



interest under the copyright laws of the United States and the common law. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 (federal question), 1338 (copyright), and 1367 (supplemental jurisdiction).

### VENUE

6. Venue is appropriate in this District pursuant to 28 U.S.C. §§ 1391(a) and (b) and 28 U.S.C. § 1400(a).

### FACTS

7. Sohm is the creator and owner of copyrights in the attached photographic images (“Photographs”) depicted in Exhibits 1, 2, 3, 4, 5, 6, and 7.

8. Alternatively, if deemed to be works for hire, VOA owns copyrights in the Photographs.

9. Each of the Photographs is an original work of authorship. Without limiting the generality of the foregoing, Exhibit 11 identifies the elements of the following Photographs that resulted from Sohm’s creative decisions: Image Id. No. JS1000460 (the “Presidential Seal of the US Image”); Image Id. No. JS004492 (“The Constitution Image”); Image Id. No. JS999775 (“Declaration of Independence Image”); Image Id. No. JS999774 (“Declaration of Independence Image II”); Image Id. No. JS1000418 (“Constitution Preamble Image”); Image Id. Nos. JS1000417 and ESOHO464910 (“Original United States Constitution Image” and “The Entire Original U.S. Constitution Image”); Image Id. No. JS1262731 (“Constitution of the United States Image”); Image Id. No. JS1000416 (“Original Declaration of Independence Image”); Image Id. No. JS1000412 (“Front of One Dollar Bill Image”); Image Id. No. JS1262253 (“American Flag with 13 Stars Image”); Image Id. No. JS1568434 (“\$20 Bill Image”); Image Id. No. JS004517 (“Florida State Seal Image”); Image Id. Nos. JS1000403 and 22531059 (“13-Star America Flag Image” and “Original Colonial Flag Image”).

10. As set forth in Exhibits 1-7, the Photographs have been registered with the United States Copyright Office.

11. Between 1993 and 2012, in response to permission requests from MHE, Sohm – either directly or by conducting business through his solely owned corporations, Chromosohm, Inc. and its successor VOA – sold MHE limited licenses to use copies of the Photographs in particular

educational publications identified in MHE's requests. The licenses granted MHE were expressly limited by number of copies, distribution area, language, duration, and/or media, as summarized in Exhibit 1.

12. In addition to Photographs Plaintiffs directly licensed to MHE, Plaintiffs also entered into agreements with stock photography agencies Corbis Corporation ("Corbis"), Jupiter Images Corporation, Photo Researchers, Inc., Picture Quest, Stock Boston, Inc., and The Image Works ("Agencies"), authorizing them to grant limited licenses for use of the Photographs to MHE, summarized in Exhibits 2-7 respectively.

13. After obtaining the licenses, MHE made wholesale or verbatim use of all of Plaintiffs' original authorship in the Photographs, and exceeded the licenses and infringed Plaintiffs' copyrights in the Photographs in various ways, including:

- a. printing more copies of the Photographs than authorized;
- b. distributing publications containing the Photographs outside the authorized distribution area;
- c. publishing the Photographs in electronic, ancillary, or derivative publications without permission;
- d. publishing the Photographs in international editions and foreign publications without permission; and/or
- e. publishing the Photographs beyond the specified time limits.

14. Upon information and belief, after obtaining access to the Photographs, MHE also used them without any license or permission in additional publications that have not yet been identified. Because MHE alone knows of these wholly unauthorized uses, Plaintiffs cannot further identify them without discovery. Examples of MHE's wholly unauthorized uses of other photographers' images are identified in Exhibit 12.

15. MHE alone knows the full extent to which it has infringed Plaintiffs' copyrights by making unauthorized uses of the Photographs, but it has not shared this knowledge with Plaintiffs.

16. More than two dozen other photographers and stock photography agencies have brought copyright infringement actions against MHE based on the same practice that Plaintiffs allege here.

17. The following examples of unauthorized printings illustrate MHE's practice of

infringing copyrights in photographs:

- a. MHE licensed to print 100,000 copies of images in *Algebra 1* 2003. It printed 1,213,373 copies.
- b. MHE licensed to print 100,000 copies of images in *Pre-Algebra* 2003. It printed 837,783 copies.
- c. MHE licensed to print 300,000 copies of images in *Everyday Math* 2007. It printed 779,281 copies.
- d. MHE licensed to print 60,000 copies of images in *Macmillan Health and Wellness, Grade 3*. It printed 345,050 copies.
- e. MHE licensed to print 60,000 copies of images in *Macmillan Health and Wellness, Grade 4*. It printed 365,000 copies.
- f. MHE licensed to print 60,000 copies of images in *Macmillan Health and Wellness, Grade 5*. It printed 358,000.
- g. MHE licensed to print 100,000 copies of images in *Science 2008 – California Grade 4*. It printed 249,533.
- h. MHE licensed to print 100,000 copies of images in *Biology 10e* 2009. It printed 195,958.
- i. MHE licensed to print 105,000 copies of images in *Physics: Principles & Problems* 2002. It printed 289,449.
- j. MHE licensed to print 100,000 copies of images in *Physics: Principles & Problems* 2005. It printed 594,608.
- k. MHE licensed to print 100,000 copies of images in *Glencoe Science* 2005. It printed 580,377.
- l. MHE licensed to print 100,000 copies of images in *The World and Its People* 2005. It printed 298,178.
18. In a parallel case, *Grant Heilman Photography, Inc. v. McGraw-Hill School Education Holdings, LLC, et al.*, No. 5:12-cv-2061-MMB, MHE conceded liability for **1,092** claims of copyright infringement pertaining to a single licensing agency. *See* Exhibit 8.
19. In the fall of 2014 in the same case, a jury sitting in the Eastern District of Pennsylvania found MHE liable for infringement of 38 photographs in 11 textbooks by committing the same scheme Plaintiffs allege here. *See Heilman*, No. 5:12-cv-2061-MMB (Doc. 180, Judgment). The jury awarded \$127,087 in actual damages and profits to that stock photography agency.
20. On November 25, 2014, Judge Rebecca Pallmeyer in the Northern District of Illinois found MHE liable on summary judgment for 81 counts of copyright infringement for

engaging in the same scheme Plaintiffs allege here (“ . . . McGraw-Hill violated the licensing agreements in three distinct ways: print overruns, distribution outside the authorized geographic areas, and unlicensed reproductions in electronic media.”). See *Panoramic Stock Images, Ltd. v. McGraw-Hill Global Education Holdings, LLC et al.*, No. 1:12-cv-09881 (Doc. 85, Memorandum Opinion and Order, p. 13).

### ***Indirect Copyright Infringement***

21. Upon information and belief, MHE facilitated the international distribution of the Photographs by transmitting them to other entities, subsidiary companies, divisions, affiliates, and/or third parties ("Third Parties"). MHE encouraged the Third Parties to distribute MHE's publications containing the Photographs in new territories, to translate its publications into new languages, and to adapt its publications for distribution in additional territories.

22. MHE materially contributed to the international distribution of publications containing the Photographs through its offices in Asia, Europe, Latin America and India that “serve customers worldwide.” (Exhibit 9.) “Each international group has its own sales, marketing, and editorial staffs, distribution center, and customer service operation. All distribute the full range of books produced by the McGraw-Hill Education Group -- either in English or in translated editions....” (*Id.*)

23. Upon information and belief, the Third Parties, after receiving the Photographs from MHE, translated the publications at issue into additional languages or published them in local adaptations or reprints and included the Photographs in these publications without Plaintiffs' permission. For example, MHE reproduced and distributed one or more photographs it obtained from Plaintiffs and/or their other licensors to the Third Party publisher, McGraw-Hill Interamericana Editores, S.A. DE C.V., for use in unauthorized Spanish translation *Understanding Human Sexuality 9th Edition*. (Exhibit 10.)

24. Upon information and belief, MHE's unauthorized reproduction and distribution to the Third Parties took place in the United States.

25. Without discovery, Plaintiffs have no way of comprehensively learning which Photographs MHE transmitted to Third Parties. Upon information and belief, MHE has, and could easily produce, documents evidencing the terms of its agreements with Third Parties and its

transmission and distribution of the Photographs.

26. Upon information and belief, MHE knew, when it reproduced and distributed the Photographs to the Third Parties – which MHE did not have the right to do – that the Third Parties would subsequently reproduce and distribute the Photographs without Plaintiffs’ authorization.

27. Upon information and belief, MHE knew that the Third Parties were continuing to reproduce and distribute Plaintiffs’ Photographs without authorization.

28. Upon information and belief, MHE had the right and ability to control the Third Parties’ use of the Photographs.

29. Upon information and belief, MHE directly profited from its transmission of the Photographs to the Third Parties since the Third Parties paid MHE for access to the content in its publications, which included the Photographs.

30. Exhibits 1-12 attached hereto are incorporated into this Complaint by this reference.

#### **COUNT I**

##### ***Copyright infringement against MHE***

31. Plaintiffs incorporate herein by this reference each and every allegation contained in the paragraphs set forth above.

32. The foregoing acts of MHE constitute infringements of Plaintiffs’ copyrights in the Photographs in violation of 17 U.S.C. §§ 501 *et seq.*

33. Plaintiffs suffered damages as a result of MHE’s unauthorized use of the Photographs.

#### **COUNT II**

##### ***Contributory and/or vicarious copyright infringement against MHE***

34. Plaintiffs incorporate herein by this reference each and every allegation contained in each paragraph above.

35. The foregoing acts of MHE constitute contributory and/or vicarious infringement of Plaintiffs’ copyrights in the Photographs in violation of 17 U.S.C. §§ 501 *et seq.*

36. Plaintiffs suffered damages as a result of the unauthorized use of the Photographs.

#### **COUNT III**

##### ***Breach of contract against MHE***

37. Plaintiffs incorporate herein by this reference the allegations in paragraphs 2-5, 9-10, and 12 above.

38. Upon information and belief, MHE entered into written agreements with Corbis, including the “Special Volume-Based Pricing Agreements” attached to the Declaration of Bonnie Beacher (Doc. 24-0) as Exhibits A, B and C (Docs. 24-1, 24-2, and 24-3).

39. The January 1, 2003 Special Volume-Based Pricing Agreement and May 1, 2006 Special Volume-Based Pricing Agreement included the following provisions:

- a. “Should actual usage vary from reported usage, Corbis reserves the right to assess standard rates to images not reported.” Page 4 of 7 under “Audit Rights.”
- b. “McGraw-Hill agrees to notify Corbis of the Images used on a per usage basis. McGraw-Hill must include image IDs within each notice. Corbis will invoice McGraw-Hill according to this schedule. Overdue statements will be sent to McGraw-Hill after 30 days. McGraw-Hill is responsible for all payments due.” Page 4 of 7 under “Invoicing/Usage Notification.”

40. Upon information and belief, the January 1, 2003 and May 1, 2006 Special Volume-Based Pricing Agreements incorporated Corbis’ Licensing Terms and Conditions, which include the following provision: “Corbis in its sole discretion reserves the right to bill you (and you hereby agree to pay) ten (10) times the normal license fee for any unauthorized use, in addition to any other fees, damages, or penalties Corbis may be entitled to under this Agreement or applicable law.”

41. Upon information and belief, each of the limited licenses for use of the Photographs that Corbis issued to MHE, in the form of an “Invoice and License Agreement,” included the following provisions:

- a. “Any license granted by Corbis is conditioned upon (i) your meeting all conditions and restrictions imposed by Corbis, and (ii) Corbis’ receipt of full payment by you for such use as invoiced by Corbis.”
- b. “Corbis in its sole discretion reserves the right to bill you (and you hereby agree to pay) ten (10) times the normal license fee for any unauthorized use, in addition to any other fees, damages, or penalties Corbis may be entitled to under this

Agreement or applicable law.”

42. Plaintiffs are third party beneficiaries of each of the Special Volume-Based Pricing Agreements and Invoice and License Agreements between Corbis and MHE.

43. Upon information and belief, Corbis on Plaintiffs’ behalf has performed all of its obligations under its agreements with MHE, and any conditions precedent to MHE’s performance occurred or were excused by MHE’s own wrongful conduct.

44. MHE breached the Special Volume-Based Pricing Agreements, the Invoice and License Agreements, and the Corbis Licensing Terms and Conditions that were part of those Agreements, by exceeding the limits of the limited licenses, failing to notify Corbis of the Images that MHE used on a per usage basis, and failing and refusing to pay the agreed-upon “ten (10) times the normal license fee for any unauthorized use.”

45. Plaintiffs suffered damages as a proximate result of MHE’s breach of contract.

#### COUNT IV

##### ***Breach of the implied covenant of good faith and fair dealing against MHE***

46. Plaintiffs incorporate herein by this reference the allegations contained in paragraphs 2-5, 9-10, 12, and 36-43 above.

47. In each of the agreements between MHE and Corbis alleged above there was an implied covenant of good faith and fair dealing, such that MHE was obligated to:

- a. implement a reliable system for tracking its uses of Plaintiffs’ Images;
- b. track its uses of Plaintiffs’ images for compliance with the terms of the Corbis-issued limited licenses; and
- c. report uses beyond license limits to Corbis, so Corbis could send MHE a bill for the agreed-upon “ten (10) times the normal license fee for any unauthorized use.”

48. Upon information and belief, MHE breached its implied obligation of good faith and fair dealing because it did not implement a reliable system for tracking its uses of Plaintiffs’ Photographs, did not track its uses of the Photographs for compliance with the terms of the Corbis-issued limited licenses, and did not disclose to Corbis uses beyond license limits.

49. MHE’s wrongful actions frustrated and prevented Corbis from acting under the express provision in the Agreements for payment of ten times the normal license fee, and denied

Plaintiffs the benefit of the Agreements.

50. Plaintiffs suffered damages as a proximate result of MHE's breach of the implied covenant of good faith and fair dealing.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs request the following:

1. A preliminary and permanent injunction against Defendants and anyone working in concert with Defendants from copying, displaying, distributing, selling or offering to sell the Photographs described in this Complaint and Plaintiffs' photographs not included in suit.

2. As permitted under 17 U.S.C. § 503, impoundment of all copies of Plaintiffs' Photographs used in violation of Plaintiffs' exclusive copyrights as well as all related records and documents and, at final judgment, destruction or other reasonable disposition of the unlawfully used Photographs, including digital files and any other means by which they could be used again by Defendants without Plaintiffs' authorization.

3. An award of Plaintiffs' actual damages and all profits that MHE derived from the unauthorized use of Plaintiffs' Photographs or, where applicable and at Plaintiffs' election, statutory damages.

4. An award of ten times the normal license fee for MHE's unauthorized use of Photographs within the scope of MHE's agreements with Corbis.

5. An accounting of (a) all of MHE's unauthorized uses of the Photographs, including uses without any license, and (b) all of MHE's profits attributable to all such uses.

6. An award of Plaintiffs' reasonable attorneys' fees.

7. An award of Plaintiffs' court costs, expert witness fees, interest and all other amounts authorized under law.

8. Such other and further relief as the Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiffs demand a trial by jury of all issues permitted by law.

DATED: October 20, 2016

Plaintiffs Joseph Sohm and Visions of America, LLC,  
by their attorneys,

*/s/ Christopher Seidman* \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that, on October 20, 2016, I caused a true and correct copy of the foregoing pleading to be filed via the cm/ecf system, which will serve a notice of electronic filing to all counsel of record.

*s/ Alex Rice Kerr*  
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Harmon & Seidman LLC