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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.

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

Assigned to: Hon. R. Gary Klausner

**DEFENDANTS AXANAR
PRODUCTIONS, INC., AND ALEC
PETERS' NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

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

Date: 12/19/16
Time: 9:00 a.m.
Place: Courtroom 850, 8th 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

NOTICE OF MOTION AND MOTION

TO THE COURT, PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on December 19, 2016 at 9:00 a.m., or as soon thereafter as counsel may be heard by the above-entitled court, located at 255 East Temple Street, Los Angeles CA 90012, on the eighth floor in Courtroom 850, before the Honorable R. Gary Klausner, Defendants Axanar Productions, Inc. and Alec Peters (“Defendants”) will and hereby do move the Court or an order granting summary judgment in favor of Defendants and against Plaintiffs on all of Plaintiffs’ claims.

Defendants bring this motion pursuant to Fed. R. Civ. P. 56 and Local Rule 56 on the grounds that they are entitled to summary judgment because: (1) Plaintiffs’ claims are premature with respect Defendants’ evolving plans to pursue a non-commercial film project, and their creation of scripts for that project; (2) none of Plaintiffs’ alleged works in this action are substantially similar to Defendants’ works; and/or (3) Defendants’ works are fair use.

Defendants’ Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, Statement of Uncontroverted Facts and Conclusions of Law, the Declarations of Alec Peters, Reece Watkins, Jonathan Lane, and Kelly N. Oki filed herewith and the exhibits attached thereto, the pleadings and papers on file herein, other records on file in this matter, and any further material and argument presented to the Court at the time of the hearing.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on November 7, 2016.

Dated: November 16, 2016

WINSTON & STRAWN LLP

By: /s/ Erin R. Ranahan
Erin R. Ranahan
Diana Hughes Leiden
Kelly N. Oki
Attorneys for Defendants,
AXANAR PRODUCTIONS, INC.
and ALEC PETERS

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Seeking to squash the very creativity that copyright law was designed to
4 protect, Plaintiffs Paramount Pictures Corp. and CBS Studios, Inc. (“Plaintiffs”) have
5 sued one of Star Trek’s biggest fans, individual Alec Peters, and his small company,
6 Axanar Productions, Inc. (“Defendants”), for allegedly infringing the copyrights of 40
7 Star Trek television episodes, 11 movies, and four novels (“Plaintiffs’ Works”).
8 Plaintiffs’ claims against Defendants are directed towards (i) an original twenty-
9 minute “mockumentary” that has been available for free on YouTube since 2014,
10 *Prelude to Axanar* (“*Prelude*”); (ii) a three-minute scene (the “*Vulcan Scene*”); and
11 (iii) Defendants’ evolving plans to pursue another non-commercial film project (the
12 “Potential Fan Film”), and their creation of scripts for that project (collectively,
13 “Defendants’ Works”).

14 Plaintiffs’ claims fail as a matter of law for at least three reasons. *First*,
15 Plaintiffs’ claims with respect to the Potential Fan Film are premature, as there are
16 currently many evolving versions of scripts for the Potential Fan Film, and only one
17 short scene, the *Vulcan Scene*. Moreover, while the latest script for the Potential Fan
18 Film features 50 original characters, an original plot, dialogue, timeline, and story,
19 Defendants have not yet settled on the direction or style the Potential Fan Film will
20 take, thus making consideration of substantial similarity and fair use analyses between
21 Plaintiffs’ Works and any final Potential Fan Film impossible.

22 *Second*, none of Defendants’ Works are substantially similar to Plaintiffs’
23 Works. Plaintiffs own a limited number of Star Trek episodes and films, but they do
24 not own a copyright to the idea of Star Trek, or the Star Trek universe as a whole.
25 Defendants’ works do not borrow sufficient material from the heart of any of
26 Plaintiffs’ Works to be considered substantially similar to, or derivative of, any
27 particular episode or film owned by Plaintiffs.

28 *Third*, even if the Court reaches the merits of Plaintiffs’ claims, Defendants’

1 Works fall squarely within the protection of fair use. There is no evidence whatsoever
2 that Defendants' Works have caused any negative impact on Plaintiffs' market. While
3 Defendants have used elements that have appeared in the Star Trek universe,
4 Defendants' Works are transformative—going where no man has gone before. Indeed,
5 Defendants' Works present new insights, featuring numerous original characters,
6 original dialogue, a unique plot, and an unexplored timeline. *Prelude* was presented in
7 a unique “mockumentary” style, unlike any Star Trek work before it. Defendants'
8 Works also borrow from numerous other sources, using the minimum amount of
9 existing material from the expansive Star Trek universe to tell a unique story about an
10 obscure character that appeared in a single Star Trek episode in 1969, a war veteran
11 otherwise abandoned by Plaintiffs in their more recent episodes and films.
12 Defendants' Works are precisely the type of creative, original works the Copyright
13 Act was designed to foster.

14 As there is no genuine issue of material fact in this case, the Court should grant
15 judgment in favor of Defendants.

16 **II. STATEMENT OF FACTS**

17 **A. Plaintiffs' Copyrights Are Limited**

18 Star Trek was originally conceived by Gene Roddenberry, and debuted as a
19 television show in 1966. (SUF 1.) Plaintiffs allege that Defendants' Works infringe
20 40 specific Star Trek episodes and 11 movies. (SUF 2). Plaintiffs do not purport to
21 own in this lawsuit a copyright to the Star Trek universe. Rather, Plaintiffs own a
22 limited number of copyrights to certain episodes and films. (SUF 3). Of the 51
23 allegedly infringed works, to date, Plaintiffs have not produced a single copy of *any* of
24 these episodes or films, though discovery is now closed. (SUF 4).¹ Plaintiffs do not
25 allege that Defendants' Works use any clips or otherwise copy the plot, dialogue,
26 timeline, or central characters of any of Plaintiffs' Works, but instead allege

27 _____
28 ¹ Plaintiffs lodged copies of the allegedly infringed works in conjunction with their
Motion for Summary Judgment. *See* ECF No. 72-63.

1 infringement of such elements such as clothing, shapes, words, colors, short phrases,
2 the Klingon language, and works derived from nature, third parties, and the public
3 domain. (SUF 5). While Plaintiffs do have copyright registrations to central Star
4 Trek characters such as Spock and Captain Kirk, Defendants Works’ do not include
5 those or any other characters to which Plaintiffs own separate copyrights. (SUF 6).

6 **B. Defendants’ Axanar Works**

7 Defendant Alec Peters, a lifelong Star Trek fan, founded Axanar Productions
8 along with a group of other Star Trek fans to celebrate their love of Star Trek by
9 creating original stories which take place in the so-called Star Trek universe. (SUF 7).
10 Defendants’ first endeavor was the short film *Prelude*, which was to be followed by
11 the as yet unmade Potential Fan Film tentatively titled *Axanar*. (SUF 8). Both
12 *Prelude* and the Potential Fan Film were intended to tell the original story of Garth of
13 Izar, an obscure character who made his lone television appearance in a 1969 episode
14 from Star Trek: The Original Series titled *Whom Gods Destroy*. (SUF 9). *Prelude*
15 portrays (and the Potential Fan Film would portray) Garth of Izar in a new way not
16 seen in any of Plaintiffs’ Works—specifically, as a war veteran with psychological
17 issues resulting from his traumatic experiences during the Four Years War between
18 the United Federation of Planets and the Klingon Empire. (SUF 10).

19 Star Trek, which promotes the ideals of tolerance, unity, inclusion, and peace,
20 aired during the Vietnam War, before it was socially accepted to publicly examine
21 issues such as Post-Traumatic Stress Disorder. (SUF 11). Through their Works,
22 Defendants sought to depart entirely from the themes previously explored in
23 Plaintiffs’ Works, and instead create a true war film. (SUF 10). Defendants’ Works
24 are both social commentary and satire, in that they focus on and intend to expose the
25 true horrors and consequences of war in ways Plaintiffs’ Works did not. (SUF 12).
26 *Prelude* takes place in a time period previously unexplored by Plaintiffs’ Works, and
27 features an original plot. It is shot in a narrative “mockumentary” style, featuring
28 direct-to-camera interviews with characters, a style never before used by either

1 Plaintiffs or in any other Star Trek fan fiction. (SUF 13). Defendants' Works are low
2 budget, intended to be distributed for free online, appeal to a relatively small audience
3 of "Trekkies," and have made no profit. (SUF 14).

4 In August of 2014, Defendants released *Prelude* for free on YouTube.com.
5 (SUF 15). In March of 2014, Defendants launched a Kickstarter campaign to raise
6 money for the Potential Fan Film. (SUF 16). Aside from the *Vulcan Scene* (released
7 for free on YouTube.com in July 2015), which may or may not ultimately become part
8 of the Potential Fan Film, no scenes from the Potential Fan Film have been filmed.
9 (SUF 17). Of the six total characters portrayed in *Prelude*, four were developed
10 entirely by Defendants. (SUF 18). As the *Vulcan Scene* and the Potential Fan Film
11 are both intended to build off of the *Prelude* storyline, they also are set in the same
12 unique timeframe. (SUF 19). The three minute *Vulcan Scene* features two characters,
13 one of which is completely original, as well as Defendants' own dialogue. (SUF 20).

14 Defendants' Works incorporate elements, themes, and ideas from numerous
15 sources. For instance, as a war mockumentary, *Prelude* was largely inspired by works
16 such as "M*A*S*H," "Band of Brothers," "Babylon 5," "The Pacific" and "The Civil
17 War." (SUF 21). Mr. Peters modeled his performance of Garth of Izar after the
18 veterans depicted in "Band of Brothers," the HBO war documentary mini-series.
19 (SUF 22). The Potential Fan Film was also intended to borrow from war film sources,
20 including "The Longest Day," "Patton," and "The Hunt for Red October." (SUF 23).
21 While Defendants do not dispute that their Works were inspired by Star Trek, the
22 Works drew from many other inspirations and sources, and sought to create the
23 entirely unique concepts of a war film in a mockumentary style. (SUF 13). The
24 characters depicted are modeled as much, if not more, on real world war heroes as
25 they are on any specific character from Plaintiffs' Works. (SUF 13, SUF 10). While
26 the Potential Fan Film is unfinished, and its scripts still in flux, the most recent draft
27 script featured **50 original characters** (of a total 57 characters). (SUF 24). Of the six
28 total characters portrayed in *Prelude*, four were developed entirely by Defendants.

1 (SUF 18). As the *Vulcan Scene* and the Potential Fan Film are both intended to build
2 off of the *Prelude* storyline, they also are set in the same unique timeframe. (SUF 10,
3 SUF 13). The three minute *Vulcan Scene* features two characters, one of which is
4 completely original, as well as Defendants’ own dialogue. (SUF 20).

5 At the Motion to Dismiss stage of these proceedings, this Court relied on the
6 truth of Plaintiffs’ allegation that as of August 2015, there was a “fully revised and
7 locked” script for the Potential Fan Film. But as has been shown through discovery,
8 Defendants used “locked script” as a term of art meaning that no new sets, scenes or
9 characters will be added to a script, and is used to aid in budgeting purposes. (SUF
10 26.) Many scripts have been created since the unfinished August 2015 script, all using
11 varying degrees of the Star Trek universe. (SUF 27). Defendants are not currently
12 committed to using any of the existing scripts in the Potential Fan Film, and have not
13 decided what format, length and substance the Potential Fan Film will take, though
14 they are considering making more mockumentary style works. (SUF 28).

15 **C. Plaintiffs Have Not Been Damaged By Defendants**

16 Plaintiffs’ Works are distributed in the following markets: (1) film distribution
17 and major movie theatres; (2) television and on-demand programming; (3) premium
18 streaming and download services; and (4) DVD consumer sales. (SUF 29). Unlike
19 Plaintiffs’ Works, Defendants’ Works are not intended to be commercialized, and
20 Defendants have no ambitions of competing against Plaintiffs’ Works in movie
21 theaters, on television, over premium streaming services, or to otherwise sell their
22 Works for profit. (SUF 30).

23 Plaintiffs’ most recent feature film, *Star Trek Beyond*, [REDACTED]
24 [REDACTED]

25 [REDACTED] Plaintiffs’ Works are budgeted and produced for appeal to the
26 general public worldwide, offering the type of production, special effects, talent, and
27 other qualities that result in extensive profits. Notably, Plaintiffs’ have not asked
28 Defendants to remove either *Prelude* or the *Vulcan Scene* from its website. (SUF 33).

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[REDACTED]

In fact, Defendants’ Works have had the opposite effect: while there is no evidence of a negative market impact on Plaintiffs’ Works, there *is* evidence of increased and continued enthusiasm for Plaintiffs’ Works stemming directly from Defendants’ Works because Defendants’ Works provide free promotion for Plaintiffs’ franchise. (SUF 36). Moreover, Star Trek fans have produced and disseminated fan fiction for over 50 years, without complaint, and rather with encouragement from Plaintiffs. (SUF 37). Plaintiffs have benefitted from the unpaid and often unacknowledged labor of fans, who have helped to maintain engagement in Plaintiffs’ Works during leaner years in Plaintiffs’ cycle of production. (SUF 38).

In contrast to the vast budget for Plaintiffs’ Works, *Prelude* had a production budget of \$125,000.00, and was posted on YouTube.com to be viewed for free, with no profit to Defendants. (SUF 39). The undisputed facts show no evidence that the free YouTube.com presentations of *Prelude* compete with, substitute for, or have any impact whatsoever on Plaintiffs’ multimillion dollar international entertainment enterprise. (SUF 40).

There is no evidence that the unfinished Potential Fan Film script, or any of the prior drafts of the script, competes with, acts as a substitute for, or has any impact whatsoever on Plaintiffs’ Star Trek franchise. (SUF 41). Indeed, particularly with respect to the Potential Fan Film script, [REDACTED]

[REDACTED] is completely speculative. (SUF 42).

D. This Lawsuit

On March 11, 2016, Plaintiffs filed their first amended complaint (“FAC”),

1 claiming infringement of an unspecified number of copyrights to Star Trek episodes
2 and films. At the Motion to Dismiss stage, this Court rejected Defendants’ argument
3 that Plaintiffs’ claim regarding the Potential Fan Film was premature, as the Court
4 assumed Plaintiffs’ allegations that Defendants had a “fully revised and locked script”
5 to be true. (SUF 26). To the contrary, there were approximately 12 more scripts
6 prepared after the August 2015 Facebook post proclaiming a “fully revised and
7 locked” script, including new scripts that were prepared after this litigation
8 commenced. (SUF 43). Indeed, though Defendants halted plans for any filming and
9 temporarily stopped working on the project altogether after Plaintiffs filed suit,
10 Defendants resumed drafting scripts when it was publicly announced that this lawsuit
11 was “going away.” (SUF 44).

12 In March 2016, Justin Lin, the director of the most recent Star Trek motion
13 picture, *Star Trek Beyond*, publicly commented on this case, stating: “[t]his is getting
14 ridiculous! I support the fans. Trek belongs to all of us.” (SUF 45). Shortly
15 thereafter, in May 2015, J.J. Abrams, who directed and/or produced the three most
16 recent Star Trek movies, publicly stated that he and Justin Lin “realized this [case]
17 was not an appropriate way to deal with the fans.” (SUF 46). Moreover, Abrams
18 stated that “fans should be celebrating [Star Trek]. Fans of Star Trek are part of this
19 world. So [Justin] went to the studio and pushed them to stop this lawsuit and now,
20 within the next few weeks, it will be announced this is going away, and that fans
21 would be able to continue working on their project.” (SUF 47). Notwithstanding the
22 recognition by those ambassadors for Star Trek that the creativity of its fans should be
23 celebrated rather than punished, this lawsuit endures.

24 **E. The Longstanding Tradition of Star Trek Fan Fiction**

25 Gene Roddenberry encouraged the creation of fan fiction, and was honored that
26 fans were so passionate about Star Trek that they were inspired to create their own fan
27 works to celebrate it. In the 1976 book *Star Trek: The New Voyages*, Mr.
28 Roddenberry stated in the Foreword that he “realized that there is no more profound

1 way in which people could express what Star Trek has meant to them than by creating
2 their own very personal Star Trek [fan fiction].” (SUF 48). Since this statement, a
3 substantial number of films have been created by fans without any complaint by
4 Plaintiffs, some using characters from Plaintiffs’ Works and exact replicas of Star
5 Trek movie sets. (SUF 49). For over 50 years, Plaintiffs have tolerated, and even
6 encouraged a community of fandom and fan fiction surrounding Star Trek. Thus, this
7 lawsuit came as a particular surprise to Defendants in light of prior communications
8 Plaintiff CBS had with Defendants about Defendants’ Works, and given Plaintiffs’
9 previous tolerance and encouragement of fan fiction, and the promotional value
10 Plaintiffs have enjoyed as a result of those works of fan fiction. (SUF 50).

11 **III. JUDICIAL STANDARD FOR SUMMARY JUDGMENT**

12 A motion for summary judgment should be granted if there is no genuine issue
13 of material fact and the moving party is entitled to judgment as a matter of law. Fed.
14 R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The
15 mere “scintilla” of evidence supporting the non-moving party’s position is
16 insufficient. *Id.* at 252. The moving party will win summary judgment unless there is
17 “evidence on which a jury could reasonably find for the [non-moving party].” *Id.*;
18 *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005).

19 **IV. ARGUMENT**

20 **A. Plaintiffs’ Claims Regarding The Unmade Potential Fan Film Are** 21 **Premature**

22 A federal court will “not resolve issues involving contingent future events that
23 may not occur as anticipated, or indeed may not occur at all.” *Clinton v. Acequia,*
24 *Inc.*, 94 F.3d 568, 572 (9th Cir. 1996). Accordingly, “[b]efore a case is justiciable in
25 federal court, it must be alleged that the plaintiff is threatened by injury that is both
26 real and immediate, [and] not conjectural or hypothetical.” *Portland Police Ass’n. v.*
27 *City of Portland*, 658 F.2d 1272, 1273 (9th Cir. 1981). “Without such immediacy and
28 certainty of injury the dispute is not ripe; it has not matured sufficiently to warrant

1 judicial intervention.” *Id.*

2 To determine whether there is substantial similarity between Plaintiffs’ Works
3 and the allegedly infringing Potential Fan Film, this Court must be able to compare
4 the relevant works. *See, e.g., Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d
5 1072, 1076 (9th Cir. 2006). As this Court has stated, “for the extrinsic similarity
6 analysis, the court may compare the two works for similarities in ‘the plot, themes,
7 dialogue, mood, setting, pace, characters, and sequence of events.’” *Gilbert v. New*
8 *Line Prods., Inc.*, No. CV 09-02231 RGK, 2009 WL 7422458, at *2 (C.D. Cal. Nov.
9 16, 2009) (Klausner, J.). Thus, Courts have held that preliminary works such as draft
10 screenplays are “too unreliable in determining substantial similarity” as to the final
11 work. *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 435 (S.D.N.Y. 1985); *See v.*
12 *Durang*, 711 F.2d 141, 142 (9th Cir. 1983) (plaintiff not allowed discovery of “early
13 drafts”); *Hudson v. Universal Pictures Corp.*, No. 03-CV-1008(FB)(LB), 2004 WL
14 1205762, at *3 (E.D.N.Y. April 29, 2004) (“The Court is under no obligation to
15 consider the draft scripts[.]”); *Marshall v. Yates*, No. CV-81-1850-MML, 1983 WL
16 1148, at *2 n.2 (C.D. Cal. Oct. 26, 1983) (refusing to consider “draft screenplays or
17 the shooting script” of movie because they were “not relevant”). Rather, it is “the
18 works as they were presented to the public” that are relevant, not preliminary internal
19 drafts. *Walker*, 615 F. Supp. at 434; *see also Chase-Riboud v. DreamWorks, Inc.*, 987
20 F. Supp. 1222, 1227 n.5 (C.D. Cal. 1997) (to determine substantial similarity, “the
21 court need only consider the final version of [defendant’s] film as presented to the
22 viewing public”); 4 Nimmer on Copyright § 13.03[D] (“[C]ourts have routinely
23 rejected requests to consider earlier [screenplay] drafts.”).

24 Because Defendants are not currently committed to using any of the existing
25 scripts in the Potential Fan Film, and have not decided what format, length and
26 substance the Potential Fan Film will take when presented to the public, Plaintiffs’
27 claims against Defendants based on the Potential Fan Film are unripe. (SUF 28).
28 Without a film of Defendants’ against which to compare Plaintiffs’ Works, this Court

1 cannot complete either a substantial similarity or fair use analysis. The existence of
2 many draft scripts for the Potential Fan Film precludes Plaintiffs' claim about the
3 Potential Fan Film, which is based on the visual aspects of the film itself.

4 Further, the lack of a true final script shows that there is no real or imminent
5 certainty of injury to Plaintiffs. In fact, through the many scripts, Defendants have
6 attempted to create drafts to alleviate Plaintiffs' concerns regarding alleged
7 infringement, and are now leaning towards more mockumentary style works. SUF 28,
8 35. As courts have recognized, "a defendant may legitimately avoid infringement by
9 intentionally making changes in a work which would otherwise be regarded as
10 substantially similar to that of the plaintiff's." *Warner Bros., Inc. v. Am. Broad. Cos.*,
11 720 F.2d 231, 241 (2d Cir. 1983); *See*, 711 F.2d at 142 ("Copying deleted or so
12 disguised as to be unrecognizable is not copying"). Plaintiffs' premature claims seek
13 to prevent Defendants from being able to avoid potential liability by making changes
14 to the Potential Fan Film's script to address Plaintiffs' concerns. Plaintiffs' claims
15 regarding the Potential Fan Film should be rejected.

16 **B. None of Defendants' Works Are Substantially Similar to Plaintiffs'**
17 **Works**

18 Under 17 U.S.C. § 103(b), any "[c]opyright in a...derivative work extends only
19 to the material contributed by the author of such work, as distinguished from the
20 preexisting material employed in the work." In other words, to the extent a character
21 or element appeared in one of Plaintiffs' Works, *a new copyright is not created every*
22 *time that same element appears again in a subsequent episode or film.* Even if
23 Defendants' Works were "derived" from or inspired by any of Plaintiffs' Works,
24 Defendants' works are only a "derivative work" if they appropriate protected
25 expression from Plaintiffs' Works. *See* W. Landes & R. Posner, *The Economic*
26 *Structure of Intellectual Property Law* 109 (2003) ("If there is no copying of
27 copyrighted material, the fact that a work derived from, in the sense of being inspired
28 or suggested by, a previous work does not make the second work an infringement of

1 the first.”). Indeed, “[a] work is not derivative unless it has *substantially* copied from
2 a prior work.” 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright*, § 3.01 at 3-3.

3 Copyright only protects the original elements of Plaintiffs’ Works. To
4 determine whether the “protectable elements” of Plaintiffs’ Works, “standing alone,”
5 are substantially similar to Defendants’ Works, this Court must “filter out and
6 disregard the nonprotectable elements.” *Funky Films*, 462 F.3d at 1077. Though
7 Plaintiffs attempt to do so, they cannot successfully claim copyright in the following
8 as they are not protectable by copyright: the general mood and theme of science
9 fiction; names and words used in Plaintiffs’ Works; elements in the public domain and
10 nature; the Klingon language; Scènes à Faire; most specific characters; and the general
11 costuming and appearance of, or shapes affiliated with, characters in Plaintiffs’
12 Works. *See, e.g.*, 37 C.F.R. § 202.1(a) (words and short phrases such as names, titles,
13 and slogans are not subject to copyright); *Feist Publ’ns, Inc. v. Rural Tel. Svc. Co.*,
14 499 U.S. 340, 350 (1991) (copyright does not protect elements from the public
15 domain); *Psihoyos v. The Nat’l Geographic Soc’y*, 409 F. Supp. 2d 268, 275
16 (S.D.N.Y. 2005) (elements derived from nature not copyrightable); *Cavalier v.*
17 *Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002) (scenes a faire not protected
18 by copyright); *DC Comics v. Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015) (ancillary
19 characters not copyrightable); *Ent. Research Grp., Inc. v. Genesis Creative Grp., Inc.*,
20 122 F.3d 1211, 1221 (9th Cir. 1997) (clothing not copyrightable, except to the extent
21 original designs can be separated from the clothing’s function).

22 Once these nonprotectable elements have been filtered out, it is apparent that
23 Plaintiffs’ Works are not substantially similar to any of Defendants’ Works. *Prelude*
24 is the story of Garth of Izar, an extremely obscure character who appeared in just one
25 1969 *Star Trek: The Original Series* television episode. (SUF 9). *Prelude* takes place
26 in a time period previously unexplored by Plaintiffs’ Works, features an original plot,
27 and is shot in a narrative “mockumentary” style never before used by either Plaintiffs
28 or any other *Star Trek* fan fiction. (SUF 13). Of the six total characters portrayed in

1 *Prelude*, four were developed entirely by Defendants. (SUF 18).

2 While the Potential Fan Film is unfinished, and its scripts still in flux, the most
3 recent draft script featured **50 original characters** (of a total 57 characters). (SUF 24).
4 As the *Vulcan Scene* and the Potential Fan Film are both intended to build off of the
5 *Prelude* storyline, they also are set in the same unique timeframe. (SUF 10, SUF 13).
6 The three minute *Vulcan Scene* features two characters, one of which is completely
7 original, as well as Defendants' own dialogue. (SUF 20). Thus, while Plaintiffs
8 arguably may claim copyright interests in the plots, dialogue, settings, pace, and
9 sequence of events in Plaintiffs' Works, no substantial similarity exists between those
10 elements of Plaintiffs' Works and Defendants' Works. (SUF 3). As Defendants'
11 Works are not substantially similar to Plaintiffs' Works, judgment should be entered
12 in favor of Defendants.

13 **C. Defendants' Works Are Protected As Fair Use**

14 To avoid "stifl[ing] the very creativity which [copyright] law is designed to
15 foster," certain uses of copyrighted works are protected as fair use. 17 U.S.C. § 107;
16 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). In determining
17 whether a work constitutes fair use, the four statutory factors to be considered are: (1)
18 the purpose and character of the use; (2) the nature of the copyrighted work; (3) the
19 amount and substantiality of the portion used in relation to the copyrighted work as a
20 whole; and (4) the effect of the use upon the potential market for or value of the
21 copyrighted work. 17 U.S.C. § 107. Courts will look to the totality of the
22 circumstances and apply the four factors on a "case-by-case analysis" to determine
23 whether fair use exists. *Campbell*, 510 U.S. at 577–78. Moreover, there is no bright-
24 line rule for determining fair use. *Harper & Row Publishers, Inc. v. Nation Enters.*,
25 471 U.S. 539, 588 (1985). Thus, the four factors are not considered in isolation, but
26 rather, are weighed together "in light of the copyright law's purpose to 'promote the
27 progress of science and art by protecting artistic and scientific works while
28 encouraging the development and evolution of new works.'" *Campbell*, 510 U.S. at

1 577 (citation omitted). Upon examination of the four factors below, Defendant’s
2 Works are protected by fair use.

3 **1. As Defendants’ Works Have No Effect Upon the Potential**
4 **Market For or Value of Plaintiffs’ Works, This Factor**
5 **Strongly Weighs In Favor of Fair Use**

6 The most important fair use factor involves the *market impact* of the secondary
7 work on the original work, as well the “harm to the market for derivative works.”
8 *Campbell*, 510 U.S. at 590. The Supreme Court has stated that this factor “is
9 undoubtedly the single most important element of fair use.” *Harper*, 471 U.S. at 566.
10 In assessing the market impact factor of the fair use analysis, courts have held that
11 where “the allegedly infringing use does not substitute for the original and serves a
12 ‘different market function,’ such factor weighs in favor of fair use.” *Seltzer v. Green*
13 *Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013) (finding this factor weighed in favor of
14 fair use as defendant’s video “did not perform the same market function” as the
15 original work); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1275 (11th Cir.
16 2001) (finding this factor weighed in favor of fair use as defendant’s work was
17 “unlikely to displace sales . . . [or] supplant demand for” the original work). In
18 examining the market impact of a secondary work, the market considered is the
19 traditional market for the copyrighted work. *Wall Data Inc. v. Los Angeles Cnty.*
20 *Sheriff’s Dept.*, 447 F.3d 769, 780 (9th Cir. 2006), *quoting Harper & Row*, 477 U.S. at
21 568; *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614 (2d Cir.
22 2006) (“we look at the impact on potential licensing revenues for ‘traditional,
23 reasonable, or likely to be developed markets’”), *quoting Am. Geophysical Union v.*
24 *Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994). In addition, courts have found that,
25 “[t]he more transformative the new work, the less likely the new work’s use of
26 copyrighted materials will affect the market for the materials.” *Elvis Presley Enters.,*
27 *Inc. v. Passport Video*, 349 F.3d 622, 631 (9th Cir. 2003), *overruled on other grounds*
28

1 as stated in *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989 (9th Cir.
2 2011); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2002). This factor
3 further requires courts to consider “whether unrestricted and widespread conduct of
4 the sort engaged in by defendant . . . would result in a substantially adverse impact on
5 the potential market for the original.” *Campbell*, 510 U.S. at 590.

6 Plaintiffs have not and will not suffer any market harm as a result of the
7 creation and distribution of Defendants’ Works. (SUF 34, 42). Instead, these works
8 offer free promotional value to Plaintiffs. (SUF 36). The works are not intended to be
9 commercialized, and will not be competing against Plaintiffs’ Works in movie theaters
10 or otherwise sold for profit. (SUF 30). *See e.g., Seltzer*, 725 F.3d at 1179. Given the
11 difference in scale and distribution, (SUF 31, 39), there is no evidence that
12 Defendants’ Works supplant the market for Plaintiffs’ Works.

13 Further, Courts have determined that there is little risk to the market for a work
14 where an allegedly infringing work is distinct from the copyrighted work at issue.
15 *Adjmi v. DLT Entm’t Ltd.*, 97 F. Supp. 3d 512, 533 (S.D.N.Y. 2015), appeal
16 withdrawn (June 25, 2015) (“A work composed primarily of an original, particularly
17 its heart, with little added or changed, is more likely to be a merely superseding use,
18 fulfilling demand for the original.”) (citing *Campbell*, 510 U.S. at 587-88). Here,
19 Defendants’ Works do not diminish the novelty of Plaintiffs’ Works because they do
20 not repeat or derive from any original storyline; instead, Defendants’ Works are
21 distinct from Plaintiffs’ Works in time period, plot, dialogue, theme, and most
22 characters.

23 Defendants’ Works do not act as a substitute for Plaintiffs’ Works. Thus, far
24 from harming Plaintiffs’ Works, the Star Trek franchise has enjoyed numerous
25 benefits as a result of Defendants’ Works, and other works of Star Trek fan fiction.
26 (SUF 39-40). As Defendants’ Works and Plaintiffs’ Works serve “fundamentally
27 different functions,” this factor weighs strongly in favor of fair use.

28 There is no evidence that the unfinished Potential Fan Film script, or any of the

1 prior drafts of the script, competes with, acts as a substitute for, or has any impact
2 whatsoever on Plaintiffs' Star Trek franchise. (SUF 30). Even though the Potential
3 Fan Film script is unfinished, Defendants intend for the story to be original in its
4 themes, dialogue, characters, and timeframe. Plaintiffs' only theory of market harm is
5 completely speculative, (SUF 34), and there is no evidence that the unfinished *Axanar*
6 script has had—or could have—any negative market impact on Plaintiffs' Works.

7 Given the foregoing, this factor weighs heavily in favor of finding that
8 Defendants' Works are a fair use because Defendants' Works do not diminish the
9 market for Plaintiffs' Works and serve fundamentally different functions.

10 **2. As They Are Transformative and Noncommercial in Nature,**
11 **the Purpose and Character of Defendants' Works Weighs**
12 **Strongly in Favor of Fair Use**

13 The second factor, regarding *purpose and character* of the secondary work, has
14 two prongs. First, courts consider “whether such use is of a commercial nature” or for
15 nonprofit purposes, such as news reporting, criticism, or comment. 17 U.S.C. § 107.
16 Specifically, “[t]he crux of the profit/nonprofit distinction is not whether the sole
17 motive of the use is monetary gain but whether the user stands to profit from
18 exploitation of the copyrighted material without paying the customary price.” *Harper*,
19 471 U.S. at 562. Second, courts will consider whether the new work is
20 “transformative.” *Campbell*, 510 U.S. at 579. A work is transformative when it “adds
21 something new, with a further purpose or different character, altering the first with
22 new expression, meaning, or message” instead of “merely ‘supersed[ing] the objects’
23 of the original creation.” *Id.* (Citation omitted). Transformative works “lie at the heart
24 of the fair use doctrine’s guarantee of breathing space within the confines of
25 copyright,” and thus “the more transformative the new work, the less will be the
26 significance of other factors, like commercialism.” *Id.* Transformative works further
27 copyright law’s goal of “promot[ing] science and the arts.” *Id.* Thus, the key inquiry
28 for this factor is “whether and to what extent the new work is ‘transformative.’”

1 *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164 (9th Cir. 2007).

2 *Prelude* is both non-commercial and transformative in nature. The short
3 mockumentary film is inherently non-commercial, as it is available for free on
4 YouTube.com, and its purpose is comment and criticism. *See* 17 U.S.C. § 107. (SUF
5 12, SUF 30). Further, the undisputed facts show that Defendants did not make any
6 profit from the free distribution of *Prelude*, and have no intent to do so in the future.
7 There is no evidence that Defendants stand to profit from Plaintiffs' Works. *See*
8 *Harper*, 471 U.S. at 562.

9 Further, *Prelude* is transformative. The styling of *Prelude* as a short
10 mockumentary featuring first-person interviews makes it especially unique and
11 distinctive from Plaintiffs' Works. The narrative style of *Prelude*, which has never
12 before been seen in Plaintiffs' Works, is reminiscent of historical documentaries on
13 famous wars and their impacts on society. (SUF 21.) This style allowed Defendants
14 to add critical commentary and analysis in order to highlight a comparison of concepts
15 in the Star Trek universe to the present-day military industrial complex, thus serving a
16 "completely different purpose" than the solely entertainment-focused Plaintiffs'
17 Works. (SUF 10.) *See Threshold Media Corp. v. Relativity Media, LLC*, 166 F. Supp.
18 3d 1011, 1023 (C.D. Cal. 2013) (finding "[t]his consideration is important and on
19 more than one occasion has led the Ninth Circuit to sanction as fair the wholesale
20 copying of an entire work.").

21 The *Vulcan Scene* is similarly non-commercial and is also available for free on
22 YouTube.com. As discussed briefly above, the undisputed facts show that Defendants
23 did not make any profit from the free distribution of the *Vulcan Scene*, and have no
24 intent to do so in the future. (SUF 15, SUF 30). Furthermore, the *Vulcan Scene*
25 contains completely original dialogue and plot, and does not contain any storylines
26 previously expressed by Plaintiffs' Works, any main characters, or any of the footage
27 or scripts from past licensed Star Trek media. (SUF 13, SUF 20).

28 Further, the *Vulcan Scene* is transformative of Plaintiffs' Works, to the extent it

1 makes use of them at all. The scene contains less than three minutes of dialogue, all of
2 which is original to Defendants. Indeed, when viewed in light of *Prelude*, the *Vulcan*
3 *Scene* is a clear continuation of the critical analysis and entirely original story told in
4 *Prelude*. (SUF 10, SUF 20).

5 Contrary to Plaintiffs' allegations, no final script for the Potential Fan Film
6 exists. (SUF 27, 28.) Therefore, this Court remains unable to compare the visual
7 representation of the alleged copying. Even if the Court considers the latest version of
8 the script in lieu of a completed work, the unfinished Potential Fan Film script still
9 qualifies as a fair use of Plaintiffs' Works, as it is both non-commercial and
10 transformative in nature. As detailed above, none of Defendants' Works are
11 commercial, and there has been no actual profit derived from any of Defendants'
12 Works. (SUF 30). The resources obtained through Defendants' use of crowdfunding
13 platforms were used solely for production and costs associated with the Potential Fan
14 Film, and were not, as Plaintiffs allege, profits. (SUF 14).

15 Moreover, the many Potential Fan Film scripts have always detailed a vision for
16 a previously untold war story about Garth of Izar, for which Plaintiffs have not
17 registered a separate character copyright. (SUF 6, 9). The Potential Fan Film script is
18 intended to tell a back story about this obscure character in an original manner.
19 Therefore, the *purpose and character* of each of Defendants' Works weighs in favor
20 of a finding of fair use.

21 **3. Defendants' Works Do Not Use a Substantial Portion of**
22 **Plaintiffs' Works**

23 Courts also consider whether "the amount and substantially of the portion used
24 in relation to the copyrighted work as a whole" are "reasonable in relation to the
25 purpose of the copying." 17 U.S.C. § 107; *Campbell*, 510 U.S. at 586. This factor
26 focuses not only on the "quantity of the materials used," but also on "their quality and
27 importance." *Id.* at 587. Here, contrary to taking "the heart of the [work]," *Harper*,
28 471 U.S. at 565, Defendants' Works borrow minimally from a limited number of

1 Plaintiffs' Works. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 221 (2d Cir.
2 2015) (“[A] finding of fair use is more likely when small amounts, or less important
3 passages, as copied than when the copying is extensive, or encompasses the most
4 important parts of the original.”).

5 Though Defendants have not used any clips from Plaintiffs' Works or engaged
6 in wholesale copying of Plaintiffs' Works whatsoever, fair use has recently been
7 expanded to include wholesale copying of works when such copying is necessary for
8 the secondary user's intended use. *See Oracle Am., Inc. v. Google Inc.*, 750 F.3d
9 1339, 1375-76 (Fed. Cir. 2014).

10 With respect to *Prelude*, Plaintiffs allege that within their twenty minute short
11 film, Defendants have infringed 40 Star Trek episodes and 11 movies. (SUF
12 2). Contrary to this allegation, the undisputed facts show that *Prelude* features an
13 obscure character and original dialogue, is filmed in a unique narrative fashion,
14 derives inspiration from many other works, and is set in a previously unseen timeline,
15 indicating that Defendants' use of Plaintiffs' Works was minimal. (SUF 12, SUF 13)
16 Moreover, the Axanar Works “do not use any clips, dialogue, plotlines or primary
17 characters” from Plaintiffs' Works, further demonstrating that Defendants took only
18 what was necessary to establish the context for their novel story. (SUF 13, SUF 18,
19 SUF 24). *Seltzer*, 725 F.3d at 1178-79 (finding that even copying an entire work can
20 constitute fair use where such use was “necessary to achieve . . . the new expression,
21 meaning or message.”)

22 Furthermore, Defendants' minimal use of Plaintiffs' Works pulls pieces from
23 the Star Trek universe, but, such borrowing cannot be considered substantial, as it
24 does not portray coherent, wholesale portions of Plaintiffs' Works. *See Authors*
25 *Guild*, 804 F.3d at 223 (finding fair use where, though defendant used an *aggregate*
26 16% of plaintiff's work, the use was not a “coherent block amounting to 16% of the
27 book,” but rather “snippets” that communicated little of the sense of the original).
28 Therefore, the *substantiality of use* factor weighs in favor of a finding of fair use with

1 respect to *Prelude*.

2 If the *Vulcan Scene* is reminiscent of Plaintiffs' Works, that likeness presents
3 only what is minimally necessary to convey the setting and context of the completely
4 original scene. (SUF 20). Furthermore, this three minute short scene is minute
5 compared to the hundreds of hours of film encompassed by Plaintiffs' catalog of
6 works. (*Id.*). Therefore, the *substantiality of use* factor weighs in favor of a finding of
7 fair use with respect to the *Vulcan Scene*.

8 Most notably, the entire plotline and characters in the unfinished Potential Fan
9 Film scripts are original, except for the limited number of characters that come from
10 the obscure edges of the Star Trek Universe. (SUF 6, SUF 14, SUF 24). To the
11 extent the unfinished Potential Fan Film scripts do reference the Star Trek universe, it
12 is only to create context for the original story Defendants seek to tell. Such use of
13 Plaintiffs' Works is no more than necessary to achieve Defendants' original creative
14 purpose. Therefore, the *substantiality of use* factor weighs in favor of a finding of fair
15 use with respect to the Potential Fan Film scripts.

16 **4. The Nature of Plaintiffs' Works Weighs In Favor of Fair Use**

17 The final fair use factor, regarding the nature of the copyrighted work, hinges
18 on two aspects of the original work: (1) "the extent to which it is creative" and (2)
19 "whether it is unpublished." *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177
20 (9th Cir. 2012). The nature of the underlying work is not particularly important when
21 the secondary use is transformative, as is the case here. *Equals Three, LLC v. Jukin*
22 *Media, Inc.*, 139 F. Supp. 3d 1094, 1106 (C.D. Cal. 2015).

23 The allegedly infringed works have been publicized over the course of the last
24 fifty years, thus weighing this factor in favor of Defendants. *See Harper*, 471 U.S. at
25 564 (stating that this factor weighs against fair use where the work is unpublished,
26 given an author's right to control the first public appearance of his expression). This
27 factor further favors Defendants, as "fair use is . . . more difficult to establish when a
28 core work is copied than when an infringer takes material that falls only marginally

1 within copyright protection.” *Adjmi*, 97 F. Supp. 3d at 532, (quoting *Leibovitz v.*
2 *Paramount Pictures Corp.*, 948 F.Supp. 1214, 1217 (S.D.N.Y.1996), *aff’d*, 137 F.3d
3 109 (2d Cir.1998)). Based on Defendants’ use of ancillary elements that fall only
4 marginally within copyright protection, this factor weighs in favor of Plaintiffs.

5 **5. The Totality of the Circumstances Favors Fair Use**

6 Defendants’ noncommercial works are transformative in that they tell an
7 entirely original story, using original characters, and using only what was absolutely
8 necessary from Plaintiffs’ Works so that the original story takes place in connection to
9 the vast Star Trek universe, albeit in an unexplored timeframe. Plaintiffs can point to
10 no actual harm suffered as a result of Defendants’ Works, and indeed, the only
11 evidence is that Plaintiffs obtain free benefit. In weighing the factors together,
12 Defendants’ Works qualify as fair use.

13 **V. CONCLUSION**

14 The undisputed facts show that Plaintiffs are unable to succeed on any of their
15 claims and in any event, Defendants Works are protected by fair use. Defendants
16 therefore respectfully request that the Court grant their motion for summary judgment.

17 Dated: November 16, 2016

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