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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Lynnell Levingston,

10 Plaintiff,

11 v.

12 Victoria L. Earle; the Law Office of  
13 Victoria L. Earle, LLC, an Arizona limited  
14 liability company; Patricia V. Piburn and  
Raymon L. Piburn, husband and wife,

15 Defendants.

No. CV-12-08165-PCT-JAT

**ORDER**

16 Pending before the Court is Plaintiff Lynnell Levingston's Memorandum in  
17 Support of Opposition to Defendant's Claim of "Fair Use" and Motion to Disqualify the  
18 Honorable Judge Teilborg (Doc. 31). The Court now rules on all pending matters.

19 **I. Background**

20 In its previous Order, the Court summarized the background of this dispute as  
21 follows:

22 In 2008, Plaintiff authored and published a book called *The*  
23 *Road Memoir of Corruption and Abuse of Power* (the  
"Book"). (Doc. 22 at 2). Plaintiff later registered the Book  
24 with the United State[s] Copyright Office. *Id.* at 3. Plaintiff  
also posts writings to a self-hosted Internet Blog entitled  
25 *Three Men Make a Tiger* (the "Blog"). *Id.* at 2.

26 On August 24, 2009, Plaintiff commenced an action for  
copyright infringement of the Book against at least some of  
27 the Defendants in the district court. (Doc. 23-5 at 2). While  
the action was pending, Plaintiff filed a Chapter 7 petition in  
28 the United States Bankruptcy Court, District of Arizona. *Id.*  
In the schedule submitted to the Bankruptcy Court dated  
December 7, [2]009, Plaintiff listed the Book as an asset, but

1 Plaintiff did not list (1) the copyright right infringement  
2 claims related to the Book, (2) the Blog, or (3) the copyright  
3 infringement claim related to the Blog. (Doc. 23-2). The  
4 district court ultimately dismissed the copyright infringement  
5 action because Plaintiff failed to substitute or join the  
6 bankruptcy trustee, or alternatively, Plaintiff failed to allege  
7 that the action was exempt from the bankruptcy estate or  
8 abandoned by the bankruptcy trustee. (Doc. 23-5 at 4).

9 On August 16, 2012, Plaintiff filed a Complaint (Doc. 1) with  
10 this Court, and on April 29, 2013, Plaintiff filed an Amended  
11 Complaint (Doc. 22). In the Amended Complaint, Plaintiff  
12 stated four claims for relief: (1) copyright infringement under  
13 17 U.S.C. § 501, (2) contributory infringement, (3) civil  
14 conspiracy to commit misappropriation, and (4) violations of  
15 the Digital Millennium Copyright Act under 17 U.S.C. §  
16 1201(a). On May 20, 2013, Defendants filed a Motion to  
17 Dismiss. (Doc. 23). Plaintiff responded to Defendants Motion  
18 to Dismiss in a First Opposition (Doc. 24) and a Second  
19 Opposition (Doc. 26). With the first Opposition, Plaintiff filed  
20 a Motion for Sanctions (Doc. 24) and a Motion for Out-of-  
21 Pocket Costs. After Defendants responded to the Amended  
22 Complaint, Plaintiff filed a Motion for Entry of Default (Doc.  
23 27) and a Motion to Compel Compliance with the Rule 16  
24 Conference (Doc. 29).

25 *Levingston v. Earle*, 2013 WL 6119036, at \*1 (D. Ariz. Nov. 21, 2013).

## 26 **II. Copyright Infringement Claim**

27 In its previous Order, the Court granted Defendants' Motion to Dismiss (Doc. 23)  
28 on all claims except Plaintiff's copyright infringement claim for Defendants' alleged  
infringement of Plaintiff's book, *The Road Memoir of Corruption and Abuse of Power*  
(the "Book"). *Levingston*, 2013 WL 6119036, at \*1, \*4-5. Plaintiff's remaining  
infringement claim arose because Defendants attached copies of the Book to their  
pleadings when proceeding in court against Plaintiff for alleged harassment. *Id.* at \*3.  
Plaintiff alleges Defendants' actions constituted willful copyright infringement. (Doc. 22  
at 4-5).

Although Defendants' actions were clearly fair use, *see* 17 U.S.C. § 107,  
Defendants inexplicably failed to raise fair use as an affirmative defense. *See Levingston*,  
2013 WL 6119036, at \*3. Accordingly, the Court noted its power to sua sponte dismiss a  
complaint if "the plaintiff is given notice and an opportunity to be heard." *Id.* (quoting  
*Wachtler v. Cnty. of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994)). The Court ordered

1 Plaintiff to file a memorandum addressing only the issue of fair use and reserved its  
2 ruling on Plaintiff's infringement claim until Plaintiff had such opportunity to be heard.  
3 *Id.* at \*5. The Court has considered Plaintiff's memorandum (Doc. 31) and now rules on  
4 whether to dismiss Plaintiff's infringement claim.<sup>1</sup>

5 Plaintiff's memorandum does not contain any significant original arguments  
6 concerning the doctrine of fair use in this case, or even fair use in general.<sup>2</sup> Instead, it  
7 contains nearly fifty pages of reproductions, either in whole or in substantial part, of  
8 various articles concerning fair use.<sup>3</sup> *See* (Doc. 31 at 9-56). Plaintiff reproduces  
9 substantial portions of, among others, Barton Beebe, *An Empirical Study of U.S.*  
10 *Copyright Fair Use Opinions, 1978-2005*, 156 U. Pa. L. Rev. 549 (2008) (Doc. 31 at 9-  
11 33); Joel Friedlander, *What Every Writer Ought to Know about Fair Use and Copyright*,  
12 *The Book Designer* (Feb. 8, 2010), [http://www.thebookdesigner.com/2010/02/what-](http://www.thebookdesigner.com/2010/02/what-every-writer-ought-to-know-about-fair-use-and-copyright/)  
13 [every-writer-ought-to-know-about-fair-use-and-copyright/](http://www.thebookdesigner.com/2010/02/what-every-writer-ought-to-know-about-fair-use-and-copyright/) (Doc. 31 at 34-37); Rich Stim,  
14 *Summaries of Fair Use Cases*, Stanford Copyright & Fair Use Ctr.,  
15 <http://fairuse.stanford.edu/overview/fair-use/cases/> (last visited Mar. 17, 2014) (Doc. 31  
16 at 38-40);  
17 *Fair Use*, Copyright Codex, <http://www.copyrightcodex.com/fair-use-toc/18-fair-use>  
18 (last visited Mar. 17, 2014) (Doc. 31 at 40-46); Gene Quinn & Michael Sullivan,  
19 *Copyright Fair Use Cases of the United States Supreme Court*, IPWatchdog (Oct. 5,  
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21 <sup>1</sup> Plaintiff twice filed her memorandum for the purpose of including additional  
22 supporting exhibits. (Doc 32).

23 <sup>2</sup> Plaintiff's sole argument concerning the application of the fair use doctrine to the  
24 specific facts in this case appears to be contained in her Exhibit 24, which is a "Fair Use  
25 Checklist" under which Plaintiff has, without comment, checked boxes under factors  
26 purporting to favor or oppose fair use. These boxes include factors such as "Commercial  
27 activity," "Bad-faith behavior," and "Repeated or long-term use." (Doc. 31-4). Plaintiff  
28 checked eleven boxes purporting to oppose fair use and only one favoring fair use. (*Id.*)  
Plaintiff fails to connect these conclusory allegations to specific facts of this case, and  
this "Fair Use Checklist" does not support a finding of fair use.

<sup>3</sup> The memorandum also contains sections on standing and facts about her  
bankruptcy petition (Doc. 31 at 3-9, 56-58). Because the Court has already ruled on  
standing and ordered Plaintiff to "address only fair use as discussed in this Order,"  
*Levingston*, 2013 WL 6119036, at \*4, the Court will not consider these discussions.

1 2012), [http://www.ipwatchdog.com/2012/10/05/copyright-fair-use-cases-of-the-united-](http://www.ipwatchdog.com/2012/10/05/copyright-fair-use-cases-of-the-united-states-supreme-court/id=26225)  
2 [states-supreme-court/id=26225](http://www.ipwatchdog.com/2012/10/05/copyright-fair-use-cases-of-the-united-states-supreme-court/id=26225) (Doc. 31 at 47-52); and Ninth Circuit Model Jury  
3 Instructions § 17.18 (2013 ed.) (Doc. 31 at 52-56).

4 The Court has reviewed the Plaintiff's quoted commentaries and finds them to be  
5 consistent with the conclusion of the Ninth Circuit Court of Appeals that reproductions of  
6 works in judicial proceedings are fair use. *See Religious Tech. Ctr. v. Wollersheim*, 971  
7 F.2d 364, 367 (9th Cir. 1992). Defendants' reproduction of the Book constituted fair use  
8 because it was a noncommercial use necessary to provide evidentiary support for  
9 Defendants' court proceedings.<sup>4</sup> Defendants could not attempt to prove Plaintiff's written  
10 harassment without providing the court with the allegedly harassing material.

11 Consequently, Plaintiff fails to state a claim against Defendants for copyright  
12 infringement and the Court will dismiss this claim.

### 13 **III. Motion to Disqualify**

14 Plaintiff additionally moves in her memorandum to disqualify the undersigned  
15 Judge.<sup>5</sup> (Doc. 31 at 58). Plaintiff's basis for sanctions is footnote 1 in the Court's  
16 previous Order, which states: "For purposes of the Motion to Dismiss, the Court assumes  
17 Plaintiff's affidavit is true. However, if the Court later finds that Plaintiff has made false  
18 statements in the affidavit that she submitted, Defendants may seek sanctions against  
19 Plaintiff." *Levingston*, 2013 WL 6119036, at \*2 n.1.

20 Plaintiff contends that this footnote evinces the Court's violation of "The  
21 Universal Human Rights Act of 1998 which guarantees Plaintiffs' [sic] *dignity*." (Doc. 31  
22 at 1). "The Universal Human Rights Act of 1998" appears not to exist; the Court  
23 presumes Plaintiff refers to the similarly named "Universal Declaration of Human

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25 <sup>4</sup> The Court notes that if Plaintiff's theory of infringement were true, if Plaintiff  
26 lacked a license to reproduce the commentaries that she has included in her  
27 memorandum, she would be liable for willful copyright infringement with statutory  
28 damages of up to \$150,000 per infringement. *See* 17 U.S.C. § 504(c)(2). Presumably  
Plaintiff is not arguing for her own infringement liability.

<sup>5</sup> Because Plaintiff has not filed an affidavit avowing that the undersigned Judge  
has a personal bias or prejudice against her, the undersigned Judge may, in the absence of  
actual bias or prejudice, rule on Plaintiff's motion. *See* 28 U.S.C. §§ 144, 455.

1 Rights,” (the “Declaration”) which was adopted in 1948 and recognizes the fundamental  
2 dignity of human beings. *See* Universal Declaration of Human Rights, G.A. Res. 217A  
3 (III), U.N. Doc. A/810 (1948). The Declaration “does not of its own force impose  
4 obligations as a matter of international law.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734  
5 (2004). Nor is it self-executing, and therefore it “did not itself create obligations  
6 enforceable in the federal courts.” *Id.* at 735; *see also Guaylupo-Moya v. Gonzales*, 423  
7 F.3d 121, 133 (2d Cir. 2005) (noting that the Declaration did not create “independent,  
8 privately enforceable rights”). Because Plaintiff has no enforceable rights under the  
9 Declaration, her argument is procedurally improper.<sup>6</sup>

10 Plaintiff’s second contention is that the Court’s actions violated Canon 2 of the  
11 Arizona Code of Judicial Conduct. (Doc. 31 at 1, 58-59). The Court has not adopted the  
12 Arizona Code of Judicial Conduct, and consequently could not have violated its Canons.  
13 *Cf. McKinney v. Ryan*, 2009 WL 2432738, at \*16 n.9 (D. Ariz. Aug. 10, 2009) (assertion  
14 of violation of Arizona Code of Judicial Conduct did not state a federal claim). Instead,  
15 the Court adheres to the Code of Conduct for United States Judges (the “Code of  
16 Conduct”). The Court has reviewed the Code of Conduct and finds that it has not  
17 committed any proscribed conduct in this case.<sup>7</sup> Plaintiff’s misinterpretation of the  
18 Court’s footnote does not give rise to a Code of Conduct violation, and adverse rulings  
19 alone are not sufficient to show bias, *see Liteky v. United States*, 510 U.S. 540, 555  
20 (1994).

21 Accordingly, the Court denies Plaintiff’s motion to disqualify the undersigned  
22 Judge.

#### 23 **IV. Conclusion**

24 For the foregoing reasons,

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25 <sup>6</sup> The Court expresses no opinion as to the merit of Plaintiff’s argument.

26 <sup>7</sup> Per Plaintiff’s request, (Doc. 31 at 58), the Court has also reviewed Plaintiff’s  
27 Exhibit 30 attached to her memorandum. Exhibit 30 contains a copy of a pleading filed in  
28 an unrelated 2006 Ohio state court proceeding and a copy of Defendant Victoria L.  
Earle’s directory listing on the State Bar of Arizona website. (Doc. 32-5). Neither is  
relevant to Plaintiff’s motion.

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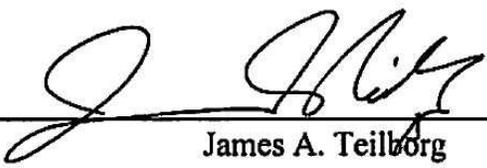
**IT IS ORDERED** granting Defendants' Motion to Dismiss (Doc. 23) in full with prejudice.

**IT IS FURTHER ORDERED** denying Plaintiff's Motion to Disqualify the Honorable Judge Teilborg (Doc. 31).

**IT IS FURTHER ORDERED** that Defendants may move for attorneys' fees as prescribed in the Court's earlier Order. *See* (Doc. 30 at 8).

**IT IS FURTHER ORDERED** that the Clerk shall terminate this case.

Dated this 26th day of March, 2014.

  
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James A. Teilborg  
Senior United States District Judge