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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.
19

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

Assigned to: Hon. R. Gary Klausner

**DEFENDANTS' REPLY IN
SUPPORT OF MOTION TO
DISMISS OR STRIKE IN PART
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

Hearing Date: May 9, 2016
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I. INTRODUCTION

In a misguided effort to squash Defendants’ creativity in telling an original story about an obscure character that appeared in only one 1969 Star Trek episode, Plaintiffs’ Opposition shows that their strategy is to avoid properly framing this copyright action by alleging numerous unprotected elements and irrelevant works, refusing to identify the specific infringed works at issue, and prematurely claiming infringement against a work that is not complete. But Plaintiffs cannot simply rely on their boundless claims to an amorphous, extended Star Trek universe when pursuing claims against Defendants in a narrow dispute. For all the reasons set forth here and in Defendants’ Motion, the Court should dismiss or strike Plaintiffs’ claims.

II. ARGUMENT

A. The Court Must Filter Out the Unprotectable Elements

Courts in this circuit reject Plaintiffs’ argument that allegedly infringed works at issue in a copyright case should be considered “as a whole,” and have held that works must be “dissected” into their protectable and unprotectable elements. *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006) (to determine whether the “protectable elements” of the plaintiff’s works, “standing alone,” are substantially similar to the defendant’s works, courts must “filter out and disregard the nonprotectable elements”); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994) (“Because only those elements of a work that are protectable...can be compared when it comes to...illicit copying, we use analytic dissection to determine the scope of copyright protection before works are considered ‘as a whole.’”)¹. “The protectability of elements of a copyrighted work is a question of law for the court.” *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1253 (C.D. Cal. 2002).

In *Muromura v. Rubin Postaer & Associates*, the court dismissed the plaintiffs’ copyright claims because the plaintiffs failed to clearly identify the *protectable*

¹ In *Apple*, the Ninth Circuit held that the district court properly filtered out unprotectable elements. *Id.* at 1445; see 4 Nimmer on Copyright § 13.03[F] (“Infringement is shown by a substantial similarity of *protectable expression*, not just an overall similarity between the works.”)

1 elements of their works that the defendants had allegedly infringed. No. CV 12-09263
 2 DDP AGRX, 2015 WL 1728324, at *3-4 (C.D. Cal. Apr. 15, 2015). There, as here,
 3 the plaintiffs provided “extensive lists of descriptors and elements characterizing their
 4 works,” but claimed that the elements identified were “provided, without limitation, as
 5 examples” of the similarities between the works. *Id.* at *3. The court held that such
 6 allegations “put the cart before the horse” because the “threshold question is whether
 7 any elements, or combinations of elements, are protectable in the first instance.” *Id.*

8 In arguing that the Court should not filter out unprotectable elements, Plaintiffs
 9 rely on out-of-circuit, inapposite cases involving the copyrightability of a jewelry
 10 design² and a diagram.³ When defending the makers of the movie *Avatar* against
 11 claims of infringement, however, the same counsel representing Plaintiffs here took
 12 the contrary position—and obtained dismissal of the plaintiff’s claims because, like
 13 Plaintiffs here, the plaintiff had failed to identify any *protectable* elements of his
 14 works that were allegedly infringed by *Avatar*. *Dean v. Cameron*, 2013 WL 6417688,
 15 at 10 (S.D.N.Y. Nov. 14, 2013) (arguing that the plaintiff failed to state a claim
 16 because “any alleged similarities between *Avatar* and Plaintiff’s works relate solely to
 17 unprotectable (and public domain) ideas and concepts, such as the use of ‘floating’
 18 land masses, stone arches or willow-like trees in landscapes”); *Dean v. Cameron*, 53
 19 F. Supp. 3d 641 (S.D.N.Y. 2014) (granting motion to dismiss). Just as the *Dean* court
 20 filtered out unprotectable ideas, concepts, and items in the public domain, the Court
 21 should filter out the unprotectable elements of Plaintiffs’ works when determining
 22 whether Plaintiffs have stated a claim for infringement.

23 Recognizing that they cannot identify a work they claim to own that is
 24 substantially similar to Defendants’ works here, Plaintiffs argue that a substantial
 25 similarity analysis is “unnecessary” where the alleged infringement is “literal,” relying
 26 solely on a massive, single-spaced block quote from a district court from over three
 27 decades ago, *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *8

28 ² *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 457 (S.D.N.Y. 2000).

³ *Enter. Mgmt. Ltd., Inc. v. Warrick*, 717 F.3d 1112, 1113 (10th Cir. 2013).

(C.D. Cal. Apr. 25, 1989). Opp. at 11. In *Stallone*, the plaintiff pitched Stallone a treatment for *Rocky IV*, and later sued Stallone for using it, even though Stallone “developed the majority of the characters in the treatment,” including Rocky. *Id.* at 13.⁴ The court did not engage in the usual “extensive comparisons” because the *Rocky* movies are character-driven works, and the main character, Rocky Balboa,⁵ was “developed with enough specificity” to be “protectable expression.”⁶ *Id.* at 6. Unlike in *Stallone*, Defendants’ works here are not alleged to, and do not, center around any main characters from Star Trek. Instead, they provide new insight about Garth of Izar⁷—an obscure character that appeared in just *one* Star Trek episode from nearly 50 years ago, and never in a movie. FAC ¶ 46 at 11; Mot. at 14. As discussed below, Plaintiffs have failed to allege appropriation of any *protected* expression.

1. **Costumes and Shapes:** Plaintiffs do not dispute that clothing may be protectable only if and to the extent it incorporates design elements separate from the function. *Entm’t Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1221 (9th Cir. 1997) (quoting 17 U.S.C. § 101). Plaintiffs apparently recognize that the simple costumes they have identified in their FAC (e.g., “gold shirt” and “cowl neck” (FAC ¶ 46, at 17-19)) are not independently protectable, as the cases they rely on analyze the distinctiveness of a “character’s appearance”—not the costumes alone.⁸ Plaintiffs have not alleged that the clothing they claim to own is associated with a particular character, or incorporates any features separate from the utilitarian aspects.

2. **Dialogue:** Plaintiffs *admit* that they may not claim copyright protection over names or words.⁹ Opp. at 14-15. Thus, the Court should grant Defendants’

⁴ This would be as if Defendants used the main Star Trek characters (like Spock) in a story and then sued the creator of Spock for copyright infringement.

⁵ The court did not reach the issue for other *Rocky* characters, or whether any characters are “protected from less than bodily appropriation.” *Id.* at 8.

⁶ In so holding, the court noted that Rocky’s name “is the title” of all *Rocky* films, and he is known for his “speaking mannerisms” and “physical characteristics.” *Id.* at 7.

⁷ Plaintiffs do not allege a registered copyright for Garth of Izar or any other character.

⁸ See *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1293 (C.D. Cal. 1995) (James Bond character); *Lone Wolf McQuade Assoc. v. CBS Inc.*, 961 F. Supp. 587, 592 (S.D.N.Y. 1997) (Lone Wolf McQuade character).

⁹ Indeed, while Plaintiffs repeatedly complain about Defendants’ works being explicitly inspired by “Star Trek,” the use of the name Star Trek would not be covered

1 Motion with respect to the use of the names Garth of Izar, Soval, Richard Robau, and
 2 John Gill (FAC ¶ 46 at 11-12), and the words Andorians, Tellarites, Romulans,
 3 Axanar, Archanis IV, Q'onoS, Nausicaa, Rigel, Andoria, Tellar Prime, Vulcans,
 4 Klingons, Terra (land), Starship Enterprise, Starfleet, Federation, Starships, and
 5 Stardate. *Id.* at 14, 16, 20-21, 23, 25, 26, 29, 30, 32, 33, 35, 38; *see also* Mot. at 18.
 6 Plaintiffs' assertion that "Defendants have copied and adopted dialogue" from the Star
 7 Trek Works should be rejected because Plaintiffs have failed to identify any specific
 8 dialogue that Defendants allegedly copied. *Shame on You v. Banks*, 120 F. Supp. 3d
 9 1123, 1156-57 (C.D. Cal. 2015) ("To show substantial similarity based on dialogue,"
 10 a plaintiff must establish "extended similarity of dialogue.") Plaintiffs concede that
 11 they are only seeking protection of dialogue like "beaming up" based on its
 12 connection to other protectable elements like characters (Opp. at 14), but they fail to
 13 identify that or any other phrase used in conjunction with any protectable element.

14 **3. Elements In Public Domain And Nature:** Recognizing that the elements
 15 from the public domain and nature are not copyrightable, Plaintiffs contend that "no
 16 discussion of public domain elements is necessary" because they have selected,
 17 coordinated, and arranged these elements in an original way. Opp. at 15-16. But it is
 18 not apparent from Plaintiffs' FAC or Opposition how or in which works Plaintiffs
 19 claim to have arranged any of the numerous unprotectable elements in an original
 20 way. *See* Mot. at 18-20. Plaintiffs cannot explain how transporters and warp drive,
 21 which existed in science fiction long before the creation of Star Trek, are uniquely
 22 implemented in the Star Trek Works. Nor have Plaintiffs alleged in their FAC or
 23 addressed in their Opposition how a Federation logo can be protected when it
 24 indisputably was copied from the United Nations flag, or how the triangular medals
 25 on Star Trek uniforms are distinct from those used by military, religious, and other
 26 groups. Plaintiffs do dispute the fact that "pointy ears" are not original to Vulcans,
 27 though it is the only feature Plaintiffs list in their FAC in claiming protection of the

28 by copyright law, and there are no trademark claims in this case.

entire Vulcan species. FAC ¶ 47 at 35. Only distinctive characters are protectable, not an entire race or species that has an unoriginal trait. Plaintiffs’ claim to an expansive “Star Trek” universe does not allow Plaintiffs to assert copyright protection over unoriginal elements. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 350 (1991) (“Copyright does not prevent subsequent users from copying from a prior author’s work...elements that are not original” or in the “public domain.”).

4. **Language:** The Klingon language, like all languages, is a “system” used to generate expressions of various creative ideas. Although a particular *expression* of language may be copyrightable, the language itself is not.¹⁰ Here, Plaintiffs have not alleged that Defendants have employed Klingon in any way that might violate Plaintiffs’ protected expression in any of the Star Trek Works. Plaintiffs also assert that “language is only useful if it can be used to communicate with people, and there are no Klingons with whom to communicate.” Opp. at 16:14-16. All languages, including Klingon, have an “infinitely generative capacity”—i.e., they provide “the ability to communicate new thoughts and ideas.” Michael Adelman, *Constructed Languages and Copyright: A Brief History and Proposal for Divorce*, 27 Harv. J.L. & Tech. 543, 559 (2014) (arguing that while “snippets of Klingon dialogue” may be copyrightable, the language itself is not). But fans regularly use Klingon to express their own creative ideas.¹¹ Plaintiffs’ claims based on the Klingon language fail.

5. **Mood and Theme:** A mood or theme is unprotectable because it “is only an idea which stands behind a protectable expression.” *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Group, Inc.*, 443 F. Supp. 291 (D.C.N.Y. 1977). Plaintiffs concede that they do not own a monopoly on the “science fiction action

¹⁰ Notably, Plaintiffs do not claim to own a copyright in the Klingon language. Nor could they. As Oracle conceded in its suit against Google, “Google and others could employ the Java [computer programming] language – much like anyone could employ the English language to write a paragraph without violating the copyrights of other English language writers.” *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1368 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015).

¹¹ Fans have used Klingon to perform a soliloquy from Hamlet (<https://www.youtube.com/watch?v=CiRMGYQfXrs>), give a tour of their home (https://www.youtube.com/watch?v=55G_TDLcURw), and The Klingon Language Institute promotes the Klingon language and culture (<http://www.kli.org/>).

adventure” genre, but they nonetheless assert that the “mood and theme” of Defendants’ works—namely, “science fiction action adventure”—infringes Plaintiffs’ works. FAC ¶ 46 at 34, ¶ 47 at 39. Plaintiffs have failed to explain how the “mood and theme” of Defendants’ works infringes upon their alleged protectable expression.

6. **Scènes à Faire:** The parties agree that *scènes à faire* are not protected, and Plaintiffs do not dispute that stock science fiction concepts such as starships, spacedocks, and space settings cannot form the basis of a copyright claim. In their FAC, however, Plaintiffs claim that Defendants have infringed Plaintiffs’ works by using starships, spacedocks, beaming up, transporters, warp drive, phasers, stardates, Starfleet, triangular medals on uniforms, and a federation of planets. FAC ¶ 46 at 19, 22, 25-26, 32. Although Plaintiffs argue that Defendants have “painstakingly copied” numerous elements from the “Star Trek universe,” Plaintiffs cannot plausibly state that each of these elements—all of which are staples of the science fiction genre—are *original to Star Trek*, and therefore protectable. *See Althouse v. Warner Bros. Entm’t*, No. CV 13-00696-RGK SSX, 2014 WL 2986939, at *4 (C.D. Cal. Apr. 28, 2014).

7. **Characters:** The parties agree that copyright protection is available only for characters that are “especially distinctive.” *Opp.* at 19; *see also DC Comics v. Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015). Here, Plaintiffs have failed to adequately allege that the characters Garth of Izar, Soval, Richard Robau, or John Gill are sufficiently distinctive to merit copyright protection. Instead of citing to specific, distinctive character traits, they cite to *categories* of traits that could be used to identify a character (e.g., “makeup and jewelry,” FAC ¶ 46, at 11). And the only traits Plaintiffs have identified are not distinctive – e.g., John Gill is “narrator”; Richard Robau is “Starfleet captain”; Soval is “Vulcan ambassador;” and Garth of Izar is “Captain Kirk’s hero who prevailed in the Battle of Axanar.” FAC ¶ 47. Plaintiffs’ claims as to characters without distinct traits should be dismissed or stricken.

B. Plaintiffs’ Claims Are Not Sufficiently Specific To Survive

Plaintiffs do not dispute the basic principle that, to state a claim, they must

1 identify “which specific original works are the subject of the copyright claim.” *N. Am.*
 2 *Thought Combine, Inc. v. Kelly*, No. 01 Civ. 8112(LMM), 2003 WL 355237, at *2
 3 (S.D.N.Y. Feb. 18, 2003). Plaintiffs argue they have sufficiently identified the works
 4 at issue because they have (1) provided a ***non-exhaustive list*** of the specific elements
 5 of their works they claim Defendants have appropriated, and (2) alleged that
 6 Defendants have infringed ***every single Star Trek television episode and motion***
 7 ***picture ever created*** – totaling well over 700 works. FAC ¶¶ 15, 46-47.

8 Plaintiffs have not plausibly alleged that all 700+ Star Trek Works have been
 9 infringed by the Axanar Works. Plaintiffs improperly suggest they can claim a
 10 separate infringed work every time an element reappears in a subsequent derivative
 11 work. FAC ¶¶ 46-47; Opp. at 21:12-15 (stating that “[E]ach time the U.S.S. Enterprise
 12 appears in their *Axanar* Works, [Defendants] are infringing upon each and every Star
 13 Trek Copyrighted Work in which the U.S.S. Enterprise appears”). This demonstrates a
 14 fundamental misunderstanding about copyright protection for derivative works.
 15 Specifically, a copyright to a derivative work *does not* extend to preexisting material.
 16 17 U.S.C. § 103(b).¹² So there is not another copyright just because the same element
 17 appears in a later derivative work. Further, Star Trek characters and settings vary
 18 widely across seasons. Defendants’ RJN, Dkt. No. 30 at ¶¶ 1-3.

19 Plaintiffs’ argument that infringements of multiple episodes within a series can
 20 be analyzed on an aggregate basis conflates substantial similarity analysis (which
 21 elsewhere they claims is “unnecessary”) with pleading requirements. In any event, in
 22 the lone case Plaintiffs rely on for this point, the court noted that the challenged book

23 ¹² Plaintiffs ignore Defendants’ point that the FAC does not provide notice about
 24 whether the films, as opposed to the television episodes, contain any original
 25 expression that Defendants have allegedly infringed. If the only protected, original
 26 elements were from the television episodes allegedly owned by CBS as opposed to the
 27 films allegedly owned by Paramount, then Paramount (which claims to own only
 28 films) has no standing in this action. Further, without the infringing works identified,
 Defendants are prevented from establishing that the Short Mockumentary is not
 infringing through a comparison. Plaintiffs fail entirely to respond to the cases cited
 in Defendants’ Motion demonstrating that this analysis would otherwise be proper at
 this stage, including *Christianson v. West Pub. Co.*, 149 F.2d 202, 203 (9th Cir. 1945)
 and *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1130 (C.D. Cal. 2007); Mot. at
 25:15-22.

1 “draws from 84 of the 86 *Seinfeld* episodes.” *Castle Rock Entm’t, Inc. v. Carol Publ’g*
 2 *Grp., Inc.*, 150 F.3d 132, 135 (2d Cir. 1998). Thus, the plaintiff did not simply claim
 3 infringement of every single *Seinfeld* episode, but, rather, identified which specific
 4 episodes were allegedly infringed, and excluded two that were not. *Id.* As in *Castle*
 5 *Rock*, Plaintiffs should be required to identify the specific works they claim
 6 Defendants have infringed amongst all the Star Trek works they claim to own.

7 To avoid this requirement, Plaintiffs rely heavily on *Perfect 10, Inc. v. Cybernet*
 8 *Ventures, Inc.*, which is neither contrary to Defendants’ position nor binding. 167 F.
 9 Supp. 2d 1114 (C.D. Cal. 2001). The defendant in *Perfect 10* was an Internet operator
 10 that was sued for massive infringements involving wholesale copying by the
 11 defendant’s users of “thousands” of the plaintiffs’ separately copyrighted photographs.
 12 The “user-dependent nature of this copyright infringement” meant that the number of
 13 infringed works “could vacillate hour-to-hour, day-to-day,” rendering it impractical
 14 for the plaintiffs to list each copyrighted work that was allegedly infringed. *Id.* at
 15 1120. Here, Plaintiffs’ claims extend to a narrow body of two of Defendants’
 16 creative, unique works. They do not involve fluid, “user-dependent” infringement, or
 17 wholesale copying of any of Plaintiffs’ works, let alone thousands of works. While it
 18 is impossible for the not-yet-completed film, Plaintiffs should be able to specify
 19 exactly which works have been infringed by the Short Mockumentary.

20 Lastly, Plaintiffs argue that their allegations on “information and belief” are
 21 proper because they are based on facts within Defendants’ possession and control.
 22 However, to the extent Plaintiffs’ allegations are based on Defendants’ *public*
 23 statements made online or through social media, unlike the testing data and consumer
 24 complaints in the *Keegan* case cited by Plaintiffs, such facts obviously are not
 25 exclusively within Defendants’ control. At a minimum, Plaintiffs’ claims for
 26 contributory and vicarious infringement should be dismissed because Plaintiffs have
 27 failed to allege any *facts* supporting them. *See* FAC ¶¶ 57-58, 61-62.

C. Plaintiffs' Claims Based on the Potential Fan Film are Premature

Plaintiffs do not dispute that the Potential Fan Film is an unfinished work still in production, acknowledging that Peters “continues to” write the *Axanar* Script, which contradicts the allegation that the script is “fully locked.” FAC ¶¶ 9, 36. And while Plaintiffs allege that “one third” of the “visual effects” are complete, Plaintiffs do not specify *what* visual effects those are, and do not even allege that these visual effects are infringing. Thus, Plaintiffs have not explained how the Court could possibly compare Plaintiffs’ works with the unfinished film in order to determine whether there is substantial similarity as to the plot, themes, dialogue, mood, setting, pace, characters, or sequence of events. *See Gilbert v. New Line Prods., Inc.*, No. CV 09-02231 RGK, 2009 WL 7422458, at *2 (C.D. Cal. Nov. 16, 2009) (Klausner, J.).

In arguing that their claims are ripe, Plaintiffs rely on two distinguishable cases. First, unlike in *Danjaq, LLC v. Universal City Studios, LLC*, Plaintiffs here have not alleged that a script was *sold* to anyone (it was not), that Defendants *purchased* a script (they did not), or even that one definitive script exists (it does not). No. CV 14-02527 SJO (Ex), 2014 WL 7882071 (C.D. Cal. Oct. 2, 2014). Indeed, Plaintiffs admit that Mr. Peters “continues to write the script” for the Potential Fan Film. FAC ¶ 9.¹³ Second, unlike here, in *Walt Disney Productions v. Filmation Associates*, the defendant had completed the story board, reel, trailer, and other physical reproductions of the infringing character designs, which enabled the court to compare the “visual resemblances” and the “totality of the characters’ attributes and traits” between the parties’ works. 628 F. Supp. 871, 874 (C.D. Cal. 1986). Plaintiffs have made no such allegations here.

Plaintiffs improperly conflate the Short Mockumentary, the “Vulcan Scene,” and the *Axanar* Script with the unfinished film. Opp. at 23:16-18, 24:12-16, 25:9-11. Unlike the film, the Short Mockumentary and the Vulcan Scene are complete and fixed, and can be compared against Plaintiffs’ works. With respect to the unfinished

¹³ Further, unlike in *Danjaq*, Plaintiffs do not (and cannot) accuse Defendants of copying any major Star Trek character, such as Captain Kirk or Spock.

script, courts have held that preliminary works such as draft screenplays are “too unreliable in determining substantial similarity” as to the final work. *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 435 (S.D.N.Y. 1985); *Quirk v. Sony Pictures Entm’t, Inc.*, No. C 11-3773 RS, 2013 WL 1345075, at *6 (N.D. Cal. April 2, 2013).

Plaintiffs’ lawsuit seeks to enjoin Defendants from “continuing to...produce” any of the *Axanar* Works, including the Potential Fan Film. FAC, Prayer ¶¶ 4-5. Plaintiffs argue that an injunction against an infringing work does not violate the First Amendment *if the work is not fair use*. Fair use “calls for a case-by-case analysis,” and prevents copyright from “stifl[ing] the very creativity which the law is designed to foster.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994). Fair use is impossible to evaluate without a complete film, as it requires consideration of the amount taken, whether the use is transformative, and other factors. That Plaintiffs have not yet filed a motion for preliminary injunction is of no moment. Plaintiffs’ claims based on the Potential Fan Film improperly seek premature injunctive relief, would constitute a prior restraint, and should be dismissed or stricken.¹⁴

III. CONCLUSION

For all the reasons set forth in the Motion and herein, Defendants respectfully request that the Court dismiss or strike Plaintiffs’ claims to the extent they (1) are based on elements not protected by copyright law; (2) fail to sufficiently identify the works and copyrights that have allegedly been infringed; and/or (3) are based on the unfinished Potential Fan Film and are therefore premature.

Dated: April 25, 2016

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¹⁴ Plaintiffs do not attempt to distinguish or otherwise respond to *Globe Int’l, Inc. v. Nat’l Enquirer, Inc.*, No. 98-10613 CAS (MANX), 1999 WL 727232, at *5 (C.D. Cal. Jan. 25, 1999) (injunction of article not yet published constitutes prior restraint because the court could not yet evaluate fair use).