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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 KENNETH B.
WILSON 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, Kenneth B. Wilson, declare as follows:

18 1. I am an attorney with the law firm of Perkins Coie LLP (“Perkins”), counsel of
19 record for LoopNet, Inc. (“LoopNet”). I have represented LoopNet in various matters since
20 approximately 1998. I have personal knowledge of the facts set forth herein, and if called to
21 testify, could and would testify competently thereto.

22 **LoopNet’s Successful Initial Public Offering**

23 2. LoopNet completed its Initial Public Offering on June 7, 2006. According to the
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1 MSN Money website, as of June 15, 2006, LoopNet's market value (also referred to as market
2 capitalization) was \$542,830,000.00.

3 3. Attached to this Declaration as Exhibit A is a true and correct copy of a June 7,
4 2006 press release from LoopNet's website, located at www.loopnet.com, announcing its Initial
5 Public Offering.

6 4. Attached to this Declaration as Exhibit B is a true and correct copy of a LoopNet,
7 Inc. report dated June 15, 2006 from the MSN Money website, located at
8 <http://moneycentral.msn.com/investor/research/printrep.asp?Symbol=LOOP>, listing LoopNet's
9 market capitalization.

10 **The History of Litigation Between LoopNet and CoStar**

11 5. In 1999, CoStar filed suit against LoopNet and its then President, Dennis
12 DeAndre, in federal court in Maryland for copyright infringement and a number of other
13 statutory and common law claims. CoStar alleged that third party brokers had purportedly
14 posted infringing photographs on LoopNet's website, although CoStar did not name a single one
15 of those brokers in the suit. At the time suit was filed, LoopNet already had a policy and practice
16 of promptly taking down purportedly infringing photographs upon receiving a notice of
17 infringement, and was doing so in accordance with Section 512(c) of the Copyright Act.

18 6. After obtaining dismissal of its President for lack of personal jurisdiction and
19 partial summary judgment on most of CoStar's claims, in June 2003, LoopNet and CoStar
20 entered into a Settlement Agreement, the terms of which are Confidential. Following execution
21 of the Settlement Agreement, LoopNet and CoStar stipulated to the dismissal of all of its claims
22 with prejudice, except for its direct copyright infringement claim, and the court entered judgment
23 against CoStar on that claim in accordance with the district court's opinion. Attached to this
24 Declaration as Exhibit C is a true and correct copy of the Stipulated Dismissal, as well as the
25 Judgment entered against CoStar.

26 7. Upon entry of the Judgment, CoStar appealed the Judgment on direct
27 infringement. On September 28, 2001, the 4th Circuit Court of Appeals issued an opinion
28 affirming the district court's judgment, which was published at *CoStar Group Inc. v. LoopNet*,

1 *Inc.*, 373 F.3d 544 (4th Cir. 2004).

2 8. Since the resolution of the above litigation, CoStar has sent several accusatory
3 and threatening "notice letters" to LoopNet, complaining that LoopNet users have posted a
4 number of alleged CoStar copyrighted photographs to the LoopNet system. In connection with
5 these threats, CoStar has identified thousands of purportedly infringing photographs posted by
6 third party brokers and realtors on LoopNet's website. However, to my knowledge, CoStar has
7 never initiated a copyright infringement suit against any of those brokers, including the
8 individual uploaders that LoopNet has already identified in response to the subpoena now at
9 issue.

10 9. While I was preparing this Declaration, I searched the LEXIS-NEXIS Courtlink
11 database, which contains information on all federal court filings for the past several years, to
12 ascertain if CoStar had ever initiated a copyright infringement suit against allegedly infringing
13 brokers. According to that database, in 2000 CoStar filed a copyright infringement suit against
14 Mie Properties and Commercial Search, LLC., and in 2004, CoStar filed a copyright
15 infringement suit against Don Walker Enterprises and John Alle and Co.; according to my
16 review of the Complaint in the latter matter, it did not involve a claim for unlawful posting of
17 photographs on the LoopNet website. Based on my review of that database, there were no other
18 copyright infringement actions brought by CoStar against parties other than LoopNet and
19 affiliates.

20 **The Current Dispute**

21 10. On October 28, 2005, CoStar sent a notice letter to CoStar, copied to me,
22 identifying 1,735 photographs allegedly owned by CoStar that were available on the LoopNet
23 system. Attached to this Declaration as Exhibit D is a true and correct copy of the October 28,
24 2005 notice letter. Since that time, CoStar has sent a number of letters withdrawing its
25 complaints as to certain of the photographs covered by the October 28, 2005 letter.

26 11. Upon receiving CoStar's letter, LoopNet promptly took down each of the
27 identified photographs, notified the uploading broker, and applied its Repeat Infringer policy to
28 any repeat infringers, as is its policy and practice.

1 12. On December 23, 2005, CoStar served a subpoena issued by the clerk of this
2 Court pursuant to 17 U.S.C. § 512(h) of the Digital Millennium Copyright Act (“DMCA”). This
3 subpoena identified the same 1,735 photographs as CoStar’s October 28, 2005 notice. Attached
4 to this Declaration as Exhibit E is a true and correct copy of the December 23, 2005 letter to
5 LoopNet serving the CoStar subpoena, along with the copy of the subpoena.

6 13. On January 10, 2006, LoopNet served its written objections and responses to
7 CoStar's subpoena. Attached to this Declaration as Exhibit F is a true and correct copy of that
8 response.

9 14. At the time or shortly after LoopNet served its responses, LoopNet produced the
10 documents that it understood to be responsive to CoStar's request. Specifically, LoopNet
11 produced to CoStar the Property Profiles CoStar claimed contained infringing photographs,
12 which show the realtor or broker that uploaded the photograph. LoopNet considered producing
13 nothing, and simply telling CoStar that the Property Profiles themselves contained the
14 information requested by CoStar. However, LoopNet was concerned that CoStar would not
15 accept a non-production, and therefore re-produced these documents because LoopNet
16 understood them to be responsive to the subpoena. LoopNet did not produce documents
17 sufficient to identify persons who "downloaded" the identified photographs because LoopNet
18 does not maintain that information.

19 15. On January 23, 2006, CoStar sent LoopNet's counsel a letter complaining about
20 LoopNet's production, although it did not take issue with LoopNet's objections or responses.
21 Attached to this Declaration as Exhibit G is a true and correct copy of that letter.

22 16. On January 30, 2006, I sent an e-mail to CoStar's counsel explaining why
23 LoopNet had produced what it had produced. Attached to this Declaration as Exhibit H is a true
24 and correct copy of that e-mail.

25 17. On February 6, 2006, I received a response from CoStar's counsel to my January
26 30, 2006 e-mail. Attached to this Declaration as Exhibit I is a true and correct copy of that
27 response.

28 18. On February 28, 2006, I sent an e-mail to CoStar's counsel explaining again how

1 LoopNet had fully complied with the subpoena, but offering to provide an additional list of
2 individuals associated with the postings at issue. Attached to this Declaration as Exhibit J is a
3 true and correct copy of the February 28, 2006 email. The list itself was sent to CoStar the next
4 day.

5 19. On March 8, 2006, CoStar sent another letter complaining of LoopNet's
6 production. Attached to this Declaration as Exhibit K is a true and correct copy of the March 8,
7 2006 letter. In his letter, counsel for CoStar demanded that LoopNet provide it documents
8 identifying so-called "downloaders," *i.e.*, individuals who "disseminate and make derivative uses
9 of CoStar photographs following their initial unlawful posting." According to CoStar's counsel,
10 such users would be those who have saved, stored, emailed, or created reports including any
11 purportedly infringing photographs.

12 20. In response, LoopNet voluntarily told CoStar that it did not "maintain information
13 that would identify persons who download purported infringing photographs." Attached to this
14 Declaration as Exhibit L is a true and correct copy of the March 14, 2006 letter to CoStar's
15 counsel containing this representation.

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17 I declare under penalty of perjury under the laws of the United States that the foregoing is
18 true and correct. This declaration is executed on June 16, 2006, in Half Moon Bay, California.

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21 Kenneth B. Wilson
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