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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Tom Bean,

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No. CV10-8034-PCT-DGC

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Plaintiff,

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11

vs.

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ORDER

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Houghton Mifflin Harcourt Publishing
Company,

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Defendant.

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Defendant Houghton Mifflin Harcourt Publishing Company has filed a motion to
dismiss Plaintiff Tom Bean’s complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).
Doc. 20. Plaintiff opposes the motion. Doc. 27. For reasons that follow, the Court will grant
Defendant’s motion.¹

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I. Background.

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Plaintiff is a photographer. Doc. 1 at ¶ 2. Defendant is a publisher of educational
textbooks. *Id.* at ¶ 3. Corbis Corporation is the licensing agent for Plaintiff. *Id.* at ¶ 8.
According to Plaintiff, between 2000 and 2009, Corbis, as Plaintiff’s licensing agent, sold
Defendant limited licenses for use of 150 of Plaintiff’s photographs. *Id.* at ¶ 8. Plaintiff

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¹ Plaintiff’s request for oral argument is denied. The parties have fully briefed the issues and
oral argument will not aid the Court’s decision. *See Lake at Las Vegas Investors Group, Inc.*
v. Pac. Malibu Dev. Corp., 933 F.2d 724, 729 (9th Cir. 1991). The briefing is particularly
sufficient given that the Court permitted Plaintiff to submit substantial briefing from a motion
for reconsideration filed in a related case. *See* Doc. 33, 34.

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1 alleges that Defendant willfully exceeded the permitted uses under the terms of the licenses
2 granted by Corbis. *Id.* at ¶ 10. On February 22, 2010, Plaintiff filed suit alleging that
3 Defendant infringed his copyrights in violation of 17 U.S.C. § 501, et seq. Doc. 1.

4 Plaintiff alleges that he transferred his ownership rights in the 150 images to Corbis.
5 Doc. 27 at 2. After obtaining rights to the images, Corbis applied to register six compilations
6 of images with the United States Copyright Office, each of which contained between 11,000
7 and 613,000 photographs. *Id.* at 2-3. Each of the six compilations contained some of
8 Plaintiff's 150 images, along with images from numerous other photographers. According
9 to the complaint, all of Plaintiff's images were registered with the United States Copyright
10 Office under one of six compilation registration numbers: VA 863-783 (which contains
11 images numbered 1-98 in Plaintiff's complaint), VA 863-785 (which contains images
12 numbered 99-211 in Plaintiff's complaint), VA 1-115-519 (which contains images 212-223
13 in Plaintiff's complaint), VA 1-132-628 (which contains images 224-242 of Plaintiff's
14 complaint), VA 1-288-586 (which contains images 243-44 of Plaintiff's complaint), and VA
15 1-408-166 (which contains image 245 of Plaintiff's complaint).² *Id.* Each of the six
16 registration documents clearly indicates that Corbis is the author of the compilation and that
17 other authors created the individual photographs within the compilation. *See* Doc. 20-1 at
18 2-3; Doc. 20-2 at 2-3; Doc. 20-3 at 2-3; Doc. 20-4 at 2-3; Doc. 20-5 at 2-5; Doc. 20-6 at 2-5.
19 The registration document for registration number VA 863-783 lists Plaintiff as one of the
20 authors of the photographs, but does not include any information on the titles of the
21 individual images. Doc. 20-1 at 2-3. The registration documents for the other five
22 registration numbers do not mention Plaintiff as the author, nor do they mention the titles of
23 any of the individual photographs. Doc. 20-2 at 2-3; Doc. 20-3 at 2-3; Doc. 20-4 at 2-3; Doc.

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25 ² Plaintiff did not attach copies of the registration certificates to his complaint. Doc. 1.
26 Defendant did provide the Court with the copyright registrations, and has requested that the
27 Court take judicial notice of them pursuant to *Knievel v ESPN*, 393 F.3d 1068, 1076 (9th Cir.
28 2005). Doc. 20 at 3. Plaintiff does not object to the Court's consideration of the copyright
registrations and included copies in his response to Defendant's motion. *See* Doc. 27. The
Court accordingly will consider the certificates in this order.

1 20-5 at 2-5; Doc. 20-6 at 2-5.

2 Defendant argues that Plaintiff's complaint should be dismissed because the images
3 were not individually registered in compliance with 17 U.S.C. § 409, but rather were
4 registered only as part of a compilation. Defendant contends that Plaintiff therefore cannot
5 bring suit for infringement on the individual photographs.

6 **II. Legal Standard.**

7 **A. Rule 12(b)(6).**

8 When analyzing a complaint for failure to state a claim to relief under Rule 12(b)(6),
9 the factual allegations “are taken as true and construed in the light most favorable to the
10 nonmoving party.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009) (citation
11 omitted). To avoid a Rule 12(b)(6) dismissal, the complaint must plead “enough facts to
12 state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
13 570 (2007)).

14 **B. The Copyright Act.**

15 Under 17 U.S.C. § 102, an applicant may seek to obtain copyright protection for any
16 “original works of authorship fixed in any tangible medium of expression,” which includes
17 literary works, musical works, and pictorial works. Under 17 U.S.C. § 103, an applicant may
18 also seek to obtain copyright protection for a “compilation or derivative work[.]” Under 17
19 U.S.C. § 101, a compilation is defined as “a work formed by the collection and assembling
20 of preexisting materials or of data that are selected, coordinated, or arranged in such a way
21 that the resulting work as a whole constitutes an original work of authorship.” In other
22 words, an applicant may obtain copyright protection for the compilation itself – that is, the
23 original work of compiling the various data or materials included in the compilation – even
24 if the applicant does not actually own or have a copyright in the individual data or materials
25 that make up the compilation. 17 U.S.C. § 101; *see also* 17 U.S.C. § 201(c) (“Copyright in
26 each separate contribution to a collective work is distinct from copyright in the collective
27 work as a whole, and vests initially in the author of the contribution.”). Because
28 compilations and collective works may include material that does not belong to the applicant,

1 the Copyright Act makes clear that the “copyright in a compilation . . . extends only to the
2 material contributed by the author of such work, as distinguished from the preexisting
3 material employed in the work, and does not imply any exclusive right in the preexisting
4 material.” 17 U.S.C. § 103(a).

5 The process by which an applicant may register his copyright for an individual work
6 or a compilation is governed by § 409 and requires that any copyright registration include
7 “the name . . . of the author or authors,” “the title of the work,” and certain other information.
8 More detailed requirements and conditions for the registration of copyrights are set out in 37
9 C.F.R. § 202.3. If an applicant seeks to register a compilation, the applicant must follow the
10 rules set out in § 409 and in 37 C.F.R. § 202.3(b)(5), which governs group registrations. If
11 an applicant seeks to register an individual work, the applicant must follow the rules set out
12 in § 409 and in 37 C.F.R. § 202.3(b)(4), which governs the registration of individual works.

13 Proper registration of a work or compilation is important because a plaintiff cannot
14 bring a “civil action for infringement of [a] copyright in any United States work” until
15 “preregistration or registration of the copyright claim has been made” in accordance with the
16 Copyright Act. 17 U.S.C. § 411; *see Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237
17 (2010). Thus, before bringing a claim for infringement, a plaintiff must have properly
18 registered his work or compilation pursuant to § 409.

19 This requirement is not entirely inflexible. Under § 411(b), a registration will be
20 deemed to satisfy the requirements of § 409 “regardless of whether the certificate contains
21 any inaccurate information, unless— (A) the inaccurate information was included on the
22 application for copyright registration with knowledge that it was inaccurate; and (B) the
23 inaccuracy of the information, if known, would have caused the Register of Copyrights to
24 refuse registration.”

25 **III. Analysis.**

26 Defendant argues that none of Plaintiff’s individual photographs was registered.
27 Plaintiff argues that the individual images were properly registered by Corbis. The question
28 before the Court is whether Corbis’s registration of six compilations containing numerous

1 photographs authored by different authors, all of whom assigned their rights in their
2 photographs to Corbis before registration, had the effect of registering the individual works
3 in the compilations to the individual authors, permitting each author to sue for copyright
4 infringement. The Court finds that they did not.

5 Under § 409, a copyright registration application must include “the name . . . of the
6 author or authors” and “the title of the work[.]” 17 U.S.C. § 409. If an applicant is seeking
7 to copyright an individual work, the applicant will name the author or authors of the work,
8 the title of the work, and will also include other information required by § 409 and 37 C.F.R.
9 § 202.3(b)(4). If the applicant is seeking to copyright a compilation, the applicant will name
10 the author of the compilation, the title of the compilation, and will include other information
11 required by § 409 and 37 C.F.R. § 202.3(b)(5).

12 Corbis filed six certificates of registration for six different compilations, each of which
13 contained thousands of photographs authored by numerous photographers. Each certificate
14 contained one title, which was the name Corbis gave to the compilation. *See, e.g.*, Doc. 20-1
15 at 2 (including one work entitled “CORBIS DIGITAL ONLINE DATABASE MARCH, 17
16 1997 GROUP”). The titles of the individual photographs were not listed in the certificates.
17 Each certificate named a few, but not all, of the authors of the photographs. *See, e.g.*, Doc.
18 20-1 at 2 (naming the authors of the photographs as “James Amos, Dave Bartruff, Tom Bean
19 and 125 other photographers); *see also* Doc. 20-2 at 2-3; Doc. 20-3 at 2-3; Doc. 20-4 at 2-3;
20 Doc. 20-5 at 2-5; Doc. 20-6 at 2-5.

21 Plaintiff argues that Corbis did not need to follow the requirements of § 409 in order
22 to copyright the individual photographs. He argues that because § 411 acts to save
23 registrations that do not comply with all the requirements of § 409, the fact that Corbis’s
24 registrations failed to comply fully with § 409 is irrelevant to the validity of the copyrights.
25 The Court does not agree.

26 Under § 411, “[a] certificate of registration satisfies the requirements of [section 409],
27 regardless of whether the certificate contains any inaccurate information, unless– (A) the
28 inaccurate information was included on the application for copyright registration with

1 knowledge that it was inaccurate; and (B) the inaccuracy of the information, if known, would
2 have caused the Register of Copyrights to refuse registration.” 17 U.S.C. § 411(b).
3 Applying the plain language of the statute, *see U.S. v. Daas*, 198 F.3d 1167, 1174 (9th Cir.
4 1999), the Court finds that § 411 is intended to save otherwise valid registrations that contain
5 unintentionally inaccurate information.

6 In this case, Corbis submitted valid compilation registrations. The compilation
7 registrations do not need to be saved by § 411. Even if we assume that Corbis also sought
8 to register each individual photograph in the compilations, the Court cannot find that § 411
9 saves the thousands of attempted registrations. Corbis did not merely provide inaccurate
10 information for the individual photographs, it failed to comply with the requirements of § 409
11 almost completely. It failed to provide the titles of any of the individual photographs, largely
12 failed to identify the authors of the photographs, and failed to connect any author with any
13 individual photograph. Reading § 411 to save such incomplete registrations would eviscerate
14 the requirements of § 409. Registrations would be saved even when they entirely omit key
15 information required by § 409. The Court cannot read § 411 so broadly. Plaintiff’s reliance
16 on *Bird Barrier America, Inc. v. Bird-B-Gone, Inc.*, SACV 09-0418 AG, 2010 WL 761241
17 (C.D. Cal. Mar. 1, 2010), is misplaced because the plaintiff in that case merely mislabeled
18 a work in an otherwise valid application and did not omit information required by § 409
19 altogether.

20 Plaintiff makes several arguments as to why § 411(b) should be read to cover the
21 omissions that occurred in Corbis’s attempted registrations, but none is persuasive. Plaintiff
22 cites to the legislative history of the statute, *see Doc. 27* at 6-7, and to a treatise discussing
23 inadvertent errors made in copyright applications, *see Doc. 27* at 9-10, but these citations do
24 not change the fact that the plain language of § 411 applies to inaccuracies in otherwise valid
25 applications, not to complete omissions of information necessary to determine what work
26 was being copyrighted. Plaintiff also attempts to argue that § 411, because it was enacted
27 after § 409, trumps § 409 to the extent they are contradictory. *Doc. 27* at 11-15. But the
28 Court does not find that the two statutes conflict. Section 409 requires certain information

1 to be included in an application, and § 411 prevents an approved application from being
2 rendered invalid if some of the information was unintentionally inaccurate. These provision
3 are not contradictory.

4 Plaintiff argues at length that *Muench v. Houghton Mifflin Harcourt Publishing Co.*,
5 —F. Supp. 2d—, 2010 WL 1838874 (S.D.N.Y. May 4, 2010), was incorrectly decided. The
6 Court need not determine whether *Muench* was decided correctly. The Court has not relied
7 on *Muench* in making its decision.

8 **IV. Conclusion.**

9 Corbis’s six compilation registrations, although valid for purposes of copyrighting the
10 compilations themselves, did not copyright the individual photographs within the
11 compilations. As a result, none of the 150 images at issue in this case is properly registered
12 under the Copyright Act. Without such registration, Plaintiff cannot bring a “civil action for
13 infringement of [a] copyright[.]” 17 U.S.C. § 411(a).³

14 Corbis filed a motion for leave to file an amicus curiae brief in support of Plaintiff.
15 Doc. 35. The Court will deny the motion. The Court read and considered Corbis’s
16 arguments raised in its amicus curiae memorandum in support of the plaintiff in a related
17 case, *see* Doc. 34-2 at 1-26, and the Court finds that consideration of Corbis’s proposed
18 amicus curiae brief in the present case will not aid the Court’s decision.

19 **IT IS ORDERED:**

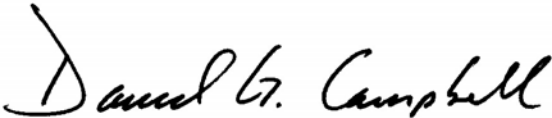
- 20 1. Defendant’s motion to dismiss (Doc. 20) is **granted**.
- 21 2. Corbis’s motion for leave to file an amicus curiae brief (Doc. 35) is **denied**.

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26 ³ The Court does not make any ruling on whether a compilation registration can ever have
27 the effect of registering the individual works contained in the compilation. The Court
28 decides only the narrow issue before it – whether Corbis’s six compilation registrations had
the effect of registering the individual photographs.

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3. The Clerk of Court shall terminate this action.

DATED this 9th day of August, 2010.



David G. Campbell
United States District Judge