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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.
19

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

Assigned to: Hon. R. Gary Klausner

**DEFENDANTS AXANAR
PRODUCTIONS, INC.'S AND ALEC
PETERS' OPPOSITION TO
PLAINTIFFS' MOTION *IN LIMINE*
NO. 5 TO EXCLUDE TESTIMONY
AND DOCUMENTS OF JONATHAN
LANE**

Hearing Date: January 31, 2017
Pretrial Conference: January 9, 2017
Trial Date: January 31, 2017

1 **I. INTRODUCTION**

2 Mr. Lane is a long-time Star Trek fan with an extensive knowledge of Star
3 Trek fan fiction who has been involved in the production of multiple fan film
4 projects, including *Prelude to Axanar*. In furtherance of his Star Trek fandom, Mr.
5 Lane has published a great deal of Star Trek content on his website “Fan Film
6 Factor” (fanfilmfactor.com) and has created a document titled “A History of Star
7 Trek fan films” summarizing the myriad fan films and related projects that have
8 been produced over the past 50 years.

9 Mr. Lane’s involvement with the Axanar Works as well as his extensive
10 knowledge of and experience with Star Trek and fan productions places him in a
11 unique position to provide the jury with evidence related to fan films generally. The
12 proliferation of Star Trek fan films helps to further the inference of Defendant
13 Peters’ state of mind when he was creating the Axanar Works; namely, that Mr.
14 Peters believed that he was operating within the tolerated realm of Star Trek fan film
15 culture that has been long celebrated.

16 Mr. Lane’s testimony is thus squarely relevant to the question of whether any
17 infringement by Defendants was innocent or willful, as well as to the jury’s wide
18 discretion in assessing the amount of any damages. For these and all the following
19 reasons, Defendants respectfully request that this Court deny Plaintiffs’ Motion *In*
20 *Limine* No. 5 and permit Defendants to introduce testimony and documents from
21 Mr. Lane to the jury.

22 **II. SUMMARY OF FACTS**

23 Defendants designated Mr. Lane in their initial disclosures as a fact witness to
24 testify at trial about his personal knowledge regarding Star Trek fan fiction and his
25 work with Defendant Axanar Productions, Inc. Declaration of Amy M. Stern
26 (“Stern Decl.”) at ¶ 2. On September 7, 2016, Defendants produced to Plaintiffs the
27 fan film summary that Mr. Lane submitted with his declaration. Stern Decl. at ¶ 3.
28

1 Mr. Lane is a Star Trek Fan and donor to Defendant Axanar Productions, Inc.
2 Dkt. 75-25 (Decl. of Jonathan Lane). From 1997 to 2004, Mr. Lane worked as a
3 freelance Star Trek expert, and in that capacity served as a consultant for employees
4 of Viacom Consumer Products, the division of Plaintiff Paramount that managed the
5 Star Trek properties at that time. Lane Decl. at ¶ 3. He also worked with licensees
6 of Star Trek properties on the recommendation of his contacts at Viacom. *Id.*
7 During his time as a Star Trek expert consultant, Mr. Lane spent hundreds of hours
8 working on numerous Star Trek projects at the behest of its owners. *Id.*

9 Mr. Lane has personally participated in the production of three different Star
10 Trek fan film projects, and has been a volunteer with Defendant Axanar
11 Productions, during which he worked with Defendant Peters. Lane Decl. at ¶ 6.

12 In January 2016, Mr. Lane created an “Executive Summary” titled “A History
13 of Star Trek fan films” based on his extensive knowledge about, and personal
14 experience watching and writing about, Star Trek fan fiction. *Id.* Due to the nature
15 of his involvement with Star Trek fan productions generally and Defendants
16 specifically, Mr. Lane is able to speak knowledgeably about Star Trek fan films, and
17 to provide the jury with background about the proliferation and evolution of Star
18 Trek fan films.

19 **III. ARGUMENT**

20 **A. Mr. Lane is Permitted to Provide Opinion Testimony as a Lay**
21 **Witness**

22 As supported by Plaintiffs’ own arguments in their motion, opinion testimony
23 from Mr. Lane is admissible under the Federal Rules of Evidence. According to
24 Federal Rule of Evidence 602, “[a] witness may testify to a matter only if evidence
25 is introduced sufficient to support a finding that the witness has personal knowledge
26 of the matter. Evidence to prove personal knowledge may consist of the witness’s
27 own testimony.” Where lay witnesses give their opinions, their testimony should be
28 limited to those opinions that are rationally based on their perceptions and are

1 helpful to clearly understanding their testimony or to determining a fact in issue.
2 Fed. R. Evid. 701.

3 Here, Mr. Lane will be asked to provide information from his own firsthand
4 knowledge and personal experience regarding Star Trek fan films and his work with
5 Axanar Productions, Inc., as well as regarding his work for Plaintiffs. In his
6 testimony, Mr. Lane will share his personal experience working with Defendant
7 Peters and observing a large number of fan film productions. Dkt. 75-25 (Decl. of
8 Jonathan Lane). To the extent that Mr. Lane provides opinion testimony regarding
9 the existence of a multitude of Star Trek fan films or his prior work as a Star Trek
10 consultant, such testimony will be rationally based on his personal perceptions, and
11 will be helpful to the jury in determining whether any copyright infringement in this
12 case was innocent or willful. The Federal Rules of Evidence specifically allow lay
13 witnesses to present personal opinion testimony based on personal knowledge; thus,
14 Mr. Lane will not risk “usurping the function of the jury,” and this Court should not
15 limit his testimony.

16 **B. Mr. Lane’s Testimony Will Not Include Inadmissible Hearsay**

17 Plaintiffs theorize without specific support that the “History of Star Trek fan
18 films” document created by Mr. Lane must be at least partially based on hearsay and
19 cannot possibly be based on Mr. Lane’s own observations and knowledge. Indeed,
20 Plaintiffs assert that Mr. Lane has not claimed “personal knowledge of any specific
21 fact presented, nor does he explain how he came to know the contents of this
22 document” notwithstanding Mr. Lane’s own declaration that he created the executive
23 summary based on his “extensive knowledge about, and following of, Star Trek fan
24 fiction. Dkt. 75-25 (Decl. of Jonathan Lane). Indeed, Mr. Lane’s “History of Star
25 Trek fan films” is not hearsay because it would not be offered into evidence to prove
26 the truth of the matter asserted – that it is a 100% accurate summary of the history of
27 Star Trek fan films. Rather, Mr. Lane’s creation of the executive summary
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1 demonstrates that he has a great deal of experience observing Star Trek fan film
2 productions and supports his testimony regarding that experience.

3 Apart from the “History of Star Trek fan films,” Mr. Lane’s testimony
4 regarding his many years of involvement with Star Trek fan films, including the
5 Axanar Works, will be based on his personal experience and observations, and is
6 therefore also not inadmissible hearsay.

7 With respect to Plaintiffs’ concerns that Mr. Lane will testify about
8 inadmissible personal opinions or reviews of the specific fan films, that is not the
9 nature of the testimony that Defendants intend to rely on, except to the extent that it
10 draws comparisons based on Mr. Lane’s personal knowledge to features that
11 Plaintiffs have complained about with respect to Defendants’ works, such as
12 fundraising and quality.

13 Plaintiffs can raise any specific hearsay objections at trial, but there is no basis
14 to include Mr. Lane or the report he prepared on that basis.

15 **C. Mr. Lane’s Testimony Is Relevant to Mr. Peters’ State of Mind,**
16 **Including Whether Any Infringement Was Innocent or Willful**

17 One January 3, 2017, this Court issued an order denying Plaintiffs’ Motion for
18 Partial Summary Judgment and Defendants’ Motion for Summary Judgment (the
19 “MSJ Order”). Dkt. 163. Pursuant to the MSJ Order, an issue that remains to be
20 decided by a jury includes—if there is substantial similarity found by the jury
21 between works—whether the Defendants’ conduct was willful. *Id.* As this Court
22 noted:

23 To prove ‘willfulness’ under the Copyright Act, the plaintiff must
24 show (1) that the defendant was actually aware of the infringing
25 activity, or (2) that the defendant’s actions were the result of ‘reckless
26 disregard’ for, or ‘willful blindness’ to, the copyright holder’s rights.”
27 *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1186 (9th Cir.
28 2016). One “who reasonably and in good faith believes [his conduct

1 does not constitute copyright infringement], is not ‘willful’. . . .”
2 *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1228
3 (9th Cir. 2012) (quoting 4 Melville B. Nimmer & David Nimmer,
4 *Nimmer on Copyright* § 14.04 (Matthew Bender rev. ed. 2012)).

5 Furthermore, deciding willfulness “requires an assessment of a defendant’s
6 state of mind...” *Friedman*, 833 F.3d at 1186.

7 Evidence is relevant if it has any tendency to make the existence of any
8 legally necessary proposition in the case more or less likely. Fed. R. Evid. 401-402.
9 Plaintiffs argue that their decision not to proceed against the multitude of fan films
10 that existed prior to the Axanar Works “has no bearing on liability.” Plaintiffs’
11 Motion *in Limine* No. 5, p. 3. However, the very fact that Plaintiffs did not take
12 legal action against the vast majority of other fan films created in the past 50 years,
13 including other works in which Defendant Peters and Mr. Lane were involved, is
14 extremely relevant to the issue of willfulness as it speaks directly to Defendant
15 Peters’ state of mind while he was developing and promoting the Axanar Works. *See*
16 MSJ Order at 14 (“**Here, Star Trek has a long history of fan films that stayed**
17 **free from copyright disputes. (Lane Decl. Ex. 1, ECF No. 75-26.) . . .** Thus,
18 Peters’ belief that the *Axanar* Works were noncommercial fan films in light of his
19 understanding from CBS that it would tolerate such films creates an issue of his state
20 of mind that must be adjudicated by the jury.” (emphasis added)).

21 Indeed, the introduction of Mr. Lane’s testimony and documentary evidence is
22 crucial to the jury’s understanding of Mr. Peters’ state of mind, and assessing Mr.
23 Peters’ state of mind is a required step in the jury’s deciding willfulness, which is
24 certainly not a waste of time as it is one of the only two issues remaining at trial.

25 There is no need to analyze whether any of the other fan films are actually
26 infringing, because that is not relevant to Mr. Peters’ state of mind—he was relying
27 on Plaintiffs’ inaction against any of these fan films collectively (even where Mr.
28 Peters brought issues to Plaintiffs’ attention), and Plaintiffs cannot deny the reality

1 of the context in which Defendants created their works. In any event, Mr. Lane’s
 2 testimony can be limited by time, but his anticipated testimony can be expected to
 3 provide, and his summary provides, a useful narrative for the jury to consider with
 4 respect to the fan film history that this Court has deemed relevant to this case.

5 Accordingly, the Court should allow the testimony by and the Executive
 6 Summary created by Mr. Lane.

7 **D. Mr. Lane’s Testimony Is Relevant To Damages**

8 A defendant is entitled to a jury trial to determine the amount of statutory
 9 damages in a copyright case. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S.
 10 340, 353 (1998). The Supreme Court has found that in copyright cases, the jury has
 11 the power to consider factors that might inform them on what they find fair and
 12 “just” when deciding where on the wide scale a plaintiff should be awarded statutory
 13 damages in a copyright case. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344
 14 U.S. 228, 232 (1952) (quoting *L.A. Westermann Co. v. Dispatch Printing Co.*, 249
 15 U.S. 100, 106 (1919)). Under the Copyright Act, the amount of available statutory
 16 damages per infringed work increases from a minimum of \$200 where the alleged
 17 infringement was “innocent,” to a minimum of \$750 to a maximum of \$30,000 to
 18 \$150,000 depending on whether the infringement was “committed willfully.” 17
 19 U.S.C. § 504(c)(2). And the jury can award anywhere in between.¹

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 21 ¹ Statutory damages must “bear some relation to actual damages suffered.”
 22 *Van Der Zee v. Greenidge*, 2006 WL 44020, at *2 (S.D.N.Y. 2006). Otherwise, they
 23 risk running afoul to constitutional principles of due process. *Parker v. Time*
 24 *Warner*, 331 F.3d 13, 22 (2d Cir. 2003) (recognizing that “statutory damages [can
 25 expand] so far beyond the actual damages suffered that the statutory damages come
 26 to resemble punitive damages” and that, under *BMW* and *State Farm*, “it may be that
 27 in a sufficiently serious case the due process clause might be invoked”) (citing *BMW*
 28 *of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) (overturning \$2 million
 punitive damages award where the plaintiff obtained a jury award of only \$4,000 in
 actual damages, because such punitive damages violated the Due Process Clause of
 the Constitution because it was “grossly excessive” compared to the plaintiff’s
 actual damages); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412
 (2003) (reversing punitive damages award of \$145 million as unconstitutionally

1 The jury “has **wide discretion** in determining the amount of statutory
2 damages to be awarded.” *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th
3 Cir. 1984) (emphasis added). Neither the statute nor its legislative history provide
4 guidance on the factors the trier of fact is to consider when making an award of
5 statutory damages. See 6 Patry on Copyright § 22:174 (2016). In the absence of any
6 statutory or other guidance, courts have employed the following *non-exhaustive*
7 factors in determining statutory damages: (1) the expenses saved and the profits
8 reaped by the defendant, (2) the revenues lost by the plaintiff, (3) the value of the
9 copyright, (4) the deterrent effect on others besides the defendant, (5) willfulness of
10 the defendant’s conduct, (6) whether the defendant has cooperated in providing
11 records to assess the value of the infringing material, (7) the potential for
12 discouraging the defendant, and (8) the conduct and attitude of the parties; (9) any
13 benefit to Plaintiffs from Defendants’ conduct. *See e.g., Coach, Inc. v. Am. Fashion*
14 *Gift*, CV 12-07647-MWF RZK, 2013 WL 950938, at *2 (C.D. Cal. Mar. 12, 2013;
15 *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 568 (S.D.N.Y. 1995).

16 As detailed above, Mr. Lane’s testimony is highly relevant to Mr. Peters’ state
17 of mind while creating the Axanar Works, which is in turn highly relevant to the
18 jury’s assessment of innocence or willfulness, and factors (2), (5), (7), (8), and (9)
19 above. Because the jury can award the lowest, the highest, or anywhere in between,
20 based on all sorts of factors or anything the jury considers relevant to get to a just
21 result, testimony about the Star Trek fan film culture must come in from somewhere.
22 The idea that the jury would need to personally view all of these fan films or cannot
23 get an understanding from someone who has seen and documented the existence of
24 these fan films (which Plaintiffs do not dispute), is simply not practical.

25 Therefore, Mr. Lane’s testimony is necessary to any damages calculation in
26 this case. Furthermore, Mr. Lane will testify to the existence of many other Star Trek
27
28 excessive compared to the \$1 million compensatory damages award because there
must be some proportionality of the punitive award to the plaintiff’s actual harm).

1 fan productions that were not prevented or even addressed by Plaintiffs, which is
2 relevant to the question of damages as it demonstrates (1) that Plaintiffs did not
3 believe these productions caused significant damage to the value of their works and
4 (2) that Plaintiffs arguably embraced the free promotional value of a robust fan
5 production tradition.

6 Thus, it is crucial that the jury hear testimony from, and review the document
7 created by, Mr. Lane.

8 **IV. CONCLUSION**

9 For all the foregoing reasons, Defendants respectfully request that this Court
10 deny Plaintiffs' Motion *In Limine* No. 5 and admit the testimony and documents of
11 Jonathan Lane.

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Dated: January 6, 2017

WINSTON & STRAWN LLP

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