

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DEX MEDIA WEST, INC.; SUPERMEDIA  
LLC; and YELLOW PAGES INTEGRATED  
MEDIA ASSOCIATION d/b/a YELLOW  
PAGES ASSOCIATION,

Plaintiffs,

v.

CITY OF SEATTLE and RAY HOFFMAN, in  
his official capacity as Director of Seattle  
Public Utilities,

Defendants.

No. 10-cv-1857

**PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

NOTE ON MOTION CALENDAR:  
March 4, 2011

ORAL ARGUMENT REQUESTED

Seattle Ordinance 123427 violates basic constitutional principles, banning distribution of yellow pages without a license, charging publishers for every book they distribute, and forcing publishers to print the City's messages on their book covers and to participate in a City-run delivery opt-out program. Although Plaintiffs believe summary judgment is warranted, if the Court concludes that factual issues preclude summary judgment (or cannot resolve the summary judgment motion by the end of March), Plaintiffs request preliminary relief enjoining the Ordinance pending final resolution on summary judgment or at trial. Preliminary relief is justified not only because of Plaintiffs' likelihood of success on the merits and the presence of irreparable harm, but also because the equities and public interest weigh in favor of such relief. Moreover, because the Ordinance is

PLAINTIFFS' MOTION FOR PRELIMINARY  
INJUNCTION (NO. 10-CV-1857) – 1

**Perkins Coie LLP**  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

1 unprecedented, its operative provisions have not taken effect, and the recent amendments will not  
 2 become law until March, preliminary relief will simply maintain the status quo.  
 3

#### 4 I. FACTS

5  
 6 Plaintiffs have provided the relevant facts in the Motion for Summary Judgment (Dkt. 14)  
 7 and Reply (Dkt. 37), and incorporate those filings and their accompanying declarations and exhibits  
 8 by reference. The focus here is solely on the facts crucial to this motion.  
 9  
 10

11  
 12 First, as of April 1, 2011, it will be unlawful to distribute “yellow pages phone books” in  
 13 Seattle without a license. SMC 6.255.030(A). Moreover, any yellow pages distributed in Seattle  
 14 after that date must “prominently and conspicuously display on . . . the front cover” a message  
 15 mandated by the City about the City’s opt-out program. SMC 6.255.110. Regulated publishers  
 16 must also add to their websites a prominent message advertising Seattle’s opt-out program.  
 17  
 18

19  
 20 Second, consistent with its historical practice, Plaintiff Dex is scheduled to print its 2011  
 21 Seattle Metro directory in May and distribute it in June. Declaration of Maggie Stonecipher (Dkt.  
 22 19) (“Stonecipher Decl.”) ¶ 4. To meet that timetable, Dex is already designing and making  
 23 decisions about the content of its directory. *Id.* Absent judicial relief, by early April Dex would  
 24 have to apply for and obtain the permit required by the Ordinance and design its directories to  
 25 incorporate the messages required by the City.<sup>1</sup> Supplemental Declaration of Maggie Stonecipher  
 26 (“Stonecipher Supp. Decl.”) ¶ 9.  
 27  
 28

29  
 30 Third, complying with the Ordinance would not only trench upon the First Amendment, but  
 31 also impose significant and partially unquantifiable burdens on Dex. Printing the City’s required  
 32 message on the cover of its directory would potentially force Dex to forego significant advertising  
 33 revenue. Stonecipher Decl. (Dkt. 19) ¶ 17. Moreover, 60% of Dex’s Seattle Metro yellow pages  
 34 have historically been delivered outside of Seattle, and Dex would have to alter its delivery  
 35  
 36

---

37  
 38  
 39  
 40  
 41  
 42  
 43  
 44  
 45  
 46  
 47  
 48  
 49  
 50  
 51  
 52

<sup>1</sup> It is not even clear at this point what the City intends to force Dex to print. Seattle Public Utilities has proposed rules that would require additional messages in locations other than the cover. In response to discovery requests, the City has said that it has not yet decided the content of the messages that it wants to make Dex communicate on the covers and elsewhere. Once the City decides, there likely will be separate constitutional issues with the exact content, and there would be very little time in which to resolve those before Dex must go to print.

1 practices substantially to ensure that residents outside of Seattle did not receive directories that  
 2 confusingly advertise Seattle's opt-out program that they will not be able to use. *Id.* ¶ 19. And in  
 3 the unlikely event the City gets its opt-out system up and running in time to be used in Dex's  
 4 delivery cycle, Dex would need to make significant changes in its database, processes, and staffing  
 5 to act on the information from the City. *Id.* ¶ 17.

6  
 7  
 8  
 9  
 10  
 11 Fourth, it appears very unlikely that Defendants will have their opt-out system functioning  
 12 by the time Dex needs to print its directories and begin delivering them, as the City has yet to sign a  
 13 contract with the system's developer and it will likely take a significant amount of time before the  
 14 system is ready to accept requests from Seattle residents. Stonecipher Supp. Decl. ¶ 9.

15  
 16  
 17  
 18  
 19 Finally, Plaintiffs maintain effective systems allowing residents to opt out of delivery of  
 20 directories. For example, Dex offers "Select Your Dex," which consumers may access through a  
 21 dedicated website, [www.selectyourdex.com](http://www.selectyourdex.com), or by calling a toll-free number. Stonecipher Decl.  
 22 (Dkt. 19) ¶ 9. Dex actively promotes the website and toll-free number. *Id.* Plaintiff YPA maintains  
 23 a website, [www.yellowpagesoptout.com](http://www.yellowpagesoptout.com), where people can decline delivery of any directory they  
 24 receive. Stonecipher Supp. Decl. ¶ 3. Publishers carefully manage their delivery systems to honor  
 25 opt-out requests, and the rate of erroneous delivery to those who have opted out is extremely low.  
 26 Stonecipher Decl. (Dkt. 19) ¶¶ 12-13, 15.

## 34 35 **II. STANDARD FOR ISSUANCE OF PRELIMINARY INJUNCTION**

36  
 37 "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on  
 38 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the  
 39 balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v.*  
 40  
 41  
 42  
 43 *Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008).

## 44 45 **III. ANALYSIS**

### 46 47 **A. Plaintiffs Are Likely To Succeed on the Merits**

48  
 49 Plaintiffs are likely to succeed on the merits for the reasons stated in the Motion for  
 50 Summary Judgment (Dkt. 14) and Reply (Dkt. 37), which are incorporated by reference and will not  
 51

1 be reprised in detail here. In brief, the City has imposed: (1) a content-based opt-out system and tax  
 2 on speech, *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (“[O]fficial scrutiny of  
 3 the content of publications as the basis for imposing a tax is entirely incompatible with the First  
 4 Amendment[] . . . .”); (2) a permitting requirement that operates as a prior restraint on speech,  
 5 *Berger v. City of Seattle*, 569 F.3d 1029, 1037 (9th Cir. 2009) (en banc) (“[A] prior restraint on  
 6 speech . . . bears a heavy presumption against its constitutionality.”); and (3) a requirement that  
 7 publishers utter speech they would rather not. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*,  
 8 475 U.S. 1, 16 (1986) (“[T]he choice to speak includes within it the choice of what not to say.”).

9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17 The City essentially concedes that these restrictions are unconstitutional if strict scrutiny  
 18 applies. Even if yellow pages were commercial speech, the Ordinance would violate the First  
 19 Amendment because, among other things, there is no “‘fit’ between [the City’s] ends and the means  
 20 chosen to accomplish those ends,” *United States v. Edge Broad. Co.*, 509 U.S. 418, 427-28 (1993),  
 21 as the City has singled out yellow pages despite making no showing that they contribute uniquely or  
 22 even substantially to the problems the City seeks to address. *See Bolger v. Youngs Drug Products*  
 23 *Corp.*, 463 U.S. 60, 71 n.20 (1983) (“The party seeking to uphold a restriction on commercial  
 24 speech carries the burden of justifying it.”).

25  
 26  
 27  
 28  
 29  
 30  
 31  
 32  
 33 Defendants have virtually conceded that there are substantial constitutional issues by  
 34 amending the ordinance “in response to current litigation.” Supplemental Declaration of Kimball  
 35 Mullins (Dkt. 40) (“Mullins Supp. Decl.”) Exhibit A. While those amendments will address some  
 36 of the most plainly flawed aspects of the Ordinance when they become effective in early March,  
 37 numerous flaws remain, and Plaintiffs are still likely to succeed on the merits for the reasons stated  
 38 above and in the summary judgment briefing.

39  
 40  
 41  
 42  
 43  
 44  
 45 **B. Plaintiffs Are Likely To Suffer Irreparable Harm Absent Preliminary Relief**

46  
 47 Absent judicial relief, Dex will soon have to apply for and obtain the permit required by the  
 48 Ordinance and print directories with covers containing the message required by the City.  
 49 Stonecipher Supp. Decl. ¶ 9. These First Amendment violations will cause Dex irreparable harm,  
 50  
 51

1 for “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably  
2 constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (internal quotation marks  
3 omitted). *See also S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998) (same).  
4  
5

6  
7 **C. The Balance of Equities Favors Plaintiffs**

8  
9 “[T]he fact that a case raises serious First Amendment questions compels a finding that . . .  
10 at the very least the balance of hardships tips sharply in [Plaintiffs’] favor.” *Sammartano v. First*  
11 *Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002). Here  
12 this general rule plainly holds true. Allowing the Ordinance to take effect will not only violate  
13 Plaintiffs’ First Amendment rights, it will also impose large compliance costs on Plaintiffs, both  
14 from having to alter their distribution practices at great cost and by denying them advertising  
15 revenue from the space taken up by the City’s compelled message. *See* Dkt. 14 at 27-28. *See also*,  
16 *e.g., Earth Island Institute v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (“Economic harm may  
17 indeed be a factor in considering the balance of equitable interests.”).  
18  
19  
20  
21  
22  
23  
24  
25

26  
27 By contrast, it is difficult to foresee any harm to Defendants if the Ordinance is temporarily  
28 enjoined. It appears unlikely that Defendants will have their opt-out system up and running in time  
29 for any Seattle residents to use it to opt out of Dex’s 2011 delivery, Stonecipher Supp. Decl. ¶ 9,  
30 and in any event any resident who wishes to opt out of this delivery may do so through Dex’s opt-  
31 out program, “Select Your Dex” ([selectyourdex.com](http://selectyourdex.com)), or through YPA’s ([yellowpagesoptout.com](http://yellowpagesoptout.com)).  
32  
33 If the Court ultimately upholds the Ordinance, the delay will have caused Defendants no meaningful  
34 injury. After Dex’s, the next scheduled delivery of yellow pages in Seattle is YellowBook’s, slated  
35 for October, and the City can seek to move the trial date earlier if necessary to get a resolution  
36 before that time. In short, there is no reason to think there will be any immediate benefit from  
37 allowing the Ordinance to take effect, but allowing the Ordinance to take effect will unquestionably  
38 impose burdens, so the balance of equities tips sharply in Plaintiffs’ favor.  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51

1 **D. An Injunction Is in the Public Interest**

2  
3 “Courts considering requests for preliminary injunctions have consistently recognized the  
4 significant public interest in upholding First Amendment principles.” *Sammartano*, 303 F.3d at 974  
5 (citing many cases). Those principles apply strongly here, where the City has imposed a range of  
6 significant burdens on speech outlined above and in the summary judgment briefing.  
7  
8

9  
10 While granting the requested injunction will protect the publishers’ First Amendment rights,  
11 it will cause no harm to the public interest. The only imminent delivery is Dex’s, and anyone  
12 wishing not to receive a Dex directory may opt out in the ways described above. Over 17,000  
13 Seattle residents have already done so, Stonecipher Decl. (Dkt. 19) ¶ 10, and nothing prevents  
14 others from following suit. Moreover, Dex’s rate of erroneous deliveries to those who have opted  
15 out is extremely low, *id.* ¶ 15, and there is no reason to think that implementation of the Ordinance  
16 will reduce it further, *id.*, especially given that the City’s opt-out system is unlikely to be  
17 operational before Dex’s delivery begins. Stonecipher Supp. Decl. ¶ 9.  
18  
19

20  
21 Moreover, there will be injury to the public (and the City) if there is *no* preliminary  
22 injunction and the City’s opt-out system is not ready by the start of Dex deliveries. Dex’s cover  
23 message and website will tell people how to opt out on the City’s site, but they will not in fact be  
24 able to do so.  
25

26  
27 Thus, enjoining the ordinance will further “the significant public interest in upholding First  
28 Amendment principles,” *Sammartano*, 303 F.3d at 974, while imposing no concomitant costs.  
29  
30

31  
32  
33  
34  
35  
36  
37  
38 **IV. CONCLUSION**

39  
40 Because Plaintiffs have satisfied all four aspects of the test for preliminary relief, Plaintiffs  
41 ask the Court to enjoin the City from taking any action to enforce the Ordinance until the Court  
42 enters a final judgment on the merits in this matter.  
43  
44  
45  
46  
47  
48  
49  
50  
51

1 DATED this 10th day of February, 2011.  
2  
3

4 *s/ David J. Burman*

5 \_\_\_\_\_  
6 David J. Burman, WSBA No. 10611  
7 DBurman@perkinscoie.com  
8 Kathleen M. O'Sullivan, WSBA No. 27850  
9 KOSullivan@perkinscoie.com  
10 **Perkins Coie LLP**  
11 1201 Third Avenue, Suite 4800  
12 Seattle, WA 98101-3099  
13 Telephone: 206.359.8000  
14 Facsimile: 206.359.9000

15 Attorneys for Plaintiffs Dex Media West, Inc.,  
16 SuperMedia LLC, and Yellow Pages  
17 Integrated Media Association d/b/a Yellow  
18 Pages Association  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51

**CERTIFICATE OF SERVICE**

On February 10, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record:

William C. Foster  
Seattle City Attorney's Office  
600 Fourth Avenue, 4th Floor  
Seattle, WA 98124  
William.Foster@seattle.gov

Jessica Goldman  
Molly Terwilliger  
Summit Law Group  
315 Fifth Avenue South, Suite 1000  
Seattle, Washington 98104-2682  
jessicag@summitlaw.com  
mollyt@summitlaw.com

Attorney for Defendants The City of  
Seattle and Ray Hoffman

Attorneys for Defendants The City of Seattle  
and Ray Hoffman

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 10th day of February, 2011.

*s/ David J. Burman*

David J. Burman, WSBA No. 10611

**Perkins Coie LLP**

1201 Third Avenue, Suite 4800

Seattle, WA 98101-3099

Telephone: 206.359.8000

Facsimile: 206.359.9000

DBurman@perkinscoie.com

Attorney for Plaintiffs Dex Media West, Inc.,  
SuperMedia LLC, and Yellow Pages Integrated  
Media Association d/b/a Yellow Pages Association