

Case No. 16-56843**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DISNEY ENTERPRISES, INC., ET AL.,

Plaintiffs-Appellees,

v.

VIDANGEL, INC.

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Case No. 16-cv-04109-AB (PLAx)
The Honorable André Birotte Jr., Presiding

**APPELLEES' OPPOSITION TO VIDANGEL, INC.'S EMERGENCY
MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure:

Appellees Disney Enterprises, Inc. and Lucasfilm Ltd. LLC certify they are wholly owned subsidiaries of The Walt Disney Company, a publicly held company.

Appellee Twentieth Century Fox Film Corporation certifies it is an indirect, wholly-owned subsidiary of Twenty-First Century Fox, Inc., a publicly held company.

Appellee Warner Bros. Entertainment Inc. certifies it is an indirect, wholly-owned subsidiary of Time Warner Inc., a publicly held company.

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INTRODUCTION

The district court considered a voluminous record (more than 2,000 pages), conducted a half-day hearing, and properly enjoined VidAngel’s rampant circumvention violations and infringements of more than a thousand of Plaintiffs’ copyrighted works. VidAngel does not deserve a stay, which it would only use to resume and expand its illegal exploitation of Plaintiffs’ works.

First, the district court did not abuse its discretion in finding that Plaintiffs have “a strong likelihood of success” on *all three* of their substantive claims. A.197, 200. VidAngel circumvents the technological protection measures on DVDs and Blu-ray discs (“Discs”—i.e., VidAngel “rips” Discs—thereby violating the anti-circumvention prohibition in the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201(a)(1)(A). VidAngel then makes additional copies of the content it has ripped, infringing Plaintiffs’ exclusive reproduction right, *id.* § 106(1). VidAngel streams performances from these unauthorized copies to thousands of users, thereby infringing Plaintiffs’ exclusive public performance right, *id.* § 106(4). VidAngel’s counter-arguments ignore statutory text, legislative history, and precedent—and defy common sense. Its liability is clear.

Second, the district court correctly held that the Family Movie Act, *id.* § 110(11) (“FMA”), does not shield VidAngel’s systematically unlawful course of conduct. A.196-97, 201. The FMA narrowly provides that the act of “making

[content] imperceptible” at a home user’s direction is not copyright infringement. 17 U.S.C. § 110(11). The statutory text makes quite clear that it does not authorize violations of the DMCA’s anti-circumvention provisions under any circumstances. On-point legislative history confirms that “[i]t would not be a defense to a claim of violation of section 1201 that the circumvention is for the purpose of engaging in the conduct covered by this new exemption in section 110(11).” *See* 151 Cong. Rec. S450 at S502 (daily ed. Jan. 25, 2005) (Sen. Hatch).

The FMA likewise provides no defense for VidAngel’s infringing copying and streaming. VidAngel cannot claim the protection of the FMA because it does not stream “from an authorized copy of the motion picture,” as the statute requires. 17 U.S.C. § 110(11). Even more to the point, the FMA simply does not authorize the unlicensed use of copyrighted works, and does not legitimize business models based on wholesale infringement because filtering happens to be applied to unlicensed performances streamed from unlicensed copies. If VidAngel’s extreme and unsupported reading of the FMA were accepted, practically any streaming service could avoid all liability for the unauthorized use of copyrighted works by adopting VidAngel’s sham “buy/sellback” model and allowing customers to filter out any snippet of content (including just a film’s credits). When Congress enacted the FMA to create a limited exception to copyright infringement for making content imperceptible, it could not possibly have intended to create the

massive loophole in DMCA and copyright protection that VidAngel purports to find there.

Third, the district court did not abuse its discretion in concluding that VidAngel’s illegal conduct caused Plaintiffs “ongoing” irreparable harms that “will likely only increase absent an injunction,” A.208, and that all the other equitable factors weighed in favor of an injunction and against a stay. A.4, 209-10. VidAngel started its business by violating Plaintiffs’ rights; scaled its business to more than 100,000 users by aggressively marketing itself as a \$1-a-day alternative to licensed streaming services, such as iTunes, Amazon, and Netflix; and only sought forgiveness (not permission) once it had been sued. VidAngel ignores the district court’s finding that its unlicensed offering directly interferes with Plaintiffs’ “windowing,” whereby Plaintiffs negotiate exclusive licenses to permit authorized services to stream that content exclusively for a period of time. A.720. On the other side of the balance, VidAngel cannot claim hardship from having to cease its illegal activity.

FACTUAL BACKGROUND

A. VidAngel’s Illegal Service

VidAngel operated and asks to continue to operate as follows:

By ripping Plaintiffs’ works from access-protected Discs. VidAngel admits that it starts its process by “removing restrictions on DVD [and Blu-ray]

encryption” from the physical Disc containing Plaintiffs’ content. A.195. That is circumvention, prohibited by 17 U.S.C. § 1201(a)(1)(A). *See Argument § I.A.*

By copying Plaintiffs’ works. VidAngel takes the ripped copies of movies and creates new copies on computers and servers, both to mark them for filters and to create digital copies to stream to customers. A.192, 199. VidAngel tries to obscure its infringement by saying it stores the movies in “tiny segments.” Mot. at 4. Even if true, the tiny segments add up to complete copies. S.A. 967 ¶ 28.

By publicly performing Plaintiffs’ works. Finally, VidAngel uses the unauthorized copies to stream Plaintiffs’ movies on demand. A.192. VidAngel again seeks to obscure what it does by insisting that it is merely streaming content its users temporarily “own” because those users “buy” and then “sellback” discs for an effective price of \$1 per day (for SD format; \$2 for HD). As the district court found, the entire buy/sellback scheme provides no legal shelter because users “view a stream from a master copy stored on a server, not [the] DVD” they purportedly “owned.” A.200. The Disc the user purportedly “owns” sits in VidAngel’s “vault,” and is recycled multiple times. A.71.

The “buy/sellback” is a gimmick. VidAngel acknowledges as much, calling it a “creative way” to compete in the on-demand streaming market “while staying buttoned up legally.” Supplemental Appendix (“S.A.”) 992. And VidAngel’s customers treat the service just like an on-demand video rental: 99.65% of its

transactions involve users “selling [] back” the Disc within an average of five hours of supposedly “purchas[ing]” it. A.282. VidAngel (not the user) maintains possession of the “sold” Disc unless the user asks for it—which has happened a trivial number of times out of the millions of purported “sales.” S.A.1040; A.166.

B. VidAngel’s Aggressive Marketing And Growth

Without any supporting evidence, VidAngel says it developed the foregoing model only *after* “attempt[ing] to work with the Studios to make filtered streaming a reality.” Mot. at 4. That is false. VidAngel launched its service, and then informed Plaintiffs about it in July 2015, with letters from its then-outside litigator (now General Counsel) to the general counsels of Plaintiffs and other parent companies. A.645. The letters described a nascent service of less than 5,000 users in “limited beta” testing and said *nothing* about VidAngel circumventing the Technological Protection Measures (“TPMs”) on Plaintiffs’ Discs. A.725-26. Plaintiffs started a legal investigation of VidAngel and monitored the service’s growth. S.A.951 ¶ 35.

VidAngel, meanwhile, launched an aggressive advertising offensive in order to get “a lot bigger” as rapidly as possible, before trying to “get licensing from Hollywood.” S.A.992. By mid-2016, VidAngel had grown to over 100,000 monthly active users and 500,000 monthly streams. A.248. It did so by touting the advantages that flowed from its unlicensed exploitation of Plaintiffs’ works.

Attempting to use the FMA as a shield, VidAngel undercut the prices of licensed streaming services—which pay for exercising copyright owners’ rights to copy and stream content. And VidAngel offered movies not currently available on other streaming services—which have rights only for specified windows based on agreements with copyright owners. A.191; S.A.860-62, 870-85 (promoting videos “Not on Netflix”); S.A.945 ¶ 16 (VidAngel streamed *Star Wars* before legitimate licensees could offer it for on-demand streaming); S.A.916-21 (same).

PROCEDURAL BACKGROUND

Plaintiffs filed this action on June 9, 2016, A.526, and a motion for a preliminary injunction (following expedited discovery and pursuant to a stipulated schedule) on August 22, A.707. On December 12, the district court granted the motion, finding that each relevant factor favored Plaintiffs. A.190. That Order immediately enjoined VidAngel from circumventing Discs containing Plaintiffs’ works, and from copying and publicly performing those works. A.211.

VidAngel requested a stay on December 14, A.42, while disregarding the court’s Order. It continued to stream Plaintiffs’ works—and even added more of Plaintiffs’ works to its service as Plaintiffs released new titles on Discs. S.A.772-

88.¹ On December 29, the district court denied VidAngel’s stay motion. A.4. Within hours, VidAngel said it had finally removed Plaintiffs’ works from its service, belying its prior claim that it could not comply with the injunction until late January, at the earliest. A.28 ¶ 13.

ARGUMENT

I. PLAINTIFFS, NOT VIDANGEL, HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

To justify a stay, VidAngel must show, “at a minimum, that [it] has a substantial case [] on the merits” of its defenses to *all* of Plaintiffs’ claims. *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). VidAngel cannot come close to meeting that burden because the district court’s determination that Plaintiffs demonstrated a strong likelihood of success on their DMCA claim and both infringement claims was plainly correct.

A. VidAngel’s Legal Violations Are Clear, And It Is Unlikely To Succeed On Its FMA Defense

Circumvention. The district court correctly held that VidAngel’s business is predicated on a systematic violation of the DMCA’s anti-circumvention provision.

¹ VidAngel’s filing of the stay motion did not excuse its immediate obligation to comply; VidAngel simply granted itself a stay and flouted the injunction—conduct that itself is manifestly inequitable. *See Tekkno Labs., Inc. v. Perales*, 933 F.2d 1093, 1099 (2d Cir. 1991). Plaintiffs have moved for an order holding VidAngel in contempt. The district court has set a hearing on that motion for this Friday, January 6, and has given VidAngel the opportunity to be heard (including, presumably, actual evidence from VidAngel of how it has complied). S.A.750.

The DMCA provides that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act].” 17 U.S.C. § 1201(a)(1)(A). Plaintiffs protect their works on Discs using TPMs—CSS, AACS and BD+—that effectively control access to the digital copies of Plaintiffs works. S.A.818-19 ¶¶ 3-5; S.A.930, 932 ¶¶ 20, 27; *see Realnetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 932 (N.D. Cal. 2009) (“CSS . . . effectively controls access to . . . copyrighted DVD content”). VidAngel admits that it decrypts these TPMs without authorization. A.630. So “decrypt[ing] an encrypted work” is a paradigmatic violation of § 1201. 17 U.S.C. § 1201(a)(3)(A). VidAngel’s DMCA violation could not be more clear.

VidAngel invokes the FMA to justify its conduct but, as the district court correctly held, the FMA provides no shelter for DMCA violations. A.195-98. The FMA applies only to the “making imperceptible” of limited portions of motion picture content and the “creation or provision of . . . technology that enables such making imperceptible,” not circumvention. 17 U.S.C. § 110(11). Further, the FMA’s text makes clear that the actions covered by that provision are exempt only from “the provisions of *section 106*” (i.e., they are not “infringements of copyright”) and conspicuously omits any mention of the DMCA’s anti-circumvention prohibition, which is codified at § 1201(a) not in § 106. 17 U.S.C. § 110 (first sentence) (emphasis added). This Court has recognized that § 1201(a)

provides a cause of action “*distinct from infringement.*” *See MDY Indus. LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 950 (9th Cir. 2010) (emphasis added). The FMA’s legislative history confirms what the text makes plain: “[T]he [FMA] does not provide any exemption from the anti-circumvention provisions of section 1201 [the DMCA].” *See* 151 Cong. Rec. S450 at S502 (daily ed. Jan. 25, 2005) (Sen. Hatch).²

VidAngel argues that the fair use defense, 17 U.S.C. § 107, may excuse its DMCA violation. Numerous courts have held that fair use is not a defense to circumventing.³ VidAngel relies on the fact that *MDY Industries* said it was not deciding the question. Mot. at 14. That does not show likely success or even the existence of a substantial case on the merits. VidAngel’s invocation of fair use is beside the point because, as the district court held, VidAngel failed to establish the defense. A.205.

² Even if VidAngel were right (which it is not) that the FMA authorizes “necessary” circumvention, the district court found as fact that circumvention is not necessary. “[A]nother filtering service, ClearPlay, offers filtering to Google Play users who access authorized streams from GooglePlay’s licensed service.” A.209. The court found the injunction “would not prevent VidAngel or any other company from providing a filtering service similar to ClearPlay’s.” *Id.*

³ *See, e.g., Dish Network, L.L.C. v. Vicxon Corp.*, No. 12-CV-9-L WVG, 2013 WL 3894905, at *6 (S.D. Cal. July 26, 2013); *United States v. Crippen*, No. CR 09-703 PSG, 2010 WL 7198205, at *2 (C.D. Cal. Nov. 23, 2010); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000).

VidAngel’s obvious DMCA violation, in and of itself, fully justifies the preliminary injunction and warrants denial of VidAngel’s stay motion.

Unauthorized Reproduction. VidAngel’s model also depends on the systematic infringement of Plaintiffs’ works. In each and every instance, VidAngel’s streaming of Plaintiffs’ works is preceded by making unauthorized copies. A.198. This infringes Plaintiffs’ exclusive reproduction right. VidAngel claims that it makes only “intermediate” copies that do not trigger liability under § 106. But the copies are permanent. S.A.825-27 ¶¶ 25-29. And § 106(1) “unambiguously encompasses and proscribes ‘intermediate copying.’” *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1518 (9th Cir. 1992).

VidAngel again seeks to hide behind the FMA. But, as the district court correctly held, the FMA (when its terms are met) “exempts only (1) ‘the making imperceptible’ of limited portions of a motion picture; and (2) ‘the creation or provision of a computer program or other technology that enables such making imperceptible.’” A.201 (quoting 17 U.S.C. § 110(11)). It does not exempt unauthorized copying.

Finally, VidAngel argues, for the first time, that the illegal copies it creates should be deemed “other technology” within the meaning of the FMA. Mot. at 8. Because that argument was not presented to the district court, it should not be considered (indeed, VidAngel’s including it justifies denying the motion, Cir. R.

27-3(a)(4)). Regardless, the assertion is meritless. Making a digital copy is neither the act of “making imperceptible” nor the “creation or provision of . . . technology.” It is *not* protected by the FMA.

Unauthorized Public Performance. VidAngel also systematically infringes Plaintiffs’ public performance right. As the district court found, VidAngel engages in precisely the unauthorized conduct that the text of § 106 forbids⁴: it “transmits” performances of Plaintiffs’ works—i.e., it streams them—to members of the public who have a “commercial ‘public’ relationship” with VidAngel, “regardless of where the viewing takes place.” A.199 (quotation omitted). That ruling is fully consistent with a long line of precedent interpreting the public performance right, including most recently *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014). *See also Warner Bros. Ent. Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1010 (C.D. Cal. 2011) (holding that streaming from DVDs and DVD players assigned to specific users violates the public performance right).

VidAngel’s contrary position rests on false premises. The core of VidAngel’s argument is the claim that its streaming is a private, not a public,

⁴ “To perform . . . a work ‘publicly’ means,” *inter alia*, “to transmit . . . a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101.

performance because VidAngel streams “only to customers who own a legitimate DVD copy.” Mot. at 9. Wholly apart from the sham nature of the “ownership” interest VidAngel claims to create, this argument cannot help VidAngel because the FMA requires the transmission to be “from an authorized copy.” 17 U.S.C. § 110(11). But VidAngel streams from a master digital copy that it unlawfully makes, not from the Disc copy that the user purportedly “own[s].” A.200-01.⁵

At bottom, VidAngel’s “ownership” claim is a sham, just like the lawyer-designed gimmickry of assigning separate antennae for each subscriber that the Supreme Court rejected in *Aereo*. Just as *Aereo*’s scheme did not “render *Aereo*’s commercial objective any different from that of cable companies” with which *Aereo* competed or “alter the viewing experience of *Aereo*’s subscribers,” 134 S. Ct. at 2508, the details of VidAngel’s “buy/sellback” scheme do not change its advertised purpose to compete with the licensed streaming services that it

⁵ VidAngel also misquotes *Aereo*, claiming the Court said that “the public” in § 101 “does not extend to those who act as owners or possessors of the relevant *content*.” Mot. at 9-10 (purporting to quote *Aereo*, 134 S. Ct. at 2510-11). The Court’s actual words were “owners or possessors of the relevant *product*.” 134 S. Ct. at 2510-11 (emphasis added). When someone buys a Disc, the product they own is the Disc. The content on the Disc continues to be a copyrighted work, the exclusive rights to which under § 106 belong to the copyright owner, save for the right to control further distribution of the physical Disc under the “first sale” defense, which is inapplicable here. *See Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013) (first sale defense inapplicable to infringement of reproduction right).

undercuts or alter the experience of those who use VidAngel to stream videos. VidAngel simply used an ersatz “ownership” label solely for the purpose of evading the copyright rights that all other streaming services must respect. Its users obtain that “interest” in order to receive a streamed movie and then relinquish it once they have watched the movie. A.282 (more than 99% of VidAngel’s claimed “sales” are sold back within an average of five hours). A sham of this kind cannot justify VidAngel’s unlicensed streaming of Plaintiffs’ works.

B. VidAngel Is Unlikely To Prevail On Its Fair Use Defense

VidAngel has the burden of showing that its fair use defense will prevail. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007). The district court did not abuse its discretion in holding that VidAngel failed to meet its burden with respect to any of the four statutory fair use factors, 17 U.S.C. § 107(1). A.202-205.

(1) Commercial and transformative use. VidAngel concedes that its use is commercial. It is also not “transformative,” which involves “add[ing] something new, with a further purpose or different character, altering the first with new expression, meaning or message.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). As the district court found, VidAngel’s use does not *add* anything; it merely subtracts a small amount of content from Plaintiffs’ works. A.203. And VidAngel’s use “serves the ‘same intrinsic entertainment value that is

protected by Plaintiffs’ copyrights.’’’ *Id.* (quoting *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003)). A commercial, non-transformative use ‘‘is ‘presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.’’’ *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 530 (9th Cir. 2008). Thus, the district court’s finding that the first factor weighs for Plaintiffs was not an abuse of discretion. *See Clean Flicks of Colo. v. LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1241 (D. Colo. 2006) (rejecting a similar fair use defense by defendants who mechanically edited movies to remove content because defendants (1) added nothing to the movies, (2) only removed small amounts of content, and (3) did so for commercial gain).

(2) Nature of the copyrighted works and (3) amount and substantiality of use. VidAngel does not and cannot dispute the court’s findings on these factors that (i) movies are at the ‘‘core’’ of copyright protection, and (ii) VidAngel copies 100% of, and streams ‘‘the heart of,’’ Plaintiffs’ movies. A.203-04.

(4) Effect on actual or potential market for the works. VidAngel cannot show that the district court abused its discretion in finding that VidAngel inflicts market harms. A.204-05. VidAngel’s own evidence showed that ‘‘49% of [its] customers would view movies without filters.’’ A.204. The question on this factor is not confined to VidAngel’s particular unauthorized use, but ‘‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . .

would result in a substantially adverse impact on the potential market’ for the original.” *Campbell*, 510 U.S. at 590 (quotation omitted). It plainly would.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT VIDANGEL CAUSES PLAINTIFFS IRREPARABLE HARM

The district court was well within its discretion in concluding that VidAngel’s illegal activity caused Plaintiffs “ongoing” irreparable harm, which “will likely only increase absent an injunction.” A.208; *see also* A.7. VidAngel’s contrary arguments are baseless.

First, VidAngel is wrong that the district court presumed irreparable harm. Mot. at 14. VidAngel ignores the district court’s order and the ample evidence supporting it. The court relied on the uncontested declaration of one of Plaintiffs’ digital distribution executives (which VidAngel ignored and neglected to include in its Appendix). That declaration established that Plaintiffs’ copyrights “are critical to providing Plaintiffs the opportunity to earn a return on their substantial investments”; that Plaintiffs exercise their rights (and earn a return) through contractual commitments to guarantee licensees “exclusive time window[s] for performing a title”; that VidAngel in fact streamed Plaintiffs’ works during periods of contractual exclusivity commitments undermining the value of exclusivity; and that VidAngel thus “interferes with Plaintiffs’ exercise of their exclusive rights and frustrates Plaintiffs’ ability to negotiate for similar rights in

the future.” A.206. These findings alone justify the district court’s conclusion of irreparable harm.

The court found additional irreparable harm to Plaintiffs’ licensee relationships and goodwill from the fact that in contract negotiations licensees complain about being undercut by unlicensed services. A.206. VidAngel says the court presumed harm because no licensee named VidAngel specifically. Mot. at 16. Not so. VidAngel’s own words and deeds prove it inflicts this harm. VidAngel expanded its user base dramatically by marketing its ability to provide on-demand streaming at prices that undercut licensed services and during windows when licensed services cannot yet offer the same titles. A.247; S.A.860-62, 870-85 (promoting titles “Not on Netflix”); S.A.888-914 (promoting \$1-a-day movies).

Second, VidAngel is wrong that money damages can fully compensate Plaintiffs. Mot. at 17. The district court correctly held that money damages were not adequate to compensate “harm to one’s negotiating position and/or goodwill with licensees.” A.207 (citing, *inter alia*, *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (“intangible injuries . . . qualify as irreparable harm”)). Moreover, as VidAngel’s infringement and circumvention continues, its liability grows, making VidAngel even less likely to have the resources to satisfy a damages award. *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1147 (C.D. Cal. 2012)

(finding irreparable harm when “start-up” “would [not] be likely to be able to satisfy the damages award”); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1217 (C.D. Cal. 2007) (same). VidAngel’s copying and streaming of more than a thousand of Plaintiffs’ works (including during the two weeks when VidAngel violated the injunction) means that its monetary liability almost certainly will exceed the \$10 million it claims it raised to defend this litigation. *See* 17 U.S.C. § 504(c) (range for statutory damages).

Third, there is no merit to VidAngel’s insistence that Plaintiffs forfeited the right to seek an injunction by waiting too long to sue and file their motion. Mot. at 18. VidAngel ignores controlling Ninth Circuit authority—which the district court followed—that “courts are ‘loath to withhold relief solely on [] ground[s]’” of delay, and that alleged “tardiness is not particularly probative in the context of ongoing, worsening injuries,” which is plainly the case here. *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014).

The district court specifically found Plaintiffs’ course of conduct to be “reasonable under the circumstances.” A.208. When Plaintiffs first learned of VidAngel in July 2015, VidAngel “was in ‘limited beta’ and had fewer than 5,000 users.” *Id.* It was reasonable for Plaintiffs to “monitor[] VidAngel and investigate[] their claims,” and file suit “once VidAngel started marketing itself more aggressively, expanded its content offering, and posed a more significant

threat of harm.” *Id.* These findings were not clearly erroneous, and the district court was within its discretion in rejecting VidAngel’s “delay” argument.

III. VIDANGEL WILL NOT SUFFER IRREPARABLE HARM WITHOUT A STAY

VidAngel’s unsupported claims of irreparable harm are meritless.

First, VidAngel “cannot complain of the harm that will befall it when properly forced to desist from its infringing activities.” *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995). To be clear, VidAngel is not asking to preserve the status quo—Plaintiffs’ works finally have been taken down—but to resume its infringement of the more than 1,000 of Plaintiffs’ titles that VidAngel already has ripped, copied and streamed, and even to add new titles as Plaintiffs release them on Disc. A.26 ¶ 9; A.393 ¶ 59.

Second, the record does not support VidAngel’s claim that the injunction effectively requires VidAngel to stop streaming all movies. Mot. at 19. The injunction applies only to Plaintiffs’ works, not the other 44% of titles VidAngel streams. A.26 ¶ 9. VidAngel tried to excuse its non-compliance by claiming that, if it removed Plaintiffs’ titles from two “app” services—Apple and Roku—users might be “confus[ed]” until VidAngel could update its apps on those services. A.26 ¶ 8, A.28 ¶ 13. The record evidence—including a declaration from Roku’s General Counsel—refuted VidAngel’s claims. S.A.751-52 (Roku); S.A.771

(Apple). VidAngel submitted *no* evidence showing that it could not comply with the injunction for transactions through its own website or other app services, or otherwise to continue offering content not owned by Plaintiffs.⁶

Third, VidAngel’s public statements belie its claim to this Court that the absence of a stay will destroy VidAngel’s business. VidAngel is telling its users that it will weather the injunction until the appeal is resolved. S.A.807 ¶ 9, 810-11. The day after the injunction issued, VidAngel announced “[t]he launch of VidAngel Studios,” which it will fund with \$5 million of the \$10 million that it has raised, to produce and offer VidAngel’s own content. S.A.811; S.A.808 ¶ 12, 815. VidAngel already has licensed content from other copyright owners. A.25 ¶ 5.

See Fox Television Stations, Inc. v. FilmOn X, LLC, 968 F. Supp. 2d 134, 138 (D.D.C. 2013) (denying stay application and noting that public still is able “to access material that is properly licensed from copyright holders”). In short, VidAngel’s predictions of doom are contrived.

IV. A STAY WOULD HARM THE PUBLIC INTEREST

“[I]t is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the

⁶ VidAngel’s real concern seems to be potential liability to other content owners, who have not provided VidAngel with a covenant not to sue. S.A. 756-57 ¶ 4. The fact that VidAngel has even sought such a covenant underscores its own lack of confidence in its likelihood of success.

misappropriation of the skills, creative energies, and resources which are invested in the protected work.” *Apple Comput., Inc., v. Franklin Comput. Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983) (quotation omitted); *accord Metro-Goldwyn-Mayer Studios, Inc.*, 518 F. Supp. 2d at 1222 (citing cases).

VidAngel argues that members of the public who use filtering will suffer absent a stay. That is not true, as shown by ClearPlay, which works on licensed streams from Google Play. A.209. “The presence of market alternatives to VidAngel’s filtering service belies its claim that an injunction would effectively end the public’s ability to watch filtered movies.” A.7 (quotations omitted).

CONCLUSION

Plaintiffs respectfully request that VidAngel’s motion be denied.

DATED: January 2, 2017

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Attorney for Plaintiffs-Appellees

CERTIFICATION OF SERVICE

I hereby certify that I electronically filed the foregoing **Appellees'** **Opposition to VidAngel Inc.'s Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Appeal** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 2, 2017.

I certify that all the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: January 2, 2017

s/ Kelly M. Klaus
KELLY M. KLAUS