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8 and ALEC PETERS

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

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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.'S AND ALEC
PETERS' NOTICE OF MOTION
AND MOTION *IN LIMINE* NO. 9 TO
PRECLUDE PLAINTIFFS FROM
REFERENCING THE QUALITY OF
DEFENDANTS' WORKS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Hearing Date: January 31, 2017
Pretrial Conference: January 9, 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 thereafter as
3 this matter may be heard in Courtroom 850 of the Honorable R. Gary Klausner,
4 located at 255 East Temple Street, Los Angeles, California 90012, Defendants
5 Axanar Productions, Inc. and Alec Peters (collectively, "Defendants") will and
6 hereby do move this Court for an order restricting Plaintiffs' counsel and all
7 witnesses from mentioning, directly or indirectly, before jurors and prospective
8 jurors, that the quality of professional nature of the works impact the copyright
9 claims in this matter. This Motion is based on the grounds that the probative value
10 of allowing this evidence is far outweighed by potential prejudice to the jury, waste
11 of time, and/or unnecessary confusion of the issues. Fed. R. Evid. 401-403.¹ Due to
12 these and the additional evidentiary infirmities described herein, the Court should
13 grant Defendants' Motion *in Limine* No. 9 ("Motion").

14 This Motion is based upon this Motion and Notice of Motion, the supporting
15 documents filed concurrently herewith, previously filed documents incorporated by
16 reference herein, and such oral argument and submissions that may be presented at
17 or before the hearing on this Motion. Pursuant to Local Rule 7-3, this Motion is
18 made following the conference of counsel that took place on December 9, 2016.

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20 Dated: December 16, 2016

WINSTON & STRAWN LLP

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22 By: /s/ Erin R. Ranahan

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Erin R. Ranahan
Diana Hughes Leiden
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Attorneys for Defendants,
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and ALEC PETERS

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¹ All further statutory references are to the Federal Rules of Evidence unless otherwise noted.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Evidence 401-403,² Defendants Axanar
4 Productions, Inc. and Alec Peters (collectively, "Defendants") move for an *in limine*
5 order precluding Plaintiffs from introducing at trial any testimony, evidence or
6 argument that Defendants' use or planned use of "professionals" in connection with
7 their works, or the high quality of their works, has any bearing on the issues before
8 the jury or is relevant to a substantial similarity analysis. The fact that technology
9 has reached a point where fans and individuals that are not huge corporations are
10 able to create new, original works that appear to be high quality on a low budget is
11 not the type of conduct that Plaintiffs have the ability to halt through copyright law.
12 Plaintiffs' attempts to conflate amateur works with non-infringement and high
13 quality, professionally-made works as infringing has no basis or support in law. A
14 work may qualify as fair use and non-infringing regardless of the quality or the
15 skills and experience that went into creating it. Not only would such evidence be
16 irrelevant and more prejudicial than probative, but also presentation of such
17 evidence would be a waste of this Court's time, and would be misleading to a jury.
18 For these and all the following reasons, Defendants respectfully request that this
19 Court grant its Motion *In Limine* No. 9.

20 **II. LEGAL STANDARD**

21 Rulings on motions *in limine* are committed to the discretion of the trial court.
22 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has
23 "broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair
24 and orderly trial"); *Gametech Int'l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed.
25 App'x 676, 677 (9th Cir. 2007). District courts can exercise their discretion to
26 exclude evidence where the evidence is not relevant, or where the probative value is

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28 ² All further statutory references are to the Federal Rules of Evidence unless
otherwise noted.

1 outweighed by other considerations. Fed. R. Evid. 401-403; *Wicker v. Oregon ex*
2 *rel. Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008) (district court did not
3 abuse discretion in excluding conclusive, speculative evidence). Even if evidence is
4 considered relevant, “[t]he court may exclude relevant evidence if its probative
5 value is substantially outweighed by a danger of . . . unfair prejudice, confusing the
6 issues, [or] misleading the jury.” Fed. R. Evid. 403; *United States v. Ellis*, 147 F.3d
7 1131, 1135-36 (9th Cir. 1998) (overruling denial of motion to exclude because
8 evidence’s probative value was substantially outweighed by unfair prejudice);
9 *United States v. W.R. Grace*, 504 F.3d 745, 760 (9th Cir. 2008) (affirming district
10 court’s exclusion of evidence that was low in probative value and could have
11 confused the jury as more prejudicial than probative under Rule 403).

12 **III. ARGUMENT**

13 **A. Any Evidence, Testimony or Argument That the Quality of** 14 **Professionalism of Defendants’ Works Is Improper Should** 15 **Be Excluded**

16 Plaintiffs repeatedly complain throughout their briefs and throughout this
17 case that Plaintiffs acted improperly because they intended to create a high quality,
18 professional project. But there is nothing to suggest that who works on a project, or
19 how high quality the work appears, has any impact on whether a work is infringing
20 or improper under the copyright laws. Plaintiffs should be precluded from
21 introducing evidence regarding Defendants’ use of and planned use of professionals
22 in connection with the their Works, as such evidence is irrelevant to the issues in
23 this case.

24 Plaintiffs have presented not a single case in seeking summary judgment or
25 opposing summary judgment where the Court has found that the use of
26 professionals to create a work, which would lead to a higher quality artistic work,
27 has any bearing on any copyright issues in this case. Indeed, the works that qualify
28 as fair use are commonly of high quality and made by professionals. See e.g.,

1 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Sofa Entm't, Inc. v.*
2 *Dodger Prods., Inc.*, 782 F. Supp. 2d 898, 905 (C.D. Cal. 2010); *Northland Family*
3 *Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 978 (C.D.
4 Cal. 2012); *Blanch v. Koons* 467 F.3d 244, 247 (2d Cir. 2006). There is no aspect of
5 substantial similarity where quality comes into play. The “amateur” exception
6 Plaintiffs appear to advocate for has no support in law.

7 If the high quality of *Prelude to Axanar*, which has been available for free on
8 YouTube since 2014, was harmful to Plaintiffs, they should have been able to
9 demonstrate any such harm by now. They have not. Instead, Plaintiffs did not even
10 send a DMCA takedown notice. Dkt. 87-1 (Defendants’ Response to Separate
11 Statement at 38). And while it is true that Plaintiffs may not want individuals to be
12 able to create high quality works that are transformative and so qualify for fair use,
13 or are otherwise not substantially similar to any of Plaintiffs’ works, copyright law
14 is not meant to be used as a weapon against technological innovation and high
15 quality.

16 Further, the fact that an actor that has appeared before in prior Star Trek
17 works elects to participate in a fan film—unless it violates a specific contract with
18 that actor which would then be between Plaintiffs and that actor—is not illegal
19 under California or Federal law. Thus, Plaintiffs’ argument that Defendants infringe
20 the Vulcan “species” merely because the same actor who appeared in a handful of
21 Plaintiffs’ works also appears in Defendants’ works fails. Of course, Plaintiffs have
22 no rights to actor Gary Graham’s identity or features.

23 Consequently, Plaintiffs should be prohibited from making arguments to the
24 jury or introducing evidence that suggest that Defendants intend to create a work
25 that looks “professional.” Fed. R. Evid. 401, 402.

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1 **B. The Probative Value of Any Use By Defendants Of**
2 **Professionals To Create A High Quality Film Is Outweighed**
3 **By Substantial Prejudice**

4 Evidence has probative value only if it has any tendency to make the
5 existence of any legally necessary proposition in the case more or less likely. Fed.
6 R. Evid. 401-402. Evidence is unfairly prejudicial if it has an “undue tendency to
7 suggest decision on an improper basis.” Fed. R. Evid. 403, Advisory Comm. Notes,
8 1972 Proposed Rules. Rule 403 explicitly states that evidence may also be excluded
9 if the waste of time caused by its introduction outweighs its probative value.

10 To the extent evidence or arguments suggesting Defendants’ alleged improper
11 use of professionals in association with Defendants’ works could be relevant to
12 Plaintiffs’ claims, such evidence would be more prejudicial than probative, and
13 would confuse the issues in this case. *See* Fed. R. Evid. 403. Prejudice suffered by
14 Defendants from Plaintiffs implying that Defendants are acting improperly by using
15 professionals could lead the jury to believe that such is relevant to a substantial
16 similarity or transformative consideration. It is not. As the introduction of evidence
17 regarding Defendants’ use of professionals would be more prejudicial than
18 probative, its consideration would also be a waste of time.

19 Accordingly, the Court should preclude Plaintiffs from introducing any
20 argument or testimony suggesting that the professionals used or the quality of
21 Defendants’ works is improper or has any bearing on the copyright issues at hand.

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1 **IV. CONCLUSION**

2 For all the foregoing reasons, Defendants respectfully request that this Court
3 grant its Motion *In Limine* No. 9.

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5 Dated: December 16, 2016

WINSTON & STRAWN LLP

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By: /s/ Erin R. Ranahan

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