

**No. 16-56843**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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VIDANGEL, INC.,

Defendant-Appellant,

v.

DISNEY ENTERPRISES, INC.; LUCASFILM LTD. LLC;  
TWENTIETH CENTURY FOX FILM CORPORATION; AND  
WARNER BROS. ENTERTAINMENT, INC.,

Plaintiffs-Appellees.

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On Appeal from the United States District Court  
for the Central District of California

Hon. André Birotte Jr.

No. 2:16-cv-04109-AB-PLA

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**EXCERPTS OF RECORD**

**VOLUME II OF V**

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January 11, 2016

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.: CV 16-04109-AB (PLAx)

Date: January 6, 2017

Title: Disney Enterprises, Inc. et al v. VidAngel Inc.

Present: The Honorable **ANDRÉ BIROTTE JR., United States District Judge**

Carla Badirian  
Deputy Clerk

Nichole Forrest  
Court Reporter

Attorney(s) Present for Plaintiff(s):

Attorney(s) Present for Defendant(s):

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Glenn D Pomerantz  
Rose Leda Ehler  
Kelly M Klaus

David W Quinto

**Proceedings:** STATUS CONFERENCE RE EX PARTE APPLICATION FOR AN ORDER TO SHOW CAUSE WHY VIDANGEL SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATING THE PRELIMINARY INJUNCTION ORDER [161]

Hearing held. Court and counsel confer.

The Court having carefully considered the papers and the evidence submitted by the parties, and having heard the oral argument of counsel, hereby GRANTS Plaintiffs' Ex Parte Application for the reasons stated on the record.

The Court holds VidAngel, Inc. in civil contempt of court and finds that an award of reasonable attorney's fees is justified in this matter. The Court awards \$10,231.20 in U.S. dollars to Plaintiffs' counsel. VidAngel shall pay this amount to Plaintiffs' counsel on or before Monday, February 6, 2017. IT IS SO ORDERED.



**FILED**

UNITED STATES COURT OF APPEALS

JAN 4 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

<p>DISNEY ENTERPRISES, INC.; et al.,</p> <p>Plaintiffs-counter-defendants-Appellees,</p> <p>v.</p> <p>VIDANGEL, INC.,</p> <p>Defendant-counter-claimant-Appellant.</p>
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No. 16-56843

D.C. No.  
2:16-cv-04109-AB-PLA  
Central District of California,  
Los Angeles

ORDER

Before: LEAVY and SILVERMAN, Circuit Judges.

Appellant’s motion to stay the district court’s December 12, 2016 order pending appeal (Docket Entry No. 16) is denied. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

Appellant’s motion to seal portions of its emergency stay motion and appendix volume 3 (Docket Entry No. 16), motion to seal its reply in support of its emergency stay motion (Docket Entry No. 21), and appellees’ motion to seal the supplemental appendix volume 5 (Docket Entry No. 19) are denied without prejudice to renewal of the motions within 14 days from the date of this order. *See Interim 9th Cir. R. 27-13*. The documents filed under seal provisionally will

TF/MOATT

**ER024**

remain under seal provisionally until renewed motions to seal are filed or, if no renewed motion is filed, the documents provisionally filed under seal will be unsealed.

The briefing schedule established previously remains in effect.

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20 **UNITED STATES DISTRICT COURT**  
21 **CENTRAL DISTRICT OF CALIFORNIA**  
22 **WESTERN DIVISION**

23 DISNEY ENTERPRISES, INC.;  
24 LUCASFILM LTD. LLC;  
25 TWENTIETH CENTURY FOX FILM  
CORPORATION; and WARNER  
26 BROS. ENTERTAINMENT INC.,

27 Plaintiffs,

28 v.

Case No. 2:16-CV-04109-AB (PLAx)

**DECLARATION OF DAVID QUINTO**

Judge: Hon. André Birotte Jr.

Action Filed: June 9, 2016

1 VIDANGEL, INC.,  
2 Defendant.

3  
4 VIDANGEL, INC.,  
5 Counterclaimant,  
6 v.

7 DISNEY ENTERPRISES, INC.;  
8 LUCASFILM LTD. LLC;  
9 TWENTIETH CENTURY FOX FILM  
CORPORATION; and WARNER  
10 BROS. ENTERTAINMENT, INC.,  
11 Counterclaim Defendants.

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1 I, David Quinto, declare as follows:

2 1. I am the General Counsel of VidAngel, Inc. I have personal knowledge  
3 of the facts set forth herein and if called and sworn as a witness, I could and would  
4 testify competently hereto.

5 2. Earlier today, this Court issued an Order that denied VidAngel's  
6 application for a temporary stay. Given the denial of the requested stay, VidAngel  
7 employees at VidAngel were immediately directed to shut the company's movie-  
8 streaming servers completely, such that it is no longer possible to stream a movie from  
9 VidAngel. Even customers who currently own tens of thousands of discs are unable to  
10 watch the content they own. Notwithstanding VidAngel's efforts to avoid having to  
11 shut down completely, it is not now technologically possible for VidAngel to comply  
12 fully with the Court's Order with respect to plaintiffs' titles while at the same time  
13 filtering and streaming titles released by the many, many studios that have neither sued  
14 VidAngel nor expressed any complaint concerning its service. VidAngel has therefore  
15 been forced to shut down its entire business as a result of the entry of the preliminary  
16 injunction and the denial of a stay.

17 3. I hope VidAngel's action today moots plaintiffs' *Ex Parte* Application for  
18 Order to Show Cause re: Contempt against VidAngel. Plaintiffs sought only to compel  
19 compliance with the preliminary injunction and VidAngel is now in full compliance  
20 with it.

21 I declare under penalty of perjury that the foregoing is true and correct. Executed  
22 this 29th day of December, 2016 in Los Angeles, California.

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26 \_\_\_\_\_  
27 David Quinto  
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.: CV 16-04109-AB (PLAx)

Date: December 29, 2016

Title: Disney Enterprises, Inc. et al v. VidAngel Inc.

Present: The Honorable **ANDRÉ BIROTTE JR., United States District Judge**

Carla Badirian  
Deputy Clerk

N/A  
Court Reporter

Attorneys Present for Plaintiffs:

None Appearing

Attorneys Present for Defendants:

None Appearing

**Proceedings: [In Chambers] Order DENYING Defendant's Ex Parte Application to Stay Preliminary Injunction Pending Appeal Or Alternatively, Pending Decision by the Ninth Circuit On Stay Pending Appeal (Dkt. No. 147)**

This matter is before the court on Defendant VidAngel, Inc.'s ("VidAngel") ex parte application to stay the Court's December 12, 2016 preliminary injunction order granting Plaintiffs' Disney Enterprises, Inc., Lucasfilm Ltd. LLC, Twentieth Century Fox Film Corporation, and Warner Bros. Entertainment Inc. ("Plaintiffs") Motion for Preliminary Injunction. (Dkt. No. 144, "Order.") The Courts Order enjoined VidAngel from copying, streaming, transmitting or otherwise publicly performing or displaying any of Plaintiffs' copyrighted works. (*Id.*) VidAngel was also enjoined from circumventing technological measures protecting Plaintiffs' copyrighted works or engaging in any activity that violates Plaintiffs anti-circumvention right under § 1201 of the Copyright Act, 17 U.S.C. §1201(a), or infringing Plaintiffs' exclusive rights under § 106 of the Copyright Act, 17 U.S.C. § 106. (*Id.*) VidAngel requests that the Order be stayed in its entirety pending resolution of its appeal of the Court's Order to the Ninth Circuit. VidAngel

alternatively moves this Court to stay its Order pending VidAngel's motion to the Ninth Circuit for a stay of the injunction which VidAngel intends to file should the instant motion be denied.

For the reasons set forth below, the court **DENIES** VidAngel's motion for a stay in its entirety.

## I. LEGAL STANDARD

Federal Rule of Civil Procedure 62(c) provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants . . . an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." In determining whether to issue a stay pending an interlocutory appeal, courts must consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987). "The first two factors of the traditional standard are the most critical." *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009).

In applying these factors, the Ninth Circuit employs a "sliding scale" approach whereby "the elements of the . . . test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 964-66 (9th Cir. 2011) (noting that the sliding scale test for preliminary injunctions described in *Alliance for the Wild Rockies* is the "essentially the same" as the test used in the stay context, and holding that this approach "remains in place" following the Supreme Court's decision in *Nken*). The Ninth Circuit "has adopted and applied a version of the sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'" *Alliance for the Wild Rockies*, 632 F.3d at 1131-32. "Serious questions" are those which are "substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation." *Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 977-78 (9th Cir. 1992) (citing *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir.1991)); *see also Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) ("serious questions" refers to questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo").

## II. DISCUSSION

### a. Likelihood of Success on the Merits

VidAngel's application for a stay raises the same arguments made in its original opposition to Plaintiffs' motion for a preliminary injunction. (Dkt. No. 42) The Court addressed each of VidAngel's arguments in its Order, and will not repeat the analysis here. For the reasons set forth in the Order, the Court determined that the Plaintiffs have demonstrated a strong likelihood of success on the merits of their claims that VidAngel's service violates Plaintiffs' rights pursuant to § 1201(a) of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201(a), and infringes Plaintiffs' exclusive rights under § 106 of the Copyright Act, *id.* § 106.

A district court's decision regarding preliminary injunctive relief is subject to limited review. *Harris v. Bd. of Supervisors, L.A. Cnty*, 366 F.3d 754, 760 (9th Cir. 2004) (review "limited and deferential") The Ninth Circuit will reverse a district court's issuance of a preliminary injunction only if the district court abused its discretion by basing its decision on an erroneous legal standard or on clearly erroneous factual findings. *Alliance for the Wild Rockies*, 632 F.3d at 1131. Moreover, the Court's factual findings are reviewed for clear error and will not be reversed "as long as [the] findings are plausible in light of the record viewed in its entirety." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 795 (9th Cir. 2005). Considering the deferential standard of review and the Court's determination that the Plaintiffs have demonstrated a strong likelihood of success on the merits of its claims, VidAngel has not shown that it is likely to prevail on the merits of the appeal.

### b. Balance of the Hardships

VidAngel raises similar arguments from its original opposition regarding the harms it will suffer if the injunction is not stayed. Specifically, VidAngel contends that the injunction "threatens to destroy VidAngel's unique market position and its market value" and will cause "serious financial loss." (Dkt. No. 147 at 12.) VidAngel also asserts that the injunction threatens to damage customer goodwill. (*Id.*) The Court addressed these arguments by noting that "[Defendants] cannot complain of the harm that will befall it when properly forced to desist from its infringing activities." *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995). "Where the only hardship that the defendant will suffer is lost profits from an activity which has been shown likely to be infringing, such an argument in defense 'merits little equitable consideration [on an appeal from a preliminary injunction].'" *Id.* (citing *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 612 (1st Cir. 1988); *accord Apple Comput., Inc. v. Franklin*



*Comput. Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983) (in motion for preliminary injunction, district court should not consider the “devastating effect” of the injunction on the infringer’s business). (Order at 21.)

The Court determined that the Plaintiffs demonstrated a likelihood of imminent, irreparable injury in the absence of an injunction. (Order at 16-20.) The Court specifically found that VidAngel’s service caused irreparable harm by undermining Plaintiffs’ negotiating position with licensees and also by damaging goodwill with licensees, some of whom had specifically referenced “unlicensed services like VidAngel’s...during negotiation meetings.” (*Id.* at 18.) VidAngel argues that the Plaintiffs goodwill with licensees will be “largely unaffected pending the outcome on appeal considering this Court’s ruling in Plaintiffs’ favor in the Order.” (Dkt. No. 147 at 13.) The Court is not persuaded by this argument. The evidence in the record shows that Plaintiffs’ irreparable harms specifically arise from VidAngel’s unlicensed use of Plaintiff’s works. Allowing VidAngel to continue offering the Plaintiff’s copyrighted works without a license will only increase these harms.

Based on the foregoing, the Court holds that the balance of the hardships tips sharply in the favor of the Plaintiffs.

### **c. Public Interest**

VidAngel has not sufficiently shown that the public interest supports a stay of the preliminary injunction. Plaintiffs have shown a likelihood of success on the merits of their claims that VidAngel’s service violates § 1201(a), and § 106 of the Copyright Act. As the Court noted in its Order, “it is virtually axiomatic that the public interest can only be served by upholding copyright protections and correspondingly, preventing the misappropriation of skills, creative energies, and resources which are invested in the protected work.” *Warner Bros. Entm’t, Inc. v. WTV Sys.*, 824 F. Supp. 2d 1003, 1015 (C.D. Cal. 2011) (citing *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3rd Cir. 1983)). VidAngel essentially restates its argument that an injunction severely undercuts “the public interest in protecting every person’s right to watch filtered content in private.” (Oppo. at 32.) However, VidAngel has not refuted the evidence in the record that indicates that ClearPlay offers a filtering service to Google Play users who access authorized streams from GooglePlay’s licensed service. (Bennett Decl. Ex. A. at 5-6.) VidAngel’s assertions regarding Clearplay’s filtering service are immaterial to the Court’s analysis.<sup>1</sup> 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.” (Oppo. at 33.)

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<sup>1</sup> VidAngel argues that that ClearPlay “does not provide a legal filtering alternative” and is “technically inferior” to VidAngel’s service. (Dkt. No. 147 at 14.)

**d. Conclusion**

For the foregoing reasons, the Court finds that VidAngel has not shown a likelihood that it will prevail on its appeal, nor has it shown that the balance of hardships tips sharply in its favor or that the public interest is best served by a stay. Therefore, the Court denies VidAngel's motion for a stay in its entirety.

**IT IS SO ORDERED.**

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21 UNITED STATES DISTRICT COURT  
 22 CENTRAL DISTRICT OF CALIFORNIA  
 23 WESTERN DIVISION

24 DISNEY ENTERPRISES, INC.;  
 LUCASFILM LTD. LLC;  
 25 TWENTIETH CENTURY FOX FILM  
 CORPORATION; AND WARNER  
 26 BROS. ENTERTAINMENT, INC.,

27 Plaintiffs,

28 vs.

CASE NO. CV16-04109-AB (PLAx)  
**VIDANGEL, INC.'S OPPOSITION  
 TO PLAINTIFFS' EX PARTE  
 APPLICATION FOR AN ORDER  
 TO SHOW CAUSE**

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VIDANGEL, INC.,  
Defendant.

[Filed concurrently with Declaration of David Quinto; Declaration of Jarom McDonald; and Declaration of Neal Harmon.]

The Hon. André Birotte Jr.  
Date Action Filed: June 9, 2016

VIDANGEL, INC.,  
Counterclaimant,  
vs.  
DISNEY ENTERPRISES, INC.;  
LUCASFILM LTD. LLC;  
TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
BROS. ENTERTAINMENT, INC.,  
Counterclaim Defendants.

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1 **I. INTRODUCTION**

2 VidAngel opposes plaintiffs Disney Enterprises, Inc., Lucasfilm Ltd., LLC,  
3 Twentieth Century Fox Film Corporation, and Warner Bros. Entertainment, Inc.’s  
4 (collectively, “Plaintiffs”) premature *ex parte* application for an order to show cause  
5 regarding contempt because VidAngel is *not* contemptuous of this Court’s  
6 preliminary injunction order (the “Order”). VidAngel fully respects this Court’s  
7 authority to order that it be preliminarily enjoined and appreciates the consideration  
8 this Court gave to both parties’ arguments on the merits. Although Plaintiffs attempt  
9 to portray VidAngel’s actions as flouting the Court’s Order, that is simply not the  
10 case.

11 Two days after the Order was entered, VidAngel applied *ex parte* for a stay of  
12 the preliminary injunction pending the outcome of VidAngel’s appeal of the Order to  
13 the Ninth Circuit. While awaiting this Court’s ruling on that application, VidAngel  
14 has worked diligently to comply with the changes required by the Order so that its  
15 entire business – including significant business activities not subject to the injunction  
16 - is not destroyed. Nothing on the face of the Order requires VidAngel to cease all  
17 its business activities, and VidAngel reasonably interpreted the Order as confined to  
18 Plaintiffs’ copyrighted works. To remove only Plaintiffs’ works from VidAngel’s  
19 offerings is not a trivial matter and is far from the mere inconvenience Plaintiffs  
20 suggest. It requires considerable technical effort and cooperation from third-party  
21 app stores such as Roku and Apple and could not be done immediately (in part due to  
22 the app stores’ policies).

23 Additionally, VidAngel was unable to predict whether or when preliminary  
24 injunction might issue or what specific conditions might be enjoined. To require  
25 VidAngel to prepare for all possible contingencies so that it could immediately  
26 respond would be unfair. Allowing VidAngel a reasonable time to implement the  
27 necessary changes to its system while it awaits a decision on its stay request made to  
28

1 this Court and, if necessary, on an emergency stay request to the Ninth Circuit which  
2 must be made within one week of the Court’s decision on the pending stay request,  
3 will allow VidAngel to avoid the total disruption of its business.

4         Given the sweeping breadth of the injunction, which was not limited to alleged  
5 DMCA violations, but included activities governed by the exclusive rights of  
6 Copyright, VidAngel had three choices. It could (i) comply immediately by  
7 disabling in-app purchases of all 2,500+ titles in its library and breaking all titles on  
8 its apps; (ii) comply within a relatively short period by disabling specific titles but  
9 without preventing further purchases of those titles made through the use of cached  
10 apps and without preventing complaints from the owners of 21,182 discs of plaintiffs'  
11 works; or (iii) remove access to plaintiffs' works in an orderly manner by writing app  
12 modifications, submitting them to the app stores for approval following the holiday  
13 "black-out" period, and attempting to notify its customers through all available  
14 means of what was happening and why and explaining that they could sell back discs  
15 they currently owned but could not re-purchase them. (Declaration of Neal in  
16 Support of Opposition to *Ex Parte* Application For Order to Show Cause (“Harmon  
17 Decl.”), ¶¶ 13-14.) To prevent irreparable injury to VidAngel through the generation  
18 of consumer ill will and disruption of its business activities beyond those directly  
19 affected by the injunction, VidAngel opted to pursue the third option. (*Id.*)

20         Contempt is a drastic remedy that is not required here, especially on an *ex*  
21 *parte* basis. VidAngel has declared that it will fully comply with the Order if no stay  
22 is granted and is meanwhile working feverishly to avoid having to completely  
23 dismantle its business and cause its customers harm if enforcement is enforcement is  
24 not stayed. Moreover, Plaintiffs’ sixteen-month delay in seeking the preliminary  
25 injunction and their inability to point to any immediate harms suffered from  
26 VidAngel’s service undermine their claims of injury requiring urgent, *ex parte* relief.  
27 Accordingly, it would be improper to consume the Court’s time to review briefing  
28



1 and conduct a hearing on civil contempt.

2 **II. PROCEDURAL HISTORY**

3 On December 12, 2016, this Court granted Plaintiffs’ motion for a preliminary  
4 injunction. (Dkt. 144.) The Court enjoined VidAngel from the following activities:

- 5 (1) circumventing technological measures protecting Plaintiffs’  
6 copyrighted works on DVDs, Blu-ray discs, or any other medium;  
7 (2) copying Plaintiffs’ copyrighted works, including but not limited to  
8 copying the works onto computers or servers;  
9 (3) streaming, transmitting or otherwise publicly performing or  
10 displaying any of Plaintiffs’ copyrighted works over the Internet  
11 (through such websites as VidAngel.com), via web applications  
12 (available through platforms such as the Windows App Store, Apple’s  
13 App Store, the Amazon App Store, Facebook or Google Play), via  
14 portable devices (such as through applications on devices such as  
15 iPhones, iPads, Android devices, smart phones or tablets), via media  
16 streaming devices (such as Roku, Chromecast or Apple TV), or by  
17 means of any other device or process; or  
18 (4) engaging in any other activity that violates, directly or indirectly,  
19 Plaintiffs’ anti-circumvention right under § 1201 of the Copyright Act,  
20 17 U.S.C. §1201(a), or infringing by any means, directly or indirectly,  
21 Plaintiffs’ exclusive rights under § 106 of the Copyright Act, 17 U.S.C.  
22 § 106.

23 (*Id.* at p. 22.) To obtain the injunction, Plaintiffs were “ordered to post a bond in the  
24 amount of \$250,000.” (*Id.*)

25 Immediately thereafter, on December 14, 2016, VidAngel moved to stay the  
26 Order in its entirety pending appeal. (Dkt. 147.) It also filed a notice of appeal.  
27 (Dkt. 148.)

28 On December 15, 2016, Plaintiffs posted the required bond. (Dkt. 152.)

On December 21, 2016, VidAngel filed a declaration signed by its Chief  
Executive Officer, Neal Harmon, to advise this Court of the status of VidAngel’s  
good faith efforts to comply with the Order and to request that “it be allowed a  
reasonable time to comply fully with the terms of the preliminary injunction if no  
stay is granted in the interim.” (Dkt. 158.)

1 On December 22, 2016, Plaintiffs applied *ex parte* for an order to show cause  
2 why VidAngel should not be held in contempt. (Dkt. 161.)

3 In light of the holidays and pre-existing travel plans for many of its team  
4 members, VidAngel’s counsel asked Plaintiffs to stipulate to permit VidAngel to file  
5 its opposition to the *ex parte* application on December 26 or 27. (Declaration of  
6 David Quinto in Support of Opposition to *Ex Parte* Application For Order to Show  
7 Cause (“Quinto Decl.”), ¶ 7, Ex. A.) Plaintiffs refused that request. (*See id.*)

### 8 **III. FACTUAL BACKGROUND**

9 Immediately after this this Court granted the preliminary injunction, VidAngel  
10 began to investigate how it could comply with the injunction. (Harmon Decl., ¶ 2;  
11 Declaration of Jarom McDonald in Support of Opposition to *Ex Parte* Application  
12 For Order to Show Cause (“McDonald Decl.”), ¶¶2-3.) Due to the nature of its on-  
13 line business and special blackout restrictions imposed on retailers by Roku and  
14 other third parties during the holiday season, VidAngel discovered that it could not  
15 modify its apps to remove Plaintiffs’ titles during the holiday blackout periods  
16 without ceasing business operations entirely.

17 “VidAngel makes 84.3 percent of its sales through app stores such as Roku,  
18 Apple, Google Play, and Amazon Fire TV.” (Harmon Decl., ¶ 3.) “To avoid risking  
19 disruptions to their users’ experience during a critical time of the year, the Apple and  
20 Roku stores do not permit modifications to their applications during the holiday  
21 season.” *Id.* For example, on December 12 and December 23, respectively, Roku  
22 and Apple entered into black-out periods that prohibit retailers from writing new  
23 code modifying their apps. *See id.* (stating that Roku’s blackout period began on  
24 December 12 before the Injunction issued). On December 13, 2016, VidAngel  
25 contacted “all the mobile app stores is uses – Roku, Apple, Amazon, and Google – to  
26 notify them of the entry of the preliminary injunction and VidAngel’s intention to  
27 remove both plaintiffs’ works and all other works we do not control from our site if  
28

1 we could not obtain a stay of the preliminary injunction.” (McDonald Decl., ¶ 3.)  
2 VidAngel is frantically writing code to remove Plaintiffs’ titles from its online  
3 library, including “removing certain third-party integrations from its back-end  
4 application interface,” reviewing “the codebase to annotate places to touch to turn off  
5 systems supporting the sale, streaming, and buy-back of plaintiffs’ works,” and  
6 “cleaning, vacuuming, and archiving old data from [VidAngel’s] production  
7 database.” (MacDonald Decl., ¶¶ 3-9.) VidAngel continues to implement these  
8 efforts and plans to diligently carry them out until they are completed. (*Id.* at ¶ 9.)  
9 Despite VidAngel’s efforts, it was not been able to complete the appropriate changes  
10 to its system before the blackout periods imposed by Roku, Apple and other on-line  
11 stores went into effect. (Harmon Decl., ¶ 3.) In fact, “because each of the apps is  
12 developed to use the interfaces native to a given platform, there are some functions  
13 that must be hard-coded in, such as how to handle errors, and how to disseminate app  
14 notifications.” (*Id.*, ¶ 12.) It takes substantial time to properly write and implement  
15 changes to VidAngel’s technical system to prevent publishing bugs, avoid rejection  
16 by the app review process and ensure that any changes do not break older versions of  
17 the apps. (*Id.*)

18       Due to special exigent circumstances surrounding the holiday blackout  
19 periods, VidAngel determined that it would be unable to modify its “system to block  
20 access to just the plaintiffs’ titles without causing major customer confusion about  
21 which titles are and are not available for purchase.” (*Id.*, ¶ 4.) “[I]f VidAngel were  
22 to remove existing Plaintiffs’ titles from its library during the black-out period,” it  
23 would appear to VidAngel’s customers that those titles are available even though  
24 VidAngel had removed them from its library, customers would be unable to use the  
25 app functionality that currently enables them to sell back and receive monetary credit  
26 for titles that they previously purchased, and VidAngel would be unable to  
27 communicate in an effective manner through its apps with customers about these  
28

1 changes to its system. (*Id.*, ¶¶ 4, 7-11.) Indeed, “[i]f VidAngel were forced to shut  
2 down without messaging within the apps to directly explain the situation for its  
3 approximately 200,000 customers, its team of 14 people would be unable to address  
4 the influx even if they devoted their holidays entirely to damage control. (*Id.*, ¶ 11.)

5 VidAngel estimates that it “will require until January 5, 2017, to modify [its]  
6 Apple app based on [its] prior experience with [Apple’s] app store and its resumption  
7 date for modifying apps, and until January 25, 2017, for the Roku apps because Roku  
8 does not permit modifications to be submitted until January, and then requires two  
9 weeks for expedited review.” (*Id.*, ¶ 13.)

10 **IV. ARGUMENT**

11 **A. PLAINTIFFS’ CONTEMPT APPLICATION IS UNNECESSARY**  
12 **BECAUSE VIDANGEL HAS DECLARED THAT IT WILL**  
13 **COMPLY WITH THE PRELIMINARY INJUNCTION**

14 Plaintiffs’ application for a finding of contempt, brought on an *ex parte* basis  
15 to require VidAngel to respond on the last business day before Christmas, will  
16 accomplish nothing.<sup>1</sup> VidAngel is *not* contemptuous of the Court’s order granting a  
17 preliminary injunction. VidAngel fully appreciates the considerable time the Court  
18 afforded the parties to argue the merits and acknowledges the time the Court took to  
19 prepare its opinion granting the preliminary injunction. VidAngel further respects  
20 fully the Court’s authority to order that it be preliminarily enjoined.

21 What the parties neither briefed nor argued, and what the Court could not  
22 know, was the effect the *immediate* implementation of that order would have. Far  
23 from the mere inconvenience Plaintiffs suggest, as reflected in Harmon Declaration it  
24 is impossible to comply with the injunction as quickly as Plaintiffs demand without

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25  
26 <sup>1</sup> Reflecting that its purpose is to prejudice VidAngel rather than allow the trial  
27 and appellate courts to decide the parties’ dispute on the merits, Plaintiffs even  
28 rejected VidAngel’s request to be allowed to respond immediately *after* Christmas.

1 ceasing all business operations entirely, including significant non-enjoined activities,  
2 and without creating enormous consumer confusion and ill will toward VidAngel.

3 As the Court does know, VidAngel promptly requested a stay of the  
4 preliminary injunction, asking either that implementation be stayed pending an  
5 expedited review of the propriety of issuing the injunction or until the Ninth Circuit  
6 can decide whether to grant an emergency stay. If the Court denies VidAngel’s  
7 application for a stay pending appeal, VidAngel will be required to request an  
8 emergency stay in the Ninth Circuit within seven days.

9 Allowing VidAngel the short time it will require to get a decision on its stay  
10 request made to this Court on December 14th and, if necessary, on an emergency  
11 stay request which must be made within one week of the Court’s decision on the  
12 pending stay request, will allow VidAngel to avoid the total disruption of its non-  
13 enjoined business activities.

14 Although Plaintiffs point to one app they claim could have been modified to  
15 eliminate their content before the app services’ blackout period, Plaintiffs do not  
16 dispute that when the injunction issued, it was already too late to modify most of  
17 VidAngel’s apps, including its most important one—Roku. Plaintiffs also ignore that  
18 apps are modified not by flipping a switch but by writing code—an activity that takes  
19 time to accomplish. Plaintiffs further ignore that VidAngel must write different code  
20 for each app. That process alone will require at least a number of days.

21 “As a technical matter, VidAngel has the ability [] to disable in-app purchasing  
22 for all titles, but it cannot use the existing in-app purchasing functionality to restrict  
23 certain titles that have been previously been made available for purchase.” (Harmon  
24 Decl., ¶ 7.) VidAngel has worked tirelessly, “pouring through codebase to annotate  
25 places [it] would have to touch to turn off systems supporting the sale, streaming,  
26 and buy-back of plaintiffs’ works.” (McDonald Decl., ¶ 5.) “Also on December 19,  
27 [VidAngel] began writing code to short circuit all requests to purchase Plaintiffs’  
28

1 titles while returning an error message. Sending an error message would, of course,  
2 result in customer complaints but we could not find a better solution without  
3 updating our apps. Unfortunately, [VidAngel] is in the annual holiday “blackout  
4 period” during which the app stores do not permit us to modify our apps.” (*Id.*, ¶ 7.)  
5 The code to short circuit all requests to purchase Plaintiffs’ works is still not fully  
6 tested or capable of being deployed. (*See Id.*)

7 Further, the issuance of the preliminary injunction has led the financial backers  
8 of VidAngel’s payment processing provider to require that it abandon VidAngel as a  
9 client. (Quinto Decl., ¶ 2.) Finding a new payment processing provider, configuring  
10 all of VidAngel’s apps and its Internet site to work with a different provider, and  
11 uploading all the relevant data files also requires a substantial amount of effort and  
12 cannot be completed overnight.

13 Finally, Plaintiffs overlook that VidAngel is a start-up company with 51  
14 employees spread across all 10 aspects of its business. (Quinto Decl., ¶ 4.) Plaintiffs  
15 speculate that VidAngel could effectively communicate with its customers to explain  
16 any serious issues they would experience resulting from the piecemeal takedown of  
17 Plaintiffs’ works. This is not true. Although VidAngel attempts to regularly  
18 communicate with its customers, its communications are not read by the vast  
19 majority of them. (*See Harmon Decl.*, ¶ 15.) Such efforts would only reach  
20 VidAngel’s most fervent users. Additionally, as a practical matter, VidAngel has  
21 nowhere near the manpower required to simultaneously accomplish all tasks  
22 necessary to block access to plaintiffs’ works without causing major disruption to the  
23 rest of its business, including offering the well over 1,000 movies whose content  
24 owners have not objected to VidAngel’s service.

25 **B. VIDANGEL HAS TAKEN REASONABLE STEPS TO**  
26 **SUBSTANTIALLY COMPLY WITH THE COURT’S ORDER**

27 A party claiming civil contempt must demonstrate a violation of the court’s  
28 order by clear and convincing evidence. *In re Dual-Deck Video Cassette Recorder*

1 *Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). Accordingly, the moving party  
2 must establish that “(1) that [the alleged contemnor] violated the court order, (2)  
3 beyond substantial compliance, (3) not based on a good faith and reasonable  
4 interpretation of the order, (4) by clear and convincing evidence.” *United States v.*  
5 *Bright*, 596 F.3d 683, 694 (9th Cir.2010) (quoting *Labor/Cmty. Strategy Ctr. v. L.A.*  
6 *County Metro. Trans. Auth.*, 564 F.3d 1115, 1123 (9th Cir.2009) ); *see also F.T.C. v.*  
7 *Affordable Media*, 179 F.3d 1228, 1239 (9th Cir.1999) (“The standard for finding a  
8 party in civil contempt is well settled: The moving party has the burden of showing  
9 by clear and convincing evidence that the contemnors violated a specific and definite  
10 order of the court.”).

11 Plaintiffs cannot meet their steep burden to prove that VidAngel should be  
12 held in civil contempt. VidAngel reasonably interpreted the Order to apply to only to  
13 Plaintiffs’ works and to allow VidAngel a reasonable time to make the necessary  
14 technical modifications to its platforms to allow VidAngel to remove Plaintiffs’  
15 works without completely shutting down its business. Additionally, VidAngel has  
16 taken reasonable steps to substantially comply with the Order. Under these  
17 circumstances, it would be inappropriate to exercise the extreme remedy of  
18 contempt.

19 **1. VidAngel Has Acted Based on a Reasonable Interpretation of**  
20 **the Preliminary Injunction Order.**

21 As a threshold matter, it would not be fair to hold VidAngel in contempt  
22 because its actions have been in accordance with a good faith and reasonable  
23 interpretation of the Order. *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126,  
24 1130 (9th Cir. 2006) (“[A] person should not be held in contempt if his action  
25 appears to be based on a good faith and reasonable interpretation of the court’s  
26 order.”). VidAngel reasonably interpreted the Order to apply to Plaintiffs’  
27 copyrighted works only and to allow VidAngel a reasonable time to make the  
28

1 necessary technical modifications to its platforms to remove Plaintiffs' works  
2 without completely shutting down its business. (*See* Quinto Decl., ¶ 3.)

3 The Order provides that VidAngel is temporarily enjoined with respect to  
4 Plaintiffs' copyrighted works only. (Dkt. 144 at 22.) Moreover, the Order sets no  
5 express time by which VidAngel was required to comply. As a result, VidAngel  
6 reasonably interpreted that the Order does not require VidAngel to shut down its  
7 entire business, which offers copyrighted content controlled by over a hundred non-  
8 party studios and distributors that have not expressed any complaint to VidAngel.  
9 (Harmon Decl., ¶ 6.) To comply with the Order in good faith, VidAngel  
10 immediately began to implement the necessary technical modifications to its system  
11 to disable customers from purchasing or watching Plaintiffs' works. (McDonald  
12 Decl., ¶¶ 2-3.) This is no trivial task. To accomplish this without shutting down  
13 entirely or causing significant harm to its consumers, VidAngel has experienced  
14 technical barriers requiring time to overcome. (*See Id.*, ¶¶3-9.) VidAngel simply  
15 needs a reasonable time to implement these changes to fully comply with the Order  
16 without disabling non-enjoined aspects of its business.

17 **2. VidAngel Has Taken Reasonable Steps to Substantially**  
18 **Comply with the Order.**

19 Even when a party has failed to technically comply with an order, a finding of  
20 contempt is not appropriate if the party has taken all reasonable steps to substantially  
21 comply with the court order. *Vertex Distribg., Inc. v. Falcon Foam Plastics, Inc.*,  
22 689 F.2d 885, 891 (9th Cir. 1982); *see also Newman v. Graddick*, 740 F.2d 1513,  
23 1525 (11th Cir.1984) (“[A] person who attempts with reasonable diligence to comply  
24 with a court order should not be held in contempt.”). Importantly, the “[a]bility to  
25 comply is the crucial inquiry, and ‘a court should weigh all evidence properly before  
26 it determines whether or not there is actually a present ability to obey.’ ” *United*  
27 *States v. Ayres*, 166 F.3d 991, 994 (9th Cir.1999) (citing *United States v. Drollinger*,



1 80 F.3d 389 (9th Cir.1996)).

2 Here, VidAngel has taken reasonable steps to substantially comply with the  
3 Order. Upon receiving the Order, VidAngel immediately investigated how to  
4 comply with the injunction without going out of business and without harming its  
5 customers. (Harmon Dec., ¶ 2.) VidAngel has stopped buying and uploading copies  
6 of Plaintiffs' works. (*Id.*, ¶ 15.) Unfortunately, two of Plaintiffs' new titles were  
7 uploaded after the Order was issued, however, that is not indicative of VidAngel's  
8 actions as a whole. (Harmon Dec., ¶ 16.) VidAngel has since taken great efforts to  
9 ensure that no title owned or licensed by Plaintiffs is added. (*Id.*)

10 Furthermore, VidAngel has been forthright about its intent remove Plaintiffs'  
11 titles from its platforms as soon as practicable. VidAngel submitted Neal Harmon's  
12 declaration dated December 21, 2016, in an effort to notify the Court of its efforts to  
13 fully comply with the Order. As Mr. Harmon explained, VidAngel is currently  
14 limited in its ability to stop its customers from streaming Plaintiffs' titles. The vast  
15 majority of VidAngel's sales are made through app stores, including Roku and  
16 Apple. (Harmon Dec., ¶ 3.) VidAngel cannot modify its Roku and Apple apps to  
17 remove Plaintiffs' titles during the holiday blackout period unless it removes all  
18 21,000 owned titles, thus creating massive customer confusion and a tidal wave of  
19 customer support requests. (*Id.*) The only alternatives would affect all titles, not just  
20 Plaintiffs' titles. This would result in a complete shutdown of VidAngel's business  
21 and significant customer confusion. Despite its current limitations, VidAngel has  
22 implemented a plan to make the necessary technical changes to its applications to  
23 address the order once the blackout period ends. Plaintiffs' contention that Mr.  
24 Harmon's attempt to update the Court on VidAngel's compliance efforts somehow  
25 demonstrates VidAngel's bad faith is misguided. (Mot. at 5-6.) Mr. Harmon no  
26 longer writes code for VidAngel and could not modify it himself. Thus, VidAngel's  
27 reasonable efforts to substantially comply with the Court's preliminary injunction  
28

1 order should not be found contemptuous.

2 **C. Plaintiffs Request for Coercive Monetary Sanctions Is Unnecessary**

3 District courts are entitled to exercise considerable discretion in selecting a  
4 means to enforce an order. *Shillitani v. United States*, 384 U.S. 364, 370 (1966)  
5 (“[C]ourts have inherent power to enforce compliance with their lawful orders  
6 through civil contempt.”). If this Court determines contempt sanctions are  
7 appropriate, it is “obliged to use the least power adequate to the end proposed.”  
8 *Spallone v. United States*, 493 U.S. 265, 276 (1990). Plaintiffs’ request for a  
9 coercive monetary sanction of \$10,000 to \$20,000 per day is inappropriate. In the  
10 case Plaintiffs cite, *CBS Broad. Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 103 (2d Cir.  
11 2016), when the court deemed coercive monetary sanctions necessary, it noted the  
12 sanctioned party’s “repeated disregard for federal injunctions.” Here, VidAngel has  
13 never been found to have violated a court order and has declared that it will fully  
14 comply with the Order within a reasonable time and intends to comply strictly with  
15 the injunction if no stay is granted.

16 **V. CONCLUSION**

17 For the foregoing reasons, Plaintiffs’ request for an order to show cause should  
18 be denied.

19  
20 DATED: December 23, 2016

21 BAKER MARQUART LLP

22 /s/ Jaime W. Marquart

23 Jaime W. Marquart

24 Scott M. Malzahn

25 *Attorneys for Defendant and*  
26 *Counterclaimant VidAngel, Inc.*

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20 UNITED STATES DISTRICT COURT  
21 CENTRAL DISTRICT OF CALIFORNIA  
22 WESTERN DIVISION

23 DISNEY ENTERPRISES, INC.;  
24 LUCASFILM LTD. LLC;  
25 TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
26 BROS. ENTERTAINMENT, INC.,

27 Plaintiffs,

28 vs.

CASE NO. 16-cv-04109-AB (PLAx)

**DECLARATION OF NEAL  
HARMON IN SUPPORT OF  
VIDANGEL, INC.'S OPPOSITION  
TO EX PARTE APPLICATION FOR  
AN ORDER TO SHOW CAUSE**

The Hon. André Birotte Jr.

1 VIDANGEL, INC.,  
2 Defendant.

Date Action Filed: June 9, 2016

3 VIDANGEL, INC.,  
4 Counterclaimant,  
5 vs.  
6 DISNEY ENTERPRISES, INC.;  
7 LUCASFILM LTD. LLC;  
8 TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
9 BROS. ENTERTAINMENT, INC.,  
10 Counterclaim Defendants.

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I, Neal Harmon, declare as follows:

1. I am a founder and the Chief Executive Officer of defendant and counterclaimant VidAngel, Inc. I have personal knowledge of the facts set forth herein and if called and sworn as a witness, I could and would testify competently hereto.

2. When I learned of the issuance of the preliminary injunction the night of December 12, 2016, I immediately began to investigate how VidAngel could comply with the injunction without going out of business completely and without causing unintended problems for our customers. I realized that we faced the following problems, among others.

3. First, unlike ClearPlay (which is able to offer its filtering of Google Play's streaming only to customers who access its eCommerce website online through a desktop browser), VidAngel makes 84.3 percent of its sales through app stores such as Roku, Apple, Google Play, and Amazon Fire TV. To avoid risking disruptions to their users' experience during a critical time of the year, the Apple and Roku stores do not permit modifications to their applications during the holiday season. These hard deadlines for publishing new apps, out of necessity, create earlier deadlines for developers to submit builds of app updates for review and approval by the respective app stores. For example, Roku, which has a thorough debug and user-interface testing process before publishing a company's app, will not accept any new app updates after November 15. As of December 12, 2016, this holiday blackout window had already begun for the largest platform through which VidAngel sells content (Roku - over a third of our purchases). I understand that we are now in that holiday blackout window for Apple too, meaning that VidAngel cannot modify its most popular apps until early January.

4. If VidAngel were to remove existing titles from its library during the black-out period for modifying apps, the system could not be modified to recognize

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1 titles that were no longer available for sale. Those titles would still appear to be  
2 available even though VidAngel had removed them. The only alternative would be  
3 for VidAngel to completely turn off in-app purchasing across the board—which  
4 would prevent VidAngel from offering content that it is directly licensed to filter  
5 and stream or as to which the rights holders have no objection to VidAngel’s  
6 service. As a result, during the app black-out period, we are unable to modify our  
7 system to block access to just the plaintiffs’ titles without causing major customer  
8 confusion about which titles are and are not available for purchase. To immediately  
9 shutdown, we would have to block access to all titles.

10 5. VidAngel has entered into licenses to filter and stream certain works  
11 released by entities that are not party to the Directors Guild of America’s collective  
12 bargaining agreement. For example, on September 12, 2016, we signed an  
13 exclusive licensing contract with Excel Entertainment to filter and stream *The Last*  
14 *Descent* commencing December 15, 2016. If we were required to shut down our  
15 entire system immediately or disable in-app purchasing across the board because we  
16 are currently unable to modify our apps to remove selected titles, we would  
17 necessarily have to block access to any works we are licensed to filter and stream  
18 (because the works catalog and purchasing system are coupled together).

19 6. The rights for our content are controlled by over 125 studios or  
20 distributors, the vast majority of whom have neither joined in the litigation nor  
21 expressed any complaint to VidAngel. Since the injunction issued, we have been  
22 contacting them to let them know that if VidAngel is unsuccessful in obtaining a  
23 stay of the preliminary injunction, it will cease filtering and streaming them and will  
24 also cease buying new DVD and Blu-ray discs of their movies unless they are  
25 willing to enter into a covenant not to sue without waiver of any legal position or  
26 argument for the duration of the appeal. To date, one such company—MGM—has  
27 rejected our request for a covenant not to sue and we have yet to hear from many  
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others.

7. Even if VidAngel were able to update its apps despite the blackout period, it is not an easy process to modify in-app purchasing. Once a title has been made available for purchase, rolling it back is not an easy process. This is because the respective platform providers make in-app purchasing available as an all-or-nothing option. As a technical matter, VidAngel has the ability completely to disable in-app purchasing for all titles, but it cannot use the existing in-app purchasing functionality to restrict certain titles that have previously been made available for purchase. On the other hand, we cannot turn off in-app purchases altogether because doing so would prevent us from selling and/or renting other content.

8. In addition, until VidAngel can update its apps after the blackout period, removing titles would also prevent customers from being able to use the app functionality that currently enables them to sell back and receive monetary credit for titles that they previously purchased. This would create confusion and a massive customer support issue.

9. Similarly, more than 20,000 discs in our vault are permanently owned by VidAngel’s customers. Because 56 percent of the discs we sell have content owned or licensed by the plaintiffs, a similar percentage likely applies to the permanently owned discs. To immediately block access to all (or all of plaintiffs’) existing titles, would cause a customer-relations nightmare to address the problem of customers who permanently owned discs that they now could not watch, with no explanation. VidAngel will need to communicate options to these customers, such as receiving the physical DVD that they own.

10. The app blackout period exacerbates these customer relations and support issues. That is because until the apps can be updated (including to reflect direct messaging to customers), there is no practical way to notify our customers of

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1 what we are doing or to let them know that VidAngel will give them credit for  
2 selling their discs back to VidAngel. Although we have our customer's e-mail  
3 addresses, e-mail messages we send to our customers are typically opened only  
4 about 20 percent of the time. As a consequence, many of our apps customers would  
5 likely not understand why our system would neither permit them to sell their discs  
6 back nor give them credit for doing so, or to stream content they previously  
7 purchased and permanently own. We are trying to ensure that customers know  
8 which movies they have purchased, even if they cannot watch them, and that they  
9 have the opportunity to sell those movies back. To avoid creating enormous  
10 consumer ill will, we need time to make our apps ready to explain what is happening  
11 without having movies simply disappear from the apps without notice.

12 11. The company is ill equipped to handle the influx of customer service  
13 requests if it is not afforded that opportunity. In the wake of the preliminary  
14 injunction ruling alone, VidAngel's support tickets doubled from approximately  
15 3,500 to 7000 per week. If VidAngel were forced to shut down without messaging  
16 within the apps to directly explain the situation for its approximately 200,000  
17 customers, its team of 14 people would be unable to address the influx even if they  
18 devoted their holidays entirely to damage control.

19 12. Regardless of the app blackout period, it will take time for VidAngel to  
20 develop updated apps to address the issues that result from the preliminary  
21 injunction order. Because each of the apps is developed to use the interfaces native  
22 to a given platform, there are some functions that must be hard-coded in, such as  
23 how to handle errors, and how to disseminate app notifications. To appropriately  
24 implement drastic changes of the kind necessitated by the preliminary injunction,  
25 such as removing all or a significant number of titles from the site, or removing the  
26 ability to purchase a significant number of movies, work of this nature will be  
27 required. All changes have to be thoroughly vetted and tested before VidAngel can  
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1 submit them to the app stores; otherwise, the app review process will reject them  
2 and/or we run the risk of publishing bugs. In addition, VidAngel has to ensure that  
3 any changes do not break older versions of the apps, which customers may continue  
4 to run.

5 13. In summary, given the sweeping breadth of the injunction, which was  
6 not limited to alleged DMCA violations but included activities governed by the  
7 exclusive rights of copyright, VidAngel had three choices. It could (i) comply  
8 immediately by disabling in-app purchases of all 2,500+ titles in its library and  
9 breaking all titles on its apps; (ii) comply within a relatively short period by  
10 disabling specific titles but without preventing further purchases of those titles made  
11 through the use of cached apps and without preventing complaints from the owners  
12 of 21,182 discs of plaintiffs' works; or (iii) remove access to plaintiffs' works in an  
13 orderly manner by writing app modifications, submitting them to the app stores for  
14 approval following the holiday "black-out" period, and attempting to notify its  
15 customers through all available means of what was happening and why and  
16 explaining that they could sell back discs they currently owned but could not re-  
17 purchase them. To prevent irreparable injury to VidAngel through the generation of  
18 consumer ill will and disruption of its business activities beyond those directly  
19 affected by the injunction, VidAngel opted to pursue the third option.

20 14. These difficulties with anything but the third option above can be  
21 further illustrated through the example of Roku. VidAngel is the only channel on  
22 Roku where titles in the video catalog are inextricably coupled with physical discs;  
23 customers do not purchase access to streams but purchase actual physical discs, and  
24 then use the Roku channel to watch that media with their filter preferences. It is  
25 therefore my understanding, based upon my conversations with VidAngel's tech  
26 team, that:

27 (a) If we simply removed works from our catalog, customers who had legally  
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1 and lawfully purchased those discs would, barring an app update, then lose  
2 access to their own property. They would also no longer be able to see what  
3 they had purchased, sell back purchased discs, etc.  
4 (b) If we left the works in the catalog but turned off the ability to purchase or  
5 watch them, it would, barring an app update, prevent customers from  
6 continuing to watch works that are not part of this suit.  
7 (c) If we turned off purchasing and streaming only on the backend API, it  
8 would, barring an app update, cause serious errors for Roku customers, errors  
9 which not only crash the VidAngel app but, in some situations, cause the Roku  
10 devices to reboot.  
11 (d) If we tried to short circuit the purchase flow so we didn't actually charge  
12 customers (but didn't throw errors from the API response), customers would,  
13 barring an app update, attempt to purchase works but have no feedback as to  
14 why things aren't working, leading to a support nightmare. Additionally, Roku  
15 customers who use in-app billing would, barring an app update, actually be  
16 charged by Roku, but VidAngel would not be able to deliver what they paid  
17 for, leading to a rash of Roku refunds (or customer chargebacks to Roku).  
18 15. To avoid the foregoing problems, we estimate that we will require until  
19 January 5, 2017, to modify our Apple app based on our previous experience with its  
20 app store and its resumption date for modifying apps, and until January 25, 2017, for  
21 the Roku apps because it does not permit modifications to be submitted until  
22 January and then requires two weeks for expedited review. Allowing VidAngel that  
23 time would allow at least some of these issues to be mitigated if no stay of the  
24 preliminary injunction order is granted in the interim.  
25 16. In addition to the steps noted above, we have taken the following  
26 additional steps to comply with the Court's Order and communicate the effect of the  
27 order to our customers. We have surveyed our customer investors for common  
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1 questions, written approximately thirty Frequently Asked Questions regarding the  
2 effect of the Order, and prepared a blog post to send to customers if we are denied  
3 any requested stay of the injunction. We have prepared an email to go to those  
4 customers who have purchased movies and owned them when the Order was issued  
5 but have not sold them back. We have prepared queries to disable the Plaintiffs'  
6 titles immediately. We have created a query and export script to find all customers  
7 who own the works and have not sold them back so that we can notify them. I have  
8 also instructed the inventory team not to purchase additional discs of Plaintiffs'  
9 works to add to inventory.

10 17. On December 20, 2016, plaintiffs complained (through the  
11 Supplemental Declaration of Kelly Klaus) that VidAngel had just added two new  
12 titles they own. This was not intended to be disrespectful or a flout of anything, and  
13 VidAngel has asked for a stay. Nevertheless, to address the concern identified in the  
14 supplemental declaration, VidAngel will not add any other titles owned or licensed  
15 by plaintiffs unless and until it obtains a stay of the preliminary injunction.

16 18. In conclusion, I would like to emphasize that VidAngel wishes to  
17 operate in a fully lawful manner and fully respects the authority of this Court. It is,  
18 and always has been, VidAngel's intent to comply fully and in all respects with all  
19 orders the Court has issued or may issue. But in view of the facts that VidAngel has  
20 now offered its service for just under two years; the plaintiffs waited 11 months after  
21 receiving written notice explaining VidAngel's service simply to file their complaint  
22 (and never sent any preliminary cease-and-desist letters); the plaintiffs never sought  
23 a temporary restraining order but took another four months after filing suit to  
24 conduct discovery and have their motion heard; and the Court understandably took  
25 several weeks to consider the parties' various arguments and issue its ruling,  
26 VidAngel requests that it be allowed a reasonable time to comply fully with the  
27 terms of the preliminary injunction if no stay is granted in the interim.

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I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed on 23<sup>rd</sup> day of December, 2016, at Provo, Utah.

Neal Harmon

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16 3007 Franklin Canyon Drive  
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17 Telephone: (213) 604-1777  
Facsimile: (732) 377-0388  
18 *Attorneys for Defendant and*  
19 *Counterclaimant VidAngel, Inc.*

20 UNITED STATES DISTRICT COURT  
21 CENTRAL DISTRICT OF CALIFORNIA  
22 WESTERN DIVISION

23 DISNEY ENTERPRISES, INC.;  
24 LUCASFILM LTD. LLC;  
25 TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
26 BROS. ENTERTAINMENT, INC.,

27 Plaintiffs,

28 vs.

CASE NO. 16-cv-04109-AB (PLAx)

**DECLARATION OF DAVID  
QUINTO IN SUPPORT OF  
VIDANGEL, INC.'S OPPOSITION  
TO PLAINTIFFS' EX PARTE  
APPLICATION FOR AN ORDER  
TO SHOW CAUSE**

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VIDANGEL, INC.,  
Defendant.

The Hon. André Birotte Jr.  
Date Action Filed: June 9, 2016

VIDANGEL, INC.,  
Counterclaimant,  
  
vs.  
  
DISNEY ENTERPRISES, INC.;  
LUCASFILM LTD. LLC;  
TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
BROS. ENTERTAINMENT, INC.,  
  
Counterclaim Defendants.

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1 I, David Quinto, declare as follows:

2 1. I am the general counsel of defendant and cross-complainant VidAngel,  
3 Inc. I make this declaration of my personal and firsthand knowledge and, if called  
4 and sworn as a witness, I could and would testify competently hereto.

5 2. The issuance of the preliminary injunction herein has caused  
6 complications that we did not anticipate. As one example, the financial backer of  
7 the company responsible both for processing payments made by VidAngel  
8 customers using either our Web site or our various apps and for processing  
9 VidAngel's re-purchases of discs from consumers who decide to sell them back has  
10 demanded that our payment processor cease doing business with VidAngel. I have  
11 been in daily, and frequently several times daily, communication with attorneys for  
12 the payment processing firm seeking to resolve the situation. In the meantime,  
13 VidAngel has been working to prepare another payment processor to replace the  
14 current payment processor, if necessary. In my understanding, that will not be a  
15 simple process owing to the facts that the service must operate across multiple apps  
16 as well as VidAngel's Web site, and will need to conform to an entirely different  
17 application programming interface for its new payment processor. VidAngel's new  
18 payment processor does not support customer data like the old system did. This  
19 change will require new database tables and software for VidAngel and will require  
20 new customer support tools to process refunds. Acknowledging these difficulties, I  
21 received a message on December 23rd from VidAngel's payment processor that  
22 stated in part: "We understand that switching payment providers can be challenging  
23 and any change at this time of year is especially difficult. We will continue to keep  
24 you apprised of any key developments and try our best to minimize the disruption to  
25 your business in the event of an adverse decision." The payment processor also said  
26 that it might be required to terminate processing for VidAngel as early as December  
27 29.  
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1           3.     In my experience, when immediate compliance with an injunction  
2 would cause a business to suffer a major disruption of its non-enjoined business  
3 activities, it is the custom and practice to seek an immediate stay of the injunction to  
4 seek a reasonable amount of time in which to comply. In a case I had in this district,  
5 for example, Judge Dean Pregerson preliminarily enjoined a business I represented  
6 from using its corporate name. Immediate compliance with that order would have  
7 required that the business shutter its doors while registering a new corporate name,  
8 changing its letterhead, changing its business cards, changing its domain name,  
9 changing its Web site, changing its marketing and advertising materials, and so  
10 on. My client therefore sought a stay to allow it to continue conducting business  
11 operations while undertaking all the tasks required to change its corporate  
12 identity. Judge Pregerson understood both that my client was not being  
13 contemptuous in failing to comply immediately with the injunction and that  
14 immediate implementation of the injunction would cause my client to suffer an  
15 unnecessary disruption of its business. He therefore ordered that my client comply  
16 within 30 days.

17           4.     The parties never briefed or explained to this court the reasons why it is  
18 impossible for VidAngel to comply immediately with the preliminary injunction  
19 without ceasing business activities entirely. At present, VidAngel has 51  
20 employees. They are divided among its 10 departments: Accounting, Customer  
21 Support, Design, Executive, Inventory, Legal, Marketing, Stream Team, Tagging,  
22 and Tech Team. The work required to implement the preliminary injunction  
23 smoothly is extraordinarily labor intensive. As but one example, I am trying to  
24 obtain consent-not-to-sue agreements from the various content creators and/or  
25 distributors whose content VidAngel makes available. I am doing so because, apart  
26 from plaintiffs (joined this week by MGM), none has ever objected to VidAngel's  
27 service but VidAngel does not want to risk exposure to intentional infringement  
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1 claims in light of the rationale behind this Court’s ruling. There are more than 125  
2 such entities (including plaintiffs and their affiliates). They are found not just in the  
3 United States but in other countries, as well. Before I can request a consent-not-to-  
4 sue, I must identify their respective general counsels or outside counsel and obtain  
5 contact information for such persons. That arduous process is complicated by the  
6 demands on my time occasioned by over-seeing the on-going litigation, responding  
7 to concerns raised by investors in our recent Regulation A+ stock offering, apprising  
8 both the SEC and our major financial backers of the status of the litigation, and  
9 working out the legal details associated with offering new content controlled by  
10 VidAngel to prevent our customer base from abandoning us.

11 5. I wish to advise the Court that VidAngel is not contemptuous of the  
12 preliminary injunction or the Court’s authority to issue it. Further, I wish to advise  
13 the Court categorically that VidAngel will comply with preliminary injunction, fully  
14 and immediately, if VidAngel is unable to obtain a stay of its enforcement.

15 6. Plaintiffs’ application for an Order to Show Cause re Contempt is  
16 therefore unnecessary. Plaintiffs are requesting that the Court schedule briefing and  
17 hear argument concerning whether contempt should be found solely for the purpose  
18 of coercing compliance. Because the purpose is to coerce compliance, no sanction  
19 may issue if VidAngel is then in compliance with the Court’s order. Accordingly,  
20 if either VidAngel is in compliance with the preliminary injunction or enforcement  
21 of the preliminary injunction has been stayed before the Court makes a finding of  
22 contempt, no sanction may be imposed. Given that VidAngel has unequivocally  
23 confirmed that it is not refusing to comply with the Court’s order but will comply  
24 *immediately* if it is unable to obtain a stay, there is no need to burden the Court to  
25 conduct a contempt proceeding.

26 7. In light of the holidays and pre-existing travel plans for many of its  
27 team members, VidAngel’s counsel asked Plaintiffs to stipulate to permit VidAngel  
28

1 to file its opposition to the *ex parte* application on December 26 or 27. Plaintiffs  
2 refused this request. A true and correct copy of this email correspondence is  
3 attached as Exhibit A.

4  
5 I declare under penalty of perjury under the laws of the United States of  
6 America that the foregoing is true and correct.

7 Executed this 23rd day of December, 2016, at Los Angeles, California.

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10 \_\_\_\_\_  
11 David W. Quinto

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# **EXHIBIT A**

**Brian Grace**

---

**From:** Ryan Baker  
**Sent:** Thursday, December 22, 2016 7:20 PM  
**To:** Klaus, Kelly  
**Cc:** Scott Malzahn; Brian Grace; Jaime Marquart; Ehler, Rose; Lunsford, Julie; Bennett, Allyson  
**Subject:** Re: Disney Enterprises, Inc., et al. v. VidAngel, Inc.; USDC Central District Case No. 16-cv-04109 AB (PLAx)

Kelly,

Happy holidays to you and your colleagues, as well!

Best,

Ryan

---

**From:** "Klaus, Kelly" <Kelly.Klaus@mto.com>  
**Date:** Thursday, December 22, 2016 at 2:34 PM  
**To:** Ryan Baker <rbaker@bakermarquart.com>  
**Cc:** Scott Malzahn <smalzahn@bakermarquart.com>, Brian Grace <bgrace@bakermarquart.com>, Jaime Marquart <jmarquart@bakermarquart.com>, "Ehler, Rose" <Rose.Ehler@mto.com>, "Lunsford, Julie" <Julie.Lunsford@mto.com>, "Bennett, Allyson" <Allyson.Bennett@mto.com>  
**Subject:** RE: Disney Enterprises, Inc., et al. v. VidAngel, Inc.; USDC Central District Case No. 16-cv-04109 AB (PLAx)

Hi Ryan –

Thanks for your email. Given VidAngel's continued refusal to comply with the Preliminary Injunction, Plaintiffs cannot stipulate to extend VidAngel's time to respond to the ex parte application. VidAngel's conduct is unacceptable and requires the Court's intervention as soon as possible.

I appreciate that you do not take this personally. I have extended courtesies to your team when possible; you have reciprocated, which I appreciate; and I know that practice will continue on both sides when circumstances allow.

Notwithstanding all that is going on, I do wish you and your colleagues the best for the holidays and new year.

Regards,  
Kelly

---

**From:** Ryan Baker [mailto:rbaker@bakermarquart.com]  
**Sent:** Thursday, December 22, 2016 1:33 PM  
**To:** Klaus, Kelly  
**Cc:** Scott Malzahn; Brian Grace; Jaime Marquart; Ehler, Rose; Lunsford, Julie; Bennett, Allyson  
**Subject:** Re: Disney Enterprises, Inc., et al. v. VidAngel, Inc.; USDC Central District Case No. 16-cv-04109 AB (PLAx)

Kelly,

Hope you're enjoying the holidays. By the looks of it, you're enjoying them more now than you were yesterday! On a related note, would your clients be willing to stipulate to permit VidAngel to file its opposition to your Ex Parte re

Contempt Monday or Tuesday of next week? Many of our team are already traveling for the holidays and at least temporarily unavailable. We would appreciate the courtesy.

Of course, I will not take it personally if we cannot agree to some accommodation.

Please let me know at your earliest convenience.

Thanks,

Ryan

Ryan G. Baker  
Baker Marquart LLP  
Direct: 424.652.7801  
[rbaker@bakermarquart.com](mailto:rbaker@bakermarquart.com)  
[www.bakermarquart.com](http://www.bakermarquart.com)

---

**From:** "Ehler, Rose" <[Rose.Ehler@mto.com](mailto:Rose.Ehler@mto.com)>  
**Date:** Thursday, December 22, 2016 at 12:09 PM  
**To:** "Lunsford, Julie" <[Julie.Lunsford@mto.com](mailto:Julie.Lunsford@mto.com)>, Jaime Marquart <[jmarquart@bakermarquart.com](mailto:jmarquart@bakermarquart.com)>, Ryan Baker <[rbaker@bakermarquart.com](mailto:rbaker@bakermarquart.com)>, Brian Grace <[bgrace@bakermarquart.com](mailto:bgrace@bakermarquart.com)>, David Quinto <[dquinto@vidangel.com](mailto:dquinto@vidangel.com)>, Scott Malzahn <[smalzahn@bakermarquart.com](mailto:smalzahn@bakermarquart.com)>, "dpepperman@blechercollins.com" <[dpepperman@blechercollins.com](mailto:dpepperman@blechercollins.com)>, "Elizabeth.brannen@strismaher.com" <[Elizabeth.brannen@strismaher.com](mailto:Elizabeth.brannen@strismaher.com)>, "mblecher@blechercollins.com" <[mblecher@blechercollins.com](mailto:mblecher@blechercollins.com)>, Peter Stris <[peter.stris@strismaher.com](mailto:peter.stris@strismaher.com)>, "twagniere@blechercollins.com" <[twagniere@blechercollins.com](mailto:twagniere@blechercollins.com)>  
**Cc:** "Klaus, Kelly" <[Kelly.Klaus@mto.com](mailto:Kelly.Klaus@mto.com)>, "Bennett, Allyson" <[Allyson.Bennett@mto.com](mailto:Allyson.Bennett@mto.com)>  
**Subject:** RE: Disney Enterprises, Inc., et al. v. VidAngel, Inc.; USDC Central District Case No. 16-cv-04109 AB (PLAx)

Counsel:

Per chambers rules, Julie's email serves as notice that any opposition papers must be filed 24 hours (or one court day) from this service.

Thank you,  
Rose

Rose Leda Ehler  
415.512.4071

---

**From:** Lunsford, Julie  
**Sent:** Thursday, December 22, 2016 12:05 PM  
**To:** [jmarquart@bakermarquart.com](mailto:jmarquart@bakermarquart.com); [rbaker@bakermarquart.com](mailto:rbaker@bakermarquart.com); [bgrace@bakermarquart.com](mailto:bgrace@bakermarquart.com); [dquinto@vidangel.com](mailto:dquinto@vidangel.com); [smalzahn@bakermarquart.com](mailto:smalzahn@bakermarquart.com); [dpepperman@blechercollins.com](mailto:dpepperman@blechercollins.com); [Elizabeth.brannen@strismaher.com](mailto:Elizabeth.brannen@strismaher.com); [mblecher@blechercollins.com](mailto:mblecher@blechercollins.com); [peter.stris@strismaher.com](mailto:peter.stris@strismaher.com); [twagniere@blechercollins.com](mailto:twagniere@blechercollins.com)  
**Cc:** Klaus, Kelly; Ehler, Rose; Bennett, Allyson  
**Subject:** Disney Enterprises, Inc., et al. v. VidAngel, Inc.; USDC Central District Case No. 16-cv-04109 AB (PLAx)

Counsel:

Attached please find the Ex Parte Application, Klaus Declaration and [Proposed] Order that were e-filed this morning. Please feel free to contact me if you have any questions.

Thank you,  
Julie Lunsford

Julie W. Lunsford | Legal Secretary  
Assistant to Martin D. Bern, David H. Fry, Kelly M. Klaus & Joshua Patashnik  
Munger, Tolles & Olson LLP  
560 Mission Street | San Francisco, CA 94105  
Tel: 415.512.4003 | [julie.lunsford@mto.com](mailto:julie.lunsford@mto.com) | [www.mto.com](http://www.mto.com)

BAKER MARQUART LLP  
2025 CENTURY PARK EAST, 16<sup>TH</sup> FLOOR  
LOS ANGELES, CA 90067  
Tel: (424) 652-7800 • Fax: (424) 652-7850

1 Ryan G. Baker (Bar No. 214036)  
rbaker@bakermarquart.com  
2 Jaime Marquart (Bar No. 200344)  
jmarquart@bakermarquart.com  
3 Scott M. Malzahn (Bar No. 229204)  
smalzahn@bakermarquart.com  
4 Brian T. Grace (Bar No. 307826)  
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5 BAKER MARQUART LLP  
2029 Century Park East, Sixteenth Floor  
6 Los Angeles, California 90067  
Telephone: (424) 652-7800  
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8 Peter K. Stris (Bar No. 216226)  
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12 STRIS & MAHER LLP  
725 South Figueroa Street, Suite 1830  
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Telephone: (213) 995-6800  
14 Facsimile: (213) 261-0299

15 David W. Quinto (Bar No. 106232)  
dquinto@VidAngel.com  
16 3007 Franklin Canyon Drive  
Beverly Hills, California 90210  
17 Telephone: (213) 604-1777  
Facsimile: (732) 377-0388  
18 *Attorneys for Defendant and*  
19 *Counterclaimant VidAngel, Inc.*

20 UNITED STATES DISTRICT COURT  
21 CENTRAL DISTRICT OF CALIFORNIA  
22 WESTERN DIVISION

23 DISNEY ENTERPRISES, INC.; LUCASFILM  
24 LTD. LLC; TWENTIETH CENTURY FOX  
25 FILM CORPORATION; AND WARNER BROS.  
ENTERTAINMENT, INC.,

26 Plaintiffs,

27 vs.

28 VIDANGEL, INC.,

CASE NO. 16-cv-04109-AB (PLAx)

**DECLARATION OF JAROM  
MCDONALD IN SUPPORT OF  
VIDANGEL, INC.'S OPPOSITION  
TO PLAINTIFFS' EX PARTE  
APPLICATION FOR AN ORDER  
TO SHOW CAUSE**

DECLARATION OF JAROM MCDONALD IN  
SUPPORT OF VIDANGEL'S OPPOSITION TO  
PLAINTIFFS' EX PARTE APPLICATION

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Defendant.

The Hon. André Birotte Jr.

Date Action Filed: June 9, 2016

VIDANGEL, INC.,

Counterclaimant,

vs.

DISNEY ENTERPRISES, INC.; LUCASFILM  
LTD. LLC; TWENTIETH CENTURY FOX  
FILM CORPORATION; AND WARNER BROS.  
ENTERTAINMENT, INC.,

Counterclaim Defendants.

BAKER MARQUART LLP

2029 CENTURY PARK EAST, 16<sup>TH</sup> FLOOR

LOS ANGELES, CA 90067

Tel: (424) 652-7800 • Fax: (424) 652-7850



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2028 CENTURY PARK EAST, 16<sup>TH</sup> FLOOR  
LOS ANGELES, CA 90067  
Tel: (424) 652-7800 • Fax: (424) 652-7850

1 I, Jarom McDonald, declare as follows:

2 1. I am the director of engineering for VidAngel and, as such, head its  
3 Tech Team. I make this declaration of my personal and firsthand knowledge and, if  
4 called and sworn as a witness, I could and would testify competently hereto.

5 2. I learned that a preliminary injunction had issued in the studios’ lawsuit  
6 against VidAngel the night of December 12, 2016 when VidAngel’s CEO, Neal  
7 Harmon, sent an e-mail message to all VidAngel employees advising them of it.  
8 Mr. Harmon scheduled a meeting of VidAngel’s executive team (of which I am a  
9 member) and its general counsel, David Quinto, for 6:30 a.m. on December 13 to  
10 discuss compliance with the injunction.

11 3. I cannot disclose what we discussed during that very early morning  
12 meeting because our communications with our counsel are privileged but  
13 immediately after the meeting concluded at 8:00 a.m., I commenced preliminary  
14 compliance planning to remove access to plaintiffs’ works focusing on the  
15 technology side of VidAngel’s various systems. I then initiated the process of  
16 removing certain third-party integrations from our back-end application program  
17 interface or “API.” Various integrations had to be removed before we could remove  
18 any of plaintiffs’ titles from our system without causing the third-party integrations  
19 to fail. The same day, our mobile apps lead, acting under my supervision, wrote to  
20 our contacts at all the mobile apps stores VidAngel uses—Roku, Apple, Amazon,  
21 and Google—to notify them of the entry of the preliminary injunction and of  
22 VidAngel’s intention to remove both plaintiffs’ works and all other works we do not  
23 control from our site if we could not obtain a stay of the preliminary injunction.

24 4. On December 14, 2016, I convened a meeting of the Tech Team to  
25 begin sketching out all the changes that we would need to make to our core API  
26 code, to the Web front end, and to our apps.

27 5. By December 15, 2016, two other members of the Tech Team and I  
28

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1 were poring through the codebase to annotate places we would have to touch to turn  
2 off systems supporting the sale, streaming, and buy-back of plaintiffs’ works. I also  
3 reached out across the company to ask what features should be implemented to  
4 mitigate the devastation to the user experience turning off all movies at once would  
5 cause.

6 6. On December 18, a database engineer acting at my direction began  
7 cleaning, vacuuming, and archiving old data from our production database. Had we  
8 shut off access to the movies before doing so, we would have had 10 million stale  
9 rows in the database, meaning that we would have had transactions and lineups  
10 linked to things that were no longer immediately visible. If we had not done the  
11 cleaning, vacuuming, and archiving work, we would have experienced severe  
12 performance problems with our database. Cleaning, vacuuming, and archiving was  
13 not an easy or quick task and we did not complete it until December 23, 2016.

14 7. On December 19, 2016, the Tech Team met to gather all the distributed  
15 work assignments and create a formal plan enumerating exactly what the  
16 consequences to the apps would be if we shut off access to all of plaintiffs’ works.  
17 As part of that effort, we consulted two outside mobile app developers to ensure that  
18 we fully understood the consequences of switching off in-app purchases, including  
19 consequences involving our payment processing provider. The same day, I  
20 completed work on a “shutdown branch” intended to stop the streaming of filtered  
21 movies that VidAngel customers currently own. The computer code for the  
22 shutdown branch was then deployed to VidAngel’s staging server for testing. Also  
23 on December 19, a member of the Tech Team acting under my supervision began  
24 writing code to short circuit all requests to purchase plaintiffs’ titles while returning  
25 an error message. Sending an error message would, of course, result in customer  
26 complaints but we could not find a better solution without updating our apps.  
27 Unfortunately, we are in the annual holiday “blackout period” during which the app  
28

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LOS ANGELES, CA 90067  
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1 stores do not permit us to modify our apps. The code for the short circuit is now  
2 being held locally on a VidAngel laptop computer.

3 8. On December 22, 2016, we conducted a test run on our staging server  
4 of our code to disable plaintiffs' works and turn off their streaming. The results  
5 reflected that we have lots of bugs to overcome. The API threw errors and neither  
6 the apps nor the Web site responded.

7 9. We are continuing to work through the holiday season to develop a  
8 technological solution that will allow us to disable access to works owned or  
9 controlled by plaintiffs or others, such as MGM, who object to allowing their works  
10 to be filtered and streamed while preserving access to works whose owners or  
11 distributors will allow their works to be filtered and streamed--all while preventing  
12 our customers from being frustrated by error messages, the inability to sell back  
13 discs they do not want to retain permanently, the inability to watch content they  
14 already own, and other indignities.

15 I declare under penalty of perjury of the laws of the United States of America  
16 that the foregoing is true and correct.

17 Executed this 23d day of December, 2016 at Provo,  
18 Utah.

19   
20 Jarom McDonald



CHUBB GROUP OF INSURANCE COMPANIES

Surety Department, 15 Mountain View Road, P.O. Box 1615, Warren, NJ 07061-1615  
Phone: 908-903-3497 Facsimile: 908-903-3656

FEDERAL INSURANCE COMPANY

Bond No. 82447302

PRELIMINARY INJUNCTION BOND

2016 DEC 15 PM 3:27  
CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
LOS ANGELES  
BX: [Signature]

FILED

DISNEY ENTERPRISES, INC.;  
LUCASFILM LTD. LLC;  
TWENTIETH CENTURY FOX FILM CORPORATION and  
WARNER BROS. ENTERTAINMENT, INC.

Plaintiff(s)

Case Number: 2:16-cv-04109 - AB (PLAx)

vs.

VIDANGEL, INC.

Defendant(s)

WHEREAS, plaintiff is about to commence an action against defendant for a preliminary injunction, to be made permanent on final hearing, and meanwhile to apply for a temporary restraining order against them enjoining and restraining them from the commission of certain acts, as in the motion for such order and affidavit attached hereto in support thereof more particularly described:

NOW, THEREFORE, the undersigned, FEDERAL INSURANCE COMPANY a corporation of the State of Indiana, as surety, in consideration of the premises and of the issuing of the temporary restraining order, does hereby undertake in the sum of: Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00) and promises that, if a temporary restraining order shall issue, the plaintiff will pay to the parties enjoined, such damages and costs not exceeding the sum of Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00) as they may sustain by reason of the issuance of the temporary restraining order, if the court finally decides that plaintiff was not entitled thereto.

IN WITNESS WHEREOF, the FEDERAL INSURANCE COMPANY has caused this undertaking to be signed, and its corporate seal affixed by its duly authorized Attorney-in-Fact.

Dated: December 14, 2016

FEDERAL INSURANCE COMPANY

By: Joyce M. Houghton  
Attorney In Fact Joyce M. Houghton, Attorney-in-Fact

**CHUBB'**

**Power of Attorney**

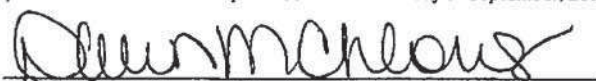
**Federal Insurance Company | Vigilant Insurance Company | Pacific Indemnity Company**

Attn: Surety Department | 15 Mountain View Road | Warren, NJ 07059

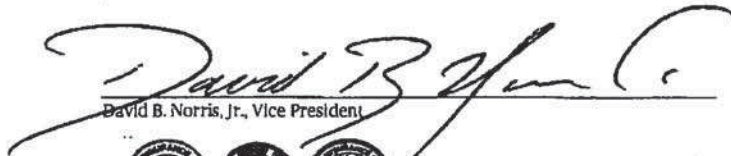
Know All by These Presents, That FEDERAL INSURANCE COMPANY, an Indiana corporation, VIGILANT INSURANCE COMPANY, a New York corporation, and PACIFIC INDEMNITY COMPANY, a Wisconsin corporation, do each hereby constitute and appoint Jonathan F. Black, Denise M. Bruno, Julia R. Burnet, Elizabeth P. Cervini, Sheri L. Feeney, Michelle G. Higgins, Joyce M. Houghton, David A. Johnson, David C. Rosenberg, Harry C. Rosenberg, and Matthew J. Rosenberg of King of Prussia, Pennsylvania

each as their true and lawful Attorney-in-Fact to execute under such designation in their names and to affix their corporate seals to and deliver for and on their behalf as surety thereon or otherwise, bonds and undertakings and other writings obligatory in the nature thereof (other than ball bonds) given or executed in the course of business, and any instruments amending or altering the same, and consents to the modification or alteration of any instrument referred to in said bonds or obligations.

In Witness Whereof, said FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, and PACIFIC INDEMNITY COMPANY have each executed and attested these presents and affixed their corporate seals on this 1<sup>st</sup> day of September, 2016.



Dawn M. Chloros, Assistant Secretary



David B. Norris, Jr., Vice President



STATE OF NEW JERSEY

County of Somerset

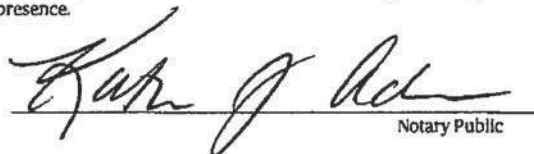
ss.

On this 1<sup>st</sup> day of September, 2016 before me, a Notary Public of New Jersey, personally came Dawn M. Chloros, to me known to be Assistant Secretary of FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, and PACIFIC INDEMNITY COMPANY, the companies which executed the foregoing Power of Attorney, and the said Dawn M. Chloros, being by me duly sworn, did depose and say that she is Assistant Secretary of FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, and PACIFIC INDEMNITY COMPANY and knows the corporate seals thereof, that the seals affixed to the foregoing Power of Attorney are such corporate seals and were thereto affixed by authority of the By-Laws of said Companies; and that she signed said Power of Attorney as Assistant Secretary of said Companies by like authority; and that she is acquainted with David B. Norris, Jr. and knows him to be Vice President of said Companies; and that the signature of David B. Norris, Jr. subscribed to said Power of Attorney is in the genuine handwriting of David B. Norris, Jr., and was thereto subscribed by authority of said By-Laws and in deponent's presence.

Notarial Seal



**KATHERINE J. ADELAAR**  
NOTARY PUBLIC OF NEW JERSEY  
No. 2318885  
Commission Expires July 16, 2019

  
Notary Public

**CERTIFICATION**

Extract from the By-Laws of FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, and PACIFIC INDEMNITY COMPANY:

"Except as otherwise provided in these By-Laws or by law or as otherwise directed by the Board of Directors, the President or any Vice President shall be authorized to execute and deliver, in the name and on behalf of the Corporation, all agreements, bonds, contracts, deeds, mortgages, and other instruments, either for the Corporation's own account or in a fiduciary or other capacity, and the seal of the Corporation, if appropriate, shall be affixed thereto by any of such officers or the Secretary or an Assistant Secretary. The Board of Directors, the President or any Vice President designated by the Board of Directors may authorize any other officer, employee or agent to execute and deliver, in the name and on behalf of the Corporation, agreements, bonds, contracts, deeds, mortgages, and other instruments, either for the Corporation's own account or in a fiduciary or other capacity, and, if appropriate, to affix the seal of the Corporation thereto. The grant of such authority by the Board or any such officer may be general or confined to specific instances."

I, Dawn M. Chloros, Assistant Secretary of FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, and PACIFIC INDEMNITY COMPANY (the "Companies") do hereby certify that

- (i) the foregoing extract of the By-Laws of the Companies is true and correct,
- (ii) the signature of any authorized officer executing this Power of Attorney or any certificate relating thereto on behalf of the Companies, and the seal of the Companies, may be affixed to such Power of Attorney or certificate by facsimile and such Power of Attorney or certificate shall be valid and binding upon the Companies, and any such Power of Attorney so executed and certified by such facsimile signature and facsimile seal shall be valid and binding upon the Companies with respect to any bond or undertaking to which it is attached.
- (iii) the Companies are duly licensed and authorized to transact surety business in all 50 of the United States of America and the District of Columbia and are authorized by the U.S. Treasury Department; further, Federal and Vigilant are licensed in the U.S. Virgin Islands, and Federal is licensed in Guam, Puerto Rico, and each of the Provinces of Canada except Prince Edward Island; and
- (iv) the foregoing Power of Attorney is true, correct and in full force and effect.

Given under my hand and seals of said Companies at Warren, NJ this 14th Day of December, 2016



  
Dawn M. Chloros, Assistant Secretary

IN THE EVENT YOU WISH TO NOTIFY US OF A CLAIM, VERIFY THE AUTHENTICITY OF THIS BOND OR NOTIFY US OF ANY OTHER MATTER, PLEASE CONTACT US AT THE ADDRESS LISTED ABOVE. OR BY: Telephone (908) 903-3493 Fax (908) 903-3656 e-mail: surety@chubb.com

## CALIFORNIA ALL-PURPOSE CERTIFICATE OF ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of Pennsylvania }

County of Montgomery }

On December 14, 2016 before me, Jonathan F. Black, Notary Public  
(Here insert name and title of the officer)

personally appeared Joyce M. Houghton  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Notary Public Signature

(Notary Public Seal)

COMMONWEALTH OF PENNSYLVANIA  
NOTARIAL SEAL  
JONATHAN F BLACK  
Notary Public  
UPPER MERION TWP, MONTGOMERY COUNTY  
My Commission Expires Aug 25, 2018

### ADDITIONAL OPTIONAL INFORMATION

DESCRIPTION OF THE ATTACHED DOCUMENT

\_\_\_\_\_  
(Title or description of attached document)

\_\_\_\_\_  
(Title or description of attached document continued)

Number of Pages \_\_\_\_\_ Document Date \_\_\_\_\_

**CAPACITY CLAIMED BY THE SIGNER**

Individual (s)

Corporate Officer

\_\_\_\_\_  
(Title)

Partner(s)

Attorney-in-Fact

Trustee(s)

Other \_\_\_\_\_

### INSTRUCTIONS FOR COMPLETING THIS FORM

- This form complies with current California statutes regarding notary wording and, if needed, should be completed and attached to the document. Acknowledgments from other states may be completed for documents being sent to that state so long as the wording does not require the California notary to violate California notary law.*
- State and County information must be the State and County where the document signer(s) personally appeared before the notary public for acknowledgment.
  - Date of notarization must be the date that the signer(s) personally appeared which must also be the same date the acknowledgment is completed.
  - The notary public must print his or her name as it appears within his or her commission followed by a comma and then your title (notary public).
  - Print the name(s) of document signer(s) who personally appear at the time of notarization.
  - Indicate the correct singular or plural forms by crossing off incorrect forms (i.e. he/she/they- is /are ) or circling the correct forms. Failure to correctly indicate this information may lead to rejection of document recording.
  - The notary seal impression must be clear and photographically reproducible. Impression must not cover text or lines. If seal impression smudges, re-seal if a sufficient area permits, otherwise complete a different acknowledgment form.
  - Signature of the notary public must match the signature on file with the office of the county clerk.
    - ❖ Additional information is not required but could help to ensure this acknowledgment is not misused or attached to a different document.
    - ❖ Indicate title or type of attached document, number of pages and date.
    - ❖ Indicate the capacity claimed by the signer. If the claimed capacity is a corporate officer, indicate the title (i.e. CEO, CFO, Secretary).
  - Securely attach this document to the signed document with a staple.

# FEDERAL INSURANCE COMPANY

## STATEMENT OF ASSETS, LIABILITIES AND SURPLUS TO POLICYHOLDERS

Statutory Basis

**DECEMBER 31, 2015**

(in thousands of dollars)

<i>ASSETS</i>		<i>LIABILITIES AND SURPLUS TO POLICYHOLDERS</i>	
Cash and Short Term Investments.....	\$ 687,917	Outstanding Losses and Loss Expenses .....	\$ 12,174,848
United States Government, State and Municipal Bonds .....	9,544,097	Unearned Premiums.....	3,726,665
Other Bonds.....	4,491,238	Dividends Payable to Stockholder .....	1,400,000
Stocks.....	692,901	Ceded Reinsurance Premiums Payable.....	329,694
Other Invested Assets.....	<u>2,187,839</u>	Provision for Reinsurance .....	35,560
		Other Liabilities.....	<u>1,295,093</u>
TOTAL INVESTMENTS .....	<u>17,603,992</u>	TOTAL LIABILITIES .....	<u>18,961,860</u>
Investments in Affiliates:			
Chubb Investment Holdings, Inc. ....	3,679,770	Capital Stock.....	20,980
Pacific Indemnity Company.....	2,930,246	Paid-In Surplus.....	3,106,809
Executive Risk Indemnity Inc.....	1,267,144	Unassigned Funds .....	<u>10,150,916</u>
Chubb Insurance Investment Holdings Ltd....	1,020,650		
CC Canada Holdings Ltd.....	590,955		
Great Northern Insurance Company .....	469,230	SURPLUS TO POLICYHOLDERS.....	<u>13,278,705</u>
Chubb Insurance Company of Australia Ltd.	404,845		
Vigilant Insurance Company.....	306,232		
Chubb European Investment Holdings SLP ..	294,200		
Other Affiliates .....	566,480		
Premiums Receivable .....	1,659,749		
Other Assets .....	<u>1,447,072</u>		
TOTAL ADMITTED ASSETS .....	<u>\$ 32,240,565</u>	TOTAL LIABILITIES AND SURPLUS TO POLICYHOLDERS.....	<u>\$ 32,240,565</u>

Investments are valued in accordance with requirements of the National Association of Insurance Commissioners.  
At December 31, 2015, investments with a carrying value of \$546,611,273 were deposited with government authorities  
as required by law.

State, County & City of New York, — ss:

Dawn M. Chloros, Assistant Secretary \_\_\_\_\_ of the Federal Insurance Company

being duly sworn, deposes and says that the foregoing Statement of Assets, Liabilities and Surplus to Policyholders of said Federal Insurance Company on December 31, 2015 is true and correct and is a true abstract of the Annual Statement of said Company as filed with the Secretary of the Treasury of the United States for the 12 months ending December 31, 2015.

Subscribed and sworn to before me  
this March 11, 2016.

*Jeanette Shipsey*  
\_\_\_\_\_  
Notary Public

JEANETTE SHIPSEY  
Notary Public, State of New York  
No. 02SH5074142  
Qualified in Nassau County  
Commission Expires March 10, 2019

*Dawn M. Chloros*  
\_\_\_\_\_  
Assistant Secretary

**CERTIFICATE BY ATTORNEY  
PURSUANT TO L.R. 65-5**

This bond (or undertaking) has been examined pursuant to L.R. 65-5 and is recommended for approval. It is not required by law to be approved by a judge.

Dated: December 15, 2016

MUNGER, TOLLES & OLSON LLP

By: /s/ Kelly M. Klaus  
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Attorneys for Plaintiffs



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20 UNITED STATES DISTRICT COURT  
21 CENTRAL DISTRICT OF CALIFORNIA  
22 WESTERN DIVISION

23 DISNEY ENTERPRISES, INC.;  
24 LUCASFILM LTD. LLC;  
25 TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
26 BROS. ENTERTAINMENT, INC.,

27 Plaintiffs,

28 vs.

CASE NO. 16-cv-04109-AB (PLAx)

**DECLARATION OF NEAL  
HARMON IN SUPPORT OF  
VIDANGEL, INC.'S EX PARTE  
APPLICATION TO STAY  
PRELIMINARY INJUNCTION  
PENDING APPEAL OR,  
ALTERNATIVELY, PENDING  
DECISION BY THE NINTH**

DECLARATION OF NEAL HARMON IN  
SUPPORT OF EX PARTE APPLICATION TO  
STAY

1 VIDANGEL, INC.,  
2 Defendant.

**CIRCUIT ON STAY PENDING  
APPEAL**

The Hon. André Birotte Jr.

Date Action Filed: June 9, 2016

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5 VIDANGEL, INC.,  
6 Counterclaimant,  
7 vs.  
8 DISNEY ENTERPRISES, INC.;  
9 LUCASFILM LTD. LLC;  
10 TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
11 BROS. ENTERTAINMENT, INC.,  
12 Counterclaim Defendants.

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DECLARATION OF NEAL HARMON IN  
SUPPORT OF *EX PARTE* APPLICATION TO  
STAY

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I, Neal Harmon, declare as follows:

1. I am a founder and the Chief Executive Officer of defendant and counterclaimant VidAngel, Inc. I have personal knowledge of the facts set forth herein and if called and sworn as a witness, I could and would testify competently hereto.

2. When I learned of the issuance of the preliminary injunction the night of December 12, 2016, I immediately began to investigate how VidAngel could comply with the injunction without going out of business completely and without causing unintended problems for our customers. I realized that we faced the following problems, among others.

3. First, unlike ClearPlay (which is able to offer its filtering of Google Play’s streaming only to customers who access its eCommerce website online through a desktop browser), VidAngel makes 84.3 percent of its sales through app stores such as Roku, Apple, Google Play, and Amazon Fire TV. To avoid risking disruptions to their users’ experience during a critical time of the year, the Apple and Roku stores do not permit modifications to their applications during the holiday season. These hard deadlines for publishing new apps, out of necessity, create earlier deadlines for developers to submit builds of app updates for review and approval by the respective app stores. For example, Roku, which has a thorough debug and user-interface testing process before publishing a company’s app, will not accept any new app updates after November 15. As of December 12, 2016, this holiday blackout window had already begun for the largest platform through which VidAngel sells content (Roku - over a third of our purchases). Because of its two-day review period, we are now in that holiday window for Apple too, meaning that VidAngel cannot modify its most popular apps until early January.

4. If VidAngel were to remove existing titles from its library during the black-out period for modifying apps, the system could not be modified to recognize

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1 titles that were no longer available for sale. Those titles would still appear to be  
2 available even though VidAngel had removed them. The only alternative would be  
3 for VidAngel to completely turn off in-app purchasing across the board—which  
4 would prevent VidAngel from offering content that it is directly licensed to filter  
5 and stream or as to which the rights holders have no objection to VidAngel’s  
6 service. As a result, during the app black-out period, we are unable to modify our  
7 system to block access to just the plaintiffs’ titles without causing major customer  
8 confusion about which titles are and are not available for purchase. To immediately  
9 shutdown, we would have to block access to all titles.

10 5. VidAngel has entered into licenses to filter and stream certain works  
11 released by entities that are not party to the Directors Guild of America’s collective  
12 bargaining agreement. For example, on September 12, 2016, we signed an  
13 exclusive licensing contract with Excel Entertainment to filter and stream *The Last*  
14 *Descent* commencing December 15, 2016. If we were required to shut down our  
15 entire system immediately or disable in-app purchasing across the board because we  
16 are currently unable to modify our apps to remove selected titles, we would  
17 necessarily have to block access to any works we are licensed to filter and stream  
18 (because the works catalog and purchasing system are coupled together).

19 6. The rights for our content are controlled by over 125 studios or  
20 distributors, the vast majority of whom have neither joined in the litigation nor  
21 expressed any complaint to VidAngel. Since the injunction issued, we have been  
22 contacting them to let them know that if VidAngel is unsuccessful in obtaining a  
23 stay of the preliminary injunction, it will cease filtering and streaming them and will  
24 also cease buying new DVD and Blu-ray discs of their movies unless they are  
25 willing to enter into a covenant not to sue without waiver of any legal position or  
26 argument for the duration of the appeal. To date, one such company—MGM—has  
27 rejected our request for a covenant not to sue and we have yet to hear from many  
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others.

7. Even if VidAngel were able to update its apps despite the blackout period, it is not an easy process to modify in-app purchasing. Once a title has been made available for purchase, rolling it back is not an easy process. This is because the respective platform providers make in-app purchasing available as an all-or-nothing option. As a technical matter, VidAngel has the ability completely to disable in-app purchasing for all titles, but it cannot use the existing in-app purchasing functionality to restrict certain titles that have previously been made available for purchase. On the other hand, we cannot turn off in-app purchases altogether because doing so would prevent us from selling and/or renting other content.

8. In addition, until VidAngel can update its apps after the blackout period, removing titles would also prevent customers from being able to use the app functionality that currently enables them to sell back and receive monetary credit for titles that they previously purchased. This would create confusion and a massive customer support issue.

9. Similarly, more than 20,000 discs in our vault are permanently owned by VidAngel’s customers. Because 56 percent of the discs we sell have content owned or licensed by the plaintiffs, a similar percentage likely applies to the permanently owned discs. To immediately block access to all (or all of plaintiffs’) existing titles, would cause a customer-relations nightmare to address the problem of customers who permanently owned discs that they now could not watch, with no explanation. VidAngel will need to communicate options to these customers, such as receiving the physical DVD that they own.

10. The app blackout period exacerbates these customer relations and support issues. That is because until the apps can be updated (including to reflect direct messaging to customers), there is no practical way to notify our customers of

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1 what we are doing or to let them know that VidAngel will give them credit for  
2 selling their discs back to VidAngel. Although we have our customer’s e-mail  
3 addresses, e-mail messages we send to our customers are typically opened only  
4 about 20 percent of the time. As a consequence, many of our apps customers would  
5 likely not understand why our system would neither permit them to sell their discs  
6 back nor give them credit for doing so, or to stream content they previously  
7 purchased and permanently own. We are trying to ensure that customers know  
8 which movies they have purchased, even if they cannot watch them, and that they  
9 have the opportunity to sell those movies back. To avoid creating enormous  
10 consumer ill will, we need time to make our apps ready to explain what is happening  
11 without having movies simply disappear from the apps without notice.

12 11. The company is ill equipped to handle the influx of customer service  
13 requests if it is not afforded that opportunity. In the wake of the preliminary  
14 injunction ruling alone, VidAngel’s support tickets doubled from approximately  
15 3,500 to 7000 per week. If VidAngel were forced to shut down without messaging  
16 within the apps to directly explain the situation for its approximately 200,000  
17 customers, its team of 14 people would be unable to address the influx even if they  
18 devoted their holidays entirely to damage control.

19 12. Regardless of the app blackout period, it will take time for VidAngel to  
20 develop updated apps to address the issues that result from the preliminary  
21 injunction order. Because each of the apps is developed to use the interfaces native  
22 to a given platform, there are some functions that must be hard-coded in, such as  
23 how to handle errors, and how to disseminate app notifications. To appropriately  
24 implement drastic changes of the kind necessitated by the preliminary injunction,  
25 such as removing all or a significant number of titles from the site, or removing the  
26 ability to purchase a significant number of movies, work of this nature will be  
27 required. All changes have to be thoroughly vetted and tested before VidAngel can  
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1 submit them to the app stores; otherwise, the app review process will reject them  
2 and/or we run the risk of publishing bugs. In addition, VidAngel has to ensure that  
3 any changes do not break older versions of the apps, which customers may continue  
4 to run.

5 13. To avoid the foregoing problems, we estimate that we will require until  
6 January 5, 2017, to modify our Apple app based on our previous experience with its  
7 app store and its resumption date for modifying apps, and until January 25, 2017, for  
8 the Roku apps because it does not permit modifications to be submitted until  
9 January and then requires two weeks for expedited review. Allowing VidAngel that  
10 time would allow at least some of these issues to be mitigated if no stay of the  
11 preliminary injunction order is granted in the interim.

12 14. VidAngel today learned that its payment processing company has  
13 indicated that, absent a stay, it might sever relations with VidAngel as early as next  
14 week.

15 15. On December 20, 2016, plaintiffs complained (through the  
16 Supplemental Declaration of Kelly Klaus) that VidAngel had just added two new  
17 titles they own. This was not intended to be disrespectful or a flout of anything, and  
18 VidAngel has asked for a stay. Nevertheless, to address the concern identified in the  
19 supplemental declaration, VidAngel will not add any other titles owned or licensed  
20 by plaintiffs unless and until it obtains a stay of the preliminary injunction.

21 16. In conclusion, I would like to emphasize that VidAngel wishes to  
22 operate in a fully lawful manner and fully respects the authority of this Court. It is,  
23 and always has been, VidAngel's intent to comply fully and in all respects with all  
24 orders the Court has issued or may issue. But in view of the facts that VidAngel has  
25 now offered its service for just under two years; the plaintiffs waited 11 months after  
26 receiving written notice explaining VidAngel's service simply to file their complaint  
27 (and never sent any preliminary cease-and-desist letters); the plaintiffs never sought  
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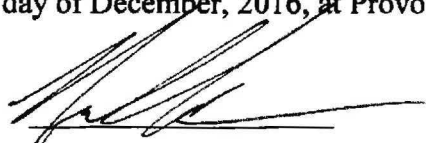
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a temporary restraining order but took another four months after filing suit to  
conduct discovery and have their motion heard; and the Court understandably took  
several weeks to consider the parties' various arguments and issue its ruling,  
VidAngel requests that it be allowed a reasonable time to comply fully with the  
terms of the preliminary injunction if no stay is granted in the interim.

I declare under penalty of perjury of the laws of the United States of  
America that the foregoing is true and correct.

Executed on 21<sup>st</sup> day of December, 2016, at Provo, Utah.



Neal Harmon



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20 UNITED STATES DISTRICT COURT  
21 CENTRAL DISTRICT OF CALIFORNIA  
22 WESTERN DIVISION

23 DISNEY ENTERPRISES, INC.;  
24 LUCASFILM LTD. LLC;  
25 TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
26 BROS. ENTERTAINMENT, INC.,

27 Plaintiffs,

28 vs.

CASE NO. CV16-04109-AB (PLAx)

**VIDANGEL, INC.'S NOTICE OF  
APPEAL FROM ORDER  
GRANTING MOTION FOR  
PRELIMINARY INJUNCTION;  
REPRESENTATION STATEMENT**

**PRELIMINARY INJUNCTION  
APPEAL**

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VIDANGEL, INC.,  
Defendant.

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VIDANGEL, INC.,  
Counterclaimant,  
vs.  
DISNEY ENTERPRISES, INC.;  
LUCASFILM LTD. LLC;  
TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
BROS. ENTERTAINMENT, INC.,  
Counterclaim Defendants.

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**Notice of Appeal**

Notice is hereby given that VidAngel, Inc. (“VidAngel”), defendant and counter-claimant in the above-captioned action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Court’s Order Granting Plaintiff’s Motion for Preliminary Injunction entered in this action on December 12, 2016 (Dkt. No. 144). A copy of that order from which VidAngel takes its appeal is attached as Exhibit A.

DATED: December 14, 2016      Respectfully submitted,

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**Representation Statement**

Pursuant to Circuit Rule 3-2(b) and Federal Rule of Appellate Procedure 12(b), the names, addresses and telephone numbers of the parties and their respective counsel are as follows:

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court’s CM/ECF system per Local Rule 5-4.7.2 on December 14, 2016.

/s/ Jaime W. Marquart  
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE ANDRÉ BIROTTE JR., U.S. DISTRICT JUDGE

DISNEY ENTERPRISES, INC.; )  
LUCASFILM LTD.LLC; TWENTIETH )  
CENTURY FOX FILM CORPORATION )  
AND WARNER BROS. ENTERTAINMENT )  
INC., )

PLAINTIFFS AND )  
COUNTERCLAIM DEFENDANTS, )

vs. ) No. CV 16-04109-AB

VIDANGEL, INC., )  
DEFENDANT AND )  
COUNTERCLAIMANT. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, NOVEMBER 14, 2016

10:35 A.M.

LOS ANGELES, CALIFORNIA

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1 LOS ANGELES, CALIFORNIA; MONDAY, NOVEMBER 14, 2016

2 10:35 A.M.

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4 THE CLERK: Calling Item No. 2, CV 16-4109-AB,  
5 Disney Enterprises, Inc., et al., versus VidAngel, Inc.

6 Counsel, please step forward and state your  
7 appearances for the record.

8 MR. KLAUS: Good morning, Your Honor. I'm Kelly  
9 Klaus from Munger, Tolles & Olson. I am joined by my  
10 colleagues, Rose Ehler, Allyson Bennett, and Glenn  
11 Pomerantz, at counsel table for the plaintiffs.

12 MR. QUINTO: Good morning, Your Honor. David  
13 Quinto, general counsel of VidAngel, Inc. With me are Jaime  
14 Marquart and Brian Grace of the Baker Marquart firm. We  
15 also have a video operator who will also show slides.

16 THE COURT: Are we going to play the "Star Wars  
17 Rogue One" movie?

18 MR. QUINTO: The filtered version, Your Honor, a  
19 lot shorter.

20 THE COURT: No opening credits? Just kidding.  
21 All right.

22 Good morning to you all. We have a lot to talk  
23 about today. The motion for preliminary injunction -- I had  
24 a chance to review the papers. I have a number of  
25 questions. I guess I will just start off -- I don't know if

1 it's Mr. Quinto. I want to make sure I understand the  
2 business model, and I will ask some questions to help walk  
3 me through it.

4 So customer says, "I want to watch 'Star Wars,'"   
5 they purchase the DVD legally through VidAngel for \$20.00,  
6 let's just -- is that correct?

7 MR. QUINTO: Yes, Your Honor.

8 THE COURT: So then VidAngel decrypts the video in  
9 order to make a version that can be streamed back to the  
10 customer. Is that correct?

11 MR. QUINTO: Sort of, yes. It could not be  
12 streamed without the decryption. It also could not be  
13 filtered without the decryption.

14 THE COURT: It's decrypted for both filtering and  
15 streaming purposes.

16 MR. QUINTO: Yes. That is a technological  
17 necessity today, and it was in 2005.

18 THE COURT: So then the DVD is sold to the  
19 customer, and then the DVD is then placed in a vault. Is  
20 that correct?

21 MR. QUINTO: Yes, Your Honor. Each DVD is  
22 individually barcoded. When a DVD is sold to a customer,  
23 the customer owns a specific DVD that is identifiable by its  
24 barcode. VidAngel has had an outside independent accounting  
25 firm go through and audit the vault to make sure that all

1 the DVDs that are supposed to be there are there and to  
2 confirm that no DVD has ever been sold to two customers  
3 simultaneously, that there is a one-to-one correspondence  
4 between the person who gets to use the DVD and the person  
5 who owns the DVD.

6 THE COURT: Okay.

7 MR. QUINTO: And VidAngel even makes sure that the  
8 customer cannot -- that the same customer cannot watch the  
9 DVD on two devices simultaneously. So you are allowed to  
10 watch it only on one device. The entire \$20.00 is paid  
11 upfront.

12 THE COURT: Right. Let me go through this just so  
13 I understand. The \$20.00 gets paid upfront. The customer  
14 streams the movie. VidAngel makes a request or offer to  
15 purchase the movie back for \$19.00. Is that -- and then the  
16 customer says yes or no.

17 If the customer says yes, then you give them back  
18 \$19.00. What happens to that DVD?

19 MR. QUINTO: Well, let me first note that  
20 Your Honor's description is almost correct but not quite.  
21 So the repurchase price for a DVD declines a dollar a day.  
22 The repurchase price for a Blu-ray disk declines \$2.00 a  
23 day. So if a customer chooses to sell back within 24 hours,  
24 the DVD, the customer would get \$19.00 in store credit.

25 If the customer waits two days --

1 THE COURT: He will get \$18.00. Let's assume they  
2 do it in that same day.

3 MR. QUINTO: I want to note that, at this point,  
4 there are over 20,000 DVDs that have -- that have been held  
5 by the customer so long that there is no sell-back value.  
6 So they're being stored for the customers in perpetuity.

7 THE COURT: I understand that, but just work with  
8 me here.

9 MR. QUINTO: Yes, Your Honor.

10 THE COURT: Let's say the customer on that day,  
11 they watch the movie, and they say, "Okay. I want to sell  
12 it back." Then VidAngel gives them a \$19.00 store credit.  
13 Okay? Then what happens to that DVD? Does it remain in the  
14 vault in perpetuity? Or is it sold again to another  
15 customer now that they've bought it back?

16 MR. QUINTO: Yes, it can be sold to another  
17 customer. The analogy -- probably all of us, at least  
18 members of the Bar are familiar with, would be the college  
19 bookstore. We went there at the start of every term, and we  
20 looked at the prices of the books, and we had heart  
21 palpitations, and the people at the bookstore said, "But  
22 take good care of the book. If the professor is using the  
23 book again next term, we will buy it back from you at the  
24 end of the semester." And we always went to the bookstore  
25 early hoping to find used and less expensive copies of the

1 books. It's the same thing.

2 THE COURT: I understand. So what happens, then,  
3 the next day when someone wants to watch that same movie?  
4 Are they sold a used copy of the video? Or are they sold --  
5 what's the price point on that, assuming my scenario, the  
6 next day someone wants to watch that same movie?

7 MR. QUINTO: Right. The next customer would pay  
8 \$20.00 and would own that DVD for as long as he or she  
9 wanted.

10 THE COURT: And then, when they sell it back, then  
11 VidAngel owns it to be able to resell to the next person.

12 MR. QUINTO: That's correct. And one of the  
13 problems with this model is that, if VidAngel estimates that  
14 2,500 people might want to own a DVD of a particular movie  
15 simultaneously and VidAngel, therefore, buys 2,500 DVDs to  
16 sell to its customers, if it guesses wrong and no more than  
17 2,000 watch it at a time, VidAngel has purchased 2,000 --  
18 has purchased 500 DVDs that will never be used.

19 On the other hand, if 3,000 people want to watch,  
20 VidAngel has to send out of stock notices to 500 customers  
21 saying, "Sorry. We don't have it."

22 THE COURT: That's the part I'm not sure I follow  
23 then. Because, if you buy 2,000 copies and on Day 1, 2,000  
24 people buy it and sell it back; on Day 2, another 2,000  
25 people want it. Then it's available for sale; correct?

1 MR. QUINTO: That would be the ideal situation for  
2 VidAngel. Yes, Your Honor.

3 THE COURT: And I am just trying to make sure I  
4 understand. That's how VidAngel makes its money, by  
5 reselling those DVDs; correct?

6 MR. QUINTO: Yes. That's where it derives its  
7 revenue.

8 THE COURT: Right.

9 MR. QUINTO: But it's not in the -- it doesn't  
10 view itself as in the DVD sale and resale business. The  
11 value it adds is the filtering. And 96 percent of all  
12 movies rented from VidAngel -- rented, used, sold -- sorry.  
13 96 percent of the DVDs sold and watched are watched by  
14 consumers who choose two or more filters.

15 THE COURT: What are generally those two or more  
16 filters? Because I was going to talk about that in a  
17 moment. There is some back-and-forth.

18 Are they really filtering for violence, profanity,  
19 what have you? Or are they just filtering out either the  
20 opening or closing credits, if you know?

21 MR. QUINTO: It's not just the credits. And I  
22 want to say something about the credits, Your Honor, because  
23 that's, I think, a real canard.

24 The credit filter didn't exist so that people  
25 could game the system. It wasn't installed so that people

1 could choose to filter something they didn't want to see  
2 anyway and thereby watch a filtered movie -- thereby watch a  
3 streamed movie for a lower price. Rather, Your Honor, today  
4 many movies contain outtakes in the credits. And often the  
5 most outrageous parts of the movie, some of the largest acts  
6 of violence or the bloodiest scenes or the worst language  
7 appear in those outtakes in the credits. That's why  
8 VidAngel customers insisted on having a closing credits.

9 But the system has been modified. VidAngel  
10 represented to the studios in July 2005 that, if they wanted  
11 some modification to the system to the technology, VidAngel  
12 would be happy to try to accommodate.

13 Now that Disney has raised that as an issue,  
14 VidAngel requires that, to watch a movie, if you choose to  
15 filter credits, you must also choose to filter something  
16 else.

17 THE COURT: What's that something else?

18 MR. QUINTO: Well, Your Honor, if I may, I would  
19 ask the Court's indulgence to watch a video that's about  
20 2 1/2 minutes long. What it -- I will tell you. It is --  
21 it shows a -- it shows exactly what the consumer would see  
22 if the consumer went to the VidAngel Web site. And it shows  
23 somebody walking through the Web site, choosing the filters.  
24 The Court can see what sorts of filters are available and  
25 how that system works.

1 THE COURT: Mr. Klaus, I assume you are not  
2 standing up just for exercise, and I assume you have some  
3 issue with the Court watching the video. So I will let you  
4 be heard.

5 MR. KLAUS: Thank you, Your Honor.

6 Two points. One is that we do object to the  
7 showing of the video that Mr. Quinto just described. It was  
8 provided to us on Saturday evening. The video contains  
9 narration by someone -- we assume it's VidAngel's chief  
10 operating officer -- but it contains narration that has  
11 commentary on why she happens to be selecting particular  
12 filters.

13 The part that is very objectionable is that, at  
14 the end of the video, there is a comment during the  
15 sell-back process where the narrator says there is a certain  
16 percentage of DVDs that are permanently owned.

17 Mr. Quinto, during his remarks just now, made a  
18 reference to there being 20,000 DVDs that have been checked  
19 out for so long that they are permanently owned. That's not  
20 in the record. There is zero evidence of that, and so we  
21 object to Mr. Quinto's attempt to bring that in in his  
22 argument and also to bring it in through the video.

23 The other thing I would say, Your Honor, is I do  
24 believe there were some points in the question and answering  
25 where Mr. Quinto was describing the system that I would like



1 the opportunity to be heard on. I don't want to break the  
2 flow of his question.

3 THE COURT: I can assure you you will have an  
4 opportunity to be heard. I just was more focused on the  
5 video.

6 Why don't we do this, Mr. Quinto. Let me get  
7 through my questions. Let's hear the arguments, and then I  
8 will decide if I need to see the video.

9 Mr. Klaus, I understand you are representing your  
10 client. It's not in front of a jury. I would like to  
11 think -- some might disagree that I have a modicum of  
12 intelligence to filter out that which is relevant to these  
13 proceedings and that which is not. But your objection is  
14 noted. Let me kind of go through this, if I could.

15 Mr. Quinto, I thought you said 96 percent of the  
16 people filter -- do some form of filtering in the -- when  
17 they engage?

18 MR. QUINTO: Choose more -- choose at least two  
19 filters and frequently many more than two filters when they  
20 watch the movie.

21 THE COURT: Do you know specifically what those  
22 filters are that they're choosing? Is it opening credits?  
23 Is it closing credits? Is it violence? Is it profanity?

24 MR. QUINTO: It's all matter of things,  
25 Your Honor. I don't know the breakdown among the various

1 categories. VidAngel has 82 general categories of content  
2 that can be filtered, including smoking, drinking, violence,  
3 blood, guts, gore, sex.

4 THE COURT: You don't keep statistics on what  
5 things get filtered out -- or at least you don't have that  
6 information today?

7 MR. QUINTO: I don't have that information,  
8 Your Honor, but the average number of filters selected is  
9 far greater than two. I do know that.

10 And although there are 82 general categories, if  
11 one includes the subcategories, there are hundreds of  
12 possible filters.

13 And when a consumer goes to the VidAngel site, the  
14 consumer can go through the general categories and open them  
15 up and look at all the subcategories and decide which  
16 specific subcategories to include or can take out an entire  
17 category.

18 And as this process goes on, the site will in real  
19 time show where in the movie, if it's language, the movie  
20 will be muted. And when I say "muted" I mean only the voice  
21 track is muted. You still hear the background noises, the  
22 music --

23 THE COURT: I'm not challenging the filtering.

24 MR. QUINTO: And if you choose to have scenes  
25 deleted, it will show you where. It will show you how much

1 of the movie is being shorted.

2 THE COURT: Okay. Fair enough.

3 Let me go through some of the other questions that  
4 I have for you. So I just want to make sure we're clear on  
5 this. Disney contends -- and I don't think you are  
6 disputing -- that there is no fair use defense to the  
7 Digital Millennium Copyright Act violation; is that correct?

8 MR. QUINTO: I'm sorry. That there is no fair use  
9 defense?

10 THE COURT: Yes.

11 MR. QUINTO: Yes, there is. And if I may ask the  
12 Court to give me a couple of minutes, I would walk the Court  
13 through the DMCA argument because it is stuff and nonsense  
14 for several reasons as I can demonstrate.

15 THE COURT: I will give you an opportunity. I  
16 just want to make sure I understand these are the issues  
17 that I had in going through the papers.

18 If I understand your papers correctly, you argue  
19 that your business model doesn't violate the DMCA because  
20 you buy these authorized copies of these DVDs and then sell  
21 them to the customers and then the customers are then able  
22 to watch the streamed content that they own without  
23 violating the DMCA.

24 Is that a fair statement of your argument?

25 MR. QUINTO: Not quite, Your Honor.

1 THE COURT: Okay. Tell me what I am missing.

2 MR. QUINTO: Sure. The first sentence of the DMCA  
3 at Section 1201(a)(1)(A) which is the section that VidAngel  
4 is relying on and which, by the way, is the subject of a  
5 pending action in the district court for the District of  
6 Columbia, seeking to have that precise provision declared  
7 unconstitutional. The first sentence says: (Reading:)

8 No persons shall -- no person shall  
9 circumvent a technological measure that  
10 effectively controls access to a work  
11 protected under this title.

12 So there are two requirements for that to apply.

13 THE COURT: I just want to make sure -- I am  
14 seeing this stuff on the screen. Has this been shared with  
15 opposing counsel?

16 MR. QUINTO: No, but this is just part of the  
17 statute --

18 THE COURT: I understand but, Mr. Quinto. You are  
19 coming here, putting up these video screens. Then I am  
20 going to have Disney jumping up in arms saying, "I haven't  
21 seen this." It seems to me, if you are going to go through  
22 this whole PowerPoint, you should share it with opposing  
23 counsel.

24 Mr. Klaus, I am sure you will object at the  
25 appropriate time.

1 MR. KLAUS: I will, Your Honor. I have a complete  
2 version of the statute that I am happy to hand up to  
3 Your Honor, but I don't mind, for purposes of this  
4 discussion right now, if Mr. Quinto goes through this  
5 sentence.

6 THE COURT: All right.

7 Go ahead, Mr. Quinto.

8 MR. QUINTO: Thank you.

9 So I have bolded the two critical elements there.  
10 First, there must be effective control; and, secondly, it  
11 must be of a work protected under Title 17, which is the  
12 Copyright Act.

13 We have submitted a declaration from our expert  
14 which explains in some detail that the control is quite  
15 ineffective. But putting that aside, as a matter of law,  
16 there is not an effective control. And if I may now,  
17 Mr. Klaus, refer to 17 USC 1201(b)(2)(B).

18 This section defines what it means to have  
19 effective protection. It says (reading:)

20 A technological measure effectively  
21 protects a right of a copyright owner under  
22 this title if the measure prevents, restricts,  
23 or otherwise limits the exercise of a right of  
24 a copyright owner under this title.

25 So the first requirement here is that there be a

1 right of a copyright owner.

2 THE COURT: Okay. Let me stop you there because  
3 Mr. Klaus is standing up.

4 So what is the issue, Mr. Klaus?

5 MR. KLAUS: He is reading from the definition of  
6 effective protection and Section 1201(b)(2)(B), whereas the  
7 actual definition of what it means to effectively protect a  
8 work for purposes of Section 1201(a)(1) is in a different  
9 section. It's in Section 1201(a)(3)(B). And what that  
10 section -- that's the one that's at issue here.

11 THE COURT: Let me stop you there.

12 We're going to be here all day if we go through  
13 this. So just note where you have issue. Then I will give  
14 you a chance to respond.

15 Mr. Quinto, continue.

16 MR. QUINTO: So first it must effectively protect  
17 the right of a copyright owner. So there must be a right  
18 involved. But under the Family Movie Act which provides  
19 that a service that meets the requirements of a Family Movie  
20 Act is exempt from all the exclusive rights of copyright  
21 under that statute, there is no right of a copyright owner  
22 here to be protected because the studios don't have any of  
23 the -- don't enjoy any of the exclusive rights of copyright  
24 vis-à-vis a service operating as required by the Family  
25 Movie Act.

1 THE COURT: You are saying that this is exempt  
2 under the Family Movie Act? That it's exempt under the  
3 Family Movie Act? Is that your contention?

4 MR. QUINTO: The Family Movie Act says that any  
5 service operating in accordance with its terms -- that is,  
6 17 USC Section 110, Subsection 11, that any service that  
7 meets those requirements is -- does not violate any of the  
8 exclusive rights of copyright, does not violate Section 106  
9 which lists -- which sets forth all the exclusive rights  
10 that copyright owners enjoy.

11 THE COURT: So, Mr. Quinto, what's your response?  
12 The plaintiff touched upon this -- Disney touched upon the  
13 legislative history that suggests that the FMA was not  
14 intended to be a defense to a DMCA violation.

15 I think there is some verbiage from Senator Hatch  
16 specifically where he states it would not be a defense to  
17 claim a violation of Section 1201, that the circumvention is  
18 for the purpose of engaging in the conduct covered by this  
19 new exemption in Section 110(11), which is FMA.

20 And then he further states that the FMA does not  
21 provide any exemption from the anti-circumvention provisions  
22 of Section 1201 of Title 17.

23 What's your response to that?

24 MR. QUINTO: Well, several, Your Honor. First,  
25 the -- Senator Hatch's statement has to be read in

1 conjunction with all the statements, all the numerous  
2 statements in the legislative history, including statements  
3 made by Disney's allies that the FMA, if it became law,  
4 would provide a blanket immunity, would provide a complete  
5 exemption for a service operating under the Family Movie  
6 Act.

7           And, in fact, Disney's -- one of Disney's allies  
8 making that point that there would be total immunity even  
9 complained that, if the FMA became law, teenagers would be  
10 deciding what the American public got to watch in the  
11 privacy of their homes.

12           Now, obviously, it's the families who decide. But  
13 the point is that they recognized that the FMA would provide  
14 a total immunity. So how to reconcile those statements?  
15 Very easy.

16           At the time, the state of the law was as it had  
17 been for hundreds of years in Anglo American jurisprudence,  
18 that there is no injury -- that there is no action, there is  
19 no actionable harm absent injury, and, therefore, there had  
20 to be an injury before there could be a legal wrong, de  
21 minimis non curat lex.

22           All the cases at the time reflect -- and this is  
23 even acknowledged by the Ninth Circuit in the MDY Industries  
24 versus Blizzard Entertainment case at page 951, I believe --  
25 that the cases had all required that there be some -- that



1 for it to be actionable under the DMCA, there had to be a  
2 nexus between the decryption and some kind of harm to the  
3 studios.

4 And a long line of cases, including those from the  
5 Federal Circuit and from the Second Circuit, had held that,  
6 absent any kind of harm, any kind of injury, there could be  
7 no actionable claim under the DMCA.

8 And, of course, the Family Movie Act represented a  
9 grand compromise made by Congress that wanted to ensure that  
10 American families had the right to enjoy filtered content  
11 streamed to them for private in-home viewing,  
12 notwithstanding that the studios had sued every company that  
13 ever offered filtering services, including several companies  
14 that, according to the Register of Copyrights, were  
15 operating lawfully under existing law but were sued anyway.

16 And the directors were so opposed to the Family  
17 Movie Act that they refused invitations from Congress to  
18 provide somebody to testify. So the grand bargain was that  
19 Congress fashioned a system to attempt to protect the rights  
20 of all stakeholders. The studios were protected in their  
21 economic interests in that consumers were required to first  
22 lawfully purchase a copy; so the studios were guaranteed a  
23 revenue stream because they would sell DVDs.

24 The directors were protected in that services such  
25 as VidAngel were prohibited from making any fixed copy of

1 the filtered work and from performing the filtered work  
2 publicly. So the only work the public would get to see  
3 would be the work that the directors had authorized.

4 The consumers were protected because they would  
5 have the right and the ability to watch filtered content in  
6 their home, filtered to their specifications.

7 And finally, the fourth stakeholder, the  
8 for-profit companies that Congress expressly envisioned  
9 would provide the service, knowing that the studios  
10 wouldn't, the for-profit companies such as VidAngel were  
11 protected in that they would in theory be immune from  
12 litigation.

13 And I might add that the studios were suing the  
14 company called ClearPlay when the Family Movie Act became  
15 law.

16 When it became law, the judge in the ClearPlay  
17 action -- and the plaintiffs there included three of the  
18 plaintiffs herein -- Disney, Warner Bros., and Fox.

19 THE COURT: I know all about that.

20 MR. QUINTO: Yeah. The judge asked them, "Do you  
21 have any claim left?" and they said, "No," and the action  
22 was then dismissed.

23 So in all those copyright arguments, infringement  
24 arguments that the studios make, are arguments that they  
25 recognized were out the window in that case.

1           So in light of this grand compromise, the point  
2 was to create a system that did not depend on studio  
3 consent.

4           So, obviously, if a service such as VidAngel  
5 needed to say -- needed to go to the studios to say, "Well,  
6 we have this wonderful statute, the FMA, but it means  
7 nothing unless you will grant us permission to decrypt,"  
8 would give the studios a veto power, the very thing that  
9 Congress wanted to take away from the studios because  
10 Congress knew the studios would never say yes.

11           So if one looks at the existing case law at the  
12 time, all the cases said that there must be an injury before  
13 you could bring an action under the DMCA.

14           Here there is not and cannot be any injury.  
15 Remember, the history of the DMCA was it was enacted in  
16 response to the rampant file sharing occurring in the music  
17 industry and the -- there was a further concern that perhaps  
18 one person might decrypt a file and a second person, perhaps  
19 in another country, might then share that file worldwide.  
20 And Congress wanted to find a way to reach that first person  
21 who decrypted the file and thereby made the worldwide  
22 infringement possible.

23           Here that potential does not exist. There is no  
24 file sharing occurring. Everybody who watches content is  
25 somebody who has first lawfully purchased a copy of the

1 work. The studios have derived revenue from every DVD  
2 watched by every VidAngel customer. There is no possibility  
3 of file sharing. In short, there is no injury.

4 So under existing case law, there could not have  
5 been a claim under the DMCA.

6 Further, Your Honor, I would point out that the  
7 MDY Industries versus Blizzard case that the studios want to  
8 hang their hat on, addresses among other things at page 941,  
9 addresses copyright misuse, which, as Your Honor knows, is  
10 an affirmative defense that VidAngel has asserted in this  
11 case.

12 The Ninth Circuit said (reading:)

13 Copyright misuse is a equitable  
14 defense to copyright infringement, and the  
15 remedy for copyright misuse is to deny the  
16 copyright holder the right to enforce its  
17 copyright during the period of misuse.

18 So while the misuse is occurring as to the party  
19 alleging copyright misuse, the plaintiffs do not have an  
20 enforceable copyright, and having an enforceable copyright  
21 is a prerequisite to protection under the DMCA. So for that  
22 reason as well, the DMCA does not apply. Finally, I would  
23 note in the same case, the same case, the Ninth Circuit at  
24 page 951 addressed a situation we have here as well. The  
25 Ninth Circuit said --

1 (Reading:) Concerning anti-trust  
2 law, we note that there is no clear issue of  
3 anti-competitive behavior in this case because  
4 Blizzard does not seek to put a direct  
5 competitor who offers a competing role-playing  
6 game out of business and the parties have not  
7 argued this issue. If a Section 1201(a)(2)  
8 defendant in a future case claims that a  
9 plaintiff is attempting to enforce the DMCA  
10 anti-circumvention right in a manner that  
11 violates anti-trust law, we will then consider  
12 the interplay between this new  
13 anti-circumvention right and anti-trust law.

14 And that is precisely the situation here. On  
15 December 19, Your Honor will hear the studio's motion to  
16 dismiss VidAngel's anti-trust counterclaim and, well, all  
17 other counterclaims as well.

18 So, finally, Footnote 12 of that same opinion says  
19 that --

20 (Reading:) Like the Chamberlain  
21 Court -- referring to the Federal Circuit  
22 decision, the principal Federal Circuit  
23 decision that had held that there was no DMCA  
24 action permissible absent injury --

25 (Reading:) Like the Chamberlain

1 Court, we need not and do not reach  
2 relationship between fair use under  
3 Section 107 of the Copyright Act and  
4 violations of Section 1201, citing  
5 Chamberlain.

6 MDY has not claimed that Glider use  
7 is a "fair use" of WoW's, World of Warcraft's,  
8 dynamic literal [sic] elements. Accordingly,  
9 we too leave open the question whether fair  
10 use might serve as an affirmative defense to a  
11 prima facie violation of Section 1201.

12 So for those various reasons, I submit that the  
13 studio DMCA argument is unfounded. And when one goes back  
14 to the legislative history to try to understand that  
15 comment, I think it's quite clear, especially from other  
16 similar remarks, that what Congress was saying or what  
17 specific congressmen were saying was that you cannot rely on  
18 the FMA to -- as an excuse to justify something that was  
19 inexcusable to start with.

20 For example, the studios in their reply papers  
21 contend that we had no answer to their point that the -- I'm  
22 blanking.

23 Their point that their -- they had quoted language  
24 saying that the FMA cannot be used to make legal conduct  
25 that was unlawful to start with.

1 Well, to start with, meaning that, if somebody had  
2 done something in violation of copyright law, trying to  
3 bring it under the penumbra of the Family Movie Act would  
4 not then provide a defense.

5 Elsewhere in the congressional record, there is a  
6 more specific reference to the notion that one could not,  
7 say, obtain bootleg copies of a work and then filter and  
8 stream them and thereby gain the protection of the Family  
9 Movie Act because there was a copyright violation ab initio  
10 at the very outset. And that is precisely the point, that  
11 you cannot sanitize something that was wrong at the outset  
12 by trying to bring it under the FMA.

13 But when the FMA was enacted, it was and remains  
14 today impossible to filter or stream filtered content,  
15 indeed stream any kind of content without -- well, to stream  
16 the filtered content without first decrypting it. That was  
17 a technological measure then. It's a technological  
18 necessity now. Nothing has changed. While a work is  
19 encrypted, it cannot be filtered, and a filtered work cannot  
20 be transmitted.

21 So absent the decryption, the FMA is meaningless.  
22 And we have, as Your Honor may have seen, challenged the  
23 studios to tell us what the FMA accomplished, what did the  
24 FMA add to the law, what new right do people have to watch  
25 filtered, streamed content that they didn't have before the

1 FMA was enacted?

2 All we've been told is the FMA does not permit  
3 this, the FMA does not permit that, the FMA prohibits  
4 something else. The studios have no answer to the question  
5 what did the FMA accomplish?

6 And as I have just explained, it accomplished  
7 allowing people, allowing American families to watch  
8 filtered content filtered to their desire, to their  
9 specifications, in the privacy of their homes without  
10 suffering a veto from the studios or the directors.

11 THE COURT: All right. Mr. Quinto, let me hear  
12 from Mr. Klaus as it relates to this issue, if I could,  
13 please.

14 And I have some questions. I would appreciate it,  
15 if you wouldn't mind, answering them.

16 The question I had for you really was how -- could  
17 you describe at least from your client's perspective a  
18 scenario where a company could operate legally under the  
19 FMA, if they're not licensed to stream movie content. Is  
20 that an impossibility?

21 Because you heard Mr. Quinto talk at length about  
22 the fact that -- basically, he says that your client takes  
23 the position that the FMA really is -- it can't be utilized  
24 in a practical sense.

25 MR. KLAUS: Yes, Your Honor. He's wrong about



1 that. He's wrong about a number of things that he said.  
2 There were a number of arguments that Mr. Quinto raised this  
3 morning, many of them that are nowhere made in their  
4 opposing papers. I have tried to take notes on all of them.

5 But to the beginning, which is that the FMA  
6 accomplished nothing when it was passed, absolutely false.  
7 What Congress did was it decided that there -- there was  
8 existing litigation going on in Utah at the time in 2004 and  
9 2005.

10 There were two -- in general, two types of  
11 services that were providing filtering. There was one type  
12 that was actually making edited copies of movies, the  
13 CleanFlicks people. And that's one of the cases that we  
14 cited.

15 And it was clear from the language of the statute  
16 that the CleanFlicks people who were making copies and then  
17 distributing those copies of edited movies to users had no  
18 defense. And the Court said, "You don't have a fair use  
19 defense either," and we can get to that in a moment.

20 There were another group of companies, one of  
21 which the lead one was called ClearPlay. Those were the  
22 subject of the Huntsman case which Mr. Quinto has held out  
23 the Huntsman decision as saying that the studios essentially  
24 said "We have absolutely no claim against any service that  
25 filters." Absolutely false.

1           What the Huntsman defendants, the ClearPlay  
2 defendants, did was they provided a separate filter that,  
3 when somebody had their own DVD lawfully purchased at home  
4 in a ClearPlay machine, they could put their DVD in. They  
5 could put the ClearPlay filter technology that went over  
6 it --

7           THE COURT: And they would filter it.

8           MR. KLAUS: -- and they could play it. So the  
9 idea that there was nothing accomplished in the studio's  
10 view by the FMA is just false.

11           THE COURT: How is that different from what  
12 VidAngel does? Aren't they -- they claim someone has  
13 purchased the copy, they have filtered that copy, and then,  
14 when they're done with it, they sell it back to the company  
15 so someone else can purchase it and then filter it.

16           MR. KLAUS: Well, that requires me to go back to  
17 one of the first things that Mr. Quinto said in response to  
18 your questions about how the service works. And there were  
19 some details I just want to make sure we're clear on.

20           I don't have a stack of DVDs with me, but if you  
21 will indulge me, I will use my binder. Unfortunately, there  
22 are too many in this case to demonstrate my point.

23           One of the things that Your Honor said, "Was is it  
24 the case that the user buys a DVD for \$20.00?"

25           Mr. Quinto said, "Yes."

1           You said, "VidAngel, then, decrypts the DVD?"

2           He said, "Yes." That's wrong.

3           What happens is at the beginning VidAngel buys a  
4 stack of DVDs or Blu-ray disks. Imagine this has 500 or  
5 2,000 and I take one.

6           If I am VidAngel, what I do is I take this one  
7 DVD, and I rip it. I use -- I use software that is plainly  
8 circumvention software that's illegal for distribution in  
9 the United States. I know it's illegal for distribution in  
10 the United States, and I use it to rip the movie out. And  
11 from that one DVD I have made a master copy that I then put  
12 on to a server, just that one master copy.

13           All the others, the whole stack of 500 or 1,000  
14 that they estimate is going to be used, those in the  
15 cellophane, those get put in a vault. They have a little  
16 barcode. And when somebody goes and says, "I am buying it,"  
17 the fiction is that what the customer is buying and  
18 streaming is the copy that's over here in the vault.

19           The reality is that, what the customer is seeing,  
20 all of them, the thousands of customers who stream the same  
21 movie over and over again, they're seeing the copy that was  
22 taken from DVD Number 1, and that became the master copy.

23           THE COURT: So let me ask you, then. Would your  
24 position change if every time someone purchased a DVD they  
25 took one from that stack to the side and put it up on the

1 server?

2 MR. KLAUS: No.

3 THE COURT: And rip it?

4 MR. KLAUS: It would still be ripping. It would  
5 still be copying. It would still be publicly performing the  
6 movie.

7 THE COURT: What's your response to the notion  
8 that -- to Mr. Quinto's point that you can't filter without  
9 ripping?

10 MR. KLAUS: That is wrong. We pointed out that  
11 there is another service, one of their competitors,  
12 ClearPlay, the same company that made the DVDs. They offer  
13 a service that -- they offer a service that works in  
14 conjunction with authorized streams from Google Play.

15 So Google Play has licenses with copyright owners.  
16 They stream -- they will stream movies to you, to you, to  
17 everyone in this courtroom for a fee. The fee has built  
18 into it the acquisition cost of having to stream a copy.

19 And ClearPlay has a service. What we know is what  
20 Mr. Harmon has said is he thinks it's similar to the one  
21 that VidAngel for a time was trying to use, but they have a  
22 service that puts a filter over a stream.

23 Now, I can't tell you that I know all of the in's  
24 and out's of it, but based on what we do know, it appears  
25 that they have -- it appears to us at least, that what they

1 have done is that ClearPlay has figured out a way to put a  
2 filter on top of an authorized stream.

3           So there is some other way. When he says that --  
4 he points to us and says, "You have absolutely no answer."  
5 He is just not reading our papers. He is not reading the  
6 evidence that we put in that shows that there is some other  
7 way to do it. Beyond that, Your Honor, the Family Movie  
8 Act -- let me get to some of the points that Mr. Quinto  
9 raised.

10           So the Family Movie Act -- it's a statute that  
11 we're talking about here. We heard a lot this morning about  
12 there being a grand bargain, about there being an awareness  
13 in the air that the existing law at the time said no injury.  
14 None of that, by the way, none of that is in their papers.  
15 It's not in their papers for good reason because we would  
16 have shown that it was wrong.

17           So it's a statute. And the first and best  
18 evidence of what it means for purposes of construing the  
19 statute is to look to see what the language is. I'm happy  
20 to hand up the language of the statute, Your Honor, if it  
21 will be helpful.

22           THE COURT: I think I have it.

23           MR. KLAUS: Let me start with what the Family  
24 Movie Act says. Your Honor, I do have two copies of the  
25 statute. May I approach.

1 THE COURT: Yes.

2 MR. KLAUS: I have copies --

3 THE COURT: You have provided it to the defense?

4 MR. KLAUS: Yes.

5 THE COURT: All right.

6 MR. KLAUS: Thank you.

7 The text of the statute of the FMA is at Tab 3,  
8 Your Honor. This is 17 USC Section 110. And Section --  
9 what Section 110 does is it sets out a whole bunch of  
10 various exemptions to the exclusive rights of copyright.

11 The Family Movie Act happens to be in  
12 paragraph 11, but the preamble, what introduces the entirety  
13 of it is, notwithstanding the provisions of Section 106 --  
14 doesn't say 1201 which is a separate section of the title --  
15 the following are not infringements of copyright.

16 If Your Honor then skips ahead several pages to  
17 the actual text -- what is not an infringement is the making  
18 imperceptible. That conduct is not an infringement, the  
19 conduct of making it imperceptible.

20 And it describes what the requirements are for  
21 something to be making imperceptible but not within it. And  
22 it makes clear that, if you are making imperceptible during  
23 a performance and/or transmitted to the household, it has to  
24 be from an authorized copy.

25 THE COURT: Right. But VidAngel says it is an

1 authorized copy. "We bought it. You get money from when we  
2 bought it, and they bought it from us." So it's authorized.

3 MR. KLAUS: But it's clearly not authorized,  
4 Your Honor, for two reasons. One is -- remember if we go  
5 back to the example that I raised at the outset.

6 When Mr. Quinto is having something streamed, it's  
7 not coming from the DVD that he supposedly bought. It's  
8 coming from the copy that they created by ripping the DVD  
9 that they had no authorization to do and the copy that they  
10 made and then put onto a server that they have no  
11 authorization to make. That's not -- that is simply the way  
12 that they are doing it. It is not an authorized copy.

13 THE COURT: Let me play devil's advocate for a  
14 second. Isn't that really a function of semantics? They  
15 bought it. You don't dispute that they bought those copies.  
16 And I assume you don't dispute that you got revenue from  
17 that. Their purchase was authorized.

18 They have put this copy of this CD onto the server  
19 to use multiple times, but it doesn't negate the fact that  
20 their original purchase of the CD -- or DVD, I should say,  
21 was an authorized purchase; correct?

22 MR. KLAUS: The original DVD is itself -- the  
23 movie that is on that particular DVD is an authorized copy.  
24 The copy that is made to the computer server is  
25 unauthorized.

1           And that is the -- Your Honor, we think it's plain  
2 from the language of the law, but if you look at the  
3 Capitol Records versus the ReDigi case, that was the case  
4 about moving the used iTunes store purchases, your downloads  
5 from iTunes to a server. And what Judge Sullivan said is,  
6 "No. You have made a new copy. You have violated the  
7 reproduction rights."

8           To answer your question, that is not an  
9 authorized -- that's not an authorized copy.

10           THE COURT: From your perspective, then, the only  
11 authorized method to do this would be the ClearPlay model  
12 where there is a DVD and somehow some way ClearPlay or --  
13 has designed sort of a filter onto that DVD so, as it's  
14 playing, it can filter.

15           MR. KLAUS: Somebody can do that technology.  
16 Somebody could actually try to go out and get a license.  
17 And I do want to get under this point, Your Honor, because  
18 Mr. Quinto said, "Copyright misuse. That's another reason  
19 why you can't enforce your rights."

20           Well, copyright misuse is alleged when they  
21 amended their affirmative defenses in the case. They put no  
22 facts in to support it. I presume that what the facts are  
23 that they are relying on are their anti-trust allegations.

24           This is a preliminary injunction hearing,  
25 Your Honor. They are supposed to put in facts into the



1 record, not just hurling statements that the studios don't  
2 want this, the studios will never do this, the studios have  
3 interfered with us at every turn without pointing to the  
4 actual evidence showing it.

5           And the reason they're not doing it is they don't  
6 have any evidence. The business plan -- the business plan  
7 of VidAngel from the get-go, when it went to this model, was  
8 to try to develop a huge base of users so that then, when  
9 they would come to the studios to negotiate a license, they  
10 would have significant leverage during the licensing  
11 negotiations.

12           I am getting a little ahead here, Your Honor, but  
13 I would submit that goes directly to the balance of the  
14 equities and the hardships and the fact that they have not  
15 behaved equitably.

16           THE COURT: Their argument is, look. You let the  
17 gnat become a hornet's nest. I mean, when they first  
18 approached you, all right. Whatever. Do your thing.  
19 You're not a problem. And now people are using it and  
20 Disney is says, "Time out. Houston, we have a problem."

21           MR. KLAUS: Let me talk about their delay.

22           THE COURT: I am asking these questions because I  
23 just want to hear from the parties. Your answer -- you cite  
24 the cases that talk about litigation, the cost of  
25 litigation, and things of that nature. But I guess I really

1 would like to hear from you, sort of, did Disney let this  
2 gnat turn into a hornet's nest?

3 MR. KLAUS: It's not that we let a gnat turn into  
4 a hornet's nest. It's the reality of the world that we live  
5 in in 2015, 2016 is that there are a lot of gnats, and a lot  
6 of the gnats go away and die of their own weight because  
7 they just don't take off.

8 And the law -- the law says that we are entitled  
9 to wait and we don't have to bring suit and we don't forfeit  
10 the right to obtain a preliminary injunction if they turned  
11 into a hornet in the meantime.

12 The reality is that my client spent -- once they  
13 received Mr. Quinto's letters, which were not business  
14 person to business letters. Mr. Quinto is a very well-known  
15 litigator in this city. He addressed his letters not to  
16 business development people but to the general counsel of  
17 the various companies. It had all the markings of being a  
18 letter that was saying, "Here is all the things we're doing.  
19 We think we're legal. You go ahead and tell us if you  
20 disagree that we're legal."

21 And, in fact, Mr. Harmon said that the one thing  
22 he could identify that they might have done actually  
23 concretely differently if they had been sued if they  
24 perceived some sort of response was to then go off and force  
25 us to litigate through the context of a declaratory judgment

1 claim.

2           What the law says is -- again, this is the --  
3 starting with the Arc of California case from the  
4 Ninth Circuit -- makes it clear that courts are loath to  
5 withhold injunctive relief on this basis alone, that you are  
6 entitled to see what happens to the harm.

7           And the harm here, Your Honor, is not simply the  
8 fact that they grew from 5,000 users during a limited beta  
9 test as described in Mr. Quinto's letter to a hundred  
10 thousand users and growing with many more projected into the  
11 future when we filed suit. It's that this is a service that  
12 continues to add works.

13           So we have 79 titles listed in Exhibit A to the  
14 Complaint. They continue to add them. If you go to  
15 VidAngel today and go to what their press room and news says  
16 is, the very first thing that you will see is a whole slew  
17 of titles that they're going to add in November, a whole  
18 slew of them, a whole bunch of pictures of the DVD covers.

19           And it says "Please stay tuned because there will  
20 be more." So Arc of California makes clear that, where you  
21 have ongoing, continuing, worsening harm, that can justify  
22 relief as well.

23           THE COURT: Mr. Klaus, I appreciate you going back  
24 and forth. And I have some other questions -- I am sure you  
25 have some other points -- but let's talk about, sort of,

1 this issue for a minute, if we could, a little further.

2 The harm -- isn't the harm really economic? Or is  
3 there more than that?

4 MR. KLAUS: The harm is definitely more than  
5 economic.

6 THE COURT: Tell me why.

7 MR. KLAUS: For several reasons. First of all,  
8 just with respect to the idea that money damages would be  
9 adequate here to compensate us for our loss -- wrong.

10 Just taking the 79 works that are at issue in the  
11 Complaint, the potential statutory damages just for the  
12 infringement of those works is \$11.85 million. And those  
13 are just those works. And they're the ones that are  
14 continuing to accrue as they continue to add more.

15 There is no evidence that VidAngel would be able  
16 to pay an actual damages award at the end of the case.

17 And if you look at the Second Circuit decision in  
18 WPIX versus ivi, it's one of many cases. But what the  
19 Second Circuit said there was, "This defendant will not be  
20 able to pay those damages at the end of the day. Therefore,  
21 that is that itself is irreparable harm."

22 Second point -- the other thing is that they are  
23 the relationships that we have with our licensees like  
24 Google Play, like Amazon and Apple's iTunes who come to us  
25 and legitimately negotiate for and receive licenses.

1           You have a service here that has decided that it  
2 will appropriate for itself the decision of when, where, for  
3 how much, under what circumstances, under what security  
4 considerations, under what type of user experience they will  
5 make our content available to build their business, to have  
6 the money go from their revenues directly to the principals  
7 and the owners of their company through their advertising  
8 agency. They have made the decision to build a business on  
9 the back of our content.

10           And the cases are -- it's the WTV Systems or the  
11 Zediva case from this district which outlines in detail the  
12 type of harm -- and I will give you the cite for that,  
13 Your Honor.

14           THE COURT: I have the case up here.

15           MR. KLAUS: Okay. There is extensive discussion  
16 in that opinion. It's hardly alone. They're also in the  
17 BarryDriller.com cases from this district as well.

18           There is discussion of the fact that, when a  
19 service comes in and says, "We're going to use your content,  
20 we're going to build our business based on your content" --  
21 and the cases say that that in itself is a harm, it harms  
22 your relationship with your licensees.

23           As Mr. Cittadine says in his declaration -- he  
24 points to examples of Fox titles that were attached to the  
25 Complaint. He says, "Those titles are right now within an

1 exclusivity window for one of our authorized distributors."

2 This happened to be HBO.

3           We have a period of time where they're the only  
4 ones -- they're the only service who can stream, and that is  
5 there is an economic relationship there. They pay money to  
6 get that exclusive right. It's something that we, as the  
7 copyright owner, have the right to determine.

8           And when somebody like VidAngel comes in and says,  
9 "We're going to help ourselves to this, we're going to  
10 make -- we're going to decide what to do," that then, that  
11 type of harm has been recognized repeatedly in the law as  
12 being irreparable.

13           There is also the point, Your Honor, that there is  
14 a -- one of the things that Judge Walter said in the Zediva  
15 case is that there is a confusion of what consumer  
16 expectations are and consumer beliefs are about what is  
17 legal.

18           One of the other things that you will see if you  
19 go to the VidAngel site -- and they have a whole blog  
20 devoted to this lawsuit. They have lots of statements that  
21 say "We're legal. What we're doing is legal." And you are  
22 changing the minds of consumers about what is legal when we  
23 submit, Your Honor, is the law is clear that what they are  
24 doing in terms of ripping DVDs and circumventing is plainly  
25 illegal and should be enjoined.

1           They are making copies to computer servers without  
2 any authorization to do so, also illegal and infringement.  
3 They are streaming, transmitting, performances of the same  
4 movie, the same television shows to an enormous public  
5 audience without any streaming license, the type that other  
6 services have to obtain.

7           If there are other questions you have on the  
8 adequacy of money damages -- I did want to turn back to the  
9 1201.

10           THE COURT: No, I don't have any further questions  
11 on that.

12           MR. KLAUS: Okay. Let me turn back, if I may,  
13 Your Honor, to the Section 1201 arguments. And just so  
14 we're clear, if you could turn in your binder, Your Honor --  
15 I put the text of the DMCA. Section 1201 is behind  
16 Tab Number 1. Just so we're clear, what it says is, the  
17 first sentence of Subsection (a)(1)(A) --

18                           (Reading:) No person shall  
19                           circumvent a technological measure that  
20                           effectively controls access to a work  
21                           protected under this title.

22           Now, the definition section for this particular  
23 subsection, circumventing access controls, is on the next  
24 page at Subsection (a)(3). And it says "As used in this  
25 subsection."

1           And this is important, Your Honor, because the  
2 section that Mr. Quinto put up to try to make his argument  
3 about there being some connection between a work being  
4 protected under this title and the Family Movie Act deals  
5 with a separate circumvention violation in a separate  
6 definition.

7           The one that controls this case says, first, to  
8 circumvent a technological measure means to descramble,  
9 decrypt, otherwise avoid, bypass, remove the technological  
10 measure without the authority of the copyright owner.

11           They admit in their answer, they admit in their  
12 pleadings they circumvent. They say, "We remove the  
13 encryption." We'll get to their defenses in a moment, but  
14 they plainly do that.

15           The second point is they say a technological  
16 measure effectively controls access to a work -- that's in  
17 Subsection capital (B) -- if the measure, in the ordinary  
18 course of its operation, requires the application of  
19 information, a process, or treatment with the authority of  
20 the copyright owner to gain access to the work.

21           That's what it means, whether there is -- whether  
22 something effectively protects access to the work.

23           Now, Mr. Quinto made a reference to his expert,  
24 Dr. Meldahl, having said in his declaration that the  
25 protection measures that are at issue here on DVDs and



1 Blu-ray disks don't effectively protect the right of a  
2 copyright owner to secure access to the work.

3 This is an important point, Your Honor, because,  
4 number one, it wasn't raised in their opposition brief. We  
5 did because Dr. Meldahl raised it -- respond to it in our  
6 reply brief.

7 The point here on whether something effectively  
8 controls access, Dr. Meldahl says, well, CSS, which is the  
9 protection measures for DVDs, and AACS and DD Plus which are  
10 for Blu-ray disks, those don't effectively control access  
11 because there are all these illegal circumvention devices  
12 that are out there like any DVD HD which they use.  
13 Therefore, it doesn't control it.

14 Just to be clear, the cases, when somebody has  
15 raised this argument, have squarely rejected it. There is  
16 the 321 Studios against MGM case which we cite in our  
17 papers. There is also the RealNetworks decision that we  
18 cite in our papers where Judge Patel said this argument is  
19 equivalent to somebody saying that, because there are  
20 skeleton keys to break through locks, a lock doesn't  
21 effectively control acts. And that is just not a tenable  
22 reading of the -- that's simply not a tenable reading of the  
23 statute.

24 Now, you have it so that the 1201 violation, we  
25 would submit, is established. So then we go to the question

1 of whether the Family Movie Act creates an exemption for  
2 circumvention. I went through the language of Section 110,  
3 which I think makes clear that it is limited to Section 106.

4 With respect to the legislative history,  
5 Your Honor asked about the statements that were made by  
6 Senator Hatch who was the Senate sponsor of the bill. His  
7 statements are at Tab 5 of the binder.

8 And they are at the page at the bottom that has  
9 the number Exhibit G, RJN 269. And he was quite clear. He  
10 said it would not be a defense to a claim of violation of  
11 Section 1201 that the circumvention is for the purpose of  
12 engaging in the conduct covered by this new exemption in  
13 Section 110(11).

14 Mr. Quinto threw up a whole bunch of statements  
15 about why he thought the legislative history actually  
16 supported his view that, even though the statute is plain,  
17 that the Family Movie Act does not apply to or excuse the  
18 Section 1201 violation, why he thought there was necessarily  
19 some grand bargain.

20 What he doesn't point to is a single sentence  
21 anywhere from any legislator that says something the  
22 opposite of what Senator Hatch did. And so if one looks at  
23 the actual legislative -- if one looks beyond the statute  
24 which is plain as can be, the only specific statement in --  
25 by a member of Congress dealing with circumvention is what

1 Senator Hatch said, and the other point in the legislative  
2 history that we cited in our papers is that this wasn't an  
3 oversight.

4           The House committee actually considered whether or  
5 not to say specifically this has nothing to do with  
6 Section 1201. They asked the Register of Copyrights whether  
7 she thought that would be something that should be added,  
8 and Register Peters sent a letter back which we put into the  
9 record that said, "No, you don't need to have it." So it  
10 showed that Congress actually considered what was being  
11 discussed here and decided not to do it. It's not  
12 inadvertent. It's not accidental.

13           Let me turn to fair use because you asked  
14 Mr. Quinto if there was a concession by VidAngel that fair  
15 use is not a defense to circumvention. He said now they're  
16 not conceding that even though they didn't say anything  
17 about it in their opposition papers.

18           Just to be clear, Your Honor, this isn't an area  
19 where there is not case law on this. And I would ask  
20 Your Honor to look -- the first and I think still the most  
21 authoritative discussion of this is in Judge Kaplan's  
22 decision in the Universal versus Reimerdes case. The cite  
23 on that is 111 F.Supp.2d 294, and the discussion is around  
24 page 322.

25           And just to be clear, the Reimerdes case -- this

1 was the big challenge to the constitutionality of the DMCA  
2 circumvention provision. It was brought in New York. It  
3 led to -- this very opinion led to the case called  
4 United States versus Corley which is the Second Circuit  
5 decision which squarely rejected the constitutional denial  
6 of fair use arguments that Mr. Quinto was trying to  
7 incorporate by reference from the Green case in the  
8 District of Columbia. I will get to that in a moment.

9           But what Judge Kaplan said in the Reimerdes case  
10 is that this wasn't an oversight that fair use was not a  
11 defense to a DMCA claim. The fair use defense is codified  
12 at Section 107 of Title 17. Just like Section 110, it  
13 starts by saying that notwithstanding the provisions of  
14 Section 106 -- meaning fair use is a defense to the  
15 violation of those exclusive rights. It is not a defense to  
16 a claim of circumvention.

17           What the judge said -- and I won't go through it  
18 in excruciating detail -- but he said the legislative  
19 history of the DMCA showed that Congress was encouraged to  
20 extend the fair use defense to a claim of circumvention.  
21 And Congress made the deliberate decision to say, no. That  
22 is separate. What circumvention, it is a violation of the  
23 law to break through the locks that protect these works.

24           What somebody does with the work later on when  
25 they -- if and when they violate one of the exclusive rights

1 of copyright, you then may be able to have that subject to a  
2 fair use defense. But until the point where that happens,  
3 the violation itself, the act of circumventing is not  
4 subject to a fair use defense.

5 Now, the other thing I would point out is that  
6 there is a mechanism that Congress did put in place. It's  
7 called a Triennial Rulemaking Proceeding by the Librarian of  
8 Congress. What happens is every three years various groups  
9 come forward and they say, "We think that, when you balance  
10 the interests that Congress told you to balance in the  
11 statute, this should be added to the list of enumerated  
12 exemptions." There is no exemption that the Librarian of  
13 Congress has promulgated that covers VidAngel's defense  
14 here, simply does not exist.

15 Beyond the Reimerdes case, there is  
16 Judge Gutierrez's decision in this district in the  
17 United States versus Crippen case, which clearly says fair  
18 use is not a defense. There is the Dish Network case that  
19 we cited from the Southern District that says that. There  
20 is no case that they cited on the other side that says that  
21 fair use is a defense.

22 They do say that the MDY Court said, "We don't  
23 have to make the decision." But that's not the  
24 Ninth Circuit saying there is a fair use defense. That's  
25 the Ninth Circuit saying, "We're not going to get involved

1 with this question." So the state of the law now is that  
2 there is no fair use defense to the circumvention claim.

3 And, Your Honor, if the -- so there is no Family  
4 Movie Act defense to the circumvention claim. There is no  
5 fair use defense to the circumvention claim. The -- there  
6 is no -- they haven't even put in authority for the  
7 proposition that copyright misuse, if they had supported it,  
8 which they haven't, would be a defense to a circumvention  
9 claim.

10 So what you have at the end of the day is they  
11 are -- they have violated in the past. They have made clear  
12 they will continue to violate in the future the  
13 anti-circumvention provision unless a court tells them, "No,  
14 you can't rip disks. This is illegal conduct. You have to  
15 stop doing it."

16 That in and of itself is one grounds for an  
17 injunction. There are two other claims that we've made,  
18 Your Honor. Happy to go into them with as much detail as  
19 you would like.

20 The first is the violation of the reproduction  
21 right and the violation of the reproduction right to make  
22 the copy and to put it on the server so that it can be  
23 streamed.

24 Again, we would -- the defenses that VidAngel  
25 raises here -- they raise the Family Movie Act as a defense,

1 but the Family Movie Act does not say -- simply does not say  
2 that so long as you are filtering, you get to copy to your  
3 heart's content, doesn't say it.

4 Is says, "You will not be liable for infringing  
5 copyright by reason of the act of making imperceptible."  
6 Doesn't say anything about "You also have a right under the  
7 statute to make a copy."

8 Second thing they say on the violation of the  
9 reproduction right. They say, "Well, the copies that we're  
10 making are intermediate copies because they are a means to  
11 an end for us to be able to stream."

12 Well, there is nothing intermediate about the  
13 copies that are made. They're permanent. They stay on the  
14 server. It's the one copy, going back to my example, the  
15 one copy that they ripped here that's their master copy.  
16 That stays there. That's not intermediate or temporary.

17 And the other point is, Your Honor, the cases that  
18 they are relying on, as we've pointed out, the Sega versus  
19 Accolade and the Sony versus Connectix case, those  
20 intermediate copying is a term of art in copyright law.

21 It deals with a very specific, very particular  
22 situation where somebody makes a copy of the interface  
23 between two computer programs to discover what the courts  
24 have said are the functional elements to allow two computer  
25 programs to interoperate. That has nothing to do with what

1 they're doing. They're making copies so that they can  
2 stream them to users and make money from the streaming  
3 service that they operate.

4 Third claim is the public performance right. And  
5 the public performance right, I am happy to go through the  
6 statutory definitions of this if you would like, Your Honor.

7 THE COURT: Yes.

8 MR. KLAUS: The defense on this -- twofold.  
9 Family Movie Act, to the public performance right. And as  
10 said before, Your Honor, what they are doing is they are not  
11 streaming from an authorized copy. They are streaming from  
12 a master copy to a mass public audience.

13 Nothing in the statute says you get a license to  
14 do that, you are excused from the requirement if you are  
15 going to operate a streaming business and actually stream  
16 the movies yourself, that you are excused from that.

17 The other defense they raise is fair use. Couple  
18 of points on fair use. Number one, it's their burden to  
19 establish at the preliminary injunction stage. That's the  
20 Perfect 10 versus Amazon.com case. Ninth Circuit couldn't  
21 be clearer. They haven't come close to showing that they  
22 will prevail on their fair use defense.

23 Four factors under fair use, go through them  
24 quickly, Your Honor. First factor, ask whether the use is  
25 commercial, whether it's transformative. Plainly, it's



1 commercial -- this is a for-profit enterprise that's going  
2 on here -- and not transformative under the case law,  
3 including the Worldwide Church of God case that we've cited  
4 from this circuit, the Monge versus Maya Magazines case that  
5 we've cited from this circuit, the Elvis Presley Enterprises  
6 case. They are showing movies. They are streaming movies  
7 to people for the same intrinsic purpose that we do.

8           The fact that they put filters on and that some  
9 language may be skipped over or that some scenes may be cut  
10 doesn't change the fact that they are streaming the movies.

11           THE COURT: What about the notion that by taking  
12 out -- whatever, smoking, foul language, violence? Doesn't  
13 that change the nature of the movie, therefore, at least,  
14 from the defendant's perspective, making it transformative?

15           MR. KLAUS: No, it doesn't, Your Honor, and for  
16 the following reason, which is the movie that they are still  
17 showing is "Star Wars." That's not -- they're not -- what  
18 they are advertising to people is "Star Wars." And if two  
19 or three minutes is taken out, it's no different than a  
20 photograph being cropped in a particular way, which is the  
21 case from the Ninth Circuit on the Monge case, the same  
22 extrinsic purpose.

23           THE COURT: Even though the violent portions of  
24 the movie are taken out? I don't think I have seen -- I am  
25 just trying to think of a movie where, if you take out some

1 of the violence, it could change the tenor of the movie.  
2 The story is the same, but you are taking out the bloods and  
3 guts.

4 MR. KLAUS: You are taking out some things, but  
5 the question under the case law is generally whether it's  
6 the heart of the work.

7 THE COURT: Your position is, even when you take  
8 those things out, "Star Wars" is still "Star Wars," "Fast  
9 and Furious" is still "Fast and Furious."

10 MR. KLAUS: Absolutely, Your Honor. And if it was  
11 not that case, then when in airplane -- on the airplane when  
12 you have seen a movie and it's sitting there so that  
13 everybody in the plane can see right in the middle of the  
14 cabin and they had -- it says "Edited for inflight service,"  
15 what -- if what they were saying is right, that that's a  
16 fair use to take that out and transform it in that way, that  
17 that's transformative, then that would be a different work.  
18 And nobody believes that, Your Honor. Nobody believes that  
19 that is somehow a different work.

20 THE COURT: I think at least three or four people  
21 over there do.

22 MR. KLAUS: When I say "nobody," let me be clear.  
23 No case has ever said that something like that is  
24 transformative.

25 THE COURT: I appreciate the clarification.

1 MR. KLAUS: Thank you, Your Honor.

2 The second point, the nature of the work, nature  
3 of the work, movies, TV shows are at the heart of copyright  
4 protection.

5 Third factor, the amount, the substantiality of  
6 the use, with respect to the copying that's being done, it's  
7 a hundred percent. It's verbatim.

8 With respect to the amount and substantiality for  
9 the stream -- now, you did ask the question, and we don't  
10 know for certain, but I believe I heard Mr. Quinto say that  
11 on average people select two filters. And the --

12 THE COURT: Ninety-six percent I think he said.

13 MR. KLAUS: Ninety-six percent.

14 But the filters are taken out, still leave the  
15 heart of the work. That's what the question is. The  
16 question is is it the heart of the work?

17 THE COURT: Is it -- I am going back to this  
18 point. I just want to make sure I understand. Is it your  
19 view that there is no amount of filtering that really  
20 changes a movie from the heart of its work?

21 MR. KLAUS: Your Honor, I can't imagine a filter  
22 that would be applied here. They certainly didn't come  
23 forward with one in opposition here saying, "Look, user  
24 Number 97,322, they took a two-hour movie and they applied  
25 so many filters to it that what they got was 90 seconds or

1 they got 2 1/2 minutes." I just don't think that's  
2 credible, Your Honor. And, again, it's not verbatim  
3 copying. It's the heart of the work that's the test.

4 The fourth factor which the Supreme Court has said  
5 is the most important factor is the effect of this on the  
6 market for the work.

7 And a couple of points on that, Your Honor. One  
8 is, because it's a commercial use, there is a presumption  
9 that they have to rebut that they don't harm the market.  
10 And the second thing is that the question isn't -- well,  
11 what if VidAngel just keeps operating its business this way?

12 That's not what the fourth factor says. The  
13 fourth factor says, "You don't just look at VidAngel. You  
14 look at what would happen if VidAngel was allowed to do this  
15 and lots of other people were allowed to come in and copy.  
16 What would the effect of that be on the market for the  
17 work?"

18 And it doesn't take a lot of imagination here,  
19 Your Honor, to think if what VidAngel is doing is legal,  
20 there is nothing stopping another service from setting up a  
21 DVD buying and streaming service.

22 The Family Movie Act is content neutral. Doesn't  
23 say what you have to take out, doesn't have a requirement of  
24 what the percentage of content that's taken out so long as  
25 it's limited. Congress left that deliberately open.

1           So you could have -- frankly, another motion  
2 picture studio could decide -- one of my clients could  
3 decide that they wanted another client's repertoire, and  
4 they'll simply go out and buy the DVDs, and they'll put a  
5 filter on. They don't have to advertise it as being any  
6 particular type of filters.

7           They can say, "You know what? The last ten  
8 seconds of the credit, here is the filter for that." And  
9 because the statute is content neutral, that could be done  
10 that way.

11           There is no reason to think that Congress thought  
12 that that was what it was doing with the Family Movie Act,  
13 was setting up a massive end-run around these established  
14 rights. And there is no reason under the case law to  
15 believe that that's not the type of use that if widespread  
16 would disrupt and destabilize the entire system.

17           The other point I would say is, respect to  
18 evidence that we put in, we put in evidence of user comments  
19 that we found and users who have said repeatedly things  
20 like, "I really like VidAngel. It's a great service even  
21 when I don't use any or most of the filters." We put in  
22 cites to YouTube how-to videos that said, "Hey, there is a  
23 great new service out there. And do you know what? It's  
24 only a dollar a day."

25           People who say on these YouTube videos, "I don't

1 like paying 5.99 to iTunes, and so I will go to VidAngel and  
2 I will use a -- I will take a snippet away, like at this  
3 point in time the opening or the closing credits." And they  
4 say, "This is the service that I will use and it's a dollar  
5 alternative."

6 That is, by the way, exactly the way that they  
7 have marketed this service. Just to be clear, to come back  
8 to the question of the -- whether or not what's going on  
9 here is that they're actually selling all that big stack of  
10 DVDs and they're just engaging in the repeated sale, we  
11 think, Your Honor, that the evidence is clear that the  
12 sale/buyback, it's a gimmick. It's a gimmick that was put  
13 in place so that, when they were sued, they would be able to  
14 say, "Well, we're actually just streaming the content that  
15 the user owns."

16 What the evidence shows -- Mr. Quinto made  
17 reference to 20,000 -- which is nowhere in the record about  
18 there being 20,000 permanently owned copies. That has just  
19 been brought in for purposes of this hearing. There is  
20 nothing in the record about that.

21 But the important point is what they have said,  
22 and when they have said this to the Securities and Exchange  
23 Commission in the document that we submitted with our  
24 supplemental request for judicial notice. This is their  
25 investment prospectus to investors. There they have got to

1 be honest. They have got to completely open the kimono and  
2 say, "Here is what's really going on."

3 And what they pointed out is that 99 1/2 percent  
4 of all their million and a half transactions that have  
5 happened so far have been short term. And the definition of  
6 short term is that the movie has been sold back within five  
7 hours somebody having rented it. Meaning that this is the  
8 way they promote the service.

9 If you go to their Web site, Your Honor, the very  
10 first thing you see on the landing page is a video that  
11 says -- it doesn't say how does filtering work. It says  
12 "How do you get one dollar movies and explained to you in 15  
13 seconds." That's the way they have advertised and marketed  
14 the program to their users. It is full of incentives to  
15 people and reminders to people. "Please sell your movie  
16 back now." And that's exactly the way that people have used  
17 the system.

18 I -- I believe we've covered irreparable harm,  
19 their delay argument.

20 On the balance of the equities, Your Honor, very  
21 briefly. First of all, we think the law is clear in the  
22 Ninth Circuit there is no hardship to a defendant from  
23 having to comply with the law. Those are the -- that's the  
24 Triad case and the Cadence case from the Ninth Circuit that  
25 we've cited.

1           We also think that VidAngel here behaved  
2 inequitably. They decided deliberately that they would  
3 pursue a strategy of seeking forgiveness rather than  
4 permission.

5           And in the binder that you have, Your Honor,  
6 behind Tab 7, one of the documents that we've put in, which  
7 is Mr. Harmon responding to a user comment about why they've  
8 got to go through this buy/sell back thing, this is what he  
9 says in February of 2015. Mr. Harmon says, "We'll have to  
10 be" -- he says, "We can't change to a rental," in the bottom  
11 paragraph, "We can't change to a rental unless we get  
12 licensing from Hollywood. We'll have to be a lot bigger to  
13 do that. Until then, we sell DVDs and Blu-rays to you,  
14 vault them at our warehouse, and stream you a filtered  
15 movie. The buyback system was the most creative way we  
16 could come up with in order to offer you the value of a  
17 Redbox while staying buttoned up legally."

18           And then at Tab 13, Your Honor, there is an e-mail  
19 from Mr. Harmon, the very top, September 29th, 2015. This  
20 is him talking to his main investors.

21           And what he says in that second paragraph -- this  
22 is where he's talking about why they're going with the  
23 dollar a day system. He said, "It worked. This is the  
24 model that -- this is the model that worked with consumers.  
25 Based on our data, we need to get to around a 20 percent



1 increase in conversion rates to justify the loss in revenue  
2 on the SD content" -- that means standard definition.

3 "Given the results, we're running with it because we think  
4 it's going to better achieve our goal of building a  
5 distribution platform. We need to acquire users as fast as  
6 possible."

7           The strategy here, Your Honor, always has been "We  
8 will help ourselves to the plaintiffs' content. We will  
9 decide how we will do it. We will do it in a way that  
10 offers a price advantage, that offers availability  
11 advantages to users, and we will build up a user base so  
12 that, when we then go and try to negotiate licenses, we'll  
13 have better leverage in those licensing negotiations."

14           Manifestly inequitable, Your Honor. In terms of  
15 the balancing of the equities, nothing to commend it.

16           The other point I will make, Your Honor, is there  
17 are statements that VidAngel makes about the harm --  
18 statements that VidAngel makes about the harm to its  
19 employees and that it's a small start-up.

20           And we've pointed out again because we have the  
21 SEC filing -- and they had to be open and honest with the  
22 SEC -- turns out that, in the first half of this calendar  
23 year, what they've made through their -- the Freudian slip  
24 that Mr. Quinto made, their rental service, but whatever you  
25 want to call it, their short-term transactions,

1 \$2.4 million. The amount that they've turned around and  
2 paid to Harmon Brothers, LLC, an Internet advertising  
3 company that is owned by the same people who own this,  
4 \$2.2 million, Your Honor.

5 What they are doing is they are simply cycling the  
6 money that they are making from exploiting our content and  
7 paying it directly to themselves, to the owners of the  
8 business.

9 Final factor, the public interest. Public  
10 interest is served by requiring that the law be complied  
11 with. And as we pointed out as well, Your Honor, there are  
12 alternatives that people can go to who really do want to  
13 filter. And there is no --

14 THE COURT: Is there -- you are saying there are  
15 "alternatives," in the plural. Isn't there really only this  
16 ClearPlay? Or is there another service out there?

17 MR. KLAUS: The streaming service that I am aware  
18 of is ClearPlay. I do know that there is ClearPlay. I  
19 believe, although I can't quote just off the top of my head,  
20 Your Honor -- there are other services that may provide the  
21 DVD-type filtering.

22 THE COURT: Other services apart from VidAngel?

23 MR. KLAUS: When I say the "DVD filtering," what I  
24 mean is somebody who has a DVD player at home and they get a  
25 DVD and they then -- they are then able to watch it that

1 way.

2 THE COURT: Mr. Quinto, you are standing up. Is  
3 there something you want to say?

4 MR. QUINTO: Yes, Your Honor. The Court was very  
5 generous in allowing me to explain VidAngel's case, and I  
6 understand that the studios have a lot of argument they want  
7 to present to the Court, but I am cognizant of the time and  
8 hoping the Court will allow me a reasonable brief period to  
9 respond --

10 THE COURT: Oh, no. We may take a break, but you  
11 all aren't going anywhere, if that's your concern, is that I  
12 was going to shut off at 12:00. No, that's not my  
13 intention. So you are going to have a chance to respond.  
14 You may be hungry, but you will have a chance to respond.

15 MR. QUINTO: I can live with hunger, Your Honor.

16 THE COURT: I'm sorry. Mr. Klaus, is there  
17 anything further you wish to add?

18 MR. KLAUS: Unless Your Honor has any other  
19 questions --

20 THE COURT: I am just curious, while I have you up  
21 here. The defendants talk about a security bond. What's  
22 your response to that?

23 MR. KLAUS: That a -- looking to the reasonable  
24 precedence, what we've cited, the ones that have been  
25 entered in cases in this district, including the WTV case,

1 including in the BarryDriller cases, in the range of 50,000  
2 to \$250,000, they've asked for a security bond of  
3 \$50 million, which is orders of magnitude beyond anything  
4 that we're aware of in any remotely analogous context.

5 I would point out, for example, they say that in  
6 the Napster case there was a requirement of a \$5 million  
7 bond. Couple things to take into consideration there.

8 One was -- it seemed like a long time ago,  
9 in 2000, when Judge Patel enjoined the Napster service, it  
10 had more than 56 -- maybe 70 million users. It had drawn  
11 significant investments, millions and millions of dollars of  
12 investments. And it also had arguments that the  
13 Ninth Circuit thought merited a stay pending appeal. Turned  
14 out they lost on all of them, but the Ninth Circuit stayed  
15 them.

16 We think, in this case, the liability is  
17 absolutely clear that the idea that somehow this is -- we  
18 are interfering with or destabilizing a business that  
19 without an injunction will be worth billions of dollars is a  
20 pie in the sky and that the bond that's required here should  
21 be in line with the cases that -- the cases that we've  
22 discussed, the BarryDriller case, the Zediva case -- again,  
23 in the range in the low six figures. Doesn't come close  
24 even to the Napster level of the type of risk that we're  
25 talking about on the other side.

1 THE COURT: Thank you. Let me just check. One  
2 moment here.

3 Why don't we take a ten-minute recess. If my  
4 eyesight is correct, we'll resume at 12:20, and then I will  
5 give you an opportunity to respond. I don't have anything  
6 until 1:30, although I would hope that we don't go until  
7 then, but I'll give you an opportunity to respond at that  
8 time. We'll take a ten-minute recess.

9 MR. QUINTO: Thank you, Your Honor.

10 (Recess taken 12:12 to 12:24 P.M.)

11 THE COURT: Mr. Quinto, before you begin, I just  
12 want to ask Mr. Klaus one last question, at least for now,  
13 just so it doesn't escape my memory.

14 When you talk about irreparable harm in that vein,  
15 you talk about -- and the goodwill, sort of, with licensees.  
16 Did -- I just want to make sure I didn't miss the needle in  
17 the haystack of paper that's been filed.

18 Have licensees specifically complained? Was there  
19 any sort of declarations that talk about, you know, iTunes,  
20 Amazon, saying, "Hey, what's going on here? Why am I paying  
21 when so-and-so doesn't have to do that?" Is there anything  
22 like that? If there is not, that's fine. I just want to  
23 make sure -- whether or not I missed that.

24 MR. KLAUS: There is not, Your Honor.

25 THE COURT: There isn't. Okay. Thank you.

1 All right. Mr. Quinto, I'm sure you have a lot to  
2 say.

3 MR. QUINTO: I do and first I beg to differ with  
4 that last response from opposing counsel.

5 There was a licensee who complained in December,  
6 complained to the studios in December 2015, specifically  
7 concerning VidAngel's aggressive marketing techniques.

8 So that is the record with respect to complaints  
9 with respect to licensees, that there was a complaint in  
10 December 2015.

11 THE COURT: Okay.

12 MR. QUINTO: At the time -- well, VidAngel  
13 launched its service as a private beta test in January 2015.  
14 As I disclosed in my letter to the studios in July 2015, the  
15 number of users had grown by 10,000 percent from the end of  
16 January to the end of June. And, of course, it took off  
17 tremendously when VidAngel went public with its service.

18 I would note that the studios, Disney in  
19 particular, opened a VidAngel account on August 6th, 2015.  
20 Disney was represented, in the Zediva case, by Mr. Klaus and  
21 his colleagues at Munger, Tolles.

22 The privilege log that we were given reflects  
23 that, in August 2015, there were a number of communications  
24 between the studios and Mr. Klaus. So the studios were  
25 clearly taking this seriously as of August 2015.

1           The -- I mentioned a moment ago the Zediva case --  
2 that is very instructive, Your Honor. There the defendant,  
3 Zediva, had been offering 138 movies for streaming. In  
4 July 2015, when I sent my letter to the studios, VidAngel  
5 was already offering 750 movies, far more.

6           In Zediva, the studios waited 18 days to file  
7 suit, just 18 days. And when they did so, your Honor, they  
8 submitted a declaration of counsel that took pains to  
9 explain that 18-day delay -- took pains to explain why that  
10 18-day delay should not be viewed as unreasonable.

11           The point, obviously, is that, when the studios  
12 believe there is a pirate, believe they're being injured,  
13 they know how to act quickly.

14           Here, I'm afraid to say, that, we believe, that  
15 something quite different is at issue. We have, as the  
16 Court knows, made a Regulation A Plus stock offering  
17 approved by the SEC.

18           VidAngel announced late last spring that it  
19 planned to have the Regulation A Plus stock offering. It  
20 was shortly after that that the studios chose to file suit.  
21 And that was consistent with the conduct the studios have  
22 always engaged in with respect to VidAngel trying to prevent  
23 it from offering its service by whatever means possible,  
24 including earlier objecting to Google, allowing the service  
25 to be based on the Chromecast device, persuading Google that

1 Google would violate its terms of service agreements with  
2 the studios if VidAngel could use the Chromecast device to  
3 filter. And at several other times, the studios had also  
4 pulled the rug out from VidAngel.

5 So we believe that the Complaint was filed for the  
6 purpose of trying to disrupt the Regulation A Plus stock  
7 offering.

8 In support of that theory, Your Honor, I would  
9 note that the studios did not request a temporary  
10 restraining order, notwithstanding the claim that they were  
11 being irreparably injured. They also did not seek an  
12 immediate preliminary injunction. Rather, they scheduled  
13 the preliminary injunction hearing for late October.

14 Why? We believe, Your Honor, that they wanted to  
15 schedule the preliminary injunction hearing so late that the  
16 pendency of the preliminary injunction application would be  
17 a proverbial, sort of, Damocles hanging over VidAngel during  
18 its Regulation A Plus stock offering.

19 I am happy to say that VidAngel has completed its  
20 Regulation A Plus stock offering. It raised over  
21 \$10 million in just a few days, and, notwithstanding the  
22 threat from the studios, VidAngel has succeeded with that  
23 and is moving forward.

24 That I submit is the true rationale for the  
25 studios' delay in bringing the action. And I also note



1 that, of the six major motion picture studios, Sony,  
2 Universal, and MGM, who were extensively copied on in e-mail  
3 messages, indeed the studios exchanged over 1,300 or  
4 approximately 1,300 privileged e-mail messages concerning  
5 VidAngel before they filed suit, Sony, MGM, and Universal  
6 chose not to be involved and have expressed interest in  
7 working with VidAngel if VidAngel can overcome the problem  
8 caused by the collective bargaining agreement with the DGA.

9 THE COURT: That's all interesting, but how is  
10 that relevant to the decision on whether there should be a  
11 preliminary injunction -- whether or not these other  
12 companies are in the plaintiffs' chair as well?

13 MR. QUINTO: I think it runs to irreparable  
14 injury, Your Honor. You have got three companies, three  
15 major motion picture studios that are saying, no, there is  
16 no irreparable injury that VidAngel is causing.

17 THE COURT: Is that fair to say? Are you saying,  
18 by virtue of them not willing to pay lawyers exorbitant  
19 fees, that they are saying they agree that there is no  
20 irreparable harm?

21 MR. QUINTO: The studios have been --  
22 historically, been very quick to act when they believed --  
23 when they really believed they were being irreparably  
24 harmed.

25 THE COURT: But in fairness, Mr. Quinto -- let me

1 just stop you. You don't know per se -- or do you know that  
2 the other studios have said, "No, we don't care what  
3 VidAngel does?" I mean, it's one thing to speculate because  
4 they're not in the plaintiffs' chair, that's one thing. But  
5 I -- it's another to say, "We know that they are not  
6 interested in this."

7 MR. QUINTO: I do know that VidAngel has had  
8 communications with them, and I do know that they have said  
9 that they would be willing to work with VidAngel to allow a  
10 filtered streaming service but for the problems posed by the  
11 group boycott and the DGA agreement.

12 THE COURT: Let's move on.

13 MR. QUINTO: I would note that the cost to them to  
14 join in the litigation would have been fairly de minimis  
15 given that they could have used the --

16 THE COURT: Why don't we --

17 MR. QUINTO: -- same counsel.

18 So Your Honor had asked earlier about the most  
19 common filters selected. I now have that answer. The most  
20 common is female nudity. Following that are filters for the  
21 F-bomb and the C word.

22 I believe that the average -- I'm not positive,  
23 but I believe that the average number of filters selected by  
24 VidAngel users when watching a given movie is 17. In any  
25 event, 96 percent -- 96 percent select more than one.

1           And the studios have suggested unfairly that  
2 VidAngel is simply an inexpensive, a cheaper, alternative to  
3 watching streamed content provided by a provider the studios  
4 have agreed to license.

5           That is factually incorrect. Here is why. When a  
6 motion picture is released, it goes through a standard cycle  
7 by which the studios attempt to maximize the revenue that  
8 they derive from that motion picture. And that's perfectly  
9 appropriate.

10           First, a new release is shown theatrically in  
11 first run motion picture theaters. That's frequently done  
12 even if it's a dog because foreign distribution agreements  
13 require an American theatrical release.

14           So first is the theatrical release. Then there  
15 might be a release to second run motion picture theaters.  
16 After that, the studios typically release a collectors  
17 edition DVD or Blu-ray that has lots of extra content. It  
18 has outtakes. It has interviews with the director, the  
19 actors, et cetera. And although those are sold as DVDs,  
20 they are very expensive, and VidAngel does not buy them.

21           After that, the studios will release a motion  
22 picture for streaming. And at that point, services that  
23 have a streaming license can offer that picture to their  
24 customers. But VidAngel doesn't have a streaming license  
25 for reasons the Court knows well.

1           So VidAngel customers are not able to watch a  
2 movie when it's released for streaming.

3           THE COURT: They are able to watch it. They're  
4 just not able to watch it on VidAngel.

5           MR. QUINTO: Okay. Fair enough. They're not able  
6 to watch a filtered movie, meaning they cannot watch it on  
7 VidAngel. They can watch the unfiltered version if they  
8 want. That's out there.

9           But if they want to watch a filtered version, they  
10 have to wait until the studios finally sell DVDs and Blu-ray  
11 disks where VidAngel buys them at retail.

12           Then and only then can VidAngel stream the  
13 filtered content, and then and only then can VidAngel  
14 customers watch filtered content.

15           So VidAngel is not competing with the streaming  
16 services. They get to offer content first. A VidAngel  
17 customer has to wait until the studios release the movie in  
18 DVD and Blu-ray.

19           Then after that, the studios will typically  
20 release a movie for pay television, for the pay cable  
21 stations, and finally it will be released for what used to  
22 be known as over-the-air television but the stations that --  
23 you don't pay for it. So there is that entire cycle, and  
24 VidAngel is required to wait its turn.

25           THE COURT: You are saying that VidAngel doesn't

1 jump in line ahead of the other streaming companies that  
2 have a license with, in this case, Disney?

3 MR. QUINTO: As an almost universal rule, yes,  
4 that's correct. The studios have pointed to two exceptions.  
5 One occurred in early 2015 before VidAngel had written to  
6 the studios, and the other evidently occurred for purposes  
7 of creating a record for this litigation because it occurred  
8 earlier this year.

9 And we know from the limited discovery we've had  
10 that the studios knew the release date, had determined the  
11 release date several months before they released the movie,  
12 and they had decided that, in that instance, they would sell  
13 streaming customers the right to buy, as they define "buy,"  
14 streamed content, at the same time that they would sell DVDs  
15 and Blu-ray disks but they would delay for several days  
16 releasing the movies to be streamed.

17 So a streaming customer could buy the movie at the  
18 same time that VidAngel was offering its service, but a  
19 streaming customer who wanted to watch a streamed unfiltered  
20 movie without buying it had to wait, I believe, four days  
21 after VidAngel acquired the DVDs.

22 Now, had the -- had that caused -- had the studios  
23 believed that would cause an irreparable harm, I submit that  
24 they would have sent a cease and desist letter to VidAngel,  
25 they would have reached out to VidAngel to warn it to wait

1 four days, they would have done something if they had  
2 believed that there would be an irreparable injury. They  
3 didn't. I would submit they were simply creating a record  
4 for the Court.

5           Apart from those two instances, the streaming  
6 companies under their licenses get the right to stream well  
7 before the studios sell the DVDs and Blu-ray disks that  
8 VidAngel depends on to offer its services.

9           Now, the studios have also tried to  
10 mischaracterize VidAngel's interest in getting a streaming  
11 license as somehow an acknowledgment by VidAngel that its  
12 service is not lawful. Nothing could be further from the  
13 truth. VidAngel believes that its current service is fully  
14 lawful under the Family Movie Act, as I have explained.

15           THE COURT: Let me stop you there. Can we shift  
16 then -- you heard Mr. Klaus talk at length about you making  
17 copies of these movies onto a server and that violates the  
18 production rights that they have. What's your response to  
19 that?

20           MR. QUINTO: Sure. I would like to, if I may,  
21 just walk the Court through the FMA, through the language of  
22 the FMA, and I will explain it in that context.

23           THE COURT: In the interest of time -- I have  
24 given you a lot of time. I don't need a recitation of the  
25 FMA. I just want some answers to my questions. Just walk

1 me through. What's incorrect about that point? Do those  
2 movies, the movies that the purchaser buys, are they copied?  
3 Are they put on a server?

4 It seems to me these are somewhat yes-or-no  
5 answers, but I'm not as knowledgeable as you all as it  
6 relates to the -- how these movies or DVDs end up onto the  
7 servers that stream it. So --

8 MR. QUINTO: Sure. Well, Your Honor, Section 110  
9 Subsection 11 of the FMA provides that the following are not  
10 infringements of copyright -- the making imperceptible by or  
11 at the direction of a member of a private household of  
12 limited portions of audio or video content of a motion  
13 picture during a performance transmitted to that household  
14 for private home viewing from an authorized copy of the  
15 motion picture.

16 From an authorized copy, not necessarily the  
17 customer's authorized copy.

18 THE COURT: So your point is "an authorized copy"  
19 means just any authorized copy?

20 MR. QUINTO: Yes, but let me keep going. The  
21 statute then provides -- if no fixed copy of the altered  
22 version of the motion picture is created by such computer  
23 program or other technology.

24 So what the FMA prohibited was not making an  
25 intermediate copy or any copy of the original work. It

1 prohibited making a fixed copy of the altered version.

2           And this, again, reflects that you cannot  
3 filter -- or at least in 2005, you could not filter a movie  
4 and then transmit it without making a copy.

5           THE COURT: What's your response to the Title  
6 17 -- USC Section 1201 says "No person shall circumvent a  
7 technological measure that effectively controls access to a  
8 work protected under this title"?

9           MR. QUINTO: Well, I have several responses,  
10 Your Honor.

11           First, as I noted earlier, under 17 USC 110  
12 Subsection 11, a service that -- a company that provides the  
13 service described therein is not engaging in an infringement  
14 of copyright. That's what the entry -- the first line of  
15 Section 110 says, "the following are not infringements of  
16 copyright."

17           So where there is no copyright infringement, where  
18 there is no violation of copyright, the DMCA, by its own  
19 terms, doesn't apply. The letter from the Register of  
20 Copyrights, Mary Beth Peters, is absolutely consistent with  
21 that.

22           She said that no modification of the DMCA was  
23 required, obviously, because no modification -- she  
24 recommended that DMCA not be -- that there not be an express  
25 exception for the DMCA for the obvious reason that no



1 express exception was needed. A service that operates as  
2 provided by Section 110 Subsection 11 does not infringe  
3 copyright.

4 Further, the Ninth Circuit opinion in the Blizzard  
5 case that I discussed earlier further says that there is no  
6 infringement so long as a copyright owner is engaging in an  
7 abuse of copyright and further says that the DMCA might not  
8 apply when the -- it's being used in -- as part of an  
9 anti-trust violation. So for all those reasons, opposing  
10 counsel is wrong in his construction of the FMA.

11 Does that sufficiently answer --

12 THE COURT: It answers it.

13 MR. QUINTO: There was also discussion about  
14 whether it is or was possible to provide streamed, filtered  
15 content without decryption.

16 There is no debate that, in 2005, that ability did  
17 not exist. As explained in the Meldahl declaration, there  
18 is still no such ability today.

19 Now, what counsel was referring to is the fact  
20 that ClearPlay -- and, by the way, Your Honor was correct.  
21 ClearPlay is the only other surviving filtering company.  
22 There are no other filtering companies out there.

23 What counsel was referring to is that ClearPlay  
24 uses a system based on the same basic idea that VidAngel had  
25 in 2014 with the Chromecast, that it would ride on top of

1 someone else's system, allow someone else to decrypt, and  
2 then would filter that content.

3 In VidAngel's case, the studios contacted Google  
4 and said, "That is a violation of your terms and service  
5 agreement with us." And I submit that the moment the studio  
6 litigation with VidAngel is concluded, the studios will go  
7 back to YouTube and say, "You're violating our terms and  
8 service agreement. You have got to cut ClearPlay off."

9 So ClearPlay, at a minimum, is operating in  
10 violation of a terms of use agreement imposed by the  
11 studios.

12 But more to the point -- and this is reflected in  
13 the Supplemental Declaration we provided from  
14 Elizabeth Ellis, the ClearPlay system at its best is  
15 extremely limited and offers the consumer, when it works,  
16 offers the consumer a really unsatisfactory experience.

17 It works only with a standard definition stream.  
18 So it doesn't work at all with high def or Blu-ray, and it's  
19 error ridden. It's difficult to sign up for. There are  
20 frequent mistakes in its application, and, of course, it  
21 works only if a consumer is also purchasing or obtaining  
22 content through YouTube.

23 The Google Play plus YouTube combination that  
24 ClearPlay relies on was created in 2012. It did not exist  
25 in 2005.

1           So as a legal matter, we submit that ClearPlay has  
2 no right to do what it's doing and is being tolerated by the  
3 studios because it is not very successful. Its business is  
4 not growing, and the studios wish to say that it's an  
5 alternative to what we're doing.

6           Now, if we go back to first principles, Congress,  
7 obviously, wanted to make filtered content available to the  
8 American public on a reasonable basis. The studios have  
9 raised a number of arguments that, if accepted, would  
10 benefit the studios not at all and would serve only to make  
11 a service such as VidAngel prohibitively expensive and could  
12 potentially be the death knell of cloud computing.

13           Here is why: The studios contend that -- I can  
14 imagine if this were several hundred years ago, they would  
15 say, "It's okay to make handwritten copies of the Bible but  
16 you can't use Gutenberg's printing press because it's an  
17 unapproved technology," that we would have to separately  
18 filter every DVD, but we couldn't do it just once. We would  
19 have to filter every one, which, you know, doing that for  
20 every DVD for every customer would mean that the customer  
21 would have to pay thousands of dollars to watch a filtered  
22 movie.

23           THE COURT: Explain that to me. Why would they  
24 have to pay thousands of dollars?

25           MR. QUINTO: Because the process that VidAngel

1 goes through is very expensive. You first decrypt what's on  
2 the disk and convert it into a Matroska file, which is an  
3 intermediate file that is incapable of being viewed.

4           From there it's put into a different form of  
5 intermediate file and various taggers in different parts of  
6 the country -- and VidAngel uses a number of taggers and  
7 deliberately uses taggers in different parts of the country  
8 because they have different sensitivities. So they all go  
9 through the same movie, and they tag things that they  
10 believe might be objectionable.

11           So as I said earlier, there are 82 general tagging  
12 categories, but with the subcategories there are many  
13 hundreds.

14           So you have a number of people doing this. You  
15 have somebody who has to watch and review to make sure that  
16 all the tags are correctly placed --

17           THE COURT: That happens now; right?

18           MR. QUINTO: Yes.

19           THE COURT: Okay.

20           MR. QUINTO: But that happens once -- right now  
21 that happens once per movie. And what the studios are  
22 saying is that it should happen once per disk, which is  
23 crazy.

24           THE COURT: But doesn't the filtering -- but it's  
25 interesting because every user or customer might have

1 different filters; correct?

2 MR. QUINTO: Correct.

3 THE COURT: So you are saying that your client has  
4 done it one time and so they are able to filter out any of  
5 all of the different 82 options when they click on?

6 MR. QUINTO: What they do is they tag everything  
7 that might be objectionable -- and the tags fall into 82  
8 broad categories and numerous subcategories. Then after  
9 that's done, the movie is chopped up into little tiny  
10 bits --

11 THE COURT: I understand your point.

12 MR. QUINTO: A maximum length is ten seconds, but  
13 many, many bits are shorter. Might be half a second, a  
14 second, two seconds. And those bits contain something that  
15 has been tagged or frequently contained something --

16 THE COURT: Let me ask you this, Mr. Quinto. Do  
17 you believe that the FMA contemplated streaming when it was  
18 enacted?

19 MR. QUINTO: Of course, on its face, the making  
20 imperceptible by or at the direction of a member of a  
21 private household -- so private household telling third  
22 party do something -- make imperceptible at my direction  
23 limited portions of audio/video content of a motion picture  
24 during a performance transmitted to that household for  
25 private home viewing, in other words, streaming. So you

1 filter it, and then you transmit it or streamed. I think it  
2 couldn't be clearer that that's what the FMA intended.

3 And part of the problem -- as a side note, part of  
4 the problem with the legislative history is, as the Court  
5 knows, every two years Congress ends and we get a new  
6 Congress. When one Congress ends, everything that's pending  
7 is out the door and legislation has to be reintroduced in  
8 the following Congress.

9 So there was a Family Movie Act of 2004 that was  
10 pending when that Congress ended. Significantly, the 2004  
11 version was not identical to the 2005 version. The 2004  
12 version contemplated only the service or device used in the  
13 house to filter content there.

14 So it was only with the 2005 version that the  
15 streaming was added. And that was done actually at  
16 ClearPlay's request because it could see that that was the  
17 future, that consumer preferences would change, that  
18 consumers would want to be able to watch content  
19 immediately. They wouldn't want to have to go to a store to  
20 buy a disk or order a disk to be delivered to them. They  
21 wouldn't want to have to insert it into a special DVD player  
22 at home and be tied to watching it on family television.  
23 They might want to watch it on their laptop. They might  
24 want to watch it on their iPad, on their tablet. They might  
25 want to watch it on their smartphone. They would want to

1 have such freedom.

2 And that is what this portion of the Family Movie  
3 Act allows. And it's what -- it's why this portion is so  
4 important because this is the portion that American families  
5 today want to use. This is how you make filtered content  
6 available to the American public now.

7 But having to do the whole process -- and let me  
8 just finish with the process of preparing a movie -- so it's  
9 then --

10 THE COURT: Mr. Quinto, I don't need you to finish  
11 the process. I think I understand the process.

12 MR. QUINTO: Okay. So counsel stated incorrectly  
13 that VidAngel keeps a -- or stores a permanent copy of the  
14 filtered work. Not true. All VidAngel does is put all  
15 those little tiny bits up in the cloud and then, when a  
16 consumer requests a movie with specific filters, VidAngel  
17 sends the instructions concerning what bits to transmit to  
18 the consumer.

19 THE COURT: I think what Mr. Klaus was saying  
20 what's stored is not the filtered content. It's the  
21 original content. So someone wants to watch "Star Wars,"  
22 VidAngel copies it and takes that copy -- puts it on the  
23 cloud, for lack of a better term, and the actual DVD or  
24 Blu-ray disk is stored. That's stored. But there is this  
25 copy that remains that is used over and over -- that is the

1 source by which the filtering -- the filtering mechanism  
2 pulls its information from. It's not from that original DVD  
3 that the person purchased.

4 MR. QUINTO: I think he was talking about two  
5 things, Your Honor. Yes, there is a sense in which there is  
6 a copy stored on the cloud.

7 THE COURT: And you believe that that is  
8 authorized?

9 MR. QUINTO: Clearly.

10 THE COURT: Why?

11 MR. QUINTO: Well, again, let's go back to the  
12 statute. Even assuming all those encrypted bits constitute  
13 a copy, even though, if you -- if a third party were somehow  
14 to intercept and collect all those bits, the third party  
15 would have no way to arrange them to reconstitute the movie.  
16 It's sort of like saying a book that has gone through a  
17 shredder is still a book.

18 THE COURT: Are you talking about the filtered  
19 movie?

20 MR. QUINTO: I'm talking about the unfiltered  
21 movie. I think Mr. Klaus was talking about two things.

22 So first let's talk about what's stored in bits.  
23 What's stored in those little tiny bits in the cloud, which  
24 are floating around and would not be -- are not a copy in  
25 the sense that, if you were somehow to gain access to the



1 cloud and intercept those bits, you could say, "Aah, I have  
2 got the movie."

3           It would be analogous to saying the book went  
4 through a shredder. I have got all the shredded papers; so  
5 there is a sense in which I have the book. In a sense, yes.  
6 But it's not -- the book wouldn't be readable. The movie is  
7 not watchable, and those bits are encrypted.

8           But importantly, at this point nothing is altered.  
9 Everything is tagged, and things are broken up into little  
10 tiny bits that reflect the tags, but it's still the original  
11 work up there.

12           Now, the statute -- going back to the statute --  
13 says that the service is lawful if no fixed copy of the  
14 altered version of the motion picture is created. It  
15 doesn't prohibit the creation of making a copy of the  
16 original. What's prohibited is making a copy, a fixed copy  
17 of the altered version.

18           And the doctrine of the inclusion of one to the  
19 exclusion of the other applies here. Congress has expressly  
20 said, "It's not a problem. It's a problem only if you make  
21 the altered version." So implicit in that is that it's fine  
22 to make a copy of the unaltered version.

23           Now, the second copy that I think Mr. Klaus was  
24 talking about is so now you have all these little encrypted  
25 bits floating around in the cloud, and a consumer chooses a

1 movie and selects the filters.

2           So if the consumer selects what I believe is the  
3 average number of filters selected, 17, bits that don't  
4 include anything falling within those 17 categories will be  
5 transmitted to the consumer.

6           Now, the bits are stored by Google in the cloud,  
7 and Google's default is to keep that arrangement of bits for  
8 24 hours in case any other consumer decides to order, to  
9 request the same movie with the exact same filters during  
10 that 24-hour period.

11           But that is simply Google's default. It's not  
12 something -- it's not necessary for the service. It's not  
13 something that Google -- that VidAngel requests. It's  
14 entirely unnecessary to VidAngel's service and is not  
15 something that VidAngel is responsible for.

16           Now, I talked about the effect that Mr. Klaus's  
17 argument would have on cloud computing. Apart from the fact  
18 that it would prohibitively expensive to go through this  
19 whole process with respect to every disk as opposed to every  
20 movie and apart from the fact that it would totally  
21 undermine congressional intent to make filtered content  
22 readily available to American families if carried to its  
23 logical conclusion, it would be the death of the cloud  
24 because you would have enormous numbers, enormous quantities  
25 of identical works stored there.

1           So, for example, if instead of having one copy of  
2 a movie broken up into hundreds and hundreds of little bits  
3 you had, say, 2,500 copies of that movie broken up into  
4 2,500 times as many little bits, one can readily see how  
5 quickly storage space in the cloud would be exhausted.

6           So for this reason, the cloud computing companies  
7 intervened in the Aereo case to call this to -- this problem  
8 to the attention of the Supreme Court.

9           And they also have their own technological  
10 measures to try to weed out duplicate copies so that they  
11 are not keeping 2,500 copies of something when one copy  
12 would suffice.

13           And, again, Mr. Klaus's argument is totally  
14 divorced from prejudice, from harm, from irreparable injury.  
15 Whatever the effect on the studios is from having a movie  
16 decrypted and being made available to VidAngel's users, that  
17 effect is identical whether it's one copy that's decrypted  
18 or 2,500 copies that are decrypted.

19           The effect on the studios is no different. This  
20 is just a case of the dog in the manger, the dog who gets no  
21 benefit from being in the manger, occupies the manger to  
22 deny the animals that would benefit, to deny them of that  
23 benefit.

24           Now, let me turn to irreparable injury. It's  
25 preliminarily -- I note that it's -- and has been for five

1 years now -- well established that irreparable injury may  
2 not be presumed but must be proved. Winter and Salinger say  
3 that.

4 Irreparable injury is discussed only in the  
5 declaration of Mr. Cittadine. Mr. Cittadine begins with the  
6 proposition that VidAngel is your stereotypical pirate,  
7 maybe even an archetype pirate. But he starts with that  
8 proposition. VidAngel is a pirate.

9 From there he says, "Well, based on the studio's  
10 experience with pirates, we can anticipate the following  
11 harms."

12 Now, as I said, VidAngel began offering its  
13 service over 22 months ago. It went public in August of  
14 2015. The studios have had an account since  
15 August 6th, 2015. And VidAngel has had incredible growth  
16 since then.

17 In fact, the two best months for month-over-month  
18 growth were November and December of 2015. Notwithstanding  
19 the 22-month history, the studios have not identified any  
20 actual injury.

21 All they have is Mr. Cittadine's declaration that,  
22 based on his experience with pirates, this is what could be  
23 expected. But -- so that raises the question is VidAngel a  
24 pirate? I submit that pirates don't spend millions of  
25 dollars to buy authorized copies of plaintiffs' works. Or

1 studios' works. Here, as of today, VidAngel has spent just  
2 shy of \$1.7 million to buy authorized copies of DVDs.

3 THE COURT: Mr. Quinto, how do you respond to  
4 Disney's contention that you or your client has pleaded  
5 financial hardship and would not be able to pay off any  
6 final judgment? And they cite to a number of cases that  
7 suggest that that fact in and of itself might make an  
8 injunction appropriate.

9 MR. QUINTO: As follows, Your Honor. First, the  
10 damages calculation was based on the assumption that the  
11 studios would, A, prove willful copyright infringement, not  
12 ordinary copyright infringement, but willful; and, B, based  
13 on the assumption that having proved willful copyright  
14 infringement, the Court would choose to award the maximum  
15 statutory damages per infringement.

16 So we have -- those are two assumptions that I  
17 don't think should -- two assumptions that should be  
18 weighed.

19 Beyond that, VidAngel's monthly revenues are now  
20 in excess of \$1 million. We've just completed a  
21 Regulation A Plus stock offering, as Your Honor knows, in  
22 which we terminated it after we had raised a little over  
23 \$10 million. So that's now in the bank. So there is plenty  
24 of money to pay any kind of reasonable damages award, should  
25 there be one.

1           But I notice that in other cases such as ReDigi,  
2 preliminary injunction was denied. In another case, the  
3 Court held that, because the defendant had kept very  
4 accurate records, damages could be calculated and,  
5 therefore, there was no need, it would be inappropriate to  
6 impose a preliminary injunction.

7           So for those reasons, Your Honor, I submit that  
8 there is no irreparable injury here.

9           THE COURT: All right. Can you talk a little bit  
10 about claim of fair use. And I guess I would like to hear a  
11 little about, sort of, the transformative prong. Is it your  
12 position that, once they apply the filter, it's now changed  
13 the movie?

14           It strikes me that, filter or not, "Trolls" is  
15 "Trolls," "Star Wars" is "Star Wars." It may not have a  
16 curse word or a scene but the movie, the heart of the movie,  
17 doesn't change, does it?

18           MR. QUINTO: Your Honor, I wish the studios agreed  
19 with that proposition because, if they agreed with it, they  
20 would surely sell us a streaming license.

21           Their basis for withholding a streaming license is  
22 that the filtering alters the content of the movie,  
23 significantly changes the director's vision. But if it's  
24 really the same thing, there is no basis to withhold the  
25 streaming license.

1 I think it's self-evident that the -- that what we  
2 do is transformative. For example, the Ninth Circuit has  
3 held that taking a thumbnail photo is a transformative  
4 use -- using a thumbnail photo or republishing a thumbnail  
5 is a transformative use of a full photograph even though  
6 it's of the exact same image because it has a different  
7 purpose. It satisfies a different need.

8 And here we have 50 percent of -- over 50 percent  
9 of VidAngel customers who say they would not watch certain  
10 movies without filtering, just wouldn't watch it at all.

11 THE COURT: Is the filter of content or just  
12 opening credits?

13 MR. QUINTO: No, no, no. It's content. The  
14 opening credits was never an issue. The studios were  
15 complaining about the closing credits. And as I explained,  
16 there was a very good reason for that.

17 And, again, going back to my letter of last July,  
18 I told the studios that, if they had any problems with what  
19 we were doing, we would be happy to work with them, modify  
20 our service.

21 Consistent with that, when we read in their papers  
22 filed with this Court that they thought that allowing  
23 filtering of a closing credits was a way to game the system,  
24 we changed that and now you may still -- if you want to  
25 filter closing credits, you have to filter something else as

1 well. That is no longer sufficient.

2 Another thing they complained of was the  
3 automatic -- that consumers could choose -- when they  
4 purchased a movie, they could choose the automatic sellback  
5 feature.

6 Studios complained about that. We eliminated it.  
7 So now it's up to the consumer to decide -- the consumer no  
8 longer has that option to have that done automatically. The  
9 consumer has to affirmatively go back to VidAngel when he or  
10 she is done with the movie and say, "Now I want to sell it  
11 back" and -- surprise. The average sellback time is now  
12 over 24 hours; so VidAngel's profits have increased. So  
13 thank you, studios.

14 So this is clearly transformative because it opens  
15 movies to a new audience. And even with respect to existing  
16 audiences, such as parents who might be willing to watch the  
17 movies themselves, it opens the movie up further because  
18 those parents who are willing to watch the movie themselves  
19 might not be willing to watch with their children.

20 THE COURT: That makes it transformative?

21 MR. QUINTO: Yes. Of course. It's a different  
22 use. It's a purpose.

23 Now, remember, with the thumbnail images, nothing  
24 was filtered, nothing was removed. It's just that the  
25 thumbnail served a different purpose than the full



1 high-resolution photograph because it allowed consumers to  
2 quickly look at photographs and decide which ones they may  
3 want to acquire in the high definition version.

4 THE COURT: Okay. I got your point, Counsel. I'm  
5 going to just give you a few minutes to wrap up because I  
6 want to hear from the moving party before we end this  
7 proceeding.

8 MR. QUINTO: Counsel has also suggested that what  
9 VidAngel is doing is somehow attempting an end-run around  
10 established rights of copyright, and they've envisioned  
11 filtering services that can filter anything.

12 Well, that problem was discussed in Congress, and  
13 it's reflected in the legislative history. Congress  
14 considered trying to limit the content that could be  
15 filtered to things that families find offensive or things  
16 that the American Medical Association, the American  
17 Pediatric Society had found, had declared that in over  
18 2,000, studies could cause injury to -- permanent injury to  
19 children such as the repeated exposure to violence on screen  
20 as a child had been demonstrated to lead to a "propensed"  
21 likelihood of exhibiting violent conduct by some  
22 individuals, as adults.

23 So they considered that, but then they considered  
24 the First Amendment and said, "Well, under the  
25 First Amendment, we cannot allow -- we cannot decide that

1 certain things can be eliminated but not other things." So  
2 owing to the First Amendment, they said, "Well, people have  
3 to be able to filter whatever they want."

4 Now, counsel raised the specter, incorrectly, that  
5 perhaps somebody could decide that it had an objection to  
6 one thing and just filter that one thing out of movies and  
7 go into competition with the streaming services -- maybe  
8 just arbitrarily filter out the closing credits or the  
9 opening credits. Nonsense.

10 Under the Family Movie Act, it's the individual  
11 family owner, family member, who decides what gets filtered.  
12 So the individual member of the family purchasing the  
13 content has to decide what is filtered, not some competitor  
14 choosing to filter only credits and compete.

15 Secondly, as a practical matter, that doesn't work  
16 anyway because the movie goes through the whole release  
17 cycle, and, if you are trying to operate under the Family  
18 Movie Act, as counsel has suggested, then you have to wait  
19 until the movie comes out on DVD and Blu-ray disk.

20 So if Warner Bros. wanted to compete with  
21 Universal, Universal would be able to stream its movies for  
22 as long as it wanted before it released those movies on DVD,  
23 and Warner Bros. wouldn't be able to compete by offering  
24 some kind of filtering service until Universal had finally  
25 released the content on DVD. So the specter that one studio

1 would compete with another is stuff and nonsense.

2 THE COURT: Anything further, Mr. Quinto?

3 MR. QUINTO: No, Your Honor, but I would like to  
4 reserve three minutes, if I may, to respond to --

5 THE COURT: You have had over an hour -- or close  
6 to an hour, I should say. I am not inclined to do that.  
7 But let me -- I just have a couple of questions of -- I'm  
8 sorry. I'm drawing a blank on the name -- Mr. Klaus. And I  
9 have an afternoon criminal calendar; so I have to get to  
10 that in a moment as well.

11 Mr. Klaus, the question I have for you is I  
12 thought I heard Mr. Quinto -- and I may have misheard it --  
13 saying that the VidAngel -- they have to wait in line just  
14 like everyone else. What's your response to that, that they  
15 don't gain an advantage or jump on consumer's access to  
16 movies? What's your response to that?

17 MR. KLAUS: That's not true. They wait in line  
18 until the DVD release date. And the moment there is a DVD  
19 release, they then go into competition with other services  
20 who may or may not have access to the content in that  
21 window.

22 THE COURT: Who would not have access to the  
23 content during that window?

24 MR. KLAUS: During that window. And there are  
25 some distributors, whether they are streaming services,

1 whether they are sometimes subscription services like  
2 Netflix, for example --

3 THE COURT: I just want to make sure I understand  
4 the time line. You are suggesting a DVD gets released on X  
5 date. Netflix may not be authorized to stream on that date.

6 MR. KLAUS: Correct.

7 THE COURT: iTunes, if a DVD is released, iTunes  
8 may or may not be authorized to release on that date?

9 MR. KLAUS: There are a couple of important  
10 concepts that Mr. Quinto jumbled together, and let's be sure  
11 that we break them apart.

12 One is he talks about whether they are available  
13 for access on a streaming service. And a streaming  
14 service -- let's take iTunes, for example -- may have two  
15 different types of streams that it can offer. One is the --  
16 where you buy the movie through iTunes. You pay a higher  
17 price, 19.99 to buy, than you would for the one-night  
18 rental. That's the essence of the window.

19 And depending on the particular company's  
20 relationship with a particular service -- and it varies  
21 because this is the subject of commercial negotiations  
22 between copyright owners and services. A service may get  
23 the ability to have the purchase where it's in your  
24 permanent iTunes collection. It may have the ability to  
25 rent on a nightly or daily basis. They may get them on the

1 same date. They may get them on different dates. Those are  
2 two different points.

3 The DVD release date, however, once that is --  
4 and, again, each studio makes its own decision about how it  
5 wants -- how and when it will release its content.

6 The DVD release date may be the same date that you  
7 have content that's available for purchase. The DVD release  
8 date may be the same date that you have content available  
9 for a single day rental. It really does depend.

10 But this idea that somehow they -- what Mr. Quinto  
11 is saying is, "We're not in competition with those services  
12 because we have to wait in line for the DVD," is just not  
13 true. Whether he may be in competition on a particular  
14 movie for a day or a five-day or a week period, that may in  
15 some cases be true, may not be true.

16 What is clear is that VidAngel views itself as  
17 being in competition with these other services. Why else  
18 would -- if Mr. Quinto's statement is the Netflixes, the  
19 other streaming services of the world, they serve a  
20 different market that we don't care about. Why do they have  
21 an entire section that you can filter their movies for  
22 things that are not available on Netflix if they don't view  
23 themselves as being in competition with something that's  
24 available on Netflix?

25 THE COURT: Isn't the answer to that "We have

1 these movies, but we have them in a format so that those  
2 that might be offended by strong language, nudity, violence,  
3 you can watch them through our service"?

4 MR. KLAUS: Well, so -- but they -- my point to  
5 you, Your Honor, is they are making them available for a  
6 significantly lower price than they're available on the  
7 other services. They are promoting the fact that they make  
8 them available for the price. And users are not oblivious  
9 to this, Your Honor. And I just point to you to a couple of  
10 examples of what we pointed out in our papers.

11 THE COURT: Go ahead, briefly. I remember reading  
12 about the users saying, "Hey, I can get this quicker,  
13 easier."

14 MR. KLAUS: Yeah. "We bought 'Star Wars'" -- I am  
15 just reading from page 9 of our opening brief. "We bought  
16 'Star Wars.' We sold it back for a total of \$1.00 when it  
17 was, like, \$5.00 to rent on Amazon. Even if you don't need  
18 the content cleaned, it's a great video service."

19 Same comments to that effect on page 17.

20 THE COURT: I am going to jump around for a  
21 minute. What's your response to -- what's the purpose of  
22 the Family Movie Act? The Family Movie Act was enacted for  
23 a reason, to allow those individuals to watch content --  
24 watch feature films, what have you, in a manner that is not  
25 objectionable to that individual family.

1 MR. KLAUS: Subject to the requirements of the  
2 statute, Your Honor, subject to the requirements of the  
3 statute.

4 And the best evidence again of what Congress  
5 ultimately intended, setting aside all the -- I have got one  
6 version in 2004 and another version that the Congress in  
7 2005 -- focusing on the language of the statute,  
8 Your Honor -- what the language of the statute says is that  
9 it has to be from an authorized copy.

10 When Mr. Quinto was going through his argument  
11 about why it was clear that Congress intended for there be  
12 streaming, he very noticeably stopped right before the  
13 critical language that the transmission that is subject to  
14 the exemption that the Family Movie Act creates has to be  
15 from an authorized copy.

16 THE COURT: Right. But he says -- we've kind of  
17 gone over this before. He says it is an authorized copy.  
18 I, customer, buy a DVD, and so I am -- VidAngel is giving  
19 the customer that authorized copy.

20 MR. KLAUS: But then, as I think Mr. Quinto  
21 ultimately conceded when he said, in a sense, there is a  
22 copy in the cloud, the copy in the cloud is a different  
23 copy. It is not the copy that the consumer -- even  
24 indulging in the fiction that the consumer owns the DVD,  
25 even though only four people have ever requested to get

1 their DVD back and 99 1/2 percent have returned them as the  
2 rental that Mr. Quinto described earlier today within the  
3 five-hour period, even indulging that fiction, the copy from  
4 which the movie is streamed, from which it is transmitted,  
5 is the copy that they have made to the cloud.

6 They do apply filters to it, but it's still not an  
7 authorized copy. And, again, Your Honor beyond the language  
8 of the statute, this is another area where the legislative  
9 history actually did discuss this issue.

10 It's again in Senator Hatch's statement which is  
11 at Tab 5 of my binder. Senator Hatch said -- this is the  
12 only -- by the way, the only legislative history that's in  
13 the record that speaks to the question of transmission and  
14 performance.

15 (Reading:) An infringing  
16 performance in a household or an infringing  
17 transmission of a performance to a household,  
18 those are not rendered non-infringing by  
19 Section 110(11) by virtue of the fact that  
20 limited portions of audio or video content to  
21 the motion picture being performed are made  
22 imperceptible during such performance or  
23 transmission in a manner consistent with that  
24 section.

25 The only legislative history, absolutely, the only



1 one that speaks to this transmission issue is that  
2 statement. So if the statute wasn't clear -- and we believe  
3 it is clear that what they are doing is plainly a  
4 violation -- the only legislative history that's on point  
5 specifically says that the argument that they are making is  
6 wrong.

7 THE COURT: All right. Anything further,  
8 Mr. Klaus?

9 MR. KLAUS: One brief point, Your Honor, because  
10 Mr. Quinto was very liberally saying that the plaintiffs in  
11 this case had gone to Google and had directed Google not --  
12 to shut off support, to stop the Chromecast filtering,  
13 et cetera. We went round and round -- I went round and  
14 round with Mr. Harmon at his deposition on this to ask him  
15 what the specific evidence was that he had.

16 We put this -- it's in -- Tab 15 of our binder are  
17 all of the excerpts from Mr. Harmon's deposition transcript.  
18 Between pages 273 and 277 are the pages in question, and I  
19 said to Mr. Harmon --

20 (Reading:) Tell me every fact you  
21 have to believe that one of the plaintiffs in  
22 this case went to Google and said to Google,  
23 "cut off service, cut off support for them."

24 And Mr. and Mr. Harmon said, "Well,  
25 I have seen things that I got from WikiLeaks"

1           that suggest there are provisions and  
2           contracts.

3                       He says, "I am suspicious about the  
4           timing."

5           And on page 277, I said to him -- and I am reading  
6   277 of the deposition transcript. This was page 70 of  
7   Exhibit M from Miss Bennett's Reply Declaration.

8                       (Reading:) I want to be very  
9           precise here, Mr. Harmon. Do you believe that  
10          a studio -- or multiple studios went to Google  
11          and specifically said "Do not provide support  
12          to VidAngel"?

13                      ANSWER: I don't have that  
14          information, but that's what we believe based  
15          on the facts that we have.

16          So I say that, Your Honor, when Mr. Quinto stands  
17   here and says that we have constantly gone to other services  
18   and told them not to do business with VidAngel, he has in  
19   fact no evidence to support that. That's simply conjecture  
20   that he's put in for the benefit of the hearing.

21                      THE COURT: Thank you, Mr. Klaus.

22                      Mr. Quinto, do you have something urgent that you  
23   need to bring to the Court's attention?

24                      MR. QUINTO: I will limit myself to 30 seconds.  
25   The Court may strictly --

1 THE COURT: I wish I had my civil trial clock  
2 here. I would put you to that, but go ahead.

3 MR. QUINTO: Thank you, Your Honor.

4 First, if the studios were really concerned that  
5 VidAngel, by relying on the Family Movie Act, can charge  
6 consumers \$1.00, they would license VidAngel to stream. If  
7 they did that, VidAngel would not only be happy to but would  
8 be required to, by economics, charge as much as anybody  
9 else.

10 Second, Mr. Klaus was incorrect about the number  
11 of DVDs permanently owned. It's 12 percent of all DVDs that  
12 are permanently owned that have no sellback value, and  
13 that's over 20,000.

14 THE COURT: Twelve percent of people ask for the  
15 movies to come back?

16 MR. QUINTO: Twelve percent of all DVDs --

17 THE COURT: But he was talking about how many  
18 people asked to have the movies sent back to them. I think  
19 that was four percent.

20 MR. KLAUS: That was four disks total, Your Honor.

21 THE COURT: Sorry.

22 MR. KLAUS: And, again, I will say there is no  
23 evidence in the record to support the 12 1/2 percent  
24 statement that Mr. Quinto is now --

25 THE COURT: I am more concerned -- I think his

1 point was how many people said, "Give me the DVD back"?

2 MR. QUINTO: Somewhere around four, six, somewhere  
3 in that vicinity. But, of course, the DVD is unfiltered.  
4 They have the right and VidAngel will mail it to them. So  
5 it's a true sale, not a rental.

6 But more to the point, people who want to watch  
7 filtered content have kept over 20,000 DVDs that now have no  
8 sellback value.

9 THE COURT: Okay.

10 MR. QUINTO: Final point, Your Honor. The comment  
11 that an infringing performance is not rendered acceptable  
12 because it was decrypted and was transmitted under the --  
13 filtered and transmitted under the Family Movie Act is  
14 perfectly logical.

15 It means that, if somebody unlawfully obtains a  
16 DVD, then it cannot be decrypted and filtered and thereby  
17 gain the protection of the Family Movie Act. That's what it  
18 means.

19 THE COURT: All right. Thank you, both counsel.  
20 I appreciate the robust arguments on both sides of this. I  
21 am going to take a little time to review some of my notes as  
22 well as some of the evidence in the case, and the matter  
23 will remain under submission until the Court issues its  
24 final order. I am certain I will see you on December 19th.  
25 So until then, thank you.

1 MR. KLAUS: Thank you, Your Honor.

2 MR. QUINTO: Thank you.

3 THE CLERK: All rise. This Court is in recess.

4 (Proceedings concluded at 1:41 p.m.)

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## 1 CERTIFICATE

2  
3 I hereby certify that pursuant to Section 753,  
4 Title 28, United States Code, the foregoing is a true and  
5 correct transcript of the stenographically reported  
6 proceedings held in the above-entitled matter and that the  
7 transcript page format is in conformance with the  
8 regulations of the Judicial Conference of the United States.

9  
10 Date: December 13, 2016.

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14           /S/ CHIA MEI JUI          

15 Chia Mei Jui, CSR No. 3287  
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MR. KLAUS: [48] 3/7 10/4 14/25 16/4 26/24 28/7 28/15 30/1 30/3 30/9 31/22 32/1 32/3 32/5 33/2 33/21 34/14 35/20 36/2 38/3 38/6 39/14 41/11 50/7 51/14 52/3 52/9 52/21 52/25 53/12 53/20 60/16 60/22 61/17 61/22 63/23 93/16 93/23 94/5 94/8 96/3 96/13 96/25 97/19 99/8 101/19 101/21 102/25  
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THE COURT: [118]

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

DISNEY ENTERPRISES, INC.;  
LUCASFILM LTD. LLC;  
TWENTIETH CENTURY FOX FILM  
CORPORATION and WARNER  
BROS. ENTERTAINMENT INC.,

Plaintiffs and Counter-  
Defendants,

vs.

VIDANGEL, INC.,

Defendant and Counter-  
Claimant.

Case No. 16-cv-04109-AB (PLAx)

**[PROPOSED] ORDER  
REGARDING HEARING DATE ON  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

Judge: Hon. André Birotte Jr.

Ctrm: 4



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20 UNITED STATES DISTRICT COURT  
21 CENTRAL DISTRICT OF CALIFORNIA  
22 WESTERN DIVISION

23 DISNEY ENTERPRISES, INC.;  
24 LUCASFILM LTD. LLC;  
25 TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
26 BROS. ENTERTAINMENT, INC.,

27 Plaintiffs,

28 vs.

CASE NO. 16-cv-04109-AB (PLAx)

**SUPPLEMENTAL DECLARATION  
OF NEAL HARMON IN  
OPPOSITION TO MOTION FOR  
ENTRY OF PRELIMINARY  
INJUNCTION**

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VIDANGEL, INC.,  
Defendant.

Judge: Hon. André Birotte Jr.  
Date: October 31, 2016  
Time: 10:00 a.m.  
Courtroom: 4  
Trial Date: None Set

VIDANGEL, INC.,  
Counterclaimant,  
vs.  
DISNEY ENTERPRISES, INC.;  
LUCASFILM LTD. LLC;  
TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
BROS. ENTERTAINMENT, INC.,  
Counterclaim Defendants.

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1 I, Neal Harmon, declare:

2 1. I am a founder and the Chief Executive Officer of defendant and  
3 counterclaimant VidAngel, Inc. (“VidAngel”). I submit this supplemental  
4 declaration in support of VidAngel’s Memorandum of Points and Authorities in  
5 Opposition to Plaintiffs’ Motion for Preliminary Injunction. I have personal  
6 knowledge of the facts set forth herein and, if called as a witness, I could and would  
7 testify competently thereto.

8 2. On October 14, 2016, Congresswoman Mia B. Love sent me a letter in  
9 which she stated: “I am writing to express my view that motion picture content  
10 filtering services are very much in the public interest . . . [and] that the availability  
11 of such services is consistent with Congressional intent in passing the Family Movie  
12 Act: to facilitate parental control over the content viewed by their children in their  
13 own homes.” Congresswoman Love also explained that, “[the] Family Movie Act  
14 thus seeks to immunize any service that satisfies its requirements from claims  
15 brought under any other provision of either the Copyright Act or the Lanham  
16 Trademark Act.” She additionally explained that, “As a Member of Congress, I  
17 believe that motion picture content filtering services provide an important public  
18 benefit and correspond with the objectives of the Family Movie Act by allowing  
19 parents to protect their families from content that they consider inappropriate.” A  
20 true and correct copy of Congresswoman Love’s letter is attached as Exhibit A.

21 3. I also wish to address contentions made in Disney’s Reply  
22 Memorandum regarding ClearPlay’s service. Disney argues that ClearPlay offers a  
23 satisfactory filtering service for content streamed to Google Play users. (Reply  
24 Memorandum at pp. 2, 11.) That is untrue.

25 4. ClearPlay’s service relies on the YouTube streaming platform owned  
26 by Google. As one would expect, that platform can be used only by Google Play  
27 customers and is thus of no use to the vast majority of American families who are  
28

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1 not Google Play customers. It is also very difficult to use. Attached as Exhibit B is  
2 a true and correct copy of a printout made by a VidAngel employee acting under my  
3 supervision reflecting her inability to get ClearPlay’s filtered streaming service to  
4 work.

5 5. To use the YouTube platform, ClearPlay must accept both the Google  
6 Play and YouTube terms of service. However, as VidAngel has learned the hard  
7 way, providing a service that filters content streamed by Google Play users violates  
8 the Google Play and YouTube terms of service. In December 2013, when VidAngel  
9 pioneered a model nearly identical to ClearPlay’s service, Google notified VidAngel  
10 that its filtering technology violated YouTube’s terms of service, which prohibit the  
11 filtering of content. As I explained in my initial declaration, paragraphs 8-16,  
12 Google modified its Chromecast device to prevent VidAngel from filtering content  
13 paid for by Chromecast users after the studios put Google on notice that it violated  
14 their terms of service to the extent it allowed third parties to filter content they  
15 provided.

16 6. Notwithstanding Disney’s suggestion that ClearPlay is employing a  
17 permissible means to filter streamed content, ClearPlay provides that service  
18 without any consent or license from the studios and without paying the studios  
19 anything. As might be expected, Disney has done nothing to enable ClearPlay’s  
20 filtering service. Moreover, ClearPlay is living on borrowed time. When Disney’s  
21 litigation with VidAngel is concluded, Disney will be free to invoke its terms of  
22 service to force Google to put an end to ClearPlay’s service. Indeed, Disney  
23 previously sued ClearPlay over its primary filtering technology--one that the  
24 Register of Copyrights termed lawful. The judge in that action dismissed Disney’s  
25 claims after the Family Movie Act took effect. Because its service filters streamed  
26 content in violation of the Google Play and YouTube terms of service, ClearPlay’s  
27 current model is not a long term option for providing the public with access to  
28



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1 filtered streamed content.

2 7. Still further, due to constraints imposed by Disney and the other MPAA  
3 studios and the implementation of ClearPlay’s technology, ClearPlay is limited in  
4 the availability and quality of movies it can offer to consumers. ClearPlay  
5 technology cannot work on approximately 9.2% of the entire Google Play movie  
6 database as to which studios prevent embedding on YouTube. This means that  
7 ClearPlay customers cannot even filter hundreds of the most popular movies in  
8 Google’s library, including many of Disney’s most popular movies: *Captain*  
9 *America: Winter Soldier*, *Marvel’s The Avengers*, *Tron Legacy*, *Iron Man 3*,  
10 *Secretariat*, *Guardians of the Galaxy*, and the entire *Star Wars* collection.  
11 ClearPlay’s movie selection is further limited by its refusal to filter films with “too  
12 much content,” leading to unmet customer demand.

13 8. ClearPlay’s service is also incompatible with most devices and  
14 platforms. The studios’ distribution agreements prohibit the use of ClearPlay apps  
15 on modern devices, including Roku, Apple TV, Chromecast, FireTV, Android TV,  
16 Xbox, iOS, and Android.

17 9. ClearPlay is additionally technologically prohibited from filtering  
18 content on Netflix, iTunes, Hulu, Amazon Prime, Vudu, and HBO Go, meaning a  
19 wide array of popular television shows are completely unavailable on its filtering  
20 service.

21 10. ClearPlay users can stream filtered content only through computer web  
22 browsers. As a result, ClearPlay is unable to provide the public with access to  
23 filtered streamed content on most popular devices and platforms. Moreover,  
24 ClearPlay users can filter only standard-definition (SD) content despite the public’s  
25 growing demand for high-definition (HD) and Blu-ray content.

26 11. Disney’s further claim that ClearPlay users can filter content streamed  
27 to their televisions using Google’s Chromecast or Apple TV is misleading.  
28

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1 ClearPlay users must use a process called “mirroring” to watch filtered content  
2 using the Chromecast or Apple TV. “Mirroring” results in a poor viewing  
3 experience that often provides very choppy playback and drops video frames. Even  
4 ClearPlay acknowledges these shortcomings on its company blog: “We have seen  
5 some slowness with the video playing (sic) on the TV when mirroring.” Attached as  
6 Exhibit B is a true and correct copy of a screenshot of the ClearPlay blog post.

7 12. Based on my review of ClearPlay customer complaints, the most  
8 frequent complaint is that ClearPlay’s filters often stop working. Tellingly,  
9 ClearPlay customer complaints include the following:

10 a. “I owned the DVD player years ago and had lots of technical trouble  
11 with it. I recently signed up again so that I could try their streaming  
12 system, but found that their streaming options are very limited. I’m  
13 trying to cancel now. They will only cancel if you phone them AND  
14 I HAVE BEEN ON HOLD FOR 15 MINUTES TRYING TO  
15 CANCEL. DO NOT BUY!”

16 b. “Let me start to say that we really prefer to watch edited videos. In  
17 this, the DVD player works great-- no more language and nudity  
18 and swearing. We love it. Not seamless edits like Family Flix used  
19 to do, but does the job well enough that we don't mind. We wish it  
20 had HDMI output and quality”

21 c. Another customer in response to the comment above: “I have had  
22 the same experience as this person and it seems to be a common  
23 thing with the ClearPlay so that is why I now use VidAngel”

24 d. “Any reason why your filter takes out the fertilization scenes from  
25 The Martian when Vulgarity is on least? For such an integral part of  
26 the movie I feel as if it shouldn't be filtered at the same level as the  
27 F words in the movie.”  
28

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2029 CENTURY PARK EAST, 16<sup>TH</sup> FLOOR  
LOS ANGELES, CA 90067  
Tel: (424) 652-7800 • Fax: (424) 652-7850

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- e. “The wedding singer takes the Lord's name in vain several times and leaves in several other swear words we had to stop halfway through. Any idea why it was done so poorly?”
- f. “Trying to watch Kingsmen.....ClearPlay not blocking the four letter words---HELP!”
- g. “ClearPlay does not work, after about 4 players we got one that filtered about half the stuff we wanted it to. We were trying to watch a movie one day and we started to hear all kinds of profanity-i think my little brother learned about 4 new words”
- h. “This review relates to their proprietary DVD player, filter stick and filter downloading service. The (USB) filter stick simply does not work with the DVD player. The DVD player denies it exists. A replacement stick made no difference. Filter downloads on a second filter stick on a different computer with a different OS and different antivirus protection made no difference. They have weak online service assistance. Their online help says "it's too difficult to put in writing so call us" and their telephone customer service is open only very limited hours in the work day (Mountain time) so it's far from convenient to the average working joe, especially if you live in the Pacific time zone. So, unless you want to skip some work (or waste time on Saturday), you are out of luck. So, I wish it would work, but without a functional filter stick that talks with the DVD player (via its USB port) you are stuck with a mediocre DVD player that will remind you that it doesn't have a working filter when you try to watch a movie, rubbing salt into the wound.”

13. As VidAngel’s COO recently noted in a blog post dated October 4, 2016: “Disney and friends have criticized VidAngel’s choice of ad agency. [They

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1 said] the owners of VidAngel spend money on their own ad agency to enrich  
 2 themselves. Which, to be clear, has nothing to do with the legal case and is simply  
 3 an attempt to smear VidAngel. [The Harmon Brothers] ad agency has created viral  
 4 ads for Squatty Potty, PouPourii, Fiber Fix, Purple, and even presidential  
 5 candidate Gary Johnson (through a Super PAC). Harmon Brothers also helped set a  
 6 Guinness World Record for orchestrating the world’s largest live nativity with The  
 7 Piano Guys. Altogether, Harmon Brothers’ videos have received over 300 million  
 8 views. Harmon Brothers has created a series of successful ads for VidAngel –  
 9 including ‘Paintball,’ ‘Angel and Demon,’ and ‘Game of Thronez’ – and accrued  
 10 over 20 million views of VidAngel ads. Within 10 months after  
 11 VidAngel’s service launched publicly, sales increased by 2,600%. VidAngel and  
 12 Harmon Brothers have always made their relationship public.”

13 14. I also wish to call the Court’s attention to various articles that have  
 14 appeared in the press concerning VidAngel’s service since I filed my initial  
 15 declaration. Attached as Exhibits C-N are true and correct copies of “Upsetting the  
 16 800-Pound Hollywood Gorilla” published by dailycaller.com on October 12, 2016;  
 17 “Hollywood Sues to Stop Parents From Filtering Sex, Profanity in Movies”  
 18 published by the *Washington Examiner* on September 20, 2016; “VidAngel Earns  
 19 Support Amid Legal Battles With Disney, Lucasfilm and More” from KUTV.com  
 20 on September 20, 2016; “Hollywood Sues to Stop Filtering of Offensive Content”  
 21 from *NE News Now* on September 26, 2016; Opinion: “‘Clean Up’ Films, or Clean  
 22 Up Filming?” published by *The Los Angeles Times*; “3 Ways to Watch Movies for  
 23 \$1 With VidAngel” published by *A Purpose Driven Wife—a Christian – Mom of 3 –  
 24 Marine Wife & Everything in Between* blog; “The Movie Filtering Site We Love!”  
 25 published by *Raising Arrows: Large Family Homeschooling & Homemaking* blog  
 26 September 23, 2016; “How to Make any Movie Family Friendly” published by  
 27 *Frugally Blonde* blog September 23, 2016; “VidAngel vs. Disney: PTC,  
 28

1 MovieGuide Defend Family-Friendly Streaming Site as Lawful” published by *CP*  
2 *Entertainment*; “Sex, Violence, and Cussing Be Gone” published by *The Christian*  
3 *Post*; “PTC Calls Out Hollywood for (Bleep)” published by *NE News Now*  
4 September 15, 2016; and “Keep Your Kids and Family Safe From Violence and  
5 Profanity on Movies” published by MommyTipz.com, respectively.

6 15. Finally, I wish to call the Court’s attention to the letter written by  
7 Dallin Webb on September 23, 2016 attached as Exhibit P.

8  
9 I declare under penalty of perjury under the laws of the United States of  
10 America that the foregoing is true and correct.

11 Executed on October 17, 2016, at Provo, Utah.

12  
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15 Neal Harmon  
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# EXHIBIT A

MIA B. LOVE  
4TH DISTRICT, UTAH

217 CANNON HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515  
(202) 225-3011

9067 S. 1300 W., SUITE 101  
WEST JORDAN, UT 84088  
(801) 996-8729

website: [www.love.house.gov](http://www.love.house.gov)

COMMITTEE ON FINANCIAL SERVICES

SUBCOMMITTEE ON  
FINANCIAL INSTITUTIONS

SUBCOMMITTEE ON  
MONETARY POLICY AND TRADE

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515-4404**

October 14, 2016

Neal Harmon  
Chief Executive Officer  
VidAngel, Inc.  
249 N. University Ave.  
Provo, UT 84601

Dear Mr. Harmon:

I am writing to express my view that motion picture content filtering services are very much in the public interest. Furthermore, I would like to convey that the availability of such services is consistent with Congressional intent in passing the Family Movie Act: to facilitate parental control over the content viewed by their children in their own homes.

Congress passed the Family Movie Act in 2005 (codified at 17 U.S.C. § 110(11) and 15 U.S.C. § 1114(3)) to clarify that existing law allows companies to offer services that filter certain material out of movies for private viewing. The Family Movie Act attempts to balance the rights of all stakeholders. First, it aims to protect studios' economic interests by requiring that consumers buy a lawful copy of any work to be filtered. It also seeks to protect the moral rights of motion picture artists by prohibiting filtering services from making any copy of a filtered work or performing any filtered work publicly. Finally, the act endeavors to allow parents to decide what their children see and hear in the privacy of their homes by establishing requirements for the streaming of filtered content to families without requiring the consent of the copyright holders. The Family Movie Act thus seeks to immunize any service that satisfies its requirements from claims brought under any other provision of either the Copyright Act or the Lanham Trademark Act.

As a Member of Congress, I believe that motion picture content filtering services provide an important public benefit and correspond with the objectives of the Family Movie Act by allowing parents to protect their families from content that they consider inappropriate.

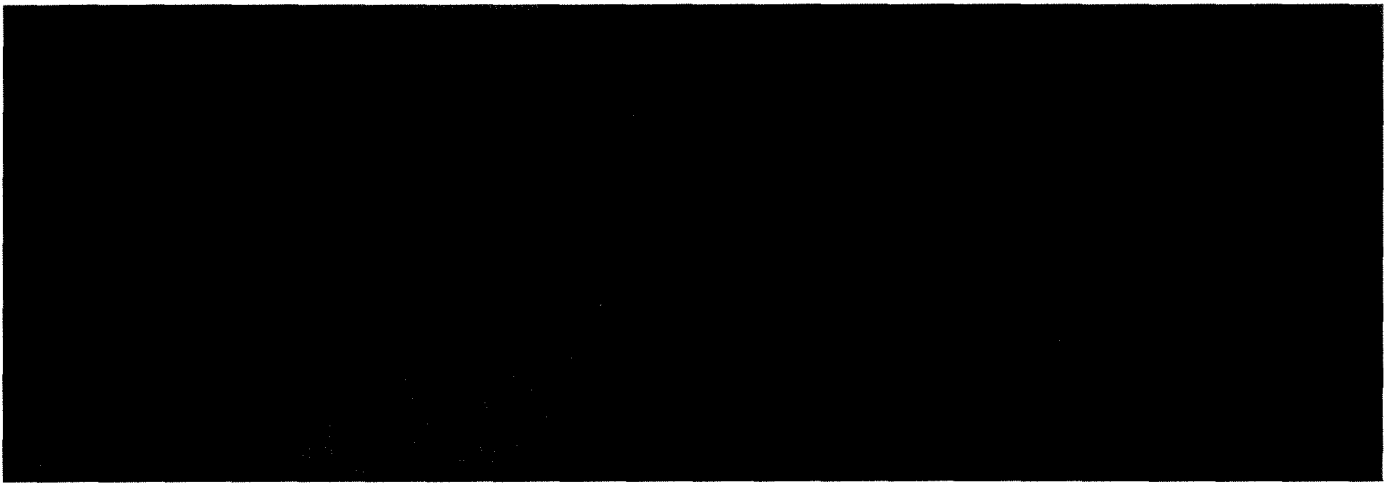
Very truly yours,



Mia B. Love  
Member of Congress

# EXHIBIT B





 CLEARPLAY STREAMING TRIAL

**Create Account**

This information is for your ClearPlay sign-in.

**CONTINUE**

[Sign In](#)

Receipt INV00001114 is attached

Inbox x



ClearPlay <ar@clearplay.com>  
to me

11:07 AM (12 minutes ago)

Dear Madeleine Flynn.

See your receipt attached:

Purchase Date: 10/12/2016  
Total Amount: 0.00 USD

Enjoy The Show!



908\_10122016.pdf Open with **Receipt**

 CLEARPLAY ClearPlay, Inc. 291 W 5400 So. Ste. 101 Salt Lake City, UT 84107 1-866-788-6992	Date: 10/12/2016 Receipt #: INV00001114 Account Number: A00000903 Account Information: Madeleine Flynn 245 W 2230 N Apt. 10 Provo Utah 84604 United States pinkyhuletiki@gmail.com
---	---

CHARGE SUMMARY					
Subscription Identifier	Rate Plan Name	Charge Detail	Subtotal	Tax	TOTAL
A-S00000769	1 Month (free trial - streaming)	Charge Name: Monthly Fee Quantity: 1 Unit Price: \$7.99	\$7.99	\$0.56	\$8.55
A-S00000769	1 Month (free trial - streaming)	Charge Name: 1 Free Month Quantity: 1 Unit Price: 100.00%	(\$7.99)	(\$0.56)	(\$8.55)

RECEIPT TOTALS	
	Subtotal: \$0.00
	Tax: \$0.00
	Total: \$0.00

Page 1 / 1

Invalid Login

### Returning Customer?

\*E-mail: pinkyhulatiki@gmail.com

\*Password:

Remember Password:

Login

Reset ClearPlay Password

Inbox



**ClearPlay Support** <care@clearplay.com>  
to me

11:12 AM (8 minutes ago)

#### Reset Your Password

\*\*\*Follow the URL below to reset your password\*\*\*

<http://www.clearplay.com/forgetcredentials/default.aspx?account=cGlua3lodWxhdGiraUBnbWFpbC5jb20=&loginpage=1>

Please call Customer Support at [866-788-6992](tel:866-788-6992) if you have a problem resetting your password.

Sincerely,  
Your ClearPlay Support Team

The information in this email is confidential. We do not ask for your password by email.



## Reset Password

pinkyhulatiki@gmail.com

\*\*\*\*\*

\*\*\*\*\*

Reset

Enter your new password and press the "Reset" button.

©Copyright 2016 ClearPlay, Inc.

Server Error in '/' Application.

*Object reference not set to an instance of an object.*

**Description:** An unhandled exception occurred during the execution of the current web request. Please review the stack trace for more information about the error and where it originated in the code.

**Exception Details:** System.NullReferenceException: Object reference not set to an instance of an object.

**Source Error:**

The source code that generated this unhandled exception can only be shown when compiled in debug mode. To enable this, please follow one of the below steps, then request the URL:

1. Add a "Debug=true" directive at the top of the file that generated the error. Example:

```
<% Page Language="C#" Debug="true" %>
```

or:

2) Add the following section to the configuration file of your application:

```
<configuration>
  <system.web>
    <compilation debug="true"/>
  </system.web>
</configuration>
```

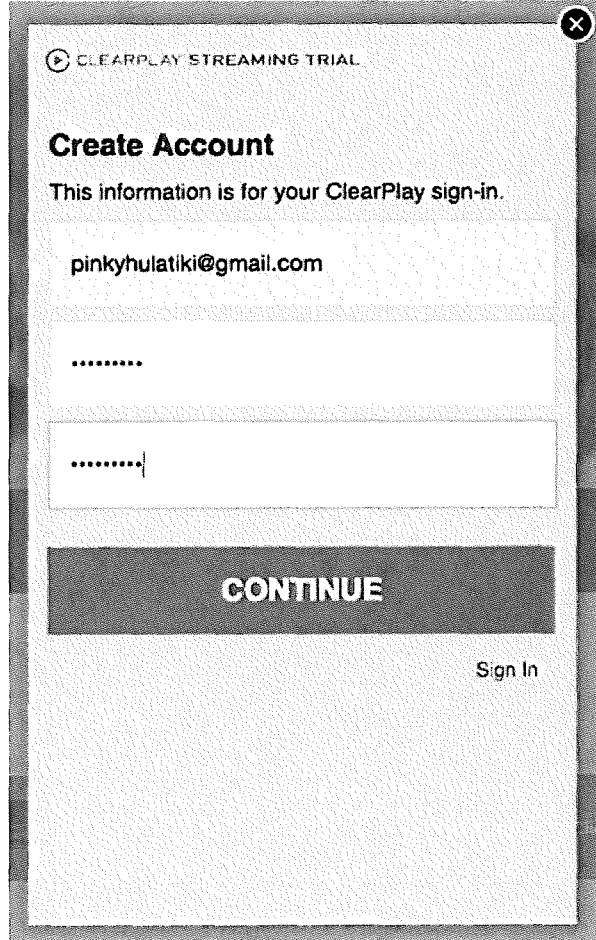
Note that this second technique will cause all files within a given application to be compiled in debug mode. The first technique will cause only that particular file to be compiled in debug mode.

**Important:** Running applications in debug mode does incur a memory/performance overhead. You should make sure that an application has debugging disabled before deploying into production scenario.

**Stack Trace:**

```
{NullReferenceException: Object reference not set to an instance of an object.}
Forgot_Credentials.Button2_Click(Object sender, EventArgs e) +256
System.Web.UI.WebControls.Button.OnClick(EventArgs e) +114
System.Web.UI.WebControls.Button.RaisePostBackEvent(String eventArgument) +139
System.Web.UI.Page.RaisePostBackEvent(IPostBackEventHandler sourceControl, String eventArgument) +26
System.Web.UI.Page.ProcessRequestMain(Boolean includeStagesBeforeAsyncPoint, Boolean includeStagesAfterAsyncPoint) +2980
```

**Version Information:** Microsoft .NET Framework Version 2.0.50727.6468; ASP.NET Version 2.0.50727.6491



Receipt INV00001115 is attached

Inbox x



ClearPlay <ar@clearplay.com>  
to me

11:15 AM (4 minutes ago)

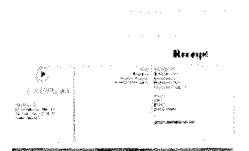


Dear Madeleine Flynn.

See your receipt attached:

Purchase Date: 10/12/2016  
Total Amount: 0.00 USD

Enjoy The Show!



INV00001115\_A00...

<p><b>CLEARPLAY</b></p> <p>ClearPlay, Inc. 291 W 5400 So. Ste. 101 Salt Lake City, UT 84107 1-866-788-6992</p>	<p>Date: 10/12/2016 Receipt #: INV00001115 Account Number: A00000904 Account Information: Madeleine Flynn 722 N 200 E Apt. 3</p> <p>Provo Utah 84606 United States</p> <p>pinkyhutatiki@gmail.com</p>
--	---

CHARGE SUMMARY					
Subscription Identifier	Rate Plan Name	Charge Detail	Subtotal	Tax	TOTAL
A-S00000770	1 Month (free trial - streaming!)	Charge Name: Monthly Fee Quantity: 1 Unit Price: \$7.99	\$7.99	\$0.56	\$8.55
A-S00000770	1 Month (free trial - streaming!)	Charge Name: 1 Free Month Quantity: 1 Unit Price: 100.00%	(\$7.99)	(\$0.56)	(\$8.55)

RECEIPT TOTALS	
	<b>Subtotal:</b> \$0.00
	<b>Tax:</b> \$0.00
	<b>Total:</b> \$0.00

Page 1 / 1

Who would you like to contact?

Customer Support

Your Name

Maddy

Phone Number

3608889315

Email Address

pinkyhutatiki@gmail.com

Subject

can't log in.

ClearPlay Product: Unknown

The letters you entered did not match, please try

again: LeAvPo

**Message**

Hi! I just created an account for a free trial, but now I can't log in. I received the receipt for the free trial. I even tried changing my password, but that didn't work either. How can I log in??

**SUBMIT**

ClearPlay Knowledge Base

[Return to Solution Search](#)

[ClearPlay Solutions Search Home](#)

Find ClearPlay Solutions

Search for:  \*in All Solutions

[Find ClearPlay Solution](#)

Search ClearPlay Solutions

Search Results for: "logging in"

Search Results in "All Solutions"

Search Results in "All Solutions" and Subcategories  
No records found

\*Sort by:



ClearPlay Knowledge Base

[Return to Solution Search](#)

[ClearPlay Solutions Search Home](#)

Find ClearPlay Solutions

Search for:  \*in All Solutions

[Find ClearPlay Solution](#)

Search ClearPlay Solutions

Search Results for: "login"

Search Results in "All Solutions"

[General Information](#) (1)

Search Results in "All Solutions" and Subcategories  
Score ClearPlay Solution Title  
67% [How do I change my account information?](#)

\*Sort by:    
Related Cases Last Modified Date  
0 6/29/2013



# EXHIBIT C



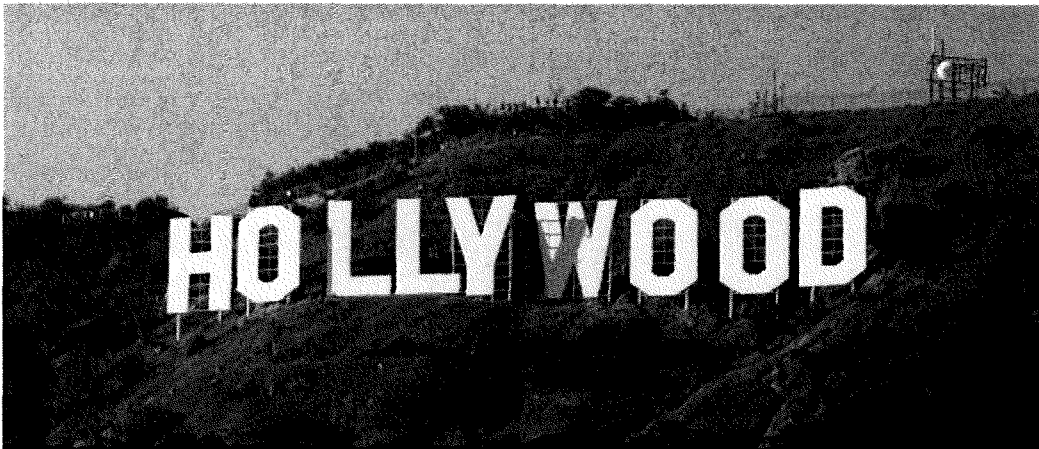
# THE DAILY CALLER

## Upsetting The 800-Pound Hollywood Gorilla



**TIM WINTER**

President, Parents Television Council



It's not often the behemoth that is Hollywood unites against families, but that's precisely what is happening to a company that offers families the ability to filter f-words and other adult content from streamed movies and TV.

Disney, Lucasfilm, 20<sup>th</sup> Century Fox, and Warner Bros. have collectively sued a company called VidAngel which offers those aforementioned filtering capabilities.

Yes, you read that right. Disney doesn't want parents to have the ability to skip past profanity, sex scenes, and graphic violence when their children are watching Disney-produced entertainment.

The crux of VidAngel's business model rests on the Family Movie Act, passed by Congress and signed into law back in 2005, which allows for the creation of technology so parents can filter potentially offensive movie content when they're watching inside their homes.

When Congress passed the Family Movie Act, the legislative intent was crystal clear: to properly balance the legal and reasonable business needs of Hollywood with the strong public interest goals of making content filtering available to American families.

VidAngel has carefully crafted its business operations – at great financial peril to itself – so as to meet the guidelines set forth in the legislation. They are clearly in compliance with both the *spirit and the letter* of the Family Movie Act. And, just as the legislation intended, millions of families who otherwise would not be able to view a film or a program are now able to do so.

Ironically, the VidAngel service actually broadens the market of potential customers for Hollywood's products. And why wouldn't a business want to dramatically expand its own marketplace? Is it really about the sanctity of the creative community's "artwork?"

The studios suing VidAngel must believe that if a standard is good, then a double-standard is twice as good. They are eager to alter or filter content when it suits their own desires.

About a decade ago, NBC secured the broadcast rights to the beloved children's animated series *Veggie Tales*. But when the network aired the program, they removed references to God – despite the program being created by Christian producers who hoped to share Christian values.

And when the television program *Duck Dynasty* was among the most-watched programs every week, "bleeps" were edited into the programming to suggest harsh profanity was being used, even when no actual profanity was being spoken. The network wanted to create the false impression in order to bring more "edginess" to the show, despite the fact that the show was so popular precisely because it was squeaky-clean.

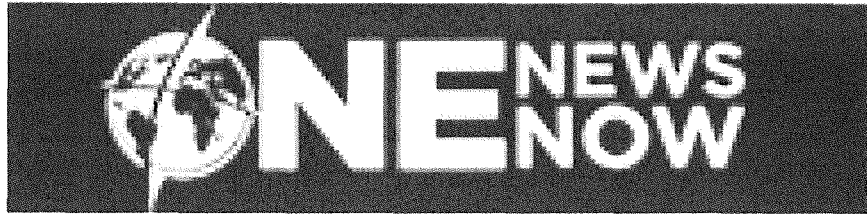
And on every program on every network, promotional materials are placed above or below the program during its broadcast. The "altering" of the producer's "work" occurs all hours of every day on every network. The notion that Hollywood must vigorously prevent content filtering or editing for the sake of the creative community is simply laughable.

A petition to support VidAngel has been started and can be found at [SaveFiltering.com](http://SaveFiltering.com).

VidAngel allows each parent and each family to consume entertainment content inside their home precisely in accord with their personal family standards. If the Hollywood studios convince the Courts to obstruct VidAngel's legitimate and lawful business, American families will be deprived of the very right granted to them by Congress in the Family Movie Act.

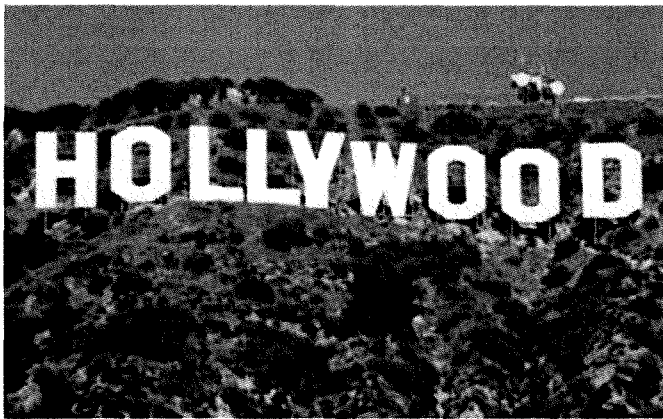
*A former MGM and NBC executive, Tim Winter is president of the Parents Television Council and a member of the California Bar Association.*

# EXHIBIT D



## Hollywood sues to stop filtering of offensive content

Monday, September 26, 2016



**A company specializing in filtering indecent content in movies and television programs is seeing a surge in grassroots support as it faces a legal challenge from movie and broadcast executives in Hollywood.**

Disney, Warner Bros, 20th Century Fox and Lucasfilm are suing [VidAngel](#) – a service that blocks offensive language, nudity, violence and other forms of indecent content from films and TV shows.

The company argues that this type of service is authorized under the 2005 Family Movie Act, and many pro-family groups in agreement. Currently, some two dozen pro-family leaders are standing with VidAngel during this legal battle.

Dan Gainor, who serves with the Media Research Center, says that conservatives were told that Hollywood would work with them about content, but this is apparently not the case.

"They want to ram through whatever content they want, and they expect us not just to accept it, but to shut up about it," Gainor expressed. "And it is outlandish that they would expect families, viewers and customers have no say in what they're allowed to watch."

Gainor explained that the lawsuit from the entertainment industry is based on a rationalization.

"They're using legalism to basically defend what is an indefensible argument – that you're not allowed to avoid the bad stuff we try to jam in there and force feed to your kids," the pro-family advocate told OneNewsNow.

The entertainment and technology expert insists that their argument is obviously not true.

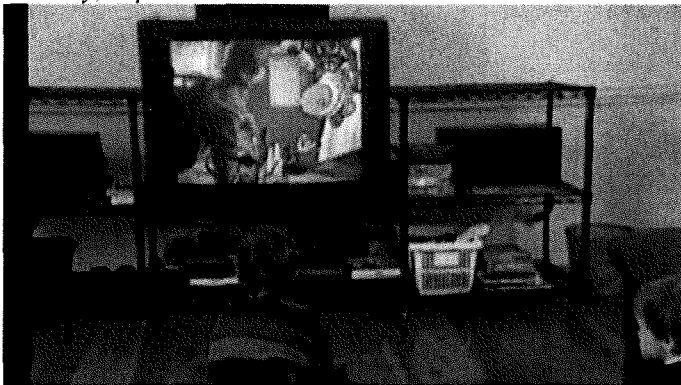
Sony, Universal and MGM chose not to join the lawsuit against VidAngel.

# EXHIBIT E



# VidAngel earns support amid legal battles with Disney, Lucasfilm and more

by Sara Weber  
Tuesday, September 20th 2016



*KUTV file photo*

AA

(KUTV) A Utah-based entertainment platform that allows users to censor content from movies and television shows is garnering support despite its legal troubles with major production companies.

VidAngel, which offers its subscribers the ability to filter nudity, violence and other subject matter they may find offensive, announced Tuesday it has gathered the support of more than 20 leaders from religious and values-based groups like The Parents Television Council and the Media Research Center. It also announced that 57

million Americans are likely to use the filtering service, according to a poll conducted by the National Research Group.

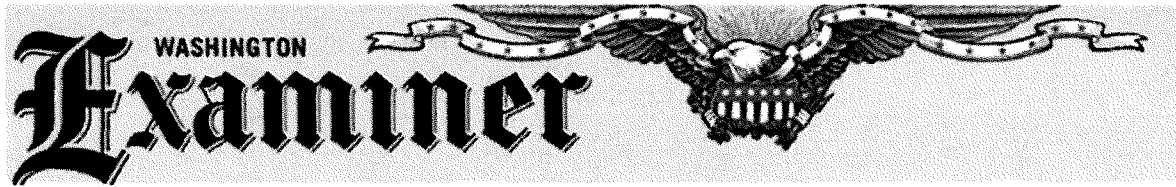
“VidAngel offers a service that is critically important,” said Pastor Jim Garlow of San Diego’s Skyline Church. “Our community, which represents thousands of families, cares deeply about being able to make thoughtful decisions about the entertainment they consume in the home.”

But major entertainment entities like Disney, Warner Bros., 20th Century Fox and Lucasfilm have all taken legal action against VidAngel claiming that the service is operating as an illegal streaming service.

VidAngel has since filed a counter lawsuit against the companies for violating antitrust laws and claims its services are protected by the Family Entertainment and Copyright Act of 2005.



# EXHIBIT F



# Hollywood sues to stop parents from filtering sex, profanity in movies

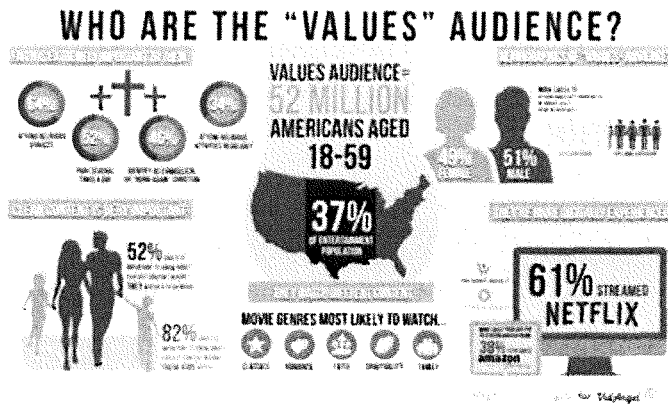
By PAUL BEDARD (@SECRETSBEDARD) • 9/20/16 10:06 AM

An entertainment company that is acting on a 2005 federal law to let parents filter sex, violence and profanity from movies is under attack in Hollywood, drawing support from at least 16 family groups who are threatening to urge a boycott by the 52 million "values audience."

VidAngel, whose motto is "watch movies however the bleep you want," took advantage of the Family Movie Act of 2005 and created a filtering system for users who are eager to watch movies but are concerned about offensive content.

It has a simple model: Consumers buy a full-price movie through its system and choose what words and actions they want filtered out. VidAngel does the work and then streams the movie to the consumer. Then they can buy the movie permanently or pay as little as \$1 for one view.

VidAngel sees it as a win-win for studios. An individual movie is bought for every customer, and more customers are buying because they can filter out the offending language and scenes that would have kept them from watching.



But Hollywood said the model isn't legal, amounts to a cheap streaming system for their products and is angered that the movie industry's art is being tampered with. And it is suing.

The fight has turned into an ugly legal battle, and now many Washington-based family groups are going to bat in court for VidAngel, saying the service is legal under the Family Movie Act.

Media Research Center founder and President Brent Bozell told the *Washington Examiner*, "Hollywood should be applauding VidAngel for saving them consumers who otherwise won't buy their product. Instead, Hollywood is on the warpath against VidAngel. They want families poisoned.

"In effect, Hollywood execs are saying, 'You can only watch our movies if you let us keep all the gratuitous garbage that offends your family.' How reprehensible of Hollywood. Good for VidAngel for fighting Goliath."

Donna Rice Hughes, whose Enough Is Enough group has convinced McDonald's restaurants and others to filter porn from free Internet offered at stores, added, "Protecting youth from pornography and other objectionable online content should be shared by the government, corporate America and the parents.

"It seems to me that VidAngel is making it much easier for parents to be empowered to easily and economically manage the type of film content their children view online."

Whatever the outcome, polling data provided to the *Examiner* shows that millions want to be able to filter movies and TV shows and amount to an enormous market Hollywood is missing.

The survey found that the "values audience" represent 37 percent of the entertainment market, are mostly Christian and have kids. Some 57 percent said it is very important for them to know the content is clean before watching, and 82 percent of parents eager to use a filter system before their children watch.

*Paul Bedard, the Washington Examiner's "Washington Secrets" columnist, can be contacted at [pbedard@washingtonexaminer.com](mailto:pbedard@washingtonexaminer.com)*

# EXHIBIT G

# Los Angeles Times

Opinion

## 'Clean up' films, or clean up filming?

**To the editor:** What about simply not watching films that one already knows have offending scenes and words in them?

That surely would send more of a message (if one feels that it is necessary) than paying someone to first buy, and then somehow censor, and then send you, a questionable film for your viewing.

*Doug Stokes, Duarte*

**To the editor:** I hope that VidAngel does well. It is long overdue for something to be done about Hollywood's debasement of the beautiful English language.

And, yes, many people do not need to be hit over head with how to have sex. We all know about sex — we learn about it in school. How about leaving something to the imagination?

*Rita Burton, Pacific Palisades*

**To the editor:** Instead of an initiative to require performers in adult films to use condoms during sex scenes, how about an initiative that proposes prohibition of filming such sex scenes for public viewing ever?

*Barbara Hill, Anaheim*

# EXHIBIT H



# A Purpose DRIVEN WIFE

A CHRISTIAN \* MOM OF 3 \* MARINE WIFE  
& everything in between

---

## 3 ways to watch movies for \$1 with Vidangel

September 20, 2016 by Hahorn [Leave a Comment](#)

**Disclaimer:** *This post contains affiliate links*

Family [movie night](#) is a big deal our house. I sometimes have popcorn, we make ice cream floats, and I make delicious homemade pizza. It was a [family activity](#) I did growing up and it was one of the best things about home, that I love. So I want to provide that for my family, create memorable memories for my children to enjoy and they can pass on to their family, just like I'm doing now.

I'm very consistent with it. In the morning I ask the kids what kind of pizza they like, pepperoni, Chicken Alfredo, or Cheese pizza for my husband who doesn't eat meat and so on. Getting movies my children can watch without bad language or bloody violence can be a little difficult and if you LOVE to [save money](#), then this is for you. When I found Vidangel it blessed my soul.

[Let me show you...](#)

[Vidangel](#) is a streaming service where you can watch movies for \$1. I was shocked when I saw this and right away checked it out. I thought it was going to be \$1.09, \$1.25 or even \$1.50...NOPE, just \$1! In addition to that, What's different about all other streaming services is that Vidangel gives you the option to filter out any kind of violence, sex, language, etc. that you don't want your family to watch. You get to pick and choose from the filters in the movie, what you don't want to watch.

<b>New Release Movie Prices</b>	
iTunes	\$3.99
Amazon	\$3.99
Google Play	\$3.99
<b>VidAngel</b> 	<b>\$1.00*</b>

\*per night with sellback

Even when I get to have "Me time" or even date night with hubby, I don't want to get bombarded with language, bloody violence, and drugs, etc. I want to enjoy the movie content without having to cover my eyes or my children eyes. They do this process legally by selling you the moving and giving you the option to sell it back to them. You can watch movies for \$1 on your Computer/Laptop, ipad/iphone or on Roku (This is my personal favorite).

*Check out this video [Vidangel](#) created with a powerful message.*

Here's how it works...

You buy the movie for \$20. You can sell it back to [Vidangel](#) and they will credit your account \$19. You can then use that credit to get another movie or cash out your account. I like to leave it in my account for Friday family movie nights!



STREAMING NOW

**\$ 1**

\*per night with sellback  
156 FILTERS AVAILABLE

**VidAngel** 

Once you put in the filters, you can watch the movie anyway you want. I watched [Captain America: Civil War](#) with some of the filters and I was so into the movie that I forgot I even put in filters for the movie, I couldn't tell. Here is a video below on how you can sign up and get started with watching movies for \$1.



I even had the opportunity to show my children the whole [Star Wars Series](#), starting from the beginning. If you want to start from the beginning, click the link above or if you want to see the recent Start Wars movie, The Force Awakens, Click below.



# EXHIBIT I

# Raising Arrows

Large Family Homeschooling & Homemaking

## The Movie Filtering Site We Love!

Some posts contain affiliate links.

SEPTEMBER 23, 2016 11 COMMENTS

Tonight is Roberts Family Movie Night. We pop popcorn and dredge it in seasonings (my favorite is this all-natural Doritos Seasoning!). We cram onto the big U-shaped couch that came with the house, and we stay up entirely too late, laughing and enjoying a movie together.



As our children have gotten older, it's been harder to find movies that everyone enjoys. Often, we have to watch a "little kid" movie earlier in the evening and switch to a "big kid" movie later on.

I still remember the night my husband rented *Goonies*. He remembered it from his childhood and wanted to share the film with the kids. A few minutes

into the movie it became obvious we would NOT be sharing Goonies with the kids. EEK!

But, then we found VidAngel. I don't even remember how we found out about the site. We joined while it was still in beta and helped make some of the selections that built their first library of films available for filtering. One of those movies was Goonies!

Since that day, we've been loyal fans of VidAngel. We have watched many, many movies that we never would have been able to watch otherwise. Movies that have merit and are worth the watching, but needed some cleaning up so the entire family could enjoy them.

The way that VidAngel works is simple. You "buy" your first movie for \$20. You choose the filters you want on – everything from language to violence to immodesty – and then watch the movie with those things taken out. There is very little disruption to the film, so you aren't getting huge blips and bleeps, just smooth transitions and muted language. (We have our filters preset now, so it doesn't take me very long to go in and check over the filters each time we watch a movie.)

After you watch the movie, you sell the movie back for \$19. That money goes into a credit account on VidAngel. The next time you "buy"/rent a movie, your cost is only \$1 because you have that \$19 credit. And right now, if you sign up and watch a movie, you can then turn around and invite other friends and family to join, and once they rent their very first movie, you receive a \$5 credit to your account, giving you **5 FREE MOVIES!**

**LEARN MORE HERE!**

We have tried several different filtering programs, and VidAngel is by far the best! Plus, you can request movies for their team to filter! Your teens can watch Schindler's List for school without needing to see the nudity. You and your spouse can settle in for a movie night with an action/adventure film that doesn't include any language. Your little ones can be in the same room when a movie is playing because you've already taken out everything that you don't want your family to see!

We haven't decided yet what we'll be watching tonight for Roberts Family Movie Night, but you can be certain it will include a VidAngel movie! Why not join us?!

*And yes, those are links that will give our family a \$5 credit – thank you!*

# EXHIBIT J



# FRUGALLY

Making The Frugal  
Life Fabulous

# Blonde

## How To Make Any Movie Family Friendly

september 23 by julie [4 comments](#)



## *How to make any movie* **Family Friendly**

I remember growing up we would often tape movies and shows on our VCR. Remember those old things? We had taped A Christmas Story, Back to the Future, Pretty Woman, and much more. If I was bored, I could just grab a movie to watch. It was awesome!

As an adult, I love to share movies that my husband and I watched growing up with my son. We love to watch A Christmas Story every year before Christmas. Unfortunately, we kept running into a problem. The movies that we grew up watching were edited for tv. I don't remember actually seeing Doc getting shot in Back to the Future and we were completely shocked at all the things in National Lampoons

Christmas Vacation. Our favorite movies we watched growing up weren't family appropriate.

For years we just talked about what we would watch with our son when he was older. Then a few months ago a blogger friend mentioned [VidAngel](#). It's a video streaming service that allows you to edit what you are going to watch. You can edit out swear words, violent scenes, or just about anything else you would want. It is absolutely amazing.

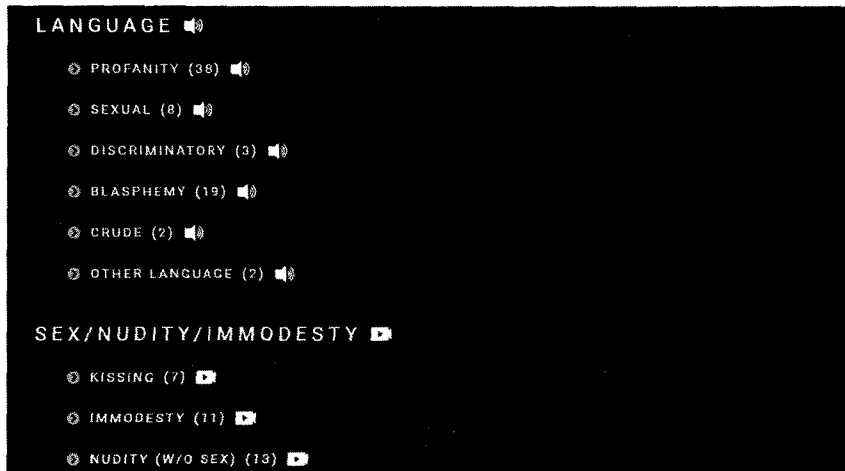
We have used it a few times now to watch movies that I normally wouldn't let my son watch. He loves it because he gets to watch movies he normally wouldn't be allowed to watch, I love it because I can edit out all the things I don't want him to see. You can watch older movies or the movies that just came out. You can see how to make any movie family friendly with [VidAngel](#).

If you haven't signed up with [VidAngel](#) you can sign up for free [here](#). Once you sign up just choose the movie you want to watch and click on add to watchlist. We watched National Lampoon's Family Vacation. It is a movie my husband loved growing up, but it rated R so inappropriate for my 14-year-old.



The screenshot shows a movie listing for "National Lampoon's Vacation". On the left is a movie poster featuring Chevy Chase. To the right of the poster, the title "National Lampoon's Vacation" is displayed. Below the title, it says "RATED R", "1h 38m", and "1983". There are two "BUY HD" buttons: one for "\$1\*" and another for "\$2\*". Below these are icons for "TRAILER", "FILTERS", "SHARE", and "WATCHLIST". A small "INSPIRING" badge is visible. At the bottom, there is a short synopsis: "The Griswold family are on a quest. A quest to a Valley World theme park for a family vacation. Not things aren't going exactly as planned, especially when Clark Griswold is taking all his frustrations and mysterious suicide on a red Ferrari." A "HIDE THIS MOVIE" link is at the bottom left.

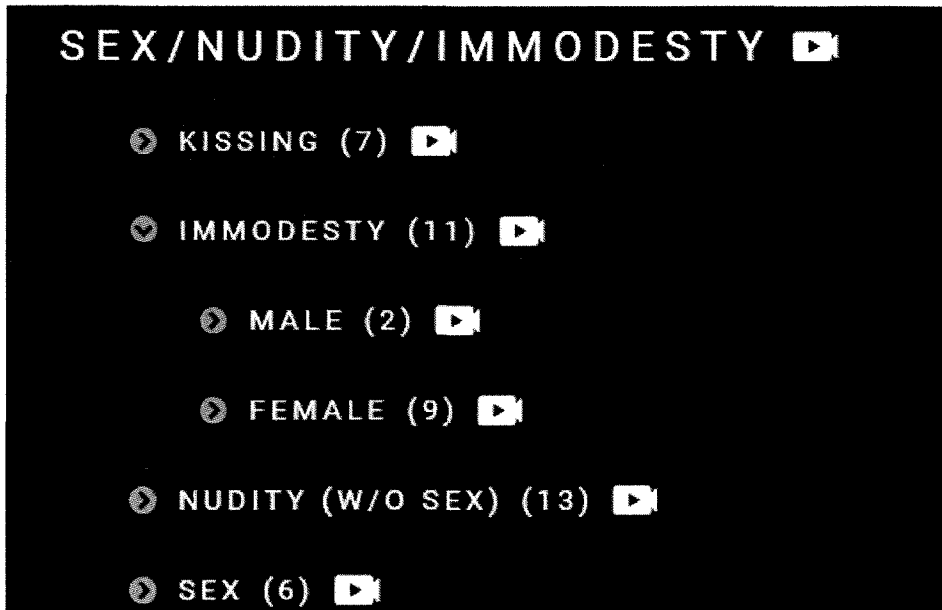
Next, you will want to click on the filters button so you can go through and set all the filters.



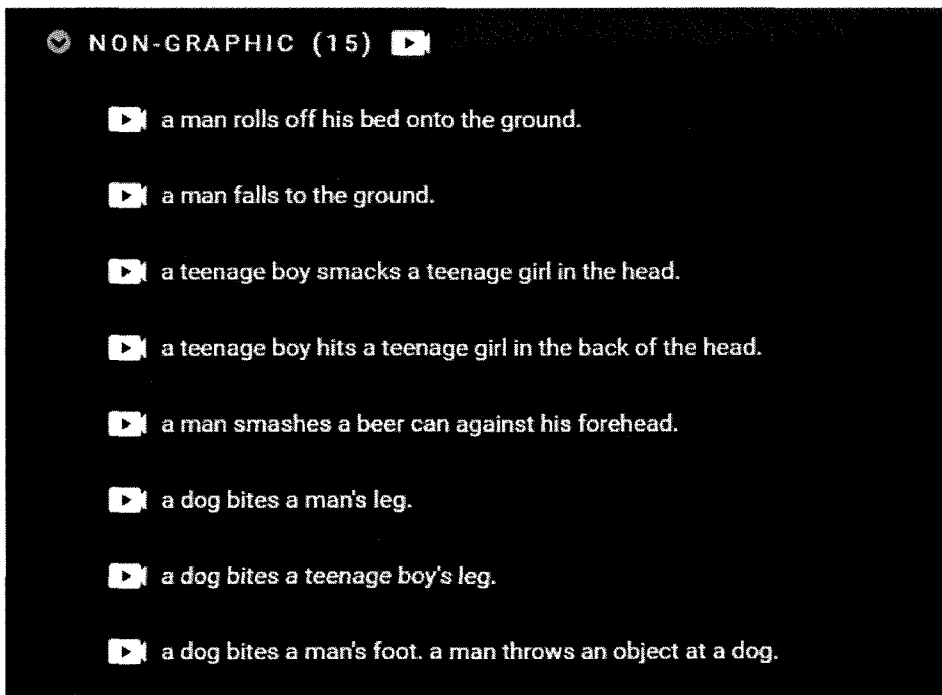
It will list out all of the filters that are available. You can easily go through each one of the categories and choose what works for your family. They have profanity, sexual remarks, blasphemy, crude talk, and discriminatory language edits.



Once you have edited out all the language you can move on to scenes you might find inappropriate. You can have it skip over scenes that show things like nudity.



You can also delete scenes that you may find violent. Each one disappears with just a click. I have noticed that the editing of them is pretty good. My son had no idea a couple of the things even happened.



When you are finished editing the movie it will show you the total number of filters that are in the movie. As you can see, we left a lot of stuff in the movie. Because my kiddo is almost 15 I didn't have a problem with a lot of the stuff in the movie. For me, it is more editing out the curse words.



You can now choose to buy the movie. You will pay \$20 to stream it and get \$19 back when you return it within 24 hours. Just like Redbox, it is \$1 a day. So if you return it two days later it will cost you \$2. Unlike Redbox, you get to do everything at home and don't even have to leave the house. Plus, you can enable all of your own filters.

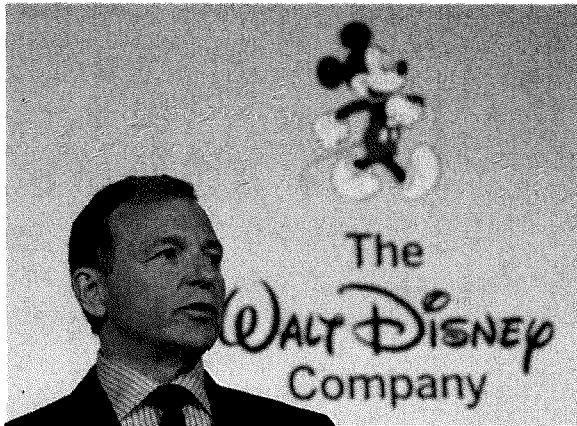
Although I feel like they do a great job of editing the movie without it looking too edited I wouldn't recommend cutting out all of the filters. You probably really don't want your 5 year old watching a rated R movie even if it is edited. I would recommend going down one rating from what you normally would. If you let your child watch PG movies then a PG-13 edited movie should be good.

I love that with [VidAngel](#) we can show our son movies that we enjoyed from our childhood and let him watch movies he normally couldn't see, all for \$1. It's a great way for us to spend a family night for a reasonable price. Has your family tried [VidAngel](#) yet? What did you think?

# EXHIBIT K

# CP ENTERTAINMENT

## VidAngel vs. Disney: PTC, MovieGuide Defend Family-Friendly Streaming Site as Lawful



(PHOTO: REUTERS/GARY CAMERON)

Walt Disney Company Chairman and Chief Executive Officer Robert Iger announces Disney's new standards for food advertising on their programming targeting kids and families at the Newseum in Washington, June 5, 2012. REUTERS/Gary Cameron/File Photo

VidAngel, a company that enables the filtering of adult content from TV and movies, is facing a lawsuit from some of the biggest names in film: the Walt Disney Company, Lucasfilms, 20th Century Fox, and Warner Bros. The four industry giants claim that the video streaming service is infringing on its copyrighted material.

According to the [lawsuit](#), Disney and the plaintiffs are suing for copyright infringement and for violation of the Digital Millennium Copyright Act. The plaintiffs also contend that the Utah-based movie filtering service does not have authorization to use its films and has failed to pay for the licensing of titles. The irony is that VidAngel, a company intending to help families filter unwanted content, is being sued by Disney, a film and TV entity known to produce some of the more family-friendly material.

Several highly-regarded TV and film watchdogs are chiming in on the issue.

Asked if he thought VidAngel was pirating content, Parents Television Council (PTC) President Tim Winter was clear about his convictions, telling The Christian Post during an interview on Monday: "The answer is, 'No.' They (VidAngel) are doing it (streaming content) lawfully. They are doing it properly," he said.

"What they're doing is they're actually buying physical copies of the DVDs, and then as a subscriber, you then purchase from them that DVD copy, and then you have the right to stream it because you own it, you

bought it, and then what you are able to do is that you are able to sell it back to VidAngel for part of the purchase price."

Winter told CP that VidAngel's initial point of sale is key. "So it's a very important distinction that the VidAngel procedure is including. It's not just they're taking some movie and streaming it for profit without giving Disney any money. They're actually paying Disney for a copy of the DVD."

The PTC president said Disney's current business structure forces VidAngel to take the risk of paying for thousands of DVDs, not knowing if customers will make a purchase.

Winter added that reselling DVDs was also a big risk. "VidAngel has to buy a bunch of copies and hope that they've estimated correctly about how many that are not going to be reselling."

MovieGuide Founder and Publisher Dr. Ted Baehr, who used to be an attorney in the U.S. Attorney's of the district of New York, also supports VidAngel.

"Something is not a law until a court decides that it's legal or illegal," he told The Christian Post during an interview on Monday.

In VidAngel's case Baehr said, "If you or I buy a DVD we can do anything we want with it because it's ours."

Baehr likened VidAngel's case to his days in law school when there had been a dispute over the airspace between a PanAm building in New York City that had been constructed over Grand Central Station.

"So we were trying to figure out what value was a piece of an apartment hanging in mid-air, full of nothing, over the Grand Central Station ... Now [regarding VidAngel] you're not just talking about a space in the air ... you're now talking about a space — in a space — in a space — in somebody's electronic thought box. It would make 'The Matrix' look like a simple equation."

Baehr's bottom line on VidAngel: "I think from the act, and from the intention, and from the classic point of view, that once you buy something, you can feed it through your shredder, you can do anything you want with it ... "

Baehr, however, is not in total agreement with the services VidAngel offers. "I don't think just whitewashing something or just erasing the foul language is a solution ... There's a point in which VidAngel's work is solutary and beneficial for families. I think it's like seventy or eighty percent beneficial ... "

"The court will make the law when it decides on this case."

Recently, the plaintiffs in the case against VidAngel asked a federal judge to force the video streaming company to shut down its operations while the suit is pending, and has requested a jury trial. VidAngel has filed a countersuit to prove that it is in fact not pirating copyrighted material.



# EXHIBIT L

# THE CHRISTIAN POST

## Sex, Violence, and Cussing Be Gone

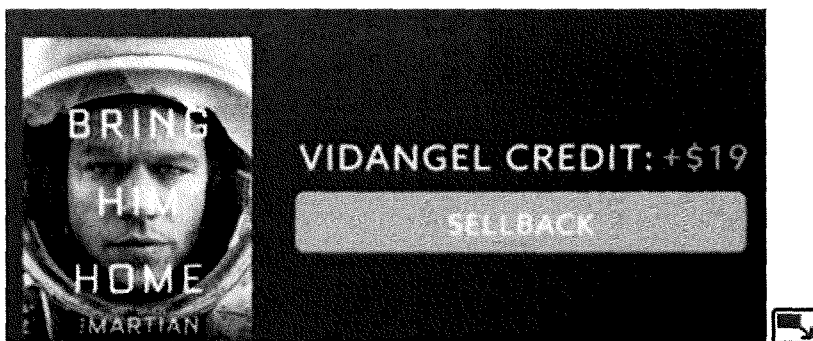
Just what every home needs—an explicit filter on Hollywood. VidAngel takes the garbage out for you—all the bad language and graphic scenes—leaving you with a family-friendly film.

As VidAngel CEO explains, “We created this company because—as parents and consumers—we understand deeply the surging demand for filtering content to suit the needs of families.”



VidAngel has a library of over 2,500 TV and movie titles available—for multiple devices like smartphones, computers, and AppleTV.

The service even allows users to pick their filter strength. The best part is the cost: users purchase the video online for \$20.00 and can sell it back for a credit of \$19.00 if viewed within 24 hours. That's \$1.00 for filtered entertainment.



For families concerned with violence, sex, and foul language, this service alleviates the bad and leaves the good. VidAngel advises consumers if excessive filtering will remove large portions of the movie.

What's not to like? Well, Hollywood doesn't like it. But under the 2005 Family Movie Act, third parties can provide the filtering that Hollywood currently does not. Disney and Warner Bros. among others consider VidAngel's actions to be an "unauthorized" use of film streaming. But so far, it hasn't slowed VidAngel down, and for consumers, it's cheap, clean entertainment. A real deal.

# EXHIBIT M



**MEDIA**

## **PTC calls out Hollywood for (bleep)**

Tuesday, September 15, 2016

Bill Bumpas (OneNewsNow.com)

**The Parents Television Council is calling out Hollywood for its stance against filtered content, saying it is a hypocritical double-standard.**

Disney, Lucasfilm, 20th Century Fox, and Warner Bros. are suing a company that offers families the technology to block out offensive content, such as profanity.

Tim Winter, president of the Parents Television Council, is publically supporting company VidAngel while pointing out the hypocrisy of Hollywood.

He recalls that when NBC secured the rights to "Veggie Tales" about a decade ago, the network edited out references to God. More recently, on A&E's "Duck Dynasty," bleeps were added to portray a harsher program even though profanity wasn't used.



Winter

"Here's an exact opposite position taken by the very same networks that are now suing a company for filtering," Winter argues. "They can filter when they

so choose, but if it's something that they don't to choose then they have a conniption and it's a blatant double-standard."

Winter accuses the Hollywood studios of interfering with VidAngel's business and depriving families of a right that was granted them by Congress in the Family Movie Act.

"Despite Congress's solution," he says, "the TV networks are now trying to resort to the courts to fight for what they want as opposed to what the Congress has passed, what the president has signed into law, and what has been longstanding law for over a decade."

# EXHIBIT N

## MommyTipz.com

# Keep your Kids and Family Safe from Violence and Profanity on Movies

The entertainment industry has evolved greatly in all these years. There has been a lot of difference in the kinds of programmes appearing on television. It is in fact a hot potato today. Apart from educational shows, all that we see on TV today are daily soaps, reality shows, movies, comic serials and other new programmes.

Many a times we tend to associate ourselves with what we watch so much that it affects our daily activities. Therefore, it is important to stay away from unwanted and impractical TV programmes. This can be done by using VidAngel that comes in different Vid Angel rental costs.



**Impact of Visual Media**



We are all so obsessed with television today that we even keep aside important tasks just to watch our favorite shows. Kids these days are so much into television that they know every little detail about the programmes on TV. They quickly learn how it works, the programme schedule and what they are all about. Elders as well as kids get greatly affected by the television programmes and movies today. There are movies and shows that use vulgar and abusive language that kids tend to learn quickly.

Scenes of violence are also shown which leave a bad image of society in the minds of kids and elders. This causes people to stay indoors due to fear of the daily incidents happening around. Kids these days also access the Internet for various purposes. There are many young children who tend to watch adult movies and contents, which is not a good habit. Children take the information in their own ways, resulting in unnecessary gathering of information and a waste of their precious time. They get glued to the television and Internet, ignoring their academics and games.

### **Safeguard your Kids from Psychological Threat**

In order to keep your kids and entire family away from such unwanted contents, it is important to make use of certain content blockers. VidAngel is one such movie streaming service that is designed to filter out bad contents from movies or TV shows, with legal permission. It lets you choose the filters yourself. You can choose the content you want to watch and hear. It filters vulgar language, scenes, violence, etc. thus letting you watch your favorite movies and shows with family.

The best part of it is that customers can stream contents on their android or Apple devices, web browsers, VidAngel app, Roku, etc. The ~~Vid Angel rental fees~~ are also minimal and affordable. It costs only \$1 for streaming in SD and \$2 for streaming in HD. You simply have to register with VidAngel, select your movie and choose the filters. The questionable content will then be removed and you will be provided with the perfect movie or TV show content that you can watch freely with everyone.

So overall, VidAngel is a great service that filters unwanted, harsh, sexual and abusive content for your benefit. Now your family and children will be safe from all the profanity and violence in the entertainment contents.

# EXHIBIT P

September 23, 2016

Dave Vance  
245 N. University Ave  
Provo, UT 84601

Dear Mr. Vance,

My name is Dallin Webb, and I am a student at BYU-Idaho. I hope everything at VidAngel is going well. I've been aware of recent legal issues the business is dealing with against major players in the movie industry. I am writing this letter to show my support in a time where it is more important than ever to stand up to today's conventional wisdom.

Although I have only used your service a few times, I can easily see the positive outcomes it will have in my life, and eventually, my family. Being a part of the LDS community, I have strict standards when it comes to the quality of entertainment, therefore, I am grateful to know of a platform that allows me to stay safe in this increasingly immoral society. Let my voice be heard when I say there is almost nothing more important to me than living in a home that is kept pure and safe from the influences of the world. VidAngel serves as a necessary tool in this regard.

I pay particular interest to organizations and businesses that defy their current conventional wisdom. I myself will likely encounter a variety of adverse reactions as I move into the alternative field of the medical industry. I've read of many examples of how great an effect small groups of people have had on positive change in the world. The group of people at VidAngel and its supporters are no different. Thanks for allowing me to vote with my dollars. I wish you all well this October.

Sincerely,

A handwritten signature in black ink that reads "Dallin Webb". The signature is written in a cursive, flowing style.

Dallin Webb  
48 W. 2<sup>nd</sup> S. #42  
Rexburg, ID 83440

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18 *Attorneys for Defendant and*  
19 *Counterclaimant VidAngel, Inc.*

20 UNITED STATES DISTRICT COURT  
21 CENTRAL DISTRICT OF CALIFORNIA  
22 WESTERN DIVISION

23 DISNEY ENTERPRISES, INC.;  
24 LUCASFILM LTD. LLC;  
25 TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
BROS. ENTERTAINMENT, INC.,

26 Plaintiffs,

27 vs.  
28

CASE NO. 16-cv-04109-AB (PLAx)

**DECLARATION OF WILLIAM J. AHO IN SUPPORT OF VIDANGEL, INC.'S OPPOSITION TO MOTION FOR ENTRY OF PRELIMINARY INJUNCTION**

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VIDANGEL, INC.,  
Defendant.

Judge: Hon. André Birotte Jr.

Date: October 31, 2016

Time: 10:00 a.m.

Courtroom: 4

Trial Date: None Set

VIDANGEL, INC.,  
Counterclaimant,

vs.

DISNEY ENTERPRISES, INC.;  
LUCASFILM LTD. LLC;  
TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
BROS. ENTERTAINMENT, INC.,

Counterclaim Defendants.

BAKER MARQUART LLP  
2029 CENTURY PARKEAST, 16<sup>TH</sup> FLOOR  
LOS ANGELES, CA 90067  
Tel: (424) 652-7800 • Fax: (424) 652-7850

1 I, Bill Aho, declare as follows:

2 1. I am a founding partner of, and am an innovation and marketing  
3 consultant for, The SagePoint Group. I make this declaration of my personal and  
4 firsthand knowledge and, if called and sworn as a witness, I could and would  
5 testify competently hereto.

6 2. From 2001 to 2007, I served as the Chief Executive Officer of ClearPlay  
7 Inc. ClearPlay was a pioneer in developing and marketing parental control  
8 technologies for consumer electronics. In particular, it developed a technology  
9 that allowed consumers to filter offensive content from movies recorded on DVDs  
10 played by consumers at home.

11 3. ClearPlay's business model at the time consisted of selling special DVD  
12 players to consumers and charging consumers a monthly service fee. Consumers  
13 who bought our DVD player and paid the monthly fee could insert DVDs they  
14 obtained on their own into the DVD player and could set filters that muted or  
15 skipped specified types of aural or visual content while they watched the DVD on  
16 a television set to which the DVD player was connected.

17 4. One of the most formidable challenges I faced as ClearPlay's CEO was  
18 the active opposition of the motion picture studios and the Directors Guild of  
19 America ("DGA") to ClearPlay's technology that allowed families to filter  
20 inappropriate content from their DVDs played at home.

21 5. In fact, rather than discuss a mutually beneficial agreement or making  
22 any attempt to negotiate, the studios, along with the DGA and individual  
23 directors, chose to sue ClearPlay. During the course of the litigation, I met with  
24 representatives of the studios and the DGA more than 30 times trying to obtain  
25 the studios' and the directors' agreement to permit ClearPlay to provide filtered  
26 content to families for private, in-home viewing. I made no progress and had no  
27 success in coming to any sort of agreement. The studios never offered to permit  
28 ClearPlay to create filters and make the filtered content available to families for  
29 private, in-home viewing on any terms or under any circumstances.

30 6. My response to the studios' lawsuit was to work to get the Family Movie  
31 Act of 2005 ("FMA") enacted. On ClearPlay's behalf, I hired a lobbyist and made  
32 numerous trips to Washington D.C. to meet with members of Congress and their

1 staffs. I primarily worked with Congressman Lamar Smith's office to get the FMA  
2 passed. At the time, Representative Smith was the Chairman of the House  
3 Judiciary Subcommittee on Courts, the Internet, and Intellectual Property. (He  
4 later served as the Chairman of the House Judiciary Committee and is now the  
5 Chairman of the House Science Committee.)

6 7. Although ClearPlay's business model at the time involved selling special  
7 DVD players to consumers who were then required to (i) pay a monthly service  
8 charge whether they watched filtered content that month or not, (ii) obtain  
9 physical DVDs, (iii) set the filter settings themselves, and (iv) watch the filtered  
10 content on a television set connected to the DVD player, everyone working to  
11 enact the FMA recognized that both consumer preferences and technology would  
12 change. Specifically, we recognized that consumers would someday want to have  
13 content filtered and then streamed to them to watch on whatever device might  
14 allow streamed content to be viewed. It was also obvious that consumers would  
15 not want to be inconvenienced by having to shop for physical DVDs or by having  
16 to wait for them to be delivered, but would want to be able to enjoy filtered  
17 content at any time, without delay. For that reason, we made sure that the FMA  
18 included a provision allowing third parties to filter content to consumers'  
19 individual specifications and then stream that filtered content to them. Including  
20 such a provision in the FMA would allow ClearPlay to build a real filtered  
21 streaming solution for its customers.

22 8. When the FMA was enacted, the studios were finally forced to abandon  
23 their lawsuit against ClearPlay. Their suit was dismissed several months after the  
24 FMA took effect in April 2005.

25 9. To my regret, the studios never agreed to enter into a license agreement  
26 with ClearPlay. The primary obstacle to a license was getting agreement from the  
27 DGA and its directors. The DGA's position was that each director should have the  
28 right to approve or refuse any filter.

29 10. I note that only very recently has ClearPlay begun to offer any kind of  
30 filtered streaming service—one which operates without studio/DGA  
31 consent. That service is very limited with respect to the platforms it works on (it  
32 is limited to Google platforms). As a result, consumers must make a myriad of  
33 unpalatable concessions in movie selection, convenience of use and viewing

1 quality to use ClearPlay's filtering feature when streaming movies. These  
2 concessions could be eliminated if licensing options were available through the  
3 studios and/or movie streaming purveyors.

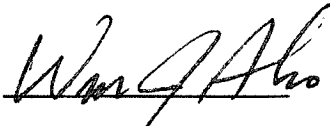
4

5 I declare under penalty of perjury of the laws of the United States of  
6 America that the foregoing is true and correct.

7 Executed this 14th day of October, 2016, at Salt Lake City, Utah.

8

9

A handwritten signature in black ink, appearing to read "William J. Aho". The signature is written in a cursive style with a horizontal line underneath the name.

10 William J. Aho



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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

DISNEY ENTERPRISES, INC.;  
LUCASFILM LTD. LLC;  
TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
BROS. ENTERTAINMENT, INC.,

Plaintiffs,

vs.

VIDANGEL, INC.,

Defendant.

CASE NO. CV16-04109-AB (PLAx)

**[PROPOSED] ORDER  
CONTINUING HEARING OF  
PLAINTIFFS' MOTIONS FOR  
PRELIMINARY INJUNCTION  
AND TO DISMISS VIDANGEL'S  
COUNTERCOMPLAINT FROM  
OCTOBER 24, 2016, TO OCTOBER  
31, 2016**

Judge: Hon. André Birotte Jr.

VIDANGEL, INC.,

Counterclaimant,

vs.

DISNEY ENTERPRISES, INC.;  
LUCASFILM LTD. LLC;  
TWENTIETH CENTURY FOX FILM  
CORPORATION; AND WARNER  
BROS. ENTERTAINMENT, INC.,

Counterclaim Defendants.

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WHEREAS Plaintiffs and Counterclaim Defendants Disney Enterprises, Inc.; Lucasfilm Ltd. LLC; Twentieth Century Fox Film Corporation and Warner Bros. Entertainment Inc. and Defendant and Counter Complainant VidAngel, Inc. have stipulated to continue the hearing of Plaintiffs' Motions for Preliminary Injunction and to Dismiss VidAngel's Countercomplaint from 10:00 a.m. Monday, October 24, 2016, to 10:00 a.m. Monday, October 31, 2016, and for good cause shown,

IT IS HEREBY ORDERED that Plaintiffs' Motions for Preliminary Injunction and to Dismiss VidAngel's Countercomplaint be, and hereby are, continued for hearing before this Court on Monday, October 31, 2016, at 10:00 a.m. with all briefing dates to remain as currently set.

IT IS SO ORDERED.

Dated: September 16, 2016

