

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

MICHAEL FOUNDATION, INC.,)
a Foreign corporation,)
)
Plaintiff and Defendant-in-Counterclaim,)
)
v.)
)
URANTIA FOUNDATION,)
an Illinois Charitable Trust,)
)
Defendant and Counterclaimant.)
)
- AND -)
)
URANTIA FOUNDATION,)
)
Counterclaimant and Third Party Plaintiff,)
)
v.)
)
HARRY McMULLAN III,)
a citizen of Oklahoma,)
)
Third Party Defendant,)
)
and MICHAEL FOUNDATION, INC.,)
a Foreign corporation)
)
Defendant-in-Counterclaim.)

Case No. CIV-00-885-W

**URANTIA FOUNDATION'S REPLY BRIEF IN SUPPORT
OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

McMullan and Michael Foundation (collectively “MF”) turn a blind eye to the years of effort and the support needed to make *The Urantia Book* (“*TUB*”) a reality, and a deaf ear to the longstanding and extensive uses of the “Urantia” and “Urantian” trademarks (the “Marks”) by Urantia Foundation (“UF”). MF’s Brief shows that its sheer determination to invalidate these rights has overwhelmed its logic and consistency.¹ MF began by alleging *TUB* cannot be copyrighted because no human authored its contents, but has now *radically shifted* position to argue *TUB* is not a composite work because it is the work of a single author, and that MF did not infringe because it did not copy the *entirety* of *TUB*. On trademark issues, MF’s asserts “fraud” against a lawyer who is no longer alive to defend his work without any supporting evidence of intent to defraud or materiality, and asserts “genericism” based solely on nominative uses of the Marks.

A. *Maaherra* Requires Summary Judgment on Copyright Validity.

Maaherra characterized the Conduit’s role as an “amanuensis” - the Conduit was “unconcerned” and “unconscious” during the origin of the Papers. *Urantia Foundation v. Maaherra*, 114 F.3d 955, 960 (9th Cir. 1997). The Court should follow *Maaherra* because the Conduit did not supply the minimal creative spark of authorship. The undisputed evidence is that the Conduit - if he or she was writing the Papers - was unconscious and totally unaware of the process. Ex. AA (attached), p.31 (Conduit was “unconcerned”); UF Tab² N, Ex. 6 (p.8 - Conduit stated, upon reviewing a Paper, he was a “dead duck” if the writer obtained possession of his checkbook); Ex. BB (attached), p.73. The evidence cited in MF Facts, ¶ 5, does not show that the Conduit was conscious, much less lent a creative spark. Accordingly, the reasoning of

¹ For example, MF’s brief selectively cites certain statements of spiritual belief as evidence, while it also decries the use of other statements of beliefs, depending upon what most advances its own ends. Also, when it suits MF, MF refers to “the Work” as the Urantia Papers rather than *TUB in its entirety*. Of course, the copyright at issue is the registered renewal copyright in *TUB*.

Maaherra applies, and UF is entitled to partial summary judgment.³ UF Brief, pp. 18-19.⁴ Were the Court to conclude that an issue for trial exists as to the Conduit's creative spark, summary judgment is still appropriate because *TUB* is a composite work ("composite" because multiple authors made separately copyrightable contributions), and UF was entitled to renew the copyright as its proprietor.

B. Urantia Foundation Is the Proprietor of a Composite Work.

Faced with summary judgment, MF jettisoned the positions taken in its pleadings.⁵ MF's only remaining argument that bears on copyright validity is that *TUB* is not a composite work, and it is based on the factually unsupportable contention that the Conduit authored *TUB* cover-to-cover. From this premise, MF argues that UF could not renew the copyright, and the renewal copyright is therefore invalid. As shown below, UF is proprietor of *TUB*, a composite work, and as the original copyright registrant, was entitled to renew its copyright in *TUB*.

Proprietor. Prior to the 1976 Copyright Act, "[a] common law copyright was capable of assignment so as to completely divest the author of his rights, without the necessity of observing

² "UF Tab" refers to the exhibits previously filed by UF at Tabs A-T with its motion and brief.

³ MF misrepresents UF's position in the *Burton* case, where Burton argued that the conduit wrote the papers and failed to assign it to the Contact Commission. UF assumed Burton's view of the facts for summary judgment purposes. However, UF advised the Court that "whether the author is an unknown superhuman being, or the unidentified individual who actually wrote the manuscript in his own handwriting, is immaterial." Ex. CC (attached), pp.5-6. UF advised Burton that it did *not* contend the conduit was the author. Ex. DD (attached, *Burton* Interrog. Answers 52-53). Ex. BB (attached), pp.66-67 (explaining UF's statements in *Burton*).

⁴ MF cites a variety of cases where parties fought over who among them was the "author" of a work. MF Brief, pp. 12-13. These cases are distinguishable because there is no contest for control of *TUB* in the instant case. MF is a third party that claims no copyright interest in *TUB*.

⁵ UF's motion dealt with the issues *actually raised* by MF. UF Opening Brief ("UF Brief"), p. 14 (citing issues raised); Joint Status Report (Aug. 31, 2000), pp. 4-5 (statement of issues). MF never previously asserted to the Court that *The Urantia Book* is not a "composite work," and should not be making new arguments at this advanced stage of the case. *Bethany Pharmacal, Inc. v. QVC, Inc.*, 241 F.3d 854, hn. 11 (7th Cir. 2001) (page ref. not available); *Missigman v. USI Northeast, Inc.*, 2001 WL 135238, *20 (S.D.N.Y. 2001).

any formalities.” *Nimmer*, §10.03[B][2], at 10-48 (Ex. EE, attached). Such an assignment could be oral or implied from conduct. *Id.* at 10-48-49; UF Brief, pp.15-16. MF may not, and apparently does not challenge UF’s title to common law copyright in the constituent parts of *TUB*. The Contact Commission had the unpublished manuscripts of the Papers, and later, UF (via the Declaration of Trust [“DOT”]) possessed the Papers, and the Sadler materials (discussed *infra*, at 5). Ex. EE (*Nimmer*, §10.03[B][2], at 10-49 [“[m]ere possession of a manuscript [is] sufficient evidence of an assignment. . . where over a long period of time, the author and other interested parties had acquiesced in the putative assignee’s ownership”).

By conduct and by the DOT, UF received all rights of the Contact Commission as compiler of the individual Papers. UF Facts, ¶¶ 17-31. From 1924 until 1942, Papers (along with the attendant common law copyright) were delivered to the Contact Commission gradually, each being studied, and then revised and expanded in response to questions submitted by the Contact Commission. MF Exhibit I (Dr. Sadler’s “History”), p.8, 18. As each new, expanded or revised Paper came in over the years,⁶ the Contact Commission maintained possession of *all* of the Papers. The first Paper appeared at least by 1924 (MF Ex. I, p.8 and UF Facts, ¶¶ 4, 11 [UF Tab B, ¶ 4 shows 1924]), and shortly thereafter, a group of 57 Papers appeared (MF Ex. I, p. 18). These early Papers were “enlarge[d]” and “engage[d]” (MF Ex. I, p.18) by questions over the next eighteen years. MF Ex. I, p.10 (last genetic questions asked in 1942); UF Facts, ¶¶ 11-14 (UF Tab B, ¶ 4 – May 7, 1934 diary entry refers to reviewing *revised* Papers). The process of organizing these Papers to include expansions, enlargements or revisions of Papers, while discarding older Papers (*e.g.*, the original 57 Papers), involved at least *de minimis* creativity, making the Contact Commission the party which assembled the Papers. *Maaherra*, 114 F.3d at

⁶ UF Tab A, p.2 states the papers did not all come sequentially; UF Tab G, pp. 15-16 describes original paper one later being expanded to two and then five papers.

958-59; *Feist Pub. v. Rural Tel. Serv., Inc.*, 499 U.S. 340, 345, 358 (1990) (“the requisite level of creativity is extremely low . . . no matter how crude, humble or obvious’ [the creative spark] might be”).⁷ Thus, when UF registered statutory copyright in *TUB*, it was proprietor of common law copyright in all contributions to *TUB* (expression, selection and arrangement). Because *TUB* is a composite work, as discussed *infra*, UF’s copyright renewal is valid. 17 U.S.C. § 304(a).

Composite Work. A composite work is a work comprised of separate copyrightable contributions or parts by more than one author. *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697, 699 (2d Cir. 1941); Ex. HH, attached (leg. history). Congress adopted this known definition of “composite work” by retaining the term in Section 304(a) of the 1976 Copyright Act. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1146 (10th Cir. 1999) (Congress legislates with knowledge of federal precedent). The historical notes to Section 304(a) of the 1976 Act state “Subsection (a) of Section 304 reenacts and preserves the renewal provision now in Section 24 [of the 1909 Act], for all the works presently in their first 28-year term.”⁸ Thus, the scope of “composite work” is the same under both the 1909 and 1976 Acts. *FBI v. Abramson*, 456 U.S. 615, 631 (1982) (statute construed

⁷ MF does not accurately describe the evidence cited in MF Facts, ¶ 11. In response to Requests for Admissions 21 and 22, UF stated it did not change the order of the final *typescript* papers (*i.e.*, the final manuscript of the compiled papers) in creating the printing plates. MF then cites the spiritual beliefs of Richard Keeler and Thomas Kendall that the Contact Commission organized the papers in the manner instructed by spiritual beings. *See* MF Facts, ¶ 11. Neither Mr. Keeler nor Mr. Kendall were members of the Contact Commission, and they lack personal knowledge regarding how the papers were actually assembled. UF Facts, ¶ 6; MF Brief, p.8 (lack of personal knowledge of those not there). UF explained the basis for statements by trustee Mr. Keeler and former trustee Mr. Kendall when it testified that UF believes the order of the papers within the book is the result of spiritual direction. Exhibit BB (attached), pp. 22-23.

⁸ The author (or his heirs) may renew copyright in any contribution(s) to a composite work even though the contribution was not separately registered originally. *Abend v. MCA, Inc.*, 863 F.2d 1465, 1470-72 (9th Cir.), *aff’d*, *Stewart v. Abend*, 495 U.S. 207 (1990). Regardless, the renewal copyright by the proprietor of the composite work continues to cover the copyright in each of the components of the work not separately registered or renewed. In this case, no heirs renewed copyright in any separate part of *TUB*, even though they had a right to do so.

consistent with its purpose). MF advocates such a narrow view of “composite works” as to deprive the term of meaning apart from encyclopedias and periodicals (two dissimilar kinds of works apart from having multiple components). *See Moskal v. U.S.*, 498 U.S. 103, 109-10 (1990) (every clause and every word in statute has meaning). In short, “composite work” means “multiple authors, separately copyrightable contributions.”

Applying this definition to the contentions of MF, the multiple authors of separately copyrightable contributions in *TUB* are:

1. MF argues the Conduit authored the Foreword and Papers.
2. As shown above, the Contact Commission compiled the Papers.
3. MF concedes William Sadler, Jr. wrote the materials set out in the first sixty pages of the book. UF Facts, ¶ 27; Opposing Brief, p.2 n.2. The Sadler contributions to *TUB* show creativity, and are thus copyrightable. *See* Ex. GG, attached (showing original content, selection).
4. Urantia Foundation compiled the Sadler materials with the Papers to create and publish *TUB* in the form in which copyright was registered. UF Facts, ¶ 1 (*see also* copyright registration certificate attached to UF answer, showing UF as author). *Lane v. First National Bank of Boston*, 687 F. Supp. 11, 17 (D. Mass. 1988) (original arrangement is a copyrightable part).

If, as MF asserts, the Conduit was a creative force giving rise to each of the Papers, *TUB* consists of separate contributions by multiple persons. Thus, *TUB* is a composite work.⁹

Cyclopedic Work. *TUB* is a “cyclopedic work.” UF Facts, ¶ 3 (admitted by MF).¹⁰ McMullan stated “*The Urantia Book* is a unique repository of information on a multitude of subjects from

⁹ As a public policy matter, the proprietor of copyright in a composite work should not be put to the task of gathering separate renewal copyright assignments from the multiple contributors in order to keep their respective contributions from lapsing into the public domain. *Cadence Ind. Corp. v. Ringer*, 450 F. Supp. 59, 64 (S.D.N.Y. 1978). This rationale for allowing the proprietor to renew via a blanket copyright renewal clearly applies in the case of *TUB*. Otherwise, UF would have to have obtained assignments of renewal copyright from all the heirs of the conduit (unknown in 1983, the year of renewal), the Contact Commission, and Sadler, Jr.

¹⁰ “Encyclopedia” means a work containing information on all or specialized branches of knowledge. *Field Ent. Edu. Corp. v. Cove Ind., Inc.*, 297 F. Supp. 989, 994 (E.D.N.Y. 1969). *TUB* offers information on virtually all if not all branches of knowledge, and exhaustively deals with specific topics such as cosmology and history. Parts I and II of *TUB* contain a

the structure of atoms to the structure of the universes.” McMullan Depo., p.24. Therefore, *TUB* was also renewable as a “cyclopedic work.” 17 U.S.C. § 304(a).

No Singular Authorship. MF proposes a far-fetched, non-existent legal standard that it cannot even meet in an attempt to show the book is not composite: *TUB* is a “unified¹¹ literary work of a single author.” MF Brief, p.10. MF likens *TUB* to an essay of Mill and the novels of Melville, Fitzgerald and Wolfe. Because *more than one author* made separately copyrightable contributions to *TUB*, as described *supra*, MF’s challenge to the renewal copyright (the book is not a composite work) collapses under the weight of MF’s own proposed standard. In addition to the preceding analysis, MF also disregards these important points:

- If the Conduit was the creative force behind the Papers, as MF asserts, the immediate delivery to the Contact Commission of each manuscript (and, with it, as shown *supra*, the attendant common law copyright) meant that the Conduit surrendered rights in the unpublished manuscripts *piecemeal*, and that he could not control the manner in which they were published, if at all. If Mill had assigned common law copyright in his essays “On Liberty,” “Thoughts on Parliamentary Reform,” and “Utilitarianism” separately, as each was completed, and a third party later obtained copyright in all three, and then published them together, adding copyrightable introductory material created by another person, such publication would be a composite work as opposed to the unified work of a single author.
- MF published Part IV of *TUB* because it narrates the story of “The Life and Teachings of Jesus.” See *Pacific South Co. v. Duncan*, 744 F.2d 1490, 1497 (11th Cir. 1984) (“coherent narrative” is a single work for copyright purposes), *cert. denied*, 471 U.S. 1004 (1985). McMullan called Part IV of *TUB* a “separate issue.” Ex. AA, pp. 31, 62. Indeed, in the preface to *JANR*, MF states “[t]he life of Jesus stands on its own” McMullan Aff., ¶ 20(e). A work within a work, but which “can stand alone” is what the law has referred to as a work within a *composite work*. *Hustler Mag., Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986).

comprehensive treatment of cosmology (UF Tab N, pp.56-57), while Part III of *TUB* contains a comprehensive treatment of world history. UF Facts, ¶ 3.

¹¹ MF argues that the Court ought not consider the spiritual beliefs of the parties, and then argues that *The Urantia Book* is “unified” on the basis of the religious beliefs of past and present UF trustees, who believe that spiritual beings known as the Revelatory Commission (Ex. BB, attached, p.71) advised the Contact Commission to put the papers together in a certain order and publish them together. MF Brief, p. 15. MF Exs. R-T merely reflect these spiritual beliefs.

- *TUB* (p.1008) describes itself as a composite work. UF Tab Q, p.115. “The book, itself, suggests it was written by a number of authors” and therefore the Papers and their organization have a composite look and feel. *Urantia Foundation v. Maaherra*, 895 F. Supp. 1347, 1354 (D. Ariz. 1995), *rev’d o.g.*, 114 F.3d 955 (9th Cir. 1997). Moreover, contrary to McMullan’s affidavit, the components of the book are described as “Papers,” not “chapters.”

MF therefore articulated a legal standard (unified literary work of one author) without support for the alleged singular authorship. UF has shown based on undisputed facts that *TUB* meets the test of a composite work, meaning the copyright in *TUB* was properly renewed by UF.¹²

Infringement. “A creative work does not deserve less copyright protection just because it is part of a composite work.” *Hustler*, 796 F.2d at 1155. UF registered and renewed copyright as proprietor of a composite work comprised of previously unpublished works, meaning UF is entitled to enforce copyright in *any* copyrightable part of the book. *Markham v. A.E. Borden Co.*, 206 F.2d 199, 201-02 (1st Cir. 1953); *Greenwich Film Productions, S.A. v. DRG Records*, 833 F. Supp. 248, 250-52 (S.D.N.Y. 1993) (assignee of copyright in sound recordings who added recordings into film and then registered copyright in film, could maintain copyright action for infringement of recordings alone). MF attempts to escape the consequences of its infringement by claiming Part IV is a divine “revelation.” The Court in *Maaherra*, 114 F.3d at 959, applied the well-known “idea-expression dichotomy,” correctly finding the facts/ideas (the “revelations in each Paper”) are not copyrightable. *Maaherra* never stated that one or more Papers constituted a revelation in the manner MF argues. Copyright protects expression, selection, and arrangement in works regardless of whether they merely report “facts.” E.g., *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977). Even if *TUB* was *merely* a compilation of expressionless, public domain facts (which it is not), like a

¹² There is no need to specifically address 1976 Act terms such as “collective works” or “compilations.” UF does object that MF Facts, ¶ 16 is based upon admissions from *Maaherra*, a previous case, and therefore inadmissible pursuant to F.R.C.P. 36(b)(4).

directory, extensive verbatim copying of 400,000 words, internal and external organization and arrangement is infringing conduct. *TransWestern Pub. Co. v. Multimedia Marketing Assoc.*, 133 F.3d 773, 776-77 (10th Cir. 1998).

MF infringed the copyright in *TUB*. UF Tab F, ¶¶ 18, 34.

C. The URANTIA® and URANTIAN® Trademarks Are Valid.

Fraud. The Court should address “fraud” and “genericism” on a mark-by-mark basis. *See Self-Realization Fellowship v. Ananda Church*, 59 F.3d 902, 909-912 (9th Cir. 1995). First, regarding fraud, MF alleges that UF concealed the Marks were the names of a religion. UF did not believe the Marks named religions when applying for the registrations, and UF still does not believe it. UF Facts, ¶¶ 38-39. Moreover, common names of religions may be marks for goods or services, so the alleged concealment is immaterial. UF Facts, ¶ 41. Second, MF alleges UF concealed the religious nature of itself, its publications, and its services. UF disclosed these religious aspects including the DOT. UF Facts, ¶ 37; *see* Ex. HH, attached. In addition, such religious aspects are immaterial. *Urantia Foundation v. Maaherra*, 895 F. Supp. 1338, 1342 (D.Ariz. 1995) (religious nature no basis for rejection of application); UF Brief, p.22-23, n.17.

Mr. Emrich, UF’s counsel, stated that “Urantian” is a coined word *only* in connection with the URANTIAN® mark, U.S. Reg. No. 1013544. It is unclear whether by “coined,” Mr. Emrich (now deceased) meant UF invented the word, that the word had no *commonly* accepted meaning (he stated “Urantian” is not “a dictionary word”), or that UF was the first to use the word in a commercial setting (“coined” distinctly connotes commerce).¹³ MF asserts that Mr. Emrich meant “invented” when he used “coined.” If this is true, there is, however, a lack of

¹³ MF lacks proof of intent to defraud in several respects. MF argues that Mr. Kendall should have known that the word “Urantian” was not coined, but MF does not show that Mr. Kendall saw Mr. Emrich’s statement, or consulted with him before it was filed. Likewise, MF posits that

fraudulent intent in that no evidence shows that Mr. Emrich was familiar with the contents of *TUB* such that he knew “Urantian” was used in *TUB*. The statement in question was not made to overcome an examiner’s objection. In fact, the statement is immaterial because trademark rights are acquired through use in commerce, not invention of the term. *Compton v. Fifth Ave. Ass’n*, 7 F.Supp.2d 1328, 1331 (M.D. Fla. 1998) (term’s inventor lacked trademark rights); UF Brief, p. 23, n.18.¹⁴

Genericism. The opposing parties have not shown a genuinely disputed issue of material fact regarding whether the Marks are “the generic name for the goods or services, or a portion thereof, for which [they are] registered.” 15 U.S.C. §1064(c). As to the three Marks registered for books and publications, neither “Urantia” nor “Urantian” have become synonyms for “books” or “publications,” the way “cellophane” became synonymous with “plastic wrap.”¹⁵ The Marks likewise are not synonymous with educational services or collective membership.¹⁶

MF claims that the relevant public is the limited group of persons for whom *TUB* has become the basis of their personal religion. However, it still has not met the burden set forth in 15 U.S.C. §1064(c). Moreover, “[t]he pool . . . must include all potential purchasers [of *TUB*]: the avid, the novice, and the not yet acquainted.” *Maaherra*, 895 F. Supp. at 1343. The “relevant

Mr. Keeler, who was not involved, stated that the word “Urantian” was not coined by UF, but never established that Mr. Emrich and Mr. Keeler used “coined” in the same way.

¹⁴ If Mr. Emrich merely said that “Urantian is not a dictionary word, and UF is the first to use the term on publications,” the registration would have been granted. There is, therefore, no need to speculate about the deceased’s meaning or his intentions.

¹⁵ The cases cited in MF Brief, p.31 n.12, and 32, held PRIMAL THERAPY and SUFISM generic as a class of treatment, and class of publications, respectively. MF’s other cases are inapplicable – they involve trade names rather than trademarks. *Self-Realization*, 59 F.3d at 909.

¹⁶ A mark that describes the good or service is descriptive, not generic. *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 193 (1985); *Self-Realization*, 59 F.3d at 911-912 (dealing with contestable marks). An incontestable mark such as those at issue **cannot** be cancelled on the basis that the mark describes some characteristic of the goods or services. *Park ‘N Fly*, 469 U.S. at 197; *Wilhelm Pudenz, GmbH v. Littlefuse, Inc.*, 177 F.3d 1204, 1209 (11th Cir. 1999).

public” for a book which sells thousands of copies a year, which has over 500,000 books in circulation, and which may be purchased on popular websites such as www.amazon.com should not be confined to the most “avid” readers. UF Facts, ¶¶ 43-44; UF Tab F, ¶¶ 13, 15; UF Tab K, ¶ 15 (only 5% of *TUB*

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CERTIFICATE OF SERVICE

This is to certify that on the 12th day of April 2001 a true and correct copy of the above and foregoing document was served by US Mail, first class, postage prepaid to:

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