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INC.
12

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15

16 PARAMOUNT PICTURES
CORPORATION, a Delaware
17 corporation; and CBS STUDIOS INC.,
a Delaware corporation,
18

19 Plaintiffs,

20 v.

21 AXANAR PRODUCTIONS, INC., a
California corporation; ALEC PETERS,
an individual, and DOES 1-20,
22

23 Defendants.
24
25
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27
28

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

**PLAINTIFFS' OPPOSITION TO
APPLICATION FOR LEAVE TO
FILE BRIEF AS AMICUS
CURIAE BY LANGUAGE
CREATION SOCIETY**

Complaint Filed: 12/29/2015

1 **I. INTRODUCTION**

2 Well after completion of all of the briefing on Defendants’ Motion to Dismiss
3 the Amended Complaint, and less than two weeks before the Court’s hearing on the
4 Motion, the Language Creation Society (“LCS”) applied to file an amicus curiae
5 brief, arguing the hypothetical issue of whether a fictional language is
6 copyrightable, and asking the court to make factual findings on a motion to dismiss
7 based on hearsay. LCS is improperly trying invite this Court to decide an issue that
8 is not currently before the Court, and to render what would be an advisory opinion.
9 Courts may grant leave to file an amicus brief if the information provided is timely
10 and useful. *Nat’l Petrochemical & Refiners Ass’n v. Goldstene*, 2010 U.S. Dist.
11 LEXIS 61394 (E.D. Cal. June 3, 2010). Here, LCS’ request should be denied as
12 untimely, irrelevant, and procedurally improper. In the alternative, if the Court
13 grants the request, Plaintiffs respectfully request that they be given the time to
14 meaningfully respond to the amicus brief.

15 **II. ARGUMENT**

16 **A. This Application is Untimely and Improper.**

17 The Federal Rules of Civil Procedure do not expressly provide for LCS’ filing
18 of an amicus brief in a district court. While LCS claims that such briefs are “not
19 unusual” (Docket No. 35 at 2), amicus briefs are not permitted when they are
20 untimely. *Jamul Action Comm. v. Jonodev Chaudhuri*, 2015 U.S. Dist. LEXIS
21 51133 (E.D. Cal. Apr. 16, 2015), *citing Cmty. Ass’n for Restoration of Env’t*
22 *(CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) and
23 *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903). Courts have held that
24 amicus briefs are untimely when they are filed after the parties’ briefing on the
25 pertinent motion has already been completed. *See, e.g., Hawksbill Sea Turtle v.*
26 *FEMA*, 11 F. Supp. 2d 529, 541 (D.V.I. 1998) (denying motion for leave to submit
27 amicus brief as untimely when it was submitted after the briefing was completed).

28

1 Defendants moved to dismiss Plaintiffs' amended complaint on March 28,
 2 2016. Plaintiffs submitted their opposition to that motion on April 11, and
 3 Defendants submitted their reply on April 25. The Court's May 9 hearing on the
 4 motion is next week. LCS waited an entire month after the filing of the Motion to
 5 Dismiss, after both sides had already completed their briefing on the motion to file
 6 its amicus brief. Its filing on the night of April 27 was only 8 business days before
 7 the hearing on the Motion to Dismiss. This is untimely. There is no provision in the
 8 Federal Rules or in this Court's local rules for filing a separate opposition to an
 9 amicus brief, and Plaintiffs do not have enough time to provide a substantive
 10 response, nor would the Court have sufficient time to review that response, in
 11 advance of the hearing.

12 If LCS had submitted its proposed amicus brief in a federal appellate court, it
 13 would have been untimely by several weeks. Fed. R. App. P. 29(e)(amicus brief
 14 must be filed "no later than 7 days after the principal brief of the party being
 15 supported"). Under this rule, LCS's brief would have been due by no later than
 16 April 4, 2016, more than three weeks before it was actually filed. LCS offers no
 17 justification for its failure to submit an amicus brief earlier.¹

18 Further, although there are no applicable district court rules, in a federal
 19 appellate court, LCS would have been permitted to file only a 10 page brief, or half
 20 the length of the Motion to Dismiss. Fed. R. App. P. 29(d) ("Except by the court's
 21 permission, an amicus brief may be no more than one-half the maximum length
 22 _____

23 ¹ In the two cases relied on by LCS, the court set deadlines for the
 24 applications to file an amicus brief. *See* Docket No. 35 at 2:5-13, citing Brief of
 25 Amicus Curiae Electronic Privacy Information Center and Eight Consumer Privacy
 26 Organizations, *in the Matter of the search of an Apple iPhone Seized During the*
 27 *Execution of a Search Warrant on a Black Lexus IS300, California License Plate*
 28 *35KGD203*, Case No. CM 16-10 (SP) (C.D. Cal. Mar. 3, 2016)(scheduling order
 specified a deadline for any request seeking leave of the court to file an amicus
 brief, and the request was timely filed); *Tabaddor v. Holder*, Case No. CV 14-6309-
 GW(CWx), Doc. 42 (C.D. Cal. Feb. 25, 2015)(the court entered an order setting a
 deadline for potential amicus briefs). Here, the Court has not set any such briefing
 schedule.

1 authorized by these rules for a party’s principal brief.”). Here, on an issue to which
2 each of the parties devoted no more than a paragraph or two in their respective
3 briefs, the LCS submitted 19 page brief – virtually the same length as allowed to the
4 Plaintiffs to respond to Defendants entire multifaceted motion to dismiss. This
5 alone makes the amicus brief completely improper.

6 **B. The Issues in the Amicus Brief Are Not Before The Court.**

7 An application to file an amicus brief should be denied when it addresses
8 issues that are not before the court or issues that are not necessary for the Court’s
9 disposition of the motion at issue. *See Juniper Networks v. Shipley*, 2010 U.S. Dist.
10 LEXIS 24889, 94 U.S.P.Q.2d (BNA) 1934 (N.D. Cal. Mar. 16, 2010)(denying
11 motion for leave to file amicus brief when the brief addressed an issue that the court
12 would not even reach); *Gingery v. City of Glendale*, 2014 U.S. Dist. LEXIS 107598
13 (C.D. Cal. Aug. 4, 2014)(denying request to appear as amicus curiae when “none of
14 the information provided by the proposed Amicus applicants [wa]s necessary for the
15 Court’s disposition of the present motions”).

16 In its application and amicus brief, LCS is asking the Court for an advisory
17 opinion on whether fictional languages are copyrightable. This is not at issue in the
18 motion to dismiss. At the motion to dismiss stage, the Court will determine whether
19 Plaintiffs have sufficiently alleged the existence of their Star Trek Copyrighted
20 Works and whether Plaintiffs have alleged infringement by the Defendants. The
21 Court has not been asked to perform a substantial similarity analysis at this stage of
22 the proceeding, and especially not to determine the independent copyrightability of
23 the Klingon language (or fictitious languages in general) outside of context of Star
24 Trek works.

25 As Plaintiffs pointed out in their Opposition to Motion to Dismiss, the use of
26 the fictitious Klingon language in Defendants’ Axanar works is merely one aspect of
27 the Star Trek Copyrighted Works that can be considered at a later point in the
28 substantial similarity analysis. Dock. 31 at 10:7-10. Defendants’ use of the Klingon

1 language in their works is further evidence of their infringement of Plaintiffs’
 2 characters, because speaking this fictitious language is one of the many creative
 3 aspects of Plaintiffs’ characters. It is undisputed that Klingons are copyrightable
 4 characters, and have been depicted in the Star Trek Copyrighted Works in a distinct
 5 and recognizable manner. Klingon is a fictional language that is part of the
 6 depiction of those characters.² Defendants have created works that incorporate
 7 Plaintiffs’ copyrighted Klingon characters, and Defendants’ characters, as depicted,
 8 speak the Klingon language. It is the use of the Klingon language in this context
 9 that will be before the Court in performing a substantial similarity analysis, not the
 10 copyrightability of languages in general. In any event, that issue is certainly not
 11 before the Court on the present motion to dismiss.

12 **C. LCS is Improperly Asking the Court to Make Factual Findings on**
 13 **a Motion to Dismiss.**

14 LCS’s primary argument is that, because the fictitious Klingon language has
 15 become a “living language,” it is not copyrightable, or at least is no longer
 16 copyrightable. To support this factual contention regarding whether or not Klingon
 17 is a “living language,” LCS submits numerous hearsay exhibits, none of which are
 18 admissible on a motion to dismiss. *Arpin v. Santa Clara Valley Transp. Agency*, 261
 19 F.3d 912, 925 (9th Cir. 2001). Based on these exhibits, which are hearsay, outside
 20 of the record in this case, and not appropriate for consideration on a motion to
 21 dismiss, LCS invites the Court to make factual findings as to whether Klingon is a
 22 “living language.”³ If this factual issue is ever before the Court, it cannot be on a

23 ² As LCS acknowledges, Paramount owns the copyright to the Klingon
 24 dictionary, which was written by the creator of the Klingon Language Marc Okrand.
 [Docket No. 35-1 at 4, FN 9.]

25 ³ While not attempting to substantively respond to amicus’s arguments, it is
 26 worth noting that LCS’s purported ‘evidence’ of the Klingon language not being
 27 copyrightable includes such things as an unauthenticated news report that one couple
 28 “spoke” Klingon while getting married at a Star Trek convention. Under this
 theory, had the couple dressed up as Professor Higgins and Eliza Doolittle and been
 married in Covent Garden, presumably *My Fair Lady* would no longer be
 copyrightable.

1 motion to dismiss, where the only issue is the sufficiency of the pleadings. *Ileto v.*
2 *Glock Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Because it seeks factual
3 findings on a motion to dismiss, and because it relies on exhibits not properly before
4 the Court, the application to file an amicus brief should be denied.

5 **D. If the Brief is Allowed, Plaintiffs Seek Leave to File a Response.**

6 If the brief by LCS is allowed, Plaintiffs request a meaningful opportunity to
7 respond. The LCS brief was filed on April 27, after the parties had completed their
8 briefing on the Motion to Dismiss and merely 8 business days before the hearing on
9 this matter. In the event that the Court allows the filing of the amicus brief,
10 Plaintiffs request that the Court set a date by which they can file a substantive
11 response, but in no event should it effect the hearing date on the Defendants motion
12 to dismiss, because doing so would allow the tail to wag the dog. Plaintiffs further
13 request that such response be permitted to be 15 pages in length given that LCS
14 submitted a 19-page brief.

15 **III. CONCLUSION**

16 LCS' brief is untimely, of improper length, and attempts to have the Court
17 resolve factual issues on a motion to dismiss based on inadmissible hearsay.
18 Nonparty LCS should not be permitted to insert itself in the litigation at this stage in
19 the proceedings to add unnecessary complication.

20
21 Dated: May 3, 2016

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