

No. 16-56843

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

VIDANGEL, INC.,

Defendant-Appellant,

v.

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

Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Central District of California,
The Honorable André Birotte, Jr.
No 2:16-cv-04109-AB-PLA

**Brief of Amici Curiae U.S. Representatives John Hostettler
and Spencer Bachus in Support of Defendant-Appellant and
in Support of Dissolution of the Preliminary Injunction**

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STATEMENT OF COMPLIANCE WITH RULE 29(a)(4)(E)

No monetary contributions were made for the preparation or submission of this brief. Counsel for a party did not author this brief, in whole or in part.

CONSENT OF THE PARTIES

Counsel for the parties have consented to the filing of this brief.

INTEREST OF THE AMICI

Amici are former members of the United States House of Representatives (“the House”). Both *Amici* served as congressmen during the 108th and 109th Congresses, when the Family Movie Act bills of 2004 and 2005 were under consideration and the Family Movie Act of 2005, 17 U.S.C. § 110(11) (“FMA”), was enacted. Former United States Representative John Hostettler served in the House from 1995 to 2007, representing the 8th District of Indiana. Former United States Representative Spencer Bachus served in the House from 1993 to 2015, representing the 6th District of Alabama.

This appeal raises important questions of first impression as to the proper interpretation and scope of the FMA. As former members of the House who participated in the deliberations on the FMA not only in the full House but also as members of various House committees and subcommittees charged with considering and reporting on draft FMA legislation, *Amici* have a shared interest in the sound and principled interpretation and application of the FMA. *Amici* also have unique and

significant knowledge as to the congressional intent and public policy concerns underlying this federal statute.

Amici were both involved in the legislative process of the FMA, including the committee stage, in 2005, the year of the FMA's enactment. The Senate version of the FMA bill was referred to the House Committee on the Judiciary, on which both *Amici* served as members. H.R. Rep. 109-33 at 1 (2005). The bill was referred to the House Subcommittee on Courts, the Internet, and Intellectual Property, on which *Amicus* Representative Bachus served. This Subcommittee also considered the House version of the FMA bill, H.R. 357. On March 3, 2005, the Subcommittee ordered the Senate bill to be favorably reported, by a voice vote. *Id.* at 19. On March 9, 2005, the House Committee on the Judiciary recommended enactment, also by voice vote. *Id.* at 1, 19. The House passed this bill by voice vote on April 19, 2005. 151 Cong. Rec. H2120 (April 19, 2005).

Both *Amici* were also involved, as members of the House, the House Committee on the Judiciary, and, in the case of Representative Bachus, the House Subcommittee on Courts, the Internet, and Intellectual Property, in deliberations over a previous FMA bill introduced in the 108th Congress in 2004, H.R. 4586. This bill was referred to the Subcommittee on Courts, the Internet, and Intellectual Property. H.R. Rep. 108-670 at 4 (2004). On July 8, 2004, the Subcommittee ordered the bill

favorably reported, as amended. *Id.* The House Committee on the Judiciary voted to favorably report the bill on July 21, 2004. *Id.*

Amicis' sole interest in this case is in the sound and principled interpretation and application of the FMA. *Amici* believe that this brief will assist the Court in its consideration of the proper interpretation and application of the federal copyright law, especially the FMA, in this appeal.

SUMMARY OF THE ARGUMENT

Amici file this brief because there is much more at stake in this litigation than the continued operation of one company. The underlying issue here is whether families should have the technological means to effectively control the movie content shown within their own private homes. As the text and legislative history of the FMA make clear, Congress strongly endorsed the public interest in developing and making available technology like VidAngel's filtering service that enables American families to view movie content filtered according to their own personal preferences in their own homes. 17 U.S.C. § 110(11).

The district court's cramped and hyper-technical reading of copyright law fails to take proper account of the public interest in protecting families that is at issue in this case. Congress enacted the FMA to prevent the use of copyright law to impede a parent's important right to control what movie content is shown in the family home.

By failing to properly weigh the public interest, the court misapplied the "extraordinary and drastic remedy" of a preliminary injunction. *Munaf v. Geren*, 553 U.S. 674, 689, 128 S. Ct. 2207, 2219, 171 L. Ed. 2d 1 (2008) (citations omitted).

The court wrongly failed to take into account the profound public interest in giving families the ability to control the content shown in their private homes using technology of their choosing, not just technology pre-approved by studios.

Congress found it necessary to enact the FMA's exemption to copyright

infringement for filtering services because of the major movie studios' intransigent and unreasonable opposition to all businesses offering filtering services to families. Congress acted out of concern that American consumers lacked effective technological tools to protect their families from movie content that they judge inappropriate for family viewing.

In crafting the FMA, Congress clearly recognized that its exemption to copyright infringement should protect not just families who wanted to filter movies shown at home but also technology companies that, like VidAngel, develop and make available filtering technology. Congress sought to protect all types of filtering technology, not just those used at the time of enactment of the exemption, and not just those approved by studios.

The court's ruling erroneously limits the FMA's exemption to yesterday's filtering technology and frustrates the law's goal of effectively protecting a family's choice to filter movies viewed at home. The court erred in finding the public interest was satisfied because ClearPlay offers a filtering service applicable to some streamed content on GooglePlay. It is not reasonable to limit families to only one type of filtering technology for streamed movies, the most popular type of content delivery to homes today. Nor is it reasonable to limit families to ClearPlay technology that cannot be used to filter content streamed on most devices and content platforms.

The only limit on the FMA's exemption to copyright liability for filtering

technology is the set of specific conditions designed to protect moviemakers' First Amendment rights. On the plain wording of the FMA and *Amicis*' understanding of the legislative history, VidAngel's filtering service fully complies with these conditions.

The plain wording of the FMA exempts systems that comply with its conditions from copyright infringement. This necessarily includes an exemption for liability under the Digital Millennium Copyright Act, which is part of copyright law. Moreover, it makes no sense to interpret the DMCA so broadly as to effectively destroy the exemption in the FMA for all but outdated or ineffective filtering technology. The court's interpretation of the DMCA is not tenable because it is completely at odds with the public interest that was the primary reason for the FMA, giving families the ability to effectively filter movies shown in their homes.

The court erred in concluding that shutting down VidAngel's filtering service was in the public interest. The injunction should therefore be dissolved.

ARGUMENT

I. THE COURT ERRED IN FINDING THAT THE PUBLIC INTEREST WEIGHS IN SUPPORT OF A PRELIMINARY INJUNCTION

The court erred in finding that the public interest weighs in favor of the Plaintiff Studios (“Studios”). The Supreme Court has cautioned that the “courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S. Ct 1798, 1803, 72 L. Ed.2d 91 (1982). The court’s skimpy analysis of the public interest fails to give appropriate weight to the vital public interest at stake in this case, protecting the ability of American families to control what movie content is shown in their homes.

A. VidAngel’s Filtering Service Benefits an Important Public Interest in Protecting Families

VidAngel’s filtering service responds to a pressing need to give American consumers a viable filtering option for movies shown at home. Many of *Amici*’s constituents as well as *Amici* themselves have grave concerns about the high prevalence of violence, sexual activity, smoking, drug use, and offensive language in films marketed to young people.

A recent study in *Pediatrics* magazine found that violence in films has more than doubled since 1950 and the amount of gun violence in popular PG-13 movies has more than tripled between 1985 and 2012. Brad J. Bushman, *et al.*, *Gun*

Violence Trends in Movies, 132 *Pediatrics* 1014, 1014-1017 (Dec. 2013) (the “Gun Violence Study”). Another study, based on a sample of hundreds of top-grossing movies from 1985 to 2010, found that around 90% of these popular films has at least one violent main character. Amy Bleakley *et al.*, *Violent Film Characters’ Portrayal of Alcohol, Sex, and Tobacco Related Behaviors*, 133 *Pediatrics* 71, 74 (Jan. 2014) (the “Violent Film Characters Study”). The same violent character engages in at least one other risky behavior, typically alcohol use and sexual activity, in approximately 77% of those movies. *Id.* Sexual content occurs in about 82% of these movies. *Id.* Many Americans are concerned about the impact of movie content on their families and do not want to expose their children to it at home.

The movie rating system administered by the Motion Picture Association of America (“MPAA”) fails to give consumers the tools they need to effectively control what movie content is viewed by their families at home. The MPAA rating system suffers from tremendous inconsistency. The Violent Film Characters Study found that there was no statistical difference between PG-rated or R-rated movies as to violence or explicit violence. *Id.* at 74. That study’s authors note that “the similarity in levels of co-occurrence between PG-13 and R-rated movies is troubling and yet it is consistent with research on the questionable effectiveness of the ratings system as a tool to shield youth from inappropriate content.” *Id.* at 75. The Gun Violence Study shows that the amount of gun violence in popular PG-13 movies has recently

outstripped gun violence in popular R-rated movies. Bushman, *Gun Violence, supra*, at 1017.

Another problem with the MPAA ratings system, pointed out by researchers at Harvard's School of Public Health is "ratings creep" over time. Kimberley M. Thompson *et al.*, *Violence, Sex and Profanity in Films: Correlation of Movie Ratings with Content*, 6(3) *Medscape General Medicine* 3 (2004). The Harvard School of Public Health study concluded that "[a]ge-based ratings alone do not provide good information about the depiction of violence, sex, profanity and other content, and the criteria for rating movies became less stringent over the last decade." *Id.* Because R-rated films generate less revenue, "it is not surprising that today many motion picture companies push the envelope at the PG-13 rating." Bleakley, *Violent Film Characters, supra*, at p. 76 (citation omitted). Parents who wish to shield their children from certain types of content, such as sexual activity, violence, drug use, or offensive language, cannot rely on the MPAA ratings as an effective tool.

Even if the MPAA's movie ratings did not suffer from inconsistency and ratings creep, a better movie rating system would still be a much blunter and less effective method to protect families than filtering services like VidAngel's. Movie ratings give only two practicable choices to families concerned about the appropriateness of movie content: to watch or not to watch an entire movie. In contrast, filtering technologies like VidAngel's offer consumers the practical ability

to tailor the content they view at home to their own specific preferences.

VidAngel's filtering service is highly sophisticated and offers numerous filtering categories individually tailored to each specific movie sold. These include specific instances of crude, profane, blasphemous, or discriminatory language; specific instances of different types of sexual activity, including sex, nudity, or kissing; specific instances of alcohol or drug use; and specific instances of violent content, including blood, gore, or disturbing images. Consumers who use VidAngel's service can identify and screen out only the movie content that they find objectionable for their families. This allows their families to experience and enjoy the rest of the movie. Filtering services like VidAngel's ultimately benefit studios by making their films available to a wider audience, leading to more film sales.

B. To Protect Families and In Response to the Studios' Opposition to All Filtering Services, Congress Strongly Endorsed the Public Interest in the Development and Making Available of Filtering Technologies Like VidAngel's

Congress enacted the FMA to promote the public interest in the distribution of technologies like VidAngel's that allow families to filter content as they see fit for their own home viewing. Congress was reacting to studio opposition to all filtering services, including lawsuits against all filtering companies. The fact that the FMA was, unusually for federal legislation, enacted without a roll call vote, indicates overwhelming congressional support that, in the words of FMA sponsor Representative Lamar Smith, "[i]t is time for the rights of parents not to be tied up in

the courts any longer.” 151 Cong. Rec. H2118 (2005).

i. Congress Enacted the FMA to Protect Families

The legislative history of the FMA consistently shows that Congress wanted to ensure that intellectual property law could not be used by studios to impede the right or ability of consumers to shield their families from home viewing of movie content that they considered inappropriate. The House Judiciary Committee Report states that “[t]he Committee strongly believes that, subject to certain conditions, copyright and trademark law should not be used to limit a parent’s right to control what their children watch in the privacy of their own home.” H.R. Rep. 109-33, at 5 (2005). When the House passed the FMA, Senator Leahy stated that this legislation “ensures that in-home viewing of movies can be done as families see fit.” 151 Cong. Rec. 3893 (Apr. 19, 2005).

ii. To Effectively Protect Families, Congress Extended the FMA’s Exemption to Filtering Services Like VidAngel’s

Congress recognized that the goal of protecting families’ ability to filter unwanted content could not be achieved without exempting providers of filtering technology from copyright liability. Representative Smith, a sponsor of the FMA in both 2004 and 2005, stated that “as a practical matter, parents cannot monitor their children’s viewing habits all the time. They need an assist.” H.R. 4586, Serial No. 94 (June 17, 2004). The House Judiciary Committee Report states “[t]he for-profit

nature of the entities providing services to the public that the legislation addresses has no bearing on the operation of the immunity from liability.” H.R. Rep. No. 109-33 at 6 (2005).

iii. Congress Determined that the FMA’s Exemption From Copyright Infringement Extends Only to Filtering Services That, Like VidAngel’s, Meet Certain Conditions

The FMA’s text shows that Congress decided that only filtering services that complied with certain conditions were entitled to the protection of the FMA’s exemption from copyright infringement. First, the service must only engage in filtering that is “by or at the direction of a member of a private household.” 17 U.S.C. § 110(11). Second, the filtering must be “during a performance in or transmitted to that household for private home viewing.” *Id.* Third, the filtering service must not create a “fixed copy of the altered [filtered] version.” *Id.* Fourth, the filtering must be “from an authorized copy.” *Id.*

Congress included these conditions as the result of its careful balancing of the public interest. Congress drafted the FMA “[t]o respect the First Amendment of the Constitution” by ensuring movies were not subject to government censorship. H.R. Rep. 109-33 at 6 (2005). The FMA was carefully limited only to exempt individualized filtering at the request of private households of movies shown in private homes.

On *Amici’s* reading of the text of the FMA and understanding of the legislative

history, VidAngel's filtering service complies with all of the law's requirements to be exempted from copyright infringement.

VidAngel's service meets the condition that it applies only to filtering that is "by or at the direction of a member of a private household." 17 U.S.C. § 110(11). "[T]his limitation does not require that the individual member of the private household exercise ultimate decision-making over each and every scene or element of dialogue in the motion picture that is to be made imperceptible." 150 Cong. Rec. S11853 (Nov. 24, 2004). The requirement that the filtering be "by or at the direction of a member of a private household" is met "where an individual selects preferences from among options that are offered by the technology." *Id.* VidAngel's service has over 80 categories of filtering preferences that its customers can select.

VidAngel's service complies with the condition that it must filter out audio or visual content only "during a performance . . . transmitted to that household for private home viewing." 17 U.S.C. § 110(11). Customers using VidAngel's service must purchase their own DVDs from VidAngel, which has lawfully purchased these DVDs. After purchase, VidAngel stores them, marked with individually assigned barcodes, in locked vaults at VidAngel's premises. A VidAngel customer can only view her purchased film as a streamed performance after she chooses her individually chosen content filters. VidAngel streams the resulting customized, filtered version of the film *only* to the owner of the purchased DVD for viewing at

that owner's private home. This stream is obviously a "performance . . . transmitted to that household for private home viewing" within the plain wording of the FMA.

VidAngel's filtering service also meets the requirement that it never makes a fixed copy of any filtered work. Where a filtering service, like VidAngel's, results only in an unfixed display of a movie with some content skipped or muted only for home viewing by the customer who requested the filtering, Congress took the view that the public interest in filtering should not be trumped by an assertion of directors' copyrights and/or moral rights. The House Committee on the Judiciary Report on the 2004 bill states that "[u]nder existing law, moral (reputational) rights do not supersede parental rights to raise children as they see fit." H.R. Rep. 108-670, at 4 (2004).

VidAngel's filtering service satisfies the FMA's requirement that the filtering be "from an authorized copy." 17 U.S.C. § 110(11). VidAngel streams content only to, and at the request of, a lawful owner of a DVD at the time of the request. The legislative history makes clear that the "authorized copy" requirement was based on the concern that the exemption should not apply to "bootleg" copies. 150 Cong. Rec. S11853 (Nov. 24, 2004). The lawfully purchased copies filtered by VidAngel at the request of their owners are obviously not bootlegs.

It is possible for the owner of a DVD purchased from VidAngel to sell the DVD back to VidAngel after viewing the purchased film, but a customer must own

the DVD at the time of the filtered streaming for his or her home viewing.

iv. Congress Crafted the FMA’s Exemption to Apply to New Filtering Technologies Such as VidAngel’s, Not Only to Technologies Available in 2005 or Studio-Approved Technologies

Technological filtering tools can be effective for today’s consumers only if they can be applied to the way movies are shown at home today, rather than to how movies were shown when the FMA was enacted in 2005. Viewing habits have greatly changed since 2005, when most families watching movies at home used DVD players that played physical DVDs. Today, a growing proportion of American consumers prefer to watch movies at home by streaming them over the Internet. The public interest in enabling families to choose the content shown in their homes applies just as much to in-home performances that are streamed over the Internet as to in-home performances using DVD players. The Studios concede the legality of filtering services that require consumers to purchase special filtering DVD players. But it is not reasonable for the law to require Americans to purchase yesterday’s technology, the DVD player, to be able to control what content is shown to their families.

Congress provided that the home performances protected by the FMA did not just include movies shown at home using DVD players. The plain language of the FMA exempts from copyright liability performances of “authorized cop[ies]” that are

“in or transmitted to” private homes. (17 U.S.C. § 110(11)). This language unambiguously covers streaming as long as the copy is an authorized copy. In the case of VidAngel, the streamed copy is authorized because the consumer is the lawful owner of a DVD of the film he is viewing. Moreover, VidAngel decrypts only authorized copies, DVDs that VidAngel has lawfully purchased, to create the intermediate files from which the short segments are created and streamed to the consumer with filtering conforming to her individual requests.

The legislative history indicates that the FMA is broad enough to exempt technologies used to filter streamed content from copyright infringement. The Senate section-by-section analysis of the FMA states, “the creation or provision of a computer program or other technology that enables such making imperceptible, does not violate existing copyright or trademark laws. That is true whether the movie is on prerecorded media, like a DVD, or is transmitted to the home, as through pay-per-view and video-on-demand services.” 150 Cong. Rec. S11853 (Nov. 24, 2004). Congress wanted to protect not just existing filtering technology in 2005, but also future filtering technology applicable to new viewing technology that might be developed. The House Judiciary Committee Report states “The [FMA] clarifies the liability, if any, for companies . . . that may be interested in providing [filtering] services in the future.” H.R. Rep. No. 109-33 at 5 (2005).

The intention of Congress to extend the exemption to streamed content rather

than just content played on DVD player counters the court's erroneous finding that VidAngel's filtering service violates the Digital Millennium Copyright Act (DMCA). The FMA expressly provides that filtering services meeting its specified conditions do not infringe copyright. Since the DMCA is copyright law, codified as part of the federal copyright statute, filtering services that comply with the FMA's conditions cannot amount to violations of the DMCA.

In 2005, Congress clearly contemplated that a decryption/filtering/streaming method, like VidAngel's, could be developed in the future and would be lawful under the FMA and the DMCA. Transmission over the Internet necessarily requires the making of intermediate copies. If these intermediate copies were held to violate the DMCA, it would never be possible to filter streamed content without studio authorization. This interpretation would frustrate the purpose of the FMA, to ensure that the studios could not thwart family filtering of movies viewed at home. As the legislative history states, "[a]ny suggestion that support for the exercise of viewer choice in modifying their viewing experience of copyrighted works requires violation of either the copyright in the work or of the copy protection scheme that provides protection for such work should be rejected as counter to legislative intent or technological necessity." 150 Cong. Rec. S11853 (Nov. 24, 2004).

C. The Preliminary Injunction Against VidAngel Disserves the Public Interest in Protecting Consumers' Access to Filtering Services

The preliminary injunction shutting down VidAngel's service harms the public interest in ensuring that consumers have access to filtering technology. Consumers are no longer able to use VidAngel's filtering service to filter streamed movies using many of the most popular streaming players, including Roku, Kindle Fire, and Apple TV, nor with many devices such as iPhones. Consumers who wish to filter movies have severely limited options for the content they can filter without VidAngel's service. They either have to enter into the extra expenditure and inconvenience of acquiring a special filtering DVD player and hard copies of DVDS, or they are limited to ClearPlay, which only works on GooglePlay and not on many other popular streaming players and devices. These limitations are at odds with growing consumer preferences for streaming films using a wide variety of streaming players and devices.

The preliminary injunction also harms the public interest in innovative filtering technologies by likely chilling potential startups and their investors from entering the filtering market.

D. The Public Interest in Copyright Law Is Also Not Served by the Preliminary Injunction

The court asserts that the injunction advances the public interest because it is in the public interest to uphold copyright protections. This errs by recasting the Studios' interests as the public's, and, for several reasons, cannot be supported.

First, the Studios continue to produce, distribute, and broadcast their creative works to the public unabated.

Second, the court neglects the fact that copyright law operates through a balance between the interests of the author (being compensated for creating the work) and the interests of the public (having the ability to access the work). The public interest is not only in protecting as strenuously as possible the outer boundaries of Studios' copyrights, nor even protecting the legitimate interests of VidAngel's ability to do business, but in the public's ability to access lawful licensed content such as movies that consumers have lawfully purchased.

Third, the distinctiveness of the parties' interests and the public interest is highlighted by the fact that regarding the two as coterminous would effectively read out the entire public interest prong of the injunction analysis. If the public interest were represented by the interests of the parties, then the balance of hardships prong would be subsumed and rendered unnecessary.

CONCLUSION

Amici respectfully request that this Court dissolve the injunction granted by the district court.

January 18, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE UNDER RULE 32(g)(1)

This brief complies with the type-volume limitation of Fed. R. App. P. Rules 29(a)(5) and 32(a)(7)(B) because it contains 4199 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Office Word 2008 for Mac.

Dated: January 18, 2017

/s/ William A. Delgado
William A. Delgado

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. Upon acceptance by the Clerk of the Court of the electronically filed documents, one copy of the foregoing will be served, via U.S. Mail, postage prepaid on:

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