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AXANAR PRODUCTIONS, INC.,  
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., AND ALEC  
PETERS' OPPOSITION TO  
PLAINTIFFS' MOTION IN LIMINE  
NO. 10**

Hon. Robert G. Klausner

Pre-Trial Conference: January 9, 2017  
Trial: January 31, 2017

1           **I. INTRODUCTION**

2           Plaintiffs’ Motion *in Limine* No. 10 seeks, on specious grounds, to exclude  
3 evidence and testimony from Defendants’ expert witness Professor Henry Jenkins  
4 concerning three topics. Not only are Plaintiffs’ objections baseless, they are  
5 irrelevant: Dr. Jenkins will not be offering testimony on those topics. Plaintiffs offer  
6 *no* objections concerning the *relevant* topics upon which Dr. Jenkins *will* testify—  
7 topics that are highly relevant to key trial issues, and are squarely within Dr. Jenkins’s  
8 area of expertise.

9           Dr. Jenkins will offer expert testimony to provide essential context for the  
10 jury’s evaluation of Plaintiffs’ damages theories. As this Court has recognized, *Star*  
11 *Trek*’s “long history of fan films that stayed free from copyright disputes” will be a  
12 key fact in the jury’s determination of willfulness, as well as whether any  
13 infringement was innocent. ECF 163 at 14. An understanding of this “long history”  
14 will assist the jury in assessing the reasonableness of Alec Peters’s belief that the  
15 *Axanar* works, as “noncommercial fan films,” were noninfringing or “tolerate[d]”  
16 uses. *Id.* Dr. Jenkins’s expertise on this topic, based on more than a quarter century of  
17 active research as one of the leading scholars in this area, is indisputable.

18           Plaintiffs fail even to address, much less object to, Dr. Jenkins’s projected  
19 testimony on this topic. Instead, Plaintiffs ask the Court to preclude Dr. Jenkins from  
20 addressing three topics that he will *not* testify on: the *economic* “impact of fan-  
21 produced films on Plaintiffs”; the legal standard for fair use under copyright law; and  
22 (confusingly) whether Plaintiffs have the right to sue for infringement. Plaintiffs’  
23 objections on these topics are not only irrelevant but spurious: they grossly  
24 mischaracterize Dr. Jenkins’s statements in his Report in an apparent attempt to  
25 prevent Dr. Jenkins from testifying even on relevant topics. The Court should deny  
26 Plaintiffs’ Motion in its entirety

27  
28

1           **II. LEGAL STANDARD**

2           Federal Rule of Evidence 702 permits a witness “who is qualified as an expert  
3 by knowledge, skill, experience, training, or education” to “testify in the form of an  
4 opinion or otherwise if: (a) the expert’s ... specialized knowledge will help the trier of  
5 fact to understand the evidence or to determine a fact in issue; (b) the testimony is  
6 based on sufficient facts or data; (c) the testimony is the product of reliable principles  
7 and methods; and (d) the expert has reliably applied the principles and methods to the  
8 facts of the case.” *Id.* Dr. Jenkins is manifestly qualified to testify as an expert under  
9 this standard.

10           **III. ARGUMENT**

11           **A. Dr. Jenkins is Qualified as an Expert and His Testimony Is Relevant**  
12           **and Will Assist the Jury**

13           **1. Dr. Jenkins’s Specialized Knowledge Qualifies Him as an**  
14           **Expert**

15           Dr. Jenkins is one of the founding fathers of academic study of science fiction  
16 fandom, fan fiction, and fan cultural productions, a subject he has studied and written  
17 on extensively for more than a quarter century. He is the author of seventeen books;  
18 his seminal 1992 book *Textual Poachers: Television Fandom and Participatory*  
19 *Culture* helped to launch the academic study of fandom and fan cultures, and has been  
20 cited in more than forty law journal articles. Topics related to fans and fandom,  
21 including Star Trek fandom, figure prominently in his scholarly research and writings.  
22 Dr. Jenkins has been on the faculty of MIT and the University of Southern California,  
23 where he is currently Provost’s Professor of Communications, Journalism, Cinematic  
24 Art, and Education. He also serves on the editorial boards of the two most prominent  
25 academic journals in the discipline (*Transformative Works and Cultures* and *The*  
26 *Journal of Fandom Studies*).

27           As further discussed below, Dr. Jenkins is uniquely qualified to assist the jury  
28 by testifying concerning the historical and ongoing relationships between the creators

1 and producers of Star Trek, and Star Trek fans; Plaintiffs’ history and practice of  
 2 tolerating and sanctioning fan fiction, fan film, and other fan uses of aspects of Star  
 3 Trek; the social value and productivity of fan creations; and the perceived benefits to  
 4 Plaintiffs of fan works such as those of Defendants.

5 **2. Dr. Jenkins’s Specialized Knowledge Will Assist the Jury in**  
 6 **Determining Willfulness and Innocent Infringement, and**  
 7 **Assessing Plaintiffs’ Damages**

8 This Court has ruled that “the determination of willfulness must be left to the  
 9 jury.” ECF 163 at 13. A defendant “who reasonably and in good faith believes his  
 10 conduct does not constitute copyright infringement, is not ‘willful.’” ECF 163 at 13  
 11 (alterations and citations omitted). Similarly, a defendant claiming innocent  
 12 infringement “must demonstrate not only a good faith belief that the infringement was  
 13 innocent, but that his belief was reasonable.” *Broad. Music, Inc. v. Arlos*, 682 F. Supp.  
 14 1, 2 (D. Mass. 1986); *United Fabrics Int’l, Inc. v. G-III Apparel Grp., Ltd.*, No. CV13-  
 15 00803-ODW AJWX, 2013 WL 7853485, at \*6 (C.D. Cal. Dec. 27, 2013) (“the  
 16 applicable standard ... is whether Defendants[] had a good faith, reasonable belief that  
 17 their conduct was innocent.”).

18 Thus, to determine whether Peters’s conduct was willful or innocent, the jury  
 19 must assess the *reasonableness* of his “belief that the Axanar works were  
 20 noncommercial fan films” and his “understanding... that [CBS] would tolerate such  
 21 films.” ECF 163 at 14. The jury must also determine whether Peters’s belief was held  
 22 in good faith.

23 As the Court notes, Peters’s belief was heavily informed by the undisputed fact  
 24 that “Star Trek has a long history of fan films that stayed free from copyright  
 25 disputes.” *Id.* Understanding this “long history” and its current state will be critical to  
 26 the jury’s determination of both the reasonableness and good faith of Peters’s belief.  
 27 Dr. Jenkins’s expert testimony will assist the jury by “provid[ing] a context for  
 28 understanding the current state of *Star Trek* fan filmmaking, and ... the complicated

1 history of close partnership and collaboration between the commercial rights holders  
2 and the grassroots fan community.” ECF 142-3 at 2 (“Jenkins Report” or “Report”)<sup>1</sup>.  
3 As discussed above, is a topic on which Dr. Jenkins is indisputably an expert.

4 Dr. Jenkins’s testimony is also directly relevant to the jury’s calculation of the  
5 amount of statutory or actual damages. The jury “has wide discretion in determining  
6 the amount of statutory damages to be awarded.” *Harris v. Emus Records Corp.*, 734  
7 F.2d 1329, 1335 (9th Cir. 1984) (emphasis added). As the trier of fact, it must be  
8 guided by “what is just in the particular case ... considering the nature of the  
9 copyright, the circumstances of the infringement and the like.” *F.W. Woolworth*, 344  
10 U.S. at 232. Among other factors relevant to a jury’s determination of statutory  
11 damages are: whether the defendant’s conduct was willful or innocent, and “the  
12 conduct and attitude of the parties.” 17 U.S.C. § 504(c)(2); *Coach, Inc. v. Am. Fashion*  
13 *Gift*, CV 12-07647-MWF RZX, 2013 WL 950938, at \*2 (C.D. Cal. Mar. 12, 2013);  
14 *Coach, Inc. v. Diva Shoes & Accessories*, No. 10–5151 SC, 2011 WL 1483436, at \*6  
15 (N.D. Cal. Apr. 19, 2011); *see also, Bryant v. Media Right Prods., Inc.*, 603 F.3d 135,  
16 144 (2d Cir. 2010). In addition, to the extent Plaintiffs’ failure to take action (legal or  
17 otherwise) against Defendants’ works was informed by this history and practice of fan  
18 engagement, that fact will be relevant to the issue of whether Plaintiffs failed to act to  
19 mitigate their alleged damages. Information about such history and practice will assist  
20 the jury in its determination of the amount of Plaintiffs’ damages.

21 **3. Dr. Jenkins’s testimony is based on sufficient facts or data and**  
22 **is the product of reliable principles and methods**

23 Contrary to Plaintiffs’ arguments, Dr. Jenkins’s Report is based on ample “facts  
24 or data” that are fully addressed in the Report, including his more than a quarter  
25 century of research and writing in precisely this area. (Indeed, the subtitle of his  
26 seminal 1992 book on the subject, *Textual Poachers*, is “Television Fandom and

27 <sup>1</sup> For consistency, since the Report has now been filed multiple times in this action,  
28 page references refer to pages of the Report itself, not to any particular electronically  
filed PDF version of the Report in the Court’s docket.

1 Participatory Culture.”) Dr. Jenkins has published scholarly books on Star Trek  
 2 fandom,<sup>2</sup> patterns of media consumption among fans,<sup>3</sup> and the interaction between  
 3 “old” and “new” media.<sup>4</sup> All of this is plainly set forth in his Report, as is a list of the  
 4 sources he directly relied on in forming his opinions.

5 Plaintiffs’ objection that Dr. Jenkins “does not indicate what data he relied on to  
 6 support his assumptions” is based on a serious mischaracterization of the Report and  
 7 the testimony Dr. Jenkins will offer. Plaintiffs’ insistence that any opinion must be  
 8 based on “financial records,” “data,” or “market” research, is misguided and  
 9 misleading. As discussed below, Dr. Jenkins does not (and never did) purport to offer  
 10 an *economic* analysis of the “dollar value” of fan fiction, fan films, or fan engagement  
 11 generally. Rather, as Plaintiffs’ own cherry-picked quote shows, Dr. Jenkins’s Report  
 12 and testimony describe the “equilibrium [that] had emerged in recent years” between  
 13 copyright owners and fans, and offers his expert opinion about the basis for and  
 14 meaning of that “equilibrium.” *Compare* Motion at 2 with, e.g., Report at 3 (“the  
 15 media industry has learned to value fan engagement **as a social currency** at a moment  
 16 of increased media options and declining consumer commitment”; noting industry  
 17 description of “fans as ‘inspirational consumers’... who promote and advocate for the  
 18 brand”) (emphasis added, internal quotation marks omitted).

19 **B. Plaintiffs’ Objections to Dr. Jenkins’s Testimony on Particular**  
 20 **Topics Lack Merit**

21 **1. Dr. Jenkins Does Not Purport to Offer Economic Analysis**

22 First, Plaintiffs speculate (incorrectly) that Dr. Jenkins will offer testimony  
 23 concerning the *financial* “impact of fan-produced films on Plaintiffs.” Motion at 2.  
 24 Not so. Contrary to Plaintiffs’ attempt to spin Dr. Jenkins’s Report, Dr. Jenkins does  
 25 not purport to opine on financial issues or the market effect of fan films, nor offer

26 <sup>2</sup> *Science Fiction Audiences: Watching Star Trek and Doctor Who*, 1995. Jenkins  
 Report at 1.

27 <sup>3</sup> *Fans, Bloggers, and Gamers: Media Consumers in the Digital Age*, 2006. *Id.*

28 <sup>4</sup> *Convergence Culture: Where Old and New Media Collide*, 2006; *Spreadable Media: Creating Meaning and Value in a Networked Culture*, 2013. *Id.*

1 economic testimony or analysis. Nor does he—nor did his Report—purport to offer an  
 2 economic opinion on the financial or economic “effect, or non-effect” of fan fiction  
 3 generally. Rather, as shown by his Report—which offers his expert opinion based on  
 4 more than a quarter century of study and scholarly research and authorship of at least  
 5 seventeen books—Dr. Jenkins will “provide an overview of fan cultural production  
 6 around *Star Trek*, which provides a context for understanding the current state of *Star*  
 7 *Trek* fan filmmaking, and suggests the complicated history of close partnership and  
 8 collaboration between the commercial rights holders and the grassroots fan  
 9 community.” ECF 75-6 at 2.

10 **2. Dr. Jenkins Does Not Purport to Offer a Legal Opinion on Fair**  
 11 **Use**

12 Plaintiffs next argue—misleadingly and incorrectly—that Dr. Jenkins’s expert  
 13 opinion on whether *Prelude to Axanar* is “transformative” of elements of *Star Trek* is  
 14 a *legal* opinion about fair use. Motion at 3-4. It is no such thing. Unsurprisingly, the  
 15 ordinary English word “transformative” is a scholarly term of art in Dr. Jenkins’s field  
 16 of study. To provide just one example ready to hand, one of the “two most prominent  
 17 academic journals in this space” is named *Transformative Works and Cultures*—and  
 18 Dr. Jenkins serves on its editorial board. Report at 1. The mere fact that this ordinary  
 19 English word is also used as a legal term in copyright law, does not transform Dr.  
 20 Jenkins’s expert opinion on a subject within his area of expertise into a “legal  
 21 opinion.”<sup>5</sup>

22 In any event, the Court’s January 3, 2017 Order renders moot Plaintiffs’  
 23 objections to any potential testimony concerning fair use. ECF 121 (holding that  
 24 Defendants are not entitled to the fair use defense). With the fair use defense no longer  
 25 an issue in this case, there is *no* risk that any use of the term “transformative” by Dr.

26 \_\_\_\_\_  
 27 <sup>5</sup> Symptomatic of Plaintiffs’ confusion is their repeated insistence that Dr. Jenkins  
 28 “opine[s] on transformativeness.” Mot. at 3-4. Unlike the *academic* term  
 “transformative,” the *legal* term of art “transformativeness” appears nowhere in  
 Dr. Jenkins’s Report.

1 Jenkins will confuse or mislead the jury.

2 **3. Dr. Jenkins’s Testimony Concerning Fan Films Is Relevant**

3 Finally, Plaintiffs make the puzzling argument that Dr. Jenkins’s knowledge  
4 and expert opinions concerning fan films is categorically “legally irrelevant” because  
5 “Plaintiffs’ decision as to which infringing parties to sue has no bearing on the  
6 determination of whether Defendants engaged in copyright infringement.” Motion  
7 at 6. Plaintiffs fail to explain what relevance this *non sequitur* has to Dr. Jenkins’s  
8 Report or testimony, which will provide the jury with context that will assist them in  
9 determining whether any potential infringement by Defendant was willful or  
10 innocent—issues that go to damages, not infringement. As discussed above, Dr.  
11 Jenkins’s testimony concerning fan films, fan culture, and the history of the  
12 relationships between rights owners and fans, is directly relevant to this area and to  
13 the jury’s calculation of damages.

14 To the extent Dr. Jenkins’s expert knowledge and opinions concerning fan films  
15 in general informs his testimony and expert opinions, and to the extent it “provides a  
16 context for understanding the current state of Star Trek fan filmmaking, and also  
17 suggests the complicated history of close partnership and collaboration between the  
18 commercial rights holders and the grassroots fan community,” it is directly relevant to  
19 this case and will assist the jury. At all events, there is no basis to categorically  
20 preclude any such testimony.

21 **IV. CONCLUSION**

22 Plaintiffs make *no* objections to any aspects of Dr. Jenkins’s expertise, the  
23 contents of his Report, or his likely testimony, that are relevant to the issues of  
24 willfulness, innocent infringement, and damages. There is no dispute that Dr. Jenkins  
25 is highly qualified as an expert on the topics he will testify on, nor any dispute that his  
26 expertise “will help the trier of fact to understand the evidence or to determine fact in  
27 issue” on these topics. FRE 702. And Plaintiffs’ objections to testimony that they  
28 merely speculate—incorrectly—Dr. Jenkins may offer, are based on



1 mischaracterizations and misinterpretations of his Report. The Court should deny  
2 Plaintiffs' Motion in Limine No. 10.

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5 Dated: January 6, 2017

**WINSTON & STRAWN LLP**

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