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**IN THE**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

\_\_\_\_\_  
NO. 99-15732  
\_\_\_\_\_

**URANTIA FOUNDATION,**

*Plaintiff-Appellee.*

v.

**KRISTEN MAAHERRA,**

*Defendant-Appellant.*

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On Appeal From  
The United States District Court  
for the District of Arizona

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**BRIEF OF PLAINTIFF-APPELLEE URANTIA FOUNDATION**

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## I. STATEMENT OF JURISDICTION

Appellee Urantia Foundation (the "Foundation") does not dispute Maaherra's statement of jurisdiction.

## II. STATEMENT OF ISSUES

- A. Whether the district court properly awarded to the Foundation an order of declaratory judgment that Maaherra infringed the Foundation's copyright in The Urantia Book, in light of this Court's holding in *Urantia Foundation v. Maaherra*, 114 F.3d 955 (8th Cir. 1997) ("Maaherra I").
- B. Whether Maaherra demonstrated before the district court that a genuinely disputed issue for trial remained on her "unclean hands" defense to the issuance of a declaratory judgment of copyright infringement.
- C. Whether Maaherra demonstrated before the district court that a genuinely disputed issue for trial remained on her "public interest" defense to the issuance of a declaratory judgment of copyright infringement.

## III. REVIEWABILITY AND STANDARD OF REVIEW

The Declaratory Judgment Act confers "unique and substantial discretion" to district courts in making the decision whether to declare the

rights of litigants. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). A declaratory judgment is reviewed de novo by this Court. *Republic Western Ins. Co. v. Spierer. Woodward. Willens. Denis and Furstman*, 68 F.3d 347, 350 (9th Cir. 1995); *Fireman's Fund Ins. Co. v. Ignacio*, 860 F.2d 353, 354 (9th Cir. 1988) (internal citations omitted).

#### **IV. STATEMENT OF THE CASE**

##### **A. Facts.**

Urantia Foundation (the "Foundation") was formed in 1950 as a charitable trust existing under the laws of the state of Illinois. SR-30 (statement 61).<sup>1</sup> In 1955, the Foundation first published *The Urantia Book* under notice of copyright. SR-21. The Foundation is the registrant of the copyright and the renewal copyright in *The Urantia Book*. SR-13, 16-18. *The Urantia Book* is over 2,000 pages long and consists primarily of 196 "papers." These papers address a wide variety of subjects, including religion, philosophy, science and history. The origins and character of *The Urantia Book* are in part the subject of this Court's previous decision in

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<sup>1</sup> All citations to the Appellee Foundation's Supplemental Excerpts of Record are denoted "SR-\_\_." All citations to the Appendix of the Foundation's Brief are denoted "A- \_ ." All citations to the Appellant Maaherra's Brief are denoted "Maaherra Brief, p. ." All citations to Maaherra's Excerpts of Record are denoted "Record, Tab\_\_ , p.\_\_."

Maaherra I, 114 F.3d at 957, which reinstated the validity of the Foundation's copyright in The Urantia Book.

In 1990, Maaherra copied the entire text of The Urantia Book onto computer diskettes and distributed them. SR-41. Maaherra admits she was at least constructively aware of the Foundation's copyright in The Urantia Book since at least 1969. SR-34 (statement 89). Maaherra has contended throughout the pendency of this case that the Foundation's copyright is invalid. From before the inception of this litigation through the present date, Maaherra has remained steadfast in her belief that it is God's will that she distribute The Urantia Book, and that she has done nothing wrong by doing so. SR-54-55. Even after the Court's holding in Maaherra I, Maaherra asserts that she must be true to her own moral law, and that she did nothing wrong in the course of copying The Urantia Book onto the computer diskettes. SR-64-67.

In the aftermath of Maaherra I, Maaherra continued to debate the Foundation's ownership of a valid renewal copyright in The Urantia Book. She authored and distributed a newsletter entitled "Lies Become Law," in which she assailed the decision of this Court. SR-57-58, 68-73. In the newsletter, Maaherra essentially asserts that her "copyright interest" in The Urantia Book outweighs the Foundation's interest: "for [Judge] Schroeder to

say I – and with me the thousands of religionists who also want the Urantia Papers in the public domain – have no ‘superior copyright interests’ is an enormous slap in the face to religionists." SR-62-63.

**B. Proceedings Below.**

The Foundation filed this action on February 27, 1991. The Foundation's complaint included a cause of action against Maaherra for copyright infringement. SR-1-20. Maaherra responded with her counterclaim that the Foundation's copyright is invalid. On February 17, 1995, the district court granted Maaherra's motion for partial summary judgment and held that the Foundation's copyright was invalid. Record, Tab b, p.33 (entry 288). On October 25, 1995, the district court entered its final judgment in the case, which dismissed the Foundation's count for copyright infringement and declared the copyright invalid. *Id.*, p.36 (entry 329). On appeal, this Court in *Maaherra I* reversed the order of the district court, and held that the Foundation's copyright was valid, and that Maaherra infringed it by copying the text of the book onto computer diskettes and distributing the diskettes. 114 F.3d at 964 (the original *Maaherra I* opinion is reproduced in its entirety at SR-103). The case was remanded to the district court for further proceedings regarding relief. *Id.*, 114 F.3d at 964.

After the case was remanded, on November 3, 1998, the Foundation and Maaherra filed a joint consolidated pretrial order relating to an impending trial on injunctive and declaratory relief. SR-74-95. The Foundation expressly waived any and all claims against Maaherra for the recovery of money damages in the pretrial order. SR-79. Maaherra stated in the pretrial order that her only defenses to declaratory and injunctive relief were the "unclean hands" and "public interest" defenses. SR-77-79. On November 3, 1998, the Foundation also filed its motion for entry of declaratory judgment, consistent with the holding of this Court in Maaherra I Record, Tab b, p.41 (entry 387). In this motion, the Foundation indicated that it would withdraw any request for further relief against Maaherra in the event its motion was granted. On December 2, 1998, Maaherra opposed the motion for declaratory judgment by contesting whether such a declaration would settle the legal rights of the parties and asserting that her "unclean hands" and "public interest" defenses remained to be tried. SR-96-102. On January 29, 1999, the district court granted the Foundation's motion for declaratory judgment, and entered final judgment for the Foundation that Maaherra infringed the Foundation's copyright in The Urantia Book. Record, Tab c. On or about March 16, 1999, Maaherra filed her notice of appeal from that order. Id., Tab a.

## **V. SUMMARY OF ARGUMENT**

The district court properly granted the Foundation's motion for a declaration of copyright infringement to put an end to this eight-year old dispute. In light of the holding in *Maaherra I*, the declaratory judgment awarded was the law of the case, and the district court was obligated to follow it on remand. The Foundation's evidence demonstrated that all of the elements required for an award of declaratory relief existed in this case. *Maaherra* introduced no evidence to the contrary. Moreover, *Maaherra* failed to introduce any evidence in support of her only two proffered defenses to declaratory relief.

## **VI. ARGUMENT**

In this case, *Maaherra* appeals from a summary final judgment of declaratory relief. In evaluating a motion for summary judgment such as the Foundation's motion for declaratory relief, the movant bears the initial burden of pointing out the lack of any genuine issue of material fact for trial; once that burden is satisfied, the burden shifts to the non-movant to demonstrate through the production of probative evidence that an issue of fact remains to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A non-movant may not discharge the latter burden by merely pointing to a scintilla of evidence, or evidence that is merely colorable or not significantly

probative of a genuinely disputed issue of material fact. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.), cert. denied, 493 U.S. 809 (1989).

As shown below, both the record and the law support the district court's final order in this case granting the Foundation a declaratory judgment of copyright infringement as an appropriate exercise of judicial discretion. The Foundation pointed to evidence in the record to satisfy every element of declaratory relief, while Maaherra failed to raise a genuinely disputed issue for trial on either of her defenses. Thus, upon review, this Court should affirm the final declaratory judgment of copyright infringement.

**A. THE DISTRICT COURT PROPERLY HELD THAT THE FOUNDATION'S EVIDENCE MET THE ELEMENTS NECESSARY FOR THE ISSUANCE OF DECLARATORY RELIEF.**

1. It is undisputed that an actual and justiciable controversy exists in this case.

28 U.S.C. sec. 2201 states:

(a) in a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party<sup>2</sup> seeking such declaration, whether or not further relief is or could be sought. Any such

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<sup>2</sup> Maaherra concedes the Foundation is an "interested party" within the meaning of the statute. Maaherra Brief, p. 19.

declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The statute's express terms demand an "actual controversy" for declaratory relief to issue. A case of actual controversy exists wherever "the facts alleged and the contentions of the parties demonstrate that there is a real and substantial controversy between parties having adverse legal interests, of sufficient immediacy so as to warrant issuance of declaratory relief."

National Basketball Ass'n v. SDC Basketball Club Inc., 815 F.2d 562, 565-66 (9th Cir. 1987). Where the essential facts creating a right to relief have already occurred, the case is justiciable. Riehl v. Travelers Ins. Co., 772 F.2d 19, 22 (3d Cir. 1985). Conversely, cases that are hypothetical rather than definite, and which request an advisory opinion from the court, are not "actual controversies." Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

The Foundation brought this action after Maaherra copied The Urantia Book onto computer diskettes and distributed them to others. Thus, there has always been an actual and justiciable controversy in this case. Indeed, as Judge Urbom noted, before the district court, Maaherra did not contest a finding of "actual controversy." Record, Tab c, p.3.<sup>3</sup>

2. **The declaratory judgment at issue settled the legal relations between the parties.**

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<sup>3</sup> "The case definitely includes actual controversy." Maaherra Brief, p.19.

The Ninth Circuit has provided that a district court should consider whether awarding declaratory relief in a case will "serve a useful purpose in clarifying and settling the legal relations in issue" or "terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *United States v. State of Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985); *Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992).

In a copyright infringement case such as this one, a plaintiff demonstrates copyright infringement by showing (1) the ownership of a valid copyright; and (2) copying of expression protected by the copyright. *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995). In *Maaherra I*, 114 F.3d at 963, this Court held that the Foundation's copyright is valid and that Maaherra infringed it by copying verbatim the text of *The Urantia Book* and distributing the copies. Therefore, as Judge Urbom held, a declaratory judgment is appropriate to give the effect of a final judgment to the Ninth Circuit's opinion and holding in *Maaherra I*. As shown more fully below, the enduring and ongoing dispute between these parties entitles the Foundation to a final order of declaratory judgment settling and clarifying once and for all the legal relationship of the parties.

In the aftermath of the Court's decision in Maaherra I, Maaherra publicly assailed the opinion, characterizing it as an "affront, a slap in the face, a travesty of justice, and an abridgement of my rights and beliefs." SR-58-59. Maaherra also has publicly characterized her "copyright interest" as equal if not superior to the Foundation's interest. SR-62-63. Thus, the Foundation, at a minimum, is entitled to a final judgment in this case stating that when Maaherra copied the book onto diskettes and distributed them, she infringed the Foundation's copyright. The district court correctly so held.

Maaherra asserted before the district court and again in her appellate brief that the declaratory judgment awarded the Foundation does not clarify and settle the relations of the parties because it does not answer her questions about what she may and may not do in the future: "What may I index? What may I give away?" Maaherra Brief, p. 20. Of course, these questions do not bear on the current controversy. Maaherra I decided that Maaherra's index which included, inter alia, the verbatim text of The Urantia Book copied onto diskettes for distribution to others was a copyright infringement. No other controversy exists between these parties.

What Maaherra requested of the district court was guidance relating to things she may or may not do in the future. Such a request on her part is not a part of any actual controversy and provides no basis for the Court to

reverse the final order of declaratory judgment in this case. Whitmore, 495 U.S. at 155. In short, this is not the case for Maaherra or the courts to address any of the hypothetical issues raised by Maaherra.

**3. Maaherra's New Claim That Facts are in Dispute Fails As a Matter of Law.**

In her brief, Maaherra asserts to no avail that certain "facts" remain to be tried on the Foundation's motion for declaratory judgment. First, Maaherra contends she did not copy the entire text of The Urantia Book. Maaherra Brief, p.5. Second, she asserts that there is no "human authorship" associated with the text of The Urantia Book. Id., p.22. Third, she disputes that the Contact Commission was the predecessor to the Foundation. Id., p.23. Lastly, she denies that the Foundation's Declaration of Trust constituted an assignment of rights, including common law copyright and renewal rights, in The Urantia Book. Id., p.28. Each of these four so-called "facts" in dispute fails to provide a ground for reversal because (a) the factual disputes, if any, were waived when Maaherra did not raise them in the joint pretrial order or in response to the Foundation's motion for declaratory judgment; and (b) the alleged factual disputes are improper attempts to circumvent the holding of Maaherra I, which is the law of the case.

**a. Maaherra waived these "factual disputes" by failing to raise them prior to appeal.**

Where an issue is not raised at the lower court, this issue is waived and generally should not be considered by the appellate court. *Adairv. City of Kirkland*, 185 F.3d 1055, 1063 (9th Cir. 1999). "Federal appellate courts generally do not consider issues first raised on appeal." *Animal Protection Institute of America v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988), citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

In the joint pretrial order, and in response to the Foundation's motion for declaratory judgment, Maaherra did not assert that a single "fact" was in dispute on infringement, or that any such dispute was material to the declaration of infringement. Maaherra simply argued that her "unclean hands" and "public interest" defenses remained for trial. SR-77-79, 97-100. As she failed to raise these so-called "factual disputes" before the district court, she waived her right to raise them for the first time on appeal.

**b. The "law of the case" doctrine bars Maaherra from raising these points again.**

"Under the law of the case doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court. . . ." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). The "law of the case" doctrine provides that "one panel of an appellate court will

not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." Merritt v. Mackev, 932 F.2d 1317, 1320 (9th Cir. 1991 ) (citation omitted).

As shown below, the so-called "factual disputes" described above are merely attempts to relitigate the issues decided in Maaherra I. In Maaherra I, 114 F.3d at 958-59, the Ninth Circuit held, mter alla, that there was sufficient human creativity associated with The Urantia Book for the book to be copyrightable. Maaherra I also held that the Contact Commission was the predecessor of the Foundation in the sense that the Contact Commission preceded the Foundation in the ownership of the unpublished manuscript of The Urantia Book. Id. at 960. Maaherra I likewise held that the establishment of the Declaration of Trust and attendant transfer of ownership rights in the printing plates of The Urantia Book transferred all rights in The Urantia Book to the Foundation. Id. Since Maaherra copied the entire text of The Urantia Book, SR-41, the Ninth Circuit properly held in Maaherra I that she infringed the copyright. Id. at 964.

**B. MAAHERRA'S DEFENSE OF "UNCLEAN HANDS" IS NOT APPLICABLE.**

At the trial court level prior to Maaherra I, Maaherra argued that the Foundation had unclean hands because it concealed the role of divine beings in the origination of the text of The Urantia Book. However, in Maaherra I,

the Court rejected this contention. *Maaherra I*, 114 F.3d at 963-64. On remand, *Maaherra* contended in response to the Foundation's motion for a declaratory judgment that she was entitled to a trial on her "unclean hands" and "public interest" defenses. These were the only defenses she raised in the joint pretrial order filed in this case. SR-77-79. In response to the Foundation's motion for declaratory judgment, she referred the district court to no evidence in the record that supported her contention that any triable issues of fact existed on either of these defenses. SR-97-100.<sup>4</sup> Moreover, as shown below, the law does not recognize these defenses as applicable to a declaratory judgment of copyright infringement. Accordingly, Judge Urbom was correct in his view that no fact-finder could use these proffered defenses to "undo" the *Maaherra I* holding that *Maaherra* infringed the Foundation's copyright.<sup>5</sup> Record, Tab c, p.5 ("I will not permit *Maaherra* to contest the Ninth Circuit's decision in this backdoor fashion").

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<sup>4</sup> Although *Maaherra's Record*, Tab e, purports to be evidence in this case, most of it is unsworn first person narrative from *Maaherra*, and none of this material was filed and referred to before the district court in opposition to the Foundation's motion for declaratory judgment. Thus, the materials contained in Tab e of *Maaherra's* record should be stricken, or deemed waived. In any event, they are not evidence, and should not be considered as such by this Court.

<sup>5</sup> Judge Urbom's reasoning is bolstered by the fact that the Ninth Circuit has never held that a plaintiff copyright holder's "unclean hands" provide a defense to a declaratory judgment when no coercive relief (e.g., injunction) is requested.

## **1. The Unclean Hands Defense Required Maaherra to Make a Showing of Proof to the District Court.**

The defense of unclean hands in copyright law is "rarely effective" and is properly rejected when the "plaintiff's transgression is of an inconsequential nature." *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 799 (9th Cir. 1992). Generally, to prevail on a claim of unclean hands, the defendant must show that the plaintiff has given false evidence and that the plaintiff is involved in a scheme to defraud the public. *Supermarket of Homes Inc. v. San Fernando Valley Bd. of Realtors* 786 F.2d 1400, 1408 th Cir. 1986). Maaherra recognizes the high threshold that must be met in order to prove the defense of unclean hands when she quotes Professor Nimmer's summary that unclean hands involves (1) falsification of a court order; (2) falsification of evidence; (3) misrepresenting the scope of one's copyright; or (4) defrauding the copyright office.. Maaherra Brief, p.11. Even in cases where the plaintiff comes into court with unclean hands, the court retains discretion to award relief to the plaintiff. *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944); *EEOC v. Recruit USA Inc.*, 939 F.2d 746, 753 (9th Cir. 1991).

Before Judge Urbom, Maaherra pointed to no evidence that the Foundation has unclean hands within the meaning of the relevant authorities. Accordingly, Judge Urbom was concerned that Maaherra merely used the

invocation of new defenses such as "unclean hands", without more, as a subterfuge to challenge the holding of Maaherra I. As Judge Urbomstated in his opinion:

Here, the Ninth Circuit's holding and mandate are quite clear: "the Foundation's renewal copyright is valid, and that Maaherra infringed it;" and "[or the foregoing reasons, the decision of the district court is REVERSED and the case REMANDED for further proceedings on [relief.]" [Maaherra I, 114 F.3d] at 964. This language, it seems to me, at the very least, impliedly dismisses all other defenses to copyright infringement not addressed in its decision.

Record, Tab c, pp.4-5.

**2. The "Fraud on the Copyright Office" Unclean Hands Defense is Barred by the Law of the Case Doctrine.**

Maaherra asserts that her unclean hands defense remains to be tried in that "Plaintiff Foundation fraudulently obtained its copyright" and "has never informed the Copyright Office that the authors of the URANTIA papers are spiritual beings ...." Maaherra Brief, p.12. However, in Maaherra I, 114 F.3d at 963-64, the Ninth Circuit rejected this contention outright and opined:

Maaherra asserts that the Foundation did not want to reveal to the Copyright Office that the "authors" were celestial beings because the Copyright Office would have rejected the application.

There is no merit to this contention. The Foundation deposited two copies of the Book with the Copyright Office.. The Book clearly describes its own origin as having been

created at the instance of: "Planetary celestial supervisors [who initiated] those petitions that resulted in the granting of the mandate making possible the series of revelations of which this presentation is a part." We conclude that there has been no fraud on the Foundation's part, and no prejudicial reliance on Maaherra's part.

Id. Therefore, the law of the case doctrine, described above, counsels against revisiting this issue, in the manner Maaherra requests.

### **3. Maaherra's Proffered Unclean Hands Defense May Not Be Based Upon the Alleged Selective Distribution of The Urantia Book.**

Maaherra also contends that the Foundation misused its copyright by "suppressing" the distribution of The Urantia Book by selectively selling and distributing the book. Maaherra Brief, p.12. Again, Maaherra presented no evidence to the district court in support of this argument. (Similarly, Maaherra never raised any "antitrust" argument before the district court in either the joint pretrial order or the brief in opposition to the motion for declaratory judgment, and thus waived any antitrust issue on appeal.)

However, even if Maaherra had pointed to such evidence, her claim that the Foundation engaged in selective selling is barred as a matter of law.

Supermarket, 786 F.2d at 1408 (rejecting assertion that discriminatory patterns in distribution of copyrighted work could give rise to a claim of copyright misuse).

Maaherra's contention is similarly barred by the law of the case. In response to Maaherra's challenge to the so-called "suppression" policy employed by the Foundation, the Foundation moved for summary judgment that the alleged selective distribution of the book is not a valid basis for a defense to a charge of copyright infringement. In *Urantia Foundation v. Maaherra*, 895 F. Supp. 1329, 1334 (D. Ariz. 1995), Judge Urbom previously ruled that the selective distribution of the Foundation provided no defense to a claim of copyright infringement. Among other things, the district court found there was no dispute as to whether the book was widely and publicly available. *Id.*<sup>6</sup>

Moreover, Maaherra's criticism of the Foundation's distribution policies, which is at the core of her misuse argument, is barred by the First Amendment. U.S. CONST., Amend. 1. The Establishment Clause of the First Amendment prohibits the government from become "excessively entangled" in matters of religious doctrine, or from endorsing one religion

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<sup>6</sup> Maaherra did not present any evidence before the district court regarding "suppression" of *The Urantia Book*. If she had asserted such an argument, the Foundation would have responded by showing the district court that *The Urantia Book* can be read, among other places, on the Foundation's web site, <http://www.urantia.org>, and can be purchased from major booksellers such as Amazon.com at <http://www.amazon.com>. Indeed, the Court is entitled to take judicial notice of these facts given that Maaherra's claims in response to the final order of declaratory judgment were not raised or substantiated before Judge Urbom.

over another. The courts therefore use a "neutral principles" approach to disputes involving religious property, including copyrights, to avoid excessive entanglement with religion. *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Presbyterian Church of the United States v. Mary Elizabeth Blue Hill Presbyterian Church*, 393 U.S. 440, 449 (1969). The Supreme Court in *Presbyterian Church*, 393 U.S. at 443-44, 450, prohibited the lower court from deciding the dispute on the basis of allegations by one party that the opposing party was not following the "original tenets and doctrine" or the "tenets of faith and practice" of the religious group. In so holding, the Court stated that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Id.* at 449.

The foregoing authorities counsel that, as a matter of law, Maaherra cannot make a question of spiritual faith a tenet, much less the central tenet, of her copyright misuse defense. Nevertheless, Maaherra has done exactly that. Her misuse defense is epitomized by her statement that "[t]he problem of ideology is central to this dispute." Maaherra Brief, p.16 (emphasis added). In short, Maaherra is of the view that the Foundation misused its copyright when it engaged in methods of distribution characterized by Maaherra as "slow growth" (as opposed to Maaherra's belief in more rapid

growth of the "movement" of persons who have read the teachings of The UrantiaBook through more aggressive dissemination practices, as demonstrated at SR-55). As Maaherra herself notes, her argument, if addressed, would force the Ninth Circuit to unravel "ecclesiastical questions" and adjudicate which of the doctrinal beliefs of the parties is "correct." The Foundation submits that the Court should not adjudicate any ideological or doctrinal disputes between these parties.

#### 4. The Remaining Theories of Unclean Hands Are Not Supported by the Record.

With her "fraud on the Copyright Office" argument, Maaherra attacks the Foundation for failing to advise the public of its belief in the revelatory nature of The Urantia Book. In somewhat contradictory fashion in this appeal, Maaherra attacks the Foundation for, among other things, communicating with the public about the association of the book with the divine to "trick" them into donating money to the Foundation. Specifically, Maaherra asserts without evidence the following contentions, claiming that they support her unclean hands defense:

- the Foundation has falsely represented that The Urantia Book contains a number of revelations (in light of the evidence of human creativity associated with the origination of the book);<sup>7</sup>
- the motivation for the Foundation's so-called "fraudulent" behavior directed towards Maaherra was undertaken "in order to get donations and tithes" from her;<sup>8</sup> and
- the Foundation tricked Maaherra into believing that the text of The Urantia Book is in the public domain.<sup>9</sup>

With the exception of attempted suppression of the book, Maaherra's unclean hands defense is that the Foundation has in essence defrauded her. However, as shown below, when the applicable evidence, if any, is examined, the Foundation submits that Maaherra's allegations of fraud are not sustainable. Maaherra I, 114 F.3d at 963 (mere misstatement or unintentional error is not grounds for refusing to enforce otherwise valid copyright); Asia Entertainment. Inc. v. Nguyen, 40 U.S.P.Q.2d 1183, 1996 WE 652767, \*3 (C.D. Cal. June 10, 1996) (same, rejecting proffered unclean hands defense).

**a. The Foundation has engaged in no fraudulent conduct.**

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<sup>7</sup> Maaherra Brief, pp.7-8.

<sup>8</sup> Maaherra Brief, p. 13.

<sup>9</sup> Maaherra Brief, p. 11.

Although Maaherra now contends that the Foundation falsely stated to her that The Urantia Book contains certain revelations (in light of the evidence that human beings asked questions giving rise to the individual Urantia Papers which comprise the text of the book),<sup>10</sup> and tricked her into believing that the text of the book is in the public domain, she introduced no evidence on these allegations before the district court.<sup>11</sup> Although Maaherra makes vague references to unfired documentary and testimonial evidence which may or may not bear on this issue, Maaherra Brief, pp.7-8, the only actual purported evidence she has introduced (before this Court, not the district court) that is on point is a document entitled "The Urantia Book: The Question of Origin" [henceforth, the "Origin document"] promulgated by the Urantia Brotherhood (a former affiliate of Urantia Foundation). Record, Tab e, p.29.<sup>12</sup> The Origin document was not introduced into the record or

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<sup>10</sup> The Foundation strongly disagrees with Maaherra's premise, which apparently is that the Foundation cannot both (a) advise the public of its belief that the text of The Urantia Book is revelatory, and (b) acknowledge the uncontested evidence that human beings asked questions that played a role in the creative process giving rise to the text, without committing fraud on the public.

<sup>11</sup> Where an issue is not raised at the lower court, this issue is waived and generally should not be considered by the appellate court. *Adair v. City of Kirkland*, 185 F.3d at 1063.

<sup>12</sup> Maaherra's record excerpts are tabulated rather than paginated. The document cited appears beginning with the twenty-ninth page counted beginning with the first page after the "Tab e" divider. The document does not bear "page 29" or any other page number on its opening page.

referred to by Maaherra in opposing the Foundation's motion for declaratory judgment. SR-97-100. However, the contents of the Origin document demonstrate that neither the Foundation nor Urantia Brotherhood attempted to trick readers. As the Origin document states:

Now the book must be evaluated solely on the basis of its quality – a personal experience of its internal authenticity or lack of it. The Urantia Book message must be experienced before one can evaluate its quality and consider the probability of the revelatory nature of its origin. Before you have completely read The Urantia Book, therefore, it is impossible to give you a very satisfying answer concerning its origin; and, after you have read the book, someone else's comments about its origin, while of interest, is of secondary importance. [Tab e, p. 29]

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We well know, however, that this secondhand knowledge [concerning origin] has severe limitations in the authentication process.... [Id.]

\* \* \* \* \*

First of all, let us acknowledge that no human being knows many of the details and specifics regarding the origin of the URANTIA papers. [Id.]

\* \* \* \* \*

In reality, information about its origin has nothing to do with the truth or spiritual quality of the book. This must be judged by the reader on the basis of the content of the book. [Id., p. 31].

This document is littered with statements that the reader must judge for herself, that knowledge of the circumstances of origination is very limited, and that no one knows very much regarding the question of origin. In the face of candid statements such as these, it is unfathomable that the Origin document supports a fraud or unclean hands claim against the Foundation. To side with Maaherra, there must be more than some "metaphysical doubt" that the Foundation is not entitled to declaratory relief. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Fraud claims involving copyright matters require proof of affirmative misrepresentations of material fact that are intentional. *Em, S.O.S.. Inc. v. Payday. Inc.*, 886 F.2d 1081, 1089 n.10 (9th Cir. 1989); *Datastorm Technologies. Inc. v. Excalibur Communications. Inc.*, 888 F. Supp. 112, 115 (N.D. Cal. 1995). In this case, Maaherra's "evidence" of scienter [sic] on the part of the Foundation consists of her self-supporting assertions in her appellate brief that the Foundation deceived her in order to get her to donate money. This statement of motive is purely hypothetical, and is wholly unsupported by the record. There is no evidence that the Foundation made any intentionally false statements about the origin of The Urantia Book in order to obtain donations from anyone, including Maaherra. Maaherra does not even point to any evidence in the record substantiating her claim that she

donated money to the Foundation. Thus, the record does not support her unclean hands defense, including her mere (and unsupported) suspicions about motive and intent.

Moreover, Maaherra's unclean hands theory based upon the Foundation's claim that The Urantia Book was created at the "instance and expense" of the Foundation, Maaherra Brief, p.13, is completely baseless. The Foundation did not prevail on the basis of the "instance and expense" analysis, so Maaherra was not even injured by the fact that the Foundation contended that the evidence in the case was sufficient to meet the "instance and expense" test for a commissioned work under the 1909 Copyright Act. Moreover, the facts underlying the "instance and expense" argument were understood by Maaherra long before this case began, and the Foundation has never denied the existence of said facts. So it cannot be said that the Foundation misled Maaherra.<sup>13</sup>

Maaherra fully understood prior to and during this case that human beings asked questions giving rise to the Urantia Papers (the "instance"

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<sup>13</sup> Maaherra mistakenly contends that the Foundation has asserted that it "paid" the celestial beings to author the text of The Urantia Book. This is an absolutely false allegation. The Foundation has never claimed to the Ninth Circuit or the public that it paid celestial beings to author the book. For this very reason, the Ninth Circuit suggested in dicta that the Foundation's proof probably did not meet the legal test of a "commissioned work" under the 1909 Copyright Act. Maaherra I, 114 F.3d at 961.

prong of the analysis), one of the few known facts about the origination process. SR-27-28 (statements 34, 35, 41 and 45). As the Foundation pointed out in opposing Maaherra's motion for reconsideration of Maaherra I, the fact that Maaherra asserted the role of the questions in her statement of undisputed facts in support of her own summary judgment motion on the question of the validity of the copyright precludes her from now challenging the role of the questions in the creative process associated with the origin of The Urantia Book. *Lloyd v. Franklin Life Ins. Co.*, 245 F.2d 896, 897 (9th Cir. 1957). For this reason, it appears Maaherra's entire premise – that she was somehow tricked into believing that no human being played a role in the origination process – is a sham. In any event, the evidence of record is devoid of any testimony or documentary evidence in support for any contention that the Foundation ever expressly denied that people asked questions giving rise to the content of the book.

As for the "expense" prong of the analysis, under which the Foundation argued that the Foundation and Contact Commissioners paid for the expenses (not the authorship) of publishing The Urantia Book, Maaherra completely fails to explain how the Foundation ever misled anyone with respect to the issue of who paid for the publication efforts. There is no

evidence in the record that the Foundation ever deceived Maaherra about how it financed the publication of The Urantia Book.

**b. The Foundation has not misrepresented the scope of its copyright.**

Similarly, the record contains no evidence that the Foundation ever advised Maaherra or anyone else that the Foundation has ever claimed that the scope of its copyright was limited to the table of contents of The Urantia Book. To the contrary, the evidence of record confirms that the Foundation first published The Urantia Book under notice of copyright in 1955, and registered its copyright in the book in that same year. SR-16-18, 21. See *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 723 (9th Cir. 1984) (copyright notice and registration certificates formed valid basis for rejecting unclean hands defense relating to ownership and scope of copyright). Maaherra never asked the Foundation about the scope of the copyright prior to copying the text of The Urantia Book onto diskettes and distributing them.<sup>14</sup> The "scope of copyright" issue is just another new issue raised for the first time on appeal – the Foundation neither created nor

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<sup>14</sup> If Maaherra had asserted before the trial court that the Foundation misled her regarding the scope of its copyright in The Urantia Book, the Foundation would have shown that Maaherra was actually and constructively aware of previous copyright infringement suits brought by the Foundation wherein the Foundation claimed copyright in the book, not merely the foreword and/or table of contents. E.g., *Urantia Foundation v. Burton*, 210 U.S.P.Q.217, 1980 W L 1176 (W.D. Mich. August 27,1980).

confirmed Maaherra's alleged misperception of the scope of the copyright. To the contrary, beginning in 1969 when she first read the book (published with notice of copyright), Maaherra has been aware that the Foundation claimed copyright in the contents of The UrantiaBook. R-32 (statement 76), 34 (statement 89). Presumably, this awareness explains why she attempted to invalidate the Foundation's copyright rather than simply defend the case based on a scope of copyright and non-infringement defense.

In summary, Maaherra's unclean hands defense is without merit. The utter lack of support in the record, as well as the law of the case doctrine, preclude her "fraud on the Copyright Office" and "suppression of the book" theories of unclean hands. The Court should affirm Judge Urbom's decision to reject this defense in the context of the Foundation's motion for declaratory judgment.

**C. MAAHERRA'S PUBLIC INTEREST DEFENSE IS INAPPLICABLE TO THE INSTANT CASE.**

Maaherra raised her "public interest" defense as a defense to a claim in the pretrial order of this case for injunctive relief. It is widely understood that for injunctive relief to issue, the district court must determine that the issuance of such relief will not disserve the public interest. *Weinberger v.*

Romaro-Barcelo, 456 U.S. 305, 312 (1982). In the joint pretrial order, Maaherra only preserved two defenses, unclean hands and the "public interest" defense to injunctive relief. Without explanation, Maaherra asserted in response to the final judgment that the "public interest" defense remains to be tried.

There is no case law holding that a simple declaration of copyright infringement may be opposed on the basis of the "public interest." In fact, such a rule would be illogical in cases where the plaintiff succeeded on the elements of a copyright infringement claim. The copyright laws were passed by Congress to embody and protect the public interest. When the evidence establishes no genuine dispute regarding whether a defendant has infringed a copyright, a mere declaration that someone has infringed a copyright, without the more coercive injunctive relief, cannot and does not disserve the public interest. To the contrary, even where injunctive and other coercive relief is at issue, courts often hold that the public interest is not adversely impacted where the public policy embodied in a particular statute is furthered. *Nintendo of America, Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1038 (9th Cir. 1994) (public policy favors permanent injunction when a violation of copyright law is established); *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 677 (5th Cir. 1988) (reversing

denial of injunctive relief on basis of privacy considerations for failure to weigh the governmental and public interest in equal employment opportunity exemplified by Title VII). For this reason, the Court should affirm Judge Urbom's decision that Maaherra failed to raise a genuine issue for trial on the asserted "public interest" defense.

## **VII. CONCLUSION**

For all of the foregoing reasons, Plaintiff-Appellee Urantia Foundation respectfully requests that the district court's final judgment in this case be affirmed.

This 21st day of October, 1999.

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