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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.

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

Assigned to: Hon. R. Gary Klausner

**STATEMENT OF
UNCONTROVERTED FACTS AND
CONCLUSIONS OF LAW IN
SUPPORT OF DEFENDANTS
AXANAR PRODUCTIONS, INC.,
AND ALEC PETERS' MOTION FOR
SUMMARY JUDGMENT**

FED. R. CIV. P. 56(c)

Hearing Date: 12/19/16
Time: 9:00 a.m.

Original Complaint Filed: 12/29/15
First Amended Complaint Filed: 3/11/16

1 Defendants Axanar Productions, Inc., and Alec Peters (“Axanar”) respectfully
 2 submits the following Statement of Uncontroverted Facts and Conclusions of Law
 3 pursuant to Local Rule 56-1 in support of Defendants’ Motion for Summary
 4 Judgment.

5 **I. STATEMENT OF UNCONTROVERTED FACTS**

<u>Fact No.</u>	<u>Uncontroverted Facts</u>	<u>Supporting Evidence</u>
1	Star Trek was originally conceived by Gene Roddenberry, and debuted as a television show in 1966.	Plaintiffs’ First Amended Complaint ECF No. 26 (“FAC”) ¶ 13; Defendants’ Answer to Plaintiffs’ First Amended Complaint, ECF No. 48 at 3, ¶ 13
2	Plaintiffs allege that Defendants’ Works infringe 40 specific Star Trek episodes and 11 movies.	Declaration of Kelly N. Oki, Nov. 16, 2016 (“Oki Decl.”), Ex. 1 (CBS Studios Inc.’s Amended Responses to Interrogatories, Set One, Response to Interrogatory Nos. 4-5); Oki Decl., Ex. 2 (Paramount Pictures Corporation’s Amended Responses to Interrogatories, Set One, Response to Interrogatory Nos. 4-5)
3	Plaintiffs do not purport to own in this lawsuit a copyright to the Star Trek universe, but rather own a limited number of copyrights to certain episodes and films.	FAC, Appendix A ¶¶ 2-6
4	Of the 51 allegedly infringed works, to date, Plaintiffs have not produced a single copy of <i>any</i> of these episodes or films, though discovery is now closed.	Oki Decl. ¶ 15
5	Plaintiffs do not allege that Defendants’ Works use any clips or otherwise copy the plot,	FAC ¶¶ 46-47

1 2 3 4	dialogue, timeline, or central characters of any of Plaintiffs’ Works, but instead allege infringement of such elements such as clothing, shapes, words, colors, short phrases, the Klingon language, and works derived from nature, third parties, and the public domain.	
5 6 7 8	6 While Plaintiffs do have copyright registrations to central Star Trek characters such as Spock and Captain Kirk, Defendants Works’ do not include those or any other characters to which Plaintiffs own separate copyrights.	FAC, Appendix A ¶¶ 2-6
9 10 11 12 13 14	7 Defendant Alec Peters, a lifelong Star Trek fan, founded Axanar Productions along with a group of other Star Trek fans to celebrate their love of Star Trek by creating original stories which take place in the so-called Star Trek universe.	ECF No. 48, Counterclaim at 18, ¶ 11; Oki Decl., Ex. 13 (Deposition of Alec Peters (Oct. 19, 2016) (“Peters Tr., Vol. I”) at 81:5-12; 88:5-14); Declaration of Alec Peters, Nov. 16, 2016, (“Peters Decl.”), at ¶ 2
15 16 17	8 Defendants’ first endeavor was the short film <i>Prelude</i> , which was to be followed by Defendants’ evolving non-commercial film project (the “Potential Fan Film”) tentatively titled <i>Axanar</i> .	Peters Decl., at ¶¶ 7-9; Peters Decl, Ex. 1
18 19 20 21 22 23 24 25 26 27 28	9 Both <i>Prelude</i> and the Potential Fan Film were intended to tell the original story of Garth of Izar, an obscure character who made his lone television appearance in a 1969 episode from Star Trek: The Original Series titled <i>Whom Gods Destroy</i> .	ECF No. 48, Counterclaim at 19 ¶¶ 15-16; Oki Decl., Ex. 14 (CBS Studios Inc.’s Responses to Requests for Admission, Set One, Response to Request for Admission Nos. 21-22); Oki Decl., Ex. 15 (Paramount Pictures Corporation’s Responses to Requests for Admission, Set One, Response to Request for Admission Nos. 21-22); Oki Decl., Ex. 12 (Deposition of J.J. Abrams, Nov. 9, 2016,

1		20	14:22-15:3;); Oki Decl., Ex. 11 (Deposition of Justin Yipin Lin, Nov. 7, 2016, (“Lin Tr.”) at 16:10-22); Peters Decl., Ex. 1
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5	10	<i>Prelude</i> portrays (and the Potential Fan Film would portray) Garth of Izar in a new way not seen in any of Plaintiffs’ Works—specifically, as a war veteran with psychological issues resulting from his traumatic experiences during the Four Years War between the United Federation of Planets and the Klingon Empire.	Oki Decl., Ex. 13 (Peters Tr., Vol. I at 87:13-88:1); Oki Decl., Ex. 5 (Burnett Tr. at 192:2-15); Peters Decl., at ¶¶ 6-7; Peters Decl., Ex. 1
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10	11	Star Trek, which promotes the ideals of tolerance, unity, inclusion, and peace, aired during the Vietnam War, before it was socially accepted to publicly examine issues such as Post-Traumatic Stress Disorder.	ECF No. 48, Counterclaim at 15, ¶ 6
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13	12	Defendants’ Works (made up of (i) an original twenty-minute “mockumentary” that has been available for free on YouTube since 2014), (ii) a three-minute scene (the “Vulcan Scene”), Defendants’ Potential Fan Film, and their creation of scripts for that project) are both social commentary and satire, in that they focus on and intend to expose the true horrors and consequences of war in ways the Plaintiffs’ Works did not.	Oki Decl., Ex. 13 (Peters Tr., Vol. I at 87:13-88:1); Oki Decl., Ex. 5 (Burnett Tr. at 192:2-15); Peters Decl., ¶ 7
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20	13	<i>Prelude</i> takes place in a time period previously unexplored by the Plaintiffs’ Works, and features an original plot and is shot in a narrative “mockumentary” style, featuring direct-to-camera interviews with characters, a style never before used by either Plaintiffs or in any other Star Trek fan fiction.	ECF No. 48, Counterclaim at 24-25, ¶¶ 30-31; Oki Decl., Ex. 13 (Peters Tr., Vol. I at 85:7-23); Oki Decl., Ex. 5 (Burnett Tr. at 22:8-23:8; 202:12-203:4); Peters Decl., Ex. 1
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25	14	Defendants’ Works are low budget, intended to be distributed for free online, appeal to a relatively small audience of “Trekkies,” and have made no profit.	Oki Decl., Ex. 13 (Peters Tr., Vol. I at 224:21-225:4)
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1	15	In August of 2014, Defendants released <i>Prelude</i> for free on YouTube.com.	ECF No. 48, Counterclaim, ¶ 16; Oki Decl., Ex. 13 (Peters Tr., Vol. I at 57:1-11, 85:7-23); Oki Decl., Ex. 5 (Burnett Tr. at 22:8-23:8; 202:12-203:4); Peters Decl., ¶ 7
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6	16	In March of 2014, Defendants launched a Kickstarter campaign to raise money for the Potential Fan Film.	Oki Decl., Ex. 13 (Peters Tr., Vol. I at 239:20-23, 241:10-13); Peters Decl., ¶ 9
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9	17	Aside from the <i>Vulcan Scene</i> (released for free on YouTube.com in July 2015), which may or may not ultimately become part of the Potential Fan Film, no scenes from the Potential Fan Film have been filmed.	Peters Decl., ¶ 9; Oki Decl., Ex. 5 (Burnett Tr. at 174:3-10); Oki Decl., Ex. 6 (Hunt Tr. at 56:12-25)
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13	18	Of the six total characters portrayed in <i>Prelude</i> , four were developed entirely by Defendants.	Peters Decl., ¶ 8
14	19	As the <i>Vulcan Scene</i> and the Potential Fan Film are both intended to build off of the <i>Prelude</i> storyline, they also are set in the same unique timeframe.	Oki Decl., Ex. 13 (Peters Tr., Vol. I at 43:9-14); Oki Decl., Ex. 6 (Hunt Tr. at 44:18-25); Oki Decl., Ex. 5 (Burnett Tr. At 104:11-105:17); Peters Decl, Ex. 2
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19	20	The three minute <i>Vulcan Scene</i> features two characters, one of which is completely original, as well as Defendants' own dialogue.	Oki Decl., Ex. 13 (Peters Tr., Vol. I at 43:9-14, 85:7-23); Peters Decl., ¶ 10; Oki Decl., Ex. 5 (Burnett Tr. at 22:8-23:8, 202:12-203:4); Oki Decl., Ex. 6 (Hunt Tr. At 44:18-25); Peters Decl., Ex. 2
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25	21	As a war mockumentary, <i>Prelude</i> was largely inspired by works such as "M*A*S*H," "Band of Brothers," "Babylon 5," "The Pacific" and "The Civil War."	Oki Decl., Ex. 5 (Burnett Tr. at 22:15-23:18); Oki Decl., Ex. 6 (Hunt Tr. at 51:8-16); Oki Decl., Ex. 13 (Peters Tr., Vol. I at 57:19-58:4); Peters Decl., Ex. 1
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22	Mr. Peters modeled his performance of Garth of Izar after the veterans depicted in “Band of Brothers,” the HBO war documentary mini-series.	Peters Decl., ¶ 7
23	The Potential Fan Film was also intended to borrow from war film sources, including “The Longest Day,” “Patton,” and “The Hunt for Red October.”	Oki Decl., Ex. 5 (Burnett Tr. at 22:15-23:18); Peters Decl., ¶ 9
24	While the Potential Fan Film is unfinished, and its scripts still in flux, the most recent draft script featured 50 original characters (of a total 57 characters).	Peters Decl., ¶ 15
25	At the Motion to Dismiss stage of these proceedings, this Court relied on the truth of Plaintiffs’ allegation that as of August 2015, there was a “fully revised and locked” script for the Potential Fan Film.	FAC ¶ 36; ECF No. 54 (Order re Defendants’ Motion to Dismiss) at 5, 7
26	As has been shown through discovery, Defendants used “locked script” as a term of art meaning that no new sets, scenes or characters will be added to a script, and is used to aid in budgeting purposes.	Oki Decl., Ex. 6 (Hunt Tr. at 47:19-48:6); Peters Decl., ¶ 13, Peters Decl., Ex. 3
27	Many scripts have been created since the unfinished August 2015 script, all using varying degrees of the Star Trek Universe.	Peters Decl., ¶ 13, Peters Decl., Ex. 3
28	Defendants are not currently committed to using any of the existing scripts in the Potential Fan Film, and have not decided what format, length and substance the Potential Fan Film will take, though are considering whether to make more mockumentary style works.	Oki Decl., Ex. 13 (Peters Tr., Vol. I at 74:10-23); Peters Decl., ¶¶ 13-14; Oki Decl., Ex. 6 (Hunt Tr. at 49:18-50:5); Oki Decl., Ex. 5 (Burnett Tr. at 88:7-18, 97:11-98:7)
29	[REDACTED]	Oki Decl., Ex. 3 (Report of Christian Tregillis) at ¶¶ 7-12, 34-35; ECF No. 72-63
30	Defendants’ Works are not intended to be commercialized, and Defendants have no ambitions of competing against Plaintiffs’	Oki Decl., Ex. 13 (Peters Tr., Vol. I at 225:5-6); Oki Decl., Ex. 4 (Report of

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	Works in movie theaters, on television, over premium streaming services, or to otherwise sell their Works for profit.	Henry Jenkins) at 4
31	Plaintiffs’ most recent feature film, <i>Star Trek Beyond</i> , had a production budget of \$185 million and has grossed over \$350 million worldwide since its July 22, 2016 release.	Oki Decl., Ex. 3 (Report of Christian Tregillis) at ¶ 10
32	Plaintiffs’ Works are budgeted and produced for appeal to the general public worldwide, offering the type of production, special effects, talent, and other qualities that result in extensive profits.	Oki Decl., Ex. 3 (Report of Christian Tregillis) at ¶ 10
33	[REDACTED]	Oki Decl., Ex. 10 (Deposition of Dan O’Rourke, Sept. 30, 2016 (“O’Rourke Tr.”) at 99:15-100:2); Oki Decl., Ex. 9 (Deposition of John Van Citters, Sept. 28, 2016 (“Van Citters Tr.”) at 160:13-15
34	[REDACTED]	Oki Decl., Ex. 14 (CBS Studios Inc.’s Responses to Requests for Admission, Set Two, Response to Request for Admission Nos. 72-73); Oki Decl., Ex. 15 (Paramount Pictures Corporation’s Responses to Requests for Admission, Set Two, Response to Request for Admission Nos. 72-73); Oki Decl., Ex. 1 (CBS Studios Inc.’s Amended Responses to Interrogatories, Set One, Response to Interrogatory Nos. 4-9); Oki Decl., Ex. 2 (Paramount Pictures Corporations Amended Responses to

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		Interrogatories, Set One, Response to Interrogatory Nos. 4-9); Oki Decl., Ex. 3 (Report of Christian Tregillis) at ¶ 58-62; Oki Decl., Ex. 9 (Van Citters Tr. at 94:8-95:7, 119:19-124:18); Oki Decl., Ex. 10 (O'Rourke Tr. at 60:22-61:5; 63:8-16)
35		Oki Decl., Ex. 9 (Van Citters Tr. at 52:14-18, 54:9-23, 119:19-124:18); Oki Decl., Ex. 10 (O'Rourke Tr. at 60:22-61:5; 63:8-16)
36		Declaration of Jonathan Lane, Nov. 15, 2016 ("Lane Decl."), Ex. 1; Oki Decl., Ex. 4 (Report of Henry Jenkins) at 2; Declaration of Reece Watkins, Nov. 15, 2016 ("Watkins Decl."), Ex. 1; Oki Decl., Ex. 3 (Report of Christian Tregillis) ¶ 63; Oki Decl., Ex. 9 (Van Citters Tr. at 137:5-21); Oki Decl., Ex. 8 (Deposition of Elizabeth Kalodner ("Kalodner Tr."), Oct. 13, 2016 at 33:22-42:17); Oki Decl., Ex. 7 (Deposition of Bill Burke, Nov. 3, 2016 ("Burke Tr.") at 40:5-45:7; Oki Decl., Ex. 16
37	Star Trek fans have produced and disseminated fan fiction for over 50 years, without complaint, and rather with encouragement from Plaintiffs.	Oki Decl., Ex. 3 (Report of Christian Tregillis) at ¶¶ 10-12; Lane Decl., Ex. 1 at 1

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38	Plaintiffs have benefitted from the unpaid and often unacknowledged labor of fans, who have helped to maintain engagement in the Plaintiffs’ Works during leaner years in Plaintiffs’ cycle of production.	Oki Decl., Ex. 4 (Report of Henry Jenkins) at 8
39	<i>Prelude</i> had a production budget of \$125,000.00, and was posted on YouTube.com to be viewed for free, with no profit to Defendants.	Peters Decl., ¶ 7
40	[REDACTED]	Oki Decl., Ex. 9 (Van Citters Tr. at 119:19-124:18); Oki Decl., Ex. 10 (O’Rourke Tr. at 60:22-61:5; 63:8-16)
41	[REDACTED]	Oki Decl., Ex. 3 (Report of Christian Tregillis) at ¶¶ 10-12; Oki Decl., Ex. 12 (Abrams Tr. at 42:7-11); Oki Decl., Ex. 9 (Van Citters Tr. at 119:19-124:18); Oki Decl., Ex. 10 (O’Rourke Tr. at 60:22-61:5; 63:8-16)
42	[REDACTED]	Oki Decl., Ex. 9 (Van Citters Tr. at 119:19-124:18); Oki Decl., Ex. 10 (O’Rourke Tr. at 60:22-61:5; 63:8-16)
43	There were approximately 12 more scripts prepared after the August 2015 Facebook post proclaiming a “fully revised and locked” script, including new scripts that were prepared after this litigation commenced.	Peters Decl., ¶ 13; Peters Decl., Ex. 3
44	Though Defendants halted plans for any filming and temporarily stopped working on the project altogether after Plaintiffs filed suit, Defendants resumed drafting scripts when it was publicly announced that this lawsuit was “going away.”	Oki Decl., Ex. 5 (Burnett Tr. at 174:3-10); Oki Decl., Ex. 6 (Hunt Tr. at 56:12-25); Oki Decl., Ex. 12 (Abrams Tr. at 20:23-21:13)
45	In March 2016, Justin Lin, the director of the most recent <i>Star Trek</i> motion picture, <i>Star Trek</i>	Oki Decl., Ex. 11 (Lin Tr. at 17:11-23); ECF No. 48,

1		<i>Beyond</i> , publicly commented on this case, stating: “[t]his is getting ridiculous! I support the fans. Trek belongs to all of us.”	Counterclaim ¶¶ 21-22
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3	46	In May 2015, J.J. Abrams, who directed and/or produced the three most recent Star Trek movies, publicly stated that he and Justin Lin “realized this [case] was not an appropriate way to deal with the fans.”	Oki Decl., Ex. 12 (Abrams Tr. at 20:23-21:13); ECF No. 48, Counterclaim ¶¶ 21-22
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7	47	In May 2015, J.J. Abrams stated that “fans should be celebrating [Star Trek]. Fans of Star Trek are part of this world. So [Justin] went to the studio and pushed them to stop this lawsuit and now, within the next few weeks, it will be announced this is going away, and that fans would be able to continue working on their project.”	Oki Decl., Ex. 12 (Abrams Tr. at 20:23-21:13); ECF No. 48, Counterclaim ¶¶ 21-22
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12	48	In the 1976 book <i>Star Trek: The New Voyages</i> , Mr. Roddenberry stated in the Foreword that he “realized that there is no more profound way in which people could express what Star Trek has meant to them than by creating their own very personal Star Trek [fan fiction].”	ECF No. 48, Counterclaim at 15-17, ¶ 7; ECF No. 49, Answer to Counterclaim at 1-2, ¶ 7
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16	49	Since Mr. Roddenberry’s statement, a substantial number of films have been created by fans without any complaint by Plaintiffs, some using characters from the Star Trek Works and exact replicas of Star Trek movie sets.	Lane Decl., Ex. 1 at 26; Oki Decl., Ex. 4 (Report of Henry Jenkins)
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20	50	For over 50 years, Plaintiffs have tolerated, and even encouraged a community of fandom and fan fiction surrounding Star Trek.	Oki Decl., Ex. 4 (Report of Henry Jenkins) at 3; Oki Decl., Ex. 11 (Lin Tr. at 40:18-41:18); Oki Decl., Ex. 3 (Report of Christian Tregillis) ¶¶ 24, 63; Oki Decl., Ex. 9 (Van Citters Tr. at 62:1-25, 137:5-21); Oki Decl., Ex. 8 (Kalodner Tr. at 33:22-42:17), Oki Decl., Ex. 7 (Burke Tr. at 40:5-45:7); Oki Decl., Ex. 16
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1 **II. CONCLUSIONS OF LAW**

2 1. A motion for summary judgment should be granted if there is no genuine
3 issue of material fact and the moving party is entitled to judgment as a matter of law.
4 Fed. R.Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

5 2. The Court should enter judgment against Plaintiffs with respect to the
6 Potential Fan Film because a federal court will “not resolve issues involving
7 contingent future events that may not occur as anticipated, or indeed may not occur at
8 all.” *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996).

9 3. Defendants’ Works do not violate 17 U.S.C. Section 103(b) because they
10 are not substantially similar to Plaintiffs’ works. Under 17 U.S.C. Section 103(b), any
11 “[c]opyright in a...derivative work extends only to the material contributed by the
12 author of such work, as distinguished from the preexisting material employed in the
13 work.” Even if Defendants’ Works were inspired by any of Plaintiffs’ Works,
14 Defendants’ Works are not “derivative works” because they do not appropriate
15 protected expression from those works. Defendants’ Works do not substantially copy
16 from Plaintiffs’ Works, and “[a] work is not derivative unless it has *substantially*
17 copied from a prior work.” 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright*, § 3.01
18 at 3-3.

19 4. Plaintiffs’ copyright claims fail because only original elements of the
20 Plaintiffs’ Works are “protectable,” and Plaintiffs’ do not set forth original elements
21 that Defendants copied. *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d
22 1072, 1077 (9th Cir. 2006).

23 5. Defendants’ Works are also protected as fair use because all four factors,
24 or at least the most important factors, weigh in favor of Defendants’ Works qualifying
25 as fair use. Specifically (1) there is no negative effect of Defendants’ use upon
26 Plaintiffs’ potential market for or value of the copyrighted works; (2) the purpose and
27 character of the use is transformative and non-commercial; (3) the amount and
28 substantiality of the portion used in relation to the copyrighted work is minimal

1 compared to the work as a whole; and (4) the nature of the copyrighted work is long-
2 published works featuring a character that was only published in one episode in 1969.

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4 Dated: November 16, 2016

WINSTON & STRAWN LLP

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