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7 *Attorneys for Defendants*

8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 JOSEPH SOHM,

11 Plaintiff,

12 vs.

13 MCGRAW-HILL GLOBAL  
EDUCATION HOLDINGS, LLC and  
14 MCGRAW-HILL SCHOOL  
EDUCATION HOLDINGS, LLC,

15 Defendants.  
16

) Case Number: 16-cv-01316-SJO

) **DEFENDANTS’ NOTICE OF AND**  
) **PARTIAL MOTION TO DISMISS**  
) **THE COMPLAINT PURSUANT**  
) **TO FED. R. CIV. P. 12(b)(6)**

) Date: Monday, June 13, 2016  
) Time: 10:00 a.m.  
) Courtroom: 1 - 2nd Floor

17  
18 **PLEASE TAKE NOTICE** that Defendants McGraw-Hill Global Education  
19 Holdings, LLC, and McGraw-Hill School Education Holdings, LLC (collectively  
20 and jointly here, as “McGraw-Hill Education”) hereby state that on Monday,  
21 June 13, 2016 at 10:00a.m., they will move to dismiss some of the claims in  
22 Plaintiff Joseph Sohm’s (“Sohm”) Complaint pursuant to Rule 12(b)(6) of the  
23 Federal Rules of Civil Procedure.  
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1 The disputed claims relate to photos that are slavish copies, with no added  
2 creative input, of well-known works of art or famous documents, or of national  
3 symbols that have long been in the public domain, and which are not eligible for  
4 copyright protection as a matter of law.<sup>1</sup>

5 The grounds for this motion are set forth further in the Memorandum of  
6 Points and Authorities, and the Declaration of Steven D. Zansberg, Esq. and  
7 Exhibit A thereto. McGraw-Hill Education also attaches a Proposed Order on the  
8 Motion to Dismiss.

9  
10 Respectfully submitted on April 25, 2016.

11  
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25 *Attorneys for Defendants McGraw-Hill Global  
26 Education Holdings, LLC and McGraw-Hill  
27 School Education Holdings, LLC*

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28 <sup>1</sup> Undersigned counsel conferred with counsel for Plaintiff on April 13,  
2016, and had subsequent discussions on April 18, pursuant to this Court’s  
Standing Order Regarding Case Management in Civil Cases, and explained the  
basis for the arguments herein. Plaintiff’s counsel agreed to review the particular  
claims that counsel for McGraw-Hill Education had identified as being subject to  
dismissal for lack of copyrightability, and responded that they would not withdraw  
or otherwise discontinue those claims.

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 9 **UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

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 11 JOSEPH SOHM,

12 Plaintiff,

13 vs.

14 MCGRAW-HILL GLOBAL  
 EDUCATION HOLDINGS, LLC and  
 15 MCGRAW-HILL SCHOOL  
 EDUCATION HOLDINGS, LLC,

16 Defendants.  
 17

) Case Number: 16-cv-01316-SJO

) **DEFENDANTS' MEMORANDUM  
 OF POINTS AND AUTHORITIES  
 IN SUPPORT OF THEIR MOTION  
 TO PARTIALLY DISMISS  
 PLAINTIFF'S COMPLAINT  
 PURSUANT TO FED. R. CIV. P.  
 12(b)(6)**

) Date: Monday, June 13, 2016  
 ) Time: 10:00 a.m.  
 ) Courtroom: 1 - 2nd Floor

1 Defendants McGraw-Hill Global Education Holdings, LLC, and McGraw-  
2 Hill School Education Holdings, LLC (collectively “McGraw-Hill Education”)  
3 respectfully submit this Memorandum of Points and Authorities in Support of Its  
4 Motion to Partially Dismiss Plaintiff Joseph Sohm’s (“Sohm”) Complaint, (*see*  
5 Doc. No. 1), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

6 McGraw-Hill Education seeks partial dismissal of Counts I and II of the  
7 Complaint on the grounds that they fail to state a claim of copyright infringement.<sup>1</sup>  
8 As is apparent from the face of the Complaint, thirty-nine of the alleged instances  
9 of copyright infringement involve photos that are slavish copies of well-known  
10 works of art, famous documents, and national symbols that have long been in the  
11 public domain. Such photos are not eligible for copyright protection, and a claim  
12 of copyright infringement as to those photos is not actionable, as a matter of law.

### 13 STATEMENT OF THE ISSUES

14 1. Whether Sohm’s pleaded claims for copyright infringement and  
15 contributory and/or vicarious copyright infringement, which are premised on  
16 photos that are slavish copies, without any creative input or independent  
17 expression by Sohm, of well-known artworks, documents, and symbols that he did  
18 not himself create and that are long in the public domain, should be dismissed for  
19 failure to state a claim upon which relief may be granted?  
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25 <sup>1</sup> Separately and concurrently, MHE has filed a motion to transfer the claims  
26 in Exhibit 2 to the Complaint (Dkt. No. 1-2), or in the alternative, the entire case,  
27 to the United States District Court for Southern District of New York based on the  
28 mandatory, binding forum selection clause in the underlying invoices and vendor  
agreement between McGraw-Hill Education and Corbis, plaintiff’s licensing agent.

1 **STATEMENT OF RELEVANT FACTS**

2 Sohm is a photographer who licenses his stock (ordinary, fungible) photos to  
 3 various publishers, including McGraw-Hill Education, for a few hundred dollars.  
 4 Compl. ¶ 2. He also enters into agreements with various third-party stock photo  
 5 agencies to represent and license his photos to publishers as well. *Id.* ¶ 9.  
 6 McGraw-Hill Education is, among other things, a publisher of educational  
 7 textbooks for K-12, college, and post-graduate students. *Id.* ¶¶ 3, 8.

8 Sohm bases his copyright claims on broad, conclusory allegations that  
 9 McGraw Hill has exceeded the purported print run and other terms in hundreds of  
 10 invoices issued to McGraw-Hill by Sohm, Sohm's own stock agency, or various  
 11 third-party stock photo agencies, including Corbis Corporation. *Id.* ¶¶ 8-10.

12 The photos for which Sohm claims copyright ownership are allegedly  
 13 depicted in Exhibits 1-7 to the Complaint. *Id.* ¶ 6; Exs. 1-7. Those Exhibits are  
 14 summary charts of photos that Sohm and his agents allegedly invoiced to McGraw-  
 15 Hill Education, frequently identified only by an image number, an invoice number,  
 16 alleged invoice date, and thumbnail image of the photo. *Id.*, Exs. 1-7. On many of  
 17 the claims, Sohm does not identify the alleged McGraw-Hill Education title at  
 18 issue. *E.g., id.*, Exs. 2, 3, 4. Setting aside the fact that Sohm is using this lawsuit  
 19 to obtain a *de facto* audit – frequently without any evidence that any *particular*  
 20 claim is sustainable – a number of the photos at issue are nothing more than slavish  
 21 copies of preexisting works in the public domain:<sup>2</sup>

22 (1) Image Id. No. JS1000460 (the “Presidential Seal of the US Image”):  
 23 The Presidential Seal of the US Image reflects a claim of copyright ownership for  
 24 visual material entitled “Presidential Seal of the US.” *Id.* Ex. 2, Row 37.

25 \_\_\_\_\_  
 26 <sup>2</sup> A summary of the contested claims, with copies of the thumbnails pleaded  
 27 by Sohm in the corresponding exhibits to the Complaint, is attached as Exhibit A  
 28 to the Declaration of Steven D. Zansberg (“Zansberg. Decl.”).

1 (2) Image Id. No. JS004492 (“The Constitution Image”): The  
2 Constitution Image reflects a claim of copyright ownership for visual material  
3 entitled “The Constitution.” *Id.* Ex. 2, Rows 49, 118, 181, 191, 221, 228.

4 (3) Image Id. No. JS999775 (“Declaration of Independence Image”): The  
5 Declaration of Independence Image reflects a claim of copyright ownership for  
6 visual material entitled “Declaration of Independence.” *Id.* Ex. 2, Row 51.

7 (4) Image Id. No. JS999774 (“Declaration of Independence Image II”):  
8 The Declaration of Independence Image II reflects a claim of copyright ownership  
9 for visual material entitled “Declaration of Independence.” *Id.* Ex. 2, Rows 64, 73,  
10 183.

11 (5) Image Id. No. JS1000418 (“Constitution Preamble Image”): The  
12 Constitution Preamble Image reflects a claim of copyright ownership for visual  
13 material entitled “We the People Preamble to the United States Cons [sic].” *Id.* Ex  
14 2, Rows 141, 142.

15 (6) Image Id. No. JS1000417 (“Original United States Constitution  
16 Image”): The Original United States Constitution Image reflects a claim of  
17 copyright ownership for visual material entitled “Original United States  
18 Constitution.” *Id.* Ex. 2, Rows 148, 158, 208, 211, 248, 249, 285.

19 (7) Image Id. No. JS1262731 (“Constitution of the United States of  
20 America Image”): The Constitution of the United States of America Image reflects  
21 a claim of copyright ownership for visual material entitled “Constitution of the  
22 United States of America.” *Id.* Ex. 2, Rows 157, 168, 175, 273, 283.

23 (8) Image Id. No. JS1000416 (“Original Declaration of Independence  
24 Image”): The Original Declaration of Independence Image reflects a claim of  
25 copyright ownership for visual material entitled “Original Declaration of  
26 Independence. *Id.* Ex. 2, Rows 160, 271, 280.

1 (9) Image Id. No. JS1000412 (“Front of One Dollar Bill Image”): The  
2 Front of One Dollar Bill Image reflects a claim of copyright ownership for visual  
3 material entitled “Front of One Dollar Bill.” *Id.* Ex. 2, Row 167.

4 (10) Image Id. No. JS1262253 (“American Flag with 13 Stars Image”):  
5 The American Flag with 13 Stars Image reflects a claim of copyright ownership for  
6 visual material entitled “American Flag with 13 Stars.” *Id.* Ex. 2, Rows 189, 217.

7 (11) Image Id. No. JS1568438 (“\$20 Bill Image”): The \$20 Bill Image  
8 reflects a claim of copyright ownership for visual material entitled “\$20 Bill.” *Id.*  
9 Ex. 2, Row 192.

10 (12) Image Id. No. JS004517 (“Florida State Seal Image”): The Florida  
11 State Seal Image reflects a claim of copyright ownership for visual material  
12 entitled “Florida State Seal.” *Id.* Ex. 2, Row 222.

13 (13) Image Id. No. JS1000403 (“13-Star American Flag Image”): The 13-  
14 Star American Flag Image reflects a claim of copyright ownership for visual  
15 material entitled “13-Star American Flag.” *Id.* Ex. 2, Row 233.

16 (14) Image Id. No. 42-23343756 (“The School of Athens Image”): The  
17 School of Athens Image reflects a claim of copyright ownership for visual material  
18 entitled “Detail of <The School of Athens> by Raphael.” *Id.* Ex. 2, Row 293.

19 (15) Image Id. No. 22531059 (“Original Colonial Flag Image”): The  
20 Original Colonial Flag Image reflects a claim of copyright ownership for visual  
21 material entitled “This is the original colonial flag with 12.” *Id.* Ex. 3, Row 23, 24.

22 (16) Image Id. No. ESOHO464910 (“The Entire Original U.S. Constitution  
23 Image”): The Entire Original U.S. Constitution Image reflects a claim of copyright  
24 ownership for visual material entitled “The entire original U.S. Constitution on its  
25 faded parchment paper.” *Id.* Ex. 7, Rows 120, 146.



## ARGUMENT

1  
2 Counts I and II of the Complaint must be dismissed in part because they fail  
3 to satisfy a necessary precondition to a claim of copyright infringement: pleading  
4 works for which the plaintiff is entitled to claim copyright protection. Sohm  
5 cannot proceed on his copyright infringement claims with regard to photos that are  
6 no more than faithful copies of well-known works of art, famous documents, and  
7 national symbols, all of which were created by others, by the government, or have  
8 long been in the public domain. None of these photos exhibits the necessary  
9 modicum of independent authorial creativity on Sohm's part, and are therefore not  
10 copyrightable by him, and the underlying copyright infringement claims must be  
11 dismissed as a matter of law.

### **A. Legal Standard Applicable to This Motion**

12 Under Rule 12(b)(6), a district court must dismiss a claim if it does not state  
13 a basis upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal may  
14 be based on either the "lack of a cognizable legal theory or the absence of  
15 sufficient facts alleged under a cognizable legal theory." *ScriptsAmerica, Inc. v.*  
16 *Ironridge Global LLC*, 119 F. Supp. 3d, 1213, 1232-33 (C.D. Cal. 2015) (citing  
17 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)). Though the  
18 court must accept all well-pleaded allegations of fact in the complaint, it is "not  
19 required to accept as true conclusory allegations which are contradicted by  
20 documents referred to in the complaint." *Warren v. Fox Family Worldwide, Inc.*,  
21 328 F.3d 1136, 1139 (9th Cir. 2003) (citations omitted).  
22

### **B. Sohm's Claims Based on Photos that Slavishly Copy Well-Known Works in the Public Domain Are Barred**

23 To establish copyright infringement, a plaintiff must prove two elements:  
24  
25 "(1) ownership of a valid copyright, and (2) copying of constituent elements of the  
26 work that are original." *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir.  
27  
28



1 2003) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361  
2 (1991)). Thirty-nine of Sohm's claims fail the first, fundamental requirement: he  
3 cannot own a valid copyright in these photos because they are mere facsimiles of  
4 existing works in the public domain reflecting not a shred of originality, and are  
5 therefore not capable of copyright protection.

6 The Copyright Act is clear: "Copyright protection subsists . . . in *original*  
7 *works of authorship* fixed in any tangible medium of expression, now known or  
8 later developed, from which they can be perceived, reproduced, or otherwise  
9 communicated, either directly or with the aid of a machine or device." 17 U.S.C.  
10 § 102(a) (emphasis added). "The *sine qua non* of copyright is originality. To  
11 qualify for copyright protection, a work must be original to the author." *Feist*  
12 *Publ'ns, Inc.*, 499 U.S. at 345.

13 The *Feist* Court explained that "Original, as the term is used in copyright,  
14 means only that the work was independently created by the author (*as opposed to*  
15 *copied from other works*), and that it possesses at least some minimal degree of  
16 creativity." *Id.* at 345 (emphasis added). While "[t]he standard of originality is  
17 low, . . . it does exist." *Id.* at 362. That is because, "[t]here remains a narrow  
18 category of works in which the creative spark is utterly lacking or so trivial as to be  
19 virtually nonexistent." *Id.* at 359. This definitive, if low, threshold serves a critical  
20 purpose: "[C]opyright rewards originality, not effort." *Id.* at 364.

21 Admittedly, most photos will, without much difficulty, satisfy this threshold  
22 requirement for copyright protection. *See Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d  
23 1068, 1076-77 (9th Cir. 2000). But courts have identified a glaring exception to  
24 this general truth: works that merely copy existing works, adding nothing, are not  
25 entitled to copyright protection. Indeed, "[o]ne who has slavishly or mechanically  
26 copied a work from others may not claim to be an author of that work." Melville  
27 B. Nimmer and David Nimmer, *Nimmer on Copyright* § 1.06(A) (2016); *see also*

1 *Stern v. Weinstein*, 512 F. App'x 701, 703 (9th Cir. 2013) (“Stern’s post is not  
2 copyrightable because it lacks the ‘modicum of creativity’ necessary to satisfy the  
3 originality requirement of the Copyright Act.”).

4 In *ATC Distribution Group, Inc. v. Whatever It Takes Transmissions &*  
5 *Parts, Inc.*, for example, the Sixth Circuit rejected a claim for copyright  
6 infringement based on hand-drawn sketches of transmissions parts that appeared in  
7 a catalogue, and which were copied from photos in competitors’ catalogues. 402  
8 F.3d 700, 712 (6th Cir. 2005). The court was unambiguous: “The illustrations  
9 were intended to be as accurate as possible in reproducing the parts shown in the  
10 photographs on which they were based, a form of slavish copying that is the  
11 antithesis of originality.” *Id.*; see also *Meshwerks, Inc. v. Toyota Motor Sales*  
12 *U.S.A., Inc.*, 528 F.3d 1258, 1267 (10th Cir. 2008) ([W]e hold, as many before us  
13 have already suggested, that, standing alone, ‘[t]he fact that a work in one medium  
14 has been copied from a work in another medium does not render it any the less a  
15 ‘copy.’” (quoting *Nimmer* § 8.01(B)); *Entm’t Res. Grp., Inc. v. Genesis Creative*  
16 *Grp., Inc.*, 122 F.3d 1211, 1221-24 (9th Cir. 1997) (denying copyright protection  
17 to 3-D costumes based on 2-D cartoon characters).

18 Likewise, in *Bridgeman Art Library, Ltd. v. Corel Corp.*, the court rejected  
19 claims for copyright in color transparencies of paintings that were in the public  
20 domain – almost exactly the situation presented here. 36 F. Supp. 2d 191, 197  
21 (S.D.N.Y. 1999). Mere copies, the court held, merit no protection. *Id.* (“In this  
22 case, plaintiff by its own admission has labored to create ‘slavish copies’ of public  
23 domain works of art. While it may be assumed that this required both skill and  
24 effort, there was no spark of originality—indeed, the point of the exercise was to  
25 reproduce the underlying works with absolute fidelity. Copyright is not available  
26 in these circumstances.”); see also *L. Batlin & Son, Inc. v. Synder*, 536 F.2d 486,  
27 492 (2d Cir. 1976) (reversing district court and finding that a plastic reproduction

1 of a mechanical bank was not entitled to copyright protection, and observing, “[t]o  
2 extend copyrightability to miniscule variations would simply put a weapon for  
3 harassment in the hands of mischievous copiers intent on appropriating and  
4 monopolizing public domain work”).<sup>3</sup>

5 The particular photos at issue here fall precisely into the category of slavish  
6 copies for which copyright protection is simply unavailable. Each of the photos  
7 reproduces, without alteration, famous works long in the public domain and for  
8 which this court can take judicial notice.<sup>4</sup> Indeed, it is hard to imagine more iconic

9  
10 <sup>3</sup> While not directly at issue in this Motion, certain of plaintiff’s claimed  
11 copyrights, such as those in photos of license plates, road signs and trash cans, are  
12 suspect for a related reason: they merely present, without additional creative input,  
13 objects as they already exist in the world. In *Meshwerks, Inc. v. Toyota Motor*  
14 *Sales U.S.A., Inc.*, for example, the Tenth Circuit considered whether a contractor  
15 that created precise digital wire-frame models of Toyota cars and trucks could  
16 possess a copyright in those models. 528 F.3d 1258, 1268 (10th Cir. 2008). That  
17 court highlighted the considerable time and skill that went into creating those  
18 models, but nonetheless came to the clear conclusion that “because the end-results  
19 were unadorned images of Toyota’s vehicles, the appearances of which do not owe  
20 their origins to Meshwerks, we are unable to reward that skill, effort, and labor  
21 with copyright protection.” *Id.* at 1268; *see also Oriental Art Printing, Inc. v.*  
22 *Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 550 (S.D.N.Y. 2001) (granting  
23 motion to dismiss claims of copyright infringement based on photographs of  
24 Chinese food dishes appearing on a menu because “[t]he Court finds that this is the  
25 rare case where the photographs contained in plaintiffs’ work lack the creative or  
26 expressive elements that would render them original works subject to protection  
27 under the Copyright Act. The photographs lack any artistic quality, and neither the  
28 nature or content of the photographs, nor plaintiffs’ description of their  
preparation, give the Court any reason to believe that any ‘creative spark’ was  
required to produce them. The photographs. . . are direct depictions of the most  
common Chinese food dishes as they appear on the plates served to customers at  
restaurants.”).

25 <sup>4</sup> “On a motion to dismiss, it is proper for the court to consider matters  
26 subject to judicial notice pursuant to Fed. R. Evid. 201. *See Mir v. Little Co. of*  
27 *Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988). Rule 201 allows a court to take  
28 judicial notice of facts that are either ‘(1) generally known within the territorial

1 American images: The Declaration of Independence, The Constitution, the original  
2 American colonial flags, the One Dollar Bill, the Twenty Dollar Bill, and the  
3 Presidential Seal. Sohm has also simply duplicated the State Seal of Florida, and a  
4 portion of one of the most famous frescoes of the Renaissance period, which has  
5 been displayed for over five centuries at the Apostolic Palace in Vatican City.  
6 These are not photos containing any artistic interpretation, as blatantly evident  
7 from the pictures attached to the Complaint itself. *Cf.* Ex. A to Zansberg Decl.  
8 This is exactly the mechanical duplication the court in *Feist* had in mind when  
9 delineating the required threshold of originality.

10 **CONCLUSION**

11 For the foregoing reasons, McGraw-Hill Education respectfully requests that  
12 the Court dismiss Counts I and II of the Complaint, as to the specific exhibit and  
13 row numbers listed *supra* herein and as depicted in Zansberg Decl., Ex. A, to the  
14 extent these claims allege infringement of photos that are not capable of copyright  
15 protection in the first instance.

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25 jurisdiction of the trial court; or (2) capable of accurate and ready determination by  
26 resort to sources whose accuracy cannot reasonably be questioned.” *Zella v. E.W.*  
27 *Scripps Co.*, 529 F. Supp. 2d 1124, 1128-29 (C.D. Cal. 2007) (quoting Fed. R.  
Evid. 201(b)).

1 Respectfully submitted on April 25, 2016,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 25th day of April, 2016, served via the Court’s electronic filing system, a true and correct copy of the above and foregoing Motion and all attachments thereto on counsel as follows:

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