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U.S. COURT OF APPEALS
FOR THE TENTH CIRCUIT
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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 01-6347 and 01-6348

MICHAEL FOUNDATION, INC. a
foreign corporation,

Plaintiff – Appellee,

v.

URANTIA FOUNDATION, an Illinois
Charitable Trust,

Defendant – Third-Party Plaintiff –
Appellant,

v.

HARRY MCMULLAN, III,

Third-Party Defendant – Appellee.

Opinion by Chief Circuit
Judge Tacha, joined by
Senior Circuit Judge
Aldisert; dissent by Senior
Circuit Judge McWilliams

Dist Ct. No. CIV-00-885-
W (W.D. Okla.)

URANTIA FOUNDATION'S PETITION FOR PANEL REHEARING

Appellant, Urantia Foundation (“Urantia”), pursuant to F.R.A.P. 40(a), petitions for panel rehearing. In this petition Urantia submits that the majority of the panel misapprehended or overlooked that:

(1) Urantia did not waive its argument that *The Urantia Book* should be held to be a composite work as a matter of law, because Urantia clearly advanced this argument in the district court, and the court and Urantia’s adversaries were well aware of Urantia’s position;

(2) when the proper *de novo* standard is applied, the undisputed facts plus a basic review of the organization and structure of *The Urantia Book* (and without any need to read the entire book or any large portion of it) show that the book is a composite work as a matter of law; and

(3) the panel relies upon extrinsic evidence of the Conduit’s intent (Opinion at 14-15) rather than the structure and composition of the book in defense of the district court’s judgment, while explicitly refusing to decide whether the Conduit’s intent is relevant to the “composite” nature of *The Urantia Book* (Op. at 17-18).

ARGUMENT

I. Urantia Did Not Waive Its Contention That *The Urantia Book’s* Status As a Composite Work Should Be Determined by the Court as a Matter of Law.

It appears that the panel’s decision on the merits was heavily influenced by its conclusion that Urantia had waived its contention that classification of *The Urantia Book* as a composite work is a question of law that should be reviewed *de novo* on appeal. This issue of waiver was raised *sua sponte* by the Court. The appellees (together, “Michael Foundation”) never argued that Urantia had failed to preserve this argument for appeal. There is a good reason why Urantia’s skilled opponents did not do so: As both Michael Foundation and the district court were well aware, Urantia had contended from the beginning of the case that classification of *The Urantia Book* as a composite work should be determined by the court as a matter of law.

Following discovery, Urantia filed and briefed a motion for summary judgment in which it sought (among other things) a ruling that *The Urantia Book* is a composite work—not a unified work—as a matter of law. Although Urantia did not include the summary judgment briefs in its appendix (because denial of summary judgment is not separately appealable), the district court’s detailed order on the motion issued on the eve of trial specifically acknowledged Urantia’s position:

Even if the Conduit is found to be the author of the Papers, Urantia Foundation argues that summary judgment is nevertheless appropriate. *Urantia Foundation argues that an examination of the work itself reveals that the work cannot be construed to be unified.*

(Appellant’s Appendix (“App.”) 281; emphasis added.) The italicized language reflects the precise argument that Urantia presented on appeal that this Court held to have been waived.

While Urantia’s summary judgment motion was pending, the parties filed their “Final Pretrial Report.” In that document, each party listed what it believed were the “Legal Issues.” (App. 168-171.) As its legal issue no. 1, Urantia stated: “Whether the copyright renewal in *The Urantia Book* is valid.” (App. 170.) Since validity of Urantia’s copyright renewal depended on whether *The Urantia Book* is a composite work or commissioned work, Urantia was clearly stating that it considered this question a “legal issue.” At trial, after the close of all the evidence, Urantia’s counsel moved for judgment as a matter of law (“JMOL”) under Fed. R. Civ. P. 50(a). In its opinion, the panel majority states: “in the course of his oral motion, Urantia’s attorney stated, ‘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.’” Opinion at 10 n.7, quoting App. 3575-76.¹ The majority is incorrect. While Urantia’s counsel did speak those words, *he was opposing Michael Foundation’s motion for*

¹ This quote responded to the opposing motion for JMOL, wherein Michael Foundation asserted implicitly that the opposing standard for “unified” (a term unmentioned and undefined in copyright statute and case law) should consider extrinsic evidence (*i.e.*, intent of the Conduit and the religious beliefs of those who

JMOL. See App. 3570-3575 (Michael Foundation's motion). It was appropriate for Urantia's counsel to oppose that motion by arguing that, "at a minimum" (App. 3575-3576), there was a fact issue for the jury to decide. When he said "at a minimum," the district court and Michael Foundation's counsel all clearly understood that, while Urantia continued to maintain that *The Urantia Book* is a composite work as a matter of law, Michael Foundation's motion for JMOL on that issue should be denied because, if Michael Foundation's argument that the intent of the Conduit or the perception of certain witnesses (themselves adherents) was controlling, there was still an issue of fact for the jury under their theory of the case.

In his actual motion for JMOL (App. 3582-3584), Urantia's counsel incorporated his discussion of the evidence concerning the composite work issue from his opposition to Michael Foundation's motion. (App. 3583.) In that discussion, Urantia's counsel argued that the district court should conclude that *The Urantia Book* is a composite work because, among other things: (1) "The book has a composite presentation and feel" (App. 3577); (2) testimony by Michael Foundation's witnesses, as a matter of religious belief, concerning the nature of the book "really doesn't advance the ball in terms of showing *the intrinsic nature* of the work itself (App. 3576; emphasis added); and (3) Michael

believe that *The Urantia Papers* are revelations). See App. 3572 (Michael Foundation JMOL argument on composite work).

Foundation’s own conduct in reprinting and distributing only a single series of papers from the Urantia Book—those it calls a “comprehensive biography of Jesus” (App. 3098)—demonstrates that distinguishable parts of *The Urantia Book* are separable. (App. 3576.) These arguments plainly constituted a request to the district court to rule in Urantia’s favor on the composite work issue solely by examining the work itself and based on the undisputed facts.

Urantia was even more explicit on this point in its renewed motion under Rule 50(b) for JMOL. There, Urantia titled an entire section of its motion: “The Urantia Book Is a Composite Work As a Matter of Law.” (App. 384.) Urantia proceeded to argue that the nature and structure of the book show that it is a composite work. Urantia argued that the book is composed of 196 separate “papers,” not chapters, and that “[d]ifferent papers are comprised of discrete subject matter.” (*Id.*) As it did on appeal, Urantia argued to the district court that the widely varying subject matters of the various papers and series of papers within the book (“the story of Adam and Eve, . . . the origin of marine life, the institution of government, and religion”) showed that it is a collection of discrete articles – like an encyclopedia, which is a composite work. (*Id.*) This argument, again, was a request that the district court rule on the composite work issue based simply on the contents and structure of the book. (App. 384-385.) It is the same argument that Urantia made on appeal, and that the panel majority held to have been waived.

Based on the foregoing, it is apparent that the district court and Michael Foundation fully understood that Urantia contended that *The Urantia Book* should be held to be a composite work as a matter of law, based solely on the undisputed facts and on the structure and contents of the book itself. This understanding is confirmed by the fact that Michael Foundation was not surprised by Urantia's argument on appeal and accordingly did not contend that it had been waived. Under these circumstances, this Court and other courts of appeals have held repeatedly that Rule 50 should not be applied narrowly or technically to bar a party's argument.

For example, in *Anderson v. United Telephone Co. of Kansas*, 933 F.2d 1500, 1503-04 (10th Cir. 1991), this Court considered whether the trial court erred in granting judgment n.o.v. where the Rule 50(a) motion before the case was submitted to the jury arguably did not specify the precise grounds on which the party later relied in its Rule 50(b) motion. In a comprehensive analysis of this issue, this Court declined to require so much precision in the original Rule 50(a) motion. The Court held: "We believe requiring more specificity in this case would be harsh and run contrary to the policy favoring a liberal application of the rules to allow correction of evidentiary shortcomings and provide a just and efficient determination of the case." *Id.* at 1504. The Court pointed to its earlier holding in *United States v. Fenix & Scisson, Inc.*, 360 F.2d 260, 266 (10th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967), that "Technical precision is not

necessary in stating grounds for the motion so long as the trial court is aware of the movant's position.”

As confirmed by the cases cited in *Anderson*, Rule 50(a)'s requirement that the motion “specify the judgment sought and the law and the facts on which the moving party is entitled to judgment” ensures fair notice of the moving party's argument before the case goes to the jury. *See Federal Sav. & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 138 (4th Cir. 1987) (one of the two “rationales” of Rule 50(a) is “ensuring that the opposing party has enough notice of the alleged error to permit an attempt to cure it before resting”); *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1556 (7th Cir. 1987) (“The modern rationale for the rule that a motion for directed verdict is a prerequisite to judgment n.o.v. is that the opposing party should have a chance to rectify (or at least seek the court's leave to rectify) deficiencies in his evidence before it is too late, that is, before the case goes to the jury.”) As shown by the sequence of events described above, Michael Foundation had ample notice of Urantia's position. In any event, Urantia's view that the composite work issue should be decided as a matter of law would not have caused Michael Foundation to introduce additional or different evidence. Indeed, Urantia *repeatedly* contended that it was unnecessary even to have a trial on the composite work issue because the matter could be decided as a matter of law based on the undisputed nature of the work itself. Accordingly, the purpose underlying Rule

50(a)'s purpose was satisfied, as Urantia adequately stated and preserved its position that the composite work issue is a question of law.

The panel majority also emphasizes that Urantia's counsel did not object to the instructions on which the composite work issue was submitted to the jury. Opinion at 10. It is well-established, however, that when a party contends that an issue should be decided as a matter of law (and not submitted to the jury), the issue is not waived merely because the party does not object to the instructions submitting the issue to the jury. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 119-20 (1988); *Bankers Trust Co. v. Lee Keeling & Associates, Inc.*, 20 F.3d 1092, 1101 n.8 (10th Cir. 1994); *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 432 (5th Cir. 1996).²

In sum, in sharp contrast to the facts of *Vanderhurst v. Colorado Mountain College Dist.*, 208 F.3d 908 (10th Cir. 2000), Urantia repeatedly and consistently made its position known to the district court and to opposing counsel that it considered the composite works question to be a question of law. Urantia's disclosure of its position fully advised Michael Foundation of Urantia's position.

² In addition, Urantia's counsel objected to the district court's jury instruction on composite work because, among other things, it emphasized considerations of authorial intent rather than the intrinsic nature of the work itself. App. 3604-3605. The district court overruled the objection and erroneously instructed the jury that the intent of the Conduit is the "controlling" factor. App. 3641.

Under these circumstances, the purpose of Rule 50 was fulfilled, and Urantia should be held to have preserved for appeal its position that *The Urantia Book's* status as a composite work should be decided as a matter of law.

II. On *De Novo* Review, *The Urantia Book* Is Demonstrably a Composite Work, and Urantia's Renewal Copyright Consequently is Valid.

The panel majority states that, as part of its contention that the composite work issue should be reviewed *de novo* on appeal, Urantia asks the court to “examine the 2097 pages of *The Urantia Book* itself.” Opinion at 14. Just as neither party asked the jury to read the entire book, Urantia has never contended that this Court must undertake this task in order to decide whether the book is a composite work. Instead, as Urantia argued below and in its briefs on the merits, it is sufficient to consider only the undisputed facts, the overall structure of the book, and the general character of sample Urantia papers. *See* Urantia Reply Br. at 10-11, Opening Br. at 34-35.

The panel majority notes that it declined to review *The Urantia Book* itself because such a review was precluded by “our discussion of the appropriate standard of review.” Opinion at 15 (rejecting Urantia's argument no. 2 stated in the Opinion at 14). The Court considered only whether the “evidence satisfies the deferential standard of review applicable to this argument.” Opinion at 15. If the Court now agrees that Urantia did not waive *de novo* review and that the composite

work issue should be reviewed *de novo* on appeal, then the Court should rehear the composite work issue and consider for the first time whether the structure and contents of the book itself, together with the undisputed facts, show as a matter of law that the book is a composite work.³ See *Urantia Opening Br.*, at 30-31, *Reply Br.* at 1-4.

This issue is addressed in *Urantia's* opening brief at 28-30 and 34-35 and in its Reply Brief at 10-11. *Urantia's* point is simple: even a cursory review of the papers (or series of papers) cited in *Urantia's* briefs shows that the papers cover a wide range of completely unrelated subjects. Various papers address subjects as diverse as the institution of marriage (Papers 82-84), the universe (Paper 15), and eastern religions (Paper 94). Part IV of *The Urantia Book*, beginning with Paper 120, describes the life and teachings of Jesus. There is no plot. The book does not endeavor to tell a single story. It is exactly what it appears to be: a series of independent, self-contained writings.⁴

³ The other two issues listed on page 14 of the Opinion and discussed on pages 15 and 16, which concern testimony and jury instructions, become irrelevant if this Court decides the composite work issue itself as a matter of law.

⁴ A cursory review of the book demonstrates that it is composite in nature, *i.e.*, it is comprised of discrete papers. See, *e.g.*, App. 2410/16 (refers to the various *Urantia Papers* as “presentations”); App. 2410/648 (Paper 56 states “This paper on Universal Unity is the twenty-fifth of a *series* of presentations”) (emphasis added); App. 2410/718 (Paper 64 commences the telling of a “story”); App. 2410/337 (“The Mortal Corps of the Finality is dealt with in *the next and final paper of this series*”) (emphasis added).

Significantly, as Urantia noted in its reply brief, Michael Foundation made no effort in its brief to contradict Urantia’s description of the book or its contents. Michael Foundation did not attempt to explain how this collection of papers on subjects as diverse as the crucifixion of Christ (Paper 187) and the Paleozoic Era on earth (Paper 59) fails to constitute a composite work.⁵

These features of *The Urantia Book* convinced the district judge in the *Maaherra* case—the only judge ever to conduct a *de novo* review of the book—to rule:

I agree that *The URANTIA Book* may be considered a composite work, if the term is simply defined as a work “to which a number of authors have contributed distinguishable parts, which they have not however ‘separately registered.’” *Shapiro*, 123 F.2d at 699. The book, itself, suggests that it was written by “a number of authors.” The “Urantia Papers” are obviously “distinguishable parts” and the Copyright Office verifies that no other author of the book has “separately registered.”

Urantia Foundation v. Maaherra, 895 F. Supp. 1347, 1354 (D. Ariz. 1995)

(citation omitted), *rev’d on other grounds*, 114 F.3d 955 (9th Cir. 1997). The

panel majority was not persuaded by the *Maaherra* decision, commenting that “the

⁵ Although Michael Foundation has failed to identify a unifying theme for the Urantia Papers, even the presence of such a unifying theme fails to convert the composite nature of the work. For example, there are topical encyclopedias (*e.g.*,

Maaherra court’s focus was not on the specific question of whether *The Urantia Book* was or was not a composite work.” Opinion at 14, n.8. The majority’s comment was directed to the opinion of *the Ninth Circuit*, however, not to the holding of the district court. While *Urantia* did refer to the Ninth Circuit’s decision as well, *Urantia*’s briefs clearly relied on the “obviously ‘distinguishable parts’” quotation from the passage set forth above, which is from the opinion of *the district court*. See *Urantia* Opening Br. at 28; Reply Br. at 4. This finding was embraced by the Ninth Circuit in its holding that the renewal copyright in *The Urantia Book* is valid as a matter of law because “*Urantia* Foundation has established that it was, at the time of renewal, the proprietor of a composite work.” 114 F.3d at 957.

Since the district court’s decision in *Maaherra*, another event occurred that confirms the composite nature of *The Urantia Book*. In the instant case, Michael Foundation printed and distributed *Jesus—A New Revelation* (“*JANR*”). This work consists of a verbatim copy of 76 consecutive papers from *The Urantia Book* that comprise the “complete biography of Jesus.” The act of separately publishing just one part of the book says more eloquently than *Urantia*’s counsel possibly could that *The Urantia Book* is, in fact, a collection of smaller works. No one would attempt to publish one quarter of *Exodus* by Leon Uris or of *A Tale of Two Cities* by Charles

encyclopedias of religion) that are nevertheless “composite” because certain components are discrete and capable of standing alone.

Dickens. The resulting publications would make no sense. That Michael Foundation could publish one quarter of *The Urantia Book* and have it make perfect sense shows that the book is more similar to a collection of essays than to a novel.

In order to resist the undisputed facts associated with the quality and nature of *The Urantia Book*, Michael Foundation had no choice but to assert extraneous considerations of the intent of the Conduit, asserting in its brief, p. 3, that the Conduit intended to write a book, not a series of papers (“In 1924, Writer announced his intention to write *TUB*, App. 711...”). This in turn caused the majority to rely mistakenly upon facts not in the record that bear only on the Conduit’s intentions rather than the nature of the work.

Panel Majority Rationale:	But the record never says that “he would create a Book, <i>not a series of separate papers.</i> ”	And the Majority states with respect to the Conduit’s intentions:
“The Conduit also announced, before writing the papers that eventually became <i>The Urantia Book</i> , that he would create a Book, not a series of separate papers.” (Opinion at 15)	<p>“The Plan for the <i>Urantia Papers</i> Announced--1924</p> <p>This period of initial contact continued until 1924 when the Contact Commission was formally established by a celestial Revelatory Commission to oversee the project of the <i>Urantia Papers</i> and the publication of <i>The Urantia Book</i>. On February 11, 1924, Machiventa Melchizedek announced to the contact group the plan to initiate the <i>Urantia Papers.</i>” App. 711.</p>	“We need not reach the question [of authorial intent].” Op. at 18. “It is not clear whether an author’s intent determines the classification of a book comprised exclusively of his own work.” Op. at 17.

The record refers to the announcement of the plan to initiate the *Urantia Papers*, a project comprising both “papers” and a “book,” not one to the exclusion of the other. A project to create a book that is a composite work (e.g., an encyclopedia), does not render the work’s internal contents indivisible simply because the project to create the work is announced in advance. See *Urantia Reply Brief* at 12-13.

The Opinion relies at 14-15 upon “evidence” of the Conduit’s intentions rather than the nature and content of the work itself as the basis for affirming the judgment below. But the Opinion proceeds (at 17-18) to question without deciding the relevance of evidence of the Conduit’s intentions to the book’s composite or indivisible nature.

III. The Majority Opinion’s Statement of Undisputed Facts Shows Copyrightable Selection or Arrangement.

The Opinion at 3 states that *not all* of the communications from the Conduit that were in written form were selected for publication: “During its sessions with the Conduit, the Contact Commission prepared stenographic notes of the Conduit’s celestial dialogs, but it destroyed most of them. These notes formed no part of *The Urantia Book*.” Such selection is ample to surpass the extremely low threshold required for compilation copyright. See, e.g., *Kregos v. Associated Press*, 937 F.2d 700, 704 (2d Cir. 1991) (compilation originality is shown by inclusion of certain materials and exclusion of others). The Opinion at 14-15 overlooked the import of

this *undisputed* fact in determining that there was a basis to affirm the jury's verdict based on evidence of a lack of selection or arrangement by the Contact Commission.

CONCLUSION

For the reasons set forth above, the panel should grant this petition for rehearing, apply *de novo* review, hold that *The Urantia Book* is a composite work as a matter of law, and accordingly hold that Urantia's renewal copyright is valid. In the alternative, the panel should grant this petition for rehearing and hold that there is insufficient evidence to warrant the jury verdict that *The Urantia Book* is not a composite work.

Respectfully submitted,

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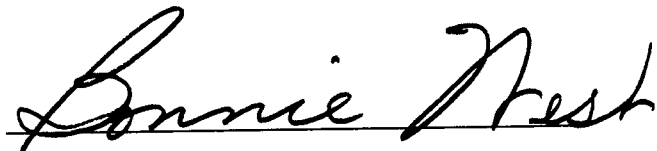
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was served by first-class mail on the following counsel of record, on March 25, 2003:

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A handwritten signature in black ink that reads "Bonnie Nest". The signature is written in a cursive style and is positioned above a horizontal line.