

CASE NOS. 01-6347 & 01-6348

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

MICHAEL FOUNDATION, INC., a non-profit corporation,  
Plaintiff—Counterclaim Defendant—Appellee,

v.

URANTIA FOUNDATION, an Illinois charitable trust,  
Defendant—Third-Party and Counterclaim Plaintiff—Appellant,

v.

HARRY McMULLAN III,  
Third-Party Defendant—Appellee.

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On Appeal from the United States District Court  
for the Western District of Oklahoma

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District Court No. 0-884-W, The Honorable Lee R. West, Senior District Judge

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**BRIEF OF APPELLEES MICHAEL FOUNDATION, INC., AND  
HARRY McMULLAN III**

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**ORAL ARGUMENT NOT REQUESTED**

CORPORATE DISCLOSURE STATEMENT .....	1
PRIOR OR RELATED APPEALS .....	2
INTRODUCTION .....	3
STATEMENT OF FACTS .....	3
SUMMARY OF ARGUMENT .....	6
STANDARD OF REVIEW .....	8
ARGUMENT .....	12
I.    BECAUSE COPYRIGHT IN <i>TUB</i> WAS NEVER PROPERLY RENEWED, IT NOW REPOSES IN THE PUBLIC DOMAIN.	12
II.   SUBSTANTIAL EVIDENCE SUPPORTS THE JURY’S VERDICT THAT <i>TUB</i> IS NOT A "PERIODICAL, CYCLOPEDIA, OR OTHER COMPOSITE WORK."	16

	<u>Page</u>
A. The Absence of Multiple Authors Disqualifies <i>TUB</i> As a "Periodical, Cyclopedic, or Other Composite Work." . . .	17
B. The Absence of "Separate and Independent Works in Themselves" Further Disqualifies <i>TUB</i> As a "Periodical, Cyclopedic, or Other Composite Work." . . . . .	25
C. The Issue of Composite Work Was Properly Presented to the Jury. . . . .	30

III. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT THAT UF FAILED TO QUALIFY AS THE "EMPLOYER FOR WHOM SUCH WORK IS MADE FOR HIRE" ENTITLED TO RENEW <i>TUB</i> AS ITS "PROPRIETOR." . . . .	33
--	----

A. Substantial Evidence Shows That <i>TUB</i> Was Not a "Work Made for Hire." . . . . .	34
1. No Predecessor to UF Was the "Employer" of Writer	34
2. No Predecessor to UF "Specially Commissioned" Preparation of <i>TUB</i> . . . . .	34
a) The district court properly instructed the jury as	

	<u>Page</u>
UF requested. . . . .	35
b) Substantial Evidence Supports the Jury's Determination that <i>TUB</i> was not prepared at UF's instance and expense. . . . .	36
c) UF's Remaining Quibbles About the District Court's Application of 1976 Act Authority Are Without Substance. . . . .	42
B. Even if <i>TUB</i> Qualified as "Specially Commissioned," UF Was Not Entitled to Renew It. . . . .	45
IV. UF'S PRE-LITIGATION CONDUCT FORECLOSES ITS POSITION (BUT NOT MICHAEL'S) ON THIS APPEAL . . .	49
A. Summary of UF's Previous Cases Regarding <i>TUB</i> . . . . .	50
B. UF's Pre-Litigation Conduct Does Not Bind Michael . . .	53
C. UF Is Estopped from Arguing on This Appeal that <i>TUB</i> Is a Work for Hire. . . . .	57
1. Collateral Estoppel . . . . .	57

	<u>Page</u>
2. Judicial Estoppel .....	58
V. THE EXCLUSION OF THE TESTIMONY OF BARBARA	
NEWSOM WAS NOT PREJUDICIAL ERROR. ....	60
CONCLUSION .....	65
STATEMENT REGARDING ORAL ARGUMENT .....	67
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME	
LIMITATIONS .....	68
CERTIFICATE OF SERVICE .....	69
ATTACHMENTS TO BRIEF .....	70

**Federal Cases**

*Academy of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*

944 F.2d 1446 (9th Cir. 1991) ..... 55

*Allen v. Minnstar*

97 F.3d 1365 (10th Cir. 1996) ..... 11

*Benson & Ford, Inc. v. Wanda Petroleum Co.*

833 F.2d 1172 (5th Cir. 1987) ..... 53

*Black v. M.W. Gear Co.*

269 F.3d 1220 (10th Cir. 2001) ..... 35

*Brattleboro Publ'g Co. v. Winmill Publ'g Corp.*

369 F.2d 565 (2d Cir. 1966) ..... 55

*Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*

810 F.2d 410 (4th Cir. 1987) ..... 44, 45

*Burton — see Urantia Found. v. Burton Cadence Indus. Corp. v. Ringer*

450 F. Supp. 59 (S.D.N.Y. 1978) ..... 18, 19

*Capano Music v. Myers Music, Inc.*

605 F. Supp. 692 (S.D.N.Y. 1985) ..... 14

*Clarkstown v. Reeder*

566 F.Supp. 137 (S.D.N.Y. 1983) ..... 39, 43, 44, 45

*Commercial Iron & Metal Co. v. Bache Halsey Stuart, Inc.*

581 F.2d 346 (10th Cir. 1978) ..... 11, 32

*Community for Creative Non-Violence v. Reid*

490 U.S. 730 (1989) ..... passim

*Cummins v. Bond*

[1927] L.R. 1 Ch. 167 ..... 58

*Donaldson Publ'g Co. v. Bregman, Vocco & Conn, Inc.*

375 F.2d 639 (2d Cir.),  
*cert. denied*, 389 U.S. 1036 (1968) Pursuant to Rule 10.7 of *The Bluebook*  
(17th ed. 2000), Appellees have omitted from the brief all citations to denials  
of *certiorari* unless the decision is less than two years old or the denial is  
particularly relevant. Appellees provide all such citations in this Table of  
Authorities. .... 10

*Easter Seals Soc. v. Playboy Enters.*

815 F.2d 323 (5th Cir. 1987),  
*cert. denied*, 485 U.S. 981 (1988) ..... 10

*Eastern Am. Trio Prods., Inc. v. Tang Elec. Corp.*

97 F. Supp. 2d 395 (S.D.N.Y.),

	<u>Page(s)</u>
<i>dismissed</i> , 243 F.3d 559 (Fed. Cir. 2000) .....	26
 <i>Eliscu v. T.B. Harms Co.</i>	
151 U.S.P.Q. 603 (N.Y. Sup. Ct. 1966) .....	46
 <i>Epoch Producing Corp. v. Killiam Shows, Inc.</i>	
522 F.2d 737 (2d Cir. 1975),	
<i>cert. denied</i> , 424 U.S. 955 (1976) .....	47, 54
 <i>Forward v. Thorogood</i>	
985 F.2d 604 (1st Cir. 1993) .....	39, 40
 <i>Gardenia Flowers, Inc. v. Joseph Markovits, Inc.</i>	
280 F. Supp. 776 (S.D.N.Y. 1968) .....	55
 <i>Garman v. Sterling Publ’g Co.</i>	
No. C-91-0882,	
1982 U.S. Dist. LEXIS 21932 (N.D. Cal. Nov. 4, 1992) .....	43
 <i>Harold Stores, Inc. v. Dillard Dep’t Stores, Inc.</i>	
82 F.3d 1533 (10th Cir.),	
<i>cert. denied</i> , 519 U.S. 928 (1996) .....	8
 <i>Harris Mkt. Research v. Marshall Mktg. &amp; Communications, Inc.</i>	
948 F.2d 1518 (10th Cir. 1991) .....	8
 <i>Hiltgen v. Sumrall</i>	

	<u>Page(s)</u>
47 F.3d 695 (5th Cir. 1995) .....	9
<i>Huddleston v. Commissioner</i>	
100 T.C. 17 (1993) .....	60
<i>Jones v. Wolf</i>	
443 U.S. 595 (1979) .....	23
<i>King Features Syndicate v. Fleischer</i>	
299 F. 533 (2d Cir. 1924) .....	21, 22
<i>Kleier Adver., Inc. v. Premier Pontiac, Inc.</i>	
921 F.2d 1036 (10th Cir. 1990) .....	9
<i>Langman Fabrics v. Graff Californiawear, Inc.</i>	
160 F.3d 106,	
<i>amended on other grounds by</i> 169 F.3d 782 (2d Cir. 1998) .....	37
<i>Lin-Brook Builders Hardware v. Gertler</i>	
352 F.2d 298 (9th Cir. 1965) .....	20
<i>Maaherra — see Urantia Found. v. Maaherra Magnuson v. Video Yesteryear</i>	
85 F.3d 1424 (9th Cir. 1996) .....	43
<i>Mamiye Bros. v. Barber S.S. Lines, Inc.</i>	
360 F.2d 774 (2d Cir.),	
<i>cert. denied</i> , 385 U.S. 835 (1966) .....	11

*Markham v. A.E. Borden Co.*

108 F. Supp. 695 (D. Mass. 1952),  
*rev'd*, 206 F.2d 199 (1st Cir. 1953) ..... 21

*Moss v. Feldmeyer*

979 F.2d 1454 (10th Cir. 1992) ..... 64

*Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation*

975 F.2d 683 (10th Cir. 1992),  
*cert. denied* 507 U.S. 1042 (1993) ..... 58

*Murray v. Gelderman*

566 F.2d 1307 (5th Cir. 1978) ..... passim

*Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*

499 U.S. 117 (1991) ..... 17

*Patton v. TIC United Corp.*

77 F.3d 1235 (10th Cir. 1996) ..... 54

*Picture Music, Inc. v. Bourne, Inc.*

457 F.2d 1213 (2d Cir.),  
*cert. denied*, 409 U.S. 997 (1972) ..... 9, 45, 47

*Playboy Enters., Inc. v. Dumas*

53 F.3d 549 (2d Cir.),

	<u>Page(s)</u>
<i>cert. denied</i> , 516 U.S. 1010 (1995) . . . . .	36, 40, 44, 45
 <i>Reid — see Community for Creative Non-Violence v. Reid Rexnord, Inc. v. Modern Handling Sys., Inc.</i>	
379 F. Supp. 1190 (D. Del. 1974) . . . . .	21
 <i>Saroyan v. William Saroyan Found.</i>	
675 F. Supp. 843 (S.D.N.Y. 1987), <i>aff’d mem.</i> , 862 F.2d 304 (2d Cir. 1988) . . . . .	13
 <i>Self-Realization Fellowship Church v. Ananda Church of Self-Realization</i>	
206 F.3d 1322 (9th Cir. 2000), <i>cert. denied</i> , 531 U.S. 1126 (2001) . . . . .	passim
 <i>Seymore v. Shawver &amp; Sons, Inc.</i>	
111 F.3d 794 (10th Cir.), <i>cert. denied</i> , 522 U.S. 935 (1997) . . . . .	61, 63
 <i>Shapiro, Bernstein &amp; Co. v. Bryan</i>	
123 F.2d 697 (2d Cir. 1941) . . . . .	17, 18, 19
 <i>Shapiro, Bernstein &amp; Co. v. Jerry Vogel Music Co.</i>	
161 F.2d 406 (2d Cir. 1946) . . . . .	20
 <i>Shapiro, Bernstein &amp; Co. v. Jerry Vogel Music Co.</i>	
221 F.2d 569,	

	<u>Page(s)</u>
<i>modified on other grounds</i> , 223 F.2d 252 (2d Cir. 1955) . . . . .	46
 <i>Smith v. Ford Motor Co.</i>	
626 F.2d 784 (10th Cir. 1980), <i>cert. denied</i> , 450 U.S. 918 (1981) . . . . .	62
 <i>State Farm Fire &amp; Cas. Co. v. Mhoon</i>	
31 F.3d 979 (10th Cir. 1994) . . . . .	19, 53, 65
 <i>Szabo v. Errisson</i>	
68 F.3d 940 (5th Cir. 1995) . . . . .	26
 <i>United States v. MegaMania Gambling Devices</i>	
231 F.3d 713 (10th Cir. 2000) . . . . .	60
 <i>United Transp. Union v. Dole</i>	
797 F.2d 823 (10th Cir. 1986) . . . . .	32
 <i>Urantia Found. v. Burton</i>	
210 U.S.P.Q. 217 (W.D. Mich. 1980) . . . . .	passim
 <i>Urantia Found. v. Maaherra</i>	
895 F. Supp. 1328 (D. Ariz. 1995), 895 F. Supp. 1329 (D. Ariz. 1995), 895 F. Supp. 1335 (D. Ariz. 1995), 895 F. Supp. 1337 (D. Ariz. 1995), 895 F. Supp. 1338 (D. Ariz. 1995), 895 F. Supp. 1347 (D. Ariz. 1995), <i>rev'd</i> , 114 F.3d 955 (9th Cir. 1997) . . . . .	passim

	<u>Page(s)</u>
<i>Weese v. Shukman</i>	
98 F.3d 542 (10th Cir. 1996) .....	9
<i>Workman v. Jordan</i>	
958 F.2d 332 (10th Cir. 1992) .....	31
<i>Yardley v. Houghton Mifflin Co.</i>	
108 F.2d 28 (2d Cir. 1939) .....	46

## **State Cases**

17 U.S.C. §101 .....	26, 32, 34, 44
17 U.S.C. §209 (1909 Act) .....	54, 55
17 U.S.C. §23 (1909 Act) .....	20
17 U.S.C. §24 (1909 Act) .....	passim
17 U.S.C. §3 (1909 Act) .....	20, 21
17 U.S.C. §301(a)(1)(C) .....	13
17 U.S.C. §304 .....	12, 16, 33

**Cases**

Carrie Fisher, <i>Postcards from the Edge</i> (1987) .....	25
<i>Compendium of Copyright Office Practices</i> .....	18
David Nimmer, <i>An Odyssey Through Copyright's Vicarious Defenses</i> , 73 N.Y.U. L. Rev. 162 (1998) .....	24
H. R. Rep. No. 1476, 94th Cong., 2d Sess. 120 (1976) .....	32
James Joyce, <i>Ulysses</i> (1922) .....	25
Jonathan Kirsch, <i>Kirsch's Guide to the Book Contract</i> (1999) .....	41
Lon Fuller, <i>The Case of the Speluncean Explorers</i> , 62 Harv. L. Rev. 616 (1949) .....	23, 24, 42
Martin Amis, <i>The Rachel Papers</i> (1973) .....	27
Robert Alter, <i>The Pleasures of Reading in an Ideological Age</i> (1989) .....	25
William Eskridge, Jr., <i>The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell</i> , 61 Geo. Wash. L. Rev. 1731 (1993) .....	24

**Federal Statutes**

	<u>Page(s)</u>
Federal Rules of Appellate Procedure 28(a) .....	32
Federal Rules of Civil Procedure, Rule 50 .....	8
Federal Rules of Evidence, Rule 1004(1) .....	64
Federal Rules of Evidence, Rule 103(a)(1) .....	31
Federal Rules of Evidence, Rule 801(c)(1) .....	64
Federal Rules of Evidence, Rule 803 .....	65

## **State Statutes**

<i>Nimmer on Copyright</i> .....	passim
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## **I. CORPORATE DISCLOSURE STATEMENT**

Michael Foundation, Inc. is a non-profit corporation organized under the laws of the State of Oklahoma. It has no stockholders or parent corporations, and there are no publicly held companies that own 10% or more of its stock.

## **II.PRIOR OR RELATED APPEALS**

This brief addresses appeals 01-6347 and 01-6348. Michael earlier filed a cross-appeal captioned 01-6358, which it voluntarily dismissed. There are no prior or related appeals.

### **III.INTRODUCTION**

This case involves the claim by Urantia Foundation ("UF") of copyright to *The Urantia Book* ("*TUB*"), and UF's contention that Michael Foundation, Inc. and Harry McMullan, III (collectively "Michael") infringed that copyright. The procedural posture in which this appeal arises is set forth in the Opening Brief of Appellant UF ("Opening Brief") pp.5-7.

### **IV.STATEMENT OF FACTS**

*TUB* is a work authored by a single human being, whose identity is unknown. App.710; 2700; 2800. He was referred to at trial as the "Subject" and will be called "Writer" herein. Around 1900, Writer sought treatment from William Sadler ("Sadler"), a Chicago medical doctor who practiced psychiatry. App.710; 2700; 2820; 2878. Sadler received handwritten manuscripts, called "papers," from Writer. In 1924, Writer announced his intention to write *TUB*, App.711, which he wrote alone by hand, App.2708-2709; 2823, over the course of more than a decade, App.784.

The product of the Writer's long toil, *TUB*, is a tome consisting of approximately 1,000,000 words spanning 2097 pages. App.Vol.9. From beginning to end, *TUB* endeavors to tell a single unified story of God, the universe in which we live, and the history of man on this earth. It describes why Jesus (also

referred to as Christ Michael) was bestowed upon the earth and the circumstances of his life.

*TUB* comprises a Foreword and 196 Papers. Each was delivered by Writer, in his own handwriting, to Sadler. UF conceded at trial that no other human being composed any portion. App.314.

Sadler shared the Writer's papers with his wife, Lena, and with other friends and relatives. Collectively, Sadler, Lena Sadler, and those others styled themselves a "Contact Commission." App.2754. That group met at Sadler's residence to review—but not themselves write or edit—Writer's manuscripts. App.2823.

During the process of writing *TUB*, Writer solicited from Contact Commission questions that "might get information of value to all mankind." App.712; 766. Because Contact Commission destroyed all documents relating to any questions submitted to Writer, all that remains is lore relating to those questions. App.2915 ("All of the record of the verbal communications, I was told, were destroyed the night before the book was to roll off the presses, by fire. They were burned."). The text of any question, its subject matter, the identity of any persons who formulated such questions, and the link—if any—between such questions and the text of *TUB* formed no part of the proof below. App.2710-2711; 3256-3257. Nevertheless, the evidence did demonstrate that no human being other than Writer had any control over whether the questions were answered in *TUB* or

how they were answered. App.2821-2823. When the papers were later published as *TUB*, they were assembled in the order given by Writer. App.2868. No selection process took place. App.719. Contact Commission's only role was to correct errors in spelling and punctuation while typing the manuscripts from their handwritten format. App.789; 1047. In 1955, long after the papers were assembled into book form, Writer finally permitted *TUB* to be published. App.722.

Writer was never compensated for his efforts in writing *TUB*. App.2729-2730; 2884. He provided the manuscripts from his own home, App.3257-3258, and no evidence was offered at trial that Writer utilized materials furnished by Contact Commission or any of its members in writing the original manuscripts.

In 1950, UF was created as an Illinois trust. App.719. Its Declaration of Trust charges it with retaining "absolute and unconditional control" of *TUB*, App.2432, towards which end it asks this court to grant it exclusive rights in *TUB* through 2050, Opening Brief p.3. As demonstrated below, UF lacks legal authority to secure that relief.

## **V.SUMMARY OF ARGUMENT**

Substantial evidence demonstrates that *TUB* is a work written by Writer, who assigned his copyright interest therein to UF. Given Writer's death prior to commencement of the work's renewal term in 1983, the operative effect of his grant terminated prior to that date. Instead, renewal for *TUB*, according to the standard rule contained in §24 of the Copyright Act of 1909, inured to Writer's wife and children; no interest therein passed to UF.

UF seeks to avoid that normal rule by adducing two statutory exceptions. Both arguments depend on UF's assertion that no substantial evidence supports any conclusion other than what UF now advances.

UF's first argument applies to a "periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof." That argument is unavailing, inasmuch as substantial evidence demonstrates that *TUB* was not the product of separate contributions by multiple authors, as would be required to make it a "composite work" under the 1909 Act renewal provisions. UF attempts to avoid that result by incorrectly relying on the definition of "collective work" in the 1976 Act. Yet even that feint is inadequate, inasmuch as a "collective work" is "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." Because

there is substantial evidence that no part of that definition applies to *TUB*, the statutory exception in question affords UF no basis for securing reversal.

As an alternative, UF inconsistently claims that the evidence is uncontroverted that *TUB* was created *ab initio* as a work for hire. Here, the pertinent statutory provision allows renewal to be effectuated by an "employer for whom such work is made for hire." But UF cannot qualify as Writer's employer. It was not in existence when composition of *TUB* took place and none of its predecessors "employed" Writer to compose the work. UF therefore proposes an alternative test, that looks to whether its predecessor qualified as a "commissioning party" of Writer. But Writer wrote independently, and was not commissioned to compose *TUB*; he wrote at his own instance and expense, and under the control of no third party. Further, even if it could satisfy the "commissioning" standard, UF would not be entitled to renew *TUB*, as the statutory language just quoted is limited to "employer" and case law takes that term at face value, allowing a commissioning party rights only in the initial term of copyright, not in the renewal term. Accordingly, this statutory exception is equally unhelpful to UF's quest for reversal.

Finally, UF's history of representing contradictory matters to various courts, and securing rulings on those bases, creates both collateral estoppel and judicial estoppel precluding it from advancing arguments on this appeal.

As set forth in detail below, the judgment from which this appeal arises should be affirmed.

## **VI. STANDARD OF REVIEW**

Review of Denial of Fed. R. Civ. P. 50 Motions. On this appeal from a judgment entered below confirming a jury verdict, the standard of review is clear: "We must affirm if, viewing the record in the light most favorable to [Michael], there is evidence upon which the jury could properly return a verdict for [Michael]." *Harold Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1546-47 (10th Cir. 1996) (affirming jury verdict in copyright case). Negatively stated, this court may reverse only if "there is no legally sufficient evidentiary basis with respect to a...defense under the controlling law." *Id.* (citing Fed. R. Civ. P. 50(a)). See *Harris Mkt. Research v. Marshall Mktg. & Communications, Inc.*, 948 F.2d 1518, 1522 (10th Cir. 1991) ("We grant the district court broad discretion and limit our review [of motion for new trial in copyright case] only to whether the district court's refusal to set aside the jury's verdict constituted a manifest abuse of its discretion") (quotation marks omitted); *Kleier Adver., Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1039-40 (10th Cir. 1990) (refusing "to substitute our judgment for the jury's verdict" in copyright case).<sup>1</sup>

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<sup>1</sup> After the jury verdict, UF moved for judgment as a matter of law in its favor. App.258-389. At the district court level, such a JNOV motion was considered "a challenge to the legal sufficiency of the evidence supporting the

UF attempts to avoid this circuit's settled authority by citing old, out-of-circuit cases purportedly requiring judges, not juries, to determine whether a work is commissioned or composite. Opening Brief p.24, citing *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213 (2d Cir. 1972), and *Donaldson Publ'g Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639 (2d Cir. 1968). Those cases fail to support UF's position, inasmuch as neither involved appeal from a jury verdict (both arose from bench trials).<sup>2</sup> Moreover, even those two inapposite cases trace their roots to an earlier Second Circuit ruling:

[T]he need for consistency militates against considering a judge's application of even an admitted legal standard as a finding of "fact" subject to F.R.Civ.P. 52(a) or its admiralty analogue, even though *a jury's doing the same would constitute a determination of "fact" protected by the Seventh Amendment*. It would be shocking if contrary decisions of two district judges in this circuit on exactly the same facts had to be left standing, *although*

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jury's verdict." *Hiltgen v. Sumrall*, 47 F.3d 695, 699 (5th Cir. 1995). The standard applicable here is the same. *See Weese v. Shukman*, 98 F.3d 542, 547 (10th Cir. 1996).

<sup>2</sup> Even further afield is UF's citation to cases arising from a grant of summary judgment. *See* Opening Brief p.24, citing *Easter Seals Soc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987).

*there would be no similar shock if such a divergence should happen as a result of the deliberation of two different juries...* yet uniformity within a circuit or among circuits can be achieved only if appellate review of the application of a legal standard is free of the shackles of the "unless clearly erroneous" rule.

*Mamiye Bros. v. Barber S.S. Lines, Inc.*, 360 F.2d 774, 777 (2d Cir. 1966)

(emphasis added, citations omitted). Given that the very authority upon which UF relies acknowledges its inapplicability to an appeal from a jury verdict, the variant standard urged by UF must be rejected.

Review of Jury Instruction. The standard of review of a challenge to a jury instruction is abuse of discretion. *See Allen v. Minnstar*, 97 F.3d 1365, 1368 (10<sup>th</sup> Cir. 1996). Jury instructions are sufficient if, "taken as a whole, they adequately and sufficiently advise the jury of the parties' respective contentions and the law applicable thereto." *Commercial Iron & Metal Co. v. Bache Halsey Stuart, Inc.*, 581 F.2d 346, 350 (10th Cir. 1978) (citation omitted).

Review of Exclusion of Evidence. As UF correctly notes, its challenge of the exclusion of testimony is reviewed for manifest abuse of discretion. Opening Brief p.49.

## **VII.ARGUMENT**

UF urges two arguments of statutory construction on this appeal. Both construe portions of the renewal provision of §24 of the Copyright Act of 1909 (repealed), recodified as §304 of the Copyright Act of 1976. "The starting point for our interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). (For that reason, Attachment A to this brief sets forth both statutory provisions.) That statutory language forecloses both of UF's arguments. *See* §§II-III *infra*. In addition, UF is estopped to argue the matters it urges on this appeal. *See* §IV *infra*. Last, no prejudicial error occurred below from exclusion of testimony. *See* §V *infra*.

## **VIII. BECAUSE COPYRIGHT IN *TUB* WAS NEVER PROPERLY**

### **RENEWED, IT NOW REPOSES IN THE PUBLIC DOMAIN.**

Writer started composing *TUB* after first meeting with Sadler for therapy around 1900. Opening Brief p.8. Though composition of *TUB* was completed by 1935, UF did not receive Writer's permission to publish it until 1955. App.722. It registered the work in its own name in 1956, and later filed a renewal registration for it in 1983. Because subscribed by a party who had no right to file it, that 1983 renewal was fatally flawed. Accordingly, any copyright to *TUB* lapsed at the close of its 28-year original term in 1983, relegating it at present to the public domain.

The governing statute allows renewal to be effectuated, in the normal course, only by:

- (i) the author of such work, if the author is still living,
- (ii) the widow, widower, or children of the author, if  
the author is not living,
- (iii) the author's executors, if such author, widow,  
widower, or children are not living, or
- (iv) the author's next of kin, in the absence of a will of  
the author.

17 U.S.C. §301(a)(1)(C). That scheme is not subject to consensual alteration, even by unanimous agreement of all concerned. *See Saroyan v. William Saroyan Found.*, 675 F. Supp. 843 (S.D.N.Y. 1987), *aff'd mem.*, 862 F.2d 304 (2d Cir. 1988).

By 1983, Writer was no longer alive. App.3322-3323. Accordingly, even if he had explicitly assigned his renewal copyright along with the initial term to UF, that grant would be a nullity and the right to renew the copyright would instead belong to his widow and children still alive in 1983.<sup>3</sup> If none of them were alive,

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<sup>3</sup> If Writer had implicitly granted his rights, that grant might have sufficed for the first 28-year term. But given that an author's death renders even a previous *explicit* grant into a nullity, *a fortiori*, an *implicit* grant is of no moment here, given

then the renewal would belong, as a matter of law, to Writer's executor or next of kin, according to the mandatory statutory scheme quoted above. *See Capano Music v. Myers Music, Inc.*, 605 F. Supp. 692, 695 (S.D.N.Y. 1985) ("If the assignor is not living when the renewal rights vest, then those who succeed to the author's interest under §304(a) take free of any assignment made by the deceased assignor, and the assignee takes nothing").

It is undisputed that Writer's statutory successors (his widow, children, executor, or next of kin, as the case may be) did not validly renew *TUB* in 1983. Instead, the only renewal certificate filed with the Copyright Office was in the name of UF. App.2414-2416. No one suggests that, as of 1983, UF was acting on the basis of a grant from Writer's statutory successors when it undertook renewal registration for the work.<sup>4</sup> Accordingly, no party entitled to effectuate renewal of *TUB* in 1983 actually did so. Supp.627 (no heir of Writer ever claimed any copyright interest in *TUB*).

To avoid that normal rule, UF points to two exceptions contained in provisos to the statute. Its arguments to this court can be schematized as follows:

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that Writer died prior to commencement of the renewal term.

<sup>4</sup> The only purported authority granted to UF emanated from Contact Commission—a group composed of Sadler's relatives and associates, not of Writer's wife or children. App.711; 2754.

- (A1) *TUB* was composed by Writer, who assigned his interest therein to UF's predecessor prior to its publication in 1955, thus rendering UF into the work's "proprietor"; and
- (A2) *TUB* was a "composite work," meaning that UF as proprietor was entitled to renew it in 1983;

*OR*

- (B1) *TUB* was composed constructively by Writer's hiring party who owned it *ab initio* as it was being written through 1935; and
- (B2) UF qualifies as the "employer" entitled to renew it in 1983.

UF secured a jury instruction in its favor on point A1. App.3633 ("I charge you that as a matter of law Urantia Foundation is the proprietor of the copyright in The Urantia Book"). The three remaining propositions were put to the jury, which returned a verdict in Michael's favor.

The evidence adduced below amply entitled the jury to rule as it did on each of those bases.

## IX. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S

**VERDICT THAT *TUB* IS NOT A "PERIODICAL, CYCLOPEDIA, OR OTHER COMPOSITE WORK."**

The first statutory exception to the normal renewal order just explicated

provides, "That in the case of any...periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof...the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work." 17 U.S.C. §24 (1909 Act); 17 U.S.C. §304(a)(1)(B)(i) (1976 Act) (Attachment A). UF's primary argument on this appeal is that the evidence is undisputed that it falls within that exception.

Given the trial court's ruling that UF was proprietor of *TUB* (A1), to overturn the jury's verdict, UF needs to demonstrate that the evidence can be viewed only as mandating the conclusion that (A2) *TUB* was a "composite work," meaning that UF as proprietor was entitled to renew it in 1983. Because substantial evidence supports the jury's resolution of this element adverse to UF, the judgment must be affirmed.

**A.** **The Absence of Multiple Authors Disqualifies *TUB* As a**  
**"Periodical, Cyclopedic, or Other Composite Work."**

*TUB* is not a "periodical, cyclopedic, or other composite work" as required by the statutory exception. 17 U.S.C. §24 (1909 Act). Both periodicals and encyclopedias typically combine contributions from a great many individuals. Under the canons of statutory interpretation, the remaining term should be interpreted likewise. *See Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991) (*ejusdem generis* requires that general terms should be understood in context of specific ones). Indeed, the accepted definition of "composite works" in §24 is to precisely that effect: As Learned Hand defines the term, it refers to works "to which *a number of authors* have contributed distinguishable parts, which they have not however, 'separately registered.'" *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697, 699 (2d Cir. 1941) (emphasis added).<sup>5</sup> The Copyright Office holds likewise: "Generally, a composite work is an original publication relating to a variety of subjects, to which *a number of different authors* have contributed distinguishable selections." *Compendium of Copyright Office Practices* §11.8.3 (emphasis added). *See Cadence Indus. Corp. v. Ringer*,

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<sup>5</sup> Anticipating *TUB*, Judge Hand adds "that the assignee of the literary property in an unpublished work, who later takes out the copyright, like the assignee of the copyright itself, does not get the right of renewal." *Id.* at 700.

450 F. Supp. 59, 63 (S.D.N.Y. 1978).<sup>6</sup> To the same effect is the summary judgment affirmed by the Ninth Circuit in *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1327 (9th Cir. 2000), *cert. denied*, 531 U.S. 1126 (2001).<sup>7</sup> Consonant with those authorities, UF conceded below repeatedly that the prerequisite for a "composite work" is multiple authors. Supp.37; 18; 22; 255.<sup>8</sup>

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<sup>6</sup> In addition to relying on the definitions set forth above from Judge Hand and the *Compendium*, this case also quotes a study by the Register of Copyrights that lists among the "determinative factors" for a "composite work" that there be a "number of authors contributing copyrightable matter to a single work." 450 F. Supp. at 64.

<sup>7</sup> In a strikingly similar factual posture, Plaintiff church SRF there sued breakaway church Ananda, alleging infringement of writings by SRF's founder, a monk named Yogananda. SRF arranged for publication of Yogananda's books and published his articles in its own magazine. SRF renewed the copyrights in its own name given Yogananda's intervening death, squarely raising the question (as at bar) whether those renewals were valid. 206 F.3d at 1324-26. The Ninth Circuit ruled, "With regard to books copied during their renewal terms, the district court's grant of summary judgment for Ananda must be affirmed. The books are not periodical, composite or encyclopedic works...." *Id.* at 1329. That affirmance of summary judgment applies *a fortiori* to the jury verdict here.

In contrast to his unitary books, as to discrete articles authored by Yogananda and published along with the works of other authors in the larger context of SRF's magazine, the Ninth Circuit recognized that they could fall within the "composite work" exception. *See* 206 F.3d at 1329. Translated to this appeal, to the extent that Writer had authored discrete articles that Contact Commission had published in its in-house periodical together with articles authored by other individuals, multiple authorship would render the magazines into "composite works." But given the actual facts at bar, App.2792-2793, just as SRF's attempted renewal of Yogananda's books failed, so too UF's attempted renewal of *TUB* failed.

<sup>8</sup> Accordingly, UF argued to the district court that Writer authored the 196 Papers and that Sadler's son separately authored the Table of Contents. Supp.38.

Before this court, UF backpedals to argue that multiple authors are not required. Opening Brief p.27. But the cases it cites fail to vindicate its new viewpoint. Instead of grappling with *Shapiro*, *Cadence*, and *Self-Realization Fellowship*—the cases actually decided in the posture of copyright renewal under §24 of the 1909 Act<sup>9</sup>—UF limits its attention to cases arising under §3 of the 1909 Act, a provision not implicated here.<sup>10</sup> Opening Brief pp.27-29. Even those §3 cases, moreover, only highlight how far afield *TUB* lies from true composite works.

*Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406, 409 (2d

Cir. 1946), intimates that the articles in an encyclopedia (typically composed by separate authors) combine to form a "composite work";

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Because UF has abandoned that argument in its Opening Brief, it cannot advance it in the Reply Brief. See *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994) ("appellant failed to raise this issue in his opening brief and, hence, has waived the point"). In any event, the district court properly rejected that argument. App.282.

<sup>9</sup> *Shapiro* cites to §23 of the 1909 Act, under which §24 was previously codified. See Attachment A.

<sup>10</sup> Section 3 provided, "The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted.... The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title." Essentially, that provision was a safety valve under the heightened formalities of the 1909 Act—even if a periodical only bore a single copyright notice, that notice sufficed to protect each of the articles contained therein. See *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 301 (9th Cir. 1965). Current copyright law no longer follows that formalistic approach. See 2 *Nimmer on Copyright* §7.01

*Rexnord, Inc. v. Modern Handling Sys., Inc.*, 379 F. Supp. 1190, 1193 (D.

Del. 1974), addresses a 1970 catalog through which plaintiff attempted "to mesh some twelve to fifteen books we presently have into one," as opposed to the publication of *TUB* without any predecessor publications;

*Markham v. A.E. Borden Co.*, 108 F. Supp. 695 (D. Mass. 1952), *rev'd*, 206

F.2d 199, 201 (1st Cir. 1953), likewise addressed a series of 39 catalogs compiled over the course of years, 108 F. Supp. at 698, as opposed to a unitary publication;<sup>11</sup>

*King Features Syndicate v. Fleischer*, 299 F. 533, 535 (2d Cir. 1924), in

which UF notes that some Barney Google cartoons were "initially published separate and apart from the rest," and from which it argues that the same circumstances pertained to *TUB*, whose components "were separately created, circulated and studied...before ever being published together as *The Urantia Book*." Opening Brief p.30. UF's characterization elides the crucial difference—unlike the separately published cartoons in *King Features*, all of Writer's materials

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<sup>11</sup> Construing the notice provisions of §3 of the 1909 Act, the court noted, "There is nothing in the statute to indicate that the protection of component parts is limited to composite works whose parts are separately authored." 206 F.2d at 201. That statement recognizes that composite works require separate authorship; it further construes §3's protection of component parts to sweep more broadly.

remained unpublished until publication of *TUB* itself.

To shoehorn its way into the requirement that a "composite work" have multiple authors, UF asserts, "It is undisputed that *The Urantia Book* is comprised of discrete compositions attributed to over 50 different celestial authors." Opening Brief, pp.20, 28. That characterization is foreclosed by UF's stipulation below that nobody other than a single human being (Writer) authored *TUB*. *See App.*314 (judge instructs jury of UF's stipulation that "the subject [= Writer] is considered the legal author of *The Urantia Book*").<sup>12</sup> Because substantial evidence below, bolstered by UF's own admission, indicated that *TUB* was composed by a single author, the work cannot qualify as a "composite work." Given UF's inability to demonstrate here that every rational factfinder must conclude that 50 celestial beings in fact authored *TUB*, its attempt to secure reversal under the "composite" category falls.

UF's argument conflates *authorship* with *voice*. Writer used the voice of 50 different celestial beings to describe the universe from various perspectives—much like, in a famous work roughly contemporaneous with *TUB*, Professor Lon Fuller

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<sup>12</sup> UF is entitled to its religious belief that "the subject was merely a conduit for the true authors—the more than fifty spiritual beings to whom the various papers are attributed...." Opening Brief p.14. But a secular court must limit itself to the evidence—which in this case showed that Writer authored the whole. *App.*314; 2703; 2707-2713; 2945-2946. *See Jones v. Wolf*, 443 U.S. 595, 602-03 (1979) (courts must apply neutral principles of law rather than religious precepts).

outlined theories of statutory interpretation through different voices. *See The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949) (Attachment B). A reader who confined attention to the internal text of *The Case of the Speluncean Explorers* would (similarly to *TUB*) find the name of no overall author on the title page, but would instead discover "discrete compositions attributed to [numerous] different authors," viz. an opinion by Chief Justice Truepenny of the Supreme Court of Newgarth, followed by separate contributions from Justice Foster, Justice Tatting, Justice Keen, Justice Handy, etc. *See* Attachment B. If proceeding uncritically, the reader would conclude that this must be a "composite work" because it features so many discrete voices. But, of course, those blinkers conceal the fact that a single author is speaking with numerous voices as part of a whole. It is that feature that makes Prof. Fuller's work into "one of the most important jurisprudential documents in this century." William Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 Geo. Wash. L. Rev. 1731, 1743 (1993).

Of course, it is not only masterpieces like *Speluncean Explorers* that adopt the stratagem of speaking in multiple voices. One finds it as well in other law review articles, *see, e.g., An Odyssey Through Copyright's Vicarious Defenses*, 73 N.Y.U. L. Rev. 162 (1998), and throughout works of literature generally, *see, e.g.,*

James Joyce, *Ulysses* (1922); Carrie Fisher, *Postcards from the Edge* (1987).<sup>13</sup>

UF can cite no authority that when a single author speaks in multiple voices, the product becomes a "composite work." Logic and common sense reject that fabulous proposition. In short, UF's characterization is insupportable.

**B. The Absence of "Separate and Independent Works in Themselves" Further Disqualifies *TUB* As a "Periodical, Cyclopedic, or Other Composite Work."**

Instead of focusing on the definition of "composite work" as courts construed it under the 1909 Act, UF argues that this court should look to the separate term "collective work" in the 1976 Act. Opening Brief pp.26-27. Yet even that tactic fails, as *TUB* does not qualify as a "collective work," which the 1976 Act defines as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, *constituting separate and independent works in themselves*, are assembled into a collective whole."

17 U.S.C. §101 (emphasis added).

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<sup>13</sup> Through UF's spectacles, a playgoer would experience *Hamlet* as a composite work "comprised of discrete compositions attributed to over 50 different" characters, *viz.* Hamlet, Horatio, Gertrude, Polonius, Laertes, Ophelia, Rosencrantz, Guildenstern, *etc.* To recount that methodology is to refute it. See Robert Alter, *The Pleasures of Reading in an Ideological Age* 50 (1989) ("unless a reader is delusional in a clinical sense, he or she never actually imagines that Emma Bovary or Isabel Archer or Huckleberry Finn is a real person").

Everything about that definition is inapplicable to *TUB*. It bears no resemblance to a periodical issue, anthology, or encyclopedia. App.2792-2796. UF can cite no 1976 Act case in support of treating *TUB* as a collective work. Although UF claims that *Szabo v. Errisson*, 68 F.3d 940 (5th Cir. 1995), holds that different songs by the same artist form a single collective work, Opening Brief p.29, that case actually construes solely a provision of the Code of Federal Regulations affording group registration to a "collection" of separate unpublished works. 68 F.3d at 943. Additionally, even if that case had construed the statute, its focus on multiple unpublished works renders it inapposite to the unitary publication of *TUB*.<sup>14</sup>

Of course, there is some sense in which every book composed of chapters (or "papers"),<sup>15</sup> every poem of stanzas, every symphony of movements, could be conceptualized as a "collective work." But that expansive characterization has never won judicial support—notwithstanding that there exist radio stations that play only one movement from a symphony, student anthologies that only reproduce one

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<sup>14</sup> The only other 1976 Act case that UF cites, *Eastern Am. Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp. 2d 395 (S.D.N.Y.), *dismissed*, 243 F.3d 559 (Fed. Cir. 2000), actually addresses compilations and derivative works, not collective works. *Id.* at 415-17.

<sup>15</sup> UF tries to derive ammunition from *TUB*'s internal labeling of its chapters as "Papers," *see* Opening Brief p.16—as if Martin Amis' first novel, *The Rachel Papers* (1973), would be transmuted into a "collective work" via a happenstance of labeling, disentiing Amis from renewing it in 2001.

chapter out of a book, *etc.* In any event, UF had an opportunity to present its theory to the jury, which was duly instructed regarding collective works—and failed to prevail.<sup>16</sup>

If Writer had published a foreword and 196 separate papers in magazines and newspapers around the country, which Contact Commission subsequently chose to organize into an order of its own choosing, the result might qualify as a "collective work." Those indicia are wholly lacking in the authorship of *TUB*, as to which substantial evidence showed:

- When the process of creating *TUB* was initiated, Writer announced the project in terms that indicated his purpose was to create a book.

App.711; 715.<sup>17</sup> Thus, from the outset, Writer intended to create *TUB*

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<sup>16</sup> The judge instructed the jury consonant with UF's theory regarding collective works:

The terms "composite work" and "collective work" are synonymous. ... Generally, a composite work is created by assembling a number of independent works by different authors into one collective whole. However, it is also possible to create a composite work by collecting a number of independent works by the same author into one collective whole.

App.3638-3639. The jury concluded that *TUB* fails to qualify. This court may affirm either (1) if it accepts the legal requirement of multiple authorship (which was lacking as to *TUB*), or (2) even if it wishes to countenance the possibility that single authorship suffices, as long as substantial evidence supports the jury's verdict that *TUB* was not comprised of "separate and independent" works.

<sup>17</sup> The evidence showed that some of Writer's communications ostensibly represented pronouncements of celestial beings. App. 711 ("Once the project of

as a single book rather than a collection of independent works.

- Contact Commission did not arrange the papers into an order of its own choosing; rather, the order in which Writer composed them represents the order in which they appear in *TUB*. There was no selection process of materials to be included. App.719.<sup>18</sup> Therefore, the jury could infer that Writer assigned a sequential number to each of the 196 Papers that comprise *TUB*. See App.3330.

- *TUB* was not published until Writer authorized its publication.

App.2821-2822. Authorization was never given to publish the individual papers separately. In fact, Writer intended it to be read as a unified work. App.2776; 2778-2779; 2781-2782; 2784; 2789-2791; 3172-3173; 3410.

- *TUB* constitutes a whole, and as such has only been presented to the world as a unified work. On many occasions, UF has resisted the separate publication of any part of *TUB*, averring that it is a unified work and its parts must be read together to be understood. As a

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the Papers began...only the Contact Commission worked closely and directly with the Revelatory Commission through the human subject through whom the Urantia Papers and other communications came.") App.3535. Because this action arises in a secular court, all such spiritual emanations are treated as manifestations of a human being (Writer) rather than bearing independent weight. See fn.12 *supra*.

<sup>18</sup> UF's own president acknowledged that nobody "dictated to these celestial beings what would be in the book." App.2822.

current UF trustee recently wrote in opposition to Michael's publication of the work that gives rise to this appeal:

There are those who, in a spirit of impatience, would violate the integrity of the text by splitting it up. We have been given a carefully painted picture of the cosmos, its origin, history and destiny in relation to the life and teachings of Jesus, our Creator Son, as he is carefully portrayed in Parts I, II, III and IV of the Book. This picture was developed over a period of hundreds of years by the revelatory commission. There are those who would cut the revelatory commission's picture up in the name of dissemination. Imagine with me for a moment taking a picture, the Mona Lisa, and cutting it up into four pieces, and displaying a quarter of that beautiful picture in its own frame. I do not think that is what Leonardo Da Vinci had in mind, nor do I believe that is what the revelatory commission had in mind. ... That picture should be respected by all of us as we go about

disseminating the truths of the Book.

App.2404. In sum, substantial evidence shows that a single author wrote a book, organized the chronology of its contents, withheld publication of any of its text until the book was complete, and did not want any part of it published separately. Substantial evidence warranted the jury's conclusion that the various papers of which *TUB* is comprised are not "separate and independent works in themselves." Its verdict must therefore be affirmed.

**C. The Issue of Composite Work Was Properly Presented to the Jury.**

UF raises a host of objections in an attempt to void the jury's verdict that *TUB* is not a composite work. First, it belatedly claims that the issue should not have gone to the jury at all, and that the court should have reached the contrary determination as a matter of law. UF invites this court to ignore everything that transpired at trial and simply to read the 2097 pages of *TUB*. Opening Brief p.31. But such an exercise, separated from the evidence explicating the work's creation, authorship, and publication history, would be meaningless—the numerous historical circumstances regarding *TUB*'s status as a composite *versus* a unified work presented a classic jury question. Indeed, UF's own counsel recognized as much below: "As to the unified nature of the work, I think there's certainly a fact issue for the jury to decide on that at a minimum." App.3575-3576. UF cannot now argue the opposite for the first time on appeal. *See Workman v. Jordan*, 958 F.2d 332, 337 (10th Cir. 1992).

Second, UF complains that Harry McMullan—the party whom it had sued for infringement—should not have been permitted to testify regarding *TUB*. Opening Brief pp.31-33. Apart from the fact that UF cites no authority whatsoever that admission of his testimony was error, *id.*, UF raised no objection to any

testimony below. As such, it has waived the issue and cannot raise it here. Fed. R. Evid. 103(a)(1). Further, the massive citations to the record set forth in §II[B] above, all separate from McMullan's testimony, demonstrate that substantial evidence apart from the challenged testimony warranted the jury's verdict, such that UF suffered no prejudice from the admission of that testimony.

Third, UF contends that the district court erred in instructing the jury that the intent of the author is the controlling factor in determining whether a work is a composite work.<sup>19</sup> Apparently, UF would have jurors place themselves in the position of determining when a "work" begins, when it ends, and what it is comprised of, rather than leaving that determination to the author.

"Intent of the author" *is* the controlling factor in determining whether a work by two or more authors is a joint work; as shown below, the same standard should apply to a work by one author. The statute itself defines a "joint work" as "a work prepared by two or more authors with the *intention* that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. §101 (emphasis added). The House Report elaborates:

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<sup>19</sup> UF also asserts in passing that Instruction No. 26 was imbalanced. Opening Brief p.33 n.7. UF failed to identify this issue in its Statement of Issues and fails to offer any rationale in its Opening Brief for that assertion. *See* Fed. R. App. P. 28(a); *United Transp. Union v. Dole*, 797 F.2d 823 (10th Cir. 1986) (superficial treatment of issue in brief normally insufficient to preserve issue). In any event, this instruction, taken as a whole, adequately and sufficiently advised the jury of the parties' respective contentions and the applicable law, thus precluding reversal on this basis. *See Commercial Iron*, 581 F.2d at 350.

The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either "inseparable" (as the case of a novel or painting) or "interdependent" (as in the case of a motion picture, opera, or the words and music of a song).

H. R. Rep. No. 1476, 94th Cong., 2d Sess. 120 (1976).<sup>20</sup> Given that "intent of the author" furnishes the means for distinguishing between joint works and collective works, there is no basis to apply a different test to the product of a single author. It would be perverse to allow two authors to decide for themselves whether their separate contributions were merged into a joint work or remain separate contributions to a collective work, but deny a single author the right to make that decision with respect to his work product. Nothing in the statute, its legislative history, or any case compels such a nonsensical result.

**X. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S  
VERDICT THAT UF FAILED TO QUALIFY AS THE "EMPLOYER  
FOR WHOM SUCH WORK IS MADE FOR HIRE" ENTITLED TO**

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<sup>20</sup> See 3 *Nimmer on Copyright* §6.05 ("What distinguishes a collective work from a joint work based upon interdependent parts? The distinction lies in the intent of each contributing author at the time his contribution is written").

## **RENEW *TUB* AS ITS "PROPRIETOR."**

The second statutory exception to the normal renewal order explained in §I above, by which only Writer or his heirs could validly renew *TUB*, attaches to works made for hire. The pertinent language in the statute provides, "That in the case of...any work copyrighted by...an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work." 17 U.S.C. §24 (1909 Act); 17 U.S.C. §304(a)(1)(B)(ii) (1976 Act). *See* Attachment A.

To overturn the jury's verdict, UF needs to demonstrate that the evidence can be viewed only as mandating the following conclusions: (B1) *TUB* was composed constructively by Writer's hiring party who owned it *ab initio* as it was being written through 1935;<sup>21</sup> and (B2) UF qualifies as the "employer" entitled to renew it in 1983. Because substantial evidence supports the jury's resolution of those elements adversely to UF, the judgment must be affirmed.

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<sup>21</sup> The test for a commissioned work applies "at the time the commission is accepted." *Reid*, 490 U.S. at 741.

**A.**      **Substantial Evidence Shows That *TUB* Was Not a "Work Made for Hire."**

There are two aspects to works made for hire, which exert differential effects: employment and special commission. Under the current 1976 Act, the distinction appears on the face of the statute. *See* 17 U.S.C. §101. Under the now-repealed 1909 Act, the distinction emerged from the case law. *See Reid*, 490 U.S. at 744.

**1.      No Predecessor to UF Was the "Employer" of Writer.**

If *TUB* qualified as a work prepared by an employee, then the employer would own both the initial and renewal term therein. However, UF does not even argue that point.

**2.      No Predecessor to UF "Specially Commissioned"**

**Preparation of *TUB*.**

Instead, UF argues that *TUB* should be deemed a specially commissioned work. Opening Brief pp.35-44. Given that the jury determined otherwise, the issues on this appeal are (a) whether the jury was properly instructed on the issue and (b) whether substantial evidence supports its verdict. Given an affirmative answer to both inquiries, UF's argument fails.

**The district court properly instructed the jury as UF  
requested.**

UF promulgated jury instructions as to the elements required to show a commissioning relationship. *See* Attachment C. Included therein were several elements, including "instance<sup>22</sup> and expense" and "right to control." *Id.* The court gave essentially the instruction that UF requested. *Id.* "In a civil case each party must live with the legal theory reflected in instructions to which it does not object. Therefore, this court will not review instructions given to which no objections were lodged before the jury retired for deliberation unless they are patently plainly erroneous and prejudicial." *Black v. M.W. Gear Co.*, 269 F.3d 1220, 1232 (10th Cir. 2001).

UF now challenges its own jury instructions as "based on the erroneous premise that a commissioning party must establish that it had the right to control the content of a work for the work to qualify as a commissioned work." Opening Brief p.43. That argument overlooks the fact that one of the primary cases on which UF's own brief relies recites the relevance of both "instance and expense"

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<sup>22</sup> UF requested the alternative term "insistence" rather than "instance," App.3580, which it derived from *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978) ("whether the work was created at the employer's insistence and expense"). The court instructed accordingly. *See* Attachment C (both court's actual instructions and UF's requested instructions use term "insistence").

and "whether the employer had the *right* to direct and supervise the manner in which the work was being performed." *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978) (emphasis original) (ruling under 1909 Act); *see Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995) (same). In short, the jury instructions properly encapsulated the law.

**Substantial Evidence Supports the Jury's Determination  
that *TUB* was not prepared at UF's instance and  
expense.**

Applying the instructions, the jury concluded that *TUB* was not prepared on commission. Given the numerous contested issues of fact explicated below regarding instance and expense in the preparation of *TUB*, it is only the jury that was competent to resolve these matters. "Questions of historical fact relevant to applying each factor [of the test for determining whether a work is a work-for-hire] are for the finder of fact...." *Langman Fabrics v. Graff Californiawear, Inc.*, 160 F.3d 106, 111 (2d Cir. 1998). *See 3 Nimmer on Copyright* §12.10[A] ("even when the arena of battle arises over a distinctive policy of the Copyright Act—for example, does a given work qualify as having been made for hire?—the questions of historical fact that go into...that analysis are for the finder of fact").

UF appeals on the basis that the evidence can support only the conclusion

that the work was created at its instance and that it bore the expense of creation. It cites, in the former regard, Contact Commission's questions to Writer and, in the latter, Contact Commission's provision of stenography materials and a typewriter at Sadler's home. Opening Brief pp.37-38. Neither circumstance pans out.

**Instance.** Writer sought out Sadler for therapy, not to be his employee. App.710; 2700; 2820. Indeed, UF has it backwards here: A physician is his patient's fiduciary, so in fact Writer was the "employer" in their relationship. Further, the psychiatrist-patient relationship began before Contact Commission was ever created, App.710, so the latter could not be the "master" as a matter of logic. Writer began to produce papers not at Sadler's instance and certainly not at that of the yet-to-be-created Contact Commission. Instead it was Writer who "announced to the contact group the plan to initiate the *Urantia Papers*." App.711. Writer himself directed the later creation of Contact Commission, App.711, and to the extent the questioning process contributed to *TUB*, Writer initiated that process as well, App.766.<sup>23</sup>

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<sup>23</sup> UF's president acknowledged that no evidence supported the conclusion "that Dr. Sadler or anyone else in The Contact Commission told the celestial beings what messages to convey that resulted in this writing." App.2820. Contact Commission "had no control over how the questions were answered," "had no control over whether or not someone chose to answer or not to answer the questions," and had no control over "how much and what and when to end it all [the book]." App.2821. Neither Sadler nor any other predecessor to UF dictated "what would be in the book," "how long the book would be," "how many papers it would consist of," "what the subject of the papers were," "the content of the specific papers," or "when to stop writing." App.2822-2823. Finally, he

The "instance" described by the courts predates the onset of authorship by the commissioned party, *see* fn.21 *supra*, whereas the "instance" described by UF is little more than a reaction to an already ongoing process of creation. No case cited by UF substantiates the suggestion that audience questions, even assuming that they shape the direction of a developing work in some respect, satisfy the instance test.<sup>24</sup> Where, as here, the putatively hiring party was limited to such editorial functions as correcting spelling errors, to label it the guiding force that commissioned the subject work borders on the absurd.<sup>25</sup>

**Expense.** Writer received exactly nothing for composing the entirety of the

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acknowledged that *TUB* was finished in 1935 but was not published until 1955 because UF and/or its predecessors were waiting for direction from the "celestial beings" (*i.e.*, Writer) to publish it. App.2821-2822.

<sup>24</sup> These facts stand in stark contrast to the cases on which UF relies. In *Murray*, the undisputed evidence showed that "Gelderman originated the New Orleans Menu Book Project and initially approached Murray about working on it." 566 F.2d at 1310. Similarly, in *Clarkstown v. Reeder*, 566 F. Supp. 137, 138 (S.D.N.Y. 1983), the Youth Court Executive Board generated the idea of crafting a manual for the Youth Court before approaching Reeder, who served on the Board, and asked him to draft the manual. In *Forward v. Thorogood*, 985 F.2d 604, 606 (1st Cir. 1993), the court rejected a commissioned work argument, even though the putatively hiring party organized and paid for two recording sessions by a blues band, and also suggested specific songs for the band to play (which it did).

<sup>25</sup> Members of Contact Commission often reaffirmed that they lacked the right to alter in any way the text of Writer's handwritten materials. App.1047 ("There was no editing. Our only jurisdiction had to do with typing, proof-reading, and publication"). Likewise, Sadler wrote: "The Papers were published just as we received them. The Contact Commissioners had no editorial authority. Our job was limited to 'spelling, capitalization, and punctuation.'" App.789.

work that UF now characterizes as having been made for hire.<sup>26</sup> App.2729-2730. "[P]rior cases on work for hire under the 1909 Act have found the 'expense' requirement to be met where a hiring party simply pays an independent contractor a sum certain for his or her work." *Playboy*, 53 F.3d at 555. *See Forward v. Thorogood*, 985 F.2d 604, 606 (1<sup>st</sup> Cir. 1993) ("Although Forward booked and paid for the studio time, he neither employed nor commissioned the band members nor did he compensate or agree to compensate them"); *Self-Realization Fellowship*, 206 F.3d at 1327 ("We have described the rationale for the [1909 Act commissioned works] doctrine as a presumption that 'the parties expected the employer to own the copyright and that the artist set his price accordingly'"); *Murray*, 566 F.2d at 1310 ("Murray definitely expected to be compensated for her services in producing the book"). Nonpayment to Writer is itself substantial evidence that *TUB* was not commissioned for hire.

UF attempts to avoid that conclusion by asserting that Contact Commission "provided the few materials and the equipment utilized (stenography materials and a typewriter), provided the use of the Sadler home and offices, and worked decades without any expectation of compensation." Opening Brief p.38. The evidence belies those claims. For example, testimony established not only that all of the

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<sup>26</sup> Beyond paying him nothing, Sadler received no written assignment from Writer, despite having consulted with copyright attorneys in the early 1930s. App.2715-2716; 3396-3397.

papers were in Writer's handwriting, but that "no parts of [*TUB*]...come from what Emma Christensen [the purported stenographer] wrote down." App.2703; 2707-2713; 2756; 2945-2946; 3326; 3329; 3466. Thus, the jury was entitled to conclude that stenography materials and a typewriter were not used in originally creating the papers that comprise *TUB*.<sup>27</sup> See App.712-713. Furthermore, one witness testified that the information received by Contact Commission was received at Writer's home. App.3257. Accordingly, the jury was entitled to believe that the Sadler residence was not used in creating those papers.

UF asserts that the expenses allegedly incurred in creating typewritten texts from the original handwritten texts, and in creating printing plates from the typewritten manuscripts, compel the conclusion that *TUB* was created at its expense. Distilled to its essence, UF's argument is that because it acted as publisher of the work and defrayed all expenses in that capacity, the work itself is transmogrified *ex ante* into something produced on commission. That argument is absurd. Essentially all works published in the United States have their *publication expenses* (as opposed to *preparation expenses*) defrayed by the publisher rather than the author. See Jonathan Kirsch, *Kirsch's Guide to the Book Contract* 164

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<sup>27</sup> The point emerges from UF's own recitation: "The final manuscript of each of the Urantia Papers originally was in the subject's handwriting, from which the Contact Commission prepared a corresponding typewritten manuscript." Opening Brief p.11.

(1999) ("All of the particulars of publication are reserved to the discretion of the publisher in a standard book contract, ranging from the physical specifications of the book...to the marketing efforts that may determine whether the book is a success"). If the outlay of funds for typesetting, binding, shipping, sales, *etc.* could qualify something under the "work for hire" doctrine, then this exception would swallow the rule, leaving nothing of meaning outside that rubric.

Reverting to *The Speluncean Explorers*, standard practices would have dictated that the Harvard Law Review underwrite all expenses related to production, advertising, and distribution of the work, for which it paid Prof. Fuller nothing. Instead, he wrote for self-fulfillment, and never sought copyright credit for the work—the very circumstances that UF alleges apply to Writer. *See* Attachment B (copyright notice solely in name of Review). Gauged by the standards that UF urges here, that article—together with just about everything else published during those decades—falls under the "work for hire" rubric. No case has ever come close to vindicating that proposition. Instead, as *Self-Realization Fellowship Church* ruled, "Works motivated by Yogananda's own desire for self-expression or religious instruction of the public are not 'works for hire.'" 206 F.3d at 1326.

### **UF's Remaining Quibbles About the District Court's**

### **Application of 1976 Act Authority Are Without**

### **Substance.**

The jury, having been properly instructed, returned a verdict supported by substantial evidence. Nothing further need be said to warrant affirmance.

Nonetheless, UF's numerous citations to inapposite authority require a brief reply.

UF relies on *Garman v. Sterling Publ'g Co.*, 1982 U.S. Dist. LEXIS 21932 (N.D. Cal. Nov. 4, 1992); *Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983); and

*Magnuson v. Video Yesteryear*, 85 F.3d 1424 (9th Cir. 1996). Opening Brief pp.39-41. *Garman* did not apply the work-for-hire doctrine. *Clarkstown* involved a party who was an admitted officer and director of the commissioning party—in marked contrast to Writer, who served no comparable role in Contact Commission. *Magnuson*, notwithstanding UF's attempt to characterize it as having determined Lenny Bruce to be a commissioned party, in fact concluded that he was a joint author of the film there at issue who subsequently assigned his interests to his fellow joint author—a posture antithetical to applying the work-for-hire doctrine. In sum, none supports UF's work-for-hire argument.

UF faults the district court's JNOV decision on the purported basis that "cases construing the work for hire doctrine under the 1976 Act are not good authority for determining whether a work is a commissioned work under the 1909 Act." Opening Brief p.41. Beside the fact that the JNOV decision is of no import

given that substantial evidence supported the jury's verdict as set forth above, UF is wrong: The standard for determining whether a work is specially commissioned under the 1976 Act has "essentially the same meaning as" the comparable test under the 1909 Act. *Playboy*, 53 F.3d at 562.<sup>28</sup>

In addition, it is UF, not the district court, that relies on improper authority. Besides relying on *Clarkstown*, UF also repeatedly relies on *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410, 413 (4th Cir. 1987), notwithstanding that: (1) the Supreme Court has disapproved both *Clarkstown* and *Brunswick Beacon*, see *Reid*, 490 U.S. at 738-39; (2) both cases arise under the 1976 Act, not the 1909 Act; (3) both construe the employment prong, rather than the specially commissioned prong at issue on this appeal.<sup>29</sup>

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<sup>28</sup> The difference between the statutes inheres in additional formalities: For a work to be specially commissioned under the 1976 Act, there must be a writing signed by both parties and it must fall within a statutory enumeration—requirements that did not pertain under the 1909 Act. See 17 U.S.C. §101. But those formal requisites aside, the determination whether a given work was specially commissioned—in other words, was the independent contractor working for herself, or was she laboring on behalf of a commissioning party?—is the same under both Acts.

<sup>29</sup> If it were necessary to marshal further case authority—which it is not, given the jury's verdict—then reference should be made to *Picture Music*, 457 F.2d at 1217, which concluded that a work was commissioned because the hiring party "had the power to accept, reject, or modify her work," circumstances that do not pertain to UF's ability to control Writer; and *Playboy*, 53 F.3d at 556, which concluded that Playboy was the commissioning party under the 1909 Act because "Nagel certainly would have not created those particular paintings if he had not been given the assignments by Playboy," circumstances again inapplicable to the facts on this appeal.

**B. Even if *TUB* Qualified as "Specially Commissioned," UF Was Not Entitled to Renew It.**

The statutory language limits renewal rights to the proprietor in the case of "an employer for whom such work is made for hire." 17 U.S.C. §24 (1909 Act). Even if UF succeeded in demonstrating that the undisputed evidence showed *TUB* to be specially commissioned (which it does not), its appeal would still fail inasmuch as the statute grants no right of renewal to "the commissioning party for whom such work is commissioned." As the Supreme Court mandates, "The starting point for our interpretation of a statute is always its language." *Reid*, 490 U.S. at 739. Here, the language of the statute grants renewal rights only to an "employer," not to a "commissioning party." 17 U.S.C. §24 (1909 Act). Accordingly, UF's argument lacks any textual basis.

Recognizing the distinction between works created during the pendency of the 1909 Act by true employers *versus* those created on commission, numerous cases hold that the latter belong to the commissioning party only for the initial 28-year term, not for the renewal term. *See Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569, 570 (2d Cir. 1955) (holding author retained renewal copyright because lyrics were created "as a special job assignment, outside the line of his regular duties"), *modified on other grounds*, 223 F.2d 252 (2d Cir. 1955);

*Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 32 (2d Cir. 1939) (holding that *only* executor of independent contractor "could legally obtain a renewal" copyright on commissioned mural); *Eliscu v. T.B. Harms Co.*, 151 U.S.P.Q. 603, 603-04 (N.Y. Sup. Ct. 1966) (holding author "had never surrendered nor lost the renewal right" because author of musical compositions was engaged by "special assignment" and not as employee). Under the authority of those 1909 Act cases, UF's interest in *TUB* ceased at commencement of its renewal term in 1983.

To the contrary is *Picture Music*, 457 F.2d at 1216, criticized in 3 *Nimmer on Copyright* §9.03[D] ("it may be that *Picture Music* is limited to the situation where the commissioning party supplies to the independent contractor an underlying work upon which the independent contractor fashions a derivative work"). But the Second Circuit later retreated from that minority holding. See *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975) (posing renewal inquiry "whether they commissioned Griffith independently to produce the film [or] whether they 'hired' Griffith as employee to do the work").

Fortunately, it is unnecessary to untangle those strands, given that the Supreme Court recently characterized the status of the now-repealed 1909 Act regarding works made for hire:

In 1955, when Congress decided to overhaul copyright law, the existing work for hire provision was §62 of the

1909 Copyright Act. It provided that "the word 'author' shall include an employer in the case of works made for hire." Because the 1909 Act did not define "employer" or "works made for hire," the task of shaping these terms fell to the courts. They concluded that the work for hire doctrine codified in §62 referred only to works made by employees in the regular course of their employment. As *for commissioned works, the courts generally presumed that the commissioned party had impliedly agreed to convey the copyright, along with the work itself, to the hiring party.*

*Reid*, 490 U.S. at 743-44 (citations and footnotes omitted, emphasis added). Under *Reid*, had Writer worked for UF in the regular course of business, then UF would have qualified as the "employer" entitled to renew. But given UF's claim that Writer was "commissioned" to prepare *TUB*, UF's claimed rights therein stemmed only from an implied agreement. The effect of the italicized sentence is that UF's rights to the work reposed not in its status as the work's constructive author via *employment*, but instead based on an *assignment* that was implied by the circumstances. As noted in fn.3 *supra*, not even an explicit assignment of the renewal term from an author takes effect when the author dies prior to renewal

vesting; *a fortiori*, an implied agreement becomes a nullity. Thus, when the time for renewal arrived in 1983, Writer's intervening death vitiated his previous implied agreement. *See* §I *supra*.

The upshot of the Supreme Court's construction of the 1909 Act is that UF was without authority to renew *TUB* under a provision of law limited to "an *employer* for whom such work is made for hire." Accordingly, even were the evidence undisputed that *TUB* was a specially commissioned work (as opposed to the actual evidence to the contrary), *TUB* still could not be renewed by UF. That consideration provides a separate basis for affirmance.

## **XI. UF'S PRE-LITIGATION CONDUCT FORECLOSES ITS**

### **POSITION (BUT NOT MICHAEL'S) ON THIS APPEAL**

UF selectively relies on previous cases it has litigated asserting rights in *TUB*. Opening Brief pp.17, 28-34, citing *UF v. Burton*, 210 U.S.P.Q. 217 (W.D. Mich. 1980); *UF v. Maaherra*, 895 F. Supp. 1347 (D. Ariz. 1995), *rev'd*, 114 F.3d 955 (9th Cir. 1997). It claims that the latter case is "strongly persuasive" here. *Id.* p.29. It also purports to derive "a presumption of validity" shifting the burden to Michael from the manner it registered *TUB* in 1956. *Id.* p.45. As shown below, UF's pre-litigation conduct forecloses only its own arguments.

### **Summary of UF's Previous Cases Regarding *TUB*.**

#### **A.**

UF listed itself as author of *TUB* in the certificate that it filed. *See* Attachment E. When it first came time to litigate the copyright status of *TUB*, UF disclaimed any imputation of element B1 (work for hire *ab initio*) that would thereby arise (*see* §I *supra*), and instead argued solely that it qualified under element A1 (proprietor of work by transfer, *see id.*). In *Burton* (Attachment D), the court noted that UF's registration certificate "named itself as author even though it, of course, knew that it was not the author." 210 U.S.P.Q. at 219. Consonant with its argument under element A1, UF argued (and the court accepted) "that the right to claim statutory copyright was transferred orally from the author to Dr. Sadler, and that Dr. Sadler then transferred that right to [UF] through the document of trust by which it was created." *Id.* at 221. The court accordingly absolved UF from "the effect of a deliberate misstatement in the certificate" of copyright registration. *Id.* at 220.

In *Maaherra*, UF again successfully argued that it should not be held to the characterizations that it made to the U.S. Copyright Office when registering and renewing *TUB*. 114 F.3d at 962-63. Accordingly, the court turned from technical matters to the substance of the claims at issue.<sup>30</sup>

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<sup>30</sup> The court ruled that a timely filing in the name of a party entitled to renew suffices, even if the certificate fails to state the appropriate basis for renewal.

The court recounted at the outset the posture in which the case was framed:

Central to an understanding of the case is the history, as

perceived by both parties, of the creation of the Book.

Both parties believe that the words in the Book were

"authored" by non-human spiritual beings described in

terms such as the Divine Counselor, the Chief of the

Corps of Superuniverse Personalities, and the Chief of

the Archangels of Nebadon. These spiritual entities are

thought to have delivered the teachings, that were

eventually assembled in the Book, "through" a patient of

a Chicago psychiatrist, Dr. Sadler.

*Id.* at 957. What the parties unanimously perceived in *Maaherra* stands far afield from the factual posture below.

At this first-ever trial on the matter, the evidence showed that *TUB* was originally written in Writer's handwriting and the final published book contains exactly the same words as were contained in the handwritten papers produced by Writer, in exactly the same order, and without any changes other than corrections in spelling, punctuation and capitalization. *See* fn.25 *supra*. The crabbed way that

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*See* 114 F.3d at 962-63. But the question remains whether UF qualified as the proprietor of a composite work. If it had no basis to renew, then even a timely filing in its name would have no operative legal effect. *Id.* at 962.

the parties presented the issues for resolution in *Maaherra* explains the strange turns that the Ninth Circuit took there. The court started with the theological conundrum of whether a work not authored by human beings can obtain copyright protection. 114 F.3d at 958. Happily, that issue does not bedevil the current case, in which the evidence shows that a human being composed the entirety of *TUB*.

Regardless of whether the Ninth Circuit reached a proper resolution for a case involving revelations by spiritual beings,<sup>31</sup> its ruling does not apply to this appeal—which concerns the copyright status of a human-authored literary work. Instead, the Ninth Circuit case that most closely matches the instant facts is *Self-Realization Fellowship*. That case held that religious writings by an individual, which he transferred to an entity designed to propagate spiritual matters emanating from his writings, belong to the transferee only for the initial term, not for the renewal term to which he did not survive. 206 F.3d at 1329. The identical result follows here.

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<sup>31</sup> Even on its own terms, the Ninth Circuit erroneously treated *TUB* as a composite work based on unconscious category shifts. It first held that Sadler and his fellow Contact Commissioners engaged in authorship by selecting and arranging uncopyrightable revelations into *TUB*. It was that basis on which the circuit validated renewal by the proprietor of a composite work. Yet by rejecting the district court's focus on the various supernatural authors who contributed separate contributions, the panel eliminated the possibility of characterizing *TUB* as one "to which a number of different authors have contributed distinguishable selections." Indeed, by stitching numerous uncopyrightable components into a unified whole, the Contact Commissioners by definition did not individually create distinguishable selections. A prerequisite for treating the work as a composite was accordingly lacking under any theory.

**B. UF's Pre-Litigation Conduct Does Not Bind Michael**

Given that neither Michael Foundation nor Harry McMullan were party to the previous cases, the doctrines of collateral estoppel and *res judicata* are facially inapplicable to them before this court—propositions that UF does not currently deny.<sup>32</sup> *See Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174 (5th Cir. 1987) (even nonparty who helps finance litigation not subsequently barred by conclusive effect of final judgment). Accordingly, *Maaherra* cannot control the ultimate issue regarding the status of *TUB* as a composite work.

Instead of invoking prior cases, UF now seeks to bind Michael by virtue of the registration certificate that it filed for *TUB* in 1956.<sup>33</sup> Opening Brief p.45. Inasmuch as UF failed to seek jury instructions on this theory below, UF has waived that argument here. *See Patton v. TIC United Corp.*, 77 F.3d 1235, 1241 (10th Cir. 1996). Accordingly, this court need devote no further attention to the

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<sup>32</sup> UF argued below that Michael is estopped from challenging the validity of UF's copyright because its president licensed the copyright at issue and executed other agreements with UF and also contributed funds towards the *Maaherra* litigation. Supp.6; 25-26. Its brief on appeal drops those arguments, though still reciting the factual circumstances regarding the purported licensing agreement and funding. Opening Brief p.4. Because UF has abandoned these arguments in its Opening Brief, it cannot advance them in the Reply Brief. *See State Farm*, 31 F.3d at 984 n.7. In any event, the district court properly rejected them. App.277-278.

<sup>33</sup> There is no occasion to consult the renewal certificate that UF filed in 1983. *See Epoch*, 522 F.2d at 745-46 (renewal certificate not entitled to presumption of validity); 3 *Nimmer on Copyright* § 9.05[D][2].

certificate.

Even putting aside UF's waiver, its theory itself does not hold water. UF claims that the certificate, which lists UF as author (Attachment E), entails the conclusion that *TUB* was a work for hire, thereby creating a presumption in its favor on element B1.<sup>34</sup> Opening Brief p.46.<sup>35</sup>

The governing law provides, "Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein." 17 U.S.C. §209 (1909 Act); *Academy of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1451 (9th Cir. 1991) (quoting §209). Because UF never expressly claimed in the certificate that *TUB* is a work for hire, its recitation of itself as

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<sup>34</sup> UF ignores the certificate's simultaneous disproof of element A1, inasmuch as elements A1 and B1 are mutually contradictory (*see* §I *supra*). Thus, crediting UF's instant proposition would defeat its own argument on this appeal casting *TUB* as a composite work.

<sup>35</sup> To bolster its proposition, UF cites a line of cases that actually deal with proprietorship (element A1) or other irrelevant matters rather than work for hire (element B1). Opening Brief pp.45-46.

"author" cannot meaningfully<sup>36</sup> give rise to that construction.<sup>37</sup> Further, even if it had so claimed, only "a rebuttable" presumption" would arise. *Id.* at 1451; *see Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F. Supp. 776, 781 (S.D.N.Y. 1968) (defendant shifted burden of proving validity back to plaintiff). Michael presented substantial evidence below to rebut any inference arising from that certificate:

- Writer, the only human being who composed *TUB*, completed his authorship between 1935 and 1942. App.712-715.
- UF was not formed until 1950. App.719.

That evidence rebutted whatever *prima facie* presumption the registration certificate created: Given that an entity cannot, long in advance of its formation, employ agents or otherwise undertake legal relationships, it was impossible for UF to have acted as Writer's employer many years before it was incorporated, the

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<sup>36</sup> UF cannot in good faith claim that it intended to obtain work-for-hire status for *TUB* as a specially commissioned work (its current theory) when it filed the certificate in 1956, given that "it was not until after [1965] that a federal court for the first time applied the work for hire doctrine to commissioned works." *Reid*, 490 U.S. at 749, citing *Brattleboro Publ'g Co. v. Winmill Publ'g Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966).

<sup>37</sup> The Copyright Office's printed form states, *inter alia*, "In the case of a work made for hire, the employer is the author." *See* Attachment E. Section 209's "prima facie evidence of the facts stated therein" cannot apply to the printed form, but only to UF's own representations on the certificate; UF's failure to affirmatively claim that *TUB* was a work for hire negates the argument it urges here.

interval during which the work was written. *See Murray*, 566 F.2d at 1310 n.6 ("Particularly significant is the fact that the corporations claiming ownership did not come into existence until after the film had been completed"). To the extent that UF wished to vindicate its work-for-hire theory, the burden of proof rested on it below. *See Burton*, 210 U.S.P.Q. at 220 (once challenger had proven UF's error by showing that UF was not actual author of *TUB*, as stated in Certificate, burden rested on UF to show basis of its claim of copyright by means other than those stated in certificate). To the extent that it seeks reversal of the jury's finding that any employment relationship was lacking, it bears the burden here of demonstrating that no evidence was presented below on which the jury could have premised its conclusions.<sup>38</sup>

**A. UF Is Estopped from Arguing on This Appeal that *TUB* Is a Work for Hire.**

UF brought both *Burton* and *Maaherra* as party-plaintiff. It is therefore

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<sup>38</sup> To the extent that UF now wishes to revalidate its copyright by arguing that Contact Commission was the party who commissioned the work, then it is relying on matters outside the certificate. Under that latter theory, it is Contact Commission that should have been listed on the certificate as "author" (except that Contact Commission, as well, was not even extant when authorship of *TUB* began), and UF should have listed itself solely as "claimant" (thereby indicating that Commission had assigned its rights to UF). As it stands, UF's error in the certificate divests it of the presumption of validity and places the burden on UF to prove a viable theory. *See Attachment E.*

estopped to proceed inconsistently before this court.

### **Collateral Estoppel**

#### **1.**

In *Maaherra*, the district court ruled UF's work-for-hire argument groundless and granted summary judgment against UF. 895 F. Supp. at 1352-54. Although the Ninth Circuit reversed on other grounds, it noted, "The Foundation was never the employer of any of the spiritual beings, of Sadler, of the Contact Commission, or of any other entity that played a role in the creation of the Papers that were eventually transferred to the Foundation." 114 F.3d at 961. Having litigated this issue and lost, UF is estopped from raising it again. *See Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation*, 975 F.2d 683 (10th Cir. 1992).

### **Judicial Estoppel**

#### **2.**

In *Burton*, UF cited *Cummins v. Bond*, [1927] L.R. 1 Ch. 167, involving a claim of copyright in a manuscript written by Ms. Cummins taking dictation from an "ancient spirit":

The Plaintiff here has taken the position that the author (being the originator) of *The Urantia Book* is the superhuman being from whom the subject matter was received, but the writer here is in the same position as the writer in the aforesaid *Cummins v. Bond Case*, and, thus

the first owner of the copyright must be held to be such writer, be he known or unknown. Since such writer had a common law copyright in what he had written....

App.811 (UF's Brief in *UF v. Burton*). The court accepted that argument:

Since the plaintiff is not the author of [*TUB*], it must demonstrate its claim of copyright as an assignee of the rights of the author. The plaintiff claims that the right to claim statutory copyright was transferred orally from the author to Dr. Sadler, and that Dr. Sadler then transferred that right to the plaintiff through the document of trust by which it was created. The very facts which the defendant has used to show that the plaintiff was not the author have also *established that Dr. Sadler was the assignee of the rights of the author of [TUB]*.

210 U.S.P.Q. at 221 (emphasis added, citations omitted).

The evidence presented in support of UF's position in *Burton* demonstrates that Writer must be considered the initial author and owner of *TUB* for copyright purposes (element A1).<sup>39</sup> That characterization negates UF's inconsistent claim on

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<sup>39</sup> As recounted in §I above, the trial judge instructed the jury in UF's favor on element A1. App.3633.

this appeal that the work was produced for-hire, making the commissioning party into the initial owner and constructive author (element B1).

These circumstances are ideal for application of judicial estoppel: UF asserted in *Burton* that Writer was the author and owner of *TUB* and the court relied on that assertion, ruling that UF was the assignee of Writer's common law copyright. *See* 210 U.S.P.Q. at 219 (Writer "had an immediate, common law copyright...in the book [and] was free to transfer or assign this right to whomever he saw fit"). Now, because Writer's intervening death has rendered the alleged assignment of his common law copyright no longer efficacious as discussed above in §I, UF argues contrariwise that Writer was a mere independent contractor whose legal rights inured at inception to UF's predecessors. Accordingly, Michael submits that this case furnishes the appropriate vehicle for the Tenth Circuit to repudiate its extreme minority position, *see United States v. MegaMania Gambling Devices*, 231 F.3d 713, 726 (10th Cir. 2000), refusing to recognize the doctrine of judicial estoppel, *see Huddleston v. Commissioner*, 100 T.C. 17, 27 (1993) ("The U.S. Court of Appeals for the Tenth Circuit is the only circuit that, as a matter of law, on occasion has refused to apply judicial estoppel").

**I. THE EXCLUSION OF THE TESTIMONY OF BARBARA NEWSOM WAS NOT PREJUDICIAL ERROR.**

At trial, UF sought to introduce Barbara Newsom's testimony regarding the contents of allegedly secret journals, purportedly prepared by Sadler. Newsom testified that the journals, which were kept in a locked file cabinet to which only UF Trustee Emma Christensen had the key, mysteriously disappeared in 1979. App.3487. The trial court refused to allow Newsom to regale the jury with her hearsay version about the contents of those "secret journals" in the absence of the journals themselves, based on hearsay as well as UF's failure to adequately disclose the testimony in the pre-trial order. App.3563-3568. It acted well within its discretion in so ruling. *See Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 800 (10th Cir. 1997) ("the admission or exclusion of evidence lies within the sound discretion of the district court and will not be reversed absent an abuse of discretion").

UF seeks a new trial<sup>40</sup> so that Newsom can testify that Writer "was aware of the Urantia Papers, knew of the Contact Commission's intent to publish them, and disclaimed any copyright in the papers." Opening Brief p.49. Although it is unclear why those issues are relevant, it would seem that they relate to UF's claims

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<sup>40</sup> UF seeks endless opportunities to relitigate its work-for-hire theory throughout the federal court system. After disclaiming a work-for-hire theory to the *Burton* court in 1980, it shifted gears given the intervening 1983 renewal, arguing to the *Maaherra* district court that, in fact, *TUB* was a work for hire; after failing there, it appealed to the Ninth Circuit and lost on that issue again; it unsuccessfully argued the same proposition to the jury below; now, it asks this court for a fourth bite at the apple.

that Writer authorized UF to publish his writings (issue A1) and its inconsistent claim that UF was the author *ab initio* of the materials as works for hire (issue B1). As set forth in §I *supra*, UF already prevailed on the former issue as a matter of law and the judge instructed the jury accordingly. App.3633. It is nonsensical to request a new trial so that UF can present evidence to a jury that the jury was already instructed to find in its favor. The remaining matter is the latter issue B1, relating to work for hire. UF offers no explanation why the proffered testimony is relevant to that issue.

Newsom's testimony was not disclosed in the Final Pretrial Report, in which UF indicated that Newsom would testify "as to the manner in which 'The 50 Years' anniversary document was prepared, matters relating to the origin of The *Urantia Book*." UF could not have intended this description to include the excluded testimony, inasmuch as UF's counsel was purportedly unaware of it until the weekend before the Monday morning when the testimony was offered. App.3564.<sup>41</sup>

UF's non-disclosure cannot be excused under *Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980). UF's contention that Michael was not surprised by the testimony is preposterous, in view of its simultaneous contention that the testimony

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<sup>41</sup> Even UF's counsel concede "it's a close call" whether the description of Newsom's testimony encompassed the excluded testimony. App.3565.

was a surprise to its own counsel. App.3489. The admission of the secret journals would have been prejudicial to Michael—particularly as offered 4½ days into trial, after Michael had already rested. Because any attempt to cure the prejudice to Michael would have required a substantial recess, admission of the evidence also had the potential of disrupting the trial.

Moreover, the trial court was entitled to conclude that UF's non-disclosure was willful. UF has been party to litigation relating to its claimed copyright to *TUB* on numerous occasions beginning in the 1970s. Throughout those lawsuits, Sadler's allegedly secret journals never came to light, even though they purportedly contained statements by Writer that "I don't need to be the author of this" and "I don't have any problem with [publication of the book] and I don't want a copyright in it." App.3561-3562 (quoting Newsom's proffered testimony regarding Sadler's alleged recollections of Writer's so-called statements). Although Newsom worked with UF staff to compile a document, which purported to describe the process of creating *TUB*, UF claims to have been completely ignorant of the existence of the secret journals until the eve of Newsom's testimony. App.3564. The trial court acted well within its discretion in rejecting UF's incredible claim that, after the passage of so much time spent litigating the matter, it still did not know about Sadler's secret journals, if indeed they truly existed and contained the kind of information about which Newsom was

purportedly prepared to testify. *See Seymore*, 111 F.3d at 800 ("exclusion of evidence lies within the sound discretion of the district court"); *Moss v. Feldmeyer*, 979 F.2d 1454, 1458-59 (10th Cir. 1992) (applying same standard when excluded evidence was not properly disclosed in pretrial order).

Finally, regarding the trial court's alternative ground for exclusion of the evidence as hearsay, UF argues, "Newsom's testimony about her search for a lost document is plainly admissible." Opening Brief p.57. That "search" testimony relates to only a minor part of the predicate UF would have to lay for testimony about the contents of the secret journals to be admissible. For example, Newsom would have been required to negate that "the proponent lost or destroyed [the supposedly lost journals] in bad faith." Fed. R. Evid. 1004(1). But the very circumstances under which the journals were purportedly lost or destroyed lay beyond Newsom's personal knowledge, App.3491-3492, 3565-3566, and thus constituted inadmissible hearsay. Fed. R. Evid. 801(c)(1).

More fundamentally, if Newsom had been permitted to testify, she would have told the jury about the contents of secret journals containing multiple levels of inadmissible assertions—she would say what Sadler purportedly said that Writer supposedly said. App.3561-3563. No prejudicial error attended the exclusion of that double hearsay—which was, moreover, irrelevant.<sup>42</sup>

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<sup>42</sup> UF further sought to overcome the fact that the contents of the journals were hearsay by arguing below that the journals were admissible under the

## **II.CONCLUSION**

Substantial evidence supports the jury's conclusions that *TUB* is neither a composite work nor one produced for an employer. Accordingly, the judgment below should be affirmed.

Dated: February \_\_, 2002

Respectfully submitted,

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business records exception, Fed. R. Evid. 803(6), or the ancient documents exception, Fed. R. Evid. 803(16). Because UF has failed to raise such arguments in its Opening Brief, it cannot advance them in the Reply Brief. *See State Farm*, 31 F.3d at 984 n.7. In any event, neither of these exceptions applies—there was no business that Sadler was running for which he created secret journals, and secret documents shown to no one scarcely acquire the patina of reliability underlying admission of ancient documents—particularly when they no longer exist! The district court properly rejected UF's arguments. App.502-515, 650, 3563-3568.

### **III.STATEMENT REGARDING ORAL ARGUMENT**

Because this appeal raises questions of sufficiency of the evidence, and given that the voluminous record compiled below has been provided to the court, Michael would submit this matter for the court's determination without the need to schedule oral argument.

**IV.CERTIFICATE OF COMPLIANCE WITH**  
**TYPE-VOLUME LIMITATIONS**

The undersigned counsel hereby certify that, according to the word-count feature provided by counsel's word-processing application (Microsoft Word), Brief of Appellees Michael Foundation, Inc., and Harry McMullan III contains 13,594 words, including words in footnotes, and therefore complies with the type-volume limitations set forth in Rule 32(a)(7)(B), Fed. R. App. P.

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**V.CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **BRIEF OF APPELLEES MICHAEL FOUNDATION, INC., AND HARRY McMULLAN III** was served by depositing two copies of the same in the United States mail, first-class postage prepaid, on February \_\_, 2002, addressed to each of the following:

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## **VI. ATTACHMENTS TO BRIEF**

- A. Pertinent Provision of 1909 Act and Recodification in 1976 Act.
- B. *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949).
- C. Juxtaposition of Court's Jury Instruction with UF's Requested Jury Instructions, App.333-334 and Supp.247, 251.
- D. *UF v. Burton*, 210 U.S.P.Q. 217 (W.D. Mich. 1980).
- E. Registration Certificate A216389, App.2411-2413.