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7 Attorneys for  
LOOPNET, INC.

8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11 *In re:*

12 LOOPNET, INC.  
Subpoena Enforcement Matter

13 COSTAR REALTY, INC., a Delaware  
14 corporation and COSTAR REALTY  
INFORMATION, INC., a Delaware corporation

15 v.

16 LOOPNET, INC, a California corporation.

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

**DECLARATION OF WAYNE  
WARTHEN IN OPPOSITION TO  
COSTAR'S MOTION TO COMPEL  
ADDITIONAL RESPONSE TO  
17 U.S.C. § 512(H) SUBPOENA**

**Date: Aug 2, 2006**  
**Time: 9:00 a.m.**  
**Courtroom: F (15th Floor)**  
**Before: The Hon. James Larson**

17 I, Wayne Warthen, declare as follows:

18 1. I am Senior Vice President of Information Technology at LoopNet, Inc.  
19 (“LoopNet”). In my current position at LoopNet, I have gained a complete understanding of the  
20 LoopNet system and how it operates. I have personal knowledge of the facts set forth in this  
21 Declaration and can testify competently to those facts.

22 2. I have worked with LoopNet or its predecessors since June 1999, when I joined  
23 PropertyFirst, which merged with LoopNet the summer of 2001.  
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1           3.       Prior to joining PropertyFirst, I held a variety of technology and technology  
2 management positions at Experian Information Services (previously TRW Credit Data), where I  
3 was employed for over 17 years. During my tenure at TRW/Experian, I was responsible for  
4 architecting a complete system rewrite of the credit reporting system. At that time, the  
5 TRW/Experian system was considered to be one of the largest commercial databases in the  
6 world. Subsequently, I managed internal computing and LAN services for the company  
7 supporting over 3000 users. I am the recipient of TRW's Chairman's Award for Innovation and  
8 am also an award winning software author.

9           **CoStar and LoopNet**

10          4.       Both LoopNet and CoStar are in the business of marketing online solutions to  
11 commercial real estate agents and brokers to assist with marketing and searching for commercial  
12 real estate. Traditionally, agents, working on behalf of commercial real estate sellers and  
13 landlords, have marketed their property listings through methods such as word of mouth in the  
14 brokerage community, signage placed directly on buildings for sale or with space for lease,  
15 availability lists that are printed and shared among brokerage firms, advertisements placed in  
16 print media including newspapers and other publications, direct mail campaigns, and emails sent  
17 to private distribution lists. Similarly, the process of searching for properties available for sale or  
18 for lease has been difficult. Unlike the residential real estate industry, which is served by local  
19 multiple listing services or other central local databases of residential real estate properties  
20 available for sale, there has not been an equivalent listing service in the commercial real estate  
21 industry. Both LoopNet and CoStar now offer online information services that compete with this  
22 traditional model and each other.

23          5.       Since it was founded in the late 1990's, LoopNet has become one of the leading  
24 providers of products and services tailored to the national and local needs of the commercial real  
25 estate industry. The LoopNet system contains more than \$300 billion of property available for  
26 sale and 2.8 billion square feet of property available for lease. The listings for these properties,  
27 which sometimes contain photographs, are almost exclusively posted by realtors, and in many  
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1 instances by affiliates of prominent national real estate brokerages such as Coldwell Banker,  
2 RE/MAX Commercial, Century 21 Real Estate and others. LoopNet’s website receives more  
3 visitors than any other commercial real estate listing service, with more than 1.2 million  
4 registered members, and 550,000 unique visitors monthly.

5 **Property Profiles on the LoopNet system**

6 6. On a technical level, LoopNet provides a web hosting service that enables users  
7 who wish to display commercial real estate over the Internet to post listings for those properties  
8 on the LoopNet system. LoopNet does not independently list properties or choose to post  
9 photographs itself. Instead, each one of the thousands of real estate listings on the LoopNet  
10 system, called a “Property Profile,” is posted by a user of the LoopNet system. As of the date I  
11 executed this declaratio n, LoopNet had approximately 360,000 commercial real estate listings on  
12 its site, approximately 252,000 of which included photographs.

13 7. The creation of a “Property Profile” is a simple, automated process. The first step  
14 is for a user to log in to LoopNet’s website with that user’s username and password. Users then  
15 fill out an input form on the LoopNet system that contains certain information about the  
16 property. This information includes (among other things) the property name, property type,  
17 address, building square footage, year built, a property description, an area description, and  
18 identifying information about the presenting broker.

19 8. LoopNet has always strongly discouraged the posting of material that is not  
20 owned and controlled by the poster. LoopNet has always maintained a strict policy against users  
21 posting any materials that infringe upon any third party rights, and has required each broker  
22 posting a listing to acknowledge and agree that it has all rights in the content being posted.

23 9. Since at least 2003, before a LoopNet user can create a single Property Profile, the  
24 user must agree to LoopNet’s “Terms and Conditions.” The first term set forth states:

25 Customer shall not submit any property descriptions, photographs, financial,  
26 contact or other information (“Listings”) to the LoopNet website unless (i)  
27 Customer has received all necessary rights and authorizations, including without  
28 limitation from the owner of the property listed, any necessary agents or brokers,  
the author of the Listing, including the photographer and/or copyright owner of  
any photographs....

1 Once a LoopNet user fills out the input form, clicks the “I agree to LoopNet’s Terms and  
2 Conditions...” check-box and then clicks the “Save Listing” button, a unique property  
3 identification number is assigned to the listing and a web page containing the real estate listing,  
4 and the property identification number is automatically created from the information provided by  
5 the user. The newly created Property Profile is then added to the system.

6 10. In the process of creating a Property Profile a user may choose to “submit  
7 graphics” (*i.e.*, photographs) to add to the listing. To add a photograph, the user must fill out  
8 another form that requires the user to identify which photographs to submit. Before the  
9 photograph may be posted, the user must also agree to the same Terms and Conditions that the  
10 user had to accept to post the listing in the first place. In addition, the user must expressly agree  
11 to the following term:

12 Submission of photographs: You may not submit a building photograph unless  
13 you are sure that you own the photo or have the right to provide it to LoopNet. In  
14 particular, do not submit any property photographs taken by or obtained from  
third parties unless you have a written agreement authorizing you to submit such  
photographs.

15 Once these steps are completed, a photograph is added to the Property Profile.

16 11. There are many ways that a Property Profile can then be viewed. While one  
17 must be a registered member to conduct searches at the specific www.LoopNet.com website,  
18 there are many other ways to access LoopNet Property Profiles without being a registered  
19 member.

20 12. The identity of the LoopNet user who uploads (or directs someone else to upload)  
21 a photograph to the LoopNet system is displayed on every property Profile. In fact, the entire  
22 purpose of the LoopNet system is to introduce potential buyers of commercial real estate to the  
23 property and to the seller of the property. This would not be possible if the potential buyers were  
24 unaware of the listing broker.

25 13. Attached hereto as Exhibit A is a true and correct copy of a representative  
26 Property Profile from the LoopNet system. As with other LoopNet Property Profiles, the sample  
27 LoopNet property Profile attached hereto as Exhibit A clearly displays the identity of the user  
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1 who uploaded (or directed someone else to upload) the photograph on the face of the listing.

2 **Information Captured About Attachments to Property Profiles**

3 14. All of the many features that the LoopNet system offers to its users refer back to  
4 the Property Profile, on a technical level, in some way or other in order to function. This is  
5 particularly so in the case of photographs. Once uploaded by a user, all of the LoopNet system's  
6 features that need to reference that photograph simply link or "point" to the uploaded version of  
7 the photograph. In almost every instance, this is done in the context of pointing to the entire  
8 Property Profile, which merely places the photograph in context.

9 15. For example, if a user wishes to add a certain property to her "Saved Property  
10 Folder," no additional copies of the Property Profile or its associated photographs are made. In  
11 fact, doing so would be inefficient and wasteful of valuable network resources. Instead, an  
12 internal link that "points" to the desired Property Profile is created in that user's "Saved Property  
13 Folder." Internal links like this are used in nearly all of our other features as well, such as  
14 "Professional Quality Reports" and "Exposure Reports." In some cases, such as "Custom  
15 Marketing Emails," the links point only to the photograph attached to the Property Profile. This  
16 is because some of the text of the Property Profile is pulled and included in the email, but it is  
17 only after a user receives the email (if the email address is correct and if it is not blocked by a  
18 spam filter) that a user would have a choice to see the picture from its linked-to original location  
19 on the LoopNet system. Thus, in all cases photographs are merely linked to either by themselves  
20 or as part of the Property Profile on the LoopNet system.

21 16. Technically, the photographs associated with Property Profiles are considered to  
22 be attachments by the LoopNet system. Each of these attachments has both a type, such as main  
23 photo, property photo, and so on, and a status, such as active or deleted. Even profiles that have  
24 no actual photograph of the property have an attachment associated with them. In those cases,  
25 though, the attachment simply shows a standard LoopNet image that tells the user that no  
26 property-specific photograph is available.

27 17. While the LoopNet system does track a number of different data points regarding  
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1 Property Profiles and usage in general, LoopNet does not track information that would enable it  
2 to determine if a user had “downloaded” a photograph. For example, if a LoopNet user were to  
3 make an affirmative act in order to download a photograph, such as “right-clicking” on a  
4 photograph displayed in a browser and then specifically choosing to save it to disk, there is no  
5 way for LoopNet to know this has even occurred. In fact, I know of no way for this information  
6 to be tracked from the server level. Additionally, even if downloading were considered to  
7 encompass a user’s mere viewing of a photograph, because LoopNet does not ever track or  
8 maintain any data concerning the time-based history of an attachment’s type or status, LoopNet  
9 cannot determine which photograph would have been displayed with any specific Property  
10 Profile at any given moment in time. That data would serve neither a business nor technical  
11 function for LoopNet.

12 18. To illustrate the relevance of the prior paragraph, when CoStar notified LoopNet  
13 in October 2005 that it believed there were infringing photographs on certain listings, LoopNet  
14 took immediate action. LoopNet promptly removed the identified photographs under the terms  
15 of the parties’ settlement agreement, and treated the uploaders according to LoopNet’s Repeat  
16 Infringers policy. The LoopNet system, however, did not record whether this photograph was  
17 the photograph that would have been displayed with the profile at specific points in time. The  
18 photograph displayed on a profile is determined dynamically at the time the listing is displayed  
19 and will vary depending on a variety of factors including the existence of other photographs, the  
20 status of the photograph(s), and type of photograph(s) available at that time. Thus, because  
21 LoopNet does not track the date or time of when any specific photograph was the active main  
22 photo for a specific listing, LoopNet cannot know if a specific user who viewed the listing  
23 actually saw the noticed photograph. There is no way to know if the photograph on the listing  
24 when it was viewed was the noticed CoStar photograph, another photograph, or the stock “no  
25 photograph is available” image from LoopNet. As a result, while LoopNet does maintain a large  
26 amount of data, none of that information would enable it to identify with certainty anyone who  
27 accessed any specific photograph, to download it or otherwise.

1                   **LoopNet’s Responses to CoStar’s DMCA Takedown Notices**

2           19.       Over the years, CoStar has served a number of takedown notices on LoopNet  
3 concerning alleged CoStar photographs that had been posted to the LoopNet system. When such  
4 a notice is received, LoopNet promptly removes the photograph referenced in the notice.  
5 LoopNet also notifies the relevant uploader and tracks that individual under the terms of  
6 LoopNet’s Repeat Infringers policy. CoStar has asked LoopNet to remove slightly more than  
7 3,304 photographs from its system in total, which represents roughly 0.33% of the total number  
8 listings with photos that have ever been on the LoopNet system

9           20.       On October 28, 2005, CoStar sent one of these notice letters which identified  
10 some 1,735 photographs allegedly owned by CoStar that were available on the LoopNet system.  
11 LoopNet responded to this complaint by immediately removing the identified photographs,  
12 notifying the brokers submitting those photographs of the possible violation of LoopNet’s Terms  
13 and Conditions, and directing them to refrain from posting photographs to which they do not  
14 own rights.

15                   **Inaccurate Statements About LoopNet’s System in the Declaration of Frank Simuro**

16           21.       I have reviewed the Declaration of Frank Simuro that CoStar submitted along  
17 with its Motion to Compel. Mr. Simuro states that he reviewed certain aspects of the publicly  
18 available portions of the LoopNet website. From that review he draws a host of conclusions  
19 about how the LoopNet system operates and about the information that he believes LoopNet  
20 must possess. In many cases his speculation is mistaken.

21           22.       In Paragraph 13 of his declaration, Mr. Simuro states that “it seems that LoopNet  
22 definitely has some level of information” that would identify those who “have reproduced,  
23 distributed, and/or displayed listings that had infringing copies of CoStar’s photographs.” As I  
24 have explained above, the LoopNet system does not track enough information about the  
25 photographs to enable LoopNet to identify which user saw any specific photograph. Mr. Simuro  
26 is wrong here.

27           23.       Mr. Simuro’s basic lack of understanding about the information LoopNet collects,  
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1 and therefore could retain or provide, leads him to other inaccurate conclusions as well. In  
2 Paragraphs 15, 16, 17, 18, and 19 of his declaration, Mr. Simuro refers to various LoopNet  
3 features for which he believes that LoopNet has records to identify users who may have seen or  
4 “downloaded” any specific photograph. However, all of these features relate in some way back  
5 to the Property Profile and, as I have explained, LoopNet does not track enough information  
6 about the photographs associated with Property Profiles to enable LoopNet to identify which  
7 user saw any specific photograph. Mr. Simuro therefore again reaches wrong conclusions in  
8 each of these paragraphs.

9  
10 I declare under penalty of perjury under the laws of the United States that the foregoing is  
11 true and correct. This declaration is executed this June \_\_, 2006, in San Francisco, California.

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13 Wayne Warthen

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