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

Assigned to: Hon. R. Gary Klausner

DISCOVERY MOTION

**DEFENDANTS' SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO
COMPEL DISCOVERY**

Date: October 21, 2016

Time: 9:30 a.m.

Place: Courtroom 20

Discovery Cutoff: November 2, 2016

Pre-Trial Conference: January 9, 2017

Trial: January 31, 2017

Local Rule 37-2.3

1 **I. Introduction**

2 Plaintiffs spend much of their portion of the Joint Stipulation regarding
3 Defendants' Motion to Compel ("Motion") prematurely arguing the merits of their
4 claims, while also insisting that Defendants' Motion is "premature" because Plaintiffs
5 have agreed to produce documents responsive to Defendants' requests. But Plaintiffs'
6 productions do not actually include many of the documents they have agreed to
7 produce, and with discovery about to close, there is no time to delay in hopes that
8 Plaintiffs will finally comply with their agreements and discovery obligations.

9 Amazingly, Plaintiff Paramount Pictures Corporation ("Paramount") *has yet to*
10 *produce a single e-mail in response to Defendants' requests.* Declaration of Erin R.
11 Ranahan ("Ranahan Decl.") ¶ 3. Though Paramount indicated in its discovery
12 responses that it would produce emails,¹ Paramount has neither done so nor provided
13 a privilege log detailing its basis for withholding them. *Id.* at ¶¶ 5-6.² Defendants
14 also sought, among others, e-mails and communications between Plaintiffs and other
15 fan film companies, as well as e-mails with J.J. Abrams and Justin Lin. Though
16 Plaintiffs admitted in a June 21, 2016 meet and confer that such communications
17 would not be privileged, these documents remain outstanding. *Id.* at ¶ 4. Plaintiffs
18 cannot reasonably contend that they have fully complied with their discovery
19 obligations when such basic categories of documents are missing from their
20 productions. And while Plaintiffs do not dispute that actual damages are relevant to a
21 claim of statutory damages, they have stonewalled Defendants, refusing to produce
22 any responsive documents relating to Defendants' investigation into actual damages.

23 Plaintiffs also argue that Defendants' discovery regarding Plaintiffs' alleged
24 damages, willfulness, and fair use is irrelevant and overbroad, though the discovery at
25 issue is central to this case. Plaintiffs have not articulated any specific burden in

26 ¹ The e-mail communications Defendants seek would be responsive to Defendants'
27 RFP Nos. 14, 17, 18, 19, 20, 21, 25, 35, 36, to which Paramount agreed to produce
responsive documents.

28 ² Plaintiffs first indicated in the June meet and confer that they would produce a
privilege log, but have since resisted doing so, despite multiple discussions since. *Id.*
at ¶¶ 5-6. The Court should compel Plaintiffs to produce a privilege log.

1 producing any of the information at issue, making the evaluation of any
2 proportionality claim under the Federal Rules impossible.

3 Finally, Plaintiffs' argument in their Supplemental Memorandum that
4 Defendants' Motion is unnecessary because "Plaintiffs allowed the corporate
5 witnesses to answer every single inquiry posed to them except those that would reveal
6 attorney-client privileged information" is both misleading and irrelevant. ECF No. 56
7 at 1-2. Plaintiffs' corporate representatives, particularly that for Paramount, were
8 unprepared and unable to answer questions on many of the topics that the parties had
9 specifically agreed upon in advance of the depositions. In any event, Plaintiffs
10 provide no explanation or authority supporting their apparent position that putting up
11 a corporate representative for deposition somehow excuses a party from producing
12 unquestionably relevant documents.

13 For all the reasons in Defendants' Motion and herein, the Court should grant
14 Defendants' Motion.

15 **II. Plaintiffs Continue To Withhold Relevant Documents Regarding Alleged**
16 **Damages, Fair Use Defense And Willfulness**

17 The documents requested by RFP Nos. 14, 23, 35, 36, 37, and Interrogatories 8
18 and 9 are relevant to the commercial impact, if any, Defendants' works (the "*Axanar*
19 *Works*") have had on the allegedly infringed works (the "*Star Trek Copyrighted*
20 *Works*"). By Plaintiffs' own admission, Plaintiffs have refused to produce any
21 documents responsive to Defendants' requests, including RFP Nos. 23 and 37. ECF
22 No. 55 at 23:8-24:20; 25:21-27:27. Plaintiffs cite a non-discovery related case about a
23 specific fair use defense to argue that in order to "negate the element of market harm,
24 it 'need[s to] only show that if the challenged use should become widespread, it would
25 adversely affect the potential market for the copyrighted work . . .'" See ECF No. 55
26 at 24: 5-7; 57:1-3; 29:14-16 (citing *Harper & Row Publr. v. Nation Enters.*, 471 U.S.
27 539, 568 (1985)). Plaintiffs argue that because they contend "Defendants are, by
28 definition, causing market harm to Plaintiff as they are damaging Plaintiffs' potential

1 market for derivative works,” the use is not fair, and that thus Defendants are not
2 entitled to discovery of documents that might support or refute that contention. *See*
3 ECF No. 55 at 24:2-20.

4 But *Harper* assessed the merits of fair use—not discovery—and does not justify
5 Plaintiffs withholding this basic discovery at this stage. Moreover, *Harper* bears no
6 resemblance to the facts at hand. The defendant in *Harper* disseminated the heart of
7 an unpublished president’s memoir that the plaintiff planned to release, *before* the
8 plaintiff could make any money from it. *Harper*, 471 U.S. at 549. Conversely, the
9 *Star Trek* Copyrighted Works were published long ago, and Defendants are therefore
10 entitled to investigate what Plaintiffs have earned and continued to earn from those
11 works so that Defendants can prepare their defense with respect to damages and the
12 impact on the market prong of the fair use defense. Moreover, the *Harper* court
13 explicitly stated that fair use applies to copying “which does not *materially impair* the
14 marketability of the work which is copyrighted.” *Id.* at 567 (emphasis added). The
15 *Harper* court further held that a copyright holder must “establish[] with reasonable
16 probability the existence of a causal connection between the infringement and a loss
17 of revenue...” *Id.* How can Defendants assess this issue without information on the
18 market at issue? Notably, the *Harper* court *did not* hold that discovery of documents
19 relevant to a plaintiff’s revenues is irrelevant; but instead that a plaintiff could rebut
20 fair use by demonstrating that the allegedly infringing work had an impact on the
21 potential market for the allegedly infringed work.³ Defendants are entitled to
22 discovery of evidence that would potentially support their argument that Plaintiffs’
23 revenues were not impacted by the *Axanar* Works, and further that Plaintiffs’
24 allegations of theoretical damages based on unspecified burden is insufficient and

25
26 ³ Indeed, Plaintiffs have the burden to demonstrate with “reasonable probability the
27 existence of a causal connection between the infringement and a loss of revenue.”
28 *Harper*, 471 U.S. at 567. “Evidence of harm to the potential market for or value of
the original copyright is crucial to a fair use determination . . . What is necessary is a
showing by a preponderance of the evidence that *some* meaningful likelihood of future
harm exists.” *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1275 (11th Cir.
2001)) (emphasis in original).

1 unavailing.⁴

2 Plaintiffs also seek to resist discovery regarding treatment of other fan films by
3 relying on a case that holds that a plaintiff's failure to pursue other potential infringers
4 is not a defense to copyright infringement. But Plaintiffs miss the point of
5 Defendants' requested discovery entirely. Defendants are not seeking this information
6 to argue that Plaintiffs should have sued any other fan film. Defendants are seeking
7 information regarding Plaintiffs' treatment of other fan films that could demonstrate
8 that Plaintiffs recognize the promotional value of fans creating their own fiction—a
9 fact that can be inferred by the very existence of the fan film guidelines, and may be
10 bolstered by other internal documents.⁵ Defendants' expert(s) cannot analyze such
11 documents for this purpose if Plaintiffs refuse to provide them to Defendants.

12 Finally, Plaintiffs argue that statements made after the lawsuit was filed "could
13 not possibly" have any bearing on Defendants' state of mind in creating the works at
14 issue in this action—and yet this action is admittedly about one Axanar work that had
15 yet to be created at the time the lawsuit was filed. Plaintiffs also argue that
16 Defendants' subjective "belief" has no bearing on "whether or not they committed
17 copyright infringement," but of course it impacts the question of whether Defendants
18 *willfully* infringed Plaintiffs' copyrights, which Plaintiffs do not dispute carries a

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20 ⁴ Plaintiffs also repeatedly state that Defendants' Motion is "moot" because they have
21 agreed to produce documents related to their alleged damages. But Plaintiffs have not
22 done so, and are apparently seeking to run the clock on Defendants' efforts to obtain
23 or challenge those productions. Given Plaintiffs' decision to put their financial
24 information at issue by alleging financial harm, and the relevance of these documents
25 to the fair use analysis and damages, Plaintiffs should be compelled to produce
26 documents and information responsive to RFP Nos. 14, 23, 35, 36, 37, and
27 Interrogatories 8 and 9.

28 ⁵ Plaintiffs' focus on statements by Defendants that distinguished the quality of their
29 productions from other "fan films" and called their productions "independent" have
30 no bearing whatsoever on the relevance of the discovery at issue. It is undisputed that
31 the creators of Axanar are Star Trek fans, and were not charging users to view the
32 film, like other fan films. Plaintiffs' insistence that Defendants are somehow not a fan
33 film is especially curious considering that Plaintiffs objected to the use of the phrase
34 "fan film" as vague and ambiguous in discovery responses. ECF No. 55 at 8:18-19,
35 30:15-16, 31:9-10, 33:5-6, 23-24. Further, it is undisputed that the *Axanar* Works are
36 independent from Plaintiffs' official Star Trek works, thus making them independent.

1 substantial enhancement of potential available statutory damages. Moreover, the fact
2 that Defendants believed that Plaintiffs owned copyrights to Star Trek episodes and
3 films *does not* have any bearing on whether Defendants believed their own use in the
4 *Axanar Works* violated copyright laws, could satisfy fair use, or was within the
5 tolerated realm of Star Trek fan fiction. Defendants did not know they were
6 considered to have gone too far until they were sued, at which time they put a hold on
7 completion of *Axanar* until they obtained guidance from this lawsuit.

8 **III. The Parties Met And Conferred With Respect To All Topics At Issue**

9 Contrary to Plaintiffs' contentions that Defendants failed to meet and confer
10 with respect to RFP Nos. 35, 36, and 37 in advance of filing this Motion, *see* ECF No.
11 55 at 25:5-6; 26:7-8; 56:12-13, all of the topics at issue (including documents relevant
12 to Plaintiffs' alleged damages, the market impact of the *Axanar Works* on the *Star*
13 *Trek* Copyrighted Works, and revenues generated by Plaintiffs' works) were
14 previously discussed in person between counsel. Ranahan Decl. ¶ 7. The parties met
15 and conferred on June 21, 2016, at which time they specifically discussed Defendants'
16 need for documents relating to Plaintiffs' alleged damages, including how the market
17 for Plaintiffs' works were impacted. *Id.* Documents demonstrating how Plaintiffs'
18 revenues have been impacted, if at all, since the *Axanar Works* were distributed online
19 is necessarily related to Plaintiffs' claims of market harm. And Plaintiffs' suggestion
20 that there was some further resolution that could have been reached if only the parties
21 held another in person meet and confer is simply false and contradicted by Plaintiffs'
22 subsequent refusal to provide such information.

23 **IV. Due To Plaintiffs' Belated Production, Defendants Withdraw Their Motion** 24 **With Respect To Documents Related To Copyright Ownership**

25 After Defendants provided Plaintiffs with their portion of the Joint Stipulation
26 on September 21, 2016, Plaintiffs produced the missing chain of title documents on
27 September 27, 2016 (long after they agreed to do so). Ranahan Decl. ¶ 8-9. Thus,
28 Defendants withdraw their Motion with respect to RFP Nos. 6 and 7.

1 Dated: October 7, 2016

WINSTON & STRAWN LLP

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