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CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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INTERNET ARCHIVE

10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN FRANCISCO DIVISION**

**ORIGINAL**

13 INTERNET ARCHIVE, a California 501(c)(3)  
14 non-profit organization,

15 Plaintiff,

16 v.

17 SUZANNE SHELL, a Colorado resident,

18 Defendant.

CASE NO.: C 06 0397 JSW

**INTERNET ARCHIVE'S REPLY TO  
DEFENDANT'S FIRST  
COUNTERCLAIM**

19 **AND RELATED COUNTERCLAIMS**

20 Plaintiff and counterclaim-defendant Internet Archive ("Plaintiff" or "Internet Archive")  
21 hereby replies to the counterclaims of Defendant and counterclaim-plaintiff Suzanne Shell  
22 ("Shell"), on personal knowledge as to its own activities, and on information and belief as to the  
23 activities of others, as follows. Internet Archive is filing a Motion to Dismiss Shell's remaining  
24 Counterclaims, and therefore is not obligated to reply to those Counterclaims at this time.

25 **JURISDICTION AND VENUE**

- 26 1. Internet Archive denies the allegations of Paragraph 25 of the Counterclaims.  
27 2. Internet Archive denies the allegations of Paragraph 26 of the Counterclaims.

1 3. Internet Archive denies the allegations of Paragraph 27 of the Counterclaims.

2 4. Answering the allegations of Paragraph 28 of the Counterclaims, Internet Archive  
3 admits that jurisdiction is vested in this Court. Except as thus expressly admitted, Internet  
4 Archive denies the allegations of Paragraph 28 of the Counterclaims.

5 5. Internet Archive denies the allegations of Paragraph 29 of the Counterclaims.

6 **INTRA DISTRICT ASSIGNMENT**

7 6. Internet Archive denies the allegations of Paragraph 30 of the Counterclaims.

8 **PARTIES**

9 7. Internet Archive admits the allegations of Paragraph 31 of the Counterclaims.

10 8. Internet Archive admits the allegations of Paragraph 32 of the Counterclaims.

11 9. Internet Archive denies the allegations of Paragraph 33 of the Counterclaims.

12 **FACTUAL BACKGROUND**

13 10. Internet Archive lacks knowledge or information sufficient to admit or deny the  
14 allegations of Paragraph 34 of the Counterclaims, and on that basis denies those allegations.

15 11. The allegations of Paragraph 35 of the Counterclaims are immaterial to the causes  
16 of action asserted, and are hereby denied for at least that reason.

17 12. The allegations of Paragraph 36 of the Counterclaims are immaterial to the causes  
18 of action asserted, and are hereby denied for at least that reason.

19 13. The allegations of Paragraph 37 of the Counterclaims are immaterial to the causes  
20 of action asserted, and are hereby denied for at least that reason.

21 14. The allegations of Paragraph 38 of the Counterclaims are immaterial to the causes  
22 of action asserted, and are hereby denied for at least that reason.

23 15. The allegations of Paragraph 39 of the Counterclaims are immaterial to the causes  
24 of action asserted, and are hereby denied for at least that reason.

25 16. The allegations of Paragraph 40 of the Counterclaims are immaterial to the causes  
26 of action asserted, and are hereby denied for at least that reason.

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1 35. Answering the allegations of Paragraph 59, Internet Archive admits that it  
2 honored Shell's demand to remove the web site profane-justice.org from the Wayback Machine.  
3 Except as thus expressly admitted, Internet Archive denies the allegations of Paragraph 59.

4 36. Internet Archive denies the allegations of Paragraph 60 of the Counterclaims.

5 37. Internet Archive denies the allegations of Paragraph 61 of the Counterclaims.

6 38. Internet Archive denies the allegations of Paragraph 62 of the Counterclaims.

7 39. Internet Archive denies the allegations of Paragraph 63 of the Counterclaims.

8 **FIRST CAUSE OF ACTION**

9 40. Internet Archive denies the allegations of Paragraph 64 of the Counterclaims, to  
10 the extent it understands them.

11 41. Internet Archive denies the allegations of Paragraph 65 of the Counterclaims.

12 42. Internet Archive denies the allegations of Paragraph 66 of the Counterclaims.

13 43. Internet Archive denies the allegations of Paragraph 67 of the Counterclaims.

14 44. Internet Archive denies the allegations of Paragraph 68 of the Counterclaims.

15 45. Internet Archive denies the allegations of Paragraph 69 of the Counterclaims.

16 46. Internet Archive denies the allegations of Paragraph 70 of the Counterclaims.

17 47. Internet Archive denies the allegations of Paragraph 71 of the Counterclaims.

18 48. Internet Archive denies the allegations of Paragraph 72 of the Counterclaims.

19 49. Internet Archive denies the allegations of Paragraph 73 of the Counterclaims.

20 50. Internet Archive denies the allegations of Paragraph 74 of the Counterclaims.

21 **AFFIRMATIVE DEFENSES**

22 **FIRST AFFIRMATIVE DEFENSE**  
23 **(Failure to State Claim)**

24 51. Shell has failed to state a claim on which relief may be granted.

25 **SECOND AFFIRMATIVE DEFENSE**  
26 **(Implied License)**

27 52. Shell's claims against Internet Archive are barred because plaintiff granted  
28 Internet Archive an implied license to the work(s) at issue.

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THIRD AFFIRMATIVE DEFENSE  
(Fair Use)

53. Shell's claims against Internet Archive are barred by the defense of fair use.

FOURTH AFFIRMATIVE DEFENSE  
(Consent)

54. Shell's claims against Consent are barred by the doctrines of acquiescence, consent, waiver, excuse, license, and/or lawfully obtained possession.

FIFTH AFFIRMATIVE DEFENSE  
(No Valid Copyright Registration)

55. Shell's claims against Internet Archive are barred because the works at issue are not covered by valid copyright registrations.

SIXTH AFFIRMATIVE DEFENSE  
(Not Original Work)

56. Shell's claims are barred because the work that is the subject copyright registration is not an original work.

SEVENTH AFFIRMATIVE DEFENSE  
(Statute of Limitations or Laches)

57. Shell's claims against Internet Archive are barred by applicable statutes of limitations and/or the doctrines of laches and/or estoppel.

EIGHTH AFFIRMATIVE DEFENSE  
(Copyright Misuse)

58. Shell's claims against Internet Archive are barred by the doctrine of copyright misuse.

NINTH AFFIRMATIVE DEFENSE  
(Unclean Hands)

59. Shell's claims against Internet Archive are barred by the doctrine of unclean hands.

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TENTH AFFIRMATIVE DEFENSE  
(Third Party Acts)

60. To the extent that Shell has suffered any damages as alleged in her Amended Answer and Counterclaims, such damages were not caused by Internet Archive but by the acts or omissions of other persons or entities, and/or by an intervening or supervening cause, and Internet Archive therefore is not liable to plaintiff.

ELEVENTH AFFIRMATIVE DEFENSE  
(Failure to Mitigate)

61. Shell's claims against Internet Archive are barred by plaintiff's failure to mitigate damages.

WHEREFORE, Internet Archive requests that the Court enter judgment in its favor and against Shell on Count I of her Counterclaims by:

- A. Dismissing Defendant's claims and declaring that Shell shall take nothing by way of her Counterclaims;
- B. Awarding Internet Archive its reasonable costs incurred in this action, including attorneys' fees to the extent permitted by law; and
- C. Granting such other and further relief as the Court deems just and proper.

Dated: March 31, 2006

**PERKINS COIE LLP**

By: Kenneth B. Wilson  
Kenneth B. Wilson

Attorneys for Plaintiff and Counterclaim-Defendant  
INTERNET ARCHIVE