

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHAEL FOUNDATION, INC.,
a foreign 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.

Case Nos. 01-6347
01-6348

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

District Court No. 00-885-W, The Honorable Lee R. West, Senior District Judge

OPENING BRIEF OF APPELLANT, URANTIA FOUNDATION

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Urantia Foundation is a non-profit charitable foundation that operates under a Declaration of Trust created in 1950. Urantia Foundation has no stock and thus has no parent corporations and no shareholders.

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PRIOR OR RELATED APPEALS

The validity of the Urantia Foundation's United States renewal copyright number RE-384 in *The Urantia Book*, which is at issue in this case, was upheld by the United States Court of Appeals for the Ninth Circuit in *Urantia Foundation v. Maaherra*, 114 F.3d 955 (9th Cir. 1997). Plaintiff Michael Foundation and third-party defendant Harry McMullan III were not parties to that appeal.

STATEMENT OF JURISDICTION

The district court possessed subject matter jurisdiction pursuant to 28 U.S.C. § 1338, which confers exclusive jurisdiction over copyright cases on the district courts. The district court entered its amended final judgment on August 14, 2001, disposing of all claims in this case. The amended final judgment is an appealable final decision over which this court possesses jurisdiction under 28 U.S.C. § 1291. On September 13, 2001, Urantia Foundation timely filed its notice of appeal pursuant to F.R.A.P. 4(a).

STATEMENT OF ISSUES

1. **Composite Work.** In light of the undisputed evidence that *The Urantia Book* consists of 196 separately titled “papers” covering a wide variety of subjects, and that the papers are attributed to more than fifty different authors, did the district court err in declining to rule as a matter of law that *The Urantia Book* is a composite work within the meaning of the 1909 Copyright Act, and that Urantia Foundation’s renewal copyright accordingly is valid?

2. **Commissioned Work.** In light of the undisputed evidence that the Urantia Papers were created at the instance and expense of Urantia Foundation and its predecessor in interest, and that no other person has ever claimed rights in the Urantia Papers, did the district court err in declining to rule as a matter of law that *The Urantia Book* is a commissioned work within the meaning of the 1909

Copyright Act, and that Urantia Foundation's renewal copyright accordingly is valid?

3. **Commissioned Work.** In light of (a) the failure of the parties challenging the copyright to introduce any evidence to rebut the presumption of validity established by Urantia Foundation's original and renewal copyright certificates, and (b) the undisputed evidence that Urantia Foundation and its predecessors exercised unquestioned control over and possession of each of the Urantia Papers prior to their publication in *The Urantia Book*, did the district court err in declining to rule as a matter of law that *The Urantia Book* is a commissioned work within the meaning of the 1909 Copyright Act, and that Urantia Foundation's renewal copyright accordingly is valid?

4. **Exclusion of Testimony Due to Claimed Surprise.** In light of Urantia Foundation's pretrial disclosures of Barbara Newsom as a witness who would testify concerning one of the historical documents in the case and generally on the origin of *The Urantia Book*, did the district court err by excluding, on grounds of unfair surprise, Ms. Newsom's testimony that the person in whose handwriting each of the Urantia Papers first appeared disclaimed any copyright for himself?

STATEMENT OF THE CASE

This case arises from a series of religious, philosophical, and scientific writings dating from the early 1900s known as the Urantia Papers. In 1955, Urantia Foundation (“Urantia”) collected and published 196 Urantia Papers in *The Urantia Book*. In the last six years alone, Urantia has sold more than 150,000 copies of the book worldwide. In this case Urantia asserts a claim for copyright infringement against parties that published and sold 76 consecutive papers from *The Urantia Book* as a separate work without Urantia’s permission.

Urantia is a public, charitable trust founded in 1950. The *Declaration of Trust Creating Urantia Foundation* entrusts Urantia with the duty to preserve inviolate the text of *The Urantia Book* and to maintain exclusive control over the means of reproducing *The Urantia Book* and all translations thereof.

In furtherance of the responsibilities of its trust, Urantia registered its original copyright in 1956 for a term of twenty-eight years. It registered its renewal claim of copyright in 1983 for an additional twenty-eight year term (with recent extensions granted by Congress, the renewal term is now valid through 2050). No one other than Urantia has ever claimed copyright in any of the individual Urantia Papers or in *The Urantia Book*.

Despite Urantia’s registered copyright, over the years a few individuals and organizations have attempted to publish some or all of the Urantia Papers without

Urantia's permission. In some cases, including *Urantia Foundation v. Maaherra*, 114 F.3d 955 (9th Cir. 1997), in which the Ninth Circuit upheld the validity of Urantia's renewal copyright, Urantia has enforced its copyright in the federal courts.

Third-party defendant-appellee Harry McMullan III ("McMullan") is a disaffected former supporter of Urantia. He provided approximately \$73,000 to finance Maaherra's unsuccessful challenge to Urantia's copyright. Shortly after he learned of the Ninth Circuit's decision in *Maaherra* upholding the validity of Urantia's copyright, McMullan announced his intention to challenge anew the copyright by publishing a substantial portion of *The Urantia Book* without permission. In 1999, plaintiff-appellee Michael Foundation, Inc., a not-for-profit corporation formed and controlled by McMullan, published and sold *Jesus – A New Revelation* ("JANR"). *JANR* consists of 76 consecutive Urantia Papers copied verbatim from Part IV of *The Urantia Book*.

McMullan and Michael Foundation (together, the "McMullan Parties") do not claim any right or interest in the copyright to *The Urantia Book*. Rather, they contend that Urantia's 1983 renewal copyright registration is invalid because, they say, Urantia was not the proper party to renew the copyright. As a result, they claim, *The Urantia Book* has passed into the public domain, and they are free to copy it.

Urantia maintains that its renewal copyright is valid because, under the governing 1909 Copyright Act, *The Urantia Book* is both a composite work and a commissioned work.¹ Copyrights in both kinds of works can be renewed by the work's proprietor and, as the original publisher and copyright registrant, Urantia is the proprietor of *The Urantia Book*. Urantia therefore was the proper party to renew the copyright registration, and its copyright remains valid and enforceable.

Urantia accordingly brought an action for copyright infringement against Michael Foundation in the United States District Court for the District of Arizona. That court dismissed the case for lack of personal jurisdiction. Michael Foundation then sued Urantia in the Western District of Oklahoma, seeking a judgment declaring Urantia's renewal copyright to be invalid and unenforceable, or alternatively that its publication of *JANR* does not infringe Urantia's copyright. (Appellant's Appendix ("App.") 26.)

Urantia asserted counterclaims against Michael Foundation and third party claims against McMullan, its founder and chief executive, for copyright infringement, multiple violations of the Anti-Cybersquatting Consumer Protection Act, and unfair trade practices. The latter two claims were based on the McMullan

¹ A composite work is a work composed of multiple individual pieces that retain their separate character. A commissioned work is a category of works made for hire in which the work is created at the instance and expense of the commissioning party.

Parties' registration and use of three Internet domain names which infringed Urantia's federally registered Urantia® or Urantian® marks. (App. 33, 48-54.) In reply, Michael Foundation counterclaimed that Urantia's trademarks are invalid. (App. 112.)

Urantia filed a motion for partial summary judgment requesting the district court to uphold the validity of Urantia's renewal copyright as a matter of law. Urantia also requested that the district court uphold the validity of its trademarks. The district court granted Urantia's motion in part and issued an order holding that Urantia is the proprietor of the copyright in *The Urantia Book* as a matter of law and that Urantia's registered marks are valid. (App. 256, 278-279, 294.) However, the district court declined to decide on summary judgment whether Urantia's renewal copyright is valid. (App. 294.)

The case proceeded to trial before a jury. During trial, the parties settled the cybersquatting and unfair trade practices claims. By the close of the evidence, therefore, the key unresolved issue was whether Urantia holds a valid renewal copyright. Each side moved for entry of judgment as a matter of law, and the court denied both motions. (App. 3570-3584.) The district court did rule, however, that if Urantia's copyright is valid, *JANR* infringes it. (App. 3588-3589.) The jury returned a verdict in favor of the McMullan Parties, finding that *The Urantia Book* is neither a composite work nor a commissioned work. (App. 354.)

Urantia moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, and to amend the judgment to limit its effect to Urantia's United States copyright registration. The district court denied Urantia's motions for JNOV and for a new trial, and granted in part Urantia's motion to amend the judgment by limiting the scope of the judgment to the U.S. renewal copyright. (App. 648, 653, 658.) This appeal followed.

STATEMENT OF FACTS

A. Events Leading To Publication and Copyright Registration

Few details are known about how the Urantia Papers came into existence. (App. 2905-2906.) The few individuals with firsthand knowledge of these events are deceased (App. 2713) and, while they were alive, chose not to divulge many details about the specific manner in which the Urantia Papers were created. (App. 2905-2906.) The papers themselves contain various references to their authorship and manner of creation. (App. 2410/vii-xii.)² Two written histories provide some information (App. 702, 762), and a handful of individuals testified at trial regarding knowledge of some of the events surrounding the creation of the Urantia Papers. (App. 2692, 3241, 3269, 3281, 3474, 3717.) These are the best available

² App. 2410 (Volume 9 of the Appendix) is *The Urantia Book*. For the convenience of the Court, all citations to *The Urantia Book* are "App. 2410/____" signifying *The Urantia Book* and the specific page(s) in the book to which the brief refers.

sources of information about the creation of the Urantia Papers and their subsequent publication together as *The Urantia Book*. One of the histories was written by Dr. William Sadler in the 1960s. (App. 762-790.) The other was written by Barbara Newsom and Carolyn Kendall, both of whom testified at trial, based on documents contained in Urantia's archives, interviews and diaries of participants in some of the key events, and other secondary sources. (App. 702-761.) The undisputed facts are summarized below.

One night in the early 1900s, Dr. William S. Sadler, and his wife, Dr. Lena Sadler, both well-known and respected physicians, were contacted by a neighbor's wife who was concerned by her husband's unusual behavior while asleep. (App. 710, 3288-3289.) This man, who has never been identified by name, became known as the "subject." (App. 710, 1900-1901, 2879.) The Sadlers were also investigators and debunkers of supposed psychic phenomena, and after full examination of the subject without finding a physical reason for his anomaly, they began participating in sessions with the unconscious subject during which they investigated alleged communications from various celestial personalities. (App. 710-711, 1900-1901, 3287-3289.) Dr. Lena Sadler kept detailed notes of these communications during these early "contact sessions" (App. 1900-1901, 2889-2890), but these notes were destroyed after *The Urantia Book* was published in 1955. (App. 2915.)

Dr. William Sadler eventually invited four other persons to participate in the contact sessions: the Sadlers' son, William S. Sadler, Jr.; Lena Sadler's sister, Anna Kellogg, and her husband, Wilfred Kellogg; and the Sadlers' adopted daughter, Emma Christensen. (App. 712, 2754.) This group was known as the "Contact Commission." (App. 712, 2754, 2882-2883, 3248.) Dr. Sadler was the acknowledged leader of this group. (App. 712.) At the sessions with the unconscious subject, the Contact Commission made what have been described as contacts with the celestial personalities identified in the Urantia Papers. (App. 690, 710-711, 764, 1900-1901.) During these contacts, these celestial personalities provided the Contact Commission with a great deal of information about a wide variety of topics. (App. 690, 710-711, 764, 1900-1901, 2888-2889.) Stenographic notes of the celestial communications were made during these early contact sessions. (App. 1900-1901, 2124, 2711, 2889-2890.) However, most of these notes were also destroyed after *The Urantia Book* was published. (App. 2915.) The contact sessions, and the process of accumulating notes of these communications, continued into the 1950s. (App. 2703, 2915.)

None of the members of the Contact Commission is alive, and the details of what happened in the contact sessions were never revealed. (App. 2905-2906.) As a result, no record exists of the precise manner in which the Urantia Papers were created. Urantia has no knowledge regarding the identity of the subject or his

heirs. (App. 2879, 2906.) The only evidence of the subject's intention concerning the Urantia Papers is that, although unconscious during the contact sessions, he was shown the manuscripts after the sessions and he read them. (App. 710, 2879, 2912.) The subject was not particularly interested in the phenomena and never claimed any rights in the manuscripts for himself. (App. 710, 2879, 2912, 2917.)

In the early 1920s, Dr. Sadler formed a discussion group that later became known as the "Forum." (App. 712, 3243-3244.) The Forum met each Sunday at Dr. Sadler's residence (now Urantia headquarters). (App. 3243-3244, 3250, 3354.) At some point in the early to mid-1920s, after some twenty years of preliminary contacts, Dr. Sadler and the other members of the Contact Commission told the Forum members about the contact sessions. (App. 712.) Dr. Sadler said that the celestial beings with whom the Contact Commission believed it was in contact had challenged them to ask more meaningful questions. (App. 712.) The Contact Commission solicited Forum members to assist in the formulation of specific questions. (App. 712.)

Forum members responded to the challenge by formulating and submitting hundreds of questions in writing to the Contact Commission. (App. 3256-3257, 3260-3261, 3311-3312, 3528.) The Contact Commission composed questions, sorted through the questions, and selected which questions to present during the contact sessions. (App. 3257.) The first Urantia Paper was created after the

Contact Commission solicited these questions and submitted them during contact sessions. (App. 712, 765.) Ms. Newsom and Ms. Kendall wrote, quoting

Dr. Sadler from the *History of the Urantia Movement*:

The doctor invited them [Forum members] “to join us in the preparation of questions.” Said the doctor, “We decided to start out with questions pertaining to the origin of the cosmos, Deity, creation, and such other subjects as were far beyond the present-day knowledge of all humankind.” On the following Sunday “several hundred questions were brought in. We sorted out these questions, discarding duplicates, and in a general way, clarifying them,” he explained. “Shortly thereafter, the first Urantia Paper appeared in answer to these questions,” he continued. “From first to last, when Papers appeared, the questions disappeared. This was the procedure followed for the many years of the reception of the Urantia Papers. No questions, no Papers.”

(App. 712, quoting App. 765.)

At each Forum meeting, one of the members of the Contact Commission read aloud a paper that responded to previously-submitted questions. (App. 712, 3260.) Then the Forum discussed what had been read and submitted follow-up questions about the topic covered by the paper. (App. 712, 3260, 3275-3276.) Later, a revised paper would appear that answered the new questions. (App. 712, 3726-3729.) 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. (App. 712, 3329, 3466.) In many cases, the papers came one at a time and were studied one at a time. (App. 3313-3316

(summarizing 2554-2560), 3726-3729.) The question-and-answer process continued nearly twenty years, with hundreds of Forum members in addition to the Contact Commission participating in composing questions. (App. 714, 2591.) The questions continued until at least 1942. (App. 714.) The questions played such a significant part in the creation of the Urantia Papers that Dr. Sadler wrote, “No questions – no papers.” (App. 712, 765.)

At all times before publication, the Contact Commission kept the Urantia Papers at Dr. Sadler’s residence. (App. 2903, 3730-3731.) Forum members were allowed to read typewritten manuscripts of the papers, but only at Dr. Sadler’s residence. (App. 2903, 3262-3263, 3730-3731.)

The Contact Commission’s assertion of copyright in *The Urantia Book* can be traced as far back as 1932 when a member of the Contact Commission wrote to the Register of Copyrights concerning the meaning of the term “proprietor” as used in Section 8 of the 1909 Copyright Act and the manner in which a “corporation, association or society” could register its ownership of a copyright as “proprietor.” (App. 830-834.) The Register responded that a copyright in a work owned by an organization could be registered “in the first instance” by such organization without the need of a “formal transfer” from the author(s), with the organization identifying itself as the “author” of a “work for hire” as provided by Section 62 of the 1909 Copyright Act. (App. 835.)

One of the earliest known statements of the Contact Commission's intention to publish the Urantia Papers in book form appeared in a 1941 letter to the Forum. (App. 2452.) The letter stated that the Contact Commission was in the process of determining the best "legal form" for the organization to publish the papers in book form. (*Id.*) The Contact Commission, and later Urantia as its successor, spent more than \$100,000 to finance the creation and publication of *The Urantia Book*. (App. 2591.) Before she died in 1939, Contact Commissioner Dr. Lena Sadler raised \$20,000 to pay for the initial expenses of setting manuscripts on printing plates. (App. 716.) Contact Commissioner Wilfred Kellogg signed a contract with R.R. Donnelly & Sons to manufacture printing plates from the typewritten manuscripts of the Urantia Papers so that they could be published in book form. (App. 2562.)

In 1950, Urantia was formed as an Illinois charitable trust to succeed to the Contact Commission's rights in the Urantia Papers, to publish the Urantia Papers collectively as *The Urantia Book*, and to register the statutory copyright. (App. 2428-2441, 2569-2570, 3263-3264.) Forum members knew Urantia was created to assume rights to and control over the eventual publication of *The Urantia Book*. (App. 3302.) No one, including the subject, objected to Urantia's assumption of rights and control. (App. at 2917, 3468.) When Urantia was formed in 1950, Wilfred Kellogg assigned all rights in the printing contract and ownership of the

printing plates to Urantia. (App. 2564.) By the time of its publication in 1955, approximately fifty years of time and effort had been invested in the process of creating the Urantia Papers for publication as *The Urantia Book*. Hundreds of people participated in the process without desire for recognition or reward. (App. 715.) Most of all, the Contact Commission devoted countless hours to this unique process and to raising the money needed to make publication a reality. (App. 2591.) The Sadlers even opened their home and offices in Chicago, which is now the headquarters of Urantia Foundation, to meetings relating to the process. (App. 3243-3244, 3250, 3354.)

No one other than Urantia has ever claimed an interest in the copyright in any of the Urantia Papers or in *The Urantia Book*. (App. 3394, 3468-3469.) The *Declaration of Trust Creating Urantia Foundation* states, among other things, that Urantia's purpose is to "perpetually preserve inviolate the text of *The Urantia Book* . . . retain absolute and unconditional control of all plates and other media for the printing and reproduction of *The Urantia Book* and any translation thereof . . . and . . . disseminate the teachings and doctrines of *The Urantia Book*" (App. 2432.)

Urantia's trustees and many other readers of *The Urantia Book* believe that the subject was merely a conduit for the true authors – the more than fifty spiritual beings to whom the various papers are attributed in references throughout the book

and who are listed in the *Titles of the Papers* section at the front of *The Urantia Book*. (App. 2774, 3535.) The Contact Commission believed, as do the current trustees of Urantia, that the celestial authorship of the Urantia Papers can be validated only by the quality and content of the papers themselves. Urantia’s trustees and many other readers also believe that the 196 Urantia Papers – collectively – constitute a revelation of truth. (App. at 2778-2779.) For this reason, preserving the original text of the papers inviolate is one of the express obligations imposed by the *Declaration of Trust*. (App. at 2431, 2778-2779, 3471-3472.)

Urantia first published the 196 Urantia Papers together as *The Urantia Book* on October 12, 1955, under notice of copyright. (App. 2411-2413.) Urantia registered the U.S. copyright in early 1956 by submitting its application to the U.S. Copyright Office along with two copies of the book. (*Id.*) Consistent with the answer received in the 1932 letter from the Register of Copyrights, and with the instructions on the application that the employer of a work for hire may identify itself as the author, the original registration certificate identifies Urantia, successor to the Contact Commission, as the author of *The Urantia Book*. (*Id.*) In 1983, Urantia renewed its copyright in *The Urantia Book* as the “proprietor of a work made for hire.” (App. 2414-2415.) Since 1995, Urantia has printed and sold more than 150,000 copies of *The Urantia Book*. (App. 3381.) Since the book’s initial

publication, sales have steadily grown. (App. 3185.) Whereas only a handful of books were sold in the 1950s, nearly 40,000 copies were sold in the year 2000 alone. (App. 2707.)

B. The Nature of the Urantia Papers.

The Urantia Book is a collection of 196 “papers,” not chapters. (App. 3198.) The papers are referred to as the “Urantia Papers.” (*Id.*) McMullan has called *The Urantia Book* a “repository” of diverse information. (App. 1197.) The book begins with two sections authored by a member of the Contact Commission, entitled *Titles of the Papers* and *Contents of the Book*, which list some of the contents of the papers. *The Urantia Book* touches on many subjects, including anatomy, anthropology, astronomy, biology, chemistry, cosmology, criminology, economics, education, evolution, genetics, geology, government, history, philosophy, history of religion, philosophy of religion, medicine, physics, psychology, sociology, family, marriage and science. (App. 2410/vii-lxvi.) The Urantia Papers state that the papers contain revelations, and the papers describe the celestial authors responsible for each of the respective papers. (App. 2410/16-17.) The *Titles of the Papers* lists these various celestial authors. (App. 2410/vii-xii.)

The Urantia Book organizes the Urantia Papers into four sections. The first three sections include 119 papers. (App. 2410/vii-x.) Part I of *The Urantia Book* (Papers 1-31) is called *The Central and Superuniverses* and includes thirty-one

papers, with titles such as *The Universal Father*, *The Nature of God*, *The Seven Master Spirits*, *The Messenger Hosts of Space*, and *Personalities of the Grand Universe*. (App. 2410/vii.) Part II of the book (Papers 32-56) is called *The Local Universe* and includes papers such as *Administration of the Local Universe*, *Energy – Mind and Matter*, *The Celestial Artisans*, and *The Lucifer Rebellion*. (App. 2410/viii.) Part III of the book (Papers 57-119) is called *The History of Urantia* (“Urantia” refers to planet Earth). It includes a series of four papers (73-76) that tell the story of Adam and Eve and other papers covering a variety of subjects, such as *The Marine Life Era on Urantia*, *The Evolution of Human Government*, and *Fetishes, Charms and Magic*. (App. 2410/viii-x.) Part IV of the book (papers 120-196) is called *The Life and Teachings of Jesus*. (App. 2410/x.) Included within Part IV are a paper on *The World’s Religions*, a series of two papers on the Greek philosopher *Rodan of Alexandria*, and an adaptation for present-day world conditions of a series of lectures on sovereignty – divine, human, and political – known as *The Urmia Lectures* that are contained within Paper 134. (App. 2410/x-xii.)

C. Past Litigation and Events Leading Up to This Case.

The validity of Urantia’s original claim of copyright was upheld on summary judgment in 1980 in *Urantia Foundation v. Burton*, 210 U.S.P.Q. 217, 1980 WL 1176 (W.D. Mich. 1980). (App. 2442.) While *Burton* was pending,

McMullan wrote a letter to Urantia stating that he supported its efforts to combat infringement of the copyright in *The Urantia Book*. (App. 2552.)

From about 1970, when McMullan first came into contact with Urantia, through 1989, Urantia and McMullan remained on good terms. McMullan served in an affiliated organization known as Urantia Brotherhood. (App. 2960.) In 1987, McMullan requested and received a non-exclusive copyright permission from Urantia to publish *21 Steps to Spiritual Awakening* (which quotes extensively from *The Urantia Book*). (App. 2460, 3038.) In 1989, McMullan entered into a written agreement assigning his key word index to the *Contents of the Book* section of *The Urantia Book* to Urantia. In this agreement, McMullan acknowledged the validity of Urantia's copyright in *The Urantia Book*. (App. 2547.) Later in 1989, Urantia and Urantia Brotherhood ended their affiliation with each other, and Urantia consequently terminated Urantia Brotherhood's license to use the name "Urantia" and its rights as distribution agent for *The Urantia Book*. (App. 3135-3137.) As a result of this split, McMullan developed an intense animosity toward Urantia. (App. 3143, 3506.) McMullan wrote in an e-mail, referring to the terrorist attack in McMullan's hometown of Oklahoma City, that he would like to park "a yellow Ryder truck" in front of Urantia's Chicago headquarters "along the lines of Timothy McVeigh." (App. 3554.)

In 1991, Urantia sued Kristen Maaherra for copyright infringement, and Maaherra filed a counterclaim asserting that the renewal copyright in *The Urantia Book* is invalid. McMullan contributed approximately \$73,000 to finance Maaherra's challenge to Urantia's copyright in *The Urantia Book*. (App. 3047.) Ultimately, the Ninth Circuit upheld the validity of Urantia's renewal copyright. *Urantia Foundation v. Maaherra*, 114 F.3d 955 (9th Cir. 1997).

In 1997, after the *Maaherra* decision but before the publication of *JANR*, McMullan pledged he would challenge the validity of Urantia's copyright in *The Urantia Book*. (App. 2458-2459.) He did so by causing Michael Foundation to publish and begin selling *JANR* in 1999. (App. 1903, 2457.) This litigation resulted.

JANR consists of a verbatim reproduction of 76 consecutive papers from Part IV of *The Urantia Book*. (App. 1903-1923.)

SUMMARY OF ARGUMENT

The Urantia Book is a composite work and a commissioned work as a matter of law, and Urantia is the proprietor that registered the original claim of copyright in the book. Therefore, Urantia, not the subject, was the proper party to renew the claim of copyright in *The Urantia Book*, and Urantia's renewal copyright consequently is valid and enforceable. If the Court does not rule that Urantia's copyright is valid as a matter of law, the Court should reverse and remand for a

new trial because the district court erroneously excluded key testimony that the unidentified subject was aware of plans to publish the Urantia Papers and that he disclaimed any rights in them.

Composite Work. A composite work is a work composed of multiple individual pieces that retain their separate character. It is undisputed that *The Urantia Book* is comprised of discrete compositions attributed to over fifty different celestial authors. For example, some papers discuss the cosmos, some papers address the institution of government, another paper addresses marine life on earth, and another describes energy. The book contains several distinct series of papers as well, such as four papers that retell the story of Adam and Eve (73-76), and the three papers on marriage and family life (82-84). Based on these facts, as the Ninth Circuit held in *Maaherra*, *The Urantia Book* is a collection of separate and independent works, which renders the book a composite work under the 1909 Copyright Act.

The district court should have held as a matter of law that *The Urantia Book* is a composite work. Instead, the district court erred by permitting the accused infringer to testify as to *his perception* that the Urantia Papers are internally cohesive and merge into a unified work, and then submitting the question as one of fact for the jury to decide.

Commissioned Work. A commissioned work is a form of work made for hire in which the work is developed by an author for the benefit of another, called a commissioning party. The commissioning party is the party who is the “motivating factor” in the creation of a work, at whose instance and expense a work is created. Whether a work is commissioned is a question of law for the court. The cases interpreting the 1909 Copyright Act, applicable in this case, broadly applied the law governing commissioned works and generally protected publishers’ rights over those of authors. Under the 1909 Act, a work that was done as an accommodation, with no expectation of monetary compensation by the commissioning party, qualified as a work made for hire.

The Urantia Papers were created over a span of decades in response to extensive questions submitted by the Contact Commission. The Urantia Papers were created and published at considerable expense to the Contact Commission and Urantia. There is no question that between the Contact Commission and the unconscious and unidentified subject, the motivating factor in the creation of the Urantia Papers was the Contact Commission. The subject, in contrast, never claimed any interest in the papers and did not assist in publishing them. Thus, the law under the 1909 Act presumes that the parties intended that the Contact Commission and Urantia, not the subject, would own the copyright in *The Urantia Book*.

The McMullan Parties failed to introduce any evidence that the subject intended to retain copyright in *The Urantia Book* or in any of its constituent papers. On the contrary, the subject acknowledged that the papers appeared to be in his handwriting, but never asserted copyright ownership in them or objected to Urantia's registration of the copyright in *The Urantia Book*. Therefore, as a matter of law, *The Urantia Book* is a commissioned work under the 1909 Copyright Act.

The district court erred in declining to grant judgment as a matter of law that *The Urantia Book* is a commissioned work. The district court also erred by placing undue emphasis on the lack of monetary compensation to the subject and by improperly injecting inapplicable standards for works made for hire under the 1976 Copyright Act that depart substantially from the applicable law of the 1909 Act .

Because *The Urantia Book* is both a composite work and a commissioned work as a matter of law, Urantia's renewal copyright is valid. The district court has already held that if the copyright in the book is valid, *JANR* infringes the copyright. Therefore, the case should be remanded to the district court with instructions to enter judgment that *JANR* infringes Urantia's valid copyright and for further proceedings on remedies.

New Trial. In the alternative, the case should be remanded for a new trial. Urantia's presentation of its case was impaired because the district court erroneously held that testimony of Barbara Newsom constituted unfair surprise.

Ms. Newsom was a co-author of one of the significant historical documents and was prepared to testify that the subject 1) knew of the papers, 2) knew that the Contact Commission intended to publish the papers, and 3) disclaimed any copyright in the papers. Urantia advised all parties during discovery and again in the pretrial order that Ms. Newsom would testify about the work she co-wrote and about the origin of *The Urantia Book*. Her proffered testimony related to both subjects. The exclusion of this evidence prejudiced the outcome of the commissioned works issue and compromised Urantia's ability to respond to McMullan's conjectural testimony that he believed Dr. Sadler appropriated the Urantia Papers from the subject without the subject's consent.

ARGUMENT

I. URANTIA HOLDS A VALID RENEWAL COPYRIGHT IN *THE URANTIA BOOK*.

Standard of Review. A district court's denial of a motion for judgment as a matter of law under Rule 50 is reviewed *de novo* applying the same standard as the district court below. *Vining v. Enterprise Fin. Group*, 148 F.3d 1206 (10th Cir. 1998); *see also Haines v. Fisher*, 82 F.3d 1503, 1510 (10th Cir 1996); *Harold Stores, Inc. v. Dillard Dep't Stores*, 82 F.3d 1533, 1546 (10th Cir.), *cert. denied*, 519 U.S. 928 (1996). Whether *The Urantia Book* is a commissioned work and/or a composite work within the meaning of the 1909 Copyright Act is a question of law

to be decided by the courts, not by a jury. *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1215 n.5 (2d Cir.), *cert. denied*, 409 U.S. 977 (1972); *Donaldson Pub. Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 641 (2d Cir.), *cert. denied*, 389 U.S. 1036 (1968); *Easter Seal Soc. For Crippled Children & Adults v. Playboy Ent.*, 815 F.2d 323 n.18 (5th Cir.), *cert. denied*, 485 U.S. 981 (1988); *see also Bayless v. Christie, Manson & Woods Int'l, Inc.*, 2 F.3d 347, 351 (10th Cir. 1993), *quoting Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th Cir.) (reversing denial of JNOV motion due to district court's failure to decide question of law), *cert. denied*, 507 U.S. 973 (1983).

A. *The Urantia Book* Is a Composite Work As a Matter of Law Because the Book Is a Collection of Several Previously Unpublished Papers First Published Together Under a Single Notice of Copyright.

The 1909 Copyright Act (“1909 Act”) governs the ownership and enforcement of copyrights in works that existed before January 1, 1978, when the 1976 Copyright Act (“1976 Act”) came into effect. Because *The Urantia Book* was published in 1955, this case is governed by the 1909 Act and doctrines developed by the federal courts in their application of the 1909 Act. *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1427 (9th Cir. 1996); *Academy of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1451 (9th Cir. 1991).

The general rule under the 1909 Act was that “authors” or “proprietors” could register copyrights for an original term of 28 years, and the copyrights could be renewed for an additional term of 28 years. *See* 17 U.S.C. § 24 (repealed).³ As used in the 1909 Act, “author” means the creator of the work. 17 U.S.C. § 26 (repealed). “Proprietor” means the “entity under whose copyright the work is published.” *Abend v. MCA, Inc.*, 863 F.2d 1465, 1471 n.6 (9th Cir.), *aff’d*, *Stewart v. Abend*, 469 U.S. 207 (1990).

The district court in the instant case, like two previous courts, held on summary judgment that Urantia is the proprietor of the copyright in *The Urantia Book* based on the fact that Urantia exercised unquestioned possession of and control over unpublished manuscripts and the printing plates of the Urantia Papers, published them together as *The Urantia Book*, and registered the original copyright in its own name. In the almost fifty years since the original copyright was registered, no one other than Urantia has ever claimed any rights in the original or renewal copyright. In light of Urantia’s copyright proprietorship, the first issue presented by this appeal is whether *The Urantia Book* is a composite work within the meaning of the 1909 Act. If *The Urantia Book* is a composite work, then

³ Under the 1976 Act, as amended, the renewal term for composite works originally copyrighted under the 1909 Act was extended to 67 years.

Urantia was entitled to renew the copyright in the book as the proprietor that registered the original copyright.

The 1909 Act uses the term “composite work,” but does not define it. At least for purposes of copyright renewal, the issue in this case, “it seems clear that a ‘composite’ work is what is referred to elsewhere in the present [1976] Act as a ‘collective’ work.” 3 *Nimmer on Copyright* § 9.03[B], at 9-17 (2001). See *Dahinden v. Byrne*, 1982 WL 1162, at *2 (D. Or. April 14, 1982).⁴ Under the 1976 Act, a collective work is defined 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.

Section 24 of the 1909 Copyright Act provided a statutory basis for the renewal of composite works that was carried forward under the 1976 Act, subsequently amended as to the duration of the renewal term, as follows:

Copyrights in Their First Term on January 1, 1978. (1)(A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of –

⁴ Pursuant to 10th Cir. R. 36.3, Urantia cites this unpublished case because it has been unable to find a published decision addressing whether the term “composite work” under the 1909 Act means the same as “collective work” under the 1976 Act.

(i) any posthumous work or of any periodical, cyclopedic, *or other composite work* upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or 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 for the further term of 67 years.

17 U.S.C. § 304(a) (emphasis added).

Examples of composite works in the case law under the 1909 Act include periodicals, catalogs, and encyclopedias. *Markham v. A.E. Borden Co.*, 206 F.2d 199, 210 (1st Cir. 1953) (catalogs); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406, 409 (2d Cir.), *cert. denied*, 331 U.S. 820 (1947) (“articles of an encyclopedia” are parts of composite work). As the district court properly held on summary judgment in this case, a collection of works by a single author is an example of a collective or composite work. *See Szabo v. Erisson*, 68 F.3d 940 (5th Cir. 1995) (collection of recordings of single artist); 1 *Nimmer on Copyright* § 3.02, at 3-7 (“It is not necessary that the contributions emanate from different authors.”).⁵

⁵ In *dicta*, *Shapiro, Bernstein & Co., Inc. v. Bryan*, 123 F.2d 697, 699 (2d Cir. 1941), described a composite work as a work consisting of distinguishable parts by multiple authors.

1. Under the Applicable Law, *The Urantia Book* is A Composite Work.

In the only case to address whether a work is a composite work as a matter of law for purposes of copyright renewal, the Ninth Circuit considered the same issue presented by this case and held that Urantia’s renewal copyright in *The Urantia Book* is valid because the book is a composite work within the meaning of the 1909 Act. In *Urantia Foundation v. Maaherra*, 895 F. Supp. 1347 (D. Ariz.), *reversed on other grounds*, 114 F.3d 955 (9th Cir. 1997), the district court addressed two issues: (1) whether Urantia is the proprietor of the Urantia Papers or *The Urantia Book*; and (2) if so, whether *The Urantia Book* is a composite work.

The district court in *Maaherra* granted summary judgment against Urantia, holding that Urantia was not the proprietor of the Urantia Papers. In discussing the composite work theory of renewal, however, the district court determined that the composite structure of *The Urantia Book* - 196 separate “papers,” attributed to over fifty different celestial beings – qualifies *The Urantia Book* as a composite work. “The Urantia Papers are obviously distinguishable parts” *Id.* at 1354. On appeal, the Ninth Circuit reversed the district court’s holding on the proprietorship issue and held in favor of Urantia on both key points. First, it reversed the district court as to proprietorship and held (as the district court here did) that Urantia is the

proprietor of the work. Second, it agreed with the district court that *The Urantia Book* is a composite work.

Maaherra, a recent decision of a federal court of appeals, is “strongly persuasive” on the copyright validity issue. *Williams v. Hughes Tool Co.*, 186 F.2d 278, 281 (10th Cir.) (citing cases), *cert. denied*, 341 U.S. 903 (1951). Adherence to the holding of *Maaherra* ensures that the law “will develop in a principled and intelligible fashion.” *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

Maaherra is consistent with the decisions of other courts holding the works at issue to be composite works. One of the earliest appellate decisions to address composite works, *Markham v. A.E. Borden Co.*, 206 F.2d 199, 201 (1st Cir. 1953), held that a refrigeration trade catalog was a composite work, capable of being infringed by the selective publication of a few of the catalog’s components.

Accord, *Szabo*, 68 F.3d at 942-44 (sound recording consisting of a number of separate songs by same artist constituted collective work); *Rexnord, Inc. v. Modern Handling Sys.*, 379 F. Supp. 1190, 1195 (D. Del. 1974) (company’s catalog of products is a composite work); *Eastern America Trio Products, Inc. v. Tang Electronic Corp.*, 97 F. Supp. 2d 395, 416-17 (S.D.N.Y.) (catalog held a collective work under the 1976 Act), *dismissed*, 243 F.3d 559 (Fed. Cir. 2000).

Markham cited with approval *King Features Syndicate v. Fleischer*, 299 F. 533, 534 (2d Cir. 1924), where a book consisting of a series of cartoons about a

character named Barney Google – each cartoon separately drawn and initially published separate and apart from the rest – was held to be a composite work. Like these cartoons, the undisputed evidence at trial was that the vast majority of the Urantia Papers were separately created, circulated and studied in the Forum before ever being published together as *The Urantia Book*.

The Urantia Book is a collection of separate, individually titled papers. The various papers address a wide range of topics. With some exceptions, the papers were separately written and were separately delivered to the Contact Commission. All papers were subject to the question-and-answer process. Therefore, *The Urantia Book* is a composite work.

2. The Composite Work Issue Presents a Question of Law.

Whether a work is composite in nature is a question of law for the Court to decide. *See Picture Music*, 457 F.2d at 1215 n.5; *Donaldson*, 375 F.2d at 641 (in “work for hire” cases under 1909 Act, type of work is a question of law). In each of the cases that considered whether a work was a joint work or a composite work, the reviewing court answered the question itself as a matter of law. *See Shapiro*, 161 F.2d at 409. *Maaherra* illustrates the judicial preference for resolving questions regarding the nature of works under the copyright laws as legal rather than factual questions.

Referencing the law of patents by analogy,⁶ the Supreme Court has held that the need for judicial uniformity requires that judges rather than juries decide the meaning of patents as legal questions, not factual questions. *Markman v. Westview Instruments*, 517 U.S. 370, 389 (1995). “The principles behind the Patent and Copyright Acts are the same: to encourage the development of works that promote consumer welfare in the long term by granting exclusive rights to the inventor or author.” *In re Independent Service Organizations Antitrust Litigation*, 989 F. Supp. 1131, 1142 (D. Kan. 1997).

The Urantia Book was in evidence. The district court should have decided for itself, on the parties’ three motions for judgment as a matter of law, that *The Urantia Book* is a composite work.

3. Even if the Composite Work Question Was an Issue of Fact, the Outcome Cannot Be Determined by Non-Expert Opinion Testimony of the Accused Infringer and Adherents to the Teachings of *The Urantia Book*.

An accused infringer’s speculation about the subjective intentions of an artist or writer cannot be permitted to guide a determination of whether a work is a collection of separate works. Nonetheless, McMullan testified, based upon his own analysis of the structure and composition of *The Urantia Book*, that in his

⁶ The U.S. Supreme Court has noted the historical kinship between patent law and copyright law. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984).

opinion the subject wrote *The Urantia Book* and did not intend it to be a composite work. McMullan testified, for example, that *The Urantia Book*'s structure is internally cohesive and that concepts are cross-referenced in several parts of *The Urantia Book*. (App. 2978-2981, 3098-3099.)

The existence of conceptual or linguistic cross-references among the various contributions to a larger work, however, does not mean that a work is not a composite work. For example, all of the cartoons in *King Features* had common characters. In encyclopedias or dictionaries, it is common to cross-reference one entry in another. Accepting the testimony of the accused infringer, the fact that a concept or term may appear in multiple Urantia Papers does not suffice to show that the papers are not separate works for purposes of composite work analysis.

If would-be infringers could support, through their own subjective opinion testimony, a conclusion that a work is not a composite work, then the defendant in a case such as *Markham* no doubt would have argued that the photographer intended the pictures of the product to be part of a single catalog. Ruling on the nature of the work as a matter of law precludes inherently unreliable mischaracterization of a work by the very person accused of infringement.

Likewise, McMullan's testimony that he believes the book is a "unified work" and the related "evidence" of the religious beliefs of readers of *The Urantia Book* that the book should be viewed in a "unified" manner cannot serve as the

basis for the conclusion that the book is anything other than a collection of separate works produced over a span of several decades. It is unthinkable that witnesses' religious or spiritual beliefs, rather than neutral principles of law, could be used as the basis for evaluating whether a work is composite. *See Jones v. Wolf*, 443 U.S. 595, 602-03 (1979) (neutral principles of law rather than religious doctrine must be used to decide controversies involving property rights). If the accused infringer's testimony about his or others' religious beliefs regarding the nature of a work can influence the outcome of a composite works analysis, then no copyright in a spiritual work is safe from attack.

4. The District Court Erred in Charging the Jury that Whether a Work Is a Composite Work Depends Upon the Intention of the Author.

The district court instructed the jury that whether *The Urantia Book* is a composite work depended upon whether the author intended the Urantia Papers to be separate and independent works.⁷ (App. 3638-3640.) Neither the statute nor the

⁷ Urantia objected to the Court's jury instruction on composite works for two reasons. First, the instruction included a criterion based on the subjective intent of the author. Second, the instruction was imbalanced because it provided a series of examples not present in the statute to demonstrate works that are not composite works, but did not even identify encyclopedias and anthologies as affirmative examples of composite works, although those examples are cited in the statutory definition of collective work set out in 17 U.S.C. § 101. This was prejudicial error because *The Urantia Book* has qualities of both an encyclopedic work (covering of a wide range of subjects) and an anthology (selected writings). The book states: "In many ways I have served more as a collector and editor". (App. 2410/1343.)

case law, however, mentions the intention of the author(s) as a factor in determining a work's status as a composite work, and for good reason. In the case of encyclopedias, for example, the writers of the various contributions may know about the encyclopedic effort while preparing their contributions and may intend each contribution to join with the others to form a finished encyclopedia. Such intentions in no way undercut the separate and independent nature of the works. Instead, the courts have taken it upon themselves to evaluate the various contributions in question to determine whether they merge to form a single work without distinguishable components, or whether they remain separate components of a composite work. *Compare Shapiro*, 161 F.2d at 409 (describing work where contributions merge into a single joint work) *with* 17 U.S.C. § 101 (definition of collective work).

In any event, where the author does not testify, as was the case here, the work itself stands as the best and only evidence of author intention. *The Urantia Book* states that it is comprised of separate and independent parts. (App. 2410/16 (Foreword refers to the Urantia Papers as “presentations”).) Paper 30, the next to

An error in jury instructions will mandate reversal of a judgment if the error is determined to have been prejudicial, based on a review of the record as a whole. *Weir v. Federal Ins. Co.*, 811 F.2d 1387, 1391 (10th Cir. 1987). In this case, however, the Court should hold that *The Urantia Book* is a composite work as a matter of law.

last paper in Part I, states that “The Mortal Corps of the Finality is dealt with in the next and *final paper of this series*.” (App. 2410/337.) Paper 64 commences a “story,” stating “[t]his is the story of the evolutionary races of Urantia from the days of Andon and Fonta, almost one million years ago, down through the times of the Planetary Prince to the end of the ice age.” (App. 2410/718.) The end of another of the separate parts states, “[a]nd thus ends the story of the Planetary Adam and Eve of Urantia” (App. 2410/854.) In short, the district court should have determined the composite work issue as a matter of law based on the abundant evidence from *The Urantia Book* itself.

For these reasons, the district court erred by not deciding that *The Urantia Book* is a composite work as a matter of law, as the Ninth Circuit held in *Maaherra*. Accordingly, the judgment should be reversed and remanded for further proceedings on remedies.

B. *The Urantia Book* Is a “Commissioned Work” As a Matter of Law Because the Book Was Created at Urantia’s Instance and Expense, and the Author(s) Have Never Claimed Copyright.

Under the 1909 Act, the proprietor of a work made for hire was entitled to renew the copyright. 17 U.S.C. § 24 (repealed); *Picture Music*, 457 F.2d at 1216. Thus, if *The Urantia Book* qualifies as a work made for hire under the 1909 Act,

then Urantia was entitled to renew its copyright in *The Urantia Book*. 17 U.S.C. § 304(a).

1. Under the Applicable Legal Test, *The Urantia Book* Is a Commissioned Work, Which Is a Form of Work Made for Hire.

The term “work made for hire” means a work created by one party in an employment or commissioning relationship for the benefit of another party. *See Brunswick Beacon v. Schock-Hopchas Pub. Co.*, 810 F.2d 410, 412 (4th Cir. 1987). A work produced in a commissioning relationship, rather than in a traditional employment relationship, is referred to under the 1909 Act as a “commissioned work.” *Id.* The commissioning party owns the original copyright in a commissioned work unless there is an express agreement that the creator of the work retains the copyright. *Id.* As the Fourth Circuit has written, a commissioned work under the 1909 Act is one that is created at the instance and expense of the commissioner:

Under the 1909 Act, the “work made for hire” doctrine flourished. Of course, employers were regarded as the authors, or creators, of works prepared by their employees in the course of their employment, but the doctrine extended far afield to reach works created or prepared on commission. While the stated endeavor was to ascertain and enforce the intention of the parties, the usual presumption was the commissioner held the copyright upon any work created by another at the *instance* of the commissioner, at the commissioner’s *expense*, and

for his benefit. *See generally* 1 *Nimmer on Copyright*, § 5.03[B][2][C] (1985) (discussing commissioned works).

Brunswick Beacon, 810 F.2d at 412 (emphasis added).

Numerous cases hold that when a work is created at the “instance and expense” of another (the “proprietor”), the work is deemed a “work made for hire” under the 1909 Act. *Brattleboro Pub. Co. v. Winmill Pub. Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966); *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965); *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978); *In re Marvel Ent. Group*, 254 B.R. 817, 830 (Bankr. D. Del. 2000). Some cases refer to a person at whose instance and expense a work is created as the “motivating factor” behind the work. *Picture Music*, 457 F.2d at 1216.

The undisputed evidence shows that the role of Urantia and its predecessors in interest vis-à-vis the subject fit the “instance and expense” test, and thus show that *The Urantia Book* is a commissioned work.

Instance. The “instance” prong of this analysis is satisfied by the role of the Contact Commission in the creation and publication of *The Urantia Book*. It is undisputed that, despite twenty years of preliminary contacts, the Urantia Papers did not begin to appear until after the Contact Commission solicited, formulated, selected, and submitted questions. In addition, there is undisputed evidence that the Contact Commission supervised hundreds of sessions with the subject. The

Contact Commission showed persistence in conducting these sessions over a period of several decades, all the while supervising the Forum meetings as well. The Contact Commission also created notes and stenographic records of the contact sessions. Although the subject was shown the manuscripts, he never asserted any claim of copyright for himself. Throughout the process of creation, the Contact Commission was clearly intent upon registering copyright itself.

Expense. The undisputed evidence also shows that Urantia and its predecessor bore the expense of creating and publishing *The Urantia Book*. The 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. The Contact Commission and its successor, Urantia, also expended over \$100,000 to finance the creation and publication of *The Urantia Book*. Those who contributed money to the project recognized that they were doing so on behalf of the Contact Commission and its successor, Urantia. Urantia's showing that the Contact Commission, and later Urantia, funded the creation and publication of *The Urantia Book* is proof that *The Urantia Book* is a "commissioned work" under the 1909 Copyright Act.

2. Cases Applying the 1909 Act Test Illustrate that *The Urantia Book* Is a Commissioned Work.

Courts have found on a variety of different facts that an employment or commissioning relationship existed within the broad purview of the 1909 Act. For example, *Garman v. Sterling Publ'g Co.*, No. C-91-0882, 1992 U.S. Dist. LEXIS 21932, *9-10 (N.D. Cal. Nov. 4, 1992), involved a book created through a process similar to the creation of *The Urantia Book*.⁸ In *Garman*, the copyright was held to be owned by a person who asked questions and took down verbatim responses by a person whom the parties agreed was an unconscious “conduit” for the transmission of information from celestial authors. The Contact Commission, like the copyright owner in *Garman*, submitted the questions to the unconscious subject, which in turn served as a motivating factor in the creation of the work.

In *Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983), the court held that the town of Clarkstown owned the copyright in a youth court manual rather than Reeder, who wrote the manual at the town’s request and without expectation of compensation. The town suggested from time to time general ideas for inclusion in the manual, although Reeder retained complete control over the content of the manual. In this case, the Contact Commission, like the town, expressed ideas (in the form of questions) about what should be included in the work and monitored the expression of ideas in the papers and partial papers that

⁸ Urantia searched for but did not locate any published authority addressing a question and answer process in relation to whether the corresponding work was a

evolved over a period of many years. The subject, like the volunteer in *Clarkstown*, never expected any compensation for his efforts. *The Urantia Book* is a commissioned work based on the holding of *Clarkstown*.

In *Magnuson v. Video Yesteryear*, 85 F.3d 1424 (9th Cir. 1996), the deceased comedian Lenny Bruce worked with Magnuson, a friend and film producer, to film a concert in which Bruce described the events that gave rise to Bruce's well-publicized arrest and conviction on obscenity charges. The production and post-production expenses for the film were borne by Imagination, a company controlled by Magnuson, and Bruce was the sole author and performer of the material used in the film. *Id.* at 1426. After Bruce's death, Magnuson set up a company called Columbus that published the film, registered the statutory copyright, and eventually transferred all rights in the registered copyright to Magnuson. *Id.*

Against a challenge by an unrelated third party that had distributed the film without the copyright holder's permission, the court held that the film was a "commissioned work" under the 1909 Act as a result of Imagination's intimate involvement in the process of producing and publishing the film with Bruce's full cooperation. Like Imagination in the *Magnuson* case, the Contact Commission was intimately involved in the process of creating the Urantia Papers and bore all expenses of the contact sessions, Forum meetings, and production of manuscripts

work made for hire under the 1909 Act.

of the Urantia Papers. The Contact Commission and later Urantia bore the expenses of publishing the papers together as *The Urantia Book*. Thus, *Magnuson* counsels in favor of holding *The Urantia Book* is a commissioned work under the 1909 Act.

3. The District Court Erred in Applying Principles From the 1976 Copyright Act.

While courts broadly construed works for hire and commissioned works under the 1909 Act, the 1976 Act significantly curtailed the scope of a work for hire and eliminated the notion of commissioned works except by express written agreement. 17 U.S.C. § 101; *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). As the United States Supreme Court recently noted, “the 1976 revision of the Copyright Act represented a ‘break with the two-hundred-year-old tradition that has identified copyright more closely with the publisher than the author.’” *New York Times Co. v. Tasini*, 533 U.S. 483, 121 S. Ct. 2381, 2388 n.3 (2001) (internal citations omitted; emphasis added). Thus, 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. In fact, the cases construing works for hire under the 1976 Act focus on traditional notions of the employment relationship, contrary to the decisions under the 1909 Act. “[T]he purpose of the [work for hire] statute [under the 1909 Act] is not to be frustrated by

conceptualistic formulations of the employment relationship.” *Picture Music*, 457 F.2d at 1216.

Citing *Forward v. Thorogood*, 985 F.2d 604, 606 (1st Cir. 1993), the district court’s order denying Urantia’s motion for judgment notwithstanding the verdict erroneously applies 1976 Act rules by focusing on the fact that the subject was not compensated for his involvement in the creation of the Urantia Papers. (App. 655.) However, under the 1909 Act, the lack of payment is not a determinative factor. *Murray*, 566 F.2d at 1310 (“the absence of payment may be considered but [is] of *minor* importance”) (emphasis added); *Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983); *Edwin K. Williams & Co., Inc. v. Edwin K. Williams & Co. – East*, 377 F. Supp. 418, 428 (C.D. Cal.), *aff’d in relevant part*, 542 F.2d 1053 (9th Cir.) (copyright validity upheld where plaintiff’s copyrighted works were the result of its revisions to the collective efforts of its employees and other persons “who contributed without expectation of payment”), *cert. denied*, 433 U.S. 908 (1977). One may be deemed to create a work for hire if his writing is done as an accommodation with no payment of compensation whatsoever. 1 *Nimmer on Copyright* § 5.03[B][1][a], at 5-16-17.

The district court also erroneously relied upon the 1976 Act’s preference for the rights of authors over the rights of publishers, which is reflected in the Supreme Court’s statement in *Reid* that “[t]he creator of a work is, at least presumptively, its

author and owner of the copyright.” *Forward*, 985 F.2d at 605, *citing Reid*, 490 U.S. at 737. The *reverse* is true under the 1909 Act commissioned works doctrine, which creates a presumption that the *publisher* owns the copyright in the absence of direct evidence that the author intended to retain ownership of the copyright. *See Brattleboro*, 369 F.2d at 567-68.

The district court’s order is also 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. (App. 655.) However, there is no requirement that a party who initiates the creation of a commissioned work outside of an employment relationship have any control over the content of the work or the manner in which it is created. *Brunswick Beacon*, 810 F.2d at 412. The right to control the creation of the work is relevant only to showing an employment relationship as required under the *1976 Act’s* work for hire provisions. *See Reid*, 490 U.S. at 743-44 (explaining that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors, with the traditional employment-based work for hire established by the letter of § 62 of the 1909 Act, and the independent contractor-based commissioned works doctrine created by the courts applying the 1909 Act). The rule that a commissioning party is not required to show that it had the right to control the content of the work is based on the fundamental distinction between an

employment and an independent contractor relationship – the very essence of an employment relationship is the right to control an employee’s work while the very essence of an independent contractor relationship is the lack of the right to control the work. *See Reid*, 490 U.S. at 743-44; *see also Brunswick Beacon*, 810 F.2d at 412.

The only relevant factors in applying the commissioned works doctrine to *The Urantia Book* are whether the work was created 1) at the instance, and 2) at the expense, of the Contact Commission and Urantia. In this case, the role of Urantia and its predecessor in interest meet the “instance” and the “expense” test to establish a commissioning relationship vis-à-vis the subject. The Contact Commission’s role in the question process, in supervising the contact sessions and the Forum meetings, in preparing the manuscripts for publication, and in financing the creation and publication of the work served as “motivating factors” in the creation of the work. Therefore, *The Urantia Book* is a commissioned work, in which Urantia properly renewed its original copyright. Accordingly, the district court erred by not entering judgment as a matter of law upholding the validity of Urantia’s renewal copyright. The judgment should be reversed, and the case should be remanded for further proceedings on remedies.

C. Appellees Failed to Introduce Any Evidence to Rebut the Presumption that Urantia Holds a Valid Renewal Copyright As Proprietor of a Commissioned Work.

Urantia holds the original and renewal copyright certificates in *The Urantia Book*. (App. 2411-2415.) Such registration certificates create “a presumption of [copyright] validity,” and one who challenges the copyright’s validity must rebut that presumption of validity with evidence showing affirmatively that the copyright is invalid. *Academy of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1451 (9th Cir. 1991) (registration certificate “creates a rebuttable presumption that the certificate holder has met all the requirements for copyright validity”). As stated in Nimmer’s treatise on copyright:

The most critical question in [copyright infringement] litigation often boils down to which party bears the burden of proof. *Particularly when events of many decades past are at issue*, direct testimony will almost always be unavailable and circumstantial evidence inadmissible (for lack of foundation or otherwise) or inconclusive. In such circumstances, *allocating the burden of proof to one party is tantamount to ruling against that party on the subject issue.*

3 *Nimmer on Copyright* § 12.11, at 12-158 (internal footnote omitted; emphasis added). Where, as here, there is no conclusive proof of the precise circumstances that gave rise to the work, a copyright holder simply may rely upon its registration certificates. If the opposing party fails to introduce evidence proving invalidity, the holder of the copyright certificates prevail.

The presumption of copyright validity is especially appropriate in a case like this one, where a stranger who claims no rights in the work asserts that the

copyright is invalid. *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306, 311 (2d Cir.) (“*Houghton Mifflin I*”) (“this technical defense cannot prevail, since possession of the manuscript by the German publishers is evidence of ownership, and the transfer in question is sufficient to convey a title good as against third persons, without any rights in the premises”), *cert. denied*, 308 U.S. 579 (1939), and 113 F.2d 627 (2d Cir. 1940) (“*Houghton Mifflin II*”); *see also Belford Clark & Co. v. Scribner*, 144 U.S. 488, 504 (1892) (a defendant who does not claim any rights in a work cannot defeat a claim of copyright infringement by attacking the plaintiff’s chain of title); *Intimo, Inc. v. Briefly Stated, Inc.*, 948 F. Supp. 315, 318 (S.D.N.Y. 1996) (unusual and unwarranted to permit challenge where challenger claims no title to copyright). Courts generally seek to preserve copyrights rather than invalidate them, and the presumption of validity helps serve this purpose. *See Huk-A-Poo Sportswear, Inc. v. Little Lisa Ltd.*, 74 F.R.D. 621, 624 (S.D.N.Y. 1977) (copyright preserved in case of innocent mistake on registration certificate); *see also United States v. Backer*, 134 F.2d 533, 536 (2d Cir. 1943) (copyright preserved despite irregularity involving date of publication).

The original registration certificate identified Urantia as the “author” of *The Urantia Book*, which is permissible *only* in cases of works made for hire pursuant to 17 U.S.C. § 26 (repealed). (App. 2411-2413.) The renewal certificate states that Urantia holds the renewal copyright as the “proprietor of a work made for

hire.” (App. 2414-2415.) These certificates alone place the burden on the McMullan Parties to come forward with evidence disproving the validity of Urantia’s renewal copyright as a type of work for hire under the 1909 Act as stated in the certificates. *Autoskill Inc. v. National Ed. Support Sys., Inc.*, 994 F.2d 1476, 1487-88 (10th Cir.) (certificate identifying entity as author established prima facie case of work for hire), *cert. denied*, 510 U.S. 916 (1993); *Longman Fabrics v. Graff California wear, Inc.*, 160 F.3d 106, 111 (2d Cir. 1998) (same).

The McMullan Parties introduced no evidence of invalidity, however. There was no evidence of (1) the subject’s intent to keep any copyright in any of the Urantia Papers, or (2) any expectation of the subject that he would be compensated (other than observation without charge in sessions from which he benefited). Moreover, the McMullan Parties controverted none of the evidence showing that Urantia and the Contact Commission were intimately involved in the creation and publication of the Urantia Papers.

The commissioned works doctrine creates a presumption that where, as here, there is no evidence that the author intended to retain ownership of the copyright, the publisher of the work owns both the original and renewal copyrights in a work made for hire. Under the rules established by *Battleboro*, *Clarkestown*, *Picture Music*, *Lin-Brook Builders Hardware*, *In re Marvel Ent. Group*, and *Murray*, where Urantia has presented evidence that, as between the Contact Commission

and the subject, the work was done at the instance and expense of the Contact Commission, a legal presumption inheres that the work is commissioned.⁹ *Marvel Ent. Group*, 254 B.R. at 828. It is then incumbent upon the McMullan Parties to rebut this presumption by affirmatively showing the existence of an agreement for the subject to retain the copyright. *Id. Playboy Enterprises, Inc. v. Dumas*, 53 F.3d 549, 554-55 (2d Cir.) (“The burden of proof is on the independent contractor to demonstrate by a preponderance of the evidence that such a contrary agreement was reached.”), *cert. denied*, 516 U.S. 1010 (1995). The McMullan Parties failed to show – indeed, made no attempt to show – that the subject ever claimed a copyright in the Urantia Papers. Thus, Urantia holds a valid renewal copyright in a commissioned work. The subject has never asserted rights in the Urantia Papers or *The Urantia Book* and has never questioned Urantia’s copyright ownership. This fact alone is adequate proof that *The Urantia Book* is a “commissioned work” under the 1909 Act. *See Picture Music*, 457 F.2d at 1216 n.7 (absence of written agreement between Disney and Ronell combined with 27-year period of silence on Ronell’s part showed that Ronell did not believe she had any claim of copyright that needed to be assigned to Disney); *Brattleboro*,

⁹ In many of these cases, such as *Clarkstown*, *Picture Music* and *Murray*, the commissioner of the work prevailed over a challenge by the actual creator of the work. By contrast, in this case, neither the challengers to the copyright nor the subject has ever asserted any claim of copyright.

369 F.2d at 568 (where there is no evidence that the author intended to own the copyright, the presumption of copyright ownership runs in favor of the proprietor). The complete failure of the McMullan Parties to present any evidence rebutting the presumption of copyright validity is equally conclusive. The judgment should be reversed, and this Court should hold as a matter of law that Urantia's renewal copyright is valid.

II. IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED FOR A NEW TRIAL BECAUSE THE DISTRICT COURT ERRED IN EXCLUDING, ON GROUNDS OF ALLEGED SURPRISE, IMPORTANT TESTIMONY SUPPORTING THE VALIDITY OF THE COPYRIGHT.

Standard of Review. The district court's denial of a motion for new trial is reviewed for manifest abuse of discretion. *Aguinaga v. United Food & Commercial Workers Intern. Union*, 993 F.2d 1463 (10th Cir.), *cert. denied*, 510 U.S. 1072 (1994); *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1555 (10th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).

Discussion. The trial court excluded, on grounds of unfair surprise, proffered testimony by Barbara Newsom that the subject was aware of the Urantia Papers, knew of the Contact Commission's intent to publish them, and disclaimed any copyright in the papers. As demonstrated below, this testimony was no surprise because the nature of the witness's testimony was disclosed in the Final Joint Pre-trial Report and in the pretrial disclosure of witnesses. Even if the

testimony had been a surprise, the district court erred by excluding it entirely, rather than giving appellees the opportunity to cure the claimed surprise. The exclusion of this evidence was reversible error because Ms. Newsom's testimony was critical to the presentation of Urantia's case on commissioned works and rebutted McMullan's assertion that Dr. Sadler had misappropriated the Urantia Papers from the subject.

The district court also expressed concern over whether Ms. Newsom's proffered testimony that the journals of Dr. Sadler were lost was hearsay. However, such an objection was never made, nor was this the basis for the district court's exclusion of Ms. Newsom's proffered testimony. Nevertheless, her testimony that the journals were lost, based on her personal participation in the unsuccessful search for the journals, was not inadmissible hearsay.

A. In Light of Urantia's Pretrial Disclosures, Barbara Newsom's Proffered Testimony Was Not a Surprise.

Barbara Newsom is the co-author of a historical study of the development and origin of *The Urantia Book*, entitled *100 Years of Revelation*. (App. 702.) She wrote this account (which was distributed at Urantia's fiftieth anniversary celebration) based on her review of archival documents, including notes she had made more than 20 years ago from her review of the journals of Dr. William Sadler. Dr. Sadler's journals were lost after Ms. Newsom reviewed them, so she is

an irreplaceable witness concerning Dr. Sadler's account of the creation of *The Urantia Book*.

The Final Joint Pre-trial Report identified Barbara Newsom as a witness and stated that she would "testify as to the manner in which The 50 Years' anniversary document was prepared, matters relating to the origin of *The Urantia Book*."

(App. 242-243 (see App. 702 for *100 Years of Revelation*, also referred to as the "50 Years anniversary document").) Urantia's list of witnesses, provided during discovery, described Ms. Newsom's testimony in exactly the same way.

(App. 250.)

Urantia offered Ms. Newsom to testify concerning the following specific matters relating to the origin of the book: (1) that the subject was aware of the Urantia Papers; (2) that the subject was aware of the Contact Commission's desire to publish the papers; and (3) that the subject disclaimed copyright in the papers.

(App. 3489, 3561-3562.)

McMullan was not a member of the Contact Commission or the Forum, and he did not know Dr. Sadler or the subject. Nonetheless, McMullan testified that it was his non-expert opinion that Dr. Sadler improperly acquired the Urantia Papers from the subject. (App. 3093-3096.) McMullan's testimony, if believed by the jury, would have tended to refute the contention that Urantia was the lawful proprietor of the copyright in *The Urantia Book*. Consequently, it was necessary

for Urantia to rebut McMullan’s testimony on this issue. Ms. Newsom’s proffered testimony would have done just that because it indicated that the subject, fully apprised of the Contact Commission’s intention to publish the Urantia Papers, never claimed copyright or otherwise objected. Ms. Newsom’s proffered testimony also supports Urantia’s commissioned works argument that the Contact Commission, not the subject, held the copyright in the Urantia Papers. Even counsel for the McMullan Parties, upon hearing a brief description of Ms. Newsom’s proffered testimony, stated that it went to the heart of the case. (App. 3489-3490.)

At trial, the McMullan Parties objected to Ms. Newsom’s testimony on the ground of unfair surprise. (App. 3485, 3488-3494, 3568.) Urantia’s counsel proposed a short recess to permit the McMullan Parties to prepare for cross-examination. (App. 3494.) The trial court, however, excluded the testimony entirely. (App. 3485, 3488-3494, 3568.) This ruling was error.

Ms. Newsom’s proffered testimony fell squarely within the subjects that Urantia disclosed – twice – before trial. Her proposed testimony that the subject knew the Contact Commission desired to publish the papers and that the subject did not desire copyright for himself unquestionably relates to “the origin of *The Urantia Book*,” which was one of the categories of testimony Urantia disclosed before trial. (App. 242-243, 250.) Moreover, her testimony was encompassed

within the preparation of the “50 Years anniversary document,” the second subject of her testimony that Urantia disclosed. *Id.* Only a hyper-restrictive reading of Urantia’s disclosures could lead to the conclusion that the McMullan Parties were legitimately surprised by Ms. Newsom’s testimony. If they did not know the details of their testimony, they have only themselves to blame. Despite Urantia’s disclosures of Ms. Newsom’s testimony, the McMullan Parties neither interviewed nor deposed her before trial. Any surprise, therefore, cannot be attributed to Urantia.

Even if the proffered testimony had not been perfectly described in Urantia’s pretrial disclosures, that would provide no ground for excluding it. *See Moss v. Feldmeyer*, 979 F.2d 1454, 1459-60 (10th Cir. 1992) (affirming order permitting an expert medical witness to expand his testimony the morning of trial over objection of unfair surprise). Indeed, this Court has stated that “[p]roper pretrial orders are indeed powerful, but even at their best they should be `liberally construed[.]’” *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 818 (10th Cir. 1979) (internal quotation omitted). “[T]he pretrial order is a procedural tool to facilitate the trial of a lawsuit on the merits and not to defeat it on a technicality.” *Id.*

Moreover, Ms. Newsom’s testimony was also offered to rebut McMullan’s testimony asserting that Dr. Sadler had improperly acquired the manuscripts of the Urantia Papers. As such, Ms. Newsom’s testimony was admissible as rebuttal

testimony, even if it had not been disclosed at all. *See Canady v. J.B. Hunt Transport, Inc.*, 970 F.2d 710 (10th Cir. 1992) (rebuttal testimony not unfair surprise warranting new trial).

The district court's error warrants a new trial because the excluded testimony was important to support Urantia's case and to refute McMullan's testimony. *See Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940) (new trial may be granted out of considerations of fairness or where a mistake was made in admitting or excluding evidence at trial); *Bower v. O'Hara*, 759 F.2d 1117, 1123 (3d Cir. 1985) (prejudicial error to exclude admissible testimony that might have affected outcome of trial).

B. Even If Ms. Newsom's Proffered Testimony Had Constituted Unfair Surprise, the District Court Erred by Excluding It Entirely, Rather Than Providing an Opportunity to Cure Any Prejudice.

Even where a party is not given adequate notice of a witness's testimony, "exclusion of evidence is a drastic sanction." *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1201-02 (3d Cir. 1978). Any prejudice to the McMullan Parties could have been cured by a short recess for their counsel to question Ms. Newsom outside the presence of the jury.

In *Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980), *cert. denied*, 450 U.S. 918 (1981), this Court identified four factors to be considered in determining whether a witness should be permitted to give allegedly surprising

testimony: (1) the prejudice or surprise in fact to the opposing party, (2) the ability of the opposing party to cure the prejudice, (3) the extent to which waiver of the rule against allowing surprise testimony would disrupt the orderly and efficient trial of the case, and (4) bad faith or willfulness in failing to disclose the evidence. *Id.* at 797.

Each of these factors weighed in favor of admitting Ms. Newsom's testimony. *First*, the McMullan Parties cannot claim genuine surprise or prejudice because of Urantia's pretrial disclosures and because of their own decision not to interview or depose Ms. Newsom. *Second*, the McMullan Parties had ample opportunity to cure any prejudice at trial by means of a short recess to question Ms. Newsom outside the presence of the jury. (App. 3494.) *Third*, a short recess would not have caused a significant disruption of the proceedings. *Fourth*, other than the allegation of unfair surprise, no one suggested (and the district court did not find) that Urantia acted in bad faith. Thus, none of the *Smith* factors weighed in favor of excluding the evidence.

Cases after *Smith* consistently reject claims of surprise (offered to support an argument for reversal) where other, less drastic remedies were not requested. *See Hull v. Chevron U.S.A., Inc.*, 812 F.2d 584, 588 (10th Cir.1987) (rejecting claim of unfair surprise because of failure to move for a continuance); *Greenwood v. McDonough Power Equip., Inc.*, 731 F.2d 690, 697 (10th Cir. 1984) (rejecting

contention of unfair surprise in part because of failure to move for a continuance); *Nalder v. West Park Hosp.*, 254 F.3d 1168 (10th Cir. 2001) (no attempt to cure or mitigate the alleged prejudicial impact of the testimony). In these cases, the Tenth Circuit clarified that it is the duty of the allegedly surprised party to suggest a continuance or recess. In the instant case, *Urantia* suggested a short recess as an alternative to the outright exclusion of Ms. Newsom's testimony, but the district court erroneously refused the less drastic remedy.

C. Ms. Newsom's Proffered Testimony that the Sadler Journals Were Lost, Based Upon Her Participation in an Unsuccessful Search for Them, Was Not Inadmissible Hearsay.

Ms. Newsom's proffered testimony was based on her review of certain journals of Dr. William Sadler. Dr. Sadler's journals were later lost. At a bench conference during Ms. Newsom's testimony, the district court expressed concern that her testimony that the Sadler journals are lost might be hearsay. (App. 3490-3491.) *Urantia's* counsel advised the district court that Ms. Newsom personally participated in the unsuccessful search for the journals, and was prepared to so testify. (App. 3491. *See also* App. 3565-3566 (formal proffer).) Nevertheless, at the conclusion of the conference, the district court excluded Ms. Newsom's testimony concerning the lost Sadler journals. (App. 3494.)

In his ruling, the district court described Ms. Newsom's proffered testimony as a "late-developing issue" as to which the McMullan Parties had no previous

opportunity to prepare. *Id.* Urantia’s counsel attempted to clarify the basis of the ruling, to which the district court stated that the basis of his ruling was that he was “sustaining the objection.” *Id.*

It is unclear whether the district court’s ruling was based even in part on the hearsay rule. If it was, the ruling was erroneous because Ms. Newsom’s testimony about her search for a lost document is plainly admissible. *See United States v. Standing Soldier*, 538 F.2d 196, 203 (8th Cir.) (oral testimony of a diligent search undertaken sufficient to establish that document is lost), *cert. denied*, 429 U.S. 1025 (1976); *see also 5 Weinstein’s Evidence* ¶ 1004(1)[05], at 1004-18 (1983) (“By far the most common means of prov[ing] loss or destruction is the use of circumstantial evidence showing a diligent but unsuccessful search and inquiry for the document.”) (quotation omitted); *McCormick on Evidence*, § 237, at 715 (3d ed. 1984) (“Loss or destruction may sometimes be provable by direct evidence but more often the only available evidence will be circumstantial, usually taking the form that appropriate search for the document has been made without discovering it.”).

In light of the importance of Ms. Newsom’s testimony, its exclusion constituted a prejudicial abuse of discretion. Accordingly, if this Court does not direct the entry of judgment upholding the validity of Urantia’s renewal copyright,

it should reverse and remand for a new trial so that a jury can decide this case with the benefit of Ms. Newsom's testimony.

CONCLUSION

For all the foregoing reasons, Urantia respectfully requests that the district court's judgment in this case be reversed and that the case be remanded with directions to enter judgment as a matter of law upholding the validity of Urantia's renewal copyright in *The Urantia Book* and to conduct further proceedings on remedies. In the alternative, Urantia requests a new trial based upon the district court's prejudicial error in precluding the testimony of Barbara Newsom regarding the subject's awareness of the intent to publish the Urantia Papers, and his disclaimer of any copyright in the papers.

Dated: December 21, 2001.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Urantia believes oral argument would materially assist the Court in resolving the issues in this appeal. Urantia seeks a judgment that *The Urantia Book*, a 2097-page book consisting of 196 individual papers, is a composite work and a commissioned work within the meaning of the 1909 Copyright Act. This issue is a matter of first impression in this Circuit. Indeed, this Court has never decided any case concerning either composite works or commissioned works under the 1909 Act.

In addition, the creation and contents of *The Urantia Book*, although undisputed, are somewhat complex. Accordingly, oral argument would provide a forum for a more complete exploration of the legal significance of these undisputed facts.

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), Appellant's Opening Brief contains 13,718 words, including words in footnotes, and therefore complies with the type-volume limitations set forth in F.R.A.P. 32(a)(7)(B).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPENING BRIEF OF APPELLANT, URANTIA FOUNDATION** was served by depositing two copies of the same in the United States mail, first-class postage prepaid, on December 21, 2001, addressed to each of the following:

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ATTACHMENTS TO BRIEF

Tab

1. *Dahinden v. Byrne*, 218 U.S.P.Q. 317, 1982 WL 1162 (D. Or. April 14, 1982).
2. *Garman v. Sterling Pub. Co.*, 1992 U.S. Dist. LEXIS 21932 (N.D. Cal. Nov. 4, 1992).
3. Order granting in part Urantia Foundation's motion for partial summary judgment.
4. Amended judgment.
5. Order denying Urantia Foundation's motion for judgment NOV.
6. Order denying Urantia Foundation's alternative motion for a new trial.