

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re) Chapter 11
)
SUPERMEDIA, INC. et al.,) Case No. 13-10546(KG)
) (Jointly Administered)
Debtors.)
_____) **Re: D.I. 58**

**POST-TRIAL OPINION ON YELLOW PAGES PHOTOS, INC.'S
AMENDED MOTION FOR ALLOWANCE AND PAYMENT
ON ADMINISTRATIVE EXPENSE¹**

Counsel to Yellow Pages Photos, Inc.

SAUL EWING LLP
Lucian B. Murley, Esquire
222 Delaware Ave., Suite 1200
P.O. Box 1266
Wilmington, DE 19899

SHUMAKER, LOOP & KENDRICK, LLP
Steven M. Berman, Esquire
Hugo S. "Brad" deBeaubien, Esquire
J. Todd Timmerman, Esquire
Mindi M. Richter, Esquire
Bank of America Plaza
101 E. Kennedy Boulevard, Suite 2800
Tampa, FL 33602

Counsel to SuperMedia LLC

YOUNG CONAWAY STARGATT
& TAYLOR LLP
Pauline K. Morgan, Esquire
Patrick A. Jackson, Esquire
Rodney Square
1000 North King Street
Wilmington, DE 19801

HITCHCOCK EVERT LLP
John M. Cone, P.C.
Megan M. O'Laughlin, Esquire
750 North St. Paul St., Suite 1110
Dallas, TX 75201

KIRKLAND & ELLIS LLP
Eric F. Leon, P.C.
Kuanyan Huang, Esquire
Alexis Brine, Esquire
601 Lexington Avenue
New York, NY 10022

¹ This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

The Court is issuing a post-trial ruling on the request by Yellow Pages Photos, Inc. (“YPPI”) for allowance and payment of an administrative expense under section 503(b)(1) of the Bankruptcy Code. YPPI claims that debtor SuperMedia, Inc. (“SuperMedia”) breached a license agreement and committed copyright infringement during the 43 days between the date of SuperMedia's bankruptcy petition and the effective date of its confirmed plan, *i.e.*, between March 18, 2013, and April 30, 2013 (the “Administrative Claim Period”).

FACTS

1. The License

On March 18, 2013, SuperMedia filed a pre-packaged Chapter 11 bankruptcy in this Court. The confirmed pre-packaged plan went effective on April 30, 2013. Pre-Trial Order (“PTO”) ¶ 30. SuperMedia LLC is a marketing company that provides print, mobile, and internet advertising to small and medium-sized businesses. (PTO ¶¶ 9, 11; 4/11/14 A.M. Tr. 55:11-18.)² In order to create and deliver a wide range of advertising products on behalf of its customers, SuperMedia regularly enters into royalty-free license arrangements to use stock images. (4/10/14 P.M. Tr. 100:17-18.) Since 2004, SuperMedia has negotiated and entered into such licensing agreements with Getty Images, Jupiter Images, Multi Ad, Photo Valet, and Imagine. (*Id.* at 100:20-21.)

YPPI was a provider of stock images which licensed its image libraries to directory publishers. (4/9/14 A.M. Tr. 31:11-12, 38:8-11.) Trent Moore (“Mr. Moore”) was YPPI's

² The Court will refer to the trial transcript by date, morning (A.M.) or afternoon (P.M.) followed by the page and line. (Date, A.M. or P.M., Page: line).

founder, and at all relevant times, president. 4/9/14 A.M. Tr. 31:5-6.) YPPI organizes its images by collection, with the theme of each collection generally corresponding to a heading of a directory's yellow pages section. For example, YPPI has collections of plumber images, food images, roofing images, and so on. (Trial Exs. 2 and 4.) Mr. Moore personally took the majority of the images that make up YPPI's library of images, with the remainder having been created by YPPI's employees or contractors. (*Id.* at 39:5-20.) For those images taken by employees or contractors of YPPI, proper agreements are in place to ensure that the images are owned by YPPI. (*Id.*; 45:8-20.) Each of YPPI's images is registered with the United States Copyright Office. (*Id.* at 45:8-46:14; Trial Ex. 1.)

Generally, all of YPPI's license agreements with directory publishers contain terms controlling the number of users permitted to use the images, as well as terms prohibiting any transfer of the images by the licensee to other parties. (4/19/14 A.M. Tr. 49:23-50:12.) The purpose of these terms is to control the use and dissemination of the images. (*Id.* at 50:10-24.)

On or about November 12, 2001, Verizon Directories Corp. (a predecessor to SuperMedia) and YPPI entered into a Service Contractor Agreement (the "Agreement"). (PTO ¶ 4; *See* Ex. 55 at YPPI-01275.) In 2006, Verizon Communications spun off Verizon Directories into a new public company called Idearc Media Corp. ("Idearc") (PTO ¶ 9.) In December 2009, Idearc changed its name to SuperMedia LLC. (PTO ¶ 11; 4/10/14 A.M. Tr. 43:14-24.)

The Agreement includes the End User License Agreement (the "License"). The License, which is central to the dispute, provided in pertinent part:

**YELLOW PAGES PHOTOS, INC.
END USER LICENSE AGREEMENT
FOR VERIZON DIRECTORIES
UNLIMITED USER UNLIMITED ACCESS
SITE LICENSE**

This license agreement grants certain limited rights to the use of the photographs and images provided to Verizon Directories pursuant to this Agreement. Yellow Pages Photos, Inc. retains all ownership and title rights to the photographs and images.

* * *

Yellow Pages Photos, Inc. Grants to Verizon Directories, and Verizon Directories accepts, a perpetual, limited, non-exclusive, fully paid license to use the photographs and images contained in any Compact Disc provided to Verizon Directories pursuant to this Agreement for the purposes contemplated by this Agreement. The photographs and images contained therein and all copyrights and other proprietary rights therein are owned by Yellow Pages Photos, Inc. are protected by United States Copyright Laws and International treaty Provisions, and may not be used, reproduced, modified, distributed or transferred except as expressly provided by this Agreement.

* * *

USE:

Yellow Pages Photos, Inc. Grants license to use such photographs and images for use in print electronic or other medium that may be used by Verizon Directors for publication of directories without limit, ROYALTY FREE. The photographs and images may be cropped, cut, altered or manipulated from original form as necessary to meet publishing needs.

* * *

NUMBER OF USERS LICENSED:

This license is a "600 USER, VERIZON EMPLOYEE ONLY UNLIMITED ACCESS SITE LICENSE". This license specifically grants authority to allow multiple user access. The licensee may load these images on whatever system is deemed appropriate to allow unfettered access to as many licensed users as necessary. This license further allows "Verizon Directories' authority to upload all information on a network server of its own design to allow multiple site access as well. VERIZON DIRECTORIES may not transfer these images to other parties or individuals unless authorized by YPPI; provided however, that Verizon Directories is authorized by the Customer License herein granted to utilize these photographs and images in the advertising purchased by its customers for inclusion in Verizon Directories' print and electronic directory products and any other medium which Verizon Directories may utilize to publish directories during the term of this Agreement. All users must be Employees of VERIZONDIRECTORIES.

* * *

LIMITS OF LIABILITY:

Because YPPI is directly involved in neither the printing nor publishing of the photos, and each printer or publisher utilizes its own specifications and technologies for print, YPPI is not responsible or liable for print errors during or after publication.

* * *

Pursuant to the License, YPPI provided SuperMedia with 100 CDs containing 50 photographs each. (4/9/14 A.M. Tr. 60:14-15, 66:12-13; 4/10/14 A.M. Tr. 69:3-6.) The YPPI images did not contain any type of metadata that was searchable. (4/11/14 A.M. Tr. 113:16-17.) In return for the images, SuperMedia paid YPPI roughly \$660,000, or \$6,600 per collection of images. (4/9/14 A.M. Tr. 60:11-13.) YPPI did in fact deliver all 100 collections of images to SuperMedia, and SuperMedia made payment. (*Id.* at 60:14-61:12.) SuperMedia

never returned or rejected a CD containing images, and the Agreement was fulfilled. (*Id.*)

In the "USE" section of the License, YPPI granted SuperMedia a "license to use such photographs and images for use in print, electronic or other medium that may be used by [SuperMedia] for publication of directories without limit, ROYALTY FREE." (Ex. 55 at YPPI-01278.) The License also provided: "The photographs and images may be cropped, cut, altered or manipulated from original form as necessary to meet publishing needs." (*Id.* at YPPI-01278.)

The License contained a restriction on the number of "users" who could use the YPPI images: "This License is a '600 USER, [SUPERMEDIA] EMPLOYEE ONLY UNLIMITED ACCESS SITE LICENSE.'" (*Id.* at YPPI-01279.) The License was "perpetual" in nature. (4/9/14 P.M. Tr. 86:5-9.)

The original Agreement also stated in the License that "Verizon Directories may not transfer these images to other parties or individuals unless authorized by YPPI, and "all users must be Employees of Verizon Directories." (*Id.*) This language made it clear that the images could not be transferred to anyone without proper authorization, which is an important provision to enable YPPI to maintain control of its images. (*Id.*; 4/9/14 A.M. Tr. 66:14-22.)

2. Printers

The License contained the following transfer restriction: "[SUPERMEDIA] may not transfer these images to other parties or individuals unless authorized by YPPI;" (Ex. 55 at YPPI-01279.) The License carved out an exception to this restriction that allowed

SuperMedia to use the YPPI images in any of its advertising products:

. . . provided, however, that [SuperMedia] is authorized by the Customer License herein granted to utilize these photographs and images in the advertising purchased by its customers for inclusion in [SuperMedia's] print and electronic directory products and any other medium which [SuperMedia] may utilize to publish directories during the term of this Agreement.

(*Id.*)

The transfer restriction did not permit SuperMedia to transfer the YPPI images to third parties for use in SuperMedia's advertising products. (See Ex. 55.) Due to the nature of the printing process, SuperMedia sent its advertisements to a third-party printer in a digital PDF file format. (4/9/14 P.M. Tr. 90:3-8; 4/11/14 A.M. Tr. 57:2-58:8, 58:15-16.)

YPPI was aware that its images were being used to third-party printers for use in SuperMedia's advertisement. In cross-examination of Mr. Moore by SuperMedia, the following evidence was adduced:

Q. But my question is the image is there in the file that is sent to the printer, correct?

A. The image is in the ad, yes.

Q. And so to that extent that image is transferred to the printer?

A. Okay.

(4/9/14 P.M. Tr. 90:3-8.)

The use under SuperMedia's supervision of YPPI's images by third parties for SuperMedia's advertising products was permitted under the License. Transfer was not.

(*Id.* at 72:2-5.)

In the "LIMITS OF LIABILITY" section of the License, YPPI recognized SuperMedia needed to enable printers to use the YPPI images in advertising products. This section states

in pertinent part: "Because YPPI is directly involved in neither the printing nor publishing of the photos, and each printer or publisher utilizes its own specifications and technologies for print, YPPI is not responsible or liable [to SuperMedia] for print errors during or after publication." (Ex. 55 at YPPI-01279.) Nonetheless, the permitted sharing of YPPI images did not go beyond a printer as is clear from the License.

The License only allowed employees of SuperMedia to use the YPPI images to create those advertising products for customers: "All users must be Employees of [SuperMedia]." (*Id.*) With respect to licensed users, the License gave SuperMedia the right to "load [the YPPI] images on whatever system is deemed appropriate to allow unfettered access to as many licensed users as necessary." (*Id.*)

3. Contractors

In mid-2007, SuperMedia began to explore the possibility of hiring third-party contractors to help create its advertising products. (4/10/14 P.M. Tr. 102:2-5.) SuperMedia also began expanding the catalog of digital advertising products that it was offering to its customers to include digital billboards, websites, and social media pages. (*Id.*) As a result of these two changes to its business, SuperMedia sought to amend the License to expand the purposes for which the YPPI images could be used and to include contractors as authorized "users" of those images. (*Id.* at 102:6-9, 106:6-10.)

In July 2007, YPPI executed Amendment Number One to the License (hereafter, unless otherwise noted, references to the "License" will be to the License as amended). (See Ex. 55 at YPPI-01280-1; PTO ¶ 10; 4/9/14 P.M. Tr. 68:1-69:20.) SuperMedia drafted the

amendment. (4/10/14 P.M. Tr. 103:6-11.) The 2007 amendment included two changes. First, the 2007 amendment changed the "USE" section to allow SuperMedia to use YPPI's images in any and all of its advertising products:

"YPPI grants [SuperMedia] a license to use such photographs and images in print, electronic, or any other media, without limit, for use in print and CD-ROM directories, Internet-based information services owned and operated by [SuperMedia] or which are otherwise powered by or obtain their content from any such [SuperMedia]-based information services, magazines and other publications, direct mail and other advertising-based products, and advertising and promotional materials, royalty free."

(Ex. 55 at YPPI-01280.)

YPPI agrees that the 2007 amendment "expanded the type of products for which SuperMedia could utilize YPPI's images." (YPPI Br. at 9.) There is no dispute that this amended language expanded the type of products for which SuperMedia could utilize YPPI's images. (4/10/14 P.M. Tr. 4:16-19.) However, the License remained a SuperMedia license for SuperMedia products. (*Id* at 5:11-25.)

The 2007 amendment also expanded the universe of authorized users who could use the YPPI images to create advertising products for SuperMedia to include "employees or contractors of [SuperMedia]." (Ex. 55 at YPPI-01280.) As stated in the amendment:

[SuperMedia] may not transfer these images to other parties or individual[s] unless authorized by YPPI; provided, however, that [SuperMedia] is authorized by this Agreement to use the photographs and images in advertising purchased by its customers for inclusion in [SuperMedia's] products. All users must be employees or contractors of [SuperMedia]. (Ex. 55 at YPPI-01280.)

As authorized "users," SuperMedia's contractors received the same "unlimited access" and right to use YPPI's images as SuperMedia employees. (*Id.*) The provision in the License prohibiting any transfer of the images without authorization from YPPI was not amended in any way other than changing "Verizon Directories" to "Idearc." (*Id.*) Specifically, the amendment stated that "Idearc may not transfer these images to other parties or individuals unless authorized by YPPI." (*Id.*) The transfer restriction was not discussed when the amendment was negotiated and signed. (4/9/14 P.M. Tr. 8:23-9:5.)

At the time of the amendment, the parties also did not discuss the potential of SuperMedia outsourcing its ad production or transferring any images to contractors. (*Id.* at 10:4-12; 4/10/14 P.M. Tr. 109:6-16.) SuperMedia's goal in requesting the amendment from YPPI was not to enable it to transfer the images to others, but rather to expand the rights to cover digital products, such as LED billboards, and to add the ability to assign user seats to contractors in addition to employees. (4/10/14 P.M. Tr. 106:5-10; 111:10-13; 112:3-12; 113:9-18.)

The 2007 amendment did not change the License provision that gave SuperMedia the right to "load [the YPPI] images on whatever system is deemed appropriate to allow unfettered access to as many licensed users as necessary." (*Id.* at YPPI-01279.) Nothing in the License expressly required SuperMedia to physically house its contractors at its own facilities. Following the 2007 amendment, SuperMedia had the right to load the YPPI images "on whatever system [was] deemed appropriate to allow" SuperMedia's contractors (and employees) to have "unfettered access" to the images. (*Id.*)

However, it was possible for contractors of SuperMedia to use the images for SuperMedia without SuperMedia transferring out any images. At the time the amendment was entered into, a company called AMDOCS was located in SuperMedia's building. (4/9/14 P.M. Tr. 10:13-11:5.) It was therefore feasible for contractors to use the images from within SuperMedia's system, preventing any transfer of the images to any contractor.

4. The Proposed Second Amendment

In 2008, SuperMedia approached YPPI with a proposed second amendment to the Agreement. (Trial Exs. 16, 18 and 19; 4/9/14 P.M. Tr. 11:6-13.) Specifically, SuperMedia explained to Mr. Moore that it was in the process of reviewing its license agreements to make sure they were consistent with SuperMedia's policy of "allowing users of websites to download content from our sites for personal non-commercial use" and that it did not appear the current agreement with YPPI addressed that issue. (*Id.*)

The specific amendment language proposed to Mr. Moore would have allowed users to download copies of YPPI's images. (*Id.*) Mr. Moore discussed the proposed amendment with Donald Vincent of SuperMedia, but Mr. Vincent was unwilling to provide any further detail as to why the amendment was necessary and what exactly SuperMedia and its customers would be doing with the images. (4/9/14 P.M. Tr. 13:16-15:3.) Mr. Moore did not agree to the proposed amendment, and it was never entered into by the parties. (*Id.* at 15:24-16:9.)

5. SuperMedia's New Uses

In response to the growth of internet-based advertising, SuperMedia expanded its advertising products to include several new digital products such as websites, video advertisements, and what SuperMedia referred to as its "SocialEze" products—advertisement, promotion, and reputation monitoring through social media platforms such as Facebook and Google+. (4/11/14 P.M. Tr. 4:17-15:7.)

Each of these digital products, including the Facebook and Google+ pages, was within SuperMedia's catalog of advertising products that could be purchased by its customers. (See YPPI Br. at 6 ("SuperMedia is a provider of local marketing solutions to business clients, including advertising in print and online yellow page directories, websites, videos, and social media pages."); see also *Id.* at 15, 20.) The SocialEze products were created in-house by SuperMedia employees using social media platforms such as Facebook and Google+. (4/10/14 P.M. Tr. 26:11-13.) These SuperMedia employees were authorized "users" under the License. (Ex. 55 at YPPI-01279-80.) SuperMedia did not use outside vendors to create Facebook and Google+ pages for its customers. (4/10/14 P.M. Tr. 26:11-15.)

6. Outside Contractors

SuperMedia did use outside contractors to create and publish print and digital advertising products for its customers. SuperMedia used outside contractors to create print advertisements for its customers Tata Consultancy Services Limited ("Tata"). (PTO ¶ 12; YPPI Br. at 32, Ex. 115; Ex. 199.), AMDOCs/Office Tiger ("AMDOCs") (Ex. 199.), ASEC

Group LLC ("ASEC") (YPPI Br. at 32; Ex. 199.), ASEC International (Ex. 70.) and Macmillan Solutions India ("MPS") (Ex. 115 at 13; 4/10/14 A.M. Tr.53:12-18; 4/11/14 A.M. Tr. 66:1-8.). SuperMedia used Hostopia as a contractor to develop and host websites for SuperMedia's customers. (4/10/14 P.M. Tr. 13:13-17; YPPI Br. at 3, 16, 19.) As such, Hostopia is an authorized user under the License. (4/10/14 A.M. Tr. 23:6-17). SuperMedia also used Web.com to develop and host websites for SuperMedia's customers. (4/9/14 P.M. Tr. 152:23-153:14; 4/10/14 P.M. Tr. 13:8-12; YPPI Br. at 3, 16, 19.) While Web.com "possibly" employed subcontractors or third-party vendors to assist in its website provision services, there is no evidence that any of these subcontractors or third-party vendors played any role in creating advertising products for SuperMedia customers or used YPPI images to do so. (See 4/9/14 P.M. Tr. 156:4-16 (Q: "Does Web.com employ any subcontractors or third party vendors to assist it in its website provision services for SuperMedia?" A: "Possibly yes. . . . So yes we have contractors, but I do not know if they do SuperMedia websites.")) Though Web.com had "[r]oughly 200" people working on SuperMedia websites, those people included not just artists creating those ads, but also "[c]opywriters, designers and modification specialists" as well as "supervisors and managers." (4/9/14 P.M. Tr. 152:23-153:14.) SuperMedia used BieMedia, LLC ("BieMedia") to create digital video advertisements for SuperMedia's customers. (4/9/14 P.M. Tr. 120:17-20; 4/11/14 A.M. Tr. 163:7-11.)

7. Dex One

On December 5, 2012, Dex One Corporation ("Dex One") and SuperMedia entered into an Amended and Restated Agreement and Plan of Merger. When neither Dex One nor SuperMedia were able to obtain the requisite consents to their merger, both entities and all of their domestic subsidiaries filed pre-packaged Chapter 11 bankruptcy cases. Through the bankruptcy, Dex One and SuperMedia merged and the merger entities are now known as Dex Media, Inc.

Dex One used Hostopia to design the new Peacock Roofing website, (4/10/14 A.M. Tr. 81:1-3; 4/10/14 P.M. Tr. 72:13-15.); SuperMedia had stopped using Hostopia in 2011. (YPPI Br. at 19) (stating SuperMedia utilized Hostopia "until 2011").)

There is no evidence to suggest that SuperMedia ever gave any of the YPPI images to Dex One, which until recently was SuperMedia's competitor. (4/10/14 A.M. Tr. 81:19-24.) Nor is there any evidence that SuperMedia knew about, or authorized, Dex One's use of any YPPI images.

Barry Peacock, the President of Peacock Roofing testified at the trial he had no direct knowledge of how the YPPI image came to be incorporated into the Peacock Roofing website. (4/10/14 A.M. Tr. at 128:19-21; 132:5-9.) His wife, Teresa Peacock, had collaborated with Dex One to create the new website and sent an email to Dex One with images. (*Id.* at 132:5-9; 133:15-134:5; Ex. 154.) At trial, however, Mr. Peacock stated that his wife did not specifically recall sending any images to DexOne. *Id.* at 135:11-5.

The image used on the Peacock Roofing website was later found on the website for a different SuperMedia customer called Academy Roofing. (4/10/14 P.M. Tr. 70:14-17; Ex. 171.) With the YPPI image on the Academy Roofing website, any third party could download that image and use it for its own purposes. (*Id.* at 75:22-76:15.) Any third party who saved a copy of the YPPI image from the Academy Roofing website or any other web page would create a copy of that image that automatically retained the same file name. (*Id.* at 72:1-3 ("If you right click an image ... you can save that image and it will actually save with the file name that ... it has on the website itself.")) The YPPI image on the Academy Roofing website had the same file name as the image on the Peacock Roofing website created by Dex One. (*Id.* at 72:7-15.)

9. ASEC

In the 2009-10 timeframe, through discovery in a different litigation, Mr. Moore learned that SuperMedia was outsourcing its ad production to a company called ASEC. (*Id.* at 16:19-17:4.) Suspecting that SuperMedia was breaching the License by transferring the images to ASEC as well as exceeding the 600-user limitation, YPPI sent SuperMedia a letter of inquiry on September 24, 2010. (*Id.* at 17:5-14; Trial Ex. 20.) SuperMedia responded to the letter, asserting that it was not in violation of the License. (4/10/14 P.M. Tr. 19:3-8.) Despite those representations, YPPI discovered a short time later in 2011 that SuperMedia had in fact transferred YPPI's images to ASEC. Specifically, YPPI discovered through other litigation that all of the images were on servers in India and the Philippines in a folder titled "SuperMedia." (*Id.* at 19:11-19; 110:5-12.) Upon discovering the images on

ASEC's servers, YPPI sent SuperMedia another letter on April 20, 2011. (*Id.* at 19:22-23; 20:17-21:2; Trial Ex. 22.) In the letter, YPPI informed SuperMedia that it was aware of transfers of the YPPI images in breach of the License.

YPPI never received a response to the letter and was never notified of any actions that SuperMedia took in response to the letter. (4/9/14 P.M. Tr. 21: 11-16.) YPPI sent SuperMedia another letter on September 22, 2011, requesting a response to the April 2011 letter, but once again, received no response. (4/9/14 P.M. Tr. 21:17-22:13; Trial Ex. 24.)

10. Other Transfers - Outsourcing

YPPI then began to uncover what appeared to be further breaches by SuperMedia when it discovered some of its images in an advertisement produced by MPS, a company that SuperMedia publicly acknowledged working with, as well as images on social media pages. (4/9/14 P.M. Tr. 22:14-23:19.) YPPI also read in a public filing that SuperMedia was outsourcing further ad production to Tata, and as a result suspected that they too had likely received YPPI's images from SuperMedia. (*Id.*) Given the information YPPI discovered, when it realized that SuperMedia had filed for bankruptcy, it then filed a breach of contract and copyright infringement claim in this Court. (*Id.* at 23:20-24:12.)

SuperMedia has outsourced its print advertising creation to third parties Tata, MPS, AMDOCS and ASEC. (Trial Exs. 65, 70, 115, 199.) MPS is a subcontractor of Tata with which SuperMedia has no agreement. (4/10/14 A.M. Tr. 57:16-23; Trial Ex. 115.) In 2009, SuperMedia transferred all of the images that it licensed from YPPI to Tata, MPS, AMDOCS and ASEC. (4/10/14 A.M. Tr. 53:12-54:24; Trial Ex. 199.) When SuperMedia

provided the YPPI images to the contractors and subcontractors, it took no measures to ensure that they only used the images for the benefit of SuperMedia. (4/10/14 A.M. Tr. 63:4-15.)

SuperMedia's own Code of Conduct states that third party copyright materials may not be copied or distributed without obtaining the copyright owner's specific written consent. (Trial Ex. 54 at Bates No. SUPER-002149.) SuperMedia considers compliance with this provision to be important. (4/10/14 A.M. Tr. 65:12-21.)

Stephen Kurth, the Senior Business Analyst for Creative Services and Fulfillment for SuperMedia ("Mr. Kurth"), testified that at some point in 2011, he removed the YPPI images from the SuperMedia library used by print advertisement artists. (4/10/14 A.M. Tr. 52:20-53:11.) Specifically, Mr. Kurth represented that he had the image index removed, which resulted in the low resolution images being removed from the Mac computers of all SuperMedia in-house artists. He also removed the high resolution images that the index pointed to from their source location on the server. (*Id.* at 53:2-11.)

Copies of any of the YPPI images selected by an artist for use in print advertisements also would be saved separately by the artists along with the advertisements in which they appear, and those copies of the images were not removed from SuperMedia's system. (4/11/14 A.M. Tr. 147:20-148:7.) Mr. Kurth had no knowledge whether the YPPI images would have also been stored anywhere else in SuperMedia's system, such as another computer, server, or library, and did not know whether artists may have stored the CDs containing the images in other locations. (4/10/14 A.M. Tr.

69:21-70:6; 4/11/14 A.M. Tr. 148:8- 149:25.)

SuperMedia did not engage in any kind of search to determine whether YPPI's images were or are located in additional locations within SuperMedia's system. (4/10/14 A.M. Tr. 70:7-10; 72:19-73:5.) The YPPI images continue to appear in SuperMedia print advertisements. (4/11/14 A.M. Tr. 112:5-7.) Mr. Kurth received some of the CDs containing YPPI images back from various SuperMedia office locations in 2013, but had no knowledge of who had the CDs previously, how they were used, how many offices had them, whether anyone made copies of them, or even whether he had received all of them back. (4/10/14 A.M. Tr. 70:11-72:8; 4/11/14 A.M. Tr. 149:8-25.) Mr. Kurth also instructed contractor Tata to remove the YPPI images from use in 2011; however, SuperMedia never contacted subcontractors MPS or ASEC's subcontractors directly about discontinuing use of YPPI's images. (4/10/14 A.M. Tr. 73:17-22.) Mr. Kurth did not visit the sites of MPS or ASEC to confirm that the YPPI images were no longer in use or to search for any of YPPI's images in their systems. (4/11/14 A.M. Tr. 111:16-25.) Mr. Kurth also had no knowledge of SuperMedia ever providing the contractors or subcontractors with a copy of the Agreement or License or any information at all about YPPI's licensing terms. (4/10/14 A.M. Tr. 73:23-74:9.)

11. Video

SuperMedia provides video products to customers. (4/10/14 P.M. Tr. 8:14-23.) SuperMedia outsources its video creation to third party BioMedia and has never created videos in-house. (4/9/14 P.M. Tr. 119:17-18; 120:2-20; 4/10/14 P.M. Tr. 8:18-9:5.) BioMedia

began creating videos for SuperMedia customers in 2010 and continues to do so today. (4/10/14 P.M. Tr. 9: 1-3.) When the videos are created for SuperMedia customers, they can then be placed in a few different places, including the customer's website, SuperMedia's website, and/or YouTube. (4/9/14 P.M. Tr. 123:25-124:14; 4/10/14 P.M. Tr. 9:10-15.) In 2010, SuperMedia transferred to BioMedia at least 12 CDs containing about 600 YPPI images for BioMedia's use. (4/9/14 P.M. Tr. 122:12-23; 125:3- 8; 127:18-22; Trial Ex. 137.) BioMedia has utilized such images in many videos for SuperMedia customers. (4/9/14 P.M. Tr. 122:24-123:11; Trial Ex. 140.) When SuperMedia provided BioMedia the CDs containing YPPI's images, it did not provide BioMedia with any restrictions on how they could be used. (4/9/14 P.M. Tr. 131:8-132:1.) Mr. Moore identified numerous videos made by BioMedia containing YPPI's images, including some posted during the pre-petition period, that remained posted through the Administrative Claim Period, as well as other videos originally posted during the Administrative Claim Period. (Trial Exs. 165-67 and 169.)

12. Websites

SuperMedia also provides business websites for customers. (4/10/14 P.M. Tr. 13:3-5.) SuperMedia has outsourced some of its website creation to third party Web.com. (4/9/14 P.M. Tr. 150:4-15; 151:5-8; 4/10/14 A.M. Tr. 66:10-18.) Web.com began creating websites for SuperMedia customers around late 2011 or 2012 and continues to do so today. (4/9/14 P.M. Tr. 151:21-152:2; 4/10/14 P.M. Tr. 13:8-12.) In addition to its own employees, Web.com also utilizes outside subcontractors to build websites for its

customers. (4/9/14 P.M. Tr. 156:4-16.) When Web.com creates a website for a SuperMedia customer, Web.com maintains that website on Web.com's server. (*Id.* at 155:7-13.) Web.com receives images in various ways to use on customer websites, including receiving images from SuperMedia directly. (*Id.* at 162:7 14; 186:6 187:8; 4/10/14 A.M. Tr. 66: 17 67:7.) In some instances, SuperMedia utilizes a link called sendthisfile.com, where it can upload images for Web.com to access and download for use in websites. (4/9/14 P.M. Tr. 179:9-24.) YPPI's images have appeared on numerous websites built by Web.com for SuperMedia. (4/9/14 P.M. Tr. 39: 19-53:2; 59:22-61:7; 165:17- 166:22; Trial Exs. 81, 82, 93,125,149, 158, 186 and 188.) At least some of the website examples containing YPPI's images contain a legend indicating that the images provided by SuperMedia are for "personal non-commercial use." (4/10/14 P.M. Tr. 23:13 20; Trial Exs. 81, 82, 93, 149, 172, 183, 186, 188.) YPPI does not have a license agreement with Web.com. (4/9/14 P.M. Tr. 154:13-15.) Web.com uses a proprietary tool to build the websites, and images associated with a particular account are stored within that tool. (4/9/14 P.M. Tr. 155:14- 156:1; Trial Ex. 210.) Customers have access to the proprietary tool and can make changes to the website, including accessing or removing images that are on the website. (4/9/14 P.M. Tr. 158:8-159:8; 4/10/14 A.M. Tr. 10:19-11:22; 117:17-20; 156:2-14; 4/10/14 P.M. Tr. 22: 12-19.) The YPPI images used on such sites are stored in Web.com's system. Specifically for Web.com, it uses a tool called the Matrix, and it would have the images saved within the system's editor tool. (4/10/14 P.M. Tr. 23:4-12; Trial Ex. 210.) At least one of the website examples found indicates that the YPPI's image was pulled from an image

library. Specifically, Mr. Sharp testified that the image on the Topa Electric website with the words "electrical maintenance and repairs" over the image would indicate that the person choosing that image held a mouse over the image, revealing the image category from which it was being pulled. (4/10/14 P.M. Tr. 64:6-65:5; Trial Ex. 188.)

In recent years the volume of SuperMedia display advertisements incorporating YPPI's stock photos has dwindled, reducing the overall number of users who might have used the YPPI images. (4/11/14 A.M. Tr. at 116:23-117:4.) In 2011, SuperMedia performed a complete upgrade of all of the computers used by its contractors and only replaced 175 computers in total. (4/11/14 A.M. Tr. 70:12-15.) In June 2011, SuperMedia also discontinued the use of YPPI's images in new print advertisements and removed the YPPI image library from its systems. (4/10/14 A.M. 52:20-22; 4/11/14 A.M. Tr. 99:18-25, 101:8-17.) As a result, SuperMedia has not used YPPI images in new SuperMedia print advertising products since June 2011. (4/11/14 A.M. Tr. 61: 19-22.)

Although not required to do so under the License, SuperMedia also took some steps to remove YPPI's images from Tata's libraries, as well as the libraries of MPS and ASEC International, and to collect any outstanding CDs containing YPPI's images. (PTO ¶ 16, 4/11/14 A.M. Tr. 103:21-22, 111:19-21, 24, 166:20-21.)

Although SuperMedia retains to the present the perpetual, unlimited right to use YPPI's images under the License. Super Media has not used those images to create any new print advertising products for customers, and has not asked its contractors to do so. (*Id.* at 99:12-25.)

SuperMedia did not force customers to remove YPPI images from their existing advertising products, so it is likely that at least some YPPI images have continued to show up in SuperMedia advertisements after 2011. (*Id.* at 112:10-114:12.) YPPI does not know the number of authorized users SuperMedia had between March 18th and April 30th, 2013. (4/9/14 P.M. Tr. 93:1-13, 94:14.)

SuperMedia has not conducted any kind of search in its systems for YPPI's images, but rather has only looked into some of the website examples containing YPPI's images provided to SuperMedia by YPPI. (4/10/14 P.M. Tr. 15:8-17:21.) SuperMedia also has not coordinated any kind of search efforts with Web.com for YPPI's images in Web.com's system. (*Id.*)

SuperMedia has not attempted to search any customer website files for YPPI's images and has never sent Web.com the Agreement and/or License or informed Web.com that it needs to follow any particular guidelines in using the images. (4/10/14 P.M. Tr. 22:1-11.)

When images are placed on business websites, coding can be utilized to prevent third parties from copying or downloading the images, which is a relatively simple process. (4/10/14 P.M. Tr. 80:11-81:9; 81:22-82:1.) Some of the SuperMedia customer websites located by YPPI's computer forensics expert Adam Sharp ("Mr. Sharp") containing YPPI's images contained protective coding to prevent the downloading of images, but most did not. (4/10/14 P.M. Tr. 81:10-21.)

When SuperMedia builds a website for a customer and it continues to do work on or maintain the website, it continues to get paid by the customer throughout the time the website is active. (4/10/14 P.M. Tr. 21:20-25.)

The SuperMedia customer websites located by YPPI containing its images were posted during the pre-petition period and remained posted through the Administrative Claim Period. (*See e.g.*, 4/10/14 P.M. Tr. 56:21-57:3.)

SuperMedia has also outsourced some of its website creation to third party Hostopia in 2008 or 2009, until 2011. (4/10/14 A.M. Tr., 15:9-16:7; 4/10/14 P.M. Tr. 13:13-17.) A team of approximately 45-50 people from Hostopia worked on creating SuperMedia websites, and Hostopia still continues to maintain and revise websites for SuperMedia. (4/10/14 A.M. Tr., 22:23-23:5; 4/10/14 P.M. Tr., 13:18-21.) Hostopia also used subcontractors to build websites for SuperMedia, with the subcontractors having access to images provided by SuperMedia. (4/10/14 A.M. Tr., 23:6-17; 24:7-18.) Dex Media currently uses Hostopia to create websites and has for about four years. (4/10/14 A.M. Tr. 15:2-8.) SuperMedia and Dex Media have provided Hostopia with images to use in building websites. (*Id.* at 21:14-21; 22:13-18; Trial Ex. 41 and 131.) Specifically, SuperMedia has provided Hostopia with at least some of YPPI's images. (4/10/14 P.M. Tr. 19:12-21:16; Trial Ex. 41.)

One way in which SuperMedia would provide Hostopia images was through a shared drive where SuperMedia could upload images into a folder, and Hostopia could access them. (4/10/14 A.M. Tr. 25:15-26:8.) End user customers also have the ability to

access the file for their website and make edits to the website, including accessing the images. (*Id.* at 24: 19-25:5.) YPPI's images have appeared on websites built by Hostopia for SuperMedia and Dex Media. (Trial Ex. 130.)

YPPI does not have a license agreement with Hostopia. (4/10/14 A.M. Tr., 22: 19-22.) The YPPI images used on such sites are stored in Hostopia's system. (Trial Ex. 131.) Hostopia created a website for a customer called Peacock Roofing, which has a "Dex Knows" logo on it. (Trial Ex. 130, 131 and 153.) The Peacock Roofing website containing YPPI's image was created and posted during the Administrative Claim Period. (Trial Ex. 154.)

13. Social Media

SuperMedia creates and maintains social media sites for its customers, including specifically Facebook and Google+ pages. (4/10/14 P.M. Tr. 26:6-8.) SuperMedia creates these pages in-house and does not use vendors. (*Id.* at 26:11-15.) SuperMedia also creates and maintains Facebook and Google+ pages for Dex Media customers. Facebook and Google+ pages are Facebook and Google products, not SuperMedia products. (4/10/14 P.M. Tr. 33:8- 19.) When SuperMedia creates Facebook and Google+ pages, at least in some instances, it takes images from the customer website and places them on the Facebook and Google+ pages. (4/10/14 P.M. Tr. 34:14-35:8; Trial Exs. 94, 101-02, 143, 153, 157, 158, 188.)

YPPI has located Facebook and Google+ pages for SuperMedia customers containing YPPI's images. (4/10/14 P.M. Tr. 57:7-58:25; 75:2-21; Trial Exs. 94, 101-02, 143, 153, 157, 158, 188.) The YPPI images found on the websites, as well as Facebook and Google+ pages, were not provided by the customers. (4/10/14 A.M. Tr. 104:8-20; 113:13- 20; 115:18-

116:7; 153:21-154:1; 154:19-22; 155:2-12; 157:1-10; 158:5-24.) When these pages are created for customers, the customers have administrator rights to the pages and can make edits to them, including removing images posted on them. (4/10/14 A.M. Tr. 85:11- 19; 4/10/14 P.M. Tr. 30:20-31:4; Trial Ex. 29.) Once an image is posted on a social media page, third parties can do anything with it, including downloading it and sharing it with others, and there is no protective measure to keep third parties from using the image. (4/10/14 P.M. Tr. 75:22- 76:15.) Along the same lines, when a Facebook user "likes" an image, that image then becomes a part of that user's profile and would be there forever unless taken down. (*Id.* at 76:7-15.) Under Facebook's policy, when images are posted on Facebook, Facebook automatically receives a license to use the images. (4/10/14 P.M. Tr. 76:20-77:6; Trial Ex. 48.) Under Google's policy, when images are posted on Google+ pages, not only does Google automatically receive a license to use the images, but so do other companies with whom Google may have a relationship. (4/10/14 P.M. Tr. 78:11-17; 79:7-80:5; Trial Ex. 49.)

In at least some instances, YPPI's images were posted on the social media pages during the pre-petition period and remained posted through the Administrative Claim Period. (4/10/14 P.M. Tr. 59:17-60:5 Trial Exs. 94, 101-02.) If SuperMedia at some point ceases working on a customer's social media page, any content posted on the page by SuperMedia would remain on the page and be under the customer's control. (4/10/14 P.M. Tr. 38: 10-39:2.) SuperMedia maintains social media pages on an ongoing basis and continues to be paid throughout the life of the contracts for them. (4/10/14 P.M. Tr. 31:5-17; Trial Ex. 29.)

14. Transfers to Dex Media

Dex Media is the parent company of SuperMedia. (Trial Exs. 194, 196.) In initial interrogatory responses, SuperMedia asserted that its servers were owned by Dex Media and that employees most knowledgeable on its advertising production systems were employed by Dex Media. (Trial Ex. 198.) Mr. Kurth was originally listed in the interrogatory responses as an employee of Dex Media. (*Id.*) Mr. Kurth also testified on February 3, 2014 in his 30(b)(6) deposition for SuperMedia that he was employed by Dex Media. (4/10/14 A.M. Tr. 34:2-5.) He further testified in that deposition that he had never heard of SuperMedia Services, LLC. (*Id.* at 43:3-7.)

On February 28, 2014, SuperMedia served amended interrogatory responses, changing the responses to reflect that the servers were owned by SuperMedia and the listed employees were actually employees of SuperMedia Services, Inc. (Trial Ex. 199.) Mr. Kurth testified at trial that he thought he worked for Dex Media, but was "informed" that he had made a mistake. (4/10/14 A.M. Tr. 40:9-18; 44:6-9.)

Mr. Ward testified in his deposition on February 10, 2014 that he was employed by SuperMedia Services, Inc. (4/10/14 P.M. Tr. 4:22-5:2.) However, he later verified the amended interrogatory responses to state that he was the Senior Manager of Digital Creative Production Fulfillment Services for Dex Media. (4/10/14 P.M. Tr. 5:20-6:8; Trial Ex. 199.)

In addition to SuperMedia, BioMedia provided video creation services to Dex Media as it existed prior to the merger and continued to do so after the merger. (4/9/14 P.M. Tr. 120:24-121:18; 4/10/14 A.M. Tr. 90:7-10.) Similar to SuperMedia, videos made by

BieMedia for Dex Media would be posted on the Dexknows.com website as well as YouTube. (4/10/14 A.M. Tr. 90: 11- 24.) BieMedia would systematically post videos on YouTube for Dex Media almost immediately upon creation. (4/10/14 A.M. Tr. 92:9-13.) After the merger, it was BieMedia's understanding that Dex Media and SuperMedia were the same company. (*Id.* at 120:24-121:10.)

When SuperMedia merged with Dex Media, BieMedia merged its files for both companies into one and has utilized the YPPI images in thousands of videos for Dex Media. (4/9/14 P.M. Tr. 125:9-126:12, 129:3-5; 4/10/14 P.M. Tr. 10:21-11:9; Trial Ex. 140.) Mr. Ward testified that he would have considered it a problem if BieMedia was using images provided by SuperMedia for other parties. (4/10/14 P.M. Tr. 12:22-13:2.)

During trial, Mr. Moore identified numerous instances of "Dex Knows" videos containing YPPI's images. (4/9/14 P.M. Tr. 28:15-38:24; Trial Ex. 165- 67, 169.) Specifically, Mr. Moore identified a group of videos that were posted pre- petition and remained posted through the Administrative Claim Period, as well as a group of videos that were posted during the Administrative Claim Period. (*Id.*; *see also* 4/10/14 P.M. Tr. 51:3-10; 52:1-16; Trial Ex. 207.)

SuperMedia creates Facebook and Google+ pages for Dex Media customers and has done so since mid-2013. (4/10/14 A.M. Tr. 78:5-17; 83:25- 84:9; 4/10/14 P.M. Tr. 36:23-37:18.) At least some of SuperMedia's customer Facebook pages contain links to a Dex Media Social Media Policy. (4/10/14 A.M. Tr. 157:11-24.) In addition, the websites of Dex Media customers are at least in some cases handled by SuperMedia. (*Id.* at 80:11-81:5.)

Specifically, when shown the Peacock Roofing website, which has a "Dex Knows" logo at the bottom of it, Jennifer Candelaria, the 30(b)(6) witness for Dex Media, testified that it could have been built by Dex Media contractors or "it could have been Web.com if it was sold on the SuperMedia side." (*Id.* at 81:1-5.) She further confirmed that the Peacock Roofing site, despite the Dex label, could have been a SuperMedia site. (*Id.* at 82:5-7.) Ms. Candelaria also testified that the Peacock Roofing Facebook page appeared to have been created by SuperMedia as part of the SocialEze product offering. (*Id.* at 85:4-10.) The Peacock Roofing website started out as a SuperMedia website and was still a SuperMedia website as of November 2012. (*Id.* at 126:7-24; Trial Ex. 202.) At some point around April 2013, Peacock Roofing was contacted by someone purporting to be from Dex Media about updating the website. (*Id.* at 138:13- 139:4.) On April 5, 2013, Peacock Roofing was provided with page proofs of the revised website, which for the first time contained a YPPI image. (*Id.* at 130:14- 25; Trial Ex. 154.) Peacock Roofing was informed that the updated website would go live on April 13, 2013. (*Id.* at 131:19-132:19; Trial Ex. 154.) The evidence shows that at some point between September 2012 and May 2013, the updated website with the YPPI image did in fact go live. (4/10/14 P.M. Tr. 69:12-70:8; Trial Ex. 202.) Peacock Roofing did not supply the YPPI image to Dex Media or SuperMedia. (4/10/14 A.M. Tr., 128:10-21; 135:19-136:11.) In addition to the website, Peacock Roofing also has a Facebook and Google+ page, both of which contain the YPPI image. (Trial Exs. 101, 157.) The YPPI image was posted on the Peacock Roofing Facebook page on March 13, 2013 and remained posted through April 2013. (4/10/14 P.M. Tr. 73:9-

19; Trial Ex. 101.) Peacock Roofing did not supply SuperMedia or Dex with the YPPI image for the Facebook or Google+ page and did not upload the image to either page on its own. (4/10/14 A.M. Tr. 140:15-22; 141:25-142:9; 142:10-143:3; 144:19-145:5.)

According to Ms. Candelaria, Dex Media has never provided images to Hostopia to use on websites. (*Id.* at 78:18-25.) Hostopia worked on the Peacock Roofing website. (Trial Exs. 130-31.) Hostopia's file for the Peacock Roofing website contains the YPPI image and shows that the file name for the image is "roof2-2.jpg." (*Id.*) YPPI's original file name for the image is not "roof2-2.jpg", but rather "ROOA0150.jpg." (Trial Ex. 3.) YPPI located another SuperMedia customer website containing the same YPPI's image as the Peacock Roofing website; specifically, a website for a company called Academy Roofing. (4/10/14 P.M. Tr. 71:15-21; Trial Ex. 171.)

Mr. Sharp was able to determine that the image on the Academy Roofing website had the same file name as the image on the Peacock Roofing website, namely "roof2-2.jpg." (4/10/14 P.M. Tr. 71:22-72:10.) Mr. Sharp was also able to determine that the YPPI images were placed on the Academy Roofing website in 2008, which would be prior to when the image was posted on the Peacock Roofing website. (4/10/14 P.M. Tr. 72:16-21.)

15. Subcontractors

The YPPI images were transferred to subcontractors MPS, ASEC Asia, and ASEC India. (Trial Exs. 199 and 115.) Web.com and Hostopia both utilized subcontractors to create websites. (4/9/14 P.M. Tr. 156:4-16; 4/10/14 A.M. Tr. 23:6-17; 24:7-18.) Website

customers of SuperMedia have access to the images used on their websites and social media pages. (4/9/14 P.M. Tr. 158:8-159:8; 4/10/14 A.M. Tr. 10:19-11:22; 24:19-25:5; 117:17-20; 156:2-14; 4/10/14 P.M. Tr. 22:12-19.) YPPI's images have been used in videos, websites, and social media for Dex Media.

On the print advertising side, since 2010 through to the present day, including both SuperMedia artists as well as contractor and subcontractor artists from Tata, ASEC, and MPS, there have been a total of approximately 350 artists building advertisements for SuperMedia. (4/10/14 A.M. Tr. 49:23-50:11; 4/11/14 A.M. Tr. 136:10-16. On the video side, BioMedia has a team of 8 full time editors that create videos for its customers. (4/9/14 P.M. Tr. 130:4-7.) On the website side, there are 200 people on Web.com's team who create websites for SuperMedia. (4/9/14 P.M. Tr.152:23-153:1; 171:12-172:13.) In addition on the website side, a team of approximately 45-50 people from Hostopia worked on creating SuperMedia websites, and Hostopia still continues to maintain and revise websites for SuperMedia. (4/10/14 A.M. Tr. 22:23-23:5; 4/10/14 P.M. Tr. 13:18-21.) On the social media side, SuperMedia has a team of about 86 employees who create social media pages. (4/10/14 P.M. Tr. 29:20-24; Trial Ex. 200.)

JURISDICTION

The Court has subject matter jurisdiction over the matters at issue pursuant to 28 U.S.C. §§ 157 and 1334, as well as the Court's April 29, 2013, Order Approving Debtors' Disclosure Statement for, and Confirming Debtors' Joint Prepackaged Chapter 11 Plan (Case No. 13-10545, D.I. No. 171). This is a core proceeding pursuant to 28 U.S.C. §

157(b)(2)(B).

DISCUSSION

The product at issue, YPPI's collection and index of photo images, is of substantial value. Although the photographs of products which we use every day may seem plain and simple, the collection is not. YPPI took thousands of photographs of such items as shoes, roofs, washing machines to name just a very few. YPPI then organized and indexed the photographs, placed the photographs onto computer readable media and thereby made the many photographs highly useful and valuable to companies including SuperMedia. Moreover, by its nature, the product, a collection of photographs of everyday items was susceptible to misuse, thereby making it incumbent upon a licensee to safeguard the product.

It is clear from the evidence adduced at trial that SuperMedia breached the License on numerous times and in several ways, as further discussed below.

SuperMedia's Numerous Breaches of the License.

The original Agreement entered into between the parties in 2001 clearly stated that "Verizon Directories may not transfer these images to other parties or individuals unless authorized by YPPI." (Trial Ex. 55 at Ex. C.) The Agreement further stated that "all users must be Employees of Verizon Directories." (*Id.*) In 2007, the parties entered into an amendment, which expanded the authorized users to include not just employees, but also "contractors" of SuperMedia. (Trial Ex. 55.) The provision prohibiting transfer of the images, however, was not amended (other than changing "Verizon Directories" to "Idearc").

(*Id.*) Therefore, the Agreement clearly states on its face that none of the images are to be transferred to anyone for any reason without YPPI's authorization.

Despite the clear prohibition on transferring the images to others, SuperMedia argues essentially that the non-transfer language should be ignored because the 2007 amendment allowed SuperMedia contractors to use the images, asserting that contractors could not feasibly use the images unless SuperMedia transferred them. SuperMedia asks the Court to ignore an unambiguous provision of the contract, and does not account for the actual circumstances. As Mr. Moore explained at trial, at the time SuperMedia and YPPI entered into the amendment, third party AMDOCS was located in SuperMedia's building. (4/9/14 P.M. Tr. 10:13-11:5.) AMDOCS could have provided services to SuperMedia at the time using YPPI's images from within SuperMedia's own office and system, which would have prevented any transfer of any images to AMDOCS. A contractor other than AMDOCS could also provide services to SuperMedia by working at SuperMedia's offices or by accessing and working within SuperMedia's computer system. Doing so would not have required a transfer. Thus, SuperMedia had the ability to honor the License with only minimal difficulty.

When SuperMedia requested the amendment in 2007, it did not even discuss the potential of SuperMedia outsourcing its ad production or transferring any images to contractors. (4/9/14 P.M. Tr. 10:4-12; 4/10/14 P.M. Tr. 109:6-16.) Lori Lawless, a SuperMedia witness, testified that SuperMedia requested the amendment to expand the use rights to cover digital products, such as LED billboards and assign user seats to

contractors in addition to employees. (4/10/14 P.M. Tr. 106:5-10; 111:10-13; 112:3-12; 113:9-12.) Ms. Lawless did not testify that SuperMedia requested the amendment to transfer images out to contractors.

SuperMedia also argues that transferring images would not be a breach under the License unless it transferred the full library of images (*i.e.*, all 5,000) that it licensed from YPPI. The License, as amended, does not state that transferring *some* images is acceptable as long as *all* images are not transferred. Surely SuperMedia could not transfer 4,999 or a majority of the 5,000 images to a third party and not be in breach. This would render the non-transfer language meaningless and would constitute an impermissibly unreasonable interpretation of the Agreement and License. *Foreman v. Forman*, 2014 WL 711249, *3 (Rex.App. Jan. 22, 2014).

SuperMedia admitted in its interrogatory responses and confirmed at trial, that it transferred all of YPPI's images to Tata, ASEC, and AMDOCS in 2009. (4/10/14 A.M. Tr. 53:12-54:24; 4/11/14 A.M. Tr. 7:10-24; Trial Ex. 199.) When SuperMedia provided the images to these contractors, it took no measures whatsoever to protect them from use by others or ensure that they would only be used for SuperMedia. (4/10/14 A.M. Tr. 63:4-15.) The images were also downloaded on all of the contractors' laptops. (Trial Ex. 199.) SuperMedia breached the License through these transfers.

SuperMedia admits to transferring the images, but argues that under the License, transfers to contractors were permitted because the License was amended in 2007 to allow contractors to use the images. SuperMedia's argument does not account for the

restriction in the License, as amended, that "Idearc may not transfer these images to other parties or individual unless authorized by YPPI." (Trial Ex. 55.) SuperMedia could not distribute third-party, copyrighted materials without obtaining owner's consent as its own Code of Conduct provides. (Trial Ex. 54 at Bates No. SUPER-002149; 4/10/14 A.M. Tr. 65:12-21.)

SuperMedia also argues that even if it did breach the License by transferring the images to contractors, it had them deleted from the contractors' systems in 2011, and therefore such transfers could not constitute a breach during the Administrative Claim Period. SuperMedia did not present any direct evidence that the contractors removed and no longer used the images. The contractors did not testify at trial. The evidence demonstrates that efforts by SuperMedia to remedy its breach were insufficient. Mr. Kurth testified that he is not surprised that advertisements containing YPPI's images are continuing to run. (4/11/14 11 A.M. Tr. 112:5-7.) Mr. Kurth also testified that he had the image index removed from the computers, which also removed the high resolution images that the index pointed to from its location on the server. (*Id.* at 53:2-11.) However, this was the extent of SuperMedia's efforts to regain possession of the images. Mr. Kurth admitted that YPPI's images used in advertisements would still be saved separately, and that those were not removed. (4/11/14 A.M. Tr. 147:20-148:7.) He also had no knowledge of where else in SuperMedia's system the images might be stored and could not even state whether all the CDs sent to SuperMedia containing the images had been gathered or the number of copies. (4/10/14 A.M. Tr. 69:21-73:5; 4/11/14 A.M. Tr. 148:8-

149:25.) SuperMedia's efforts were insufficient to ascertain what YPPI images contractors possessed and then to make certain they were not continuing to use them.

MPS, ASEC Asia, and ASEC India do not have contracts with SuperMedia; they are subcontractors of Tata. (4/10/14 A.M. Tr. 57:16-23; Trial Ex. 115.) It is undisputed that SuperMedia not only transferred all of YPPI's images to Tata, ASEC, and AMDOCS, but also to subcontractors MPS, ASEC Asia, and ASEC India. Mr. Moore testified that he personally discovered that these subcontractors possessed YPPI's images, and SuperMedia admitted they did. (4/10/14 A.M. Tr. 53:12-54:24; 4/11/14 A.M. Tr. 7:10-24; Trial Ex. 199.) The License permits contractors, not subcontractors, to use YPPI's images. SuperMedia further breached the License by transferring all of the images to three more entities with which SuperMedia did not even have a contractual relationship. SuperMedia did not establish that the subcontractors no longer have the images. Instead, Mr. Kurth confirmed that the subcontractors were never directly contacted by SuperMedia about discontinuing use of the images. (4/10/14 A.M. Tr. 73:17-22.) Mr. Kurth also never visited the subcontractor facilities to confirm that the images were no longer in use or to search for any YPPI's images in their systems. (4/11/14 A.M. Tr. 111:16-25.)

SuperMedia argues that "contractor" includes "subcontractor." In the context of this dispute, that is a distinction with a huge difference and one which the Court cannot accept. SuperMedia argues that as a legal matter, the term "contractors" is broad enough to include "subcontractors." See *Smith v. Texas Co.*, 53 S.W.2d 774, 777 (Tex. 1932) ("There are a number of decisions which hold that the word, contractor, when used in statutes similar to the

one under consideration, includes a subcontractor.”) This is not a case involving statutory construction. Rather, it arises from an agreement between parties which has one of its fundamental concerns the protection of YPPI’s unique product.

In addition to SuperMedia's numerous transfers of YPPI’s images to contractors and subcontractors for print advertising, it also transferred at least 12 CDs containing Yellow Pages' images to its video contractor BieMedia. (4/9/14 P.M. Tr. 122:12-23; 125:3-8; 127:18-22; Trial Ex. 137.) The images were provided at some point in 2010, and the uncontroverted evidence showed that BieMedia still had and was actively using the images throughout the Administrative Claim Period. (*Id.*; see also 4/9/14 P.M. Tr. 122:24-123:11; Trial Exs. 140, 165-67 and 169.) The evidence at trial showed videos posted during the pre-petition period that remained posted through the Administrative Claim Period, as well as some videos first posted during the Administrative Claim Period. (*Id.*) Given the clear language in the License prohibiting a transfer of the images, this constitutes yet another breach by SuperMedia.

SuperMedia also transferred at least some of Yellow Pages' images to its website contractors, Web.com and Hostopia. Web.com began creating websites for SuperMedia customers around late 2011 or 2012 and continues to do so today. (4/9/14 P.M. Tr. 151:21-152:2; 4/10/14 P.M. Tr. 13:8-12.) Web.com witnesses testified that it receives images in various ways to use on the websites, including receiving images from SuperMedia directly. (*Id.* at 162:7-14; 186:6-187:8; 4/10/14 A.M. Tr. 66:17-67:7.) In some instances, SuperMedia utilizes a link called sendthisfile.com, where it can upload images for

Web.com to access and download for use in websites. (4/9/14 P.M. Tr. 179:9-24.)

Instances of SuperMedia customer websites containing YPPI's images, which were built by Web.com, were shown during trial. (4/9/14 P.M. Tr. 39:19- 53:2; 59:22-61:7; Trial Exs. 81, 82, 93, 125, 149, 158, 186 and 188.) The YPPI images used on such sites are stored in Web.com's system, and examples from Web.com's system containing YPPI's images as stand-alone image files were shown at trial. (4/10/14 P.M. Tr. 23:4-12; Trial Ex. 210.) Web.com's files clearly demonstrate that at least some of YPPI's images have been transferred to it by SuperMedia, and SuperMedia produced no evidence to the contrary. The website examples were posted during the pre-petition period and remained posted through the Administrative Claim Period. (*See e.g.*, 4/10/14 P.M. Tr. 56:21-57:3.)

In addition to Web.com, SuperMedia has used Hostopia to create customer websites since around 2008 or 2009. (4/10/14 A.M. Tr. 15:9-16:7; 3/10/14 P.M. Tr. 13:13-17.) SuperMedia continues to use Hostopia today to maintain and revise websites. (4/10/14 A.M. Tr. 22:23; 23:5; 4/10/14 P.M. Tr., 13:18-21.) Similar to Web.com, SuperMedia has provided Hostopia with images for websites, including specifically YPPI's images. (4/10/14 A.M. Tr. 21:14-21; 22:13-18; 4/10/14 P.M. Tr. 19:12- 21:16; Trial Ex. 41 and 131.) SuperMedia's transfer of images to Web.com and Hostopia, no matter the number, is yet another breach. Moreover, the Topa Electric website, which has the image category placed over the image, indicates that it was pulled from an image library, not a one-off passing from SuperMedia. (*Id.* at 64:6-65:5; Trial Ex. 188.)

SuperMedia's transfer to Web.com and Hostopia resulted in further unauthorized and uncontrolled transfers. Web.com testified that it utilizes subcontractors to create the websites for SuperMedia, and they would have access to the YPPI images. (4/9/14 9 P.M. Tr. 156:4-16.) In addition, individual customers have access to Web.com's website creation tool, and can make changes to their sites, including accessing or removing images that are on the site. (4/9/14 P.M. Tr. 158:8-159:8; 4/10/14 AM. Tr.10:19-11:22; 117:17-20; 156:2-14; 4/10/14 P.M. Tr.22:12-19.) The same is true for Hostopia. Mr. Ward, SuperMedia's head of digital fulfillment, testified that SuperMedia recognizes it has a duty to protect third-party images it uses. (4/10/14 P.M. Tr. 23:18-24:17.) SuperMedia breached both its duty and the License.

SuperMedia also creates and maintains Facebook and Google+ pages for customers, which it does internally. (4/10/14 P.M. Tr. 26:6-15.) SuperMedia's use of YPPI images for social media pages constitutes further breaches of the License in numerous ways. First, SuperMedia is licensed to use the YPPI images in SuperMedia products, not the products of others. (4/9/14 P.M. Tr. 5:11-25; Trial Ex. 55.) As Mr. Ward admitted, Facebook and Google+ pages are not SuperMedia products, they are Facebook and Google products. (4/10/14 P.M. Tr. 33:8-19.) A license is granted to Facebook and Google to use the images without restriction. (4/10/14 P.M. Tr. 76:20-77:6; 78: 11-17; 79:7-80:5; Trial Exs. 48, 49.) This is an unauthorized transfer of YPPI images which is a breach of the License. When SuperMedia creates and maintains social media pages for customers, customers have administrator rights to the pages and can make edits to them, including removing images

posted on them. (4/10/14 A.M. Tr. 85:11-19; 4/10/14 P.M. Tr. 30:20-31:4; Trial Ex. 29.) When SuperMedia posts images on social media pages, it is transferring the images to the customers in breach of the License. Once an image is posted on a social media page, third parties can do anything with it, including downloading and sharing it with others, and there is no protective measure to keep third parties from using the image. (4/10/14 P.M. Tr. 75:22-76:15.) Posting YPPI's images on social media pages results in a transfer to the general public, as well as a complete loss of control of the images. This is another breach of the License.

SuperMedia's operations are combined with Dex Media, which has resulted in a transfer of YPPI's images to Dex Media. There is clear proof of this transfer. SuperMedia's employees, including their own witnesses at trial, believed they were employed by Dex Media. Mr. Kurth testified in SuperMedia's 30(b)(6) deposition that he was employed by Dex Media and had never heard of SuperMedia Services, LLC. (4/10/14 A.M. Tr. 34:2-5; 43:3-7.) Mr. Ward, whose deposition took place after Mr. Kurth's, testified he was employed by SuperMedia Services, Inc. (4/10/14 P.M. Tr. 4:22-5:2.)

SuperMedia's vendors understand SuperMedia and Dex Media to be the same company. BiMedia testified that, after the merger, it was their understanding that SuperMedia and DexMedia were the same company. (4/10/14 A.M. Tr. 120:24-121:10.) Web.com testified that they were unable to distinguish between SuperMedia and DexMedia. (4/9/14 P.M. Tr. 159:21-160:7.)

After the merger, BiMedia merged its files for both companies into one and has

utilized YPPI's images in thousands of videos for Dex Media. (4/9/14 P.M. Tr. 125:9-126:12; 129:3-5; 4/10/14 P.M. Tr. 10:21-11:9; Trial Ex. 140.) Dex Media therefore had access to and the benefits of all images previously provided to BioMedia by SuperMedia. During trial, Mr. Moore identified numerous "Dex Knows" videos containing YPPI's images. (4/9/14 P.M. Tr. 28:15-38:24; Trial Exs. 165-67, 169.) Some videos were posted pre-petition and remained posted during the Administrative Claim Period, and others were posted during the Administrative Claim Period. (4/10/14 P.M. 51:3-10; 521:1-16; Trial Ex. 207.) Dex Media is not and never has been a licensee of YPPI.

SuperMedia and Dex Media have also combined their website and social media products. SuperMedia creates Facebook and Google+ pages for Dex Media customers and has done so since around mid-2013. (4/10/14 A.M. Tr. 78:5-17; 83-25-84:9; 4/10/14 P.M. Tr. 36:23-37:18.) Some of SuperMedia's customer Facebook pages contain links to a Dex Media Social Media Policy. (4/10/14 A.M. Tr. 157:11-24.)

This was clearly demonstrated at trial through the customer Peacock Roofing. The Peacock Roofing website started out as a SuperMedia website that did not contain a YPPI image, but in April 2013, it changed to a "Dex Knows" website that contained a YPPI image. (4/10/14 A.M. Tr. 126:7-24; Trial Ex. 202.) Peacock Roofing was provided with page proofs containing the YPPI image on April 5, 2013 and informed that the website would go live on April 13, 2013. (4/10/14 A.M. Tr. 130:14-25; 131:19-132:19; Trial Ex. 154.)

In addition to the website, the same YPPI image appears on Peacock Roofing's Facebook and Google+ pages. (Trial Exs. 101, 157.) Peacock Roofing testified that it did not

provide the YPPI image to SuperMedia or Dex Media and did not post it on its website or social media pages. (4/10/14 A.M. Tr. 128:10-21; 135:19-136:11; 140:15-22; 141:25-142:9; 142:10-143:3; 144:19-145:5.) The revised website was built by Hostopia, and, according to Ms. Candelaria, Dex Media has never provided images to Hostopia. (4/10/14 A.M. Tr. 78:18-25; Trial Exs. 130-31.) The Court must therefore conclude that the YPPI image for the Peacock Roofing website came from SuperMedia.

The image appearing on the Peacock Roofing website was licensed from YPPI by SuperMedia, and SuperMedia previously provided YPPI images to Hostopia. (4/10/14 P.M. Tr. 19:12-21:16; Trial Exs. 3, 41.) Hostopia's file for the website, which has the YPPI image saved in it, shows a file name for the image ofroof2-2.jpg. (Trial Exs. 130-31.) YPPI's file name for the image, which is ROOA0150.jpg. (Trial Ex. 3.) YPPI located another website for a SuperMedia customer, Academy Roofing, another which contained the same Yellow Pages' image with the same resaved file name of roof2-2.jpg. (4/10/14 P.M. Tr. 71:15-72:10; Trial Ex. 171.)

The evidence establishes that the YPPI image on the Peacock Roofing website came from SuperMedia and that SuperMedia, through combined operations with Dex Media, has provided Dex Media with YPPI images. SuperMedia's allowing Dex Media to utilize YPPI's images comprised in a transfer of the images to DexMedia.

The License provides that "all users must be employees or contractors of Idearc." (Trial Ex. 55 at Ex. C.) SuperMedia allowed numerous parties to use the Yellow Pages images who were neither employees nor contractors. SuperMedia transferred all 5,000 images licensed from YPPI to subcontractors, including MPS, ASEC Asia, and ASEC India. (Trial Exs. 199 and 115 at

p. 13.) In addition, SuperMedia provided YPPI images to Web.com and Hostopia, who then utilized subcontractors to create websites for SuperMedia. (4/9/14 P.M. Tr. 156:4-16; 4/10/14 A.M. Tr. 23:6-17; 24:7-18.) The License does not grant subcontractors the use of the images. The License specifically and unambiguously states that all users "must" be either an employee or a contractor of SuperMedia. The limitation is important because SuperMedia does not have direct agreements with subcontractors and certainly does not have control over them. Construing "contractor" including "subcontractors" would violate the express language of the License and constitute an unreasonable interpretation when the clear purpose is to provide YPPI the ability to account for the YPPI images.

SuperMedia has also allowed its individual customers to become users of YPPI images. Website customers of SuperMedia have access to the images used on their websites and social media pages. (4/9/14 P.M. Tr. 158:8-159:8; 4/10/14 A.M. Tr. 10:19-11:22; 24:19-25:5; 117:17-20; 156:2-14; 4/10/14 P.M. Tr. 22:12-19.) Customers can edit and change the websites and social media pages, making them users of the YPPI images. (*Id.*; 4/10/14 A.M. Tr. 85:11-19; 4/10/14 P.M. Tr. 30:20-31:4; Trial Ex. 29.) Customers are not employees or contractors of SuperMedia. SuperMedia has also allowed Dex Media to become a user of YPPI images. YPPI images have been used in websites and videos for Dex Media. Dex Media is neither an employee nor a contractor of SuperMedia.

The Court granted SuperMedia's motion to supplement the record after the close of evidence, over YPPI's objection. D.I. Nos. 152 and 155. The evidence SuperMedia introduced was the expert testimony of Mr. Brad T. Ulrich ("Mr. Ulrich"). Mr. Ulrich

testified that SuperMedia should not be held liable for the use of YPPI's images after certain images were depicted on the World Wide Web, because by its nature, the "architecture" of the World Wide Web, any posted image can be freely copied or transferred by the end user. According to Mr. Ulrich, through "caching" images which a computer user views are stored in a hidden folder called a "cache folder." The caching therefore makes the YPPI images available to the public.

Mr. Ulrich's testimony does not relieve SuperMedia of its liability for its numerous breaches of the License. The fact remains that SuperMedia - not World Wide Web users - transferred the images to numerous third parties in direct violation of the License. These wrongful transfers very clearly are the premise of the Court's finding of liability.

Mr. Ulrich also testified about SuperMedia's involvement in the placement of YPPI images on social media, i.e., Facebook and Google+. Mr. Sharp, YPPI's witness, testified about the uncontrolled copying of images posted on social media sites, 4/10/14 P.M. Tr. 75-76; 80-81; Ex. 48, 29. Mr. Ulrich agreed with Mr. Sharp that there was no safeguards against the copying of images posted on social media sites 9/3/14 P.M. Tr. 126:18-127:6. It is as YPPI aptly stated, that posting on Facebook results in a "potentially permanent license to members of the general public." Reply Brief at 6.

The "600"

The License clearly limits SuperMedia to 600 users. "This license is a 600 USE, VERIZON EMPLOYEE ONLY LIMITED ACCESS SITE LICENSE." The parties disagree on

the number of users. SuperMedia calculates the number at fewer than 600. YPPI counts approximately 700 users, not counting customers or Dex Media. On this point, YPPI has not clearly established that the number of users exceed 600. Without names of users, the Court cannot be certain of the number. The other difficulty is that there is no evidence that more than 600 users were using the YPPI images at one time.

Copyright Infringement

YPPI has charged SuperMedia with copyright infringement. YPPI must prove that 1) it owns valid copyrights in the images and 2) SuperMedia illegally copied, created derivative works using, distributed, and/or displayed the images and/or contributed to such illegal actions by others. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 40, 361 (1991). YPPI's copyright registrations covering all applicable 5,000 images were entered into evidence at trial. (Trial Ex. 1.) The registrations carry a presumption of validity. SuperMedia did not challenge YPPI's registrations at trial. *Webloyalty.com, Inc. v. Consumer Innovations, LLC*, 388 F. Supp. 2d 435 (D. Del. 2005) ("since Webloyalty has copyright registrations for its Banner and Sell Page, CI must overcome the presumption that Webloyalty owns valid copyrights"). Accordingly, YPPI has satisfied the first element for proving copyright infringement. When a licensee under a license agreement for copyrighted works exceeds the scope of its license, it infringes the copyrights in the works. *In re Valley Media, Inc.*, 279 B.R. 105, 144 (Bankr. D. Del. 2002); *Greenfield v. Twin Vision Graphics, Inc.*, 268 F. Supp. 2d 358, 368 (D.N.J. 2003). SuperMedia exceeded the scope of the License by transferring and distributing the images to third parties and

allowing unauthorized users to utilize the images. These actions constitute copyright infringement by SuperMedia of all 5,000 images licensed from YPPI and thus prove the second element for copyright infringement.

Copyright infringement is willful when the defendant "actually knew it was infringing the plaintiffs' copyrights or recklessly disregarded that possibility." *Webloyalty.com*, 388 F. Supp. 2d at 441. YPPI bears the burden of proving willfulness. Willfulness can be established by inference and by evidence that SuperMedia attempted to hide the infringement.

SuperMedia had knowledge of YPPI's copyrights as well as the terms of the License. SuperMedia knew the specific terms of the License. It approached YPPI for the amendment in 2007 and again approached it about the terms of the License in 2008. Given SuperMedia's line of business and level of sophistication, SuperMedia understood copyrights and the applicable law. SuperMedia's own Code of Conduct addresses copyrights and rules relating to them, including that third-party copyrighted materials may not be copied or distributed without obtaining the owner's specific consent. (Trial Ex. 54 at Bates No. SUPER-002149.) SuperMedia recognized the importance of following these provisions. (4/10/14 A.M. Tr. 65:12-21.) These facts establish willfulness.

SuperMedia's willfulness is further demonstrated by its proposed second amendment to the License. SuperMedia sought an amendment related to "website use" that would allow users to download YPPI images for what SuperMedia called "personal, non-commercial use." (Trial Exs. 16, 18, 19.) Mr. Moore expressly rejected the amendment,

and it never became a part of the License. (4/9/14 P.M. Tr. 15:24-16:9.) Nevertheless, SuperMedia proceeded forward with the use of YPPI's images not only in websites, but social media pages. Many of the website examples shown at trial contained language mirroring the proposed-but-rejected amendment. (4/10/14 P.M. Tr. 23:13-20; Trial Exs. 81, 82, 93, 149, 172, 183, 186, 188.) SuperMedia disregarded YPPI's rejection of the amendment and then began using the images on websites with no protective coding to prevent copying of the images, as well as on social media sites, which have no protective options.

SuperMedia's breaches occurred over a number of years, even after YPPI put it on notice of such breaches. *Broadcast Music, Inc. v. Spring Mount Area Bavarian Resort, Ltd.*, 555 F. Supp. 2d 537, 542 (E.D. Pa. 2008) (infringement found willful when defendant infringed after being put on notice of infringement by plaintiff). In 2010, YPPI sent SuperMedia a letter inquiring into the transfer of images to ASEC. (Trial Ex. 20.) SuperMedia responded that it had not violated the License. (4/9/14 P.M. Tr. 19:3-8.) YPPI discovered its images on ASEC Asia and ASEC India's servers in folders labeled "SuperMedia," and again approached SuperMedia in April 2011. (Trial Ex. 22.) SuperMedia did not respond. (4/9/14 P.M. Tr. 21:11-16.) YPPI sent another follow-up letter in September 2011 to which SuperMedia did not respond. (4/9/14 P.M. Tr. 21:17-22:13; Trial Ex. 24.) SuperMedia engaged in further breaches including transferring images to BieMedia, Web.com, Hostopia, and Dex Media, as well as using the images on social media pages. Such conduct is certainly willful.

Administrative Expense Claim

In order for a claim to be allowed as an Administrative Expense Claim under § 503(b), it must "arise from a transaction with the debtor-in-possession" that was "beneficial to the debtor-in-possession in the operation of the business." *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 172-73 (3d Cir. 2012) (internal quotation marks omitted); see 11 U.S.C. § 503(b). YPPI's administrative expense claim hinges on the narrow exception to § 503(b) established in *Reading Co. v. Brown*, 391 U.S. 471 (1968). In *Reading*, the Supreme Court held that certain tort claims may be entitled to administrative expense priority if, and only if, they arise from acts committed by the debtor-in-possession "*after the bankruptcy filing*." *In re Refco Inc.*, 331 F. App'x 12, 13 (2d Cir. 2009) (emphasis added) (citing *Reading Co. v. Brown*, 391 U.S. 471 (1968)); see *Philadelphia Newspapers*, 690 F.3d at 173 (stating *Reading* applies only to "post-petition tort claims"). There are no cases applying *Reading* to allow administrative expense status to tort claims which arose prepetition." *In re Brooke Corp.*, 485 B.R. 650, 660 (Bankr. D. Kan. 2013).

To satisfy *Reading*, YPPI was required to offer evidence of a tortious act by SuperMedia that allegedly occurred between March 18, 2013, when SuperMedia filed for bankruptcy protection, and April 30, 2013, when its plan of reorganization went effective (the "Administrative Claim Period"). First, YPPI argues that, even if SuperMedia's alleged infringement occurred pre-petition, the consequences of that infringement were still being felt during the Administrative Claim Period. Second, YPPI argues that SuperMedia should be held accountable for the alleged post-petition tortious acts of third parties such as BiMedia,

Dex One, and Hostopia. Neither argument passes muster.

"The *Reading* analysis requires a post-petition action. . . ." *In re Cont'l Airlines, Inc.*, 148 B.R. 207, 214 (D. Del. 1992) (emphasis added). The mere post-petition *effects* of pre-petition conduct cannot trigger *Reading*. In *In re Cont'l Airlines*, the claimant brought an administrative expense claim for damages arising from an alleged pre-petition wrongful termination. *Id.* at 216. The claimant contended that his pre-petition termination constituted a post-petition wrongful act under *Reading*, because "[e]very day" until he was re-instated post-petition "constituted another violation." *Id.* The court concluded that "the only violation was a pre-petition event, and therefore there is no question that *Reading* and its progeny are inapplicable." *Id.* See also *in re Lazar*, 207 B.R. 668, 675 (Bankr. C.D. Cal. 1997) (rejecting administrative expense claim where "[a]ll of the acts by the debtors that caused [the damages alleged] took place prepetition" and claimant "has shown *no active postpetition conduct by the debtors* to justify an award of administrative expense priority"). YPPI does not, and cannot, point to any evidence of alleged infringement by SuperMedia within the Administrative Claim Period. The allegedly infringing acts, the *posting* of YPPI images online through BioMedia videos and SuperMedia web products, occurred pre-petition. That argument is insufficient as a matter of law.

CONCLUSION

YPPI established at trial, through witnesses and documentary evidence, clearly and by a preponderance of the evidence, that SuperMedia committed multiple breaches of License, thereby exposing YPPI to as yet undetermined damages. The acts giving rise to the breaches occurred pre-petition, although the effects continue. Supermedia also committed copyright infringement and the amount to be awarded to YPPI will have to be determined. For that reason, the Court will deny the request for allowance of an administrative claim, but will allow the claim in an amount to be determined.

Dated: December 29, 2014

A handwritten signature in black ink, appearing to read "Kevin Gross", written over a horizontal line.

KEVIN GROSS, U.S.B.J.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re) Chapter 11
)
SUPERMEDIA, INC. et al.,) Case No. 13-10546(KG)
) (Jointly Administered)
Debtors.)
_____) Re: D.I. 58

**ORDER DENYING YELLOW PAGES PHOTOS, INC.'S
AMENDED MOTION FOR ALLOWANCE AND PAYMENT
OF ADMINISTRATIVE EXPENSE CLAIM**

WHEREAS:

A. On February 19, 2014, Yellow Pages Photos, Inc. filed its Amended Motion for Allowance and Payment of Administrative Expense Claim (the "Motion") (D.I. 58).

B. The Court conducted a hearing on the Motion on April 9, 10 and 11, 2014, and thereafter a hearing on September 3, 2014 at which the Court heard supplemental testimony presented by SuperMedia, LLC ("SuperMedia").

C. The Court has carefully and duly considered the evidence the parties presented at the Hearing and Supplemental Hearing and the parties' post-trial submissions.

D. On December 29, 2014, the Court issued an opinion with its findings and legal conclusions (the "Opinion").

NOW, THEREFORE, for the reasons contained in the Opinion, and despite finding that SuperMedia breached the License (defined in the Opinion), the Motion is denied.

Dated: December 29, 2014

A handwritten signature in black ink, appearing to read "Kevin Gross", written over a horizontal line.

KEVIN GROSS, U.S.B.J.