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11 CORPORATION and CBS STUDIOS
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12

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15

16 PARAMOUNT PICTURES
CORPORATION, a Delaware
17 corporation; and CBS STUDIOS INC.,
a Delaware corporation,
18

19 Plaintiffs,

20 v.

21 AXANAR PRODUCTIONS, INC., a
California corporation; ALEC PETERS,
an individual, and DOES 1-20,
22

23 Defendants.
24
25
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27
28

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

**PLAINTIFFS' MOTION IN
LIMINE NO. 10 TO EXCLUDE
TESTIMONY OF HENRY
JENKINS**

Discovery Cutoff: November 2, 2016
Pre-Trial Conference: January 9, 2017
Trial: January 31, 2017

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that, on January 31, 2017, at 9:00 a.m., or as soon
3 thereafter as counsel may be heard in the Courtroom of the Honorable R. Gary
4 Klausner, United States District Judge, Central District of California, located at 255
5 E. Temple Street, Los Angeles, California 90012, plaintiffs Paramount Pictures
6 Corporation and CBS Studios Inc. (“Plaintiffs”) will and hereby do move to exclude
7 the testimony of Professor Henry Jenkins.

8 This motion is brought on the grounds that, as stated more fully in the
9 accompanying Memorandum of Points and Authorities, the testimony of this
10 claimed expert is not reliable and will unfairly prejudice Plaintiffs.

11 Plaintiffs discussed the reasons for the filing of this Motion with Defendants’
12 counsel. This Motion is based on this Notice, the accompanying Memorandum of
13 Points and Authorities, the Declaration of Jennifer Jason, all records in this action
14 and on such further argument, evidence and authority as may be offered at the time
15 of hearing.

16 Dated: December 16, 2016

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20 By: /s/ Jennifer Jason
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Paramount Pictures Corporation and CBS Studios Inc. (collectively,
4 “Plaintiffs”) anticipate that Defendants Axanar Productions, Inc. and Alec Peters
5 (collectively, “Defendants”) will seek to introduce the testimony of purported expert
6 Professor Henry Jenkins (“Prof. Jenkins”). In support of Defendants’ Motion for
7 Summary Judgment, Prof. Jenkins submitted an untitled report that opines on two
8 subjects:

- 9 (1) The impact of fan-produced films on Plaintiffs; and
10 (2) Whether *Prelude to Axanar* is “transformative.”

11 Prof. Jenkins’ conclusions with respect to the impact of fan-produced films on
12 Plaintiffs are not supported by any data or methodology, and are irrelevant since
13 prior to this litigation, Defendants denied that the Axanar works were fan films, and
14 instead repeatedly claimed that they were the first independent professional Star
15 Trek films. Further, Prof. Jenkins lacks competence or expertise to opine on what
16 constitutes transformative work, as that term is used in connection with the first
17 factor of the fair use test, as demonstrated by the fact that what he defines as a
18 “transformative” work is actually a derivative work.

19 Prof. Jenkins’ opinions will be unduly prejudicial for the jury, and will add
20 needless confusion and time to the trial.

21 **II. The Standards Applicable to Plaintiffs’ Claimed Expert.**

22 Federal Rule of Evidence 702 (“Rule 702”) permits a qualified witness to
23 “testify in the form of an opinion or otherwise if: (a) the expert’s scientific,
24 technical, or other specialized knowledge will help the trier of fact to understand the
25 evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts
26 or data; (c) the testimony is the product of reliable principles and methods; and (d)
27 the expert has reliably applied the principles and methods to the facts of the case.”
28

1 Additionally, the Court “must ensure that any and all scientific testimony or
2 evidence admitted is not only relevant, but reliable.” *Daubert v. Merrell Dow*
3 *Pharm., Inc.*, 509 U.S. 579, 589 (1993). “In its role as gatekeeper, the district court
4 determines the relevance and reliability of expert testimony and its subsequent
5 admission or exclusion.” *Barabin v. AstenJohnson, Inc.*, 700 F.3d 428, 431 (9th Cir.
6 2012), *on reh’g en banc sub nom. Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d
7 457 (9th Cir. 2014). “[T]his basic gatekeeping obligation applies [not] only to
8 ‘scientific’ testimony [but] all expert testimony.” *Kumho Tire Co. v. Carmichael*,
9 526 U.S. 137, 147 (1999). Here, Prof. Jenkins’ proposed testimony fails to satisfy
10 the requirements for admission under Rule 702, *Daubert*, or its progeny.

11 **A. Prof. Jenkins’ Testimony Regarding the Benefit of Fan Fiction in**
12 **General, and Axanar in Particular is not Based on Data nor Reliable.**

13 In his report, Prof. Jenkins hypothesizes that fan-produced films, and other
14 content, create value for commercial producers of copyrighted material, including
15 that of Plaintiffs. Declaration of Jennifer Jason (“Jason Decl.”) ¶ 6, Ex. B. He notes
16 that “[a]n equilibrium [has] emerged in recent years, where legal actions had
17 decreased and producers of all kinds of cult media had come to accept the value fan
18 culture generates ... as creating value more than doing damage.” *Id.* at 4. However,
19 Prof. Jenkins does not indicate what data he relied on to support his assumptions.

20 Apart from a vague reference to “research” on page four of his report, Prof.
21 Jenkins cites no basis for his opinion that fan-produced films aid Plaintiffs. He has
22 not been employed by Plaintiffs, he has not reviewed Plaintiffs’ financial records,
23 nor has he done so for any other commercial producer of materials subject to fan
24 appropriation. His opinions on the value of fan-produced films to Plaintiffs are, at
25 best, wishful thinking from a fan of the medium. Nor does Prof. Jenkins distinguish
26 between the effect on the market of amateur low-budget fan films, and Defendants’
27 works, which Defendants claim are not fan films at all, but rather the first
28 professional independent Star Trek films, with professional actors (some of whom

1 appeared in the authorized Star Trek works) and professional technicians, made with
 2 million dollar plus budgets, and which Defendants further claim to be made to the
 3 same standards as the authorized Star Trek works. Jason Decl., ¶¶ 8-13, Exs. D-J. It
 4 would be non-probative and prejudicial to allow Prof. Jenkins to opine on the effect,
 5 or non-effect of a class of works so different than the Axanar works.

6 **B. Prof. Jenkins Lacks the Required Expertise to Opine on the**
 7 **Transformativeness of *Prelude to Axanar*.**

8 Prof. Jenkins' opinion on the transformativeness of *Prelude to Axanar* is not
 9 based on any specialized knowledge, and is outside his area of expertise.

10 Transformativeness is a legal standard and Prof. Jenkins does not claim to have any
 11 special legal training. Indeed, when discussing transformativeness in connection
 12 with fan films in general, and *Prelude to Axanar* specifically, Prof. Jenkins is
 13 promoting a political agenda as to what he would like copyright law to be, rather
 14 than analyzing such films or *Prelude to Axanar* under existing copyright law.¹

15 Prof. Jenkins uses two examples of ways in which *Prelude to Axanar* differs
 16 from *Star Trek* produced by Plaintiffs. First, he claims that *Prelude to Axanar*
 17 uniquely focuses on the human cost of war and the concept of sacrifice, with one
 18 battle being described as a "bloodbath." Jason Decl., ¶ 6, Ex. B at 9. His testimony
 19 is not based on any particular expertise, nor is it accurate - *Prelude to Axanar* speaks

21
 22 ¹ Prof. Jenkins appears to have consulted with an outside attorney on the
 23 subject and simply reframed her opinions as his own. On September 27, 2016, Prof.
 24 Jenkins published a blog post with excerpts from a conversation he had with
 25 Georgetown Law Professor Rebecca Tushnet, "who has extensively studied the
 26 legal implications of fan culture." Jason Decl., ¶ 5, Ex. A. It is clear from these
 27 excerpts that Prof. Jenkins' independent knowledge of what constitutes
 28 transformative use is non-existent and that his expert report is merely an facsimile of
 Professor Tushnet's remarks. Notably, Prof. Jenkins did not include his interview
 with Professor Tushnet in his list of sources, which is a violation of Federal Rule of
 Civil Procedure 26(a)(2)(B)(i) ("if the witness is one retained or specially employed
 to provide expert testimony in the case... [t]he report must contain... a complete
 statement of all opinions the witness will express and the basis and reasons for
 them"). Plaintiffs uncovered this source independently during a review of Prof.
 Jenkins' recent blog postings.

1 for itself and is not a commentary on the “human costs of war” or the “concept of
2 sacrifice” any more than any other fictional story of intergalactic conflict.

3 Prof. Jenkins’ second distinction is even more absurd. He remarks that seeing
4 a female starship captain in *Prelude to Axanar* contrasts with the “promise of female
5 equality that *Star Trek* producers have often failed to deliver upon.” Prof. Jenkins is
6 apparently unaware that Plaintiffs produced a **seven-season television series**
7 starring Kate Mulgrew in the lead role as the female captain of the titular starship
8 *Voyager*. Jason Decl. ¶ 3, Ex. 4. Thus, not only are Prof. Jenkins’ opinions lacking
9 in any scientific or technical basis, they are uninformed and incorrect.

10 Furthermore, the legal standard Prof. Jenkins purports to apply for
11 transformative use is incorrect. Instead of applying the standard for a transformative
12 work under the fair use standard, Prof. Jenkins describes the standard for a
13 derivative work, which would be protected by copyright. *See* 17 U.S.C. § 106(2)
14 (copyright owner has rights to derivative works). Prof. Jenkins does not distinguish
15 between a work with a new character or purpose, the standard under the fair use
16 standard (*see Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)) or a work
17 which simply builds on pre-existing material for the same purpose, which is an
18 infringing derivative work. In this case, *Prelude to Axanar* simply uses the
19 copyrighted material to create another Star Trek film for the purpose of
20 entertainment, the exact character and purpose of the copyrighted Star Trek works.
21 Under the definition used by Prof. Jenkins in his Report, Defendants could have
22 produced *Star Trek: The Next Generation* (Plaintiffs’ Star Trek television series)
23 without fear of copyright infringement. Prof. Jenkins is unqualified to opine on
24 transformativeness as regards to fair use—the standard he uses is clearly erroneous,
25 based on a lack of specialized knowledge, and would mislead the jury. Therefore,
26 Prof. Jenkins’ opinions on transformativeness should be excluded from trial.²

27
28 ² Just like how Defendants failed to show their other expert (Mr. Tregillis) the
actual financial statement for Axanar prepared prior to the litigation, and instead

1 **C. Prof. Jenkins' Opinions on Fan Films is Legally Irrelevant.**

2 In his report, Prof. Jenkins spends substantial time discussing "fan films"
3 other than those made by Defendants. Prof. Jenkins is especially concerned with a
4 sub-genre he refers to as "fan vids," which are a type of music video made by re-
5 cutting copyrighted material and setting it to music. No court has ever held that "fan
6 films" (whether or not that label is accurate, which in this case it is not) has any
7 impact on the copyright infringement analysis. Furthermore, fan produced materials
8 other than narrative films like *Prelude to Axanar* have no relevance to this case.

9 Also, Plaintiffs' interactions with "fan film" creators other than Defendants
10 are legally irrelevant. This precise issue, with respect to the Star Trek copyrighted
11 works and Plaintiff Paramount, was addressed in an earlier copyright infringement
12 lawsuit. *See Paramount Pictures Corp. v. Carol Publ'g Grp.*, 11 F. Supp. 2d 329,
13 336 (S.D.N.Y. 1998) ("Defendants also argue that Plaintiff's lack of legal action
14 against other allegedly infringing [sic] indicates that *The Joy of Trek* will not
15 damage a potential market. This argument is without merit. It is possible that
16 Paramount believed that the other books did not infringe on the Star Trek Properties.
17 It is also possible that Paramount simply has had a change in corporate policy,
18 determining that the market is now ripe for this type of derivative product.
19 Regardless, the lack of earlier litigation against other similar works is simply
20 irrelevant. A self-avowed substitute for other Paramount licensed products
21 adversely impacts the market for derivative works.").

22 The court in *Paramount Pictures Corp. v. Carol Publishing Group* further
23 explained:

24 Allowing such a defense would compel courts to examine all the other
25 allegedly infringing works on which defendant's reliance was based in

26 only showed him the doctored one prepared for the purpose of the litigation.
27 Defendants similarly failed to show Prof. Jenkins a key document in the litigation.
28 Defendants inexplicably did not show Prof. Jenkins the script that Mr. Peters testified [REDACTED] As a result, Prof. Jenkins has no opinion as to whether a motion picture based on that script would be harmful to the Plaintiffs, and no opinion on whether such a film would be "transformative."

1 order to ascertain whether these works were in fact infringing, thereby
2 creating a number of smaller infringement hearings within a single
3 copyright action. Moreover, there is no legal duty to instigate legal
4 proceedings. Perhaps it is the case, as Defendants intimated, that
5 Paramount has chosen to eschew litigation with larger publishing
6 houses, and instead bring suit against a relatively small firm. It matters
7 not. Provided it does not violate any other provision of law, Paramount
8 is free to instigate legal action against whomever it wishes.

9 *Paramount Pictures Corp.*, 11 F. Supp. 2d at 337.

10 As a court has held in this exact context, Plaintiffs' decisions as to which
11 infringing parties to sue has no bearing on the determination of whether Defendants
12 engaged in copyright infringement, and Prof. Jenkins' opinions related to that topic
13 should be excluded. *See also Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d
14 471, 484 (2d Cir. 2004) (“[F]ailure to pursue third-party infringers has regularly
15 been rejected as a defense to copyright infringement or as an indication of
16 abandonment.”) (citing *Paramount Pictures Corp.*, 11 F. Supp. 2d at 337).

17 **D. Prof. Jenkins' Testimony is an Improper Legal Conclusion.**

18 Federal Rule of Evidence 704 (“Rule 704”) allows that, “[a]n opinion is not
19 objectionable just because it embraces an ultimate issue.” However, a witness is not
20 permitted to provide a legal opinion. *United States v. Duncan*, 42 F.3d 97, 101 (2d
21 Cir. 1994); *Pelletier v. Main St. Textiles, LP*, 470 F.3d 48, 55 (1st Cir. 2006)(trial
22 court properly excluded expert testimony that constituted an opinion about the
23 applicability of the law).

24 In his report, Prof. Jenkins repeatedly opines that Defendants' Axanar works
25 are “transformative,” stating, for example, that “I see *Prelude to Axanar* as a
26 transformative work.” Jason Decl., Ex. B at 9. In places, his report reaches even
27 more explicit legal conclusions, noting that “[s]uch practices evoke *Star Trek*
28 **without infringing it,**” and that Defendants “[do] not deserve to be singled out for
legal sanction.” *Id.* at 8 (emphasis added). Statements like these, which litter Prof.
Jenkins' report, are impermissible legal conclusions and render Prof. Jenkins' entire
testimony inadmissible.

1 **III. CONCLUSION**

2 For the foregoing reasons, Plaintiffs request that the entire testimony of Prof.
3 Jenkins be excluded from trial.

4
5 Dated: December 16, 2016

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