

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action no. ___06 - CV - 00318 REB-BNB

SUZANNE SHELL

v.

JOLENE DEVRIES

ANNA HALL OWEN

UNKNOWN DEFENDANT DOE

PLAINTIFF SHELL'S VERIFIED MOTION TO RECONSIDER

Plaintiff Suzanne Shell submits this motion to reconsider and in support thereof I state the

following:

1. The Magistrate Judge and the U.S. District Judge have demonstrated obvious bias against me in this case, and the U.S. District Judge also demonstrated bias against me in a prior case. See appendix A, Affidavit of Suzanne Shell. I will refer to them collectively as "the court."
2. This bias has been harmful to me, and has resulted in a denial of due process on my copyright infringement and associated state claims before this court.
3. This bias has been demonstrated by the misrepresentations, omissions and errors contained in the recommendation and order to dismiss my copyright infringement and associated state law claims.
4. The U.S. District Judge rubber stamped the Magistrate Judge's recommendations and assessed defendants's costs and attorney fees against me contrary to my due process rights:

The district judge must make a de novo determination of that "portion of the magistrate judge's disposition to which specific written objection has been made." Fed.R.Civ.P. 72(b). Under Section 636(b)(1)(B) the district court must, "actually

exercise its discretion, rather than summarily accepting or denying” the magistrate judge’s findings. United States v. Howell, 231 F.3d 615, 622 (9th Cir. 2000). It is reversible error for the district court to fail to conduct such review. See, e.g., Hosna v. Goose, 80 F.3d 298, 306 (8th Cir. 1996); Northington v. Marin, 102 F.3d 1564, 1570 (10th Cir. 1996).

5. The court stated in the recommendation and order it could not act as my advocate. However, the court did favor the defendants as well as manipulate its findings on fair use to protect the defendants from liability for their tortious conduct simply because they are lawyers. This was evidenced when the court allowed the defendants to submit a motion to dismiss which exceeded the page limitations, but struck my response as exceeding the page limitations. Then, the court allowed me 18 pages, because the defendants’s motion to dismiss was 18 pages, then chastised me when the motion I submitted exceeded 15 pages.

6. It also denied my request for an extension of time to file the motion, citing a problem beyond my control. My audit of copyright cases revealed that my motion for extension of time was the **only such motion denied in 6 years and 246 copyright** cases filed in this District since 2000.

7. The court favored the defendants and demonstrated bias against me by accepting the defendants’s assertions in toto and giving no weight to my claims, omitting or misrepresenting my facts, ignoring my arguments and providing mere legal “incantations” to create the deceitful appearance of fairness and impartiality .

“A judge may not abdicate his responsibility by omitting key facts that have been omitted by the party on whose work the judge is relying. In a copyright case where fair use is the issue, this practice destroys the delicate discrimination necessary if fair use is to be fairly evaluated. We have more than once stated that such mass adoption of ‘the suggestions’ of a party will require ‘special scrutiny’ on appeal. L.K. Comstock & Co. v. United Eng'rs & Constructors Inc., 880 F.2d 219, 222 (9th Cir. 1989); Photo Elecs. Corp. v. England, 581 F.2d 772, 776-77 (9th Cir.

1978). Furthermore, the district judge's job in reviewing uses claimed to be transformative is particularly important as the fair use doctrine is intended to preserve the values enshrined in the First Amendment. See Eldred v. Ashcroft, 537 U.S. 186, 219-20 (2003). When the trial court simply accepts the defendant's assertions, the constitutional values are ignored.”

8. The court did not liberally construe my pleadings as a pro se plaintiff as both courts asserted and did not construe all reasonable inferences in my favor, despite both courts’s legal incantations to the contrary on the recommendation and the order. A process which is a mere gesture is not due process. See Mullane V. Central Hanover Tr. Co., 339 U.S. 306 (1950). The U.S. Supreme Court, in Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) said:

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. See Carey v. Phipus, 435 U.S. 247, 259 -262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Mathews v. Eldridge, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, “generating the feeling, so important to a popular government, that justice has been done,” Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. . . . We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. Indeed, “justice must satisfy the appearance of justice,” Offutt v. United States, 348 U.S. 11, 14 (1954), and this “stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,” In re Murchison, 349 U.S. 133, 136 (1955). See also Taylor v. Hayes, 418 U.S. 488 (1974).

9. If the court had actually taken the posture it professed to have taken, the findings would have

been in my favor and the court would have had to find that I could, in fact, prove sufficient facts to support my copyright infringement and associated state law claims. Since the state law is clearly established as to at least one of the state law claims, the only way it could protect the defendants from that claim was to dismiss the copyright infringement claim and refuse to hear the state law claims, and, as it did, refuse to remand the remaining state law claims to the appropriate state court as they have done in other copyright infringement cases since 2000.

10. The Purpose and Character of Use analysis by the court asserts “Nor are there any allegations to support a reasonable inference that the defendants’ use of the material was commercial in nature.” This is a blatantly false finding by the court, and is not supported by the record. In ¶ 36a-g of my First Amended Complaint (Complaint), I cited 7 reasons why the defendants’ use weighed against fair use under Purpose and Character of Use.

11. I expressly stated in ¶ 36b (Complaint) “Defendants’ use is considered “financial gain” as defined in the No Electronic Theft Act for their infringing conduct, including receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.”

12. I also asserted (¶ 36e Complaint),

“The purpose and character of the defendants’ use was to seek an order from the court against Shell in the form of an award of Owen’s attorney fees and costs. This is clearly a use intended to obtain a financial benefit for both of the defendants and therefore renders their use commercial in nature.”

13. I alleged the defendants copied an entire article (¶ 36j, Complaint). This presumptively weighs against fair use. American Geophysical Union v. Texaco, Inc. 60 F.3d 913, 918 (2d Cir. 1994):

The only other appellate court to consider the propriety of photocopying articles from journals also recognized that each article constituted an entire work in the fair use analysis. See Williams & Wilkins [Co. v. United States], 487 F.2d 1345, 1353-56 (Ct. Cl. 1973), *aff'd* by equally divided Court, 420 U.S. 376 (1975)] at 1353.

Though not an absolute rule, “generally, it may not constitute a fair use if the entire work is reproduced.” Nimmer on Copyright, § 13.05[A][3] at 13-178 (1997). See also, Weissman v. Freeman, 868 F.2d 1313, 1325 (2d Cir. 1989). Contrary to the established rulings, the court made special effort to find a way that this element would weigh in favor of fair use which was inconsistent with established law. If inferences were actually being drawn in my favor, the court would not have weighed this fair use element in favor of the defendants.

14. As to marketability, the court stated, “The Complaint does not allege that the marketability of her work is impaired. Indeed, it is impossible to imagine how the defendants’ use of the materials as an exhibit to a motion for attorneys’ fees could in any way impact the marketability of the materials.” The court totally ignored (¶39, Complaint) where I addressed marketability issues which have already affected me as a result of the defendants’ acts:

“As a direct cause of this infringement, Shell has suffered copyright infringement, **effectuation of new and further infringements, depreciation in the value of and ability to sell and license her work, lost profits and/or opportunities, and damage to her goodwill and reputation.** Defendants' direct and/or contributory and/or vicarious copyright infringement has caused, and will continue to cause, Plaintiff to suffer substantial injuries, loss and damage to her exclusive rights in Plaintiffs' web site.”

15. In ¶ 6 of my Objection to Recommendation of United States Magistrate Judge (Objection), I asserted that the courts were a market,

“I instituted and published limitations on use of my web site content because state

agencies, service providers, contractors and other affiliates involved with child welfare cases had been engaged in wholesale infringement and copying of my web site content without my permission, without my knowledge, and were using the copies in ongoing dependency and neglect court cases nationwide for improper purposes.”

16. Furthermore, the copyright notice attached (Appendix A) to the Complaint also implied that persons engaged in the occupations the defendants were engaged in were an intended market for my work. This should have been sufficient to deny the defendants’s motion to dismiss, IF all inferences were being drawn in my favor. I then would have had the opportunity to present the evidence from as early as 2000 showing that courts were an intended market for my web site content.

17. In its fair use analysis, the court also ignored, omitted or drew inferences unfavorable to me in response to the following express facts, allegations or references raised by me. In so doing, the court advocated on the defendants’s behalf by not including these issues as part of its analysis.

18. The court did not address the doctrines of Unclean Hands and/or Equitable Estoppel¹ which I raised (¶¶ 30 & 35, Complaint), as precluding the defendants from asserting a fair use defense. There is no copyright infringement exclusion to asserting these doctrines in any court which would support the court’s omitting or excluding them from consideration in support of my claim denying the defendants a fair use defense. Had the court considered the merits of these doctrines, it would never have even gotten to a fair use analysis without first determining whether these

¹These are issues of first impression in this Circuit.

doctrines must be universally excluded from copyright infringement claims.

19. The court did not make its analysis from the perspective that the onus of avoiding infringement is on users, not on copyright holders (¶ 9, Complaint).

20. The court did not include the No Electronic Theft Act² in its analysis (¶ 36b, Complaint).

21. The court did not include the defendants's expectation of receipt of money for their unauthorized use of my copyrighted property in its analysis (¶36e, Complaint).

22. The court did not even consider, despite the fact that the defendants conceded their use was for the purposes I alleged, that the defendants's use was commercial in nature (¶ 36 c, e & f, Complaint).

23. The court totally ignored the effect of the defendants's bad faith (¶ 38, Complaint) in their failure and refusal to pay for the content (¶¶ 25 & 27, Complaint) they took as part of its analysis.

Harper & Row v. Nation Enterprises et al., 105 S. Ct. 2218, 471 U.S. 539 at 560 (U.S.

05/20/1985) states:

Also relevant to the "character" of the use is "the propriety of the defendant's conduct." 3 Nimmer § 13.05[A], at 13-72. "Fair use presupposes 'good faith' and 'fair dealing.'" Time Inc. v. Bernard Geis Associates, 293 F.Supp. 130, 146 (SDNY 1968), quoting Schulman, Fair Use and the Revision of the Copyright Act, 53 Iowa L. Rev. 832 (1968).

24. The court failed to give any weight to the fact that manner of the defendants's acquisition was solely to avoid paying the published license fees (¶ 36f, Complaint).

25. The court totally ignored the use to which the defendants put this property, which was a use

²This is another issue of first impression in this Circuit.

that was expressly prohibited (¶ 21, Complaint and Exhibit A, Complaint).

26. The court ignored my asserted rights to exclude persons and uses of my copyrighted property (¶ 21, Complaint):

But nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work. See Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

27. The court did not give any weight to the fact that I undisputably have an interest in exploiting a licensing market involving the Internet (¶ 9, Complaint)

“[I]t is appropriate that potential licensing revenues for [copying] be considered in a fair use analysis.” American Geophysical, 60 F.3d at 930.

28. The court did not consider that the defendants had other, noninfringing means to provide this content to the court in support of the motion as I alleged (¶36f, Complaint):

“ They could have avoided license fees by simply including the URL address (e.g. www.profane-justice.org) to their motion for fees and costs, so that the court could view it without anyone violating copyright. Or they could have asked for a hearing wherein they could display the subject pages from the Internet on a computer in the courtroom. Or they could have subpoenaed Shell to produce the subject property. They, instead, deliberately chose to infringe Shell’s copyright rather than employ alternative methods that would not infringe her copyright nor deprive her of the income associated with that use.”

Furthermore, the defendants never defended their refusal to use any of the alternative and lawful methods of providing the information to the court as I described, instead attempted to justify their willful infringement.

29. The court ignored the fact that the defendants are attorneys and as such, are expected to have a higher knowledge and standard of the law and to conduct themselves within the confines of the

law (¶17, Complaint).

30. The court did not consider that the defendants' use was not transformative (¶36f, Complaint):

“The defendants' use was not transformative. This was not a use that contributed in some way to the public welfare, and was merely intended for the sole benefit of the Defendants, therefore it does not meet fair use guidelines.”

31. The court did not consider the effect of defendants' admitted refusal to pay fees, seek a fee waiver or fee reduction or employ non-infringing methods to use my property merely because they believed they were entitled to use my property as they saw fit (¶¶ 12, 13, 14, 15, 39, Complaint) Veeck v. Southern Bldg. Code Congress Intern. Inc., 241 F.3d 398 (5th Cir. 2001), reh'g en banc granted, 268 F.3d 298 (5th Cir. 2001):

Website operator's posting of private organization's copyrighted model building codes on the Internet was not a “fair use,” as would preclude operator's liability for copyright infringement, although operator's use was noncommercial, because such use could severely undermine the market for those works if it were to become widespread. 17 U.S.C.A. § 107. . .

Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., 342 F.3d 191 (3d Cir. 08/26/2003):

the court must consider “. . .the effect of the unauthorized use upon the... value of the copyrighted work,” not only the effect upon the “market,” however narrowly that term is defined. § 107(4); see also Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1119 (9th Cir. 2000) (drawing such a distinction). And the value “need not be limited to monetary rewards; compensation may take a variety of forms.” Id.; see also Sony Corp., 464 U.S. at 447 n.28 (stating in a different context that the “copyright law does not require a copyright owner to charge a fee for the use of his works, and... the owner of a copyright may well have economic or non-economic reasons for permitting certain kinds of copying to occur without receiving direct compensation from the copier”).

32. The court limited its fair use analysis to only the four factors in violation of clearly established law, and performed only the most superficial evaluation.

33. The court has not assessed this case in light of the total circumstances, including but not limited to the effect of this ruling on all web site owners who face the same copyright infringement issues (¶¶ 12-16, Complaint) I have claimed. It would be impossible to consider the total circumstances involved in this case based on the few pleadings filed in this case. Religious Tech. Ctr. v. F.a.c.t.net, Inc., 901 F. Supp. 1519 (D.Colo. 09/15/1995) states:

“‘Fair use’ is a factual determination. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 549, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985). Each fact must be assessed in light of the total circumstances of the case and then a conclusion can be made as to whether the doctrine applies.”

34. The court wrongfully placed the burden of proof upon me to prove that the defendants’s use was not fair use, in contradiction to established law. The burden of proving ‘fair use’ is supposed to be on its proponent. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994); American Geophysical Union v. Texaco, Inc. 60 F.3d 913, 918 (2d Cir. 1994) .

35. By the aforementioned acts, both courts held me, a pro se plaintiff, to a higher and more exacting standard than litigants represented by counsel, in direct contradiction to their legal incantations on the recommendation and order and the rules governing this court.

36. The court acted contrary to the Federal Rules of Civil Procedure, which erect a powerful presumption against rejecting pleadings for failure to state a claim. Morgan v. City of Raul, 792 F.2d 975, 978 (10th Cir.1986). Granting such a motion to dismiss is “a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to

protect the interests of justice.”

37. Certain issues raised by me in this case constitute issues of first impression in the Tenth Circuit, as clearly evidenced by the fact that the court had to cite persuasive authority from the Ninth Circuit in support of its ruling. Therefore, it is the height of judicial irresponsibility, and even bordering on contempt of the judicial process, to dismiss this case absent a thorough examination of the facts and evidence, which have yet to be presented. Furthermore, in response to the court’s citation, I submit the following analysis from the Seventh Circuit, refuting this court’s analysis and supporting my claims, citing BMG Music v. Gonzalez, 430 F.3d 888, 77 U.S.P.Q.2d 1312 (7th Cir. 12/09/2005) :

“Authorized previews share the feature of evanescence: if a listener decides not to buy (or stops paying the rental fee), no copy remains behind. With all of these means available to consumers who want to choose where to spend their money, **downloading full copies of copyrighted material without compensation to authors cannot be deemed ‘fair use.’** Copyright law lets authors make their own decisions about how best to promote their works; copiers such as Gonzalez cannot ask courts (and juries) to second-guess the market and call wholesale copying ‘fair use’ if they think that authors err in understanding their own economic interests or that Congress erred in granting authors the rights in the copyright statute.”

38. If due process is to be secured, the laws must operate alike upon all and not subject the individual to the arbitrary exercise of governmental power unrestrained by established principles of private rights and distributive justice. Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894).

39. The court’s findings ignore and undermine the intrinsic value of my right to control the use of my copyrighted work, which is the essence of the law of copyright. Both of the judges have made numerous and profound errors of judgment and exceeded the bounds of permissible choice.

Their findings were unsupported by the facts or the law, and in direct contradiction to their legal incantations and their oaths of office, and were, therefore, arbitrary and capricious, epitomizing manifestly unreasonable judgment. See e.g. Moothart v. Bell, 21 F.3d 1499, 1504 (10th Cir. 1994); Coletti v. Cudd Pressure Control, 165 F.3d 767, 777 (10th Cir. 1999)).

40. The court then based its order that I pay defendants's costs and attorney fees on the aforementioned erroneous and unfair findings. I filed this complaint to protect my property rights, which the defendants willfully violated. I meticulously conformed to clearly established principles under copyright law and tort law. This court is the appropriate venue to address those violations. I cited the bad faith of the defendants in their infringing conduct, which they have not refuted. I have raised several issues of first impression before this court, some of which issues have been determined in other circuits, proving my claims to be legitimate and valid and worthy of determination on the merits. This case addresses the need for decisions over copyrighted web site content, which has not been specifically addressed in this court and which remains a legally muddy arena. This is not a frivolous or vexatious complaint and the award of defendants's attorney fees and costs was abusive and retaliatory.

Conclusion

People online who post or download music files are infringers. The music industry is vigilant about protecting the property rights of musicians and their music on the Internet. A computer user making a single unauthorized download of a single song on the internet without paying a license fee for that song to the copyright owner has been held liable for copyright infringement. The courts have held that unauthorized copies being retransmitted in another

medium is a violation of the copyright laws.³ This principle is the essence of my complaint.

The National Football League has enforced their right to say bars can display large screen broadcasts of the Superbowl, but church groups cannot display the broadcast on a screen larger than 52 inches. Libraries and copy centers all have copyright warnings displayed prominently on their copy machines⁴. The court has also decided that electronic republication of magazine articles without the consent of the author constitutes infringement.⁵ Home videos bear the copyright notice that the DVD or video tape is licensed for home viewing only. Generally, if the copyright owner makes it clear that she or he is granting only a license to intellectual property and imposes significant restrictions on the purchaser's ability to redistribute, display, copy or transfer that copy, the purchaser is considered a licensee, not an owner, of the software. Such licensing schemes are prevalent in the intellectual property arena and I legitimately employed this scheme on my web site. This is the essence of my complaint.

The 9th Circuit recognized licensing of copyright software in Wall Data Inc. v. Los Angeles County Sheriff's Dep't, 447 F.3d 769, 78 U.S.P.Q.2d 1728 (9th Cir. 05/17/2006) “that computer licensing is generally an ‘honor system,’ in that there is little to stop a person with physical possession of software from installing it on multiple computers.” Like this licensing of

³UMG Recordings, Inc. v. MP3.Com Inc., 92 F. Supp. 2d 349 (S.D.N.Y., May 4, 2000); MGM Studios, Inc. v. Grokster, Ltd., 125 S.Ct. 2764 (2005); In re Aimster Copyright Litigation, 334 F.3d 643, 645 (7th Cir. 2003); A&M Records, Inc., et al. v. Napster, Inc. No. C 99-05183 MHP (N.D. Cal. 2000)

⁴Basic Books, Inc. v. Kinko's Graphics Corporation, 758 F. Supp. 1522

⁵New York Times Co. v. Tasini, 121 S. Ct. 2381 (June 25, 2001)

software, I also relied on an ‘honor system’ for my articles published on my web site with the similar risk that there was nothing to stop a dishonest person who viewed my articles on my web site from making unauthorized copies and distributing them, except the protection of the copyright law. This is the essence of my complaint.

The constitution permits the creation of temporary monopolies in a context ruled by our American suspicion of monopolies and our high valuation of freedom of expression in the copyright laws. See Eldred v. Ashcroft, 537 U.S. at 219. These rights have been enforced by this Court for musicians, movie producers, architects, book authors, artists and publishers. I am an copyright owner, author and publisher who is entitled to the same protection of this Court as any other copyright owner. IF the facts and the law matter in this court, IF the playing field is level and the referee fair, then I have met my burden and stated a valid claim for relief.


RELIEF

I am entitled to the following relief:

- a. The Magistrate Judge’s recommendation and the U.S. District Judge’s order dismissing this case be **vacated**; and
- b. The Magistrate Judge and the U.S. District Judge be **removed** from this case and this case assigned to Judge(s) who will proceed impartially and with fairness; consistent with the rules, the law and their oaths of office; who will not allow their prejudices of me, my pro se status, my viewpoints or my occupations to inappropriately influence their decisions.; and who will not favor the defendants nor protect them from any legitimate liability, for any reason, including because they are attorneys.

c. By virtue of the courts's findings, I am being set up to be declared a vexatious litigant without just cause. Because I am indigent, and cannot afford counsel, a finding like this will seriously impair my rights to petition the government for redress of grievances. I request the protection of the court from any future abuse of this same kind by any judge who presides over my cases.

I submit **PLAINTIFF SHELL'S VERIFIED MOTION TO RECONSIDER** under the penalty of perjury.


Suzanne Shell
pro se
14053 Eastonville Rd.
Elbert, CO 80106
719.749.2971

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached document **PLAINTIFF SHELL'S VERIFIED MOTION TO RECONSIDER** were placed in the United States Mail, first class mail, postage prepaid on February 14, 2007 to:

Dan Slater
Attorney for Defendants
1415 Main St. Suite A
Canon City, CO 81212



Suzanne Shell February 14, 2007

AFFIDAVIT of Suzanne Shell
Exhibit A

Case no. 06-CV-00318

I am over the age of 18, am competent to testify and have first hand knowledge of the facts, I make the following statement under the penalty of perjury:

1. I am a political activist, author, documentary video producer and journalist covering issues involving government abuse, focusing primarily on child welfare issues and the courts, both State and Federal.
2. I publish analysis and commentary which is frequently highly critical about the issues I cover and highly critical about the people who administer the relevant government institutions.
3. My scrutiny and public participation in issues of significant societal importance has caused me to be the subject of ongoing retaliation. I have been the subject of numerous false and defamatory reports about my conduct. These reports are made to government agencies, courts and contract providers. I have been the victim of repeated efforts to chill my speech and public participation as well as ongoing retaliation when I attempt to assert, enforce or vindicate my rights. In short, I have been dragged into litigation, harassed, investigated, excluded and defamed by those who resent my viewpoint, my public participation and scrutiny and my news gathering and reporting activities.
4. Two of the primary institutions in this state which resent my activities are comprised of lawyers and judges who embrace a closed fraternal clique which I have called 'The Brotherhood of the Bar.' This 'brotherhood' protects the members of this fraternity, at the expense of the public interest. The other institution consists of employees and contractors associated with the various Departments of Human Services. Both view my occupations and my critical commentary as intruding into their respective monopolies and they are the primary instigators and perpetrators of retaliation, harassment, violations of my civil rights and property rights, and other abuses directed against me. These people are well funded and are often protected under statutory immunity protections. These people frequently commit their wrongs against me under the color of law and with government funds.
5. By virtue of my unenviable status in the legal community, I am often unable to find a lawyer who will represent me, and am often forced to represent myself in court when I need to vindicate the violations of my civil rights and property rights that are perpetrated by those who

object to my viewpoint, my public participation and my publications.

6. By virtue of my viewpoint, occupations and public participation, the Colorado Supreme Court Attorney Regulation Counsel, the Colorado Commission on Judicial Discipline and other institutions which purport to address grievances about the conduct of state employees, lawyers or judges have refused to give appropriate consideration to grievances filed me. These institutions have proven unresponsive to my complaints. My only viable recourse is in the courts.

7. I make this affidavit based in part on comparisons of my experiences as a party (either pro se or represented by counsel) in courts where the Judges's discretion has been exercised consistent with the law and the facts and evidence which is on the record vs. instances where the court has displayed a bias and abused its discretion.

8. I currently have two open Copyright Infringement cases in the U.S. District Court for the District of Colorado. These two cases share a similar fact pattern, yet the treatment I am receiving from the two courts hearing these two cases is dramatically different.

9. I have litigated claims as a pro se party several times in other courts in the past few years.

10. I submit as further evidence of my competence in this arena the fact that an attorney & Judge training program which I have devised and presented numerous times has been accredited for 8 to 9 Continuing Legal Education credits in 5 states, including Colorado.

11. In the course of my public participation, I have experienced and witnessed first hand, varying degrees of bias and prejudice inappropriately influencing the judiciary in various legal forums and venues.

12. On the one hand, I have witnessed parties being, and have myself been treated with utter fairness, dignity and respect as a party to litigation, even as a pro se party in certain courts.

13. On the other extreme, I have witnessed that others and I have been treated with contempt, disrespect, unfairness and outright violations of my rights by other courts - often based on nothing more than our viewpoints, our associations and/or our public participation. I have witnessed outright retaliation in the courts against parties for nothing more than their association with me.

14. The most prevalent negative bias I have experience and witnessed is manifested through the abuse of judicial discretion. This includes judge's decisions which are cloaked in the appearance of fairness, but which are, in substance, based upon:

a. The judge's deliberate misrepresentation of evidence, facts and claims. These misrepresentation appear liberally in the offending judge's opinions, becoming the basis for

his/her biased decision, and bear little or no resemblance to the evidence, fact and claims asserted by me or the targeted party; and

b. The judge omitting or disregarding key facts, evidence and arguments which support my claims from his/her opinion which then forms the basis for the court's denial of my claims; and

c. The judge summarily dismissing key facts, evidence, and arguments which support my claims without the benefit of any supporting law or evidence which supports their dismissal; and

d. The judge giving undue weight to evidence, facts and arguments which weigh against my claims or even inferring evidence which is not part of the record. This includes treating opposing party ~~agreements~~ ^{arguments} as evidentiary and assuming facts which are not in evidence; and

e. The judge's denial of requests which are routinely granted to parties in other cases or to my opponents (including motions for extensions of time, reconsideration, objections, etc). These denials are cloaked in with the proper incantations so as to appear fair (e.g. I audited all 246 copyright infringement suits filed in the U.S. District Court for the District of Colorado between Jan. 1, 2000 and December 31, 2006. Out of all those cases with the volumes of requests by parties for extensions of time to file responsive pleadings, including instances where the same party requested and was granted as many as 5 extensions of time for the same pleading, mine was the ONLY first request denied - in fact mine was the ONLY such request denied in six years); and

f. The judge denying my fundamental due process rights so as to prevent me from presenting the facts, evidence or arguments in support of my claims, often effectively eliminating appealable issues; and

g. Transcripts of offenses which are perpetrated on the record being altered and recordings proving the alterations or violations being "disappeared;" and

h. The judge imposing monetary sanctions against me arising out of my pro se efforts to protect my rights. These sanctions are not routinely awarded in similar cases and situations (based on my audit of the copyright cases); and

i. Judges's rulings which are blatantly wrong, or unsupported by evidence or existing law, so as to increase my expenses by requiring me to go through the appeals process beyond the State or Circuit appeals or else force me to acquiesce to the violations because the cost of appeals would be beyond my ability to fund. This is also intended to prevent me from seeking the protection of the courts on future violations against me; and

j. The Judge will recite the proper incantations (e.g. " . . .court has construed the pro se

pleadings more liberally and held them to a less stringent standard” or “construing the pleadings in the light most favorable to the non-moving party,” etc.) but substantively holds me to a higher, more exacting standard than opposing parties; and

k. These tactics are being employed in successive cases to make it appear that I file frivolous and vexatious claims so as to block my access to the courts and eliminate the likelihood that I can effectively petition the courts for redress of my grievances.

15. U.S. District Judge Blackburn has exhibited a negative bias toward me in both cases he has presided over in this court where I was a pro se plaintiff. This includes this case and a prior case involving civil rights claims (Civil Action No.03-RB-0743 (MJW)). I have no basis to assert that his bias appears to be against pro se litigants, but I do assert that he is clearly biased against me.

16. In that same prior civil rights case, Magistrate Judge Michael Watanabe also exhibited an extreme negative attitude and bias against me. He was referred on the prior case where I was suing Fremont County and others, including a defendant on this copyright infringement case, for civil rights violations.

17. During hearings, Magistrate Judge Watanabe accused me of writing motions for my co-plaintiff. I objected and advised him that I was under a Colorado District Court order to not have any contact with her and the only time I even saw her was during the hearings on this case. I declared truthfully that I had not written any pleadings for her. He refused to believe me.

18. In response to his disbelief, Christine Korn, mother of my co-plaintiff, stood up in the gallery and told the court that SHE had written her daughter’s pleadings. She affirmed my statement that I had nothing to do with her daughter’s pleadings. Magistrate Judge Watanabe attempted to ignore Ms. Korn’s disclosures and continued to assert that I wrote my co-plaintiff’s pleadings and instructed me not to do it any more.

19. I filed a written objection to his statements to insure the record was accurate regarding this issue. Magistrate Judge Watanabe’s “findings” that I was writing pleadings for my co-plaintiff became evidence against me in another proceeding involving the Unauthorized Practice of Law.

20. Since my co-plaintiff’s pleadings were signed by her and evidenced a writing style distinctively different than mine, and made different arguments than mine, the conclusion that I was writing her pleadings would not have been evident from the face of the pleadings. I believe he obtained this information and belief from the defendants on this case during ex parte

discussions about me because the defendants on that case have consistently published false and defamatory statements of fact throughout the legal community claiming I was writing legal pleadings for others when I was not doing so.

21. During a status conference on this case, Magistrate Judge Watanabe suddenly declared a ‘settlement conference’ and isolated me and my co-plaintiff in a conference room. He made us wait for about 15 minutes before joining us, a tactic which I viewed as abusive, intimidating and coercive.

22. He then proceeded to pressure both of us to drop our civil rights suit against the defendants, stating, “Pro se litigants NEVER win in this court.”

23. He threatened to sanction us by dismissing the lawsuit and charging the defendants’ costs and attorney fees against us.

24. The civil rights case included claims against the defendants for violating my freedom of association and freedom of the press by their acts taken to prohibit me from having contact with my co-plaintiff who was the subject of my documentary video. I also claimed that I was denied due process when I was added as a Special Respondent to my co-plaintiff’s Dependency & Neglect case by virtue of not being allowed an opportunity to be heard or represented by counsel.

25. Magistrate Judge Watanabe stated that he had been a judge in Arapahoe County and had presided over D&N cases. In spite of his assertions that he had been a D&N judge, he did not understand that the Special Respondent statute in the Colorado Children’s Code mandated that I be afforded notice and opportunity to be heard and be provided with court appointed counsel if I was indigent. He challenged my assertion that the statute provided those rights and refused to believe my claims that I was not afforded an opportunity to be heard at the hearing where I was joined as a Special Respondent. This claim is proven by the transcript of that proceeding. I have a copy of that transcript, which was altered but which still reflects that I was denied the opportunity to be heard and denied representation.

26. He further advised us that he had personally trained Julie Marshall, who was the District Court Judge in Fremont County who denied me due process and joined me as a Special Respondent, and who ordered that I not have contact with my co-plaintiff upon the request and recommendations of the other defendants. He assured us that Judge Marshall would never do such a thing as I had described. It was clear he was predisposed toward the defendants in that case. I was shocked at this overt bias.

27. When I insisted that I had the constitutionally protected right to associate with my co-

plaintiff, and to engage in news gathering about her case, he attempted to minimize the injury I had suffered. He responded that a Denver television station had already done a story on this issue and why did I need to cover this story? It was about the money, wasn't it? I said so what if it was about money? But, I advised him, the issue at hand was that I did not need the permission of any judge to determine which stories I would cover and that no judge had any right to tell me what I news gathering I could or could not engage in or what stories I could or could not cover.

28. He kept insisting that my wanting to do the story about my co-plaintiff was about the money. I told him that no money was involved in my news gathering and production, that nobody was offering to buy my story. He pressured me to provide him with my motive for doing the work I do. I asked him, "Would you believe altruism?" His response was to scoff and refuse to believe me, despite the fact that I had engaged in my occupation without pay for the prior 14 years. His demeanor was offensive, insulting and condescending.

29. He then advised me that my solution to having my rights violated by the defendants was not to file a civil rights lawsuit but to disobey the court order issued by Judge Marshall and to contact my co-plaintiff if I wanted to. I was shocked at this advice because I would not disrespect a court order, despite defamatory rumors to the contrary. I told him that I could not disobey a court order because that would be grounds for further court action against me.

30. Magistrate Judge Watanabe then proceed to reinforce his threats to dismiss the case and assess defendants's costs and fees against us. By the time I left this 'settlement conference' I was shaking with fear and anger. It was clear to me that I would not receive a fair process on my claims. The tenor of this "conference" was threatening and coercive. When I re-entered the courtroom after this conference, the defendants were smug and smirking.

31. Magistrate Judge Watanabe subsequently recommended dismissal of that civil rights case ruling that my claims were barred under Rooker-Feldman. He did not recommend awarding defendant's costs and attorney fees.

32. Judge Blackburn adopted Magistrate Judge Watanabe's recommendation on the civil rights case without altering them.

33. I appealed, arguing that Rooker-Feldman did not apply to my claims. The 10th Circuit Court of Appeals upheld the District Court decision.

34. Shortly thereafter, the U.S. Supreme Court ruled in *EXXON MOBIL CORP. V. SAUDI BASIC INDUSTRIES CORP.* (03-1696) 544 U.S. ____ (2005) that claims like mine were not barred by Rooker-Feldman, contrary to what Judge Blackburn and the 10th Circuit had held in my

civil rights case. However, this decision came too late to benefit my claims.

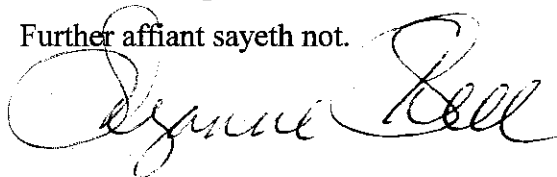
35. Judge Blackburn knows about and accepted the infringing content (which is the subject of this case) that was submitted in the prior civil rights case by the defendants in support of their motion for costs and attorneys fees. He permitted the subject infringing content to be included in the court record on the prior case.

36. This knowledge and participation has clearly prejudiced Judge Blackburn against me in this case, over which he is currently presiding. He should have recused himself when it became evident that he was a participant or had knowledge of the facts that caused this copyright infringement complaint to be filed.

37. Magistrate Judge Boyd Boland recommended dismissal of my copyright infringement claims in this case in error based on many of the items I've listed in #14 above. He recommended that I not pay defendants's costs and attorney fees and provided his analysis for that recommendation.

38. Judge Blackburn adopted the Magistrate Judge's recommendations to dismiss this case, with the exception that he ordered I pay defendants's costs and attorney fees. He did not provide any supporting law for altering the Magistrate Judges' recommendation as he has done in other cases where he altered the Magistrate Judge's recommendations. The content of his order on this case consisted primarily of legal "incantations" required to make it appear this order was proper. It was a "boilerplate" order which, I discovered during my audit of his orders on pro se cases over which he has presided, was similar and/or identical to many of his other orders which also did not contain findings of facts or conclusions of law.

39. Further affiant sayeth not.



Suzanne Shell - February 12, 2007

Subscribed and sworn before me this 12 day of February, 2007

**My Commission Expires
8/6/2009**

My commission expires:

