

1 Erin R. Ranahan (SBN: 235286)
eranahan@winston.com
2 Diana Hughes Leiden (SBN: 267606)
dhleiden@winston.com
3 Kelly N. Oki (SBN: 304053)
koki@winston.com
4 WINSTON & STRAWN LLP
333 South Grand Avenue
5 Los Angeles, CA 90071
Telephone: (213) 615-1700
6 Facsimile: (213) 615-1750

7 Attorneys for Defendants,
AXANAR PRODUCTIONS, INC.,
8 and ALEC PETERS

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11
12 **Winston & Strawn LLP**
333 S. Grand Avenue
Los Angeles, CA 90071-1543

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

**DEFENDANTS AXANAR
PRODUCTIONS, INC.'S AND ALEC
PETERS' OPPOSITION TO
PLAINTIFFS' MOTION IN LIMINE
NO. 2 TO EXCLUDE SCRIPTS
CREATED AFTER THE
LITIGATION WAS FILED AND
THE TESTIMONY DISCUSSING
THEM**

19 Pretrial Conference: Jan. 9, 2017
20 Trial Date: Jan. 31, 2017

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333 S. Grand Avenue
Los Angeles, CA 90071-1543

1 **I. INTRODUCTION**

2 By their Motion *in Limine* No. 2 (“Motion”), Plaintiffs Paramount Pictures
3 Corporation and CBS Studios, Inc. (“Plaintiffs”) seek to exclude evidence and
4 arguments relating to versions of scripts for the potential fan film, *Axanar*, created
5 by Defendants Axanar Productions Inc. and Alec Peters (“Defendants”) after
6 litigation was filed. Plaintiffs contend that the most recent scripts toward making
7 that *Axanar* film, and any testimony regarding them, are somehow not relevant to
8 this case. Instead, Plaintiffs arbitrarily ask the Court to allow into evidence only an
9 interim script, created after the “locked” script they alleged in the FAC, and before
10 the most recent June 2016 script.

11 But Plaintiffs’ Motion simply ignores what Defendants have repetitively
12 stated and what discovery has confirmed: no “locked” version of the script from
13 June 2015 for the *Axanar* full-length film exists, and in any event, the version
14 Plaintiffs seeks to prop up has been superseded by a more recent script. Plaintiffs’
15 copyright infringement claim is for the *Axanar* film—not a particular script. The
16 later versions of the scripts would be relevant to show that Defendants Works’ are
17 not substantially similar to Plaintiffs’ Works and that Defendants did not willfully
18 infringe on Plaintiffs’ Works. Accordingly, Plaintiffs’ Motion should be denied and
19 the Court should allow Defendants to admit such evidence and testimony
20 concerning these subsequent versions of the script at trial.

21 **II. FACTUAL SUMMARY**

22 This case was filed on December 29, 2015. (Declaration of Jennifer Jason
23 (“Jason Decl.”), ¶ 3.) Plaintiffs’ original complaint made no reference to any script,
24 but was about the unmade *Axanar* film. (Compl., Dkt. 1.) After Defendants moved
25 to dismiss on the grounds that the *Axanar* film had not yet been made and therefore
26 a claim regarding *Axanar* was premature (Defendants’ first motion to dismiss at 10,
27 Dkt. 20), Plaintiffs amended their complaint to add reference to the “script” in an
28 attempt to defeat the prematurity argument, to show there was some aspect of the

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1 unmade film *Axanar* was “fixed” in tangible medium. (FAC ¶ 7.) Plaintiffs’ FAC
 2 alleges that its claims to the “feature film” is “based on the *Axanar* Script, *or a*
 3 *version thereof*” and defines the “*Axanar Works*” as *Prelude to Axanar*, the *Axanar*
 4 Motion Picture, ***and all versions of the Axanar Script . . .***” (FAC ¶ 2) (emphasis
 5 added.)

6 Nevertheless, Plaintiffs now seek to arbitrarily cut off consideration of “all
 7 versions” of the *Axanar* script, and in particular the most recent version, even
 8 though there is no chance the superseded November 2015 script Plaintiffs seek to
 9 introduce—and limit the jury’s consideration to—will be used to make *Axanar*.

10 There are at least 40 total versions of the *Axanar* script. (Declaration of Alec
 11 Peters in Support of Defendants’ Mot. for Summary Judgment (“Peters Decl.”) ¶ 13,
 12 Dkt. 75-19.) While Defendants announced on Facebook in August 2015 that “there
 13 was a fully revised and locked script,” Defendants have since repeatedly reiterated
 14 that they are not currently committed to using any of the existing scripts for *Axanar*,
 15 and have not decided what format, length and substance the potential film will take
 16 when presented to the public. (*Id.*) The November 26, 2015 script, that Plaintiffs
 17 seek to isolate, was written several months after the Facebook declaration of a
 18 “locked script.” (FAC ¶ 36.)

19 Given various delays and constantly-evolving plot changes, Defendants still
 20 do not even have a “final shooting script” for *Axanar*. (Declaration of Alec Peters in
 21 Opposition to Plaintiffs’ Mot. for Summary Judgment ¶ 29, Dkt No. 90-10.) The
 22 most recent revision to the script for the unmade *Axanar*, revision 10.0-NX, dated
 23 July 1, 2016, contains 57 characters, only seven of which have appeared previously
 24 in any official Star Trek episode, film, or other work. *Id.* While Defendant Peters
 25 was not aware of this script at the time of his first deposition, many revisions
 26 occurred even without his knowledge. (Peters Decl. ¶ 14.) The *Axanar* writer, Bill
 27 Hunt, testified about it, which he created in response to statements by Plaintiffs’
 28 producer and director that the lawsuit was “going away.” (*See* Declaration of Amy

1 Stern in Support of Defendants’ Oppositions to Plaintiffs’ Motions *in Limine*, Ex. 1
 2 (Hunt Tr. 87:23-88:8), concurrently filed.) Mr. Peters testified about the most recent
 3 script during his second deposition, and submitted declarations about their latest
 4 plans regarding the *Axanar* script since. At present, Defendants are not fully
 5 committed to proceeding on any of the existing scripts, and have considered a
 6 number of options for moving forward with the unmade *Axanar* film, including
 7 making a number of short “mockumentary” style episodes. (Peters Decl. ¶ 14.)

8 III. LEGAL STANDARD

9 Rulings on motions *in limine* are committed to the discretion of the trial court.
 10 *Gametech Int’l Inc. v. Trend Gaming Sys., L.L.C.*, 232 Fed. Appx. 676, 677 (9th Cir.
 11 2007). District courts may exercise their discretion to exclude irrelevant evidence,
 12 or to exclude evidence whose probative value is outweighed by other considerations.
 13 Fed. R. Evid. 401-403; *Wicker v. Oregon ex rel. Bureau of Labor*, 543 F.3d 1168,
 14 1177-78 (9th Cir. 2008). Evidence is relevant only if “it has any tendency to make a
 15 fact more or less probable than it would be without the evidence, and the fact is of
 16 consequence in determining the action.” Fed. R. Evid. 401. Moreover, “[t]he court
 17 may exclude relevant evidence if its probative value is substantially outweighed by a
 18 danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury.” Fed.
 19 R. Evid. 403; *United States v. Ellis*, 147 F.3d 1131, 1135-36 (9th Cir. 1998).

20 IV. ARGUMENT

21 a. The Subsequent *Axanar* Scripts Are Relevant to Substantial 22 Similarity

23 The evidence of scripts created after litigation is directly relevant to a
 24 substantial similarity analysis. In order to determine whether there is substantial
 25 similarity between Plaintiffs’ Works and the allegedly infringing Potential Fan Film,
 26 the jury must first be able to compare the relevant works. *See, e.g., Funky Films,*
 27 *Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006). This includes
 28 comparing the two works for similarities in ‘the plot, themes, dialogue, mood,

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1 setting, pace, characters, and sequence of events.” *Gilbert v. New Line Prods., Inc.*,
2 No. CV 09-02231 RGK, 2009 WL 7422458, at *2 (C.D. Cal. Nov. 16, 2009)
3 (Klausner, J.). Preliminary works such as draft screenplays are generally “too
4 unreliable in determining substantial similarity” as to the final work. *Id.*

5 If any script should be used as a substitute to analyze whether the *unmade*
6 *Axanar* film is substantially similar to Plaintiffs’ works, the most recent version of
7 the script, revision 10.0-NX, dated July 1, 2016, should be used, or at least
8 available, for the jury’s substantial similarity analysis.

9 Moreover, allowing introduction of multiple versions of the script, many of
10 which differ substantially from both Plaintiffs’ Works and the November 26, 2015
11 script, supports Defendants’ contention that comparing that superseded script to
12 Plaintiffs’ Works for purposes of substantial similarity is pointless.

13 **b. The Subsequent *Axanar* Scripts Are Also Relevant Because They**
14 **Are Probative of the Originality of Defendants’ Works**

15 The subsequent *Axanar* scripts are also probative of the original expression of
16 Defendants’ Works. Only if works are substantially similar when taken as a whole
17 is a finding of copyright infringement proper. *Cavalier v. Random House, Inc.*, 297
18 F.3d 815, 824 (9th Cir. 2002). Although Plaintiffs would prefer to cherry-pick from
19 the three-minute *Vulcan Scene* as evidence of infringement, the law demands more
20 for its substantial similarity analysis. *See* Dkt. No. 163 at 4.

21 Introducing the later *Axanar* scripts will further illustrate the dissimilarities in
22 “the plot, themes, dialogue, mood, setting, pace, characters, and sequence of
23 events” between Plaintiffs’ Works and Defendants’ Works. *Gilbert v. New Line*
24 *Prods., Inc.*, No. CV 09-02231 RGK, 2009 WL 7422458, at *2 (C.D. Cal. Nov. 16,
25 2009) (Klausner, J.). Specifically, the latest script, dated July 1, 2016, contains 50
26 original characters (of a total 57 characters) and is set in the same unique timeframe
27 as *Prelude*, which is unexplored in any of Plaintiffs’ Works; the latest script also
28 provides further context regarding the originality of Defendants’ plot and character

1 development—all of which are relevant (and more probative than the November 26,
2 2015 script) when it comes to analyzing whether the unmade *Axanar* infringes on
3 any of Plaintiffs’ copyrights.

4 **c. The Subsequent *Axanar* Scripts Are Also Relevant To Damages**

5 The subsequent versions of *Axanar* script are also relevant to Plaintiffs’
6 willful infringement claim and to statutory damages. While the Copyright Act does
7 not define the term “willful,” the Ninth Circuit has held that the term means “with
8 knowledge that the defendant’s conduct constitutes copyright infringement.” *United*
9 *Fabrics Intern., Inc. c. G-III Apparel Group, Ltd.*, No. CV13-00803-ODW (AJWx),
10 2013 WL 7853485, at *5 (C.D. Cal. Dec. 27, 2013) (citing *Peer Int’l Corp. v. Pausa*
11 *Records, Inc.*, 909 F.2d 1332, 1335 n.3 (9th Cir. 1990); *Columbia Pictures*
12 *Television v. Krypton Broad.*, 106 F.3d 284, 293 (9th Cir. 1997) *rev’d on other*
13 *grounds sub nom.*; *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998);
14 *cv. Danjaq LLC v. Sony Corp.*, 263 F.2d 942, 957-58 (9th Cir. 2001)). Under the
15 Copyright Act, the amount of available statutory damages per infringed work
16 increases from a minimum of \$200 where the alleged infringement was “innocent,”
17 to a minimum of \$750 to a maximum of \$30,000 to \$150,000 depending on whether
18 the infringement was “committed willfully.” 17 U.S.C. § 504(c)(2). And the jury
19 can award anywhere in between.¹

20
21 ¹ Statutory damages must “bear some relation to actual damages suffered.”
22 *Van Der Zee v. Greenidge*, 2006 WL 44020, at *2 (S.D.N.Y. 2006). Otherwise, they
23 risk running afoul to constitutional principles of due process. *Parker v. Time*
24 *Warner*, 331 F.3d 13, 22 (2d Cir. 2003) (recognizing that “statutory damages [can
25 expand] so far beyond the actual damages suffered that the statutory damages come
26 to resemble punitive damages” and that, under *BMW* and *State Farm*, “it may be that
27 in a sufficiently serious case the due process clause might be invoked”) (citing *BMW*
28 *of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) (overturning \$2 million
punitive damages award where the plaintiff obtained a jury award of only \$4,000 in
actual damages, because such punitive damages violated the Due Process Clause of
the Constitution because it was “grossly excessive” compared to the plaintiff’s
actual damages); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412
(2003) (reversing punitive damages award of \$145 million as unconstitutionally

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1 The jury “has **wide discretion** in determining the amount of statutory
 2 damages to be awarded.” *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th
 3 Cir. 1984) (emphasis added). Neither the statute nor its legislative history provide
 4 guidance on the factors the trier of fact is to consider when making an award of
 5 statutory damages. See 6 Patry on Copyright § 22:174 (2016). In the absence of any
 6 statutory or other guidance, courts have employed the following *non-exhaustive*
 7 factors in determining statutory damages: (1) the expenses saved and the profits
 8 reaped by the defendant, (2) the revenues lost by the plaintiff, (3) the value of the
 9 copyright, (4) the deterrent effect on others besides the defendant, (5) willfulness of
 10 the defendant’s conduct, (6) whether the defendant has cooperated in providing
 11 records to assess the value of the infringing material, (7) the potential for
 12 discouraging the defendant, and (8) the conduct and attitude of the parties; (9) any
 13 benefit to Plaintiffs from Defendants’ conduct. *See e.g., Coach, Inc. v. Am. Fashion*
 14 *Gift*, CV 12-07647-MWF RZK, 2013 WL 950938, at *2 (C.D. Cal. Mar. 12, 2013;
 15 *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 568 (S.D.N.Y. 1995).

16 The subsequent versions of the *Axanar* script demonstrate that Defendants’
 17 have gone to great lengths—both before and since this lawsuit commenced—to stay
 18 within the tolerated realm of fan films. This is highly relevant to Defendants’ state
 19 of mind while creating the *Axanar* Works, which is in turn highly relevant to the
 20 jury’s assessment of innocence or willfulness, and factors (5), (7) and (8) above. All
 21 versions of the *Axanar* script show that Defendants never repeated or derived from
 22 any of Plaintiffs’ original storyline; instead, Defendants’ Works are distinct from
 23 Plaintiffs’ Works in time period, plot, dialogue, theme, and most characters.
 24 Defendants’ efforts to revise the script and reduce concerns subsequent to the
 25 lawsuit offers further evidence regarding Defendants’ good faith in this regard.

26
 27
 28 excessive compared to the \$1 million compensatory damages award because there
 must be some proportionality of the punitive award to the plaintiff’s actual harm).

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V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs’ Motion and allow Defendants to introduce evidence and testimony of later versions of the *Axanar* script.

Dated: January 6, 2017

WINSTON & STRAWN LLP

By: /s/ Erin R. Ranahan

Erin R. Ranahan
Diana Hughes Leiden
Kelly N. Ōki
Attorneys for Defendants,
AXANAR PRODUCTIONS, INC.
and ALEC PETERS

Winston & Strawn LLP
333 S. Grand Avenue
Los Angeles, CA 90071-1543