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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' OPPOSITION TO
PLAINTIFFS' MOTION *IN LIMINE*
NO. 8 TO EXCLUDE TESTIMONY,
DOCUMENTS OR OTHER
EVIDENCE CREATED OR MADE
AFTER THE COMPLAINT IN THIS
LITIGATION**

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

1 **I. INTRODUCTION**

2 Though Plaintiffs' lawsuit alleges that Defendants have infringed their
3 copyrights based on an unmade, in progress, *Axanar* fan film, Plaintiffs' Motion *in*
4 *Limine* No. 8 ("Motion") would curiously like to freeze the relevant time of evidence
5 in this matter to the day Plaintiffs filed their lawsuit. But Plaintiffs are not consistent
6 with respect to this position, as they seek to introduce evidence that post-dates the
7 filing of the Complaint that they believe favors them, yet ask the Court to prevent the
8 jury from hearing about events that took place after the lawsuit was filed that are
9 favorable to Defendants. But as explained herein, and to the extent this has already
10 been explained in Defendants' Oppositions to Plaintiffs' Motions *in Limine* Nos. 1, 2,
11 3, this information is relevant to the jury's consideration of substantial similarity,
12 innocent infringement or willfulness, and/or any assessment as to the amount of any
13 damages. As all of these facts and evidence are more probative than prejudicial, the
14 Court should deny Plaintiffs' effort to keep this relevant information from the jury.

15 **II. FACTUAL BACKGROUND**

16 Since this lawsuit was filed, several events have transpired that Plaintiffs do not
17 want the jury to hear about, including: (i) that their own director and producer came
18 out publicly against the lawsuit, and made the announcement that the "lawsuit was
19 going away" to promote Star Trek at the fan 50th Anniversary Event and to promote
20 their latest film, *Star Trek Beyond*; (ii) after Defendants requested it, Plaintiff CBS
21 issued fan film guidelines in mid-2016; (iii) Defendants revised the *Axanar* script after
22 hearing J.J. Abrams' announcement that the lawsuit was "going away" in mid-2016;
23 (iv) while complaining about Defendants renting a studio to make their fan film,
24 Plaintiffs entered into a commercial agreement with James Cawley, a fan film
25 producer who produced fan films in which Mr. Peters played the role of *Garth of Izar*,
26 to allow fans to pay to tour the fan film set that, without original authorization,
27 meticulously recreated in the sets in exact same manner as *Star Trek: The Original*
28 *Series*; and (v) Defendants promoted extensively, through social media, official Star

1 Trek works, including *Star Trek: Beyond*.

2 Though Plaintiffs ask the Court to shield the jury from post-lawsuit evidence
3 that does not help them, at the same time, Plaintiffs have included all sorts of exhibits
4 for trial that were created *after* the lawsuit, including (1) Defendants’ first breakdown
5 of donor funds, expenditures and costs, which was created in connection with
6 Defendants’ efforts to settle this case, and which Plaintiffs seek to introduce (while
7 seeking to exclude a similar subsequently produced report made in the same manner
8 as the first one); (2) public postings by Defendants following the filing of the lawsuit;
9 and (3) emails from Defendants after the lawsuit was filed. (*See e.g.*, Plaintiffs’
10 Exhibit List, Exs. 61, 73, 77, 78, 80, 120).

11 In what appears to be a rehash compilation of their Motions *In Limine* Nos. 1, 2,
12 and 3, Plaintiffs apparently believe this repetitive Motion was necessary.

13 **III. ARGUMENT**

14 **A. Post-Lawsuit Evidence Is Relevant to the Issue of Innocent or Willful**
15 **Intent, and the Analysis of Statutory Damages**

16 Evidence is relevant if it has any tendency to make the existence of any fact that
17 is of consequence to the determination of the action more or less probable than it
18 would be without such evidence. Fed. R. Evid. 401. As damages will be at issue in
19 this trial, any evidence that assists the jury in their analysis of damages is relevant.

20 Plaintiffs have alleged that Defendants willfully infringed upon their copyrights
21 in creating their works. This allegation is directly tied to the issue of damages. In
22 finding factual issues for the jury on the issue of willfulness, the Court has
23 acknowledged that Star Trek fan film culture may have shaped Defendants’ state of
24 mind because Mr. Peters’ “actions demonstrate a respect for Plaintiffs’ intellectual
25 property that makes a finding of willfulness on summary judgment inappropriate.”
26 Dkt. 163 at 14 (Order). A finding of willful infringement would allow Plaintiffs,
27 within the Court’s discretion, to obtain up to \$150,000 in statutory damages per
28 infringed work. 17 U.S.C. § 504(c)(2). Innocent infringement occurs where the

1 infringer “was not aware and had no reason to believe that his or her acts constituted
2 an infringement of copyright.” *United Fabrics Int’l, Inc. v. G-III Apparel Grp., Ltd.*,
3 No. CV13-00803-ODW (AJWx), 2013 WL 7853485, at *5 (C.D. Cal. Dec. 27, 2013)
4 (citing 17 U.S.C. § 504(c)(2)). Innocent infringement *lowers* the floor of statutory
5 damages to \$200 per work. 17 U.S.C. § 504(c)(2)).

6 Regardless of whether the floor and ceiling for available statutory damages are
7 lowered or raised by a finding of innocent infringement or willfulness, the jury “has
8 wide discretion in determining the amount of statutory damages to be awarded.”
9 *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984). Courts have
10 employed the following non-exhaustive factors in determining statutory damages: (1)
11 the expenses saved and the profits reaped by the defendant, (2) the revenues lost by
12 the plaintiff, (3) the value of the copyright, (4) the deterrent effect on others besides
13 the defendant, (5) willfulness of the defendant’s conduct, (6) whether the defendant
14 has cooperated in providing records to assess the value of the infringing material, (7)
15 the potential for discouraging the defendant, and (8) the conduct and attitude of the
16 parties; and (9) any benefit to Plaintiffs from Defendants’ conduct. *See e.g., Coach,*
17 *Inc. v. Am. Fashion Gift*, CV 12-07647-MWF RZK, 2013 WL 950938, at *2 (C.D.
18 Cal. Mar. 12, 2013); *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 568
19 (S.D.N.Y. 1995).

20 Plaintiffs do not cite a single case to support their contention that everything
21 that happened after the date they decided to file their Complaint bears no relevance to
22 this action. Plaintiffs claim that any evidence made or created after the lawsuit was
23 filed should be precluded because its probative value is substantially outweighed by
24 the danger of unfair prejudice to Plaintiffs and the risk of confusing the jury.
25 However, Plaintiffs do not articulate what these dangers are, or how any of this
26 information will confuse the jury. Nor could Plaintiffs seek a wholesale exclusion of
27 all post-lawsuit evidence, as their case is largely based on an *unmade* fan film. And
28 when they believe it favors them, Plaintiffs have sought to introduce evidence that

1 occurred after the lawsuit, including a financial summary, emails, and public postings.
2 *See e.g.*, Plaintiffs’ Exhibit List, Exs. 61, 73, 77, 78, 80, 120).

3 As set forth below, each of the five categories of evidence that post-dates the
4 filing of the Complaint is relevant.

5 **1. J.J. Abrams’ and Justin Lin’s Comments Are Relevant**

6 For the reasons set forth in Defendants’ Opposition to Motion *In Limine* No. 3,
7 the testimony and exhibits relating to Justin Lin and J.J. Abrams are relevant to
8 Defendants’ state of mind in creating the most recent script, as well as the extent to
9 which Plaintiffs have been actually damaged, or where on the range of statutory
10 damages the jury should decide to award any damages. It is clear that Plaintiffs used
11 J.J. Abrams’ statements about the lawsuit going away to *promote* Star Trek, making
12 the announcement at a 50th anniversary event for fans on the Paramount lot where
13 Defendant Alec Peters was one of the fans present.

14 **2. The Fan Film Guidelines Are Relevant**

15 Plaintiffs’ introduction of the fan film guidelines (which were released
16 immediately following J.J. Abrams’ announcement that the lawsuit was “going
17 away”) after suing Defendants support the inference that prior to that time, Defendants
18 reasonably believed—and actually were—operating within the enduring tradition of
19 Star Trek-inspired works of fan fiction, which have been long tolerated and
20 encouraged by Plaintiffs since the inception of the Star Trek franchise. *See* ECF No.
21 127-2 (Star Trek Fan Film Guidelines); ECF No. 127-3 (History of Star Trek Fan
22 Films); ECF No. 144-18 (Email from Alec Peters to Elizabeth Kalodner and John Van
23 Citters about Defendants’ Works). Evidence and testimony relating to the Star Trek
24 fan film guidelines, which came out in 2016, is also relevant to support an inference
25 that Plaintiffs have not suffered any damages. To the extent substantial similarity is
26 found by the jury, Plaintiffs’ general attitude and latest approach to fan fiction also
27 helps to inform the jury regarding the level of appropriate statutory damages given
28 that Plaintiffs obviously do recognize the promotional value and benefit from

1 celebrating fan film activity.

2 **3. Plaintiffs' Venture with Fan Film Maker James Cawley Is**
3 **Relevant**

4 The commercial venture Plaintiff CBS entered into with fan film producer
5 James Cawley, which was announced publicly after the lawsuit was filed, is also
6 relevant to damages and Defendants' good faith state of mind with respect to the fan
7 film studio Defendants built out in preparation for making fan films and continued to
8 rent throughout this lawsuit. While Plaintiffs have attempted to malign Defendants'
9 fan film studio as an inappropriate venture funded with donor money, Plaintiffs'
10 contrary actions when it comes to Mr. Cawley shows that Plaintiffs have previously
11 *rewarded* other fan film makers for creating their own studio to make fan films, by
12 virtue of entering into a venture with Mr. Cawley for commercial tours of that studio.

13 **4. Post-Lawsuit Scripts Are Relevant**

14 As explained in Defendants' Opposition to Plaintiffs' Motion *In Limine* No. 2,
15 the evidence of scripts created after this litigation was filed is directly relevant to a
16 substantial similarity analysis. In order to determine whether there is substantial
17 similarity between Plaintiffs' works and the allegedly infringing potential fan film
18 *Axanar*, the jury must first be able to compare the relevant works. *See, e.g., Funky*
19 *Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006). This
20 includes comparing the two works for similarities in 'the plot, themes, dialogue,
21 mood, setting, pace, characters, and sequence of events.'" *Gilbert v. New Line Prods.,*
22 *Inc.*, No. CV 09-02231 RGK, 2009 WL 7422458, at *2 (C.D. Cal. Nov. 16, 2009)
23 (Klausner, J.). Preliminary works such as draft screenplays are generally "too
24 unreliable in determining substantial similarity" as to the final work. *Id.* If any script
25 should be used as a substitute to analyze whether the unmade *Axanar* film is
26 substantially similar to Plaintiffs' works, the most recent version of the script, revision
27 10.0-NX, dated July 1, 2016, should be used, or at least available, for the jury's
28 substantial similarity analysis. Further, as already explained in Defendants'

1 Opposition to Plaintiffs’ Motion *In Limine* No. 2, the more recent script is relevant to
2 any damages assessment.

3 **5. Defendants’ Updated Expenditures Are Relevant if the Court**
4 **Allows Plaintiffs to Introduce Defendants’ First Financial**
5 **Summary**

6 Defendants already explained in Opposition to Plaintiffs’ Motion *in Limine* No.
7 1 why the Second Financial Summary produced by Defendants should come in if the
8 Court accepts Plaintiffs’ strained theory of Defendants’ “profits” for a disgorgement
9 of profits analysis. Otherwise, as explained therein, Defendants believe that Plaintiffs
10 have no standing to challenge the manner in which donor funds were spent on a work
11 that was halted as a result of the lawsuit.

12 **IV. CONCLUSION**

13 For all of these reasons, and for all the reasons discussed in Defendants’
14 Oppositions to Plaintiffs’ Motions *In Limine* Nos. 1, 2, and 3, the Court should deny
15 Plaintiffs’ Motion *in Limine* No. 8 to exclude testimony, documents, or other evidence
16 created or made after the Complaint in this litigation.

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18 Dated: January 6, 2017

WINSTON & STRAWN LLP

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20 By: /s/ Erin R. Ranahan
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