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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  
20  
21  
22

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

*Assigned to: Hon. R. Gary Klausner*

**DEFENDANTS AXANAR  
PRODUCTIONS, INC., AND ALEC  
PETERS' REPLY IN SUPPORT OF  
THEIR MOTION FOR SUMMARY  
JUDGMENT**

Date: 12/19/16  
Time: 9:00 a.m.  
Place: Courtroom 850, 8<sup>th</sup> Floor  
255 East Temple Street  
Los Angeles, CA 90012  
Judge: Hon. R. Gary Klausner

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

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1 **I. INTRODUCTION**

2 Plaintiffs fail to present any triable issues of fact to defeat Defendants' Motion.  
3 First, Plaintiffs cannot use their premature claim against the "full-length *Axanar* Film"  
4 to obtain an unnecessary advisory opinion on a now superseded script. Second,  
5 Plaintiffs fail to present evidence demonstrating that any of their works, when  
6 considered as a whole, are "substantially similar" to any of Defendants' works. Third,  
7 Plaintiffs have not presented evidence to overcome Defendants' showing that their  
8 works are protected as fair use. The Court should grant Defendants' Motion.

9 **II. PLAINTIFFS' CLAIMS ON THE FEATURE FILM ARE PREMATURE**

10 Plaintiffs have placed just two of Defendants' works at issue: "*Prelude to*  
11 *Axanar*" and "[t]he *Axanar* Motion Picture." FAC ¶¶ 6, 7 (Dkt. 26). Because the  
12 undisputed facts show that the "*Axanar* Motion Picture" does not yet exist, Plaintiffs  
13 cannot "demonstrate that *the works* are substantially similar in both *ideas and*  
14 *expression.*" *Data E. USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 207 (9th Cir. 1988)  
15 (second emphasis in original). It is simply not possible to determine from a  
16 *superseded draft* script, which has already been substantially altered, (Reply to  
17 Plaintiffs' Statement of Genuine Issues ("RSGI") 107), whether a *future, potential*  
18 film will ultimately be found to infringe.<sup>1</sup> Plaintiffs nonetheless ask the Court to find  
19 that "any film based on...a script substantially similar to the *Axanar* Script would  
20 infringe." Opp. 9 (Dkt. 88). Any such ruling would amount to a mere advisory opinion  
21 about an irrelevant draft script. In a strikingly similar recent case, the court held that  
22 no justiciable controversy was presented even though a screenplay adaptation was  
23 "currently underway" for a film based on a pre-existing story about the well-known  
24 fictional character Buck Rogers. *Team Angry Filmworks, Inc. v. Geer*, 171 F. Supp.  
25 3d 437, 446 (W.D. Pa. 2016) ("this dispute lacks the requisite 'immediacy' and  
26 'reality' to warrant the issuance of a declaratory judgment") (quoting *MedImmune,*  
27 *Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)).

28 <sup>1</sup> Plaintiffs' claim that the *Axanar* script is "locked" is belied by the undisputed  
evidence. RSGI 25.

1 The cases Plaintiffs cite in opposition are readily distinguishable. Unlike here,  
 2 the plaintiffs in both *Filmation* and *Danjaq* alleged that defendants had copied  
 3 multiple, central, extremely well-defined, copyrighted characters that had appeared in  
 4 coherent, well-integrated stories—respectively, Walt Disney’s Pinocchio and James  
 5 Bond.<sup>2</sup> In neither case was there evidence that the draft script at issue had been  
 6 superseded and was no longer relevant, as discovery has shown here. RSGI 26. In  
 7 *Filmation*, a case about illustrated cartoon characters, the court declined to grant  
 8 judgment for defendants on this issue since they had “generated a substantial body of  
 9 work preliminary to a ‘finished film,’” including not only a script, but also a detailed  
 10 story board, story reel, models, a promotional trailer, and designs “said to be tangible  
 11 and permanent reproductions of characters and scenes.” *Walt Disney Prods. v.*  
 12 *Filmation Assocs.*, 628 F. Supp. 871, 875, 878 n.5 (C.D. Cal. 1986).<sup>3</sup>

13 Critically, neither of Plaintiffs’ cases considered fair use, which is front and  
 14 center here. Defendants’ fair use defense militates strongly against consideration of  
 15 Plaintiffs’ premature claim, for any infringement analysis that fails to consider fair use  
 16 runs a grave risk of impinging upon the First Amendment. It is black letter law that  
 17 fair use has a substantial role in preserving free speech values in light of copyright  
 18 law’s undeniable restrictions on speech rights. *See, e.g., Eldred v. Ashcroft*, 537 U.S.  
 19 186, 190 (2003) (recognizing fair use as a “built-in First Amendment  
 20 accommodation[.]” to copyright law); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d  
 21 1257, 1264 (11th Cir. 2001) (“[fair use] exceptions...are at the heart of fair use’s  
 22 protection of the First Amendment, as they allow later authors to use a previous

23 <sup>2</sup> These facts stand in stark contrast to Plaintiffs’ scattershot allegations here, which  
 24 rely on alleged borrowings of names, abstract ideas, and minor (and largely  
 25 unprotectable) elements that Plaintiffs have plucked from a grab-bag of books,  
 26 movies, role-playing games, and television shows.

27 <sup>3</sup> *Danjaq* was decided on a motion to dismiss, where the court was constrained to  
 28 “accept[] the plaintiff’s material allegations in the complaint as true....” *Danjaq, LLC*  
*v. Universal City Studios, LLC*, Case No. CV 14-02527 SJO EX, 2014 WL 7882071 at  
 \*2 (C.D. Cal. Oct. 2, 2014). While this Court found an allegedly “locked script”  
 sufficient to proceed at the motion to dismiss stage, the undisputed evidence shows  
 that Defendants do not intend to proceed on that script. RSGI 25. There have been  
 several new scripts since then, and other considerations about the style Defendants  
 intend to pursue. RSGI 28.

1 author’s copyright to introduce new ideas or concepts to the public”). Among other  
2 things, “[f]air use requires a fact-intensive and context-specific evaluation” of the  
3 “purpose and character of the use... [in the] new work.” *Fox News Network, LLC v.*  
4 *TVEyes, Inc.*, 124 F. Supp. 3d 325, 330 (S.D.N.Y. 2015). Defendants cannot prove  
5 their fair use defense based upon a non-created work. And such an analysis cannot be  
6 reasonably based on an intermediate, superseded draft of a script: indeed, as Plaintiffs  
7 concede, “courts generally will not consider intermediary works as evidence that a  
8 later version of a work is infringing.” Opp. 9 (emphasis in original). In the symbol-  
9 rich, visual medium of film, it is impossible to judge what the finished work will  
10 become from perusing mere words on a page. As courts have long recognized, “[i]t  
11 would be a dangerous undertaking for persons trained only to the law to constitute  
12 themselves final judges of the worth” of works. *Bleistein v. Donaldson Lithographing*  
13 *Co.*, 188 U.S. 239, 251 (1903). The danger is incalculably greater when the work to be  
14 judged does not yet exist. The Court should enter judgment in favor of Defendants on  
15 Plaintiffs’ claim as to the “full-length *Star Trek: Axanar* film.”

16 **III. THE UNDISPUTED EVIDENCE SHOWS THAT THE WORKS TAKEN**  
17 **AS A WHOLE ARE NOT SUBSTANTIALLY SIMILAR**

18 Only if works are substantially similar when “taken as a whole” can there be  
19 infringement. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 824 (9th Cir. 2002).  
20 Fragmented similarity is insufficient if it does not rise to the level of substantial  
21 similarity of the works taken as a whole: “[i]f no reasonable jury could find substantial  
22 similarity out of... fragmented similarity, summary judgment [for defendant] is  
23 proper.” *Civility Experts Worldwide v. Molly Manners, LLC*, 167 F. Supp. 3d 1179,  
24 1215 (D. Colo. 2016). “To show that two works are substantially similar, plaintiff  
25 must demonstrate that the works are substantially similar in both *ideas and*  
26 *expression.*” *Data E. USA*, 862 F.2d at 207 (emphasis in original). “[S]ummary  
27 judgment for defendant is appropriate when plaintiff fails to make a sufficient  
28 showing” of substantial similarity “after defendant has properly identified in a motion



1 for summary judgment that plaintiff has failed to do so.” *Frybarger v. Int’l Bus.*  
2 *Machines Corp.*, 812 F.2d 525, 528 (9th Cir. 1987).<sup>4</sup>

3 Plaintiffs fail to provide sufficient evidence to show that the works at issue  
4 “taken as a whole” are substantially similar. Instead, Plaintiffs argue that Defendants  
5 copied disparate “elements” of their alleged works. Opp. 10-15. Not only is this  
6 insufficient as a matter of law to show infringement, but because the “elements”  
7 Plaintiffs point to are largely or entirely unprotectable, the Court must “filter out and  
8 disregard” them. *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072,  
9 1077 (9th Cir. 2006) (citation omitted).

10 Plaintiffs fail to provide sufficient evidence for a reasonable finder of fact to  
11 hold that the disparate elements they allege—such as imaginary “species” and stock  
12 “characters”—are protectable. “The bar for substantial similarity in a character is set  
13 quite high.” *Sheldon Abend Revocable Trust v. Spielberg*, 748 F. Supp. 2d 200, 208  
14 (S.D.N.Y. 2010). Thus, “[only] characters that are ‘especially distinctive’ or the ‘story  
15 being told’ receive protection apart from the copyrighted work.” *Rice v. Fox Broad.*  
16 *Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003). For example, in *Hogan v. DC Comics*, the  
17 court found that two main characters were not substantially similar, even though both  
18 were half-human, half-vampires named Nicholas Gaunt; were young white males with  
19 pale skin, a medium build, dark, tired eyes, and dark, scraggly hair; sought to learn the  
20 truth about their origins, and did so through flashbacks; faced the choice of pursuing  
21 good or evil; were indoctrinated into the forces of evil by killing. 48 F. Supp. 2d 298,  
22 310-11 (S.D.N.Y. 1999). These “unprotectible ideas and themes ... [did] not represent

23 <sup>4</sup> This Court has repeatedly granted summary judgment in favor of the defendant  
24 where the plaintiff has not demonstrated substantial similarity. *Althouse v. Warner*  
25 *Bros. Entm’t*, No. CV 13-00696-RGK SSX, 2014 WL 2986939, at \*2–3 (C.D. Cal.  
26 Apr. 28, 2014) (Klausner, J.) (holding that all 118 examples set forth by the plaintiffs  
27 in the complaint were “either too general for copyright protection, are *scenes a faire*,  
28 or are commonly used, unoriginal ideas”); *Gilbert v. New Line Prods., Inc.*, No. CV  
09-02231 RGK, 2010 WL 5790628, at \*4 (C.D. Cal. Aug. 13, 2010) (Klausner, J.),  
*aff’d*, 490 F. App’x 34 (9th Cir. 2012) (“[a]ny similarities between the works are far  
outweighed by the significant differences in the plot, sequence of events, characters,  
mood, theme, settings, and dialogue.”); *Glass v. Sue*, No. CV 09-08570-RGK, 2010  
WL 4274581, at \*4 (C.D. Cal. Oct. 22, 2010) (Klausner, J.) (“no reasonable juror  
could find substantial similarity between the two works.”)

1 any original elements of plaintiffs’ work.” *Id.*

2 Plaintiffs’ evidence falls far short of the evidence deemed insufficient in  
3 *Hogan*. It is simple common sense that no general group (such as “Vulcans,”  
4 “Federation officers,” or “Klingons”) can possibly be a “character” in any meaningful  
5 sense of the word—or have the sort of ‘especially distinctive’ qualities required to be  
6 a *protectable* character under copyright law.<sup>5</sup> Plaintiffs’ attempt to define the Vulcan  
7 “species” as a “character” is telling: “Vulcans are serious and contemplative and  
8 Vulcan men are usually depicted with pointy ears, upswept eyebrows, and straight,  
9 dark (or gray) hair cut in a ‘bowl style.’” Opp. 11. None of these characteristics, either  
10 alone or in combination, is sufficiently particular to define a distinctive character.

11 Still less persuasive is Plaintiffs’ argument that Defendants infringe the Vulcan  
12 “species” merely because the same actor who appeared in a handful of Plaintiffs’  
13 works also appears in Defendants’ works. Of course, Plaintiffs have no rights to actor  
14 Gary Graham’s identity or features. Once that patently unprotectable element is  
15 filtered out, all Plaintiffs are left with is an (unprotectable, unoriginal) bowl hairstyle,  
16 a pair of (unprotectable, unoriginal) pointed ears, the (ancient Roman) word “Vulcan,”  
17 and the (Hindi) name “Soval.” None of these elements, alone or in combination, make  
18 “Vulcans” protectable by copyright law.<sup>6</sup> Similarly, no reasonable finder of fact could  
19 find that stock “characters” like the “heroic” Garth of Izar<sup>7</sup> or the “Vulcan  
20 Ambassador” Soval<sup>8</sup> are “especially distinctive” or have “consistent, widely  
21 identifiable traits” warranting copyright protection. Plaintiffs’ evidence shows merely  
22 that Garth is the “hero” of “Axanar,” a battle that is named but never described. RSGI  
23 9. Moreover, even if there were anything distinctive about this minor character,  
24 Plaintiffs have not provided facts to show that Defendants copied anything more

25 <sup>5</sup> Plaintiffs themselves argue that one of *Defendants’* original characters is not  
26 original, but “simply a Klingon.” Opp. at 11.

27 <sup>6</sup> “If what the alleged infringer took was not copyrightable, the copyright owner may  
28 not complain, although his work may have been what directly inspired the work of the  
infringer.” *Shipman v. R.K.O. Radio Pictures*, 20 F. Supp. 249, 250 (S.D.N.Y. 1937).

<sup>7</sup> *Garth* is a common Welsh name RSGF at 5; *Izar* is the name of a star in the  
constellation Boötes, the herdsman *Id.*

<sup>8</sup> *Soval* is a Hindi given name. *Id.*

1 “distinctive” about him than his name, home solar system, and captain’s rank, none of  
2 which is protectable by copyright. Allegations that may be sufficient at the pleading  
3 stage, must be supported by evidence at summary judgment. Here, Plaintiffs have  
4 failed to provide evidence sufficient to support a finding of substantial similarity.

#### 5 **IV. DEFENDANTS’ USE IS FAIR AS A MATTER OF LAW**

6 By definition, a work is “transformative” if it “alter[s] the first [work] with **new**  
7 **expression, meaning, or message.**” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.  
8 569, 579 (1994) (emphasis added). There can be no reasonable dispute that  
9 Defendants’ *Axanar* works provide “new expression, meaning, or message” to the  
10 grab-bag of disparate and widely-separated elements that Plaintiffs allege as their  
11 “work” in this case. Plaintiffs’ argument that there is “nothing transformative” about  
12 Defendants’ works because they were “created to function as [] Star Trek work[s]”  
13 (Opp. 16) is simply wrong. From Virgil’s *Aeneid* (based on a minor character from  
14 Homer’s *Iliad*) to John Gardner’s *Grendel* (retelling *Beowulf* from the monster’s point  
15 of view), and from *Campbell v. Acuff-Rose* to *Suntrust Bank v. Houghton Mifflin Co.*,  
16 there is ample precedent for artistic works that “comment” on other artistic works. *See*  
17 *Campbell*, 510 U.S. 569, *passim* (finding fair use of song by a song); *Suntrust Bank*,  
18 268 F.3d 1257, *passim* (finding fair use of novel by a novel).

19 Contrary to Plaintiffs’ sweeping contention that “not...a single case in the  
20 history of copyright jurisprudence...finds this kind of activity ‘transformative’” (Opp.  
21 2), numerous cases have found fair use as a matter of law, when the defendants used  
22 pre-existing elements to create new works of the same type as the plaintiffs’ works.<sup>9</sup>  
23 For example, the defendant’s novel in *Suntrust Bank* made fair use of plaintiff’s well-  
24 known novel *Gone with the Wind*, when it allegedly “(1) explicitly refer[red] to

25 <sup>9</sup> Transformativeness has been decided in the defendant’s favor on summary judgment  
26 even where exact clips of the plaintiffs’ works have been used by the defendant  
27 (which is not the case here). *Sofa Entm’t, Inc. v. Dodger Prods., Inc.*, 782 F. Supp. 2d  
28 898, 905 (C.D. Cal. 2010) (“Defendant’s use of the Clip... is transformative.”);  
*Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp.  
2d 962, 978 (C.D. Cal. 2012) (“the juxtaposition of the new video clips with the  
original creates an entirely different impact on the viewer. Thus, the accused Videos  
are transformative.”)

1 [plaintiff's novel] in its foreword; (2) copie[d] core characters, character traits, and  
2 relationships from [plaintiff's novel]; (3) copie[d] and summarize[d] famous scenes  
3 and other elements of the plot from [plaintiff's novel]; and (4) copie[d] verbatim  
4 dialogues and descriptions from [plaintiff's novel]." 268 F.3d at 1259.

5 Similarly, the court in *Blanch v. Koons* held that a visual artist made fair use of  
6 the plaintiff's photograph when he "culled images from advertisements...scanned  
7 them into a computer...digitally superimposed [them] against backgrounds of pastoral  
8 landscapes[, and] printed color images... for his assistants to use as templates for  
9 applying paint to...canvasses." 467 F.3d 244, 247 (2d Cir. 2006). And in *Campbell*,  
10 the Supreme Court held it was fair use when petitioners copied the "heart" of a  
11 creative work to create another creative work of the same kind. 510 U.S. at 589. Thus,  
12 contrary to Plaintiffs' apparent belief, fair use does not require explicit "social  
13 commentary" or "critical commentary." *See* Opp. 16.

14 Plaintiffs' crabbed interpretation of fair use lacks any basis in the Copyright Act  
15 or decisional law. Indeed, § 107 expressly states that copying for purposes of  
16 "comment" may be fair use, without any limitation as to the *type* of comment or the  
17 *target* of the comment. 17 U.S.C. § 107. "The law imposes no requirement that a work  
18 comment on the original or its author in order to be considered transformative, and a  
19 secondary work may constitute a fair use even if it serves some purpose other than  
20 those... identified in the preamble to the statute." *Cariou v. Prince*, 714 F.3d 694, 706  
21 (2d Cir. 2013). As the Supreme Court has discussed, parody is but one form of fair use  
22 "comment or criticism." *Campbell*, 510 U.S. at 579 ("less ostensibly humorous forms  
23 of criticism [than parody] can provide social benefit, by shedding light on an earlier  
24 work, and, in the process, creating a new one.").

25 And in any event, *Prelude*'s transformativeness is readily apparent from the fact  
26 that it is a mockumentary, which is a form of parody that presents characters in a  
27 "fake" documentary, a way that Star Trek had never been portrayed in all its 50 years.  
28 RSGI 13. In *Prelude*, it is the characters themselves that provide commentary about

1 the battle of *Axanar*, a battle that has not been featured in any of the allegedly  
2 infringing works in this action. RSGI 13. For example, in *Prelude to Axanar*, Captain  
3 Sonya Alexander (an original character) serves as the comedic relief, presenting a  
4 powerful character who provides her commentary about the battle, infused with salty  
5 language rarely used by female characters. RSGI 18. It is irrelevant that Defendants  
6 may not have explicitly claimed fair use as “parody” or “satire” before Plaintiffs  
7 brought suit. “What is critical [in assessing transformativeness] is how the work in  
8 question appears to the reasonable observer, not simply what an artist might say about  
9 a particular piece.” *Cariou*, 714 F.3d at 707 (“[defendant’s] testimony that he  
10 ‘[doesn’t] really have a message’” did not preclude a finding of fair use). And in any  
11 event, here Defendants made clear in their promotional materials, crowdfunding  
12 campaigns, and through the works themselves, that they were presenting Star Trek in  
13 a manner that had never been seen before. Dkt. 87-1 at 81, 152 (Defendants’  
14 Response to Plaintiffs’ Statements of Fact in Opposition to Plaintiffs’).

15 For purposes of analyzing transformativeness, the relevant question is simply  
16 this: did Defendants take the material allegedly copied—names Plaintiffs borrowed  
17 from astronomy (*Izar*), Roman mythology (*Vulcan*), and Hindu culture (*Soval*); the  
18 idea of a “contemplative” alien species whose males are “usually” depicted with  
19 “pointed ears”; the merest sketch of a “hero” named Garth of Izar—and “transform” it  
20 into something that was not inherent in that source material? And does the new work,  
21 “at least in part, comment[] on [the prior] work[]?” Here, the answer to both questions  
22 is clearly: Yes. Because Plaintiffs provide no evidence to the contrary,<sup>10</sup> the  
23 transformativeness of Defendants’ fair use should be deemed established.

24 Plaintiffs also ask the Court to hold that, as a matter of law, a transformative,  
25 non-commercial fan work that adds richness and depth to Plaintiffs’ fictional  
26 “universe” will “inevitably” “effect” the market for their alleged works.<sup>11</sup> This is pure

27 <sup>10</sup> Plaintiffs argue that Defendants “expanded upon” a Star Trek “story,” but Plaintiffs  
28 have presented *no* facts to support the existence of this “story.” RSGI 5.

<sup>11</sup> Plaintiffs have presented no evidence whatsoever beyond pure speculation that their  
market has been impacted. RSGI 34.

1 speculation.<sup>12</sup> The Ninth Circuit requires far more to show market harm. For example,  
2 in *Perfect 10, Inc. v. Amazon.com, Inc.*, the Ninth Circuit disapproved the district  
3 court’s “reason[ing]” that users who could download images “free of charge...are less  
4 likely to pay for a download, and [that] the availability of [such]... images would  
5 harm [plaintiff’s] market” for licensing. 508 F.3d 1146, 1168 (9th Cir. 2007). This  
6 was insufficient: in the absence of a finding that users had actually downloaded such  
7 images for competing uses, “[t]his potential harm to [plaintiff’s] market remain[ed]  
8 hypothetical.” *Id.* Similarly here, “there is no actual evidence of any [cognizable  
9 market] harm,” and “[t]hus, on this record...any market harm remains hypothetical.”  
10 *Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094, 1108 (C.D. Cal. 2015).  
11 Nor do Plaintiffs provide any evidence that Defendants’ non-commercial use “is  
12 competing in [an] actual market that Plaintiffs have already exploited.” Opp. 19.  
13 Plaintiffs fail to show that there exists *any* “market” for non-commercial fan works  
14 like Defendants’; provide no evidence that such works have *ever* been a source of  
15 licensing revenue for Plaintiffs; and provide no evidence that such works have *ever*  
16 interfered with or negatively impacted their ability to license *commercial* derivative  
17 works. To the contrary, the undisputed evidence shows that Plaintiffs have reaped  
18 substantial benefits from precisely the type of fan-created non-commercial work that  
19 *Axanar* exemplifies. RSGI 36.<sup>13</sup>

20 Plaintiffs’ conclusory statement that the second fair use factor—the “nature of  
21 the copyrighted work”—weighs “heavily” in favor of “fictional...creative works,” is  
22 unsupported by authority and indeed nonsensical, as it would mean that this factor  
23 must also weigh “heavily” in favor of *Defendants’* fictional, creative works.<sup>14</sup>

24 <sup>12</sup> It is particularly unpersuasive in the context of a science fiction franchise with a  
25 long history of permitting and benefitting from such works—a franchise that, indeed,  
26 owes its 50-year existence to a deep, continuous engagement of its fans that is to a  
27 great extent enabled and maintained by fan works like those of Defendants. RSGI 36.

<sup>13</sup> Because “the goal of copyright, to promote science and the arts, is generally  
27 furthered by the creation of transformative works... the more transformative the new  
28 work, the less will be the significance of other factors.” *Campbell*, 510 U.S. at 579.

<sup>14</sup> And Plaintiffs do not dispute that their works were published long ago, and are thus  
not “unpublished,” which presents another reason why this factor weighs in favor of  
Defendants. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177 (9th Cir. 2012);

1 The third factor, “the amount and substantiality of the portion used in relation to  
 2 the copyrighted work as a whole,” favors Defendants, who have taken no more from  
 3 the original than is required to create their own, highly transformative work. Plaintiffs’  
 4 reliance on *Castle Rock Entm’t v. Carol Publ’g Grp.*, 955 F. Supp. 260 (S.D.N.Y.  
 5 1997) is misplaced. In that case, the defendant publisher had created a for-profit trivia  
 6 book by “draw[ing] upon little else” other than “essential’ elements” of the plaintiff’s  
 7 original works to create a work that was only “minimally transformative.” *Id.* at 272;  
 8 *Castle Rock Entm’t, Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 144 (2d Cir. 1998).<sup>15</sup>  
 9 Here, by contrast, the *non-essential* elements of Plaintiffs’ Works are used merely to  
 10 provide a common frame of reference within which to tell an original, highly creative,  
 11 *non-commercial* story that comments on Plaintiffs’ works. Plaintiffs attempt to  
 12 portray Defendants’ concern for *accuracy*—a necessity where one work comments on  
 13 another—as somehow implying Defendants’ *culpability* and that Defendants’ copying  
 14 is *extensive*. This is cannot be the law: under Plaintiffs’ reasoning, only a slipshod  
 15 work, or one *lacking* any relationship to the original, could possibly be a fair use—but  
 16 in such a case, fair use would not even be at issue. Plaintiffs’ proposed test would  
 17 preclude not only fan fiction, but parody and countless other protected forms of  
 18 comment and criticism that “[further] the goal of copyright, to promote science and  
 19 the arts.” *Campbell*, 510 U.S. at 579.

## 20 V. CONCLUSION

21 For any or all of these reasons, the Court should grant Defendants’ Motion.

22 Dated: December 5, 2016

**WINSTON & STRAWN LLP**

23  
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 25 AXANAR PRODUCTIONS, INC.  
 and ALEC PETERS  
 26

27 *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985). In any  
 event, courts recognize that “[t]he second factor has rarely played a significant role in  
 28 the determination of a fair use dispute.” *Authors Guild v. Google, Inc.*, 804 F.3d 202,  
 220 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1658 (2016).

<sup>15</sup> See also, Defendants’ Opp. to Plaintiffs’ Motion (Dkt. 87 at 16-17).