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8 and ALEC PETERS

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11
12 PARAMOUNT PICTURES
CORPORATION, a Delaware
13 corporation; and CBS STUDIOS INC., a
Delaware corporation,

14 Plaintiffs,

15 vs.

16 AXANAR PRODUCTIONS, INC., a
17 California corporation; ALEC PETERS,
an individual; and DOES 1-20,

18 Defendants.
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Case No. 2:15-cv-09938-RGK-E

Assigned to: Hon. R. Gary Klausner

**DEFENDANTS AXANAR
PRODUCTIONS, INC., AND ALEC
PETERS' MOTION *IN LIMINE*
NO. 3 TO PRECLUDE PLAINTIFFS
FROM INTRODUCING EVIDENCE
REGARDING ALLEGEDLY
INFRINGEMENTS NOT
IDENTIFIED IN THE FIRST
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Pretrial Conference: January 31, 2017
Trial Date: January 31, 2017

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 31, 2017, or as soon as may be heard
3 before the Honorable R. Gary Klausner, 255 East Temple Street, Los Angeles,
4 California 90012, Defendants Axanar Productions, Inc. and Alec Peters
5 (“Defendants”) will and do hereby move this Court for an order precluding Plaintiffs
6 from relying on evidence regarding Plaintiffs’ allegedly infringed works that were not
7 claimed in the Complaint.

8 This Motion is brought pursuant to Rules 401-403 of the Federal Rules of Civil
9 Procedure, and is based on this Motion and Notice of Motion, the supporting
10 documents filed concurrently herewith, previously filed documents incorporated by
11 reference herein, and upon such oral argument and submissions that may be presented
12 at or before the hearing on this Motion. Pursuant to Local Rule 7-3, this Motion is
13 made following the conference of counsel that took place on December 9, 2016.

14 Dated: December 16, 2016

WINSTON & STRAWN LLP

15
16 By: /s/ Erin R. Ranahan

17 Erin R. Ranahan
18 Diana Hughes Leiden
19 Kelly N. Oki
20 Attorneys for Defendants,
21 AXANAR PRODUCTIONS, INC.
22 and ALEC PETERS
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Evidence 401, 402, and 403, Defendants Axanar
4 Productions, Inc., and Alec Peters (“Defendants”) move for an *in limine* order
5 precluding Plaintiffs from introducing at trial any testimony or evidence regarding
6 allegedly infringed works not identified in the Complaint, including a “Role-Playing
7 Game” that is not even the type of work complained about in the First Amended
8 Complaint. Plaintiffs should be precluded from introducing evidence about these
9 works because any probative value is substantially outweighed by a danger of
10 prejudice to Defendants, waste of time, and/or unnecessary confusion of the issues.
11 Fed. R. Evid. 401-403. Due to the evidentiary infirmities described herein, the Court
12 should grant Defendants’ Motion *in Limine*.

13 **II. LEGAL STANDARD**

14 Rulings on motions *in limine* are committed to the discretion of the trial court.
15 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has
16 “broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair
17 and orderly trial”); *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. App’x
18 676, 677 (9th Cir. 2007). District courts can exercise their discretion to exclude
19 evidence where the evidence is not relevant, or where the probative value is
20 outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel.*
21 *Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not abuse
22 discretion in excluding conclusive, speculative evidence). Even if evidence is
23 considered relevant, “[t]he court may exclude relevant evidence if its probative value
24 is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues,
25 [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131,
26 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because evidence’s
27 probative value was substantially outweighed by unfair prejudice); *United States v.*
28 *W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district court’s exclusion of

1 evidence that was low in probative value and could have confused the jury as more
2 prejudicial than probative under Rule 403); *E.E.O.C. v. GLC Rests., Inc.*, No. CV05-
3 618 PCT-DGC, 2007 WL 30269, at *1 (D. Ariz. Jan. 4, 2007); *Dream Games of Ariz.,*
4 *Inc. v. PC Onsite*, 561 F.3d 983, 993 (9th Cir. 2009) (holding district court did not
5 abuse its discretion in granting plaintiff’s motion *in limine* to exclude evidence based
6 on concerns that it might improperly influence the jury on the amount of statutory
7 damages to assess under 504(c)(1) of the Copyright Act of 1976, because the evidence
8 did not provide sufficiently probative information).

9 Evidence has probative value only if it has any tendency to make the existence
10 of any legally necessary proposition in the case more or less likely. Fed. R. Evid.
11 401-402. Evidence is unfairly prejudicial if it has an “undue tendency to suggest
12 decision on an improper basis.” Fed. R. Evid. 403, Advisory Comm. Notes, 1972
13 Proposed Rules. Rule 403 explicitly states that evidence may also be excluded if the
14 waste of time caused by its introduction outweighs its probative value.

15 **III. ARGUMENT**

16 **A. Plaintiffs Should Be Precluded from Relying on Evidence Relating to** 17 **Allegedly Infringed Works That They Failed to Claim in the** 18 **Complaint**

19 Plaintiffs filed two complaints in this case, and neither of them mentioned the
20 works that are subject to this Motion. Dkt. 1, Dkt. 26, ¶¶ 15-19 (First Amended
21 Complaint). Plaintiffs’ operative complaint in this case alleges that Defendants
22 infringed over seven hundred television episodes, twelve motion pictures, and four
23 novels. *Id.* Plaintiffs described all of these works in the Complaint filed on March 11,
24 2016, *id.*, and Defendants investigated these works in order to properly assess the case
25 and prepare a defense. However, Plaintiffs now intend to rely heavily on allegedly
26 infringed works that they failed to introduce until October 28, 2016—over seven
27 months later. Dkt. 75-3, (CBS Studios Inc.’s Amended Responses to Interrogatories,
28 Set One at 1, 3-4, 9); Dkt. 75-4, (Paramount Pictures Corporation’s Amended

1 Responses to Interrogatories, Set One 1, 3-4, 9). These works include *The Four Years*
2 *War* supplement to *Star Trek: The Role Playing Game* (“Supplement”), which
3 Plaintiffs certainly had knowledge of at the time they filed the Complaint. Dkt. 91-20
4 at 8, 10, 15, 17, 19 (Plaintiffs’ Opposition to Defendants’ Motion for Summary
5 Judgment); Dkt. 72-61 (*The Four Years War* supplement); Dkt. 72-62 (Copyright
6 Registration to *The Four Years War*).

7 Moreover, Plaintiffs had numerous opportunities to bring up this allegedly
8 infringed work before they served their interrogatory responses towards the tail end of
9 the discovery period. Many of Plaintiffs’ witnesses had been deposed previously, and,
10 specifically, the 30(b)(6) witness of CBS, John Van Citters, who was designated to
11 testify about how Defendants’ Works allegedly copy Plaintiffs’ Works, was deposed
12 on September 28, 2016—one month before the discovery responses were served—and
13 declined to even mention this additional allegedly infringed work that was not claimed
14 in the Complaint. Instead, Plaintiffs waited to call attention to the work at issue until
15 Defendants had no more opportunity to depose Plaintiffs’ witnesses as to its contents.

16 Plaintiffs should not be allowed to introduce evidence of allegedly infringed
17 works beyond those identified in the Complaint. Under Rule 8, a complaint must state
18 “claim[s] showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The
19 purpose of this rule is to ensure that a defendant is afforded notice of the claims
20 asserted so it can properly assess the case and adequately prepare a defense. *Starr v.*
21 *Baca*, 652 F.3d 1202, 1212-16 (9th Cir. 2011). In the copyright context, because
22 “each act of infringement triggers a separate federal claim for relief” under the
23 Copyright Act, a plaintiff’s complaint must identify each work claimed to have been
24 infringed. *Urbont v. Sony Music Entm’t*, 863 F. Supp. 2d 279, 288 (S.D.N.Y. 2012)
25 (citing *Kwan v. Schlein*, 634 F.3d 224, 228 (2d Cir. 2011)); *Jaso v. The Coca Cola*
26 *Co.*, 435 Fed. Appx. 346, 352 (2011) (“each act of infringement gives rise to an
27 independent claim”) (emphasis in original); *Southern v. All Points Delivery Sys., Inc.*,
28 No. 04-cv-590, 2006 WL 521501, at *1 n.1 (N.D. Okla. Mar. 2, 2006) (“because each

1 alleged infringement forms a separate claim, the Court requests more precision from
2 the parties in future pleadings”); *Gee v. CBS, Inc.*, 471 F. Supp. 600, 643 (E.D. Pa.
3 1979), *aff’d* 612 F.2d 572 (3d Cir. 1979) (holding a complaint must state, *inter alia*,
4 “which specific original work is the subject of the copyright claim . . . and by what
5 acts and during what time defendant has infringed the copyright”).

6 Plaintiffs identified copyrighted works such as television episodes and series,
7 motion pictures, and novels in their complaint, but none of those encompassed *The*
8 *Four Years War* supplement to *Star Trek: The Role Playing Game*, upon which they
9 now heavily rely. Plaintiffs cannot now build their case upon an allegedly infringed
10 work without giving adequate notice to Defendants of a significant source of the
11 alleged infringement. *Flynn v. Health Advocate, Inc.*, No. Civ. A. 03-3764, 2004 WL
12 51929, at *12 n.6 (E.D. Pa. Jan 13, 2004) (dismissing copyright claim under Rule
13 12(b)(6) because allegations that plaintiff owned “a federal copyright in a collection of
14 works” did not give notice of “what *specific* original work or works are the subject of
15 Plaintiffs’ copyright claim”) (emphasis in original); *Sharp v. Patterson*, No. 03 Civ.
16 8772, 2004 WL 2480426, at *14 (S.D.N.Y. Nov. 3, 2004) (“[I]n light of . . . the
17 principle enshrined in Rule 8—namely, to provide defendants fair notice of the claims
18 against them—a plaintiff suing for copyright infringement may not rest on bare-bones
19 allegations that infringement occurred. Rather, [plaintiff] must identify the ‘specific
20 original work [that] is the subject of the claim.’”); *see* 6 Patry on Copyright § 19:6 n.3
21 (2010) (stating that, for example, “if plaintiffs know 669 sound recordings have been
22 infringed, they owe a duty of fair notice to specify each one”); *see also La. Pac. Corp.*
23 *v. James Hardie Bldg. Prods., Inc.*, 2012 WL 5520394, at *1 (N.D. Cal. Nov. 14,
24 2012) (holding that plaintiff was required to “identify every trademark which was
25 allegedly infringed”; stating that this requirement “is necessary to provide Defendant
26 with adequate notice” because, where the complaint only identifies some of the
27 allegedly infringed marks, this “leaves Defendant to guess at the others. This is
28 insufficient.”).

1 Here, any works and infringements at issue should have been identified by
2 Plaintiffs through the Complaint to comply with due process—not seven months later
3 in an amended response to a discovery request and after the depositions of key
4 witnesses for Plaintiffs had already been taken. All of Plaintiffs’ witnesses relevant to
5 the works at issue in the case had been deposed by the time these amended responses
6 were served on October 28, 2016. Specifically, the 30(b)(6) witness of CBS, John
7 Van Citters, who was designated to testify about how Defendants’ Works allegedly
8 copy Plaintiffs’ Works, was deposed on September 28, 2016—one month before the
9 discovery responses were served—and declined to even mention this additional
10 allegedly infringed work that was not claimed in the Complaint. Paramount's 30(b)(6)
11 witness, Mr. O'Rourke, had also been deposed a month earlier. Leiden Decl., ¶ 9.
12 Clearly Defendants were severely prejudiced by being presented with these amended
13 responses seeking to expand the scope of the case just a few days before the close of
14 discovery on November 2, 2016. Dkt 44 (Minutes for Scheduling Conference).
15 Without knowing what specific infringements are at issue, Defendants can neither
16 fully assess nor investigate the applicable defenses. Moreover, since the additional
17 work at issue is now prominently featured in Plaintiffs’ claims of infringement,
18 allowing Plaintiffs to introduce evidence of it when it had been withheld from
19 Defendants for such a long period of time would be severely prejudicial. Dkt. 91-20
20 at 8, 10, 15, 17, 19 (Plaintiffs’ Opposition to Defendants’ Motion for Summary
21 Judgment).

22 Additionally, because each allegedly infringed work constitutes a separate and
23 distinct legal claim for statutory damages, failure to identify such works is a failure of
24 notice, and violates due process, Fed. R. Civ. P. 8 and the Copyright Act. Any
25 evidence of infringements for works beyond those identified in the Complaint should
26 therefore be excluded.

27 **IV. CONCLUSION**

28 For all of these reasons, the Court should grant Defendants’ Motion *in Limine*

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Dated: December 16, 2016

WINSTON & STRAWN LLP

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