing is receiving on LoopNet.” *Id.* These reports, at a minimum, keep track of how often a
 listing (and photograph) has been accessed and e-mailed. See Simuro Decl. ¶ 17. Given that LoopNet maintains this
 information, it is of course highly probable that, in some form, LoopNet can access information about the identities of the
 subscribers (by username and/or IP address) who downloaded or e-mailed these photographs. Simuro Decl. ¶ 15.

1 in some executive's file. Rather, identifying infringers under the DMCA inherently involves a search of
2 the relevant computer servers and some level of analysis to correlate computer log files with
3 information as to real world subscriber identity.

4 By way of illustration, LoopNet requires its subscribers to "register" -- that is, to create a
5 username and password that identifies that subscriber while on the LoopNet website. See Simuro Decl.

6 ¶ 13. Thus, LoopNet clearly maintains a database of subscriber information. Indeed, once logged-in,
7 LoopNet subscribers can go to "My LoopNet" and access "My Account" to view their registration
8 information. Simuro Decl. ¶ 13. As subscribers interact with LoopNet's servers -- downloading
9 photographs of real estate properties, attaching such photos to e-mails, generating reports containing
10 photos, etcetera -- LoopNet may track those subscribers by username/password, rather than by its
11 subscribers' real world names. LoopNet also may track them by IP address, date and time. Invariably,
12 as discussed above, LoopNet's servers log subscriber activity. Thus, LoopNet has multiple computer
13 logs tracking actions by subscribers according to their username/password or IP address (or both).
14 However, according to LoopNet, it does not "maintain documents" that identify which subscribers have
15 downloaded infringing photos because there is no existing document that correlates logs of activity (by
16 username/password or IP address) with the database of real world subscriber information -- *even*
17 *though both sets of data are maintained and LoopNet could readily make the correlation.* Under
18 LoopNet's theory, no Internet service provider would ever have to respond to a DMCA subpoena
19 because, almost certainly, none "maintain documents" in a form that identifies infringers.

20 Put another way, LoopNet has the equivalent of two databases: one that identifies drivers who
21 have registered their motor vehicle license plates; and one that keeps track by license plate of every car
22 that runs a red light at corner of Turk and Larkin. In response to a subpoena for the identifies of drivers
23 who have run the red light, LoopNet's response is the it does not "maintain documents" with that
24 information -- because no pre-existing memorandum contains correlated license plate and driver
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28

1 information. This of course is misleading, and is not the law. If it were, it would render the subpoena
2 provision of the DMCA essentially useless.⁴

3 As discussed above, LoopNet's answers with respect to infringing downloaders have been vague
4 and evasive from the start. Under the DMCA, as well as Rule 37(a) of the Federal Rules, vague and
5 evasive denials are not sufficient: a party who makes "an evasive or incomplete disclosure, answer, or
6 response" in response to a discovery request may be compelled to rectify its submission by court order.
7 Fed. R. Civ. P. 37(a)(3).⁵ A party similarly cannot escape an order compelling production simply by
8 claiming it does not have responsive documents or information. Where, as here, such denials are not
9 plausible or there are serious questions as to their veracity, courts have not hesitated to direct further
10 compliance. *See, e.g., Fresenius Med. Care Holding Inc. v. Baxter Int'l, Inc.*, 224 F.R.D. 644, 651
11 (N.D. Cal. 2004) ("[B]ecause [defendant] has provided incomplete information in responding to
12 [interrogatories], it is not clear that [defendant] has adequately searched for responsive documents" and
13 a motion to compel is appropriate); *Geophysical Sys. Corp. v. Raytheon Co., Inc.*, 117 F.R.D. 646, 648
14 (C.D. Cal. 1987) (granting motion to compel despite statement under oath that no documents existed
15 where producing party misunderstood what constituted relevant material). LoopNet's claim that it does
16 not "maintain documents" is belied by LoopNet's own public statements (*see supra* pp. 10-11).

17 Looking only at LoopNet's "ProspectList" -- which allows LoopNet subscribers to access
18 summaries of those to whom they have e-mailed particular listings (and infringing photographs) --
19 LoopNet's carefully crafted denials are simply implausible. CoStar believes that discovery of LoopNet
20 would fully reveal that LoopNet, like Westlaw and virtually every other online subscriber service, in
21 fact maintains information regarding its subscribers' activities on its site. When parsed, LoopNet's
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26 ⁴ Subpoenas are commonly used to require Internet access and other providers to search their computer logs to identify
27 copyright infringers. *See, e.g., Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

28 ⁵ The DCMA provides that subpoenas issued under its provisions "shall be governed to the greatest extent practicable by
those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena
duces tecum." 17 U.S.C. § 512(h)(6).

1 evasive “denials” do not in fact deny this. At bottom, LoopNet seems to be saying that it does not
 2 “maintain documents” that correlate data it maintains about subscriber activities with other information
 3 it maintains about the real world identities of subscribers. LoopNet simply refuses to provide that
 4 information -- that is, to comply with the subpoena -- because LoopNet has no interest in helping
 5 CoStar protect its copyrighted photographs. LoopNet’s very business model depends upon its
 6 subscribers posting real estate listings and photographs, whether infringing or not. Put bluntly:
 7 CoStar’s effort to protect its valuable intellectual property is contrary to LoopNet’s business interests.
 8

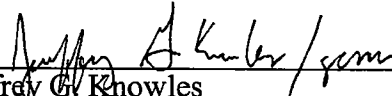
9 The very purpose of the DMCA subpoena provision is to enable copyright owners, like CoStar,
 10 to take action against otherwise anonymous online infringers. The DMCA is supposed to provide
 11 appropriate incentives for website operators, such as LoopNet, to cooperate. At the very least, site
 12 operators should not be actively obstructing enforcement efforts of copyright owners.
 13

14 CONCLUSION

15 For the foregoing reasons, CoStar respectfully asks this Court to compel LoopNet to comply
 16 with the terms of the December 15, 2005 DCMA subpoena by providing CoStar with the real world
 17 identities of its infringing subscribers and/or with all available server data and logs from which CoStar
 18 might be able to ascertain their identities.

19 Dated: May 19, 2006

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